

Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

11-1995

Securing Deliberative Autonomy

James E. Fleming

Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Constitutional Law Commons](#)

Recommended Citation

James E. Fleming, *Securing Deliberative Autonomy*, in 48 Stanford Law Review 1 (1995).
Available at: https://scholarship.law.bu.edu/faculty_scholarship/2777

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



Securing Deliberative Autonomy

James E. Fleming*

In this article, Professor Fleming proposes to tether the right of autonomy by grounding it within a constitutional constructivism, a guiding framework for constitutional theory with two fundamental themes: deliberative democracy and deliberative autonomy. He advances deliberative autonomy as a unifying theme that shows the coherence and structure of certain substantive liberties on a list of familiar "unenumerated" fundamental rights (commonly classed under privacy, autonomy, or substantive due process). The bedrock structure of deliberative autonomy secures basic liberties that are significant preconditions for persons' ability to deliberate about and make certain fundamental decisions affecting their destiny, identity, or way of life. As against critics' charges that the right of privacy or autonomy is dangerously unruly and unconstrained, Professor Fleming argues that deliberative autonomy is rooted, along with deliberative democracy, in the language and design of our Constitution. Each theme, he contends, has a structural role to play in securing the basic liberties that are preconditions for our scheme of deliberative self-governance. Finally, Professor Fleming argues for reconceiving the substantive due process inquiry in terms of a criterion of the significance of an asserted liberty for deliberative autonomy, charting a middle course between Scalia—the rock of liberty as "hidebound" historical practices—and Charybdis—the whirlpool of liberty as unbounded license.

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Justice Louis D. Brandeis¹

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

I am grateful to Akhil Amar, Sot Barber, Jill Fisch, Martin Flaherty, Ned Foley, Samuel Freeman, Abner Greene, Will Harris, Tracy Higgins, Nick Johnson, Bob Kaczorowski, Greg Keating, Sandy Levinson, Steve Macedo, Frank Michelman, Wayne Moore, Walter Murphy, John Rawls, Bill Treanor, Mark Tushnet, and Ben Zipursky for helpful comments relating to this article. Special thanks go to Linda McClain for constructive readings of numerous drafts and for countless discussions. I also would like to thank my research assistants Alan Rabinowitz, Sabrena Silver, and Anthony Cicia. Fordham University School of Law provided generous research support. I benefitted greatly from presenting drafts at a Fordham University School of Law Faculty Work-in-Progress Colloquium and an Ohio State Legal Theory Workshop. Finally, my thinking about this article owes much to the valuable discussion of an earlier work that I presented at the New York University School of Law Colloquium on Constitutional Theory, especially to the comments of Chris Eisgruber and Larry Sager.

1. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see also *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both

I. INTRODUCTION

A. *The Problem of Tethering Autonomy in Constitutional Law*

The right of privacy or autonomy, once loosed, is not easily tethered.² It is, however, easily caricatured. Robert H. Bork asserts that "the right of privacy" has become a loose canon in the law" and that the recognition of such a right in *Griswold v. Connecticut* was tantamount to the "construction of a constitutional time bomb."³ Catharine A. MacKinnon attacks it as "a right of men 'to be let alone' to oppress women one at a time" in private realms of sanctified isolation.⁴ Michael J. Sandel and Mary Ann Glendon portray persons endowed with the right of autonomy as "unencumbered selves" or as "lone rights-bearers" who indeed are "let alone" and thus deprived of the constitutive bonds of community.⁵ John Hart Ely belittles "the right to be different" as an upper-middle-class right: "the right of my son to wear his hair as long as he pleases."⁶ The right of privacy or autonomy on the loose in these caricatured renditions is so unruly, dangerous, or rootless that one might wonder whether such a right can be tethered in constitutional law.

In this article, I shall tether the right of autonomy by grounding it within a constitutional constructivism,⁷ a guiding framework for constitutional theory with two fundamental themes: first, securing the basic liberties that are 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 basic liberties that are preconditions for *deliberative autonomy*, to enable citizens to apply their capacity for a conception of the good to deliberating about and deciding how to live their own

as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.").

2. Cf. ARCHIBALD COX, *THE WARREN COURT* 6 (1968) ("Once loosed, the idea of Equality is not easily cabined."); PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 165 (1970) (quoting COX, *supra*). The Supreme Court proved Cox and Kurland wrong, easily (though problematically) cabinining equality in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 51-55 (1973), which limited the expansion of both the "fundamental rights" and the "suspect classifications" strands of equal protection doctrine.

3. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 95, 97 (1990) (criticizing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

4. CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 93, 102 (1987) (citations omitted).

5. MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 182 (1982); MARY ANN GLEN-
DON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 47-48 (1991); Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 *POL. THEORY* 81, 85-87 (1984).

6. John Hart Ely, *Democracy and the Right to be Different*, 56 *N.Y.U. L. REV.* 397, 405 (1981).

7. This article carries forward my project of developing a constitutional constructivism. See James E. Fleming, *Constructing the Substantive Constitution*, 72 *TEX. L. REV.* 211 (1993). Constitutional constructivism is analogous to John Rawls' political constructivism, a theory developed in his important book, *Political Liberalism*. Rawls 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 theorists of moral realism or natural law. JOHN RAWLS, *POLITICAL LIBERALISM* 90-99 (1993). 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 underlying constitutional order.

lives. Together, these themes afford everyone the common and guaranteed status of free and equal citizenship in our morally pluralistic constitutional democracy.⁸ They reflect two bedrock structures of our constitutional document and underlying constitutional order: deliberative political and personal self-government.⁹ The second theme bounds the right of autonomy by limiting it to protection of basic liberties that are significant preconditions for persons' development and exercise of deliberative autonomy in making certain fundamental decisions affecting their destiny, identity, or way of life. Thus, constitutional constructivism, in the spirit of Justice Brandeis' famous formulation, undertakes to "secure conditions favorable to the pursuit of happiness" by securing the preconditions for deliberative autonomy.¹⁰

My aim in developing a constitutional constructivism is not to unveil a new package of basic liberties that We the People never knew we had. Nor is it to provide a new justification for any particular liberty. Rather, I aim to reinterpret familiar understandings of our basic liberties as manifestations of two fundamental themes: deliberative democracy and deliberative autonomy. I also put forward a guiding framework incorporating these two themes to help orient our deliberations, reflections, and judgments about our Constitution and constitutional democracy.¹¹ In this article, I advance deliberative autonomy as a unifying theme that shows the coherence and structure of certain substantive liberties on a list of familiar "unenumerated" fundamental rights (commonly classed under privacy, autonomy, or substantive due process)¹² and argue that deliberative autonomy is rooted, along with deliberative democracy, in the language and design of our Constitution.

To the extent that my project succeeds, responsible constitutional interpreters may become less vulnerable to the temptation to take flights from protecting such substantive liberties — to merely perfecting processes of democracy or preserving original understanding, narrowly conceived — in the name of

8. See Fleming, *supra* note 7, at 280-97.

9. I do not mean to imply that the realms of political self-government and personal self-government (or self-determination) are entirely distinct. See text accompanying notes 150-164 *infra*.

10. In this article, I do not claim to be elaborating Brandeis' vision of "the right to be let alone." I quote Brandeis' famous passage because I wish to echo his idea that the Constitution "secure[s] conditions favorable to the pursuit of happiness" and because many critics of the right of autonomy quote Brandeis in caricaturing this idea. Some scholars have distinguished between "informational privacy" and "decisional privacy" (or autonomy), and argued that Brandeis contemplated the former and not the latter. See Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 524, 525-31 (1989) (citation omitted) (distinguishing between the "old privacy," or an "interest in avoiding disclosure of personal matters," and the "new privacy," or an "interest in independence in making certain kinds of important decisions"). Laurence H. Tribe believes that "privacy" is a misnomer for the latter idea, which is better expressed by "autonomy." See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1352 (2d ed. 1988). I believe that these two understandings of "privacy" are two aspects of a larger conception of autonomy, not irreconcilable ideas.

