

*Review of Human Rights in the
Constitutional Law of the United States* by
Michael J. Perry

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INTRODUCTION

Over the past century, human rights discourse has developed into an international dialogue focused on countries across the world. Often, nations that pride themselves in upholding fundamental international human rights within their legal system allow laws that directly contradict such rights. Such is the case with the United States and the fundamental rights it believes to be embedded in its Constitution. However, the constitutionality of the death penalty, restrictions on same-sex marriage, and the criminalization of abortion continue to be the subject of much debate. Michael J. Perry offers an insightful, fresh look at this issue in his discussion of these rights through the idea of the constitutional morality of the United States.¹

In examining international human rights and the constitutional morality of the United States, Perry looks at three main areas of discussion—the death penalty, same-sex marriage, and abortion—and considers them each in conjunction with internationally recognized rights that are entrenched in the Constitution: (1) the right not to be subjected to cruel and unusual punishment, (2) the right to moral equality, and (3) the right to religious and moral freedom. Perry discusses the internationalization of human rights and its normative grounding and then pursues an analysis of why the death penalty, the exclusion of same-sex couples from civil marriage, and bans on abortion cannot exist in harmony with those internationally recognized rights entrenched in the Constitution. Perry's additional focus on the role of judicial review in upholding the constitutional morality of the United States also contributes to his detailed analysis of the issues and to the value of his overall work in shedding a new light on human rights discourse, especially with regard to the constitutional law of the United States.

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1. MICHAEL J. PERRY, HUMAN RIGHTS IN THE CONSTITUTIONAL LAW OF THE UNITED STATES (2013) [hereinafter PERRY, HUMAN RIGHTS].

Perry specializes in the areas of constitutional law, human rights, and law and religion, and he has written previously on the same topics that come up in this book. Perry's noteworthy publications² and his impressive teaching credentials³ demonstrate his expertise and interest in this area of work and serve as reason to value his opinions and analysis. Perry's principal argument—that certain laws in the United States directly conflict with specific rights entrenched in the Constitution—is not only well supported and insightful, but also applicable on a wider level in looking at human rights from a global standpoint.

I.

SUMMARY

Perry's detailed and analytical work provides a basic understanding of the morality of human rights and offers a novel perspective on the constitutional morality of the United States.

Perry spends the first half of the book setting out a definition of the morality of human rights by focusing on the internationalization of human rights, considering what a "human right" is, and explaining the normative ground of human rights. Perry then goes on to pursue three inquiries: first, whether punishing a criminal by killing him or her violates the right not to be subjected to cruel and unusual punishment; second, whether excluding same-sex couples from civil marriage violates the right to moral equality or the right to religious and moral freedom; and third, whether criminalizing abortion violates the right to moral equality or the right to religious and moral freedom. While addressing these key questions, Perry also conducts an analysis of judicial deference and the Supreme Court's role in upholding the constitutional morality of the United States.

To gain an understanding of the constitutional morality of the United States, it is necessary to first understand the morality of human rights—"a set of moral convictions and commitments about what laws to enact . . . what policies to pursue, and the like" on an international level.⁴ "Some of the morality of human rights is entrenched—more precisely, some of the rights internationally recognized as human rights are entrenched—in the constitutional law of the United States."⁵ Perry refers to that set of entrenched internationally recognized human rights as "the constitutional morality of the United States."⁶

Human rights have become increasingly internationalized since the Second World War, as reflected in the development of international charters and treaties

2. See, e.g., MICHAEL J. PERRY, *THE POLITICAL MORALITY OF LIBERAL DEMOCRACY* (2010).

3. Perry serves as the Robert W. Woodruff University Chair at Emory University, the Howard J. Trienens Chair in Law at Northwestern University, the University Distinguished Chair in Law at Wake Forest University, and as a Visiting Professor at several law schools.

4. PERRY, *HUMAN RIGHTS*, *supra* note 1, at 1.

5. *Id.*

6. *Id.*

setting out fundamental human rights that should be protected by governments around the world. Under the first such document, the Charter of the United Nations, a “fundamental freedom” is one kind of “human right.”⁷ In his evaluation of how certain rights have come to be recognized internationally as human rights, Perry uses a discussion of major international human rights documents to ensure that the reader understands which countries signed onto these various agreements and which countries either abstained or refused to sign on.⁸ The internationalization of human rights is a reflection of how the world has shifted from nationalism to internationalism in enumerating universal human rights standards that act as a check on governments worldwide (thereby depriving the sovereign nation State of the unlimited power it once had).⁹ The continuing internationalization of human rights with treaties such as the International Covenant on Civil and Political Rights (ICCPR), the (First) Optional Protocol to the ICCPR, and the International Covenant on Economic, Social and Cultural Rights, combined with the existence of four transnational human rights systems,¹⁰ provide an apt depiction of the wide global recognition of human rights. Governments’ attempts to protect those rights are highlighted by the “human rights . . . enshrined in the constitutions of virtually every [country].”¹¹

