12-1993

Constructing the Substantive Constitution

James E. Fleming
Boston University School of Law

Texas Law Review

Volume 72, Number 2, December 1993

Article

Constructing the Substantive Constitution

James E. Fleming*

I. Introduction

A. The Flights from Substance in Constitutional Theory

A specter is haunting constitutional theory—the specter of *Lochner v. New York*.[1] In the *Lochner* era, the Supreme Court gave heightened judicial protection to substantive economic liberties through the Due Process Clauses.[2] In 1937, during the constitutional revolution wrought by the

---

* Associate Professor of Law, Fordham University. A.B. 1977, University of Missouri; J.D. 1985, Harvard University; Ph.D. 1988, Princeton University.

I am grateful to John Ely and John Rawls for providing helpful comments concerning this Article and to Cass Sunstein for writing a thoughtful response to it. Special thanks go to Linda McClain for her patient and constructive readings of numerous drafts. Akhil Amar, Sot Barber, Debby Denno, Chris Eisgruber, Martin Flaherty, Ned Foley, Samuel Freeman, Will Harris, Tracy Higgins, Bob Kaczorowski, Greg Keating, Sandy Levinson, Steve Macedo, Frank Michelman, Walter Murphy, Larry Sager, Bill Treanor, and Mark Tushnet gave valuable suggestions. I also would like to thank my research assistants Steven Shaw, Sabrena Silver, and Larry McCabe. Fordham University School of Law provided generous research support. I presented an earlier version of this Article at a work-in-progress seminar at the AALS Conference on Constitutional Law, the Fordham University School of Law Faculty Work-in-Progress Colloquium, and the New York University School of Law Colloquium on Constitutional Theory, and I benefitted from the discussions at these sessions.

1. 198 U.S. 45 (1905); *see* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873 (1987) (characterizing *Lochner* as an infamous "defining case" in constitutional law, and a "spectre" that "has loomed over most important constitutional decisions"); *cf.* KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY (1848), *reprinted in* THE MARX-ENGELS READER 469, 473 (Robert C. Tucker ed., 2d ed. 1978) ("A spectre is haunting Europe—the spectre of Communism.").

2. *See, e.g.*, Atkins v. Children's Hosp., 261 U.S. 525 (1923) (striking down a federal minimum wage law for women and minors as violative of the Due Process Clause of the Fifth Amendment);

New Deal, *West Coast Hotel v. Parrish*[3] officially repudiated the *Lochner* era, marking the first death of substantive due process.[4] Nevertheless, the ghost of *Lochner* has perturbed constitutional theory ever since, manifesting itself in charges that judges are "Lochnering" by imposing their own substantive fundamental values in the guise of interpreting the Constitution.[5]

The cries of "Lochnering" have been most unrelenting with respect to *Roe v. Wade*,[6] which held that the Due Process Clause of the Fourteenth Amendment protects a realm of substantive personal liberty or privacy broad enough to encompass the right of women to decide whether or not to terminate a pregnancy. In a well-known critique, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, John Hart Ely attacked the Court for engaging in Lochnering, arguing that to avoid doing so it must confine itself to perfecting the processes of representative democracy,[7] as intimated in Justice Stone's famous footnote four of *United States v. Carolene Products Co.*[8]

Despite these cries, *Planned Parenthood v. Casey*[9] officially reaffirmed the "central holding" of *Roe* instead of marking the second death of substantive due process by overruling it.[10] In an apoplectic dissent,

---

Lochner, 198 U.S. at 61 (invalidating, under the Due Process Clause of the Fourteenth Amendment, a state maximum hours law that the Court described as "mere meddlesome interference[] with the rights of the individual" to liberty of contract).

3. 300 U.S. 379 (1937) (upholding a state minimum wage law and signaling the demise of the *Lochner* era by overruling *Atkins*).

4. For accounts of the official demise of *Lochner*, see, for example, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-6 to 8-7 (2d ed. 1988); Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 36-38; Sunstein, *supra* note 1, at 873-83. For attempts to resurrect stringent judicial protection of economic liberties, see, for example, RICHARD A. EPSTEIN, TAKINGS (1985); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

5. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA (1990); John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973). Ely apparently coined the term "Lochnering" or "to Lochner." *Id.* at 944.

6. 410 U.S. 113 (1973).

7. Ely, *supra* note 5, at 933-45.

8. 304 U.S. 144, 152 n.4 (1938).

9. 112 S. Ct. 2791 (1992).

10. *Id.* at 2804 (joint opinion of O'Connor, Kennedy & Souter, JJ.). Justices Stevens and Blackmun, who would have reaffirmed *Roe* in its entirety, joined Parts I, II, III, V-A, V-C, and VI of the joint opinion, supplying the fourth and fifth votes necessary to make those parts the opinion of the Court, thus reaffirming *Roe*. *See id.* at 2838 (Stevens, J., concurring in part and dissenting in part); *id.* at 2843 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). The remaining four Justices would have overruled *Roe*. *See id.* at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part, joined by White, Scalia & Thomas, JJ.); *id.* at 2873 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Rehnquist, C.J., White & Thomas, JJ.).

For different views concerning whether the joint opinion in *Casey* in fact reaffirmed the central holding of *Roe*, contrast Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106

Justice Scalia blasted the Court for continuing to engage in Lochnering, protesting that the Court must limit itself to giving effect to the original understanding of the Constitution, narrowly conceived.[11]

Ely's and Scalia's critiques illustrate the two responses to the specter of *Lochner* that have dominated constitutional theory since *West Coast Hotel*. Both strategies have been widely criticized for taking "pointless flights from substance": the flights to process and original understanding, respectively.[12] The substance that these dominant responses are said to flee is not only substantive liberties like privacy or autonomy, but also substantive political theory in interpreting the Constitution. These flights are said to be pointless because perfecting processes and enforcing original understanding inevitably require the very sort of substantive constitutional choices that these strategies are at pains to avoid.

After *Casey*, President Clinton's election, and the appointment of Justice Ginsburg to replace Justice White, the long-anticipated second death of substantive due process is unlikely to come anytime soon.[13] What is

---

HARV. L. REV. 24, 27-34 (1992) (arguing that *Casey* preserves *Roe*) with *Casey*, 112 S. Ct. at 2860 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (arguing that "*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality") and *id.*, 112 S. Ct. at 2881 (Scalia, J., concurring in the judgment in part and dissenting in part) (contending that certain "portions of *Roe* have not been saved"). Prior to the decision in *Casey*, some scholars believed that the Court's decision in Bowers v. Hardwick, 478 U.S. 186 (1986), was evidence of "the second death of substantive due process." *See* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987).

11. *Casey*, 112 S. Ct. at 2883 (Scalia, J., concurring in the judgment in part and dissenting in part) (analogizing *Roe* and *Casey* to *Lochner* and Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-65 (1989).

12. *See, e.g.*, Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) [hereinafter Tribe, *Puzzling Persistence*], *reprinted in* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 9 (1985) [hereinafter TRIBE, CHOICES] (retitled *The Pointless Flight from Substance*) (arguing that Ely's theory takes a pointless flight from making substantive constitutional choices to perfecting processes); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 470 (1981) (originally entitled *The Flight from Substance*, *see Commentary*, 56 N.Y.U. L. REV. 525, 539 n.* (1981)) [hereinafter Dworkin, *Forum*], *reprinted in* RONALD DWORKIN, A MATTER OF PRINCIPLE 33, 34 (1985) [hereinafter DWORKIN, PRINCIPLE] (arguing that the flights from substance to process and original understanding "end in failure" because "[j]udges cannot decide what the pertinent intention of the Framers was, or which political process is really fair or democratic, unless they make substantive political decisions of just the sort the proponents of intention or process think judges should not make"). It may well be that some of Ely's and Scalia's supporters embrace their theories precisely because they believe that doing so will enable them to flee substance in constitutional interpretation.

13. President Clinton has indicated that he plans to appoint to the Supreme Court persons who believe that the Constitution protects the right to privacy, including the right to choose abortion. *See* Thomas L. Friedman, *Clinton Expected to Pick Moderate for High Court*, N.Y. TIMES, Mar. 20, 1993, at A9. Justice White and then-Justice Rehnquist dissented in *Roe*'s companion case, Doe v. Bolton, 410 U.S. 179, 221 (1973) (White & Rehnquist, JJ., dissenting), and Justice White joined Chief Justice Rehnquist's and Justice Scalia's dissents from *Casey*'s refusal to overrule *Roe*. *Casey*, 112 S. Ct. at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 2873

needed is a theory of constructing the substantive Constitution that would beware of the specter of *Lochner*, yet also resist the "temptations" to flee from substance to process or original understanding.[14] This Article outlines a Constitution-perfecting theory: a theory that reinforces not only the procedural liberties, but also the substantive liberties embodied in our Constitution.[15] This theory constructs the substantive Constitution by securing both the preconditions for deliberative democracy and the preconditions for deliberative autonomy in our constitutional democracy.

B. Between Process and Substance

In 1980, Ely published *Democracy and Distrust*, the pinnacle of the *Carolene Products* tradition, elaborating the theory that courts should perfect the processes of representative democracy rather than impose substantive fundamental values.[16] His theory has two elegant, comprehensive

---

(Scalia, J., concurring in the judgment in part and dissenting in part). Justice Ginsburg believes that the Constitution protects the right of a woman to choose abortion, although she contends that sex equality arguments for such a right are better than autonomy or privacy arguments. *See* Ruth B. Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198-1200 (1992); Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 379-83 (1985).

14. This Article focuses primarily on the flight from substance to process. In *Casey*, the joint opinion resisted the temptations, in interpreting the Due Process Clause of the Fourteenth Amendment, to take a flight from substantive liberties to procedural liberties or to original understanding. *See Casey*, 112 S. Ct. at 2804-06 (acknowledging that it was tempting to abdicate the responsibility of exercising reasoned judgment). The joint opinion discussed the infamous era of *Lochner*, *id.* at 2812, but it reiterated that the Due Process Clause protects substantive liberties, "a realm of personal liberty which the government may not enter." *Id.* at 2805. Justice Scalia angrily replied that the Court's "temptation" is not to abdicate responsibility but rather "in the quite opposite and more natural direction—towards systematically eliminating checks upon its own power; and it succumbs." *Id.* at 2874 (Scalia, J., concurring in the judgment in part and dissenting in part). For similar notions of "temptation" and "seduction," see BORK, *supra* note 5, *passim*; Robert H. Bork, *Again, a Struggle for the Soul of the Court*, N.Y. TIMES, July 8, 1992, at A19.

15. I mean "perfecting" in the sense of interpreting the Constitution with integrity so as to render it a coherent whole, not in Monagban's caricatured sense of "Our Perfect Constitution" as a perfect liberal utopia or an "ideal object" of political morality. *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 356 (1981); *cf.* Frank I. Michelman, *Constancy to an Ideal Object*, 56 N.Y.U. L. REV. 406, 407 (1981) (distinguishing "weak-sense perfectionism" or "constitutional rationalism" from "strong-sense perfectionism"). For the notion of law as integrity, see RONALD DWORKIN, LAW'S EMPIRE 176-224 (1986).

16. JOHN H. ELY, DEMOCRACY AND DISTRUST 75-77 (1980) (characterizing his own theory as filling in the outlines of United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)); *see* Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 131 (1981) (stating that Ely's book "culminates" the *Carolene Products* tradition); Richard D. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 223 (1981) (claiming that Ely's book "perfect[s]" the tradition). There have been many valuable discussions of *Carolene Products*. *See, e.g.*, LOUIS LUSKY, BY WHAT RIGHT? 108-12 (1975); ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 512-17 (1956); J.L. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982); Louis Lusky, *Footnote*

themes: first, keeping the processes of political communication and participation open, and second, keeping those processes free of prejudice against discrete and insular minorities, in order to assure equal concern and respect for everyone alike.[17]

Although numerous critics have charged Ely with taking a pointless flight from substance to process, his book has set the terms that have framed the central debates in constitutional theory for over a decade.[18] An important reason for the persistence of process-perfecting theories such as Ely's,[19] notwithstanding the resistance to them,[20] is that no one has done for "substance" what Ely has done for "process." That is, no one has developed a Constitution-perfecting theory with the elegance and power of Ely's process-perfecting theory.[21]

Redux: A Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093 (1982); Lewis F. Powell, Carolene Products *Revisited*, 82 COLUM. L. REV. 1087 (1982).

17. ELY, *supra* note 16, at 75-88. By "elegant," I mean to suggest the notion of elegance in the construction of scientific theories. An important reason for the attractiveness of Ely's theory is its elegance. For assessments of Ely's book that stress this aspect, see, for example, Harry H. Wellington, *The Importance of Being Elegant*, 42 OHIO ST. L.J. 427 (1981); Ronald Dworkin, *Equality, Democracy, and Constitution: We the People in Court*, 28 ALBERTA L. REV. 324, 328 (1990).

18. *See* Symposium, Democracy and Distrust: *Ten Years Later*, 77 VA. L. REV. 631 (1991).

19. *See* Tribe, *Puzzling Persistence*, *supra* note 12, at 1063 (expressing puzzlement at the "persistence of process-based constitutional theories").

20. *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 772-82 (1991) (providing a partial defense of Ely's theory against various critiques).

21. Nevertheless, there has been a great deal of sophisticated work about the need for substantive political theory or substantive constitutional choices in interpreting the Constitution. *See, e.g.*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS (1984) [hereinafter BARBER, CONSTITUTION]; SOTIRIOS A. BARBER, THE CONSTITUTION OF JUDICIAL POWER (1993) [hereinafter BARBER, JUDICIAL POWER]; PHILIP BOBBITT, CONSTITUTIONAL FATE (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter DWORKIN, RIGHTS]; DWORKIN, *supra* note 15; EPSTEIN, *supra* note 4; WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION (1993); STEPHEN MACEDO, LIBERAL VIRTUES (1990); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION (1993) [hereinafter RICHARDS, CONSCIENCE]; DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1989) [hereinafter RICHARDS, FOUNDATIONS]; DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986) [hereinafter RICHARDS, TOLERATION]; SIEGAN, *supra* note 4; ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1985); TRIBE, CHOICES, *supra* note 12; LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991); Dworkin, *Forum*, *supra* note 12; Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1 (1993); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) [hereinafter Michelman, *Traces*]; Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) [hereinafter Michelman, *Law's Republic*]; Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3 (Douglas Greenberg et al. eds., 1993); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980) [hereinafter Murphy, *Ordering*]; Lawrence G. Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417 (1981) [hereinafter Sager, *Skepticism*]; Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893 (1990); Tribe, *Puzzling Persistence*, *supra* note 12.

In an important new book, *The Partial Constitution*,[22] Cass R. Sunstein advances a rich, synthetic theory that might appear to be such a Constitution-perfecting theory. He claims to avoid Ely's putative flight from substance by clearly grounding his own constitutional theory in a substantive political theory of liberal republicanism or deliberative democracy.[23] Sunstein's theory seems at once more liberal and more republican than Ely's: that is, to stem from both a more robust vision of "liberal" substantive liberties and a richer vision of "republican" political processes.[24] Furthermore, he makes the bold and imaginative claim that what was wrong with *Lochner* had nothing to do with protecting substantive fundamental values; rather, it was the Court's use of "status quo neutrality" and existing distributions as the baseline from which to distinguish unconstitutionally partisan political decisions from impartial ones.[25] Deliberative democracy, to the contrary, reflects a commitment to an impartial Constitution, understanding impartiality as requiring the government to provide public-regarding reasons for its decisions.[26]

Nevertheless, those who thought that Ely's theory was the grandest process-perfecting theory of them all, or that it had sounded the Hegelian death knell for such theories,[27] may be in for a surprise. For Sunstein's liberal republicanism leads to a theory of judicial review whereby courts principally should secure the preconditions for deliberative democracy, and the structure of his theory parallels that of Ely's *Carolene Products*

---

22. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993). Sunstein's book, which is likely to be regarded by some as the most important book in constitutional theory since Ely's *Democracy and Distrust*, judiciously weaves together strands of liberalism, republicanism, pragmatism, and feminism, drawing significantly upon the work of John Rawls, John Stuart Mill, John Dewey, and Catharine A. MacKinnon.

23. *See id.* at 104-05, 142-45.

24. Thus, Sunstein's liberal republicanism might seem to satisfy two lines of criticism of Ely's theory: one, that the latter is not liberal enough, or that it stems from too frail a vision of substantive rights, *see, e.g.*, Dworkin, *Forum*, *supra* note 12, at 513-16; Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9-10, 16-17 (1979); Tribe, *Puzzling Persistence*, *supra* note 12, at 1064, 1076 & n.66; and two, that it is not republican enough, or that it reflects an impoverished vision of political processes, *see, e.g.*, Parker, *supra* note 16, at 239-57.

25. *See* SUNSTEIN, *supra* note 22, at 45-62, 259-61; Sunstein, *supra* note 1, at 874-75, 882-83.

26. *See* SUNSTEIN, *supra* note 22, at 10, 24-25.

27. The allusion is to G.W.F. HEGEL, PHILOSOPHY OF RIGHT 13 (T.M. Knox trans., 1942) ("When philosophy paints its grey in grey, then has a shape of life grown old. By philosophy's grey in grey it cannot be rejuvenated but only understood. The owl of Minerva spreads its wings only with the falling of the dusk."). The idea of the Hegelian death knell is that Ely, by giving the *Carolene Products* paradigm its fullest development, or its most expansive elaboration, has shown process-perfecting tradition's ultimate incompleteness, if not rendered it anachronistic. Many scholars have suggested that Ely has perfected the *Carolene Products* tradition. *See* Brest, *supra* note 16, at 131-32; Parker, *supra* note 16, at 223, 240-45; *see also* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 716-17 & 716 n.6 (1985) (noting Ely's contribution to the *Carolene Products* framework, but advocating moving beyond it).

theory.[28] Moreover, his theory gives remarkably little attention to substantive liberties such as privacy and autonomy, affording them constitutional protection, if at all, largely on the basis of equality rather than liberty. For example, Sunstein specifically eschews a substantive due process approach in favor of an equal protection approach in defending *Roe* and *Casey* and criticizing *Bowers v. Hardwick*.[29] In fact, he all but cedes the Due Process Clause to Justice Scalia, practically accepting Scalia's narrow conception of it as embracing procedural due process and only those substantive liberties historically and traditionally protected, a conception pointedly rejected in *Casey*.[30] In that sense, Sunstein's theory, like Ely's, represents a flight from protecting substantive liberties.

C. *Toward a Constitutional Constructivism*

To move beyond Ely's and Sunstein's process-perfecting theories to a Constitution-perfecting theory, I outline a constitutional constructivism. I mean constitutional constructivism in both a methodological sense—as a method of interpreting the Constitution—and a substantive sense—as the substantive political theory that best fits and justifies our constitutional document and our underlying constitutional order. I develop such a theory by analogy to John Rawls's political constructivism,[31] a theory developed in his significant new book, *Political Liberalism*.[32]

---

28. *See* SUNSTEIN, *supra* note 22, at 144, 142-44 (arguing that none of the criticisms of Ely's theory "fundamentally damages the view that interpretive principles should be based first and foremost on considerations of democracy" and acknowledging parallels between the two themes of Ely's theory of judicial review and his own theory).

29. *See id.* at 35, 259-61, 270-85 (defending *Roe* and *Casey* and rejecting a privacy or autonomy justification in favor of an equal protection justification for the right of a woman to decide whether to have an abortion); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163, 1174-75 (1988); SUNSTEIN, *supra* note 22, at 131-32, 154, 156-57, 402-03 n.17 (both criticizing Bowers v. Hardwick, 478 U.S. 186 (1986), and arguing that the Due Process Clause is backward-looking, safeguarding traditional practices against short-run departures, while the Equal Protection Clause is forward-looking and is critical of existing practices that deny equality, however long-standing and deeply rooted).

30. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2805 (1992) (joint opinion) (rejecting as "inconsistent with our law" Justice Scalia's conception of due process, put forth in Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion)).

31. Rawls's political constructivism seeks to construct principles of justice that provide fair terms of social cooperation on the basis of mutual respect and trust among free and equal citizens in a morally pluralistic constitutional democracy such as our own, rather than to discover principles of justice that are true for all times and all places. The latter project is that of theories of moral realism or natural law. JOHN RAWLS, POLITICAL LIBERALISM 90-99 (1993). For elaboration of the two senses of constitutional constructivism, see *infra* notes 69-71 and accompanying text; *infra* text accompanying notes 353-57.

32. In *Political Liberalism*, Rawls significantly reformulates his well-known theory of justice as fairness. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971). In his new book, Rawls addresses "the problem of political liberalism": "How is it possible that there may exist over time a stable and just

Constitutional constructivism is, however, a theory of constructing *our* substantive Constitution, as distinguished from a theory of constructing the just constitution (unmoored by the constraints of our constitutional text, history, and structure). It entails a theory of judicial review with two elegant, comprehensive themes: first, securing the preconditions for *deliberative democracy*, to enable citizens to apply their capacity for a conception of justice to deliberating about the justice of basic institutions and social policies, and second, securing the preconditions for *deliberative autonomy*, to enable citizens to apply their capacity for a conception of the good to deliberating about how to live their own lives, in order to afford everyone the common and guaranteed status of free and equal citizenship in our morally pluralistic constitutional democracy.[33] It neither flees substantive political theory nor flees protecting substantive liberties. Constitutional constructivism is a Constitution-perfecting theory in the sense that it gives meaningful effect to the substantive liberties along with the procedural liberties embodied in our Constitution.

---

society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?" RAWLS, *supra* note 31, at xviii. Put another way, he asks: "How is it possible that deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception [of justice] of a constitutional regime?" *Id.* The major change from *A Theory of Justice* is that the earlier work had treated his conception of justice as fairness not as a political conception of justice, but as a comprehensive philosophical doctrine that all citizens would endorse in a well-ordered society. *See id.* at xv-xvii.

Much work in constitutional theory has been inspired by Rawls's *A Theory of Justice*, most notably that of David A.J. Richards and that of Frank I. Michelman. *See, e.g.*, RICHARDS, CONSCIENCE, *supra* note 21; RICHARDS, FOUNDATIONS, *supra* note 21; RICHARDS, TOLERATION, *supra* note 21; Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 [hereinafter Michelman, *Welfare Rights*]. For applications of Rawls's articles since *A Theory of Justice* to constitutional theory, see, for example, Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 LAW & PHIL. 327 (1990-91) [hereinafter Freeman, *Constitutional Democracy*]; Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3 (1992) [hereinafter Freeman, *Democratic Interpretation*]; Stephen M. Griffin, *Reconstructing Rawls's Theory of Justice: Developing a Public Values Philosophy of the Constitution*, 62 N.Y.U. L. REV. 715 (1987); Symposium, *Rawlsian Theory of Justice: Recent Developments*, 99 ETHICS 695 (1989).

33. Throughout this Article, my use of such terms as "our" Constitution, or "our" constitutional document and "our" underlying constitutional order, should not be read as ignoring the tension between such inclusive references and the historical exclusion of categories of persons from "We the People" as well as from "free and equal citizenship." *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 582-83 (1992) (observing that the voice of "We the People" in the Preamble of the Constitution "does not speak for everyone," nor does "men" or "people" in the Declaration of Independence include everyone) (citing JAMES B. WHITE, WHEN WORDS LOSE THEIR MEANING 232 (1984)); Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (observing that the "We the People" who ratified the original Constitution did not include African-Americans or women); *see also* RAWLS, *supra* note 31, at xxix, 238-39 (stating that the principle of equality underlying the Declaration of Independence and the Constitution condemns slavery of African-Americans and oppression of women).

In Part II, I reconsider Ely's theory, assessing the common charges that it takes a flight from substance: that it flees substantive political theory in interpreting the Constitution and that it flees giving effect to certain substantive constitutional provisions. I argue that his theory does not take the first flight: it is not a process-*based* theory at all, but rather a process-*perfecting* theory that perfects processes in virtue of its substantive basis in a political theory of representative democracy (a qualified utilitarianism rooted in equal concern and respect). Ely's theory, however, does take the second flight: his two process-perfecting themes do not account for, and thus leave out, certain substantive liberties that are manifested in our constitutional document and implicit in our underlying constitutional order. Still, his interpretive method shows the need for a Constitution-perfecting theory, such as a constitutional constructivism.

In Part III, I consider Sunstein's theory, examining the extent to which it moves beyond perfecting processes to perfecting the Constitution substantively as well. Sunstein repeatedly states that his theory of deliberative democracy is entirely compatible with the theories of constitutional democracy put forward by John Stuart Mill and Rawls.[34] But his theory lacks a principal theme of securing the preconditions for deliberative autonomy, and it recasts certain substantive liberties such as privacy, autonomy, and liberty of conscience as preconditions for deliberative democracy or, worse yet, leaves them out entirely. From the standpoint of constitutional constructivism, Sunstein's theory proves, contrary to his intention, to be a theory of "the partial Constitution." His theory is *partial*, not *whole*, because it would not fully secure the preconditions for deliberative autonomy. Furthermore, it is *partial*, not *impartial*, for it consequently would not adequately protect citizens' pursuit of their divergent conceptions of the good from coercive political power.

Finally, in Part IV, I outline a constitutional constructivism, a Constitution-perfecting theory. It is a theory of constitutional democracy and trustworthiness, an alternative to Ely's theory of representative democracy and distrust and to Sunstein's theory of deliberative democracy and impartiality.[35] To be trustworthy, a constitutional democracy must secure and

---

34. *See* SUNSTEIN, *supra* note 22, at 141, 175, 186; *see also* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1566-71 (1988) (outlining a theory of liberal republicanism and noting affinitites between it and Rawls's theory).

35. To fix ideas, I shall use the term "constitutional democracy" to refer to a Rawlsian theory of our underlying constitutional order, "representative democracy" to refer to Ely's theory, and "deliberative democracy" to refer to Sunstein's. These terms are for the most part consistent with Rawls's, Ely's, and Sunstein's usages. On occasion, however, Sunstein refers to his own theory of deliberative democracy as a theory of constitutional democracy. *See, e.g.*, SUNSTEIN, *supra* note 22, at 14, 193.

There is a long-standing conflict between the political and constitutional theories of constitutionalism and democracy. In their purest forms, constitutionalism is concerned with limited

respect not only the procedural preconditions for deliberative democracy but also the substantive preconditions for deliberative autonomy.[36] Ely's and Sunstein's process-perfecting theories secure only the former type of precondition for trust or impartiality. Constitutional constructivism provides a framework to guide the exercise of reasoned judgment in constructing the substantive Constitution so as to give both substance and process their due.[37]

II. Beyond Ely's Theory of Reinforcing Representative Democracy

In *Democracy and Distrust*, Ely argues that courts should perfect the processes of representative democracy rather than impose substantive fundamental values. As such, his theory is widely thought—by critics and supporters alike—to represent a flight from substance to process.[38] In *The*

---

government and democracy with unfettered majority rule. *See* WALTER F. MURPHY, JAMES E. FLEMING & WILLIAM F. HARRIS II, AMERICAN CONSTITUTIONAL INTERPRETATION 23-46 (1986) [hereinafter MURPHY, FLEMING & HARRIS]. The political system of the United States is a complex hybrid of constitutionalism and democracy, or a constitutional democracy, rather than a representative democracy. *See id.* A constitutional democracy is a system in which a constitution imposes limits on the content of legislation: To be valid, a law must be consistent with fundamental rights and liberties embodied in the constitution. A representative democracy, by contrast, is a system in which there are no constitutional limits on the content of legislation: Whatever a majority enacts is law, provided the appropriate procedural preconditions are met. *See* John Rawls, Justice as Fairness: A Brief Restatement § 43 (1992) (unpublished manuscript, on file with the author). Constitutional constructivism is a theory of constitutional democracy, whereas Ely's theory, with certain qualifications, *see infra* text accompanying note 77, is a theory of representative democracy. Sunstein claims to resolve "the much-vaunted opposition between constitutionalism and democracy" through his theory of deliberative democracy. SUNSTEIN, *supra* note 22, at 142; *see also* Cass R. Sunstein, *Constitutions and Democracies: An Epilogue*, *in* CONSTITUTIONALISM AND DEMOCRACY 327 (Jon Elster & Rune Slagstad eds., 1988) (exploring the relationship between different conceptions of democracy and different approaches to constitutionalism). I argue that the model of constitutional democracy better fits and justifies our constitutional document and underlying constitutional order than does Ely's model of representative democracy or Sunstein's model of deliberative democracy.

36. For Rawls's reference to trustworthiness, see RAWLS, *supra* note 31, at 319; *infra* text accompanying note 429.

37. For the idea of a "guiding framework," see RAWLS, *supra* note 31, at 368 (describing a "guiding framework" for deliberation). For the notion of "reasoned judgment" in the specific context of substantive due process, see the joint opinion in Planned Parenthood v. Casey, 112 S. Ct. 2791, 2806 (1992) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."). The joint opinion was echoing Justice Harlan's famous conception of judgment, not as a formula or bright-line rule, but as a "rational process." *See* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *cf.* RAWLS, *supra* note 31, at 222 ("[W]e may over the course of life come freely to accept, as the outcome of reflective thought and *reasoned judgment*, the ideals, principles, and standards that specify our basic rights and liberties, and effectively guide and moderate the political power to which we are subject." (emphasis added)). As for the notion of giving both substance and process their due, contrast Monaghan, *supra* note 15, at 355 (referring, disparagingly, to "the 'due substance clauses': substantive due process and substantive equal protection").

38. *See supra* note 12 and accompanying text.

Wages of Crying Wolf, Ely criticizes *Roe* by telling a fable of the theorists who cried "*Lochner*" too often.[39] In assessing Ely's theory, I tell a parallel fable of the theorist who cried "substance" too indiscriminately, the wages of which are that he is fated to suffer reiterations of the mistaken charge that his theory of the Constitution flees substantive political theory.

This Article interprets Ely's project as a quest for a process-perfecting "ultimate interpretivism" that is based on a substantive political theory of representative democracy, a qualified utilitarianism rooted in equal concern and respect.[40] From that standpoint, I argue that Ely's own interpretive method shows the need for a Constitution-perfecting theory, such as a constitutional constructivism, that would give meaningful effect to the substantive liberties embodied in our Constitution along with the procedural liberties. Such a theory would move beyond process to substance.

A. An Outline of Ely's Quest for the Ultimate Interpretivism

1. The False Dichotomy Between Interpretivism and Noninterpretivism.—At the outset, I sketch the terrain of constitutional theory as Ely sees it and indeed has defined it for over a decade.[41] Constitutional theory, on his view, is dominated by a false dichotomy between two theories of judicial review.[42] "Clause-bound interpretivists" (or "originalists") believe that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written

---

39. Ely, *supra* note 5, at 943-45.

40. *See* ELY, *supra* note 16, at 82, 88; James E. Fleming, *A Critique of John Hart Ely's Quest for the Ultimate Constitutional Interpretivism of Representative Democracy*, 80 MICH. L. REV. 634 (1982).

41. *See* Symposium, *supra* note 18.

42. ELY, *supra* note 16, at vii. Some constitutional theorists who popularized the terms "interpretivism" and "noninterpretivism," have repudiated that dichotomy. *Compare* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 714-18 (1975) (proposing a "noninterpretive" theory as an alternative to the "pure interpretive model") *with* Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984) (recanting the dichotomy, stating that "[w]e are all interpretivists; the real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt"). Others have criticized the distinction between interpretivism and noninterpretivsim. *See, e.g.*, HARRIS, *supra* note 21, at 127-28 (arguing that the distinction hinders real insight into constitutional interpretation); Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 110-14 (1989) (rejecting the distinction). Dworkin rejected the dichotomy from the beginning, Dworkin, *supra* note 12, at 471-76, along with the dichotomy between originalism and nonoriginalism, *id.* at 471 n.7. Similarly, he rejects the distinction between enumerated and unenumerated rights. Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. CHI. L. REV. 381, 381-91 (1992).

The dichotomy between originalism and nonoriginalism is similar to that between interpretivism and noninterpretivism. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 n.1 (1980). If there is a difference between interpretivism and originalism, it seems to be that the former places greater emphasis on constitutional text (or language) and the latter upon intention of the framers and ratifiers (or history).