11. See RAWLS, *supra* note 7, at 156, 368; Fleming, *supra* note 7, at 283, 289-90. Throughout this article, my use of such terms as "our" Constitution is inclusive and 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."

12. I list many of these "unenumerated" rights below. See text accompanying note 27 *infra*.

avoiding "Lochnering."¹³ Furthermore, interpreters may become less likely to lapse into constitutional illiteracy concerning deliberative autonomy, as the Supreme Court did in *Bowers v. Hardwick*¹⁴ and as Justice Scalia did in his apoplectic dissent in *Planned Parenthood v. Casey*.¹⁵ Finally, the right of autonomy may become less susceptible to caricature.

B. *Toward a Fundamental Theme of Securing Deliberative Autonomy*

This article will elaborate constitutional constructivism's second fundamental theme, securing deliberative autonomy. I conceive it as carrying forward what I call "the unfinished business of Charles Black": constructing a structure of fundamental rights integral to free and equal citizenship, and showing its coherence. In his classic book, *Structure and Relationship in Constitutional Law*, Black demonstrated that responsible constitutional interpretation requires not mere textual exegesis and historical research concerning isolated clauses but also reasoning from structures and relationships manifested in the constitutional document and implicit in the underlying constitutional order as a whole.¹⁶ In his famous article, *The Unfinished Business of the Warren Court*, he applied a similar analysis to resolve the "methodological crisis" precipitated by *Griswold*'s recognition of an "unenumerated" right of privacy. There he called for the construction of a structure or *corpus juris* of fundamental rights essential to full citizenship.¹⁷ Ever since, Black has been building that structure, arguing for protection of "unenumerated" rights that are analogous to or

13. For analysis of the "flights from substance" to process and narrowly conceived original understanding, see, e.g., RONALD DWORKIN, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981) (originally titled *The Flight from Substance*, see *Commentary*, 56 N.Y.U. L. REV. 525, 539 n.* (1981)), reprinted in A MATTER OF PRINCIPLE 33 (1985); LAURENCE H. TRIBE, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980), reprinted in CONSTITUTIONAL CHOICES 9 (1985) (retitled *The Pointless Flight from Substance*). Here, I shall focus on the flight from substance to process. Ely apparently coined the term "Lochnering" or "to Lochner," meaning to impose one's own substantive fundamental values in the guise of interpreting the Constitution. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 943-44 (1973). The idea derives from the infamous case, *Lochner v. New York*, 198 U.S. 45, 53, 61 (1905) (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).

14. 478 U.S. 186, 194-95 (1986) (rejecting the argument that the Due Process Clause of the Fourteenth Amendment protects a right to homosexual sodomy on the ground that such a right has "little or no cognizable roots in the language or design of the Constitution").

15. 112 S. Ct. 2791, 2873-85 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). Scalia bitterly protested against the official reaffirmation of the "central holding" of *Roe v. Wade*, 410 U.S. 113 (1973), that the Due Process Clause of the Fourteenth Amendment protects the right of women to decide whether to terminate a pregnancy, and confidently declaimed that he is sure that it does not "because of two simple facts: (1) the Constitution says absolutely nothing about [a right to abortion], and (2) the longstanding traditions of American society have permitted [abortion] to be legally proscribed." *Id.* at 2874.

16. See generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

17. Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 31-45 (1970) [hereinafter Black, *Unfinished Business*].

presupposed by already recognized rights and using neglected "stones" such as the Ninth Amendment to justify their protection.¹⁸

Black's project of persuading the discipline that constitutional interpretation requires drawing inferences from structures and relationships has been more successful with regard to institutional structures (e.g., separation of powers and federalism) and procedural liberties (e.g., the right to vote) than it has been with respect to substantive liberties (e.g., the right of privacy or autonomy). For example, even narrow originalists such as Bork and Scalia today accept the trilogy of "text, history, and structure" as legitimate sources of constitutional values. They readily engage in structural reasoning concerning separation of powers, federalism, and a republican form of government, yet they still attack or flee from, as "Lochnering," drawing inferences from a structure of ordered liberty, privacy, or autonomy.¹⁹ The same can be said of process-perfecting theorists like Ely²⁰ and, to a lesser extent, Cass R. Sunstein.²¹ Much work remains to be done in articulating such substantive liberties as stemming from coherent structures or patterns rooted in the language and design of our Constitution, rather than as representing nothing more than episodic "ukases" by roving philosopher-judges.²²

This essay takes up this unfinished business of Charles Black, by showing the coherence and structure of certain familiar basic liberties (commonly grouped under the names of privacy, autonomy, or substantive due process) on the basis of a fundamental theme of securing deliberative autonomy. I certainly do not expect to complete that work, for the structure of fundamental rights integral to free and equal citizenship "will always be building," whether through reasoning by analogy or through working toward reflective equilibrium.²³ Bork may call that project the construction of a time bomb.²⁴ Black

18. See, e.g., CHARLES L. BLACK, JR., *DECISION ACCORDING TO LAW: THE 1979 HOLMES LECTURES* 43-54 (1981) [hereinafter BLACK, *DECISION*]; Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1104 (1986) [hereinafter Black, *Livelihood*]; Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, in 1 *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 337, 337-49 (Randy Barnett ed., 1989) [hereinafter Black, *Ninth*]. The allusion to "stones" is to Black, *Unfinished Business*, *supra* note 17, at 44 ("The stone the builders rejected [the Ninth Amendment] may yet be the cornerstone of the temple."). Black largely rejects the distinction between "enumerated" and "unenumerated" rights. See texts accompanying notes 209 & 390 *infra*.

19. See, e.g., *Casey*, 112 S. Ct. at 2883 (Scalia, J., concurring in the judgment in part and dissenting in part); *Michael H. v. Gerald D.*, 491 U.S. 110, 123-27, 127 n.6 (1989) (plurality opinion); *Morrison v. Olson*, 487 U.S. 654, 715 (1988) (Scalia, J., dissenting); BORK, *supra* note 3, at 85-87, 95-100, 110-26, 150, 351-55; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853-54, 862-65 (1989).

20. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73-104 (1980); Ely, *supra* note 13, at 935-36.

21. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 119-22, 259-61 (1993); Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 TEX. L. REV. 305, 312 (1993) (responding to Fleming, *supra* note 7, at 260-75).

22. BORK, *supra* note 3, at 120 n.*.

23. Black, *Ninth*, *supra* note 18, at 343. For reasoning by analogy, see, e.g., *id.* at 342-44; Black, *Unfinished Business*, *supra* note 17, at 37-45. For reflective equilibrium, see, e.g., RAWLS, *supra* note 7, at 8; JOHN RAWLS, *A THEORY OF JUSTICE* 20-21, 48-51 (1971); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 159-68 (1977). For an analysis of the differences between reasoning by analogy and work-

terms it decision according to law.²⁵ I call it constructing the substantive Constitution.²⁶

In Part II, I describe deliberative autonomy and outline a constitutional constructivism with two fundamental themes: deliberative democracy and deliberative autonomy. I show that both themes have structural roles to play in our scheme of deliberative self-governance, and that both are integral to our dualist constitutional democracy. I also contend that we should not flee deliberative autonomy for deliberative democracy (or liberty for equality), but should deploy both grounds in deriving basic liberties essential to free and equal citizenship.

