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Michael Perry, Prophet of Progressive Collapse

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Appearances can be deceiving. Just on the face of it, Michael Perry's justly lauded first book, *The Constitution, the Courts, and Human Rights*[1] (*CCHR*), had an upbeat message and tone. The book was a thoughtful and spirited defense of the progressive constitutional project—the project, namely, of using the Constitution and the courts to advance a progressive agenda of human rights and equalities. Although the book had an element of prophecy—and Perry explained what he meant by the term[2]—it was no visionary undertaking. Visionary in the dismissive sense of "utopian and unrealistic," that is. On the contrary, in 1982, when *CCHR* was published, the progressive project was already well underway, as Perry explained, and it already enjoyed the support of a generally progressive legal academy.

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1. MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982) [hereinafter CCHR].

2. *See infra* note 21 and accompanying text.

So there was ample reason for optimism that the project might succeed. And indeed, it is arguable that the project *has* succeeded, beyond expectations. To be sure, the path has had its ups and downs. Thus, along one major frontier only lightly touched on in the book (namely, the protection of rights of "intimate association"[3]), the Supreme Court took a step backwards in *Bowers v. Hardwick*—but then corrected itself, obliquely in *Romer v. Evans* and more directly in *Lawrence v. Texas*. And the Defense of Marriage Act, adopted in 1996 with overwhelming support in Congress and signed by President Bill Clinton, may seem to have been a reactionary or anti-progressive development. And yet two decades later the Supreme Court would invalidate that statute,[4] and shortly thereafter would declare that the Constitution recognizes a right to same-sex marriage[5]—a culture-transforming edict that even the most sanguine progressive thinkers could scarcely have imagined back when *CCHR* appeared.[6] *Nunc dimittis*: "Now let thy servant depart in peace."[7]

Except that the project's successes have not culminated in any sort of peace. On the contrary: going on four decades after the publication of *CCHR*, it seems that the nation Perry wanted to view as an "American Israel" is as bitterly divided as it has been in any period since the Civil War, and perhaps ever.[8] Despite (and surely in part because of) the judicial implementation of ever expanding rights and equalities, political polarization has reached frightening levels.[9] Observers report an "escalating cycle of dislike and distrust" perhaps boding "democratic collapse."[10] Perry's book

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3. PERRY, CCHR, *supra* note 1 at 117–18.
4. United States v. Windsor, 570 U.S. 744 (2013).
5. Obergefell v. Hodges, 576 U.S. 644 (2015).
6. *See* GEOFFREY R. STONE, SEX AND THE CONSTITUTION xxvii–xxviii, 534–35 (2017).
7. Cf. *Luke* 2:29–32.
8. Today's "culture wars" are not the horrifically violent conflict that the Civil War was. And yet despite their violent disagreements over slavery, Americans of the Civil War period arguably shared a general framework for understanding the world: as Lincoln put it in his Second Inaugural, they "read the same Bible and prayed to the same God." Today, by contrast, Americans are radically divided with respect to the Bible and God; and as a result they speak to each other, or shout at each other, from "separate and competing moral galax[ies]," as James Davison Hunter puts it. *See infra* notes 36–39.
9. *Cf.* JAMAL GREENE, HOW RIGHTS WENT WRONG: HOW OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART xvii (2021):

> Our opponent in the rights conflict becomes not simply a fellow citizen who disagrees with us, but an enemy out to destroy us. . . . With stakes this high, polarization should not just be expected but is indeed the only sensible response. . . . Conflict over rights can encourage us to take aim at our political opponents instead of speaking to them. And we shoot to kill.

10. Lee Drutman, *How Hatred Came to Dominate American Politics*, FIVETHIRTYEIGHT, (Oct. 5, 2020), https://fivethirtyeight.com/features/how-hatred-negative-partisanship-came-to-dominate-american-politics/ [https://perma.cc/LBE7-UNTP]. *See also* Manuel Hinds, *Liberal*

favored—and exemplified—a candid and searching conversation about fundamental legal and political commitments; but it seems that the quality of political discourse in the country has deteriorated precipitously, often degenerating into little more than fusillades of bombastic accusations: "bigot," "racist," "homophobe," "liar," "fascist." And the Supreme Court itself at times joins in this discourse of denigration.[11] In sum, the house of the Republic is deeply, passionately divided; and we have been told what happens to a house divided.[12]

Moreover, if the expansion of rights advocated by progressives like Perry has in one sense exceeded even their fondest hopes, as in the instance of same-sex marriage, in other respects such rights seem more vulnerable than they were at the time he began writing. In particular, the First Amendment freedoms of religion and speech that Perry along with much of the profession and professoriate championed are currently embattled. The term "totalitarian" is increasingly deployed to describe the atmosphere that prevails, especially but not exclusively in universities.[13]

And if *CCHR* advocated and anticipated the expansion of rights and equalities reflected in decisions like *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges*, the book also foreshadowed (albeit unintentionally) these darker developments as well.

