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HUMAN RIGHTS, CONSTITUTIONAL RIGHTS, AND JUDICIAL REVIEW: COMPARING AND ASSESSING MICHAEL PERRY'S EARLY AND CONTEMPORARY ARGUMENTS

Daniel O. Conkle*

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INTRODUCTION

I have been a student of Professor Michael J. Perry for more than four decades. In the late 1970s, in classes at The Ohio State University College of Law, I experienced first-hand his extraordinary command of constitutional law and theory, his precise organization and logic, and his contagious intellectual enthusiasm. Influenced by his inspirational example, I was moved to become a constitutional law teacher and scholar myself. As such, I have been and remain a student of constitutional law and theory, and therefore of Professor Perry. And I have learned and profited enormously from his tightly reasoned, insightful, trail-blazing, and provocative work.

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Over the course of his remarkable career, Professor Perry has written extensively on a variety of topics, and he has been broadly open to critique and competing perspectives. From one book or article to the next, he has reconsidered, clarified, and modified his positions and arguments, embracing and exhibiting a salutary model of scholarly development and maturation. In this Essay, I will not attempt to survey Perry's voluminous work or map the various steps of his decades-long scholarly evolution. Instead, I will focus narrowly on selected aspects of his work in the area of constitutional law and theory.

More specifically, I will address and evaluate Perry's approach to the Supreme Court's exercise of judicial review in individual rights cases—that is, in cases presenting claims of constitutionally protected individual rights. In fact, I will consider two different Perry approaches: that of “Early Perry” and that of “Contemporary Perry.” These two approaches are drawn from what (as of this writing) can be seen to represent the bookends of Perry's thinking on the constitutional rights of individuals and their protection by the Supreme Court: his very first book, published in 1982,¹ and his most recent, published thirty-five years later, in 2017.² Early Perry embraced an aggressive form of judicial activism, urging the Supreme Court to test political judgments through an open-ended search for political-moral truth.³ Contemporary Perry, by contrast, advocates an originalist, but highly nuanced, model of judicial review, contending that there is a global political morality of human rights and that this global morality should influence the interpretation of American constitutional law.⁴ I am critical of Early Perry but find Contemporary Perry's theory attractive, albeit with caveats.

In Part I, I will identify three criteria for evaluating competing models of judicial review in individual rights cases: (1) majoritarian self-government, (2) judicial objectivity and competence, and (3) functional justification. Using these criteria, Part II will assess Early Perry. I will argue that Early Perry's posited search for political-moral truth provided a compelling functional justification for his model of judicial review but that, conversely, the model faltered badly under my remaining criteria—majoritarian self-government, as well as judicial objectivity and competence. In Part III, at considerably greater length, I will explore, analyze, and evaluate Contemporary Perry's complex and subtle

¹ MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (1982).

² MICHAEL J. PERRY, *A GLOBAL POLITICAL MORALITY: HUMAN RIGHTS, DEMOCRACY, AND CONSTITUTIONALISM* (2017).

³ See *infra* Part II.A.

⁴ See *infra* Part III.A.2.

arguments. As I will explain, Contemporary Perry's theory, viewed in the abstract, satisfies each of my three criteria to a substantial degree. His model of judicial review would serve a powerful function by bringing American constitutional law into closer alignment with the political morality of human rights even while accommodating majoritarian self-government and the need for judicial objectivity and competence. Moving from an abstract account to a more fine-grained analysis of Contemporary Perry's elaborations and applications of his model, I will add caveats to my positive appraisal, suggesting that the model might not be as objective as it seems and that, as a result, it might permit the Supreme Court to exercise discretion in a manner that could significantly diminish the role of majoritarian self-government. I will end the Essay with concluding observations. I will summarize my principal points; highlight Professor Perry's dramatic transformation from Early Perry to Contemporary Perry; and identify a possible path for future scholarly inquiry.

I. JUDICIAL REVIEW IN INDIVIDUAL RIGHTS CASES: CRITERIA OF EVALUATION

Writing in 1962, Professor Alexander M. Bickel famously identified the "counter-majoritarian difficulty."⁵ As Bickel understood, our representative democracy rests on the consent of the governed or, more precisely, the consent of a majority of those governed, making judicial review "a deviant institution in the American democracy."⁶ At a minimum, judicial review is in serious tension with the principle of majoritarian self-government in individual rights cases—that is, in cases presenting claims of constitutionally protected individual rights. Why should the Supreme Court, a body of unelected, life-tenured jurists, be permitted to nullify majoritarian policies by declaring that they violate constitutional rights? According to Bickel, the answer is not obvious, and the practice requires a normative justification.⁷ "The search must be for a function," he concluded, "which might (indeed, must) involve the making of policy, yet which differs from the legislative and executive functions; which is peculiarly suited to the capabilities of the courts; [and] which will not likely be performed elsewhere if the courts do not assume it."⁸

Bickel's insights suggest grounds for evaluating the exercise of judicial review in individual rights cases. Because the Supreme Court might employ

⁵ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

⁶ *Id.* at 18; *see id.* at 16–21.

⁷ *Id.*

⁸ *Id.* at 24.

various sorts of decisionmaking methodologies, including various forms of originalism or nonoriginalism, normative theories of judicial review must be assessed with reference to the particular methodologies that they propose. Bickel's observations can be understood to generate three criteria of evaluation, each of which is a matter of degree.⁹

The first and most obvious criterion is that of majoritarian self-government.¹⁰ Designed to address the counter-majoritarian difficulty, this criterion asks how or to what extent the Court's decisionmaking can be reconciled with the fundamental principle of majoritarian self-government.

Second, there is the criterion of judicial objectivity and competence.¹¹ As Bickel suggested, the Supreme Court's role should be well-suited to the judicial office.¹² Courts are not "naked power organ[s]."¹³ Rather, as Justice Cardozo insisted, their task is that "of a translator, the reading of signs and symbols given from without."¹⁴ To the fullest extent possible, the Supreme Court's decisionmaking should be principled and consistent. It should be based on objectively determined values, not merely the Justices' own, and the determination of these values should be within the judicial ken.

Finally, there is the criterion of functional justification.¹⁵ To justify judicial review, Bickel explained, "[t]he search must be for a function"¹⁶ that is sufficiently compelling to support the practice. Accordingly, this criterion asks how or to what extent the Court's individual rights decisionmaking serves an important function in contemporary American government.

II. EARLY PERRY

A. *Early Perry's Theory of Judicial Review*

In his first book, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary*,¹⁷

⁹ I first identified these criteria in the context of substantive due process. See Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 80–81 (2006). But the criteria readily extend to individual rights cases more generally.

¹⁰ *Id.* at 80.

¹¹ *Id.* at 81.

¹² BICKEL, *supra* note 5, at 24.

¹³ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

¹⁴ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 174 (1921).

¹⁵ Conkle, *supra* note 9, at 81.

¹⁶ BICKEL, *supra* note 5, at 24.

¹⁷ PERRY, *supra* note 1. For an analysis of the book beyond that which is presented here, see Daniel O.

Professor Perry equated human rights with constitutional rights. “By ‘human rights,’” Early Perry explained, “I mean simply the rights individuals have, or ought to have, against government under the ‘fundamental’—constitutional—law.”¹⁸ And he went on to advocate a remarkably broad role for the Supreme Court in the identification and protection of such rights.

Perry maintained that, properly understood, the text and original meaning of the Constitution (including its amendments) do not confine, and do little to inform, the Supreme Court’s decisionmaking in individual rights cases. Originalism, he explained, simply cannot justify the individual rights that have been and should be recognized by the Supreme Court.¹⁹ Perry rejected arguments for expanding the original meaning by reading it to embody broad principles, as opposed to more specific judgments. As originally understood, he concluded, the Constitution’s power-limiting provisions reflected “plainly *narrow*” intentions and “discrete, determinative value judgments about what particular sorts of political practices government ought to forswear.”²⁰ As a result, he concluded, “virtually all of [the Supreme Court’s contemporary] constitutional doctrine regarding human rights” is the product of nonoriginalist decisionmaking.²¹

Eschewing originalism in favor of “(a fierce) judicial activism,”²² Early Perry embraced a decidedly nonoriginalist and extremely expansive approach to judicial review. In so doing, he defended the Court’s contemporary decisions and urged it to go further. Judicial review in individual rights cases, he contended, should be designed to advance an American commitment to “moral evolution”—a commitment “to bring our collective (political) practice into ever closer harmony with our evolving, deepening moral understanding.”²³ He envisioned the Supreme Court as a moral prophet whose prophetic voice and wisdom could and would lead the country toward morally correct answers to individual rights questions. Judicial review, he wrote, “represents the institutionalization of prophecy.”²⁴

Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry’s Constitutional Theory and Beyond*, 69 MINN. L. REV. 587, 601–24 (1985).

¹⁸ PERRY, *supra* note 1, at 2 n.†.

¹⁹ *Id.* at 91.

²⁰ *Id.* at 71.

