

REVIEW

The Heavenly City of Post-Constitutional Constitutional Theory

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The Constitution, the Courts, and Human Rights. MICHAEL J. PERRY. Yale University Press, New Haven and London, 1982. pp. xi, 241. \$24.00.

[T]he function of noninterpretive review in human rights cases is finally clarified. Such judicial review represents the institutionalization of prophecy.¹

Michael J. Perry

Among all forms of mistake, prophecy is the most gratuitous.²

George Eliot

In *The Morality of Consent*, Alexander Bickel identified two traditions that have competed for preeminence in American constitutional history.³ One he called the contractarian tradition, stemming from John Locke. That tradition tended to be “moral, principled, legalistic”; it looked to a social contract based on individual rights as the basis for social obligations; it understood the law as a body of formally enacted rules binding all members of the society. The other was the Whig tradition, associated above all with Edmund Burke. This tradition was more historical and relativistic than the contractarian, less theoretical and deductive; the Whig method was “flexible, pragmatic, slow-moving, highly political.” For this tradition, law was primarily a process—a process of accommodation that made possible “a peaceable, good, and improving society.”⁴

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¹ M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 98 (1982) [hereinafter cited without cross-reference as PERRY].

² G. ELIOT, *MIDDLEMARCH* 83 (Signet ed. 1964).

³ A. BICKEL, *THE MORALITY OF CONSENT* 3-5 (1975).

⁴ *Id.* at 4-5.

Much of American constitutional history has consisted of a dialogue between these two traditions. Neither side ever vanquished the other, perhaps because each was in fact a strand of a more comprehensive Anglo-American tradition that knit together Lockean principle and Burkean prudence. But contemporary constitutional theorists have shown little interest in knitting the strands together, or even in continuing the traditional dialogue. Instead, as they cheerfully acknowledge, they have "progressed" beyond Locke and Burke, and beyond traditional American constitutionalism altogether.⁵

Bickel glimpsed this development on the horizon, but he preferred to avert his eyes and to hope for the best. Thus, in *The Morality of Consent*, he alludes to the capture of the liberal contractarian tradition in Europe by Rousseau and his utopian and anti-democratic followers; but Bickel thought it still the case that "[i]n our system the liberal contractarian finds his escape in the Constitution . . . speaking through the Supreme Court . . ."⁶ Similarly, in *The Supreme Court and the Idea of Progress*,⁷ Bickel pulled back from the full implications of his chapter title, "The Heavenly City of the Twentieth-Century Justices." The chapter title refers to Carl Becker's *The Heavenly City of the Eighteenth-Century Philosophers*,⁸ where Becker argued that the apparently rationalistic philosophers of the Enlightenment in fact simply manifested a new kind of faith, a faith in progress.⁹ Bickel argued that the Warren Court too was based on such a faith, but Bickel distinguished his respectful criticism of the Warren Court from Becker's rather harsh debunking of the philosophers,¹⁰ and in the end Bickel located the Warren Court more or less on "the main highway of the institution's history."¹¹

That highway is still traveled by many judges and commentators dealing with routine matters. But advanced judges and leading constitutional theorists have found a better way, a way on which one is less confined by history and a way less clogged by other travelers. Constitutional law and constitutional theory have, in the decade since Bickel's death, moved decisively and confidently off their historical highway onto the yellow brick road of post-Consti-

⁵ See, e.g., A. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM 175-91, 268, 298 (1982).

⁶ A. BICKEL, *supra* note 3, at 8.

⁷ A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS ch. 2 (1970).

⁸ C. BECKER, THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS (1932).

⁹ A. BICKEL, *supra* note 7 at 29-31.

¹⁰ A. BICKEL, *supra* note 7 at 14 n.*.

¹¹ A. BICKEL, *supra* note 7, at 42.

tutional constitutional theory. Professor Perry's book is an effort to push further down this road, and stands as an instructive guide to the heavenly city shimmering and beckoning at its end.

