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MICHAEL PERRY’S INTEGRATIVE POLITICAL VISION

*M. Cathleen Kaveny**

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INTRODUCTION

First impressions are mistaken impressions—or so says common wisdom. Most of the time, of course, common wisdom is correct. But every once in a while, a first impression conveys—in a flash, in a single instant—a truth about a person that is only burnished and deepened by time and experience. That is the case with respect to my first impression of Michael Perry.

During a year I spent as a student in Hyde Park in the mid-1980s, I wandered into an interdisciplinary seminar on law and religion that Perry (then a professor at Northwestern Law School) was teaching with Robin Lovin (then on the faculty of the University of Chicago Divinity School). Perry immediately struck me as someone who fully integrated in both mind and heart the disciplines by which I was most fascinated. He was an established law professor with a specialization in constitutional law. At the same time, he was also thoroughly knowledgeable about debates in both philosophy and theology regarding the nature of human dignity, the importance of human sociality, and the challenges of living together with peacefulness and respect in a pluralistic society. He was open-minded, dialogical, and respectful of different views, even as he vigorously defended his own positions.

Most importantly, as I came to realize later, Michael Perry was committed to treating law as an equal conversation partner with the humanities, rather than merely as an instrument to implement the insights of the social sciences. During the mid-1980s, in the heyday of “law and economics” scholarship at the

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University Chicago,¹ this commitment struck me as equally revolutionary and compelling. Perry was also dedicated to treating the insights of religious traditions as fully capable of engaging with the secular disciplines of law, politics, and philosophy. He read *Theological Studies* (the most important American journal of Catholic theology) as well as the *Harvard Law Review*.

In my view, Perry's genuine respect for religious traditions as loci of intellectual inquiry and debate is what sets him apart from many other scholars—both religious and secular—in the field of law and religion. It is not uncommon for First Amendment specialists, including scholars and activists, to treat “religion” as an undifferentiated lump of controversial moral propositions held by one or more clusters of citizens; by their reckoning, both the lump of propositions and the citizens are to be managed with the tools of the law rather than substantively engaged on their merits. Some secular First Amendment scholars see those who believe in religious propositions as threatening the liberal polity,² while some religious First Amendment scholars see religious believers as threatened by liberalism and in need of protection against encroaching secularism.³

In my view, however, too few First Amendment scholars are inclined to see these propositions as calling for critical engagement on terms drawn from the religious tradition itself.⁴ In one respect, their approach is understandable, since established First Amendment jurisprudence does not permit judges to inquire into the merits of positions held by litigants on religious grounds. But legal scholars are not judges. They are free to enter discussion with academic theologians and religious ethicists who regularly question, reformulate, define, and distinguish the commitments of the faith communities to which they belong in much the same way that academic lawyers engage with the secular community. In retrospect, I now recognize that it is because Perry views Christian theological ethics as a living, developing tradition of inquiry rather than a hermetically sealed capsule of doctrines that he could effectively co-teach a doctoral seminar in the Divinity School with Robin Lovin. In fact, for many

¹ For a more detailed survey on the development of law and economics scholarship, see, e.g., GEORGE L. PRIEST, *THE RISE OF LAW AND ECONOMICS: AN INTELLECTUAL HISTORY* (2020).

² See, e.g., BRIAN LEITER, *WHY TOLERATE RELIGION?*, at xvii–xix (2013).

³ See, e.g., KEN STARR, *RELIGIOUS LIBERTY IN CRISIS: EXERCISING YOUR FAITH IN AN AGE OF UNCERTAINTY* (2021).

⁴ In this regard, Perry's work bears a great deal of resemblance to that of John T. Noonan, Jr., who treats both religious and legal traditions as capable of internal development. See, e.g., JOHN T. NOONAN, JR., *A CHURCH THAT CAN AND CANNOT CHANGE: THE DEVELOPMENT OF CATHOLIC MORAL TEACHING* (2005). I explore Noonan's thought on development and tradition in CATHLEEN KAVENY, *ETHICS AT THE EDGES OF LAW: RELIGIOUS MORALISTS AND THE AMERICAN LEGAL TRADITION* 3–34 (2018).

years, Perry was a regular participant in the annual meeting of the Society of Christian Ethics, a major venue for academic Christian moralists to reflect critically and constructively on their tradition.⁵

In Perry's hands, religious traditions are analogous to legal traditions in two ways. First, in both cases, many people mistakenly believe that the deliverances of both sets of traditions are simply self-interpreting commands backed by threats, whether those threats come from an omnipotent deity or a political ruler that is powerful enough to compel obedience.⁶ Second, despite what these people think, both law and religion actually involve traditions of inquiry characterized by complicated processes of reasoning.⁷ In both cases, even the process of recognizing a command as coming from the highest source, whether that source be the word of God or the words of a constitution, is not without complication and controversy. Consequently, studying both kinds of tradition together was not simply an idiosyncrasy. Rather, it was a path to intellectual enrichment.

For these reasons, Michael Perry has been not only a mentor to me but also a role model. In fact, it is precisely because he was, and remains, a role model that he has been such a powerful mentor. From the time I was an undergraduate at Princeton, I not only wanted to pursue the fields of law and ethics but I also wanted to *integrate* them. But what does it really mean to integrate these fields? Is "interdisciplinary" the equivalent of "integrative"? Or does integrative scholarship require something more? I was not able to articulate the answer to these questions at the time, but I instinctively recognized that Perry exemplified the type of scholar I aspired to be.

⁵ Descriptions of the purposes, history, and programs of the Society of Christian Ethics can all be found at its website. *About the Society of Christian Ethics*, THE SOCIETY OF CHRISTIAN ETHICS, <https://www.scethics.org/> (last visited May 10, 2022).

⁶ In religious studies, this idea comes from divine command ethics, whose fundamental insight is that forms of activity are good or bad because they are commanded or forbidden by God. There are many sophisticated forms of divine command ethics, which give human reason an important (but subordinate) role in moral decision-making. At the same time, many people hold a crude view of what it means to identify and follow a divine command. In the twentieth century, Christian divine command ethics is associated with the Protestant theologian Karl Barth. *See, e.g.*, WILLIAM WERPEHOWSKI, KARL BARTH AND CHRISTIAN ETHICS 3–57 (2010). In English legal theory, the idea that law is a command backed by the threat of a sovereign was given prominence by John Austin, sparking the development of legal positivism. There are many sophisticated forms of legal positivism that recognize the role of moral judgment in a legal system. *See, e.g.*, THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM (Torben Spaak & Patricia Mindus eds., 2021); *see also* Wilfred E. Rumble, *Legal Positivism of John Austin and the Realist Movement in American Jurisprudence*, 66 CORNELL L. REV. 986 (1981) (discussing the influence of English legal positivism in the United States).

⁷ For an account of both religion and law as traditions, see KAVENY, *supra* note 4, at 3–34.

As I reflect now on Perry's scholarship, his teachings, and his life, I would say that integrative academic work has three distinct components. First, it not only draws from two or more disciplines but also aims to create a conversation among those disciplines. Consequently, integrative scholarship takes care to explain the presuppositions of one field to practitioners of the other(s) so that all are equipped to carry out a common discussion. I remember vividly Perry's efforts to ensure that the law students in the interdisciplinary seminar understood how theology worked, while the theology students acquired a basic grasp of legal reasoning.

Second, scholarship that is integrative across disciplines recognizes the arguments internal to each discipline and is sensitive to the changing shape of the consensus with each discipline.⁸ Integrative scholarship does not take an isolated insight or proposition from one discipline and bring it into another field of inquiry, as if one were carrying a tightly wrapped package across a border. Not content merely to take the answers from one discipline into another, integrative scholarship shows how the questions that one discipline asks, and the presuppositions it brings to them, can change the shape of the discussion in another field—and vice versa.

Third, in my view, the work of a scholar dedicated to integrative scholarship evinces a kind of integration in the components of his or her own work. Years of reading intensively and extensively across disciplinary boundaries creates an expansiveness in both thought and writing. It generates an impetus to cast questions and concerns not in the terms of one field or the other, but in the terms of a unique and rich fusion of both. A scholar determined to live his or her intellectual life traversing disciplinary boundaries produces a body of work that is marked by those choices in a way that is far more radical than simply raiding another discipline for one or two helpful concepts (for example, raiding economics for the concept of Pareto optimality).⁹

My purpose in the Essay is to explore the integrative nature of Perry's writings. In Part I, I look at the three major foci of Perry's work, drawing out their interconnections and, more broadly, their normative assumptions about human beings and society. I argue that Perry's approach to constitutional interpretation, commitment to global human rights, and understanding of the

⁸ See, e.g., THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, at v (David M. Tubek & Alvaro Santos eds., 2006) (discussing the evolution of economic development models and their related legal reform efforts).

⁹ For an overview of Pareto optimality, see *Pareto Optimality*, Science Direct, <https://www.sciencedirect.com/topics/engineering/pareto-optimality> (last visited May 10, 2022).

place of religion in the American public square depend upon and instantiate his view of human beings as bearers of an inherent dignity and as individuals who express that dignity in a range of social relationships, which are facilitated and protected by human rights. Perry's work across all three spheres of his interests depends upon a robust political anthropology.

