

Book Review

The Role of Democratic Politics in Transforming Moral Convictions into Law

Morality, Politics, and Law. By Michael J. Perry.* Oxford University Press, 1988. Pp. ix, 323. \$29.95.

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Professor Michael Perry's new book, *Morality, Politics, and Law*, is an ambitious attempt to address the extent to which moral and religious beliefs in a pluralistic society, such as ours, can legitimately influence law. He departs from the common opinion in legal circles that moral beliefs are a matter of taste or "values," and defends an older conception that it is possible to attain moral "knowledge."¹ He also departs from the "liberal political-philosophical project,"² which claims that it is possible (and desirable) for governments to steer a neutral course between competing moral understandings of the good. This, he suggests, is an illusion, and a disguise for the imposition of a particular moral structure without opportunity for open deliberation and reflection.

Professor Perry brings some refreshing common sense to these riddles of moral philosophy. His "naturalist" approach has obvious roots in Aristotle—not a bad place to begin thinking about ethics. His dismissal of

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1. M. PERRY, *MORALITY, POLITICS, & LAW* 28 (1988) [hereinafter referred to by page only].
2. P. 57.

moral skepticism and his respectful dissection of moral relativism, while not precisely original, are cogent and provocative. His insistence that moral principles are rooted in the experience of actual moral communities over time (religious communities among them) is a welcome antidote to modern rationalism, which has left its adherents defenseless against deconstruction and, ultimately, nihilism. Although professional philosophers would no doubt find much to criticize in his often summary disposition of perennial questions of ethics and epistemology, he presents his insights in a form that is interesting and challenging to those primarily concerned about questions of constitutional interpretation.

Perry couples his observations about moral philosophy with a plea for a new kind of politics—"a deliberative, transformative politics—as distinct from a politics that is merely manipulative and self-serving."³ It turns out that this kind of politics does not take place chiefly in legislative halls or on the electoral hustings, but in courtrooms. It turns out, also, that this kind of judicial politics requires a particular kind of interpretation, one all too familiar to devotees of modern constitutional theory. The task is to liberate judges from the constraints of a constitution seen as a settled body of principles. Thus, while his moral philosophy sets Perry apart from the prevailing opinion in legal academia, his constitutional theory does not.

Despite its familiar elements, however, Professor Perry's argument for "nonoriginalist" judicial review has a distinctive character. Most arguments about "originalism" and "nonoriginalism"⁴ consist of attacks on the former: that originalism is incoherent, based on historical error, or morally derelict. Much of this criticism can itself be criticized for being more detailed, exacting, and censorious about the positions attacked than about the (often rather hazy) alternatives proposed. *Morality, Politics, and Law* departs from this model. In it, Perry responds to "the soundest—most attractive, least vulnerable—version of originalism I can imagine."⁵ He goes so far as to defend originalism against a few of the most common arguments made by such scholars as Ronald Dworkin, Sanford Levinson, Mark Tushnet, and Robert Bennett. His presentation of the originalist position—while not the most attractive *I* can imagine—is fair-minded and respectful. His argument is not based on the defects of originalism, but on the superior quality of his own theory. "Originalism's weaknesses," he says, "are not intrinsic, but comparative: Originalism lacks the strengths of the nonoriginalist theory of judicial role I elaborate and defend."⁶

In that spirit I will take up Professor Perry's argument, beginning, as he begins, with the question of moral knowledge. This requires an exami-

3. P. 4.

4. Like Perry, pp. 279–80 n.7, I have misgivings about the terms "originalism" and "nonoriginalism," but will use them in this review in the way I understand him to be using them.

5. P. 122.

6. P. 131.

nation of how moral reasoning takes place. Part I is a discussion of Perry's uneasy attempt to wed critical rationality to moral (including religious) tradition. The role of moral and religious communities leads to a discussion in Part II of the ways in which religious communities interpret their sacred texts, and of Perry's analogy to judicial interpretation of the constitutional text. In these two sections my focus is largely methodological, and I follow Perry's order of argument.

In the remainder of the essay, I attempt to apply Perry's approach (appropriately modified) to the liberal, democratic, and law-governed traditions of the American polity, which I believe he is prone to undervalue. In Parts III and IV, I explore the principles of equality and individual rights, highlighting the contrast between Perry's approach and the "self-evident" truths of the Declaration of Independence. In Parts V, VI, and VII, I discuss Perry's ambivalent posture toward the principle of government by consent, which manifests itself in a preference for judicial over representative decisionmaking on matters of moral consequence. In Part VIII, I conclude with a brief discussion of why Perry's reformulation of the judicial function might weaken the vital democratic link between moral convictions and law.

I. ON TRADITION AND MORAL KNOWLEDGE

*The moral question, according to Professor Perry, echoing the ancients, is how to live. His "naturalist" approach to moral philosophy is to reason about how to live so as to "flourish"—to live the most deeply satisfying life of which one is capable.⁷ Reasoning about how to "flourish" involves reasoning from certain core convictions (usually relatively concrete) to the issue at hand. This process, as described by Perry, is neither individualistic nor rationalistic. "Basic moral beliefs," he says, "are less the property of individuals than of communities."⁸ And while moral reasoning must be self-critical and rational, its constitutive elements are the traditions of the moral communities in which the moral actor participates. "[T]he criterion for the revision of self is self, and the criterion for the revision of tradition is tradition. There is no escaping self or tradition: There is no evaluative perspective outside self or tradition."⁹ One of the most distinctive and attractive features of Perry's account is that he accords full respect and recognition to *religious* communities and *religious* traditions, which, he believes, have full and equal rights to participate as such in political decisionmaking—to speak in their own terms and to promote their own conceptions of the good. Indeed, he calls them the "paradigmatic" moral*

7. P. 11.

8. P. 29.

9. P. 31.

communities,¹⁰ and criticizes "secular leftists" for their "reductionist attitudes," which keep them from exploring "the resources of the great religious traditions" for "thinking about the human."¹¹

Thus far, Perry's naturalist moral philosophy may seem to have more in common with the conservatism of an Edmund Burke or the Bible Belt than with the various strains of individualism, rationalism, and secularism that make up modern American liberalism. If Burke could be summoned from the grave, he would surely agree with Perry that "[t]he ambition of liberal political philosophy notwithstanding, moral discourse must rely on relatively particular moral beliefs that, for the present at least, have withstood the test of experience, especially the experience of a moral community (or communities) over time."¹² As Burke understood,¹³ if moral discourse is grounded in this form of experience, we are less likely to stumble into the totalitarian horrors of a political system predicated on an abstract and unreal vision of the nature of humankind.

One shortcoming of Perry's account is that he neglects to discuss the reasons why thoughtful individuals often defer to tradition and historical experience when making moral judgments, rather than attempt a more individualistic or utopian analysis. Such deference is natural and inevitable, as Perry indicates, but it is also *sensible*. An individual has only his own, necessarily limited, intelligence and experience (personal and vicarious) to draw upon. Tradition, by contrast, is composed of the cumulative thoughts and experiences of thousands of individuals over an expanse of time, each of them making incremental and experimental alterations (often unconsciously), which are then adopted or rejected (again, often unconsciously) on the basis of experience—the experience, that is, of whether they advance the good life. Much as a market is superior to central planning for efficient operation of an economy,¹⁴ a tradition is superior to seemingly more "rational" modes of decisionmaking for attainment of moral knowledge.

This is true for individuals, but it is even more true for societies. Individuals sometimes "beat the market" (thereby adding information to the market) and individuals sometimes become saints and martyrs (thereby adding to the tradition). But economies directed by a central planning of-

10. He is more explicit about the role of religious arguments in politics in Perry, *Comment on "The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment,"* 27 WM. & MARY L. REV. 1067, 1070-72 (1986).

11. P. 183.

12. P. 36.

13. See generally E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (J.M. Dent & Sons ed. 1910).

14. Despite obvious flaws in many actual markets, a virtual consensus has emerged, across the ideological spectrum, that markets (where they are possible) are more efficient than central planning, leading to higher productivity and growth. The emerging tendency on the left is to rely on markets for economic organization and to engage in redistribution and selective intervention to accomplish other goals.

fice are always inefficient and societies directed by a central moral authority tend toward blindness and tyranny. Communities of free, spontaneously interacting persons are superior to both individualistic and hierarchical systems of designed order.¹⁵

But Perry recognizes, as many have not, the revolutionary potential of a deep commitment to a recorded tradition. A recorded tradition gives individuals and communities access to a vantage point distinct from—and potentially in opposition to—the prevailing judgment of today, of what religious persons typically call “the world.”¹⁶ Far from being the “dead hand of the past,” tradition can be liberating because it frees us from the tyranny of the present. Thus we arrive at the paradox of conservatism: that allegiance to the memory of an idealized past, with its idealized principles, has historically been the leading impetus to constructive social (as well as individual) transformation.¹⁷

Yet Professor Perry has not fully absorbed the wisdom of his own message. He takes pains to dissociate himself from the “conservative” point readers might otherwise draw from his discussion of tradition.¹⁸ He insists that “an important condition of the ‘health’—the flourishing—of persons and therefore of traditions is that they have the capacities for self-critical rationality and for growth.”¹⁹ Indeed, it is necessary for a community to “maintain a critical attitude towards the tradition.”²⁰ “A religious tradition has ceased to live when, *inter alia*, the community that is its present bearer is no longer sensitive to the need to criticize and revise the community’s form of life in the light of new experience and exigencies.”²¹ He thus singles out for praise the “critical efforts of feminist Christian theolo-

15. The leading theorist of spontaneous order is Friedrich A. von Hayek, whose *THE FATAL CONCEIT* (1988), *1 LAW, LEGISLATION, AND LIBERTY* (1973), and *STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS* (1967) are most pertinent here. An early statement of this position can be found in D. HUME, *A TREATISE OF HUMAN NATURE*, bk. III, pt. I (L.A. Selby-Bigge 2d ed. 1978) (1739–40).

16. For a particularly thoughtful discussion of the relation between religion and the world, see H.R. NIEBUHR, *CHRIST AND CULTURE* (1951).

17. See H. ARENDT, *ON REVOLUTION* 35–36 (1963) (“revolution” originally meant “movement of revolving back to some pre-established point and, by implication, of swinging back into a pre-ordained order”—“restoration”); M. WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 4–5 (1987) (“The claim to have found again some long-lost or corrupted doctrine is the basis of every religious and moral reformation.”). For dozens of examples of the transformative impact of tradition in English history, see P. JOHNSON, *A HISTORY OF THE ENGLISH PEOPLE* (1987). Johnson comments:

The concept of an ancient and perfect legal framework is, of course, an illusion. Such a thing has never existed, could never exist. But the English conviction that it does and must exist is so strong that any approach to change must be made from a conservative standpoint. It must be introduced under the guise of putting the clock back to an imaginary period in which the law flourished in all its majesty. The only form of progression is to move backwards into the past. . . .

Id. at 85.

18. P. 31.

19. P. 31.

20. P. 138.

21. P. 139.

gians, like Rosemary Ruether, to uncover the patriarchal aspects of their tradition and to establish . . . the 'sinful' (alienated and alienating) character of those aspects,"²² while referring disparagingly to the efforts of "the Polish Pope and many of his bureaucratic staff, most of whom are European," for seeking to restrain the tides of change in the American Catholic Church.²³

Professor Perry is trying to have his tradition and eat it too. An excess of "self-critical rationality" is death to tradition.²⁴ Is it *rational* for Jewish boys and men to wear little black caps on their heads or for Amish to dress like 17th Century German peasants? Is it *rational* for pro-life Catholics to go to jail to save a few babies from abortion or for Hindus to refuse to eat beef? What does Perry make of Tertullian's famous remark, "credo quia absurdum" ("I believe because it is absurd")? What will be left of tradition after we excise all the beliefs and practices that flunk the test of self-critical rationality? It is not even clear that posing the question ("Is it rational. . . ?") makes sense for a belief system in which faith, piety, charisma, love, esthetics, mystery, or wonder plays the central role. St. Paul warned against allowing human wisdom to be dominant over religious faith:

For the word of the cross is folly to those who are perishing, but to us who are being saved it is the power of God. For it is written, "I will destroy the wisdom of the wise, and the cleverness of the clever I will thwart." Where is the wise man? Where is the scribe? Where is the debater of this age? Has not God made foolish the wisdom of the world?²⁵

Ironically, an excess of self-critical rationality neutralizes the revolutionary potential of tradition. In practice, it means that we will seek to bring the tradition (including its idealized principles) into conformity with what seems more "reasonable" to our modern minds—namely, the norms of modern culture, particularly its more elite expression. If we maintain a "critical attitude towards the tradition," we are no longer able to *use* the tradition to foster a critical attitude toward "the world."