How so?

In *CCHR*, characteristically, Michael Perry was not content with exhilarating conclusions and prescriptions; rather, he methodically examined the most prominent theoretical justifications for activist human rights judicial review then on offer—and found all of them wanting. The progressive constitutional project could nonetheless be justified, Perry went on to contend, on the basis of what he called a "religious" justification. But Perry

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Democracy: On the Brink Again?, LAW AND LIBERTY BLOG (May 12, 2021), https://lawliberty.org/liberal-democracy-on-the-brink-again/ [https://perma.cc/EGR6-YQZP].

11. *See* Steven D. Smith, *The Jurisprudence of Denigration*, 48 UC DAVIS L. REV. 675 (2014).

12. *Cf. Mark* 3:25.

13. *See, e.g.*, Edward Sidelsky, *The Spectre of Totalitarianism*, THE CRITIC (March 2021), https://thecritic.co.uk/issues/march-2021/the-spectre-of-totalitarianism/ [https://perma.cc/3FF7-TYDH. *Cf.* Pierre Manent, *Europe and America after COVID: An Interview with Pierre Manent*, PUBLIC DISCOURSE (June 12, 2021), https://www.thepublicdiscourse.com/2021/06/76281/ [https://perma.cc/UZ35-LHEE] ("We now find that public—and I suppose often private—speech and writing are as carefully, even punctiliously, regulated in the country of the First Amendment as in a totalitarian country, but without need of a secret police!").

understood that this kind of justification was deeply suspect in the contemporary judicial and academic culture. Indeed, his discussion revealed that he himself had serious misgivings about the "religious" rationale—as well he might.

So then, what if Perry was correct in concluding that the positions taken by then prominent constitutionalists—John Hart Ely, Robert Bork, Jesse Choper, and others—were all infirm? And what if his own "religious" justification likewise proved to be unpersuasive—or in any case inadmissible in a secular constitutional culture? The progressive project, it seems, would be left high and dry, without any persuasive supporting rationale.

So, what would happen then?

Maybe nothing. Maybe theoretical rationales are merely of academic interest; politics including judicial politics just go on of their own force in the real world, maybe, leaving academics to amuse ourselves and justify our existence by inventing *post hoc* explanations and rationales for what is going to happen anyway. Given the momentum that the progressive project enjoyed at the time, the question of theoretical justification may have seemed to matter mostly to theorists—like Perry.

Then again, maybe a movement or project can go on for a time of its own inertia; but without a good supporting rationale maybe the movement will eventually founder or stall. If so, Perry's book would have a more foreboding tone. The true takeaway, albeit an inadvertent one, would be that the progressive project lacked any compelling justification—that all of the rights and equalities for which Perry and so many others were so passionately advocating amounted to a house built upon sand. And then when a storm came along . . . well, who knows?[14]

Today that storm appears to be upon us. We have already noted the severe polarization that afflicts the nation, and the embattled status of some of the rights Perry favored—in particular those associated with the First Amendment. Talk of potential civil war, insurrection, or secession, once confined to a minuscule lunatic fringe, has become increasingly familiar.[15] A mob of protesters storm and seize temporary control of the Capitol, forcing the nation's legislators to flee for their safety.

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14. *Cf. Matt*. 7:26.

15. *See, e.g.*, Adam K. Raymond, *How Close is the U.S. to Civil War? About Two-thirds of the Way, Americans Say*, NEW YORK INTELLIGENCER, Oct. 24, 2019, https://nymag.com/intelligencer/2019/10/americans-say-u-s-is-two-thirds-of-the-way-to-civil-war.html [https://perma.cc/86TP-9CQE]; *Bruce Frohnen, A Tale of Two Nations*, CHRONICLES (July 2021), https://www.chroniclesmagazine.org/a-tale-of-two-americas/ [https://perma.cc/B37K-24E3]; Nathan Newman, *The Case for Blue State Secession*, THE NATION (Feb. 10, 2021), https://www.thenation.com/article/politics/secession-constitution-elections-senate/ [https://perma.cc/84RH-4N6D]; F. H. BUCKLEY, AMERICAN SECESSION: THE LOOMING THREAT OF A NATIONAL BREAKUP (2020).