In Part II, I begin to show the relevance and power of Perry's approach by examining the broader legal and social context in which it operates. The contemporary culture wars have, in my view, splintered the practice of American constitutional interpretation. More specifically, they have resulted in a firmly bifurcated approach to the jurisprudence of due process rights that appears rigidly divided along political ideological lines.¹⁰ I examine the standoff that has developed in contemporary Fourteenth Amendment jurisprudence, which centers on the famous "Mystery Passage" extolling human autonomy and moral self-creation that appears in the majority opinion in *Planned Parenthood v. Casey*.¹¹ One side of the standoff, represented by *Washington v. Glucksberg*, downplays the importance of moral self-creation in declining to find a constitutionally protected right to assisted suicide.¹² The other side, found in *Obergefell v. Hodges*, emphasizes the importance of moral self-creation in justifying the extension of constitutional protection to same-sex marriage.¹³

In my view, the conflicting approaches in *Glucksberg* and *Obergefell* have brought Fourteenth Amendment jurisprudence to an impasse. In Part III, I show that Perry's integrative approach offers us a way beyond that impasse by overcoming a flaw ironically shared by both contesting approaches. Despite their differences, neither the *Glucksberg* majority nor the *Obergefell* majority acknowledges that judges need to incorporate evolving, communally articulated social and moral norms in their judgments of constitutional law. Instead, they each tend to point to a different external locus of moral authority. The *Glucksberg* majority prioritizes the moral judgments made in the past.¹⁴ If the Framers prohibited certain behavior, such as suicide, then it is not for contemporary constitutional interpreters to gainsay them.¹⁵ In contrast, *Obergefell* gives precedence to the moral judgments made by the contemporary, autonomous, self-creating individual.¹⁶ If an individual decides that self-creation

¹⁰ See *infra* notes 103–08 and accompanying text.

¹¹ 505 U.S. 833, 851 (1992).

¹² 521 U.S. 702, 735–36 (1997).

¹³ 576 U.S. 644, 681 (2015).

¹⁴ *Glucksberg*, 521 U.S. at 720–21.

¹⁵ *Id.* at 719.

¹⁶ *Obergefell*, 576 U.S. at 660–61.

requires a certain pattern of life, such as same-sex marriage, then it is not the task of constitutional interpreters to allow them to be thwarted.

Michael Perry offers a way beyond this impasse by recognizing that the constitutional interpretation is a task of political morality.¹⁷ The justices cannot offload, or pretend to offload, this task by pointing to an external data point that gives them the political moral judgment they need, whether that externality be the past or the contemporary, isolated individual. Perry's work highlights and acknowledges the communally informed moral-political judgments that are at stake in Fourteenth Amendment jurisprudence.¹⁸ He recognizes that what is at stake in constitutional interpretation is not just a political process but also a political vision about how fellow members of the community are to treat one another as brothers and sisters who have much in common and also who disagree about much as well.¹⁹ Perry's ability to draw on different sources and perspectives allows him to cut across rigid jurisprudential and ideological lines in his approach to constitutional controversies, such as abortion and same-sex marriage. In so doing, he may be able to reach the significant portion of Americans in the political and moral middle who do not line up fully behind either side in the culture wars.

I. AN INTEGRATIVE APPROACH TO SCHOLARSHIP

As Perry himself has observed (in the "Brief Autobiographical Statement" he provided to the authors of this Festschrift), his work over the past four decades has centered around three basic areas: (1) constitutional law; (2) human rights in a global perspective; and (3) political morality in a liberal democracy, in all of which he attends to the intersection of law and religion.²⁰ It is possible to treat these broad subject areas as autonomous fields of inquiry. Many scholars do. Yet, as Perry's later work makes increasingly clear, his normative commitments in each of these areas affect how he construes the nature, purpose, and fundamental tasks of the other fields. Moreover, the interconnections in the three facets of his work draw from and strengthen a coherent moral and social anthropology that animates Perry's work as a whole.

Let us begin with Perry's approach to constitutional law. Perry sketches his mature theory of constitutional adjudication in a democracy in Chapter Five of

¹⁷ See *infra* Part III.

¹⁸ See *infra* Part III.

¹⁹ See *infra* notes 154–56 and accompanying text.

²⁰ Michael Perry, Brief Autobiographical Statement (Oct. 6, 2020) (unpublished manuscript) (on file with author).

his latest book, *A Global Political Morality*.²¹ His approach exemplifies a balance of realism and idealism. Ideally, Perry would endorse a “weak form” of judicial review in a well-functioning democracy—a form that would give lawmakers the right to overrule or disregard a court’s interpretation of the constitution.²² Yet, he recognizes that in the United States, “strong form” judicial review is a deeply entrenched practice: the Supreme Court of the United States (SCOTUS) “exercises the power of judicial ultimacy: [that is,] the power to have what is, as a practical matter, the last word when ruling that a law is unconstitutional.”²³ At the same time, however, Perry maintains that the use of this power is not untrammelled, but is instead subject to norms of political morality. In his view, the relevant norms are drawn not only from the U.S. Constitution itself but also from the morality of human rights and, in particular, the right to democratic governance.²⁴

Recognizing the tension between strong-form judicial review and the sovereignty of the people, Perry articulates his approach to constitutional interpretation, maintaining that SCOTUS can and should “proceed deferentially” when presented with a claim that the government has violated a constitutional norm.²⁵ The deference Perry calls for extends to two judgments: (1) whether the norm allegedly violated is in fact a constitutional norm, and (2) assuming it was, whether the governmental action actually violated that norm.²⁶ More specifically, Perry maintains that in most cases, SCOTUS should uphold the challenged legislation if there is a reasonable argument that either (1) the norm in question is not a constitutional norm under his “General Principle” of

²¹ MICHAEL J. PERRY, *A GLOBAL POLITICAL MORALITY: HUMAN RIGHTS, DEMOCRACY, AND CONSTITUTIONALISM* 96–97 (2017).

²² *Id.*

²³ *Id.* at 98.

²⁴ *Id.* at 99.

²⁵ *Id.*

²⁶ *Id.* at 108–11.

constitutional interpretation,²⁷ or (2) the norm, even if it is a constitutional norm, was not violated.²⁸

But Perry's "General Principle" is subject to a very important "Exception." Perry argues that if a case raises a claim that "is part of the morality of human rights [that] is claimed to have constitutional status," then the presumptions are *partially* reversed.²⁹ SCOTUS should vindicate the right hypothetically if there *is* a reasonable argument that the human rights claim is a constitutionally protected right.³⁰ At the same time, Perry does not alter the requirement that SCOTUS should uphold the challenged law or other act if there is a reasonable argument that it does *not* violate the constitutional right in question.³¹

²⁷ Perry defines a constitutional norm in two ways:

First. N is a constitutional norm if constitutional enactors made N a constitutional norm—if they entrenched N in the Constitution of the United States; if other later enactors did not entrench in the Constitution a norm that supersedes N; and if no norm that supersedes N has become constitutional bedrock. . . . *Second.* N is a constitutional norm if N is constitutional bedrock—if N is a bedrock feature of the constitutional law of the United States—in this sense: N has become, in the words of Robert Bork, "so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions," that SCOTUS should and almost certainly will continue to deem N constitutionally authoritative even if it is open to serious question whether enactors ever entrenched N in the Constitution.

Id. at 108–09.

²⁸ *Id.* at 108.

²⁹ *Id.* at 111 (emphasis omitted). Perry writes the following:

In this section, I defend an exception ('the Exception') to the General Principle. If in a case before SCOTUS a right *that is part of the morality of human rights* is claimed to have constitutional status, SCOTUS should rule that the right has such status if the judgment is reasonable that one of the two conditions specified in the preceding section—at least one—is satisfied.

Id.

³⁰ Perry argues that vindication would better coordinate constitutional law with the morality of human rights:

The fundamental rationale for the General Principle is that by exercising the power of judicial review according to the General Principle, SCOTUS would bring the constitutional law of the United States into closer alignment with the morality of human rights; SCOTUS would reduce—not eliminate, but reduce—the extent to which the constitutional law of the United States is morally problematic, as evaluated from the perspective of human rights—from the perspective, in particular, of the human right to democratic governance, a core aspect of which is the presumptive right of a majority to prevail. But the very same rationale supports the exception, because by exercising the power of judicial review according to the Exception, SCOTUS would bring the constitutional law of the United States into closer alignment with the morality of human rights.

Id.

³¹ Application of the General Principle, therefore, turns on the argument of whether a constitutional norm was violated, not simply whether there was a constitutional norm:

Assume that even if it is well established that the norm is a constitutional norm, there is a serious

In Perry's analytical matrix, then, judges face two key questions: (1) how to identify a constitutional norm, and (2) how to identify a human rights claim. Regarding the first question, Perry outlines two paths for an alleged constitutional right to achieve the status of a constitutional norm. First, a norm is a constitutional norm if "constitutional enactors made it a constitutional norm" and it has been superseded neither by amendment nor by the development of a norm that itself counts as "constitutional bedrock."³² This last phrase points to the second path for a norm to achieve constitutionally protected status. Even if not enacted by the Framers, a norm can be constitutionally protected if it has been accepted as "part of the fabric of American life" and for that reason has been incorporated into the bedrock of the constitutional tradition.³³

Perry identifies himself as an originalist in his approach to constitutional interpretation.³⁴ In one sense, of course, this self-description is accurate. Perry pays careful attention to the text of the Constitution, as well as to the meaning the text would have conveyed at the time of the Framing.³⁵ In another sense, however, the originalist label is misleading because Perry does not interpret the text solely in light of his best reconstitution of the Framers' intentions.³⁶ Nor does he insist on finding that meaning in the broader philosophical and

question whether the challenged government action violates the norm. I argued in the preceding section of this chapter that when confronted with that question, SCOTUS should rule in the negative if there is room for a reasonable difference in judgment about whether the challenged government action violates the norm. Nothing I have said in this section supports an exception to that conclusion. Even if the norm that the challenged government action is claimed to violate is a constitutional right that is part of the morality of human rights, SCOTUS should rule in the negative on the question whether the challenged governmental action violates the right if there is room for a reasonable difference in judgments about whether the challenged government action violates the right—if, that is, the judgment is reasonable that the challenged government action does not violate the right.