Perry's insistence on self-critical rationality contradicts his own position that "[t]here is no evaluative perspective outside self or tradition."²⁶ To say that the "health" of a tradition should be judged by its "capacit[y] for self-critical rationality and for growth"²⁷ is obviously to apply a standard

22. P. 139.

23. P. 30.

24. The corrosive effects of modern rationalism are vividly described in Michael Oakeshott's classic essay, *Rationalism in Politics*, in M. OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* (1962).

25. 1 Cor. 1:18-20 (RSV) (quoting Is. 29:14).

26. P. 31.

27. P. 31.

of judgment independent of the tradition. It is to give a privileged position to the post-Enlightenment western secular tradition.

To be wary of "self-critical rationality" is not, however, to reject the role of reason within a moral or religious tradition. There are different styles of reason, appropriate to different purposes. The style of reason characteristically employed within a moral-religious tradition is quite unlike the self-critical rationality that Perry insists upon. The sign of a faithful participant in a tradition is that he is engaged, seriously and conscientiously, in learning what the tradition has to offer. He need not be blind to the defects in the tradition, but he will approach the tradition with a receptive and respectful—even pious—attitude. At its best, this entails powerful and creative exercises of the faculty of reason, but it is not the same as self-critical rationality. The distinction is between reason that seeks to understand the wisdom of the tradition and reason that seeks to expose its faults.

The difference between the critical and the receptive styles of reason helps explain the paradox of conservatism, the connection between tradition and reformation. The virtue of piety inclines us to regard our forebears in the tradition as good, wise, and just (probably better, wiser, and more just than they were in fact). This will incline us, in seeking to understand the tradition, to emphasize those elements in the tradition that are most worthy of praise. We like to contemplate the American founders' heroic sacrifices for liberty; we do not like to dwell upon their institution of slavery. Thus, we interpret their legacy, piously and not critically, as embodying the spirit of liberty; we deem the institution of slavery, with its still-lingering shadows, to be out of keeping with the tradition. Piety is therefore the engine of reform, as faithful participants in the tradition ever strive to make it more worthy of an idealized past.

The great example in American history is Abraham Lincoln's interpretation of the Declaration of Independence. Lincoln, refusing to believe that our forefathers were hypocrites, understood the invocation of equality in the Declaration as a "standard maxim for free society, which could be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated."²⁸ He was therefore able to oppose slavery on the ground that it was inconsistent with the fundamentals of the American system. Many abolitionists, adopting a "critical" attitude toward the tradition, denounced the Constitution with its protections for slavery as "a covenant with death and an agreement with hell."²⁹ They thus cut themselves off from great reservoirs

28. R. BASLER, *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 361 (1946).

29. Resolution Adopted by the Anti-Slavery Society (Jan. 27, 1843) (drafted by William Lloyd Garrison), quoted in P. PALUDAN, *A COVENANT WITH DEATH: THE CONSTITUTION, LAW AND EQUALITY IN THE CIVIL WAR ERA* 3 (1975).

of popular understanding and support, as well as sources of wisdom about political right.

Perhaps the greatest recent example is the Reverend Martin Luther King, Jr., who repeatedly invoked the principles of the American tradition in support of the civil rights struggle. King's message carried so much moral force (even among whites and even in the South) precisely because it drew faithfully upon the (unfulfilled) tradition of the American political community. His "dream" of a more just America was less a condemnation of the nation than a call for its "return" to the principles announced, but never fully followed, by the Founders.

Moral reasoning by the pious adherent may *end up* transforming the tradition, sometimes convulsively, in the belief that a "return" to original principles is vital. Martin Luther loved the authentic tradition of his Church and venerated the apostles. His piety sundered that Church. But the person who is self-consciously committed to criticizing the tradition on the basis of "rational" principles derived from outside that tradition (from "the world") is another matter. Blinded by its faults, he may be unable to appreciate its virtues; accustomed to criticizing it from the outside, he may be unable to use it as a standard of judgment for reforming the world; estranged from its principles, he may be unable to rally the community defined by the tradition to reformation or renewal. These are, admittedly, questions of degree. But Perry so emphasizes the need for perpetual change, revision, criticism, and reform, and so praises radical religious movements (the only religious tradition he describes as "great" is liberation theology³⁰) as to suggest that the best traditions are those that are in the process of abandoning their traditional moorings.

In the final analysis, Professor Perry's conventionalist moral theory seems to contain the seeds of its own destruction. Our only access to "moral knowledge" is through our moral traditions; yet we have an obligation to subject our moral traditions to "self-critical rationality." His approach conjures up the vision of a student trying to warm himself in a freezing library, burning the very books he needs to find answers to his questions.

Perhaps the problem is that Perry takes his conventionalism one step too far. He sometimes appears to claim, not merely that beliefs obtained after properly critical reflection on moral tradition are the best access we have to moral knowledge, but that such beliefs *are* moral knowledge.³¹ I can agree that the most promising means of obtaining moral knowledge is to immerse oneself in a worthy moral tradition; that this is superior to acquiescence in the moral fads of the moment; that this is superior to an

30. P. 183.

31. P. 28.

application of one's own powers of abstract reason. But this is a means for obtaining knowledge; it is not knowledge itself.

II. ON INTERPRETING SACRED TEXTS

The appropriate attitude toward tradition is all the more important if we pursue Professor Perry's analogy between the role of the Constitution in American political life and the role of a sacred text in the life of a religious community. Consider Perry's description:

In [a religious] community, the sacred text is not—not simply, at any rate—a book of answers, but rather a principal symbol of, perhaps *the* principal symbol of, and thus a central occasion of recalling and heeding, the fundamental aspirations of the tradition. In that sense, the sacred text constantly *disturbs*—it serves a prophetic function in—the life of the community.³²

So also, says Perry, “[a]s a principal symbol of fundamental aspirations of the American political tradition, the constitutional text constantly disturbs—it serves a prophetic function in—the life of the political community.”³³

Professor Perry's analogy depends on his readers having some familiarity with the way in which religious communities interact with their sacred texts. (It must be noted, however, that his *argument* does not depend on his *analogy*.³⁴) This, in turn, presupposes that there is some paradigmatic posture toward scripture that might be said to be typical of “religious communities” in general. If different religious communities interact with their sacred texts in fundamentally different ways, Perry's analogy loses its force; indeed, the analogy may undermine his claim to have discovered a hermeneutical approach to textual interpretation that will command wide acceptance in the American political community.

Unfortunately, and despite Perry's obvious sincerity in seeking to consider and respect religious traditions other than his own, his paradigmatic religious community is far from typical—even if we confine our attention to the principal religious traditions of the United States. It certainly does not describe the self-understanding of Orthodox Jews, who do indeed look to their sacred texts for “answers” to specific questions—and find them. (Orthodox Jews recognize 613 specific religious commands, or *mitzvot*, that they strive to obey; if they could obey them all consistently, a herculean if not impossible task, they would have lived a perfect life.) The Orthodox posture toward scripture and tradition is shared, to a greater or

32. P. 137.

33. P. 139.

34. P. 145.

lesser extent, by some Christian persuasions such as the Amish and the fundamentalists.

Perry's description comes closer to mainstream Protestant and Catholic thought, but even there his description is in tension with the more traditional elements within those religious communities. Evangelical and other "conservative"³⁵ Protestants use scripture as a vantage point for criticizing present-day institutions and practices. But they do not believe it necessary or appropriate to "revise the community's form of life in the light of new experience and exigencies."³⁶ Quite the contrary. In evangelical circles, it is common to distinguish between the "biblical" and the "cultural." The former is fixed and authoritative; the latter is changing and open to question. "New experiences and exigencies" are strictly "cultural." Nor is a "critical" attitude toward the scriptures encouraged. The unifying theme of conservative Protestantism is its insistence on the inerrancy of the inspired Word of God, as it came from God.³⁷ Evangelicals understand the scriptures as an unchanging source of revealed truth *against which* they must judge their own actions, their community's life together, and the practices of the world.

This attitude does not differ greatly from traditional Roman Catholicism, but traditional Catholics also believe that the church leadership, most particularly the Pope, has access to revealed truth (the "magisterium") to which individual believers are not privy. This gives teaching authority to the bishops, in communion with the Pope; individual believers must subordinate their reading of the scriptures to the authoritative pronouncements of the Church. This is one of the principal points of difference between Protestants (not just evangelicals) and Catholics. To the Protestant, each individual believer is able to read and interpret the scriptures for himself, under the guidance of the Holy Spirit. While the teaching of church leaders is entitled to respect (and in practice receives great deference), and while church leaders have the ultimate authority to determine who may participate in the life of the religious community, for Protestants God alone is lord of the conscience, and scripture alone is the authority for spiritual judgments. For Catholics, however, any reading of the Bible must be mediated by experience, tradition, and institutional authority.³⁸

Professor Perry's description of the role of sacred texts in the religious community conforms to neither the conservative Protestant nor the tradi-

35. I regret the use of political terminology—"liberal" and "conservative"—to describe theological movements, but the usage is standard. See, e.g., D. KELLEY, *WHY CONSERVATIVE CHURCHES ARE GROWING* (1972); W. ROOF & W. MCKINNEY, *AMERICAN MAINLINE RELIGION: ITS CHANGING SHAPE AND FUTURE* (1987).

36. P. 139.

37. See S. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 812-16 (1972).

38. See R. NEUHAUS, *THE CATHOLIC MOMENT: THE PARADOX OF THE CHURCH IN THE POSTMODERN WORLD* 4-13 (1987).

tional Catholic view. On the one hand, it suggests a loose and critical posture toward scripture that evangelicals and other conservative Protestants are united in rejecting. On the other hand, it suggests a confrontational posture toward the church's structure and tradition that traditional Catholics would consider presumptuous.

Which religious community does Perry have in mind? His references to religious authorities give a clue: most are exponents of the modern American variant of Catholicism, exemplified by the National Conference of Catholic Bishops and the so-called "liberal" or "progressive" wing of Catholic theologians at major American centers of Catholic scholarship.³⁹ This religious community conforms rather well to Perry's description. It concerns itself deeply and intensively with criticism and change, both of church practices (the male celibate priesthood, the posture toward homosexuality, the teaching against artificial birth control, the authority of the Pope) and of society at large (reliance on nuclear weapons, organization of the economy, policy toward Marxist movements in Central America). It challenges church authority. It is open to innovative exegeses of the Bible, even to the rejection of some passages that conflict with modern views of morality, history, science, or human nature. Perry himself describes the paradigmatic religious tradition as one that employs "the sort of interpretation of sacred texts that presupposes no more than that the texts are human artifacts and repositories of human wisdom."⁴⁰ It would seem that, when choosing a religious community to serve as paradigmatic for all religious communities, Professor Perry has chosen his own.⁴¹

Needless to say, the approach to sacred texts that Perry describes is controversial. Joseph Cardinal Ratzinger, the traditionalist Catholic theologian (Prefect of the Congregation for the Doctrine of the Faith and President of the International Theological Commission and the Pontifical Biblical Commission), has described some examples of the approach as "not even claim[ing] to be an understanding of the text itself in the manner in which it was originally intended."⁴² According to Cardinal Ratzinger, modern critical liberal theology expresses the view that the "Bible's message is in and of itself inexplicable, or else that it is meaningless for

39. That the Bishops' Conference and the principal American Catholic theological schools are presently in conflict both with Rome and with Catholic traditionalism is apparent from recent church controversies. See, e.g., Steinfels, *Academic Freedom is Key Issue in Suit*, N.Y. Times, Dec. 18, 1988, § 1, at 30, col. 6 (discussing lawsuit by prominent Catholic theologian dismissed by Vatican from Catholic University for deviations from official Catholic theology); Goldman, *U.S. Bishops Reject Bid by Vatican to Curb Role*, N.Y. Times, Nov. 17, 1988, at A20, col. 5 (reporting vote by American bishops to reject draft Vatican document that would limit teaching authority of Bishops' Conference). On the posture of the modern American Catholic Church generally, see J. DOLAN, *THE AMERICAN CATHOLIC EXPERIENCE* (1986); R. NEUHAUS, *supra* note 38.

