

**Michael J. Perry.** *Human Rights in the Constitutional Law of the United States*, Cambridge: Cambridge University Press, 2013, x,185pp. (\$32.99).

The concept of Human Rights finds a strong source in morality and the idea of a higher law which trumps laws of even elected legislatures. Viewed first as derived from a deity and then from human reason, it retains an aura of natural law—the morally correct norm.

Michael J. Perry, who holds the Robert W. Woodruff University Chair at Emory University and teaches in the law school, and writes prolifically on morality, human rights law and politics, presents here his latest reflections on his favorite topic. In this short volume, Perry summarizes in Part I the absorption of human rights into international law and outlines its normative basis. The latter he asserts can be found in the admonition of the Universal Declaration of Human Rights that “all human beings . . . act towards one another in a spirit of brotherhood”. A right is a “human” right, he claims, if its underlying rationale for protection is based on this single Grundnorm. It matters not whether one is a religious believer or a non-believer: International Human Rights law is silent about *why* we must treat all human beings as brothers, only that we should. Perry completes his analysis applying his “brotherhood” Grundnorm to two of the most morally difficult contemporary questions: 1) how to treat all in a spirit of brotherhood regardless of the consequences? (E.g., using torture to rescue a kidnapped child or to avert terrorism) and, 2) whether the brotherhood of all human beings include the unborn?

In Part II, he similarly reduces his analysis to practical resolution of contemporary issues: capital punishment, same sex marriage and abortion. The first he is able to resolve with little difficulty. Whether capital punishment violates the right against cruel, inhumane and degrading punishment as understood in the Constitution, one must simply inquire whether such treatment violates the spirit of brotherhood. He finds that it does in that it fails to respect human brotherhood or human dignity by cutting off the opportunity to grow morally and live a life of “ongoing, deepening repentance.”

The courts and international human rights instruments have approached same sex marriage as an issue of Due Process, privacy, or equal treatment—which Perry calls a right of moral equality. Perry believes that same sex marriage is indeed a fundamental right, but on a different basis, what he calls the right to religious and moral freedom.

He plays down resolution based on moral equality and instead proposes one based on the right to religious and moral freedom. Indeed this resolution directly confronts the usual argument opposing same sex marriage: It violates religious or moral norms. Perry indeed seems to be fighting (religious) fire with (religious) fire. While this right is articulated as freedom of “religion” in the Constitution, it is usually characterized to include “moral” freedom in International Human Rights instruments, which is how Perry believes it should be correctly interpreted in U.S. Constitutional Law. This moral freedom is “to live one’s life in accord with one’s own worldview”, which would cover homosexual behavior as well as same sex marriage. He concedes that this is not an absolute right, but must take into consideration any harm and defer to the decisions of elected government, but finds these miniscule in the case of same sex marriage.

The case of abortion, however, he views as controlled by a different and more nuanced

moral/legal analysis. He returns his basic principle, or Grundnorm, that governments are to “act towards all human beings in a spirit of brotherhood.” Responding to the question of whether all human beings include the unborn, Perry argues that indeed there is life in the fetus and that it is human rather than another species. Following the principal that deference is due the elected legislature unless they are acting unreasonably, he conceded that extreme abortion bans (even in case of rape or child destined to die, or pregnancy threatening the life of mother) should be struck down as not giving reasonable recognition of the heavy burden on the mother. Less extreme bans, on the other hand, would not violate proportionality because of the state’s legitimate interest in preserving life, in spite of the considerable burden on the mother.

The above brief summary of some of Perry’s arguments does not do justice to his detailed and sophisticated analysis, obviously well thought out over years of writing on this subject. The book is well written and an easy read, in spite of the complex analysis presented. Teachers of political science and law will find this book a fitting supplementary student assignment as well as a source of inspiration for their lectures.

The book does not focus on the precedential force of International Human Rights law on the United States Supreme Court, which has been subject to recent debate among Justices and scholars, but rather starts from the proposition that such law is persuasive but not binding on the domestic courts. Part of that persuasion is Perry’s explanation of the common moral basis that underlies Constitutional principles and International Human Rights law principles, which could aid in the interpretation of the document. On a broader scale it compellingly explores the complex relationship between law and morality.

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