In this essay, I will discuss these implications, and will reflect on how Michael Perry's seemingly upbeat book can today be viewed as a harbinger of darker developments that were to come, and that are now upon us.[16]

I. THE "RELIGIOUS" JUSTIFICATION

In *CCHR*, Perry argued that the judicial advancement of human rights could not be justified as "interpretation" of the Constitution—he later revised that opinion in the direction of the interpretive approaches of Ronald Dworkin and, later, Jack Balkin[17]– and he carefully criticized the alternative democratic or "representation reinforcement" position elaborated by John Hart Ely. Instead, Perry appealed to what he took to be "a basic, irreducible feature of the American people's understanding of themselves." Americans had conceived of themselves as a "religious" people.

More specifically, they had "understood themselves to be 'chosen' in the biblical sense of that word" and to be "charged with a special responsibility" to realize a "higher law."[18] Indeed, America had a sort of providential mission "among the nations of the world," an obligation to be "a beacon to the world, an American Israel, *especially in regard to human rights*."[19] And Perry argued that this self-understanding provided a "functional" justification for judicial advancement of human rights. America was "a nation standing under transcendent judgment,"[20] and judges were the governmental actors best qualified to understand and implement that judgment. Judicial review in the cause of human rights should accordingly be understood as an "institutionalization of prophecy."[21]

However plausible this rationale may or may not have been as a justification for "noninterpretive" judicial review, just as a historical matter Perry's claim about Americans' religious self-understanding was surely correct. Or at least it was correct as an interpretation of the nation up until and into the 1960s.

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16. *Cf. Matt*. 16:2–3.
17. *See* Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669 (1991). For elaboration, see Steven D. Smith, *That Old-Time Originalism*, *in* THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY (Grant Huscroft ed. 2012).
18. PERRY, CCHR, *supra* note 1, at 97.
19. *Id.* at 97, 98 (emphasis in original).
20. *Id.* at 98.
21. *Id.*

The claim might be supported from any number of historical sources and with abundant historical evidence. Perry himself relied on the eminent Berkeley sociologist Robert Bellah and his seminal scholarship on American civil religion.[22] Writing in the late 1960s and 1970s, Bellah had explained that, from the outset, Americans "saw themselves as being a 'people' in the classical and biblical sense of the word."[23] Citing the appeals to deity in the Declaration of Independence, Bellah argued that

> [i]t is significant that the reference to a suprapolitical sovereignty, to a God who stands above the nation and whose ends are standards by which to judge the nation and indeed only in terms of which the nation's existence is justified, becomes a permanent feature of American political life ever after.[24]

"Biblical imagery provided the basic framework for imaginative thought in America up until quite recent times," he wrote, "and unconsciously its control is still formidable."[25]

Given this self-understanding, it was natural that most of the movements toward greater freedom and equality—including the movements for abolition of slavery and then for civil rights—had been grounded in religious assumptions and appeals. As John Coleman observed:

> [T]he strongest American voices for a compassionate just community always appealed in public to religious imagery and sentiments, from Winthrop and Sam Adams, Melville and Lincoln of the second inaugural address, to Walter Rauschenbusch and Reinhold Niebuhr and Frederick Douglas and Martin Luther King. . . . The American religious ethic and rhetoric contain rich, polyvalent symbolic power to command commitments and of emotional depth, when compared to "secular" language . . . .[26]

(I first encountered the Coleman statement and book, incidentally, in a talk given by Michael Perry in a conference at William and Mary in 1985.[27] I hadn't met Michael before, and I didn't meet him then—I was just an anonymous spectator at the conference—but I knew *of* him, and of *CCHR*. And I distinctly recall thinking that he projected exactly the kind of prophetic presence that his writing had led me to expect.)

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22. *Id.* at 97–98.

23. ROBERT N. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL 2 (2d ed. 1975) (emphasis added).

24. *Id.* at 174.

25. *Id.* at 12. For a more recent scholarly treatment of the pervasiveness of civil religion throughout American history, see PHILIP GORSKI, AMERICAN COVENANT: A HISTORY OF CIVIL RELIGION FROM THE PURITANS TO THE PRESENT (2019).

26. JOHN COLEMAN, AN AMERICAN STRATEGIC THEOLOGY 193–94 (1979).

27. Perry's talk was published as Michael J. Perry, *Comment on "The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment"*, 27 WM. & MARY L. REV. 1067 (1986).

