

## REVIEW

### Of Speakable Ethics and Constitutional Law: A Review Essay

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*Morality, Politics, and Law: A Bicentennial Essay.* Michael J. Perry. Oxford University Press, New York, 1988. Pp ix, 323.

#### I. HARD QUESTIONS

Courts, and especially the Supreme Court, frequently engage in moral reasoning as an aspect of their judicial decision making.<sup>1</sup> And it is both necessary and desirable that they do so.<sup>2</sup> Although it may be impossible to specify precise rules concerning the occasions for invocation of moral judgments or the weight that such judgments should be given in comparison with other legally relevant factors,<sup>3</sup> it is part of the Supreme Court's appropriate modern role, sometimes at least, to adapt constitutional doctrine to the demands of enlightened morality.

These are the working assumptions of modern constitutional law—seriously disputed only by so-called constitutional “original-

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<sup>1</sup> Constitutional scholars generally agree that much of modern doctrine departs from the originally intended meaning of the text, and reflects an approach to constitutional interpretation that relies heavily on extra-textual sources of moral value. See, for example, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 BU L Rev 204 (1980); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 Stan L Rev 703 (1975). Not all scholars who have perceived widespread departures from original intent approve of this phenomenon. See, for example, Henry P. Monaghan, *Our Perfect Constitution*, 56 NYU L Rev 353 (1981).

<sup>2</sup> See, for example, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv L Rev 1189 (1987).

<sup>3</sup> For an effort to identify how moral judgments interact with other factors in the constitutional calculus, see id.

ists.”<sup>4</sup> Dispute among mainstream theorists tends to focus less on the empirical validity of these assumptions than on their theoretical justification. Yet unsettling questions arise as soon as the assumptions are bared. What does it mean for the Court to engage in moral reasoning? Surely the Justices should not merely impose their own subjective preferences.<sup>5</sup> But few people today believe in natural law<sup>6</sup> or an objective common good that is not reducible to individual goods.<sup>7</sup> And once these seemingly archaic ideals are dismissed, what, other than subjective preferences, is left for judges to rely on?

The relevant preferences, it is sometimes suggested, are not those of the Justices themselves, but those of the society.<sup>8</sup> But it is elected legislators, not appointed Justices, who are more likely to have their fingers on the pulse of prevailing moral sentiments.<sup>9</sup> How would the Justices, elite members of the legal profession who are not democratically accountable, know what society’s morality is? Virtually no one wants them taking direction from public opinion polls: it is hard to look up to decision makers who have one ear to the ground. But if the Justices try to “interpret” other sources, such as “the American tradition,” the suspicion nags that they will return from their journey of discovery having “found” in the society the same values that they personally held at their time of departure.<sup>10</sup>

Despite an extensive literature purporting to define and justify a role for the Supreme Court as a moral decision maker, fresh insight is rare. In this context, the great strength of Michael Perry’s

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<sup>4</sup> This is a contentious term. According to Michael Perry, originalists hold that a judge, in interpreting a constitutional provision, should seek to establish the provision’s meaning by relying only on the “original” beliefs of those who drafted and ratified the provision and any “supplemental” beliefs “reliance on which is necessitated by reliance on original beliefs.” Michael J. Perry, *Morality, Politics, and Law: A Bicentennial Essay* 123 (Oxford, 1988). All parenthetical page and note references are to this book.

<sup>5</sup> See John Hart Ely, *Democracy and Distrust* 44-48 (Harvard, 1980).

<sup>6</sup> See *id.* at 48-54. I do not mean to deny that most people regard moral judgments as having an objective foundation—only that they do not believe in natural law in the traditional sense of that term. For a fascinating account of the historical origins of the natural law tradition, including a luminous account of the assumptions about a normative natural order into which natural law notions fit most coherently, see Lloyd L. Weinreb, *Natural Law and Justice* (Harvard, 1987).

<sup>7</sup> See Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 Harv L Rev 1695, 1698 (1989).

<sup>8</sup> See, for example, Harry M. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L J 221 (1973).

<sup>9</sup> See, for example, Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 Yale L J 1, 56-60 (1987).

<sup>10</sup> See, for example, Ely, *Democracy and Distrust* at 60-69 (cited in note 5).

new book, *Morality, Politics, and Law*, lies in the questions that it asks and the lucidity with which it asks them. What is morality? Is it objective or subjective? Does it make sense to talk about moral "truth"? If so, by virtue of what are moral truths true? How should the Court discover moral truth? And, if the Justices can discover truth, how should they bring it to bear on constitutional cases in which factors such as constitutional text, history, and precedent are also relevant?

These questions are more than a little daunting. Issues about morality, truth, and epistemology are among the most difficult and contentious in modern philosophy. Most legal academics who seek to assess constitutional doctrine from the perspective of political morality have not been trained as philosophers.<sup>11</sup> It is therefore tempting to turn our heads. But that approach, if we are honest, will not do. Constitutional lawyers cannot honestly assert in one breath that judges should act as moral decision makers and deny in the next that we need to think seriously about the nature of morality and its precise relationship to constitutional law. We need to ponder deeply about moral reasoning and moral truth, about whether constitutional moralizing is the search for moral truth or for something else, and about whether and how far our metaphysical beliefs support what we have come to take for granted in our constitutional practice. Perry reminds us of this. He goads us to struggle with the hard questions that emerge once we deny that constitutional law is, or should be, wholly autonomous from politics and morality.

Although *Morality, Politics, and Law* frames probing questions with admirable clarity, its most important answers prove unconvincing. The relativist theory of truth that Perry presents in part I is confused and self-contradictory. It produces a series of muddles when he tries to rely on it in his theory of constitutional interpretation. Perry errs in his claim that all of a judge's personal moral beliefs, including those directly traceable to religion, may appropriately play at least a limited role in judicial decision making. And this error reflects the same mistaken assumptions that underlie his unconvincing argument that liberalism, with its characteristic call for neutrality among contending religious doctrines, is an irredeemable failure.

Because I believe that Perry's conclusions are substantially misguided, the preponderance of my comments will be critical. But

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<sup>11</sup> Perry, at the outset, offers the plain assertion that he is not a "professional philosopher." (p 5) Neither am I.

the critical tone should not obscure my respect for Perry's achievement in mapping a path of inquiry that all modern constitutional scholars—if they are to be intellectually honest—must travel.

I hope it will also be clear that this essay has a constructive dimension: it offers at least the skeleton of an alternative conception of political morality and its relation to law. The bones of the skeleton are not assembled in any one place, since they emerge through a series of separate criticisms and counterpoints. But I do propound affirmative theses, and those theses fit together.

Among my most important affirmative claims is that moral truth must be conceived as objective in important respects. Moral relativism is a deep bog and, for reasons both related and unrelated to constitutional law, it should be recognized as such. As I argue in my discussion of Perry's constitutional theory, however, the notion of objective moral truth is of only limited relevance to constitutional interpretation. The foremost job of the judge as moralist is to bring the morality of the society—which may itself be objectively mistaken—to bear on constitutional issues. Anyone who wants to devote herself full-time to the pursuit of absolute moral truth should be in some business other than that of adjudicating legal controversies. But while moral truth and legally correct answers are distinct concepts in our constitutional practice, the two are certainly not unconnected: in identifying society's morality through a process of interpretation, a judge, I argue, will sometimes need to rely on her own moral views about which plausible interpretation is "best." And the standard of moral preferability that a judge uses in such cases should flow from some form of liberal political theory—not because liberalism is the theory on which a skeptic should necessarily fall back, but because our best methods of moral investigation indicate that some form of liberalism is objectively correct.

Throughout this essay, my exposition and analysis track Perry's order of presentation, with one important exception. Because the most interesting aspect of *Morality, Politics, and Law* is its drawing together of moral philosophy and constitutional theory, I shall discuss parts I and III, which deal directly with those two subjects, before considering the attack on philosophical liberalism that constitutes part II.

## II. SPEAKABLE ETHICS, RE-NATURALIZED LAW

Part I of *Morality, Politics, and Law* aims to develop a theory of moral and political truth that justifies the Supreme Court's role

as a moral and political decision maker.<sup>12</sup> Perry is right that questions about moral and political truth are relevant to constitutional law. But his answers to those questions are misconceived.

#### A. A Naturalist Refutation of Skepticism

In developing a theory of the nature of morality, Perry seeks less to make an original contribution to philosophy than to correct what he regards as prevalent misimpressions among constitutional lawyers. Rather than leading off with an affirmative theory, he therefore tries first to refute views, which he believes to be common in the legal academy, that fall under the heading of "skepticism." (p 10) Skepticism holds that morality is subjective and that moral claims can be neither true nor false. People either agree or disagree about what is right and wrong, but there is nothing in "the fabric of the world"<sup>13</sup> that renders their views either correct or incorrect. Objectively speaking, the skeptic thus claims, there are no moral rights or wrongs. And ordinary moral discourse, which rests on a mistaken but disprovable assumption that moral values are objective features of the universe, embodies a systematic error that renders it literally groundless.<sup>14</sup>

Perry rightly makes quick work of the skeptical argument. Its premise is that moral claims—for example, Arthur Leff's sample proposition that napalming babies is bad<sup>15</sup>—must, if they are to be true at all, "correspond" to something in "the fabric of the world." (p 40) But this seems a wrongheadedly mysterious way to approach questions about moral knowledge, truth, or objectivity. If moral values "exist," as surely they do in some senses of that term,<sup>16</sup> they plainly do not exist in the same physical way—"in the fabric of the world"—as chairs, for example, do. Yet this conces-

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<sup>12</sup> In an earlier book, Perry had argued that the justification for the courts' engaging in morally-based decision making or what he calls "noninterpretive" review depends largely on the existence of "right" answers to moral and political questions. Michael J. Perry, *The Constitution, the Courts, and Human Rights* 16, 61-90, 102, 106-07, 115 (Yale, 1982). But he did not, in that volume, defend the claim that positions of political morality can be right or wrong, true or false. The purpose of part I of *Morality, Politics, and Law* is to establish what the earlier book had only assumed.

<sup>13</sup> See J.L. Mackie, *Ethics: Inventing Right and Wrong* 15 (Penguin, 1977).

<sup>14</sup> See id at 33-35. See also Simon Blackburn, *Errors and the Phenomenology of Value*, in Ted Honderich, ed, *Morality and Objectivity: A Tribute to J.L. Mackie* 1, 1-4 (Routledge & Kegan Paul, 1985).

<sup>15</sup> See Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 Duke L J 1229, 1249.