Constitution."[43] Advocates of this theory include Justice Black and Judge Bork, not to mention Justice Scalia.[44] "Noninterpretivists" (or "nonoriginalists") contend, on the contrary, that "courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."[45] Representatives of this theory include the majority of the Supreme Court that decided *Roe*,[46] along with proponents of protecting substantive fundamental values.[47]

Put another way, clause-bound interpretivists have claimed a monopoly on the classical, interpretive justification of judicial review, put forward in *The Federalist* No. 78 and *Marbury v. Madison*: Courts are obligated to interpret the higher law of the Constitution and to preserve it against encroachments by the ordinary law of legislation.[48] They have accused other theorists of engaging in Lochnering, or attempting to impose their own visions of political utopia upon the polity in the name of the Constitution. Moreover, they have insisted that the only way to avoid Lochnering is to flee making substantive constitutional choices in favor of giving effect to the original understanding of the Constitution, narrowly conceived.[49]

By contrast, fundamental values theorists typically have rejected or reconstructed the classical justification, arguing that courts should elaborate the substantive fundamental values embodied in the higher law of the

---

43. ELY, *supra* note 16, at 1.

44. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2873 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); Griswold v. Connecticut, 381 U.S. 479, 507-27 (1965) (Black, J., dissenting); HUGO L. BLACK, A CONSTITUTIONAL FAITH (1969); BORK, *supra* note 5; Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); Scalia, *supra* note 11. Needless to say, there are great variations among the advocates of this type of theory.

45. ELY, *supra* note 16, at 1.

46. *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973) (holding that the right of privacy, although "not explicitly mention[ed] in the Constitution," encompasses a woman's decision whether or not to terminate her pregnancy).

47. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); DWORKIN, RIGHTS, *supra* note 21; DWORKIN, *supra* note 15; RONALD DWORKIN, LIFE'S DOMINION (1993); TRIBE, CHOICES, *supra* note 12; LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990); TRIBE & DORF, *supra* note 21; Dworkin, *Forum*, *supra* note 12; Tribe, *Puzzling Persistence*, *supra* note 12. There are, of course, considerable differences among the proponents of this type of theory. Dworkin rejects the terms "noninterpretivism" and "nonoriginalism" for such theories. *See supra* note 42.

48. THE FEDERALIST No. 78, at 467, 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803). Numerous scholars, however, have disputed the clause-bound interpretivists' (or originalists') pretension to a monopoly on the classical justification. *See, e.g.*, 1 ACKERMAN, *supra* note 21, at 60-61, 72; BARBER, JUDICIAL POWER, *supra* note 21, at 157-58; DWORKIN, RIGHTS, *supra* note 21, at 131-49; Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419, at 1425-27 (1990) (reviewing BORK, *supra* note 5); Sotirios A. Barber, *Judicial Review and* The Federalist, 55 U. CHI. L. REV. 836, 836-39 (1988); Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 661-65 (1990) (reviewing BORK, *supra* note 5).

49. *See, e.g.*, BORK, *supra* note 5, at 143-60; Scalia, *supra* note 11, at 862-64.

Constitution and protect them against deprivations by the ordinary law of legislation. They have been at pains to distinguish their theories from Lochnering, and to justify protecting certain substantive fundamental values rather than others.[50] Furthermore, they have charged clause-bound interpretivists with abdicating responsibility for making substantive constitutional choices by resorting to formalist, authoritarian pretexts to interpretive neutrality like original understanding.[51]

The genius of Ely's approach is that it leads to a middle ground, a "third theory" that aims to break out of this false dichotomy.[52] First, Ely argues that clause-bound interpretivism, notwithstanding its allure, is impossible.[53] Its allure is its evident rule-of-law virtues and democratic virtues: It supposedly fits our usual conceptions of what the Constitution is and how it should be interpreted, and it claims to dissolve what Bickel conceived as the "counter-majoritarian difficulty" posed by judicial review through invoking the classical justification.[54] Its impossibility is that it dispositively fails on its own terms: "For the constitutional document itself, the interpretivist's Bible, contains several provisions whose invitation to look beyond their four corners—whose invitation, if you will, to become at least to that extent a noninterpretivist—cannot be construed away."[55] The three open-ended provisions that Ely stresses are the Ninth Amendment and the Privileges or Immunities and Equal Protection Clauses of the Fourteenth Amendment (but not the Due Process Clauses of the Fifth and

---

50. *See, e.g.*, DWORKIN, RIGHTS, *supra* note 21, at 278 (arguing that it is not inconsistent to recognize fundamental rights grounded in equal concern and respect while criticizing *Lochner* for protecting a right that is not so grounded); TRIBE, *supra* note 4, § 11-1, at 769-72 (contending that *Lochner* gave a "perverse content" to fundamental values); TRIBE & DORF, *supra* note 21, at 65-66 (arguing that the Constitution protects certain individual rights but not laissez-faire capitalism).

51. *See, e.g.*, Dworkin, *Forum*, *supra* note 12, at 469-500, 516 (arguing that the flight from substance to original intention—or from making substantive choices to enforcing choices made long ago by the framers and ratifiers—fails because judges cannot decide what the pertinent original intention was without making substantive political decisions of the sort that the proponents of original intention are at pains to insist judges must avoid); Dworkin, *supra* note 48, at 674, 674-76 ("Bork seems to forget, moreover, that on his own account the method of original understanding also requires judges to make controversial moral choices in applying abstract constitutional principles."). Sunstein argues that Bork's originalism is "formalist" in the sense that it insists that "the meaning of texts is usually or always a simple matter of fact"—"the neutral, apolitical invocation of the original understanding of the founders" and "authoritarian" in the sense that it "ultimately traces legal legitimacy to an exercise of power, to the view that might makes right." SUNSTEIN, *supra* note 22, at 94-95, 94-104, 107-10.

52. ELY, *supra* note 16, at vii.

53. *See id.* at 1-9, 11-41; John H. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978).

54. *See* ELY, *supra* note 16, at 3-5. For the "counter-majoritarian difficulty," see BICKEL, *supra* note 47, at 16. Of course, Ely's approach to "our usual conceptions" of the Constitution is not necessarily the only way of framing the issue. *See, e.g.*, MURPHY, FLEMING & HARRIS, *supra* note 35 (structuring constitutional interpretation on the basis of three interrogatives: (1) *What* is the Constitution?, (2) *Who* may authoritatively interpret it?, and (3) *How* ought it to be interpreted?).

55. ELY, *supra* note 16, at 13.

Fourteenth Amendments).[56] His argument is basically that the clause-bound interpretivists, in their zeal to flee substance and avoid Lochnering, engage in their own brand of Lochnering by trying to read these open-ended clauses out of the Constitution. In doing so, they forfeit their claim to a monopoly on the classical, interpretive justification of judicial review.[57]

Second, Ely contends that theories of protecting substantive fundamental values, despite their appeal, are illegitimate. For such theories, which he claims fill in the open-ended provisions with values drawn from "external" sources beyond the Constitution like natural law, tradition, or consensus, are frighteningly indeterminate and irredeemably undemocratic.[58] Therefore, they lack both the supposed rule-of-law virtues and democratic virtues of clause-bound interpretivism and, accordingly, aggravate rather than resolve the counter-majoritarian difficulty. Worse yet, Ely maintains, these theories prove to be straightforward invitations to engage in Lochnering.

2. Ely's Third Theory of Reinforcing Representative Democracy.— Thus, Ely declines to embrace either a clause-bound interpretivism or a substance-unbound fundamental values theory. Instead, he puts forward a third theory of representative democracy and distrust, whose outlines were prefigured in the famous footnote four of *Carolene Products*: Courts should enforce the specific provisions of the Constitution and should reinforce the processes of representative democracy by setting aside decisions of legislatures and executive officials when those processes are systematically malfunctioning and thus producing untrustworthy outcomes.[59]

---

56. *Id.* at 14-38. Ely rejects the common view that the Due Process Clauses are similarly open-ended and justify recognition of "unenumerated" substantive rights, arguing that "'substantive due process' is a contradiction" and, by the same token, "'procedural due process' is redundant." *Id.* at 18 & n.*.

57. *See id.* at 38-41. The most transparent attempt to read such clauses out of the Constitution is Robert Bork's. Bork has advanced an "ink blot" thesis with regard to both the Ninth Amendment and the Privileges or Immunities Clause. *See* BORK, *supra* note 5, at 166 (likening the Privilege or Immunitites Clause to a provision that has been "obliterated past deciphering by an ink blot"); Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 249 (1987) (testimony of Judge Robert H. Bork) [hereinafter *Nomination Hearings*] (analogizing the Ninth Amendment to a text whose meaning cannot be known because it is covered by an "ink blot"). For a powerful rejoinder to Bork, much like Ely's critique of Justice Black, see Ackerman, *supra* note 48, at 1430-34.

58. ELY, *supra* note 16, at 3-5, 43-72.

59. *Id.* at 73-77, 103. In footnote four of *Carolene Products*, Justice Stone suggested three situations in which representative democracy is not to be trusted and which therefore justify judicial scrutiny more intensive than ordinary deference to the political process:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution,

Ely also suggests that his third theory represents the ultimate interpretivism, because it derives content for the open-ended provisions of the Constitution "from the general themes of the entire constitutional document and not from some source entirely beyond its four corners."[60] That is, it fills in the Constitution's open texture by deriving whatever rights are implicit in the constitutional document and underlying constitutional order of representative democracy.[61]

Ely argues that his third theory avoids the pitfalls and incorporates the strengths of the first two theories. By questing for the ultimate interpretivism rather than searching for an "external" source of substantive fundamental values in the nether world beyond the *Carolene Products* paradigm, the theory can lay claim to the supposed rule-of-law virtues as well as the democratic virtues of the classical, interpretive justification of judicial review.[62] By reinforcing the processes of representative democracy when their outcomes are unworthy of trust, the theory is consistent with and supportive of the underlying system, thereby minimizing the countermajoritarian difficulty.[63] In both ways, he maintains, his theory avoids Lochnering.

Much of the enormous critical literature responding to Ely's provocative theory has focused upon his supposed eschewal of substance for process, to the relative neglect of his claim to be the ultimate interpretivist.[64] Moreover, scholars who have addressed that claim typically have done little more than belittle it.[65] This Article instead takes Ely's claim

---

such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or national or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (citations omitted).

60. ELY, *supra* note 16, at 88.

61. *See id.* at 73-101.

62. *See id.* at 12.

63. *See id.* at 88, 101-02.

64. *See, e.g.*, Brest, *supra* note 16, at 137; Dworkin, *Forum*, *supra* note 12, at 470; Tribe, *Puzzling Persistence*, *supra* note 12, at 1064; Mark V. Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045-57 (1980).

65. *See, e.g.*, Bruce A. Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1047-48 (1984). *But see* Fleming, *supra* note 40, at 638-46 (critiquing Ely's project as a failed quest for an ultimate interpretivism); Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 360 (1981) (taking Ely's claim seriously but concluding that Ely is not ultimately an interpretivist).

seriously, interpreting his project as a quest for a process-perfecting ultimate interpretivism that is based on a substantive political theory of representative democracy.

My interpretation suggests neglected affinities between Ely's theory and the method and content of Dworkin's theory of constitutional interpretation.[66] These affinities are significant for two reasons. First, they show that the common charge that Ely's theory takes a flight from substantive political theory to feigning interpretive neutrality is mistaken. Second, they indicate that although the other familiar charge—that his theory takes a flight from protecting certain substantive constitutional provisions to perfecting processes—is basically sound, Ely's theory itself shows the need for a Constitution-perfecting theory.

B. Ely Does Not Flee Substantive Political Theory: The Flight Not Taken

1. Ely's Substantive Political Theory: Ely as Hercules.—The suggestion that Ely's theory bears affinities to Dworkin's may seem surprising, if not paradoxical, for Dworkin's theory may appear to epitomize the substantive fundamental values theories that Ely rejects as illegitimate. By creating a mythical philosopher-judge Hercules, who constructs a substantive political theory underlying the constitutional document and constitutional order to decide hard cases,[67] Dworkin boldly invites critical invocation of Judge Learned Hand's or Judge Bork's objections to rule by Platonic philosopher-judges in a democracy.[68] Indeed, Dworkin's Hercules may seem to be the very incarnation of the Lochnering judge.

Nonetheless, Ely's quest for the ultimate interpretivism leads him, like Hercules, to attempt to construct the substantive political theory that best *fits* and *justifies* the Constitution as a whole, as it was originally framed and has developed.[69] First, like Hercules, Ely works back and forth

---

66. Some scholars, however, have noted similarities between Ely's and Dworkin's theories. *See, e.g.*, James O'Fallon, Book Review, 68 CAL. L. REV. 1070, 1091 (1980) (reviewing ELY, *supra* note 16) (observing that Ely identifies Dworkin's notion of the right to equal concern and respect as "central to the project of giving content to the open-ended clauses of the Constitution"); Sager, *Skepticism*, *supra* note 21, at 426 (stating that "Ely in fact comes to depend rather heavily on premises closely akin to those advanced by Dworkin," for example, the right to equal concern and respect).

67. *See* DWORKIN, *supra* note 15, at 238-75, 379-402; DWORKIN, RIGHTS, *supra* note 21, at 105-30.

68. *See* LEARNED HAND, THE BILL OF RIGHTS 73-74 (1958) (stating that rule by "Platonic Guardians" would deny citizens the satisfaction of participation in a common venture); BORK, *supra* note 5, at 355, 210-14, 252-54, 351-55 (criticizing constitutional theorists who "would remake our constitution out of moral philosophy" for engaging in political judging and for succumbing to the "temptations of utopia").

69. For Dworkin's formulations of the two dimensions of best interpretation, fit and justification, see DWORKIN, *supra* note 15, at 239; RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, *in* DWORKIN, PRINCIPLE, *supra* note 12, at 119, 143-45; DWORKIN, RIGHTS, *supra* note 21, at 107.

between the constitutional document and an underlying political theory of the constitutional order, striving toward reflective equilibrium between them.[70] Thus, Ely's interpretive method resembles Dworkin's constructivist method of constitutional interpretation.[71]

Second, the affinities between Ely's and Dworkin's theories extend beyond their interpretive methods to the content of their substantive political theories. Ely argues that the substantive political theory that best fits and justifies our constitutional document and underlying constitutional order is a theory of representative democracy that is rooted in Dworkin's constitutive principle of equal concern and respect.[72] As Ely puts it, our system combines "actual representation" of majorities' interests[73] and "virtual representation" of minorities' interests,[74] and "preclude[s] a refusal to *represent* [minorities], the denial to [them] of what Professor Dworkin has called 'equal concern and respect in the design and administration of the political institutions that govern [majorities and minorities alike].'"[75]

Ely also characterizes his substantive political theory of representative democracy as an "applied utilitarianism" that is designed to realize Jeremy Bentham's utilitarian principle of the equal weighting of preferences, namely, "each to count for one and none for more than one."[76] He adds,

---

70. *See* ELY, *supra* note 16, at 75-101; *see also Commentary*, *supra* note 12, at 527-28 (statement of Ely) (characterizing interpretation as "striving for 'reflective equilibrium'"); John H. Ely, *Democracy and the Right to Be Different*, 56 N.Y.U. L. REV. 397, 398 n.4 (1981) (describing interpretation as a quest for reflective equilibrium). *But see* ELY, *supra* note 16, at 56, 56-60 (criticizing reliance upon "reason" or "the method of reason familiar to the discourse of moral philosophy" as a souree of substantive fundamental values (quoting BICKEL, *supra* note 47, at 87)).

71. Dworkin initially put forth a constructivist method of legal interpretation by analogy to Rawls's conception of justification in political philosophy as a quest for reflective equilibrium between our considered judgments and underlying principles of justice. *See* DWORKIN, RIGHTS, *supra* note 21, at 159-68. Dworkin argues, by analogy, that legal interpretation proceeds back and forth between extant legal materials and underlying principles toward reflective equilibrium between them. Below, I distinguish between constructivism in Dworkin's general methodological sense and constructivism in Rawls's specific substantive sense. *See infra* text accompanying notes 353-57. For another development of a constructivism in a general methodological sense, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

72. *See* ELY, *supra* note 16, at 82-87, 219 n.119; *see also* Dworkin, *Forum*, *supra* note 12, at 512 & n.101 (arguing that Dworkin's theory is "the theory on which Ely himself actually relies (in spite of much that [Ely] says)").

73. ELY, *supra* note 16, at 101.

74. *Id.* at 86, 82-87.

75. *Id.* at 82 (quoting DWORKIN, RIGHTS, *supra* note 21, at 180) (emphasis in original).

76. *Id.* at 237 n.54; John H. Ely, *Democracy and Judicial Review*, 17 STAN. LAW. 3, 8 (1982) [hereinafter Ely, *Judicial Review*]. For an analysis of Bentham's utilitarian equal-weighting principle, as well as Mill's use of it, see H.L.A. HART, *Natural Rights: Bentham and John Stuart Mill*, *in* ESSAYS ON BENTHAM 79 (1982). Ely states the substantive basis for his theory of representative democracy in qualified utilitarianism most clearly in Ely, *supra* note 53, at 405-08. Ely omitted this discussion from *Democracy and Distrust*, *see* ELY, *supra* note 16, at 187 n.14, but his continued adherence to this view is apparent from both the book, *see id.* at 187 n.14, 237 n.54, and from three more recent articles. *See* Ely, *supra* note 70, at 401-04; Ely, *Judicial Review*, *supra*, at 6-9; John H. Ely,

though, that his theory is a qualified utilitarianism: paragraphs one and two of the *Carolene Products* framework, concerned with enforcing specific prohibitions of the Constitution and keeping political processes open, impose rights or "side constraints" upon the utilitarian processes' pursuit of the general welfare, while paragraph three mandates "distributional corrections" where those processes are corrupted by prejudice against discrete and insular minorities.[77] His theory, however, does not embrace substantive fundamental rights or values that lie beyond the *Carolene Products* framework.

To be sure, Ely's substantive political theory rooted in equal concern and respect or qualified utilitarianism is synthetic and eclectic rather than programmatic or doctrinaire. Thus, he presents it as compatible with both republicanism and qualified interest-group pluralism, not to mention utilitarianism and liberalism. For example, he states that his theory attempts to secure "the republican ideal of government in the interest of the whole people," and that it does not endorse a pure interest-group pluralist vision of government in the interests of majority coalitions, "winner-take-all."[78] But his claim that his substantive political theory synthesizes or is compatible with several traditions of political thought does not make it any less substantive.

Ely's substantive political theory of representative democracy entails the process-perfecting theory of judicial review outlined above: first, keeping the processes of political communication and participation open, and second, keeping those processes free of prejudice against discrete and insular minorities, in order to assure equal concern and respect for everyone alike.

My interpretation of Ely's theory shows two things. Clearly, Ely seeks to avoid Lochnering by condemning judicial enforcement of substan-

---

Professor Dworkin's External/Personal Preference Distinction, 1983 DUKE L.J. 959, 979-80 [hereinafter Ely, *External/Personal*]; *see also Commentary*, *supra* note 12, at 540-41 (statements of Ely and Dworkin) (discussing a utilitarian conception of democracy). For analyses of Ely's theory as utilitarian, see, for example, Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1102-04 (1981); Robin L. West, *In the Interest of the Governed: A Utilitarian Justification for Substantive Judicial Review*, 18 GA. L. REV. 469, 473-79 (1984).

Despite similarities between their substantive political theories, Ely's theory is more utilitarian than Dworkin's. Indeed, Dworkin is well known for his critiques of utilitarianism, though he has engaged in internal critiques concerning the rights that utilitarianism itself presupposes if it is to honor its egalitarian promise that "each is to count for one and no one for more than one." *See* DWORKIN, RIGHTS, *supra* note 21, at 275-77; RONALD DWORKIN, *Do We Have a Right to Pornography?*, *in* DWORKIN, PRINCIPLE, *supra* note 12, at 335, 359-72 [hereinafter DWORKIN, *A Right to Pornography*].

77. *See* Ely, *supra* note 53, at 406 & n.29.

78. ELY, *supra* note 16, at 79, 82; *see also* John H. Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 840 n.15 (1991) (explaining that his theory is intended to be as compatible with a "republican" model as with a "pluralist" model).

tive fundamental values that lie beyond his *Carolene Products* framework. Equally clearly, however, he does not shy away from constructing the substantive political theory that he believes best fits and justifies our constitutional document and underlying constitutional order. Whether Ely's political theory actually provides the best interpretation of our Constitution is, of course, another question.[79]

2. The Mistaken Charge That Ely Flees Substantive Political Theory.—Nevertheless, many constitutional theorists have charged that Ely flees substance for process—that he denies the need for substantive political theory or substantive constitutional choices in constitutional interpretation and feigns interpretive neutrality through perfecting processes. For example, Tribe immediately responded to Ely's *Democracy and Distrust* by expressing his puzzlement at the persistence of "process-based" constitutional theories, calling instead for a substance-based theory.[80] He argued that process-based theories are radically indeterminate and fundamentally incomplete, because they necessarily perfect processes by virtue of a basis in a "full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid."[81] Yet, Tribe contended, Ely seeks to eschew making substantive constitutional choices in favor of being "neutral on matters of substantive value."[82] Notwithstanding Ely's use of certain aspects of Dworkin's theory, Dworkin himself made a similar critique of Ely's theory.[83]

In *The Partial Constitution*, Sunstein reiterates this type of critique, charging Ely with claiming that it is possible to interpret the Constitution without making substantive arguments and, thereby, to attain interpretive neutrality.[84] Sunstein argues, however, that constitutional interpretation inevitably requires reliance on substantive principles, which must be justified in terms of moral or political theory, through substantive arguments. He contends that Ely fails to make such substantive arguments to defend his conception of representative democracy.[85]

---

79. In Part IV, I suggest that constitutional constructivism's theory of constitutional democracy is superior to Ely's theory of representative democracy in this respect. For a fuller consideration of this question, see James E. Fleming, Constitutional Constructivism (1988) (unpublished Ph.D. dissertation, Princeton University, on file with the *Texas Law Review*).

80. Tribe, *Puzzling Persistence*, *supra* note 12, at 1063.

81. *Id.* at 1064. Tribe makes this argument with respect to both themes of Ely's *Carolene Products* theory. *Id.* at 1067-79.

82. *Id.* at 1068.

83. *See* Dworkin, *Forum*, *supra* note 12, at 470, 500-16. *But see id.* at 512 & n.101 (arguing that Dworkin's theory is "the theory on which Ely himself actually relies (in spite of much that [Ely] says)").

84. SUNSTEIN, *supra* note 22, at 104-05 & 369 n.17 (acknowledging that Dworkin and Tribe have made similar arguments).

85. *Id.* at 104-05, 143-44.

My interpretation of Ely's theory, by emphasizing its affinities to the method and content of Dworkin's theory, shows that these common critiques are mistaken. Ely's theory of democracy and distrust, contrary to Tribe's puzzled suggestion, is not a process-*based* theory at all; rather, it is a process-*perfecting* theory that perfects processes in virtue of its substantive basis in a political theory of representative democracy, a qualified utilitarianism rooted in equal concern and respect. And so it will not suffice even to meet, let alone to better, Ely's theory to belittle it as taking a pointless flight from substance to process, or to pontificate about the necessity of making substantive constitutional choices in constitutional interpretation. Instead, the battle with Ely has to be at the level of substantive political theory.

Some critics have argued that Ely's theory is not liberal enough because it stems from too frail a vision of "liberal" substantive liberties like privacy and autonomy.[86] Others have argued that his theory is not republican enough because it reflects an impoverished vision of political processes as utilitarian and pluralist.[87] But what they miss is that to argue for a more liberal theory or a more republican theory is to engage with Ely's substantive political theory rather than to deny that he has such a theory.

Thus, as it turns out, Sunstein does battle with Ely at the level of substantive political theory, arguing for the superiority of his liberal republican theory of deliberative democracy over Ely's qualified pluralist theory of representative democracy.[88] Constitutional constructivism also engages in that battle with Ely and Sunstein, maintaining the superiority of a theory of constitutional democracy over their theories.[89]

All of this, however, poses a puzzle: Why have constitutional theorists persisted in mistakenly charging that Ely eschews substantive political theory in constitutional interpretation in favor of feigning interpretive neutrality? To try to account for this puzzle, I shall construct a fable of the theorist who cried "substance" too indiscriminately in his critique of substantive fundamental values theories.

3. The Wages of Crying "Substance."

a. The fable of the theorists who cried "Lochner" *too often.*—In *The Wages of Crying Wolf*, Ely advances a well-known critique of *Roe* by

86. *See, e.g.*, Dworkin, *Forum*, *supra* note 12, at 513-16; Fiss, *supra* note 24, at 9-10, 16-17; Tribe, *Puzzling Persistence*, *supra* note 12, at 1064, 1076.

87. *See, e.g.*, Parker, *supra* note 16, at 239-57.

88. *See* SUNSTEIN, *supra* note 22, at 143-44.

89. For my usage of the terms "representative democracy," "deliberative democracy," and "constitutional democracy," see *supra* note 35.

analogy to the fable of the boy who cried "wolf" too often.[90] The wolf, of course, is *Lochner*. Ely's fable of the theorists who cried "*Lochner*" too often, as I iuterpret it, goes something like this:

> Since *West Coast Hotel* officially repudiated *Lochner*'s special judicial protection for substantive economic liberties, every time the Supreme Court has given heightened judicial protection to any constitutional value in any decision, judges and commentators alike have cried "*Lochner*." They have done so frequently and indiscriminately, regardless of whether the decisions in question could be justified, on the basis of inferences from the text, history, or structure of the Constitution, as being within the *Carolene Products* paradigm and its underlying theory of representative democracy. Therefore, when a real case of Lochnering came along, in the form of *Roe*, judges and commentators did not believe the cry of "*Lochner*." Instead, they said that they had heard that cry too often.

The point of Ely's fable is that judges and commentators should have reserved the cry of "*Lochner*" for cases that could not be justified within the *Carolene Products* paradigm and its underlying theory of representative democracy. On his view, what the Supreme Court did in *Lochner* that was so dreadful was to enforce substantive fundamental values drawn from the nether world beyond a *Carolene Products* jurisprudence. That, too, Ely argues, is what is wrong with *Roe*.[91] Thus, for him, the specter of *Lochner* is incarnate in *Roe* and any other decision that rests upon such substantive fundamental values, not in substance or fundamental values as such.

To fix ideas, we should distinguish Ely's narrow sense of the substance or Lochnering (beyond a *Carolene Products* jurisprudence) that is out-of-bounds from a generic sense of the substance that is not forbidden. Contrary to common misinterpretations, Ely does not argue that it is out-of-bounds and illegitimate for judges to enforce substance or fundamental values as such, in a generic sense of making substantive constitutional choices and thus not being neutral in deciding which values the Constitution especially protects.

b. The fable of the theorist who cried "substance" too indiscriminately.—In *Democracy and Distrust*, Ely puts forward a famous critique of "noninterpretivist" (or "nonoriginalist") theories of discovering substantive fundamental values.[92] There he runs "the gamut of fundamental-value methodologies" that was "the odyssey of Alexander Bickel."[93] He

---

90. Ely, *supra* note 5, at 943-45.
91. *Id.* at 933-45.
92. *See* ELY, *supra* note 16, at 43-72.
93. *Id.* at 71.

rejects, on skeptical and democratic grounds, the following "external" sources of substantive fundamental values that such theorists have proffered: the judge's own values, natural law, neutral principles, reason, tradition, consensus, and the predicted values of the future.[94]

Ely's explosive critique is an indiscriminate rout of all of these *sources* of values as such, irrespective of the *content* of the values derived from these sources and of whether that content is plausibly manifested in our constitutional document or implicit in our underlying constitutional order. His no-holds-barred attack seems to have misled some readers into thinking that he was rejecting, as out-of-bounds and illegitimate, judicial enforcement of substance in a generic sense rather than in the narrower sense of substance or Lochnering just distinguished. These readers may have rejected his theory for that reason.

To suggest how this result may have occurred, I shall construct a fable of the theorist who cried "substance" too indiscriminately. It goes something like this:

> There once was a theorist who warned judges and commentators against crying "*Lochner*" too often. When what he viewed as a real case of Lochnering came along, in the form of *Roe*, he himself cried "*Lochner*." But the judges and commentators, who had heard that cry too often from others, did not heed his cry. Then the theorist ran the gamut of sources of substantive fundamental values, crying "substance" indiscriminately with respect to all of them, regardless of their content. When he finished, the judges and commentators said that they had heard the cry of "substance" too often. Next, the theorist elaborated a *Carolene Products* theory of judicial review and tried to explain that he really had meant to cry "substance" only with respect to judicial imposition of substantive fundamental values lying in the nether world beyond his *Carolene Products* jurisprudence. But he had cried "substance" so indiscriminately that the judges and commentators did not listen. Worse still, they chanted back "substance" at the theorist's own theory, and proclaimed that they were not afraid of substance. Finally, they criticized him for pointlessly trying to flee substance for process.

The wages of Ely's crying "substance" too indiscriminately are that he is doomed to endure reiterations of the mistaken charge that his theory flees substance for process in the sense of denying the need for substantive political theory or substantive constitutional choices in interpreting the Constitution.

---

94. *Id.* at 43-72.

C. *Ely Does Flee Substantive Constitutional Provisions: The Flight Taken*

1. Ely's Interpretive Method Calls for a Constitution-Perfecting Theory.—Ely's theory, however, does take a different flight from substance to process: It flees certain substantive provisions of the Constitution in the sense that his two process-perfecting themes do not account for them and thus do not give meaningful effect to them. Some constitutional theorists have argued that Ely ignores or seeks to deny the Constitution's openly substantive provisions by construing those provisions so as to reduce them to procedural protections or, worse yet, to read them out of the Constitution. For example, Tribe points to the Constitution's protection of religious freedom and private property, as well as its prohibition of slavery, as evincing substantive commitments that cannot be reduced to procedural protections.[95] Dworkin and Ackerman make similar arguments, as does Sunstein.[96] These theorists, as it were, argue that Ely flees the whole, substantive Constitution for a partial, procedural Constitution. This criticism is basically sound, but misplaced.

My tack concerning Ely's flight from substantive constitutional provisions is different, for I seize the opportunity to criticize his theory on its own terms.[97] I shall take seriously Ely's quest for the ultimate interpretivism, interpreting it as a commitment to a constructivist method of constitutional interpretation. My argument is that Ely's interpretive method shows the need for a Constitution-perfecting theory, not merely a process-perfecting theory, to give meaningful effect to both the substantive liberties and the procedural liberties embodied in our Constitution.

Ely's argument for his theory of judicial review from "the nature of the United States Constitution" is that his political theory of representative democracy better fits and justifies the constitutional document and underlying constitutional order than do substantive fundamental values theories.[98] He takes a "brisk tour" of the Constitution, arguing that it is "principally" concerned with establishing a procedural framework and protecting procedural liberties rather than securing substantive liberties.[99] Yet Ely admits that there are numerous manifestations of substantive values, as

---

95. Tribe, *Puzzling Persistence*, *supra* note 12, at 1065-67.

96. *See* SUNSTEIN, *supra* note 22, at 104; Ackerman, *supra* note 65, at 1047-48; Dworkin, *supra* note 17, at 328, 343-44.

97. *Cf.* Fleming, *supra* note 40, at 638-46 (critiquing Ely's project as a failed quest for an ultimate interpretivism); Laycock, *supra* note 65, at 360 (taking Ely's claim seriously but concluding that Ely is not ultimately an interpretivist).

98. *See* ELY, *supra* note 16, at 88, 87-101. *But see id.* at 101 (conceding that "the argument from the general contours of the Constitution is necessarily a qualified one"). Ely also makes two other arguments for his theory. *See infra* note 126 and text accompanying notes 434-37.

99. ELY, *supra* note 16, at 87, 92.

distinguished from procedural values, on the face of the Constitution that are not accounted for in his two process-perfecting themes. Indeed, on the evidence of his brisk tour, one might doubt whether he—supposedly the process theorist *par excellence*—is a process theorist in any strong sense.

