

10-28-2022

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### Recommended Citation

Koppelman, Andrew (2022) "Michael Perry and Human Rights," *The Journal of Contemporary Legal Issues*: Vol. 23: Iss. 2, Article 14.

Available at: <https://digital.sandiego.edu/jcli/vol23/iss2/14>

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# Michael Perry and Human Rights

ANDREW KOPPELMAN\*

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Michael Perry’s lifelong project has been to give a philosophical account of human rights, beginning with its foundational basis and ending with specific prescriptions for controversial cases. His writing is notable for the moral urgency he brings to the task—an urgency that is often underscored by his conscientious willingness to engage with objections and to rethink his arguments. For most scholars, such willingness is the only opportunity we have in our work to display the virtue of courage. It is an opportunity too often declined, but never by Perry. All this makes him admirable, not only as a scholar, but also as a human being.

Human rights are increasingly a matter of international consensus. Even the most abusive countries are unwilling to be seen as rejecting the political

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\* © 2022 Andrew Koppelman. John Paul Stevens Professor of Law and Professor (by courtesy) of Political Science, Department of Philosophy Affiliated Faculty, Northwestern University. Thanks to Ron Allen, Bob Burns, Fred Gedicks, and Steve Lubet for comments on earlier drafts. Please send comments, correction of errors, and grievances to [akoppelman@northwestern.edu](mailto:akoppelman@northwestern.edu).

morality of human rights. Perry aims to articulate the basis of this consensus, and what it ought to amount to in practice.

Any proposal for a global political morality must answer several mutually complicating questions. What is the basis of the morality— why should anyone embrace it? What is its content? What is the relation between that content and what people tend to want or need? How is it to be implemented? If the judiciary is to play a role in implementing it, what should that role be?

Perry's most recent book, *A Global Political Morality*,<sup>1</sup> is spectacularly ambitious, because it tries to answer all of those questions and to make the answers fit together. The kind of synoptic perspective he presents is enormously valuable. It is important to know whether our ideas form a coherent whole. The answer to each of these questions is likely to be influenced by the answers to each of the others, and the alleged lines of entailment are particularly clear and well worked out in Perry's account.

There is, however, tension within that account. This is not a complaint against Perry so much as a statement of our predicament. Perry's answers are each, standing alone, well worked out and thoughtful. The tension among them is one that we all have to deal with.

The basic problem is that Perry's claims rest at many points on controversial and undefended value choices. They hang together in that all are attractive, and they do not contradict one another. They forcefully state a political ideal. But the claims of entailment are unpersuasive. What he offers is less a philosophical account than a set of articles of faith.

Part I of this essay examines Perry's account of the foundations of human rights, which, he shows, ultimately rest on revulsion against unnecessary suffering rather than any set of propositions. This conclusion is bad news for any effort to deduce specific rights. Part II illustrates this difficulty by critiquing his claims for a human right to democratic governance, which he takes to encompass rights to intellectual freedom and moral equality. Part III similarly critiques his neo-Thayerian argument for deferential judicial review. Part IV argues that human rights are best understood as resting on an overlapping consensus among people with radically inconsistent comprehensive views. Part V examines Perry's claim for a "right to moral freedom," which he takes to mean a right to live one's life in accord with one's religious and/or moral convictions and commitments. I argue that such a right is too vague to be administrable. Part VI responds to Perry's critique of my own work, in which I claim that American law treats religion as a distinctive good, understood at a high level of abstraction. That body of

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1. Michael J. Perry, *A GLOBAL POLITICAL MORALITY: HUMAN RIGHTS, DEMOCRACY, AND CONSTITUTIONALISM* (2017).

law is vague, but it is more specific than Perry's "right to moral freedom," and it has been the basis of America's remarkably successful response to religious diversity.

### I. DO HUMAN RIGHTS HAVE FOUNDATIONS?

The foundational question for human rights theory is, why should one believe that there are any such rights at all? The notion of rights is ambitiously universal: "A human-rights-claim is to the effect that such-and-such a right ought to be conferred on (virtually) all and not just on some human beings because conferral of the right on any human being is, as a general matter, conducive to, perhaps even constitutive of his authentic good no matter who he is."<sup>2</sup>

Perry has, in the past, suggested that human rights make no sense unless they are given a religious foundation.<sup>3</sup> He continues to be drawn to that view: he writes that "it is open to serious question whether [the rights claim] coheres with . . . any secular worldview."<sup>4</sup> But in the end he relaxes that claim, for the excellent reason that a lot of atheists obviously believe in human rights. (The point is not only one of psychology. The idea that a religious foundation is somehow intellectually superior was always weak: the naked belief in rights, without further foundation, is no less defensible than the doubtful and unprovable claim that God exists.<sup>5</sup>)

He concludes his latest reflection on the problem by crediting the belief in rights to what he calls "the agapic sensibility," a disposition to "detest and oppose states of affairs in which human beings—any human beings, not just myself and those for whom I happen to care deeply, such as my family and friends—suffer grievously in consequence of a law or other policy that is misguided or worse."<sup>6</sup> This sensibility is "ecumenical"

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2. Michael J. Perry, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 30 (1991).

