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Moral Knowledge and Constitutional Adjudication

Richard Kay

MORAL KNOWLEDGE AND CONSTITUTIONAL ADJUDICATION

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> The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester.[1]

In the *Statesman* Plato considers the art of government. At one point the Eleatic Stranger, Plato's primary interlocutor, argues that the sole criterion for true government is whether the governors possess the "royal science." Everything else is irrelevant: "[W]hether they rule according to law or without law, over willing or unwilling subjects, and are rich or poor themselves—none of these things can with any propriety be included in the notion of the ruler."[2] On this point his student, young Socrates, raises a rare if mild demur suggesting that "as to their ruling without laws—the expression has a harsh sound."[3] In response the Stranger puts the case of a physician who departs upon a long journey and leaves a written set of instructions for his patients. Should he return earlier than expected no one would want him to adhere to his written rules if he thought that "owing to an unexpected change of the winds or other celestial influences"[4] those rules no longer offered the greatest promise of cure. Similarly, any rules laid down by the political "physician" must, given the "endless irregular movements of human things,"[5] be inferior to the unfettered judgment of the wise ruler.

> And if he who gave laws, written or unwritten, determining what was good or bad, honourable or dishonourable, just or

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1. R. BOLT, A MAN FOR ALL SEASONS 66 (1962).

2. PLATO, *Statesman*, in 3 THE DIALOGUES OF PLATO 465, 508 (B. Jowett trans. 4th ed. 1953). The passage quoted is found at 293c-d of the standard reference numerals to the dialogue. (Hereinafter citations will be to *Statesman*, followed by the standard reference and the page number in the Jowett translation.) Charles McIlwain discussed the relevance of Plato's discussion in *Statesman* to issues of constitutionalism in C. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 28-35 (rev. ed. 1947).

3. *Statesman*, *supra* note 2, 293e, at 509.

4. *Id.* 295d, at 511.

5. *Id.* 294b, at 509.

> unjust, to the tribes of men who flock together in their several cities, and are governed in accordance with them; if, I say, this expert author of laws were suddenly to come again, or another like to him, is he to be prohibited from changing them?—would not this prohibition be in reality quite as ridiculous as the other?[6]

Of course, the Stranger's judgment that the returning governor may act independently of the rules depends on an assumption that the returning governor is a true statesman, that he possesses the royal science. The Stranger and young Socrates agree that such rulers are very rare. In the more common situation, when there is no such statesman, the society can do no more than resort to a "second-best procedure."[7] It is necessary, then, "to meet and compose written laws, endeavouring, as it seems, to approach as nearly as they can to the true form of government."[8] "The laws would be copies of the true particulars of action as far as they admit of being written down from the lips of those who have knowledge."[9] But such law-governed polities are, at best, imitations of states in which the ruler governs "in the spirit of virtue and knowledge, and . . . dispense[s] what is due to all, justly and holily."[10] Thus, Plato never abandoned the view that the only truly worthy goal was a city "in which kings are either philosophers or gods."[11]

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6. *Id.* 296a, at 511.
7. *Id.* 297e, at 513.
8. *Id.* 301e, at 518.
9. *Id.* 300c, at 516.
10. *Id.* 301d, at 518.
11. B. Jowett, *Statesman: Introduction and Analysis*, in 3 THE DIALOGUES OF PLATO, *supra* note 2, at 429. Commentators have remarked that Plato views law with increasing favor in his later work. He shows total trust in the wisdom of the philosopher-rulers in *Republic*, acknowledges the necessity of rule by law in the absence of a qualified person in *Statesman*, and finally embraces the rule of law in *Laws*. *See, e.g.*, Plato, *Laws*, in 4 THE DIALOGUES OF PLATO, *supra*, 715d, at 285 [hereinafter *Laws*] ("[T]he state in which the law is above the rulers, and the rulers are the inferiors of the law, is preserved, and has every blessing which the Gods can confer."); R. HALL, PLATO 100-01 (1981). Even in *Laws*, however, Plato's acceptance of rules is only the byproduct of an increasing skepticism that real statesmen could be found or that states would accept them if they were found:

> For if a man were born so divinely gifted that he could naturally apprehend the truth, he would have no need of laws to rule over him; for there is no law or order which is above knowledge, nor can mind, without impiety, be deemed the subject or slave of any man, but rather the lord of all. I speak of mind, true and free, and in full possession of its nature. But then there is no such mind anywhere, or at least not much; and therefore we must choose law and order, which are second best. These look at things as they exist for the most part, but are unable to take account of every case.

