Protecting Open Space

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BOOK REVIEW


INTRODUCTION

The exercise of government power to regulate the use of land in order to achieve public benefits such as well-planned communities, clean and orderly neighborhoods, and environmental quality is a critical legal and policy issue for federal, state, and local governments. In Protecting Open Space: Land Use Control in the Adirondack Park,1 Richard A. Liroff, Senior Associate at the Conservation Foundation,2 and G. Gordon Davis, an attorney in Elizabethtown, New York, and former General Counsel of the New York State Adirondack Park Agency, analyze the efforts of New York State to establish land use controls over the six million acre Adirondack Park. Liroff and Davis have conducted a detailed study of one of the most important and controversial regional land use planning and control initiatives in the United States. Their book is among the best treatments of the subject of land use regulation.

I

THE BROAD LEGAL CONTEXT

Protecting Open Space is a significant contribution to the already extensive literature on land use law and policy in the United States.3

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2 The Conservation Foundation is a nonprofit organization, founded in 1948 and based in Washington, D.C., that conducts research on issues in environmental and resource management.
Since the beginning of this century, the exercise of governmental power to regulate the use of privately owned land has spawned an extensive legal history. The landmark decisions of the United States Supreme Court in Pennsylvania Coal v. Mahon and Village of Euclid v. Ambler Realty Co., among others, foreshadowed innumerable judicial opinions at all levels of government. Recent decisions by the Supreme Court in Penn Central Transportation Co. v. New York City and Agins v. City of Tiburon, as well as the opinions of state courts, indicate the likelihood of continued judicial review of issues raised by government's exercise of land use control powers.

Many state and local governments, and in some circumstances, the federal government are exercising their powers to regulate the use of land in a variety of ways in order to achieve a broad spectrum of public policies. For example, state-initiated land use control efforts in Florida, Vermont, California, and Hawaii; local and state government land use regulation in such diverse areas as farmland preservation and historic preservation; and federal government regu-


4 See the materials collected in C. Haar, Land-Use Planning (3d ed. 1976); D. Hagman, supra note 3; E. Roberts, supra note 3.
5 260 U.S. 393 (1922).
6 272 U.S. 365 (1926).
11 See R. Healy & J. Rosenberg, supra note 3, at 126-76.
12 Id. at 40-79.
13 Id. at 80-125.
14 D. Mandelker, supra note 3, at 269-323.
lation of land uses affecting wetlands provide convincing evidence of the pervasive and dynamic nature of land use controls. These developments involve critical political, social, and economic issues as well as legal questions.

Two central issues dominate the debate on the exercise of government power over the use of land resources: First, which level of government (federal, state, or local) should have primary authority to manage land use; and second, what limits exist on the authority of the government to regulate the uses of private land. Given the interest of government at all levels in making decisions about land resources and the desires of landowners to use their land as they believe best, there has been no easy resolution to these issues.

Since the early 1900s, when local governments began to enact zoning ordinances and other land use control mechanisms, the issue of...
which level of government should control the exercise of land use powers has been actively debated. Initially the activity of many local governments occupied this field. The promulgation and widespread adoption of the Standard Zoning and City Planning Enabling Acts in the 1920s and the inactivity of state governments and the federal government reinforced local government dominance in the land use field. During the 1930s, however, the national level planning efforts by such entities as the National Resources Planning Board focused new attention on this issue. This focus in national planning did not change the existing dominance of local governments in the land use planning and control field.

In the late 1960s and early 1970s, interest in regional, state, and national planning was revived, and many state governments asserted their general police power authority to establish numerous types of land use controls. In many instances, state-adopted controls were a reaction to the inability or unwillingness of local governments to protect adequately such important land and environmental resources as beaches, wetlands, or agricultural lands. In other cases, these state controls reflected state government dissatisfaction with how local governments were dealing with proposals for certain major kinds of development such as the siting of electric power plants. Some of these new land use control programs vested all critical decisions in state government, while others created various mechanisms through which state and local governments would share power over land use decisions. Whatever choices were made, local governments almost always opposed these state government initiatives because they perceived the state initiatives to mean a loss of traditional power and prerogatives at the local level.

By the early 1970s, many people were eagerly discussing "a quiet revolution" in which state governments were asserting much greater

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23 Notable exceptions were the efforts of many so-called "regionalists" that foreshadowed the planning activity of the 1930s. See, e.g., L. Mumford, The Culture of Cities (1938); H. Odum & H. Moore, American Regionalism (1938); Planning the Fourth Migration: The Neglected Vision of the Regional Planning Association of America (C. Sussman ed. 1976).

24 For a discussion of the National Resources Planning Board, see M. Clawson, New Deal Planning (1981); Merriam, The NRPB: A Chapter in American Planning Experience, 38 AM. POL. SCI. REV. 1075 (1944). See also the publications of the Board: NATIONAL RESOURCES BOARD, STATE PLANNING: A REVIEW OF ACTIVITIES AND PROGRESS (1935); NATIONAL RESOURCES COMMITTEE, OUR CITIES: THEIR ROLE IN THE NATIONAL ECONOMY (1937); NATIONAL RESOURCES COMMITTEE, REGIONAL FACTORS IN NATIONAL PLANNING AND DEVELOPMENT (1935).

25 See F. Bosselman & D. Callies, supra note 3.

26 F. Bosselman & D. Callies, supra note 3; see also Model Land Development Code (1975).

control over land use decisions than they traditionally had exercised. During this period there were also federal legislative initiatives to promote state government exercise of land use controls. However, none of the proposals attracted sufficient support to obtain congressional approval. Consequently, the primary authority to directly control land use remains with state and local governments.

Today the forces that encouraged state governments and, with much less success, the federal government to assert greater control over land use decisions appear to be less powerful than a decade ago. Whether there is a general negative reaction to removing land use decisions from the local level or whether the economic and energy crises have diminished state and federal government interest in land use issues is difficult to determine. It is clear, however, that there are new voices from a broad political perspective reassessing the centralized-regionalist logic of the "quiet revolution."

The second issue concerning the limits of government authority over the use of private land has been even more controversial. Courts at all levels have wrestled with the difficult question as to when government control of private property in a particular case becomes an unconstitutional "taking" of private property rights. In Pennsylvania Coal v. Mahon, Justice Oliver Wendell Holmes set forth a case by case weighing process to assess the effect of the government's controls on the rights of an individual property owner. Although the legal literature is replete with discussions of the various tests for determining when in fact a "taking" has occurred, there are no precise rules for predicting when a

28 Bosselman and Callies helped popularize the notion that a revolution, albeit a quiet one, was occurring in the land use control arena. F. Bosselman & D. Callies, supra note 3.


31 See B. Bobo, No Land Is an Island: Individual Rights and Government Control of Land Use (1975); F. Popper, supra note 3; Geisler, The Quiet Revolution in Land Use Control Revisited, in THE RURAL SOCIOLOGY OF THE ADVANCED SOCIETIES 489-526 (F. Buttel & H. Newby eds. 1980); McClaughry, supra note 3; Walker & Heiman, supra note 3.

32 260 U.S. 393 (1922).

33 Id. at 413.

court will find a “taking” of property rights where government has applied controls to a landowner’s property. 35

Recent decades have witnessed a significant change in judicial attitudes to land use controls. For many years courts looked harshly on land use controls that seriously affected the ability of landowners to use their property as they saw fit. By the early 1970s, however, parallel with the assertion of greater control over land resources by state governments, and during a period of renewed interest in the environment in general and land resource protection in particular, the courts became far more willing to uphold land controls that imposed tough standards for development of certain important land resources such as tidal and freshwater wetlands, flood plains, agricultural lands, and historic buildings. 36 In 1978, the Supreme Court’s decision in Penn Central Transportation Co. v. New York City 37 underscored the strong judicial support for land use controls in order to achieve appropriate public goals even if such controls imposed significant burdens on landowners. 38 The opinion also suggested the continued necessity for case by case determinations where the constitutionality of particular land use control mechanisms is challenged. 39

No land use control effort in the United States exemplifies these two critical issues more clearly than New York State’s efforts to protect the Adirondack Park. By state statute 40 New York State has created a comprehensive land use scheme in the Adirondack Park. While the state is to share power with local governments in major land use decisions, 41 the plan provides that the state government holds the “bottom

36 In Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), the Court stated:

The question of what constitutes a “taking” for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the “Fifth Amendment’s guarantee ... [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” Armstrong v. United States, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons ... Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely “upon the particular circumstances [in that] case.” United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).


37 See generally 1 P. Rohan, supra note 3, §§ 1.04 & 1.05; 3 P. Rohan, supra note 3, §§ 17.01-19.07(2).


39 Id. at 125-28.


41 N.Y. Exec. Law §§ 807-10 (McKinney 1982); R. Liroff & G. Davis, supra note 1, at
line" of authority. Furthermore, the land use controls that the state has imposed on major portions of the private lands in the Park are, in comparison to other land use controls in the United States, quite restrictive. Local governments and Adirondack residents have strenuously opposed these restrictions. Accordingly, the Liroff and Davis book chronicles an important chapter in the development of land use controls in the United States.

II
THE ADIRONDACKS—A BRIEF SKETCH

Liroff and Davis address both the nature of the Adirondack Park and the regional land use planning and control framework that the state has established. We will briefly describe the Park, its history, and the land use law framework established there.

The six million acre Adirondack Park in northern New York is one of the great natural resources of the eastern United States. Its vast forests, hundreds of lakes, thousands of miles of free-flowing rivers and streams, extensive wetlands, and abundant wildlife are valuable natural

42 N.Y. EXEC. LAW §§ 809-10 (McKinney 1982).
43 Typical land use density controls are expressed in terms of numbers of acres per allowable building. Density controls ranging up to five acres for a single house are not uncommon, but they are considered restrictive. See P. ROHAN, supra note 3, § 42.03(2). In contrast, more than 50% of the private lands in the Adirondack Park are included in the Resource Management category under the Land Use and Development Plan. The density guideline for Resource Management areas is 15 principal buildings per square mile, or approximately 43 acres per principal building. R. LIROFF & G. DAVIS, supra note 1, at 33. While these density requirements are not directly transferable into minimum lot size requirements, they clearly are quite restrictive. An additional 34% or so of the private lands in the Park are included in the Rural Use category for which the density requirement is 75 principal buildings per square mile, or approximately 8.5 acres per principal building. Id. at 32-33. See also id. at 72-73.
46 ADIRONDACK PARK AGENCY, 1 COMPREHENSIVE REPORT 1 (1976) [hereinafter cited as COMPREHENSIVE REPORT].
treasures in the nation's second most populous state. The Park provides commercially important natural resources such as minerals, timber, water and water power. Equally significant, the great open spaces of the Adirondacks, which include more than one million acres of formally designated wilderness areas, provide extensive recreational opportunities for the tens of millions of persons who live within a day's drive of this area.

Established as a state park encompassing approximately 4,400 square miles in 1892, the Adirondack Park today consists of both public and private lands that cover about 9,000 square miles. The Park is approximately the same size as Vermont and "one million acres larger than Yellowstone, Yosemite, Grand Canyon, Glacier, and Olympic national parks combined." The state owns approximately forty percent, or 2.3 million acres, of the Park. Virtually all of these state-owned lands are part of the State Forest Preserve and protected as "Forever Wild" lands by the New York State Constitution. The Park's state-owned lands are intermingled with the sixty percent of the Park (3.7 million acres) owned by private individuals, educational institutions, group camps, corporations, and Adirondack local governments.