Id. at 112–13 (emphasis omitted).

³² *Id.* at 108.

³³ *Id.* at 109.

³⁴ Perry carefully qualifies what he means by the term "originalist":

More than one religion marches under the banner of "originalism". . . . I want to stress, therefore—before I am mistakenly praised by some for having saved my soul and condemned by others for having lost it—that the originalist approach I elaborate and defend . . . is not the originalist approach usually associated with "conservative" attacks on the modern Supreme Court.

MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 9 (1994) (emphasis omitted). Indeed, Perry returns to this distinction many times throughout the chapters of the book to extract "originalism" from the popular association with conservatism.

³⁵ *Id.* at 8.

³⁶ On Perry's shift in perspective, see Frederick M. Gedicks, *Conservatives, Liberals, Romantics: The Persistent Quest for Certainty in Constitutional Interpretation*, 50 *VAND. L. REV.* 613, 614 (1997).

theological commitment likely to have been dominant at the time of the Framing, such as Protestant congregationalism and a nebulous form of deism. Instead, Perry configures and interprets the requirements of the Constitution within the broader normative context of a contemporary global human rights framework. In fact, he views the enactment of the Constitution, particularly the Bill of Rights, as a major step component in the development of that framework. Consequently, the Constitution stands at the intersection of two traditions of interpretation—constitutionalism and human rights morality—and is able to be drawn upon and required to be accountable to both. These two traditions, rightly understood, are mutually implicating and supporting in at least three ways.

First, according to Perry, a global human rights framework serves first to justify and contextualize the American practice of constitutional interpretation. Perry writes the following:

A democracy should both entrench in its fundamental law the human rights to which it is (or professes to be) committed and authorize its courts to protect the rights by enforcing them. Thus understood, constitutionalism so strongly complements the political morality of human rights that we may fairly regard it as an integral part of that morality.³⁷

Second, and related, for Perry, a global human rights framework supports and helps guide the interpretation of key structural aspects of the American constitutional framework. The Constitution's establishment of several layers of representative democracy instantiates the global human right of democratic governance, including the right to vote.³⁸ The First Amendment right of freedom of expression operationalizes the fundamental human right of intellectual freedom, of which the aspects of inquiry, discussion, and debate are essential to the flourishing of democratic government.³⁹ Other constitutional rights, such as the right to equal protection of the law, specify the fundamental underpinning of democratic rule: the right to moral equality.⁴⁰ It is only because every human being is entitled "to be treated as the moral equal of every other human being,"⁴¹ that it makes sense to organize ourselves in a democratic polity in the first place.

³⁷ PERRY, *supra* note 21, at 89–90.

³⁸ *Cf. id.* at 48–52 (discussing principles in the Universal Declaration of Human Rights that mirror the government envisioned by the U.S. Constitution).

³⁹ *Cf. id.* at 52–55 (discussing rights in the Universal Declaration of Human Rights that are very similar to those in the U.S. Constitution).

⁴⁰ *Id.* at 55–62.

⁴¹ *Id.* at 56.

Other rights in the Constitution limit the reach of democratic power in order to preserve the equal moral dignity of each person.⁴² Perry casts the First Amendment religion clauses in terms of the global human right of religious and moral freedom.⁴³ Because he sees the right of religious freedom as so intimately connected with individual moral dignity, he calls for a broad interpretation of that right, which he interprets as covering acts or omissions with “a religious or spiritual essence.”⁴⁴ He asks, for example, “Wouldn’t a generous application of the right to religious and moral freedom involve resolving the benefit of the doubt in favor of the conclusion that the choice at issue is animated by ‘core or meaning-giving beliefs and commitments’—and is therefore protected by that right?”⁴⁵

Third, Perry’s account not only gives human rights morality a justificatory role to play in the process of constitutional interpretation but also provides a purposeful, almost teleological role regarding the identification and articulation of substantive constitutional rights. To see how this might work, we can ask ourselves as citizens the following question: how should we decide what rights we should allow to become part of the fabric of our life, and therefore part of the bedrock of the Constitution for American life in the future?

For Perry, the Exception to his General Rule of constitutional interpretation points the way toward the answer to this question: a claim of human rights that reasonably could be viewed as a constitutional right ought to be treated as a constitutional human right, even if there is a reasonable argument to the contrary.⁴⁶ Once it has been treated as such a right by the courts and accepted as such a right by the people, then it fully becomes such a right because it has now been hardened into constitutional bedrock.⁴⁷ We, as a people living in a constitutional democracy, ought to strive to incorporate global human rights into our lives, our law, and ultimately, our constitutional interpretation.⁴⁸

⁴² *Id.* at 63–87.

⁴³ *See id.* at 83 n.57 (detailing the content of the religion clauses); *cf. id.* at 64–65 (explaining portions of the Universal Declaration of Human Rights relating to religious freedom that are similar to those in the U.S. Constitution).

⁴⁴ *Id.* at 68 (“‘It is the religious or spiritual essence of an action,’ reasoned the Canadian Supreme Court, ‘not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection.’” (citing *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 588 (Can.)).

⁴⁵ *Id.* at 69.

⁴⁶ *See supra* note 29.

⁴⁷ *See, e.g.,* PERRY, *supra* note 21, at 60 n.39 (2017) (discussing how a human right became a “bedrock feature of the constitutional law of the United States”).

⁴⁸ *See infra* Part III.

As my last point suggests, Perry's commitment to global human rights not only infuses his approach to constitutional interpretation but also animates his political morality. But this explanation does not do justice to Perry's commitments. He writes that "the morality of human rights is not just a political morality, it is a political morality—indeed, the first truly global political morality in human history."⁴⁹ Perry recognizes that some, even many, human rights are legal rights in that they are recognized and enforceable by the machinery of a legal system.⁵⁰ Nonetheless, he argues that the fundamental nature of human rights is moral rather than legal:

Some human rights—the human rights the violation of which truly does violate the "act toward all human beings in a spirit of brotherhood" imperative or an equivalent norm—are moral rights. If we call such human rights "true" human rights, we may say that all true human rights are moral rights.⁵¹

Like Aristotle, Perry believes human beings are *zoa politika*—political animals.⁵² Not only do we need to advocate on behalf of the well-being of other human beings but we also need to work with them to forge a flourishing common life together in our polis. In fact, in *Love and Power*, Perry describes himself as advocating a "neo-Aristotelian liberalism"⁵³ for our liberal polity, which requires articulating and defending an "'ecumenical' politics."⁵⁴ Perry's approach to political dialogue in the public square is reflected in his understanding of political morality. In fact, one can easily reframe his contribution to the debate about the role of religion, and other comprehensive worldviews, in public discussion in terms of his injunction to "act toward all human beings in a spirit of brotherhood."⁵⁵

⁴⁹ *Id.* at 7.

⁵⁰ *Id.* at 19–23.

⁵¹ *Id.* at 20 (emphasis omitted).

⁵² ARISTOTLE, *POLITICS*, bk. I, at 1253a1 (W. D. Ross trans., 1998) ("[M]an is by nature a political animal . . .").

⁵³ "The liberalism of ecumenical politics is a neo-Aristotelian liberalism." MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* 138 (1991).

⁵⁴ *Id.* at 44–45 ("'[E]cumenical' politics aspires to discern or achieve, in a religiously and morally pluralistic context, a common political ground. Moreover, as I later explain, ecumenical politics, like ecumenical theology, is pluralist: It values moral (including religious-moral) pluralism.").

⁵⁵ Perry asks this question:

What reason (or reasons) do we have—if indeed we have any—to take human rights seriously; more precisely, what reason do we have, if any, to live our lives in accord with the imperative, which is articulated in the very first article of the foundational human rights document of our time, the UDHR, and which is the very heart of the morality of human rights: "Act towards all human beings in a spirit of brotherhood."

PERRY, *supra* note 21, at 8.

Not surprisingly, then, Perry advocates for the adoption of an Aristotelian mean with regard to neuralgic questions on the role of religion in the public square:

The serious challenge, in my view, is to define a middle ground between, on the one side the position of [those] . . . who would largely exclude religious-moral discourse from political-justificatory practice and, on the other side, the position of those who would bring religious-moral discourse to bear in a sectarian, divisive way.⁵⁶

More specifically, Perry rejects the call for a “Holy Grail of neutral/impartial political justification” for two major reasons.⁵⁷ First, he contends that “a practice of political justification that tolerates only neutral/impartial arguments is not itself neutral/impartial.”⁵⁸ Second, he maintains that “only a politics in which beliefs about human good, including disputed beliefs, have a central place is capable of addressing our most basic political questions.”⁵⁹ How, then, do we discuss these matters in ways that are not counterproductive and excessively divisive? Perry responds to this challenge with a call to “ecumenical political dialogue,” a practice that he describes, in a way fitting for an Aristotelian, largely in terms of the virtues that foster its success. Important personal qualities include cognitive competency (e.g., being well-informed),⁶⁰ respect for one’s interlocutors,⁶¹ honesty,⁶² and sincerity.⁶³ The list of necessary qualities, in Perry’s view, also includes a commitment to fallibilism (e.g., embracing a self-critical understanding rationality) and pluralism (i.e., the belief that there is something to learn from other ways of life).⁶⁴

Perry’s “cardinal dialogic virtues” are two: “public intelligibility and public accessibility.”⁶⁵ These virtues enable Perry to treat religious and secular worldviews in the same way and on the same terms. Both fully belong in the

⁵⁶ PERRY, *supra* note 53, at 5.