<sup>16</sup> See R.M. Hare, *Ontology in Ethics*, in Honderich, ed, *Morality and Objectivity* 39, 42-43 (cited in note 14).

sion, if it is a concession at all, does not rule out the possibility of "objective" moral truth. As Thomas Nagel has written, "[t]he objective badness of pain, for example, is not some mysterious further property that all pains have, but just the fact that there is reason for anyone capable of viewing the world objectively to want it to stop."<sup>17</sup> Kant, too, had a theory of moral objectivity that was not ontologically based. He held that moral statements can be objectively valid, not because they correspond to something, but because they reflect conclusions that all rational agents must accept.<sup>18</sup>

But Kant and Nagel, of course, qualify as liberals, and Perry finds liberalism untenable. (pp 55-73) He therefore locates his answer to skepticism in another tradition that he calls neo-Aristotelian or, more frequently, "naturalist." (pp 9-11, 180) The essence of moral naturalism, in the work of philosophers such as Stuart Hampshire,<sup>19</sup> inheres in a picture of human beings as creatures in a natural order who, like other creatures, may either "flourish" or, to varying degrees, fail to do so. Since human beings are social by nature, their flourishing will have a social as well as a physical dimension. (p 11) But this extension of the concept of "flourishing" generates no insuperable difficulty. According to Perry, "moral knowledge is knowledge of how to live so as to flourish, to achieve well-being. More precisely, it is knowledge about how *particular* human beings—the particular human being(s) I am, or we are, or you are, or she (or he) is, or they are—must live if they are to live the most deeply satisfying lives of which they are capable. . . ." (p 11)

Perry's naturalism thus defines morality, as well as moral truth and moral knowledge, as concerned centrally with the question of how one ought to live in order to flourish. This approach, according to Perry, is "anthropocentric," (p 19) since its accounts of what is good and bad, or right and wrong, must always be relative to human interests.<sup>20</sup> Beyond being anthropocentric, naturalist

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<sup>17</sup> Thomas Nagel, *The View from Nowhere* 144 (Oxford, 1986).

<sup>18</sup> See Immanuel Kant, *Groundwork of the Metaphysic of Morals* (2d ed 1786), in H.J. Paton, transl, *The Moral Law: Kant's Groundwork of the Metaphysic of Morals* 51, 53-55 (Hutchinson, 1948).

<sup>19</sup> See Stuart Hampshire, *Two Theories of Morality* (Oxford, 1977); Stuart Hampshire, *Morality and Conflict* (Basil Blackwell, 1983).

<sup>20</sup> As Hampshire expresses it, "There is no independent, and no transcendental, sanction of moral restraints, and no authority external to men's experience of the workings of their own nature. The experience of ease and enjoyment of a way of life, as opposed to frustration and suffering, makes the crucial test, and men will in fact be guided by this test, if they are not governed by perverse passions." Hampshire, *Two Theories of Morality* at 53-

morality has a self-centered aspect that can be qualified but not eliminated. "Aristotle was right," Perry says, "that no one has any reason to do what morality requires except the 'prudential' or 'self-regarding' reason that doing what morality requires is somehow constitutive of one's flourishing." (p 23)

Although this account of morality has many virtues,<sup>21</sup> including its capacity to support theories of moral knowledge, moral truth, and moral motivation, naturalism is ultimately unpersuasive. Its central deficiency lies in its egoism, its assumption that an agent's concern with her own flourishing forms the appropriate center of moral thought. Perry's claims notwithstanding, the lived experience of morality is one in which the demands of right or duty frequently conflict with self-interest. Sometimes the pull is felt unreflectively. Other times it exerts itself when, after a deliberate effort to gain detachment, we recognize ourselves located in a vast universe in which our individual interests and happiness cannot reasonably or "objectively" count as more important than the welfare of others.<sup>22</sup> This phenomenology of morality—its categorical demand that we sometimes sacrifice to supervening concerns those interests and projects that make our lives "the most deeply satisfying" to us (p 11)—is reflected in our ordinary moral vocabulary. As John Mackie put it:

On a naturalist analysis, moral judgements can be practical, but their practicality is wholly relative to desires or possible satisfactions of the person or persons whose actions are to be guided; but moral judgements seem to say more than this. This view leaves out the categorical quality of moral requirements . . . . Any analysis of the meanings of moral terms which omits this claim to objective, intrinsic, prescriptivity is to that extent incomplete . . . .<sup>23</sup>

To this objection Perry presumably would respond that "flourishing" consists partly in adhering to the demands of impersonal morality.<sup>24</sup> Plato, for example, argued that departing from the demands of moral virtue produces a disordered soul and thereby makes flourishing impossible.<sup>25</sup> But however well this view may

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54 (cited in note 19).

<sup>21</sup> See, for example, Hampshire, *Two Theories of Morality* (cited in note 19).

<sup>22</sup> See, for example, Nagel, *The View from Nowhere* at 171 (cited in note 17).

<sup>23</sup> Mackie, *Ethics* at 33, 35 (cited in note 13).

<sup>24</sup> See, for example, Aristotle, *The Nichomachean Ethics*, Terence Irwin, transl (Hackett, 1985).

<sup>25</sup> See Plato, *Republic*, in Edith Hamilton and Huntington Cairns, eds, *Plato: The Col-*

have cohered with the metaphysical assumptions of the Hellenic world,<sup>26</sup> it fails to fit with modern understandings of our moral predicament. Although many examples might illustrate the point, the clearest are cases in which the felt demands of impersonal morality call upon someone to risk death or serious bodily injury—to fight in a just war, for example, or to swerve a car off the road to avoid a cluster of children. The stark point of these cases is that impersonal morality sometimes calls for action that would threaten, or possibly end, our capacity to flourish at all. Yes, we may flourish less with a disordered soul than with an ordered one; but flourish we can, to a degree at least, as we cannot do if we choose a path that leads to death.

The point can be generalized. Egoism and self-interest may have a place in moral thought, but it is a limited place that must frequently cede priority to an objective component. I shall say more about this issue later, but a central element is implicit in what I have asserted already: we are tiny and transient creatures in a large universe, in which we cannot reasonably regard our own interests and projects as being objectively more important than those of our fellow human beings, and in which the moral significance of others enjoys as compelling a claim to recognition as our own. In such a universe, morality is substantially about the rights of others, and about our duties to compromise our natural interests in our own flourishing.

I do not mean to claim that our interest in flourishing wholly lacks moral status. When the demands of impersonal morality clash with our interest in flourishing—our freedom to pursue our own chosen projects, to enjoy books and recreation, and so forth—difficult issues arise.<sup>27</sup> Various positions command consideration, among them (i) that the demands of objective morality always hold primacy, and (ii) that neither the demands of objective morality nor the interest in flourishing should always outweigh the other.<sup>28</sup> What is most troubling about Perry's approach is that it either obscures the question that ought to trouble us or purports to solve it by definitional fiat; Perry defines "flourishing" unconvincingly, in such a way as to subsume adherence to moral demands

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lected *Dialogues* 575, 586-87 (Princeton, 1961).

<sup>26</sup> See Weinreb, *Natural Law and Justice* at 30-32 (cited in note 6).

<sup>27</sup> For provocative recent discussions, see, for example, Bernard Williams, *Ethics and the Limits of Philosophy* (Harvard, 1985); Bernard Williams, *Moral Luck* (Cambridge, 1981); and Charles Taylor, *II Philosophy and the Human Sciences* 230-47 (Cambridge, 1985).

<sup>28</sup> See Nagel, *The View from Nowhere* at 193-97 (cited in note 17).



that make flourishing, in any ordinary sense of that term, hopelessly difficult or even impossible.

The question-obscuring capaciousness of Perry's use of the term "flourishing"—and of the related concepts of "naturalism" and "anthropocentric" ethics (p 19)—becomes even clearer in another context. Having defined morality as providing only "prudential or self-regarding reasons" for action, Perry surprisingly classifies the New Testament injunction to love one's neighbor as a conception—indeed as the conception that he seems to favor—of naturalistic flourishing. (Pp 22-23) At this point "naturalism," the attraction of which lies in its seemingly incontestable assumption that human beings are parts of the natural order, subsumes "supernaturalism." And the concept of "anthropocentric" morality envelops theistic morality since we have, Perry says, no moral interest in obeying God except that God may make our lives worse for us, either now or in the hereafter, if we do not. (p 222 n 49)

It seems clear by this juncture that Perry's argument has gone seriously awry. After beginning intelligibly enough with a neo-Aristotelian form of naturalism (similar to that elaborated by Hampshire, for example), Perry, in his desire to accommodate religious commitment and altruistic duty, has stretched the naturalist framework beyond the bounds of plausibility and possibly beyond the bounds of sense. It is more than a little doubtful, to put it mildly, that the religious ethic of love of God can be translated without loss into the conceptual scheme of rational egoism.

But however this question is judged, a further issue remains. Having defined "flourishing" in a way that admits such radically divergent "conceptions" as the ethical schemes of Aristotle, Nietzsche, Hume, and the New Testament, (p 23) Perry must—if his version of "naturalism" is to have any practical payoff—give some indication of how to evaluate the goodness or truth of competing conceptions. How should we choose between, say, a theory that counsels pursuit of this-worldly flourishing and, to take another example, the New Testament? The location of such questions in Perry's larger project is significant. The theoretical existence of moral truth would have little relevance to constitutional law in the absence of a reasonable belief that there are means for discovering it and that courts have some special capacity for doing so.

## B. Is Truth Relative?

Perry discusses moral epistemology in chapter two. If it is assumed that moral knowledge is knowledge about how to live in order to flourish, the epistemological problem (broadly conceived) is

to identify how to go about discovering such knowledge and, relatedly, to show how to establish particular moral claims as true or false. Perry attempts to develop his theory of moral epistemology between the polar mistakes of skepticism, which he dismissed in chapter one, and "foundationalism," (p 25) which he undertakes to refute in chapter two. Where skepticism makes truth impossible, Perry argues that foundationalism—which posits the existence of firm foundations for the acquisition of knowledge about how things really are—would make truth too absolute.

The relevant fallacy of foundationalism, as Perry employs that term, lies in its commitment to a "correspondence theory" of truth—a theory that "the truth of thought consists in the agreement or correspondence between what one thinks, believes, or opines and what actually exists or does not exist in the reality that is independent of our minds and of our thinking one thing or another." (p 40)<sup>29</sup> The trouble with a correspondence theory, Perry argues, is that "we lack access to" the "unmediated reality" to which our thoughts and words are supposed to correspond. (p 41) Our conceptual scheme filters and even determines our perceptions of what exists in the world, of what human nature is and is capable of, and of what forms human life might take. And though our conceptual scheme is itself revisable in light of experience, we can never get outside of conceptual schemes altogether and see whether our beliefs correspond to the world as it looks from what Hilary Putnam calls a "God's eye point of view." (p 41)<sup>30</sup>

Rejecting the possibility of a correspondence theory, Perry locates moral truth in a framework that he calls "Epistemological Relativism." Epistemological Relativism, as Perry defines it, holds that "the truth (or falsity) of any belief is always relative [not to what really is in some absolute sense but] to a web of beliefs" or a conceptual or moral system. (p 40) And there are many possible webs of beliefs. As a result, "a belief can be true relative to one or more webs, and not true, even false, relative to one or more others." (p 40) If this seems a shocking account of moral truth, Perry emphasizes, rightly, that Epistemological Relativism is a theory about truth and knowledge generally and is in no way peculiar to moral philosophy. (pp 39-40) Epistemological Relativism has emerged at least as much, and perhaps principally, as an explanatory thesis in the history and philosophy of science.<sup>31</sup> But

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<sup>29</sup> Quoting Mortimer J. Adler, *Six Great Ideas* 42 (Macmillan, 1981).