For example, Ely acknowledges manifestations of substantive values, in addition to procedural values, in the First Amendment.[100] These values include religious liberty, liberty of conscience, freedom of association, and autonomy. He also concedes an admixture of substantive and procedural values in the Third, Fourth, and Fifth Amendments, such as privacy, repose, and independence.[101] His analysis of the Thirteenth Amendment is more complicated, but the upshot basically seems to be an admission that it is concerned with securing the substantive value of independence or autonomy.[102]

Furthermore, Ely grants that the syntax of the open-ended Privileges or Immunities Clause of the Fourteenth Amendment and the Ninth Amendment "is most naturally that of substantive entitlement."[103] He also states that these provisions "seem to have been included in a 'we must have missed something here, so let's trust our successors to add what we missed' spirit."[104] Hence, his *ejusdem generis* analysis of these open-ended provisions as substantive would seem to entail construing them to justify protecting implicit substantive entitlements as well as implicit procedural entitlements.[105]

If one were questing for the ultimate interpretivism, and thus striving for reflective equilibrium between the constitutional document and the underlying political theory of the constitutional order, one should be disconcerted by the presence of so many disequilibrating substantive value "anomalies" or "mistakes" in the document that even Ely concedes are not reflected in the process-perfecting theory that he has constructed.[106] Such manifestations of substantive values on the face of the Constitution, in Ely's words, "call for more,"[107] that is, for further movement back and

---

100. *Id.* at 93-94.

101. *Id.* at 95-97.

102. *See id.* at 98-100.

103. Ely, *supra* note 70, at 400; *see* ELY, *supra* note 16, at 193 n.45.

104. ELY, *supra* note 16, at 87.

105. *But see* Ely, *supra* note 70, at 400 (responding to Fleming, *supra* note 40, and maintaining that "it does no violence to these provisions to read them as I believe they ultimately must be read, as protecting rights of participation in the processes and outputs of representative government").

106. In speaking of "anomalies," I mean to echo THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 52-53 (enlarged 2d ed. 1970) (defining "anomalies" as violations of "paradigm-induced expectations that govern normal science"). On "mistakes," see DWORKIN, RIGHTS, *supra* note 21, at 118-23 (conceiving "mistakes" as legal materials that are inconsistent with the theory that provides the best scheme of justification for a body of law and therefore lack generative force).

107. ELY, *supra* note 16, at 76.

forth between document and theory toward reflective equilibrium between them, and thus for a more acceptable fit and a better justification.[108]

To attain the ultimate interpretivism and reflective equilibrium, one would need to elaborate a theory that would construe these provisions of the document to vindicate their substantive values as well as their procedural values. Instead of moving beyond perfecting procedural liberties to securing substantive liberties, Ely basically lops off the document's substantive members in order to fit it into the narrow bed of his process-perfecting theory. If Ely achieves a close fit between the admittedly substantive and procedural Constitution and his merely process-perfecting theory, it is a fit in the manner of Procrustes, not Hercules.

And so Ely takes a flight from perfecting the whole Constitution to merely perfecting its processes. But his own interpretive method calls for more, a Constitution-perfecting theory that would protect both the substantive liberties and the procedural liberties embodied in our Constitution. In Part IV, I outline such a theory in the form of a constitutional constructivism.

2. The Ninth Amendment: The Constitutional Jester.—Ely refers to the Ninth Amendment[109] as "that old constitutional jester" and observes that "[i]n sophisticated legal circles mentioning [it] is a surefire way to get a laugh."[110] Nonetheless, he takes it seriously, arguing that "the conclusion that the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution is the only conclusion its language seems comfortably able to support."[111] In his quest for the ultimate interpretivism, Ely uses the open-ended Ninth Amendment to show that clause-bound interpretivism is

---

108. *See supra* note 69 and accompanying text (discussing two dimensions of best interpretation, fit and justification).

109. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

110. ELY, *supra* note 16, at 33, 34. As in: "What are you planning to rely on to support that argument, Lester, the Ninth Amendment?" *Id.* at 34. The joke supposedly was that a litigant who had no plausible constitutional arguments to support a claim might as a last resort invoke the "unenumerated" constitutional rights contemplated by the Ninth Amendment. In years past, similar jokes could have been based on Justice Holmes's view of the Equal Protection Clause. *See* Buck v. Bell, 274 U.S. 200, 208 (1927) (Holmes, J.) (referring disparagingly to equal protection arguments as "the usual last resort of constitutional arguments"). Needless to say, the status of the Equal Protection Clause in constitutional law has changed considerably since Holmes wrote.

111. ELY, *supra* note 16, at 38; *see also* CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW 43, 43-44 (1981) (suggesting that Ely and he had moved and seconded that "the Ninth Amendment . . . at long last be adopted"); Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 44 (1970) ("The stone the builders rejected may yet be the cornerstone of the temple.").

impossible.[112] Ironically, his analysis likewise shows that his own process-perfecting interpretivism is incomplete.

Ely's interpretive method, understood as a constructivist method, leads to a conception of the Ninth Amendment as a rule of construction for the Constitution as a whole. As Tribe puts it, "[T]he Ninth Amendment is a uniquely central text in any attempt to take seriously the process of *construing* the Constitution."[113] Indeed, it has come to play a supporting role, if not a leading one, in the work of courts and scholars in constructing the Constitution to protect rights not specifically enumerated, such as the right to privacy or autonomy.[114] The Ninth Amendment not only textually authorizes, but indeed calls for, deriving "unenumerated" constitutional rights that are implicit in the particular provisions of the constitutional document, the general themes of the Constitution as a whole,

---

112. *See* ELY, *supra* note 16, at 34-41; *supra* text accompanying notes 55-57. For critical responses, see BORK, *supra* note 5, at 166, 183-85; Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 259-64 (1983); Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1220-22 (1990). Bork has tried to read the Ninth Amendment (along with the Privileges or Immunities Clause) out of the Constitution with his "ink blot" thesis. *See supra* note 57.

113. Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 100 (1987); *see also* TRIBE & DORF, *supra* note 21, at 54-55, 110-11 (treating the Ninth Amendment as a rule of interpretation that expresses a presumption in favor of generalizing from specific, enumerated rights to others retained by the people).

114. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485, 484-85 (1965) (citing the Ninth Amendment in discussing the "zone of privacy created by several fundamental constitutional guarantees"); *id.* at 486-93 (Goldberg, J., concurring) (emphasizing the role of the Ninth Amendment in supporting the Court's protection of fundamental personal rights not specifically mentioned in the Constitution); Roe v. Wade, 410 U.S. 113, 153 (1973) (citing the Ninth Amendment in support of the right of a woman to decide whether to terminate a pregnancy); Richmond Newspapers v. Virginia, 448 U.S. 555, 579 n.15 (1980) (citing the Ninth Amendment in upholding the right of the public to attend criminal trials); Bowers v. Hardwick, 478 U.S. 186, 201-03 (1986) (Blackmun, J., dissenting) (objecting to the Court's holding that the right of privacy did not extend to protect homosexual intimate association and the Court's refusal to consider whether Georgia's sodomy law ran afoul of the Ninth Amendment); Planned Parenthood v. Casey, 112 S. Ct. 2791, 2805 (1992) (joint opinion) (citing the Ninth Amendment to support its rejection of the views that the Due Process Clause of the Fourteenth Amendment protects only those rights specifically enumerated in the first eight amendments or "only those practices, defined at the most specific level, that were protected . . . by other rules of law when [it] was ratified"). *But see Griswold*, 381 U.S. at 520 (Black, J., dissenting) (protesting that "[u]se of any such broad, unhounded judicial authority [as the Ninth Amendment or Fourteenth Amendment as construed by Justice Douglas's opinion of the Court and Justice Goldberg's concurring opinion] would make of this Court's members a day-to-day constitutional convention"); *Casey*, 112 S. Ct. at 2884, 2884-85 (Scalia, J., concurring in the judgment in part and dissenting in part) (claiming angrily that the joint opinion treats the Ninth Amendment as "a literally boundless source of additional, unnamed, unhinted-at 'rights'").

Recently, entire scholarly symposia and books have been devoted to interpreting the Ninth Amendment. *See, e.g.*, 1 THE RIGHTS RETAINED BY THE PEOPLE (Randy Barnett ed., 1989); 2 THE RIGHTS RETAINED BY THE PEOPLE (Randy Barnett ed., 1993); Symposium, *The Bill of Rights and the Unwritten Constitution*, 16 S. ILL. U. L.J. 267 (1992); Symposium, *Interpreting the Ninth Amendment*, 64 CHI.-KENT L. REV. 1 (1988). For critical responses, see *supra* note 112.

and the underlying constitutional order.[115] Because the Constitution as a whole includes manifestations of substantive liberties such as liberty of conscience, privacy, and autonomy as well as procedural liberties, a constructivist conception of the Ninth Amendment would seem to call for deriving implicit substantive liberties along with implicit procedural liberties.

As stated above, Ely acknowledges numerous manifestations of substantive liberties in the Constitution.[116] Yet he argues that the Constitution as a whole embodies a political theory of representative democracy, which entails a process-perfecting theory of judicial review that does not account for, and so leaves out, those substantive liberties. Thus, he attempts to limit the Ninth Amendment to justify recognizing only implied procedural liberties. But again, the Ninth Amendment requires that responsible constitutional interpretation derive not only the procedural liberties but also the substantive liberties that are implicit in the constitutional document and the underlying constitutional order.

This constructivist conception of the Ninth Amendment accords with Justice Goldberg's interpretation of it in his concurring opinion in *Griswold v. Connecticut*.[117] Goldberg argued that to fail to protect a substantive fundamental right, such as privacy—which is implicit in "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" and is "so rooted in the traditions and conscience of our people as to be ranked as fundamental"—simply because "that right is not guaranteed in so many words" by the Constitution is "to ignore the Ninth Amendment and to give it no effect whatsoever."[118] Failing to do so, he contended, would violate *Marbury v. Madison*'s interpretive principle that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect."[119] If, to recall Chief Justice Marshall's hermeneutic principles in *McCulloch v. Maryland*—we must seek a "fair construction of the whole instrument" and "we must never forget, that it is *a constitution* we are expounding"[120]—we must never forget to expound the Ninth Amendment so as to give it meaningful effect.[121]

Ironically, the Ninth Amendment indeed may play the role of the constitutional jester, but in the sense of the jester as a truth-teller in

---

115. For reservations about the distinction between enumerated and unenumerated rights, see, for example, Dworkin, *supra* note 42, at 381-91.

116. *See supra* text accompanying notes 100-03.

117. *See Griswold*, 381 U.S. at 492 (Goldberg, J., concurring) (arguing that the Ninth Amendment is a rule of construction for the Constitution as a whole, not an independent source of constitutional rights).

118. *Id.* at 491 (citations omitted).

119. *Id.* at 490-91 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803)).

120. 17 U.S. (4 Wheat.) 316, 406, 407 (1819) (emphasis in original).

121. *See Griswold*, 381 U.S. at 490 n.6 (Goldberg, J., concurring) (citing BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955)).

Shakespearean drama. Like the jester in *King Lear*, who is free to speak the truth notwithstanding the King's authority,[122] the Ninth Amendment scoffs at any presumption of the sovereign's omnipotence and omniscience in enumerating specific constitutional rights. It mocks the pretensions of all theories of constitutional interpretation that try to reduce constitutional rights to a closed, enumerated list (as clause-bound interpretivism or originalism does[123]). But it also scoffs at the presumptuousness of theories that attempt to prune constitutional provisions of their substantive character by recasting them as procedural protections (as Ely's theory does). Thus, the Ninth Amendment shows that the Constitution itself calls for moving beyond a process-perfecting theory to a Constitution-perfecting theory that would give meaningful effect to both the substantive liberties and the procedural liberties embodied in the Constitution. The constitutional constructivism that I propose in Part IV is such a theory.

D. Ely's Process-Perfecting Interpretivism: Its Allure and Incompleteness

Ely concluded his critique of Justice Black's clause-bound interpretivism by saying that "[t]he point of all this is this": One cannot be a clause-bound interpretivist because several open-ended provisions of the Constitution show that the theory dispositively fails on its own terms.[124] Likewise, to conclude my parallel critique of Ely's theory, the point of all this is this: One cannot be an ultimate interpretivist and at the same time remain a *Carolene Products* process-perfecting representative democrat because certain substantive provisions of the Constitution call for going beyond *Carolene Products* to a Constitution-perfecting theory. In the end, Ely abandons his quest for the ultimate interpretivism, choosing instead a process-perfecting theory and therewith only the penultimate interpretivism.[125]

---

122. *See* WILLIAM SHAKESPEARE, THE TRAGEDY OF KING LEAR act 1, sc. 4.

123. *See Griswold*, 381 U.S. at 519, 518-20 (Black, J., dissenting) (arguing that the Ninth Amendment does not give the Court authority to invalidate laws that it thinks violate "fundamental principles of liberty and justice" (quoting *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring))); BORK, *supra* note 5, at 166, 183-85 (outlining the "ink blot" thesis of the Privileges or Immunities Clause and the Ninth Amendment); *Nomination Hearings*, *supra* note 57, at 249 (affirming Bork's ink blot theory as applied to the Ninth Amendment); Monaghan, *supra* note 15, at 365-67 (describing the Ninth Amendment as "entirely empty" and the "schedule of rights" in the Constitution as "a list closed as of 1791"); *see also* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2884-85 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (construing the Ninth Amendment in terms of a closed list plus narrowly conceived traditions).

124. Ely, *supra* note 53, at 445. By implication, Ely's analysis also applies to Bork's originalism. Bork certainly treats Ely's critique of clause-bound interpretivism as being aimed at theories like his own. *See* BORK, *supra* note 5, at 178-85, 194-99.

125. For an analysis suggesting parallels between Justice Black's and Ely's predicaments and their responses to them, see Fleming, *supra* note 40, at 646-48.

That abandonment, not a failure to do substantive political theory in the first place, is Ely's flight from substance to process. In a sense, he builds a flight from substantive liberties such as liberty of conscience, privacy, and autonomy into the very substance of his process-oriented political theory of representative democracy, which does not include such liberties. In trying to avoid the specter of *Lochner*, Ely's theory flees substance for process by recasting certain substantive liberties of the Constitution as procedural protections of his theory or, worse yet, repealing their substantive aspects by construction.[126]

In conclusion, Ely's process-perfecting interpretivism, notwithstanding its allure, is incomplete. Ely's theory falls short of a Constitution-perfecting theory because it fails to give both substance and process their due. To move beyond the sphere between process and substance, we need a Constitution-perfecting theory.

E. Interlude: A Thayer for Our Time?

In *Democracy and Distrust*, Ely sought to justify the Warren Court's constitutional revolution on the basis of a *Carolene Products* jurisprudence.[127] Beyond the two process-perfecting themes of his framework,

---

126. *See* ELY, *supra* note 16, at 100 (stating that the right of individuals to bear arms and liberty of contract have been "'repealed' by judicial construction"). In another sense, Ely flees substance for process when he shifts from his first two, *interpretive* arguments for his process-perfecting theory to his third, *institutional* argument for it. *See id.* at 87-103. His first two arguments stem from his analysis of the nature of the Constitution as a whole, and the type of theory that would be consistent with and supportive of the underlying system, as being principally concerned with process rather than substance. His third argument is based on his assessment that because of the differences in institutional positions or perspectives between courts and legislatures, courts should perfect processes and legislatures should pursue substantive fundamental values. Thus, his distinction between process and substance turns from being a principle about *what* the Constitution, properly interpreted, means to a principle about *who* should interpret what it means. (For an analysis of constitutional interpretation on the basis of these interrogatives, along with the interrogative *how* ought the Constitution to be interpreted, see MURPHY, FLEMING & HARRIS, *supra* note 35.) His distinction becomes a principle of role differentiation between courts and legislatures.

When Ely turns from his two interpretive arguments to his institutional argument, he shifts, as it were, from theory of the *Constitution* to theory of *judicial review*. (For the distinction between theory of the Constitution and theory of judicial review, see BARBER, CONSTITUTION, *supra* note 21, at 196-99; Stephen M. Griffin, *What Is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition*, 62 S. CAL. L. REV. 493, 529-35 (1989).) He then basically names as "the Constitution" those values that are judicially enforceable, that is, procedural values, rather than arguing for a conception of the Constitution outside the courts that would include substantive values along with procedural values. By contrast, Sunstein and constitutional constructivism distinguish between the partial, judicially enforceable Constitution and the whole Constitution that is binding outside the courts on legislatures, executive officials, and citizens generally. *See* RAWLS, *supra* note 31, at 240; SUNSTEIN, *supra* note 22, at v-vi, 9-10, 138-40, 145-61, 350.

127. ELY, *supra* note 16, at 73-75 (arguing that the "deep structure" of the Warren Court's jurisprudence was that of footnote four of *Carolene Products*, not discovering substantive fundamental values).

Ely's argument becomes reminiscent of James Bradley Thayer's classic argument for judicial deference to the representative process.[128] Thayer's argument, along with Justice Holmes's dissent in *Lochner*,[129] served as a rallying cry for progressives during the conservative era of *Lochner*.[130] Recently, in a symposium assessing his book, Ely published *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures*.[131] His article implies that those who have argued that courts should impose substantive fundamental values rather than merely perfect processes have won the battle, but at too great a cost: namely, that courts are now in theory and practice no different from legislatures.[132] Indeed, Ely's article reads like a veiled plea to be the Thayer for the next generation, the proponent of a theory of judicial review for progressive voices crying in the wilderness during the conservative era of the Rehnquist Court.[133] Ely himself is making a principled argument, but there may also be strategic arguments for joining him. In 1993, the centennial of the publication of Thayer's classic argument, Sunstein has made his own plea to be the Thayer for the next generation.[134] I now turn to Sunstein's theory.

---

128. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (arguing for judicial deference to the Congress and President, absent a clear mistake, on the ground that politically elected officials are the primary makers of policy as well as the primary interpreters of the Constitution in our scheme of government). It is important to bear in mind, however, that footnote four of *Carolene Products*, which Ely elaborates in *Democracy and Distrust*, defines itself in opposition to Thayer's doctrine of the clear mistake by setting forth three exceptions to the general presumption of constitutionality and deferential scrutiny of legislative (and executive) actions.

Justice Frankfurter regarded Thayer's classic article as "the most important single essay" in constitutional law. FELIX FRANKFURTER REMINISCES 301 (Harlan B. Phillips ed., 1960). During 1993, the centennial of the publication of his essay, Thayer enjoyed a revival. A symposium was held at Northwestern University School of Law to mark the centennial. *See One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993). None other than Ely gave the keynote address. *See id.* at vi.

129. Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

130. *See* G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 48-49 (1993).

131. Ely, *supra* note 78.

132. Ely's article, however, does not constitute a "surrender." *Id.* at 854 n.57; *see also* JOHN H. ELY, WAR AND RESPONSIBILITY 54 (1993) (applying the theory of *Democraey and Distrust* to justify judicial review as a corrective for Congress's evasion of its constitutional responsibilities in deciding what wars we should and should not fight).

133. Ely calls for a revival of the strand of the Legal Process tradition that emphasizes that because courts are different from legislatures in that judges (at least federal judges) do not stand for election, courta should perfect processes rather than discover society's substantive fundamental values. Ely, *supra* note 78, at 833-54.

134. *See infra* text accompanying notes 158-62.

III. Beyond Sunstein's Theory of Securing Deliberative Democracy

In *The Partial Constitution*, Sunstein might seem to provide a Constitution-perfecting theory that moves beyond Ely's process-perfecting theory. He promises both to beware of the legacy of *Lochner* and to resist taking a flight from substance. In his introduction, he proclaims that the Warren Court's constitutional revolution is over. The most important contemporary disputes about the meaning of the Constitution, he argues, reflect disagreement about the meaning of the requirement that government be impartial or neutral: status quo neutrality versus deliberative democracy.[135]

Sunstein contends that what was wrong with *Lochner* was not, as Ely thought, that the Court gave heightened judicial protection to substantive fundamental values. Rather, it was the Court's use of status quo neutrality and existing distributions as the baseline from which to distinguish unconstitutionally partisan political decisions from impartial ones.[136] Ironically, the implication of this interpretation is that the contemporary Justices, such as Scalia, who protest most against Lochnering in fact engage most actively in it.[137]

Furthermore, Sunstein claims to avoid Ely's putative flight from substance by clearly grounding his own constitutional theory in a substantive political theory of liberal republicanism or deliberative democracy.[138] His theory appears at once more liberal and more republican than Ely's; that is, it appears to stem from both a more robust vision of "liberal" substantive liberties and a richer vision of "republican" political processes.[139]

Yet the structure of Sunstein's theory parallels that of Ely's *Carolene Products* theory, and his liberal republicanism leads to a theory of judicial review whereby courts principally should secure the preconditions for deliberative democracy.[140] Although Sunstein moves somewhat beyond

---

135. SUNSTEIN, *supra* note 22, at 1-2, 6.

136. *See id.* at 45-62, 259-61; Sunstein, *supra* note 1, at 874-75, 882-83. Sunstein also states that "[t]he basic view of the *Lochner* period that is set out here is strongly endorsed by the important leading opinion" in *Planned Parenthood v. Casey*, which accordingly rejected the view, elaborated in Justice Scalia's opinion, that "the problem with the *Lochner* era rested solely in the aggressive use of the due process clause." SUNSTEIN, *supra* note 22, at 363 n.40 (citing Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992)). For an historical account of the *Lochner* era as responding to the collapse of "vested rights-retroactivity" jurisprudence rather than as inaugurating the protection of unenumerated substantive fundamental rights, see James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 123-42 (1993).

137. *See* SUNSTEIN, *supra* note 22, at 68-92, 130-31; Sunstein, *supra* note 1, at 874-75, 883-902.

138. *See* SUNSTEIN, *supra* note 22, at 104-05, 142-44.

139. *See supra* note 24 and accompanying text.

140. *See* SUNSTEIN, *supra* note 22, at 142-44. Sunstein does not claim that the general commitment to deliberative democracy is the exclusive source of interpretive principles. Rather, he

Ely's theory of reinforcing representative democracy, he falls short of offering a full Constitution-perfecting theory.

In this Part, first, I outline Sunstein's theory along with his interpretation of what was wrong with *Lochner*. Second, I argue that Sunstein's liberal republicanism represents a flight from substance to process in the sense that it emphasizes "republican" deliberative democracy to the neglect of "liberal" deliberative autonomy (and such substantive liberties as liberty of conscience, privacy, and autonomy). Third, I illustrate this argument by criticizing Sunstein's analysis of *Bowers v. Hardwick*,[141] showing that Sunstein's theory, somewhat like Ely's, flees substantive due process and the preconditions for deliberative autonomy in favor of equal protection and the preconditions for deliberative democracy. Finally, I suggest that, to the extent that Sunstein's theory lacks a theme of securing the preconditions for deliberative autonomy, it is indeed, contrary to his hope, a theory of securing the *partial* Constitution.[142]

A. An Outline of Sunstein's Theory of Deliberative Democracy

1. Sunstein's Political Theory of Deliberative Democracy.—Sunstein argues that the substantive political theory that best fits and justifies the Constitution is a theory of deliberative democracy or liberal republicanism.[143] This theory reflects a commitment to the "impartiality principle," which requires government to provide public-regarding reasons concerning the common good for its actions and forbids government from acting solely on the basis of the self-interest or "naked preferences" of private groups or individuals. In this sense, the Constitution is an impartial constitution, to be distinguished from a partial constitution of pure interest-group

---

says that it is the principal source, the "first and foremost" type of consideration, or "a promising source." *See id.* at 123, 144, 162.

141. 478 U.S. 186 (1986).

142. In Part IV, I contend that constitutional constructivism entails a fuller theory of perfecting the whole, impartial Constitution.

143. *See* SUNSTEIN, *supra* note 22, at 17-39, 123-61 (setting out the core commitments of deliberative democracy and arguing that this substantive political theory better fits and justifies the text, history, and structure of the Constitution than do alternative theories such as status quo neutrality and interest-group pluralism); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 241-52 (1993) (outlining the conception of deliberative democracy, especially with reference to the political functions of free speech).

In effect, Sunstein and Ackerman are in competition to be the new Madison. *See* 1 ACKERMAN, *supra* note 21, at 165-99 (advancing a theory of neo-federalism that is said to rediscover the dualism of Publius, or Madison). Both Sunstein's theory of deliberative democracy and Ackerman's theory of dualist democracy aim to synthesize the traditions of liberalism and republicanism in theories of liberal republicanism. *Compare* SUNSTEIN, *supra* note 22, at 133-45 *with* 1 ACKERMAN, *supra* note 21, at 25-33. Sunstein acknowledges a debt to Ackerman, but resists the latter's complex apparatus of higher lawmaking and structural amendments to the Constitution outside the formal procedures of Article V. *See* SUNSTEIN, *supra* note 22, at 357 n.3, 370 n.21, 372 n.17; Cass R. Sunstein, *New Deals*, NEW REPUBLIC, Jan. 20, 1992, at 32 (reviewing 1 ACKERMAN, *supra* note 21).

pluralism. It establishes "a republic of reasons," not a political market of naked preferences. Sunstein argues that this commitment to deliberative democracy, central to the founding, has been deepened by the Civil War Amendments and the New Deal.[144]

Deliberative democracy has four core commitments.[145] First, and most important, is a belief in political deliberation.[146] Political decisions should not simply reflect aggregations of the self-interested preferences of well-organized private groups or individuals. Nor should they consist merely of protections of status quo neutrality, or "prepolitical" private rights.[147] Instead, political decisions should be produced by an extended process of deliberation and discussion concerning the common good, in which new information and new perspectives are brought to bear, and the decisions should reflect public-regarding reasons. Moreover, politics should not simply implement existing preferences, as a market might; it should reflect upon and sometimes transform such preferences in light of aspirations. Sunstein rejects any close analogy between consumers in a market and citizens in a polity, or between "consumer sovereignty" and the political sovereignty of We the People.[148]

Second, the belief in political deliberation entails a commitment to citizenship and to widespread political participation by the citizenry.[149] It also requires that people have a large degree of security and independence from the will of others and from the state.[150] For example, the commitment to citizenship implies a sphere of autonomy into which the state may not enter, such as that protected by the Fourth Amendment's prohibition on unreasonable searches and seizures. It further implies both property rights and social programs that attack poverty, such as the New Deal's "second Bill of Rights."[151] The Civil War Amendments deepened the original commitment to citizenship by abolishing involuntary servitude and casting doubt on "all efforts at political exclusion of identifiable groups

144. SUNSTEIN, *supra* note 22, at 51-62, 123, 133-34.

145. *Id.* at 133-41. Sunstein emphasizes that these four commitments "draw on diverse starting points; this is no sectarian creed." *Id.* at 141; *cf.* RAWLS, *supra* note 31, at 15, 133-72 (arguing that a society's political conception of justice draws support from an overlapping consensus among opposing moral, philosophical, and religious conceptions of the good). For example, Sunstein claims that his theory of deliberative democracy is compatible with the liberal theories of Mill and Rawls, the liberalism (or pragmatism) of Dewey, certain forms of utilitarianism, *see* SUNSTEIN, *supra* note 22, at 141, and certain forms of feminism, *see id.* at 257-90.

146. SUNSTEIN, *supra* note 22, at 133-34.

147. *See id.* at 3-7, 40-67, 68-92, 134.

148. *See id.* at 164, 134-35, 162-94.

149. *See id.* at 135-36.

150. *Id.* at 136.

151. *Id.* at 139; *see also id.* at 60.

on the basis of morally irrelevant characteristics," for example, race, sex, and sexual orientation.[152]

Third, deliberative democracy is committed to agreement as a regulative ideal for politics.[153] It seeks to reach agreement among equal citizens through deliberation concerning public-regarding reasons and the common good, not simply to register the different tastes or the different perspectives of disagreeable people.[154]

The final commitment is to political equality, which forbids not only disenfranchisement but also large disparities in political influence held by different social groups.[155] It also presupposes freedom of speech and access to a good education. Political equality does not require economic equality, but it does entail: (1) freedom from desperate conditions; (2) opposition to caste systems (*e.g.*, racism, sexism, and heterosexism); and (3) rough equality of opportunity, including roughly equal educational opportunity.[156]

2. Sunstein's Theory of Judicial Review as Securing Deliberative Democracy.—This political theory of deliberative democracy, Sunstein argues, entails a theory of judicial review under which courts principally should secure the preconditions for deliberative democracy.[157] But he stresses that the judicially enforceable Constitution is not coterminous with the Constitution that is binding outside the courts on legislatures, executive officials, and citizens generally (unless and until they amend it).[158] *Constitutional* theory is broader than theory of *judicial review*.[159]

---

152. *See id.* at 136, 259-61, 402 n.17.

153. *Id.* at 137.

154. *Cf.* Christopher L. Eisgruber, *Disagreeable People*, 43 STAN. L. REV. 275, 297-98 (1990) (reviewing ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989)) (contending that American culture inevitably will breed disagreement over the meaning of constitutional principles).

155. SUNSTEIN, *supra* note 22, at 137.

156. *Id.* at 137-40, 402 n.17.

157. *Id.* at 142-44.

158. *See id.* at v-vi, 9-10, 138-40, 145-61, 350; *see also* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 586 (1975) (arguing that legislators have a duty to interpret the Constitution conscientiously and that the deferential rationality standards applied by courts, for example, to the Due Process and Equal Protection Clauses do not comprehend all that is demanded of legislators who fulfill that duty); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) [hereinafter Sager, *Fair Measure*]; Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 419 (1993) [hereinafter Sager, *Thinness*] (both disputing the modern view that confines constitutional norms to the scope of federal judicial enforcement); *cf.* William M. Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1936, 1946-47 (1993) (rejecting the view that the judiciary alone has the power to determine what the Constitution means in favor of the notion of constitutional dialogue among the branches of government).

159. *See supra* note 126.

Accordingly, Sunstein sensibly and sensitively elaborates certain institutional limits on the role of courts in social reform.[160] For example, he argues that although deliberative democracy entails freedom from desperate conditions and imposes obligations upon government to provide a social minimum of goods and services to meet people's basic needs for subsistence, such obligations are not judicially enforceable in the absence of legislative or executive action.[161] Beyond securing judicially enforceable preconditions for deliberative democracy, Sunstein's argument becomes somewhat reminiscent of Thayer's plea for judicial deference to political decisions on the ground that easy resort to judicial review deadens the citizenry's sense of political responsibility.[162]

Nonetheless, Sunstein argues for an aggressive role for courts in two categories of cases. The first involves "rights that are central to the democratic process and whose abridgement is therefore unlikely to call up a political remedy."[163] The second involves "groups or interests that are unlikely to receive a fair hearing in the legislative process."[164] The first category calls for active judicial protection of the preconditions for political deliberation, political equality, and citizenship. The second category leads to active judicial vindication of an anticaste principle of equal citizenship.

Sunstein acknowledges that these two categories of cases parallel the two themes of Ely's *Carolene Products* theory.[165] Furthermore, he observes that both his and Ely's theories of judicial review secure preconditions for democracy. But Sunstein argues that his conception of democracy—liberal republicanism—better fits and justifies the American system than does Ely's conception, which he characterizes as interest-group pluralism.[166] He overstates this contrast. As shown above, Ely's theory is one of qualified pluralism, and it is concerned also with securing the "republican ideal of government in the interest of the whole people."[167] There

---

160. *See* SUNSTEIN, *supra* note 22, at 145-53.

161. *See id.* at 138-40, 148-49.

162. *See* Thayer, *supra* note 128; *supra* text accompanying notes 128-34; *see also* James B. Thayer, *John Marshall*, *in* JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 1, 86 (Philip B. Kurland ed., 1967) ("The tendency of a common and easy resort to [judicial review] . . . is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility."). Indeed, Sunstein and Ely may be the principal contenders to be the Thayer for the next generation. Whereas Sunstein differentiates the roles of courts and legislatures on the basis of the institutional limits of courts, Ely basically uses his distinction between process and substance as a principle of role differentiation. In effect, Ely names as "the Constitution" those procedural values that are judicially enforceable, rather than distinguishing between the partial Constitution that is judicially enforceable and the whole Constitution that is binding outside the courts. *See supra* note 126.