²¹ *Id.* at 91. Using then-common academic terminology, Early Perry referred to originalist review as “interpretive” and nonoriginalist as “noninterpretive.” *Id.* at 71.

²² *Id.* at 138.

²³ *Id.* at 99.

²⁴ *Id.* at 98.

But how, exactly, were the Justices to perform this function? How were they to discern the answers that are morally correct? Perry's answer was bold and provocative. The Justices would and should rely on their own values:

The problem of how to proceed, when dealing with a difficult human rights issue, is not different for the justice than it is for the legislator. . . . [T]he justice, like the legislator, will inevitably conclude that some particular political-moral principles (perhaps even a particular political-moral system) are better than others. Inevitably each justice will deal with human rights problems in terms of the particular political-moral criteria that are, in that justice's view, authoritative.²⁵

Thus, even as he conceded that his position was "radical," Perry insisted that "the ultimate source of decisional norms is the judge's own values"—albeit values informed and tested, he hoped, by "a very deliberate search for right answers."²⁶ In short, according to Early Perry, the Justices should recognize and protect, as constitutional rights, whatever individual rights they personally regard as human rights worthy of legal recognition and protection.²⁷

B. Evaluating Early Perry's Theory of Judicial Review

Considering my criteria of evaluation in reverse order, Early Perry offered a functional justification for his approach that was profound and powerful. He posited an American obligation, grounded in "the American people's understanding of themselves,"²⁸ to promote moral growth in the world by providing the right answers to individual rights questions:

The American people still see themselves as a nation standing under transcendent judgment: They understand . . . that morality is not arbitrary, that justice cannot be reduced to the sum of the preferences of the collectivity. They persist in seeing themselves as a beacon to the world, an American Israel, *especially in regard to human rights* ("with liberty and justice for all").²⁹

To advance the country's own moral evolution and to fulfill its global role, America could not rely merely on the will of the people, which is morally

²⁵ *Id.* at 111.

²⁶ *Id.* at 123.

²⁷ In an article published a few years after his book, Perry argued, by analogy to scriptural interpretation, that the text of the Constitution can be read to support a prophetic understanding of judicial review. See Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 563–64 (1985).

²⁸ PERRY, *supra* note 1, at 97.

²⁹ *Id.* at 98.

fallible. Instead, wrote Perry, “[t]here is a higher criterion in terms of which this will can be judged; it is possible that the people may be wrong.”³⁰

According to Perry, when legislative and executive officials address political-moral issues, they are concerned mainly with the desires of their constituents.³¹ As a result, they “tend simply to rely on established moral conventions and to refuse to see in such issues occasions for moral reevaluation and possible moral growth.”³² By contrast, the Supreme Court, being relatively detached from majoritarian influences, can and should exercise independent moral leadership, embracing a prophetic role and testing the popular will through nothing less than a search for political-moral truth. To be sure, the Court might not initially provide the right answer to every question, but it could be expected “to move us in the direction of a right answer.”³³ Over time, the practice of judicial review therefore would permit the Supreme Court to identify and protect, as constitutional rights, those individual rights that warrant recognition as human rights—that is, rights the government should respect and honor because human beings are morally entitled to possess them. In the exercise of this function, moreover, the Court would be leading not just the country but also the world. It is difficult to imagine a model of judicial review that could do more extraordinary good. The Court would be promoting fundamental rights both here and abroad—rights to which all human beings are properly entitled. Early Perry readily and powerfully satisfied the criterion of functional justification.

Unfortunately, Early Perry’s theory of judicial review faltered badly under my other criteria of evaluation. As noted earlier, the criterion of judicial objectivity and competence asks whether the proposed decisionmaking methodology is appropriate and fitting for judges.³⁴ As I have explained, Perry’s open-ended search for political-moral truth is a high and noble calling. But it hardly qualifies as a *judicial* calling. However thoughtful and deliberate their inquiry, the Justices have no particular competence or expertise in the realm of political-moral reasoning. And for them to rely on their own values as “the ultimate source of decisional norms”³⁵ would render the Court a non-judicial body, if not, indeed, “a naked power organ.”³⁶ When the Justices act as judges, they draw decisional norms from external sources, permitting objective

³⁰ *Id.* at 97 (quoting Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1, 4 (1967)).

³¹ *See id.* at 100–01.

³² *Id.* at 100.

³³ *Id.* at 102; *cf. id.* at 113 (describing “a subtle, dialectical interplay between Court and polity”).

³⁴ *See Conkle, supra* note 9, at 81.

³⁵ PERRY, *supra* note 1, at 123.

³⁶ Wechsler, *supra* note 13, at 19.

evaluation and critique. By contrast, when they look inside themselves, invoking their own values in an unguided and indeterminate search for political-moral truth, an objective assessment is all but impossible.

Two centuries ago, Justice Iredell, responding to the suggestions of “some speculative jurists,”³⁷ explained why the Supreme Court had no authority to invalidate laws based merely on the Justices’ own appraisals of “natural justice”:

If . . . the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.³⁸

Early Perry spoke of political-moral truth, not natural justice, but Iredell’s criticism is equally fitting and equally powerful. In the exercise of judicial review, the Supreme Court should neither employ a decisionmaking methodology that is not objective nor adopt a judicial role that the Justices are not competent to perform. Perry’s model failed on both counts.

Turning finally to the first of my three criteria, it almost goes without saying that Early Perry’s theory did serious violence to the principle of majoritarian self-government. Any form of judicial review in individual rights cases is counter-majoritarian to a degree, but Perry dramatically exacerbated the problem by endorsing the model of judicial decisionmaking that he did. The source of governing norms that he identified—the Justices’ own political-moral values—plainly is not majoritarian. Nor would any significant portion of the American population, much less a majority, support the judicial role that Perry envisioned, according to which unelected judges could invalidate the judgments of elected officials based on an open-ended search for political-moral truth. Indeed, it would be difficult to imagine a less democratic governmental process.

In apparent recognition of this problem, Early Perry attempted to rescue his theory by contending that Congress, a majoritarian institution, must be accorded broad power to control the exercise of judicial review. In particular, he took an

³⁷ *Calder v. Bull*, 3 U.S. 386, 398 (1798) (Iredell, J., concurring in the judgment). Iredell’s reference seemingly included Justice Chase. *See id.* at 387–89 (Chase, J., concurring in the judgment).

³⁸ *Id.* at 399 (Iredell, J., concurring in the judgment).

expansive view of Congress's power to restrict the Supreme Court's appellate jurisdiction under the Exceptions Clause of Article III.³⁹ On this view, Congress, if so inclined, could pass a jurisdiction-restricting statute that would effectively countermand the Court's recognition of individual rights by precluding it from deciding future cases in a similar manner. Conversely, and more to the point, Congress's failure to enact such legislation should be seen as congressional acquiescence to the Court's individual rights decisionmaking, thus providing silent or covert majoritarian consent or approval. Although this argument is not without force,⁴⁰ it suffers from serious weaknesses. First and foremost, there is simply no evidence that Congress has knowingly acquiesced to the open-ended and extravagant model of judicial decisionmaking that Early Perry advocated. Moreover, Congress's power to control the Court's jurisdiction in response to unpopular decisions has been contested constitutionally;⁴¹ has been challenged as unworkable;⁴² and, despite recurrent proposals, has been discredited and rejected in the contemporary period as politically inappropriate and misguided.⁴³ As a result, this supposed power no longer provides, if it ever did, anything close to a clear majoritarian check on the Court. It is, at best, an untested and problematic mechanism for controlling the contemporary exercise of judicial review. As a result, it is perhaps not surprising that Perry, in a follow-up article, quietly backed away from his Exceptions Clause argument.⁴⁴

In summary, Early Perry offered an extraordinarily powerful justification for judicial review in individual rights cases, but his theory was unpersuasive because it fared so poorly under the other two criteria of evaluation. He proposed a decisionmaking methodology that undermined judicial objectivity and that fell well outside the competence of the Justices. And his model was dramatically at odds with the fundamental principle of majoritarian self-government.

³⁹ U.S. CONST. art. III, § 2, cl. 2 (“[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”); see PERRY, *supra* note 1, at 128. Perry argued that Article III gives Congress a similar power to control the jurisdiction of the lower federal courts as well. See *id.*

⁴⁰ Cf. Conkle, *supra* note 17, at 638–64 (embracing a similar but distinctive argument).

⁴¹ See PERRY, *supra* note 1, at 128, 133. Indeed, Perry himself contended that Congress could use its power over jurisdiction only to countermand nonoriginalist decisions, as opposed to decisions based on “value judgments constitutionalized by the framers.” *Id.* at 130. But see Perry, *supra* note 27, at 580 n.89 (conceding that, “as a practical matter,” any such power would have to extend to originalist as well as nonoriginalist decisionmaking).

⁴² See PERRY, *supra* note 1, at 130–32, 136–37 n.* (discussing, but disputing, such concerns).

⁴³ See NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 31–32 (20th ed. 2019).