3. Michael J. Perry, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 35 n.26 (2017), citing his own earlier work.

4. *Id.* at 33.

5. See my *Naked Strong Evaluation*, review of Charles Taylor, A Secular Age, 56 DISSENT 105 (2009). For an argument that secular liberals should own up to the reasonably contestable elements of their own worldview, see my *If Liberals Knew Themselves Better, Conservatives Might Like Them Better*, 20 LEWIS & CLARK L. REV. 1201 (2017). Understanding this might lower the temperature of some contemporary controversies. See my GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT (Oxford Univ. Press 2020).

6. Perry, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 36.

and not confined to religious believers. It is “perhaps, even for many theists, the deepest explanation”<sup>7</sup> of their belief in human rights.

This conclusion is important and, I believe, correct. A human rights claim typically is made on behalf of distant strangers. What could possibly move people to take the trouble? Something about the abuses arouses revulsion. The revulsion sometimes takes a collective form and manifests itself in political action. Perry has thus anatomized the primitive basis (“foundation” is the wrong word, because it is not a proposition from which one can make deductions) of human rights claims. His account is less elaborate than some of those on offer. For those who trade in complex lines of argument, it is alarming in its simplicity. But that doesn’t mean he isn’t right.

So all the musing about whether human rights need a religious foundation is beside the point. Indeed, the whole search for foundations is a mistake.<sup>8</sup> People believe in rights because they are disposed to do so. This is probably accurate. And circular. It has no explanatory or justificatory value. People believe in rights because they believe in rights.

That account bodes ill for resolving controversies about the content of rights. If the foundation of human rights is not propositional but dispositional, then there are no articulable premises from which one can infer conclusions. So there isn’t much hope of relying on deductive reasoning to settle arguments about the content of rights, or the proper institutional means of enforcing them, or the appropriate rules for those institutions to lay down or to follow. Many disagreements about such matters will be traceable to differing foundational intuitions.

When he takes up concrete issues, Perry tries to navigate around this difficulty. He does not succeed. But that is not an objection, because the thing he is trying to do cannot be done in any deductive fashion. He

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7. *Id.* at 40. In earlier work, Perry claimed that rights rested on a religious foundation, but wisely added that “I use the word *religious* in its etymological sense, to refer to a blinding vision—a vision that serves as a source of unalienated self-understanding, of ‘meaning’ in the sense of existential orientation or rootedness. *I do not use the word in any sectarian, theistic, or otherwise metaphysical sense.*” Michael J. Perry, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 97 (1982).

8. I therefore disagree with Steven D. Smith’s claim, elsewhere in this issue, that the difficulties (reflected in the work of Perry and many others) of finding a shared philosophical foundation make bitter political polarization inevitable. On the contrary, Perry’s insight helps to explain why people can and sometimes do come to agreement about the terms of their common life together even when they profoundly disagree about philosophical premises. This is one more iteration of a longstanding argument I have been having with Prof. Smith. See, e.g., Andrew Koppelman, *This Isn’t About You: A Comment on Smith’s Pagans and Christians in the City*, 56 *SAN DIEGO L. REV.* 393 (2019); Andrew Koppelman, *Theorists, Get Over Yourselves: A Response to Steven D. Smith*, 41 *PEPPERDINE L. REV.* 937 (2014).

himself has elegantly shown why this is the case. All he can do is offer general considerations that may or may not persuade readers to share his conclusions. He is well aware of this problem, which helps explain why his work has a persistent tentative quality, and why he is so often willing to revisit arguments that he has made in the past.

## II. DEMOCRACY AS A HUMAN RIGHT

The trouble becomes apparent as soon as we consider the first substantive right that Perry offers, “the human right to democratic governance.” Why think that this is a human right? If the basic human rights claim is that people should not “suffer grievously in consequence of a law or other policy that is misguided or worse,”<sup>9</sup> then democracy isn’t a solution. It may even be part of the problem. Such suffering notoriously has been the fate of unpopular minorities in many democracies, while some authoritarian governments have avoided such abuses.<sup>10</sup>

It is also doubtful that this right can deliver what Perry promises: “Unlike any version of autocracy, democracy gives the (adult) citizenry a meaningful opportunity—at its best, democracy gives the citizenry as meaningful an opportunity as is practicable—to determine, indirectly if not directly, what laws and other public policies (consistent with human rights) shall govern their lives.”<sup>11</sup> He rejects Joseph Schumpeter’s claim that democracy cannot mean anything more exalted than the opportunity of voters to replace one set of elites with another.<sup>12</sup> But it is not clear that “as meaningful an opportunity as is practicable” means more than Schumpeter envisions.

Perry pushes beyond Schumpeter by supplementing his definition of democracy with two other elements: “rights to intellectual freedom and

9. Perry, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 36.

10. Edmund Burke’s observation is relevant here:

[I]n a democracy, the majority of the citizens is capable of exercising the most cruel oppressions upon the minority, whenever strong divisions prevail in that kind of polity, as they often must; and that oppression of the minority will extend to far greater numbers, and will be carried on with much greater fury, than can almost ever be apprehended from the dominion of a single sceptre.