Perry's book is notable for its frank defense of "noninterpretative review," which he defines as judicial "determination of constitutionality by reference to a value judgment other than one constitutionalized by the framers,"¹² and for his advocacy of "(a fierce) judicial activism" in exercising such review.¹³ He misleads only by his title, for the book is not primarily about the Constitution; nor should it be, for in his world the Constitution offers little guidance to judges, at least in human rights cases (which seems to include just about all of constitutional law except for federalism and the separation of powers, narrowly conceived). Perry therefore does not devote much attention to the Constitution or to constitutional commentaries or history; he takes his bearings from "the conversation of constitutional theory," a conversation he hopes "to help advance."¹⁴ This hope might seem presumptuous were it not for the fact that, judging by his references, the conversation is a young one, having developed only about ten years ago, and were it not for the fact that, judging again from his references, it is a conversation carried on almost exclusively by law professors.

Much of Perry's book consists of a sort of clearing away of the underbrush preparatory to his presentation of his case. In the first chapter he sketches the interpretivist position; in the second he demonstrates that noninterpretative review is illegitimate in federalism and separation of powers cases; and in the third chapter he argues that most modern judicial decisions in the areas of free expression and equal protection cannot be understood as interpretivist, nor can they be justified by John Hart Ely's "participational" version of noninterpretivism. These first three chapters serve two purposes. First, they show that Perry is not a wild-eyed judicial imperialist—after all, he foregoes noninterpretative review in non-human rights cases.¹⁵ Second, and more important, they contain Perry's attempted discrediting of the alternative of interpretivism. Perry avoids the straw-man characterization of interpretivism as literalism,¹⁶ and grants that interpretivists may extend the scope of constitutional provisions to encompass practices anal-

¹² PERRY at 11.

¹³ *Id.* at 138.

¹⁴ *Id.* at x.

¹⁵ *Id.* at 60.

¹⁶ *Id.* at 32.

ogous to those within the actual intent of the framers.¹⁷ But he rejects as illegitimate attempts, such as that of Robert Bork in “interpreting” the equal protection clause to ban segregated schools, to embrace a notion of interpretivism that preserves the Constitution as fundamental law, while allowing for some flexibility, some use of judgment on the part of judges in applying constitutional principles to contemporary questions. Thus, Perry can raise the stakes of the debate to a level “very high indeed”¹⁸ by posing as our only alternatives an interpretivism that leaves us unable to strike down racial segregation¹⁹—indeed, that requires us to jettison virtually all the decisions featured in the “individual” rights sections of our casebooks²⁰—and noninterpretivism, i.e., judicial legislation.

We are thus prepared for Perry’s frank presentation of his own position in chapter 4, “the heart of [the] book.”²¹ To endorse noninterpretive review, “the definition, elaboration, and enforcement of values beyond those constitutionalized by the framers,”²² is to say that judges are to legislate: “The problem of how to proceed, when dealing with a difficult human rights issue, is not different for the justice than it is for the legislator.”²³ It may be “a radical thing to say, and hence a thing not often said, that the source of judgment is the judge’s own values,”²⁴ but Perry says it. Or is this in fact so radical? Did not a host of legal realists say precisely this decades ago? The difference, of course, is that Perry says this in the course of *defending* judicial legislation. His defense requires that the “judge’s own values” not be simply any values, or, for that matter, values identical to the legislator’s; for then, given our general commitment to electoral accountability, there would be no case for judicial review at all.²⁵ How then does Perry justify noninterpretative review in human rights cases after acknowledging the failure of participants in this debate to locate a source of values “that can serve as a reservoir of decisional norms” for judges in human rights cases?²⁶

¹⁷ *Id.* at 68-69.

¹⁸ *Id.* at 92.

¹⁹ *Id.* at 65-69.

²⁰ *Id.* at 92.

²¹ *Id.* at 7.

²² *Id.* at 93.

²³ *Id.* at 111.

²⁴ *Id.* at 123.

²⁵ *See id.* at 9.

²⁶ *Id.* at 97.