In Part III, I elaborate the idea of deliberative autonomy, exploring its underpinnings in liberty of conscience and freedom of association and showing that its scope is limited to significant basic liberties. I indicate what deliberative autonomy is not, distinguishing it from the familiar understandings or caricatures of privacy, autonomy, or liberty mentioned above. I also argue that deliberative autonomy constitutes a realm of personal sovereignty and that it provides an "exit" option from majoritarian oppression to a figurative "frontier."

Finally, in Part IV, I propose a reconception of the substantive due process inquiry that bases the recognition of "unenumerated" fundamental rights on their significance for deliberative autonomy. With this criterion of significance, constructivism's guiding framework would chart a middle course between Scylla (Scalia)—the rock of liberty as "hidebound" historical practices—and Charybdis—the whirlpool of liberty as unbounded license. I also attempt to bring a sense of order and discipline to (supposedly wild and unruly) judgments about significance for deliberative autonomy by exploring homologies between the structure of deliberative autonomy and that of deliberative democracy. I show that substantive due process and First Amendment jurisprudences are mirror images of one another with respect to the judgments that they make regarding significance for deliberative autonomy and deliberative democracy, respectively.

II. CONSTRUCTING A FUNDAMENTAL THEME OF DELIBERATIVE AUTONOMY: BEYOND DELIBERATIVE DEMOCRACY TO CONSTITUTIONAL CONSTRUCTIVISM

In this Part, I present deliberative autonomy as a unifying theme that shows the coherence and structure of a list of familiar "unenumerated" fundamental rights. Then, I argue for moving beyond process-perfecting theories of deliberative democracy to constitutional constructivism, a theory that can fit and jus-

ing toward reflective equilibrium, see Cass R. Sunstein, *Commentary: On Analogical Reasoning*, 106 HARV. L. REV. 741, 781-87 (1993).

24. BORK, *supra* note 3, at 95.

25. BLACK, *DECISION*, *supra* note 18.

26. Fleming, *supra* note 7. I also call my project constructing a "Constitution-perfecting" theory, as distinguished from a "process-perfecting" theory. *Id.* at 214 & n.15; see also text accompanying notes 84-91 *infra*.

tify such substantive liberties as preconditions for deliberative autonomy rather than recasting them as preconditions for deliberative democracy or disregarding them entirely.

A. *What Deliberative Autonomy Is*

1. *Constructing the structure of deliberative autonomy from a list of familiar "unenumerated" fundamental rights.*

Imagine that you are a constitutional archaeologist and that you dig up the following bones or shards of a constitutional culture: liberty of conscience and freedom of thought; freedom of association, including both expressive association and intimate association, whatever one's sexual orientation; the right to live with one's family, whether nuclear or extended; the right to travel or relocate; the right to marry; the right to decide whether to bear or beget children, including the rights to procreate, to use contraceptives, and to terminate a pregnancy; the right to direct the education and rearing of children; and the right to exercise dominion over one's body, including the right to bodily integrity and ultimately the right to die.²⁷ You may recognize this as a list of familiar "unenumerated" fundamental rights. The Supreme Court has recognized most of these rights under the rubrics of privacy, autonomy, or substantive due pro-

27. See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (liberty of conscience and freedom of thought); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984) (freedom of association, including both expressive association and intimate association); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977) (right to live with one's family, whether nuclear or extended); *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969) (right to travel or relocate); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (right to marry); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (right to marry); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (right to procreate); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (right within marital association to use contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (right of individual, married or single, to use contraceptives); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977) (right to distribute contraceptives); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (right of a woman to decide whether to terminate a pregnancy); *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2812 (1992) (reaffirming "central holding" of *Roe*); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (right to direct the education of children); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (right to direct the upbringing and education of children); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (right to bodily integrity, in particular, to avoid unwanted administration of anti-psychotic drugs); *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (right to bodily integrity, in particular, to be protected against the extraction of evidence obtained by "breaking into the privacy" of a person's mouth or stomach); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) (assuming for purposes of the case a "right to die"); *id.* at 339-45 (Stevens, J., dissenting) (arguing that decisions about death are a matter of individual conscience); see also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (right of privacy includes both an "individual interest in avoiding disclosure of personal matters" and an "interest in independence in making certain kinds of important decisions"); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (right to receive ideas and to be free from unwanted governmental intrusions into the privacy of one's home).

cess.²⁸ The challenge that you face is to decide whether these bones or shards fit together into, and are justifiable within, a coherent structure.²⁹

Let us consider how originalist, process-perfecting, and constructivist archaeologists might view these materials. Generally, originalists hold that interpreters must limit themselves to giving effect to the specifically enumerated provisions or narrowly conceived original understanding of the Constitution.³⁰ Process-perfecters believe that interpreters must confine themselves to perfecting the processes of democracy rather than imposing substantive fundamental values.³¹ Constructivists contend that interpreters should perfect the whole Constitution by reinforcing not only the procedural liberties of democracy but also the substantive liberties of autonomy embodied in it.

If you were an originalist archaeologist, you might conclude, from the fact that these shards were not specifically enumerated in the constitutional document, that you had unearthed the junk pile of the constitutional culture. From that viewpoint, the only thing that these shards have in common is that they are anomalies that have nothing to do with the language and design of the Constitution. Or, perhaps you might decide that what they have in common is that they evince the hubris and futility of judges episodically succumbing to the temptation of imposing their personal visions of utopia upon the polity in the guise of interpreting the Constitution. Indeed, you might speculate that you had exhumed a ghost town, and that these shards were lying here together because judicial protection of them culminated in the destruction of the Supreme Court and the Constitution.³²

28. But, for example, the Supreme Court refused to recognize a right of intimate association for homosexuals. See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (rejecting right of homosexuals to engage in sodomy). But see *Commonwealth v. Wasson*, 842 S.W.2d 487, 497 (Ky. 1992) (criticizing *Bowers* as a "misdirected application of the theory of original intent" in light of precedents such as *Loving*, and interpreting the Kentucky Constitution's privacy and equal protection guarantees to prohibit a criminal statute outlawing consensual homosexual sodomy).

29. In speaking of the bones or shards as fitting into, and being justifiable within, a coherent structure, I refer to Dworkin's formulation of the two dimensions of best interpretation: fit and justification. See RONALD DWORKIN, *LAW'S EMPIRE* 239 (1986).

30. See note 19 *supra* (identifying Bork and Scalia as narrow originalists). Some constitutional theorists have sought to develop broader conceptions of originalism. See, e.g., MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS* 54-115 (1994); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1264 (1993); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995). One might also understand the work of Bruce Ackerman as an attempt to develop a broader form of originalism. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3-33 (1991); James E. Fleming, *We the Exceptional American People*, 11 CONST. COMM. 355, 369-70 (1994) (interpreting Ackerman's constitutional theory along these lines); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 579-90 (1995) (same). To make clear that I am criticizing narrow conceptions of originalism, I speak of "narrowly conceived original understanding" or use similar expressions.

31. See notes 20 & 21 *supra* (identifying Ely and Sunstein as proponents of process-perfecting theories).

32. I draw this account of a narrow originalist archaeologist from several sources. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2874, 2884 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring); *Michael H. v. Gerald D.*, 491 U.S. 110, 123-27 & n.6 (1989) (Scalia, J., plurality opinion); *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986); BORK, *supra* note 3, *passim*; Scalia, *supra* note 19.