⁵⁷ *Id.* at 28.

⁵⁸ *Id.* at 15.

⁵⁹ *Id.* at 29. For Perry, considering beliefs about human good is overdue:

If Ackerman, Nagel, or others want to persist in the quest for a neutral/impartial politics, so be it. Understandably, others of us believe that the quest for the Holy Grail of neutral/impartial political justification is spent and that it is past time to take a different, more promising path.

Id. at 28.

⁶⁰ *Id.* at 99.

⁶¹ *Id.*

⁶² *Id.* at 99–100.

⁶³ *Id.*

⁶⁴ *Id.* at 100–05.

⁶⁵ *Id.* at 105–12.

public square as long as they conform to his dialogic virtues, which “inhibit sectarian imperialism . . . the very antithesis of ecumenical dialogue.”⁶⁶ Public intelligibility is “the habit of trying to elaborate one’s position in a manner intelligible or comprehensible to those who speak a different religious or moral language.”⁶⁷ Public accessibility is “the habit of trying to defend one’s position in a manner neither sectarian nor authoritarian.”⁶⁸ Perry’s critique of sectarianism is not targeted solely at religious believers. In fact, it calls for the repudiation of any “rel[iance] on *experiences or premises* that have little if any authority beyond the confines of one’s own moral or religious community.”⁶⁹ Analogously, he rejects “authoritarian” defenses because they “rel[y] on *persons or institutions* that have little if any authority beyond the confines of one’s own community.”⁷⁰

The foregoing pages have, I hope, been sufficient to give some sense of the lines of connection across the three major areas of Michael Perry’s scholarship. His approach to both the form and the substance of political morality is not only integrative but also inclusive. In his discussion on public morality, he grants the possibility of contributing to the discussion about the public good to the widest range of sources, both religious and secular.⁷¹ In treating the development of global human rights morality, Perry does not present that development as a purely secular accomplishment of lawyers and political philosophers but rather highlights the contributions of religious thinkers and religious thought to the project.⁷² Moreover, in working out his constitutional theory, Perry carefully sifts through religious contributions to public debate. He is neither a culture warrior nor an all-or-nothing thinker. For example, he maintains the broader legitimacy of conservative Christian political efforts to protect unborn human beings while arguing that their efforts to deny marriage to same-sex couples is unacceptably sectarian. One may agree or disagree with him on either issue. At the same time, however, it is impossible not to acknowledge that Perry exemplifies the ecumenical political virtues he advocates.

⁶⁶ *Id.* at 108.

⁶⁷ *Id.* at 106.

⁶⁸ *Id.*

⁶⁹ *Id.* (emphasis added).

⁷⁰ *Id.* (emphasis added).

⁷¹ Emphasizing the consonances between common morality and the morality of religious traditions, Perry reflects that “the great religious traditions, Indic as well as semitic, tend to converge with one another in affirming that an essential part of what it means to be (truly, fully) human, an essential requirement of the meaningful life for everyone, is to accept (some) responsibility for the basic well-being of the Other.” *Id.* at 90.

⁷² PERRY, *supra* note 21, at 29–41.

The integration—and the inclusiveness—achieved by Perry’s work is not accidental. It depends on key anthropological, social, and epistemological assumptions that undergird his vision and support his project. His core commitment is anthropological: he believes in the equal moral dignity of every human being. His belief in this regard tracks most Christian concepts of the human being as made in the image and likeness of God. In fact, many classical theologians specified the *imago dei* as the specifically human capacity to reason, deliberate, and choose.⁷³ At the same time, deliberation and choice are never isolated events. Human beings are essentially social. We live together and learn together in overlapping communities extending over time. We are members of families and towns, regions, and nations, as well as churches, synagogues, and mosques. Consequently, while Perry wants to give great weight to the individual and social conscience,⁷⁴ he does not confer upon their deliverances an exemption from discussion and debate. Individually and collectively, our consciences can be mistaken.

Perry also thinks that human beings and human communities have much in common. He recognizes that “there is . . . a good common to every human being, a *human* and not merely local good.”⁷⁵ Perry readily acknowledges that this good may need to be defined in pluralistic terms and expressed in ways sensitive to the differences of time, place, and culture. Nonetheless, he contends that it exists. Consequently, he believes that it is both necessary and possible for human beings to work together despite their differences, aiming to coordinate their well-being and their visions of the good. Indeed, because a key aspect of human flourishing is expressing concern for the other, Perry thinks that such coordination is a moral imperative.⁷⁶

Perry’s pluralism, in short, is both bounded (in that it is limited by the needs and aspirations of our common human nature) and optimistic (in that it views discussion and debate as potentially productive and unifying). He believes that

⁷³ For a more detailed discussion on this topic, see generally ANTHONY A. HOEKEMA, *CREATED IN GOD’S IMAGE* (1986).

⁷⁴ PERRY, *supra* note 21, at 65–67.

⁷⁵ PERRY, *supra* note 53, at 32.

⁷⁶ He writes, for example, the following:

A theist—in particular, an adherent of one of the three Abrahamic religions—may say something to this effect: *The perfection for which God created us, the true happiness (eudaimonia) that is our fundamental end, consists in part, in discerning—in our hearts, so to speak, if not also in our minds—the Other (i.e., every “other,” every human being) as sacred—as a beloved child of God and as a sister or brother to oneself—and in loving the Other.*

PERRY, *supra* note 21, at 32.

it is good that we are *all* here, working together, despite our differences. Of the United States in particular, he writes that “in our religiously and morally pluralistic domestic context, there is good reason to believe that significant premises about human good, significant standards of political-moral judgment, are authoritative for many (though not for all) persons and groups in American society.”⁷⁷

II. CULTURE WARS AND CONSTITUTIONAL INTERPRETATION

Perry’s vision of the possibilities of cooperation across differences is appealing. I believe it to be true. But in the United States, we now find ourselves in a situation in which many Americans no longer believe it to be true. The culture wars in the United States have been simmering for decades now. Perhaps they have always been with us.⁷⁸ In my view, however, their most recent configuration congealed in the early- to mid-1990s around issues of sex, gender, and family.

In 1995, Pope John Paul II issued an encyclical titled *Evangelium Vitae* (the “Gospel of Life”), which framed the dominant cultural struggle in the West as one between a “culture of life” and a “culture of death.”⁷⁹ In his view, the “culture of life” protects the elderly, the unborn, and all vulnerable human beings against intentional killing or other forms of violence.⁸⁰ Moreover, it values traditional heterosexual family structure as the best place to protect vulnerable life, rejecting contraception and premarital sex.⁸¹ The “culture of death,” in contrast, privileges individual fulfillment and financial success, valuing autonomy over human connection and interdependence. It features legalized abortion and euthanasia, recognizes extramarital sex (both heterosexual and homosexual), and champions contraception as a responsible choice.⁸²

The Pope’s theme of “culture wars” fell on receptive ground in the United States. Just a few years earlier, University of Virginia professor James Davison Hunter had published a book called *Culture Wars: The Struggle to Define America*,⁸³ which analyzed political and social divisions among Americans. He traced the divisions between religious, socially conservative citizens and their

⁷⁷ *Id.* at 41.

⁷⁸ For a history, see ANDREW HARTMAN, A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS (2d ed. 2019).

⁷⁹ JOHN PAUL II, EVANGELIUM VITAE 37, ¶ 21 (1995).

⁸⁰ *Id.* ¶ 87.

⁸¹ *Id.* ¶ 90 (“A family policy must be the basis and driving force of all social policies.”).

⁸² *Id.*

⁸³ JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

secular, more socially liberal counterparts on a range of issues from sex to public education to gun rights, arguing presciently that these divisions not only reflect different policy choices but also instantiate very different world views.⁸⁴ On the one hand, liberal secularists deride religious conservatives as ignorant and intolerant, powerless to resist the inexorable march of social progress.⁸⁵ On the other hand, religious conservatives question the very definition of progress.⁸⁶ Believing themselves to be under siege since the 1960s, conservative Catholics, Evangelical Protestants, and Jews set aside their theological differences to organize politically and push back against what they viewed as an aggressive, encroaching secularist mindset.⁸⁷

The three main foci of Perry's intellectual interests have substantially affected and themselves been affected by the culture wars. In my view, for example, the intensive and extensive discussion about Rawls's concept of public reason served only to deepen the suspicion with which religiously affiliated social conservatives viewed secular elites.⁸⁸ They deeply resented the implication that their presence—and their beliefs—in the American public square needed to be cabined and controlled, while secularists were free to speak their minds without restraint.⁸⁹ Moreover, the appeal of progressives to the language of human rights did not apply a balm to conservative worries. In fact, many religious conservatives were strongly influenced by Alasdair MacIntyre's scathing account of rights, as in *After Virtue*.⁹⁰ MacIntyre argues that rights are arbitrarily defined fictions that prop up liberal society, which he views as excessively individualistic, emotivistic, and manipulative.⁹¹ While not willing to dismiss all rights—particularly the right to religious freedom—many religious and social conservatives found in MacIntyre's work a framework that helped them deflect liberal claims to rights regarding sexual freedom and abortion.⁹²

⁸⁴ *Id.* at 31–34.