Perry's answer begins by appealing to our "religious" conception of the American polity. There are no particular "political-moral values supported by either 'tradition' or 'consensus' sufficiently determinate to be of significant use in resolving the sorts of human rights conflicts" that come before the Court; but there is a general conception of the polity "that seems to constitute a basic, irreducible feature of the American people's understanding of themselves. The conception can be described, for want of a better word, as religious."²⁷ Perry hastens to add that he does not use the word religious "*in any sectarian, theistic, or otherwise metaphysical sense*"; "religious" refers to "a binding vision—a vision that serves as a source of unalienated self-understanding . . ."²⁸ The American vision is the acceptance of an obligation to try to live up to some higher standard of right and wrong.²⁹ This aspiration requires a kind of moral leadership that Perry calls "prophecy," exercised by prophetic types who call the people "to judgment—provisional judgment—in the here and now."³⁰

What is Perry's standard for this judgment? The standard is found in "the notion of moral evolution."³¹ The prophetic judiciary is to challenge our established moral convictions for the purpose of bringing "our collective (political) practice into ever closer harmony with our evolving, deepening moral understanding."³² Perry's account of our religious understanding stands in contrast with, say, that of Abraham Lincoln who seems to have understood the "religious" task of America as a call to live up to certain unchanging principles, not to keep pace with a notion of moral evolution.³³ But Perry offers an alternative justification for noninterpretive review: it enables us to keep faith with the possibility that there are right answers to moral questions and helps us move towards those answers.³⁴ Thus, judges ought to judge "not simply by looking backward to the sediment of old moralities, but ahead to emergent principles,"³⁵ in light of the most critical and thoughtful consideration of competing moral philosophies.³⁶ The "subtle, dia-

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 97-98.

³⁰ *Id.* at 98.

³¹ *Id.* at 99.

³² *Id.*

³³ A. Lincoln, Gettysburg Address, paras. 1 & 2 (Nov. 19, 1863).

³⁴ PERRY at 102-10.

³⁵ *Id.* at 111.

³⁶ *Id.* at 110-14.

lectical interplay between Court and polity," between the judiciary whose morality is "open" and our other institutions whose morality tends to be "closed," should result in "a far more self-critical political morality than would otherwise appear, and therefore likely a more mature political morality as well—a morality that is moving (inching?) toward, even though it has not always and everywhere arrived at, right answers"37

Why judges as prophets? It is not that judges are divinely inspired; Perry endorses Owen Fiss's observation that judges "are most assuredly people."³⁸ Rather, Perry offers a functional justification based on "comparative institutional competence."³⁹ Legislators or executives cannot fulfill the prophetic function; they tend to deal with fundamental political-moral problems by relying on "established moral conventions," since they are responsive to their constituencies, if only from a desire to be re-elected.⁴⁰ Legislators and executives tend not to see fundamental issues as "occasions for moral reevaluation and possible moral growth," and therefore are not particularly suited "to keep faith with the notion of moral evolution, which requires ongoing, vigorous reevaluation of established moral conventions."⁴¹ Thus, "[o]ver time, the practice of noninterpretive review has evolved as a way of remedying what would otherwise be a serious defect in American government—the absence of any policymaking institution that *regularly* deals with fundamental political-moral problems other than by mechanical reference to established moral conventions."⁴² The emergence of this practice, primarily over the last twenty years, has enabled us to deal with political-moral issues in a way faithful to the notion of moral evolution (and, therefore, to our collective unalienated self-understanding): noninterpretive review in human rights cases "represents the institutionalization of prophecy."⁴³

What allows Perry to describe this institutionalization of prophecy, however admirable, as a "dialectical interplay between Court and polity" rather than as government by the judiciary? How does noninterpretive review enable us to keep faith with *both*

³⁷ *Id.* at 111, 113.

³⁸ *Id.* at 99 (quoting Fiss, *The Supreme Court, 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 12 (1979)).

³⁹ *Id.* at 100. Perry argues that only a functional justification can support noninterpretive review. *Id.* at 91.

⁴⁰ *Id.* at 100-01.

⁴¹ *Id.*

⁴² *Id.* at 101 (emphasis in original).

⁴³ *Id.* at 98, 101.

aspects of our collective self-understanding—our democratic commitment to policymaking by electorally accountable officials, and our “religious” commitment to “moral evolution?” Perry’s answer is that our democratic commitment is vindicated by the congressional power “to define, and therefore to limit, the appellate jurisdiction of the Supreme Court and the original and appellate jurisdiction of the lower federal courts.”⁴⁴