<sup>30</sup> Quoting Hilary Putnam, *Reason, Truth, and History* 49 (Cambridge, 1981).

<sup>31</sup> The seminal works include Thomas Kuhn, *The Structure of Scientific Revolutions*

the implications for moral philosophy remain significant. Not only can a belief be true within one moral system and false in others; "there is no privileged standpoint from which to adjudicate among different webs of beliefs, in the sense of a perspective that transcends all webs of beliefs." (p 40)<sup>32</sup>

Perry's epistemologically relativized ethical stance invites at least two objections. The first has to do with Perry's development of his argument. Beginning with the incontrovertible premise that our understanding of reality is mediated by our language, culture, and conceptual scheme, Perry draws the conclusion that truth is relative to what people believe. Although the premise is banal, the conclusion, which does not follow, is both wrong and potentially pernicious. Beliefs, even whole webs of them, cannot make it "true" (in what is possibly the most important sense of that term) that the earth is flat or that napalming babies is a matter of moral indifference.

Second, I doubt that Perry's version of Epistemological Relativism is logically tenable. According to Perry, the truth of all statements is relative to a web of beliefs; this must therefore be true of the statement that "the truth of all statements is relative to a web of beliefs." Yet Perry, in advancing his arguments for Epistemological Relativism, implicitly asserts more than this; he tries to claim, for all cultures and all plausible webs of beliefs, that no one could "really" have access to unmediated reality in the sense that the correspondence theory of truth requires. In doing so, Perry, like the Epistemological Relativism that he espouses, presupposes the kind of transcultural absolute truth whose existence he purports to deny.<sup>33</sup>

Perry gets into this predicament, I think, because his conception of "truth" is too monolithic; he wants to subsume all uses under a single analysis. But this is a mistake. Sometimes we do talk about truth as if it were relative to frameworks or webs of beliefs—as when we talk of "one person's truth" or what was "true within the assumptions of Ptolemaic system." At other times, espe-

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(Chicago, 1962); and W.V. Quine, *Two Dogmas of Empiricism*, 60 *Philosophical Rev* 20 (1951).

<sup>32</sup> It remains possible, of course, from the non-neutral and non-transcendent perspective of any particular web of beliefs, to pronounce an alternative web or some of its constitutive views to be wrong or false. (p 91)

<sup>33</sup> For a more general argument that relativism is self-refuting, see Maurice Mandelbaum, *Subjective, Objective, and Conceptual Relativisms*, in Jack W. Meiland and Michael Krausz, eds, *Relativism: Cognitive and Moral* 34 (Notre Dame, 1982). See also Williams, *Ethics and the Limits of Philosophy* at 137-38 (cited in note 27).

cially when talking about beliefs that we hold today, we tend to equate truth with rational warrantability; we take beliefs to be true when they are supported by good reasons and have not been shown to be false.<sup>34</sup> At yet other times, however, we use "truth" in a more absolute sense—as when we say that, even if everyone believes something today and is justified in doing so, further investigation may reveal it not to be true. When we say this, we mean not merely that another web of beliefs is destined to replace those that we now hold; we mean instead that reality—the world that exists independent of what we think—may turn out to be different than we had thought.

Does this claim—that "truth," in one familiar and important sense of that term, depends on the way things really turn out to be—repeat the fallacy that Perry sees in the correspondence theory of truth? In arguing that it need not, Bernard Williams has introduced the idea of what he calls an "absolute conception" of the world.<sup>35</sup> This is a conception of the world, and of us as subjects within it, as they would appear to an investigator using methods "to the maximum degree independent of our perspective and its peculiarities" as well as the perspectives that have preceded us and are in fact likely to succeed us.<sup>36</sup> This conception would, in principle, provide an account of both how and why the world looks different from rival and more partial perspectives. The notion of "the world" that emerges from an "absolute conception" acknowledges that our access to reality is always mediated by our conceptual schemes, but it also admits claims of absolute truth, measured against the world as it would appear in an absolute conception or against the statements about the world that that conception would warrant.<sup>37</sup> Among its virtues, the absolute conception enables us to avoid the logical perplexities to which Perry's Epistemological Relativism gives rise.

It is unclear, however, how far Perry would be interested in or

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<sup>34</sup> See Putnam, *Reason, Truth, and History* at 55 (cited in note 30).

<sup>35</sup> Williams, *Ethics and the Limits of Philosophy* at 111, 139 (cited in note 27).

<sup>36</sup> *Id.* at 139.

<sup>37</sup> Although Williams believes that the notion of an absolute conception is appropriate in the realm of science, where the phenomenon of convergence suggests that perception is guided by reality, he argues that the notion of an absolute conception cannot be extended to ethics, since ethical judgments are not guided by the world in the same way as are scientific conclusions. See *id.* at 149-52. Other philosophers, however, believe that an ideal of appropriately impartial or objective inquiry into the subject matter of morality might yield similar accounts of how the views characteristic of less objective perspectives can be explained and transcended by something like an absolute conception. See, for example, Nagel, *The View from Nowhere* (cited in note 17); compare John Rawls, *A Theory of Justice* (Belknap, 1971).

troubled by this logical critique. Although arguments about the "self-referentially inconsistent" or self-refuting character of relativism are well known, many relativist philosophers have felt no need to abandon their claims.<sup>38</sup> Perry, like other relativists, might believe that the logical critique somehow misses what is at stake.<sup>39</sup> In any event, it is not surprising, given his view that truth is relative, that by the end of chapter two Perry has shifted his focus of attention from the nature of truth to the possibility of persuasion. Even if my truth is true relative only to my web of beliefs, and your truth is relative to yours, it does not follow that there cannot be "productive moral discourse." (pp 51, 54) Although there is no absolute or objective right or wrong, we may still be able to persuade each other about what, relatively speaking, we ought to do.

### C. Moral Persuasion in a Relativist Universe

Perry's account of moral persuasion across different and incompatible moral frameworks is straightforward. For all of us, he argues, moral beliefs are elements of total webs of beliefs; at least within our culture, there is likely to be considerable overlap among belief systems; and the areas of overlap provide points from which conversation can proceed. (pp 50-53) Although we do not know how much agreement can be reached, we ought not be pessimistic until we have tried. (p 52)

The principal argument for this conclusion issues from Perry's discussion of what he calls "Anthropological Relativism," defined as "a position on . . . the existence *vel non* of human interests" (p 44) in light of which, from a naturalist perspective, it must be judged whether individual persons or a complete society is "flourishing." Departing from Aristotle, (pp 48,99) Perry maintains that "human nature, conceived in terms of common human needs and capacities, always underdetermines" (pp 47-48)<sup>40</sup> what is the best way of life, and what is the best way for an individual to conduct herself within a way of life. There is, accordingly, a range of acceptable kinds of community, and "within the context of the community there is a range of acceptable ways to live . . ." (p 48) But while Perry is an Anthropological Relativist, his relativism, he insists, is limited and moderate. (p 48) Perry argues that some

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<sup>38</sup> See Richard J. Bernstein, *Beyond Objectivism and Relativism* 15 (U Penn, 1983).

<sup>39</sup> See Meiland and Krausz, *Relativism: Cognitive and Moral* at 32 (cited in note 33) ("Relativism may be more appropriately considered as a world-view which generates its own goals and standards.").

<sup>40</sup> Here quoting Hampshire, *Morality and Conflict* at 155 (cited in note 19).

senses, appetites, needs, and interests are shared cross-culturally, and that there are limits, intrinsic in human nature, on what could count as conducive to human flourishing and thus as morally good within any sane web of beliefs. (pp 47-48) It is the existence of shared human needs and interests, in common with overlapping webs of beliefs, that gives rise to Perry's optimism about the possibility of productive moral discourse. (pp 51-53)

But at least two problems beset Perry's moral theory, even after he shifts its focus from truth to persuasion. First, when he argues that interests and needs that are shared cross-culturally limit the forms of life that are defensible within a naturalist moral framework, Perry reverts to the conventional understanding of naturalism—seen in Aristotle and Hampshire, for example—that regards human life as an aspect of the natural order. But Perry has at times defined naturalism to encompass, among other things, theocentric morality, (p 222 n 49) and once he has done so, he can no longer assume that “flourishing” can be defined by reference to the shared and familiar needs of human beings as natural creatures. “Naturalism,” as peculiarly and capaciously defined by Perry, cannot rule out the possibility of it being “true” (relatively speaking or otherwise) that we should eschew the pleasures of the material world, offer human sacrifices, or coerce infidels onto the path of righteousness because God will punish us if we do not.

Second, in reaching his accommodation with the challenge of relativism, Perry reopens the door to the moral skepticism that he introduced naturalism to refute. It is precisely the asserted relativity of truth and value, which Perry's Epistemological Relativism affirms, that makes the skeptic want to say that there is not “really” any right or wrong with respect to issues of morality. Moreover, the skeptic's insistence that at least some truths must be non-relative for there to be real truth at all expresses a yearning felt by many of us. When we seek the answers to moral questions, we do not just want answers that are true relative to the web of beliefs of *some* person, tradition, or philosophy—a web of beliefs that we might reasonably reject. If Ethical Relativism were correct, however, that is all we could ever hope for.

This problem resonates when we consider Perry's view that the Supreme Court should, sometimes at least, pursue moral truth. In our complex, pluralistic society there is little ground for confidence that, when the Court creates law on the basis of moral judgments, it will be acting according to the moral truth (in the relativ-

ist sense) of any particular individual.<sup>41</sup> Nor can it be confidently predicted that any particular individual will be persuaded.<sup>42</sup> Nor, Perry tells us, is there an objective, impartial, or transcendent perspective from which it can be judged whether anyone ought to be persuaded. The question thus becomes as obvious as it is urgent: If the Supreme Court is to act as a moral decision maker at all, whose truth ought it to act upon?

Although Perry has interesting things to say on this issue, his discussion, when he gets to it, suffers from his failure to frame the problem in the proper light. Morality is not, as Perry's naturalism holds, exclusively a matter of rational egoism. Moreover, in our search for knowledge and truth we want, and may reasonably hope to attain, more than Perry's Epistemological Relativism would permit us even to seek.