⁴⁴ See Perry, *supra* note 27, at 580 (“The various mechanisms of political control or influence over the Court,” Perry wrote, “are adequate even if the Court refuses to concede to Congress the broad jurisdiction-limiting power I discussed in my book.”).

III. CONTEMPORARY PERRY

A. *Contemporary Perry's Theory*

Fast-forwarding through three and a half decades of scholarly maturation, we encounter a very different Professor Perry—Contemporary Perry—in his most recent book, *A Global Political Morality: Human Rights, Democracy, and Constitutionalism*.⁴⁵ Unlike Early Perry, Contemporary Perry does not equate human rights with constitutional rights. Nor does he call for the United States in general, or the Supreme Court in particular, to be “a beacon to the world” in promoting individual rights both at home and abroad.⁴⁶ Instead, Contemporary Perry moves in the opposite direction, from global human rights to American constitutional rights. He begins by explaining what he means by human rights and by the political morality of human rights.⁴⁷ Contemporary Perry then describes how the political morality of human rights should influence the recognition of constitutional rights in the United States.⁴⁸ As for the Supreme Court, Early Perry’s call for a “fierce” judicial activism⁴⁹ has been replaced by an appeal for judicial deference, as originally proposed by Professor James Bradley Thayer in his famous 1893 article.⁵⁰ Despite his invocation of Thayer, however, Contemporary Perry continues to promote a strong judicial role in the recognition of constitutional rights—that is, to the extent that they also constitute human rights.

All of this requires elaboration. In Part III.A.1, I will describe Contemporary Perry’s understanding of the political morality of human rights and explain why, in his view, this global morality warrants the support of religious and secular thinkers alike. Then, in Part III.A.2, I will turn to Contemporary Perry’s theory of constitutional interpretation and judicial review. As we will see, Contemporary Perry embraces distinctive versions of originalism and stare decisis, but he also draws upon the political morality of human rights. His complex analysis leads to an elaborate framework for judicial decisionmaking, a framework that instructs the Supreme Court to exercise judicial deference in certain situations but not in others.

⁴⁵ PERRY, *supra* note 2.

⁴⁶ See PERRY, *supra* note 1, at 98.

⁴⁷ PERRY, *supra* note 2, at 7.

⁴⁸ *Id.* at 9.

⁴⁹ See *id.* at 138.

⁵⁰ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 129, 142 (1893).

1. *The Political Morality of Human Rights*

Contemporary Perry concedes that the *international law* of human rights has limited efficacy.⁵¹ Even so, he argues, there is a *political morality* of human rights, grounded in the Universal Declaration of Human Rights (UDHR)⁵² and other international agreements that have garnered the support of an overwhelming majority of nations, including in most respects the United States.⁵³ These international agreements define particular human rights, but, according to Perry, all such rights derive from and are specifications of what the UDHR proclaims in its very first article: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”⁵⁴ To Perry, the critical provision is the final phrase, declaring that all of us, as individuals and collectively, should honor what Perry calls “the imperative to ‘act towards all human beings in a spirit of brotherhood.’”⁵⁵ The political morality of human rights—precisely because it is a *political* morality—addresses collective action in the form of *governmental* action. It maintains that governments should honor the brotherhood imperative.⁵⁶ In other words, governments should recognize and respect the most basic of all human rights: the right of each and every human being, without exception, to be treated in a spirit of brotherhood.⁵⁷ To fully honor the brotherhood imperative, governments likewise should recognize and respect other, more specific human rights—that is, “the various rights recognized by the vast majority of the countries of the world as human rights—as specifications of what the imperative forbids or requires.”⁵⁸ In short, the political morality of human rights includes the brotherhood imperative and the various human rights that this imperative generates and supports.

Why should any of us, much less the Supreme Court, embrace and promote the political morality of human rights? Contemporary Perry outlines a dignity-based justification, according to which every human being has equal inherent

⁵¹ PERRY, *supra* note 2, at 2–3.

⁵² G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

⁵³ See PERRY, *supra* note 2, at 3–4.

⁵⁴ UDHR, *supra* note 52, art. 1.

⁵⁵ PERRY, *supra* note 2, at 18. As Perry observes, “‘brotherhood’ has a masculine resonance” in today’s linguistic environment, but the term should be understood, as it was when the UDHR was adopted, to encompass all human beings, whatever their gender. *See id.* at 25 n.7.

⁵⁶ *See id.* at 25–26.

⁵⁷ As Perry explains, not all human rights extend to every human being; some are reserved for particular groups, such as women, children, or the disabled. But the brotherhood imperative extends to all. *See id.* at 15–19.

⁵⁸ *Id.* at 26.

dignity and is, therefore, inviolable—not to be “violated” by treatment that fails to honor the brotherhood imperative.⁵⁹ As Perry explains, however, this dignity-based justification depends upon underlying assumptions about the nature and moral worth of human beings.⁶⁰ As a result, the justification is more persuasive to some than to others. In particular, it is more persuasive to many religious believers than it is to secular thinkers.⁶¹ The justification can readily be supported, for example, by theists who believe that every human being, without exception, is born in the image of God and is a beloved child of God, who, as such, should be treated as sacred.⁶² A purely secular thinker, by contrast, cannot easily accept the extension of equal inherent dignity to those, such as infants and mentally disabled adults, who do not possess the distinctively human capacities—for reason, self-reflection, and the like—that tend to distinguish the human race from non-human animal species.⁶³ As a matter of purely secular logic, Perry concludes, it may not be possible to defend the political morality of human rights.⁶⁴

Even if secular arguments fall short, many secular thinkers nonetheless embrace the brotherhood imperative and therefore embrace the political morality of human rights. They do so, Perry suggests, based simply on an “agapic sensibility”⁶⁵ that generates a commitment to love in the sense of *agape* (as opposed to *eros* or *philia*). Their abiding love for other human beings springs not from religious or philosophical justification but from personal experience, perhaps informed by the observation of moral exemplars, such as the Dalai Lama, “who embody the sensibility . . . [in] their deep, transformative humanity and peace.”⁶⁶ According to Perry, it is this basic human sensibility, however derived, that provides “the deepest nontheistic explanation” for acceptance of the brotherhood imperative, and it might provide the deepest motivation “even for many theists.”⁶⁷ As a result, he suggests, “[t]he language of love provides strong . . . [and] perhaps . . . indispensable support for the morality of human rights.”⁶⁸

⁵⁹ See *id.* at 27–29. Perry separates the argument into two claims: the dignity claim and the inviolability claim. *Id.* In the discussion that follows, I am simplifying Perry’s account by treating the two claims together.

⁶⁰ *Id.* at 30, 32.

⁶¹ See *id.* at 29.

⁶² See *id.* at 30, 32.

⁶³ *Id.* at 30–33.

⁶⁴ See *id.*

⁶⁵ *Id.* at 38.

⁶⁶ *Id.* (italization omitted); see *id.* at 35–41.

⁶⁷ *Id.* at 40.

⁶⁸ *Id.* at 41.

The political morality of human rights is further supported, writes Perry, by the international consensus that it represents.⁶⁹ In the aftermath of World War II, the United Nations proclaimed the UDHR,⁷⁰ and, since then, it has adopted a series of more specific human rights treaties.⁷¹ All of these treaties have garnered overwhelming support from the United Nations' 193 member states. For example, eighty-seven percent of them, or 168 countries, including the United States, are parties to the International Covenant on Civil and Political Rights (ICCPR).⁷² To be sure, the governments of many countries "do little more than pay lip service to their obligations under the treaties,"⁷³ but "the political morality of human rights has become so compelling to so many . . . that even among countries that do not take human rights seriously, an ever-diminishing number is willing to be seen as rejecting the political morality of human rights."⁷⁴ And the very fact that the principles embodied in human rights treaties are broadly accepted, at least as a matter of professed political-moral judgment, adds normative weight to the principles themselves, representing as they do a *global* political morality—indeed, "the first truly global political morality in human history."⁷⁵ Perry draws the following conclusion:

[T]he norms that constitute the political morality of human rights . . . serve, among the peoples of the world, as fundamental grounds of political-moral judgment, grounds that derive their strength from being formally inscribed in the international human rights treaties to which most countries of the world—the vast majority of them—are parties.⁷⁶

Contemporary Perry goes on to discuss a number of important human rights, as articulated in the UDHR and the ICCPR, explaining how and why they constitute specifications of the brotherhood imperative. Perry explains his understanding of these rights and provides his own descriptive labels. Notably, he argues that the political morality of human rights requires a commitment to democracy, including, in particular, what he calls the human right to democratic governance.⁷⁷ The human right to democratic governance is a compelling specification of the brotherhood imperative, he argues, because the brotherhood

⁶⁹ *Id.* at 3.

⁷⁰ UDHR, *supra* note 52.

⁷¹ *See, e.g., infra* note 72.

⁷² *See, e.g.,* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; PERRY, *supra* note 2, at 3–4, 27 (highlighting broad support for ICCPR and other relevant treaties).