In the context of the internationalization of human rights, Perry confronts two questions. First, what does it mean to say that a right is a “human right”? Second, is that human right legal or moral in nature? Perry first concludes that a right is a “human right” if “the fundamental rationale for establishing and protecting the right . . . is that conduct that violates the right violates the imperative to ‘act towards all human beings in a spirit of brotherhood.’”¹² Therefore, by describing government actors as duty-bearers and human beings as rights-holders, Perry convincingly suggests that the government has the duty to protect the rights of its citizens in acting towards them in a spirit of brotherhood.¹³ Perry further concludes that while every human right is a moral right, a human right is a legal right in a particular country only if that right is generally enforceable in that country; therefore, the importance of specific rights varies from country to country.¹⁴

Having highlighted the importance of human rights in a global setting, Perry narrows his focus down to address the relevance of human rights to his

7. *Id.* at 11.

8. *Id.* at 14–16.

9. *Id.* at 13–14.

10. The author makes reference to the regional human rights systems that exist, namely, the Council of Europe’s European Court of Human Rights, the Organization of American States’ Inter-American Court of Human Rights, the African Union’s African Court on Human and People’s Rights, and the Arab League’s Arab Court for Human Rights. *Id.* at 17.

11. *Id.* at 18.

12. *Id.* at 22.

13. *Id.* at 20–22.

14. *Id.* at 22.

specific topic of interest—the constitutional morality of the United States. The importance of the internationalization of human rights is explained in terms of the normative grounding of human rights and how that normative grounding brings about the question of governmental responsibility to protect the rights of citizens. Article 1 of the Universal Declaration of Human Rights says that all human beings should act towards one another in a spirit of brotherhood.¹⁵ This imperative is the normative ground of human rights, since “a right is a human right if the fundamental rationale for establishing and protecting the right is that conduct that violates the right violates the ‘act towards all human beings in a spirit of brotherhood’ imperative.”¹⁶ Perry considers the desire to have every government act towards all human beings in this spirit of brotherhood in terms of three different responses: (1) inherent dignity and inviolability,¹⁷ (2) the altruistic perspective,¹⁸ and (3) with regards to self-interest.¹⁹ The inherent dignity and inviolability approach is based on the idea that each and every born human being has equal inherent dignity and is inviolable.²⁰ The altruistic perspective stands on the notion that all humans are strongly linked to each other through a shared humanity and are therefore inclined to look out for each other.²¹ Self-interest is described as a concern for one’s own well-being but also for the well-being of others one cares for, such as family and friends.²²

By exploring the reasons behind “our common concern that no government abuse its citizens or others with whom it deals”²³ through three differing perspectives, Perry provides a balanced, comprehensive overview of the normative grounding of human rights, which in turn allows the reader an opportunity to consider which approach, if any, they agree with. Through such an inclusive analysis, Perry ensures clarity and simplicity for his reader in exploring the ideas and concepts in the book.

Going on to address the constitutional morality of the United States, Perry focuses on three constitutionally entrenched, internationally recognized human rights—(1) the right not to be subjected to cruel and unusual punishment, (2) the right to moral equality, (3) and the right to religious and moral freedom. A right is “constitutionally entrenched” if constitutional enactors established that right in the constitutional law of the United States (and if other later enactors did not establish a different right that supersedes the former right) or if the right is a

15. Article 1, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

16. PERRY, HUMAN RIGHTS, *supra* note 1, at 28.

17. *Id.* at 29.

18. *Id.* at 39.

19. *Id.* at 43.

20. *Id.* at 30.

21. *Id.* at 41.

22. *Id.* at 43.