The 112,000 permanent residents of the Park, as well as the much larger seasonal and transient populations, use the Park's nonstate lands

49 ADIRONDACK PARK AGENCY, ADIRONDACK PARK STATE LAND MASTER PLAN 23 (1979) [hereinafter cited as MASTER PLAN]. New York's system of designated wilderness areas comprises a significant percentage of all designated wilderness in the eastern United States. See U.S. GEOLOGICAL SURVEY, U.S. FOREST SERVICE, NATIONAL WILDERNESS PRESERVATION SYSTEM AND PRINCIPAL LANDS ADMINISTERED OR HELD IN TRUST BY FEDERAL AGENCIES (1978 map).
50 R. LIROFF & G. DAVIS, supra note 1, at 2-5.
51 Act of May 20, 1892, ch. 707, 1892 N.Y. Laws 1459. For an indication of the original size of the Park, see N. Van Valkenburgh, The Adirondack Forest Preserve: A Chronology 302 (1968) (unpublished transcript, Bureau of Land Acquisition, New York State Department of Conservation). The Park did not originally include private lands, but the Park's boundary encompassed private lands. In 1912 the statutory definition of the Park was changed to include state and nonstate lands. Id.
52 R. LIROFF & G. DAVIS, supra note 1, at 1.
53 COMPREHENSIVE REPORT, supra note 46, at 1.
54 N.Y. CONST. art. XIV, § 1. Section 1 states in part: The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed. That language has been in the State Constitution since 1895. It applies to Forest Preserve lands in the Adirondack and Catskill regions. See MASTER PLAN, supra note 49, at 10.
for a wide spectrum of activities. Land uses range from private homes, churches, schools, and commercial activities in the area's small villages and hamlets to vast private estates and large timber and mining operations. Although the Park's economy depends heavily on tourism, other significant economic activities including forestry, mining, government service, and agriculture also are important. Nevertheless, the economic situation for many of the Park's residents is bleak. Extremely high rates of unemployment regularly occur, particularly during the winter months, because most of the Park's tourist industry is oriented toward summer activities.

In the late 1960s the Adirondack area came into the national and state limelight. In 1967, Laurance Rockefeller privately funded a study that recommended the creation of a 1.7 million acre national park. The proposal met with nearly unanimous disfavor and prompted New York's Governor Nelson Rockefeller, Laurance's brother, to appoint The Temporary Study Commission on the Future of the Adirondacks. Their multivolume final report, issued in 1970, contained 181 recommendations. Among the most important was the recommendation to create the Adirondack Park Agency, an independent planning and regulatory organization to provide integrated land management in the Park.

In 1971 the New York Legislature passed the Adirondack Park Agency Act. That legislation created the Adirondack Park Agency (APA), a state executive agency that now consists of eleven members, eight private citizens appointed by the governor and three state officials. The Agency prepared a comprehensive plan for the state lands

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63 R. Liroff & G. Davis, supra note 1, at 10, 16-18.
64 F. Graham, supra note 44, at 219-29.
66 Id. at 25-32.
in the Park and a land use and development plan for the Park's private and other nonstate lands.

The Adirondack Park State Land Master Plan became effective when signed by Governor Rockefeller in July 1972. The Plan divides state lands into nine classifications, ranging from intensive use to wilderness areas, and establishes guidelines for their use and management. The New York State Department of Environmental Conservation exercises responsibility over most of these state lands, including the Park's constitutionally protected Forest Preserve.

In 1973 the State Legislature passed, and the Governor signed, a land use plan for nonstate lands within the Park. Incorporated into the Adirondack Park Agency Act, the Land Use and Development Plan for nonstate lands took effect on August 1, 1973. The APA developed the plan from an ecological approach to planning similar to the methods that Ian McHarg popularized.

The regulatory structure for the Park's nonstate lands is intended to be environmentally oriented and yet sensitive to economic and social concerns. By any measurement the controls that it establishes are restrictive. By text and map it divides the Park's nonstate lands into six land use classifications. These range from hamlets in settled areas to resource management areas in the Park's vast "outback." Furthermore, it defines compatible uses for those areas. The Act sets density guidelines and shoreline restrictions. The density guidelines are the

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70 See Id. § 805, 1971 N.Y. Laws 1853, 1856.
71 MASTER PLAN, supra note 49, at 9.
72 The original State Land Master Plan designated only seven land use areas: Wilderness, Primitive, Canoe, Wild Forest, Wild Scenic and Recreational Rivers, Intensive Use, and Travel Corridors. ADIRONDACK PARK AGENCY, ADIRONDACK PARK STATE LAND MASTER PLAN (1972). In 1979 New York State Governor Hugh Carey signed amendments to that plan that created two new state land classifications: Historic and State Administrative.
75 Id. § 1.
76 Id. § 13.
77 R. LIROFF & G. DAVIS, supra note 1, at 28; see I. MCHARG, DESIGN WITH NATURE (1969).
78 The balancing of environmental, social and economic factors is most evident in the general statement of purpose of the APA Act, in the description of land use areas for nonstate lands, and in the criteria that the Act establishes for approval of regional projects in the Park. See N.Y. EXEC. LAW §§ 801, 805, 809(10) (McKinney 1982).
79 Id. § 805(3).
80 Id. § 805(2).
81 Id. § 805(3). The six land use areas located on nonstate lands are hamlets, moderate intensity use areas, low intensity use areas, rural use areas, resource management areas, and industrial use areas.
82 The overall density guidelines are established as follows:
Act’s most restrictive and consequently most controversial aspect. The statute requires a permit from the APA before the undertaking of any regional project, as defined in the Act. The scheme essentially attempts to protect the character of the Park by focusing development activities either in already developed areas or in areas where resources can best sustain additional development; conversely, it attempts to discourage intensive land use activities in less suitable areas. Local governments may assume elements of the Agency’s jurisdiction over project reviews if they adopt local land use controls approved by the Agency. The APA provides technical assistance to local governments to assist in the preparation of local plans and ordinances.

In addition to its responsibilities under the APA Act, the Agency also administers within the Park New York’s Freshwater Wetlands Act and major parts of the state’s Wild, Scenic, and Recreational Rivers System Act. Accordingly, the whole land use structure is rather complex. Both that structure and the APA itself have been highly controversial within the Park but, in contrast, generally quite popular outside the Park. The extraordinary resources of the Park, the strong

| a) | hamlet areas: | no guidelines |
| b) | hamlet use areas: | 500 principal buildings per square mile (or approximately 1.3 acres per building) |
| c) | low intensity use areas: | 200 principal buildings per square mile (or approximately 3.2 acres per building) |
| d) | rural use areas: | 75 principal buildings per square mile (or approximately 8.5 acres per building) |
| e) | resource management areas: | 15 principal buildings per square mile (or approximately 43 acres per building) |
| f) | industrial use areas: | no guidelines |

R. LIROFF & G. DAVIS, supra note 1, at 32-33; see also N.Y. EXEC. LAW § 805(3) (McKinney 1982).

83 N.Y. EXEC. LAW § 806 (McKinney 1982).
84 See generally R. LIROFF & G. DAVIS, supra note 1, at 126-29.
85 N.Y. EXEC. LAW §§ 809, 810 (McKinney 1982).
86 COMPREHENSIVE REPORT, supra note 46, at 16-17; telephone interview with George Davis, former Assistant Director of the APA (May 17, 1983). Davis, the primary staff architect of the Land Use and Development Plan, is currently Executive Director of the Adirondack Council, a private environmental organization.
87 N.Y. EXEC. LAW §§ 807, 808 (McKinney 1982).
88 R. LIROFF & G. DAVIS, supra note 1, at 58-63; COMPREHENSIVE REPORT, supra note 46, at 36.
89 N.Y. ENVTL. CONSERV. LAW §§ 24-0801 to -0805 (McKinney 1984).
90 Id. §§ 15-2701 to -2723.
91 See Booth, supra note 41, at 696-99. To some extent the complexity that arises from the Agency’s implementation of all or parts of three major land use statutes, and from the Agency’s interrelationships with the New York State Departments of Health and Environmental Conservation, constitutes a liability.
93 R. LIROFF & G. DAVIS, supra note 1, at 1, 29-30, 133, 149-53. Statewide environmental groups typically identify the protection of the Adirondack Park as among their highest environmental priorities. See, e.g., ENVIRONMENTAL PLANNING LOBBY, ENVIRONMENTAL
land use control program created,\textsuperscript{95} and the tension between in-Park and out-of-Park political forces\textsuperscript{96} make the Liroff and Davis book an interesting and highly informative study of the nature of land use planning control programs.

III

The Authors' Efforts

Liroff and Davis discuss in detail and with great insight many of the salient issues necessary to understand and assess land use planning and control of nonstate lands in the Adirondacks. The authors explore the conditions that prompted formation of the Agency as well as the Land Use and Development Plan for the Park's nonstate lands; the process by which legislation is transformed into an administrative program—including the critical role that the leadership in the state capital and within the Agency played; the environmental impact of the Agency's regulatory program; the relationship of the Agency to local planning; the politics of the Agency's planning and implementation efforts; and a legal analysis, authored separately by F. Frank Lyman, of the approach used in the APA Act. The authors conclude by discussing the lessons that the Adirondack experience provides for other land use planning and control efforts.

The authors' approach is admirably multi-disciplinary. They have accumulated a wealth of substantive data from numerous sources. Their study encompasses historical research, numerous interviews, a mail survey to local Adirondack legislators, an economic analysis of land market impacts, a set of project review case studies, an examination of agency files, and the use of selected consulting experts for the environmental and legal analyses.\textsuperscript{97} Many of these resources are available to the reader in the book's copious footnotes; among the information included in the appendices is a reprint of the Adirondack Park Agency Act.

Liroff and Davis explain much about the history and socio-economic conditions of the Adirondacks. It is not, however, the authors' intention merely to describe the area, the Plan, or the Agency, but also to assess the effectiveness of the Agency and the Plan in planning and

\textsuperscript{94} See generally W. White, supra note 58.

\textsuperscript{95} Those land use controls have some important weaknesses. See Booth, supra note 41, at 691-701 (discussing APA's inability to fulfill its long-range planning responsibilities, and difficulties of sharing administrative authority with other state agencies); Booth & Hullar, supra note 45, at 16 (citing such weaknesses as inadequate control of development around lakes and ponds, limited enforcement capability, and lack of attention to long range park planning).

\textsuperscript{96} See F. Graham, supra note 44, at 275-78.

\textsuperscript{97} For a discussion of the authors' research methods, see R. Liroff & G. Davis, supra note 1, at 12-13.
regulation. Thus, to this assessment, the authors direct the bulk of the data and analysis. They use the four substantive concepts of law, environment, administration, and politics as a framework for analysis. We treat each of these subjects briefly below.