This discussion in *Statesman* summarizes succinctly the opposition between government by ad hoc decision and government by fixed rule. That opposition is an ineradicable presence in the continuing academic debate over the nature of constitutional law in the United States. Most modern commentators reject adjudication that consists of the application of rigid abstract rules. Instead, they prefer one or another model in which the judge actively brings to bear his critical thinking, intelligence, and moral sensitivity in the decision of each case.[12] Like the Eleatic Stranger, such writers disparage the former approach, in part, because static rules must necessarily fail to take account of the inevitable "irregular movements of human things."[13] And also like the Eleatic Stranger, these writers must suppose that there is some other, non-rule-based technique for molding the character of government, a science of public decisionmaking—a royal science. Moreover, this science is not limited to choosing the most effective or efficient means of implementing goals formulated elsewhere in society. It encompasses as well the selection of the proper ends of state and society. Royal science must be moral science.

Michael Perry's *Morality, Politics, and Law* is an exceptionally valuable and perspicuous contribution to the continuing discussion of the relationship between moral philosophy and constitutional adjudication. The book is not limited to this single issue, however. It also deals intelligently and insightfully with more general questions of morality and with other varieties of public decisionmaking. I wish to deal here, however, only with the implications of Perry's argument for the duty of judges in assessing the validity of government actions. Any prescription for judicial review that denies both that the textual or intended meaning of the words of the Constitution is the sole measure of validity and that constitutional decisions should be made according to the arbitrary preferences of the judges is bound to come up against the problem that Perry confronts in this book. That position inescapably entails some right and

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Laws, supra, 875c, at 443-44; *see* G. KLOSKO, THE DEVELOPMENT OF PLATO'S POLITICAL THEORY 198-200 (1986).

12. *See, e.g.*, *Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981); *Judicial Review and the Constitution—The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983).

13. *Statesman, supra* note 2, 294b, at 509; *see, e.g.*, Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 229 (1980); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 357 (1985); *cf.* E. BARKER, GREEK POLITICAL THEORY: PLATO AND HIS PREDECESSORS 278-79 (3d ed. 1947).

wrong of public action independent of the conventional criteria of positive law. It is not surprising, therefore, that modern constitutional commentary has become increasingly explicit in recognizing the need for some form of moral knowledge.[14]

Like most of his contemporaries, Michael Perry has found historically defined, text-bound limitations on the power of judicial review unacceptable.[15] Unlike some of them, however, he makes no attempt to dodge the implications of that finding. In *Morality, Politics, and Law* he has forcefully carried the reasons supporting his preference to their logical conclusion: Judges engaged in constitutional adjudication should make explicitly moral decisions. This is not to say, however, that they should do what they please. For Perry, decisionmaking unconstrained by positive law is not arbitrary because moral decisionmaking is not arbitrary. Some decisions are morally—and, therefore, legally—right, and some are wrong. This forthright exposition poses the most cogent kind of challenge to the standard model of decisionmaking according to positive law because it strikes at the very foundation of that model—the value of rule-governed behavior.

Perry skillfully canvasses much of the voluminous philosophical literature, but his own claim about moral knowledge turns out to be quite modest. Moral beliefs, he asserts, are derived from views of human good, and those views are grounded in moral communities and traditions.[16] Those communities and traditions, however, are diverse, and few can be disqualified as fostering a conception of the good utterly incompatible with human nature. Consequently, we can only hope to "identify a range of equally acceptable (unacceptable?) ways of

14. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1977) (arguing for a "fusion of constitutional law and moral theory"); Richards, *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, 42 OHIO ST. L.J. 319 (1981).