⁸⁵ *Id.* at 140–41.

⁸⁶ *Id.* at 137.

⁸⁷ See 1 *CULTURE WARS: AN ENCYCLOPEDIA OF ISSUES, VIEWPOINTS, AND VOICES* (Roger Chapman ed., 2010).

⁸⁸ See JOHN RAWLS, *THE LAW OF PEOPLES* (2002). A helpful, scholarly exploration of the difficulties from the perspective of religious believers can be found in *RELIGION AND CONTEMPORARY LIBERALISM* (Paul J. Weithman ed., 1997). On the idea of backlash by conservative Christians, see Phil Ryan, *Stout, Rawls, and the Idea of Public Reason*, 42 *J. RELIGIOUS ETHICS* 450 (2014).

⁸⁹ See, e.g., STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

⁹⁰ ALASDAIR MACINTYRE, *AFTER VIRTUE* (3d ed. 2007).

⁹¹ *Id.* at 70.

⁹² MacIntyre's argument has been popularized—and in my view, distorted—by those who think he literally advocates the creation of hermetically sealed Christian communities. See, e.g., ROD DREHER, *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION* (2018).

But it is the third prong of Perry’s interests—constitutional interpretation—that intersects most closely with the culture wars. As James Davidson Hunter pointed out long ago, a key aspect of the battle was the struggle to control the law, particularly the courts that interpret the law.⁹³ In this struggle, religious conservatives have arguably emerged as the victors. They successfully advocated a textualist and originalist approach to constitutional interpretation—an approach that strongly limited the judicial development of constitutional rights over time.⁹⁴ Moreover, they successfully portrayed those that adopted a more developmental approach to constitutional interpretation—in a manner consonant with the broader common law tradition—as “making the law” by usurping the power of the legislative branch.⁹⁵ During the four years in which Donald J. Trump was president, the decades of efforts on the part of the Federalist Society to assume control of the federal courts came to fruition.⁹⁶ Trump appointed Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett to the Supreme Court, thereby ensuring that the Court will be dominated for the foreseeable future by a 6-3 conservative majority.⁹⁷

The divisions on the Court are glaring. At an event sponsored by the American Bar Association, liberal Justice Sonia Sotomayor said that “[t]here is going to be a lot of disappointment in the law, a huge amount.”⁹⁸ A few weeks earlier, in a speech delivered at the McConnell Center at the University of Louisville, conservative Justice Amy Coney Barrett, denied that the justices were “a bunch of partisan hacks.”⁹⁹ Senator Mitch McConnell, who spearheaded her confirmation just weeks before the presidential election that brought defeat to her presidential nominator, emphasized her bona fides from the perspective of social conservatives: “[She] does not try to ‘legislate from the bench.’ He also

⁹³ HUNTER, *supra* note 83, at 250–87.

⁹⁴ For an introduction, see JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2007).

⁹⁵ Robert George, *Judicial Usurpation and the Constitution: Historical and Contemporary Issues*, THE HERITAGE FOUND. (Apr. 11, 2005), <https://www.heritage.org/report/judicial-usurpation-and-the-constitution-historical-and-contemporary-issues>.

⁹⁶ Jason Zengerie, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html>.

⁹⁷ See David Montgomery, *Conquerors of the Courts: Forget Trump’s Supreme Court Picks. The Federalist Society’s Impact on the Law Goes Much Deeper.*, WASH. POST MAG. (Jan. 2, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/>.

⁹⁸ Ariane de Vogue, *Justice Sonia Sotomayor: ‘There Is Going to Be a Lot of Disappointment in the Law, a Huge Amount,’* CNN, <https://www.cnn.com/2021/09/29/politics/sonia-sotomayor/index.html> (Oct. 7, 2021, 8:58 PM).

⁹⁹ Chandelis Duster, *Justice Amy Coney Barrett Says Supreme Court Is ‘Not a Bunch of Partisan Hacks’*, CNN, <https://www.cnn.com/2021/09/13/politics/amy-coney-barrett-supreme-court-not-partisan/index.html> (Sept. 13, 2021, 9:45 AM).

noted she is from ‘Middle America’ and the only current justice to not have attended Harvard or Yale.”¹⁰⁰

Notwithstanding Justice Barrett’s protestations, Americans likely believe that the culture wars have infested the Supreme Court. A recent Gallup Poll, released just days after Justice Barrett’s speech at the McConnell Center, revealed that only forty percent of Americans approved of the job being done by the justices.¹⁰¹ The poll revealed a strong correlation between those who disapprove of the Court’s ideology (as too liberal or too conservative) and those who think it is doing a bad job.¹⁰²

Moreover, there is reason to think the Supreme Court has indeed been infested by the culture wars, at least regarding their jurisprudence on the issues most important to many warriors on both sides. At present, in my view, there are two fundamentally different approaches to the identification of fundamental rights uneasily at play in the Court’s active jurisprudence. It is difficult not only to reconcile the approaches but also to get their proponents to engage with one another in a constructive, non-polemical way. The two conflicting approaches are exemplified by the sharply contrasting jurisprudential frameworks in *Glucksberg*, which declined to recognize physician assisted suicide as a constitutional right, and *Obergefell*, which conferred constitutional protection on same-sex marriage.¹⁰³ The *Glucksberg* majority adopts a historically oriented approach to the identification of due process rights, protecting claims that are “deeply rooted in this Nation’s history and tradition.”¹⁰⁴ According to the majority opinion, “[o]ur Nation’s history, legal traditions, and practices thus provide the crucial ‘guideposts for responsible decision-making,’ that direct and restrain our exposition of the Due Process Clause.”¹⁰⁵ In contrast, the *Obergefell* majority’s approach is less concerned with history and more focused on the contemporary enculturation of enduring political values: “The fundamental liberties protected by this [Due Process] Clause include most of the rights enumerated in the Bill of Rights. In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate

¹⁰⁰ *Id.*

¹⁰¹ Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021), <https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx>.

¹⁰² *Id.*

¹⁰³ *Washington v. Glucksberg*, 521 U.S. 702, 735–36 (1997); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

¹⁰⁴ *Glucksberg*, 521 U.S. at 720–21 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

¹⁰⁵ *Id.* at 721 (citations omitted).

choices that define personal identity and beliefs.”¹⁰⁶ The central question for the *Obergefell* majority is what sort of claims must be protected to defend these fundamental values in a changing society.¹⁰⁷

At first glance, *Glucksberg* and *Obergefell* seem to occupy mutually exclusive jurisprudential universes. But, they are connected by a case that looms behind them and even before them, a case that galvanizes both approaches, for good or ill: *Planned Parenthood of Southern Pennsylvania v. Casey*.¹⁰⁸ For the *Obergefell* majority, *Casey* is a lodestar, offering a pellucid and compact articulation of the purposes and scope of the Due Process Clause. For the *Glucksberg* majority, in contrast, *Casey* is a death star, a disastrous and destructive misadventure in constitutional interpretation. *Casey*, in my view, is the epicenter of the current configuration of the culture wars in the constitutional realm.

The result in *Casey* itself was not radical. In a 5-4 decision, *Casey* maintained constitutional protection for a right to abortion while crafting a new standard that permits more regulation of the practice than was permissible under *Roe v. Wade*.¹⁰⁹ Under the *Casey* test, it is constitutionally impermissible for a state regulation to impose an “undue burden” on a woman’s right to seek an abortion before viability.¹¹⁰ An unduly burdensome law is one that, “by purpose

¹⁰⁶ *Obergefell*, 576 U.S. at 663.

¹⁰⁷ *Id.* at 659 (“The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.”).

¹⁰⁸ 505 U.S. 833 (1992).

¹⁰⁹ From a policy perspective, *Casey* recast *Roe v. Wade*, 410 U.S. 113 (1973), in three basic ways. First, it explicitly recognized the State’s interest in nascent life:

The woman’s liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.

Casey, 505 U.S. at 869. Second, *Casey* “reject[ed] the trimester framework, which we do not consider to be part of the essential holding of *Roe*.” *Id.* at 873. Third, *Casey* did not adopt a hermeneutic of suspicion toward nearly all regulation of abortion, a suspicion which reached its high-water mark in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), and began to recede in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

¹¹⁰ While undue burdens are not permitted, the Court recognized that the State may impose some burdens:

The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.

Casey, 505 U.S. at 876.

or effect,” puts a “substantial obstacle” in the way “of a woman seeking an abortion.”¹¹¹

Casey exemplifies the culture war in three ways. First, the Court itself was bitterly divided about both outcome and rationale.¹¹² Second, many social conservatives, like the conservative justices on the Court, viewed the case as a vehicle for overturning *Roe*.¹¹³ Third, social conservatives felt deceived and betrayed by the three Republican appointees to the Court who crafted the majority opinion that saved the constitutional right to abortion: Sandra Day O’Connor and Anthony Kennedy (both appointed by Ronald Reagan), as well as David Souter (appointed by George H.W. Bush).¹¹⁴ In short, for social conservatives, it was not enough that the new constitutional test signaled a significant reduction in the Court’s hostility to the regulation of abortion and growing acknowledgement of the value of unborn life. In their view, *Roe* required not merely reformation but rather thoroughgoing repudiation. *Casey* was objectionable because it further entrenched the constitutional right to abortion.¹¹⁵

¹¹¹ *Id.* at 877.