Frank Lyman, the author of the legal analysis chapter, sees the Adirondack Park Agency Act as "one of the most ambitious undertakings in land use planning and control ever attempted in the United States." His analysis addresses four constitutional issues, primarily with regard to important legal decisions made under the statute. The first of those issues is the state's authority to pass the statute. In analyzing that authority, Lyman discusses home rule issues, the power of the state legislature to delegate authority to an administrative body, and the limitations on the proper exercise of the state's police power. The other major issues that Lyman reviews are the taking issue, equal protection considerations (a very brief section), and procedural due process issues.

It was inevitable that there would be a challenge to the APA Act concerning its legitimacy in light of the home rule provisions of the State Constitution. In 1977 in Wambat Realty Corp. v. State, the New York State Court of Appeals considered whether the Act violated those home rule provisions. The case arose as a result of Wambat Realty's proposal to build a very large second house development in the northeastern portion of the Adirondacks. In a unanimous opinion that is replete with very strong language supporting the APA Act, the court held that the APA Act relates to matters "other than the property, affairs or government of a local government" and thus is authorized by powers that the home rule article expressly reserves to the state. The opinion, considered the leading decision under the Act, characterized the ecological considerations served by the Act as a "supervening State concern transcending local interests."

As Lyman points out, New York State has successfully defended the APA Act against other challenges that the state did not have the authority it asserted in that statute. The courts have supported the state's

98 Id. at 156.
99 Id. at 157-65.
100 Id. at 166-70.
101 Id. at 170-71.
102 Id. at 171-74.
103 For the New York home rule provisions, see N.Y. CONST. art. IX, §§ 1-3.
104 41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977); see also the companion case to Wambat, Town of Black Brook v. State, 41 N.Y.2d 486, 362 N.E.2d 579, 393 N.Y.S.2d 946 (1977) (town has standing to challenge constitutionality of APA Act only because claim based on home rule provision of New York State Constitution).
105 For a discussion of this case, see R. Litoff & G. Davis, supra note 1, at 157-60.
106 41 N.Y.2d at 497, 362 N.E.2d at 586, 393 N.Y.S.2d at 954.
107 Id. at 495, 362 N.E.2d at 584, 393 N.Y.S.2d at 952.
108 R. Litoff & G. Davis, supra note 1, at 160-65.
position against claims that the Legislature unconstitutionally delegated too much power to the APA.\textsuperscript{109} The state has also successfully defeated claims that the APA Act exceeded the proper bounds of the police power and violated citizens' rights to substantive due process.\textsuperscript{110}

The state's position as to the three other main issues discussed by Lyman (taking, equal protection, and procedural due process) seems quite strong. There has been no definitive answer to the taking issue in the Adirondack context. The 1976 New York State Court of Claims decision in \textit{Horizon Adirondack Corp. v. State}\textsuperscript{111} suggests, however, that the courts are likely to support the state in the face of most of these claims.\textsuperscript{112} Lyman offers only a general discussion of equal protection issues, focusing on whether the Act can legitimately discriminate between property owners inside and outside the Adirondack Park.\textsuperscript{113} The case of \textit{Tyler v. Adirondack Park Agency}\textsuperscript{114} serves as the focus of the procedural due process analysis. In \textit{Tyler}, the petitioner argued successfully that the Agency could not deny his requested variance to the Act's shoreline restrictions without holding a public hearing. Although \textit{Tyler} underscores the need for the Agency to afford procedural due process to persons affected by its decisions, Lyman does not believe that the decision presents any threat to the basic legal structure that New York has established in the Adirondacks.\textsuperscript{115}

Lyman is careful to point out that "[w]ith the exception of . . . whether the APA Act violates the home rule provisions of New York's constitution (it does not), all the issues discussed [in this analysis] remain open, in the sense that they have not been passed upon by the courts of


\textsuperscript{110} See, e.g., Adirondack Park Agency v. Ton-Da-Lay Assocs., 61 A.D.2d at 110-11, 401 N.Y.S.2d at 905 (APA Act not "constitutionally beyond the powers of the Legislature"); McCormick v. Lawrence, 54 A.D.2d at 125, 387 N.Y.S.2d at 920 (holding that aesthetic preservation of area permissible exercise of police power).

\textsuperscript{111} 88 Misc. 2d 619, 388 N.Y.S.2d 235 (N.Y. Ct. Cl. 1976).

\textsuperscript{112} R. LIROFF \& G. DAVIS, supra note 1, at 166-70. Lyman also discusses Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), as lending strong support to the position of New York State on "taking" questions in the Adirondacks. Lyman points with some caution, however, to the dissenting opinion of Justice Rehnquist in \textit{Penn Central} as suggesting directions that the Supreme Court might eventually pursue. R. LIROFF \& G. DAVIS, supra note 1, at 166-68.

\textsuperscript{113} R. LIROFF \& G. DAVIS, supra note 1, at 170-71.


\textsuperscript{115} R. LIROFF \& G. DAVIS, supra note 1, at 175.
Nevertheless, the record of the APA Act to date in court suggests that New York's legal structure for land use planning and control in the Adirondack Park is sound. The legal chapter clearly supports Lyman's conclusion that "[w]ithout a most remarkable turn-about in the law, the APA Act will enjoy a long and robust legal life."117

Liroff and Davis have more difficulty assessing the environmental impact of the Agency's regulatory program under the Land Use and Development Plan than Lyman had assessing the legal issues. The authors consulted a planner-architect-landscape architect to evaluate the APA Plan map. The expert found problems of accuracy and consistency, an absence of documentation, and a high degree of subjectivity that together may raise doubts about defending the Plan's ecological basis.118 A quantitative analysis of the APA's project reviews highlights some important facts. A full 58% of these reviews were for small projects, that is, single-family dwellings or two-lot subdivisions.119 Fewer than one percent were for large subdivisions, a major raison d'être of the Agency.120 To the authors the figures suggest that "the agency devotes an unduly high percentage of time and effort"121 to very small projects, for which their review "may not be more sophisticated than what one might expect from a local government employing technical expertise available from a well-staffed county office."122 An in-depth review of six project cases indicates that for the APA, as with many other regulatory agencies, "[t]he technical bases for decisions are sufficiently malleable in some instances as to allow outcomes responsive to political concerns."123

Perhaps because the legal issues are relatively clear and the environmental issues subject to political interests, the most useful portions of the Liroff and Davis analysis concentrate on administrative and political aspects. With regard to administration they note factors that reinforce other analyses. Because it is the governor who selects the members of the Agency, the governor's predilections are crucial to the Agency's success, activism, and support.124 The chairman of the Agency, also selected by the governor, is an important, though not omnipotent, figure with regard to the Agency's style, focus, and priorities.125 Finally, some of the antagonism that the Agency encountered at the outset in the Adirondacks appears attributable to its hiring a highly dedicated but rela-

116 Id. at 174 (emphasis in original).
117 Id. at 175.
118 Id. at 68-73.
119 Id. at 75.
120 Id. at 74-83, 112.
121 Id. at 78.
122 Id. at 83.
123 Id. at 112.
124 Id. at 43, 155.
125 Id. at 11, 43-44, 143.
tively young, inexperienced staff who were "apparently perceived by many indignant Adirondackers as having come from the outside with the belief that they were bringing environmental religion to the heathens." 126

New York's choice to retain strong central authority over land use in a state agency reflects the Temporary Study Commission's initial perceptions concerning local government capacity and ability. 127 That choice fed (and feeds) political opposition at the local level 128 and among certain state legislators. 129 Given the Agency's interest in pursuing regional environmental quality goals, opponents in the Adirondacks perceive the Agency as insensitive to the economic impact of regulation, 130 including the differential impact of its regulatory program on private property rights. 131 The APA's initial strict interpretations of the APA Act and the environmental protection oriented enthusiasm of the staff prompted this perception. Although the survey conducted for the study showed "local officials' support for the basic premises of the APA's plan [to be] quite limited," 132 the Agency has remained politically strong because of the gubernatorial power and support, the relative lack of importance of these issues for most state legislators, and the very firm support the APA has throughout the rest of the state. 133

Overall, the story that emerges in the authors' view is that of a well intentioned effort, conducted for a good cause, but which has had some major shortcomings in the area of implementation. The authors are also quite sensitive to the issue of the roads not taken, the alternative options that were available to the Agency. In particular, they believe that there was the possibility of local government participation and coalition-building with sympathetic local interests, but that this became difficult, if not at times impossible, because of the Agency's apparent attitudes. 134 The authors' conclusions about the lessons of the Adirondack experience recognize the changed political macro-climate: "[W]hat was appropriate and politically possible for the Adirondacks in the early 1970s may be neither possible nor appropriate for other areas in the 1980s." 135 They see that the Agency's strength derived from certain unique cir-

126 Id. at 53.
127 Id. at 21, 177-78.
128 Id. at 22-30, 116-19, 177-80.
129 Id. at 153-54.
130 Id. at 128, 147-49.
131 Id. at 116-21. Material on the subject of differential impact is still rare in the environmental and land use control field. For an indication of the disproportionate impact of regulatory policy, see Castle, Property Rights and the Political Economy of Resource Scarcity, 60 J. AGRIC. ECON. 1 (1978); D. ERVIN, J. FITCH, K. GODWIN, W. SHEPARD & H. STEVENS, supra note 27, at 24-30.
132 R. LIROFF & G. DAVIS, supra note 1, at 115.
133 Id. at 122-55, 177.
134 Id. at 178-84; F. POPPER, supra note 3, at 144-48.
135 R. LIROFF & G. DAVIS, supra note 1, at 180.
cumstances, including a financial and institutional independence from local government, which also contributed to its political-administrative problems.\textsuperscript{136} As for the future, it is within the areas of nonregulatory land policy, easement acquisition, preferential tax assessment, and increased dialogue between the Agency's protagonists and opponents that the authors see opportunities to ameliorate local grievances and establish a more useful role for the Agency.\textsuperscript{137}

The Liroff and Davis book is not without its weaknesses. Three obvious weaknesses are particularly significant: the lack of focus on issues arising from the state's management of state lands in the Park; the lack of detail respecting the economic impacts of the APA Act on the area; and the failure to examine the future of the Adirondack Park in any detail.

Ironically, the book's strength is also its greatest weakness. By choosing to concentrate their analysis on the Land Use and Development Plan for nonstate lands, i.e., private and municipal lands, the authors have ignored the single most important landowner in the area, the State of New York. As noted, the state owns fully forty percent of the Adirondack Park. Thus, its land use or nonuse decisions have important implications for the environmental quality and economy of the region. The existence of more than two million acres of state lands in the Park was one of the major reasons New York State decided that it must create a comprehensive land use control framework for the Adirondacks.\textsuperscript{138}

There are, in addition, important questions regarding the actual impact of the State Land Master Plan on the state's management of its own lands and the Agency's ability to serve as the key policy entity for overseeing integrated land management for all of the state and nonstate lands in the region.\textsuperscript{139}

The APA has inevitably confronted numerous controversies in its efforts to implement a strong, reasonably comprehensive land use plan in the Adirondacks. As the authors note, much of that controversy has arisen from the widespread perception among Adirondack residents that the APA Act negatively affects the economic well-being of a region already beset by economic problems.\textsuperscript{140} The authors discuss in detail a number of the disputes in which the APA has become embroiled, from the significant\textsuperscript{141} to the petty.\textsuperscript{142} They fail, however, to discuss in any detail the impact to date of the APA Act on the Adirondack economy or

\textsuperscript{136} Id. at 176-80.
\textsuperscript{137} Id. at 182-85.
\textsuperscript{138} COMPREHENSIVE REPORT, supra note 46, at 9-12.
\textsuperscript{139} Booth, supra note 41, at 695-96; 1982 ADIRONDACK PARK AGENCY ANN. REP. 5 (1983).
\textsuperscript{140} R. LIROFF & G. DAVIS, supra note 1, at 122-23, 147-49.
\textsuperscript{141} Id. at 93-98, 107-12.
\textsuperscript{142} Id. at 104-07, 139-40.
its potential economic impact in the future, impacts that have serious policy implications. Supporters of the APA Act understandably argue that the impact of the Act is, and will continue to be, significantly positive for the area’s economic mainstays, tourism and the forest products industry. In part the authors fail to provide an adequate evaluation because there is not a great deal of information yet available on the economic impact of the APA Act. Nevertheless, they do not try to assess in any detail the information that does exist or examine what types of indicators would be useful in order to make valid assessments of the Act’s economic impact. As a result, they leave the reader with little more than the knowledge that local residents believe that the APA Act has hurt them economically.