15. Perry argues that there is a connection between the constitutional text and the form of adjudication he defends and that it is, therefore, entitled to be regarded as constitutional interpretation. As I will discuss further in the text, the judicial role described by Perry is the elaboration and application of fundamental political-moral aspirations contained in the constitutional text. The language of the Constitution is consistent with these aspirations, so the "aspirational meaning" has as much claim to the authority of the text as the originally intended meaning. *See* M. PERRY, MORALITY, POLITICS, AND LAW 132-36 (1988). I do not wish to discuss Perry's invocation of the authority of the text here, except to say that it seems to me problematic because it cuts the text off from the source of its legal authority in the first place, the intentional exercise of human will that comprised the constitution-making act. *See* Kay, *Original Intentions, Standard Meanings, and the Legal Character of the Constitution*, 6 CONST. COMM. 39 (1989).

16. M. PERRY, *supra* note 15, at 128-33.

life and, beyond that, to achieve an ever more sensitive understanding of the advantages and disadvantages of different ways of life."[17] While the existence of some relevant shared beliefs creates the possibility of "productive moral discourse,"[18] Perry acknowledges that in America's pluralistic society "moral discourse often runs out before agreement—consensus—is reached."[19] His claim, then, turns out to be not so much the existence of moral facts, but only the hopeful prospect for moral communication.[20]

Perry does assert a stronger claim for correct moral answers in the more limited context of constitutional adjudication. There he is able to identify the particular moral community whose values inform the decision: the "constitutional community." This community includes "those persons and groups in the morally pluralistic society who share a commitment to the aspirations signified by the constitutional text,"[21] including the aspirations of "the freedoms of speech, press, and religion, due process of law, and equal protection of the laws."[22] Although these shared aspirations are admittedly indeterminate in application, they provide a sufficient basis for a judge to "rely on *her own beliefs* as to what the [relevant] aspiration requires."[23]

It should be obvious that not even this somewhat limited view of the role of moral knowledge in constitutional adjudication is likely to convince many skeptics.[24] But even if right and wrong answers to questions of constitutional morality exist, there is still much that is troublesome in Perry's model of judicial review. Perry makes it clear that the constitutional aspirations which provide the basis for judgment are indeterminate and that invoking those aspirations cannot reveal unique and self-evident conclusions about proper and improper government behavior.[25] It follows that the judicial activity prescribed is bound to be relatively unpredictable[26] and controversial.[27]

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17. *Id.* at 48-49.
18. *Id.* at 50.
19. *Id.* at 77.
20. *Id.* at 103.
21. *Id.* at 158.
22. *Id.* at 154.
23. *Id.* at 149 (emphasis in original).
24. *See, e.g.*, S. LEVINSON, CONSTITUTIONAL FAITH 72-74 (1988); Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229; Reynolds, *Originalism and the Separation of Powers*, 63 TUL. L. REV. 1541 (1989).
25. M. PERRY, *supra* note 15, at 155-57.
26. Relative, that is, to other more limited models of adjudication. The most

This problem is evident on examining the program of constitutional adjudication that Perry sets forth. It appears to require at least six separate steps. The "correct" execution of each of these steps will be open to fairly radical dispute. First, and probably least problematic, the judge must identify the constitutional provisions that bear on the question at issue. Second, he must decide whether any of the relevant provisions are associated with a "fundamental aspiration." Not all the parts of the Constitution have such an association. The first amendment does. The requirement that each House of Congress keep a journal presumably does not.[28] Third, he must determine what the associated fundamental aspirations are. These aspirations change and develop. The judge must define the aspiration as it has "emerged over time—in the course of constitutional adjudication and, more generally, of political discourse."[29] Fourth, a judge must determine whether the aspiration or aspirations so identified are worthwhile.[30] The fundamental aspiration associated with some constitutional provisions, for example, may be the maintenance of human slavery.[31] Fifth, the judge must bring any worthwhile aspirational meaning, so determined, to bear on the problem at hand, to decide "what that aspiration, if accepted, requires the court to do, if anything, with respect to the conflict at hand."[32] Finally, having answered all the previous questions, a judge must still decide whether to restrain himself in a given case and withhold judgment. Such abstention would be appropriate, for example, when a judge is not confident enough in his own conclusion to overrule a presumed contrary decision by a legislature, when the matter is relatively unimpor-