REFLECTIONS ON THE REVOLUTION IN FRANCE 229 (Conor Cruise O’Brien ed. 1968).

11. Perry, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 50.

12. *Id.* at 45–47, discussing Joseph Schumpeter, CAPITALISM, SOCIALISM, AND DEMOCRACY (3d ed. 1942). Modern political science scholarship supporting Schumpeter’s view is reviewed in Christopher H. Achen & Larry M. Bartels, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT (rev. ed. 2017).

moral equality.”<sup>13</sup> Both of these are mighty attractive, but I wonder whether it is wise to tie either to democracy, rather than regarding both as freestanding human rights. Both can exist in regimes in which laws are handed down by edict from an oligarchical elite. Tying them to democracy can entail an excessively restrictive understanding of both. Notoriously, a conception of intellectual freedom that is tied to democracy provides uncertain protection to speech that is not explicitly about democracy, such as art and literature.<sup>14</sup> Democracy, when it gives everyone a vote, presupposes that no one is a being of an inferior order. But that presupposition itself needs defending. Majorities are sometimes keen to disenfranchise minorities.<sup>15</sup> Since ancient Greece, there have been democracies that excluded much of the population from the empowered demos, and of course the United States did that for much of its history. Perry’s own exclusion of children from the electorate concedes that one can subject some people to undemocratic rule without calling their moral worth into question.

Perry himself has given us one of the most powerful critiques of the effort to derive a broad set of constitutional rights from the idea of democracy. When he wrote his first book, *The Constitution, the Courts, and Human Rights*,<sup>16</sup> constitutional theorists had recently been dazzled by John Hart Ely’s *Democracy and Distrust*.<sup>17</sup> Ely purported to offer a constitutional theory in which “the selection and accommodation of substantive values is left almost entirely to the political process,”<sup>18</sup> and judicial review is concerned solely with “what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government.”<sup>19</sup> From this premise Ely derived a number of substantive rights, notably free speech and protection against discrimination.

Perry objected that Ely had simply shifted the judicial choice of substantive values to a different register. “What Ely overlooks is that the very same social and political fragmentation that prevents any consensus as to the various values the judiciary enforces in substantive due process cases also prevents consensus as to process.”<sup>20</sup> Americans have different

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13. Perry, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 47.

14. See my *In Praise of Evil Thoughts*, 37 SOC. PHIL. & POL’Y 52 (2020); *Madisonian Pornography or, The Importance of Jeffrey Sherman*, 84 CHICAGO-KENT L. REV. 597 (2009).

15. Such disenfranchisement is a persistent theme in American history. See Rogers Smith, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997).

16. Michael J. Perry, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS, *supra* note 7.

17. John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1981).

18. *Id.* at 87.

19. *Id.* (footnote omitted).

20. Perry, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS, *supra* note 7, at 79–80.

conceptions of the democratic process, and Ely's representation-reinforcing review simply picks one of these and enforces it. Similarly with protection of minorities: "There is, after all, much that majorities can do to minorities that is not offensive to any value judgment the framers constitutionalized."<sup>21</sup> The uncertainty is particularly clear with respect to the gay rights question: do laws that criminalize homosexual sex, or that forbid same-sex marriage, reflect permissible moral judgments or animus against an historically oppressed minority?<sup>22</sup>

I am inclined to think that Ely's arguments work if they are understood to lay down minima for any decently functioning democracy. Elections presuppose some liberty for the voters to discuss the merits of the candidates.<sup>23</sup> Democracy also presupposes the basic worth of every citizen.<sup>24</sup> There have been laws that transgressed both of these limits, and they have presented easy cases of unconstitutionality. But the reach of these arguments is considerably less than the scope of present First and Fourteenth Amendment doctrine.

But these presuppose democratic governance, and human rights claims, once more, are typically about individual rather than collective rights. The dignity and inviolability of persons bars certain kinds of mistreatment. Perry repeatedly cites the Universal Declaration of Human Rights declaration that "[a]ll human beings . . . should act toward one another in a spirit of brotherhood,"<sup>25</sup> but that's a mighty vague basis with which to begin. Attempts to operationalize it tend to focus on individual wrongs. One influential account argues that a person must have certain rights if they are to have any kind of life at all.<sup>26</sup> Whatever your ends, you cannot

21. *Id.* at 88.

22. The answer was always "both." I lay out the problem in detail in *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL OF RIGHTS J. 89 (1997).

23. The classic statement of this argument is James Madison, *The Virginia Report*, in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 243 (Marvin Meyers ed., rev. ed. 1981).

24. Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 163, 178–80 (Sanford Levinson ed., 1995). Fortunately for gay rights litigators, legislatures persisted in enacting laws that lashed out at gay people so wildly as to resist innocent explanation. See Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923 (2010).