Perry acknowledges that neither the amending process, nor the appointment power, nor impeachment are useful checks on the judiciary.⁴⁵ He therefore insists, contrary to other supporters of judicial activism,⁴⁶ on a broad construction of Congress’s power to limit and withdraw jurisdiction,⁴⁷ recognizing this as the price he must pay in democratic accountability for his bold claim for the judiciary of the power of noninterpretive review. Perry is “not happy conceding such a broad jurisdiction-limiting power to Congress,” and he invites others to try to limit that power consistently with the principle of electorally accountable policymaking.⁴⁸ He even speculates that perhaps he is “mistaken in taking seriously the principle of electorally accountable policymaking.”⁴⁹ Though he thinks acceptance of this principle is required for a constitutional theory to have currency in America today, he rather wistfully wonders whether there is not “a better principle—a sounder axiom of democratic political morality—that should ground our inquiry into legitimacy,” and whether that better principle might require no such concession to Congress of a broad jurisdiction-limiting power.⁵⁰ Perry “eagerly await[s]” the elaboration of such a principle by others who, like himself, “are interested in justifying (a fierce) judicial activism.”⁵¹ With this elaboration, we shall truly have entered the Heavenly City of government by the judiciary, freed from the tiresome restraints of both constitutionalism and

⁴⁴ *Id.* at 128.

⁴⁵ *Id.* at 126-28.

⁴⁶ See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 46 (1980) (“Congress’s theoretical power to withdraw the Court’s jurisdiction over certain classes of cases is . . . fraught with constitutional doubt.”); see also Sager, *The Supreme Court 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 *HARV. L. REV.* 17, 17 n.1 (1981) (Justice Potter Stewart on retiring from the Court observed that a bill limiting Supreme Court jurisdiction in subject matter areas “would present immediately very difficult Constitutional questions.”).

⁴⁷ PERRY at 128-37.

⁴⁸ *Id.* at 137.

⁴⁹ *Id.* at 138-39.

⁵⁰ *Id.* at 138.

⁵¹ *Id.*

democracy. In the meantime, Perry's book, and the fact that its argument is not far at all from the mainstream of debates in our leading law journals,⁵² suggests how far down the road to that city "the conversation of constitutional theory" has progressed.

I have noted that Bickel, who saw the foundations for this city being laid over a decade ago, chose to hope for the best.⁵³ Though borrowing a chapter title from Carl Becker, he distinguished his criticism from Becker's: "I portray my philosophers neither as 'naive,' nor as a 'little fraudulent,' to quote Professor Gay's accusation against Becker."⁵⁴ Whatever one's assessment of the twentieth-century Court, I wonder whether the charges of naivete and (unintentional) fraudulence would not stand up with respect to contemporary constitutional theorists. One is disarmed from blaming Perry for the naivete of his fifteen-page discussion of "religion" and moral evolution—a discussion on which his whole argument rests—by his disclaimer that he is not a philosopher,⁵⁵ and by his modest demeanor while marshalling arguments for a fierce judicial activism. But what of Perry's case for why we should trust the judges? He acknowledges that, despite the judiciary's "institutional competence" to serve its prophetic role, the Court does not always give right answers; "certainly it is possible that noninterpretive review will retard rather than advance the polity's political morality."⁵⁶ Perry mentions *Dred Scott* and *Lochner*, but dismisses these cautionary examples since they come from the dim past of over a half-century ago.⁵⁷ We must take our bearings from the present: "Our evaluation of noninterpretive review in human rights cases must be contextual, which is to say that it must proceed principally by reference to how such review worked, can work, and is likely to work in the modern period . . ."⁵⁸ Here we have every reason to be quite confident that noninterpretive review will be "*generally* salutary, on the whole helping us in our struggle to keep faith with our commitment to moral reevaluation and moral growth."⁵⁹ The evidence for this is that the courts have tended in

⁵² See, e.g., Nichol, Book Review, 93 YALE L.J. 171 (1983) (reviewing Perry's book); Saphire, Book Review, 81 MICH. L. REV. 782, 800 (1983) (same); Wellington, Book Review, 97 HARV. L. REV. 326 (1983) (same).

⁵³ See *supra* text accompanying notes 3-8.

⁵⁴ A. BICKEL, *supra* note 7, at 14 (quoting P. GAY, *THE PARTY OF HUMANITY* 188-210 (1964)).

⁵⁵ PERRY at 110.

⁵⁶ *Id.* at 115.

⁵⁷ *Id.* at 116-17.

⁵⁸ *Id.*

⁵⁹ *Id.* at 116 (emphasis in original).

modern times to give right answers—"answers approaching or perhaps even reaching an emergent point of convergence among a variety of systematic moral theories."⁶⁰ The fact 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"⁶¹ only reinforces the case for the judiciary to take the lead.