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prominent alternative discussed in Perry's work is "originalism": the application of the meaning of the rules originally intended by the constitutional enactors. That technique is not free from uncertainty but, as a comparative matter, it appears far more certain than nonoriginalist models in general and Perry's in particular. *See generally* Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226 (1988).

27. Persistent disagreement in practice is not inconsistent with the assumption that there are morally correct and incorrect answers to the questions posed by constitutional adjudication. *See* R. DWORKIN, *supra* note 14, at 280-81.

28. *See* M. PERRY, *supra* note 15, at 133, 288-89 n.55.

29. *Id.* at 133.

30. *Id.* at 134-35.

31. If a judge finds no fundamental aspiration associated with a provision, or that it is not a worthwhile aspiration, he should then apply only the originally intended meaning. *Id.* at 135.

32. *Id.* at 136.

tant, or when judicial action might precipitate a public crisis.[33] Moreover, throughout all of these choices, although the judge ought to consult such factors as the originally intended meaning and prior judicial decisions, in the final analysis she "should rely on *her own beliefs* as to what the aspiration requires."[34]

This sketch of the suggested process of constitutional interpretation and decisionmaking makes plain what Perry freely concedes: The results will be unpredictable and imprecise. Serious and honest disagreements can and will emerge at every stage of the process. Consequently it will be extremely difficult to gauge in advance whether a particular instance of governmental activity will be held valid or invalid. Any attempt to build more predictability into the process would limit the judges' ability to follow what they believe to be the correct implications of constitutional morality. Thus, the unfettered pursuit of that morality comes with a significant cost—a constitutional law that is uncertain and unstable. It is a real question, then, even assuming Perry is correct on the larger conceptual issue of the existence of moral knowledge, whether the benefits that may be derived from the process of moral inquiry prescribed for constitutional adjudication are worth that cost.

The costs of uncertainty in morality-based adjudication are significant. The shared aspirations that comprise the "constitutional morality" that Perry describes are exceedingly general.[35] Indeed, only their generality makes plausible the claim that they are shared.[36] While they may provide a basis for intelligible argument about their application to particular cases, their capaciousness also increases the likelihood that, as a practical matter, such argument will remain unresolved, with each participant still firmly and reasonably convinced of the correctness of his position. Moreover, the very centrality of those aspirations in the traditions of our society can lead to a vehemence of conviction that itself can strain the other common ties of the community.[37] The continuing acrimonious and sometimes violent dissension associated with attempted judicial management of questions of abortion, religious observances in schools, demonstrations by unpopular groups, and school busing provide the

33. *See id.* at 170-71.

34. *Id.* at 149 (emphasis in original).

35. "[F]or example, the freedoms of speech, press, and religion, due process of law, and equal protection of the laws." *Id.* at 154.

36. *Id.* at 155.

37. *See* S. LEVINSON, *supra* note 24, at 125.

most obvious examples. Ongoing, evolving, and highly uncertain judicial-moral responses to these constitutional questions surely inflict some injury on social peace and cohesion.

Morality, Politics, and Law does not extensively treat the effects of such a morality-based adjudication on the stability and predictability of law, or, therefore, its effects on order in society generally.[38] But in his discussion of the place of rules in moral reasoning, Perry does not put a particularly high value on those characteristics. He explains that general rules of morality are valuable only as "memoranda of particulars"[39] and, therefore, that moral rules have no force independent of the prior moral experience they embody. Highly determinate rules, therefore, are flawed because they bring the judgments of past situations to bear on new and necessarily different ones.