⁷³ PERRY, *supra* note 2, at 3.

⁷⁴ *Id.* at 4.

⁷⁵ *Id.* at 27; *see id.* at 4–5.

⁷⁶ *Id.* at 5; *see id.* at 63–64.

⁷⁷ *See id.* at 48–52.

imperative demands, as a general proposition, that people be empowered to determine for themselves the laws and policies that govern them.⁷⁸ As a practical matter, this means some form of representative, majoritarian self-government, informed by free and fair elections, and the UDHR and ICCPR include provisions to this effect.⁷⁹

At the same time, the brotherhood imperative also supports the recognition of competing human rights—rights that limit the operation of majoritarian self-government. Three are especially noteworthy. The first, a right that Perry calls the human right to intellectual freedom, is closely connected to the human right to democratic governance.⁸⁰ As recognized in the UDHR and elaborated in the ICCPR, the human right to intellectual freedom protects “freedom of opinion and expression,” including related acts of assembly and association.⁸¹ As Perry explains, this human right is critical to democratic governance, including full and informed participation in the majoritarian system.⁸² Second, there is what Perry calls the human right to moral equality—the right to be treated as the moral equal of every other human being.⁸³ This right is protected by the UDHR and the ICCPR, both as a general proposition and in more specific provisions listing common types of impermissible discrimination.⁸⁴ According to Perry, the human right to moral equality is a virtual restatement of the brotherhood imperative: treating every human being in a spirit of brotherhood demands that every human being be treated as morally equal, not morally inferior, to any other human being.⁸⁵ Third, in Perry’s terminology, there is the human right to religious and moral freedom.⁸⁶ This right, too, is supported by relevant provisions of the UDHR and ICCPR, provisions that conspicuously protect not only religious freedom but also freedom of “conscience” and “belief.”⁸⁷ Accordingly, writes Perry, everyone has “the freedom to live one’s life in accord with one’s religious and/or moral convictions and commitments.”⁸⁸ As Perry explains, the brotherhood imperative supports this right because the imperative

⁷⁸ See *id.* at 50–51.

⁷⁹ UDHR, *supra* note 52, art. 21; ICCPR, *supra* note 72, art. 25; see PERRY, *supra* note 2, at 48.

⁸⁰ PERRY, *supra* note 2, at 47.

⁸¹ UDHR, *supra* note 52, arts. 19, 20(1); ICCPR, *supra* note 72, arts. 19, 21, 22; see PERRY, *supra* note 2, at 52–53.

⁸² See PERRY, *supra* note 2, at 53–55.

⁸³ *Id.* at 47.

⁸⁴ UDHR, *supra* note 52, arts. 1, 2; ICCPR, *supra* note 72, art. 26; see PERRY, *supra* note 2, at 55–56.

⁸⁵ See PERRY, *supra* note 2, at 56.

⁸⁶ *Id.* at 63.

⁸⁷ UDHR, *supra* note 52, art. 18; ICCPR, *supra* note 72, art. 18; see PERRY, *supra* note 2, at 64–67, 65 n.4.

⁸⁸ PERRY, *supra* note 2, at 64.

requires government to respect a person's self-identity and moral integrity by permitting the person to live out "core or meaning-giving beliefs and commitments,"⁸⁹ whether or not religious in nature.⁹⁰ Perry devotes considerable attention to moral equality and religious and moral freedom, which play a central role in his understanding of the political morality of human rights.⁹¹

2. *Constitutional Interpretation and Judicial Review*

Moving from global human rights to American constitutional law, Contemporary Perry constructs a novel theory of constitutional interpretation and judicial review.⁹² Gone is the expansive nonoriginalism of Early Perry. Instead, Contemporary Perry embraces a particular form of originalism and a distinctive version of *stare decisis*. At the same time, he draws upon the political morality of human rights, arguing that it should influence, but not replace, domestic constitutional law.⁹³ In so doing, he develops an elaborate schema of judicial presumptions, explaining when the Supreme Court should exercise judicial deference and when it should not.⁹⁴

As his starting point, Contemporary Perry adopts a modest and tightly constrained approach to constitutional interpretation. As a matter of American constitutional law, he writes, there are only two sources of constitutional meaning.⁹⁵ Thus, a constitutional right or other constitutional norm should be recognized only if it is supported by originalism or, in the alternative, by such deep and longstanding precedent and societal acceptance that it has become a bedrock constitutional principle.⁹⁶ According to the first, originalist alternative, "N is a constitutional norm if constitutional enactors made N a constitutional norm"⁹⁷—that is, if the norm was entrenched in the Constitution by "the human

⁸⁹ *Id.* at 68 (quoting JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 12–13 (2011)).

⁹⁰ *See id.* at 71–74. Perry notes that the human right to intellectual freedom is an indispensable component of the human right to religious and moral freedom because it permits individuals "to deliberate about various possible religious and/or moral convictions and commitments." *Id.* at 54, 87.

⁹¹ *See id.* at 55–87. Perry argues that three human rights constitute "pillars of democracy": "the human rights to democratic governance, intellectual freedom, and moral equality." *Id.* at 45; *see id.* at 45–62. The first two are readily characterized as such. Conversely, it is not clear why the human right to moral equality is accorded "pillar of democracy" status, especially when the human right to religious and moral freedom is not. In any event, the "pillar" characterization, as such, seems inconsequential to Perry's theory.

⁹² *Id.* at 112–13.

⁹³ *Id.*

⁹⁴ *See id.* at 95–118.

⁹⁵ *Id.* at 108–09.

⁹⁶ *Id.*

⁹⁷ *Id.* at 108.

beings whose approval gave the [original] Constitution [or any amendment] the force of law.”⁹⁸ According to the second, bedrock alternative, “N is a constitutional norm if N is constitutional bedrock.”⁹⁹ Perry explains what it takes for a norm to qualify:

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 [the Supreme Court] 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. As Michael McConnell has put the point: “[M]any decisions, even some that were questionable or controversial when rendered, have become part of the fabric of American life; it is inconceivable that they would now be overruled This overwhelming public acceptance constitutes a mode of popular ratification.”¹⁰⁰

A far cry from Early Perry’s embrace of moral evolution and a prophetic approach to constitutional interpretation,¹⁰¹ Contemporary Perry’s interpretive model is entirely backward-looking. It calls not for the development of new constitutional norms but for the enforcement of old ones, drawn from the enactors or from bedrock precedent.¹⁰²

Contemporary Perry’s starting point is only that—a starting point for constitutional interpretation. As already noted, the United States, through the UDHR, the ICCPR, and other international agreements, has committed itself to the political morality of human rights.¹⁰³ According to Perry, that commitment should inform the practice of judicial review.¹⁰⁴ And so Perry offers a theory of judicial review “that the Supreme Court of the United States, *pursuant to the morality of human rights*, should follow.”¹⁰⁵

⁹⁸ *Id.* at 109 (quoting Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 709 n.28 (2009)).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (quoting ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158 (1989)); see Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2417 (2006).

¹⁰¹ See PERRY, *supra* note 1, at 98–99.

¹⁰² In a follow-up article published after his book, Contemporary Perry suggests a third possible source of constitutional norms, also backward-looking (and implicitly originalist): “the structure of government established by the Constitution.” Michael J. Perry, *Two Constitutional Rights, Two Constitutional Controversies*, 52 CONN. L. REV. 1597, 1601 (2021).

¹⁰³ See *supra* Part III.A.1.

¹⁰⁴ See *supra* Part III.A.1.

¹⁰⁵ PERRY, *supra* note 2, at 92.

As discussed earlier, a critical component of the political morality of human rights is the human right to democratic governance.¹⁰⁶ And that right, according to Perry, “should be understood to entail a *presumptive* right of a majority to prevail over a minority, such that any departure from majority rule requires a strong justification.”¹⁰⁷ This presumptive favoring of majority rule, he explains, stands in serious tension with the authority of the Supreme Court to render ultimate (and not merely penultimate) judgments protecting constitutional rights,¹⁰⁸ judgments that cannot be countermanded politically except through the exceedingly difficult, supermajoritarian process of constitutional amendment.¹⁰⁹ To mitigate this tension, Perry advocates Thayerian judicial deference, modeled on James Bradley Thayer’s classic argument.¹¹⁰ Echoing Thayer, Perry contends that the Supreme Court “should generally proceed as deferentially as possible in adjudicating constitutional claims.”¹¹¹ In other words, it generally should defer to the lawmakers in question, who have at least implicitly concluded that their law is constitutional.¹¹² As Thayer explained, “much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another.”¹¹³ According to Thayer and now Perry, the Supreme Court should accept the lawmakers’ judgment of constitutionality—their judgment, even if merely implicit, that the challenged law is *not* unconstitutional—as long as that judgment is reasonable. Moreover, “the lawmakers’ judgment is reasonable . . . if rational, well informed, and thoughtful persons could affirm the judgment.”¹¹⁴ In the language of Thayer, the Court “can only disregard [a challenged law] when those who have the right to make laws have not merely made a mistake, but have made a very clear one, . . . so clear that it is not open to rational question.”¹¹⁵

The political morality of human rights generates what Contemporary Perry calls his “General Principle” of Thayerian deference.¹¹⁶ Notably, however, it

¹⁰⁶ *Id.* at 48–52.