Finally, the authors devote little time to examining the future of the Adirondacks and assessing how the land use structure imposed will help the state to deal with problems that the Park will face. Those problems will be many and varied. They will include, for example, a determination whether to retain the basic legal structure embodied in article XIV of the State Constitution and the APA Act, strategies for dealing with the impact of acid rain, the cumulative impact of development on the Adirondacks, and the establishment of a more viable balance between the goals of environmental protection and economic development. Liroff and Davis accurately conclude that those supporting and opposing the structure that the APA embodies should engage in a more cooperative dialogue, and that, in the name of social equity, alternatives to strict regulation should be explored. These two suggestions alone are far from sufficient in determining the future role of the APA in land use control. Given the authors’ skills and insights they could have done much more to help identify and assess the goals that future decisions about the Adirondacks might pursue.

These reservations about the Liroff and Davis book do not alter our

143 See Council Newsletter, supra note 93, at 3-4.
144 R. LIROFF & G. DAVIS, supra note 1, at 147-49. For one of the few studies in this area, see C. ZINSER, THE ECONOMIC IMPACT OF THE ADIRONDACK PARK LAND USE AND DEVELOPMENT PLAN (1980).
145 Some important new information on the economic impact of the Adirondack Park program may result from a project entitled “Social and Economic Research” currently being conducted by the College of Agricultural Life Sciences at Cornell University.
146 For a number of years, various proposals have surfaced in the state legislature to amend the Forever Wild clause of article XIV of the State Constitution. See ENVIRONMENTAL PLANNING LOBBY, NEW YORK ENVIRONMENTAL VOTER’S GUIDE (1981 & 1982); Council Newsletter, supra note 93, at 1.
148 Booth & Hullar, supra note 45, at 20.
149 THE FUTURE OF THE ADIRONDACK PARK, supra note 48, at 67-70.
150 R. LIROFF & G. DAVIS, supra note 1, at 184-85.
151 Frank Graham Jr., in his study of the Adirondacks, reflected on these future concerns:
very positive reaction to *Protecting Open Space*. Land use regulation in the Adirondacks is an important topic. The authors have contributed a very valuable and readable work to the growing literature on this land use experiment. Land use efforts around the country would benefit by having works of equal quality prepared on them.

**SUMMARY**

The Adirondack Park Agency Act represents a major step in the land use planning and control field in the United States. Its successes and failures, its strengths and weaknesses can provide valuable information for other efforts. Liroff and Davis have done much to make understandable the nature and significance of this complicated history and complex framework. Their book is well worth attention.

*Richard S. Booth*  
*and Harvey M. Jacobs*

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In *An Inquiry into the Human Prospect*, Robert L. Heilbroner concludes that "whether we are unable to sustain growth or unable to tolerate it, there can be no doubt that a radically different future beckons."

In the face of such prospects it is fruitless to predict with any confidence the shape of things to come in the Adirondacks. Some future energy crisis may force the federal government to take an "easement" in the Forest Preserve and harvest wood for fuel or materials, just as it did on a restricted scale to extract titanium during World War II. New pressures from an increasing population or changing values may undo the most carefully planned regulations to preserve open space on private lands. In the years ahead we may find ourselves squirreling away tracts of wilderness as early monks hid illuminated manuscripts, gold chalices, and other treasures from the menace of their own Dark Ages.

But for now we must go on behaving as if our values have substance. In New York there is a long tradition of land stewardship, and the decisions made by the Adirondacks' broad constituency during the last century have carried this treasure reasonably intact into our own day. There will be new challenges and decisions just ahead for all Americans as they try to accommodate wild and viable green spaces in their changing society. Primarily because of the Forever Wild clause in their Constitution and a strong land use planning law, both of them refined by experience, the people of New York State retain their options.

And that, in the modern world, is no small privilege.


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INTRODUCTION

In The Constitution, the Courts, and Human Rights, Michael J. Perry examines the legitimacy of constitutional policymaking by the judiciary. Perry presents a new functional justification for noninterpretive review—the practice by which the judiciary has recognized constitutional guarantees beyond those envisioned by the framers or granted in the Constitution. Perry seeks to establish that although noninterpretive review lacks constitutional authorization, it fulfills a crucial societal function and is not inconsistent with American society's commitment to representative democracy. Thus, he asserts, noninterpretive review and the decisions reached by such review are legitimate.

This Review examines Professor Perry's resolution of the legitimacy problem. It briefly describes the debate over judicial policymaking and outlines Perry's theory of noninterpretive review. The Review then analyzes Perry's dual justification for noninterpretive review and concludes that his argument contains fatal shortcomings.

I

THE PROBLEM

The proper scope of judicial review has been in dispute since the inception of constitutional adjudication. In recent years, the dispute has heightened as the Supreme Court has announced decisions such as Roe v. Wade that many commentators contend are based not on a historical understanding of the Constitution, but rather on extraneous policy judgments. Participants in the debate contest the legitimacy of the
judiciary's constitutional policymaking, specifically, its use of noninterpretive review.

Perry distinguishes noninterpretive from interpretive review by examining the source of the values a court uses to decide a constitutional question. A court engages in interpretive review when it determines the constitutionality of a given policy choice by reference to one of the value judgments of which the Constitution consists—that is, by reference to a value judgment embodied, though not necessarily explicitly, either in some particular provision of the text of the Constitution or in the overall structure of government ordained by the Constitution.\(^\text{10}\)

By contrast, a court engages in noninterpretive review when it ascertains the constitutionality of a policy choice “by reference to a value judgment other than one constitutionalized by the framers.”\(^\text{11}\) The boundary between interpretive and noninterpretive review, as those terms are defined by Perry, is an elusive one; whether one views a decision as based on values explicitly or implicitly expressed in the Constitution or in the governmental structure, or as based solely on those values prevailing among a majority of the Justices, depends largely on one’s reading of the Constitution’s text and historical underpinnings.\(^\text{12}\) To evaluate Professor Perry’s theory on its own terms, this Review adopts his restrictive interpretation of the Constitution’s text and the framers’ intent.

Perry divides the participants in the legitimacy debate into two camps: interpretivists and noninterpretivists. According to Perry, interpretivists argue that only interpretive review, and only decisions arrived at through interpretive review, are legitimate.\(^\text{13}\) Interpretivists hold that, in reviewing the constitutionality of a given practice, a court should look beyond the “plain meaning” of the constitutional text\(^\text{14}\) to the value judgments the framers intended to embody in the textual language.\(^\text{15}\) Thus, a court should invalidate a practice if the framers specifically intended to ban it or if it is the modern analogue of a constitutionally prohibited practice.\(^\text{16}\) Interpretivism, however, does not authorize the invalidation of practices that differ in “significant re-

\(^\text{10}\) \text{Id. at 10.}
\(^\text{11}\) \text{Id. at 11.}
\(^\text{12}\) \text{But see id. at 19 (“The Supreme Court’s actions in virtually none of the important constitutional cases of the modern period . . . can be explained as exercises of interpretive review.”).}
\(^\text{13}\) \text{See id. at 11.}
\(^\text{14}\) Perry distinguishes interpretivism from an even more restrictive theory of constitutional adjudication, literalism. The latter theory holds that courts should base constitutional decisions solely on the “plain meaning” of express provisions of the Constitution. \text{Id. at 32.}
\(^\text{15}\) \text{Id.}
\(^\text{16}\) \text{Id. at 32-33. For example, interpretivists would apparently support the application of fourth amendment standards to modern forms of search and seizure, such as wiretapping and electronic surveillance. Id.}
spect[s] from those the framers banned.\textsuperscript{17}

In contrast, Perry asserts that noninterpretivists embrace some,\textsuperscript{18} if not all, judicial decisions reached without specific reliance on the constitutional text, the framers’ intent, or the governmental structure.\textsuperscript{19}

The Supreme Court rarely admits to engaging in noninterpretive review, apparently because it questions the validity of such review.\textsuperscript{20} Scholarly debate over the appropriate form of judicial review has nevertheless proven vigorous and widespread.\textsuperscript{21} The controversy exists, according to Perry, because many of the Court’s modern decisions, especially in the human rights area, cannot plausibly be explained as the products of interpretive review.\textsuperscript{22} If noninterpretive review is illegitimate, all those decisions based on decisional norms not constitutionalized by the framers are also illegitimate.\textsuperscript{23}

Many theorists contend that the legitimacy question turns on whether noninterpretive review can be reconciled with American society’s commitment to democratic or “electorally accountable” decision-making.\textsuperscript{24} Interpretivists and noninterpretivists take as axiomatic “the political principle that governmental policymaking . . . ought to be

\begin{itemize}
\item \textsuperscript{17} Id. (footnote omitted).
\item \textsuperscript{18} Id. at 11; see also infra notes 51-73 and accompanying text (discussing what Perry terms selective theory of noninterpretivism).
\item \textsuperscript{19} See M. Perry, supra note 1, at 11.
\item \textsuperscript{20} Id. at 139-40.
\item \textsuperscript{22} M. Perry, supra note 1, at 11, 19, 130.
\item \textsuperscript{23} Id. at 11. For Perry, who endorses a narrow reading of the Constitution’s text and the framers’ intent, the stakes are high. For example, Perry argues that the first amendment was intended to apply only to the federal government and that the framers of the fourteenth amendment did not intend to apply the first amendment or any other bill of rights guarantees to the states through the fourteenth amendment. Thus, Perry argues, the cases in which the Court has reviewed actions of state governments under the first amendment, as applied through the fourteenth, are products of noninterpretive review. See id. at 61-66. In addition, Perry argues that the equal protection clause, as originally understood, simply “forbade enactment or enforcement of laws denying on the basis of race any fundamental right granted residents generally.” Id. at 63 (footnote omitted). Perry concurs with Raoul Berger’s conclusion that the framers did not intend to constitutionalize the value of equality of the races and that “segregated public schooling does not offend equal protection as originally understood.” Id. at 67. Perry concludes that “[o]ne cannot be a logically consistent interpretivist and accept equal protection doctrine banning, for example, racial segregation.” Id. (footnote omitted).
\item \textsuperscript{24} This Review refers to the principle of democratic decisionmaking as “electorally accountable decisionmaking” or “representative democracy.” See id. at 4 (“Because the word democracy is so freighted and misused, suggestive of vague substantive ideals as well as procedural forms, . . . I use a different term, . . . electorally accountable policymaking.”) (emphasis in original).
\item \textsuperscript{25} See, e.g., id. at 2-3, 9-10, 21, 24; J. Ely, Democracy and Distrust 4-9, 101-04 (1980); sources cited supra note 21.
\end{itemize}
subject to control by persons accountable to the electorate.” When the Supreme Court, a politically insulated institution, engages in constitutional policymaking, as opposed to constitutional interpretation, it creates a seemingly irreconcilable conflict with this basic democratic principle.