Does Perry really expect the American people to consent to be led along? Apparently so. Indeed Perry is so unconcerned about a popular reaction that he devotes the fifth chapter of his book to encouraging the judiciary to move ahead vigorously on the newest frontier of activist noninterpretive review, that of institutional-reform litigation.⁶² "Contemporary noninterpretive review—noninterpretive review in this emergent age of scarcity—must be informed and guided by a developing sensitivity to the moral and political plight of society's 'marginal' persons."⁶³ Perry suggests no limit as to what this developing sensitivity might entail in the way of judicial appropriation of legislative and executive functions; indeed he is more concerned by the prospect of judicial timidity than by the possibility of judicial usurpation.⁶⁴ Perry's cheerful embrace of the limitless vistas opened up by the doctrine of noninterpretive review is eloquent testimony to the utter confidence, held by what Jeremy Rabkin has called "the court party,"⁶⁵ that a fierce popular reaction to fierce judicial activism is virtually out of the question.

Perhaps the court party is right. Perhaps Perry is not naive to think that the judiciary will prevail. After all, as the Declaration of Independence observes, "mankind are more disposed to suffer,

⁶⁰ *Id.* at 118.

⁶¹ *Id.*; cf. P. BOBBITT, *CONSTITUTIONAL FATE* 211 (1982) (arguing that the Court "must sometimes be in advance of and even in contrast to, the largely inchoate notions of the people generally").

⁶² PERRY at 146-62. See, e.g., Glazer, *The Judiciary and Social Policy*, in *THE JUDICIARY IN A DEMOCRATIC SOCIETY* 67 (L. Theberge ed. 1979); Glazer, *Overseeing Education and Social Services*, in *THE ROLE OF THE JUDICIARY IN AMERICA* (Moore ed. 1982).

⁶³ PERRY at 147. The implications of "the emergent age of scarcity" for Perry's argument are opaque at best.

⁶⁴ As for anyone, such as Nathan Glazer, who dares criticize institutional reform litigation—even while making clear his sympathy with the ends sought—Perry is none too generous: "Critics like Glazer, willing to pay the price of delay with the suffering of others, remind me of the inquisitor in Shaw's *Saint Joan*, who insists that Joan be put to death by fire." PERRY at 158 n.*. Perry follows this with a long quotation from *Saint Joan* in which the inquisitor expresses his remorse, concluding, "I am in hell for evermore." *Id.* (quoting G.B. SHAW, *SAINT JOAN*, scene 6 (1923)). I suppose it was inevitable that if judges were to become prophets, their critics would be consigned to eternal damnation.

⁶⁵ Rabkin, *The Charismatic Constitution*, *PUB. INTEREST*, Fall 1983, at 142.

while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed."⁶⁶ Perhaps the people—and Congress—will be satisfied by Perry's insistence that the principle of electoral accountability has been satisfied by Congress's retaining the authority to limit federal courts' jurisdiction⁶⁷ even though Congress is not to be allowed to reverse particular court decisions.⁶⁸ Withdrawing jurisdiction on abortion cases would thus leave *Roe v. Wade* the law of the land; the status quo ante would be restored only if state or lower federal courts were to disregard Supreme Court precedent.⁶⁹ Meanwhile abortions will have been performed as a result of what Bickel called "the Court's guess on the probable and desirable direction of progress."⁷⁰ Is there not something "a little fraudulent" about the claim that the possibility of limiting jurisdiction does justice to the principle of electoral accountability? Bickel was confident a decade ago that eventually the realization would come "that this will not do."⁷¹ That realization has not come to the legal community; it is unclear how strongly it has come to the community at large.

The realization might come more clearly if constitutional theorists like Perry followed the implication of their argument to its logical conclusion. According to Perry, the judiciary has assumed its prophetic role as agent of moral evolution by an "organic political development";⁷² Perry admits that this role was not envisaged by the Framers.⁷³ Why then continue to be imprisoned within the Framers' institutional bounds? Surely it would make more sense to have a separate body performing the prophetic function, resolving general political-moral issues, than to have that function all mixed up with the function of resolving ordinary legal cases between individuals. (This new body, too, could be subject to withdrawal of jurisdiction, if one wanted to preserve the principle of electoral accountability.) Perry does not follow out the consequences of his defense of noninterpretive judicial review far enough: why should such review be "judicial"? Does Perry really think judges—retired politicians and prominent local lawyers, appointed for political reasons—are the best people to serve the crucial function he has iden-

⁶⁶ The Declaration of Independence, para. 2 (U.S. 1776).