23. *Id.* at 45.

bedrock feature of the constitutional law of the United States.²⁴ To be considered a bedrock feature, the right must have become 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 that right constitutionally authoritative, even if it is open to serious question whether enactors entrenched it in the constitutional law of the United States.²⁵

The right not to be subjected to cruel and unusual punishment is enumerated in the Eighth Amendment of the United States Constitution and encompasses the right not to be subjected to cruel, inhuman, or degrading punishment, which is an internationally recognized human right. Perry rightly points out that the words “cruel,” “inhuman,” and “degrading” are interchangeable terms that refer to whether a punishment fails to treat the criminal in a spirit of brotherhood.²⁶ Many reasons exist to oppose the death penalty, some of which are unrelated to its cruelty *per se*. However, Perry’s concern with the death penalty lies in one particular reason: “[c]apital punishment imposed on anyone, including a mentally competent adult who, after a fair trial, has been found guilty of having committed a depraved crime, is cruel.”²⁷

According to Perry, capital punishment cannot be defended against the charge of cruelty on the basis of incapacitation, retribution, deterrence, or rehabilitation.²⁸ If the imposition of a punishment amounts to a failure by a government to treat a criminal in the spirit of brotherhood, that punishment crosses the threshold of cruelty.²⁹ The cruelty of the death penalty has been increasingly recognized on an international level; however, Perry is wise to point out that the United States is party to neither the Second Optional Protocol to the ICCPR nor the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, both of which provide for the abolition of capital punishment.³⁰ The Supreme Court has used the Eighth Amendment to prevent a state from imposing the death penalty in certain cases, and the question arises from this whether the cruel and unusual punishment clause of the Eighth Amendment prevents the imposition of capital punishment on any person, regardless of the crime committed.³¹ To answer such a question, the meaning of “cruel” and “unusual” as the enactors understood them must be considered, and Perry does just this. Giving “unusual” its common meaning of “uncommon; infrequent; rare,” Perry puts forward that it is safe to say that capital

24. *Id.* at 57.

25. *Id.* at 58.

26. *Id.* at 61.

27. *Id.* at 65.

28. *Id.* at 66–68.

29. *Id.* at 67.

30. *Id.* at 70–72.

31. *Id.* at 73.

punishment, in a global sense, is unusual.³² Before concluding that the Supreme Court should rule that capital punishment violates the right not to be subjected to cruel and unusual punishment, Perry first gives attention to the notion of judicial deference.

A consideration of judicial deference understandably involves an analysis of the role of the U.S. Supreme Court in protecting the constitutional morality of the United States. Perry discusses both strong form³³ and weak form³⁴ judicial review in analyzing the importance and relevance of the Court. While strong form judicial review endows the Court with absolute power in ruling a law unconstitutional, weak form judicial review limits the Court's power by making Court rulings subject to ordinary legislation. Perry lends further attention to the question of whether, in exercising strong form judicial review, the Supreme Court should consider in its own view whether a law is unconstitutional or whether the Court should give deference³⁵ to lawmakers' judgment that the law is constitutional. While the answer to this question remains unclear, Perry suggests that even with deference given to lawmakers, the Supreme Court should rule capital punishment unconstitutional.³⁶

Perry goes on to cover the constitutionally entrenched right to moral equality as encompassed in the Equal Protection Clause of the Fourteenth Amendment. The right to moral equality—the right not to be treated as morally inferior and thereby be disadvantaged—follows naturally from the normative ground of human rights, and equates with the right to equal protection of the law.³⁷ It has become “constitutional bedrock” that the right to moral equality is a right under both federal and state governments.³⁸

The right to religious and moral freedom, as set out in the First Amendment, comes next in Perry's efforts to analyze and clarify the constitutionally entrenched rights that are threatened by exclusion of same-sex marriage and the criminalization of abortion. The right to religious and moral freedom is not limited to practices linked to religious or moral obligations, but also includes practices that are animated by a person's “‘core or meaning-giving beliefs and commitments’ as distinct from those that are animated by ‘the legitimate but less fundamental preferences we display as individuals.’”³⁹ In terms of practicality, this right is not unconditional because governments are forced to balance their important duties of protecting public morals with

32. *Id.* at 81.

33. Strong form judicial review is understood as judicial ultimacy, where the court has the last word. *Id.* at 96.

34. Weak form judicial review is understood as judicial penultimacy, where the court has penultimate word in that it can rule that a law is unconstitutional, but this decision can be nullified by means of ordinary legislation. *Id.* at 96.

35. Giving deference to the lawmakers' judgment is termed “Thayerian deference.” *Id.* at 102.

36. *Id.* at 103.

37. *Id.* at 106.

38. *Id.* at 111.