40. P. 143 (entire quotation italicized in original).

41. On the last page of the book, Professor Perry identifies himself as a Catholic, and his treatment of Catholic sources indicates his allegiance within the Church.

42. Ratzinger, *Biblical Interpretation in Crisis*, *THIS WORLD*, Summer 1988, at 3, 5 (Erasmus Lecture #4).

life in today's world."⁴³ Fundamentalists, evangelicals, other conservative Protestants, and Orthodox Jews might well have even harsher things to say.⁴⁴

Let us, then, expand Professor Perry's analogy to include the ways in which other American religious communities interact with their sacred texts. Of course, this will be a generalization, perhaps even a caricature; but it may illustrate the limitations of Professor Perry's approach.⁴⁵

Constitutional interpretation, performed in the manner of Orthodox Jews and Christian fundamentalists, would seek specific answers to specific questions from a particular time in the past (presumably the founding), and would enforce those answers in today's world, notwithstanding considerable pressure arising from changes in context and circumstance. This would look rather like the "specific intentionalism" of some legal commentators, most notably Raoul Berger.⁴⁶

Constitutional interpretation, performed in the manner of evangelicals and other conservative Protestants, would seek unchanging principles in the Constitution's text, structure, and history, and would attempt to apply those principles to modern questions in the spirit of the principles rather than necessarily of the specific contexts addressed by the framers. As in Biblical interpretation, there are no mechanical rules to achieve this result, but one can identify the proper attitude to bring to the task: the desire to learn from the sources, the determination to conform one's decisions to what one learns, and the willingness to put aside "cultural" and other prejudices, including the fashionable and the modern. This would look something like "originalism," at least in its most attractive form, the form described by Professor Perry. It may or may not be significant that this is the posture toward sacred texts with which the framers and ratifiers of the Constitution would have been most familiar.

Constitutional interpretation, performed in the manner of traditional Catholics, would regard Supreme Court decisions as of (almost?) equal weight to the Constitution as originally understood. Constitutional law would consist of a progression of decisions by the Court. The nation would rely on the cumulative institutional wisdom of the judiciary, rather than on the precise contours of the original plan of government. The key question in constitutional analysis would be the orderly unfolding of pre-

43. *Id.* at 5-6.

44. *See, e.g.*, J. MACHEN, *CHRISTIANITY AND LIBERALISM* 172-73 (1923) (arguing that liberalism differs from Christianity on full range of fundamental issues).

45. Readers may wish to compare Sanford Levinson's discussion of "Protestant" and "Catholic" modes of constitutional interpretation, in S. LEVINSON, *CONSTITUTIONAL FAITH* 17-53 (1988). *See also* Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 1 (1984).

46. *See, e.g.*, R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974); R. BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987); R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977). For my analysis of Berger's approach, see McConnell, *Federalism: Evaluating the Founders' Design* (Book Review), 54 *U. CHI. L. REV.* 1484 (1987).

cedent (though no exponent of this approach takes as strong a view of *stare decisis* as that accorded in official Catholic theory to the *ex cathedra* pronouncements of the Pope). This approach to constitutional law would look something like common law adjudication.⁴⁷

Professor Perry's modern American liberal Catholic approach gives some weight to the Constitution as originally understood. "To say that the judge should rely on her own beliefs . . . is not to say that she should ignore original beliefs. She should not. The ratifiers, too, were participants in the tradition."⁴⁸ It also accords respect to past decisions of the Court. "She should not ignore [the beliefs of past judges]—including 'precedent'—or, indeed, any other source that may shed light on the problem before the court."⁴⁹ But after due consideration of the Constitution as originally understood and of precedent, the "thoughtful judge will rely on her own beliefs. . . ."⁵⁰ And the judge will do so in a way that is "transformative"—that "disturbs" the political community. This looks rather like modern judicial activism.

My point is not that the modern American liberal Catholic posture toward sacred texts is wrong, though it is not mine. I suggest only that Perry's deployment of the analogy is parochial. It is not true, as he seems to suggest, that the experience of "religious communities" points to a particular understanding of interpretation, which should be applied to constitutional interpretation. If anything, the experiences of most religious communities in this country through most of our history point toward other understandings of interpretation.

This raises the troubling question of authority, a question Perry's analogy sidesteps. In the American constitutional scheme, the Supreme Court is the ultimate expositor of constitutional meaning, within the context of a case or controversy. There is no ultimate expositor of religious meaning (at least none that is shared). In the absence of an ultimate interpreter, the religious community can enrich its life by listening to different and inconsistent readings of religious texts and traditions. None has the power to impose its view on the others.

Similarly, insofar as the Constitution serves to inform the political conscience of each political actor—making both citizen and official more conscious of the values of separation of powers, free speech, religious freedom, due process, equal protection, private property, and so forth—there is no problem with "nonoriginalist" interpretation. Indeed, there is no problem with political actors turning to natural law, science fiction, the

47. For an example, see Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984); see also Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

48. P. 150.

49. P. 150.

50. P. 150.

New York Times editorial page, or “any other source that may shed light on the problem.”⁵¹ There is no requirement that all participants agree on the proper sources; each source can enrich the discussion of the public good.

But insofar as the Constitution limits the range of democratic choice through the decisions of the Supreme Court, this latitudinarian posture is impossible. If a single body of nine religious judges were authorized to set forth the minimum permissible content of the sacred text—an interpretation to which the rest of the community would be compelled to conform—I suspect Professor Perry would join with me in wishing that they would stick to the common core of agreed-upon essentials, leaving more contentious propositions to bodies whose judgements are less final and conclusive.

III. ON LIBERALISM

Having set forth his methodology for evaluating claims about moral knowledge, Professor Perry proceeds to the question of the proper relationship between morality and coercion in the pluralistic American political community. “How ought politics and law to respond,” he asks, “to the reality of deep, pervasive, persistent moral dissensus?”⁵² His approach to the question is a combination of positive and normative argument—a positive argument about what the American political tradition *in fact* stands for, and a normative argument about what it *ought* to stand for. “The vision of the proper relation between morality and politics I offer here,” he says, “is a vision already realized, already embodied, to some extent, in the practices of the American political-constitutional community. Thus, although my discussion is prescriptive [sic], it is, to some extent, descriptive as well.”⁵³

Perry begins his political theory by arguing that what he calls “the liberal vision” of the relationship between morality and politics is a “failure.”⁵⁴ This should immediately cause the reader to doubt whether his “positive argument”—that his normative commitments are “already embodied” in the American political tradition—is entirely accurate. We live, after all, in the most thoroughly liberal political community in the history of the world, a community in which virtually all serious political figures from Barry Goldwater to George McGovern are “liberals.”

The liberal vision, according to Perry, is that “our politics and law must aim to be ‘neutral’ or ‘impartial’ among the basic differences that constitute the moral dissensus.” It reflects the “ambition to achieve a

51. P. 150.

52. P. 54.

53. P. 76.

54. P. 55.

politics that transcends the deep, pervasive, persistent differences among us—a politics less divided, less fragmented, than we, a politics that unites us. . . .”⁵⁵ The liberal vision, he says, is “noble.” But it is also futile. “[O]ur politics and law simply cannot be neutral or impartial among the differences that constitute the dissensus. The relation between morality/religion and politics/law envisioned by liberal political philosophy is impossible to achieve.”⁵⁶

Professor Perry supports his thesis through a brief critique of three modern liberal thinkers: John Rawls, Bruce Ackerman, and Ronald Dworkin. To Rawls he responds that there are no principles of justice that satisfy Rawls’ criterion—that the principles adopted by the State must transcend the subjective circumstances of fundamental disagreement about the good. To Ackerman he responds that no principle of distribution can pass Ackerman’s own neutrality principle. To Dworkin he responds that, contrary to Dworkin’s own criteria of liberalism, his principles rely implicitly on a particular conception of the good. In short, “any liberal theory in which no particular conception or range of conceptions of human good plays a role in the derivation of a principle or principles of justice [] is doomed to failure.”⁵⁷ He insists that “there is a need for ‘a religious or philosophical preface to politics.’”⁵⁸

Thus, Professor Perry rejects the notion of “liberalism-as-neutrality.” He says it is “a phantom, a will o’ the wisp.”⁵⁹ Notwithstanding his sweeping remarks about the “liberal political-philosophical project,” however, Perry embraces a different kind of liberalism, which he calls “liberalism-as-tolerance.”⁶⁰ “Liberalism-as-tolerance” holds that, while in principle a “coercive strategy” for government is “an important means” of protecting “interests the satisfaction of which significantly enhances one’s level of well-being and the frustration of which significantly diminishes it,”⁶¹ there are powerful pragmatic reasons why the political community should use its coercive power sparingly. Perry lists six such reasons: (1) there is always a risk that the government decision may be wrong; (2) coercion may stifle “new or unusual ways of life” that, if not suppressed, might contribute to society’s “self-critical rationality”; (3) one might not always be in power, and a tradition of non-coercion would be valuable “in the event the winds change”; (4) coercion causes suffering; (5) coercion is “corrosive” of the sense of community; and (6) “extreme” coercion can

55. P. 55.

56. Pp. 55–56. For an argument that this neutral or impartial understanding does not adequately describe liberal thought, see West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985).

57. Pp. 71–72.

58. P. 87 (quoting Rorty, *The Priority of Democracy to Philosophy*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM* 257, 264 (M. Peterson & R. Vaughan eds. 1988)).

59. P. 102.

60. Pp. 72, 102.

61. P. 97.

violate individual conscience.⁶² Thus, according to Perry, the political community need not (cannot) be neutral, but it should be tolerant. Participants in the political life have no choice but to rely on their moral beliefs, including their religious beliefs about the human good, when determining public policy. But in so doing they should have "a strong reluctance to rely on coercive legislative strategies."⁶³

These are good reasons, all of them, for avoiding coercion when possible. But they are also contingent: factors to be weighed in the balance rather than principles to be obeyed. The state is to be tolerant. As James Madison argued in a similar context, the word "toleration" implies a privilege or forbearance accorded by legislative grace, rather than a right that is the natural inheritance of humankind.⁶⁴ Liberalism-as-tolerance implies that the government is vested with full authority to act coercively when those in power believe it to be right. For excellent reasons, the government ought not exercise these powers to their fullest, but there can be no question that the authority is there. (And Perry reminds us that it does not matter whether the coercive strategy is "paternalistic, nonpaternalistic, or both."⁶⁵ The government has full authority to act coercively against us *even in our own interest.*)

Liberalism-as-tolerance is not the liberalism of the Constitution. Constitutional liberalism is neither the "phantom" neutrality of Rawls-Ackerman-Dworkin nor the contingent toleration of Professor Perry. Rather, it begins with the proposition that each person has a right to his life, liberty, and property. These are not mere privileges, to be enjoyed at the sufferance of the state. We may be deprived of our lives, liberty, and property only by laws that have been approved by our representatives through prescribed procedures, pursuant to constitutional grants of power by the people to the governing authorities, for particular ends, with particular limitations even within those ends. For constitutional liberals, liberty requires no justification: it is coercion that requires justification, and the consent of the governed is the only allowable justification.

Professor Perry does not face up to the central difference between political communities and moral-religious communities: governments can use force and private associations cannot. To judge from the metaphors he uses, Perry believes that politics is very like a conversation. He says that politics should be seen as an instrument for the "transformation of prefer-

62. Pp. 98-102.

63. P. 102.

64. The context was the drafting of the Virginia Declaration of Rights. For an account of the controversy, see W. MILLER, *THE FIRST LIBERTY* 3-6 (1985). Later, in *THE RIGHTS OF MAN*, Thomas Paine went a step further than Madison: "Toleration is not the *opposite* of intolerance, but is the *counterfeit* of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, and the other of granting it." T. PAINE, *Rights of Man*, pt. 1 (1791), in *THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE* 291 (P. Foner ed. 1945).