> The point, rather, is that *given the priority of the particular*, relative determinacy often ought not to be a goal. Relative determinacy is not a principal virtue either of moral rules or of the beliefs they represent. To achieve relative determinacy . . . "is to secure a measure of certainty or predictability at the cost of blindly prejudging what is to be done in a range of future cases, about whose composition we are ignorant."[40]

Of course, when translated to a discussion of *legal* rules, this estimate of the importance or unimportance of "relative determinacy" is, at least, controversial. Certainly, one well-established view of the utility of constitutional rules is that they secure a class of expectations from arbitrary and unpredictable interference by the state. It is exactly because people do not trust the fresh day-to-day decisionmaking of ordinary governmental officials that we settle at least some important matters in advance, more or less permanently, immune from the discretionary judgment of public authorities. For the creators of the American Constitution, at any rate, a critical objective was to fix the Constitution, to ensure that there were limits beyond which the state would not go.[41] This conception of the Constitution is a particular application of the more general virtue associated with the phrase "the rule of law" or sometimes, more descrip-

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38. Perry devotes much more attention to the argument that his position is inconsistent with democracy. *See* M. PERRY, *supra* note 15, at 128-30, 163-72.

39. *Id.* at 35 (citing R. BAMBROUGH, MORAL SCEPTICISM AND MORAL KNOWLEDGE 130, 137-38 (1979)).

40. *Id.* at 38 (quoting H. HART, THE CONCEPT OF LAW 126 (1961)) (emphasis in original) (footnote omitted).

41. *See* R. BERGER, GOVERNMENT BY JUDICIARY 290-91 (1977).

tively, "the rule of law and not men."[42] It seems quite clear that *ceteris paribus* some "relative determinacy" in the law, and especially in the law of the Constitution, is an important value.

Plainly, however, determinacy is not the only worthwhile value to be pursued by a legal system. No one would suggest that it trumps every consideration of substance. A clear, stable set of legal rules that embody oppressive or stupid judgments about the relative rights and powers of individuals and states would not be desirable merely because they are determinate. Furthermore, any system of rules that excludes the possibility of substantive changes in response to changed circumstances in society is quite likely to become stupid and oppressive over time. The question becomes one of trading off costs and benefits. How much determinacy will we buy at the cost of how much substance?[43]

The process of adjudication put forth by Michael Perry argues strongly for substance. The principal end he seeks to foster is not the stability of constitutional limits but the capacity for moral growth in society. The judges are moral "interlocutors of the political community and its elected representatives,"[44] forcing those other political actors to consider what might otherwise be neglected moral questions. The judges thereby contribute to a "deliberative, transformative politics,"[45] valuable not merely as an instrument for social moral improvement but as a good in itself.

This picture is attractive and can hardly fail to appeal to people who believe in the value of reason and self-criticism. But it neglects important aspects of constitutional adjudication. Judicial review is more than part of an ongoing national discussion. The resolution of constitutional issues by the judiciary may, indeed, stimulate and enrich moral debate on such important and difficult social-political questions as those involving matters of privacy and race. If the decisions of courts were merely occasions for abstract discussions of contested questions of political morality, any instability and confusion resulting from their consideration would be fairly harmless and maybe even helpful. But those decisions also resolve real disputes between

42. *See, e.g.*, E. BARKER, *supra* note 13, at 279; F. HAYEK, THE CONSTITUTION OF LIBERTY 148-53 (1960).

43. *See* Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187, 201-03 (1981).

44. M. PERRY, *supra* note 15, at 159.

45. *Id.*

real human beings. Whatever other benefits ultimately accrue to the polity, for the involved parties the results of the decision of a constitutional case will be specific, palpable, and dramatic, involving, sometimes literally, life or death.

Moreover, Supreme Court decisions have an important impact beyond the immediate parties. They create rules of law that may affect the lives of large numbers of people. Of course, constitutional decisions may be reversed by amendment or by overruling. As a practical matter, however (and as Perry acknowledges), they are usually unchangeable at least in the short and medium terms. In some cases, that may well be forever.[46] One commentator has asserted that in the four years following the judgment in *Roe v. Wade*,[47] a decision that Perry agrees was overly broad even by his criteria,[48] a million additional abortions were performed.[49] It is hard to escape the conclusion that constitutional adjudication is more than discursive.[50]

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46. Perry argues that history has shown that in the long run a tension between a judicial determination and contrary public sentiment will be resolved in favor of the latter. He also recognizes that the amount of time that passes before such a "correction" occurs is one serious factor in evaluating any conception of judicial review. *See id.* at 169, 300-01 nn.168-73.