39. *Id.* at 120.

protecting sectarian morals.⁴⁰ Therefore, a government can enforce limits on a practice protected by this right if each of three conditions—legitimacy, least burdensome alternative, and proportionality—is satisfied.⁴¹ To satisfy the legitimacy condition, the policy must serve a legitimate government objective; to satisfy the least burdensome alternative condition, the policy must be necessary to serve that legitimate government objective; and finally, to satisfy the proportionality condition, the policy must achieve enough “good” to justify the burden imposed on those whose actions are restricted by the policy.⁴²

Free exercise of religion is a constitutionally entrenched right and, accordingly, the government’s lack of authority to prohibit the free exercise of religion has become entrenched in the constitutional law of the United States.⁴³ Since the constitutionally entrenched right to free exercise of religion is, if correctly interpreted, consistent with the right to religious and moral freedom, it follows that the right to religious and moral freedom, as it is understood in an international human rights context, is also entrenched in the constitutional law of the United States.⁴⁴

With a clear idea of what the right to moral equality and the right to religious and moral freedom entails, it is worth considering which of these rights is threatened by the exclusion of same-sex couples from civil marriage. Perry puts forward that there are two different conceptions of what marriage constitutes, one that excludes same-sex couples and one that does not.⁴⁵ While excluding same-sex couples from civil marriage disadvantages gays and lesbians, this does not equate to a violation of their right to moral equality because it is not based on the premise that gays and lesbians are morally inferior human beings.⁴⁶ This is not to say that certain exclusionary policies may indeed violate this right, but it cannot be declared that every law or policy that disadvantages gays and lesbians violates their right to moral equality.⁴⁷ The idea behind exclusionary policies—that same-sex sexual conduct is immoral—does not presuppose that those who engage in such conduct are morally inferior human beings, and thus cannot be viewed as violating the right to moral equality.⁴⁸ On the other hand, Perry notes that the exclusion policy can be seen to violate the right to religious and moral freedom, because the government’s objective of not legitimizing immoral conduct by allowing same-sex couples to

40. *Id.* at 121–22.

41. *Id.* at 122.

42. *Id.* at 122.

43. *Id.* at 128.

44. *Id.* at 131.

45. *Id.* at 137.

46. *Id.* at 142.

47. *Id.*

48. *Id.*

marry does not constitute a legitimate government objective that would justify the impediment to the right to religious and moral freedom.⁴⁹

The same two constitutionally entrenched rights—the right to moral equality and the right to religious and moral freedom—are relevant to the criminalization of abortion, and Perry extends his analysis to this issue area as well. In the previously-referenced spirit of brotherhood imperative, the reference to “all human beings” in the context of international human rights instruments is widely understood to mean all born human beings, and the question arises as to whether the law should provide that all unborn human beings have a right to life.⁵⁰ Perry addresses this question once again through the different perspectives on the normative ground of human rights—inherent dignity and inviolability, self-interest, and the altruistic perspective—and concludes that the answer to that question depends on one’s specific perspective on the normative ground of human rights.⁵¹ A ban on abortion is analyzed through a consideration of government objectives in terms of legitimacy, least burdensome alternative, and proportionality—the first two of which are considered by Perry to be satisfied, the third of which is considered contested.⁵² Perry uses two abortion cases, *Roe v. Wade* and *Doe v. Bolton*, to look into different types of abortion bans. In *Roe v. Wade*, the Supreme Court invalidated a Texas law that banned all abortions except those necessary to save the life of the mother.⁵³ In *Doe v. Bolton*, the Court invalidated a more permissive Georgia law that banned abortions except those necessary to preserve the health of the mother, those in which the fetus would likely be born with physical or mental defects, and those involving pregnancies resulting from rape.⁵⁴ Perry’s analysis of these two very differing cases leads to his conclusion that a relatively permissive ban on abortion might be justified by legitimate government objectives; however, an extreme ban, such as that in question in *Roe v. Wade*, does violate both the right to moral equality and the right to religious and moral freedom.⁵⁵

II. DISCUSSION

As outlined above, Perry offers a concise yet in-depth analysis of the constitutional morality of the United States with regard to three internationally recognized human rights.⁵⁶ At each stage of his analysis, Perry identifies and

49. *Id.* at 146.

50. *Id.* at 159.

51. *Id.* at 162.

52. *Id.* at 165–66.

53. *Id.* at 163.

54. *Id.*

55. *Id.* at 173.

56. The three internationally recognized human rights are as follows: (1) The right not to be subjected to cruel and unusual punishment, (2) the right to moral equality, and (3) the right to religious and moral freedom. *Id.* at 2.

responds to new questions and thereby leaves the reader with a thorough understanding of his arguments. Perry's focus on language and the meanings of specific words offers a certain degree of intelligibility on the controversial and often complex topics of his discussion.⁵⁷ He writes succinctly but effectively engages the reader with his strong analysis of every concept, addressing conflicting views every step of the way. In an area of discourse that can often be vague and ambiguous, Perry offers some clarity that is valuable in allowing his readers, whether scholars or otherwise, to use the content of this work to guide themselves in reaching their own conclusions.