65. P. 102.

ences *through public and rational discussion*.”⁶⁶ He says that “our *political life* includes *ongoing moral discourse* with one another in an effort to achieve ever more insightful answers to the questions of what are our real interests, as opposed to our actual preferences, and thus what sort of persons—with what projects, goals, ideals—ought we to be.”⁶⁷ But politics is more than a discussion. After moral discourse is over, even if some parties remain unconvinced, the prevailing party’s moral beliefs attain the force and effect of law. *That* is why politics is so scary.

It is difficult to see why a naturalist moral philosopher would look to *politics* as the preferred forum for the transformation of preferences. The application of force is less likely to result in “insightful answers” than continued discussion and disagreement. Contrary to Perry’s belief, liberals do not assume (at least, my kind of liberal does not assume) that “existing sensibilities” or “existing preferences” should be “take[n] as a given” or with an “uncritical attitude.”⁶⁸ We are all for testing existing preferences through deliberation and debate. But deliberation and debate, especially over the highest things—matters of ultimate truth and value—is best conducted in forums where the ties of common experience are closer and the threat of coercion is absent: the communities of church, synagogue, club, political association, debating society, university, labor union (if voluntarily joined), communications media, dinner table, and so forth. The political community, being more comprehensive, must necessarily be more heterogeneous. It cannot seek “moral knowledge” in quite the same way. When the prospect of coercion is introduced, it is better, insofar as possible, to agree to disagree, especially about the highest things. Perhaps I am wrong about this; but I can claim as authority the Constitution itself, which forbids the government from even attempting to iron out our differences with respect to the highest things.⁶⁹ (Of course, the Constitution did not establish a regime of pure libertarianism: the founders “agreed to agree”—or at least to acquiesce in the decisions of representative institutions—about many questions, including war and peace, taxation and spending, crime and punishment. But not about religion.)

It is strange, to say the least, that in a book about the relation between what Perry calls “morality/religion” and “politics/law”⁷⁰ he does not attempt to relate his constitutional vision to the establishment or free exercise principles of the First Amendment. These principles are a clue that

66. P. 152 (quoting Elster, *Sour Grapes—Utilitarianism and the Genesis of Wants*, in UTILITARIANISM AND BEYOND 219, 23 (1981)) (emphasis added); see also p. 81.

67. P. 152 (emphasis added).

68. Pp. 80–81.

69. See U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”). For an account of how the Religion Clauses relate to the political theory of the Constitution as a whole, see McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 14–24.

70. P. 72.

Perry's vision is not the vision of the Constitution. It has been said that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."⁷¹ How can politics serve as the instrument for transformation of preferences—for achievement of moral knowledge—without establishing a public orthodoxy? How can politics tell us what our "real interests" should be, or "what sort of persons—with what projects, goals, ideals" we ought to be, if the questions of ultimate truth and value are constitutionally committed to each person's conscience, as it may be informed by his religious faith and tradition?

IV. ON EQUALITY, RIGHTS, AND CONSENT

Professor Perry is absolutely correct about one thing: constitutional liberalism, like other systems of political theory, presupposes a particular view about the good life, which in turn is based on a particular view about the nature of man. But he is oddly incurious about what moral beliefs lie behind constitutional liberalism. For a scholar committed to the view that the fundamental aspirations of our political tradition form the basis for moral knowledge within our political community, he is surprisingly silent about the causes that impelled the American people towards the separate and equal station to which they believed the laws of nature and of nature's God entitled them.

The Founders of the American political community held as "self-evident" certain moral beliefs ("truths") about the nature of man and the good life, and the political principles that follow from these truths. These surely qualify as fundamental aspirations of our political tradition, under Perry's definition, and are therefore worthy of attention. The three most important elements of this moral-philosophic theory are equality, individual rights, and government by consent. Perry, it turns out, is skeptical about equality and ambivalent toward the other two.

A. *Equality*

Perry does not mention the Declaration, but at one point he comments: "I don't know what it means to say that one human being is intrinsically superior to another."⁷² This implies—indirectly but ineluctably—that he also does not know what it means to say that one human being is intrinsically *equal* to another. If there is no "ultimate standard of comparison" that could tell us that A is superior to B, there is also no "ultimate standard of comparison" that could tell us that A is equal to B. One is as

71. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

72. P. 64.

baseless an assertion as the other. Accordingly, Perry can neither affirm nor deny the Declaration's first "self-evident truth". He cannot base a political theory on it. In effect, Perry has signalled that his moral philosophy is rooted in something other than the tradition of Jefferson, Madison, and Lincoln. This does not make Perry wrong—but it must cause us to be wary of his claim that his "vision of the proper relation between morality and politics . . . is a vision already realized, already embodied, to some extent, in the practices of the American political-constitutional community."⁷³

Perry explains his skepticism about "intrinsic superiority" in an endnote:

Imagine two human beings, *A* and *B*. To say that *A* is superior to *B* seems to be to say that *A* compares favorably to *B* in terms of some factor *X*, like strength, intelligence, or race. But what does it mean to say that *A* is *intrinsically* superior to *B*? That *A* compares favorably to *B* not in terms of some *X*, but *period*? If that is what it means, then the statement is incoherent, because *A* and *B* cannot be compared at all except in terms of some *X*. Perhaps "A is intrinsically superior to B" means that *A* compares favorably to *B* in terms of some *X*, which is not merely intrinsically good, but better than any other factor, including any factor in terms of which *B* compares favorably to *A*. In that case, *X* would have to be the ultimate standard of comparison. How might one defend the claim that *X* is the ultimate standard of comparison? By asserting that one simply knows—"intuits"—it?⁷⁴

Professor Perry apparently assumes his rhetorical question is unanswerable. Let us attempt to answer it. Is there an *X* that is the ultimate standard of comparison between human beings? *The* central question addressed by Perry's "naturalist" moral philosophy is how human beings "are to live the most deeply satisfying lives of which they are capable." He tells us that "moral knowledge is knowledge of how to live so as to flourish, to achieve well-being."⁷⁵ Presumably, therefore, the ultimate standard of comparison between individuals must have something to do with "flourishing," if flourishing is the most important—most deeply satisfying—thing. It does not follow, however, that *A* is superior to *B* if *A* has a superior capacity for flourishing, since by definition flourishing is to live the "most deeply satisfying life of which one is capable." Since one's degree of flourishing is relative to one's capability (rather than to an absolute or interpersonal standard), all are by definition equal in their capacity to flourish. But this equality is definitional, or tautological.

73. P. 76.

74. P. 257, n.31.

75. P. 11.

A harder and more important question is whether all are equal in their capacity to *know* what it means to "flourish." This could be an "ultimate standard of comparison." If A is "intrinsically superior" to B, it could mean that A has a better understanding than B of how to flourish. It follows that B would be better off if he submitted (or were forced to submit) to rule by A. Infants and lunatics are examples: they need guardians to rule over them for their own good. This is what Aristotle called a "natural slave": "all men who differ from others as much as the body differs from the soul, or an animal from a man . . . all such are by nature slaves, and it is better for them . . . to be ruled by a master."⁷⁶ To be intrinsically inferior is to be of such diminished moral capacity that someone else is a superior judge of your own interest. Conversely, to be equal—in the sense that term is used in the Declaration—is to be what Aristotle called a "freeman": a person who is the best judge of his own interest.⁷⁷

Professor Perry does not share the Declaration's belief that each person is equal, *i.e.*, the best judge of his own interest. This is most clearly revealed in his criticism of "experience-utilitarianism," which he summarizes as follows, quoting Dan W. Brock:

[F]or persons to be happy is for them to be undergoing a conscious experience that they like or enjoy for its own sake On the happiness conception then, it is conscious experience enjoyed for its own sake that has intrinsic value, and each person is in a privileged position for determining what they enjoy or what makes them happy.⁷⁸

"This conception of human good or well-being," according to Perry, "is utterly implausible." Why?

Perry explains: "To achieve the mental state in question [happiness] is not necessarily to have achieved well-being or even to have come close. It is not necessarily to be flourishing."⁷⁹ The problem with experience-utilitarianism is that "[w]hat makes a person 'happy' depends on her sensibilities, yet a person's sensibilities might be antithetical to, subversive of, her

76. ARISTOTLE, *POLITICS I. v.*, § 8, at 13 (E. Barker trans. 1946).

77. Surprisingly, in light of his announced methodology, Professor Perry does not inquire into the religious roots of the doctrine of equality. Compare p. 183 (criticizing "secular leftists" who often fail "to explore some of the richest resources for thinking about the human: the resources of the great religious traditions"). The equality of all souls before God is an essential element in Christian doctrine, especially in the Protestant tradition that informed the American Revolution. The Protestant notion of equality ("the priesthood of all believers") is conceptually quite close to the Declaration, in that it affirms that each believer has equal access to knowledge of the divine will through the scriptures, and thus to answers to the question: How shall we live? See M. LUTHER, *THREE TREATISES* 21-22 (Muhlenberg Press ed. 1943).

78. P. 79 (quoting Brock, *Utilitarianism*, in *AND JUSTICE FOR ALL* 217, 222 (1982)).

79. P. 79.

flourishing.”⁸⁰ He gives the example of the sadist or masochist who nonetheless considers himself “happy.”

This suggests that Perry’s objection to experience-utilitarianism might be based on its use of the term “happiness” (as opposed to “flourishing”) to denote the good life. Interestingly, the same term, in the form “pursuit of happiness,” is used in the Declaration, and I assume this usage is subject to the same objection. But surely Perry is aware of the philosophical history of the term “happiness,” which long predates experience-utilitarianism and the Declaration. Perry calls himself a “neo-Aristotelian.”⁸¹ Aristotle devotes his *Nicomachean Ethics* to the meaning of happiness. Consider the following:

What is always chosen as an end in itself and never as a means to something else is called final in an unqualified sense. This description seems to apply to happiness above all else: for we always choose happiness as an end in itself and never for the sake of something else.⁸²

Aristotle, like the modern experience-utilitarian, identifies the highest good with the good “in itself”—the good that is not chosen for the “sake of something else.” This good they call “happiness.” So understood, the term “happiness” does not appear to differ significantly from Perry’s preferred term “flourishing.”

A more substantial ground for Perry’s objection to experience-utilitarianism is based on the utilitarian’s belief that “each person is in a privileged position for determining what they enjoy or what makes them happy.” An individual’s “sensibilities,” Perry says, may be “antithetical to, subversive of, her flourishing.” Such a person would be better off under someone else’s governance. As he says, “[i]t simply makes no sense to give priority to satisfaction of a person’s mistaken preferences rather than to strategies for correcting her mistaken vision of her possibilities and of what she would find most deeply satisfying.”⁸³

At one level, this is obviously true; Perry’s examples of sadists and masochists are to the point. But the experience-utilitarian does not, as I read him, make the claim that each person will invariably make the right choices. Rather, he claims that “each person is in a *privileged position*” for determining the right choices. In other words, no one else is in a better position than the individual himself to determine how he should live. That human beings are fallible does not mean that human beings are *unequal* in this most important respect. Rulers, no less than subjects, can make

80. P. 80.

81. P. 180.

82. ARISTOTLE, *NICOMACHEAN ETHICS* I, § 7, 1097a-1097b, at 15 (M. Ostwald trans. 1962).

83. P. 80.

choices “antithetical to, subversive of” the good life. They have even been known to be sadists and masochists. If all human beings are equal, then each is in a “privileged position” to determine for himself how to flourish. It is a natural right, an intrinsic part of being an adult human being, that we can engage in the pursuit of happiness—the quest for the good life—as we understand it. It is better to err as an autonomous being than to live well as a slave.