⁶⁷ PERRY at 135-37.

⁶⁸ *Id.* Perry seems uncertain as to why this limitation should exist.

⁶⁹ See J. ELY, *supra* note 46, at 46; see Sager, *supra* note 46, at 39-40.

⁷⁰ A. BICKEL, *supra* note 3, at 28.

⁷¹ *Id.* at 27.

⁷² PERRY at 101.

⁷³ *Id.* at 114.

tified? Perry calls upon judges to be candid when they engage in noninterpretive review;⁷⁴ would not the system as a whole be more candid and more effective if we created a Prophetic Council, consisting, presumably, of progressive moral philosophers and theologians, to engage in that review?⁷⁵ Or is it not the case, for all the admirable frankness of Perry's presentation, and despite his strong endorsement of candor,⁷⁶ that he wishes noninterpretive review to borrow an aura of legitimacy from the fact that it will be exercised by the same courts whose primary task is to interpret the laws and the Constitution?

How should we restore, or revive, constitutional democracy? We cannot simply recall the past, when at least in principle the role of the Supreme Court was to uphold the Constitution and to preserve limited government. But perhaps we can learn from the argument used originally to justify judicial review. An important part of that argument appears in *The Federalist* No. 49.⁷⁷ There Madison comments on Jefferson's proposal for constitutional conventions, based on popular elections, to resolve constitutional disputes. Madison acknowledges that it "seems strictly consonant to republican theory" to recur to the people when the interpretation of the people's constitution is in dispute,⁷⁸ but he rejects the proposal, primarily for two reasons: first, frequent appeals to the people would lessen reverence for the laws, and for the Constitution; and second, it is unlikely that, in making such decisions, the "reason . . . of the public," as opposed to its passions, "would sit in judgment."⁷⁹ It is this argument, discrediting the notion of an appeal to the people to uphold the Constitution, that prepares for the subsequent exposition of the case for judicial review in *The Federalist* No. 78.⁸⁰

The first of these two arguments is no longer relevant, given the pace of change in judicial interpretation of the Constitution in recent years; indeed it would be bizarre to claim that noninterpretive review would foster reverence for the Constitution. As for the second, I, at least, am doubtful that the federal judiciary now embodies the "reason of the public" any more than the public itself. Indeed, on Perry's argument it should not even try to; the judiciary

⁷⁴ *Id.* at 140.

⁷⁵ See, e.g., A. MILLER, *supra* note 5, at 259, 261-63, 274-76, 293-94, 297-303.

⁷⁶ PERRY at 139-43.

⁷⁷ THE FEDERALIST No. 49 (J. Madison) (Modern Library ed. 1961).

⁷⁸ *Id.* at 332.

⁷⁹ *Id.*

⁸⁰ THE FEDERALIST No. 78 (A. Hamilton) (Modern Library ed. 1961).

is supposed to strike out ahead of the public. So perhaps it is time to consider "abolishing the forms to which [we] are accustomed," and to consider a reform "consonant to republican theory,"⁸¹ a reform that would allow for appeals to the people to establish the meaning of the Constitution, either through the election or recall of judges, or through a provision for referenda or conventions in response to particular constitutional decisions. One might add that such elections, referenda, or conventions, could become occasions for grand debates on constitutional principles, providing an opportunity for deepening popular understanding of the tasks and responsibilities of republican government.

Perhaps all of this would be undesirable; let us hope it will prove unnecessary. Certainly there are ample opportunities for curbing judicial imperialism, using the means of presidential appointments and congressional legislation, and, if need be, limited constitutional amendment. Surely it is not too late to check the transformation of American democracy from constitutional self-government to government by prophets clothed in judicial robes. But it will not be an irony unprecedented in history if such a transformation takes place under the guidance of men and women acting with the best of intentions and in the name of so elevated a principle as human rights.

⁸¹ THE FEDERALIST No. 49, *supra* note 77, at 332.