25. Quoted in Perry, *A GLOBAL POLITICAL MORALITY*, *supra* note 1, at 17, 18, 19, 20, 24, 25, 26, and *passim*.

26. Even some of these, such as a right to basic health care, are surprisingly controversial. During oral argument in the *Obamacare* case, when the Solicitor General argued that Americans could legitimately be required to purchase health insurance because

achieve them if you are enslaved, arbitrarily imprisoned, beaten, starved, tortured, or killed.<sup>27</sup> These necessarily involve an incomplete political ideal. Their deployment against authoritarian governments, for example, necessarily distracts attention from democratic accountability.<sup>28</sup>

### III. RESTRAINED JUDICIAL REVIEW

So how to justify a more extensive set of rights—and, in particular, judicially enforceable rights, which are obviously in tension with the commitment to democracy?<sup>29</sup> In his first book, Perry tried to account for judicial review by attributing to it the function of maintaining the possibility of moral progress. Elected officials, he wrote, “tend to deal with fundamental political-moral problems, at least highly controversial ones, by reflexive reference to the established moral conventions of the greater part of their particular constituencies.”<sup>30</sup> The judiciary plays its distinctive role “by seizing such issues as opportunities for moral reevaluation and possible moral growth.”<sup>31</sup> That possibility did not justify judicial review, but it did “help explain its existence and clarify its character.”<sup>32</sup> It provides a balance between democracy and moral realism. “Noninterpretive review in human rights cases has enabled us to maintain a tolerable accommodation between, first, our democratic commitment and, second, the possibility that there may indeed be right answers—discoverable right answers—to fundamental moral-political questions.”<sup>33</sup>

The trouble with this ingenious defense is that it has too narrow a conception of the possibilities of democratic politics. It supposes that there can’t be democratic mass movements for moral innovation. As a veteran of the struggle for same-sex marriage—with Perry as my capable ally!—I am unpersuaded.<sup>34</sup>

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the country is obligated to provide care when they get sick, Justice Antonin Scalia responded: “Well, don’t obligate yourself to that.” Andrew Koppelman, *THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM I* (Oxford Univ. Press 2013).

27. See James Griffin, *ON HUMAN RIGHTS* (2008); Michael Ignatieff, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 90, 173 (2001).

28. See Samuel Moyn, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

29. Or, at least, with many theories of democracy. In fact, judicial review has become increasingly common among the world’s democracies. See Steven Gow Calabresi, *THE HISTORY AND GROWTH OF JUDICIAL REVIEW* (2021).

30. Perry, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS*, *supra* note 7, at 100.

31. *Id.* at 101.

32. *Id.* at 99.

33. *Id.* at 102.

34. At the end of the book, reviewing the aspiration for moral growth, he acknowledges: “To some extent political dissent serves that function, as do congressional deliberations from time to time.” *Id.* at 163.

Perry seems to be as well, because in his most recent work he narrows the scope of what he takes to be legitimate judicial review. Today his answer to the tension between democracy and judicial review is judicial deference, with carefully defined exceptions. The U.S. Supreme Court, for example, should *decline* to find a constitutional rights violation “if there is room for a reasonable difference in judgments either about whether the norm at issue—the norm that the government action is claimed to violate—truly is a constitutional norm or about whether the challenged government action truly violates the norm.”<sup>35</sup>

Here Perry cites with approval James Bradley Thayer’s argument that a statute should be declared unconstitutional only “when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question.”<sup>36</sup> Such a rule, Perry thinks, is demanded by “the human right to democratic governance, a core aspect of which . . . is the presumptive right of a majority to prevail.”<sup>37</sup> The rule even applies to human rights claims. “With respect to the question whether the challenged government action violates a constitutional norm, Thayerian deference is appropriate, and it is appropriate even if the norm is a right that is part of the morality of human rights.”<sup>38</sup>

In order for Thayerian deference to be overcome, the norm that the judiciary enforces must either be entrenched in the original constitutional text or “have become part of the fabric of American life.”<sup>39</sup> The rationale for both the deference and the exception is the same: both of them—the first by promoting democracy, the second by promoting rights—“would bring the constitutional law of the United States into closer alignment with the morality of human rights.”<sup>40</sup> The overall aim is to “bring the constitutional law of the United States into closer alignment with a right recognized by the vast majority of the countries of the world.”<sup>41</sup>

35. Perry, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 108.

36. *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893), quoted in A GLOBAL POLITICAL MORALITY, *supra* note 1, at 106 n.29.

37. Perry, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 107.

38. *Id.* at 116. Here as elsewhere, Perry has rethought an earlier position: he was far more dismissive of Thayer in THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS, *supra* note 7, at 17–19.

39. Perry, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 109.

40. *Id.* at 111.

41. *Id.* at 119.

The argument thus replicates a familiar move on the Court, the effort to conceal the exercise of discretion by attributing decisions to some broad societal consensus.<sup>42</sup> Perry agreed with Ely that the Court has no special competence to discern such a consensus. 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 have come and foreseeably will come before the Court.”<sup>43</sup>

More generally, if the case for judicial review boils down to the raw intuition that rights are important and that there needs to be an institution to protect them, then one’s conception of judicial review will derive from that intuition. Structural arguments for judicial restraint will then leave you unmoved if you think that it leaves really important rights unprotected.