¹⁰⁷ *Id.* at 99.

¹⁰⁸ *See id.* at 96–98 (discussing America’s “strong-form” judicial review and contrasting it with “weak-form” judicial review, according to which judicial rulings of constitutional invalidity either are merely advisory or else can be overridden by ordinary legislation); *id.* at 96 n.4 (citing Mark Tushnet, *The Rise of Weak-Form Judicial Review*, in *COMPARATIVE CONSTITUTIONAL LAW* 321, 321 (Tom Ginsburg & Rosalind Dixon eds., 2011)).

¹⁰⁹ *See id.* at 100–03.

¹¹⁰ PERRY, *supra* note 2, at 103–08; *see* Thayer, *supra* note 50, at 152.

¹¹¹ PERRY, *supra* note 2, at 108.

¹¹² *See id.* at 104–05.

¹¹³ Thayer, *supra* note 50, at 144; *see* PERRY, *supra* note 2, at 104.

¹¹⁴ PERRY, *supra* note 2, at 105.

¹¹⁵ Thayer, *supra* note 50, at 144; *see* PERRY, *supra* note 2, at 106 n.29.

¹¹⁶ PERRY, *supra* note 2, at 111.

also generates what he labels “the Exception”¹¹⁷—and it is a significant exception indeed. In Perry’s view, the Supreme Court’s consideration of constitutional claims should be informed by the political morality of human rights generally, including not only the human right to democratic governance but other, competing human rights as well—rights that can override the presumption favoring majority rule.¹¹⁸ Therefore, when the claimed *constitutional right* is a *human right* that limits majority rule, Thayerian deference should give way.¹¹⁹ The “very same rationale,” explains Perry, extends to both the General Principle and the Exception: the Supreme Court’s interpretations of the Constitution should be designed to “bring the constitutional law of the United States into closer alignment with the morality of human rights.”¹²⁰ What emerges is an elaborate framework of judicial review, with deference governing some constitutional questions but not others.

Under Perry’s General Principle, the Supreme Court should reject a constitutional claim “if there is room for a reasonable difference in judgments either about whether the norm at issue—the norm that the government action is claimed to violate—truly is a constitutional norm or about whether the challenged government action truly violates the norm.”¹²¹ The latter point addresses the application of a posited norm, including a posited constitutional right, stating that the Court should not find a constitutional violation if lawmakers could reasonably conclude that their law does not violate the norm. The former question is more complicated. It implicates the substance of constitutional norms, including constitutional rights; that is, it implicates the meaning of the Constitution and therefore Perry’s understanding of constitutional interpretation. More specifically, Thayerian deference adds an additional layer of analysis to what I earlier described as Perry’s interpretive starting point, which recognizes two, and only two, sources of constitutional meaning. This additional layer makes Perry’s approach to judicial review even more constrained than his starting point would suggest. Thus, the Supreme Court, taking a deferential stance, should recognize a claimed constitutional norm, despite lawmakers’ implicit judgment that no such norm exists, only if the Court finds (1) that the norm not only is required by originalism but also is so clearly required that it would be unreasonable to conclude otherwise, or (2) that the norm not only is a matter of constitutional bedrock but also is so clearly a

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 99.

¹¹⁹ *See id.* at 111–12.

¹²⁰ *Id.*

¹²¹ *Id.* at 108.

matter of constitutional bedrock that it would be unreasonable to conclude otherwise. Conversely, the Court should reject a claimed constitutional norm, including a claimed constitutional right, if it would be at least reasonable for lawmakers to reject both the originalist and the bedrock arguments.¹²²

Under the Exception, by contrast, the Supreme Court should not defer to lawmakers. Much to the contrary, if “a right *that is part of the morality of human rights* is claimed to have constitutional status, [the Court] should rule that the right has such status if the judgment is reasonable that one of the two [alternative grounds of constitutional interpretation]—at least one—is satisfied.”¹²³ Accordingly, before turning to constitutional interpretation as such, the Court must first decide, as a matter of independent judgment (with Thayerian deference playing no role), whether the claimed *constitutional right* is a *human right* according to the political morality of human rights. And if the Court concludes that it is such a human right, the Court then should decide that the human right is also a constitutional right as long as it would be *reasonable* to conclude *either* that the right is supported by originalism *or* that the right is constitutional bedrock. In other words, once the Court reaches the issue of constitutional interpretation, it not only should forego Thayerian deference but also, in effect, should reverse the Thayerian presumption disfavoring the judicial recognition of constitutional rights. Thus, the Court need not be satisfied, as a matter of its own best judgment, that a claimed constitutional right is indeed supported by originalism or constitutional bedrock. Instead, it should recognize a constitutional right if it would be *reasonable* to accept one (or both) of these alternative arguments. With respect to originalism, for instance, if there are two competing views, both reasonable, about what the enactors meant by a constitutional provision, the Court should accept the view that permits the Court to recognize a constitutional right.¹²⁴ Although Perry’s constrained, twofold starting point of constitutional interpretation does not disappear from view, this dramatic shift in the analysis makes the Supreme Court far more likely to recognize a constitutional right.

As the final component of his multi-faceted approach to judicial review, Perry maintains that judicial deference continues to play a role even within the context of the Exception—that is, even when, in reliance on the Exception, the Supreme Court recognizes a constitutional norm in the form of a constitutional

¹²² See *id.* at 110–11.

¹²³ *Id.* at 111.

¹²⁴ See *id.* at 116.

right.¹²⁵ In particular, he argues that the Court should still exercise Thayerian deference in *applying* the constitutional norm that it has recognized. Accordingly, it should not find a constitutional violation if lawmakers could reasonably conclude that their law does not violate the norm.¹²⁶

Contemporary Perry offers the following threefold summary, explaining his position concerning the role of judicial deference in the exercise of judicial review:

- (1) With respect to the question whether the norm at issue is truly a constitutional norm—whether the norm truly has constitutional status—Thayerian deference is appropriate,
- (2) unless the norm at issue is a right that is part of the morality of human rights, in which case Thayerian deference is not appropriate.
- (3) With respect to the question whether the challenged government action violates a constitutional norm, Thayerian deference is appropriate, and it is appropriate even if the norm is a right that is part of the morality of human rights.¹²⁷

In reality, as I have explained, Perry's second point goes beyond a rejection of Thayerian deference. Instead, when the Exception applies, the Supreme Court is to accept a constitutional claim even if it does not find the claim *persuasive* in its own best judgment; it is enough that the claim is *reasonable* as a matter of originalism or constitutional bedrock. As a result, the Exception calls for “deference of a different sort, deference in a different direction . . . —*deference to the right*—if the right at issue is part of the morality of human rights.”¹²⁸

Perry discusses the implications of his theory for various constitutional issues, in part through a series of hypothetical judicial opinions.¹²⁹ He concludes, for example, that neither the Supreme Court's recognition of an individual right to gun possession under the Second Amendment nor its imposition of strict constitutional limits on race-based affirmative action is supported by a right that is part of the political morality of human rights.¹³⁰ The Court therefore should have applied the General Principle, leading it to Thayerian deference, and it should have rejected these constitutional claims because it is at least reasonable

¹²⁵ *Id.* at 112.

¹²⁶ *See id.* at 112–13.

¹²⁷ *Id.* at 116.

¹²⁸ *Id.* at 117.

¹²⁹ The hypothetical opinions are designed to reflect and illustrate Perry's own position. *See id.* at 119–20. Accordingly, I include them in my account and evaluation of his theory.

¹³⁰ *See id.* at 114; *id.* at 135 (hypothetical judicial opinion).

to conclude that the claims are supported neither by originalism nor by constitutional bedrock.¹³¹ Conversely, Perry argues that his theory supports the Supreme Court's recognition of an Eighth Amendment right to be free from excessive punishments that have become uncommon over time, even if the punishments are not "contrary to long usage."¹³² Perry also argues that his theory supports the Court's recognition of a constitutional right to same-sex marriage grounded in "the right of privacy."¹³³ Each of these rights, he asserts, is part of the political morality of human rights, which includes the human right to be free from cruel, inhuman, or degrading punishments as well as the human right to religious and moral freedom.¹³⁴ These claims therefore are properly governed by the Exception, which calls for "deference to the right."¹³⁵ Under this judicial presumption, each right warrants constitutional recognition—the Eighth Amendment right because it is supported by a reasonable originalist argument¹³⁶ and the right to same-sex marriage because it is reasonable to accord bedrock status to the broader right of privacy on which it rests.¹³⁷

B. *Evaluating Contemporary Perry's Theory of Judicial Review*

Recall my three criteria for evaluating theoretical models of judicial review in individual rights cases.¹³⁸ First, can judicial review in accordance with the model be reconciled with the fundamental value of majoritarian self-government? Second, does the model satisfy the need for judicial objectivity and competence? Third, does judicial review in conformity with the model serve a function that is sufficiently compelling to support the practice? As explained earlier, these criteria are matters of degree. A model of judicial review, in other words, might be more or less compatible with majoritarian self-government, more or less compliant with the need for judicial objectivity and competence, and more or less compelling in the function that it serves. Under these three criteria, Contemporary Perry's theory of judicial review is attractive indeed, at

¹³¹ See *id.* at 113–15; *id.* at 132–37 (hypothetical judicial opinion).