If you were a process-perfecting archaeologist, you might conclude, from the fact that many of these bones do not readily fit the procedural mold of representative or deliberative democracy,³³ that they were alien substances, malformed growths upon the body of the Constitution. Yet if you were imaginative, you might reconstruct or recast some of these substantive growths as legitimate procedural appendages to the skeleton. In performing that reconstruction, however, you would have to force fit these bones into the body of the Constitution, lopping off or leaving out some of them. Thus, the fit would be Procrustean, not Herculean.³⁴

But if you were a constructivist archaeologist, you would accept these bones as stipulated features (or fixed points) of a skeleton that you had a responsibility to construct. You would be able to construct the unity of these bones in a structure of deliberative autonomy that, along with a framework of deliberative democracy, is an integral part of the body of the Constitution.³⁵ From that standpoint, you would comprehend that all of these bones constitute rights that reserve to persons the power to deliberate about and decide how to live their own lives, with respect to certain matters unusually important for such personal self-governance, over a complete life.³⁶ Put another way, the bones represent basic liberties that are significant preconditions for persons' development and exercise of deliberative autonomy in making certain fundamental decisions affecting their destiny, identity, or way of life, and they span a complete lifetime. Hence, constructivists would fit these bones together into and justify them within a coherent structure of deliberative autonomy in a Constitution that embodies both deliberative autonomy and deliberative democracy as aspects of "a political ideal . . . of a society of citizens both equal and free."³⁷

33. Elsewhere, I have distinguished between Ely's theory of "representative democracy" and Sunstein's theory of "deliberative democracy." See Fleming, *supra* note 7, at 219 n.35. Here, I use the two terms interchangeably.

34. I base this account of a process-perfecting archaeologist on ELY, *supra* note 20, at 73-104, and, to a lesser extent, on SUNSTEIN, *supra* note 21, at 133-41. Procrustes was a mythical Greek giant who stretched or shortened captives to make them fit his beds. Hercules is Dworkin's mythical philosopher-judge who, in order to decide hard cases, constructs a substantive political theory that best fits and justifies the Constitution as a whole. See note 73 *infra* and accompanying text.

35. This account of a constructivist archaeologist is based on DWORKIN, *supra* note 23, at 159-68; RAWLS, *supra* note 23, at 46-53, 577-87; RAWLS, *supra* note 7, at 89-129.

36. I am persuaded by the arguments of Ronald Dworkin and Justice Stevens that there is no right to life before birth. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2839 (1992) (Stevens, J., concurring in part and dissenting in part); RONALD DWORKIN, *LIFE'S DOMINION* 109-16 (1993). In speaking of such rights as reserving to persons powers to make certain decisions, I mean to echo Ely, *supra* note 6, at 402.

37. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 382 (1992); see also RAWLS, *supra* note 7, at 15-20, 29-35, 299-304 (grounding equal basic liberties on a conception of citizens as free and equal persons, together with a conception of society as a fair system of social cooperation).

2. *Familiar understandings of deliberative autonomy in our constitutional culture.*

Returning from this imaginary archeological excavation to our constitutional culture, we can find many familiar understandings of deliberative autonomy with respect to "unenumerated" fundamental rights on the foregoing list.³⁸ For example, it is illustrated by Justices Stevens' and Blackmun's dissents in *Bowers v. Hardwick*.³⁹ Stevens writes that the Court's "privacy" decisions have actually 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."⁴⁰ In *Whalen v. Roe*, Stevens describes this right as an "interest in independence in making certain kinds of important decisions."⁴¹ In his dissent in *Bowers*, Blackmun characterizes this liberty in terms of "freedom of intimate association" and the "decisional and the spatial aspects of the right to privacy."⁴² His discussion builds upon Justice Brennan's powerful analysis of the right of intimate association in *Roberts v. United States Jaycees*: "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."⁴³ This protection, Brennan states, "safeguards the ability independently to define one's identity that is central to any concept of liberty."⁴⁴

Similar conceptions of deliberative autonomy appear in *Planned Parenthood v. 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."⁴⁵ He emphasizes liberty of conscience and decisional

38. See note 27 *supra* and accompanying text.

39. 478 U.S. 186, 199-214 (1986) (Blackmun, J., dissenting); *id.* at 214-20 (Stevens, J., dissenting); see Fleming, *supra* note 7, at 254-55.

40. *Bowers*, 478 U.S. at 217 (Stevens, J., dissenting) (quoting *Fitzgerald v. Porter Memorial Hosp.*, 523 F.2d 716, 719-20 (7th Cir. 1975) (footnotes omitted), *cert. denied*, 425 U.S. 916 (1976)); see generally John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13 (1992) (discussing his conception of liberty protected by the Constitution).

41. 429 U.S. 589, 599-600 (1977) (writing for a unanimous Court, Justice Stevens stated that the right of privacy includes both decisional and informational dimensions).

42. 478 U.S. at 202, 204 (Blackmun, J., dissenting). For a critique of Blackmun's dissent and, in particular, the conception of autonomy it expresses, see Sandel, *supra* note 10, at 530, 533-38.

43. 468 U.S. 609, 618 (1984).

44. *Id.* at 619.

45. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2840 (1992) (Stevens, J., concurring in part and dissenting in part) (emphasis added); see also *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 339-45 (1990) (Stevens, J., dissenting) (arguing that choices about death are a matter of individual conscience).

autonomy (as well as equal dignity and respect for women and men).⁴⁶ Likewise, 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."⁴⁷ He, too, stresses personal self-government or self-determination (along with gender equality).⁴⁸ 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.⁴⁹

The joint opinion's explication of this personal liberty, rooted in decisional autonomy and bodily integrity, evinces deliberative autonomy. (Like the opinions of Stevens and Blackmun, the joint opinion intertwines concerns for personal liberty and gender equality.⁵⁰)

Landmark substantive due process cases such as *Meyer*,⁵¹ *Pierce*,⁵² *Griswold*,⁵³ *Loving*,⁵⁴ *Eisenstadt*,⁵⁵ *Moore*,⁵⁶ *Carey*,⁵⁷ and *Roe*⁵⁸ also illustrate de-

46. *Casey*, 112 S. Ct. at 2840, 2842 (Stevens, J., concurring in part and dissenting in part). Jane Cohen analyzes Stevens' idea of decisional autonomy in terms of "deliberative autonomy." See Jane Maslow Cohen, *A Jurisprudence of Doubt: Deliberative Autonomy and Abortion*, 3 COLUM. J. GENDER & L. 175 (1992).

47. 112 S. Ct. at 2846 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

48. *Id.* at 2846-47.

49. *Id.* at 2807; cf. *Lee v. Weisman*, 112 S. Ct. 2649, 2658 (1992) (affirming that the First Amendment protects freedom of conscience). The joint opinion in *Casey* went on to state: "Abortion is a unique act. It is an act fraught with consequences for others" 112 S. Ct. at 2807.

50. See *Casey*, 112 S. Ct. at 2809, 2812, 2831.

51. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) ("[The] 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."). For statements of the holdings of *Meyer* and the other cases I discuss in this section, see note 27 *supra* and accompanying text.

52. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty 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.").

53. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights . . . Marriage is . . . intimate to the degree of being sacred. It is an association that promotes a way of life . . .").

54. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

55. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). As Tribe has noted, "the effect of *Eisenstadt v. Baird* was to single out as decisive in *Griswold* the element of reproductive autonomy," not just the protection of the heterosexual marital relationship. TRIBE, *supra* note 10, at 1339 (footnotes omitted). For critiques of *Eisenstadt* precisely because of this aspect of it, see GLENDON, *supra* note 5, at 57; Sandel, *supra* note 10, at 527-28.

liberative autonomy. Justice Jackson expresses deliberative autonomy in perhaps the most stirring terms in *Barnette*:

[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.⁵⁹

Jed Rubenfeld has argued persuasively that such cases reflect an antitotalitarian principle of privacy: they are concerned with the danger of "creeping totalitarianism, an unarmed *occupation* of individuals' lives."⁶⁰ Constitutional constructivism incorporates a similar antitotalitarian principle of liberty, along with a parallel anticaste principle of equality, as aspects of the free and equal citizenship that is due everyone in our morally pluralistic constitutional democracy.⁶¹ Below, I shall focus upon the idea of liberty of conscience and freedom of association as underwriting deliberative autonomy.