Thus, for example, Perry agrees with the Court’s invalidation of Texas’s extreme anti-abortion statute in *Roe v. Wade*,<sup>44</sup> but he would have upheld Georgia’s less restrictive one in *Doe v. Bolton*.<sup>45</sup> The Texas statute criminalized all abortions except those necessary to save the life of the mother. Grave, irreparable physical harm, rape, or conditions that would produce a baby’s early and painful death, would not justify abortion. Perry concludes that “because it is so extreme, the statute is fairly judged to be based on sex-selective sympathy and indifference—and, therefore, to violate the right to equal protection.”<sup>46</sup> Georgia’s statute, on the other hand, permitted abortion in cases of rape, severe fetal deformity, or the possibility of severe or fatal injury to the mother. Perry thinks the Georgia statute implicates the right to privacy, but does not violate it, because “[p]rotecting human life is a paramount government objective, and that the life being protected is unborn does not *ipso facto* render the government objective less weighty.”<sup>47</sup>

Perry recognizes that his weighing is controversial.<sup>48</sup> If protecting human life is a paramount objective, then why is the Texas law too extreme? Even if a baby is the product of rape, or will die within a few hours of birth, is it not entitled to the life of which it is capable? Or might one not

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42. See, e.g., *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

43. Perry, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS, *supra* note 7, at 97.

44. 410 U.S. 113 (1973).

45. 410 U.S. 179 (1973).

46. Perry, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 159.

47. *Id.* at 160.

48. *Id.* at 164.

to be under a duty.”<sup>53</sup> If this is correct, then accounts of rights will depend on accounts of human well-being. But the question of what counts as well-being is a large part of what divides us.

Perry has sometimes confronted this difficulty and been discouraged by it. “To the extent some political-moral premises enjoy consensual support, given our pluralism they are likely to be rather abstract or general premises and thus rather indeterminate with respect to the actual political conflicts that beset us.”<sup>54</sup>

Charles Taylor proposes that, given our diversity, the only hope for a shared ethic is “overlapping consensus,” which does not seek any agreement about foundations, but only acceptance of certain political principles.<sup>55</sup> Taylor borrows the term “overlapping consensus” from John Rawls,<sup>56</sup> but by it he means something considerably shallower, and therefore less necessarily committed to neutrality toward contested ideas of the good. Taylor thinks that “Rawls still tries to hold on to too much of the older independent ethic.”<sup>57</sup> Rawls expects citizens not only to endorse a set of political principles, but also to accept a doctrine of political constructivism and just terms of cooperation. This, Taylor thinks, is too much to ask. All one can have is a common set of political practices that facilitate peaceful cooperation.

Perry is unpersuaded: “It is doubtful that a political conception of justice supported by an overlapping consensus . . . will ever emerge in a society as morally pluralistic as the United States.”<sup>58</sup> He thinks that he is vindicated here by experience. “Even if a political conception of justice supported by an overlapping consensus is possible in American society, there is at present no such conception in the United States.”<sup>59</sup>

This conclusion is too pessimistic. It would certainly entail that there could be no consensus on international human rights, which confront even greater diversity than exists in the United States. But in fact America has been unusually successful in dealing with religious diversity—more so than many other generally well-functioning democracies, such as France, Germany, and Italy. Even if the American law of religious liberty were entirely incoherent, it might still be a sensible approach to this perennial human problem. Edmund Burke said: “It is a presumption in favour of any settled

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53. Joseph Raz, *THE MORALITY OF FREEDOM* 166 (1986).

54. Perry, *LOVE AND POWER*, *supra* note 2, at 27.

55. Charles Taylor, *Modes of Secularism*, in *SECULARISM AND ITS CRITICS* 33 (Rajeev Bhargava, ed., 1998). As will become apparent, I find his argument here more persuasive than his later work with Maclure, discussed below, on which Perry relies.

56. John Rawls, *POLITICAL LIBERALISM* 133–72 (1993).

57. Taylor, *Modes of Secularism*, *supra* note 55, at 51.

58. Perry, *LOVE AND POWER*, *supra* note 2, at 26.

59. *Id.* at 26–27.

scheme of government against any untried project, that a nation has long existed and flourished under it.”<sup>60</sup>

Consider the way in which America deals with the problem of diversity of ends—what Perry calls moral freedom.

### V. MORAL FREEDOM

Perry argues for the “right to religious and moral freedom,” which he defines as “the right to the freedom to live one’s life in accord with one’s religious and/or moral convictions and commitments.”<sup>61</sup> He agrees with Jocelyn Maclure and Charles Taylor, on whose work he relies, that “it is difficult to establish in the abstract where the line between preferences and core commitments lies.”<sup>62</sup> But he proposes that in doubtful cases, there should be “a default rule according to which the benefit of the doubt is resolved in favor of the conclusion that the choice at issue is protected by the right.”<sup>63</sup>

The scope of this right is however mysterious. Maclure and Taylor explain that “core beliefs” are those that “allow people to structure their moral identity and to exercise their faculty of judgment.”<sup>64</sup> “Moral integrity, in the sense we are using it here, depends on the degree of correspondence between, on the one hand, what the person perceives to be his duties and preponderant axiological commitments and, on the other, his actions.”<sup>65</sup> Like Perry, they think that there is no good reason to single out religious views, because what matters is “the intensity of the person’s commitment to a given conviction or practice.”<sup>66</sup>

There is an epistemic problem here. How can the state discern what role any belief plays in anyone’s moral life? What could the state know about my moral life?<sup>67</sup> If the state is supposed to defer to identity-defining

60. *Speech on Reform of Representation*, in ON EMPIRE, LIBERTY, AND REFORM: SPEECHES AND LETTERS 274 (David Bromwich ed. 2000).