¹¹² Justices O’Connor, Kennedy, and Souter articulate the revised test in Part IV of the opinion. *Id.* at 869–79. Both Justice Stevens and Justice Blackmun would have applied a test more protective of a right to abortion. *Id.* at 911–22 (Stevens, J., concurring in part and dissenting in part); *id.* at 922–43 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Scalia, joined by Chief Justice Rehnquist, Justice White, and Justice Thomas, would have more greatly restricted that right. *Id.* at 979–1002, (Scalia, J., concurring in the judgment in part and dissenting in part). Consequently, the net effect is that the test articulated in Part IV controls.

¹¹³ See, e.g., Ed Kilgore, *For the Anti-Abortion Movement, It’s Been a Long Road Back from the Great Betrayal of 1992*, N.Y. MAG. (Dec. 1, 2021), <https://nymag.com/intelligencer/2021/12/anti-abortion-movement-nears-victory-29-years-after-betrayal.html>.

¹¹⁴ See, e.g., Lawrence Baum & Neal Devins, *Federalist Court: How the Federalist Society Became the De Facto Selector of Republican Supreme Court Justices*, SLATE (Jan. 31, 2017), <https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html>.

¹¹⁵ See, for example, the blistering editorial in the neo-conservative magazine *First Things*:

Media chatter notwithstanding, *Casey* is neither an accommodation of conflicting views in the abortion debate nor a movement of even one inch toward an accommodation. The Court majority is absolutely right when it says that it absolutely affirms “the essential holding of *Roe v. Wade*.” O’Connor, Kennedy, and Souter are not the “moderates” finding a middle way between extremes. On the substantive question, their way is the way of Blackmun and Stevens. In an apocalyptic concurring opinion that depicts “two worlds” at war—the children of darkness vs. the children of light—Justice Blackmun, the author of *Roe*, celebrates *Casey* by declaring that once again “the flame has grown bright.”

Editorial, *Abortion and a Nation at War*, FIRST THINGS (Oct. 1992), <https://www.firstthings.com/article/1992/10/editorial-abortion-and-a-nation-at-war>.

From the perspective of religious and social conservatives, however, *Casey* manifested a far more general—and lethal—jurisprudential error. It inscribed into constitutional jurisprudence a paean to autonomy that seems to adopt an individualist and constructivist account of moral values—an account in which each person creates norms by choosing them, as opposed to recognizing and responding to moral norms that exist independently of individual human choice. The offending passage, often called the “Mystery Passage,” is widely attributed to Justice Kennedy:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹¹⁶

These words celebrate a notion of individual self-creation, including moral-creation, which has been applauded by progressive jurists as a basis for the identification and protection of new personal rights. Not surprisingly, it is also loathed by religious and social conservatives.¹¹⁷ In their view, human beings are required to identify and observe moral norms that make a claim on them regardless of personal choices—for some, those norms are enunciated in an authoritative religious text; for others, they are discernable from the nature and structure of human reality.¹¹⁸ While there are a wide variety of accounts of “biblical ethics” and “natural law morality,” these accounts are united in their repudiation of the idea that morality is confected by the choice of each individual.¹¹⁹

In the past twenty-five years, the Mystery Passage has proven itself to be a litmus test—or lighting rod—for the justices serving on a deeply divided Supreme Court. More troublingly, it has also precipitated two opposing views of Fourteenth Amendment interpretation that proceed more in wary isolation than in dialogue with each other, at least in key majority opinions. At the present moment, these two opposed views of the jurisprudence of Fourteenth

¹¹⁶ *Casey*, 505 U.S. at 851.

¹¹⁷ See, e.g., William Haun, *The “Mystery of Life” Makes Law a Mystery*, PUB. DISCOURSE (July 26, 2013), <https://www.thepublicdiscourse.com/2013/07/10091/>.

¹¹⁸ See generally Michael Quinlan, *The Sources of Morality* (Nov. 15, 2011) (unpublished manuscript) (on file at <https://ssrn.com/abstract=2970899>) (conducting a survey of various sources of human morality).

¹¹⁹ See, e.g., Carl E. Braaten, *Reclaiming the Natural Law for Theological Ethics*, J. LUTHERAN ETHICS (Oct. 1, 2007), <https://www.elca.org/JLE/Articles/484>.

Amendment rights are inscribed in constitutional law, where they remain at an uneasy standoff.

First, consider *Glucksberg*, a case in which the Supreme Court declined to recognize a constitutional right to physician-assisted suicide. While citing *Casey* on ancillary points, Chief Justice Rehnquist's opinion of the Court does not engage, much less criticize, the Mystery Passage. Instead, it proceeds to construct an alternative, skeptical stance toward the recognition of new constitutional rights.¹²⁰

The *Glucksberg* majority sets a two-pronged test for a purported right to qualify for constitutional protection under the Due Process Clause.¹²¹ First, courts should look to see if the purported right or liberty interest is "deeply rooted in this Nation's history and tradition."¹²² Second, courts should require a "careful description" of the right or liberty interest.¹²³ Needless to say, the second element takes logical precedence over the first. Rejecting the Ninth Circuit's autonomy-focused description as to whether there exists "a liberty interest in determining the time and manner of one's death," the *Glucksberg* majority instead draws its description from the laws that must be struck down to protect the right.¹²⁴ Consequently, what is at issue is "a right to commit suicide which itself includes a right to assistance in doing so."¹²⁵ Once the majority settles on this description of the right, the first component of the analysis becomes evident. Most importantly, since suicide was long prohibited by state law, no right to commit suicide, either with or without assistance, can be deeply rooted in our nation's history and tradition.¹²⁶

The *Glucksberg* Court neither ignores *Casey* nor demeans it. But it deftly resizes and reframes it. More specifically, after quoting the Mystery Passage, the Court proceeds in two steps to deny it any expansive implications. First, it

¹²⁰ The Court notes the difficulty in recognizing new rights:

But we "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.

Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citing Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

¹²¹ *Glucksberg*, 521 U.S. at 720–21.

¹²² *Id.* (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

¹²³ *Id.*

¹²⁴ *Id.* at 722–23.

¹²⁵ *Id.* at 723.

¹²⁶ *Id.* at 719.

interprets the Mystery Passage as describing “in a general way and in light of our prior cases” the Fourteenth Amendment rights that have been identified according to the two-step process for identifying constitutional rights set forth in *Glucksberg*.¹²⁷ The Court sidesteps controversy, giving no hint that some rights (e.g., the right to abortion) might be justified by the Mystery Passage but not by the *Glucksberg* test. Second, the Court tacitly treats the Mystery Passage as a rhetorical trope rather than as a serious constitutional test: “That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.”¹²⁸

Needless to say, the preceding sentence from *Glucksberg* was not quoted by the majority in *Obergefell*, which held that the Fourteenth Amendment protects a fundamental right to marry that extends to same-sex couples.¹²⁹ Authored by Justice Kennedy, the majority opinion in *Obergefell* reads like a master class in the jurisprudential implications of the Mystery Passage. Its first two sentences signal the path of reasoning taken by the opinion:

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.¹³⁰

Echoing and amplifying the themes of the Mystery Passage, Kennedy’s opinion emphasizes the importance of marriage to individual dignity, self-creation, and intimacy:

Choices about marriage shape an individual’s destiny. As the Supreme Judicial Court of Massachusetts has explained, because “it fulfils

¹²⁷ *Id.* at 727.

¹²⁸ *Id.*

¹²⁹ *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015). Kennedy grounds the recognition of the constitutional right to marry in four principles, which he argues are as crucial to same-sex couples as to opposite sex couples:

(1) “[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy.”

(2) “[T]he right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”

(3) “[T]he right to marry . . . safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”

(4) “[T]his Court’s cases and the Nation’s traditions make clear that marriage is a keystone of the Nation’s social order.”

Id.; see *id.* at 665–69.

¹³⁰ *Id.* at 651–52.

yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.¹³¹

While Kennedy certainly recognizes the social dimensions of marriage, he focuses on the institution as a protected form of personal intimacy: "Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."¹³² Since same-sex couples need and receive the same benefits from the institution of marriage, the Court concludes that it is a violation of the principle of equal protection to deny them these benefits.¹³³

The majority opinion in *Obergefell* deals with *Glucksberg* in a way analogous to the *Glucksberg* approach to *Casey*. First, it articulates a historically and morally developmental approach to the identification of Fourteenth Amendment rights that implicitly repudiates *Glucksberg*'s approach, just as *Glucksberg* implicitly repudiated *Casey*'s. Regarding the task of articulating fundamental rights, Kennedy writes the following:

[The Court] is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.¹³⁴

Second, the *Obergefell* majority opinion treats the *Glucksberg* test itself both gingerly and dismissively. Kennedy briefly acknowledges the objection that, according to *Glucksberg*'s requirements, a "careful description" of the right at issue is not "the right to marry but rather a new and nonexistent 'right to same-sex marriage.'"¹³⁵ Rather than addressing the conflict head-on, he treats the case as distinct legal entities. Kennedy writes the following:

Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted

¹³¹ *Id.* at 666 (quoting *Goodridge v. Dept. Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003)).

¹³² *Id.* at 667.

¹³³ *Id.* at 675.

¹³⁴ *Id.* at 664 (citation omitted).