¹³² See *id.* at 115–16. So understood, Perry continues, the Eighth Amendment is properly read to impose significant restrictions on capital punishment. See *id.*; see also *id.* at 120–32 (hypothetical judicial opinion suggesting that Perry's theory could go further, rendering capital punishment categorically unconstitutional).

¹³³ See *id.* at 142–52 (hypothetical judicial opinion).

¹³⁴ *Id.* at 63–64, 115–16.

¹³⁵ *Id.* at 117.

¹³⁶ See *id.* at 115–16.

¹³⁷ See *id.* at 142 (hypothetical judicial opinion); *id.* at 152 (commentary on hypothetical judicial opinion). Perry also applies his theory to physician-assisted suicide and abortion. See *id.* at 153–64 (hypothetical judicial opinions). He offers distinctive observations concerning welfare rights as human rights, urging constitutionalization but not necessarily judicial enforcement. See *id.* at 165–84.

¹³⁸ See *supra* Part I.

least in the abstract—certainly as compared to the theory of Early Perry. Conversely, moving from an abstract description and appraisal of Contemporary Perry's theory to a more detailed and fine-grained analysis uncovers weaknesses that might not otherwise be apparent. In the following three sections of this Part III.B, I first will address Contemporary Perry's theory in the abstract, offering an evaluation that is straightforward and highly favorable. I then will explore, at some length, the complications that arise from a more detailed evaluation of his theory as elaborated and applied in particular settings. Finally, I will offer my overall assessment.

1. Contemporary Perry's Theory in the Abstract

When his theory is considered in the abstract, Contemporary Perry, unlike Early Perry, fares well under my first criterion of evaluation. He gives serious weight to the value of majoritarian self-government through his call for Thayerian deference—both in the recognition of constitutional norms when his General Principle is in play and in the application of any constitutional norm that the Supreme Court might recognize, even under the Exception.¹³⁹ To be sure, Thayerian deference gives way, and indeed is reversed, when the Court is asked to recognize a constitutional right pursuant to the Exception.¹⁴⁰ Even so, Perry's theory, on balance, honors majoritarian self-government to a substantial degree.

Second, while Early Perry urged reliance on the Justices' personal values,¹⁴¹ Contemporary Perry advocates decisionmaking based on externally derived norms—norms drawn from originalism, bedrock precedent, and internationally recognized standards of political morality.¹⁴² Discerning these norms is no easy feat, of course, but the tasks are hardly foreign to judges, who often ascertain the original intention of legal provisions, assess the weight and depth of judicial precedent, and determine the meaning of international agreements. Contemporary Perry's theory thus satisfies, to a substantial degree, the need for judicial objectivity and competence.

Third, Contemporary Perry provides a strong functional justification for judicial review. By adhering to his model, including the Exception, the Supreme Court would be advancing the political morality of human rights by bringing American constitutional law into closer alignment with that political morality.¹⁴³

¹³⁹ See *supra* notes 127–28 and accompanying text.

¹⁴⁰ See *supra* notes 127–28 and accompanying text.

¹⁴¹ See *supra* notes 22–26 and accompanying text.

¹⁴² See *supra* notes 97–105, 127–28 and accompanying text.

¹⁴³ See *supra* notes 119–20 and accompanying text.

Early Perry went further, urging the Court to promote moral growth in the world by providing the right answers to human rights questions, not merely answers consistent with an established global framework of rights.¹⁴⁴ According to Early Perry, the Supreme Court should be leading the world in a search for political-moral truth.¹⁴⁵ Contemporary Perry, by contrast, is asking the Court to follow, not lead, by recognizing global human rights as American constitutional rights.¹⁴⁶ And he asks the Court to act in this manner only to the extent that it can reasonably do so as a matter of American constitutional law.¹⁴⁷ Contemporary Perry's nuanced theory steps back substantially from Early Perry's open-ended pursuit of political-moral truth. In that respect, Contemporary Perry's functional justification for judicial review may be less powerful. But the justification nonetheless is forceful, especially because it also accommodates majoritarian self-government and the need for judicial objectivity and competence.

2. *Contemporary Perry's Theory as Elaborated and Applied*

To reiterate, under my criteria, Contemporary Perry's theory of judicial review is quite attractive, at least in the abstract. But Perry's elaborations and examples go beyond an abstract account. We therefore can evaluate his theory not only in the abstract but also as applied in particular settings. Unpacking Perry's theory in this manner exposes some cracks in the theory, cracks that might jeopardize the theory's standing under the criteria I have articulated. In particular, the theory as applied might be less successful in satisfying my criterion of judicial objectivity and competence and, therefore, my criterion of majoritarian self-government as well.

Consider, for instance, Perry's discussion of the human right to moral equality and its relationship to the constitutional right to equal protection. As noted earlier, the human right to moral equality is "the right . . . to be treated as the moral equal of every other human being,"¹⁴⁸ a right that precludes discrimination based on morally irrelevant characteristics such as race.¹⁴⁹ But Perry goes further in elaborating this right, arguing that it bars not only intentional discrimination but also unintentional mistreatment based on "a sensibility such as 'racially selective sympathy and indifference,' namely, 'the

¹⁴⁴ See *supra* notes 28–30, 32–33 and accompanying text.

¹⁴⁵ See *supra* notes 28–30, 32–33 and accompanying text.

¹⁴⁶ See *supra* notes 45–50 and accompanying text.

¹⁴⁷ PERRY, *supra* note 2, at 108–09; see *supra* notes 97–101 and accompanying text.

¹⁴⁸ PERRY, *supra* note 2, at 56.

¹⁴⁹ *Id.*

unconscious failure to extend to a [racial] minority . . . the same sympathy and care [that are accorded to others].”¹⁵⁰ This elaboration is not implausible, but it is not grounded in the text of the international agreements upon which Perry relies, nor does he offer any evidence of an international consensus. Instead, the elaboration rests on a plausible, but expansive and therefore contentious, understanding of the brotherhood imperative.¹⁵¹ And Perry then relies on this contentious understanding in urging further, as a matter of constitutional law, that the Supreme Court should adopt a disparate impact approach to equal protection, rejecting longstanding doctrine to the contrary¹⁵² by no longer requiring proof of intentional discrimination in every case.¹⁵³

Under Perry’s General Principle of judicial review, however, the Supreme Court should exercise Thayerian deference in addressing a claimed constitutional right¹⁵⁴—here, an alleged right to be free from disparate impact—if the claimed constitutional right is not part of the political morality of human rights. The General Principle is avoided, and the Exception is triggered, only if the Court—as a matter of independent judicial judgment—accepts Perry’s contentious interpretation of the human right to moral equality.¹⁵⁵ And even under the Exception, the Court should nonetheless reject the constitutional claim unless the claim can reasonably be supported as a matter of originalism or constitutional bedrock.¹⁵⁶ The disparate impact approach has never been adopted by the Supreme Court,¹⁵⁷ so the bedrock alternative is plainly untenable. Moreover, it seems equally difficult to maintain that any set of constitutional enactors embraced the disparate-impact understanding of equal protection. In short, neither alternative seems reasonable. If, as Perry claims, the Supreme Court should recognize a constitutional right to be free from disparate impact, then his theory of judicial review, as implemented, may permit a far more creative and aggressive judicial role than his abstract theory would suggest—first in articulating the scope and nature of the underlying human right and then in applying the General Principle or the Exception to the constitutional claim.

¹⁵⁰ PERRY, *supra* note 2, at 56–57 (quoting Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976)).

¹⁵¹ *Id.*

¹⁵² *See* *Washington v. Davis*, 426 U.S. 229, 240–41 (1976); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977).

¹⁵³ *See* PERRY, *supra* note 2, at 61–62.

¹⁵⁴ *See supra* notes 110, 116, 127 and accompanying text.

¹⁵⁵ PERRY, *supra* note 2, at 113.

¹⁵⁶ *See supra* notes 97–102 and accompanying text.

¹⁵⁷ *See supra* note 140 and accompanying text.