Interpretivists concede that electorally accountable policymaking is subject to constitutional constraints. They apparently also concede that a politically unaccountable judiciary is the only effective means of implementing these constraints and protecting certain individual rights against infringement by the majority. They argue, however, that the constraints should consist only of those that the American people imposed upon themselves through a popular vote to ratify or amend the Constitution. This somewhat simplistic “civics book” understanding of the American political system reflects a valid concern that the people should have ultimate control over the values that govern them. Interpretivists apparently are reluctant to allow the judiciary to enforce norms that lack a constitutional basis because norms derived from extraconstitutional sources such as tradition, consensus, or natural law inevitably vary with the interpreter and cannot be effectively validated or overruled by majority vote.

Proponents of noninterpretive review have responded to the interpretivists’ arguments by attempting to show that the framers’ original understanding or the functional needs of the constitutionally mandated structure of government authorize noninterpretive review. In doing so, the noninterpretivists implicitly concede that noninterpretive review must be authorized by the text of the Constitution, the governmental structure, or the framers’ intent; otherwise, such review is irreconcilable with basic principles of representative democracy. Perry rejects the possibility of textual, historical, or structural authority for noninterpretive review and presents a controversial new theory to justify noninterpretivism.

Perry seeks to justify this extraconstitutional mode of judicial review by establishing that it is the most effective means of serving an

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26 M. Perry, supra note 1, at 9; see also J. Ely, supra note 25, at 5, 7 (“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.”) (footnote omitted).

27 See M. Perry, supra note 1, at 2-3.

28 See id. at 28.

29 See id.; J. Ely, supra note 25, at 8.

30 M. Perry, supra note 1, at 28.

31 "Extraconstitutional" describes that which is "beyond" the values embodied in the Constitution; "contraconstitutional" describes that which is "against" those values. Id. at IX.

32 See id. at 93-95; J. Ely, supra note 25, at 43-72.


34 See J. Ely, supra note 25; see also infra notes 51-73 and accompanying text (outlining Ely’s theory).
equally extraconstitutional societal value: the national commitment to
to moral evolution or to the possibility that there are right answers to
moral-political issues. Because Perry asserts that the judiciary's political
isolation makes it more competent than Congress to act as the nation's
moral diviner, he does not contend that noninterpretive review is ulti-
mately supportive of representative democracy. Rather, he attempts to
demonstrate that noninterpretive review and the principle of electorally
accountable policymaking are not mutually exclusive by arguing that
Congress's power to limit the jurisdiction of the federal courts subjects
the federal judiciary to "significant political control . . . at the hands of
electorally accountable officials."35

This Review questions the three basic propositions that underlie
Perry's theory: (1) the American public is committed to moral evolution
or at least believes that there are "right answers" to moral-political
problems; (2) the judiciary is best equipped to further this moral reeval-
uation and growth or to discern morally "right" answers; and (3) Con-
gress's authority to limit the jurisdiction of the federal courts36
provides the means by which noninterpretive review can be reconciled with the
principle of electorally accountable decisionmaking. Before examining
those propositions, the Review explains the progression of Perry's argu-
ment in more detail to illustrate the extreme alternative conclusions
presented to the credulous reader: accepting Perry's justification for
noninterpretive review in all areas of constitutional adjudication or
adopting the narrowest of interpretivist stands.

II

PROFESSOR PERRY'S JUSTIFICATION FOR
NONINTERPRETIVE REVIEW

The implicit initial step in Professor Perry's analysis is to establish
that the practice of noninterpretive review goes beyond value judgments
constitutionalized by the framers not against them—that is, that
noninterpretive review is extraconstitutional, rather than contraconsti-
tutional.37 First, Perry rejects justifications advanced by fellow noninter-
pretivists,38 arguing that neither the Constitution's text nor the framers'
original understanding legitimates noninterpretive review.39 Moreover,
after surveying the "equivocal"\textsuperscript{40} textual support for interpretive review, Perry concludes that the framers did not intend to constitutionalize "any theory of the proper scope of judicial review, whether narrow, like interpretivism, or broad."\textsuperscript{41}

Perry's treatment of interpretive review illustrates how he bolsters his argument and intensifies the consequences of rejecting his thesis. Perry asserts that interpretive review is legitimated by its "compelling functional justification":\textsuperscript{42} the Supreme Court enforces the Constitution through interpretive review, "completing the framers' vision of the Constitution as supreme law."\textsuperscript{43} By adducing a functional justification for interpretive review, Perry builds an analytical bridge between interpretive and noninterpretive review. If one rejects the notion that a functional rationale can validate a practice not constitutionalized by the framers,\textsuperscript{44} Perry implies that one must then abandon both interpretive and noninterpretive review.

The second step in Perry's proof that noninterpretive review is extraconstitutional is his assertion that "to say that the framers did not intend the judiciary to undertake a noninterpretive function is not necessarily to say that the framers intend the judiciary not to undertake such a function."\textsuperscript{45} Perry would have the reader believe that the framers neglected to address the issue of judicial review at all in constructing their delicate system of checks and balances. He therefore feels unconstrained by constitutional considerations and free to pursue other means of justifying judicial policymaking.

Before presenting the substance of his theory, Perry makes clear the disastrous consequences of rejecting his functional justification. Perry raises the stakes of the interpretivist/noninterpretivist debate considerably by subscribing to an extremely narrow reading of the Constitution. For example, in the equal protection area, Perry endorses Raoul Berger's largely discredited view that the framers' original understanding of the fourteenth amendment did not intend a "charter for the political and social equality of [Blacks]."\textsuperscript{46} As a result, were the reader to accept Perry's historical analysis, he would be forced to conclude that "[o]ne cannot be a logically consistent interpretivist and accept equal protection doctrine banning, for example, racial segregation."\textsuperscript{47}
To further ensure that a reader sympathetic to the Supreme Court’s recent human rights decision is acutely receptive to his functional theory, Perry attempts to similarly polarize the noninterpretivists’ position. Perry argues that either all noninterpretive review is legitimate or none of it is. He devotes an entire chapter to demonstrating that “no consideration presented by either federalism or separation-of-powers issues undermines the [interpretivist] claim . . . that all noninterpretive judicial review is illegitimate.” Having established that these issues do not disturb the notion that all noninterpretive review must be treated as a whole, Perry goes on to attack what he views as the most prominent of the selective theories of noninterpretivism, John Hart Ely’s “representation-reinforcing” approach.

Ely contends that although some of the Court’s decisions, purportedly based on the equal protection clause or the first amendment, are not supported by values embodied in those provisions, the decisions are nonetheless legitimate because they further the functioning of representative democracy, a value implicit in the Constitution and in the governmental structure. One might argue, based on Ely’s focus on constitutional values in determining the legitimacy of a particular exercise of judicial review, that he is not a noninterpretivist. Perry, however, ignores this argument and rejects what he views as Ely’s selective noninterpretivist thesis: noninterpretive review is legitimate when applied to “participational” values such as free speech and equal protection but illegitimate when, as in substantive due process cases, the Court conducts a substantive review of a legislative policy choice. A brief exposition of Ely’s theory of noninterpretive review is useful as a contrast to Perry’s holistic approach. In addition, the problems Perry identifies in Ely’s theory parallel many of the difficulties in Perry’s own analysis.

Ely contends that noninterpretive review in first amendment and equal protection cases is “entirely supportive of the American system of representative democracy” because it removes the obstacles to public participation in the political process. Judicial policymaking in these areas, he argues, is legitimate on systemic rather than on substantive grounds. The judiciary must be charged with maintaining the interpretivism to be even wider than Berger is apparently willing to acknowledge: “that Brown [v. Board of Education] and its progeny ought to be overruled.”

48 Id. at 77, 90.
49 Id. at 77, 90.
50 J. ELY, supra note 25, at 101.
51 M. PERRY, supra note 1, at 77-90, 119-22.
52 J. ELY, supra note 25, at 73-104.
53 M. PERRY, supra note 1, at 77-78 (emphasis in original).
54 Id.
55 J. ELY, supra note 25, at 102.
56 Id. at 102-03.
processes of democratic government (representation-reinforcing) because only the judiciary can objectively assess claims "that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are."57

Perry criticizes Ely's first amendment argument on alternative grounds. First, he contests what he claims is Ely's implicit premise: that there is a consensus among Americans as to "the sort of democratic process that ought to prevail in America."58 Perry argues that because there is no consensus on the optimal nature of speech, publication, and associational rights, there is no consensus as to democratic processes.59

Perry alternatively asserts that even if Ely's argument does not presuppose public consensus, it fails because it neglects to justify the judiciary's right to impose its particular ideal of the scope of debatable first amendment rights and its model of representative democracy on the political community. Perry asks "by what right does the judiciary substitute its particular conception for the conception of the people's electorally accountable representatives?"60 Ely relies on the supposition that incumbents cannot be trusted to resolve first amendment issues impartially.61 Perry retorts that incumbents will resolve free speech issues as their constituencies demand.62 In sum, Perry finds no reason why the people's choice as to the dimensions of their first amendment rights and the character of the democratic processes cannot prevail over the Justices' particular conceptions.63

Ely's rationale for terming equal protection a "participational" value is less intuitive than that forwarded in regard to freedom of expression. In the first amendment area, the judiciary guards the public's right to speak, publish, and associate, thereby ensuring that the people are able to participate in the processes by "which values are appropriately identified and accommodated."64 In equal protection cases, the judiciary supports the democratic processes by ensuring that minorities are not denied participation in "the accommodation [of values] those processes have reached."65 Ely recognizes the conceptual conflict between the judiciary's purported role of maintaining democratic processes and its actual role in equal protection cases of compelling the majority to behave toward the minority in a way the majority has re-

57 Id.
58 M. Perry, supra note 1, at 79 (emphasis in original).
59 Id.
60 Id. at 80.
61 See J. Ely, supra note 25, at 103; M. Perry, supra note 1, at 81.
62 See M. Perry, supra note 1, at 81-82.
63 Id. at 82.
64 J. Ely, supra note 25, at 77; M. Perry, supra note 1, at 84.
65 J. Ely, supra note 25, at 77.
jected. He attempts to resolve the apparent conflict by use of the concept of “virtual representation.” Under this theory, the judiciary forces public officials to bestow benefits, or refrain from imposing burdens, on minorities with chronically little political power because “as a practical matter those officials are not electorally accountable to such [disadvantaged] persons.”