Perry observed in *CCHR* that "in less secular times the religious conception [of the nation] was expressed in openly and conventionally religious terms."[28] Again he was surely correct. Familiar examples come quickly to mind. The Declaration of Independence, with its appeals to the Creator as the source of rights and equality. Lincoln's Gettysburg Address (now engraved on a wall of the Lincoln Memorial), with the phrase "this nation, under God," which was later incorporated into the Pledge of Allegiance. Lincoln's magisterial Second Inaugural Address (now engraved on the opposite wall of the Lincoln Memorial), which was, as one historian observed, a "theological classic, containing within its twenty-five sentences fourteen references to God, many scriptural allusions, and four direct quotations from the Bible."[29] The Supreme Court's unapologetic declaration as recently as 1952 that "[w]e are a religious people whose institutions presuppose a Supreme Being."[30] President Dwight D. Eisenhower's often noted (and often mocked) declaration that "our form of government has no sense unless it is founded in a deeply felt religious faith."[31]

At least with respect to this claim, it seems, Michael Perry was on solid ground.

Or was he?

II. RETREAT FROM THE RELIGIOUS RATIONALE

Perry's observation that these religious interpretations of the Republic had been made "in less secular" times was also a quiet acknowledgment of an anachronistic element in his appeal to the "religious" conception of the country. By the late 1960s, Bellah had argued, the traditional American civil religion was breaking up. The Supreme Court had decreed that religion must be a purely private affair and that government must act for exclusively "secular" purposes.[32] By 1982, when Perry was writing, political philosophers like John Rawls were developing the notion that democratic decisions and

28. PERRY, CCHR, *supra* note 1, at 98.

29. ELTON TRUEBLOOD, ABRAHAM LINCOLN: THEOLOGIAN OF AMERICAN ANGUISH 135–36 (1973).

30. Zorach v. Clauson, 343 U.S. 306, 312 (1952).

31. The president had famously added "and I don't care what it is." Quoted in Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 U. MEMPHIS L. REV. 973, 978 (2009).

32. I have argued elsewhere that the seminal decisions in this regard were the school prayer decisions of the early 1960s. *See* Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPPERDINE L. REV. 945 (2011).

discourse could not be based on religious grounds.[33] And the academy if not the American people generally had moved decisively, sometimes aggressively, in a secular direction[34] (which was what made Perry's appeal to religious foundations intriguing and adventurous, not merely platitudinous as it might have been in earlier times).

A generation after Bellah's influential work, another prominent sociologist described the new reality in America. In his book *Culture Wars*, James Davison Hunter found that across a surprising variety of issues ranging from education to family to media to law and politics, Americans were increasingly coalescing into two contending camps, which he labeled "orthodox" and "progressive."[35]

"Orthodox" Americans continued to embrace something akin to the old, biblically-oriented civil religion that Bellah had described; they believed in a nation committed to "an external, definable, and *transcendent* source of authority," and to "moral and spiritual truths [that] have a supernatural origin beyond . . . human experience."[36] By contrast, the "progressive" camp was composed of "secularists" and also of persons who, though counting themselves religious, looked more to "inner-worldly sources of moral authority."[37] Though living side-by-side as Americans, orthodox and progressive citizens held to moral conceptions so divergent that each effectively inhabited "a separate and competing moral galaxy."[38]

The conception of America as a modern-day Israel had thus become a source not of national strength and unity but rather of fragmentation. Moreover, if Perry himself invoked the older "orthodox" conception, he gravitated to the newer "progressive" conception as well.

Thus, Perry's argument began with what appeared to be an appeal to the traditional understanding. He used words like "religious," "prophetic," "biblical," and "Israel." And yet even as he put forward this interpretation, he was already preparing for a retreat to the more secular conception. Thus, even before explaining his conception of America's "religious" character, Perry sharply qualified that characterization. "Before I indicate what that conception is," he cautioned, "I should comment on my use of the word *religious*, which doubtless risks serious misunderstanding." And

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33. *See generally* JOHN RAWLS, POLITICAL LIBERALISM (paperback ed. 1996).

34. Christian Smith argues that the change was accomplished through the efforts of "networks of activists who were largely skeptical, freethinking, agnostic, atheist, or theologically liberal; who were well educated and socially located mainly in knowledge production occupations."

35. JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 43–44, 120–125 (1991).

36. *Id.* at 120.

37. *Id.* at 124.

38. *Id.* at 128.

then he explained, "I want to emphasize, as strenuously as I can, that in the following discussion I use the word *religious* in its etymological sense, to refer to a binding vision—a vision that serves as a source of unalienated self-understanding, or 'meaning' in the sense of existential orientation or rootedness. *I do not use the word in any sectarian, theistic, or otherwise metaphysical sense*."[39] (The italics are Perry's.) And he went on to insist that the conception he was appealing to was "in no sense a metaphysical or supernatural one."[40]

A confused or cynical reader might find these qualifiers baffling. It almost sounds as if Perry is saying something like: "America is based on a religious foundation—although by 'religious' I emphatically do not mean, well, *religious*." This would be an unfair reading, no doubt. Still, what exactly was supposed to be the difference between a "religious" vision and any other "unalienated self-understanding" or "existential orientation"?