¹³⁵ *Id.* at 671 (quoting Brief for Respondent at 8 (No. 14-556)).

suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.¹³⁶

Glucksberg gently distinguished and thereby deftly sidelined *Casey*. In due time, *Obergefell* did much the same to *Glucksberg*. But in fact, these cases are not readily distinguishable on the basis of their treatment in American legal history. Abortion, assisted suicide, and sexual activity between members of the same sex were all criminalized activities for long periods in American life. More recently, each practice has been vigorously defended as a fundamental aspect of an individual's rightful autonomy over the course of his or her own life.¹³⁷ Consequently, it is impossible to avoid the conclusion that the two cases instantiate two diametrically opposed stances toward the identification of fundamental rights. Mutual, gentle treatment of one another in the two very different majority opinions cannot disguise this fact—or the fact that their respective approaches correspond to the entrenched opposing factions of the culture wars.

It is becoming increasingly clear, however, that many Americans do not rigidly define themselves morally or politically in the terms set by warring groups of social activists. Consider, for example, differences between recent polls on same-sex marriage and abortion. While culture warriors tend either to oppose (or to support) both abortion and same-sex marriage, many Americans distinguish between the two issues. According to a 2021 Gallup poll, seventy percent of Americans support same-sex marriage—a record high.¹³⁸ Climbing from twenty-seven percent in 1997, the approval level reached sixty percent in 2015, the year *Obergefell* was handed down. For the first time, in 2021, a small majority of Republicans (fifty-five percent) supported same-sex marriage.¹³⁹

In contrast, polls suggest that the shape of the abortion debate has moved very little over the past fifty years. According to Gallup, for example, in 2021, thirty-two percent of the population said that “abortion should be legal under any circumstances,” thirteen percent said that it “should be legal in most circumstances,” thirty-three percent said that it should be legal “only in a few circumstances,” and nineteen percent said that it should be “illegal in all

¹³⁶ *Id.*

¹³⁷ John McChesney & Deborah Tedford, *States Weigh Gay Marriage, Other Sensitive Issues*, NPR (Nov. 5, 2008, 12:01 AM), <https://www.npr.org/templates/story/story.php?storyId=96600599>.

¹³⁸ Justin McCarthy, *Record-High 70% in U.S. Support Same-Sex Marriage*, GALLUP (June 8, 2021), <https://news.gallup.com/poll/350486/record-high-support-same-sex-marriage.aspx>.

¹³⁹ *Id.*

circumstances.”¹⁴⁰ Three percent of the respondents expressed no position.¹⁴¹ In 1994, the first year for which Gallup provides data on this question, the responses were virtually identical.¹⁴² Thirty-three percent said that abortion should be legal in any circumstances, thirteen percent said that it should be legal in most circumstances, thirty-eight percent said that it should be legal only in a few circumstances, and thirteen percent said that it should be illegal in all circumstances. Three percent expressed no position.¹⁴³

One might respond, “So what?” The key obligation of the Supreme Court is to articulate timeless constitutional principles—consequences be damned. On this view, one might insist that the constitutional rights to abortion and same-sex marriage stand or fall together. Either one goes with *Glucksberg* or the Mystery Passage—there is no middle ground. But I believe this is a false dichotomy for many of the reasons expressed by Alexander Bickel in his classic work, *The Least Dangerous Branch*.¹⁴⁴ Bickel recognized that the Supreme Court was tasked with articulating constitutional principles.¹⁴⁵ At the same time, he clearly saw that task as inevitably entangled with and responsive to the political community it serves.¹⁴⁶

First, according to Bickel, in the common law system, principle is neither ahistorical nor insensitive to the prevailing moral and political commitments:

I have suggested that the rule of principle in our society is neither precipitate nor uncompromising, that principle may be a universal guide but not a universal constraint, that leeway is provided to expediency along the path to, and alongside the path of principle, and, finally, that principle is evolved conversationally not perfected unilaterally.¹⁴⁷

Second, while the Court may be charged with leading the articulation of our nation’s fundamental moral commitments, it is not meant to substitute its own commitments for those of the people:

What is meant, rather, is that the Court should declare as law only such principles as will—in time, but in a rather immediate future—gain

¹⁴⁰ *Abortion*, GALLUP, <https://news.gallup.com/poll/1576/abortion.aspx> (last visited May 10, 2022).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

¹⁴⁵ *Id.* at 203.

¹⁴⁶ *Id.* at 220.

¹⁴⁷ *Id.* at 244.

general assent. . . . The Court is a leader of opinion, not merely a register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed.¹⁴⁸

Those who adopt the *Glucksberg* approach to the identification of constitutional rights may object that they do not violate Bickel's injunction because they are so parsimonious in identifying new constitutional rights. This objection misses Bickel's point. The values of the American people evolve over time—including their conception of what counts as a fundamental right. For the Court to so tightly tether the nation's fundamental constitutional commitments to the view of the framers about particular meanings is to ignore the fact that the framers themselves understood that they were drafting a charter that needed to be flexible enough to meet circumstances they could not foresee.¹⁴⁹ The men who justified revolution from English rule cannot sensibly be interpreted as attempting to preserve their own legal and moral commitments in constitutional amber for all time—nor even as requiring every development to be encapsulated in a constitutional amendment. After all, they are sons of the common law tradition, retained by the American colonies even as they threw off British rule.¹⁵⁰

III. A WAY FORWARD: MICHAEL PERRY ON THE BENCH

As Bickel's work suggests, the Court can betray the people by stymying the development of constitutional principles as well as by forcing such development too quickly. Bickel also suggests that the Court can betray the people by clinging to a particular framework for too long, articulating broad constitutional principles like due process or equal protection: "Everybody knows that the lifetime of applied principle is often no longer than one or two generations."¹⁵¹ In my view, both *Casey*'s amorphous Mystery Passage and the rigid two-step framework found in *Glucksberg* may be reaching the end of their usefulness as an applied (or applicable) expression of constitutional principle because neither is able to encompass the complexities of American views on fundamental questions like same-sex marriage and abortion.¹⁵²

¹⁴⁸ *Id.* at 239.

¹⁴⁹ See, e.g., Michael Kammen, "A Vehicle of Life": *The Founders' Intentions and American Perceptions of Their Living Constitution*, 131 AM. PHIL. SOC'Y 325, 329–31 (1987).

¹⁵⁰ For a nuanced history, see generally Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951). For more recent work, see generally WILLIAM E. NELSON, *E PLURIBUS UNUM: HOW THE COMMON LAW HELPED UNIFY AND LIBERATE COLONIAL AMERICA, 1607-1776* (2019).

¹⁵¹ BICKEL, *supra* note 144, at 244.

¹⁵² *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

But what is the way forward? In this Part, I suggest that Michael Perry's integrative approach might offer us some insights. It is not a blueprint, of course. But it is a very helpful inspiration. In Chapter Six of *A Global Political Morality*, Perry illustrates his constitutional theory by offering five hypothetical judicial opinions on some of the most controversial cases to come before the U.S. Supreme Court: “[C]apital punishment, raced-based affirmative action, same-sex marriage, physician-assisted suicide, and abortion.”¹⁵³

One might say Perry's approach is equally opposed (from a jurisprudential perspective) to the Mystery Passage and the *Glucksberg* test. That claim may seem counterintuitive. But as I indicated earlier, neither of these two approaches to law incorporate substantive moral and political commitments into the heart of their frameworks. On the one hand, taken by itself, the Mystery Passage outlines a purely individualist and constructivist account of morality—it implies that each individual defines the “meaning of the universe” for purposes of living her own life. On the other hand, taken by itself, the *Glucksberg* test is purely positivistic. What ultimately matters is that the right is “deeply rooted” in our history and tradition—not that it withstands critical moral scrutiny here and now.

I am not saying, of course, that Kennedy and Rehnquist do not incorporate normative values into their respective analyses of abortion and same-sex marriage or physician-assisted suicide. They most certainly do. What I am saying, however, is that their respective ways of framing the issue do not put the question of normative political values at the center of the discussion of Fourteenth Amendment rights. They advance their respective moral and political views tacitly rather than explicitly. The Rehnquist approach says, “It's nothing personal. We are not deliberately favoring political and moral conservative values—it just so happens that the values deeply rooted in our nation's past (as we read them) are conservative.” The Kennedy approach says, “It's not personal on our part either—it just so happens that the values chosen by individuals gripped with the task of self-creation (as we see them) tend to be creative and innovative.” But such responses are likely to be cold comfort to their critics. Consequently, they can leave those who do not share those views feeling ignored, manipulated, and even disrespected.

For Perry, in contrast, the normative commitments of the human rights framework, as inspired by and specified in the American constitutional tradition, are front and center. Perry's central commitment, as I explained above,

¹⁵³ PERRY, *supra* note 21, at 119.

highlights the dignity and inviolability of all human beings.¹⁵⁴ He straightforwardly works out the jurisprudential implications of that commitment in each of his hypothetical opinions. He makes judgments about those implications, directly engaging with (rather than sidestepping) arguments opposed to his own. Moreover, he interprets opposing views in a broad spirit of intellectual charity. By so doing, he indicates that the holders of these views still *count* as fellow citizens, even if they did not *win* in this particular case. This is the polar opposite of a culture war approach.