B. *Rights and Consent*

From the axiom that “all men are created equal” follow the twin propositions that they have certain “unalienable rights” and that the “just powers” of governments derive from the “consent of the governed.” The doctrines of “rights” and “consent” are linked because no person has a natural claim to rule over another.⁸⁴ The only presumptively legitimate “strategy” for A to “correct” B’s “mistaken vision of her possibilities”⁸⁵ is by persuasion and consent, as distinguished from force or fraud. (Of course, A and B can agree to abide by the results of some previously-arranged decisionmaking process, for example, majority rule. As long as A and B continue to live within and reap the benefits of their compact, they can be said to have “consented” to laws properly enacted, even if they do not agree with them.)

The political significance of the Declaration’s self-evident truths, therefore, is that the only just form of government is self-government, in two senses of the word. The liberal sense of self-government is that each person must be free to order his own affairs in most respects, except as it affects other persons or society as a whole. Governmental intervention is exceptional. The republican sense of self-government is that each person must be permitted to participate in the process of government; we govern ourselves if we are equal participating members of the political community (even if we do not necessarily agree with the collective decisions of the community).⁸⁶ Thus, both aspects of liberal democracy—individual rights and political participation—are bottomed on the premise of equality. If all were not equal, if some were better than others in the fundamental sense

84. On the doctrines of rights and consent in early liberal thought, see R. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 26–32, 41–45 (1985).

85. P. 80.

86. The American political community was not perfectly republican in this sense at the time of the founding. Decisions about the suffrage were deliberately left to the states, many of which had property qualifications and all of which restricted the vote to adult white males. *See* U.S. Const. art. I, § 2 (election of Representatives); art. I, § 3 (election of Senators); art. II, § 1 (election of President). However, it is striking that at each expansion of the franchise, advocates invoked the principle of the Declaration of Independence (the “just powers” of government are derived from “the consent of the governed”) and opponents were unable to summon forth arguments of comparable authority. In a sense, therefore, it can be said that the principle of universal suffrage was present from the founding, simply requiring time for its ultimate vindication.

of being better judges of how to flourish, then some form of aristocracy (rule of the good) might be preferable, in theory, to liberal democracy.⁸⁷

The Constitution itself is neither radically liberal nor radically democratic. It would be impossible to be both. The Constitution allows many interferences with individual freedom, when authorized through democratic procedures. But the constitutional system is most liberal with respect to the matters most central to flourishing—the freedoms associated with the speech and religion clauses of the First Amendment. Nor is the Constitution thoroughly democratic; indeed, it was specifically designed to avoid the pitfalls of unbridled democracy, especially the dangers to individual rights. But this was accomplished without introduction of aristocratic or monarchical elements; all authority stems, even if indirectly, from the choices of the people. The constitutional scheme was designed and defended as “a republican remedy for the diseases most incident to republican government.”⁸⁸ It represents a skillful—if sometimes uncomfortable—accommodation of the two aspects of self-government espoused by the Declaration.

Despite his skepticism about a political theory predicated on equality, Professor Perry is neither illiberal nor anti-democratic. He is, however, ambivalent toward both liberalism and democracy, toward both rights and consent. His liberalism, as we have seen, is contingent; it is not based on rights that inhere in the individual but on a posture of toleration by the state. Among the six reasons he has given for using coercion sparingly, none, with the possible exception of violations of “individual conscience” (an argument he makes applicable only to “extreme coercion”),⁸⁹ recognizes the person as an autonomous entity. His liberalism-as-tolerance accords no weight, in principle, to the possibility that an essential element in the fully human life is the authority to choose for oneself, whether for good or for ill.⁹⁰

As Professor Perry’s liberalism is contingent, so also is his commitment to democratic rule. This is evident in his approach to constitutional law, the subject of his final, and longest, chapter.

V. ON CONSTITUTIONAL INTERPRETATION

The legal journals have been filled in recent years with disputation over the question: How shall the courts interpret the words of the Constitution

87. I say “might,” because even if there were wise and good aristocrats, and even if we could identify them and put them into power (Socrates says against their will), there would still be the danger that they would abuse their power. More diffuse forms of government might still be the safer practical alternative.

88. *THE FEDERALIST* No. 10, at 84 (Madison) (New American Library ed. 1961).

89. P. 101.

90. Following his methodology of moral reasoning, Perry might well have reflected on why, according to the principal American religious traditions, a good and all-powerful God decided to leave open to the original man and woman the choice that would result in their expulsion from paradise.

of the United States? When differences in nomenclature and issues of evidence and proof are put aside, however, there are only three answers. The first is that the words should be interpreted as they were understood by those with the authority to adopt them as law. The second is that the words should be interpreted as they are now understood, or as they have been understood, by the American political community. The third is that the words should be interpreted to produce the best results, as understood by the person doing the interpreting.⁹¹ Much modern academic theorizing has consisted of debunking the first, making selective use of the second, and embracing the third.

Professor Perry seems to waver between the second and the third. On the one hand, he states that “the fundamental, constitutive aspirations of the American political tradition” are the source of “authorit[y]” in our legal system.⁹² This suggests that the understanding of the American people over time controls constitutional interpretation. The judge’s task, under this conception, is more historical or sociological than philosophical. The judge observes aspirations; he does not deduce them. On the other hand, Perry states that in deciding cases “the judge should rely on *her own beliefs* as to what the aspiration requires,” and explicitly rejects reliance on beliefs of the majority, or even of a consensus, in cases where the judge believes that the people are “incorrect.”⁹³ This suggests the judge’s task is more that of moral decisionmaker than observer, though the precise division of authority between judge and people will depend on the level of generality with which the “aspiration” is articulated by the judge. In any event, Perry rejects the proposition that the Constitution should be interpreted as it was understood by those with the authority to enact it—but not because it is unsound or incoherent on its own terms. Indeed, he defends this “originalist” view against some of the more common arguments against it. As Perry notes, “Because critics of originalism often misconceive it, they end up attacking a straw man.”⁹⁴ The “most prevalent misconception,” he says, “is that originalism requires the Court to answer the question the way the ratifiers would have answered it in our day, were they still living.”⁹⁵ This question, he notes, is unanswerable and irrelevant. “Rather, the originalist project is to discover what belief(s) the ratifiers constitutionalized, and then to decide the case on the basis of that belief.”⁹⁶ He also rejects the argument that the important provisions of the

91. Cutting across these approaches are two concerns of an institutional nature: the deference to be paid to decisions of the representative branches of government and the deference to be paid to past judicial decisions. As a logical matter, any of the three answers limned in the text can be approached with more or less deference to representative bodies and precedent.

92. P. 162.

93. P. 149 (emphasis in original).

94. P. 125.

95. P. 126.

96. P. 126.

Constitution, as originally understood, require the exercise of vast and unbridled judicial discretion. “[I]t does not seem to me plausible to suppose that the ratifiers of any constitutional provision constitutionalized a belief so indeterminate or ‘general’ that reliance on it necessitates judges acting inconsistently with originalism’s democratic premises.”⁹⁷ Perry concludes that “[o]riginalism is fundamentally sound,” quoting historian Jack Rakove to the effect that “‘a historical approach to the problem of the original understanding can produce more rewarding results than . . . [critics of originalism] are ordinarily prepared to concede.’”⁹⁸

Indeed, if originalism were unsound, the legal system would be in trouble, since it is essentially the method used for interpreting other legal instruments—statutes, contracts, wills, treaties—which are interpreted in light of the understanding of those who enacted or entered into them. Why this process should be thought impossible for the Constitution but natural and inevitable in every other area is something of a mystery.

One of the myths about originalism is that its adherents believe it would eliminate the need for judicial judgment and discretion—that it would make constitutional interpretation mechanical. This is absurd. Few litigated issues are resolved by ready reference to Madison’s Notes. The best we can hope for in some cases is that judges will steep themselves in the history and philosophy of the Constitution and attempt to apply it faithfully. Of course this assumes the Constitution *has* an intelligible philosophy—that it is neither a mishmash of political compromises nor a congeries of inscrutable phrases. But while this cannot be deduced from first principles or established empirically in the space of a book review, it is my experience and conviction that the Constitution is an elegant and profound statement of a highly attractive conception of government.

Indeed, this—not just its greater compatibility with democracy, as Perry holds—is the great appeal of originalism.⁹⁹ Whatever one’s theory of constitutional interpretation, judges will be engaged in the difficult task of measuring the facts of concrete cases against the abstractions of moral principles. The appeal of originalism is that the moral principles so applied will be the foundational principles of the American Republic—principles we can all perceive for ourselves and that have shaped our nation’s political character—and not the political-moral principles of whomever happens to occupy the judicial office.

Rather than debunking originalism, Perry makes a comparative argument. His nonoriginalism, he claims, is superior to originalism. His the-

97. P. 130.

98. Pp. 130–31 (ellipses and bracketed material in original) (quoting J. Rakove, *Original Meanings of the Constitution: The Historian’s Contribution* 4 (1985) (unpublished manuscript)).

99. Of course, one feature of the constitutional scheme, as originally understood, is its reliance on representative institutions—a feature undermined, as Perry points out, by nonoriginalism. Pp. 167–68.

ory is based on the distinction between the original understanding and the "aspirational meaning" of the constitutional text. He explains that "what the constitutional text means to us, what it signifies to us (in addition to the original meaning), are certain basic, constitutive aspirations or principles or ideals of the American political community and tradition."¹⁰⁰ "Some provisions of the constitutional text have a meaning *in addition to* the original meaning: Some provisions signify fundamental aspirations of the American political tradition. Not every provision of the text signifies such aspirations, but some do."¹⁰¹

Perry distinguishes between aspirations that are "signified by" or "not signified by" the text. Presumably this provides some constraint on judicial decisionmaking. But how much or what it means he never explains. Is the judgment linguistic (any meaning that might be teased out of the language of the text is permissible)? Is it historical (only those meanings that have been perceived by the American political community over time are permissible)? Is it a matter of present-day observation (only those meanings that are currently perceived by the American political community are permissible)? Is it philosophical (any meaning that appears normative is permissible)? Is it some combination (any meaning that both can be teased out of the text and also passes one of the other tests is permissible)? I am confident that the philosophical approach is not what Perry means, since he tells us that some aspirations signified by the text are not "worthwhile." As to the other possibilities, we are left in the dark. Depending on the answers, Perry's approach could provide significant constraint—or virtually none at all.

In any event, Perry's proposed approach to constitutional law is that judges should "bring to bear" "worthwhile" aspirations that are "signified by the text" of the Constitution.¹⁰² He says that judges should *not* "bring to bear" aspirations, however worthwhile, that are not "signified by" the text,¹⁰³ or aspirations, however clearly "signified," that are not "worthwhile."¹⁰⁴

Both halves of this position are problematic. I will address them separately. Then I will offer more general comments on Perry's "aspirational" approach to constitutional interpretation.

A. *Governance By Linguistic Accident*

Professor Perry wants to persuade us that nonoriginalist interpretation is "interpretation" nonetheless. This is because he subscribes to the "axiomatic" proposition that "constitutional cases should be decided on the ba-

100. P. 133.

101. P. 133 (emphasis in the original) (footnote omitted).

102. P. 134.

103. Pp. 134–35.

104. P. 135.

sis of, according to, the Constitution."¹⁰⁵ He states that it would be "a gross abuse" for a judge to overturn a governmental "policy choice" simply "because it was a choice she would have opposed as a legislator."¹⁰⁶ He therefore limits judges to enforcing aspirations "signified by" the text. His constitutional theory, however, seems to depend on separating the constitutional *text* from its *meaning*. It will not work if the same arguments that make the Constitution's original text authoritative also make its original meaning authoritative.

It is therefore necessary to take a step back and pose the question: why is the constitutional text authoritative? "Why," in Perry's words, "should a judge bring to bear, in constitutional cases, *only* aspirations signified by the text? Why not all fundamental aspirations, even those not signified by the text?"¹⁰⁷ Curiously, having posed the question, Perry does not provide an answer. He states simply that this is "axiomatic." He goes on to state that "[i]f someone wants to claim that a judge should bring to bear all fundamental aspirations, or even all worthwhile aspirations, I want to hear the argument."¹⁰⁸ I would rather provide the counter-argument.