The focus in the first part of the book is vital to understanding the constitutional morality of the United States discussed in the second part, and also allows the reader to gain a basic yet solid grasp of the meaning of human rights as well as the development of human rights in international law. By focusing on human rights as a concept in the first part, Perry offers readers new to the subject area, such as general readers and law students, a valuable foundation through which they can build their understanding about this area of law. For other readers, such as legal scholars, Perry's analysis of judicial deference and his choice of analyzing international human rights in the context of national constitutional law could potentially serve as platforms of discussion in the wider academic debate. Additionally, the key notions of the normative ground of human rights and the spirit of brotherhood come up throughout the book at all relevant instances, reflecting Perry's consistent and comprehensive analysis of the issues at hand.

In addressing controversial issues such as capital punishment as well as bans on same-sex marriage and abortion through the concept of morality, Perry seems to introduce a new perspective to the ongoing discussion of these topics in combining an analysis of constitutional law in the United States with international human rights law, bringing to the reader's attention the link between the two. His notions of international morality and constitutional morality are novel and powerful concepts that could be used more generally in the international human rights discourse.

Notwithstanding the value of his clear and erudite analysis, Perry fails to offer substantive policy recommendations in his concluding note. This is somewhat understandable, taking into consideration that international human rights law is notoriously difficult to regulate, mostly due to its far-reaching nature and lack of effective regulatory bodies. This notoriety, however, deserves some attention so as to illuminate for the reader the paradoxical relationship between the internationalization of human rights and the minimal international regulation of those rights. Although such lack of regulation is implicit in Perry's analysis of how internationally recognized rights are not fully protected despite being enumerated in the United States Constitution, Perry sidesteps a complete discussion of the ongoing tension between the growing recognition of human

57. For example, Perry devotes significant attention to the meanings of "cruel" and "unusual" in the context of "cruel and unusual punishment." *Id.* at 74–85.

rights and the recurrent failure to protect those rights. In juxtaposing an international level of recognition with a domestic failure to regulate, however, Perry's analysis does reflect a diminishing faith in the power and utility of international law. Still, without further analysis, his stance on this issue is unclear. Does Perry suggest that international human rights law is ineffective and therefore futile? Alternatively, does he suggest that international human rights law can be effective but only by way of better implementation? Or does he suggest that the success of international human rights law depends on the cooperation of the sovereign nation-state? Whatever stance put forth, an inevitable question follows from Perry's inquiry into human rights in the constitutional law of the United States: how could the international community, and the United Nations in particular, facilitate better implementation of international human rights law within individual countries? Without addressing concerns such as these, Perry's conclusion places the reader at risk of being left wary of international human rights law and possibly even confused as to the significance of the internationalization of human rights in the first place.

Enforcement of the protection of internationally recognized human rights essentially comes down to individual countries and their domestic laws. Perry effectively portrays the importance of domestic law within the discipline of international law, while also reminding the reader that "developed" nations such as the United States do not always succeed in their efforts to protect basic rights. Although Perry sets out a good background of how human rights are represented and recognized in various international treaties and oftentimes makes clear that the actions of the United States do not always reflect those of its counterparts in the United Nations, he neither offers an explanation of why the United States makes such decisions nor does he offer any possible means through which the United States might be compelled to act differently in the future. Thus, although Perry presents an international perspective on human rights that highlights the power of human rights in transcending the nation-state's sovereignty, throughout the book the reader is constantly informed of the fact that nation-state sovereignty often prevails, but without a thorough explanation as to why. Perry could have attempted such an explanation through a discussion of the existing political reality, especially with regard to specific powerful nations such as the United States and the consequent limitations of a universal system of human rights. Doing so would have perfectly complemented his well-structured analysis of human rights in the constitutional law of the United States, and could have avoided the possibility of leaving the reader with unresolved final questions, by providing a truly in-depth exploration of the issues at hand.

While Perry's focus on the relationship between domestic principles and international human rights is refreshing, it still begs the question of practicality and administrability. For example, it seems unfeasible to imagine that internationally recognized rights could be effectively protected within a country without any intrusion from external forces. In addition, Perry's emphasis on the United States Supreme Court's role in striking down the discussed laws as unconstitutional, and thereby advancing the recognition and protection of

international human rights, is a further reminder that the protection of human rights often comes down to one powerful institution that will not necessarily follow in other countries' footsteps in recognizing certain rights. The Supreme Court has yet to strike down the discussed laws as unconstitutional, and it is too hopeful to imagine that they will do so sometime soon.

The conclusions that Perry does reach, however, present important and thought-provoking arguments about international human rights, morality, and their relationship to constitutional law, rendering *Human Rights in the Constitutional Law of the United States* a valuable contribution to a variety of disciplines, especially the fields of international and constitutional law.