Perry again criticizes Ely’s model, arguing that the framers did not constitutionalize the idea of virtual representation, and that no societal consensus endorses the concept. To Ely’s contention that elected representatives cannot be trusted to impartially address equal protection problems, Perry responds that elected officials will respond to such problems as their constituencies require. Again, Perry questions why electorally accountable officials should not be left to resolve equal protection claims within the limits imposed by the fourteenth amendment. According to Perry, Ely ultimately relies on the idea that “it is somehow fairer to have politically disinterested judges resolve equal protection claims of majority tyranny than to have legislators . . . resolve them.” To this Perry responds that fairness issues have traditionally been resolved, and are better resolved, through the political processes.

Perry, like Ely, founds his theory on an assumption that certain societal needs can be fulfilled only by judicial policymaking. Ely ties his theory to needs created by values implicit in the constitutionally mandated governmental structure. He argues that some noninterpretive review is necessary for representative democracy to function effectively. In contrast, Perry founds his theory on extraconstitutional societal needs that he derives from his personal view of the American psyche.

Perry posits that the American public has a “religious” conception that “constitute[s] a basic, irreducible feature of the American people’s understanding of themselves” and that “serves as a source of unalienated self-understanding.” Americans, he asserts, feel themselves committed to realize a “‘higher law,’” to act as “a beacon to the world, an American Israel, especially in regard to human rights.”

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66 See M. Perry, supra note 1, at 85.
67 J. Ely, supra note 25, at 77-88; M. Perry, supra note 1, at 85.
68 M. Perry, supra note 1, at 85 (emphasis in original).
69 Id. at 85-88.
70 Id. at 88.
71 Id.
72 Id. at 88-89 (emphasis in original).
73 Id. at 89 (quoting Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1177-78 (1977)).
74 M. Perry, supra note 1, at 97.
75 Id.
77 Id. at 98 (emphasis in original) (footnote omitted).
function of noninterpretive review, then, is "prophetic"; the Supreme Court, in engaging in policymaking in moral-political realms, calls the government to "provisional judgment" and furthers the "moral evolution" of the American polity. 78

Lest such a premise be too mystical for general consumption, Perry posits an alternative end that requires the use of noninterpretive review. He contends that as a society, Americans are, or should be, open to "the possibility that there are right answers to political-moral problems." 79 In this context, noninterpretive review is essential to allow Americans to "keep faith" 80 with this possibility.

The functional justification for noninterpretive review that Perry builds upon these assumptions is that, to be true to the American "religious" understanding, one government institution must fulfill the role of moral prophet. Perry contends that the judiciary, although not infallible, is institutionally better suited to further America's moral evolution or to divine the "right" answers to moral-political issues:

As a matter of comparative institutional competence, the politically insulated federal judiciary is more likely, when the human rights issue is a deeply controversial one, to move us in the direction of a right answer . . . than is the political process left to its own devices, which tends to resolve such issues by reflexive, mechanical reference to established moral conventions. 81

Perry argues that noninterpretive review has evolved to fill a vital function not assumed by legislators for the very reason that legislators are electorally accountable. Given the assumption that American society is pledged to moral reevaluation and growth, the judiciary's political immunity makes it the institution most capable of forging beyond the moral norms of the majority of Americans. Thus, Perry's functional justification for noninterpretive review is premised on the judiciary's electoral unaccountability.

Perry's justification is manifestly at odds with the principle of representative democracy. He argues, however, that the judiciary is subject to effective political control in the form of Congress's power under article III 82 to limit the Supreme Court's appellate jurisdiction and Congress's ability to control the lower federal courts' original and appellate jurisdiction. 83 Perry's idea, only vaguely expressed, is that the Supreme

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78 Id. at 99 (footnote omitted).
79 Id. at 102.
80 Id. at 100.
81 Id. at 102.
82 Under article III, the Supreme Court "shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2.
83 See U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To constitute Tribunals inferior to the Supreme Court."); see also id. art. III, § 1 ("The judicial Power of the
Court, the Congress, and the public engage in a discussion that results in moral growth. The Court speaks through noninterpretive review; Congress and the public can respond through the legislative power to curtail jurisdiction. Perry explains that:

The relationship between noninterpretive review and electorally accountable policymaking is dialectical. The electorally accountable political processes generate a policy choice, which typically reflects some fairly well established moral conventions . . . . In exercising noninterpretive review, the Court evaluates that choice on political-moral grounds, in the end either accepting or rejecting it. If the Court rejects a given policy choice, the political processes must respond, whether by embracing the Court's decision, by tolerating it, or, if the decision is not accepted, or accepted fully, by moderating or even by undoing it [through the jurisdiction-limiting power].

Perry would limit Congress, however, to withdrawing the federal judiciary's jurisdiction over questions resolved by reference to values not constitutionalized by the framers. Thus, Congress may control the Court's noninterpretive policymaking but not its interpretive functions. Perry also asserts that the Court, in reviewing jurisdiction-limiting legislation, may only exercise its interpretive function.

Perry's critics argue that the jurisdiction-limiting power is ineffective because it generally will be exercised in reaction to a binding decision. Perry responds that a decision is binding "only where the Court retains jurisdiction to decide future, similar cases in the same way." He concludes that Congress's power is "not a source of perfect control" but it does "tolerably" reconcile the practice of noninterpretive review with the principle of electorally accountable decisionmaking.

Perry's aim is to legitimate the Court's practice of noninterpretive review. To this end, Perry constructs a dual thesis. First, noninterpretive review performs the indispensable function of allowing Americans "to keep faith (or try to) with our commitment to moral growth—or, if

United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.")

Because this Review concentrates on the proper role of the federal judiciary in reviewing problems arising under the federal Constitution, see supra note 7, it does not address the problem of how Perry's thesis, which holds that Congress's power to limit the jurisdiction of the federal courts resolves the tension between noninterpretive review and the principle of representative democracy, can legitimate a state court's policymaking under the federal (or state) Constitution. For Perry's resolution of this issue, see M. Perry, supra note 1, at 131-32.

84 M. Perry, supra note 1, at 112 (footnote omitted).
85 Id. at 128.
86 Id.
87 Id. at 130.
88 Id. at 131 (emphasis in original).
89 Id. at 138.
90 Id. at 126 (emphasis in original).
you prefer, with the possibility that there are right answers."91 Second, noninterpretive review performs this function in a way that "*tolerably accommodates our other basic, constitutive commitment—our commitment to the principle of electorally accountable policymaking.*"92 Perry neglects to articulate whether both elements are necessary to validate the Supreme Court's policymaking. Accordingly, before proceeding with analysis of Perry's theory, it is necessary to identify the propositions essential to the legitimacy of noninterpretive review.

It is unclear whether Perry views his functional justification as either necessary or sufficient to establish the legitimacy of noninterpretive review. At some points he asserts that "[t]he justification for the practice, if there is one, must be functional."93 However, Perry never forthrightly addresses the question of whether such an extraconstitutional practice *can* be legitimated by reference to its extraconstitutional utility. The question is of some import for, as one commentator has noted, "[t]he fact that something serves a particular function does not directly justify it. It may have been a fact that cannibalism provided a vital protein supplement to the Aztec diet. If so that fact certainly did not justify the practice."94 Nothing in the Constitution authorizes amendment by necessity; where then does Perry find his authority?

Perry apparently believes that the system's functional need for a practice will legitimate the practice notwithstanding the framers' intent. He would argue that the Constitution, by necessity, allows for extraconstitutional institutional growth; functionally necessary practices, therefore, are legitimate additions to the framers' scheme. He cites the "imperial presidency"95 as an example of a practice that goes beyond the framers' intent but is nonetheless legitimate.96 One can easily accept that the Constitution must be open to some organic institutional growth. Nevertheless, recognition of the federal judiciary's power to conduct unlimited noninterpretive review constitutes a greater reallocation of constitutional powers and roles than that involved in the development of an "imperial presidency."97 Perry fails to address the significant problems involved in introducing a power of this enormous scope into a federal system based on notions of a central government of limited, enumerated powers.

Taking Perry's argument as a whole, functional considerations are

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91 Id. at 125.
92 Id. at 126 (emphasis in original).
93 Id. at 24.
95 M. PERRY, supra note 1, at 114.
96 Id. It seems incongruous for Perry, who insists on endorsing the narrowest possible interpretation of the Constitution, to be arguing for flexible construction.
97 See infra text accompanying notes 133-36.
apparently insufficient in Perry's view to legitimate noninterpretive review. Perry often argues that any justification must allow us "to keep faith with two of the most basic aspects of our collective self-understanding": commitment to moral development and commitment to the principle of electorally accountable policymaking. Moreover, in framing the noninterpretivist/interpretivist debate, Perry poses the crucial question as "whether, given the principle of electorally accountable policymaking, judicial review is legitimate."99

The final inquiry is whether Perry can legitimate noninterpretive review solely by establishing its compatibility with representative democracy. Perry’s formulation of the legitimacy issue suggests an affirmative response to this inquiry: "If a principled approach to noninterpretive review can be developed, one that is consistent with our nation's commitment to representative democracy, ... the problem of legitimacy will have been solved."100 Perry apparently presents his functional justification to demonstrate that noninterpretive review is "salutary."101 Having established that the practice is beneficial, he proceeds to the legitimacy question: whether noninterpretivism is consistent with representative democracy.

The final section of this Review examines the components of Perry's dual justification independently. First, it attempts to demonstrate that Perry's functional justification fails because it involves an unsupportable assumption about the existence of an American "religious" understanding and a questionable assertion that the judiciary is best equipped to act as moral diviner. Second, the Review argues that Congress's jurisdiction-limiting power does not remedy the flaws in Perry's functional theory nor does it independently establish the legitimacy of noninterpretive review.

III
ANALYSIS

A. The Functional Justification for Judicial Policymaking

Perry constructs his functional justification on the alternative premises that the American people are committed to moral evolution or at least recognize that discoverable "right"102 answers to moral-political issues exist. The latter premise is simply a more palatable restatement of the former. One may readily accept the notion that the American peo-

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98 M. Perry, supra note 1, at 101.
99 Id. at 9.
100 Id. at 24; see also id. at 9-10.
101 Id. at 125.
102 Professor Perry conducts his discussion on the implicit understanding that the people are making "principled" moral choices. He does not recognize that compromises may result in "the best possible" choice or a solution necessitated by practical or political considerations.
ple believe right answers to moral issues exist. In fact, they probably believe that their own resolution of a moral issue is the "right" one. If this is the case, they have no need and little tolerance for Supreme Court prophecy. Thus, Perry's functional theory works only if his assertion that the American people are open to the possibility of "right" answers means that they believe that "[t]he moral sensibilities of the pluralistic American polity typically lag behind, and are more fragmented than, the developing insights of moral philosophy and theology,"103 and that the people are therefore devoted to the search for right answers. In sum, the single premise underlying Perry's functional approach is that the American people recognize that there are right answers that they have not yet found, but will strive to discover.