The eloquent formulations of deliberative autonomy in *Casey* and the dissents in *Bowers* aptly distill the core of the cases involving decisional autonomy, bodily integrity, and dignity. They have consolidated a framework of "reasoned judgment" concerning our Constitution's "promise" of a "rational continuum" of liberty,⁶² rather than just recapitulating doctrines. These formulations, uttered in the contexts of abortion and intimate association, also apply

56. *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977) ("[T]he Constitution prevents [the city] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.").

57. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687-88 (1977) (stressing that prior decisions such as *Griswold*, *Eisenstadt*, and *Roe* protected the right of "[i]ndividual autonomy in matters of childbearing" and the individual's "right of *decision*" about procreation from unjustified intrusion by the government).

58. *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("Th[e] right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

59. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943). In *Barnette*, the Court invalidated a state board of education's requirement that students salute the flag as a violation both of "a right of self-determination in matters that touch individual opinion and personal attitude" and of the First Amendment. *Id.* at 630, 641.

60. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989). 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 788, 790; see also LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 92-93 (1990) (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 10, at 1302-21, 1337-62 (discussing the parameters of the rights of privacy and personhood and the judicial 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. See SUNSTEIN, *supra* note 21, at 137-41.

61. Elsewhere, I have explored the relationship between liberty and equality in grounding the basic liberties associated with deliberative autonomy, arguing that we need not and should not flee substantive due process for equal protection but should deploy both grounds. See Fleming, *supra* note 7, at 260-78; text accompanying notes 267-282 *infra*.

62. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805-06, 2833 (1992) (joint opinion).

to the other types of personal decisions encompassed by the rights on the foregoing list.⁶³ They succinctly capture what is at stake in these unusually important decisions profoundly affecting persons' destiny, identity, or way of life, and why such decisions lie in "a realm of personal liberty which the government may not enter."⁶⁴ In other words, these rights represent basic liberties that are significant preconditions for deliberative autonomy.

Notwithstanding the cogency and coherence of these formulations, Bork asserts that the recognition of a right of privacy in *Griswold* amounted to "the construction of a constitutional time bomb" whose full extent we still do not know many years later.⁶⁵ One thing that we do know, however, is that for Bork, *Griswold* indeed proved to be a constitutional time bomb, for it blew up in his face during his Supreme Court nomination hearings in 1987. It did so because he still had not articulated or embraced a theory of constitutional interpretation that could justify it.⁶⁶

Bork's hearings, and all of the subsequent confirmation hearings of Supreme Court nominees, suggest that *Griswold*, far from being a constitutional time bomb, has become a "fixed star in our constitutional constellation."⁶⁷ *Brown v. Board of Education*⁶⁸ in the 1950s, and *Griswold* in the 1960s, provoked methodological crises in constitutional law.⁶⁹ Yet like *Brown*, *Griswold* today is a case that any nominee, to stand a chance of being confirmed, has to say was rightly decided. Thus, Justices Kennedy, Souter, and Thomas were as scrupulous about saying that they recognized a constitutional right of privacy and accepted *Griswold* as they were about declining to say whether they recognized a right to abortion and accepted *Roe*.⁷⁰ Justices Gins-

63. See note 27 *supra* and accompanying text.

64. *Casey*, 112 S. Ct. at 2805.

65. BORK, *supra* note 3, at 95-100. We still do not know the full extent of the right of privacy 30 years later (and it's a good thing, too). For that matter, we never know the full extent of any constitutional principle, least of all any important one.

66. See Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 657 (1990) (reviewing BORK, *supra* note 3) (arguing that Bork was not confirmed largely because of his rejection of a constitutional right of privacy).

67. Cf. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

68. 347 U.S. 483 (1954) (holding that racial segregation of public schools violated the Equal Protection Clause).

69. Charles Black offered sensible resolutions for the methodological crises that *Brown* and *Griswold* provoked in constitutional law. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (defending *Brown*); Black, *Unfinished Business*, *supra* note 17, at 31-45 (defending *Griswold*).

70. See *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 135-36, 164-65 (1988); *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 172-76 (1990); *1 Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 225, 364 (1991). Even Justice Scalia strains to say that *Griswold* was rightly decided according to his conception of the due process inquiry. See *Michael H. v. Gerald D.*, 491 U.S. 110, 128 n.6 (1989).

burg and Breyer accepted both *Griswold* and *Roe* as settled law.⁷¹ (So it is in our constitutional culture that the most controversial cases of earlier decades become litmus tests for later decades.)

Constructing a fundamental theme of deliberative autonomy does not entail constructing a constitutional time bomb. Nor does it involve drawing bright lines around privacy, autonomy, or liberty. Instead, it entails tethering the right of autonomy, and what *Casey* called "*Griswold* liberty,"⁷² to a bedrock structure in our constitutional democracy.

3. *Beyond deliberative democracy to constitutional constructivism.*

I shall situate these familiar understandings of deliberative autonomy and "unenumerated" fundamental rights in the framework of a constitutional constructivism, an alternative to process-perfecting and narrow originalist theories. What is a constitutional constructivism? First, I intend a general methodological sense of constructivism, illustrated by Ronald Dworkin's conception of constitutional interpretation as requiring the construction of a substantive political theory (or scheme of principles) that best fits and justifies our constitutional document and underlying constitutional order as a whole.⁷³ Second, I intend a specific substantive sense of constructivism, exemplified by John Rawls' 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.⁷⁴ Constitutional constructivism is analogous to Rawls' political constructivism.⁷⁵

Constitutional constructivism has two fundamental themes, securing deliberative democracy and securing deliberative autonomy. I seek to develop a constitutional constructivism because it can better fit and justify the foregoing substantive liberties associated with autonomy, as manifested in our constitutional document and implicit in our underlying constitutional order, than can process-perfecting and narrow originalist theories.

71. See *Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 207, 282 (1993); *Nomination of Stephen G. Breyer to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 103d Cong., 2d Sess. 138 (1994). Breyer, while a law clerk, wrote the first draft of Justice Goldberg's concurrence in *Griswold*. See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 250 (1994).

72. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2810 (1992) (referring to the line of decisions exemplified by *Griswold*, which protect "liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child").

73. See DWORKIN, *supra* note 29, at 239, 355-99; DWORKIN, *supra* note 23, at 105-30. 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). Dworkin initially put forth a constructivist method of legal interpretation by analogy to Rawls' conception of justification in political philosophy as a quest for reflective equilibrium between our considered judgments and underlying principles of justice. Dworkin argued that legal interpretation proceeds back and forth between extant legal materials and underlying principles of law toward reflective equilibrium between them. See DWORKIN, *supra* note 23, at 159-68.