47. 410 U.S. 113 (1973).

48. *See* M. PERRY, *supra* note 15, at 172-78.

49. J. NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 65-66 (1979) (citing Tietze, *Induced Abortion: 1977 Supplement*, in 14 POPULATION COUNCIL, REPORTS ON POPULATION/FAMILY PLANNING (2d ed. Supp. 6 1977)). It is extremely difficult to obtain an estimate of the total number of induced abortions, legal and illegal, performed in the United States prior to *Roe*. A 1957 inquiry concluded that the annual number could be as low as 200,000 or as high as 1,200,000. The figure of 1,000,000 "gained wide acceptance" in the 1960s and was compatible with subsequent studies. *See* C. TIETZE & S. HENSHAW, INDUCED ABORTIONS: A WORLD REVIEW 43-44 (6th ed. 1986). Legal abortions in the United States in 1985 were estimated at 1,588,550. ALAN GUTTMACHER INST., ABORTION SERVICES IN THE UNITED STATES, EACH STATE & METROPOLITAN AREA 106, Table 8 (1988). Of course these figures do not prove that *Roe* caused the increase. I recognize that the extent of the impact of legal rules on behavior is sometimes controverted. *See generally* L. FRIEDMAN & S. MACAULAY, LAW AND THE BEHAVIORAL SCIENCES 193-575 (2d ed. 1977). On the effectiveness or ineffectiveness of Supreme Court judgments in changing behavior, see J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 140-50 (1980).

50. Adjudication in the sense that Perry conceives it is lawmaking. Such lawmaking is effective because the judgments it embodies are backed by the tangible authority of the state. That is, in our legal system, official adjudication is essentially coercive. *See* S. LEVINSON, *supra* note 24, at 79-80; Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40-44 (1983); Maltz, *The Supreme Court and the Quality of Political Dialogue*, 5 CONST. COMM. 375, 380 (1988). Perry makes a number of sensitive and convincing arguments for why we should always be cautious about employing the coercive power of the state through legislative action. *See* M. PERRY, *supra* note 15, at 98-104. I believe those arguments also apply to judicial lawmaking.

Even if we only consider the courts as participants in a process that criticizes and defines our moral values, the practical power of the courts to define our legal rules may make that participation less attractive. That is because the dialogue that Perry proposes will not be a conversation among equals. As I have noted, the Supreme Court does not merely express a viewpoint. It declares a binding and more or less unchangeable rule of law. This power can alter the background against which further consideration of the issue takes place, giving to the Court's position the advantage that necessarily flows from advocating the status quo.[51] Ironically, much of the respect accorded to the Court's pronouncements is likely to stem from the belief—however tenuous—that the Court does not make an independent moral judgment, but articulates a decision already implicit in the Constitution. Even over the long term, then, the debate may be rigged in advance on behalf of the conclusions of the judges.

Both the concrete and coercive nature of constitutional adjudication and the consequent ability to skew opinions weaken the claim that a non-rule-based method of interpreting the Constitution contributes more to the moral well-being of society than it costs by introducing more uncertainty into the relations between individuals and the state. The confusions it can cause are far from theoretical; and the increase in moral knowledge it promises is, at least, suspect.