Perry refuses to argue with those who believe that there are no right answers to moral-political questions ("metaethical relativists") or those who contend that even if right answers exist, there is no way to conclusively discern them ("ethical skeptics").104 To be fair, there seems no effective method to "prove" that discoverable right answers exist short of a dissertation on moral philosophy, a task for which Perry is concededly105 ill-equipped. Perry mistakenly concludes, however, that

[i]f Bork's and Rehnquist's moral skepticism were widely shared, it would be extremely difficult, perhaps impossible, to elaborate a justification for noninterpretive review that would have much currency. For the moral skeptic who is committed to the principle of electorally accountable policymaking, there is no principled reason to prefer an answer given by the Court to one given by an institution that, unlike the Court, is electorally accountable. No answer is demonstrably correct, and, therefore, better an answer by an electorally accountable institution than by an electorally unaccountable one.106

Perry fails to see that the truth of the assertion that there are discoverable right answers is irrelevant to his theory. One must believe that right answers can be found to personally endorse noninterpretivism.107 But to concede the legitimacy of noninterpretive review, assuming that Perry's functional justification is valid, one need only believe that the American public perceives that there are discoverable right answers, whether or not that perception is well-founded. To illustrate, assume with Perry that a functional justification built upon an extraconstitutional societal need can legitimate a practice not contemplated by the fram-

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103 M. PERRY, supra note 1, at 118.
104 Id. at 103.
105 See id. at 110.
106 Id. at 105 (emphasis in original).
107 For the principled ethical skeptic committed to representative democracy, "[w]here constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other," id. (quoting Bork), and judgments made by elected policymakers must always prevail.
Assume also that Perry establishes the functional necessity of noninterpretive review and reconciles it with the principle of representative democracy. Finally, accept Perry’s premise regarding the American public’s commitment to moral growth. Ethical skeptics would still view the product of noninterpretive review as morally arbitrary, but they would be forced to concede its legitimacy, just as they concede the legitimacy of morally arbitrary legislative enactments because the people have a fundamental commitment to representative democracy. Thus, Perry need only establish as a necessary (but not sufficient) condition to legitimacy that the public’s commitment to moral evolution is as fundamental as its commitment to representative democracy.

Perry, however, makes no attempt to support his supposition regarding the American “religious” understanding. He is therefore guilty of the offense with which he charges Ely: employing an unsupported assumption of consensus as the basis for his analysis. If one rejects the notion that American society is committed to moral evolution, the remainder of Perry’s “functional” analysis becomes superfluous. This critique of Perry’s functional justification of noninterpretive review therefore assumes that the American public aspires to moral growth.

Perry builds his functional theory on his premise regarding the American “religious” understanding. Simply stated, he believes that some governmental institution must assume the task of “regularly dealing with fundamental political-moral problems other than by mechanical reference to established moral conventions,” and that the judiciary is best equipped to do so. Upon examination, Perry’s justification raises two fundamental questions. First, should any governmental entity, particularly one that is politically isolated, voluntarily assume the role of moral diviner? Second, is the judiciary an effective instrument for promoting moral growth and, if so, is it more effective than Congress in achieving this end?

Perry, apparently entirely comfortable with the idea that a governmental institution should take upon itself the role of moral prophet, does not even address the first question. Perry’s failure to consider the propriety of this prophetic role is consistent with his view that the American “religious” conception is “a basic, irreducible feature of the American people’s understanding of themselves.” Perry implies that, as one of the public’s deepest concerns, moral development should be pursued in

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108 See supra text accompanying notes 91-101 (discussing necessary and sufficient conditions for legitimacy).
109 Perry must also establish that noninterpretive review serves the American commitment to moral growth better than other mechanisms and that noninterpretivism can be reconciled with the principle of representative democracy.
110 See supra text accompanying notes 58-59, 69 (discussing Ely’s theory).
111 M. Perry, supra note 1, at 101 (emphasis in original).
112 Id. at 97.
the manner most likely to involve the conscience of the entire nation—through the political processes. In addition, Perry's definition of "political-moral" issues encompasses almost any issue worthy of public debate.\(^{113}\) The government must necessarily confront issues such as "distributive justice and the role of government, freedom of political dissent, racism and sexism, the death penalty, [and] human sexuality."\(^{114}\) Perry's conclusion that some governmental agency must assume a prophetic role thus is entirely consistent with his assumption that the public wants "right," not necessarily popular, answers to these issues.

The second issue raised by Perry's functional justification is the accuracy of his conclusion that the judiciary is the governmental institution best qualified to act as moral pathfinder. To support this conclusion, Perry relies exclusively on the idea that legislators' electoral accountability binds them to prevailing societal norms.\(^{115}\) He credits the politically insulated judiciary\(^{116}\) with the institutional capacity to resolve controversial issues by reference to progressive values. Perry neglects to consider, however, that the judiciary has characteristics other than electoral unaccountability that may frustrate its ability to act as prophet. The most obvious such characteristic is the judiciary's traditional vision of itself as an enforcer, not a creator, of law. Judges' own perceptions of their role may make them unwilling to forge a new political morality. Many judges may feel compelled to exercise restraint, follow precedent, defer to legislative judgments, and submerge their personal predilections to the values of the community.\(^{117}\)

A related consideration in assessing the judiciary's capacity to promote moral growth is the public's perception of the judicial role. If the public is unaware that courts are engaging in constitutional policymaking, not interpretation, they are likely to simply accept the decision as law, whether or not they agree with the moral judgment underlying it. Thus the public's perception of the Supreme Court as constitutional interpreter may foreclose the possibility of a dialectical growth process initiated by the Court's noninterpretive review and informed by public participation.

\(^{113}\) See, e.g., text accompanying note 114.

\(^{114}\) M. PERRY, supra note 1, at 100.

\(^{115}\) See, e.g., supra quotation accompanying note 81.

\(^{116}\) Perry's reliance on the judiciary's political unaccountability may seem inconsistent with his assertion that Congress's jurisdiction-limiting power subjects the judiciary to effective political control. One can resolve this apparent contradiction, however, by referring to Perry's dialectical theory. Individual judges' electoral unaccountability allows them to instigate moral reevaluation by continuously deciding cases according to their advanced moral vision. Their judgments are theoretically subject to correction by the public through the agency of Congress, but they may continue to spur the nation's conscience unimpeded by incumbency concerns.

\(^{117}\) See, e.g., Cox, The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 HARV. L. REV. 91, 94 (1966).
Even if the public is aware that the Court is acting extraconstitutionally, it is debatable whether the Court's resolution of issues encourages moral growth. Commentators argue, for example, that the Court's decision in *Roe v. Wade*, one of the few decisions that has been widely denounced as illegitimate, extinguished the dialectic that Perry seeks to promote. They contend that *Roe* effectively ended legislative and societal reevaluation of the abortion issue and polarized the debate, thus terminating the process of compromise and moral growth.

Assuming the judiciary would candidly undertake a prophetic role and the public would respond to noninterpretive decisions as it does to legislative policy choices, Perry still must establish that the judiciary is better equipped to initiate moral growth than the legislature. Perry concedes that the judiciary is fallible and that "[i]f the Court can serve as an instrument of moral growth, it can also serve as an instrument of moral retardation." But, he argues, the proper question to ask is whether "noninterpretive review has served a salutary, perhaps crucial governmental (policymaking) function during the modern period." In assessing the judiciary's contribution to moral growth, one can certainly treat *Lochner v. New York* and *Dred Scott v. Sanford* as aberrations and look in the more recent past to *Brown* or *Roe* as examples of morally progressive decisions. Perry fails to explain, however, why the Court will continue to make "progressive" value choices, that is, choices consistent with Perry's liberal philosophy, and escape the misjudgments of past Courts. The question remains whether individual judges are made privy to a source of advanced values by virtue of their office.

In determining the source of extraconstitutional values to which judges should look in deciding human rights cases, Perry rejects "tradition" and "consensus" as insufficiently determinant. Nor does he contend that there exists "a single authoritative moral system that should inform the exercise of noninterpretive review." Rather, "right" answers can be found, according to Perry, at "a point at which a variety of philosophical and religious systems of moral thought and belief converge." Perry ultimately concedes, however, that, rather than scouring major moral theories for points of convergence, "each justice

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118 410 U.S. 113 (1973).
119 See M. Perry, supra note 1, at 1 n.6.
120 *See, e.g., Malitz, Murder in the Cathedral—the Supreme Court as Moral Prophet, 8 Dayton L. Rev. 623, 631 (1983).*
121 *See id. at 110.*
122 M. Perry, supra note 1, at 115.
123 *Id. at 116 (emphasis added).*
124 198 U.S. 45 (1905).
125 60 U.S. (90 How.) 393 (1857).
126 *See M. Perry, supra note 1, at 93.*
127 *Id. at 110.*
128 *Id. at 109 (emphasis in original).*
[inevitably] will deal with human rights problems in terms of the particular political-moral criteria that are, in that justice's view, authoritative." 129 At this point, Perry's theory invites the same challenge Perry directs at Ely's analysis: why should the American public prefer the views of individual judges to their own, or to those of their elected officials? 130

Even if the judge's office allows him the freedom to choose an unpopular policy, the question remains whether he will use that freedom in a morally progressive way. If judges may decide extraconstitutional issues by reference to their own "moral vision," 131 the "right" answers flowing from noninterpretive review are, as the ethical skeptics contend, just "a matter of taste" 132 unless even morally regressive decisions further moral development. One can salvage Perry's functional theory, by arguing that the Court, in issuing "different" policy choices, acts as a catalyst for a moral dialogue. Thus, the legitimacy of noninterpretive review under Perry's functional theory turns on the existence of a true dialectic. There must be a meaningful way in which Congress and the public can respond to the judge's individual value choices so that through a moral dialogue, the "right" answer can be forged. Perry asserts that Congress's jurisdiction-limiting power constitutes the mechanism by which this dialogue is effected.

B. Congress's Jurisdiction-Limiting Power

Perry's contention that Congress's jurisdiction-limiting power subjects the judiciary to "significant political control . . . at the hands of electorally accountable officials" 133 is the most crucial component of his argument. Perry's functional justification is valid only if he can establish that this power promotes a dialectical process of moral reevaluation and growth. Even if his functional theory fails, Perry may be able to legitimate noninterpretivism, based on the accommodation effected by the jurisdiction-limiting power between the practice of noninterpretive review and the principle of representative democracy. 134

Although Perry's interpretation of the jurisdiction-limiting power is crucial to the success of his argument, it is one of the weakest parts of his analysis. One senses that Perry's resort to the jurisdiction-limiting power is not a sincere attempt to identify a bona fide check on judicial policymaking. Perry presents an anti-majoritarian (in his terms, "dialectical") justification for noninterpretive review but needs a credible,

129 Id. at 111.
130 See supra text accompanying notes 60-62, 70-72 (discussion of Ely's theory).
131 M. PERRY, supra note 1, at 123.
132 Id. at 103.
133 Id. at 126.
134 See supra text accompanying notes 91-101 (discussing necessary and sufficient conditions to legitimacy).
yet not too effective, means of reconciling noninterpretivism with representative democracy. He virtually concedes that such a motive underlies his reliance on the jurisdiction-limiting power, stating:

I am not happy conceding such a broad jurisdiction-limiting power to Congress . . . . Perhaps I have overlooked something. Perhaps it is possible to justify noninterpretive review in a way that takes seriously the principle of electorally accountable policymaking but that does not concede a broad jurisdiction-limiting power to Congress. I invite anyone interested in elaborating such a justification to try to do so.\textsuperscript{135}

Perry’s grudging acceptance of the jurisdiction-limiting power, and his professed willingness to withdraw his reconciliation at the sign of another, narrower theory of control indicates that he is not truly seeking an effective means of making the Supreme Court politically accountable.