"All fundamental aspirations" are not legally authoritative because they have not been adopted as constitutive principles by the American people. Under our political theory, all governing authority, including that of judges, proceeds from the consent of the governed. In Madison's words, "the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived."¹⁰⁹ One of the proudest claims of the American people is that they were the first to adopt a form of government "from reflection and choice," instead of "accident and force."¹¹⁰ It is from that reflection and choice that the Constitution derives its authority. As Chief Justice John Marshall explained in *Marbury v. Madison*:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very

105. P. 131.

106. P. 170.

107. P. 134.

108. P. 134. Professor Perry has a disconcerting way of shifting the burden of proof. Here, he takes a proposition as proven because he has not heard a counter-argument. He uses the same technique again at page 110. Elsewhere, he purports to refute a claim on the ground that the only defense (of which he is aware) is that "one simply knows—'intuits'—it." Pp. 64, 257–58 n.31. This suggests that a proposition cannot be proved without an affirmative argument for it. Otherwise, as he points out, whatever principle "gets the benefit of the presumption—the benefit, that is, of being tested last and getting to say 'all the others failed, therefore I win (by default)'—will prevail." P. 64. He uses this second, inconsistent, technique again at pages 64, 65 (criticizing Ackerman); 67 (criticizing Dworakin); 161–62 (criticizing Easterbrook).

109. THE FEDERALIST No. 49, at 313–14 (J. Madison) (New American Library ed. 1961).

110. *Id.* No. 1, at 33 (A. Hamilton).

great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental; and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.¹¹¹

Some say that “we the people” of 1787 had no right to bind our “posterity” 200 years thence—that the consent of the governed rendered in 1787 can have no legal effect in 1989.¹¹² But this objection, even if valid, would not help Perry’s argument. If it were valid, the implication would not be nonoriginalist, but majoritarian: judges would lose their warrant to countermand the decisions of today’s representative institutions on the basis of a musty and outmoded Eighteenth century document. The power of judges cannot logically be expanded by undermining the authoritativeness of the Constitution.

If one necessary (even if not sufficient) condition for the Constitution to be authoritative is that it was adopted by the people, then it follows that principles never adopted by the people cannot be authoritative, even if they have some linguistic plausibility. Functionally, to apply an unintended meaning is no different from introducing a principle that has no textual basis whatsoever. The only difference between the unintended meaning and the extratextual principle is verbal happenstance. Perhaps an unintended—an accidental—meaning can be said to be “better,” or will seem so to the judge. Precisely the same can be said of other “worthwhile aspirations” that are “not signified by” the text. None of these principles were the product of the people’s “reflection and choice.” None of these principles properly can be said to be law.

Nor do alternative readings attain democratic warrant on the ground that they reflect “aspirations” of the American political community—even assuming that this means beliefs actually commanding a popular consensus and not merely beliefs held by the judge. There are two ways in which the aspirations of the political community with reference to the Constitution could diverge from the original understanding: the people could cease to believe in principles originally intended and they could begin to believe in principles not originally intended. Neither presents an appropriate occasion for judicial departure from the original meaning. That the people are disenchanted with a constitutional principle (freedom of speech during the McCarthy era, perhaps; or the contracts clause during the New Deal) can hardly be deemed sufficient reason to cease to enforce it: the very purpose of a Constitution is to protect certain fundamental principles from temporary majorities.

111. 5 U.S. (1 Cranch) 137, 175 (1803).

112. See, e.g., Brest, *supra* note 47, at 225. For a compelling response to this argument, see Holmes, *Precommitment and Self-Rule*, in CONSTITUTIONALISM AND DEMOCRACY (J. Elster & R. Slagstaad eds. forthcoming).

But if the people come to believe in principles in addition to those originally intended (and not in conflict with other constitutional principles) there is no need for judges to enforce them through "interpretation." The people are free to enact them into law. This happens all the time: the Civil Rights Act of 1964 and the Voting Rights Act of 1965 are conspicuous examples. The only occasion when judicial enforcement through interpretation need occur is when the people are sufficiently divided that the new aspirations cannot be enacted, or if the people change their minds and seek to reverse or repeal laws reflecting the new aspirations. But in these cases, it would seem that the principles are not so firmly established as to be fundamental constitutive principles of the polity. Whose aspirations are they?

Originalism and noninterpretivism operate from different normative premises, but each has its own integrity. The force of the originalist argument is that the people had a right to construct a Constitution, and that what they enacted should therefore be given effect, including the portions allocating powers to representative institutions. The force of the usual noninterpretivist argument is that judges should not be constrained in their quest to do good, either by the decisions of past generations (the text) or the beliefs of the majority (aspirations of the community). Professor Perry's intermediate position contradicts both these premises, but offers no persuasive normative argument of its own.

Thus, I would like to ask Professor Perry: From where does the judge derive the authority to enforce an "aspiration" not embodied in the Constitution as originally understood? Is there any answer to this question that would not also justify the judge in enforcing an "aspiration" *not* "signified" by the text? I think not. This does not mean that Perry's theory is illegitimate under any conceivable standard. But it does mean that it is illegitimate under the very "axiomatic"¹¹³ standard he claims to espouse.

B. "*Unworthwhile*" Aspirations

The problem with the second half of Professor Perry's prescription¹¹⁴ is that it allows judges to refuse to enforce principles that both are "signified by the text" and also are "fundamental aspirations of the American political tradition," for the reason that the judge does not consider these principles "worthwhile." This seems to abandon the notion that judges are subject to the law. They seem to be able to pick and choose among constitutional principles on the basis of their own political-moral predilections, rejecting those they do not agree with. Perry does not illustrate this approach with any concrete cases. One wonders which elements of our constitutional tradition he has in mind.

113. P. 132.

114. See text accompanying notes 101-03.

In any event, by Perry's own lights, this appears illegitimate. Consider Perry's own words: "If anything is authoritative for public officials in the American political community, it is, of course, the fundamental, constitutive aspirations of the American political tradition (and the principal textual embodiment of those aspirations: the Constitution)."¹¹⁵ What, then, is the judge's authority for refusing to enforce "unworthwhile" fundamental aspirations of the American political tradition, signified by the constitutional text?

C. *Aspirations*

Why does Professor Perry refer repeatedly to constitutional "aspirations," as opposed to more standard legal terms such as law, provision, principle, requirement, or limitation? He almost never states that a constitutional provision is authoritative; always it is the "aspiration." The choice of terminology must be significant. Lon Fuller distinguished between the "morality of duty" and the "morality of aspiration."¹¹⁶ The morality of duty "lays down the basic rules without which an ordered society is impossible. . . . It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living." The principles of a morality of aspiration "present us rather with a general idea of the perfection we ought to aim at, than afford us any certain and infallible directions of acquiring it."¹¹⁷ The distinctive connotation of "aspiration," then, is that it is a perfection to be striven for, but never entirely achieved. Laws, provisions, principles, requirements, and limitations can be complied with. Aspirations are always slightly out of our reach. That is why, in Perry's words, the Constitution so understood "constantly disturbs" the life of the political community.

To some extent, the term "aspiration" is not a bad expression for the principles of the United States Constitution. I have used it myself.¹¹⁸ Few observers of our national life, I suspect, would be so bold as to claim that our national, state, and local governments are or ever have been in full compliance with the Constitution. Who can doubt that the Constitution

115. P. 162.

116. L. FULLER, *THE MORALITY OF LAW* 5 (1964).

117. *Id.* at 5-6.

118. See McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 *CHI.-KENT L. REV.* 89, 100 (1988):

A defender of constitutional democracy can therefore accept the "aspirational" character of natural law, and even of the Constitution, without acceding to the theory of open-ended judicial review. The Constitution is chock-full of aspirations. We usually call them, more mundanely, constitutional principles. . . . Traditional constitutionalism is not hostile to judicial enforcement of aspirational principles—if they can fairly be discovered in the text, structure, and purposes of the Constitution.

For another example of the term used in this sense, see G. JACOBSON, *THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* (1986).

expresses the aspirations of the founding generation for a regime of limited and separated powers, with protections for individual rights? Who can doubt that the Fourteenth Amendment expresses the aspirations of the American people after the Civil War to achieve equal protection of the laws for all our citizens without regard to race, color, or previous condition of servitude? Who can doubt that, despite our impressive progress, the governments of this nation still fall short of these aspirations to a not inconsiderable degree? In this sense, originalism is no less "aspirational" than nonoriginalism. The only issue is: Which aspirations? Those embodied in the Constitution by the framers and ratifiers? Or others of uncertain origin and untested value?¹¹⁹

But there is another connotation to the term "aspiration" that is more problematic. In Professor Perry's hands, the term connotes not just a standard that is difficult to meet, but a continual catalyst for change at a fundamental level. He insists that constitutional adjudication "at its best, is a species of deliberative, transformative politics."¹²⁰ Aspirations are the agents of continual social transformation.

Here again, to a degree I agree that provisions of the Constitution were designed to bring about fundamental changes in the political system and even, through the Thirteenth Amendment (abolishing slavery) and the Eighteenth Amendment (prohibiting alcoholic beverages), in society. The Civil War Amendments, for example, were not passed in order to encapsulate a status quo and protect it against future dangers; they were passed to do away with slavery and all the vestiges of the slave system. A good case can be made, as well, that these Amendments were also designed to nationalize some issues of individual rights, unrelated to slavery, where the prior system of state autonomy had proven injurious to our ancient liberties.

But Professor Perry exaggerates the extent to which most of the Constitution can be understood as expressing a "transformative" ideal. He says the "least controversial examples" of aspirational provisions "are probably the first amendment, signifying the tradition's aspirations to the freedoms of speech, press, and religion; the fifth amendment, signifying the aspiration to due process of law; and the fourteenth amendment, signifying the aspirations to due process of law and to equal protection of the laws."¹²¹ I think he is probably right about equal protection; as to the rest, they are better understood as bulwarks against change rather than aspirations to further change. They are limitations on the coercive power of the state. They do not reflect any "aspiration" toward social transformation.

As Justice William J. Brennan, Jr. commented in a speech that is

119. This is the principal theme of Gary Jacobsohn's excellent book. *See supra* note 118.

120. P. 121.

121. P. 133.

quoted at least six times in *Morality, Politics and Law*, "It is the very purpose of our Constitution—and particularly of the Bill of Rights—to declare certain values transcendent, beyond the reach of temporary political majorities."¹²² Under this vision, the Constitution is intended to prevent "temporary political majorities" from violating the traditional freedoms of our political system. The Constitution is not, for the most part, to be the catalyst of change. That is the task of legislation. Ample powers to pass laws for the public good have been vested in state legislatures and (within certain enumerated areas) in Congress. These powers are to be used to promote evolving notions of the good society. The Constitution and the power of judicial review, by contrast, exist to ensure that our elected officials do not step beyond the limits prescribed for them.

This philosophy is most evident in the due process clauses of the Fifth and Fourteenth Amendments: neither the states nor the federal government may "deprive any person of life, liberty, or property without due process of law." This is plainly and unmistakably a protection of the status quo. No one shall be *deprived*. No government shall take away what any person has (without due process of law). If the government wishes to alter the preexisting distribution of life, liberty, or property, it must comply with the proper forms and procedures. The scheme of democratic governance, separation of powers, and checks and balances, which makes up the bulk of the constitutional text, defines those forms and procedures, and is designed to retard change and to subject it to the discipline of popular accountability. The constitutional system is "deliberative," to be sure, but hardly "transformative" (except in its democratic aspects).

Nor can the protections for free speech, press, and religion in the First Amendment reasonably be thought to express "transformative" aspirations. The people had just established a new central government. They feared that the new government might invade the precious liberties they exercised under their own state constitutions. They insisted, as a condition of forming the Union, that the new federal government be prevented from invading those liberties. This was a profoundly conservative impulse. The historical context precludes any possibility that the First Amendment is a "transformative" principle. (To some extent, "incorporation" of the First Amendment against the states through the Fourteenth Amendment has a "transformative" element, but not much. The people of 1789 did not devote their attention to innovative liberties when they insisted upon a Bill of Rights; they protected the most fundamental liberties they enjoyed in their states at the time. That those liberties have now been "incorporated" against the states means, at most, that federal courts rather than state

122. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 436 (1986).

courts will define in particular cases what the contours of the liberties will be.)