### III. THE POLITICS OF INTERPRETATION

Perry addresses the question of whose morality the Court ought to rely on in part III of *Morality, Politics, and Law*, in which he seeks to define and defend a non-originalist approach to constitutional interpretation. The main lines of his theory permit succinct sketching. But his answer to the "whose morality" question, despite the importance that he attaches to it, turns out to be surprisingly, though by no means inexplicably, elusive.

#### A. Perry's Constitutional Theory

Perry begins with the proposition that the Constitution, like other texts, frequently bears more than one meaning. (pp 132-33) In addition to its originally intended meaning, the Constitution has acquired a second meaning as a symbol of the nation's aspirations to justice. (p 133) Thus, although it is "axiomatic" that judges are bound by the constitutional text, (p 131) it is not axiomatic that "the text" refers only to the originally intended meaning of the written document. (p 132) On the contrary, Perry argues, certain constitutional provisions have demonstrably acquired "aspirational meanings" that are reflected in decided cases and are available to support future decisions. (pp 133-34) In any case involving a constitutional provision with an aspirational as well as an original meaning, the Supreme Court must decide which to apply.

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<sup>41</sup> See, for example, Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harv L Rev 4, 19 (1983).

<sup>42</sup> See *id.*

(pp 134-35)

Having characterized the interpretive function in this way, Perry contemplates that judges will bring morality and politics to bear on their decision making in at least two ways. First, when the best characterization of a constitutional aspiration is in doubt, a judge "should rely on *her own beliefs* as to what the aspiration requires." (p 149) Second, in cases requiring a choice between original and aspirational meanings, the decision should rest on considerations of moral preferability: "an aspiration [should] be brought to bear if, but *only if*, the aspiration is a worthy one . . . ." (p 146)

Perry's picture of the interpretive process is somewhat oversimplified. He seems to believe that not all constitutional provisions embody aspirations, but he fails to give a full account of how to determine which do and which do not. He suggests that history and precedent are relevant to the determination, (pp 134, 138) but never considers how existing aspirations got rooted in the past, and whether judges should ever identify "new" aspirations in the future. The fundamental problem, however, is not one of inattention to detail. Perry's basic conception is askew. The distinction between intended and aspirational meanings is far too sharp, and Perry pays inadequate attention to the broader interpretive context. Not least among his theory's deficiencies, it pays too little attention to how, exactly, different kinds of constitutional arguments—for example, those based on precedent, those rooted in the framers' intent, those appealing to constitutional structure, and those embodying value judgments—fit together.<sup>43</sup>

This, however, is not the issue that concerns Perry most. His central question, which he precisely formulates at least twice in the meandering course of the argument of section III, is the one that I have framed already: "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?" (see pp 121, 148)

## B. Whose Morality?

Because Perry's effort to answer this question proceeds crablike, by movements in one direction and another that cannot easily be transcribed into a straight line, it may help to fix some points of reference. Roughly speaking, three possible answers stand out. First, a judge might rely squarely on her own moral beliefs.

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<sup>43</sup> Perry does not overlook this question altogether. (See pp 134, 150)



Michael Moore has urged this approach.<sup>44</sup> In his view, the Constitution's value-laden concepts aim at correspondence with moral reality, which judges, steering by their own lights, should endeavor to discover.<sup>45</sup> Second, a judge might aspire to rely only on "conventional" or "majoritarian" moral views. (p 149)<sup>46</sup> The Supreme Court occasionally acts as if these were the relevant beliefs. For example, in eighth amendment cases, the Court sometimes asks whether a contemporary moral consensus would find a particular punishment cruel and unusual.<sup>47</sup>

A final position, suggested by the recent work of Professor Dworkin,<sup>48</sup> among others,<sup>49</sup> holds that the appropriate values are the society's immanent values, as reflected in its institutions and traditions, but that these values can emerge only from a process of interpretation in which the judge's personal values play a significant role. This position seeks to combine two central ideas. First, as a representative moral decision maker acting on behalf of the society, a judge must aim to bring the society's morality, insofar as it can be distinguished from her own, to bear on constitutional questions. But second, the society's morality must be as much constructed as discovered, especially in a radically pluralistic society whose tradition frequently includes contradictory strands: glorification of robust and uninhibited political debate, but also repeated incidents of suppression to promote other goals and ideals; proud professions of human equality, but also profound dispute over the entailments of this ideal, and even familiar histories of discrimination; and so forth. In the effort to identify the "true" morality of the society and its tradition, more than one account will frequently fit tolerably well with the evidence. The choice of interpretations should then be made on moral grounds, with the moral views of the interpreter—possibly subject to some limits—playing an irreducible role.<sup>50</sup> According to this position, the interpreter should strive to portray the immanent morality of the society in the

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<sup>44</sup> See Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 Stan L Rev 871 (1989).

<sup>45</sup> See id at 883.

<sup>46</sup> Perry defines "conventional" beliefs as those "as to which there is a consensus in the political community," and "majoritarian" beliefs as "beliefs that enjoy majoritarian support in the community." (p 149)

<sup>47</sup> The question, in Earl Warren's famous phrase, is whether the punishment is acceptable under the "evolving standards of decency that mark the progress of a maturing society." *Trop v Dulles*, 356 US 86, 101 (1958).

<sup>48</sup> See Ronald Dworkin, *Law's Empire* (Belknap, 1986).

<sup>49</sup> See Fallon, 100 Harv L Rev at 1263-64 & n 297 (cited in note 2).

<sup>50</sup> See id.

"best" plausible light, with what counts as best emerging from her own understanding of ultimate moral truth.

As I have said, Perry's position on the central "whose morality" question is equivocal, and, at the risk of overextending the preliminaries, I want to speculate as to why. In his earlier book, *The Constitution, the Courts, and Human Rights*,<sup>51</sup> Perry took the clear position that a judge ought to depend on her own moral beliefs.<sup>52</sup> He did so in reliance on the undefended assumption<sup>53</sup> that there are right answers to moral and political questions; given the existence of such answers, Perry argued, courts would have comparative advantages in identifying them. By his own account, Perry embarked on the writing of *Morality, Politics, and Law* with the intention of establishing the validity of the earlier book's central assumption. When it came time to argue that moral and political questions have "right" answers, however, Perry had concluded that the rightness of answers was only "relative." And this must have made the view that a judge should rely directly on her own moral views at least uncomfortable. If a judge's views are only true relative to her web of beliefs, not objectively correct, then why should we—the rest of us—want her to impose her convictions?

This concern leads naturally to examining the community's traditional or consensus morality as a possible source of moral guidance. The community's web of beliefs, rather than those of a possibly eccentric individual, would then be relevant. Yet problems immediately present themselves. The conflicts built into the American tradition and the pluralistic character of contemporary culture may render the search for traditional or consensus morality problematic;<sup>54</sup> it is implausible that there is any web of moral beliefs shared by all members of the constitutional community against which everyone's truth could be measured. And as a further source of perplexity, we want morality to tell us how we ought to think about moral questions, not mirror how the community thinks already.<sup>55</sup> So where is a constitutional moralist to turn? Perry, in *Morality, Politics, and Law*, never quite decides.

Occasionally Perry writes as if he accepted the first of the positions that I identified: a judge should bring her own values di-

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<sup>51</sup> Cited in note 12.

<sup>52</sup> Perry, *The Constitution, the Courts, and Human Rights* at 123 (cited in note 12).

<sup>53</sup> See *id.* at 102.

<sup>54</sup> See, for example, Cover, 97 Harv L Rev at 17-18 (cited in note 41).

<sup>55</sup> See, for example, Ronald Dworkin, *A Matter of Principle* 217-20 (Harvard, 1985).

rectly to bear on constitutional interpretation. He says, for example, that a judge should "rely on *her own beliefs* as to what constitutional aspirations require" (p 149) and that a judge, in choosing between a constitutional provision's original and aspirational meanings, must decide whether she "believes that the relevant aspiration is worthwhile . . . ." (p 135) If she concludes that the aspiration is unworthy, he asserts, then she should not go beyond the text's originally intended meaning. But consider how these claims bear on whether the Constitution's due process clause protects abortion rights. Surely the due process clause has acquired what Perry calls an "aspirational meaning." (pp 173-74) Should a judge, then, rely on her own beliefs in determining what the aspiration requires and whether it is worthwhile? The reader might well expect so.

When he discusses abortion regulation, (pp 172-78) however, Perry instead sounds as if he subscribes to the second and quite different position that a judge should follow conventional or majoritarian moral values. He argues that, to invalidate legislation restricting pre-viability abortions other than in exceptional circumstances, a judge would need to rely on a premise that "the protection of fetal life is not a good of sufficient importance" to outweigh a pregnant woman's liberty interest. (p 175) And this premise must be rejected, Perry argues, because it fails to command majoritarian moral agreement:

[B]ecause the issue the premise addresses—the value of fetal life—is so widely contested in American society, and, further, because the issue is one as to which people of good will and high intelligence (among others) seem irresolvably to disagree, it is not at all clear that the premise is an appropriate basis for constitutional judgment. To the contrary, reliance on the premise as a basis for constitutional judgment seems plainly imperial. (p 175)<sup>56</sup>

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<sup>56</sup> Perry thus argues that the Supreme Court erred in *Roe v Wade*, 410 US 113 (1973), when it held that the states may not regulate "non-therapeutic" or "elective" abortions during the first trimester. (p 175) But Perry would not allow the states a free hand. The Constitution should be held to proscribe state prohibitions against abortion, he concludes, when the pregnancy threatens the health of the mother, results from rape or incest, or would culminate in the birth of a genetically defective child "whose life would be short and painful." (p 175) The reason again has its roots in majoritarian or conventional morality: "[I]t is most unlikely that abortion legislation failing to provide even for these relatively narrow exceptions would be enacted or maintained in contemporary American society unless the . . . value[] of the well-being of the women affected . . . was unfairly, that is discriminatorily, disregarded . . . ." (pp 175-76)

But although there are traces of competing views, the dominant thrust of Perry's analysis—if I understand it correctly—expresses a view of constitutional morality that accords more nearly with the third of the positions that I have distinguished: a judge should seek to interpret and then to follow the immanent morality of the constitutional community, but must, in carrying out the interpretive task, draw on her own moral convictions. His position emerges through the development of an elaborate analogy between constitutional interpretation and the interpretation of sacred texts. Three concepts central to both interpretive practices ground his argument: those of (i) a community; (ii) a tradition, embodying a particular form of life and modes of discourse, of which the community is the present bearer; and (iii) foundational texts, whether sacred (in the case of a religious tradition) or constitutional (in the case of our political tradition), that symbolize the tradition's uniting and guiding aspirations. (p 137)<sup>57</sup>