In like manner, consider Contemporary Perry's discussion of the human right to religious and moral freedom and its implications for analogous constitutional claims. As Perry explains, this right permits a person to live out "core or meaning-giving beliefs and commitments,"¹⁵⁸ whether or not religious in nature. This human right is conditional, not absolute.¹⁵⁹ It can be overcome in certain circumstances by legitimate governmental interests, including interests grounded in "public morals," but not, according to Perry, interests grounded in "sectarian morals," which reflect moral understandings (religious or nonreligious) that are "widely contested, and in that sense sectarian, among the citizens of . . . a [contemporary, pluralistic] democracy."¹⁶⁰ Whether the human right to religious and moral freedom has been violated thus turns, in part, on whether the beliefs in question are "core or meaning-giving"¹⁶¹ and, if so, whether the government's competing interests are grounded in "sectarian" as opposed to "public" morality.¹⁶² In some instances, of course, the proper answers to these questions might be unclear—that is, the political morality of human rights might be vague or "underdeterminate."¹⁶³ Line-drawing issues and underdeterminate norms are hardly unique to Perry's theory of judicial review. But they do open the door to greater judicial creativity and discretion than might otherwise be apparent because the Supreme Court, in deciding whether a claim of constitutional right falls under the General Principle or the Exception, must first decide whether the claim falls within the political morality of human rights.¹⁶⁴ This critical preliminary judgment is rendered independently, untempered by Thayerian deference, and it includes potentially controversial assessments of the scope and nature of the relevant human right.

¹⁵⁸ PERRY, *supra* note 2, at 68 (quoting MACLURE & TAYLOR, *supra* note 89, at 12–13).

¹⁵⁹ *Id.* at 69.

¹⁶⁰ *Id.* at 74–79.

¹⁶¹ See *supra* note 158 and accompanying text. In part because the right to religious and moral freedom is only conditional, Perry urges "[a] generous application of the right," according to which "the benefit of the doubt is resolved in favor of the conclusion that the choice at issue is protected by the right." PERRY, *supra* note 2, at 69; see *id.* at 69–70 (explaining that the right to religious and moral freedom is conditional in the sense that the government may restrict it if the restriction serves a legitimate government objective, is the least burdensome alternative, and is proportionate to the government objective).

¹⁶² PERRY, *supra* note 2, at 75. For Perry, this distinction prevents the government from advancing a morality-based objection to same-sex sexual conduct, because such an objection should be seen as sectarian, but it permits the government to protect human life, including unborn human life, because the governmental interest in that setting is based on public as opposed to sectarian morality (combined with biological knowledge). See *id.* at 147–51, 160–61 (hypothetical judicial opinions); Perry, *supra* note 102, at 1634, 1643–47.

¹⁶³ As Perry explains, "[a] right is underdeterminate in a particular context to the extent that in that context there is room for a reasonable difference in judgments as to whether government has violated the right." PERRY, *supra* note 2, at 171–72 (emphasis omitted).

¹⁶⁴ *Id.* at 113.

Turning to a more specific context, similar issues arise in Contemporary Perry's treatment of the constitutional right to same-sex marriage, as recognized in *Obergefell v. Hodges*.¹⁶⁵ Perry endorses the Supreme Court's decision, but his reasoning differs from the Court's. Discussing the constitutional implications of both the human right to moral equality and the human right to religious and moral freedom, Perry reaches two conclusions: (1) the Court's ruling cannot be justified under equal protection, but (2) it is justified under the constitutional right of privacy.¹⁶⁶ Each conclusion presents theoretical difficulties.

Perry explains that the constitutional right to equal protection, at its core, embodies the human right to moral equality, which precludes discriminatory lawmaking based on the demeaning view that certain human beings, such as gays and lesbians, are morally inferior.¹⁶⁷ Perry contends, however, that "it is highly questionable whether in the contemporary United States, the view that gays and lesbians are morally inferior is a 'but for' predicate" for their exclusion from marriage.¹⁶⁸ Instead, he concludes that "the dominant and sufficient rationale" for many or most supporters of the exclusion is that "[s]ame-sex sexual conduct is immoral."¹⁶⁹ But Perry's elaboration of the human right to moral equality, as we have seen, extends the protection of this right to unintentional and unconscious mistreatment based on selective sympathy and indifference, an extension leading Perry to endorse, as a matter of constitutional law, a disparate impact approach to equal protection.¹⁷⁰ Earlier I suggested that this extension of the human right is contentious, as is the argument for a disparate impact approach to constitutional equal protection. Assuming Perry's arguments on those points are sound, however, it is difficult to understand—at least without further explanation—why they would not support an equal protection argument favoring same-sex marriage.¹⁷¹

Moving on, Perry rests his support for *Obergefell* on the right of privacy. Perry argues that this claimed constitutional right falls within the scope of the

¹⁶⁵ 576 U.S. 644, 681 (2015).

¹⁶⁶ PERRY, *supra* note 2 at 138, 142.

¹⁶⁷ *See id.* at 138 (hypothetical judicial opinion).

¹⁶⁸ *Id.* at 140.

¹⁶⁹ *Id.*; *see id.* at 140–42; Perry, *supra* note 102, at 1638–42.

¹⁷⁰ *See supra* notes 152–53 and accompanying text.

¹⁷¹ *Cf.* PERRY, *supra* note 2, at 158 (hypothetical judicial opinion arguing that the strict Texas abortion law invalidated in *Roe v. Wade*, 410 U.S. 113 (1973), violated equal protection as "a law based on sex-selective sympathy and indifference—the failure to extend to women the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to men"); *see id.* at 157–59; Perry, *supra* note 102, at 1630–32.

human right to religious and moral freedom.¹⁷² It is for the Supreme Court to decide, in the exercise of independent judicial judgment, whether this argument is persuasive. But let us assume that the Court properly would agree. If so, then, according to Perry's theory of judicial review, the Court should invoke the Exception, meaning deference to the claim of constitutional right. Thus, the Court should recognize the constitutional right—here, a claimed right of privacy that extends to same-sex marriage—if there is a reasonable argument that the right is supported either by originalism or by constitutional bedrock. But the question remains: is either alternative reasonable in this context?

The right of privacy, of course, protects rights that are not enumerated in the Constitution, and Perry concedes that “no constitutional enactors entrenched such a right in the constitutional law of the United States,”¹⁷³ rendering an originalist argument implausible and therefore unreasonable. Instead, he argues that the right of privacy is reasonably regarded as constitutional bedrock.¹⁷⁴ In reality, however, the right of privacy has been and remains deeply contested, certainly as extended beyond traditional rights. The problem lies in the level of generality at which the claim of right is assessed. It may well be bedrock, or so one reasonably could conclude, that the right of privacy protects rights that “are, objectively, ‘deeply rooted in this Nation’s history and tradition,’”¹⁷⁵ including, for instance, parental rights¹⁷⁶ and the right to conventional, opposite-sex marriage.¹⁷⁷ But it is extremely difficult, and seemingly unreasonable, to argue that bedrock status goes any further. In other words, it seems unreasonable to conclude that the right of privacy, as a matter of well-settled and embedded constitutional doctrine, protects rights that are neither enumerated in the Constitution nor grounded in longstanding tradition—such as a claimed right to

¹⁷² See PERRY, *supra* note 2, at 145 (hypothetical judicial opinion); *id.* at 152 (commentary on hypothetical judicial opinion). In a follow-up article published after his book, Perry contends that the right of privacy is implicated when gays and lesbians are denied the benefits of marriage because the right “includes not only freedom from government action punishing one for making a particular choice in exercising one’s moral freedom, but also freedom from government action withholding benefits bestowed on others who make a different choice in exercising their moral freedom.” Perry, *supra* note 102, at 1643.

¹⁷³ PERRY, *supra* note 2, at 152 (italization omitted) (commentary on hypothetical judicial opinion); Perry, *supra* note 102, at 1627 n.93.

¹⁷⁴ See PERRY, *supra* note 2, at 142 (hypothetical judicial opinion); *id.* at 152 (commentary on hypothetical judicial opinion).

¹⁷⁵ *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

¹⁷⁶ See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 518 (1925).

¹⁷⁷ See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (declaring that “the right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause”).

physician-assisted suicide,¹⁷⁸ for example, or, as argued here, an asserted right to same-sex marriage.¹⁷⁹

In a follow-up article published after his book, Contemporary Perry shifts ground, offering a two-part constitutional argument for attaching the right of privacy to the Free Exercise Clause of the First Amendment and for extending the Clause's protection of religious free exercise to nonreligious moral choices.¹⁸⁰ First, he claims that there is a reasonable originalist argument for rejecting the approach of *Employment Division v. Smith*¹⁸¹ and for concluding, instead, that the right to free exercise "is a broad right that protects against any government action that, without adequate justification, impedes one's ability to live one's life in accord with one's religious convictions and commitments."¹⁸² Second, he argues that it is reasonable to accord constitutional bedrock status to the principle that "the constitutional right to the free exercise of religion covers moral choices rooted in and nourished by one or another nontheistic worldview as well as those rooted in and nourished by one or another theistic worldview."¹⁸³ This argument is creative, but the Supreme Court has never linked its right of privacy cases to the Free Exercise Clause, much less developed a well-established constitutional doctrine along the lines that Perry proposes. In any event, the second part of Perry's argument seems tendentious.¹⁸⁴ Yes, the Court

¹⁷⁸ In *Washington v. Glucksberg*, the Supreme Court rejected a right of privacy challenge to a law prohibiting physician-assisted suicide, finding that the outlawed practice lacked deeply rooted historical support and therefore did not warrant presumptive constitutional protection. See *Glucksberg*, 521 U.S. at 710–28. Perry, by contrast, concludes that the right of privacy indeed was implicated in *Glucksberg*, although he would have upheld the law nonetheless by finding that it reasonably could be said to satisfy strict scrutiny. See PERRY, *supra* note 2, at 153–56 (hypothetical judicial opinion).