To support the model of adjudication that Perry describes, therefore, it is necessary to justify the special and privileged role the courts will take in the constitutional-moral dialogue. The doubts I have introduced are troublesome only if we mistrust the capacity of the judges to move moral growth in the right direction. If the courts were somehow natural experts in resolving these profound moral, political, and social problems, we would be less disturbed by the power they have to impose their results on litigants and others. Nor would we feel the value of moral dialogue was tainted by the advantage they hold in determining the relevant facts. We thus inevitably return to the choice posed in *Statesman*. We will endure a great deal from the statesman so long as we are convinced that he really does possess the royal science. The Eleatic Stranger thought a properly qualified physician entitled to compel his patient, even by violence, to do that which is good for him. "Nothing could be more unjust than for

51. *See* Maltz, *supra* note 50, at 380-81.

the patient to whom such violence is applied, to charge the physician . . . with unskillful conduct"[52] just because it contravenes the rules the physician prescribed for use in his absence.

> And so when the citizen, contrary to law and custom, is compelled to do what is juster and better and nobler than he did before, the last and most absurd thing which he could say in objection to such violence, is that he has incurred disgrace or evil or injustice at the hands of those who compelled him.[53]

But we will want to be quite sure that the physician is really wiser than the medical treatises before we grant him the authority to compel us. We will want to be equally certain that our governors are really wiser than the laws before we grant them the authority to rule by their own moral lights.[54] Abstract rules are a second-best solution, clearly inferior to decision by one possessed of the royal science. In the absence of such a statesman, however, "to appoint as the guardian of the laws someone . . . caring nothing about the written text . . . [acting] contrary to it from motives of interest or favour, and without any claim to knowledge,—would . . . be a still worse evil."[55]

The appeal of Perry's model of judicial review, therefore, depends, critically, on our view of the quality of our judges and especially on our estimate of the men and women who serve on the Supreme Court of the United States. How sure are we that they possess the royal science, that they have special qualifications for the job of moral inquiry that justify their taking a privileged position in the moral discourse suggested? Even with the most intelligent, committed, and skillful judges, the vesting of that power comes with a significant cost in uncertainty. We might bear those costs without complaint if we were confident the judges had the capacity to edge us closer to moral knowledge. On the other hand, no one would tolerate such a grant of power to officials about whose wisdom and prudence he entertained serious doubts.

Perry argues on two distinct grounds that the judges are likely to possess characteristics that fit them for the crucial task he would assign to them. The first focuses on the institutional advantages of judges over other governmental actors. Among these advantages is the "political insularity" that gives the judi-

52. *Statesman, supra* note 2, 296b, at 512.
53. *Id.* 296d, at 512.
54. *See id.* 299d, at 515.
55. *Id.* 300a, at 516.

ciary a special "capacity to engage in the pursuit of political-moral knowledge . . . in a relatively disinterested manner."[56] In addition, the courts get to see the moral questions presented in the context of a concrete dispute that clarifies the general problem involved.[57] Finally, judicial decisionmaking permits the development of " 'a body of coherent and intelligible constitutional principle,' " appropriate to the kind of moral investigation suggested.[58]

The second ground of argument is empirical: the actual results of recent constitutional adjudication (adjudication not tied to the originally intended effect of the constitutional rules) have led to a more just society. The interventions of the Supreme Court on questions of freedom of expression, freedom of religion, and racial equality have contributed to a doctrine that is "on balance . . . sounder than the doctrine we might have had."[59]

Each of these contentions has some force, but there is no need to respond to them at any length to show how controvertible they are. Indeed, the first two aspects of the claim of institutional advantage are somewhat at war with each other. If judges' insulation from political pressure enables them to act rationally and dispassionately, their exposure to the flesh and blood details of actual controversies has the potential to tempt them out of their role as articulators of impartial moral principles. Hard cases make bad law. Adjudication makes possible the thoughtful accumulation of a systematic corpus of principle, but that does not mean that judges will, in fact, seize that possibility. Anyone who has spent much time studying and attempting to teach the case law of the United States Supreme Court knows that the search for coherence often ends in despair.

As for the suggestion that expansive judicial activity has, in fact, led to moral progress, Perry acknowledges that it is plausible only if we confine examination to the "modern period." That record, he argues, is more indicative of what courts are likely to do in the foreseeable future.[60] He thus does not dispute what many would conclude on looking at the influence of the

56. M. PERRY, *supra* note 15, at 147.

57. *Id.* at 147-48 (quoting A. BICKEL, THE LEAST DANGEROUS BRANCH 26 (2d ed. 1986)).