Within this picture of text, community, and interpretation, an interpreter's task is "to interpret the tradition itself, to mediate the past of the tradition with its present." (p 138) (emphasis omitted) And on this view, it seems clear, judges should only rely on values that have some claim to be those of the tradition in which the text and the community are located. It often will be contestable, in light of what Perry characterizes as the text's disturbing and "prophetic" function, (pp 137-45) what the values of the community or its tradition really are. Decisions about the nature of the tradition's fundamental aspirations will be bound up in a matrix of views about what is right and wrong as well as about what was done or believed in the past. (p 140) But the moral values to which a judge appeals must, according to the logic of this argument, be those of the community and its tradition.<sup>58</sup>

This—if I have drawn the proper inferences from Perry's mixed and ambivalent utterances—is an intelligible answer, and

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<sup>57</sup> The point of the analogy, for Perry, seems to be that the Constitution, like a religious text, has a "disturbing" or "prophetic" function: "The political community must respond to the incessant prophetic call of the text—must recall and heed the aspirations signified by the text—and thus create and give (always-provisional, always-reformable) meaning to the text, as well as take meaning from it." (p 139)

<sup>58</sup> Perry thus quotes not once but twice these lines from a speech by Justice Brennan: "When Justices [of the Supreme Court] interpret the Constitution, they speak for their community, not for themselves alone. The act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought." (pp 121, 159) See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S Tex L Rev 433, 434 (1986).

insofar as it goes a generally accurate one, to the question of whose moral values a judge ought to rely on in interpreting the Constitution. But if Perry reaches the right conclusion, he does so for the wrong reason. For Perry, a judge should try to interpret the community's morality because moral truth, for constitutional purposes, is relative to the constitutional community and its traditions. But relativism, as I have argued, is a confused theory of moral truth which cannot bear the weight that Perry would place on it.

A judge should seek to interpret the community's values and bring them to bear on constitutional interpretation, not because this is the way to moral truth, but because it is her job to do so; this is what the implicit rules and understandings of modern constitutional interpretation require her to do.<sup>59</sup> An example may prove illustrative. I believe capital punishment to be morally wrong. I also believe, based on the facts as I now view them (although I am less confident of this), that capital punishment is not per se incompatible with the best interpretation of the deep values of the constitutional community. If I were a judge, it would be my job in implementing the Eighth Amendment to follow (my interpretation of) the community's values.<sup>60</sup>

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<sup>59</sup> Fallon, 100 Harv L Rev at 1265-66 (cited in note 2).

<sup>60</sup> The distinction between a judge's values and those that she attributes to the constitutional community should not be overstated. See *id* at 1263-64 & n 297. As individuals holding personal moral beliefs, we are the products as well as the creators of a tradition. As a result, it will often be easy for a judge to link her personal moral beliefs to an interpretation of the practices or traditions of the community.

Disputes about capital punishment furnish an apt example. In *Furman v Georgia*, 408 US 238 (1972), the Supreme Court called into question the constitutionality of the then-existing state death penalty statutes by reversing three capital sentences imposed under Texas and Georgia law as violative of the prohibition against cruel and unusual punishment. But by 1986, 41 of the 50 states had death penalty statutes on the books. *Ford v Wainwright*, 477 US 349, 408 (1986). In addition, a decade after *Furman*, "more than 70 percent of the general public and almost the same percentage of college freshmen and ABA members favored continuation of the death penalty." William B. Lockhart, Yale Kamisar, Jesse H. Choper, & Steven H. Shiffrin, *Constitutional Law* 565 n j (West, 6th ed 1986). But although these facts undoubtedly constitute relevant evidence, they are not necessarily dispositive of debates about how the morality of the society and the constitutional order are best understood.

Dissents by Justices Brennan and Marshall in the Supreme Court's first major post-*Furman* death penalty decision illustrate two valuable distinctions. The first is between currently prevailing moral views and deep moral principles. See Wellington, 83 Yale L J at 248 (cited in note 8) (arguing that a judge must "disengag[e] himself from contemporary prejudices which are easily confused with moral principles."). Dissenting in *Gregg v Georgia*, 428 US 153 (1976), Justice Brennan argued, in effect, that the legislature and the citizens themselves had made a mistake, measured against their own deepest commitments, in undervaluing the "primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings . . ." *Id* at 229. Justice Marshall's separate dissent relied on a related distinction between reflective and

There are good reasons why we might want constitutional interpretation to turn on the moral values of the community, as they emerge through judicial interpretation, rather than on the values that an individual judge or theorist might identify with moral truth. On the one hand, this peculiar and limited form of judicial moralizing gives a community that aspires to justice the benefit of systematic and detached thought about the implications of those provisionally settled moral commitments that are reflected in its constitution, laws, and practices.<sup>61</sup> Articulate consistency is itself a moral value, which may be better served by a relatively detached judicial decision maker than by a legislature that is subject to shifting political currents and enthusiasms.<sup>62</sup> On the other hand, by circumscribing the scope for judicial exercise of moral judgment independent of community values, this approach prevents judges from functioning as moral imperialists, implementing the dictates of a foreign moral system. There are, of course, many questions about this position that critics might raise—as they have, for example, in commenting on Ronald Dworkin's *Law's Empire*,<sup>63</sup> the best known exposition of the type of constitutional theory that calls upon judges to exercise independent moral judgment in interpreting the morality of the constitutional community. But enough has been said already to indicate why, although I agree with Perry's position as I have so far described it, I have quite different reasons for arriving at the shared conclusion.

### C. Personal Moral Values, Religion, and the Judicial Role

Although we are swimming in deep water already, it is necessary to go deeper. As I have suggested, a judge who undertakes to interpret the morality of the constitutional community engages in a moral as well as a descriptive enterprise. Several interpretations

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unreflective morality. The American people were "largely unaware of the information critical to a judgment on the morality of the death penalty," he argued, and would be likely to change their minds if adequately informed. *Id.* at 232.

Whether or not these specific arguments are adjudged persuasive, the kinds of distinctions they involve are legitimate and important to the judicial enterprise of interpreting society's morality, since they help explain much of the phenomenon of moral and political persuasion. Persuasion often occurs through a demonstration, not that we had the wrong values, but that we misunderstood what our own values really were or required. See, for example, Williams, *Moral Luck* at 101-13 (cited in note 27).

<sup>61</sup> See, for example, Dworkin, *Law's Empire* at 176-275 (cited in note 48).

<sup>62</sup> See, for example, Alexander M. Bickel, *The Least Dangerous Branch* 24-26 (Bobbs Merrill, 1962); Charles L. Black, Jr., *The People and the Court: Judicial Review in a Democracy* 177 (Macmillan, 1960).

<sup>63</sup> Dworkin, *Law's Empire* (cited in note 48).

will often be plausible; that is, they will fit sufficiently well with the obviously relevant facts to be serious candidates for adoption. When this occurs, a judge, within reasonable limits, has the flexibility to choose the interpretation that she regards as morally best; and due to the obvious threat of circularity, the standard of judgment must be something other than the community's views. At this point, I think Perry would agree, a judge must rely on her own views about what is morally preferable. Yet if this is agreed, a hard question immediately presents itself: on what personal moral views, however limited a role those views may have within a particular constitutional theory, may a judge permissibly rely? Or, to cast the issue in a slightly different form, are there some types of views that ought to be excluded from the decisional calculus? Can a Catholic judge, for example, permissibly rely on her religious convictions in developing a theory about whether the immanent morality of our political tradition—which, again, I assume to be reasonably susceptible to divergent interpretations—calls for the recognition of constitutional abortion rights?

Perry seems to believe that no set of personal moral beliefs should be excluded from the interpretive calculus. First, he avows that religion and morality are necessary engines of our political and constitutional life. To interpret law with one's religious convictions "bracketed," he says, would be "to annihilate[] essential aspects of one's very self . . . . [O]ne can participate in politics and law . . . only as a partisan of particular moral/religious convictions . . ." (pp 181-83) Second, Perry suggests that a single judge with aberrant views is unlikely to do much harm. (pp 149-50) Third, he thinks that the moralization of our constitutional politics is an affirmative good. (pp 152-60) "Questions of human good . . . are too fundamental," Perry writes, "to be marginalized or privatized." (p 182) And in pressing such questions, we should "explore . . . the resource of the great religious traditions." (p 183) Finally, Perry contends that insistence on liberal neutrality as a moral or constitutional ideal is futile, misguided, and a dead end. (pp 55-76)<sup>64</sup>

These arguments draw support from the recent work of another thoughtful scholar. In *Religious Convictions and Political Choice*, a book published nearly contemporaneously with Perry's,<sup>65</sup>

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<sup>64</sup> But see pp 157-58 (arguing that, when there is discordance between the "criteria of judgment" of a judge's religious community and those of the broader political community, she must, for purposes of political discourse, accept the standards of the political community).

<sup>65</sup> Kent Greenawalt, *Religious Convictions and Political Choice* (Oxford, 1988).

Kent Greenawalt joins in attacking the "liberal" view that religiously-based moral convictions have no place in constitutional decision making.<sup>66</sup> Greenawalt accepts, as it is not clear that Perry does, that there should be a strong preference for decision making that appeals entirely to what he calls "publicly accessible reasons"—"reasons whose force [as reasons, even if not their power to determine the resolution of an issue] would be acknowledged by any competent and level-headed observer";<sup>67</sup> and he believes that arguments and decisions that rest even partly on disputed religious foundations generally fail to meet this standard.<sup>68</sup> But, Greenawalt continues, for many people religiously-based and other moral convictions are inextricably intertwined.<sup>69</sup> Moreover, even in cases in which religious convictions can be disentangled, arguments that appeal only to publicly accessible reasons frequently will run out before determining a conclusion.<sup>70</sup> Greenawalt contends, for example, that the moral status of the fetus cannot be determined on the basis of publicly accessible reasons.<sup>71</sup> And if it is true, Greenawalt continues, that moral decision makers must sometimes go beyond publicly accessible reasons merely to bring arguments to conclusion, then it would be arbitrary and wrong to exclude religious convictions from the broader set of non-publicly accessible reasons—including those based on moral intuitions, for example—on which a judge may permissibly rely.<sup>72</sup>

Putting Perry's and Greenawalt's arguments together, the strongest case for permitting judges to rely on their religious values in deciding cases reduces to this: we cannot have it both ways. If we want judges to act as moral decision makers even when they cannot employ society's morality as their standard of moral refer-

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<sup>66</sup> Greenawalt, however, argues that a demand for governmental neutrality that excludes reliance on religious beliefs, although commonly associated with modern liberalism, is no part of an appropriately crafted and circumscribed liberal theory, and subscribes to a liberal theory that includes no neutrality requirement. See *id.* at 215-16. Greenawalt is largely concerned with the restraints that the immanent ideals of liberal democracy place on citizens' reliance on their religious convictions in deciding which policies to favor and how to vote. At the end of the book, however, he explicitly extends his arguments to encompass the appropriate role of religious convictions in judicial decision making. See *id.* at 239-41.