¹⁷⁹ What about the right to choose abortion? Perry argues that abortion decisionmaking warranted presumptive constitutional protection in 1973, as part of the right of privacy, when the Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973). See PERRY, *supra* note 2, at 159–64 (hypothetical judicial opinion invoking strict scrutiny but upholding some abortion regulations as reasonably satisfying this test). But the right to choose abortion was not a deeply rooted traditional right in 1973, making Perry's argument contentious. Nonetheless, despite repeated challenges to *Roe* and significant doctrinal modifications, by now there has been presumptive constitutional protection for pre-viability abortion decisionmaking for nearly half a century. See FELDMAN & SULLIVAN, *supra* note 43, at 526–46 (discussing *Roe* and subsequent abortion cases). The long duration of this specific precedent, in itself, makes it at least reasonable today to accord bedrock status to the right to choose abortion prior to fetal viability—entirely apart from Perry's retrospective argument about 1973. (Whether the current Supreme Court will adhere to this precedent is a different question, one that the Court is considering in a pending case. See *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021), *granting cert. to* 945 F.3d 265, 273 (5th Cir. 2019).

¹⁸⁰ See Perry, *supra* note 102, at 1628–29.

¹⁸¹ 494 U.S. 872, 883 (1990).

¹⁸² Perry, *supra* note 102, at 1628.

¹⁸³ *Id.* at 1628–29.

¹⁸⁴ The first part of Perry's argument, standing alone, cannot justify an extension of free exercise rights to nonreligious moral choices.

sometimes has suggested that free exercise extends to deeply held moral beliefs.¹⁸⁵ But it has never adopted this view in a clear constitutional ruling. And it sometimes has suggested, to the contrary, that the right is limited to beliefs that are theistic or otherwise religious in a conventional sense.¹⁸⁶ According to the latter view, free exercise does not protect moral choices that are “purely secular”—that is, choices that are “philosophical and personal rather than religious.”¹⁸⁷ The former view, which would extend free exercise to a broader range of deeply held moral beliefs, may make good sense, but it seems unreasonable to argue that such a doctrine is already in place and, indeed, that the doctrine is so clearly settled as to qualify as constitutional bedrock.

3. *An Overall Assessment of Contemporary Perry’s Theory*

I do not mean to exaggerate the problems I have identified in Perry’s elaborations and applications of his theoretical model. As Perry notes, judges do not always agree in their evaluation of particular claims, not even when the issue is whether a claim is reasonable.¹⁸⁸ And even if some elaborations and applications of Perry’s model may be unjustified, that might mean only that he should revise those elaborations and applications, not that he should jettison his general theory. Even so, my discussion suggests that Perry’s theory may leave room for a troublesome degree of judicial creativity and discretion—in making independent judicial judgments about the nature and scope of human rights and about whether they should be understood to encompass constitutional claims; in determining whether originalist and bedrock arguments are reasonable or unreasonable; and in defining the level of generality at which human rights and constitutional claims should be conceptualized. Compounding these difficulties is Perry’s reliance, in part, on hypothetical judicial opinions from a fictional jurist who is “not always explicit” in explaining how Perry’s theory leads to the positions that she adopts.¹⁸⁹

The issues that I have highlighted relate mainly to my criterion of judicial objectivity and competence. That criterion calls for principled and consistent judicial decisionmaking based on objectively determined values. The elaborations and applications that I have discussed, by contrast, suggest that Perry’s theory opens the door to judicial decisionmaking that is insufficiently cabined by norms drawn from external sources and that therefore permits a

¹⁸⁵ See DANIEL O. CONKLE, RELIGION, LAW, AND THE CONSTITUTION 61–64 (2016).

¹⁸⁶ See *id.* at 64–66. Buddhism, for example, is essentially non-theistic, but it plainly qualifies as religious.

¹⁸⁷ *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972).

¹⁸⁸ See PERRY, *supra* note 2, at 107.

¹⁸⁹ *Id.* at 120.

relatively aggressive form of judicial review. To the extent that this is so, the theory also falters, in like degree, under the criterion of majoritarian self-government, because the zone of majority rule shrinks as the realm of judicial policymaking expands.

In summary, under my three criteria, Contemporary Perry's theory of judicial review is attractive in the abstract. Perry's elaborations and applications of his theory raise difficulties, but the theory overall remains strong, certainly as compared to the theory of Early Perry. Contemporary Perry offers a forceful and appealing functional justification for judicial review: bringing American constitutional law into greater harmony with the political morality of human rights. And, with the caveats I have noted, his theory honors to a significant degree the need for judicial objectivity and competence and the importance of majoritarian self-government.

CONCLUDING OBSERVATIONS

Employing three criteria—(1) majoritarian self-government, (2) judicial objectivity and competence, and (3) functional justification—I have analyzed and evaluated two theoretical models of judicial review in individual rights cases, each proposed by Professor Michael J. Perry, albeit in books separated by three and a half decades. As I have explained, Early Perry's justification for his approach, the judicial advancement of political-moral truth, was extraordinarily powerful. But his theory was unpersuasive because it called for a decisionmaking methodology that undermined judicial objectivity, fell well outside the competence of the Supreme Court, and was fundamentally inconsistent with the principle of majoritarian self-government. Contemporary Perry's theory is far more attractive. Despite the weaknesses and difficulties that I have identified, this theory respects, to a substantial extent, the need for judicial objectivity and competence and the importance of majoritarian self-government. At the same time, it offers a strong functional justification for the model of judicial decisionmaking that it endorses. Although judicial review in accordance with this model might not advance political-moral truth, at least not directly, it would move American constitutional law into closer alignment with the global political morality of human rights, a morality that Contemporary Perry has persuasively elaborated and forcefully defended.

Having summarized my principal conclusions, I turn briefly to two final sets of observations. The first addresses Professor Perry's transformation from Early Perry to Contemporary Perry, and the second raises a question for future consideration.

First, to state the obvious, Professor Perry's thinking has changed dramatically over time. Early Perry advocated passionately and eloquently for a prophetic and activist Supreme Court that would propel the advancement of human rights through nonoriginalist decisions based on the Justices' own values. Contemporary Perry is far more cautious, embracing a backward-looking approach to constitutional interpretation that relies on originalism combined with a narrow understanding of bedrock precedent. Even so, Contemporary Perry is still promoting the advancement of human rights—now understood as the product of a worldwide political-moral consensus—by adjusting his model of judicial review to include a presumption favoring the recognition of constitutional rights that fall within the global political morality of human rights. Influenced by the rising tide of originalism in constitutional interpretation, Contemporary Perry is older and wiser, if perhaps less conspicuously passionate than his earlier self. As I have explained, however, some of Contemporary Perry's rights-promoting elaborations and applications of his complex approach are contentious, suggesting that Contemporary Perry, at heart, is not as far from Early Perry as their competing theories might suggest.

Second, I wonder whether an explicitly forward-looking theory of judicial review, if properly designed, might permit an openly progressive understanding of constitutional rights without falling prey to the weaknesses of Early Perry's theory. In my own work, I have proposed such a theory, arguing that the Supreme Court, at least in certain contexts, properly can draw nonoriginalist constitutional norms from evolving American values, thus protecting rights that have grown to reflect a general or emerging national consensus.¹⁹⁰ This theory fares well under my criteria of evaluation. Evolving American values can fairly be described as majoritarian, and they can be objectively discerned in patterns of social and legal change, including lawmaking in the various states. Moreover, judicial review in accordance with this theory would serve several interrelated functions: nationalizing rights that most but not all states have embraced; enhancing liberty to a significant degree; and advancing political-moral progress in the United States. Or so I have argued.¹⁹¹ But my focus on American values seems too narrow, discounting as it does the global political morality that Contemporary Perry so ably identifies and defends. Could a theory of evolving

¹⁹⁰ I have elaborated the theory in the context of substantive due process (i.e., right of privacy cases). See Conkle, *supra* note 9, at 128–33. But evolving American values properly can inform equal protection as well, adding important support, for example, to the substantive due process argument for a right to same-sex marriage. See Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 28, 34 (2014).

¹⁹¹ See Conkle, *supra* note 9, at 133–45.

American values be combined or intertwined with a theory promoting the global political morality of human rights? I leave that question to future exploration.