And in any case, although using the term "religious," Perry did not insist on it. The essential commitment, he proceeded to explain, was actually to what philosophers call "moral realism." This is a position sometimes taken by philosophers who do not regard themselves as "religious" at all—who may even come across as overtly *anti*-religious.[41] In any case, what is important, Perry explained, is not that America is a nation under God or anything of that sort, but only that Americans believe there are "right answers to political-moral problems."

Notice: it is not necessary that there actually *are* right answers to political-moral problems, but only that *we believe* there are such answers. And yet even this is too strong. We don't need to be confident that there actually *are* right answers, Perry explained; we only need to be "open to the possibility" of such answers.[42]

So we begin with Robert Bellah's traditional stalwart and biblically-oriented Americans, who see America as a modern "Israel," and who are committed to "a God who stands above the nation and whose ends are standards by which to judge the nation and indeed only in terms of which the nation's existence is justified." And then we end up, just a few pages

39. PERRY, CCHR, *supra* note 1, at 97.
40. *Id.* at 99.
41. *See, e.g.*, David O. Brink, *The Autonomy of Ethics*, *in* THE CAMBRIDGE COMPANION TO ATHEISM 149 (Michael Martin ed., 2007); Michael S. Moore, *Good Without God*, *in* NATURAL LAW, LIBERALISM AND MORALITY 221 (Robert P. George ed., 1996).
42. PERRY, CCHR, *supra* note 1, at 101–02.

later, with Americans who are "open to the possibility" that there may be right answers to political-moral problems.

With respect to the cultural divide described by Hunter, it seems that Perry came down squarely on both sides of that divide. But I do not mean this description to be a criticism of *CCHR*, or of Perry. For one thing, when Perry's book was being written Hunter's diagnosis was still a decade off. And even when Hunter's book appeared many critics found it unconvincing. So if it seems in retrospect that Perry ambled casually between camps in the culture wars without quite noticing, that way of understanding what was happening was scarcely available in 1982.

It needs also to be noted that *CCHR* was not Perry's last word on the matter. Far from it. Much of his career has been devoted to revisiting and exploring these issues, and the opus is now a formidable one: I am concentrating here on the first book because although I have read much of the later work as well, there is surely a lot that I have not read, or that after lo these many years I do not now remember. (Or perhaps, understandably enough, that Michael Perry himself does not remember?[43])

III. WHAT DOES IT MATTER?

But if the apparent conflation of "orthodox" and "progressive" in *CCHR* should not be counted as a deficiency in the book, did it nonetheless at least point to a problem for the nation itself?

It might seem so. Consider the question in terms of rhetorical force. John Coleman had explained, as noted, that the "American religious ethic and rhetoric" reflected in the traditional and biblically-based self-conception "contain rich, polyvalent symbolic power to command commitments and of emotional depth, when compared to 'secular' language."[44] Would the secular language arising from a much tamer acknowledgment that there *might be* a possibility of right answers to political-moral questions carry any similar power?[45]

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43. In a Federal Courts class several years ago, I told the students that some major constitutional scholars who have favored activist progressive judicial review have also supported a broad Congressional power to curtail federal court jurisdiction, on the assumption that this power renders judicial review less problematic on democratic grounds; and I mentioned Michael Perry as one such scholar (based on my recollection of *CCHR*). Afterwards, uncertain, I emailed Michael to confirm that this was indeed his position. Entirely understandably after all these decades, he did not recall whether he had argued for this position.

44. *See supra* note 26.

45. From all I have heard, John Rawls was an earnest and admirable figure. But I recall listening to an elderly Rawls reading an important paper on "public reason" in a large, crowded, stuffy lecture hall; and I recall struggling to fend off drowsiness by trying to count how many times the man could pack the weasel word "reasonable" into a single sentence. ("Reasonable" views held by "reasonable" people deliberating "reasonably.")

Once again, though, it might be too much to expect someone writing in the early 1980s to perceive what would be lost in shifting from a robust biblical conception to a somewhat tentative moral realism. In the late 1970s and early 1980s, when *CCHR* was forming and then making its public appearance, the movement toward ever more expansive rights and equality seemed to have an almost irresistible political and cultural momentum, in this country and more globally. So the academic justification of that movement might have seemed, well, . . . academic.