Consider Perry's treatment of same-sex marriage. While he ultimately confers constitutional protection on the practice, he does not do so in way that ignores the moral, social, and political concerns of those on the other side of the issue.¹⁵⁵ For example, while he begins with an equal protection argument, he does not end with it—in part because his view of equal protection is morally nuanced. Perry understands the right to equal protection as the following:

[A]t its core, the right not to be treated by government less well than another is treated, or otherwise disadvantaged, based on the demeaning view that one is morally inferior, in this sense: not worthy, or less worthy than some others, of being treated—in the words of the Universal Declaration of Human Rights—"in a spirit of brotherhood."¹⁵⁶

Thus, the core of equal protection is not differential treatment but rather differential treatment *based on a demeaning view*. While Perry does not downplay the shameful treatment of the LGBTQ+ community over the years, he takes pains to acknowledge that not all opposition to same-sex marriage is rooted in a demeaning view—even when the opposition extends to sexual activity between same-sex couples.¹⁵⁷ Taking official Catholic teaching seriously, he notes that the Catholic Church affirms the equal dignity of all persons regarding sexual orientation but insists that permissible sexual activity only takes place in a lifelong, heterosexual marriage (a demanding teaching for heterosexual people as well).¹⁵⁸ Consequently, Perry does not ground protection for same-sex marriage in the Equal Protection Clause, since “adjudging same-sex sexual conduct to be immoral does not assert, imply, or presuppose that those who

¹⁵⁴ See, e.g., MICHAEL J. PERRY, HUMAN RIGHTS IN THE CONSTITUTIONAL LAW OF THE UNITED STATES 30 (2013).

¹⁵⁵ See, e.g., PERRY, *supra* note 21, at 140–42.

¹⁵⁶ *Id.* at 138.

¹⁵⁷ *Id.* at 140, 142.

¹⁵⁸ *Id.* at 140–41.

engage in the conduct are morally inferior human beings.”¹⁵⁹ By this step, he affirms his continuing right to participate in the conversation of religious conservatives. They are not to be dismissed as bigots because of their moral judgments about sexual relationships outside of traditional marriage.

Next, Perry turns from equal protection to the right to privacy as a potential basis for a constitutional status of same-sex marriage.¹⁶⁰ Notably, he does not define the right to privacy in a way that suggests all moral values are constructed rather than discovered, as the Mystery Passage arguably does. Instead, hewing closely to precedent, he interprets that right as “a right that protects certain fundamental aspects of moral freedom: the freedom to live one’s life in accord with one’s moral convictions and commitments.”¹⁶¹ This framing of the right to privacy highlights the emphasis many religious believers place on the rights and duties of conscience—that an agent’s subjective discernment and appropriation of a moral obligation is experienced not as pure self-creation, but rather as a claim that the moral order exerts upon him or her.

While the right to privacy may be “implicate[d]” by laws prohibiting same-sex marriage, Perry insists that the right is not necessarily “violate[d]” by them.¹⁶² Additional analysis is necessary. The judgment of violation depends on whether the state has a compelling interest for enacting such laws. This step of evaluation does not limit compelling interests to considerations susceptible to cost-benefit analysis. Perry recognizes the place of “*morality-based* objecti[ons]” to same-sex marriage, which turn on the conviction that sexual activity between members of the same sex is immoral as well as “*non-morality based* objecti[ons],” which he defines as entailing no such conviction.¹⁶³

In his view, falling in the latter category are public policy initiatives dedicated to preserving “the health of the institution of traditional (i.e., opposite-sex) marriage” and “protecting the welfare of children”—both weighty objectives.¹⁶⁴ But he maintains that “no credible argument supports the proposition that the exclusion policy serves either objective.”¹⁶⁵ Perry’s hypothetical justice does not hide the fact that judging involves, well, *judgment*. Others may and will disagree with his judgment. But because he has so carefully

¹⁵⁹ *Id.* at 142.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 145.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ PERRY, *supra* note 21, at 145–46.

¹⁶⁵ *Id.* at 146. By “exclusion policy,” Perry means the exclusion of same-sex couples from the legal institution of marriage.

explained the nature, focus, and presuppositions of the judgment involved, those who disagree are not excluded from further conversation—indeed, they know precisely where to take it up.

What about morality-based objections to same-sex marriage? Significantly, Perry does not dismiss them out of hand. He writes that “[e]xcluding same-sex couples from civil marriage obviously serves the government objective of not taking a step that would legitimize conduct that many believe to be immoral: same-sex sexual conduct.”¹⁶⁶ Perry’s hypothetical judge does not argue that these beliefs are benighted or wrong. Instead, he simply maintains that the arguments for the immorality of same-sex sexual conduct are *sectarian* and therefore cannot trump the right to privacy.¹⁶⁷ Even here, however, Perry shows that he understands those who disagree with him on their own terms. Quite significantly, he does not reduce religiously infused moral beliefs to a crude divine command ethics. He notes that many religious believers do not think that sexual activity between persons of the same sex is wrong because God forbids it; instead, they believe God forbids it because it is immoral.¹⁶⁸

Why, then, is it sectarian to believe that same-sex sexual activity is morally wrong? While he does not say so explicitly, Perry tacitly finds the answer in the meaning of the term—the Latin word *secare* means *to cut*.¹⁶⁹ To be a *sect* is to be *cut off* from the larger community. On this view, sectarianism produces a kind of political factionalism. Consequently, Perry does not look at the pedigree of the argument against same-sex relations in the manner that many public reason theorists do (e.g., whether they are based in scripture or reason). Instead, he focuses on the nature and social location of the people who hold to those arguments here and now.¹⁷⁰ Perry invokes John Courtney Murray’s remarks to Cardinal Richard Cushing on contraception: “Same-sex marriage has received official approval by various religious groups within the community. It is difficult to see how the state can refuse to countenance, as contrary to public morality, a relationship that numerous religious leaders and other morally upright people approve as morally good.”¹⁷¹

¹⁶⁶ *Id.* at 148.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See id.* at 148; *Secō*, OXFORD LATIN DICTIONARY: ENGLISH-LATIN (James Morwood ed., 3d. ed. 2012).

¹⁷⁰ *Id.* at 150 (discussing the arguments of Catholic bishops and popes).

¹⁷¹ *Id.* at 150–51 (citing Memorandum from John Courtney Murray on Contraceptive Legislation to Cardinal Cushing (n.d.) (on file with Woodstock Theological Library at Georgetown University) (available at <https://www.library.georgetown.edu/woodstock/murray/1965ff#:~:text=In%20the%20mid%2D1960s%20Richard,%20immorality%20of%20artificial%20contraception>)).

Perry's approach here, like Murray's over half a century ago, is *practical*, not *ideological*. Unlike the *Glucksberg* test, it does not overwhelmingly privilege the moral perspectives dominant two centuries ago. Unlike the Mystery Passage, it does not separate autonomous self-creation from moral responsibility or divorce the exercise of autonomy from communal context and communal values. Moreover, it recognizes that no moral norms are self-interpreting, even moral norms that are embedded in normative texts such as religious scriptures or those that are judged consonant with human nature and human social life. Interpreting those norms requires full debate and discussion, particularly in a democratic society such as our own.

Focusing on a current, stable, and growing consensus about values allows the Supreme Court to avoid extremes and (as Bickel said) to help *shape* a national consensus without *imposing* one.¹⁷² For example, unlike the Mystery Passage, Perry's approach would allow the Court to hold that polygamy is not protected by a right to privacy, since it remains subject to broad-based moral opposition, which encompasses secular feminists and religious conservatives. Unlike the *Glucksberg* test, Perry's approach would not threaten to sweep away *Eisenstadt v. Baird*, which conferred constitutional protection on the right of the unmarried to use contraception.¹⁷³ His approach recognizes that we are the constitutional heirs of the Founding Fathers. They are our ancestors, but they are not our brothers and sisters with whom we are called to make a family here and now.

CONCLUSION

I will conclude this long, appreciative essay by picking a small bone with Michael Perry. As I noted earlier, Perry highlights the distinctive features of his constitutional theory by drafting hypothetical Supreme Court opinions on controversial cases.¹⁷⁴ What I want to highlight now is that he does not pen his opinions in his own name but under a pen name, which is "Justice Nemo."¹⁷⁵ In Latin, "nemo" means "nobody" or "no one." So, Perry's stirring hypothetical opinions are written by Justice Nobody.

But that can't be right. Nor can it be consistent with Perry's theory overall. In fact, the overarching point of Michael Perry's entire body of work is that no human being is "nobody." Every human being is somebody or someone. Perry's

¹⁷² BICKEL, *supra* note 144, at 239 ("The Court . . . must lead opinion, not merely impose its own . . .").

¹⁷³ 405 U.S. 438, 454–55 (1972).

¹⁷⁴ PERRY, *supra* note 21, at 119.

¹⁷⁵ *Id.*

political morality reflects his convictions regarding *the inalienable dignity of each and every human being*, which he interprets through the lens of Article 1 of the Universal Declaration of Human Rights.¹⁷⁶ Taken together, Perry's writings defend the proposition that "no human being is less worthy than any other human being—of being treated 'in a spirit of brotherhood.'"¹⁷⁷ Every human being is a socially situated someone or somebody—a brother or sister in our human family—who has rights and duties because of their identity, needs, relations, and roles.

So, no one is actually "Nemo," not even a hypothetical justice of the Supreme Court of the United States. I would therefore urge Perry to allow Justice Nemo to retire after a long and distinguished service and to confirm a new, vigorous Justice Aliquis to his hypothetical bench. In Latin, "aliquis" means "someone" or "somebody." I look forward to reading Michael Perry's next set of hypothetical Supreme Court opinions—under the *nom de plume* of Justice Aliquis, or Justice Somebody. There remains a lot of hard judicial work for Justice Aliquis to do.

¹⁷⁶ PERRY, *supra* note 154, at 29–30.

¹⁷⁷ *Id.* at 56.