61. Perry, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 64.

62. *Id.* at 68 (quoting JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 92 (2011)).

63. *Id.* at 69.

64. Maclure & Taylor, *supra* note 62, at 76.

65. *Id.*

66. *Id.*, 97.

67. Some Supreme Court opinions and commentators have similarly suggested to each person’s “ultimate concerns,” with similar difficulties. Jesse H. Choper, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 69–74 (1995).

scheme of government against any untried project, that a nation has long existed and flourished under it.”<sup>60</sup>

Consider the way in which America deals with the problem of diversity of ends—what Perry calls moral freedom.

#### V. MORAL FREEDOM

Perry argues for the “right to religious and moral freedom,” which he defines as “the right to the freedom to live one’s life in accord with one’s religious and/or moral convictions and commitments.”<sup>61</sup> He agrees with Jocelyn Maclure and Charles Taylor, on whose work he relies, that “it is difficult to establish in the abstract where the line between preferences and core commitments lies.”<sup>62</sup> But he proposes that in doubtful cases, there should be “a default rule according to which the benefit of the doubt is resolved in favor of the conclusion that the choice at issue is protected by the right.”<sup>63</sup>

The scope of this right is however mysterious. Maclure and Taylor explain that “core beliefs” are those that “allow people to structure their moral identity and to exercise their faculty of judgment.”<sup>64</sup> “Moral integrity, in the sense we are using it here, depends on the degree of correspondence between, on the one hand, what the person perceives to be his duties and preponderant axiological commitments and, on the other, his actions.”<sup>65</sup> Like Perry, they think that there is no good reason to single out religious views, because what matters is “the intensity of the person’s commitment to a given conviction or practice.”<sup>66</sup>

There is an epistemic problem here. How can the state discern what role any belief plays in anyone’s moral life? What could the state know about my moral life?<sup>67</sup> If the state is supposed to defer to identity-defining

60. *Speech on Reform of Representation*, in ON EMPIRE, LIBERTY, AND REFORM: SPEECHES AND LETTERS 274 (David Bromwich ed. 2000).

61. Perry, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 64.

62. *Id.* at 68 (quoting JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 92 (2011)).

63. *Id.* at 69.

64. Maclure & Taylor, *supra* note 62, at 76.

65. *Id.*

66. *Id.* at 97.

67. Some Supreme Court opinions and commentators have similarly suggested deference to each person’s “ultimate concerns,” with similar difficulties. Jesse H. Choper, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 69–74 (1995).

commitments, how can it tell what these are? Simon Căbulea May hypothesizes a draft resistor for whom military service would prevent the perfection of his skills at chess, which he regards as “a most vivid manifestation of the awesome beauty of the mathematical universe.”<sup>68</sup> Would that get the benefit of the doubt?

Perry offers the Maclure-Taylor intensity claim as though it were interchangeable with “freedom of conscience, in the sense of freedom to live one’s life in accord with the deliverances of one’s conscience.”<sup>69</sup> But the conscience formulation is narrower. It includes only religious or moral commitments and excludes others, however intense they may be. May’s draft resistor cannot invoke “the freedom to live one’s life in accord with one’s religious and/or moral convictions.”<sup>70</sup> His intense devotion to chess may be a core concern that structures his life, but it is neither religious nor moral.

The invocation of “conscience” unreflectively thematizes one principal theme of Christianity. Many who propose it as a substitute for “religion” treat its value as so obvious as not to require justification.<sup>71</sup> Unstated and perhaps unstatable (because theologically loaded) premises are at work. They also implausibly assume that the will to be moral trumps all our other projects and commitments when these conflict, and that no other exigency has comparable weight.<sup>72</sup> There is undoubtedly value in construing “religion” broadly and accommodating analogous claims—more on that shortly—but one ought to recognize that one is reasoning by analogy rather than enforcing a right to “moral freedom.” That right cannot be coherently formulated or administered.<sup>73</sup>

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68. Simon Căbulea May, *Exemptions for Conscience*, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY 191 (Cécile Laborde & Aurelia Bardon, eds., 2017).

69. Perry, A GLOBAL POLITICAL MORALITY, *supra* note 1, at 67.

70. *Id.* at 64.

71. See, e.g., Amy Gutmann, IDENTITY IN DEMOCRACY 151–91 (2003); William Galston, THE PRACTICE OF LIBERAL PLURALISM 45–71 (2005); Kwame Anthony Appiah, THE ETHICS OF IDENTITY 98 (2005); Michael J. Sandel, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 65–71 (1996); Rogers M. Smith, “Equal” Treatment? A Liberal Separationist View, in EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY 190–94 (Steven V. Monsma & J. Christopher Soper, eds., 1998).