The use of the term "aspirations" (in lieu of laws, provisions, principles, requirements, or limitations) thus serves to create a subtle misapprehension about the respective roles of constitutional law and democratic politics under our system. With the significant exception of portions of the Civil War Amendments, already noted, constitutional law protects existing liberties and entitlements. With respect to some of those entitlements (freedom of speech, freedom of religion, and so on) the protections are absolute, in the sense that they may not be taken away by legislative action. With respect to other entitlements (unenumerated aspects of life, liberty, and property), the protections are provisional; to take them away requires enactment of legislation and execution through proper procedures. The Constitution thus slows the process of social change, but it does not prevent it. Decisions about the pace and direction of social change are, by and large, left to representative politics.

VI. ON THE PROPHETIC FUNCTION OF JUDGES

Professor Perry argues frankly that the "deliberative, transformative politics" for which he yearns finds its fullest expression in constitutional adjudication. Not that "the persons who occupy the executive and legislative branches of government aren't also capable of moral leadership." But his "argument is simply that because of its political insularity, the federal judiciary is institutionally advantaged in dealing with controversial political-moral issues."¹²³ This preference for courts over representative institutions is the only basis for his claim that nonoriginalism is superior to originalism.

One might note that it is not always true, as Perry assumes, that the "aspirational" meaning gives greater scope to judicial governance and less to representative institutions than does the original meaning.¹²⁴ The Commerce Clause as originally understood and intended, for example, constricted Congress's power within fairly narrow limits; but its broader, "aspirational," meaning¹²⁵ may be closer to the current rule: Congress has the power to regulate anything vaguely related to economics. Enforcing the original meaning would keep the federal courts very busy, and enable them to smuggle in large doses of their political-moral insight in the guise of policing the boundaries of Congress's commerce power.

Perry has evidently conflated originalism and the doctrine of judicial

123. P. 147.

124. See pp. 167-68 (equating nonoriginalism with "larger" judicial role and originalism with "smaller").

125. This presupposes that "aspirational" meaning is based on popular consensus, in this case from the New Deal to the present. As noted above, the concept is not clearly defined. See *supra* text accompanying notes 92-94.

restraint. But this is not a serious error. In most respects, the two approaches are compatible. On the whole, originalist judges will have fewer opportunities for exercising moral-political discretion, since the range of constitutional meaning will be somewhat less indeterminate. Moreover, originalism will produce more constrained judges because the Constitution, as originally understood, envisioned a somewhat smaller role for the courts than they now exercise.

In any event, Perry's argument for nonoriginalism is that as moral-political decisionmakers judges are superior to elected officials. It is their very lack of political accountability—their "political insularity"—that makes judges superior decisionmakers.¹²⁶ For many members of "the electorally accountable branches of government," after all, "the cardinal value is 'incumbency' "—they want to be reelected.¹²⁷ To his credit, Perry does not shrink from the anti-democratic implications of his argument. He admits that "[t]he originalist role is a better way of keeping faith" with "the tradition's aspiration to electorally accountable government."¹²⁸ But he is willing to sacrifice the democratic aspect of self-government for an improved "mediation of the past of the tradition with its present," which he believes will promote "justice"—a term he leaves undefined.¹²⁹ He does not take refuge in the notion that the people somehow, somewhere "intended" the outcomes of nonoriginalist decisions. The argument from consent of the governed was necessarily abandoned when originalism was abandoned.

Even under Perry's nonoriginalist argument, there is nothing unique about judges themselves that places them "in an institutionally advantaged position to play a prophetic role."¹³⁰ It is not their training in law school; prophecy is not in the curriculum. Any other elite institution, insulated from popular accountability, would serve as well as the judiciary. All that matters is that the decisionmakers *not* be responsive to popular opinion. What we are looking for is an aristocracy (not in the sense of a hereditary nobility, but in the Aristotelian sense of rule by the best). It just so happens that in the United States, the Supreme Court (under the tutelage of the bar and the academy) is the closest thing to an aristocracy that we have available. To attempt to create a new institution for moral-political decisionmaking would be impossible.

126. Perry also argues that "an eminently sensible division of labor . . . helps justify the judicial role in question," since the representative branches lack the "time and resources" to deal with the many "individual rights cases" that fill the courts' dockets. P. 148. But this is a makeweight argument at best. It supports the judicial role of deciding cases, but does not support nonoriginalism over originalism. The question is whether the courts will enforce the general principles established by the legislature, if consistent with the Constitution as originally understood, or substitute their own. It saves the legislature neither time nor resources to have its legislation struck down by the courts.

127. P. 147.

128. P. 168.

129. P. 168.

130. P. 147.

It is difficult to argue with the proposition that a form of government in which the only participants are highly educated citizens trained in the arts of persuasion (lawyers) has some advantages over mass democracy, and even over the representative democracy bequeathed to us by the framers and ratifiers. And it is difficult to dispute the fact that on some issues, racial discrimination notably among them, the Supreme Court responded more rapidly to the moral imperative than did the representative branches.¹³¹ But I would nonetheless pose some practical objections to rule by federal judges, which should be considered in addition to the obvious arguments from principle.¹³²

First, the most notable successes of the federal judiciary have been their faithful enforcement of constitutional provisions as originally understood, even under adverse political circumstances. This is not surprising, since the Constitution, faithfully interpreted, includes most of the provisions a reasonable person, steeped in our liberal political tradition, would want to see. Among these have been *Youngstown Sheet & Tube Co. v. Sawyer*¹³³ (affirming that individual rights may not be invaded without legislative sanction); *Brown v. Board of Education*¹³⁴ (affirming that *de jure* racial segregation is a denial of equal protection); the free speech cases, culminating in *Brandenburg v. Ohio*;¹³⁵ the school prayer cases;¹³⁶ and *INS v. Chadha*¹³⁷ (affirming that Congress must follow constitutionally-prescribed procedures if it wishes to issue directives with the force and effect of law).¹³⁸ All of these decisions were "activist" in the sense of striking down actions of the political branches, sometimes quite entrenched. But all of them were based on principles traceable to the Constitution as originally understood. (That the latter assertion is controversial is only proof that the originalist method leaves ample scope for judgment and disagreement.)¹³⁹ And to these might be added decisions, like the reapportionment and poll tax cases, that reached the right result but on the wrong constitutional theory.¹⁴⁰

131. If one ignores *Dred Scott* and *Plessy*. Third time's a charm.

132. My purpose here is only to introduce practical points not considered in *Morality, Politics, and Law*. The practical disadvantages of greater judicial discretion should be evaluated in comparison to the alternatives, an analysis I do not undertake here. For a comparative perspective, see McConnell, *supra* note 118, at 105-07.

133. 343 U.S. 579 (1952).

134. 347 U.S. 483 (1954).

135. 395 U.S. 444 (1969).

136. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

137. 462 U.S. 919 (1983).

138. This list is intended to be suggestive, not comprehensive. In particular, it neglects the Court's nonconstitutional decisions, which make up the bulk of its work.

139. See Brest, *supra* note 47, at 237 ("moderate originalism and nonoriginalism so often produce identical results").

140. *Wesberry v. Sanders*, 376 U.S. 1 (1964), *Reynolds v. Sims*, 377 U.S. 533 (1964), and the subsequent reapportionment cases would have been better decided under the republican form of government clause, art. IV, § 4, and *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966),

Many of the other popular successes of the Court have been cases in which it strikes down laws that are unpopular, unenforced, and would be repealed if they were not ignored. It is no accident that defenders of modern jurisprudence in the Bork hearings concentrated on decisions like *Griswold v. Connecticut*,¹⁴¹ a challenge to an antiquated law that had not been enforced for a generation. In these cases, a nonoriginalist approach does no damage to democratic governance; but it also accomplishes virtually nothing of practical importance. The right to use birth control had already been won in the popular arena, years before the Supreme Court made it official.¹⁴²

The work left to be done by nonoriginalism is the creation of "rights" never contemplated by the framers and ratifiers and too controversial to be passed by the various legislatures. Surely some of these rights (to work for more than 10 hours a day or for less than a minimum wage, to abort a child, to show a sexually explicit movie in view of an expressway, and others) could have used a bit more deliberation, which they would have received in the political process if the courts had not put an end to it.

Second, contrary to Professor Perry's romantic vision, judicial decision-making contains very little serious deliberation on moral issues.¹⁴³ In the abortion decision, for example, the Court majority thought it "need not resolve" the moral-legal status of the unborn child (thereby deciding it by default),¹⁴⁴ while the dissenters devoted their entire opinion to issues of standing to sue and the power of the states. Of course, standing and state power are important legal issues, but surely the overriding moral-political question was how the political community goes about determining to whom it will extend the protection of the law. *Bowers v. Hardwick*,¹⁴⁵ which dealt with state power to regulate private consensual sexual conduct, presented an unedifying face-off between a majority that believed the claims of homosexuals to sexual autonomy were "at best, facetious,"¹⁴⁶ and dissenters who reflexively equated long-standing religious moral teaching with "religious intolerance," without pausing to reflect on its possible moral underpinnings.¹⁴⁷ It may sound extreme, but I think the

ought to have been decided under the Fifteenth Amendment.

141. 381 U.S. 479 (1965).

142. In other cases, of which the state action cases of the 1960's and the gender discrimination cases of the 1970's are examples, the Court has been one step ahead of the political process. This has speeded progress, but not without cost. For example, by striking down forms of discrimination against women that had little persuasive justification, the Court deprived supporters of the Equal Rights Amendment of their strongest arguments and may have contributed the margin of defeat.

143. See Maltz, *The Supreme Court and the Quality of Political Dialogue*, 5 CONST. COMM. 375, 386-87 (1988).

144. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

145. 478 U.S. 186 (1986).

146. *Id.* at 194.

147. *Id.* at 212 (Blackmun, J., dissenting). Contrast the opinion by the same author in *Roe*, 410 U.S. at 160 (citing Jewish, Protestant, and pre-nineteenth century Roman Catholic teachings on abortion in support of his conclusion).

discussion of gay rights in and around the Chicago City Council had more substance than the opinions in *Bowers v. Hardwick*. The Court's treatment of other prominent moral-constitutional questions (affirmative action, parochial school aid, children's rights, educational funding, capital punishment, pornography, property rights, and others) has not been much better. The Court's analysis is typically long on manipulation of precedent and low on intelligible principle.

Nor, I believe, has there been much more moral deliberation behind the curtains. The Justices are far too busy to spend much time thinking about the cases, and their conferences are largely perfunctory. Certainly they have no time to do the kind of outside reading they would need to become able to contribute to moral-political deliberation in a serious way. In contrast to the months, even years, that are devoted to major legislative deliberation, the Justices devote one hour to oral argument and somewhat less than that to discussion at conference. Amazingly, they do not even wait to see what the dissenting opinion has to say before joining the majority. The appearance of debate and deliberation created by the opinions is largely a sham.

Third, not only do Supreme Court opinions contain little serious moral reflection, but they serve as an excuse for dispensing with moral reflection at other levels of government. Supporters of a right to abortion do not have to engage in a serious discussion of their position in the state legislatures; as Perry observes,¹⁴⁸ all they need do is cite *Roe v. Wade*.¹⁴⁹ The silence has broken in recent months, but only because many now believe the Court may withdraw from some applications of *Roe* and return decisionmaking authority to the states. When a candidate for President is criticized for vetoing flag salute legislation, he hides behind an advisory opinion from a court rather than explaining why he was right (if he was). When federal communications regulators revoke the "Fairness Doctrine" on the ground that it interferes with freedom of speech they are criticized for not waiting for the Supreme Court. Constitutional adjudication is not a supplement to moral-political deliberation; it is often a substitute.

Fourth, it is difficult to avoid the conclusion that a preference for judicial rule contains a large element of class bias. Judges, as well as most of the lawyers who appear before them and the academics who comment on their work, are members of the upper-middle-class. They come from a highly educated sector of society. This class typically has a particular predisposition toward moral issues. By contrast, legislators have to listen to, and accommodate, the opinions of a broader segment of society. The one clear effect of nonoriginalism is to give upper middle class opinions a disproportionate role in public decisionmaking. Some may contend that up-

148. P. 177.

149. 410 U.S. 113 (1973).

per middle class values are objectively the best; I suspect this is the real reason why nonoriginalism is so popular among academics.¹⁵⁰ But these arguments are rarely made in public.