163. *See* SUNSTEIN, *supra* note 22, at 142.

164. *Id.* at 143.

165. *See id.* at 143-44.

166. *Id.*

167. ELY, *supra* note 16, at 82; *see supra* text accompanying note 78.

is no question, however, that Sunstein's theory is a richer republican theory than Ely's.

3. The Legacy of Lochner*: Status Quo Neutrality Versus Unenumerated Substantive Fundamental Rights.*—The best illustrations of the differences between Sunstein's and Ely's theories with respect to the two categories of cases calling for an aggressive role for courts are their approaches to *Buckley v. Valeo*[168] and *Roe v. Wade*.[169] I contrast their analyses of these cases in light of their different understandings of what was wrong with *Lochner*: status quo neutrality and unenumerated substantive fundamental rights, respectively.

In *Buckley*, the Court struck down certain campaign finance regulations imposing limitations on expenditures on the ground that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[170] For Sunstein, *Buckley* is an incarnation of *Lochner* because it evinces status quo neutrality.[171] The Court treated the existing distribution of wealth and political power as a prepolitical state of nature and therefore held that interfering with it was an impermissible, partisan objective.

Moreover, for Sunstein, *Buckley* stems from a flawed conception of democracy as a veritable marketplace of preferences rather than a republic of reasons. He draws upon Rawls's analysis of *Buckley* and analogy between *Buckley* and *Lochner*.[172] As Rawls puts it:

> The First Amendment no more enjoins a system of representation according to influence effectively exerted in free political rivalry between unequals than the Fourteenth Amendment enjoins a system of liberty of contract and free competition between unequals in the economy, as the Court thought in the *Lochner* era.[173]

Thus, according to Sunstein and Rawls, what is wrong with *Buckley* is that the Court fails to see that such campaign finance regulations can be justified on the basis of a liberal republican commitment to securing political

---

168. 424 U.S. 1 (1976).

169. 410 U.S. 113 (1973).

170. *Buckley*, 424 U.S. at 48-49.

171. *See* SUNSTEIN, *supra* note 22, at 84-85, 223-24; SUNSTEIN, *supra* note 143, at 94-101; Sunstein, *supra* note 34, at 1576-78; Sunstein, *supra* note 1, at 883-84.

172. *See* SUNSTEIN, *supra* note 22, at 387 n.45 (quoting John Rawls, *The Basic Liberties and Their Priority*, *in* 3 THE TANNER LECTURES ON HUMAN VALUES 1, 76 (Sterling M. McMurrin ed., 1982), *reprinted in* RAWLS, *supra* note 31, at 289, 360-61); Sunstein, *supra* note 34, at 1577 n.206 (also quoting Rawls, *supra*).

173. RAWLS, *supra* note 31, at 362.

equality[174] or the fair value of the equal political liberties.[175] Cases like *Reynolds v. Sims*[176] and *Wesberry v. Sanders*,[177] in affirming the principle of one-person, one-vote, presuppose that the Constitution as a whole guarantees "a political procedure which secures for all citizens a full and equally effective voice in a fair scheme of representation."[178]

For Ely, by contrast, *Buckley* is unrelated to *Lochner* because it does not involve unenumerated substantive fundamental rights. Unlike Sunstein and Rawls, Ely conceives our system as being "programmed, at least roughly, to register the intensities of preference that utilitarianism makes crucial."[179] On his view, what is "questionable" about *Buckley* is that it allows money to distort the reflection of such intensities of preference and thus may thwart realization of Bentham's utilitarian principle of the equal weighting of preferences, namely, "each is to count for one, and none for more than one."[180] This principle itself is a principle of impartiality, Ely's alternative to status quo neutrality.[181]

For Ely, *Roe* is an incarnation of *Lochner* because it involves judicial protection of a substantive fundamental right drawn from the nether world beyond his *Carolene Products* jurisprudence.[182] Ely emphatically rejects

---

174. *See* SUNSTEIN, *supra* note 22, at 137-40, 223-24 (setting forth the commitment to political equality).

175. *See* RAWLS, *supra* note 31, at 5-6, 356-63 (explaining the guarantee of the fair value of the equal political liberties and distinguishing it from formal equality); *see also infra* note 393.

176. 377 U.S. 533 (1964).

177. 376 U.S. 1 (1964).

178. RAWLS, *supra* note 31, at 361, 360-63.

179. Ely, *Judicial Review*, *supra* note 76, at 7. For the contrast between Ely's utilitarian view and the views of Sunstein and Rawls, see *id.*; SUNSTEIN, *supra* note 22, at 162-63; RAWLS, *supra* note 31, at 190, 327-28, 361-62; RAWLS, *supra* note 32, at 361.

180. Ely, *Judicial Review*, *supra* note 76, at 7, 8 (quoting Mill's analysis of Bentham). For discussion of Ely's qualified utilitarianism, see *supra* note 76 and text accompanying notes 76-77. Ely's only reference to *Buckley* in *Democracy and Distrust* is different from the discussion quoted in the text. There he criticized the Court for adopting "a balancing test—albeit an exacting one demanding a 'compelling' state interest—not an approach that absolutely protects all expression that does not fall within some unprotected category." ELY, *supra* note 16, at 234 n.27.

181. *See* ELY, *supra* note 16, at 82-87 (explaining the commitment to equal concern and respect in the design and administration of the political institutions that govern majorities and minorities alike). As H.L.A. Hart has pointed out, Bentham's utilitarian principle of the equal weighting of preferences is "no respecter of persons." HART, *supra* note 76, at 97, 97-99 (citation omitted). That apparent egalitarianism and impartiality is a principal source of the appeal that utilitarianism has had. *See id.* at 97-98; DWORKIN, RIGHTS, *supra* note 21, at 275; DWORKIN, *A Right to Pornography*, *supra* note 76, at 360. But, Hart continues, utilitarianism is "'no respecter of persons' in a sinister as well as a benign sense of that expression." HART, *supra* note 76, at 99. That is, for utilitarianism, "separate individuals are of no intrinsic importance but only important as the points at which fragments of what *is* important, *i.e.*, the total aggregate of pleasure or happiness, are located." H.L.A. HART, *Between Utility and Rights*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 198, 200 (1983). Hence arises Rawls's famous argument that "[u]tilitarianism does not take seriously the distinction between persons." RAWLS, *supra* note 32, at 27.

182. *See* Ely, *supra* note 5, at 933-45. For an account of critiques (such as Ely's) of the right to

substantive due process arguments for a right to abortion, whether framed in terms of liberty, privacy, or autonomy. But he also rejects the argument that women constitute a discrete and insular minority, and therefore does not make an argument for a right to abortion based on equal protection or an anticaste principle.[183]

For Sunstein, by contrast, *Roe* is unrelated to *Lochner* because it does not evince status quo neutrality.[184] Sunstein, like Ely, rejects substantive due process arguments for a right to abortion, whether rooted in privacy, decisional autonomy, or bodily integrity.[185] But Sunstein, unlike Ely, argues for a right to abortion grounded in equal protection and an anticaste principle, contending that abortion restrictions turn a morally irrelevant characteristic, sex (like race), into a systemic source of social disadvantage. On his view, restrictive abortion laws are invalid because they are "an impermissibly selective co-optation of women's bodies," and they "turn women's reproductive capacities into something for the use and control of others."[186] Sunstein defends *Roe* and *Casey* as necessary to secure equal citizenship for women, indeed as tantamount to a *Brown v. Board of Education*[187] for women, not analogous to *Lochner* or, worse yet, *Dred Scott v. Sandford*.[188]

---

privacy and abortion that emphasizes the ghost of *Lochner*, see Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of* Lochner, 61 WASH. L. REV. 293 (1986).

183. *See id.* at 933-35; *see also* ELY, *supra* note 16, at 164-70, 247-49 n.52 (arguing that women are not insular, nor are they a minority).

184. *See* SUNSTEIN, *supra* note 22, at 259-61.

185. *See id.* at 259-61, 270-85. Decisional autonomy and bodily integrity are the two doctrinal strands upon which the joint opinion in *Casey* relied in officially reaffirming the central holding of *Roe*. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2806-08, 2810-11 (1992). The joint opinion notably does not use the word "privacy" to refer to the substantive liberty that is protected by the Due Process Clause, though it does speak of precedents that have "respected the private realm of family life which the state cannot enter." *Id.* at 2807; *see* Linda C. McClain, *The Poverty of Privaey?*, 3 COLUM. J. GENDER & L. 119, 127-33 (1992) (discussing the virtual disappearance of privacy in the joint opinion in *Casey*).

186. SUNSTEIN, *supra* note 22, at 259, 272. Sunstein rightly notes that the joint opinion in *Casey* emphasized issues of sexual equality. *Id.* at 284. And he correctly stresses that Justices Blackmun and Stevens in their separate opinions also emphasized equality. *Id.* His quotation from Justice Stevens, however, omits the crucial passage that shows that Stevens regards liberty and equality as intertwined. Stevens writes: "*Roe* is an integral part of a correct understanding of *both the concept of liberty and* the basic equality of men and women." *Casey*, 112 S. Ct. at 2838 (Stevens, J., concurring in part and dissenting in part) (emphasis added). Sunstein omits the italicized passage. *See infra* note 215 and accompanying text. Sunstein's equality approach to *Roe* and *Casey* is not without problems, but I cannot pursue them here.

187. 347 U.S. 483 (1954).

188. 60 U.S. (19 How.) 393 (1857). *Compare* SUNSTEIN, *supra* note 22, at 260-61 (analogizing *Roe* and *Casey* to *Brown*), *with Casey*, 112 S. Ct. at 2882, 2882-85 (Sealia, J., concurring in the judgment in part and dissenting in part) (asserting that the joint opinion's "description of the place of *Roe* in the social history of the United States is unrecognizable" and drawing analogies between *Roe*, on the one hand, and *Lochner* and *Dred Scott*, on the other).

Thus, Sunstein's liberal republicanism cogently satisfies one line of criticism of Ely's theory by providing a more republican theory. I shall argue, however, that it does not sufficiently satisfy another line of criticism, for it does not offer a significantly more liberal theory than Ely's. I shall also preview constitutional constructivism, a theory that answers both lines of criticism of Ely's theory and is more liberal than Sunstein's theory.

B. Sunstein's Liberal Republicanism: A Flight from Substance?

1. Beyond the False Antithesis of Liberalism and Republicanism.— There is a long-standing conflict in political and constitutional theory between the traditions of republicanism and liberalism. This conflict is encapsulated in Benjamin Constant's famous contrast between, respectively, the tradition associated with Jean-Jacques Rousseau, which gives primacy to the *liberties of the ancients*, such as the equal political liberties and the values of public life, and the tradition associated with John Locke, which gives greater weight to the *liberties of the moderns*, such as liberty of conscience, certain basic rights of the person and of property, and the rule of law.[189] Despite arguments that liberalism triumphed over republicanism at the founding,[190] the conflict has resurfaced periodically in various guises throughout our constitutional history through attempts to recover the communitarian aspirations of the republican tradition and to critique the individualist presuppositions of the liberal tradition.[191]

Yet some political philosophers, including Rawls, and some constitutional theorists, most prominently Sunstein and Frank Michelman, have sought to break the stranglehold of this false antithesis.[192] Sunstein

---

189. RAWLS, *supra* note 31, at 4-5, 299 (referring to Benjamin Constant, Liberty of the Ancients Compared with That of the Moderns, Address Before the Athénée Royal in Paris (1819), *reprinted in* BENJAMIN CONSTANT, POLITICAL WRITINGS 307 (Biancamaria Fontana ed. & trans., 1988)); *see* RAWLS, *supra* note 32, at 201; John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 519 (1980); *see also* STEPHEN HOLMES, BENJAMIN CONSTANT AND THE MAKING OF MODERN LIBERALISM 31-52 (1984) (recounting Constant's distinction between liberties in different social and historical contexts). Locke's most significant work in this respect is JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 2d ed. 1967) (3d ed. 1698), and Rousseau's is JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Roger D. Masters ed. & Judith R. Masters trans., 1978) (1762).

190. *See, e.g.*, LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE *FOR* (1981).

191. *See, e.g.*, J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT (1975); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

192. Roberto Unger has described this conflict, encapsulated in Constant's famous contrast, as "the stranglehold of a false antithesis." ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 41 (1986). For Rawls's attempt to move beyond this impasse, see RAWLS, *supra* note 31, at 5; Rawls, *supra* note 189, at 519; *infra* text accompanying notes 208-09, 349-50. For Michelman's efforts, see Michelman, *Law's Republic*, *supra* note 21, at 1524-32; Michelman, *Traces*, *supra* note 21, at 36-47.

proposes to move beyond the recent revival of classical republicanism, and beyond the clash between certain versions of liberalism and republicanism, to a synthesis, liberal republicanism.[193] He also claims that his synthesis would resolve other familiar tensions in political and constitutional theory, for example, between constitutionalism and democracy and between understandings of liberty and equality.[194]

I shall consider whether Sunstein's liberal republicanism represents an adequate synthesis of these traditions and liberties or instead takes a flight from substance to process—namely, from the substantive liberties of the moderns to the procedural liberties of the ancients.[195] First, I shall defend Sunstein's synthesis against Richard A. Epstein's critique arising from the standpoint of classical liberalism.[196] Second, I shall critique his synthesis from the standpoint of Rawls's own resolution, political constructivism.

2. Epstein's Antithesis: Status Quo Neutrality over Deliberative Democracy.—Epstein argues that Sunstein's liberal republicanism represents an indefensible flight from substance. He contends that "[n]o political theory can concentrate on process and deliberation to the exclusion of substantive concerns," yet Sunstein's theory tries to do precisely that.[197] At first glance, Epstein's critique of Sunstein looks like Tribe's, Dworkin's, and Sunstein's critiques of Ely. On careful examination, however, it proves to be quite different, amounting to nothing more than an emphatic argument that the antithesis between liberalism and republicanism is real, and that in this clash classical liberalism should totally vanquish republicanism. In Sunstein's terms, Epstein basically argues that status quo neutrality should prevail over and constrain deliberative democracy.

What is Sunstein's supposed flight from substance? Epstein contends that Sunstein flees both the substance of republicanism and the substance of liberalism. First, he argues that Sunstein embraces the procedural and

---

193. *See* SUNSTEIN, *supra* note 22, at 373 n.18, 133-41 (stating that "it appears that the often-drawn opposition between liberalism and republicanism is, in the American tradition, a large mistake" and outlining the principles of a synthesis, liberal republicanism or deliberative democracy); Sunstein, *supra* note 34, at 1567, 1566-71 (criticizing scholars who have posited an "opposition between liberal and republican thought" as stemming from a "caricature" of the liberal tradition).

194. SUNSTEIN, *supra* note 22, at 142; *see supra* note 35.

195. *Cf.* Michael Walzer, *Flight from Philosophy*, N.Y. REV. BOOKS, Feb. 2, 1989, at 42-43 (reviewing BENJAMIN BARBER, THE CONQUEST OF POLITICS: LIBERAL PHILOSOPHY IN DEMOCRATIC TIMES (1989), a book by a prominent civic republican and proponent of "strong democracy") (critiquing Barber's argument that politics should be free of philosophy). *But see* Michael Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379 (1981) (criticizing invocation of philosophy in constitutional theory).

196. *See* Richard A. Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 YALE L.J. 1633 (1988) (critiquing both Sunstein, *supra* note 34, and Michelman, *Law's Republic*, *supra* note 21).

197. Epstein, *supra* note 196, at 1633.

deliberative elements of classical republicanism while fleeing its substantive components, for example, by disavowing its militarist, elitist, sexist, racist, and religious sentiments.[198] As a result, he suggests, Sunstein's theory is selective, seductive, and incoherent.[199] But traditions of political and constitutional theory are not all-or-nothing packages of ideas that one must accept or reject as a unit, and there is hardly anything more commonplace in the history of ideas than attempting to synthesize elements of more than one tradition while rejecting other elements.[200] Sunstein's flight from objectionable substantive components of classical republicanism does not render his project incoherent or doomed to fail.

Second, Epstein contends that Sunstein flees the substantive concerns of classical liberalism and thereby fails to respond to the major challenge of modern constitutional law: "the development of a substantive theory which demarcates the zone of collective legislative control from the zone of entrenched individual rights."[201] Epstein himself answers this challenge with a putatively Lockean theory of limited governmental powers and entrenched individual rights.[202] That is, he defends a strong version of precisely the sort of liberalism that is said fundamentally to oppose republicanism.[203] Epstein would flee from the deliberation and process of Sunstein's liberal republicanism to the substance of classical liberalism.[204] He would constrain deliberative democracy with a "natural" or "prepolitical" conception of status quo neutrality of the very sort that Sunstein is at pains to throw off.

Thus, unlike Rawls and Sunstein, who perceive the clash between liberalism and republicanism as a false opposition to be transcended through a synthesis, Epstein perceives that clash as a real opposition to be resolved through a total victory of classical liberalism over republicanism. But to charge, as Epstein does, that Sunstein's liberal republicanism flees from certain substantive concerns of classical liberalism is to comprehend that

---

198. *Id.* at 1634-36.

199. *Id.* at 1636.

200. *See, e.g.*, 1 ACKERMAN, *supra* note 21, at 303, 302-03 (stating that the "Founders' genius" resided in the way that they artfully recombined received ideas and practices into new constitutional patterns); THE FEDERALIST No. 10, *supra* note 48, at 81-84 (James Madison) (reworking Montesquieu's theory of republics); *id.* No. 14, at 104, 102-04 (James Madison) (defending the "experiment of an extended republic"); SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT (1960). Ely has attempted to formulate a theory that is compatible with several traditions of political thought. *See supra* text accompanying note 78.

201. Epstein, *supra* note 196, at 1634.

202. *Id.* at 1635, 1649-50; *see also* EPSTEIN, *supra* note 4, at 11-18 (advancing a Lockean theory in the context of the Takings Clause).

203. Sunstein would reject this antithesis. *See supra* note 193.

204. *Cf.* 1 ACKERMAN, *supra* note 21, at 11 (criticizing Epstein as a conservative "rights foundationalist").

Sunstein rejects substantive political theories such as Epstein's and aims to synthesize liberalism and republicanism in the aftermath of the New Deal and the rise of the welfare state. That charge does not derail Sunstein's project.

There is nothing objectionable in Sunstein's rejection of Epstein's substantive political theory.[205] We should flee the substance of Epstein's theory, with its scheme of limited governmental powers over the economy and its zone of entrenched economic liberties, for it would unduly constrain deliberative democracy. Sunstein's theory gives adequate protection to property and liberty of contract; there is no justification for heightened judicial protection of such economic liberties at the present time.[206] Epstein's theory is the very incarnation of status quo neutrality; indeed, it is *Lochner*'s revenge on constitutional theory since *West Coast Hotel* and the New Deal.[207]

3. A Rawlsian Synthesis: Deliberative Autonomy Along with Deliberative Democracy.—Nonetheless, Sunstein's liberal republicanism does take a different, objectionable flight from substance—namely, a flight from judicial protection of such substantive liberties as liberty of conscience, freedom of association, privacy, and autonomy, which I shall unify around a theme of securing deliberative autonomy. Rawls's resolution of the conflict between liberalism and republicanism through political constructivism would not take a flight from process to substance that would unduly constrict the procedural liberties of the ancients (as Epstein does). Nor would it take a flight from substance to process that would not fully account for the substantive liberties of the moderns (as Sunstein does).

Like Sunstein's theory, Rawls's theory addresses the impasse thrown up by the conflict between the traditions of the liberties of the ancients and of the liberties of the moderns and between understandings of equality and liberty.[208] Rawls tries to dispel that conflict and to reconcile equality and liberty by combining the liberties of both traditions in one coherent scheme

---

205. In this Article, I cannot undertake a full critique of Epstein's theory. (I have mentioned it mainly because Epstein has sounded the charge that Sunstein's theory represents a flight from substance to process.) Suffice it to say that I agree with Sunstein's critique of Epstein's theory. *See* SUNSTEIN, *supra* note 22, at 296-98. In a general way, much of Sunstein's critique of status quo neutrality applies to Epstein's theory. For additional critiques of Epstein, see Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21 (1986); Jeremy Paul, *Searching for the Status Quo*, 7 CARDOZO L. REV. 743 (1986) (reviewing EPSTEIN, *supra* note 4). *See generally* Symposium, *Richard Epstein's* Takings: Private Property and the Power of Eminent Domain, 41 U. MIAMI L. REV. 1 (1986).

206. *See* SUNSTEIN, *supra* note 22, at 143.

207. *See* EPSTEIN, *supra* note 4, at 306-30 (arguing that much of the New Deal and the modern welfare state is unconstitutional); *supra* text accompanying notes 2-4.

208. *See supra* notes 189, 192.

of equal basic liberties that is grounded on a conception of citizens as free and equal persons.[209]

In Part IV, I outline a constitutional constructivism by analogy to Rawls's political constructivism. For now, the main idea to note is that constitutional constructivism has two fundamental themes, which correspond roughly to the liberties of the ancients and the liberties of the moderns, respectively. First, a republican theme secures the preconditions for *deliberative democracy*, to enable citizens to apply their capacity for a conception of justice to deliberating about the justice of basic institutions and social policies. Second, a liberal theme secures the preconditions for *deliberative autonomy*, to enable citizens to apply their capacity for a conception of the good to deliberating about how to live their own lives. Together, these two themes afford everyone the common and guaranteed status of free and equal citizenship in our constitutional democracy.[210]

To put the idea schematically, in the synthesis of republicanism and liberalism, each tradition has a principal theme. Furthermore, both themes correspond to aspects of self-government: political self-government and personal self-government (or self-determination). While this formulation may seem overly schematic or dichotomous, and may appear to deny that democracy and autonomy are complementary aspects of one unified vision,

---

209. *See infra* text accompanying note 382. Rawls contends that his political liberalism or political constructivism is compatible with "classical republicanism" or "civic republicanism." *See* RAWLS, *supra* note 31, at 205-06. He maintains, however, that it is not compatible with "civic humanism" as a form of Aristotelianism that sees taking part in democratic politics "as the privileged locus of the good life." *Id.* at 206. Such a strong form of republicanism gives primacy to the liberties of the ancients rather than resolving the impasse between those liberties and the liberties of the moderns. *See id.* at 5, 206.

210. For a fuller statement of these two themes, see *infra* section IV(A)(4). I refer to the first theme as that of securing the preconditions for deliberative democracy, to emphasize its similarity to Sunstein's principal theme. Sunstein has done an excellent job of elaborating that theme. But he does not develop a counterpart to the second theme of seeuring the preconditions for deliberative autonomy. *See infra* section III(B)(4). Rawls also speaks of "deliberative democracy" as an aspect of constitutional democracy. *See* Rawls, *supra* note 35, § 43; *see also* RAWLS, *supra* note 31, at 214 n.3 (speaking of "deliberative democracy" as an aspect of political liberalism).

I refer to the second theme as that of securing the preconditions for deliberative autonomy for three reasons: first, Rawls refers to the second moral power, the capacity for a conception of the good, as the power of deliberative reason, *see infra* text accompanying note 395; second, Justice Stevens refers to "decisional autonomy" in terms of "deliberations" about important decisions concerning how to live one's life, *see infra* text accompanying notes 212-15; and third, this theme relates to deliberation concerning fundamental decisions affecting one's identity and destiny, not merely the pursuit of gratification of preferences or desires. Deliberative autonomy is not a conception of liberty as license. *See infra* text accompanying note 334. This second theme is concerned with securing the preconditions for the development and exercise of persons' capacity for a conception of the good. It reflects a general assumption about this capacity, and it does not call for or require an inquiry into the actual deliberations, responsibility, and judgment of specific individuals in their particular exercises of this capacity. *See* MACEDO, *supra* note 21, at 32-33. For an analysis of charges that such rights license irresponsibility, see Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. (forthcoming Mar. 1994).

it has the virtue of emphasizing that an adequate unified account requires two themes.[211]

Constitutional constructivism's first theme, securing deliberative democracy, protects such basic rights as the equal political liberties and freedom of thought. Its second theme, securing deliberative autonomy, protects such basic rights as liberty of conscience and freedom of association, including decisional autonomy and freedom of intimate association.

Familiar understandings of deliberative autonomy are illustrated by Justice Stevens's and Justice Blackmun's dissents in *Bowers*. For example, Justice Stevens writes that the Court's "privacy" decisions have been animated by fundamental concerns for "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny" and "the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable."[212] Similarly, Justice Blackmun characterizes this liberty in terms of "freedom of intimate association" and a right to "decisional privacy" along with "spatial privacy."[213]

Similar conceptions of deliberative autonomy are present in *Casey*, not only in the opinions of Justices Stevens and Blackmun but also in the joint opinion of Justices O'Connor, Kennedy, and Souter. As Stevens puts it, "Decisional autonomy must limit the State's power to inject into a woman's most personal *deliberations* its own views of what is best because a woman's decision to terminate her pregnancy is nothing less than a matter of conscience."[214] He emphasizes liberty of conscience and decisional

---

211. By putting these two themes so schematically, I do not mean to imply that the realms of political self-government and personal self-government (or self-determination) are entirely distinct. To the contrary, for active, responsible citizens, deliberation concerning the common good in the political realm may be an important aspect of their pursuit of their conception of the good or of how to lead their own lives. *See* RAWLS, *supra* note 31, at 206. More fundamentally, as Frank Michelman has cogently emphasized, democracy and autonomy are complementary aspects of one unified vision that coexist in a dialectical relation of mutuality, reciprocity, and entailment. *See* Michelman, *Law's Republic*, *supra* note 21, at 1524-37; Frank Michelman, *~~Private~~ Personal but Not Split: Radin Versus Rorty*, 63 S. CAL. L. REV. 1783, 1790 (1990).

212. Bowers v. Hardwick, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting) (quoting Fitzgerald v. Porter Mem. Hosp., 523 F.2d 716, 719-20 (7th Cir. 1975) (Steven, J.), *cert. denied*, 425 U.S. 916 (1976)). Justice Stevens's dissent also illustrates how evolving notions of "ordered liberty" offer a standpoint for criticism of historical practices, and how principles of equality guide us in concluding that minorities should not be deprived of such liberty. *Id.* at 218-19.

213. *Id.* at 205 (Blackmun, J., dissenting).

214. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2840 (1992) (Stevens, J., concurring in part and dissenting in part) (empbasis added); *see also* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 340-45 (1990) (Stevens, J., dissenting) (arguing that choices about death are a matter of individual conscience). Despite Justice Stevens's broad view of liberty of conscience, he joined in Justice Scalia's opinion of the Court in Employment Division, Department of Human Resourees v. Smith, 494 U.S. 872 (1990) (rejecting the argument that the Free Exercise Clause of the First Amendment required an exemption from a general criminal prohibition on the use of peyote to allow ceremonial use of peyote by members of the Native American Church).

autonomy as well as equal dignity and respect for women and men.[215] Likewise, Justice Blackmun's opinion in *Casey* emphasizes that cases protecting the fundamental right of privacy embody "the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government."[216] He, too, stresses self-determination along with gender equality.[217] Similarly, the joint opinion in *Casey* speaks of a woman's liberty at stake in the decision whether to have an abortion as

> involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . . At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[218]

Like the opinions of Stevens and Blackmun, the joint opinion illustrates a complex intertwining of liberty and equality in its justification of the right to decide whether to have an abortion.[219]

Constructivism's second theme of securing deliberative autonomy articulates and unifies such concerns for liberty of conscience, decisional autonomy, privacy, and freedom of intimate association. Furthermore, that theme fits well with the substantive due process cases that reflect an antitotalitarian principle of liberty, to be discussed below.[220] Finally, it embodies intertwined concerns for liberty and equality in one coherent scheme.

---

215. In his opinion in *Casey*, Justice Stevens intertwines liberty arguments and equality arguments. For example, he writes that "*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women," *Casey*, 112 S. Ct. at 2838 (Stevens, J., concurring in part and dissenting in part), and that "[p]art of the constitutional liberty to choose is the equal dignity to which each of us is entitled." *Id.* at 2842. He also emphasizes the notion of "equal respect." *Id.*; *see supra* note 186. For an analysis of Stevens's idea of decisional autonomy in terms of "deliberative autonomy," see Jane M. Cohen, *A Jurisprudence of Doubt: Deliberative Autonomy and Abortion*, 3 COLUM. J. GENDER & L. 175 (1992).

Rawls only briefly discusses abortion, mentioning it in a footnote. *See* RAWLS, *supra* note 31, at 243 n.32. There he identifies three important political values at issue in the question of abortion: the equality of women as equal citizens, the ordered reproduction of political society over time, and due respect for human life. He states that he believes that "any reasonable balance of these three values will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester." *Id.* He acknowledges that a reasonable balance may allow a woman such a right beyond this, but does not discuss the question in general. *Id.*

216. *Casey*, 112 S. Ct. at 2846 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

217. *Id.* at 2846-47.

218. *Id.* at 2807 (joint opinion); *cf.* Lee v. Weisman, 112 S. Ct. 2649, 2658 (1992) (affirming that the First Amendment protects freedom of conscience).

219. *See Casey*, 112 S. Ct. at 2809, 2812, 2831 (joint opinion).

220. *See infra* text accompanying notes 229-37.

4. Sunstein's Synthesis: Deliberative Democracy to the Neglect of Deliberative Autonomy.—Sunstein likens his synthesis, liberal republicanism, to Rawls's theory.[221] Moreover, he claims that his theory of deliberative democracy is entirely compatible with the theories of constitutional democracy defended by Mill and Rawls.[222] Sunstein's principal theme of securing the preconditions for deliberative democracy is indeed largely compatible with constructivism's first theme.[223] But his theory lacks a principal theme of securing the preconditions for deliberative autonomy corresponding to constructivism's second theme. Indeed, he is remarkably silent concerning certain substantive liberties such as liberty of conscience, privacy, autonomy, and freedom of association. To the extent that he addresses them, he tries conclusorily (and unconvincingly) to recast them as preconditions for deliberative democracy. Constitutional constructivism better fits and justifies these substantive liberties, which are manifested on the face of our constitutional document and implicit in our underlying constitutional order, than does Sunstein's theory.

For example, in his presentation of the four core commitments of deliberative democracy, Sunstein makes no reference whatever to liberty of conscience or religious liberty.[224] To be sure, in *Beyond the Republican Revival*, he states that "liberty of expression and conscience and the right to vote . . . are the basic preconditions for republican deliberation," citing Rawls.[225] But he does not justify this conclusory statement, nor does he elaborate the relationship between liberty of conscience and republican deliberation.

Sunstein explains that the exclusion of religion from politics is a precondition for republican deliberation in an "ironic sense": "[R]emoval of religion from the political agenda protects republican politics by ensuring against stalemate and factionalism."[226] Here Sunstein analyzes

---

221. *See* SUNSTEIN, *supra* note 22, at 141, 373 n.18; Sunstein, *supra* note 34, at 1566-71.

222. *See* SUNSTEIN, *supra* note 22, at 141, 175, 186; *see also* Sunstein, *supra* note 34, at 1567 (noting affinities between his synthesis, liberal republicanism, and Rawls's integration of the liberal tradition and republican thought).

223. *See* Rawls, *supra* note 35, § 43 (discussing deliberative democracy as an aspect of constitutional democracy and referring favorably to Sunstein's treatment of deliberative political discussion in Sunstein, *supra* note 34).

224. *See* SUNSTEIN, *supra* note 22, at 133-41. Sunstein acknowledges that his failure to say more about the "constitutionally central issue of religion" is a "significant gap" in *The Partial Constitution*. Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 TEX. L. REV. 305, 311 n.29 (1993).

225. Sunstein, *supra* note 34, at 1551 (citing RAWLS, *supra* note 32, at 205-21). Pages 1547-58 of that article are the basis for the statement of the four core commitments at pages 133-41 of *The Partial Constitution*, but in the book Sunstein omits the passage from the article that is quoted in the text.