Perry’s distaste for meaningful public control over the Court’s noninterpretive function is best illustrated by examining the flaws of his jurisdiction-limiting theory. Perry’s vision of Congress’s jurisdiction-limiting power as a constraint on judicial policymaking is objectionable on two counts. First, on a “functional” level, the jurisdiction-limiting power fails to provide an effective check on the Court’s extraconstitutional activities. Second, the jurisdiction-limiting power subjects fundamental “constitutional” rights to majority ratification or veto. This, in turn, diminishes the symbolic power of the Constitution and the public perception, if not the reality, of the relation between the Court, Congress, and the people.

On a theoretical level, Congress’s jurisdiction-limiting power may satisfy the felt need to subject the Court to some kind of political accountability. In practice, however, this power has not proved an effective source of control. Although Congress has considered many proposals,\textsuperscript{136} only once has it exercised its jurisdiction-limiting power to prevent the Supreme Court from acting.\textsuperscript{137} In contrast, constitutional amendments have overruled the Court four times.\textsuperscript{138} Thus, the amendment process, a source of control that Perry rejects as ineffective,\textsuperscript{139} has

\textsuperscript{135} M. Perry, supra note 1, at 137.
\textsuperscript{136} For a list of proposals, see J. Choper, supra note 6, at 446 n.56; Sager, Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 18 n.3 (1981).
\textsuperscript{137} See Ex parte McCordle, 74 U.S. (7 Wall.) 506 (1880) (habeas corpus jurisdiction). As Maltz notes, “[e]ven in that case, the effect of the imposition of the limitation was only to delay the exercise of judicial authority.” Maltz, supra note 120, at 629 (citing Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1868) in support of this proposition).
\textsuperscript{138} Oregon v. Mitchell, 400 U.S. 112 (1970) (overruled in part by the twenty-sixth amendment); Pollack v. Farmers’ Loan & Trust Co., 157 U.S. 429 (1895) (overruled by the sixteenth amendment); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) (overruled by the fourteenth amendment); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (overruled by the eleventh amendment); see also Maltz, supra note 120, at 629.
\textsuperscript{139} See M. Perry, supra note 1, at 127.
injected a relatively greater degree of accountability into the judicial review process. Moreover, even if one were to found a theory of control on the combined mechanisms of jurisdiction-limiting and amendment, one could not seriously suggest that five cases in over two hundred years demonstrate "significant political control" or even the existence of a meaningful dialogue between the Court and the public.

Perry's response to this argument further illustrates that his jurisdiction-limiting theory is a makeweight. First, Perry claims that congressional reticence in using the jurisdiction-limiting power stems from the fact that many congressmen secretly endorse the Court's controversial human rights decisions but, for political reasons, would not endorse similar legislative solutions. Even if this claim were true, Perry should not rely on it to explain congressional behavior. Such a claim is counter to his assertion that public input, through the agency of Congress's jurisdiction-limiting power, furthers the Court-initiated dialectical process of moral growth. If the legislators choose not to listen to their constituents, as Perry implies, the conduit for public discussion closes and the moral dialogue ends. In addition, Perry fails to recognize that some legislators who disagree with the Court's policy choices or who would feel bound to register their constituencies' disapproval are reluctant to take action because they view the Court's directives as supreme law.

Perry does recognize that Congress's failure to exercise its jurisdiction-limiting power in the last hundred years may be due to "legislative inertia." He applauds this phenomenon, however, as a necessary check on impulsive political behavior: "If it were relatively easy to enact a jurisdiction-limiting proposal, the temptation to do so frequently and unreflectively would likely prove irresistible to legislators willing, indeed eager, to bend to prevailing if momentary passions in order to preserve their incumbency." Perry apparently believes that the judiciary alone has the capacity to make principled judgments in pursuit of a moral vision. Although Perry concedes that "the opposition of even a significant minority of the Senate or House can, as a practical matter, doom [jurisdiction-limiting] proposals," he denies that "the burden of legislative inertia prevents Congress's jurisdiction-limiting power from serving as a source of significant political control over noninterpretive review." In Perry's mind, "significant" control is synonymous with "potential" control. Potential control, however, may well be insufficient not only to satisfy those who adhere to the principle of electorally ac-

140 Id. at 126.
141 Id. at 134.
142 Id. at 134-35.
143 Id. at 135.
144 Id. at 134.
countable decisionmaking, but to also allow any meaningful dialogue between the Court and the public.

Another practical difficulty with Perry's analysis of the jurisdiction-limiting power is his distinction between Congress's power to curtail the Court's noninterpretive jurisdiction and its inability to control the Court's interpretive function. It is worth noting that Perry's restrictive view of Congress's power to define the Court's appellate jurisdiction differs from the "orthodox view,"145 which holds that this power is plenary.146 In support of his view, Perry simply points out that even interpretivists recognize the legitimacy of interpretive review and admit that the principle of electorally accountable decisionmaking is not absolute. Thus, "it is unnecessary for the noninterpretivists (or anyone else) to concede to Congress power to control interpretive review."147 Even if Perry were to advance a more compelling textual or historical basis for his view, however, there remain significant practical difficulties in distinguishing between interpretive and noninterpretive review for the purposes of restricting the Court's jurisdiction or reviewing such restrictions. Commentators differ greatly over what rights are "implicit" in the Constitution; their dispute demonstrates the inherent difficulties in drawing the interpretive/noninterpretive distinction. One's definition of what constitutes a noninterpretivist decision depends on one's historical predilection.148 Moreover, the Supreme Court rarely acknowledges that it engages in noninterpretive review.149 Thus, it is doubtful that Congress, in exercising its jurisdiction-limiting power, will be able to find a clear line between decisions based on values explicit or implicit in the Constitution and those decisions based on extraconstitutional values. The Court will have similar difficulties in exercising review over jurisdiction-limiting enactments.

Perry implicitly denies the existence of these line drawing problems with the assertion that "in very few consequential human rights cases of the modern period can the Court's decisions even plausibly be explained as products of interpretive review."150 One must regard Perry's estimate of

146 Id.; see also Ex parte McCordle, 74 U.S. (7 Wall.) 506 (1868). Other commentators have suggested that McCordle has been read too broadly and that Congress cannot make exceptions to the Court's jurisdiction that would destroy the essential role of the Supreme Court in the constitutional plan. See, e.g., Sager, supra note 136, at 42-58; see also C. Wright, supra note 145, at 34 & n.7. Even some commentators who adhere to the orthodox view suggest that some limits on Congress's jurisdiction-limiting power may exist. See, e.g., Meserve, Limiting Jurisdiction and Remedies of Federal Courts, 68 A.B.A. J. 159 (1982) (Congress cannot violate other constitutional provisions in defining appellate jurisdiction); see also C. Wright, supra note 145, at 35 & n.10.
147 M. Perry, supra note 1, at 130.
148 See supra text accompanying notes 6-12.
149 See M. Perry, supra note 1, at 139-40.
150 Id. at 130 (emphasis in original).
the plausibility of deriving these decisions from the values embodied in
the Constitution with some skepticism, however, because of his ex-
trremely narrow reading of the Constitution's text and historical under-
pinnings.\textsuperscript{151} Indeed, Perry begs the question by saying that, in his
judgment, interpretivist explanations of the modern human rights cases
are incorrect and that, if one accepts his theory, one encounters no line-
drawing difficulties. The fact remains that others do not share his views
and, thus, Congress's and the Court's task in differentiating between in-
terpretive and noninterpretive decisions will not be easy.

Perry also counters objections to the practical problems inherent in
his jurisdiction-limiting theory by advocating that the Supreme Court
candidly acknowledge when it engages in noninterpretive review.\textsuperscript{152} To
date, however, the Court has consistently avoided doing so and is un-
likely to become more forthright in the future. Moreover, the Court's
public recognition that a given decision represents constitutional legisla-
tion would exacerbate the final flaw in Perry's jurisdiction-limiting the-
ory: its reallocation of power among the Court, Congress, and the
people without constitutional authorization.

The Court's recent human rights decisions have primarily involved
individuals' "constitutional"\textsuperscript{153} rights against the majority. Perry would
countenance a congressional veto over what the Court has pronounced
to be fundamental rights of the American people. In effect, "[n]o longer
could rights be thought of as something we have independent of major-
ity will . . . . [T]he fact is that [control over jurisdiction] would leave
us only those rights that no determined majority could be mustered to
oppose."\textsuperscript{154} The probability of congressional action to effectively over-
rule the right to privacy, for example, is remote. Nevertheless, the fact
that the majority could do so illustrates the way in which Perry's theory
would radically alter the perception, if not the reality, of constitution-
ally mandated roles.

Under Perry's theory, the Court would candidly\textsuperscript{155} acknowledge
that a decision effectively amended the Constitution by adding to its
guarantees.\textsuperscript{156} Congress, if it chose to exercise its jurisdiction-limiting
power, could veto the proposed amendment by silencing the Court. If
Congress could not overcome its traditional lethargy, the deci-

\textsuperscript{151} See supra note 23.
\textsuperscript{152} M. Perry, supra note 1, at 139-45.
\textsuperscript{153} That is, rights the Court claims are derived from the Constitution, regardless of comment-
ators' contentions that the rights are not based on values constitutionalized by the
framers.
\textsuperscript{154} O'Fallon, supra note 94, at 720.
\textsuperscript{155} See M. Perry, supra note 1, at 139-41 (discussing need for candor).
\textsuperscript{156} Perry has his own "ratchet theory." He argues that the Court may not make deci-
sions that are contraconstitutional but it may render decisions that are extraconstitutional.
See id. at IX; cf. id. at 33-34. Thus the list of constitutional guarantees may be expanded, but
may not be trimmed.
sion/amendment would be treated as constitutional law, subject to subsequent overruling by Congress or the Court. Such fundamental reordering of traditional roles requires public endorsement in the form of a constitutional amendment. Perry, however, has attempted to legitimate this reallocation of roles through a functional justification, apparently obviating the need for popular ratification. In structuring his analysis of noninterpretive review, Perry has highlighted the true character of the Court's actions in recent human rights decisions and the gradual shift in roles that has come about. Perry ultimately has done the Court a great disservice by advancing a fatally flawed theory of legitimacy which, at the same time, throws into sharp relief the constitutional illegitimacy of the role restructuring that has evolved.

CONCLUSION

The virtue of Perry's theory of judicial review lies in its fundamentally candid approach to the noninterpretivist/interpretivist debate. Perry does not strain the constitutional text or fabricate an intent on the part of the framers to legitimate noninterpretive review. He feels that although the Supreme Court may occasionally err, it has assumed a crucial role in furthering human rights, a role no other branch of government is willing or able to undertake. Through an elaborate analytical scheme, Perry essentially admits that he endorses noninterpretive review as a means to attain necessary ends.

Perry's principle fault is his failure to adequately address the problems his justification raises or to sufficiently support his positions. After rebutting all other justifications for noninterpretivism, Perry advances a less than compelling argument for his own theory. Thus, although he may be honest, he is ineffective. The credible reader may intuitively agree with Perry and sympathize with the result he seeks. Such a reader may nevertheless conclude that the only tenable position in the constitutional system to which we are committed is reluctant interpretivism.

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