Fifth, if it becomes acceptable for judges to decide cases in light of their own moral beliefs, the appointment-confirmation process will give us a different sort of Justice. The system has worked reasonably well up to now, mostly because the large part of the judicial function has been traditional legal interpretation, and judges could be selected accordingly. Already, in the Bork controversy, we have caught a glimpse of the future. Democracy will not tolerate an aristocracy. If judges assume powers of a legislative nature, we must expect the selection of judges to descend to the level of sound-bite, litmus test, character assassination, media blitz, issue simplification, celebrity endorsement, platitude, and distortion that we know and love in the electoral arena. We may not gain an aristocracy; we may lose an independent judiciary.

Sixth, judicial errors are more difficult to correct than political errors. For solid institutional reasons, courts are reluctant to overrule precedents, especially recent precedents.¹⁵¹ Political response to judicial error is slow and difficult, if not impossible.

Most fundamentally, however, rule by judges is objectionable in this society because it is inconsistent with the principles of self-government. The tradition of this political community cannot accept the proposition that the elite make better decisions than the people, or that popular institutions are inferior to electorally unaccountable ones. The cure to republican diseases must themselves be republican. As a result, nonoriginalist decisionmaking has generally survived outside the academy by cloaking itself in a source of authority more persuasive than the judge's own moral beliefs, usually some combination of spurious original intent, precedent, and a pretense that the judge is doing no more than enforcing "the Constitution."¹⁵² When is the last time the Supreme Court explained a decision on the ground that it reflected "the Justice's *own beliefs* about the aspirations of the American tradition"? If Professor Perry is serious, he ought to urge the Court to do just that. Then we would be able to determine whether, as he claims, his approach is consistent with the American moral-political tradition.

150. Professor Perry displays a surprising deference to the moral opinions of establishment organizations such as the American Medical Association and the American Bar Association, stating that a judicial decision following their lead would be immune to the charge of being "imperial." P. 177.

151. See Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983).

152. See, e.g., *Sloan v. Lemon*, 413 U.S. 825, 835 (1973) (if some believe the Court's parochial school aid decisions have had unfair and paradoxical results, "the 'fault' lies not with the doctrines which are said to create a paradox but rather with the Establishment Clause itself").

VII. ON JUDICIAL RESTRAINT

If the “strengths of the nonoriginalist theory of judicial role” consist solely in the superior institutional position of judges, it is odd that Professor Perry does not more forthrightly declaim the virtues of unbridled judicial activism. But he does not. Rather, he argues that “[a] theory of judicial self-restraint or self-limitation can and should be an important component of nonoriginalism.”¹⁵³ In particular, the judge should “hesitate” to invalidate policy choices that are the product of “deliberation,” waiting until she is “confident of her position that the policy choice is ruled out by the relevant aspiration(s).”¹⁵⁴ Moreover, the judge should defer to representative institutions where “proper” resolution of the issue is “relatively unimportant,” or where judicial activism would “threaten[] to precipitate a societal crisis and perhaps even impair the Court’s capacity to function effectively.”¹⁵⁵

Like Perry’s pragmatic arguments for sparing use of government coercion, these arguments for judicial restraint are sound and persuasive (though only in the context of nonoriginalist interpretation).¹⁵⁶ But also like those arguments, they depend on a highly case-specific form of self-restraint, rather than on a more defined understanding of institutional boundaries. Just as Perry’s liberalism is contingent, his judicial restraint is contingent. It is not based on the view that politically accountable institutions are the legitimate decisionmakers, but on the realization that it is sometimes prudent to let them act *as if* they were—in cases of substantial doubt, of trivial importance, or of danger to the courts’ institutional position.

Nonetheless, like Perry’s liberalism, his commitment to judicial restraint is real. Virtually alone among nonoriginalist academics, Perry believes that (with relatively minor exceptions) state legislatures should be free to decide whether to permit abortions.¹⁵⁷ This is the acid test. Sometimes it seems that the holy grail of modern constitutional theorizing is to find an explanation that might justify the result in *Roe v. Wade*. Perry, however, argues that the *Roe* decision is “plainly imperial.” He states, “I strongly doubt that sensitive application of the constitutional principle of due process can support the conclusion that a state may not outlaw

153. P. 170.

154. P. 170.

155. P. 171.

156. If the Constitution, properly interpreted, clearly indicates that a practice of the government is unconstitutional, and if the case is properly within the court’s jurisdiction, a judge would be derelict in his duty if he voted to sustain it. Misplaced judicial restraint can be a disaster. *See, e.g., Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*) (postponing enforcement of desegregation decree for fear of social consequences).

157. This statement may seem to neglect John Hart Ely, whose criticism of *Roe* is well known. *See Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). I am not sure that Ely’s structural approach to constitutional law is not a variant of originalism; but even if it is not, he is the rare exception.

previability abortions of any sort. Such a conclusion seems to me to require a premise—that the protection of fetal life is not a good of sufficient importance—obviously not entailed by that principle.”¹⁵⁸

Perry argues that, instead of creating an abortion right, the Court should have struck down the Texas law in *Roe* on the narrow, and curable, ground that it did not allow for certain exceptions (significant threat to physical health of the mother, rape or incest, genetically defective child whose life would be “short and painful”). The effect of such a decision, he says, would be to instigate debate in the various states over the moral issues involved. *Roe*, by contrast, attempted “to preempt discourse about that question.”¹⁵⁹ This alternative course of action (which resembles the Court’s treatment of capital punishment and pornography), would have been preferable, according to Perry, “not simply because that would have been the more ‘democratic’ thing to do, but also, and more fundamentally, because the Court, like the rest of us, might have learned something useful from the ensuing discourse.”¹⁶⁰

I agree with Perry that this would have produced more serious deliberation over the moral issue of abortion than the course the Court adopted. I also believe, as he does not say, that representative bodies are institutionally better able to reach solutions to contentious issues of this sort—partly because they can adopt an “unprincipled” compromise position,¹⁶¹ and partly because the right of political participation will make the losers in the conflict better able to accept the result. The actual decision in *Roe* seems the worst of all possible worlds: a decision that resolves the key moral question by purporting not to do so, that cuts off deliberation and debate, that makes compromise impossible, and that eliminates political solutions and thereby drives opponents of the decision to non-political “direct action.”¹⁶²

Where I disagree with Perry is in his specific prescription for the case (to strike down the Texas statute for failure to provide the three exceptions). I have three objections. First, it was unnecessary. At the time of *Roe*, there was already great legislative ferment on the issue of abortion; five states had already passed permissive abortion laws and others would

158. P. 175. This represents a change in Perry’s thinking since 1976. See Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976).

159. P. 177.

160. P. 177.

161. Some say that it is impossible to compromise a clear-cut, life-and-death issue like abortion. This is manifestly untrue, as experience in other Western countries demonstrates. See M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 13–24 (1987). There are any number of intermediate positions which, unlike the current rule of abortion on demand and unlike the pure pro-life position, could command substantial majority support.

162. See *1,000 Arrested in Blockades of Abortion Clinics*, L.A. Times, Oct. 30, 1988, at 1, col. 4 (over 7,000 individuals arrested in non-violent protests at abortion clinics during four-month period in 1988).

have followed suit. Judicial intervention was *not* necessary to “insure that the various considerations against criminalizing previability abortions . . . were given due consideration in the legislative process.”¹⁶³ It was already happening. Second, the three exceptions, however closely they may track popular sentiments,¹⁶⁴ are unprincipled. While they would be unexceptionable as the product of legislative processes, they have no basis in constitutional law. Third, the suggested disposition violates basic norms of constitutional adjudication, particularly the doctrines of overbreadth and severability. The plaintiff in *Roe* did not fall within any of the exceptions Perry would recognize. Since the abortion statute was constitutional as to her, she had no right to seek its invalidation as it might be applied in other cases. However sensible Perry’s approach might seem in this particular case, the Court should not make up new procedural rules for abortion cases.

In short, Professor Perry’s contingent judicial restraint is superior to the *Roe* Court’s dogmatic activism, but traditional jurisprudence would have been better yet.

VIII. ON MORALITY, POLITICS, AND LAW

The overall message of *Morality, Politics, and Law* might be said to be that the categories of “morality,” “politics,” and “law” are indistinguishable and interchangeable. Politics cannot be severed from morality,¹⁶⁵ and law—the process of adjudication—is a “species” of “politics.”¹⁶⁶ But after playing a prominent role in the fourth chapter (on legislation) and the fifth chapter (on obedience and disobedience), the concept of “law” almost drops out of the section where it would seem to be most central: the section on legal interpretation.

In setting up his discussion of constitutional adjudication, Professor Perry puts the question this way: “On what moral beliefs ought a person to rely, in her capacity as judge, in deciding whether public policy regarding some matter is constitutionally valid?”¹⁶⁷ Is this not a peculiar way to phrase the question? Does it not invite the simple answer: the judge must rely on those “moral beliefs” that have been embodied in a *law*?

It is no easy matter to figure out what principles have been embodied in the Constitution (or any other law) and how to apply those principles to the case at hand. But at least it helps to know that “moral beliefs” *other than* those embodied in law are irrelevant to the decision of the case. This includes the moral beliefs of the framers and ratifiers of the Constitution (to the extent they were not enacted into law), the moral beliefs of a ma-

163. P. 176.

164. P. 176.

165. P. 66.

166. P. 121.

167. P. 121.

majority of the American people (to the extent they have not been enacted into law), and the moral beliefs of the judge (to the extent they have not been incorporated by reference into law).

But this is not Perry's answer. The concept of "law" does not intrude into his discussion of what "moral beliefs" should be enforced by the courts, apparently because it does not matter whether any set of moral principles has in fact been adopted by the American people through the procedures our nation recognizes as necessary for the enactment of "law." Good moral beliefs will do. The effect is to distract attention from the principal question addressed by our Constitution—the allocation, diffusion, and limitation of power. Perry's terminology makes it unnecessary for the judge to ask the key question—the *only* question—entrusted to the judge engaged in constitutional judicial review: whether the decision under challenge was made in the constitutionally prescribed manner by officials vested with constitutional authority to make it.

Perry thus disregards the very element that distinguishes "morality" from "law," and "politics" from both. The difference does not lie in the subject matter. It lies in the institutional setting. "Morality" is diffuse and decentralized; in a pluralistic society there is no single private authority with a right to determine morality for everyone else. "Politics" is the process we use to determine which of the various moral principles held by the people command (and should command) sufficient support to become enforceable through the coercive power of the state. "Law" is the end result of politics (including the constitutional politics of drafting, ratifying, and amending the Constitution). It is the process of applying those moral principles so adopted to a particular case.

In any society there are reasons to insist that politics and law be conducted by different institutions and different persons. The power both to make the rules and to apply them is so potent a combination that it is safer to divide them, at least to the extent it is possible (some interstitial lawmaking by the executive and judicial branches is unavoidable). But in a democratic society, the distinction between morality, politics, and law is especially important. Our constitutional structure guarantees that we, the people, will have a role in deciding which moral principles will be authoritative. We have made our politics a democratic politics. If those with power to determine what the law is simply cast about for the best, most persuasive moral principles (to them), then the people's role in the process is eliminated. If he is to be consistent, Perry cannot claim that the institutional advantage of the courts as moral-political decisionmakers is their insulation from popular opinion, and at the same time assert that adjudication is a species of democratic politics.

Professor Perry takes the position that in determining what application to give to the Constitution and its "aspirations," the "judge should rely on

her own beliefs."¹⁶⁸ But this is to say judges should decide cases on the basis of "morality" (their own)—not "law." It is to cut "politics"—democratic politics—out of the picture. I do not believe Professor Perry has made his case that this is the better way to interpret the Constitution, and certainly not that his rejection of liberal republicanism faithfully represents the aspirations of the American political tradition.

168. P. 149 (emphasis in original).