226. *Id.* at 1555 n.85. He further states that this exclusion of religion from politics has also been based "on the notion that religious conviction is a matter of private right." *Id.*

religious liberty in terms of a "gag rule" to remove divisive, factional issues from the political agenda so that republican deliberation can go on.[227] He does not treat religious liberty and liberty of conscience as shields to protect citizens against oppressive republican deliberators wielding coercive political power in enforcing the republic's collective judgments concerning the good. Hence, he recognizes the potential divisiveness of protecting religious liberty, which results in citizens holding divergent conceptions of the good, but he ignores the potential oppressiveness of not protecting it.[228]

Sunstein's liberal republican theory also gives remarkably little attention to principles of liberty, privacy, or autonomy that have been vindicated through substantive due process cases from *Meyer v. Nebraska* and *Pierce v. Society of Sisters* to the present.[229] These landmark cases, however controversial, reflect fundamental principles of our underlying constitutional order. Any constitutional theory, to be persuasive, must account for them and for the principles that they embody. Yet Sunstein does not consider whether these cases from the *Lochner* era, not to mention their progeny—including *Griswold*,[230] *Loving*,[231] *Roe*,[232] *Moore*,[233]

---

227. *Id.* (citing Stephen Holmes, *Gag Rules or the Politics of Omission*, *in* CONSTITUTIONALISM AND DEMOCRACY, *supra* note 35, at 19).

228. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640-42 (1943) (recognizing the potential for oppression through any coercion of belief). Rawls recognizes both aspects of religious liberty. *See* RAWLS, *supra* note 31, at 36-38, 134-40, 151-54; RAWLS, *supra* note 32, at 205-21.

229. Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923) ("[T]he ideas touching the relation between individual and state [in ancient Sparta and Plato's ideal commonwealth, which 'submerge the individual and develop ideal citizens'] were wholly different from those upon which our institutions rest."); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) ("The fundamental theory upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state.").

Sunstein's only reference to autonomy in his presentation of the four core commitments of deliberative democracy is a reference to "a sphere of autonomy into which the state may not enter" that is created by the Fourth Amendment's prohibition of unreasonable searches and seizures. SUNSTEIN, *supra* note 22, at 136. Clearly, he is referring to "spatial privacy" as distinguished from "decisional privacy" or decisional autonomy. Furthermore, as stated above, Sunstein is critical of both of the doctrinal strands upon which the joint opinion in *Casey* relied in reaffirming the right of a woman to decide whether to have an abortion, that is, decisional autonomy and bodily integrity. Instead, he would base that right on equal protection grounds. *See supra* text accompanying notes 184-88.

230. Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a Connecticut statute that criminalized the use of contraceptives by married persons violated the right of privacy created by several fundamental constitutional guarantees).

231. Loving v. Virginia, 388 U.S. 1 (1967) (holding that a Virginia statute preventing interracial marriage violated both the Equal Protection and Due Process Clauses). The casebook of which Sunstein is a co-author reprints, in the section on equal protection, the portion of Chief Justice Warren's opinion that holds that the miscegenation statute denied the Lovings equal protection but omits the portion that holds that the statute also deprived them of liberty without due process of law. *Id.* at 12; *see* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 605-06 (2d ed. 1991).

232. Roe v. Wade, 410 U.S. 113 (1973) (holding that a Texas statute criminalizing abortions except those performed "for the purpose of saving the life of the mother" violated the right of privacy protected by the Due Process Clause).

233. Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (holding that a city ordinance limiting

and *Casey*[234]—evince status quo neutrality or, to the contrary, stem from an alternative baseline in liberty.[235] Jed Rubenfeld has argued persuasively that such cases reflect the latter, an antitotalitarian principle of privacy: they are concerned with the danger of "creeping totalitarianism, an unarmed *occupation* of individuals' lives."[236] In constitutional constructivism, a similar antitotalitarian principle of liberty, privacy, or autonomy parallels Sunstein's anticaste principle of equality. Moreover, all of these cases are justifiable on the basis of a constructivist principle of deliberative autonomy, or a conception of liberty and personhood, that constrains the republic's enforcement of its collective judgments concerning the good. Instead of developing an antitotalitarian principle of liberty as a precondition for deliberative autonomy, Sunstein neglects cases like *Meyer*, *Pierce*, *Griswold*, *Loving*, and *Moore*, while justifying cases like *Roe* and *Casey* on the basis of an anticaste principle of equality as a precondition for deliberative democracy.[237]

Despite his neglect of liberty of conscience, privacy, and autonomy, Sunstein does state that "no democracy should impose on citizens a particular or unitary conception of what their lives ought to be like."[238] His theory, however, does not provide or entail any limits on deliberative

---

occupancy of a dwelling unit to members of a single family, and narrowly defining "family" to exclude certain extended family arrangements, violated the Due Process Clause).

234. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (reaffirming the "central holding" of *Roe*, that the Due Process Clause protects the right of a woman to decide whether to terminate a pregnancy, but upholding certain aspects of Pennsylvania's abortion law while invalidating the spousal notification provision).

235. *But see* Sunstein, *supra* note 29, at 1172, 1173 (acknowledging that "tradition is sometimes treated as aspirational" and discussing the "references to tradition" in *Griswold*).

236. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989) (emphasis in original). For example, Rubenfeld emphasizes the profound sense in which laws restricting abortion reduce women to "mere instrumentalities of the state," and "take diverse women with every variety of career, life-plan, and so on, and make mothers of them all." *Id.* at 790, 788; *see also* TRIBE, *supra* note 47, at 104 (approvingly quoting Rubenfeld's analysis); *id.* at 92, 93 (characterizing *Meyer* and *Pierce* as "bulwarks in our legal system" and as ancestors of the right of women "not to be made mothers against their will"); TRIBE, *supra* note 4, at 1302-21, 1337-62 (discussing the parameters of the rights of privacy and personhood and the court decisions that have developed them).

I refer to the right of privacy or autonomy as an "antitotalitarian principle of liberty" to suggest a parallel with Sunstein's anticaste principle of equality. (I use the term "totalitarian" in Rubenfeld's sense, not the stronger sense applied to Nazi Germany or the Communist Soviet Union.) Such an antitotalitarian principle of liberty is intertwined with an anticaste principle of gender equality. For example, Justice Blackmun's opinion in *Casey* observes that "[b]y restricting the right to terminate pregnancies, the State conscripts women's bodies in its service" and proceeds to cite both the article on privacy by Rubenfeld, *id.*, and an article on equality by Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 31-44 (1992), as among the commentaries recognizing the gender equality issues present in the context of abortion. *Casey*, 112 S. Ct. at 2846, 2847 n.4 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

237. *See supra* text accompanying notes 184-88.

238. SUNSTEIN, *supra* note 22, at 185-86.

democracy that would protect citizens against the republic's doing so and thus encroaching on deliberative autonomy. He claims that the rights that are preconditions for deliberative democracy impose constraints on collective judgments, adding that "other rights fundamental to individual autonomy or welfare—such as consensual intimate sexual activity—ought generally to be off-limits to government."[239] Yet he offers this statement almost as a throwaway line. He does not articulate any reason why such activity should be off limits to government, for example, because this sort of individual autonomy or welfare is a precondition for deliberative autonomy or even for deliberative democracy.

At this point in his argument, Sunstein conclusorily states that "the notions of autonomy and welfare would be defined by reference to the ideal of free and equal persons acting as citizens in setting up the terms of democratic life," echoing Rawls's idea that basic liberties are grounded on a conception of citizens as free and equal persons.[240] Prior to this point, though, Sunstein has not grounded his theory of deliberative democracy on such a conception of the person. Furthermore, he does not proceed to develop this sort of a conception. But Sunstein's reference to Rawls's theory suggests what is needed in his own theory: namely, a theme of securing deliberative autonomy that, together with his theme of securing deliberative democracy, is grounded on a conception of citizens as free and equal persons. The former theme would protect citizens' pursuit of their divergent conceptions of the good from coercive political power, even that of a well-functioning deliberative democracy. The constitutional constructivism that I outline in Part IV includes these two themes and is based on a conception of citizens as free and equal persons.[241]

Ironically, my Rawlsian critique of Sunstein in this respect amounts to a charge that Sunstein's republican theory presupposes too thin a conception of the person. This critique is ironic because some political theorists who are celebrated by republicans, such as Michael J. Sandel, have argued that Rawls's theory reflects an impoverished conception of the person as an "unencumbered self."[242] Such criticisms of Rawls's theory are not

---

239. *Id.* at 184.

240. *Id.* at 186. For a discussion of Rawls's conception of citizens as free and equal persons, see *infra* text accompanying notes 382-90.

241. Sunstein's relative inattention to deliberative autonomy suggests that he underestimates the extent to which many real, intractable battles in our constitutional democracy at the present time involve not only the problem of partisanship versus neutrality, but also the clash between divergent conceptions of the good (involving competing claims concerning who we as a people are and what our values are—claims that are couched in terms of a cultural war of us versus them). One need only mention the 1992 Republican National Convention to illustrate this clash. *See* Chris Black, *Buchanan Beckons Conservatives to Come "Home,"* BOSTON GLOBE, Aug. 18, 1992, at 12 (reporting Pat Buchanan's declaration of "cultural war" at the Republican National Convention).

242. *See* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 21 (1982); Michael J.

well founded, but that is a topic for another article.[243]

In sum, Sunstein's elaboration of the preconditions for deliberative democracy includes several references to substantive liberties of the moderns such as religious liberty, liberty of conscience, freedom of intimate association, and autonomy. But he does not elaborate the role or significance of these liberties in relation to securing the preconditions for deliberative democracy, much less develop a principal theme of securing the preconditions for deliberative autonomy. Nor does he adequately ground either deliberative democracy or deliberative autonomy on a conception of citizens as free and equal persons.

Moreover, the architecture of Sunstein's theory forces or leads him to recast, as preconditions for deliberative democracy, certain substantive liberties that are better understood as preconditions for deliberative autonomy. Worse yet, his theory ignores such liberties. In this sense, Sunstein's liberal republicanism, somewhat like Ely's qualified utilitarianism, represents a flight from giving effect to substantive liberties to perfecting processes.

C. *Sunstein's Flight from Substantive Due Process to Equal Protection*

1. Bowers*: The New* West Coast Hotel *or the New* Lochner*?*—To illustrate what is at stake in Sunstein's emphasis on deliberative democracy to the neglect of deliberative autonomy, I shall explore his conception of the relationship between due process and equal protection in general, and how that understanding shapes his analysis of *Bowers v. Hardwick*[244] in particular. (I put to one side the question of whether the Privileges or Immunities Clause provides a firmer ground for protecting substantive

---

Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 85-87 (1984). Sandel's critique of Rawls has been invoked by scholars who are sympathetic with republicanism and critical of liberalism. *See, e.g.*, MARK TUSHNET, RED, WHITE, AND BLUE 317 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 545 (1986); *cf.* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 191 n.4 (1991) (drawing upon Sandel's claim that liberalism neglects the "situated" or "encumbered" self in advancing a communitarian critique of the alleged liberal conception of the person as a "lone rights-bearer").

243. Many scholars have defended Rawls's liberal theory against Sandel's communitarian critique. *See, e.g.*, WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 47-73 (1989); CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 118-30 (1987); Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985); *see also* RAWLS, *supra* note 31, at 10, 27 n.29, 97; John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985) (both explaining that his conception of the person is political, not metaphysical). For defenses of Rawls's theory in the context of feminist criticisms of liberalism that have invoked Sandel's critique, see Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1204-06 (1992); Susan M. Okin, *Reason and Feeling in Thinking About Justice*, 99 ETHICS 229, 246-49 (1989).

244. 478 U.S. 186 (1986).

liberties than the Due Process Clause.[245]) My critique of Sunstein's theory in this respect shows that a theme of securing deliberative autonomy, along with a theme of securing deliberative democracy, is necessary to secure the basic liberties essential to free and equal citizenship for everyone in our constitutional democracy. I suggest that Sunstein, like Ely, flees substantive due process for equal protection.

In *Bowers v. Hardwick*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment does not protect a fundamental right to engage in homosexual sodomy.[246] Writing for the Court, Justice White acknowledged that many cases have interpreted that clause to protect not only procedural rights but also substantive rights that "have little or no textual support in the constitutional language," including substantive rights to heterosexual intimate association.[247] But Justice White expressed wariness, fearing that the ghost of *Lochner* was incarnate in those decisions.[248] The opinion stated that heightened judicial protection under the Due Process Clause has been limited to those fundamental rights that are

---

245. *See, e.g.*, RICHARDS, CONSCIENCE, *supra* note 21, at 199-232 (arguing that the Privileges or Immunities Clause, not the Due Process Clause, expressed the nationalization of human rights); TRIBE, *supra* note 4, § 7-4 (acknowledging that the Privileges or Immunities Clause has been historically eclipsed by the Due Process and Equal Protection Clauses, but suggesting that it is potentially robust as a basis for vindicating personal rights); *see also* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 925-28 (1986) (arguing that the privileges and immunities of citizenship comprehended by the Fourteenth Amendment provide a principled basis for protecting rights that are essential to the enjoyment of life, liberty, and property).

246. *Bowers*, 478 U.S. at 186. Accordingly, the Court upheld Georgia's statute that prohibited sodomy, as applied to consensual homosexual sodomy. The decision was by a narrow 5-4 majority. As is well known, Justice Powell, who voted with the majority, subsequently stated publicly that he "probably made a mistake" by doing so. *See* Linda Greenhouse, *When Second Thoughts in Case Come Too Late*, N.Y. TIMES, Nov. 5, 1990, at A14. Justice White, who wrote the majority opinion, has retired from the Court and has been replaced by Justice Ginsburg. *See supra* note 13. Ginsburg, while a judge on the Court of Appeals for the District of Columbia Cireuit, voted with the en banc majority to deny a rehearing in a 1984 case that rejected a discharged homosexual sailor's argument that the military's ban on homosexuals violated his constitutional right to privacy and denied him equal protection. *See* Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984) (en banc). She wrote separately from Judge Robert Bork's more conservative opinion, stating simply: "I am of the view that the Supreme Court's disposition in *Doe* [*v. Commonwealth's Attorney*, 425 U.S. 901 (1976),] controls our judgment in this case . . . ." *Dronenburg*, 746 F.2d at 1582. (*Doe*, in a one-line decision without opinion, had summarily affirmed the decision of a three-judge federal district court upholding a Virginia law that made it a crime, even for consenting adults acting in private, to engage in homosexual relations. *Doe*, 425 U.S. at 901, *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975).) Nonetheless, some observers have predicted that Ginsburg might vote to overrule *Bowers*. Senator Jesse Helms of North Carolina, one of only three senators to vote against her confirmation to the Supreme Court, justified his vote in part by saying that she "is likely to uphold the homosexual agenda." Linda Greenhouse, *Senate, 96-3, Easily Affirms Judge Ginsburg as a Justice*, N.Y. TIMES, Aug. 4, 1993, at B8.

247. *Bowers*, 478 U.S. at 191.

248. *See id.* at 194-95.

"implicit in the concept of ordered liberty"[249] or "deeply rooted in this Nation's history and tradition."[250] Although it said that these two formulations were different descriptions, it treated them as if they were the same.

Applying an understanding of substantive due process as basically confined to protecting traditions conceived as *historical practices*, White's opinion rudely concluded that the claim that the Due Process Clause protects a fundamental right of homosexuals to engage in acts of consensual sodomy "is, at best, facetious."[251] The opinion ignored the fact that the claim instead was being made in all earnestness on the basis of an understanding of substantive due process as extending to protecting traditions and a scheme of ordered liberty conceived as *aspirational principles*. Below, I explain this contrast between two basic understandings of what a tradition is and of what due process requires.

Bowers is an emblematic, defining case.[252] Some decry it as marking a second death of substantive due process, at any rate as a principled doctrine of constitutional law applicable to all citizens.[253] Others, including Justice Scalia and Judge Bork, celebrate it as signaling a restoration of legitimacy in constitutional law.[254] Both reactions suggest an analogy between *Bowers* and the watershed case of *West Coast Hotel v. Parrish*,[255] which officially repudiated the era of *Lochner*. But *Bowers*, unlike *West Coast Hotel*, did not overrule substantive due process precedents. Rather, it refused to extend those precedents from protecting heterosexual intimate association to protecting homosexual intimate association.[256]

---

249. *Id.* at 191 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.)).

250. *Id.* at 192 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion)).

251. *Id.* at 194.

252. *Cf.* Sunstein, *supra* note 1, at 873 (giving *Lochner* and *Brown* as examples of "defining cases").

253. *See, e.g.*, Conkle, *supra* note 10, at 242; *cf.* TRIBE & DORF, *supra* note 21, at 55-60, 74-79, 116-17 (reading *Bowers* as a retreat from the right to privacy); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (arguing that laws that condemn homosexual behavior, such as the law upheld in *Bowers*, violate constitutional norms of gender equality); Michelman, *Law's Republic*, *supra* note 21, at 1532-37 (advancing a republican critique of *Bowers* that emphasizes the link between privacy and citizenship); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1475-76 (1992) (contending that statutes outlawing homosexual sodomy violate the right to be free from state-legitimized homophobic violence and that such violence inflicts cruel and unusual punishment upon the bodies of homosexuals).

254. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality opinion); BORK, *supra* note 5, at 116-26.

255. 300 U.S. 379 (1937); *see supra* text accompanying notes 2-4.

256. Perhaps a more apt analogy is between *Bowers* and San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). The latter case curbed the expansion of both the fundamental rights and the suspect classification branches of equal protection analysis, proclaiming that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Id.* at 33. Just as *Rodriguez* takes a "this far and no further" approach to "substantive equal protection," so *Bowers* takes such an approach to substantive due process. To the

Sunstein's analysis, however, suggests that *Bowers*, far from signaling the end of Lochnering, is analogous to *Lochner* itself and indeed to *Plessy v. Ferguson*.[257] For *Bowers*, like those egregious precedents, evinced status quo neutrality. The Court simply pointed to historical practices, common law, and statutes condemning sodomy (whether heterosexual or homosexual) to justify refusing to recognize the asserted right of homosexual intimate association.[258] Sunstein argues that the Due Process Clause is backward-looking: It is grounded in a principle of status quo neutrality that operates largely as a baseline for protecting historical practices against ill-considered or short-term departures.[259] From that standpoint, he suggests that the decision in *Bowers* as a matter of due process is not altogether surprising, even if it is unprincipled in relation to precedents protecting heterosexual intimate association.[260]

Sunstein contends that the Equal Protection Clause, by contrast, is forward-looking: It is grounded in a principle of equality that operates largely as a baseline for criticizing historical practices that deny equality, protecting against such practices, however long-standing and deeply rooted. Equal protection is largely an anticaste principle, criticizing historical practices that manifest second-class citizenship, whether founded on racism, sexism, or heterosexism.[261] From that standpoint, laws of the sort upheld in *Bowers* on due process grounds nevertheless should be struck down on

---

extent that *Casey* rests upon a commitment to stare decisis, rather than a commitment to substantive liberty itself, that case, too, may prove to be somewhat analogous to *Rodriguez*. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808-16 (1992) (joint opinion).

257. For the analogy between *Bowers* and Plessy v. Ferguson, 163 U.S. 537 (1896), see Sunstein, *supra* note 29, at 1162 (quoting Watkins v. United States Army, 847 F.2d 1329, 1358 (9th Cir. 1988) (Reinhardt, J., dissenting), *withdrawn but aff'd*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990)). The analogy between *Bowers* and *Lochner* is suggested by Sunstein's analysis of *Bowers* in relation to status quo neutrality, epitomized in *Lochner*. *See* Sunstein, *supra* note 29, at 1168-74. Before *Bowers* was decided, Ely argued that sexual orientation should be recognized as a suspect classification under the Equal Protection Clause, and he anticipated the analogy to *Plessy*. *See* ELY, *supra* note 16, at 163.

258. Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986); *cf. Plessy*, 163 U.S. at 550 (refusing to invalidate a statute enacted "with reference to the established usages, customs, and traditions of the people"). As Justice Stevens pointed out in dissent in *Bowers*, the historical "condemnation was equally damning for heterosexual and homosexual sodomy." *Bowers*, 478 U.S. at 215 (Stevens, J., dissenting). As Justice Blackmun retorted in dissent, quoting Holmes's dissent in *Lochner*: "[T]he fact that [such] moral judgments . . . may be 'natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'" *Id.* at 199 (Blackmun, J., dissenting) (quoting Locbner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

259. *See* SUNSTEIN, *supra* note 22, at 131-32, 402 n.17; Sunstein, *supra* note 29, at 1163, 1170-74, 1179. Sunstein concedes that due process and tradition are sometimes treated as "aspirational" rather than being backward-looking and rooted in status quo neutrality. *See* Sunstein, *supra* note 29, at 1173.

260. Sunstein, *supra* note 29, at 1173-74.

261. *See* SUNSTEIN, *supra* note 22, at 131-32, 136, 259-61, 402 n.17; Sunstein, *supra* note 29, at 1163, 1174-75, 1179.

equal protection grounds.[262] Sunstein puts forward this conception of the relationship between due process and equal protection, not simply as a litigation strategy in the aftermath of *Bowers* or as a strategy of damage control in trying to protect our basic liberties while Justice Scalia sits, but as a general constitutional theory. It is, however, better as such strategies than as such a theory.[263]

2. The Relationship Between Due Process and Equal Protection.—Thus, Sunstein, like Ely, eschews substantive due process in favor of equal protection as a ground for deriving basic liberties implicit in deliberative democracy and representative democracy, respectively. Instead, Sunstein emphasizes an anticaste principle of equality, Ely a conception of equal concern and respect.[264] In order to explicate Sunstein's flight from substantive due process and deliberative autonomy, I examine three conceptions of the relationship between due process and equal protection, or liberty and equality: those illustrated by Dworkin, Scalia, and Sunstein.[265]

a. Dworkin: free and equal citizens.—First, one might argue that due process and equal protection in large part overlap and are intertwined. For example, Dworkin argues that the Constitution embodies an abstract conception of justice, "a political ideal . . . of a society of citizens both equal and free."[266] On his view, both equality and liberty are comprehensive principles: The Constitution requires both that government treat everyone with equal concern and respect and that it not infringe their most basic liberties, those liberties essential to a scheme of "ordered liberty," to use Justice Cardozo's famous formulation in *Palko v. Connecticut*.[267]

---

262. *See* Sunstein, *supra* note 29, at 1162-70, 1175-79.

263. *See* TRIBE & DORF, *supra* note 21, at 115-16 (criticizing Sunstein's argument concerning the relationship between due process and equal protection "[a]s a matter of constitutional theory," but conceding that it might be a good proposal "as a matter of advocacy and legal strategy"); *see also infra* note 281 and text accompanying notes 325-27.

264. *See* ELY, *supra* note 16, at 14-21, 82-87, 135-79; Ely, *supra* note 5, at 933-45.

265. For another exploration of the relationship between due process and equal protection, see Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979).

266. Dworkin, *supra* note 42, at 382.

267. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Dworkin himself, in his earlier work elaborating equal concern and respect as a ground for rights, has been charged with trying to derive too much from equality and too little from liberty. *See* HART, *supra* note 181, at 214, 217, 221 (arguing that Dworkin has "sought to derive too much from the idea of equal concern and respect"; that "[w]hat is fundamentally wrong is the suggested interpretation of denials of freedom as denials of equal concern or respect"; and that as to certain denials of freedom, equality plays an "empty but misleading role" better performed by liberty or respect). *But see* DWORKIN, *A Right to Pornography*, *supra* note 76, at 365-72 (replying to Hart's critique). For Dworkin's more recent efforts to reconcile equality (of resources) and liberty, see Ronald Dworkin, *What Is Equality?: The Place of Liberty*, 73 IOWA L. REV. 1 (1987).

And so, Dworkin continues, "[p]articular constitutional rights that follow from the best interpretation of the Equal Protection Clause, for example, will very likely also follow from the best interpretation of the Due Process Clause."[268] As Chief Justice Warren put it in *Bolling v. Sharpe*,[269] "[T]he concepts of equal protection and due process, both stemming from our American ideal of *fairness*, are not mutually exclusive."[270]

Thus, Dworkin, like Justice Stevens, justifies *Roe* and *Casey* on grounds of equal concern and respect as well as liberty of conscience and decisional autonomy.[271] Furthermore, he criticizes *Bowers* not only on the ground that it fails to accord equal concern and respect to homosexuals but also on the ground that it denies them liberty of conscience and decisional autonomy.[272]

Hence, for Dworkin, *both* due process *and* equal protection stem from principles of justice that provide alternative baselines to status quo neutrality. They provide intertwined bases for criticizing historical practices that fail to realize our ideals of liberty and equality.

b. Justice Scalia: destruction and salvation.—Second, one might argue that due process and equal protection, instead of overlapping, in large part perform separate functions. Both Justice Scalia and Sunstein, from different perspectives, advance versions of this conception. Scalia argues that the Due Process Clause assures procedural due process and, to the extent that it includes substantive restrictions, prohibits only deprivations of "substantive" rights "historically and traditionally protected against State interference."[273] If the Court uses the Due Process Clause to try

---

268. Dworkin, *supra* note 42, at 382-83.

269. 347 U.S. 497 (1954). *Bolling* was the District of Columbia companion case to Brown v. Board of Education, 347 U.S. 483 (1954).

270. *Bolling*, 347 U.S. at 499 (emphasis added). The Court continued, "[W]e do not imply that the two are always interchangeable phrases." *Id.* Hence, the Supreme Court held that although the Equal Protection Clause does not apply to the federal government, racially segregated public schools in the District of Columbia are unconstitutional under the Due Process Clause of the Fifth Amendment, which does apply.

271. *See* Dworkin, *supra* note 42, at 418-27; *supra* notes 214-15 and accompanying text; Planned Parenthood v. Casey, 112 S. Ct. 2791, 2840-42 (1992) (Stevens, J., concurring in part and dissenting in part); *cf.* DWORKIN, *supra* note 47, at 171 (arguing that the *Casey* joint opinion's rationale for "the right of procreative autonomy . . . matched, in several important respects," the argument that Dworkin makes in terms of liberty of conscience). For a different point, Justice Stevens cited Dworkin's article in his opinion. *Id.* at 2839 n.2.

272. *See* Ronald Dworkin, *Foundations of Liberal Equality*, *in* 11 THE TANNER LECTURES ON HUMAN VALUES 1, 113-15 (Grethe B. Peterson ed., 1990); Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 480-84 (1989); Dworkin, *supra* note 17, at 340-42; *supra* note 212 and accompanying text.

273. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 294 (1990) (Scalia, J., concurring);

to protect the citizenry from "irrationality and oppression," he warns, "it will destroy itself."[274] After all, the ghost of *Lochner* lurks. By contrast, Scalia declaims, "Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me."[275]

For example, Scalia argues that *Roe* and *Casey* are the *Lochner* or, worse yet, the *Dred Scott* of our time.[276] He contends, on the other hand, that *Bowers* signals a restoration of legitimacy in constitutional law.[277]

Therefore, for Scalia, *neither* the Due Process Clause *nor* the Equal Protection Clause offers a baseline beyond status quo neutrality for criticizing historical practices. Due process requires status quo neutrality and grows out of a Burkean deposit of historical practices.[278] Equal protection requires neutrality in the sense of generality, and reflects a Thayerian[279] or Frankfurterian[280] faith in salvation through democratic processes rather than easy resort to judicial review.[281] Hence, for Scalia,

---

see also Michael H. v. Gerald D., 491 U.S. 110, 123-27 & n.6 (1989) (Scalia, J., plurality opinion) (arguing that the Fourteenth Amendment does not protect a relationship between a biological father and a child whose mother was married to and cohabiting with another man at the time of the child's conception and birth because such relationships have not been historically protected).

274. *Cruzan*, 497 U.S. at 301. For a skeptical view of such fears about the "destruction" of courts, see ELY, *supra* note 16, at 47-48.

275. *Cruzan*, 497 U.S. at 300.

276. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2883-85 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). For a critique of conservative or originalist invocation of the ghost of *Dred Scott* in criticizing *Roe* and *Casey*, see Christopher L. Eisgruber, Dred *Again: Originalism's Forgotten Past*, 10 CONST. COMMENTARY 37, 46-50 (1993) (arguing that Chief Justice Taney's opinion of the Court in *Dred Scott* embraced a version of originalism).

277. *See Michael H.*, 491 U.S. at 127 n.6; *Cruzan*, 497 U.S. at 294.

278. *See* SUNSTEIN, *supra* note 22, at 130 (interpreting Scalia as a Burkean defender of status quo neutrality as a baseline and referring to EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790)); *see also* Burnham v. Superior Court, 495 U.S. 604, 610-16 (1990) (Scalia, J.) (concluding that state court jurisdiction over physically present nonresidents cannot violate the Due Process Clause because of the established place of transient jurisdiction in American tradition).

279. *See* Thayer, *supra* note 128, at 156 ("[U]nder no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere."); Thayer, *supra* note 162, at 86 ("The tendency of a common and easy resort to [judicial review] . . . is to dwarf the politieal capacity of the people, and to deaden its sense of moral responsibility.").

280. *See* Sanford Levinson, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430, 439 (1973) (interpreting Frankfurter's theory of "judicial restraint" as rooted in a "democratic faith" and a conviction that "the Court had abused beyond salvation" its limited mandate through its interpretation of the Due Process Clauses during the era of *Lochner*); *see also* SANFORD LEVINSON, CONSTITUTIONAL FAITH 3-4 (1988) [hereinafter LEVINSON, CONSTITUTIONAL FAITH] (discussing Frankfurter's constitutional faith).

281. Two caveats regarding Scalia's theory are in order. First, it is very likely that Scalia, for his own part, would limit due process to procedural due process and overrule the whole line of substantive due process cases. He does not, however, have the votes on the Court to bring about that result. His *Michael H.* gloss on substantive due process as tradition understood as historical practices and argument concerning the appropriate level of generality, which narrow the analysis of *Bowers* even

due process is not an antitotalitarian principle of liberty or a principle of deliberative autonomy, nor is equal protection an anticaste principle. Even in the context of discrimination on the basis of race, equal protection is merely a principle of racial neutrality.[282]

c. Sunstein: Janus.—Like Scalia, Sunstein argues that due process and equal protection in large part operate along different tracks and serve different purposes. But according to his analysis, the Fourteenth Amendment, like Janus, has two faces looking in opposite directions. The Due Process Clause is backward-looking and largely evinces status quo neutrality as a baseline. The Equal Protection Clause, by contrast, is forward-looking and centrally embodies an anticaste principle of equal citizenship as a baseline. Thus, Sunstein's Due Process Clause looks backward somewhat like Scalia's, and his Equal Protection Clause looks forward somewhat like Dworkin's. For example, Sunstein justifies *Roe* and *Casey* on the ground of an anticaste principle of equality, but not on the ground of an antitotalitarian principle of liberty or a principle of deliberative autonomy.[283] Likewise, he criticizes *Bowers* primarily on the former ground.[284]

Sunstein's account of the relationship between due process and equal protection has two fundamental problems. First, it gives insufficient attention to the possibility that the Due Process Clause might reflect an antitotalitarian principle of liberty that would serve as a baseline for criticizing historical practices that deny deliberative autonomy, much as the Equal Protection Clause expresses an anticaste principle of equality that provides a baseline for criticizing historical practices that deny equal citizenship.

---

further, are his effort to engage in damage control: to limit the reach of the substantive due process cases as narrowly as he can and to deprive them of critical force or generative power. *See infra* note 311 and text accompanying notes 325-27.

Second, the salvation that Scalia contemplates through the Equal Protection Clause is not heightened judicial protection for fundamental rights or from prejudice against discrete and insular minorities, under either the fundamental rights or the suspect classifications strand of equal protection analysis. It is merely the political safeguard of a requirement of neutrality in the sense of generality and, in the context of classifications based on race, a requirement of racial neutrality. *See infra* note 282.

282. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring) (asserting that only "race-neutral remedial program[s] aimed at the disadvantaged *as such*," not programs that operate on the basis of race, are constitutional (emphasis in original)); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 609 (1990) (O'Connor, J., dissenting, joined by Rehnquist, C.J., Scalia & Kennedy, JJ.) (asserting that the Equal Protection Clause requires racial neutrality, for the idea of a "'benign racial classification' is a contradiction in terms"); *id.* at 635 (Kennedy, J., dissenting, joined by Scalia, J.) (rejecting any distinction between invidious and "benign" discrimination); *see also* Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L.Q. 147 (contending that affirmative action programs foster racism).

283. *See supra* text accompanying notes 185-88.

284. *See supra* text accompanying notes 259-62.

Second, Sunstein ignores or downplays that equal protection alone, without a substantive conception of citizens as free and equal persons from which to derive fundamental rights or fundamental interests, may not be a sufficient ground for securing even equal citizenship, let alone free citizenship. Without such a conception, Sunstein cannot satisfactorily answer the question, "Equality with respect to what?"[285] Ely's theory of equal protection needs to be complemented by a principle like deliberative autonomy to accomplish all that he claims for it with respect to discrimination on the basis of race and sexual orientation.[286] Similarly, Sunstein's anticaste principle of equality needs to be supplemented with an explicit principle like deliberative autonomy to support all that he attempts to derive from it, for it inevitably smuggles in such a principle.[287] Sunstein's theory in this sense takes a flight from substantive due process and deliberative autonomy to equal protection and deliberative democracy. Constitutional constructivism more comfortably grounds such basic liberties on both liberty and equality, or on a conception of citizens as free and equal persons.

Here I focus on the first problem. Sunstein's account of due process accepts too readily *Bowers*'s obliteration of the difference between the *Palko* and the *Moore* formulations of the due process inquiry and its adoption of a narrow understanding of that inquiry. His account accedes too readily to the Court's flight between *Palko* and *Bowers* from aspirational principles to historical practices in the due process inquiry.

3. Due Process from Palko *to* Bowers*: From Aspirational Principles to Historical Practices.*—Between *Palko*, *Griswold*, and *Roe*, on the one hand, and *Moore* and *Bowers*, on the other, an initially subtle but ultimately significant change seems to have occurred in the Court's conception of the due process inquiry: from Cardozo's formulation in *Palko*, "implicit in the concept of ordered liberty,"[288] to Powell's formulation for the plurality in *Moore*, "deeply rooted in this Nation's history and tradition."[289]

---

285. *But see* SUNSTEIN, *supra* note 22, at 138 (discussing certain "universal human needs, to be met in any just society").

286. *See* Tribe, *Puzzling Persistence*, *supra* note 12, at 1072-77 (arguing that Ely's theory should be complemented with rights derived from a conception of the person, intimate association, and what is needed to realize one's humanity); Dworkin, *Forum*, *supra* note 12, at 510-16 (contending that Ely's theory presupposes a conception of moral independence).

287. *See* SUNSTEIN, *supra* note 22, at 270-85. Sunstein's analysis of a woman's right to abortion, although it emphasizes equality rather than liberty, and indeed unnecessarily puts in doubt the due process justification for such a right, *see id.* at 285, appears to resort to notions like autonomy and independence, not just an anticaste principle of equality. In this respect, it is telling that Sunstein acknowledges his debt to two classic articles—involving samaritanism and antisubordination—that intertwine privacy and equality, although he criticizes them for not sufficiently emphasizing issues of equality. *See id.* at 396 n.21 (citing Judith J. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971), and Donald Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979)).

288. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

289. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).

To fix ideas, *Palko* seems to call for an inquiry into aspirational principles, while *Moore* may appear to suggest an inquiry into historical practices. The shift reflects a flight from aspirational principles to historical practices as the baseline for due process. (My claim is not that the Due Process Clause incorporates all of justice, or that due process is purely aspirational principles as opposed to historical practices, or indeed that the Court ever actually has fulfilled the promise of the *Palko* formulation. Rather, my claim is about the way the Court has conceived the due process inquiry.)

First, consider Justice Cardozo's formulation in *Palko*, which was decided the same year as *West Coast Hotel*[290] and one year before *Carolene Products*.[291] Cardozo asked whether an asserted right is "of the very essence of a scheme of ordered liberty," and whether refusing to recognize it would "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[292] Such expressions seem to contemplate elaboration of the basic liberties implicit in a scheme of justice embodied in our Constitution.[293] They do not appear to call simply for an inquiry into historical practices, the common law, or statute books (collectively, "historical practices").

Granted, in *Palko*, Cardozo also frames the due process inquiry as whether abolishing a given right would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[294] But he does not conceive traditions merely as *historical practices*. Instead, the coupling of "traditions" with "conscience" bespeaks an understanding of traditions as *aspirational principles*—the fundamental principles of justice to which we as a people aspire and for which we as a people stand, whether or not we actually have realized them in our historical practices.[295] Our aspirational principles may be critical of our historical practices; our traditions are not merely the Burkean deposit of those practices, notwithstanding Scalia.

---

290. West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

291. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

292. *Palko*, 302 U.S. at 325, 328 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)); *see supra* text accompanying note 118.

293. *Cf.* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (invoking "certain vital principles in our free republican government"); Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J., riding circuit) (referring to "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments" in construing the Privileges or Immunities Clause); Dworkin, *supra* note 42, at 382 (arguing that the "natural reading" of the Bill of Rights, including the Due Process and Equal Protection Clauses, is that it embodies an abstract scheme of justice).

294. *Palko*, 302 U.S. at 325 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

295. For a similar distinction between history and tradition, see BARBER, CONSTITUTION, *supra* note 21, at 84-85. For analyses of constitutional aspirations, see *id.* at 33-37, 54-62; GARY J. JACOBSOHN, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION 107-11 (1986).

Furthermore, Cardozo's phrases in *Palko* envision enlargement of due process and liberty through moral progress, illustrated by what Chief Justice Warren refers to in *Trop v. Dulles* as the "evolving standards of decency that mark the progress of a maturing society."[296] In sum, nothing in *Palko* suggests that Cardozo identifies due process, much less our traditions, with our historical practices. Cases such as *Bolling*, *Griswold*, *Loving*, and *Roe* broke from traditions, in the sense of historical practices, in pursuit of due process and traditions, in the sense of aspirational principles.[297]

Second, consider Justice Powell's formulation of the due process inquiry for the plurality in *Moore*. Powell asks whether an asserted right is "deeply rooted in this Nation's history and tradition."[298] If *Palko*'s coupling of "traditions" with "conscience" evinces an understanding of traditions as aspirational principles, *Moore*'s coupling of "tradition" with "history" may seem to suggest a conception of traditions as historical practices. But Powell draws upon Harlan's dissent in *Poe v. Ullman*, which speaks of a tradition as a "living thing," and refers to "what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke."[299] Hence, even if Powell's formulation appears to have less critical bite with respect to historical practices than does Cardozo's, it does retain a notion of aspirational principles. Moreover, the plurality in *Moore* expands constitutional protection under the Due Process Clause from nuclear families to extended families.[300]

In *Bowers*, however, the Court practically reduces the due process inquiry to a backward-looking question concerning historical practices, stripped of virtually any critical bite with respect to the status quo. The Court simply observes what our nation's historical practices, common law, and statutes have been regarding homosexual sodomy.[301] Furthermore,

---

296. 356 U.S. 86, 101 (1958) (plurality opinion) (interpreting the Eighth Amendment); *see* Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992) (defining the Eighth Amendment with the same language as that used in *Trop*). Justice Thomas, joined by Justice Scalia, dissented in *Hudson*, protesting against the Court's cutting the Eighth Amendment "loose from its historical moorings." *Id.* at 1007 (Thomas, J., dissenting); *see infra* note 310.

297. To be sure, *Bolling* and *Loving* involved equal protection as well as due process, *see supra* notes 231, 270, but that supports my thesis that the two clauses overlap and are intertwined, rather than Sunstein's thesis that the two clauses perform largely different functions and look in opposite directions. *Cf.* TRIBE & DORF, *supra* note 21, at 116 (criticizing Sunstein's thesis on the basis of *Bolling*).

298. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).

299. *Id.* at 501 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). The joint opinion in *Casey* drew heavily on the approach of Justice Harlan's dissent in *Poe*. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2805-06 (1992) (joint opinion).

300. *Moore*, 431 U.S. at 505-06.

301. Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986). White's opinion of the Court observes that whereas in 1961 all 50 states outlawed sodomy, by 1986 only 24 states continued to provide criminal penalties for sodomy performed in private and between consenting adults. *Id.* at 193-94. That legal transformation from 1961 to 1986 suggests a tradition from which we are breaking, to paraphrase

as Justice Stevens stressed in dissent, the Court engages in a flagrantly selective reading of such practices, ignoring that the common law and statutes historically have condemned all sodomy, both homosexual and heterosexual.[302] Applying such an approach, the Court rudely dismissed Hardwick's claim that the Due Process Clause protects a fundamental right of homosexuals to engage in acts of consensual sodomy as, "at best, facetious."[303]

Contrast *Bolling*, which illustrates traditions as aspirational principles. There Chief Justice Warren wrote, "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[304] From the standpoint of White's understanding in *Bowers* of traditions as historical practices, Warren's argument in *Bolling* concerning our traditions "is, at best, facetious," given our shameful history of slavery and historical practices of enacting laws that drew classifications based solely upon race, even after the ratification of the Civil War Amendments and Reconstruction.[305] Along similar lines, the Supreme Court of Kentucky, criticizing *Bowers* as a "misdirected application of the theory of original intent" in light of precedents such as *Loving*, interpreted its state constitution's privacy and equal protection guarantees to prohibit a criminal statute outlawing consensual homosexual sodomy.[306]

Finally, Scalia's *Michael H.* jurisprudence is an attempt to narrow the *Moore-Bowers* due process inquiry even further, to reduce substantive due process entirely from aspirational principles to historical practices.[307] That is, Scalia seeks to limit substantive due process to include only those rights that have been protected through historical practices, the common

---

Harlan's dissent in *Poe*, 367 U.S. at 542 (Harlan, J., dissenting). Admittedly, Harlan himself in *Poe* contemplated that substantive due process would not protect homosexual intimate association, *id.* at 546, but he wrote in 1961, before the tradition that by his account is a "living thing" began to evolve. For Harlan-like arguments that *Bowers* was wrongly decided, see CHARLES FRIED, ORDER AND LAW 81-85 (1991); TRIBE & DORF, *supra* note 21, at 76-79, 116-17. It is interesting to note that Fried was Harlan's law clerk during the term that *Poe* was before the Court. For a critique of *Bowers*'s conception of the due process inquiry as "authoritarian" as distinguished from "self-revisionary" (which parallels my distinction between "historical practices" and "aspirational principles"), see Michelman, *Law's Republic*, *supra* note 21, at 1496, 1514.

302. *Bowers*, 478 U.S. at 214-16 (Stevens, J., dissenting).

303. *Id.* at 194.

304. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

305. *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d rev. ed. 1974); C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1913 (Wendell H. Stephenson & E. Merton Coulter eds., 1951).

306. Commonwealth v. Wasson, 842 S.W.2d 487, 497 (Ky. 1992). The court also drew upon John Stuart Mill's liberal political philosophy. *Id.* at 496-98 (citing JOHN S. MILL, ON LIBERTY 68-69, 71 (Gertrude Himmelfarb ed., Penguin Books 1984) (1859)).

307. Michael H. v. Gerald D., 491 U.S. 110, 123-27 & n.6 (1989) (plurality opinion).

law, and statute books.[308] So far only Chief Justice Rehnquist has joined Scalia in that effort,[309] although it is likely that Justice Thomas will do so when the occasion arises.[310] Many criticisms of Justice Scalia's conception of due process have focused on problems of identifying what our traditions are and at what level of generality to describe them.[311] More fundamentally, the problem with Scalia's conception lies in his answer to the basic question of what constitutes a tradition. Unlike Cardozo in *Palko*, Scalia in *Michael H.* confuses or conflates due process and our traditions with our historical practices, to the neglect of our aspirational principles.[312]

In *Casey*, the joint opinion rejected Scalia's *Michael H.* jurisprudence, pointedly resisting the "temptation" to take such a flight from substantive

---

308. *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 294 (1990) (Scalia, J., concurring) ("[N]o 'substantive due process' claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against state interference.").

309. *See Michael H.*, 491 U.S. at 113.

310. *See* Hudson v. McMillian, 112 S. Ct. 995, 1007 (1992) (Thomas, J., joined by Scalia, J., dissenting) (protesting against the majority's cutting the Eighth Amendment "loose from its historical moorings"); *see also* Jeff Rosen, *Reassessing Justice Thomas: Never Mind*, NEW REPUBLIC, Sept. 21, 1992, at 19, 20, 22 (interpreting Thomas as a "malignant hybrid: a conservative activist sanctimoniously posing as a strict constructionist" and observing that Thomas's opinions "read like parodies of the opinions of Scalia").

311. *See, e.g.*, TRIBE & DORF, *supra* note 21, at 73-74, 97-117; Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058-59 (1990); Robin West, *The Ideal of Liberty: A Comment on* Michael H. v. Gerald D., 139 U. PA. L. REV. 1373, 1374-75 (1991). For defenses of Scalia's due process methodology, see Timothy L.R. Shattuck, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743 (1992); Gregory C. Cook, Note, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853 (1991).

In *Michael H.* itself, Justice O'Connor, in concurrence, expressed doubts about Scalia's "mode of historical analysis" and observed that "[o]n occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available." *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring) (citing, *e.g.*, *Griswold* and *Loving*, and also mentioning Justice Harlan's dissent in *Poe*). Justice Brennan wrote a powerful dissent, criticizing Scalia's interpretive method as "misguided" and "novel," stating:

> The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.

Michael H., 491 U.S. at 141 (Brennan, J., dissenting) (emphasis in original).

312. Scalia's project of identifying our historical practices, in the context of due process and elsewhere, raises a whole host of controversial questions and prompts sharp disputes, notwithstanding his pretense to neutrality. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2917 (1992) (Blackmun, J., dissenting) (criticizing Scalia for treating history "as a grab-bag of principles, to be adopted where they support the Court's theory, and ignored where they do not"); *see also id.* at 2921 (Stevens, J., dissenting) (protesting that Scalia's approach "effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property" in light of moral progress).

liberties to original understanding, narrowly conceived, or from aspirational principles to historical practices.[313] It instead accepted Harlan's approach to due process in his dissent in *Poe* and his concurrence in *Griswold*.[314]

4. Sunstein's Janus-Faced Fourteenth Amendment.—Sunstein's backward-looking conception of due process concedes too much to the *Bowers* formulation of the due process inquiry or, worse still, to Scalia's formulation in *Michael H.* Sunstein basically goes along with Scalia in his flight from aspirational principles to historical practices. But substantive due process and liberty are better understood as furthering aspirational principles, not merely as safeguarding backward-looking historical practices. The Rehnquist Court may well be Burkean, but our Constitution and our constitutional democracy are not.

Ironically, Sunstein's analysis of due process as backward-looking and evincing status quo neutrality carries forward the legacy of *Lochner*. Yet our due process precedents such as *Meyer*, *Pierce*, *Bolling*, *Griswold*, *Loving*, *Roe*, and *Casey* have repudiated status quo neutrality in favor of a normative baseline rooted in a conception of liberty and personhood. These cases have vindicated an antitotalitarian principle of liberty or a principle of deliberative autonomy. Such landmark precedents pose serious problems for Sunstein's general conception of due process as backward-looking. Thus, he concedes that there is "some" aspirational element to due process and that there is nothing about the Due Process Clause itself that compels a reading of it as backward-looking.[315]

To recapitulate, Sunstein's Janus-faced conception of the relationship between due process and equal protection allows substantive due process and liberty to do too little work in grounding basic liberties, and it tries to make equal protection and equality do too much. But equal protection and

---

313. See *supra* note 14 for the debate in *Casey* between the joint opinion and Justice Scalia concerning the opposing "temptations" to abdicate responsibility and to seize power.

314. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2805-06 (1992) (joint opinion). Thus, *Casey* to some extent replays the great debate concerning constitutional interpretation from *Griswold*, with the joint opinion playing Harlan to Scalia's Black. *See* Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Harlan, J., concurring); *id.* at 507 (Black, J., dissenting). For an analysis along these lines, see David B. Anders, Note, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia over Unenumerated Fundamental Rights*, 61 FORDHAM L. REV. 895 (1993).

315. *See* Sunstein, *supra* note 29, at 1170, 1173. Sunstein does not there discuss *Meyer* and *Pierce*. Those cases conceivably fit Sunstein's claim that due process largely protects against temporary aberrations from historical practices, but *Griswold*, *Loving*, and *Roe* do not, for each of the latter cases struck down a long-standing statutory provision. *Bolling* is more complicated: although it, too, struck down a long-standing practice on the basis of due process, the Court basically held that the Due Process Clause of the Fifth Amendment incorporates the Equal Protection Clause of the Fourteenth Amendment, thereby making the latter applicable to the federal government. Bolling v. Sharpe, 347 U.S. 497, 499 (1954); *see supra* notes 270, 297 and accompanying text.

equality alone, to the exclusion of substantive due process and liberty, need not, cannot, and should not do all of the work in grounding basic liberties essential to free and equal citizenship for everyone in our constitutional democracy.

My more general contention is that the architecture of Sunstein's theory of deliberative democracy forces or leads him to recast issues of liberty and equality as issues of equality alone, and to recast preconditions for deliberative autonomy as preconditions for deliberative democracy or, worse yet, to leave them out entirely. Sunstein's Janus-faced conception of the relationship between due process and equal protection is mirrored in the architecture of his general theory: It unwittingly reflects the false antithesis between the liberties of the moderns and the liberties of the ancients, despite all his attempts at synthesis.

Constitutional constructivism instead combines due process and equal protection, liberty and equality, the liberties of the moderns and the liberties of the ancients, and liberalism and republicanism into a coherent scheme of equal basic liberties with two themes: securing the preconditions for deliberative autonomy as well as those of deliberative democracy. Together, these two themes secure aspects of the justice that is due free and equal citizens within our constitutional democracy. As Chief Justice Warren put it in *Bolling*: "[T]he concepts of equal protection and due process, both stemming from our American ideal of *fairness*, are not mutually exclusive."[316] Constitutional constructivism combines both in a conception of justice as fairness.

Constitutional constructivism grounds basic liberties in a conception of citizens as free and equal persons or, in Dworkin's terms, "a political ideal . . . of a society of citizens both equal and free."[317] From that standpoint, *Bowers* was wrongly decided not only because it ignored an anticaste principle of equality and thus failed to secure the preconditions for deliberative democracy, as Sunstein argues. It also was wrongly decided because it applied a stunted conception of liberty of conscience and freedom of intimate association—which Justices Stevens and Blackmun also have articulated in terms of decisional autonomy, decisional and spatial privacy, and freedom of intimate association[318]—and thus failed to secure the preconditions for deliberative autonomy that are essential to our scheme of ordered liberty.

Put another way, within constitutional constructivism, if the Fourteenth Amendment is indeed Janus-faced, perhaps the Equal Protection Clause is an entrance, a gate that opens the polity to everyone with respect to deliberative democracy, whereas the Due Process Clause is an exit, a

316. *Bolling*, 347 U.S. at 499 (emphasis added).

317. Dworkin, *supra* note 42, at 382.

318. *See supra* notes 212-17 and accompanying text.

gate that allows persons "to be let alone" from the polity with respect to deliberative autonomy.[319] Constitutional constructivism, unlike Sunstein's theory, does not take a flight from substantive due process to equal protection, or from deliberative autonomy to deliberative democracy.

5. The Puzzle of Sunstein's Flight from Substantive Due Process to Equal Protection.—We are left with a puzzle: Why would Sunstein go to all the trouble to establish that what was wrong with *Lochner* was *not* substantive due process, and then himself flee from substantive due process in developing his principal theme of securing the preconditions for deliberative democracy? Given that he characterizes his theory as a synthesis, liberal republicanism, and likens it to Rawls's theory, why does he not put forward a theory that would combine a theme of securing deliberative autonomy with a theme of securing deliberative democracy?

It is perfectly understandable why Ely, conceiving the specter of *Lochner* as he does, would avoid a substantive due process approach to such questions as those raised in *Bowers* in favor of an equal protection approach. After all, for Ely, the lesson of *Lochner* is to repudiate substantive due process and protection of unenumerated substantive fundamental rights, whether economic or personal.[320]

It is far less clear why Sunstein, conceiving the legacy of *Lochner* as evincing status quo neutrality rather than unenumerated substantive fundamental rights,[321] would flee substantive due process for equal protection. To try to account for this puzzle, I offer five speculations, two obvious and three more complex. The first obvious answer is that Sunstein simply is more republican than liberal and accordingly has sought to avoid constraining our deliberative democracy with "liberal" liberties that are not preconditions for deliberative democracy itself.[322] The second is that he is a New Dealer through and through[323] and therefore has adopted a New

---

319. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In his dissent in *Bowers*, Justice Blackmun quotes Brandeis's famous formulation of "the right to be let alone." Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting); *cf.* ELY, *supra* note 16, at 178-79 (analogizing the tradition of the frontier, and the right of "dissenting or 'different' individuals" to relocate, to the "exit" option as distinguished from the "voice" option). I do not take up the issue of whether the Privileges or Immunities Clause provides a firmer ground for such a right to "exit" than the Due Process Clause. *See supra* note 244 and accompanying text. I also acknowledge that this metaphor of the "Janus" expresses too schematically the relationship between equal protection and due process, or between deliberative democracy and deliberative autonomy. *See supra* note 211.

320. *See supra* text accompanying notes 91, 182.

321. *See supra* section III(A)(3).

322. Along these lines, Sunstein contends that it is less intrusive on the political process to rely on equal protection principles (as an aspect of deliberative democracy) than on privacy or autonomy principles (as an aspect of deliberative autonomy) in defending *Roe* and *Casey* or in attacking *Bowers*. *See* Sunstein, *supra* note 224, at 310-11.

323. Sunstein practically celebrates the New Deal. *See, e.g.*, SUNSTEIN, *supra* note 22, at 6-7,

Deal solution to combat the legacy of *Lochner*: a new version of a *Carolene Products* framework as a sophisticated flight from substantive liberties to process analogous to Ely's.

The first more complex speculation is that Sunstein, somewhat like Ely in *Another Such Victory*, is making a principled plea to be the Thayer for the next generation, a progressive voice crying in the wilderness during the conservative era of the Rehnquist Court.[324] To protect our basic liberties, we no doubt need a revitalized citizenry, and easy resort to judicial review may well have deadened the citizenry's sense of political responsibility during the progressive era of the Warren Court and its immediate aftermath.

In some respects, Sunstein's theory may be more appealing as a strategy of damage control in trying to protect our basic liberties while Justice Scalia sits than it is as a general constitutional theory.[325] Scalia, from the right, is trying to control the damage caused by expansive substantive due process holdings, such as those in *Griswold* and *Roe*,[326] by narrowly confining the due process inquiry. Perhaps Sunstein, from the left, is trying to control the damage brought about by narrow substantive due process opinions, such as that in *Bowers*, by resorting to equal protection arguments. But the upshot of Sunstein's analysis is that he all but cedes the Due Process Clause and liberty, as a ground for basic liberties, to Scalia. Furthermore, such efforts at damage control may not work, because just as the Rehnquist Court tries to read status quo neutrality—rather than an antitotalitarian principle of liberty or a principle of deliberative autonomy—into the Due Process Clause, it attempts to read racial neutrality—rather than an anticaste principle of equality—into the Equal Protection Clause.[327]

The second speculation is that perhaps Sunstein has made the judgment that in combining liberty and equality into one coherent scheme, it is safer to derive specific basic liberties from a conception of equality than to ground them in a conception of liberty. He rejects the idea of a general right to liberty, or to liberty as such.[328] He may be wary that if we start down the road of talking about protecting liberty, autonomy, or privacy in any strong sense, we may have greater difficulty fending off conservative status quo neutrality arguments like Epstein's than if we stay on the road of talking about securing equality and deliberative democracy. As stated above, Epstein wishes to demarcate a prepolitical zone of entrenched in-

---

40-42, 51-62, 134-35, 197-231; SUNSTEIN, *supra* note 143, at 17-52.

324. *See supra* text accompanying notes 128-34, 158-62.

325. *See supra* note 263 and accompanying text.

326. *See supra* note 281.

327. *See supra* note 282 and accompanying text (discussing *Croson* and *Metro Broadcasting*).

328. *See* SUNSTEIN, *supra* note 22, at 162-94, 261.

dividual rights, including economic liberties reminiscent of the era of *Lochner*, that would constrain deliberative democracy.[329]

My final speculation is that perhaps Sunstein has made the judgment that in securing certain basic liberties, such as women's reproductive freedom and homosexuals' freedom of intimate association, it is safer to cast our lot with equal protection than with substantive due process or privacy. He may be persuaded by arguments of feminists like Catharine A. MacKinnon that rights of privacy, autonomy, and liberty may readily prove, for women, to be "an injury got up as a gift."[330] On this view, such constitutional rights not only have been illusory for women, but indeed have been a hindrance to—rather than a precondition for—securing equal citizenship for them.[331] Moreover, Sunstein may be mindful of feminist arguments about the social costs of general rights of liberty (prominently, free speech in addition to privacy) to women's equality and liberty, not to mention their physical security.[332]

These concerns do not, however, warrant neglecting the preconditions for deliberative autonomy or overlooking the vital importance of such autonomy to women's as well as men's free and equal citizenship.[333] Constitutional constructivism instead attempts to hold Epstein at bay regarding liberty and to address MacKinnon's reservations regarding privacy by cabining liberty and privacy. Like Sunstein's theory, it rejects the idea of a fundamental right to liberty as such, or liberty as license.[334] It accords the much-vaunted priority of the basic liberties not to liberty as such, but rather to the whole family of basic liberties, as they are articulated through the two fundamental themes of securing deliberative democracy and securing deliberative autonomy.[335] Notwithstanding Epstein, the opportunity for consenting adults to perform capitalistic acts

---

329. *See supra* text accompanying notes 201-07.

330. CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED 93, 100 (1987).

331. *See id.*; Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 454-55 (1992); Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 454-61 (1992). For Sunstein's own work concerning feminist legal theory, see SUNSTEIN, *supra* note 22, at 257-90; Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826 (1988) (reviewing FEMINISM UNMODIFIED, *supra* note 330); Cass R. Sunstein, *Introduction: Notes on Feminist Political Thought*, 99 ETHICS 219 (1989) (introducing a symposium entitled "Feminism and Legal Theory").

332. *See* CATHARINE A. MACKINNON, ONLY WORDS (1993); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991); West, *supra* note 331, at 454-61.

333. For works defending privacy from feminist viewpoints, see ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY (1988); McClain, *supra* note 243, at 1176; McClain, *supra* note 185, at 124-50; Schneider, *supra* note 332, at 975.

334. *See* RAWLS, *supra* note 31, at 291-92; *cf.* DWORKIN, RIGHTS, *supra* note 21, at 266-71 (rejecting the idea of "liberty as license" as distinguished from "liberty as independence").

335. *See* RAWLS, *supra* note 31, at 294-98; *infra* text accompanying notes 422-25.

in private without reasonable governmental regulation is not among the preconditions for deliberative autonomy, any more than for deliberative democracy.[336]

Nor does deliberative autonomy, contra MacKinnon, entail a right of privacy as "a right of men 'to be let alone' to oppress women one at a time."[337] Within Rawls's political constructivism, the protection of basic liberties includes protecting individuals not only from the government but also from each other, including within families (for example, wives from husbands and children from parents).[338] That is, within constructivism, to be a woman "is . . . the name of a way of being human."[339] Both women and men are due the status of free and equal citizenship.[340]

Thus, liberal republicans such as Sunstein need not and should not flee substantive due process for equal protection. Constitutional constructivism better combines liberty and equality into one coherent scheme of equal basic liberties for free and equal citizens.

D. Sunstein's Partial Constitution

The title of Sunstein's book, *The Partial Constitution*, is richly ambiguous in ways that he largely leaves implicit.[341] I focus on two senses of his title. Sunstein's theory of judicial review as principally securing preconditions for deliberative democracy proves, contrary to his intention, to be a theory of securing the *partial* Constitution: first, as

---

336. *See supra* text accompanying notes 201-02. *But see* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 163 (1974) (stating that (a hypothetical) socialist society would have to prohibit capitalistic acts between consenting adults).

337. MACKINNON, *supra* note 330, at 102. Ronald Dworkin persuasively argues that MacKinnon mistakenly conflates different senses of privacy, for example, "territorial privacy" with "sovereignty over personal decisions" (or what I call deliberative autonomy). *See* DWORKIN, *supra* note 47, at 52-56.

338. *See* RAWLS, *supra* note 31, at 221. Sunstein himself cited Rawls in criticizing MacKinnon on this point, stating that it is a "large mistake to suggest that liberal thinkers believed that threats lay only in government intrusions and that there was no right to protection from private power." Sunstein, *supra* note 34, at 1567 & nn.156-57 (criticizing CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED, *supra* note 330, at 32, and citing RAWLS, *supra* note 32). This is not to suggest that our Constitution in general requires protection from private power, but rather to observe that Rawls's political liberalism does.

339. *See* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1299 (1991) (quoting Richard Rorty, *Feminism and Pragmatism*, *in* 13 THE TANNER LECTURES ON HUMAN VALUES 1, 7 (Grethe B. Peterson ed., 1992)); *see also* SUSAN M. OKIN, JUSTICE, GENDER, AND THE FAMILY 89-109 (1989); Okin, *supra* note 243, at 230 (both setting forth a feminist argument that Rawls's liberal conceptions provide a basis for a critique of gender inequality); Sunstein, *supra* note 34, at 1569 (citing Okin, *supra* note 243).

340. *See* RAWLS, *supra* note 31, at xxix.

341. *But see* SUNSTEIN, *supra* note 22, at v-vi (distinguishing partial in the sense of biased and partial in the sense of not whole); *id.* at 347-54 (outlining four conceptions of neutrality in a chapter entitled "Conclusion: The Impartial Constitution").

compared with the *whole* Constitution, and second, as compared with the *impartial* Constitution.

First, one might speak of the *partial* Constitution as distinguished from the *whole* Constitution—for example, the partial, judicially enforceable Constitution as contrasted with the whole Constitution that is binding outside the courts upon legislatures, executive officials, and citizens generally (unless and until they amend it). Sunstein intends his theory of judicial review to be a theory of the partial Constitution in this sense. Constitutional constructivism's theory of judicial review is likewise partial in this respect.

But Sunstein's theory is partial rather than whole in another sense that he does not intend. It does not fully account for important aspects of our constitutional document and underlying constitutional order that are concerned with protecting substantive liberties such as liberty of conscience, freedom of association, and decisional autonomy. From the standpoint of constitutional constructivism, Sunstein's theory of securing deliberative democracy to the neglect of securing deliberative autonomy is partial rather than whole in this sense.

Second, one might distinguish between the *partial* Constitution and the *impartial* Constitution—for example, between the partial, self-interested marketplace of preferences and the impartial, public-regarding republic of reasons. Sunstein intends his theory to be a theory of the impartial Constitution in this sense. Constitutional constructivism is similarly impartial in this respect.

But Sunstein's theory is partial rather than impartial in another, unintended sense. It does not adequately secure preconditions for deliberative autonomy that constrain the government's enforcement of collective judgments concerning the good. Constitutional constructivism's theme of securing deliberative autonomy requires the government to be impartial with respect to citizens' pursuit of their divergent conceptions of the good in a certain sense. That is, it more fully prevents the government from imposing comprehensive religious, philosophical, or moral conceptions of the good, which are outside the limits of public reason, and thus it more fully secures toleration of citizens' pursuit of their divergent conceptions of the good. From the standpoint of constitutional constructivism, Sunstein's theory of securing deliberative democracy to the neglect of securing deliberative autonomy is not sufficiently impartial in this respect.