74. See RAWLS, *supra* note 7, at 15-20, 29-35, 299-304.

75. See Fleming, *supra* note 7, at 282-83.

For example, Ely argues that the Constitution is principally concerned with establishing a procedural framework of democracy and protecting procedural liberties rather than securing substantive liberties.⁷⁶ Nonetheless, he admits that there are numerous expressions of substantive values, in addition to procedural values, on the face of the Constitution for which his process-perfecting theory does not account.⁷⁷ These substantive values (manifested in the First, Third, Fourth, Fifth, Ninth, Thirteenth, and Fourteenth Amendments) include liberty of conscience, freedom of association, autonomy, privacy, and independence.⁷⁸ Yet Ely suggests that to represent such concerns for substantive liberties "as a dominant theme of our constitutional document one would have to concentrate quite single-mindedly on hopping from stone to stone and averting one's eyes from the mainstream."⁷⁹

Notwithstanding Ely, constitutional constructivism concentrates on constructing the unity or structure of these substantive "stones." These stones do not necessitate hopping; they form a bedrock structure of deliberative autonomy. This fundamental theme powerfully fits and justifies these substantive liberties, and shows them to be integral to the language and design of the Constitution. In the words of Charles Black, "[t]he stone[s] the builders rejected may yet be the cornerstone of the temple."⁸⁰ Ely's and Sunstein's process-perfecting theories recast such substantive liberties as procedural preconditions for democracy or, worse yet, omit them altogether.⁸¹ Narrow originalists like Scalia and Bork are even less faithful to the constitutional scheme, in effect repealing these substantive liberties by construction.⁸² In short, these two types of theories take "flights from substance" to process and narrowly conceived original understanding.⁸³ Constitutional constructivism instead treats these substantive liberties reflected on the face of the Constitution and these "unenumerated" fundamental rights recognized in landmark cases as crucial features (or fixed points) of our constitutional practice, tradition, and culture. It accepts the responsibility to fit and justify these materials in constructing a constitutional theory.

To construct the substantive Constitution, we need to move beyond process-perfecting theories to a Constitution-perfecting theory: a theory that reinforces not only the procedural liberties of deliberative democracy but also the substantive liberties of deliberative autonomy embodied in our Constitution.⁸⁴

76. Ely, *supra* note 20, at 87, 92.

77. *Id.* at 87-101.

78. *Id.* at 93-100. Ely also acknowledges that the Constitution protects the substantive values of private property and the obligation of contracts. *Id.* at 91-92, 97-98.

79. *Id.* at 101.

80. Black, *Unfinished Business*, *supra* note 17, at 44 (referring to the Ninth Amendment).

81. See Fleming, *supra* note 7, at 233-35, 256-60.

82. See notes 19 & 32 *supra*.

83. See note 13 *supra*.

84. See Fleming, *supra* note 7, at 214 & n.15. I mean "perfecting" in the sense of interpreting the Constitution with integrity so as to render it as a coherent whole, not in Monaghan'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, *Concancy to an Ideal Object*, 56 N.Y.U. L. REV. 406, 407 (1981) (distinguishing "weak-

Constitutional constructivism is such a theory. It is, however, a theory of constructing *our* substantive Constitution, as 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 practice, tradition, and culture).⁸⁵

In other words, constitutional constructivism is not a theory of natural law or natural rights, and does not conceive the foregoing substantive liberties as prepolitical or given by a prior and independent order of moral values that is binding for all times and all places.⁸⁶ Thus, it does not attempt to impose claims to philosophical truth upon an unwilling people.⁸⁷ Instead, it is what Frank Michelman, analyzing Rawls' political constructivism, has called an "interpretative theory" drawn from the ongoing political practice of a constitutional democracy.⁸⁸ Constitutional constructivism draws our principles and substantive liberties from our constitutional democracy's ongoing practice, tradition, and culture.⁸⁹ These principles are aspirational — the principles to which we as a people aspire, and for which we as a people stand — and may not be fully realized in our historical practices, statute books, and common law.⁹⁰ Accordingly, constitutional constructivism recognizes that our principles may fit and justify most of our practices or precedents but criticize some of them for failing to live up to our constitutional commitments to principles such as liberty and equality.⁹¹

sense perfectionism" or "constitutional rationalism" from "strong-sense perfectionism"). For the notion of law as integrity, see DWORKIN, *supra* note 29, at 176-224.

85. Nonetheless, constitutional constructivism is wary of the specter of *Lochner*. See Fleming, *supra* note 7, at 211-14, 246-48, 302; text accompanying notes 386-389 *infra* (discussing competing understandings of what was wrong with *Lochner*).

86. See RAWLS, *supra* note 7, at 89-99 (contrasting political constructivism with theories of moral realism (including natural law and natural rights) along these lines).

87. *Id.* at 28, 66-71; see also John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 554-72 (1980) [hereinafter Rawls, *Kantian Constructivism*]; John Rawls, *Reply to Habermas*, 92 J. PHIL. 132, 156-70 (1995) [hereinafter Rawls, *Reply*] (responding to the charge that his political liberalism is such a theory advanced in Jürgen Habermas, *Reconciliation through the Public Use of Reason: Remarks on John Rawls' Political Liberalism*, 92 J. PHIL. 109, 128-31 (1995)).

88. See Frank I. Michelman, *On Regulating Practices with Theories Drawn from Them: A Case of Justice as Fairness*, in NOMOS: THEORY AND PRACTICE 309 (Ian Shapiro & Judith Wagner DeCew eds., 1995).

89. See Fleming, *supra* note 7, at 286 (observing that within Rawls' political constructivism, equal basic liberties are conceived, not as "true," but as "most reasonable for us," and are worked up from the way citizens are regarded in the public political culture of our 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).

90. For discussion of aspirational principles, see notes 334 & 338 *infra*; texts accompanying notes 327-337, 360-361.

91. For the formulation "fits most and criticizes some," I am indebted to Lewis D. Sargentich. See Gregory C. Keating, *Fidelity to Pre-existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1, 38 (1993) (using this formulation in developing a general conception of legal justification).

B. *An Outline for a Constitutional Constructivism*

1. *A guiding framework for securing deliberative democracy and deliberative autonomy.*

Constitutional constructivism advances a guiding framework with two fundamental themes, securing deliberative democracy and securing deliberative autonomy. I am developing this guiding framework by analogy to Rawls' political constructivism, but I make no claim that everything Rawls argues is required by justice is also mandated by our Constitution. Nor do I rely upon Rawls as an authority for what the Constitution means, much less hold an absurd anachronistic view that the constitutional framers and ratifiers in 1791 enacted a book published by Rawls in 1971 or 1993.⁹² I simply use the guiding framework because it suggests certain interpretive strategies to help orient our deliberations, reflections, and judgments about our Constitution and constitutional democracy.⁹³ The usefulness of the framework is to be assessed by ordinary criteria for an acceptable theory of constitutional interpretation and judicial review.⁹⁴ To explain that framework, I must put forth several abstract conceptions from Rawls' theory.

Political conception of justice: fair terms of social cooperation on the basis of mutual respect and trust. In *Political Liberalism*, Rawls reformulates his well-known theory—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.⁹⁵ 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.⁹⁶ Second, political liberalism emphasizes the related “fact of oppression”—the fact that a single comprehensive religious, philosophical, or moral doctrine could be established as a shared basis of 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.⁹⁷ Political liberalism generalizes the principle of religious toleration to apply to reasonable conceptions of the good.⁹⁸

92. See BORK, *supra* note 3, at 210-11 (ridiculing an effort to apply Rawls' *A Theory of Justice* to interpreting the Constitution).

93. See RAWLS, *supra* note 7, at 156, 368 (arguing that the proper role of his conception of justice is as a framework which may help others in their deliberations on constitutional essentials).

94. See Fleming, *supra* note 7, at 298-300 (arguing that constitutional constructivism better satisfies Ely's three criteria for an acceptable theory than does his own theory: (1) how well it fits and justifies the constitutional document and underlying constitutional order; (2) whether it is consistent with and supportive of the underlying political system; and (3) whether it assigns judges a role that they are well situated to perform).

95. See RAWLS, *supra* note 7, at xv-xviii.

96. *Id.* at 36-37, 144.

97. *Id.* at 37.

98. *Id.* at 9-10, 154.

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 or public justification 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.⁹⁹ Such a political conception of justice, with the following basic liberties embodied in a constitution,¹⁰⁰ would provide fair terms of social cooperation on the basis of mutual respect and trust that citizens might reasonably be expected to endorse, whatever their particular conceptions of the good.

