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Book Review: We the People: The Fourteenth Amendment and the Supreme Court

S. I. Strong
University of Missouri School of Law, strongsi@missouri.edu

We the People: The Fourteenth Amendment and the Supreme Court. By MICHAEL J. PERRY. [Oxford: Oxford University Press. 1999. viii and 258 pp. Hardback £25.00. ISBN 0–19–512362–X.]

NEVER one to shirk a challenge, Michael Perry has taken on the difficult task of investigating whether, as charged by a number of prominent social and legal commentators, "the modern Supreme Court, in the name of the Fourteenth Amendment [to the US Constitution], [has] usurped prerogatives and made choices that properly belong to the electorally accountable representatives of the American people," and if so, to what extent (p. 8). Perry makes no attempt to address every facet of Fourteenth Amendment doctrine, but instead focuses his discussion on some of the most controversial topics: racial segregation, affirmative action, discrimination on the basis of sex and sexuality, abortion and physician-assisted suicide.

Upon being presented with Perry's enunciated goals, the reader's first thought is that it is impossible to produce a single, cohesive theory incorporating such a range of issues unless one engages in gross generalizations or disregards important factual or legal distinctions. Perry, however, falls prey to neither of these shortcomings. Instead, he develops a theory of the Fourteenth Amendment that, while not without its flaws, effectively rebuts claims that the US Supreme Court has forsaken its constitutional role and taken up judicial politics as a usual practice.

Perry begins by identifying two types of US constitutional norms: those that were actually established by "We the people" when the textual provisions in question were enacted and those that may not have ever been established by "We the people" but which have, nevertheless, become "constitutional bedrock" through continued usage. Perry claims that critics of recent US Supreme Court practice cannot dispute the "constitutional bedrock" aspect of his theory, since Robert Bork, one of the leading critics of the Court, has himself written that there are some principles that, while not having been originally enacted by the framers of any particular piece of constitutional text, have nonetheless "become so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions, that the result should not be changed now" (p. 21, quoting Robert Bork). One example of a constitutional premise that is now embedded in the constitutional bedrock is the idea that the privileges and immunities guaranteed against the national government through the Bill of Rights are applicable against the various state governments by virtue of the Fourteenth Amendment. Perry claims that although there has been some controversy as to whether the text of the Fourteenth Amendment actually established such a practice, it is now too late to change tacks: for better or for worse, the principle is now part of US constitutional law.

Perry next analyses what norms were established by the Fourteenth Amendment at the time of its passage, paying particular attention to what values are being protected, who is being protected and from or against what those persons are being protected. This exercise permits Perry to construct an admittedly "complex" antidiscrimination norm that describes the fundamental purposes of the second sentence of the Fourteenth Amendment (p. 76). This norm forms the basis of his more specific

investigations into whether the judicial actions in each of the areas under discussion constitute a usurpation of legislative or executive prerogatives.

The remainder of the book contains Perry's detailed analysis of each of the judicial controversies mentioned above. He begins with racial segregation and affirmative action, two issues that are closely related to the original race-related purposes of the Fourteenth Amendment, and concludes that the Supreme Court decisions in this area were not improper. He then moves farther afield with considerations of sex and sexual orientation followed by abortion and physician-assisted suicide. Perry's analytical premise is that the Supreme Court should protect the persons or practices in question if to not do so would offend the fundamental antidiscrimination norm posited early on. If discrimination against the set of persons in question is contrary to the principles found within the Fourteenth Amendment, then it is not a judicial usurpation of the other branches' powers to overrule their actions, no matter how longstanding or popular the discriminatory practices may be. He cites the famous education desegregation case, *Brown* v. *Board of Education*, to demonstrate how the Court must sometimes transcend popular prejudice and longstanding legal practice to apply the correct constitutional principle.

Perry admits that his theory obtains results that are patently contrary to the considerations of the framers of the Fourteenth Amendment. For example, the historical evidence suggests that (at least most of) the authors of that amendment did not intend its principles to apply to women. However, Perry defends his claim that decisions forbidding discrimination on the basis of gender were nevertheless proper by arguing, first, that the framers might not have understood the full implications of the text they were drafting and second, that even if the Fourteenth Amendment did not establish the broad antidiscrimination norm that he believes it did, then such a norm became part of the modern constitutional bedrock in the period immediately following the second World War, when the full implications of treating certain groups as "not truly or fully human" became clear (p. 127).

In the end, Perry's evaluation of recent Supreme Court actions is overwhelmingly positive. In addition to concluding that the Supreme Court did not usurp the political branches in cases concerning racial segregation and affirmative action, he believes that the Court acted properly in cases involving discrimination on the basis of sex and sexual orientation and physician assisted suicide. In fact, Perry would go even farther in cases concerning sexual orientation, claiming that it would be improper for the Court to fail to protect homosexuals from discrimination in any future cases. The only issue that he believes was incorrectly decided is abortion.

Perry's book, while excellent in many ways, is not perfect. One problem is that, by focusing on the Fourteenth Amendment in isolation, Perry is able to analyse very complex questions as if only a single principle were at issue. In fact, many of the situations he discusses raise several competing principles of law: freedom of belief or association, for example, or the right to privacy and to contract. While it is beyond his mandate to discuss all of these issues as well as the one he has set himself, it would have been helpful for him to identify how his reading of the Fourteenth Amendment would respond (if at all) to competition with other constitutional values. Still, this book is a valuable contribution to constitutional analysis and

theory, and should provide critics of recent Supreme Court decisions with much to consider.

S.I. STRONG