I now turn to my argument that constitutional constructivism is a fuller theory of perfecting the whole, impartial Constitution than is Sunstein's theory. Its theme of securing deliberative democracy requires that political decisions be justifiable on the basis of *public-regarding reasons*. And its theme of securing deliberative autonomy requires that such decisions be justifiable on grounds of *public reason*.

IV. Constructing the Substantive Constitution: An Outline for a Constitutional Constructivism

In Part III, I argued that Sunstein's theory of securing deliberative democracy, though it moves somewhat beyond Ely's theory of reinforcing representative democracy, proves largely to be a process-perfecting theory. To move beyond such theories to a Constitution-perfecting theory,[342] I shall outline a constitutional constructivism by analogy to John Rawls's political constructivism, a theory developed in *Political Liberalism*.[343] I mean constitutional constructivism in both a methodological sense—as a method of interpreting our Constitution—and a substantive sense—as the substantive political theory that best fits and justifies our constitutional document and underlying constitutional order. Constitutional constructivism is, however, a theory of perfecting the Constitution and securing the preconditions for constitutional democracy[344] through constructing *our* substantive Constitution. It is distinguished from a theory of constructing a perfectly just constitution (unmoored by the constraints of our constitutional text, history, and structure, to say nothing of tradition, practice, and culture).

Constitutional constructivism entails a theory of judicial review with two fundamental themes: first, securing the preconditions for deliberative democracy, and second, securing the preconditions for deliberative autonomy, in order to afford everyone the common and guaranteed status of free and equal citizenship in our constitutional democracy. Such a theory flees neither substantive political theory nor substantive constitutional provisions. The first theme, deliberative democracy, closely resembles Sunstein's principal theme of securing deliberative democracy (which itself draws upon Rawls's theory). The second theme, deliberative autonomy, secures substantive liberties such as liberty of conscience, freedom of association, privacy, and autonomy, which Ely's and Sunstein's theories flee or recast as preconditions for representative or deliberative democracy. Constitutional constructivism does for substance and process what Ely's and Sunstein's theories have done for process.[345]

In this Part, I put forward an outline for a constitutional constructivism. Then, I argue that such a theory resists the temptations to take

---

342. For my meaning of "perfecting," see *supra* note 15 and accompanying text.

343. RAWLS, *supra* note 31. Much work in constitutional theory has been influenced by Rawls's earlier work in political philosophy. *See supra* note 32.

344. For my usage of the term "constitutional democracy" as distinguished from Ely's term "representative democracy" and Sunstein's term "deliberative democracy," see *supra* note 35.

345. *See supra* notes 19-21 and accompanying text.

flights from substantive liberties like those taken by Ely's and Sunstein's theories. Indeed, I suggest that constitutional constructivism better satisfies Ely's criteria for an acceptable theory than does his own theory, and that it offers a better synthesis of the traditions of liberalism and republicanism than does Sunstein's liberal republicanism. Finally, I defend constitutional constructivism against charges that it represents a boundless flight to substance beyond the Constitution, or that it is the very incarnation of the specter of *Lochner*.

A. An Outline for a Constitutional Constructivism

1. Political Constructivism and Constitutional Constructivism.—In *Political Liberalism*, Rawls reformulates his well-known theory—justice as fairness—as a political constructivism.[346] What is a political constructivism? How might it provide a framework for a constitutional constructivism?

Rawls's political constructivism seeks to construct a shared basis of reasonable political agreement in a morally pluralistic constitutional democracy such as our own, or to construct principles of justice that provide fair terms of social cooperation on the basis of mutual respect and trust among free and equal citizens.[347] He distinguishes the purpose of his project from that of theories of moral realism or natural law, which is to discover principles of justice that are true to a prior and independent order of moral values binding for all times and all places.[348] Rawls seeks to construct the principles of justice that are "most reasonable for us," given our conceptions of the person and society and our principles of practical reason.[349] He asks: "[W]hat is the most appropriate conception

---

346. *See* RAWLS, *supra* note 31, at xiv-xxi, xxvii-xxx, 89-129. *See generally id.* at 89-129 (developing the notion of political constructivism); Rawls, *supra* note 189 (elaborating the idea of Kantian constructivism). Rawls initially put forward his theory, justice as fairness, in fully elaborated form in *A Theory of Justice*. RAWLS, *supra* note 32. For a brief account of the major changes between *A Theory of Justice* and *Political Liberalism*, see *supra* note 32. To the degree that Rawls's new book makes his political conception of justice appear less universal, and so perhaps less interesting to some political philosophers, it may make his conception more immediately applicable to American constitutional theory and hence more interesting to constitutional theorists. That is, the more limited or parochial Rawls's aim is, as a matter of political philosophy, the more directly he speaks to constitutional theorists and citizens in our constitutional democracy.

347. *See* RAWLS, *supra* note 31, at 3-22.

348. *See id.* at 90-99. Rawls's political constructivism is a third theory between conventionalism and natural law, just as Dworkin's legal constructivism is a third theory between positivism (or conventionalism) and natural law. *Compare* RAWLS, *supra* note 32, at 263 (characterizing his theory as attempting to find an "Archimedean point" outside existing circumstances that does not appeal to a priori or perfectionist principles) *with* Ronald Dworkin, *The Law of the Slave-Catchers*, TIMES LITERARY SUPPLEMENT (London), Dec. 5, 1975, at 1437, 1437 (reviewing ROBERT COVER, JUSTICE ACCUSED (1975)) (claiming that his theory is a "third theory" of law between legal positivism and natural law).

349. *See* RAWLS, *supra* note 31, at 28, 93-99, 107-10. Furthermore Rawls aims to resolve the

of justice for specifying the fair terms of social cooperation between citizens regarded as free and equal, and as fully cooperating members of society over a complete life, from one generation to the next?"[350]

Rawls conceives justification in political philosophy not as a search for truth and objectivity from the point of view of the universe, but as a quest for reflective equilibrium between our considered judgments and underlying principles of justice.[351] This conception accords with and has influenced contemporary conceptions of justification as the exercise of practical reason.[352]

Now, what is a constitutional constructivism? First, I intend a general methodological sense of constructivism, illustrated by Dworkin's conception of constitutional interpretation as constructing schemes of principles that best fit and justify our constitutional document and underlying constitutional order as a whole.[353] Dworkin originally put forth this conception by analogy to Rawls's conception of justification in political philosophy as a quest for reflective equilibrium.[354] Constitutional constructivism embraces a methodological constructivism that is similar, though not identical, to Dworkin's.[355]

Second, I intend a specific substantive sense of constructivism, exemplified by Rawls's conception of the equal basic liberties in a constitutional democracy such as our own as being grounded on a conception of citizens as free and equal persons, together with a conception of society as a fair system of social cooperation. As shown below, constitutional constructivism employs a substantive constructivism that is analogous, though not identical, to Rawls's.

---

conflict between the traditions of the liberties of the ancients and of the liberties of the moderns, and to combine equality and liberty into one coherent scheme, by answering the question in the text. *See supra* text accompanying notes 208-09.

350. RAWLS, *supra* note 31, at 3.

351. *See id. passim.*

352. *See* SUNSTEIN, *supra* note 22, at 113-19, 370-71 nn.32-35 (discussing practical reason and objectivity); *id.* at 351-53 (addressing impartiality and objectivity); *see also* Michelman, *Law's Republic*, *supra* note 21, at 1526-28 (describing public practical reason). *But see* Cass R. Sunstein, *Commentary: On Analogical Reasoning*, 106 HARV. L. REV. 741, 781-87 (1993) (arguing that analogical reasoning, as an approach to legal reasoning, has comparative advantages over Rawls's idea of the search for reflective equilibrium and Dworkin's conception of law as integrity).

353. *See supra* notes 69-71 and accompanying text.

354. *See supra* note 71 (explaining the analogy).

355. Dworkin has formulated the two dimensions of best interpretation, fit and justification, in several ways. *See supra* note 69. In some formulations, he speaks of a dimension of fit and a dimension of political morality. Rawls expresses reservations about "political morality" as a formulation of the second dimension, for it may appear too broad. RAWLS, *supra* note 31, at 236 n.23. He instead formulates "best interpretation" as "the one that best fits the relevant body of [constitutional] materials, and justifies it in terms of the public conception of justice or a reasonable variant thereof." *Id.* at 236. He concludes, however, by stating: "I doubt that this view differs in substance from Dworkin's." *Id.* at 237 n.23.

In Part II, I previewed constructivism in the methodological sense, arguing that Ely's interpretive method, understood as a quest for the ultimate interpretivism, has affinities to Dworkin's constructivist conception of constitutional interpretation and Rawls's notion of reflective equilibrium. I contended that Ely's interpretive method shows the need for a Constitution-perfecting theory, such as a constructivism in the substantive sense, to better fit and justify the constitutional document and underlying constitutional order as a whole than does his own process-perfecting theory, which does not account for certain substantive liberties. Sunstein's interpretive method also has affinities to Dworkin's constructivist method.[356]

In Part III, I previewed constructivism in the substantive sense, pointing out that Sunstein's liberal republicanism has affinities to Rawls's political constructivism. I suggested that constitutional constructivism, which combines a theme of securing the preconditions for deliberative democracy (much like that of Sunstein's theory) with a theme of securing the preconditions for deliberative autonomy (which Sunstein's theory lacks), better fits and justifies our constitutional document and underlying constitutional order as a whole than does his theory.

In this Part, I present constitutional constructivism more fully. It is important to state two things at the outset. First, this theory does not entail that everything Rawls argues is required by justice is also, for that reason, mandated by our Constitution. Second, one need not be persuaded to adopt Rawls's political constructivism in order to embrace constitutional constructivism. Constitutional constructivism simply uses Rawls's guiding framework of equal basic liberties to help orient our deliberations, reflections, and judgment about our Constitution and our constitutional democracy.[357] To explain that framework, I must put forth several abstract conceptions from Rawls's theory.

2. The Constitution of Political Liberalism.—Aristotle remarks that a common understanding of justice makes a *polis*.[358] Similarly, Rawls says that a shared conception of justice as fairness makes a constitutional democracy.[359] Aristotle, however, conceived such a common understanding as being based on a single conception of the good, that is, a single

---

356. *See* SUNSTEIN, *supra* note 22, at 368 n.1 (acknowledging his debt to Dworkin's work, but stating that there are some differences in their approaches); *id.* at 369 n.17 (noting similarity between his critique of Ely and Dworkin's). *But see id.* at 375 n.35 (stating that "Dworkin's powerful and lucid account [of interpretive method] has influenced mine" but outlining "several difficulties" with it); Sunstein, *supra* note 352, at 783-87 (criticizing Dworkin's ideal judge, Hercules).

357. *See infra* text accompanying notes 401-02.

358. ARISTOTLE, THE POLITICS OF ARISTOTLE bk. 1, ch. II, §§ 15-16, at 1253a (Ernest Barker trans. & ed., 1948).

359. RAWLS, *supra* note 32, at 243.

comprehensive religious, philosophical, or moral doctrine concerning what is valuable in human life.[360] By contrast, Rawls argues that, at least since the Wars of Religion in the sixteenth and seventeenth centuries and the Protestant Reformation, a shared basis of reasonable political agreement in a morally pluralistic constitutional democracy such as our own cannot be grounded on a single conception of the good without intolerable state oppression. Instead, such a shared basis can be grounded only on an overlapping consensus concerning a political conception of justice.[361]

a. Political conception of justice.—Rawls offers justice as fairness as an example of a political liberalism or a political conception of justice, as distinguished from a comprehensive religious, philosophical, or moral conception of the good.[362] First, political liberalism accepts "the fact of reasonable pluralism"—the fact that a diversity of reasonable yet conflicting and irreconcilable comprehensive religious, philosophical, and moral doctrines may be affirmed by citizens in the free exercise of their capacity for a conception of the good—as a feature of the political culture of a constitutional democracy not to be regretted and not soon to pass away.[363] Second, political liberalism also emphasizes the related "fact of oppression"—the fact that a single comprehensive religious, philosophical, or moral doctrine can be established as a shared basis of reasonable political agreement or public justification in a constitutional democracy only through the intolerably oppressive use of coercive political power—as an entailment of accepting the fact of reasonable pluralism.[364] Political liberalism, as it were, generalizes the principle of religious toleration to apply to reasonable conceptions of the good.[365]

Despite these two related facts, Rawls argues that citizens in a constitutional democracy who hold opposing and irreconcilable conceptions of the good, such as comprehensive religious, philosophical, or moral doctrines, may be able to find a shared basis of reasonable political agreement through an overlapping consensus concerning a political conception of justice. This sort of consensus would obtain where different persons, from the standpoint of their own divergent conceptions of the good, affirmed a shared political conception of justice.[366] Such a political conception of

360. *See* ARISTOTLE, *supra* note 358, at 1253a; *see also* RAWLS, *supra* note 31, at 134; RAWLS, *supra* note 32, at 25, 325 (both interpreting Aristotle's theories).

361. *See* RAWLS, *supra* note 31, at xxiii-xxx, 3-11, 134-37, 303-04.

362. For a brief discussion of the relationship between justice as fairness and political liberalism, see *id.* at xv-xviii.

363. *See id.* at 37, 144.

364. *Id.* at 37.

365. *See id.* at 9-10, 154.

366. *See id. passim.*

justice, to be illustrated below, would provide fair terms of social cooperation on the basis of mutual respect and trust that citizens might reasonably be expected to endorse. It would have priority over and would constrain the polity's pursuit of conceptions of the public good and its imposition of perfectionist values.[367] This is what is meant by the common notion that the right, or justice, is prior to and constrains the good.[368]

b. The two principles of justice.—Rawls presents justice as fairness as an illustration of a political conception of justice that might provide such a shared basis of reasonable political agreement in a constitutional democracy such as our own. It has two principles of justice:

> [1] Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.
>
> [2] Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society [the "difference principle"].[369]

The equal basic rights and liberties of the first principle of justice are specified by a list as follows: "freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law."[370] This list is drawn up from both historical and theoretical analysis. It includes the basic liberties that the constitutions of successful constitutional democracies, such as our Constitution, historically have protected. It also includes the basic liberties that such systems analytically presuppose as necessary for the development and exercise of the two moral powers of citizens, conceived as free and equal persons, in the two fundamental cases to be explained below.[371]

Again, within Rawls's political constructivism, these equal basic liberties are not conceived as being given by a prior and independent order

---

367. *See id.* at 6, 223, 295. *But cf.* SUNSTEIN, *supra* note 22, at 186 (describing his own theory of deliberative democracy as "a mild form of liberal perfectionism").

368. *See* RAWLS, *supra* note 31, at 174-76, 190-95, 203-09.

369. *Id.* at 5-6.

370. *Id.* at 291.

371. *Id.* at 292-93, 325; *see infra* subsections IV(A)(2)(c), IV(A)(2)(d).

of moral values, as in theories of natural law. Rather, they are conceived as being those which are "most reasonable for us,"[372] and are worked up from the way citizens are regarded in the public political culture of a constitutional democracy, in the basic political texts (*e.g.*, the Constitution and the Declaration of Independence), and in the tradition and practice of the interpretation of those texts.[373]

Rawls envisions an ideal four-stage sequence for incorporating the two principles of justice into the basic institutions and social policies of a constitutional democracy: the original position and the constitutional, legislative, and judicial stages.[374] At the constitutional stage, two kinds of constitutional essentials are embodied in the constitution: first, the general structure of government and the political process; and second, the equal basic liberties of the first principle of justice.[375] The latter constitutional essentials include the equal basic liberties listed above; due process of law and equal protection of the laws; and rights and liberties protecting the security and independence of citizens, such as freedom of movement and free choice of occupation, the right to hold and have exclusive use of personal property, and a guaranteed provision of a social minimum of goods and services to meet the basic needs of all citizens.[376]

But the second principle of justice, including the principle of fair equality of opportunity and the difference principle, is not among the constitutional essentials in a constitutional democracy, and it is not incorporated in the constitution.[377] "Indeed," Rawls observes, "the history of successful constitutions suggests that principles to regulate economic and social inequalities, and other distributive principles, are generally not suitable as constitutional restrictions."[378] The history to

372. *Id.* at 28; *see id.* at 66-71; Rawls, *supra* note 189, at 554-72; *cf.* SUNSTEIN, *supra* note 22, at 353, 403 n.7 (discussing a "suitable social point of view" or the "right baseline" as a conception of impartiality).

373. *See* RAWLS, *supra* note 31, at 13-14, 78. For an illuminating analysis of Rawls's political liberalism as a case of an "interpretative theory" drawn from the ongoing political practice of constitutional democracy, see Frank I. Michelman, *On Regulating Practices with Theories Drawn from Them: A Case of Justice as Fairness*, *in* NOMOS: THEORY AND PRACTICE (Ian Shapiro & Judith Wagner DeCew eds., forthcoming 1994).

374. *See* RAWLS, *supra* note 31, at 336-40; RAWLS, *supra* note 32, at 194-201. For Rawls's account of the original position, see RAWLS, *supra* note 31, at 22-28, 304-10.

375. *See* RAWLS, *supra* note 31, at 227.

376. *Id.* at 228-29, 232, 298; *see also id.* at 164-68, 236 n.23 (explaining that the overlapping consensus constituting the political conception of justice encompasses such rights and liberties); Freeman, *Constitutional Democracy*, *supra* note 32, at 347 (listing many of the same liberties as "a part of the freedom of sovereign democratic citizens"); Freeman, *Democratic Interpretation*, *supra* note 32, at 29-35 (arguing that such constitutional rights are a reflection of equal sovereignty among citizens).

377. RAWLS, *supra* note 31, at 228-30, 337.

378. *Id.* at 337.

which he refers includes the era of *Lochner*.[379] Instead, it is only at the legislative stage that the second principle of justice, to the extent that it is accepted by the citizenry, is incorporated into legislation.

Constitutional democracy is in a general way "dualist": It distinguishes the constituent power of We the People from the ordinary power of officers of government and, accordingly, distinguishes the higher law of We the People from the ordinary law of legislative bodies.[380] At the judicial stage, courts may serve as one of the institutional devices to protect the higher law of the constitution against encroachments by the ordinary law of legislation.[381]

c. Conception of citizens as free and equal persons: the two moral powers.—Rawls conceives the equal basic liberties as being grounded on a conception of citizens as free and equal persons, together with a conception of society as a fair system of social cooperation.[382] He argues that free and equal persons engaged in social cooperation in a constitutional democracy should be conceived as having *two moral powers*.

The first moral power is *the capacity for a sense of justice*—the capacity to understand, apply, and act from (and not merely in accordance with) the political conception of justice that characterizes the fair terms of social cooperation in a constitutional democracy.[383] Citizens apply this capacity in judging and deliberating about the justice of basic institutions and social policies.[384]

The second moral power is *the capacity for a conception of the good*—the capacity to form, revise, and rationally pursue a conception of the good, individually and in association with others.[385] A conception of the good is a conception of what is valuable in human life, and it typically consists of ends and aims derived from certain religious, philosophical, or moral doctrines, as well as attachments to other persons and loyalties to various groups and associations.[386] Citizens apply this capacity, their power of deliberative reason, in deliberating about how to live their own lives, individually and in association with others.[387]

---

379. *See id.* at 233 n.18, 362-63.

380. *Id.* at 231-34 (referring to 1 ACKERMAN, *supra* note 21). *But see infra* note 405 (distinguishing between a commitment to dualism in a general sense and a commitment to dualism in Ackerman's specific sense).

381. *See id.* at 233, 240; *infra* text accompanying notes 408-12. I put to one side the question of whether judicial review is a necessary requirement in a constitutional democracy; suffice it to say that judicial review exists as an institutional device for preserving the higher law of the constitution in some existing constitutional democracies, such as our own.

382. *See id.* at 15-20, 29-35, 299-304.

383. *See id.* at 19, 302.

384. *See id.* at 332.

385. *See id.* at 19, 302, 332, 335.

386. *See id.* at 19, 302.

387. *See id.* at 332.

Rawls's basic idea is that by virtue of their two moral powers persons are free and that their having these powers makes them equal. Possession of these two moral powers constitutes the basis of free and equal citizenship.[388] The equal basic liberties are understood as preconditions for the development and exercise of the two moral powers.[389] It is important to understand that this conception of the person as free and equal, and as having these two moral powers, is a normative, political conception of the person as a citizen in a constitutional democracy; it is not a biological or psychological conception of the human being as such.[390]

d. Deliberative democracy and deliberative autonomy: the two fundamental cases.—Rawls arranges the equal basic liberties so as to show their relation to the *two fundamental cases* in which these two moral powers are exercised. The first fundamental case is that of what I have called *deliberative democracy*: The equal political liberties and freedom of thought enable citizens to develop and exercise their first moral power (their capacity for a conception of justice) in understanding, applying, and acting from their conception of justice in judging and deliberating about the justice of basic institutions and social policies.[391] In the first instance, the constitution is seen as establishing a just and workable political procedure, without any explicit constitutional restrictions on legislative outcomes.[392] It incorporates the equal political liberties and seeks to guarantee their fair value, so that the processes of political decision will be open to all on a roughly equal basis.[393] It also protects freedom of thought (including freedom of political speech and press, freedom of assembly, and the like), so that the exercise of those liberties in those processes will be free and informed.[394]

---

388. *See id.* at 19, 29-35, 79, 109; RAWLS, *supra* note 32, at 504-12.

389. *See* RAWLS, *supra* note 31, at 332.

390. *Id.* at 18 n.20, 86-88. At the same time, Rawls does posit a "reasonable moral psychology" whereby citizens "want to be, and to be recognized as, . . . members" of society. *Id.* at 81, 86.

391. *See id.* at 332-35. For the sake of simplicity, I use Sunstein's term, "deliberative democracy." *See supra* note 210 (concerning Rawls's use of that term).

392. *See* RAWLS, *supra* note 31, at 337.

393. *Id.*; *see supra* text accompanying notes 174-78 (discussing fair value of the equal political liberties in relation to Sunstein's notion of political equality and in criticizing *Buckley*). Rawls treats the equal political liberties in a special way: "by including in the first principle of justice the guarantee that the political liberties, and only these liberties, are secured by [guaranteeing] their 'fair value.'" RAWLS, *supra* note 31, at 327. Rawls explains that "this guarantee means that the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions." *Id.* "Formal equality is not enough" where the equal political liberties are concerned. *Id.* at 361.

394. RAWLS, *supra* note 31, at 335, 337.

The second fundamental case is that of what I have called *deliberative autonomy*: Liberty of conscience and freedom of association enable citizens to develop and exercise their second moral power (their capacity for a conception of the good) in forming, revising, and rationally pursuing their conceptions of the good, individually and in association with others—that is, to apply their power of deliberative reason to deliberating about how to live their own lives.[395] In the second instance, the constitution is seen as establishing constitutional restrictions upon the grounds for political decisions.[396] It protects liberty of conscience and freedom of association both to secure citizens' free exercise of deliberative autonomy and to assure that political decisions will not be justifiable solely on the basis of comprehensive religious, philosophical, or moral conceptions of the good.[397]

Finally, Rawls connects the remaining (and supporting) basic liberties to the two fundamental cases by noting that it is necessary to secure them in order properly to guarantee the preceding basic liberties. These remaining and supporting liberties include "the liberty and integrity of the person (violated, for example, by slavery and serfdom, and by the denial of freedom of movement and occupation) and the rights and liberties covered by the rule of law."[398] The constitutional essentials also include due process of law, equal protection of the laws, the right to personal property, and a guaranteed provision of a social minimum of goods and services to meet citizens' basic needs.[399] In other words, guarantees of these basic liberties are preconditions for securing both deliberative democracy and deliberative autonomy. Possession of this whole family of equal basic liberties constitutes the common and guaranteed status of free and equal citizenship.[400]

3. Constitutional Constructivism: A Guiding Framework for Securing Deliberative Democracy and Deliberative Autonomy.—Constitutional constructivism builds upon the architecture of Rawls's political constructivism. Rawls states that although his political conception of justice "is not to be

395. *See id.* at 332-35. For an explanation of my usage of the term "deliberative automony," see *supra* note 210. For a similar usage of that term in the context of justifying a woman's constitutional right to decide whether to have an abortion, see Cohen, *supra* note 215, at 176-86.

396. *See* RAWLS, *supra* note 31, at 337-38.

397. *See id.* at 335-38.

398. *Id.* at 335. The rights and liberties covered by the rule of law include, for example, procedural due process, habeas corpus, freedom from unreasonable searches and seizures, and freedom from self-incrimination. *See* RAWLS, *supra* note 32, at 235-43; Freeman, *Democratic Interpretation*, *supra* note 32, at 26, 31.

399. *See supra* text accompanying note 376.

400. *See* RAWLS, *supra* note 31, at 335.

regarded as a method of answering the jurist's questions," it may provide "a guiding framework, which if jurists find it convincing, may orient their reflections, complement their knowledge, and assist their judgment."[401] He also states that it is "a guiding framework of deliberation and reflection" concerning constitutional essentials.[402] In putting forth a constitutional constructivism, I intend to deploy this guiding framework to help orient our reflections, deliberations, and judgment in interpreting and justifying our Constitution and our constitutional democracy. I do not, however, mean to suggest that our Constitution is a perfectly just constitution, or to offer constitutional constructivism as a theory of constructing a constitution for a perfect liberal utopia, unconstrained by our constitutional text, history, and structure (not to mention tradition, practice, and culture).

a. What, how, and who?—In general, constitutional constructivism is a conception of *what* the Constitution is, *how* it ought to be interpreted, and *who* may authoritatively interpret it.[403] First, as for *what*, constitutional constructivism conceives our Constitution as embodying (or aspiring to embody) a coherent scheme of equal basic liberties, or fair terms of social cooperation on the basis of mutual respect and trust, for our constitutional democracy. The Constitution does not merely enact a discrete list of particular rights narrowly conceived by the framers and ratifiers.[404] Furthermore, as indicated above, the theory understands our constitutional democracy as dualist in a general way.[405]

---

401. *Id.* at 368.

402. *Id.* at 156, 368. On the idea of a guiding framework for deliberation, reflection, and judgment, see RAWLS, *supra* note 32, at 53; Rawls, *supra* note 189, at 560-64.

403. For a work organizing constitutional interpretation on the basis of these three fundamental interrogatives, see MURPHY, FLEMING & HARRIS, *supra* note 35.

404. *See* DWORKIN, *supra* note 47, at 119, 126-29; Dworkin, *supra* note 42, at 382 (both contrasting a constitution of principle with a constitution of detail); *see also* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2833 (1992) (joint opinion) (conceiving the Constitution as a "covenant" or "coherent succession" embodying "ideas and aspirations that must survive more ages than one"); *id.* at 2838-42 (Stevens, J., concurring in part and dissenting in part); *id.* at 2853 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (construing the Court's personal-liberty cases as protecting the general right of privacy rather than a laundry list of particular rights).

405. *See* RAWLS, *supra* note 31, at 231-34 (referring to 1 ACKERMAN, *supra* note 21). A theory of constitutional democracy can be dualist in a general sense, *see supra* text accompanying note 380, without being dualist in Ackerman's specific sense—that is, without endorsing his complex apparatus of higher lawmaking through structural amendments to the Constitution outside the formal Article V amendment procedure, and without accepting his purported distinction between dualism and rights foundationalism on the ground that the former theory but not the latter rejects the idea that a duly ratified amendment might be unconstitutional. *See* 1 ACKERMAN, *supra* note 21, at 13-16, 319-21. For discussions of the idea that Ackerman's hypothetical amendment repealing the First Amendment and establishing a state religion, *id.* at 14-16, instead of being a valid amendment, amounts to a "constitutional breakdown" or "revolution," see RAWLS, *supra* note 31, at 239; Freeman, *Democratic Interpretation*, *supra* note 32, at 41-42. Put another way, just as Ackerman elaborates a notion of

Second, as regards *how*, constitutional constructivism conceives interpretation as the exercise of reasoned judgment[406] in quest of the interpretation that best fits and justifies the constitutional document and underlying constitutional order.[407] Responsible interpretation is not merely exegesis of isolated clauses of the constitutional document or research into the concrete intentions of the framers and ratifiers. In short, the theory is committed to a methodological constructivism.

Finally, with respect to *who*, constitutional constructivism holds that although the Supreme Court generally is the final (but not the exclusive) institutional interpreter in any given case, We the People are the ultimate interpreters of the Constitution.[408] Furthermore, it distinguishes between the partial, judicially enforceable Constitution and the whole Constitution that is binding outside the courts upon legislatures, executive officials, and citizens generally in our constitutional democracy (unless and until they amend it).[409] As Rawls puts it, the Supreme Court is an "exemplar of

---

"structural amendments" to the Constitution outside the formal Article V amending procedure, *see* Ackerman, *supra* note 65, at 1051-57; 1 ACKERMAN, *supra* note 21, at 266-94, so might one develop a notion of "structural entrenchments" to the Constitution through constitutional practice and tradition. *See* RAWLS, *supra* note 31, at 238-39 (suggesting that constitutional tradition and practice over two centuries place restrictions on the formal amending procedure of Article V). On such a view, neither amendment nor entrenchment is purely positivist and confined to the formal procedures of Article V. *See* HARRIS, *supra* note 21, at 164-208; MACEDO, *supra* note 21, at 182-83 (both describing limitations beyond the text of Article V on amending power); Murphy, *Ordering*, *supra* note 21, at 754-57 (discussing basic values and the possibility of unconstitutional constitutional amendments). I pursue these matters further in James E. Fleming, *We the Exceptional American People*, 11 CONST. COMMENTARY (forthcoming 1994). For valuable discussions of the theory and practice of amending the Constitution, see RESPONDING TO IMPERFECTION (Sanford Levinson ed., forthcoming 1994); Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988) (arguing that the "first, most undeniable, inalienable and important, if unenumerated, right of the People is the rigbt of a majority of voters to amend the Constitution—even in ways not expressly provided for by Article V").

406. *See Casey*, 112 S. Ct. at 2806 (joint opinion); *see also* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (calling for "rational process" of judgment); *cf.* RAWLS, *supra* note 31, at 222 (discussing "reasoned judgment").

407. *See* RAWLS, *supra* note 31, at 236 & n.23. For the two dimensions of best interpretation, fit and justification, see *supra* note 69 and accompanying text.

408. *See* RAWLS, *supra* note 31, at 232-33, 237. *But see supra* note 405 (discussing the possibility that some provisions are entrenched outside the formal Article V amending procedure). Constitutional constructivism entails a "protestant" conception of *who* may interpret the Constitution. *See* LEVINSON, *supra* note 281, at 29, 9-53 ("As to the ultimate authority to interpret the source of doctrine, the protestant position is based on the legitimacy of individualized (or at least nonhierarchical communal) interpretation."); *see also* Michelman, *supra* note 373, at 11-18 (arguing that Rawls's political liberalism rejects "judicial supremacy").

409. *See* RAWLS, *supra* note 31, at 240. For example, the Constitution might impose affirmative obligations upon the legislative and executive branches of government, such as a constitutional obligation to provide a social minimum of goods and services to meet the basic needs of all citizens, but it might not accord a judicially enforceable right to such subsistence in the absence of legislative or executive measures. Others have expressed similar views concerning the gap between the judicially enforceable Constitution and the Constitution that is binding outside the courts. *See, e.g.*, SUNSTEIN,

public reason" in a forum of principle.[410] But it is not the exclusive voice of such reason, nor is it the sole forum of principle: "[W]hile the Court is special in this respect, the other branches of government can certainly, if they would but do so, be forums of principle along with it in debating constitutional questions."[411] In other words, constitutional constructivism is a theory of the Constitution, not merely a theory of judicial review. Moreover, judicial review is subject to certain institutional limits in carrying out social reform, such as those sensitively and sensibly stated by Sunstein.[412]

b. The two fundamental cases or themes of deliberative democracy and deliberative autonomy.—In particular, constitutional constructivism entails a theory of judicial review with an active role for courts with respect to the two fundamental cases or themes: first, securing the preconditions for *deliberative democracy*, to enable citizens to apply their capacity for a conception of justice to judging and deliberating about the justice of basic institutions and social policies, and second, securing the preconditions for *deliberative autonomy*, to enable citizens to apply their capacity for a conception of the good (or their power of deliberative reason) to deliberating about how to live their own lives, in order to afford everyone the common and guaranteed status of free and equal citizenship in our constitutional democracy. In other words, courts should exercise more stringent review to strike down democratic choices when those choices do not respect the preconditions for deliberative democracy and deliberative autonomy. The remaining (and supporting) basic liberties, as stated above, also must be guaranteed in order to secure these preconditions.