Take free speech as a bellwether example. When Michael Perry was beginning his professorial career, and when I was still in law school, freedom of speech seemed to be an irresistible force. After its earlier reticence in cases like *Schenck* and *Gitlow*, and *Dennis*, the Supreme Court had been in process of expanding protections for free speech in exhilarating decisions like *New York Times v. Sullivan*, *Brandenburg v. Ohio*, and *Cohen v. California*. And most law professors and students seemed to think this was a very good thing. Indeed, my impression at the time was that most students and professors were close to being free speech absolutists.

True, constitutional doctrine suggested and most people might concede that, in principle, government should be able to restrict speech if necessary to achieve a "compelling interest." But "compelling" was understood to indicate an almost impossibly high standard: government would need to be acting to avert a "clear and present danger" of something like an imminent threat of nuclear catastrophe. The vaguer sort of threat to national security asserted by the government in the Pentagon Papers case surely did not qualify.[46] And the offense that an individual might claim to suffer, sincerely, from an epithet or aspersion was *a fortiori* not sufficient. Justice Brennan had disposed of that sort of possibility in *New York Times vs. Sullivan* in declaring, eloquently, our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[47]

Let me support this description of the climate of the time with some anecdotal evidence. In 1978, as a 3L, I took a class on freedom of speech from Robert Bork. Bork had a well-defined theory that offered protection

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The paper was no doubt admirable as a philosophical exercise; and it has received considerable attention in the academy. But "rich polyvalent symbolic power" or "emotional depth"? Michael Perry's moral realism, to be sure, is not Rawls's "public reason" (which Perry has criticized); I mention Rawls only to raise the question of the rhetorical power of contemporary secular political-moral philosophy.

46. New York Times Co. v. United States, 403 U.S. 713 (1971).

47. New York Times v. Sullivan, 376 U.S. 254 (1964).

to speech within a relatively restricted range—political speech, mostly, and even then not speech advocating overthrow of the government.[48] Nearly all the students in the class regarded Bork's position as hopelessly narrow in the protections it offered, and so the class consisted of spirited thrust-and-parry exchanges in which students attacked and Bork defended his retrograde views. As it happened, although I didn't know him then, Michael Perry was sitting in on the class while residing at Yale as a visiting professor. And I recall Perry vocally and vigorously joining in the assault on Bork.[49]

Here is a further piece of evidence. Also as a 3L, I was assigned to prepare the problem for the final argument in the law school's moot court competition, and I wrote up a hypothetical case based on the then much discussed "Nazis in Skokie" controversy.[50] The two finalists who were assigned to argue for the city complained to me that there was simply no remotely colorable argument to be made in favor of a city's authority to restrict a Nazi group from parading their racist message through a largely Jewish neighborhood that included thousands of Holocaust survivors. I disagreed, but when the judges (including Justice Potter Stewart and Chief Judge John Brown of the Fifth Circuit) awarded first and second prizes to the students representing the Nazis, the complaint may seem to have been vindicated.

Suppose someone had observed that the Nazis' message was worthless, vicious, and hateful. The typical answer at the time would have been "Of course it's worthless, vicious, and hateful. Everyone knows that. So what? It's speech."

The right to free speech, in short, was gloriously ascendant. If asked to justify this right, we might have invoked the venerable justifications—the "marketplace of ideas," democracy, and self-realization rationales—that seemed more than sufficient to support a commitment that was pretty much self-evidently correct, and eminently righteous. A few years later, Frederick Schauer would examine these and other rationales closely and find them to be disappointingly but demonstrably less compelling than we supposed they were. Hardly compelling at all, in fact: Schauer ended up relying mainly on the "negative" rationale of governmental incompetence as the foundation for the commitment to free speech.[51] But given the quasi-absolutist attitude that prevailed, this analysis would have seemed largely

48. See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

49. If memory serves, I recall in particular Perry criticizing Bork on the case of *Cohen v. California* and in doing so quoting the words from Cohen's jacket, which Bork had avoided reciting. (Bork reacted with at least pretended disgust.)

50. One important scholarly work that emerged from and commented on the controversy was LEE C. BOLLINGER, THE TOLERANT SOCIETY (reprint ed. 1988).

51. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).

academic and irrelevant—like a discovery that in immigrating to this country someone's great-great-grandfather had misrepresented something on his application for citizenship. Okay, but so what? Everyone knew what the obviously correct, overdetermined conclusion was.

Today things are very different. To be sure, the current Justices of the Supreme Court, whose legal formation occurred in an earlier time, continue to support the First Amendment rights of speech,[52] and also religion.[53] In the academy, however, these rights are increasingly perceived as in conflict with other constitutional or political commitments associated with "equality" or "antidiscrimination."[54] And the weight of opinion in the universities has seemingly come to preponderate in favor of the equality commitments.