58. *Id.* at 148 (quoting P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 82 (2d ed. 1973)).

59. *Id.* at 166.

60. *Id.* at 167.

courts over the long run of American history, that the judiciary has as often thwarted as facilitated the adoption and implementation of what are now thought to be more humane public policies. Perhaps the recent period really is different and represents a secular change in the judges' attitudes and behavior. But some sensitive and principled people find many of the modern decisions offensive on moral as well as political grounds. Our more recent history may better predict the near-term future, but our very proximity to it may also deprive us of the perspective necessary to evaluate it correctly.[61]

The picture of judicial activity that Michael Perry has sketched out is, therefore, fraught with risk. It stakes everything on the capacity of our judges, and particularly the justices of the Supreme Court, to move us closer to the goal of moral knowledge. Even if we do not question the intelligence, good faith, or responsibility of American judges, we may well ask whether some other structure, one that assigns to the judges less power and accords them less discretion, may not better serve our interests. Like the Eleatic Stranger, we may be pressed to a second-best solution—the rule of law.

To prefer the rule of law, confining the role of judges in constitutional adjudication to applying pre-existing positive rules, is not necessarily to believe that moral consequences are irrelevant to questions of law. Indeed, even people who share Perry's general conviction about the possibility of right and wrong answers to questions of political morality might well take that position. That is because it may better conform to their moral judgments about the best system of law for a society composed of people holding many sharply different understandings of what constitutes a good life. In such a society it may be impossible to secure agreement on matters of substantive morality. But in spite of these differences—perhaps precisely because of the fears generated by them—there may be a general preference for restraining the coercive power of the state by demanding order, clarity, and predictability in the application of public power. That result is made possible by impersonal, abstract, and stable constitutional rules.

Perry's own account of the "contractualist" explanation of coercive legal rules illuminates this argument for adjudication

61. For a critical evaluation of claims that the Supreme Court has contributed positively to moral and political dialogue in the recent past, see Maltz, *supra* note 50, at 381-91.

based on static, positive law. Perry recognizes that a system of rules may be supported by some conception of the good shared by people whose overall views may be in other respects widely disparate. Adopting the terminology of John Rawls, he concludes that an "overlapping consensus" makes possible a *modus vivendi* in a society encompassing a range of moral viewpoints.[62] The broader the range of conceptions of the good, however, "the thinner the system of rules,"[63] because the overlapping consensus will be narrower. As such narrowing occurs, more and more substantive moral judgments drop out of the system of rules supported. The values that remain—the potential basis of widespread agreement—are likely to be, in increasing proportion, those less controversial, formal values that provide individuals with assurance that they can know where the power of the state begins and where it ends. Applying this phenomenon to the creation of constitutional rules, we would expect to end up with a system that will vindicate a few fairly universally shared substantive values and the more formal but still critical values promoted by the rule of law.[64]

Any system of lawmaking that has the undefined potential to generate coercive orders beyond this limited range will be too risky for too many people. It portends too much in the way of unacceptable moral judgments and too little in the clarity and security that accompany the exercise of state power. It is perhaps dispiriting to exchange the promise of constant moral growth for the authority of fixed and mindless rules that promote the more prosaic goals of certainty and safety—to abandon hope for the royal science in favor of the second best of the rule of law. But for this people, in this place and this time, maybe that is the best we can do.[65]

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62. *See* M. PERRY, *supra* note 15, at 85-87 (discussing Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985), and Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987)); *see also* Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251 (1988).

63. M. PERRY, *supra* note 15, at 85.

64. Lon Fuller referred to these formal values as collectively constituting the "internal morality" of law. *See* L. FULLER, THE MORALITY OF LAW 33-94, 162-70, 181-86 (rev. ed. 1969).

65. "After all, an aspect of trying to flourish, for those who inhabit the subjective circumstances, is trying to locate mutually acceptable bases of accommodation with those with whom we find ourselves in fundamental moral disagreement." M. PERRY, *supra* note 15, at 88.