Constitutional constructivism's first theme, concerned with securing deliberative democracy, is quite similar to Sunstein's principal theme of securing deliberative democracy. It frames questions regarding the equal political liberties and freedom of thought much as his theory does (though

---

supra note 22, at 9-10, 138-40, 145-61, 350; Sager, *Fair Measure*, *supra* note 158; Sager, *Thinness*, *supra* note 158; *supra* note 126; *supra* note 158 and accompanying text.

410. RAWLS, *supra* note 31, at 231, 235-37, 240 (referring to Dworkin's notion of courts as a "forum of principle," in Dworkin, *Forum*, *supra* note 12, at 516-18). For the idea of the Supreme Court as an educative institution, see Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992). Again, I do not take up the question of whether judicial review is a necessary requirement in a constitutional democracy. *See supra* note 381. Here I am offering an account of the role of the Supreme Court in our constitutional democracy.

411. RAWLS, *supra* note 31, at 240.

412. *See* SUNSTEIN, *supra* note 22, at 145-53; *supra* text accompanying note 160-161. It is not the role of courts to say what arrangements are necessary to secure the preconditions for deliberative democracy and deliberative autonomy, but merely to assure that the arrangements enacted by legislatures do not flout these preconditions. *See* RAWLS, *supra* note 31, at 362.

I do not endorse everything that Sunstein proposes in elaborating and applying his principal theme). Indeed, as noted above, Sunstein repeatedly claims that his theory of deliberative democracy is entirely compatible with, not to mention indebted to, the theories of constitutional democracy put forward by Mill and Rawls.[413]

Furthermore, the first fundamental theme of deliberative democracy seeks to assure that political decisions will be impartial in the sense that they are justifiable on the basis of *public-regarding reasons*, not merely the self-interested preferences of private groups or individuals.[414] Constitutional constructivism conceives our political system to be a public facility for deliberation concerning the common good, not a veritable political market for aggregation of self-interested preferences. Also, this theme forbids political decisions that violate the constraints of impartiality in the sense that they deny equal citizenship to groups or individuals on the basis of morally irrelevant characteristics, such as race, sex, or sexual orientation.[415]

I have previewed this first theme, along with its central notion of securing political equality or the fair value of the equal political liberties, in presenting Sunstein's cogent analysis of *Buckley* as an incarnation of *Lochner* (which itself draws upon Rawls's discussion of those cases).[416] The equal political liberties are *primus inter pares*, first among the equal basic liberties. Constitutional constructivism in this respect parallels the doctrine of preferred freedoms outlined in footnote four of *Carolene Products* and elaborated in Ely's theory, not to mention Sunstein's. It also incorporates their two *Carolene Products* categories of cases warranting stricter judicial scrutiny. Finally, it largely accepts Sunstein's insightful analysis of the legacy of *Lochner* and is wary of status quo neutrality—without further justification—as a baseline for judging the justice of basic institutions and social policies and as a constraint on deliberative democracy.[417]

---

413. *See supra* note 34 and accompanying text.

414. *See* RAWLS, *supra* note 31, at 219-20, 359-63; RAWLS, *supra* note 32, at 221-28, 356-62; *cf.* SUNSTEIN, *supra* note 22, at 17-39, 133-41 (arguing that interest-group pluralism is antithetical to deliberative democracy, which requires public-regarding reasons for political decisions); *supra* text accompanying notes 144-48 (summarizing the requirement of public-regarding reasons in Sunstein's theory).

415. *See* RAWLS, *supra* note 31, at 79-81, 335; *cf.* SUNSTEIN, *supra* note 22, at 136, 259-61, 402 n.17 (acknowledging that his notion that morally irrelevant differences should not be turned into social disadvantages draws upon RAWLS, *supra* note 32).

416. As stated above, both Sunstein and Rawls argue that *Buckley* is analogous to *Lochner* because the Court misconceives our political system as a veritable marketplace of preferences rather than a republic of reasons. *See supra* text accompanying notes 170-78.

417. *See supra* text accompanying notes 205-07. Thus, within constitutional constructivism, there is no justification for special judicial protection for economic liberties.

Constitutional constructivism's second theme, concerned with securing deliberative autonomy, is not articulated as a principal theme in Sunstein's theory. It aspires centrally to protect liberty of conscience and freedom of association, along with autonomy and privacy. Moreover, at least where constitutional essentials and matters of basic justice are at stake, it seeks to assure that political decisions will be impartial in the sense that they are justifiable on the basis of *public reason*—on grounds that citizens generally can reasonably be expected to endorse, because they come within an overlapping consensus concerning a political conception of justice.[418] These constitutional restrictions must be honored if free and equal citizens are to engage in social cooperation on the basis of mutual respect and trust in a constitutional democracy such as our own, which is characterized by the fact of reasonable pluralism and which recognizes the related fact of oppression.[419] Constitutional constructivism conceives our polity as being subject to the limits of public reason, at least where constitutional essentials and matters of basic justice are at stake, rather than being free to make collective judgments founded solely on comprehensive religious, moral, or philosophical conceptions of the good.[420]

I have previewed this second theme in criticizing Sunstein's theory for emphasizing deliberative democracy to the neglect of deliberative autonomy. I also have shown, through critiquing his analysis of *Bowers*, that constitutional constructivism, unlike Sunstein's theory, applies both substantive due process and equal protection as bases for securing the status of free and equal citizenship for everyone. As shown above, it embraces conceptions like decisional autonomy, decisional privacy, spatial privacy, and freedom of intimate association as aspects of deliberative autonomy, not merely an anticaste principle of equal citizenship as an aspect of deliberative democracy.[421] The architecture of constitutional constructivism,

---

418. *See* RAWLS, *supra* note 31, at 213-20, 223-30; Freeman, *Democratic Interpretation*, *supra* note 32, at 17, 20-29.

419. *See* RAWLS, *supra* note 31, at 319, 337-38; *supra* text accompanying notes 362-65.

420. Rawls speaks of the limits of public reason as imposing "a moral, not a legal, duty—the duty of civility." RAWLS, *supra* note 31, at 217. Others have produced valuable discussions and applications of Rawls's idea of public reason to constitutional theory. *See* Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. (forthcoming 1993); Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083 (1990); Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963 (1993). Elsewhere I plan to elaborate upon the constraints of public reason in our constitutional democracy. Here I would note that Rawls has suggested that the ideal of public reason does not forbid citizens to rely upon their religious beliefs in public discussions of political matters, provided that they also in due course support their political proposals in terms of the values of public reason. *See* John Rawls, The Idea of Public Reason: Further Considerations § 3 (Nov. 2, 1993) (unpublished manuscript, on file with the author) (discussing "wide public reason"); RAWLS, *supra* note 31, at 247-54 (adopting an "inclusive" view of public reason).

421. Seeuring deliberative autonomy would not involve Lochnering in Sunstein's sense, for these constraints on deliberative democracy are not reflections of status quo neutrality. *See supra* text

unlike that of Sunstein's theory, would not force or lead it to recast such basic liberties, better understood as preconditions for deliberative autonomy, as preconditions for deliberative democracy or, worse yet, to disregard them entirely.

Constitutional constructivism accords priority to the whole family of equal basic liberties over pursuit of conceptions of the public good or the imposition of perfectionist values.[422] This understanding of priority entails that it may be permissible to regulate certain basic liberties for the sake of securing other basic liberties or the whole family of such liberties. No single basic liberty by itself is absolute.[423] For example, *Buckley* was wrongly decided with respect to limitations on campaign expenditures, among other reasons, because the Court failed to see the Constitution as a whole. Therefore, it failed to see that freedom of political expression may be regulated (though not restricted) through campaign finance laws in order to try to assure political equality, or the fair value of the equal political liberties, for equal citizens in a fair scheme of representation.[424] The Court's single-minded focus on the First Amendment without regard to such preconditions for deliberative democracy blinded it to that compelling governmental objective.[425]

---

accompanying notes 135-36, 235-37, 318. Instead, they are rooted in a conception of citizens as free and equal and of what is necessary for the development and exercise of their two moral powers. *See supra* subsection IV(A)(2)(c).

422. *See* RAWLS, *supra* note 31, at 6, 223, 295.

423. *Id.* at 294-99.

424. *See id.* at 359-63. Rawls states that his discussion of *Buckley* is "in sympathy with" Justice White's and Justice Marshall's dissents in *Buckley*, *id.* at 359 n.72 (citing Buckley v. Valeo, 424 U.S. 1, 257-66 (1976) (White, J., dissenting) and *id.* at 287-90 (Marshall, J., dissenting)), as well as with Justice White's dissent in First National Bank v. Bellotti, 435 U.S. 765, 803-04 (1978) (arguing that the government's interest in prohibiting expenditures by banks and corporations to influence the outcome of voting on certain referenda is derived from the First Amendment and the system of expression itself). *See* RAWLS, *supra* note 31, at 359 n.72.

425. A similar blindness may be at work in Justice Scalia's opinion for the Court in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), which struck down a "Bias-Motivated Crime Ordinance." Scalia and the Court resolutely refused to see the Constitution as a whole and therefore failed to see that freedom of hateful racist expression quite possibly may be regulated (though not restricted) in order to attempt to secure equal citizenship for members of groups who are subject to racial, religious, or gender hostility. *Cf.* Akhil R. Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 151-60 (1992) (criticizing the Court for ignoring the Reconstruction Amendments). *But see* Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1657 (1993) (arguing, in response to Amar, *supra*, that the Thirteenth and Fourteenth Amendments are "missing" from *R.A.V.* because "penumbras and emanations are dangerous business," and these provisions' "shadows" are "too tenuous" or "too far" from the First Amendment to be brought to bear on the case). This suggestion regarding what is wrong with Scalia's opinion accords with that of Justice Stevens in his concurring opinion in *R.A.V.* Stevens argues that the First Amendment—in isolation from the whole scheme—is not an absolute. *R.A.V.*, 112 S. Ct. at 2564 (Stevens, J., concurring). Justice White made a similar argument in *R.A.V.*, 112 S. Ct. at 2556, 2555-56 (White, J., concurring) (mentioning the Equal Protection Clause and stating that "[i]n light of our Nation's long and painful experience with discrimination," the ordinance was plainly reasonable and the interest

Sunstein's theory of securing deliberative democracy bears a resemblance to Alexander Meiklejohn's well-known view of the overriding value of self-government and political freedom.[426] Constitutional constructivism also has a certain similarity to Meiklejohn's view, but it gives the kind of primacy that Meiklejohn and Sunstein give to political liberties instead to the family of political and personal liberties as a whole[427] and thus seeks to secure both deliberative democracy and deliberative autonomy. It aspires to be a theory of self-government in both a political sense and a personal sense.[428]

c. Constitutional democracy and trustworthiness.—Constitutional constructivism is a theory of constitutional democracy and trustworthiness, an alternative to Ely's theory of representative democracy and distrust and to Sunstein's theory of deliberative democracy and impartiality. I mean trustworthiness in the sense of Rawls's own remark: "By publicly affirming the basic liberties citizens . . . express their mutual respect for one another as reasonable and trustworthy, as well as their recognition of the worth all citizens attach to their way of life."[429] Each of constitutional constructivism's two themes seeks to secure a type of precondition for the trustworthiness of political decisions in our constitutional democracy. To be trustworthy, a constitutional democracy must secure and respect a scheme of equal basic liberties that guarantees not only the preconditions for deliberative democracy but also the preconditions for deliberative autonomy. Ely's and Sunstein's process-perfecting theories secure only the former type of precondition for trust or impartiality.

Hence, constitutional constructivism is a fuller theory of perfecting the trustworthy and impartial Constitution than is Sunstein's (or Ely's) theory.[430] Its first theme of securing deliberative democracy, like Sunstein's theory, requires that political decisions satisfy his impartiality principle—that they be justifiable on the basis of *public-regarding reasons*, not merely self-interested preferences. But its second theme of securing deliberative autonomy, unlike Sunstein's theory, requires that such decisions satisfy another principle of impartiality—that they be justifiable on the

---

compelling). For Sunstein's analysis of *R.A.V.*, see SUNSTEIN, *supra* note 22, at 245-53; SUNSTEIN, *supra* note 143, at 180-93.

426. Sunstein, for example, writes that a renewal of the Madisonian view that "the First Amendment is principally about political deliberation, [which was] asserted most vigorously in the work of the philosopher Alexander Meiklejohn, would help to resolve many current controversies." SUNSTEIN, *supra* note 22, at 232 (citing ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)).

427. *See* RAWLS, *supra* note 31, at 290 n.1.

428. These two senses of self-government, however, are interrelated. *See supra* note 211 and accompanying text.

429. *Id.* at 319; *see supra* text accompanying note 36.

430. *See supra* text accompanying note 341.

basis of *public reason*, or reasons that everyone in our constitutional democracy can reasonably be expected to accept, whatever their particular conceptions of the good. It would secure greater toleration for citizens' pursuit of divergent conceptions of the good than does his theory. Like Rawls's political constructivism, constitutional constructivism generalizes the principle of religious toleration to apply to reasonable conceptions of the good.[431] From the standpoint of constitutional constructivism, Sunstein's theory of securing deliberative democracy to the neglect of securing deliberative autonomy is not sufficiently impartial. His partial Constitution is not trustworthy enough.

Constitutional constructivism, with its two themes, gives a sense to the common idea of the Constitution as the basis for a civil religion in our constitutional democracy.[432] The idea is that the Constitution, conceived as an embodiment of fair terms of social cooperation on the basis of mutual respect and trust among free and equal citizens, provides a shared public basis for reasonable political agreement in our morally pluralistic constitutional democracy. In this sense, constitutional constructivism does not gainsay Justice Holmes's observation in dissent in *Lochner* that "a constitution . . . is made for people of fundamentally differing views."[433]

B. *Constitutional Constructivism Does Not Take a Pointless Flight from Substance*

I have claimed that constitutional constructivism resists the temptations to take flights from substantive liberties like those taken by Ely's and Sunstein's theories. Now I shall pull together several earlier strands of the analysis. Bear in mind that this Article merely sets forth an outline for a constitutional constructivism, but it should suffice to suggest ways in which such a theory avoids Ely's and Sunstein's flights.

1. Constitutional Constructivism Avoids Ely's Flight from Substance.—In Part II, I intimated that constitutional constructivism avoids Ely's flight from giving effect to certain substantive provisions of the

---

431. *See supra* text accompanying note 365; *supra* note 420 and accompanying text.

432. For the idea of the Constitution in the American civil religion, see LEVINSON, *supra* note 281, at 9-53. Kathleen Sullivan has advanced a theory of "the culture of liberal democracy" as the American "civil public order" entailed by the religion clauses of the First Amendment. *See* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 199, 197 (1992); *see also* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1613 (1993) (arguing that "if the Establishment Clause should be read to place a special burden on the role of religious values in politics, then those values should receive special treatment when they conflict with the values adopted by the legislature"). For a view contrary to Sullivan's (and Greene's), see Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992).

433. Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

Constitution to merely perfecting processes. Here I suggest three arguments for the superiority of constitutional constructivism over Ely's theory of reinforcing representative democracy. These arguments parallel Ely's three arguments for his theory of judicial review, or his three criteria for an acceptable theory.

Ely's first argument for his process-perfecting theory is that it better fits and justifies the constitutional document and underlying constitutional order than do substantive fundamental values theories.[434] I contended, though, that his own quest for the ultimate interpretivism showed the need for a Constitution-perfecting theory, such as a constitutional constructivism. In this Part, I have outlined the latter sort of theory, which provides a guiding framework of equal basic liberties. Constitutional contructivism's second theme of securing deliberative autonomy fits and justifies the substantive liberties manifested in our constitutional document and implicit in our underlying constitutional order that elude the reach of the two process-perfecting themes of Ely's *Carolene Products* framework. Its first theme of securing deliberative democracy better fits and justifies our constitutional democracy's political processes than does Ely's qualified utilitarian and pluralist theory of representative democracy. Accordingly, constitutional constructivism better satisfies Ely's first criterion than does his own theory.

Ely's second argument is that his theory, unlike substantive fundamental values theories, "is not inconsistent with, but on the contrary is entirely supportive of, the American system of representative democracy."[435] This argument assumes that, or begs the question whether, the political theory that best fits and justifies the American system is Ely's theory of representative democracy as an applied utilitarianism.[436] By constructing such a conception of our system, which cannot account for certain substantive liberties, Ely has built his flight from such liberties into the very substance of his process-oriented political theory of representative democracy. His theory, however, is not consistent with and supportive of the substantive liberties that it cannot account for and that are better fit and justified by constitutional constructivism.

Constitutional constructivism, by contrast, argues that our underlying system is better interpreted as a constitutional democracy and a synthesis of liberalism and republicanism. Unlike Ely's theory, it aspires to perfect

---

434. *See* ELY, *supra* note 16, at 88, 87-101 (arguing from "the nature of the United States Constitution" for a "representation-reinforcing approach to judicial review" rather than a substantive value-protecting approach).

435. *Id.* at 102; *see id.* at 88.

436. *See* Dworkin, *supra* note 42, at 384, 384-85 (characterizing Ely's theory as adopting an "'external' revisionist strategy" that "plainly begs the question" what conception of democracy the Constitution establishes and that "rewrites [the Constitution] to make it more congenial to what the revisionists consider the best theory of democracy").

both our constitutional democracy's substantive preconditions for deliberative democracy and its procedural preconditions for deliberative autonomy and thus to reinforce that system on its own terms. Accordingly, constitutional constructivism is more consistent with and more effective at reinforcing our underlying system than is Ely's theory. Therefore, it is superior to Ely's theory on his second criterion.

Ely's third argument is that his representation-reinforcing theory, again unlike substantive fundamental values theories, "assigns judges a role they are conspicuously well situated to fill" as compared with politically elected officials: perfecting political processes rather than discovering society's substantive fundamental valuens.[437] His argument is not so much one of relative institutional competence as it is one of institutional position or perspective.

Constitutional constructivism agrees with Ely that courts are different from legislatures, but it draws the opposite conclusion: Precisely because of their differences from legislatures, and because of their independence from politics in the narrow sense of a battleground of power politics, courts are well situated to protect basic liberties against encroachment by the ordinary political processes. To use Dworkin's term, courts should be a "forum of principle," vindicating fundamental rights.[438] (That is not to say, however, that legislative and executive branches should not also be forums of principle, deliberating concerning matters of principle.[439])

This argument, like Ely's, is less one of competence than of institutional position. It is an argument about the entailments of judges' responsibility to render their decisions according to law, understanding law on a constructivist model of principles rather than a positivist model of rules.[440] As Justice Jackson put it in the second flag salute case,

---

437. ELY, *supra* note 16, at 102; *see id.* at 88, 103; Ely, *supra* note 78, at 833-36 & 833 n.4.

438. *See* Dworkin, *Forum*, *supra* note 12, at 516-18. *But see* Ely, *supra* note 78, at 833 n.4 (criticizing the fundamental values strand of the legal process tradition represented by, *e.g.*, Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959)).

439. *See* RAWLS, *supra* note 31, at 240. Similarly, Sunstein criticizes Dworkin's distinction between legislatures as a battleground of power politics and courts as a forum of principle for being overstated and for understating the extent to which "the major reflections of principled deliberation in the American history have come from Congress and the President, not the courts." SUNSTEIN, *supra* note 22, at 146.

440. *See* DWORKIN, RIGHTS, *supra* note 21, at 14-45, 46-80, 87-88, 104-05, 126, 160-62 (contrasting the constructivist model of principles with the positivist model of rules as different conceptions of the rule of law and emphasizing the responsibility of judges and the notion of "articulate consistency" under the former model); DWORKIN, *Political Judges and the Rule of Law*, *in* DWORKIN, PRINCIPLE, *supra* note 12, at 9 (contrasting the model of principles (the "rights" conception) with the model of rules (the "rule-book" conception)); DWORKIN, *How Law Is Like Literature*, *in* DWORKIN, PRINCIPLE, *supra* note 12, at 146, 159-62 (stressing judges' responsibilities under the model of principles); DWORKIN, *supra* note 15, at 114-50, 176-224 (contrasting "law as integrity" with positivism (or "conventionalism")). Contrast Scalia's positivist understanding of the rule of law as a law of rules. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175

responding to Justice Frankfurter in the first flag salute case: Rather than deferring to the "vicissitudes" of the political process, courts vindicate fundamental rights, "not by authority of [their] competence but by force of [their] commissions."[441]

Constitutional constructivism combines a conception of courts as an exemplar of public reason in a forum of principle, vindicating fundamental rights in our constitutional democracy, with a recognition of certain institutional limits of courts, such as those stated by Sunstein.[442] Ely basically uses the notion of "substance" versus "process" as a principle of role differentiation between legislatures and courts, so again he builds his flight from certain substantive liberties into his argument for a process-perfecting theory of judicial review.[443] Constitutional constructivism is also superior to Ely's theory on his third criterion.

And so, constitutional constructivism better satisfies Ely's three criteria for an acceptable theory of judicial review than does his own theory. It also is at once more liberal and more republican than Ely's qualified utilitarian and pluralist theory. Finally, it is a fuller Constitution-perfecting theory.

2. *Constitutional Constructivism Avoids Sunstein's Flight from Substance.*—In Part III, I contended that constitutional constructivism avoids Sunstein's flight from deliberative autonomy to deliberative democracy and, in particular, from substantive due process to equal protection. Now that I have outlined that theory more fully, I shall review those arguments.

First, constitutional constructivism does not flee deliberative autonomy for deliberative democracy. It offers a better synthesis of the traditions of liberalism and republicanism than does Sunstein's liberal republicanism, for it combines a "republican" theme of securing the preconditions for deliberative democracy with a "liberal" theme of securing the preconditions for deliberative autonomy. Sunstein's synthesis emphasizes the liberties of the ancients to the neglect of the liberties of the moderns. Furthermore, constitutional constructivism better fits and justifies certain substantive liberties

---

(1989). For a similar contrast, though between standards and rules instead of principles and rules, see Sullivan, *supra* note 10. For a valuable analysis of the model of principles and the model of rules as competing understandings of the ideal of the rule of law, see Gregory C. Keating, *Fidelity to Pre-Existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1 (1993).

441. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638, 640 (1943), *overruling* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940). In *Gobitis*, Justice Frankfurter's opinion of the Court had emphasized that courts "possess no marked and certainly no controlling competence" as compared with state legislatures and school boards in deciding whether compelling a salute to the flag inculcates patriotism. *Gobitis*, 310 U.S. at 597-98.

442. *See supra* notes 409-12 and accompanying text.

443. *See supra* note 126 and accompanying text.

manifested on the face of our constitutional document and implicit in our underlying constitutional order than does Sunstein's theory.

Second, constitutional constructivism does not flee substantive due process for equal protection. It aspires to secure both free and equal citizenship for everyone by providing both liberty- and equality-rooted baselines for criticizing existing practices that fail to satisfy the preconditions for deliberative autonomy and deliberative democracy. It offers a better combination of liberty and equality in one coherent scheme of equal basic liberties than does Sunstein's theory. In sum, constitutional constructivism is a fuller Constitution-perfecting theory.

C. *Constitutional Constructivism Does Not Take a Boundless Flight to Substance: The Specter of* Lochner

Hence, constitutional constructivism does not take a flight from substance to process like Ely's or Sunstein's theories. But does it take a boundless flight from process to substance beyond the Constitution? That is, does it put aside the legal materials of our constitutional order and succumb to the temptation to remake our Constitution in the image of a perfect liberal utopia?[444] Indeed, is constructivism the very incarnation of the specter of *Lochner*?

Constitutional constructivism must be prepared to confront the inevitable paraphrase of Justice Holmes's dissenting opinion in *Lochner*: If the Constitution does not enact Mr. Herbert Spencer's *Social Statics*, neither does it enact Mr. John Rawls's *A Theory of Justice* or his *Political Liberalism*.[445] What responses can it give to this paraphrase?

Most important, a first response is to recall that constitutional constructivism simply deploys the constructivist framework as a guiding framework to help orient our reflections, deliberations, and judgment about our Constitution and our constitutional democracy as embodying (or aspiring to embody) a coherent scheme of equal basic liberties, rather than merely enacting a "laundry list of particular rights."[446] It does not make an absurd anachronistic claim that the constitutional framers and ratifiers in 1791 enacted a book published by Rawls in 1971, much less 1993.[447]

---

444. *See* BORK, *supra* note 5, at 210-14, 351-55; Monaghan, *supra* note 15, at 356.

445. *See* Ely, *supra* note 70, at 401 (quoting paraphrase of Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) with respect to Mill's *On Liberty*). *But see* Commonwealth v. Wasson, 842 S.W.2d 487, 496-98 (Ky. 1992) (implying that the Kentucky Constitution *does* enact John Stuart Mill's *On Liberty*); *supra* text accompanying note 306 (discussing *Wasson*).

446. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2853 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see supra* text accompanying notes 357, 401-04.

447. *But see* BORK, *supra* note 5, at 211 (ridiculing efforts to apply Rawls's *A Theory of Justice* to interpreting our Constitution).

Nor does it make a far-fetched Panglossian claim that our Constitution establishes a perfect liberal utopia.[448] It simply conceives our equal basic liberties as being centrally concerned with two fundamental cases or themes, those of deliberative democracy and deliberative autonomy.

A second response to the paraphrase is in terms of economic liberties and particular economic theories: To grant that it would aptly dispose of any attempt to read Rawls's difference principle, like liberty of contract, into our Constitution. But we need to recall that Rawls himself argues that the difference principle is not among the constitutional essentials that would be incorporated into a constitution in the ideal four-stage sequence (let alone into our Constitution).[449] He observes that history, including the era of *Lochner*, shows that principles to regulate economic and social inequalities and other distributive principles are not among the constitutional essentials that are incorporated as constitutional restrictions. "Rather," he suggests, "just legislation seems to be best achieved by assuring fairness in representation and by other constitutional devices."[450] In this respect, Rawls sounds more like Ely or Sunstein than like either Justice Brewer of the *Lochner* era[451] or Richard A. Epstein or Mark V. Tushnet of the age of *Roe* and *Buckley*.[452]

A third, more general response is in terms of the legacy of *Lochner*. Constitutional constructivism largely accepts Sunstein's provocative analysis of what was wrong with *Lochner* and largely rejects status quo neutrality—without further justification—as a baseline that imposes constraints on deliberative democracy. It decidedly does not enact status quo neutrality, whereas *Lochner* in effect did.

A final response is in terms of interpretive method: To argue that the terms of Holmes's dissent in *Lochner*, such as whether the Constitution

---

448. *But see* Monaghan, *supra* note 15, at 356 (criticizing "due substance" theorists as espousing the utopian view of a perfect Constitution).

449. *See supra* text accompanying notes 377-79.

450. RAWLS, *supra* note 31, at 337.

451. It is hard to determine who is the most heinous villain of the era of *Lochner*. The progressive historian Arnold M. Paul awards the prize to Brewer. *See* ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW 70, 83 n.3 (1960) (analyzing, *e.g.*, David J. Brewer, The Nation's Safeguard, 1893 Proceedings of the New York State Bar Association—Sixteenth Annual Meeting). Later in 1893, perhaps in response to Brewer, Thayer published his classic essay calling for judicial deference to the national representative process. For discussions of Thayer, see *supra* notes 128-33, 158-62 and accompanying text.

452. *See* EPSTEIN, *supra* note 4 (advocating stringent judicial protection of economic liberties, though under the Takings Clause and the Contract Clause rather than the Due Process Clauses); Mark V. Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981) (explaining that his answer to the question "how would *you* decide the X case" is "to make an explicitly political judgment: which result is, in the circumstances now existing, likely to advance the cause of socialism" and then "write an opinion in some currently favored version of Grand Theory" (emphasis in original)); *supra* text accompanying notes 201-07.

"enacts" the text of "a particular economic theory" or a particular political theory, are the wrong terms. Instead, the right terms are what substantive political theory best fits and justifies the constitutional document and underlying constitutional order as a whole—taking the Constitution's text, history, and structure as "fixed points" that a theory must acceptably fit and justify.[453] These terms are those of a methodological constructivism and are accepted with slight variations by Ely and Sunstein.

Constitutional constructivism holds that interpreting the Constitution with fidelity and integrity to its text, history, and structure requires elaborating the substantive political theory (or competing theories) that best fits and justifies the constitutional document and underlying constitutional order that were originally framed and have developed.[454] Thus, substantive political theory in constitutional interpretation is bounded by the criteria of fit with and justification of the extant legal materials. Courts are exemplars of public reason in a forum of principle, not seminars of boundless philosophical speculation.[455] The character of the Constitution, as an embodiment of a coherent scheme of general principles rather than merely an enactment of a discrete list of particular rights, "enacts" or establishes the need for substantive political theory in interpreting it faithfully and with integrity. These terms are those not only of a methodological constructivism but also of the joint opinion of *Casey* along with the opinions of Justices Stevens and Blackmun.[456] On this view, to echo *The Federalist* No. 78, courts have neither force nor will but merely reasoned judgment.[457]

In conclusion, it would be profoundly beside the point to protest, as against constitutional constructivism, that the Constitution does not enact Rawls's *Political Liberalism*. One might practically as well complain that

---

453. *See* RAWLS, *supra* note 31, at 8, 124, 342-43; RAWLS, *supra* note 32, at 19-20, 579-81 (both discussing certain "fixed points," or moral convictions about which people generally agree and to which any theory of justice must conform); *see also* DWORKIN, RIGHTS, *supra* note 21, at 159-68 (describing Rawls's theory of equilibrium between the "fixed points" in which people adjust between theory and conviction until a fit is reached).

454. For an illuminating account of fidelity in constitutional interpretation, see Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

455. For the idea of courts as exemplars of public reason in a forum of principle, see *supra* text accompanying notes 399-403. By "seminar," I mean to echo BICKEL, *supra* note 47, at 26 (quoting Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952)).

456. *See supra* note 404 and accompanying text.

457. *See* THE FEDERALIST No. 78, *supra* note 48, at 465 ("The judiciary . . . may truly be said to have neither force nor will but merely judgment."). For the phrase "reasoned judgment," see Planned Parenthood v. Casey, 112 S. Ct. 2791, 2806 (1992) (joint opinion). For Scalia's angry reply, invoking *The Federalist* No. 78, see *id.* at 2882 (Scalia, J., concurring in the judgment in part and dissenting in part). For Rawls's (presumably coincidental) usage of the phrase "reasoned judgment," see RAWLS, *supra* note 31, at 222.

it does not enact the *Carolene Products* framework, or Scalia's *Michael H.* framework, or indeed Holmes's dissent in *Lochner*, to say nothing of Bork's *The Tempting of America*. All of this should go without saying. The inevitable paraphrase of Holmes's dissent in *Lochner* is hardly dispositive of the projects of Ely, Sunstein, or constitutional constructivism.

V. Conclusion: Constitutional Democracy and Trustworthiness

We need to move beyond Ely's and Sunstein's process-perfecting theories to a Constitution-perfecting theory, a theory that would reinforce not only the procedural liberties but also the substantive liberties embodied in our Constitution. In this Article, I have set forth an outline for a constitutional constructivism, a theory that secures the preconditions for trustworthiness of political decisions in our constitutional democracy by reinforcing both the procedural preconditions for deliberative democracy and the substantive preconditions for deliberative autonomy. Constitutional constructivism is wary of the specter of *Lochner* and takes neither a pointless flight from substance to process nor a boundless flight from process to substance beyond the Constitution. It provides a guiding framework to help orient our reflections, deliberations, and judgment in interpreting and justifying our constitutional document and underlying constitutional order. Unlike Ely's theory of representative democracy and distrust and Sunstein's theory of deliberative democracy and impartiality, constitutional constructivism is a theory of constitutional democracy and trustworthiness.