<sup>67</sup> *Id.* at 57.

<sup>68</sup> See *id.* at 69-76.

<sup>69</sup> See *id.* at 30-48.

<sup>70</sup> See *id.* at 98-195.

<sup>71</sup> See *id.* at 120-43. He also argues that religiously-based views of human nature may be necessary to resolve otherwise indeterminate arguments about the appropriateness and likely effectiveness of various kinds of incentive and deterrent schemes, including capital punishment. See *id.* at 187-89.

<sup>72</sup> See *id.* at 156-62, 239-41.



ence, and if judges' personal moral views are determined by their religious convictions, we cannot sensibly ask them to exclude from their calculations what many of them may view as the most relevant source of moral guidance.

These arguments are important and thought-provoking but ultimately unpersuasive. The decisive objection arises from the incompatibility of Perry's and Greenawalt's positions with the ideal of fairness that lies at the heart of the notion of reasoned justice under law—the ideal, which retains its vitality even in a post-Realist age, that judicial decision making should be “objective” or “impartial.”<sup>73</sup> I recognize that these are deeply contestable terms that permit no short or unitary analysis. It may therefore help to begin by juxtaposing the contrasting notions of judicial “partiality” and

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<sup>73</sup> As Judith Resnik has written, “from the Code of Judicial Conduct to federal statutes, the buzz words are the same: ‘Impartiality’ is required; ‘bias is forbidden.’” Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S Cal L Rev 1877, 1882 (1988) (footnotes omitted). Resnik does not write in praise, however. Her article is part of an impressive body of recent scholarship, much of it falling under the rubric “feminist,” that criticizes traditional legal notions of objectivity and impartiality as partial, gender-biased, and unworthy. See, for example, Catharine A. MacKinnon, *Feminism Unmodified* (Harvard, 1987); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 Harv L Rev 10, 14, 45, 70 (1987); and Robin West, *Jurisprudence and Gender*, 55 U Chi L Rev 1 (1988). It is impossible for me to respond adequately here to the wide range of relevant criticisms that have recently emerged from the feminist movement. But since I shall be treating impartiality as a worthy ideal, a few remarks are in order.

First, to say that impartiality is an ideal is certainly not to say that anyone has perfectly attained it. I would not wish to defend all practices or modes of thought that have been advanced as objective or impartial or, in particular, that are sometimes put under the heading of “liberal legalism.” See, for example, West, 55 U Chi L Rev at 3. Second, “subjective” experiences and beliefs are irreducible features of objective reality, see, for example, Nagel, *The View from Nowhere* at 7 (cited in note 17), and they are frequently of profound moral relevance. I do not understand the method or ideal of objectivity as denying this. See, for example, Nagel, *The View from Nowhere* at 7 (cited in note 17); see also, Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 99 Ethics 229, 238, 247 (1989). Third, because of the moral relevance of subjective experience, empathetic understanding of others is an exceedingly important attribute in moral and political decision makers. Most of us currently know far too little about how it feels to stand in others' shoes, and we need to open ourselves to those who would tell us that our current views are mistaken, crabbed, or “gendered.” See Minow, 101 Harv L Rev at 75. I would also agree with Professor Minow that perfect impartiality, in the sense of a perspective that encompasses and therefore transcends all other perspectives, is never attainable. But fourth, as long as the most empathetic understanding of others does not reveal a unanimously acceptable ground of settlement for all disputes, empathetic understanding will yield relevant data, but not ultimate standards of moral and political judgment. This is not intended as a criticism of the aspiration to empathetic understanding as a source of moral wisdom. On the contrary, the method or stance of objectivity more nearly builds upon than displaces empathetic modes of understanding in such cases. Nonetheless, the perspective of objectivity—or at least our best approximation of it—appropriately continues to do moral work. And the status of objectivity as an ethical ideal remains unimpaired.

"subjectivity"—terms that invoke images of a judge or other decision maker examining an issue from a personal perspective that renders her insensitive to the full range of relevant considerations. It is, of course, impossible in the quest for objectivity or impartiality to escape perspective altogether. In Thomas Nagel's phrase, there is no "view from nowhere."<sup>74</sup> But a decision maker can respond to concerns about the limitations of her particular perspective—her own partiality or subjectivity—by forming a new picture of the world in which she, her perspective, and her beliefs form a part of the larger context in which she is asked to make a judgment. Nagel argues persuasively that this "method of understanding" is what we mean, and all that we can mean, by "objectivity":

To acquire a more objective understanding of some aspect of life or the world, we step back from our initial view of it and form a new conception which has that view and its relation to the world as its object. In other words, we place ourselves in the world that is to be understood. The old view then comes to be regarded as an appearance, more subjective than the new view, and correctable or confirmable by reference to it. The process can be repeated, yielding a still more objective conception.<sup>75</sup>

When we seek objectivity in this way, we see ourselves and our beliefs in a new light. As for ourselves, the psychologically disorienting realization is that our wants and interests are no more important than those of other human subjects; we are no more likely than others to have privileged access to the universe's most important truths. On the other hand, we are not less important than others either, and we retain a certain dignity. We are entitled to concern and respect and, at least in cases involving the use of coercive force by the state, to justification.<sup>76</sup>

The issue then is: what counts as justification? Once the equal dignity of human beings is recognized, the ideal would be justification before "the tribunal of each person's understanding."<sup>77</sup> As a practical matter, this standard will surely prove too demanding to be workable. Some weaker approximation will have to do service. And the best approximate specification may vary with the context.

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<sup>74</sup> See Nagel, *The View from Nowhere* (cited in note 17).

<sup>75</sup> *Id.* at 4.

<sup>76</sup> See Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 *Phil & Pub Aff* 215, 223 (1987).

<sup>77</sup> The phrase comes from Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 *Philosophical Q* 127, 149 (1987).

It may matter, for example, whether the issue involves the design of what Rawls calls "the basic structure"<sup>78</sup> of a society or the interpretation of an established constitutional right.

In considering what ought to count as a justification for a judge's direct reliance on a substantive moral principle, an objective view of the foundations of a person's beliefs—whether our own or anyone else's—becomes important. As Nagel puts it, "there is a big difference, looking at it from the outside, between [someone] believing something and its being true."<sup>79</sup> And in assessing which of anyone's beliefs—most relevantly here, which of a judge's beliefs—justify the use of the state's power, Nagel argues persuasively for distinguishing between those beliefs that are and those that are not supported by what Greenawalt calls "publicly accessible reasons."<sup>80</sup> For not to demand justification of judicially ordered coercion in such terms would be to trample on the right to equal respect of mature and competent persons who could not reasonably be expected to acknowledge the justificatory force of the non-publicly accessible reasons on which a court might instead rely.<sup>81</sup>

In other words, the stance of objectivity leads to a demand that state coercion be justified by reasons that would at least have the status of reasons before the tribunal of every (or virtually every) mature person's understanding.<sup>82</sup> To put the point in Kant-

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<sup>78</sup> See, for example, Rawls, *A Theory of Justice* (cited in 37).

<sup>79</sup> Nagel, 16 Phil & Pub Aff at 229.

<sup>80</sup> Rawls seems to have something similar in mind when he says that political issues should be resolved in accord with "free public reason." See John Rawls, *The Idea of an Overlapping Consensus*, 7 Oxford J Legal Stud 1, 8 (1987). See also John Rawls, *Kantian Constructivism in Moral Theory*, 77 J Phil 515, 537 (1980) (defining "publicly shared methods of inquiry" in terms of "ways of reasoning . . . familiar from common sense and . . . includ[ing] the procedures and conclusions of science, when these are well established and not controversial.").

<sup>81</sup> The true believer may, of course, deny that such a right exists or that it is entitled to moral priority. Consider the case of a judge who is tempted to hold that the Constitution protects no abortion rights based partly on her conviction that God has invested fetuses with immortal souls whose salvation is at risk. The argument to be directed to her is that when she looks at her actual position in the vast universe, she ought to doubt the reasonableness of acting against others on the belief that she has privileged access to metaphysical truth. She may be right about souls being at stake, but she ought not to act on her belief in the absence of more, or a different kind of, evidence than she now has. The religious believer may of course be unmoved by this argument, but the method of objectivity suggests that she ought to be. At this point of collision, metaphysical issues must be joined, but possibly only to a limited degree. It may suffice that, whatever the moral status of the fetus, the best metaphysical theory (whatever it is) would not require a judge or a citizen to make law based on publicly inaccessible reasons.

<sup>82</sup> Otherwise the risk is too great that those who hold political power will satisfy themselves that what they are doing is fair or reasonable in light of their own convictions—which may depart far from those of some or even many of the citizens generally. See John Rawls,

ian language, if a court forces someone to serve an end whose status as an end she can reasonably decline to acknowledge—to do the purported will of a god in whom she does not believe, for example—it is treating her as a mere means in the pursuit of others' purposes, and not as an end in herself.<sup>83</sup>

It is a fair question whether the concept of a "publicly accessible reason," which I have adapted from the writings of contemporary philosophers, can bear the weight that this argument asks it to carry. I think so, though I cannot prove it here. Having introduced the basic intuitive idea, however, perhaps I can illustrate some of the lines that an adequate elaboration might take by offering a few examples. Claims of natural fact that are relevant to moral and political issues would surely satisfy the standard of public accessibility, even if the claims are themselves disputable. Public accessibility, in such cases, arises from shared standards of what counts as evidence and how evidence should be evaluated. Also satisfying the public accessibility standard are many causal and conceptual claims about the relationship between events or policies and values that can be taken as widely shared—for example, claims about whether capital punishment is cruel in light of accepted paradigms of cruelty, or whether recognition of a right to die would undermine respect for the shared value of the sanctity of human life. Although reasonable people can disagree, the disagreements generally occur within an argumentative framework marked by common standards of relevance and accepted norms for the assessment of evidence.

Matters admittedly grow murky with respect to claims of ultimate value. My sense is that "unnecessary pain is bad" is a publicly accessible reason for a judicial decision in a way that "God wants us to be merciful" is not. We all know what pain is and that we have reason to avoid it.<sup>84</sup> We also know that many people, even many intelligent people, do not believe in God, or think that religious belief must be explained in terms of faith alone.<sup>85</sup> When a court appeals to God's will, such people can be expected to feel,

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*The Domain of the Political and Overlapping Consensus*, 64 NYU L Rev 233, 247 (1989).

<sup>83</sup> This is one interpretation of the second formulation of Kant's categorical imperative—that one should never treat humanity as a mere means, but always also as an end. See Kant, *Groundwork of the Metaphysics of Morals* at 91 (cited in note 18); Onora O'Neill, *Between Consenting Adults*, 14 Phil & Pub Aff 252, 261-63 (1985); Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, 15 Phil & Pub Aff 325, 330-34 (1986).