72. Bernard Williams spent much of his career refuting that. See, e.g., ETHICS AND THE LIMITS OF PHILOSOPHY (1985).

73. For further critique of the Taylor-Maclure formulation, see my *How Could Religious Liberty Be a Human Right?*, 16 INT. J. CONST. LAW 985, 994–96 (2018); Andrew Koppelman, *Keep It Vague: The Many Meanings of Religious Freedom*, 140 COMMONWEALTH, Nov. 15, 2013.

## VI. RELIGION AND DISESTABLISHMENT

I have argued for a conception of liberty very much like the one that Perry is advocating, but on an entirely different basis: the actual overlapping consensus that exists in the United States today. I describe it in *Defending American Religious Neutrality*,<sup>74</sup> a book that Perry read with some skepticism. I will end by contrasting our approaches.

The Supreme Court has in fact constructed rights that look something like Perry's right to moral freedom, with comparably fuzzy scope, but which wears its incoherence on its sleeve. (Not that there's anything wrong with that: there are worse things than incoherence, as I'll shortly explain.) In the modern conception of substantive due process, judges are empowered to discern "interests of the person so fundamental that the State must accord them its respect."<sup>75</sup> Packed into that formulation are contestable discretionary judgments of both the intrinsic value of the interest and its typical place in people's lives. Judges take it upon themselves to decide, on the basis of no legal materials at all but only their own experience and prepossessions, what is important in human life.<sup>76</sup>

With respect particularly to religious freedom, the idea of religion plays a more central role in American law than it does in the right to moral freedom as Perry imagines it. He is troubled by the religion-specific character of American free exercise and disestablishment law. I'll summarize my description of that law, and then consider Perry's reservations.

*Defending American Religious Neutrality* responded to the perception, increasingly common among scholars and some Supreme Court justices, that the American law of religion, and particularly of the Establishment Clause, is incoherent and unattractive. I argue that the clause is rooted in the framers' belief that religion can be degraded and corrupted by state support. American law treats religion as a distinctive human good, but protects it from political manipulation by denying the state the power to declare religious truth—more generally, to take sides on any theological question. That limitation is clearest in the requirement that a law have a secular

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74. Andrew Koppelman, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (Harv. Univ. Press 2013).

75. *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).

76. The point is not unique to substantive due process. The entire practice of judicial rights protection is pervaded with contestable discretionary judgments. See Richard H. Fallon Jr., *THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY passim* (2019).

legislative purpose.<sup>77</sup> This determinedly vague endorsement of religion is the American ideal of “neutrality.”

The American regime of religious neutrality resembles overlapping consensus as Taylor (but not Rawls) understands it. The state is supposed to be neutral toward religion. But at the same time, religion is treated as something so important that even political values are sometimes sacrificed for its sake. That undergirds, for example, the practice of religious accommodation, which is deeply entrenched in American practice.

Perry is dissatisfied with my account of “the meaning of the non-establishment norm and the constitutionality of granting conscience-protecting exemptions only to religious believers.”<sup>78</sup> He objects that I have not shown that “as compared to any competing understanding of the norm,

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77. Perry thinks that we disagree about this. I don’t believe that we do. He writes: As I have explained elsewhere, there are three basic categories of moral inquiry: (1) Which human beings should we care about; (2) What is truly good for those we should care about, and what is bad for them; and (3) How should we resolve conflicts between goods-in particular, between what is good for some we should care about and what is good for others we should care about? (Andrew Koppelman asserts that the nonestablishment norm forbids government to “formulate official answers to religious questions.” But the three basic inquiries I have just articulated are not “religious” questions. They are “moral” questions-albeit, moral questions to which some persons sometimes give religiously grounded answers.) For many religious believers in the United States, no response to one or more of these three fundamental moral questions is as plausible, if plausible at all, as a religiously grounded response. For example: For many religious believers, no secular warrant for the claim that we should care about each and every person-that each and every person is inviolable-is plausible; only a religious warrant is plausible. Therefore, to construe the nonestablishment norm to forbid government to disfavor conduct on the basis of a moral belief that, though religiously grounded, lacks, or may lack, plausible, secular grounding makes no sense at all to such believers, for whom the only plausible response-or at least the most plausible response-to one or more of the three fundamental moral questions is a religiously grounded response.

Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663, 676–77 (2001) (footnotes omitted).

The question a court must decide is however whether the law in question has a plausible secular grounding. It doesn’t matter whether some of the legislators thought that their own views lacked a secular grounding. Courts don’t need to psychoanalyze the legislators. They just need to read the statute. A court, assessing secular purpose, looks at legislative outcomes rather than legislative inputs. . . . there is nothing wrong with a legislative process that is influenced by religious people, who, after all, are not second-class citizens. The basic premises of democracy condemn a political process in which the decision makers are racist, but not a political process in which some of the decision makers have religious views and allow those views to influence their political positions.

Koppelman, DEFENDING AMERICAN RELIGIOUS NEUTRALITY, *supra* note 74, at 94.