By analogy to Rawls' political liberalism, constitutional constructivism accepts the fact of reasonable pluralism and recognizes the related fact of oppression. Moreover, it conceives our Constitution as partially embodying a political conception of justice that provides fair terms of social cooperation on the basis of mutual respect and trust. It does not, however, import any basic liberties from Rawls' theory of justice as fairness as such, irrespective of whether they have a firm grounding in our constitutional practice, tradition, and culture.

Conception of citizens as free and equal persons: the two moral powers. Constitutional constructivism, like Rawls' political liberalism, understands our 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.¹⁰¹ It views such persons engaged in such cooperation 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. Citizens apply this capacity in deliberating about and judging the justice of basic institutions and social policies, as well as about the common good.¹⁰²

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, over a complete life. A conception of the good is a conception of what is valuable in human life. 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. Citizens apply this capacity, their power of deliberative reason, in deliberating about and deciding how to live their own lives.¹⁰³

99. *Id. passim*.

100. See text accompanying notes 106-115 *infra*.

101. See RAWLS, *supra* note 7, at 15-20, 29-35, 299-304.

102. *Id.* at 19, 302, 332.

103. *Id.* at 19, 302, 332, 335.

The 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 the two moral powers constitutes the basis of the status of free and equal citizenship.¹⁰⁴ The basic liberties are understood as preconditions for the development and exercise of the two moral powers.¹⁰⁵

Deliberative democracy and deliberative autonomy: the two fundamental cases. Constitutional constructivism arranges our basic liberties so as to show their relation to the *two fundamental cases* in which citizens exercise their two moral powers. The first fundamental case is that of *deliberative democracy*: the equal political liberties and freedom of thought enable citizens to develop and exercise their first moral power (their capacity for a sense of justice) in understanding, applying, and acting from their conception of justice in deliberating about and judging the justice of basic institutions and social policies, as well as about the common good.¹⁰⁶ In the first instance, the Constitution is seen as establishing a just and workable political procedure without imposing any explicit constitutional restrictions on legislative outcomes.¹⁰⁷ 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.¹⁰⁸ It also protects freedom of thought (including freedom of speech and press, freedom of assembly, and the like), so that the exercise of those liberties in those processes will be free and informed.¹⁰⁹

The second fundamental case is that of *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, over a complete life—that is, to apply their power of deliberative reason to deliberating about and deciding how to live their own lives.¹¹⁰ In the second instance, the Constitution is seen as establish-

104. *Id.* at 19, 29-35, 79, 109; RAWLS, *supra* note 23, at 504-12.

105. RAWLS, *supra* note 7, at 332. For an insightful analysis of Rawls' political conception of the person, see Frank I. Michelman, *The Subject of Liberalism*, 46 STAN. L. REV. 1807 (1994) (reviewing RAWLS, *supra* note 7).

106. See RAWLS, *supra* note 7, at 332-35. For the sake of simplicity, I use Sunstein's term, "deliberative democracy," to refer to this first fundamental case or theme. James W. Nickel has criticized Rawls' idea of the first fundamental case as being too narrowly defined. James W. Nickel, *Rethinking Rawls's Theory of Liberty and Rights*, 69 CHI.-KENT L. REV. 763, 781-82 (1994). I broaden it by proposing a theme of deliberative democracy that is quite similar to Sunstein's principal (and general) theme of deliberative democracy. See Fleming, *supra* note 7, at 256, 292-93.

107. RAWLS, *supra* note 7, at 337.

108. Rawls explains that the guarantee of "fair value" 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.* at 327. "Formal equality is not enough" where the equal political liberties are concerned. *Id.* at 361. For a provocative analysis that has affinities to Rawls' idea, see Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994).

109. RAWLS, *supra* note 7, at 335, 337.

110. See *id.* at 332-35. Deliberative autonomy includes not only deliberation but also decision-making. For the sake of simplicity, I intend to encompass the concepts of "deliberating about and deciding how to live their own lives" within the expressions "deliberative autonomy" or "deliberating

ing constitutional restrictions upon the grounds for political decisions.¹¹¹ 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.

Finally, constitutional constructivism 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 associated with deliberative democracy and deliberative autonomy. 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."¹¹² The constitutional essentials also include due process of law, equal protection of the laws, the right to personal property, and the right to basic necessities.¹¹³ In other words, guarantees of these basic liberties are preconditions for securing both deliberative democracy and deliberative autonomy.

Possession of this whole family of basic liberties constitutes the common and guaranteed status of free and equal citizenship.¹¹⁴ Moreover, the preconditions for both deliberative democracy and deliberative autonomy are preconditions for the sovereignty of free and equal citizens.¹¹⁵

2. *The Constitution as securing deliberative democracy and deliberative autonomy: the two fundamental themes.*

Constitutional constructivism conceives our Constitution as a "constitution of principle," which embodies (or aspires to embody) a coherent scheme of basic liberties, or fair terms of social cooperation on the basis of mutual respect and trust, for our constitutional democracy. The Constitution is not merely a "constitution of detail," which enacts a discrete list of particular rights narrowly

about their conception of the good." For an explanation of my usage of the term "deliberative autonomy" to refer to this second fundamental case or theme, see Fleming, *supra* note 7, at 253 n.210; text accompanying notes 169-172 *infra*.

Nickel has criticized Rawls' idea of the second fundamental case as being too broadly defined. Nickel, *supra* note 106, at 782-83. I narrow it by outlining a theme of deliberative autonomy that is bounded by a criterion of significance. See text accompanying notes 227-243 *infra*.

111. See RAWLS, *supra* note 7, at 337-38.

112. *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 23, at 235-43; Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3, 26, 31 (1992).

113. Notably, the constitutional essentials do not include Rawls' famous "difference principle," that "[s]ocial and economic inequalities . . . are to be to the greatest benefit of the least advantaged members of society." RAWLS, *supra* note 7, at 6, 228-30, 337. Moreover, the right to basic necessities may not be judicially enforceable in the absence of legislative or executive measures. Similarly, the right to personal property may be judicially underenforced. See text accompanying notes 259-260 *infra*.

114. See RAWLS, *supra* note 7, at 335. For a critique of Rawls' list of basic liberties, see Nickel, *supra* note 106, at 766-72 (proposing a reconstructed list).

115. See Freeman, *supra* note 112, at 30-33 (arguing that equal political rights and other basic liberties such as liberty of conscience and freedom of association are essential to democratic sovereignty).

conceived by framers and ratifiers.¹¹⁶ Nor does it simply establish a procedural framework of democracy. Furthermore, constitutional constructivism views interpreting the Constitution as specifying basic liberties in terms of the significance of an asserted liberty for the development and exercise of one (or both) of the two moral powers in one (or both) of the two fundamental cases.¹¹⁷

But constitutional constructivism distinguishes between the partial, judicially enforceable Constitution and the whole Constitution that is binding outside the courts upon legislatures, executives, and citizens generally.¹¹⁸ In other words, it is a theory of *the Constitution*, not merely a theory of *judicial review*. Certain constitutional norms, including aspects of deliberative democracy and deliberative autonomy, may be judicially underenforced because of the institutional limits of courts, and left to the political processes for fuller enforcement. For example, the Constitution might impose affirmative obligations upon the legislative and executive branches to provide basic necessities for all citizens, but it might not afford a judicially enforceable right to these necessities in the absence of legislative or executive measures.¹¹⁹

Constitutional constructivism entails a theory of judicial review with an active role for courts with respect to the two fundamental cases or corresponding themes: first, securing the basic liberties that are preconditions for *deliberative democracy*, and second, securing the basic liberties that are preconditions for *deliberative autonomy*. Both themes are necessary to afford everyone the common and guaranteed status of free and equal citizenship in our constitutional democracy. Courts should exercise stringent review to strike down political decisions that do not respect the two types of basic liberties because both are preconditions for the trustworthiness of such decisions. (The remaining and supporting basic liberties, as stated above, also must be guaranteed in order to secure these preconditions.)