Thus, in sharp contrast to my classmates who believed there was simply no colorable argument for limiting the right of Nazis to carry their hateful, in-your-face message to neighborhoods of Holocaust survivors, academic theorists today devote themselves to devising rationales for limiting speech that is deemed hateful or demeaning.[55] And on campuses throughout the country, the youthful descendants of the 1960s "free speech" radicals now shout down or even attack speakers whose views they find unacceptable. University officials and faculty often adopt and implement similar policies, albeit in more bureaucratic ways. The "cancel culture" of academia (though not just academia[56]) has been compared to the "living with lies" environment of totalitarian regimes described and criticized by participants like Vaclav Havel and Alexander Solzhenitsyn.[57]

In a similar vein, academics increasingly argue that although the freedom of religion may be named in the First Amendment, there is in fact no good

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52. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443 (2011).

53. *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294 (decided Apr. 9, 2021); Our Lady of Guadalupe School v. Morrissey-Behru, 140 S. Ct. 2049 (decided July 8, 2020); Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014).

54. Once one comes to understand the basic point of Peter Westen's classic article "The Empty Idea of Equality," 95 HARV. L. REV. 537 (1982), it becomes apparent that virtually *any* cause or commitment *can* be framed in the language of equality. As a historical matter, however, the value of equality has come to be most strongly associated with particular commitments, and more specifically to protections for individuals viewed in terms of race, sex, gender, sexual orientation, and related characteristics.

55. *E.g.*, JEREMY WALDRON, THE HARM IN HATE SPEECH (2014).

56. *See A Letter on Justice and Open Debate*, HARPER'S MAGAZINE (July 7. 2020), https://harpers.org/a-letter-on-justice-and-open-debate/ [https://perma.cc/RZ9C-8PDE].

57. *See, e.g.*, ROD DREHER, LIVE NOT BY LIES (2020); STEVEN D. SMITH, FICTIONS, LIES, AND THE AUTHORITY OF LAW, ch. 4 (2021).

rationale for singling out religion for special legal protection.[58] As the title of a provocative book by one well-known academic provocateur puts it, "*Why Tolerate Religion*?"[59]

In this context, commitments that once seemed axiomatic now appear in urgent need of justification if they are to remain viable. Why *is* freedom of speech so important, given that speech can often be divisive or hurtful? Why *should* freedom of religion be protected even when it is invoked by, say, employers who object to the equality-oriented goals of the so-called contraception mandate?

From a different perspective, of course, the same kind of question can be asked of the currently more fashionable equality-framed commitments. What is the justification for saying that every person is of equal and inherent worth and is equally entitled to "equal concern and respect"? Just looking at the sorry specimens of humanity we encounter (including, perhaps, ourselves), we might not think the bare facts support any such conclusion. And most societies throughout history have not embraced any such exotic supposition. So what is the justification for our insistence on human equality?[60]

IV. A FAMINE OF JUSTIFICATIONS[61]

In short, assumptions and commitments that once seemed just obviously true—"self-evident," as our founders might have said—now seem urgently to demand justification. Unfortunately, the very polarization that makes such justification necessary today can also make it unavailable. If Americans

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58. *See, e.g.*, Kenneth E. Himma, *An Unjust Dogma: Why a Special Right to Religion Wrongly Discriminates Against Non-religious Worldviews*, 54 SAN DIEGO L. REV. 217 (2017); BRIAN LEITER, WHY TOLERATE RELIGION? (2012); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012); Gemma Cornelissen, *Belief-Based Exemptions: Are Religious Beliefs Special?*, 25 RATIO JURIS 85 (2012); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); Anthony Ellis, *What is Special about Religion*?, 25 LAW & PHIL. 219 (2006); James W. Nickel, *Who Needs Freedom of Religion?*, 76 COLO. L. REV. 941 (2005).

59. BRIAN LEITER, WHY TOLERATE RELIGION? (2012).

60. For discussion of the question, see Louis Pojman, *On Equal Human Worth: A Critique of Contemporary Egalitarianism*, *in* EQUALITY: SELECTED READINGS 295 (Louis P. Pojman & Robert Westmoreland eds., 1997). *See also* JEREMY WALDRON, GOD, LOCKE, AND EQUALITY 243 (2002):

> [M]aybe the notion of humans as one another's equals will begin to fall apart, under pressure, without the presence of the religious conception that shaped it. . . . Locke believed this general acceptance [of equality] was impossible apart from the principle's foundation in religious teaching. We believe otherwise. Locke, I suspect, would have thought we were taking a risk. And I am afraid it is not entirely clear, given our experience of a world and a century in which politics and public reason have cut loose from these foundations, that his cautions and suspicions were unjustified.