78. Michael J. Perry, *American Religious Freedom: Reflections on Koppelman and Smith*, 77 REV. POL. 287 (2015).

the understanding at issue is, if not more congruent, not less congruent with the original understanding of the norm, or with a widely shared historical understanding of the norm, or, at least, with well-settled constitutional doctrine.”<sup>79</sup> But the competing understandings that I am responding to consist, for the most part, of a “consensus that the American law of religious liberty makes no sense. It has been called ‘unprincipled, incoherent, and unworkable,’ ‘a disaster,’ ‘in serious disarray,’ “‘chaotic, controversial and unpredictable,’ ‘in shambles,’ ‘schizoid,’ and ‘a complete hash.’”<sup>80</sup> Perry does not specify the competing norm that I have neglected. It is possible that he has in mind his own.

Perry thinks that I can’t account for the *Welsh v. United States*,<sup>81</sup> in which the Supreme Court avoided constitutional difficulties by construing the military draft’s conscientious objector provision to cover objections that were not theistically based. A four-judge plurality concluded that Welsh’s beliefs were “religious” as that term was defined in the statute, holding that the law “exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.”<sup>82</sup> Justice Harlan agreed with that result, because he thought that the law impermissibly discriminated on the basis of religion—that it drew “a distinction between theistic and nontheistic religions.”<sup>83</sup> If Congress was going to create exemptions, Harlan thought, it was constitutionally required to show “equal regard for men of nonreligious conscience.”<sup>84</sup>

Justice Harlan and I both think that extending exemptions only to those who believe in God would violate the establishment clause. Perry responds:

It is far from obvious that by granting conscience-protecting exemptions only to (all) religious believers (i.e., who otherwise qualify), government violates even the broad understanding of the nonestablishment norm . . . granting such exemptions only to religious believers does not affirm—or presuppose or entail the affirmation

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79. *Id.* at 290.

80. Koppelman, DEFENDING AMERICAN RELIGIOUS NEUTRALITY, *supra* note 74, at 4 (citations omitted).

81. 398 U.S. 333 (1970).

82. *Id.* at 344.

83. *Id.* at 348 (Harlan, J., concurring in the result).

84. *Id.* at 360 n.12. Harlan here conflates “nontheistic religion” with the “nonreligious.” This is confused. A nonreligious religion is an oxymoron.

of—any religious tenet; it does not, in Koppelman’s articulation, “declare religious truth.”<sup>85</sup>

I don’t understand how such a requirement could be construed not to declare religious truth. It grants exemptions only to those who believe what the state wants them to believe. Welsh himself told me:

It was made very clear at the hearing by the hearing officer: is there anything you can say that you believe is God? When I think about it from where I am now, I’m thinking, why didn’t I just say yes? But it wasn’t true and I just wasn’t going to say it. That’s all I can say.<sup>86</sup>

His application for conscientious objector status was rejected because he did not believe in God. Had he been willing to confess to the theological proposition the state wanted him to endorse, he would not have found himself appealing a three year prison sentence to the Supreme Court.

What the Court has in fact done is broaden the legal definition of “religion,” an already vague term, to encompass Welsh and those like him. I write in the book that the *Welsh* case shows “that in the present regime, the concept of religion is fluid enough to address the conscientious objection problem.”<sup>87</sup>

Perry doubts that it is constitutional “for government to grant conscience-protecting exemptions only to religious believers.”<sup>88</sup> I think that this is the wrong way to draw the religious/nonreligious line. He focuses on the singling out of religious conscience for special treatment in the Religious Freedom Restoration Act.<sup>89</sup> That statute, however, does not single out conscience. In its present form, it clearly disavows that limitation.<sup>90</sup>

Perry is one of many scholars who have treated religion as a subset of “conscience.” I’m inclined to think that conscience is only one of many bases for accommodation that deserve respect, and that those bases, taken together, cannot be subsumed under any single description. All law can do is handle them one at a time. I’m not troubled by the singling out of “religion” if it is undertaken as part of that larger project.<sup>91</sup> I don’t know if Perry disagrees.

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85. Perry, *American Religious Freedom*, *supra* note 78, at 296.

86. See Andrew Koppelman, *The Story of Welsh v. United States: Elliott Welsh’s Two Religious Tests*, in *FIRST AMENDMENT STORIES* 293, 293 (Richard Garnett and Andrew Koppelman, eds., 2012).

87. Koppelman, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY*, *supra* note 74 at 174.

88. Perry, *American Religious Freedom*, *supra* note 78, at 295.

89. *Id.* at 298.

90. The most recent Congressional pronouncement on religious liberty, the Religious Land Use and Institutionalized Persons Act of 2000, declares that “[t]he term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A).

91. I develop this claim in *How Could Religious Liberty Be a Human Right?*, 16 *INT. J. CONST. LAW* 985 (2018).

## VII. CONCLUSION

Perry's most important and valid teaching is that the power of human rights talk lies, not in any philosophical deduction, but in an agapic sensibility that responds with revulsion to atrocities committed against distant strangers. The core task of human rights discourse is to arouse this revulsion and to direct it in a coherent and effective way. That sounds like a precarious undertaking, but it has been done for centuries, and it sometimes works. Perry is one of its most talented and tireless practitioners. It is a privilege to be invited to engage with his work.