<sup>84</sup> See, for example, Nagel, *The View from Nowhere* at 144 (cited in note 17).

<sup>85</sup> See, for example, Greenawalt, *Religious Convictions and Political Choice* at 69-84 (cited in note 65).

not merely that they have lost an argument, but that they and their interests have been sacrificed to "reasons" that, for them, lack justificatory force altogether and depend for their appeal on a world view that they cannot reasonably be expected to share.

There is, I recognize, much in this argument that is less than wholly satisfying. The concept of a publicly accessible reason has not been fully developed or tested, and there are surely many problematic cases.<sup>86</sup> The conception of impartiality or objectivity on which the argument relies is also contestable; it would be unacceptable to someone who firmly believed that true religion required a different conception—although I do not, and although I agree with Rawls that there is an "overlapping consensus" in our society that true religion does not.<sup>87</sup> But the argument that I have sketched, despite its incompleteness, suggests a mode of ethical approach that I find more attractive than Perry's alternative. The testing case of judicial reliance on religious beliefs,<sup>88</sup> occurring in a context where the ideal of impartiality is firmly established and needs not so much defense as interpretation,<sup>89</sup> indicates why. Religious disagreements, which often implicate the most fundamental values in human life, must be accepted as a permanent feature of free societies<sup>90</sup>—and one that should occasion more satisfaction than regret. There are powerful reasons, rooted in ideals of individ-

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<sup>86</sup> See Nagel, 16 Phil & Pub Aff at 235-36 (cited in note 76).

<sup>87</sup> See Rawls, 7 Oxford J Legal Stud at 15 (cited in note 80).

<sup>88</sup> Whether voters and legislators also ought to act only on the basis of publicly accessible reasons is an interesting and difficult, but definitely distinct, problem. Among the reasons it is distinct is that a judge's purpose in bringing moral and political values to bear on judicial decision making is very limited: to identify interpretively and to express the moral values of the community. Given the peculiarly limited kind of moral question that is most relevant in judicial decision making, a judge, unlike a legislator, is not likely to find that publicly accessible arguments run out before producing an answer, since to appeal to widely held or traditional values is generally to furnish a publicly accessible reason. Special problems would arise if a judge thought that the community's morality traced exclusively to religious or other publicly inaccessible reasons; in such a case, the judge ought not rely on the community's current or traditional morality. But a judge should not assume lightly that this situation exists.

<sup>89</sup> Greenawalt adopts the view that judges, although they occasionally may or must rely on religious reasons in reaching their conclusions, should frame their opinions entirely in terms of publicly accessible reasons in order to preserve a desirable publicity norm in public discourse. See Greenawalt, *Religious Convictions and Political Choice* at 215-30 (cited in note 65). But this position seems untenable, and for reasons beyond the strong general argument for judicial candor. See David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv L Rev 731 (1987). Also implicated are issues of utmost public importance—namely, to what extent judges should rely on personal beliefs, and what personal beliefs are admissible—that peculiarly require forthrightness in order to facilitate deliberation about the appropriate judicial role within our constitutional scheme.

<sup>90</sup> See, for example, Rawls, 7 Oxford J Legal Stud at 4 (cited in note 80).

ual dignity and autonomy, why the state should stay out of religious disputes. And American constitutionalism, if it is to be true to its immanent ideals, must develop a workable conception of reasoned justice under law that calls for impartiality or neutrality among contending religious views (as well as among other philosophical views that cannot be supported by publicly accessible reasons).

This idea is not of course original with me. On the contrary, it echoes a core tenet of modern liberalism. But liberalism is a deeply contested doctrine, which Perry, among others, finds to be irredeemably flawed. His arguments, which constitute part II of *Morality, Politics, and Law*, must therefore be considered.

#### IV. ON BURYING LIBERALISM: IS IT DEAD YET?

In undertaking to debunk liberalism, Perry attacks the liberal theories of Rawls,<sup>91</sup> Ackerman,<sup>92</sup> and Dworkin.<sup>93</sup> He aims to show, by defeating the tradition's strongest modern representatives, that "[t]he liberal political-philosophical project is spent [and that i]t is past time to take a different path." (p 57) But Perry's arguments fail to achieve their purpose. Although often telling against their particular targets, they do not support his conclusion that liberalism—with its characteristic concepts of individualism, equality, rationality, objectivity, and neutrality—is fundamentally misconceived.

Because Perry makes his most powerful arguments against Rawls, who also has offered the most influential formulation of modern liberalism, I shall focus on these arguments. But my aim, I should emphasize, is not to defend Rawls's peculiar version of liberal theory; it is, rather, to show that Perry fails to prove the defectiveness of the central liberal concepts—including "neutrality" and "objectivity"—as organizing ideals in political theory. Interpretation of these ideals is surely required in order to render them workable for practical purposes. But to recognize this is very different from concluding that they ought to be discarded.

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<sup>91</sup> See, for example, Rawls, *A Theory of Justice* (cited in note 37); Rawls, 77 J Phil 515 (cited in note 80); Rawls, 7 Oxford J Legal Stud 1 (cited in note 80); Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 Phil & Pub Aff 223 (1985); Rawls, *The Priority of Right and Ideas of the Good*, 17 Phil & Pub Aff 251 (1988).

<sup>92</sup> See, for example, Bruce A. Ackerman, *Social Justice in the Liberal State* (Yale, 1980).

<sup>93</sup> See, for example, Ronald Dworkin, *Liberalism*, in Stuart Hampshire, ed, *Public and Private Morality* 113 (Cambridge, 1978).

## A. Perry on Rawls

Perry locates the essence of liberalism generally, and of Rawlsian liberalism in particular, in the view that law and politics should achieve "neutrality" among the opposing "religious, philosophical, and moral views" (p 58) that define the prevailing "dissensus" (p 55) in a modern, pluralistic society. Rawls begins with the assumption that "the practical [mission] of political philosophy,"<sup>94</sup> which is to resolve disagreements about the appropriate structure of a society's basic institutions, threatens to founder unless "deep and pervasive"<sup>95</sup> differences of moral and religious belief can somehow be transcended. He therefore aims to achieve principles of justice that are "neutral"<sup>96</sup> or "impartial" with respect to competing conceptions of how people ought to live. Toward this end, Rawls invokes the celebrated conception of "the original position"<sup>97</sup> in which representative persons, reasoning behind a "veil of ignorance"<sup>98</sup> that deprives them of information about their own conception of the good and their assets and abilities, seek to agree on the basic structure of a just society. Through the use of modeling devices such as the original position and the veil of ignorance, Rawls claims, it is possible to identify the principles of justice that all free and rational persons, conceived in a particular way, would accept "in an initial position of equality."<sup>99</sup>

Perry attacks the Rawlsian conception of justice most forcefully by arguing that Rawls's original position methodology fails his own neutrality test. It does so, Perry argues, because it relies on "a conception of the person" (p 60) that is not itself "impartial among the differences" (p 60) that Rawls hopes to transcend. According to the conception of the person that Perry finds most attractive, a person "is partly constituted by her moral convictions and commitments." (p 60) Yet if a person is so constituted, Perry argues, the Rawlsian demand that persons should choose principles of justice in ignorance of their deepest moral convictions is not neutral at all. (see pp 60-61) Entirely non-neutrally, the Rawlsian scheme portrays the subjects of justice as severable from their most fundamental commitments. For liberalism to be defended,

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<sup>94</sup> Rawls, 77 J Phil at 543 (cited in note 80).

<sup>95</sup> Id at 540.

<sup>96</sup> Rawls himself is very careful about his use of this term. See Rawls, 17 Phil & Pub Aff at 261 (cited in note 91).

<sup>97</sup> See Rawls, *A Theory of Justice* at 11-14, 18, 20-21, 120-21 (cited in note 37).

<sup>98</sup> See id at 12, 19, 136-42.

<sup>99</sup> Rawls, *A Theory of Justice* at 11 (cited in note 37).

Perry asserts, the Rawlsian conception of the person would need to be argued for; and the defense would need to occur on the same plane on which substantive religious and philosophical doctrines—with their rival conceptions of human nature—already compete. In short, Perry argues that Rawlsian liberalism stands as one sectarian doctrine among others,<sup>100</sup> with no defensible claim to neutrality, impartiality, or transcendence. (see p 63)

Much of Perry's argument impresses me as persuasive. But it is harder to assess how far it departs from the best interpretation of Rawls's theory, since Rawls himself is very much a moving target.<sup>101</sup> Moreover, Perry errs in believing that he has significantly undermined "the liberal political-philosophical project" (p 57) as a whole.

## B. Impartiality Among Which Differences?

Perry is surely correct that the "Kantian conception" of a moral person on which Rawls relies—one that implicitly locates human equality, worth, and dignity in the capacities to adhere to a conception of justice in public life and to form, revise, and act upon conceptions of the good in private life<sup>102</sup>—is a contestable one.<sup>103</sup> It is less clear, however, that reliance on a contestable con-

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<sup>100</sup> Rawls has accepted that the strength of liberalism depends on its capacity to resist this characterization. See Rawls, 14 Phil & Pub Aff at 246 (cited in note 91).

<sup>101</sup> For a wide-ranging assessment of what can reasonably be taken to be modifications in Rawls's theory since the publication of *A Theory of Justice* in 1971, see *Symposium on Rawlsian Theory of Justice: Recent Developments*, 99 Ethics 695 (1989).

<sup>102</sup> Whether clarifying or modifying the argument of *A Theory of Justice*, Rawls, in an important article published in 1980, explicitly acknowledged the dependence of his derivation of principles of justice on the acceptance of an essentially Kantian conception of "the moral person" in light of whose interests and capacities a theory of just institutions is to be constructed. See Rawls, *Kantian Constructivism in Moral Theory*, 77 J Phil 515 (cited in note 80). Within this conception, moral persons are "characterized by two moral powers and by two corresponding highest-order interests in realizing and exercising these powers." Id at 525. The first moral power is the capacity to form and act upon an effective sense of justice. As elucidated in terms of a conception of what Rawls calls "the Reasonable," it involves a disposition to agree to fair terms of social cooperation, provided that everyone else likewise accepts them. Id at 528. The second moral power is "the capacity to form, to revise, and rationally to pursue a conception of the good." Id at 525. As associated with a conception of "the Rational," this power involves a disposition, not only to pursue a conception of the good in sensible and effective ways, but to deliberate toward principles of justice in light of the interest in being able to do so. Id at 528-29. The "highest-order interests" of moral persons are to be able to "realize and exercise" their moral powers. Id at 525.