61. *Cf. Amos* 8:11.

today inhabit "separate and competing moral galax[ies]," as James Davison Hunter reported, how are we to find common ground or common premises from which to reason together?

One influential diagnosis of our modern situation was offered in a book published almost simultaneously with *CCHR*—Alasdair MacIntyre's classic *After Virtue*. MacIntyre provided a description and diagnosis of the unmoored disconnectedness apparent in so much moral argumentation today. Briefly reviewing some of the most familiar competing arguments on issues including just war, abortion, and governmental support for equality,[62] MacIntyre observed that although the pro and con arguments lead to opposite conclusions—abortion *is* permissible, or abortion *isn't* permissible, for example—those arguments themselves do not actually engage each other; rather they pass like ships in the night. They hardly *can* engage, because they proceed from different (and arguably arbitrary) premises, and indeed from fundamentally different conceptions of what morality is even about.

In such a situation, how are people supposed to talk with each other? Some issues—how to reduce unemployment, for example, or improve the balance of trade—will seem to involve mostly instrumental questions that can be addressed in instrumental terms, for example, through economic analysis. Not surprisingly, therefore, there has been a tendency to instrumentalize issues, so that they can be debated in rational-sounding terms. And this tendency is massively evident in the legal academy—in law-and-economics, policy analysis, rational choice theory.[63] Everything boils down to how to satisfy people's preferences most efficiently. Michael Perry was concerned not so much with efficient preference satisfaction, though, as with issues of "political morality." He defended an active, rights-promoting judicial review based on arriving at right answers to political moral questions. But how are those right answers to be found and defended under current conditions?

I think it is fair to say that this has been a central question—arguably even *the* central question—animating Michael Perry's work, beginning with *CCHR* and continuing to the present. As noted, his academic career might be interpreted as a relentless search for justifications. He has not

62. ALASDAIR MACINTYRE, AFTER VIRTUE 6–7 (2d ed. 1985).

63. For a study of the pervasiveness of instrumentalism in modern legal discourse, see BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END (2006). *Cf.* R. J. Snell, *God and Public Reason*, PUBLIC DISCOURSE (June 19, 2021), https://www.thepublicdiscourse.com/2021/06/76402/ [https://perma.cc/SX8M-LJ8Z] ("[A] politics [of technological secularism] might be very good at determining interest rates and how to build roads, but it would be all but incapable of asking about the justice of such things.").

been content with favorable judicial *outcomes*; he has wanted the *reasons* to be right. Thus, Perry thoroughly approved of the results in *Windsor* and *Obergefell*. But he did not approve of the Court's reasoning, and hence he proposed what he took to be a better rationale.[64]

For myself, I think that Perry's on-going obsession with getting the rationales right is admirable—and also perceptive: it reflects an awareness of one of the central shortfalls of our time. In our normatively frantic and yet impoverished age, it might not be too strong to call Perry's project "prophetic."

But has Perry's relentless pursuit of the correct justifications succeeded? Opinions on that point will differ, no doubt. Speaking just for myself, I would say that I often disagree with Perry's conclusions, which suggests that I do not find his justifications persuasive. And I don't, most of the time. But this is merely a report, not a criticism. Under current conditions, persuasive justifications that would satisfy any sort of criteria of public accessibility —a condition to which Perry also seems committed—are difficult or impossible to come by. So what could we expect?

V. CONCLUSION

Things might be different if the country actually were united around the religious or biblical self-conception that Perry invoked, for a few pages at least, in *CCHR*. But as his own slide away from that conception even in that very book suggested, the biblical conception was already largely unavailable—as a general matter, that is—even as Perry was attempting ambivalently to invoke it.

So let us sum up. In *CCHR*, Perry argued hopefully that although the then current rationales for the progressive judicial project in advancing human rights were inadequate, the project might nonetheless be justifiable on a religious conception of the American community. Let us stipulate for purposes of argument that he was correct in this claim. The negative implication of his analysis was that the progressive project would *not* be justifiable—and hence would be unlikely over time to prosper?—if the religious conception were rejected. I am happy to agree with this negative corollary as well. And as things have developed, it is the gloomier and negative implicit claim—not the hopeful explicit one—that has turned out to be more prescient.

64. Michael J. Perry, *Why Excluding Same-Sex Couples from Civil Marriage Violates the Constitutional Law of the United States*, 2014 ILL. L. REV. 1887 (2014).