<sup>103</sup> See, e.g., Bernard Williams, *Persons, Character and Morality*, in Amelie Oksenberg Rorty, ed, *The Identities of Persons* 197, 215 (UC Berkeley, 1976); Gerald Doppelt, *Is Rawls's Kantian Liberalism Coherent and Defensible?*, 99 Ethics 815, 842-43 (1989). Professor Galston, who is generally a sympathetic critic, thinks it is unclear how far Rawls would be willing to go in acknowledging that the Kantian conception of a moral person, from



ception of moral personality offends Rawlsian liberalism's self-imposed requirement that a theory of the right should be philosophically prior to, and also neutral or impartial among, disputed conceptions of the good.<sup>104</sup> To form a conception of moral personality is at least not self-evidently to adopt a view about the nature of the good that anyone ought to pursue. Moreover, Perry seems mistaken in imputing to Rawls the preposterous premise that a theory of justice could be pronounced failed, not on the ground that its conceptual structure is wrong, but simply on the basis that it is contestable. Who would have thought that a political theory could avoid being controversial? I am therefore doubtful that Perry has provided either the best reading of Rawls or the most plausible interpretation of liberal neutrality.

Rawls, in his recent writings, has explicitly linked his conception of impartiality or neutrality to what he characterizes as an "overlapping consensus" among the "metaphysical" theories that are most prominent in the western democracies.<sup>105</sup> Rawls believes that these otherwise disparate religious and philosophical doctrines have coalesced around liberal principles of justice in two distinct but related ways. First, the leading religions and philosophies of the western democracies support the principal forms of civil liberty—freedom of speech and religion, for example—that are historically associated with liberalism.<sup>106</sup> Second, Rawls argues, it is possible to reason backward from the widely shared commitment to such liberties to a common conception of moral personhood—namely, his own Kantian conception—that best explains the centrality of those liberties.<sup>107</sup>

Rawls's recent reliance on the idea of an overlapping consensus suggests that his theory's aspiration to neutrality must be viewed as relative. It is neutral—both in its substance and in its derivation—with respect to issues that divide the religious and philosophical doctrines that lie within the overlapping consensus (if it indeed exists). In order to support religious toleration in par-

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which Rawls derives his principles of justice, is contestable and in that sense arguably non-neutral. See William A. Galston, *Pluralism and Social Unity*, 99 *Ethics* 711, 724-25 (1989).

<sup>104</sup> Rawls has recognized that a liberal theory of justice may draw upon appropriate political conceptions of the good so long as it avoids comprehensive commitments about how individuals ought to live within the bounds established by political theory. See Rawls, 17 *Phil & Pub Aff* 251 (cited in note 91).

<sup>105</sup> See, for example, Rawls, 7 *Oxford J Legal Stud* 1 (cited in note 80); Rawls, 14 *Phil & Pub Aff* at 225 (cited in note 91).

<sup>106</sup> See, for example, Rawls, 77 *J Phil* at 540 (cited in note 80); Rawls, 7 *Oxford J Legal Stud* at 4 (cited in note 80); Rawls, 14 *Phil & Pub Aff* at 249 (cited in note 91).

<sup>107</sup> See, for example, Rawls, 77 *J Phil* at 518-19 (cited in note 80).

ticular or a liberal conception of justice more generally, there is no need to determine which, if any, of the contending metaphysical theories is correct in all of its particulars.<sup>108</sup> It is enough to assert the point, over which there is no dissent among those religious and philosophical doctrines that contribute to the overlapping consensus, that the best or most accurate metaphysical doctrine, whatever its details, requires or at least permits the stance toward justice prescribed by Rawlsian liberalism.<sup>109</sup> But Rawlsian liberalism is not, and does not claim to be, neutral with respect to all of the tenets of metaphysical doctrines that lie outside the overlapping consensus. It occupies the same logical space as, for example, certain religious doctrines with which it might be in conflict: both tell people what they ought to do and, in cases of disagreement, both assert priority for their claims. In cases of conflict, Rawls has acknowledged, the Rawlsian liberal must assert that the hostile doctrines, insofar as they call for religious intolerance, for example, are wrong or misguided.<sup>110</sup>

Seen in this context, the contestability of the Kantian conception of a person, which plays a central role in the derivation of Rawlsian theory, does not impugn the only kind of neutrality to which Rawlsian liberalism can reasonably or even intelligibly aspire. Though neutral with respect to the doctrines that comprise a supporting overlapping consensus, Rawlsian theory, like the Kantian conception on which it depends, ultimately reflects contestable (though limited) metaphysical assumptions that require defense when they collide with outside doctrines. Once this is recognized, the important question is not whether Rawlsian liberalism is appropriately characterized as neutral or neutrally derived. It at once is (with respect to doctrines that form a part of the overlapping consensus) and is not (with respect at least to certain tenets of the doctrines that lie on the outside). The real issue is whether a theory of justice should be neutral, as most versions of modern liberalism try to be, in something like Rawls's sense: protecting religious freedom and freedom of speech, regarding individuals as entitled within broad limits to decide what ends to pursue, and standing above the disputes that divide the comprehensive religious and philosophical doctrines that are naturally at home in a loosely "liberal" society.

For purposes of reasoning about the characteristic issues ad-

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<sup>108</sup> See, for example, *id.* at 540-43; Rawls, 14 *Phil & Pub Aff* at 224-31 (cited in note 91).

<sup>109</sup> See Rawls, 7 *Oxford J Legal Stud* at 14 (cited in note 80).

<sup>110</sup> See *id.*

dressed by political theory, it bears observing that something analogous to what Rawls calls a Kantian conception of moral personality may emerge from what Nagel has termed the method of objectivity—the method of looking at ourselves, our views, and our perspectives as features of a centerless universe in which we, objectively speaking, are neither more important than anyone else nor more likely to have unique insight into metaphysical truth.<sup>111</sup> Looking at things in this way, we are led to conclude, not that we should abandon either all of our projects or all of our metaphysical beliefs, but that we should accord equal respect to the interests and purposes of others. At least insofar as the basic structure of society and governmental coercion are involved, the ideal standard or rightness or legitimacy would be justifiability before the tribunal of each person's understanding. And as a minimally acceptable approximation of this ideal, at least in some contexts, we should demand a kind of public accessibility in political justification similar to that which Rawls's conception of moral personality, in conjunction with the original position and the veil of ignorance, also requires.

Perry recognizes that a response of this general kind, which seeks to provide a workable conception of liberal neutrality through a process of reflective adjustment and interpretation, is available to modern liberals, and he therefore anticipates it and offers a reply. (see pp 85-87) The line of argument just sketched, he argues, requires a kind of philosophical preface to Rawls's original position, in which philosophies incompatible with the general Rawlsian approach—those, for example, that equate justice with the advancement of a religious conception of the good rather than with impartiality—are rejected. (p 87) Yet recognition that the Rawlsian principles of justice depend on a contestable conception of moral personality effectively introduces at least a partial theory of what is good or right for human beings in light of their natures,<sup>112</sup> Perry argues, and thus reduces liberalism to an “aspect” of naturalism. (p 87-88)

Among the problems with Perry's argument is that to claim that liberalism is a species of naturalism—in light of Perry's

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<sup>111</sup> See Nagel, *The View from Nowhere* at 60-66 (cited in note 17); Nagel, 16 *Phil & Pub Aff* at 229-31 (cited in note 76).

<sup>112</sup> Although Rawls's conception of moral personality is compatible with a wide range of views about what the good is in an affirmative sense, it does, I think, exclude certain conceptions of the good, such as those that would call for religious coercion. Compare Amy Gutmann, *Communitarian Critics of Liberalism*, 14 *Phil & Pub Aff* 308, 313-14 (1985).

sweeping definition of that term—is to say virtually nothing. According to Perry's definition, the doctrines of Aristotle and Nietzsche, Hume and Hegel, Sartre and the New Testament, Plato and the Ayatollah Khomeini are also forms of naturalism. In this company, however, liberalism is distinguished not only by its substantive prescriptions, but also by its demand for a special kind of objectivity or impartiality in political reasoning, elucidated through a search for principles of justice acceptable to all persons who satisfy the thin (though surely contestable) conceptions of reasonableness and moral rationality implicit in a Kantian theory of moral personality.

Although I find myself more attracted to the liberalism of Nagel than to that of Rawls, consideration of the merits and prospects of liberalism brings my disagreements with Perry full circle. Perry thinks that truth is relative. I believe that some truths, at least, are absolute. Perry thinks that there are sufficient bases for productive moral discourse so that we can produce better politics and create better law by carrying our religious beliefs into political debate and judicial decision making. I am less optimistic that debates of this kind would prove fruitful; religious disagreements will seldom be reconcilable through arguments that rest on publicly accessible reasons, and we cannot reasonably ask those whose beliefs are rejected to acknowledge the justificatory force of reasons of other kinds. Perry believes that a liberal politics is a politics without a soul;<sup>113</sup> I believe that respect for the dignity of human beings, including their souls, requires some form of liberal political theory—and this as a matter of absolute, not merely relative, truth.

I could of course be wrong about these issues, and I am far from doubt-free in making many of the claims that I do. The questions are so hard that it is easy to see why many constitutional

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<sup>113</sup> Perry echoes the influential argument of Michael J. Sandel, in *Liberalism and the Limits of Justice* (Cambridge, 1977), that the Kantian conception of moral personality yields an impoverished politics, since it imagines persons without moral situation or character who are called upon to "choose" what to believe and what values to affirm, but have no basis for doing so. *Id.* at 177-78. But an adequate answer to this charge is that what Rawls frames as the theory of moral personality underlying our political institutions is just that—a theory of limited reach, developed to explain our considered judgments about how people should be treated and respected in designing the basic structure of a just society, and not intended as a comprehensive theory either of personal identity or of human nature. See Rawls, 14 Phil & Pub Aff at 223 (cited in note 91). It is significant, I think, that although critics have denied (unpersuasively) that Rawls can limit his theory of moral personality in this way, neither Sandel nor Perry has developed an affirmative rival theory of the self that even attempts to meet the demands they have made of Rawls—demands for a metaphysical or ontological theory that either analyzes or corrects the linguistic concept of individual identity and also accounts for the moral psychology of everyday life.

scholars would prefer to avoid them. But I am in complete accord with Perry that we cannot.

### CONCLUSION

*Morality, Politics, and Law* is an invigorating book that lucidly frames many of the most important questions at the intersection of constitutional law and moral and political philosophy. The book provides a foundation for further thought, a position against which to contend, and a starting point for the difficult intellectual journey that the modern character of constitutional law demands. But Perry's affirmative arguments, however provocative, are mostly fallacious. Morality is not chiefly a matter of rational self-interest; truth is not all relative; a judge should have a clear view about the relationship between the morality of the society and her own views about ultimate moral truth; religious morality should be kept out of constitutional decision making; and liberalism is far from spent. But though Perry may be wrong on the most significant issues that he engages, his book deserves respect. Simply to ask so many right questions is a rare achievement.