Constitutional constructivism's first theme emphasizes the equal political liberties and freedom of thought. This theme resembles Sunstein's principal

116. See DWORKIN, *supra* note 36, at 119, 126-29 (contrasting a "constitution of principle" (a scheme of abstract, normative principles) with a "constitution of detail" (a list of particular, antique rules)); Dworkin, *supra* note 37, at 382 (same); see also *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2833 (1992) (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) (interpreting the constitutionally protected concept of liberty as embodying abstract principles); *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").

117. See texts accompanying notes 227-243, 372-382 *infra*; see also RAWLS, *supra* note 7, at 332-39; Freeman, *supra* note 112, at 30-33.

118. Fleming, *supra* note 7, at 291; see also RAWLS, *supra* note 7, at 240. Others have expressed similar views concerning the gap between the partial, judicially enforceable Constitution and the whole Constitution that is binding outside the courts. See, e.g., SUNSTEIN, *supra* note 21, at 9-10, 138-40, 145-61, 350; Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. REV. 410, 419 (1993); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

119. See, e.g., SUNSTEIN, *supra* note 21, at 145-53; Fleming, *supra* note 7, at 291-92. It is not the role of courts to say in the first instance what arrangements are necessary to secure the preconditions for deliberative democracy and deliberative autonomy, but to assure that the arrangements enacted by legislatures do not flout these preconditions. See RAWLS, *supra* note 7, at 362.

theme of securing deliberative democracy and, to a lesser extent, Ely's dominant theme of reinforcing representative democracy.¹²⁰ It seeks to secure the preconditions for political self-government, conceiving our political system as a public facility for deliberation concerning the common good, not a veritable political market for aggregation of self-interested preferences.¹²¹ This theme aims to assure that political decisions will be impartial in the sense that they are justifiable on the basis of *public-regarding reasons* (common good), not merely the self-interested preferences of private groups or individuals. Also, it forbids political decisions that violate the constraints of impartiality by denying equal citizenship on the basis of morally irrelevant characteristics, such as race, sex, or sexual orientation.¹²²

Constitutional constructivism's second theme is underwritten by liberty of conscience and freedom of association. This theme articulates and unifies the concerns for substantive liberties that process-perfecting theories such as those of Sunstein and Ely recast or neglect: liberty of conscience, freedom of intimate association, decisional autonomy, decisional privacy, spatial privacy, bodily integrity, and an antitotalitarian principle of liberty.¹²³ It seeks to secure these preconditions for personal self-government, or deliberation and decision by citizens, individually and in association with others, about how to lead their own lives. Moreover, at least where constitutional essentials and matters of basic justice are at stake, this theme aspires to assure that political decisions will be impartial in the sense that they are justifiable on the basis of *public reasons* (common ground)—on grounds that citizens generally can reasonably be expected to accept, whatever their particular conceptions of the good, because they come within an overlapping consensus concerning a political conception of justice.¹²⁴ 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. Constitutional constructivism conceives our polity as being subject to the limits of public reason, rather than being free to make collective judgments founded solely on comprehensive religious, moral, or philosophical conceptions of the good.¹²⁵

Thus, constitutional constructivism is concerned with securing preconditions for processes of deliberation and decision with respect to both deliberative democracy and deliberative autonomy. By virtue of these concerns, it is a the-

120. See Fleming, *supra* note 7, at 256, 292-93.

121. See RAWLS, *supra* note 7, at 219-20, 359-63; RAWLS, *supra* note 23, at 221-28, 356-62.

122. See RAWLS, *supra* note 7, at 79-81, 335.

123. See Fleming, *supra* note 7, at 233-35, 256-60, 294-95.

124. See RAWLS, *supra* note 7, at 213-20, 223-30; Freeman, *supra* note 112, at 17, 20-29.

125. Rawls speaks of the limits of public reason as imposing "a moral, not a legal, duty—the duty of civility." RAWLS, *supra* note 7, at 217. Elsewhere, I plan to elaborate upon the constraints of public reason in our constitutional democracy. For recent valuable discussions and applications of Rawls' idea of public reason to constitutional theory, see Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 CHI.-KENT L. REV. 619 (1994); Lawrence B. Solum, *Inclusive Public Reason*, 75 PAC. PHIL. Q. 217 (1994).

ory of constitutional democracy and trustworthiness, an alternative to Ely's theory of representative democracy and distrust. I mean trustworthiness in the sense of Rawls' 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."¹²⁶ Constitutional constructivism is a fuller theory of perfecting the trustworthy Constitution than is Ely's (or Sunstein's) process-perfecting theory.

3. *The value of the apparatus of the guiding framework.*

Why do I stress using the apparatus of the guiding framework with two fundamental themes instead of just putting forward a stand-alone conception of deliberative autonomy? I do so because the guiding framework underscores that the basic liberties associated with the second theme of deliberative autonomy, like those related to the first theme of deliberative democracy, have a "structural role to play" in securing and fostering our constitutional democracy.¹²⁷ Together, their structural roles are to secure the preconditions for deliberative self-governance in political and personal senses. The guiding framework keeps in view that the basic liberties that are preconditions for deliberative autonomy are rooted in the language and design of our constitutional document and underlying constitutional order, not usurpations by illegitimate philosopher-judges who roam beyond process or narrowly conceived original understanding.¹²⁸

The guiding framework also demonstrates that constitutional constructivism's conception of citizens (with two moral powers) is writ large in its conception of our Constitution (with two fundamental themes).¹²⁹ It presents our Constitution as embodying (or aspiring to embody) a coherent scheme of basic liberties fit for use by free and equal citizens, rather than as enacting an antique list appropriate for ancestor worship.¹³⁰ And constitutional constructivism frames questions of constitutional interpretation in terms of the significance of an asserted liberty for such citizens' application of their two moral powers in the two fundamental cases that arise in our constitutional scheme.

126. RAWLS, *supra* note 7, at 319; see ELY, *supra* note 20, at 101-04.

127. *Cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring in the judgment) ("[T]he First Amendment . . . has a structural role to play in securing and fostering our republican system of self-government.")

128. *Contra BORK*, *supra* note 3, at 120, 351-55, *passim* (asserting that protection of substantive rights such as privacy ignores original understanding and illegitimately imposes rights derived from abstract moral philosophy upon democracy); ELY, *supra* note 20, at 56-60 (suggesting that protection of substantive fundamental values like autonomy illegitimately superimposes the "reason" of moral philosophers or philosopher-kings upon democracy).

129. *Cf. THE REPUBLIC OF PLATO*, Book II, at 368e, Book VIII, at 543c-545c (Francis MacDonald Cornford trans., 1941) (suggesting that the constitution of individuals is writ large in the constitution of a state).

130. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 220 (1824) (Marshall, C.J.) (criticizing antifederalists, who argued for a narrow construction of the Constitution in general and the commerce power in particular, contending that they would "explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use"). On narrow conceptions of originalism as forms of "ancestor worship," see Freeman, *supra* note 112, at 16.

Finally, by putting these two fundamental themes of deliberative democracy and deliberative autonomy side by side as reflecting two bedrock structures, the guiding framework invites us to inquire whether homologies exist between these structures (and between the doctrines of constitutional law that they undergird).¹³¹ As Charles Black might put it, rubbing these two stones together may generate some illuminating sparks.¹³² Below, I use the guiding framework to suggest such homologies and thus to bring a sense of order and discipline to deliberative autonomy.¹³³

4. *Constitutional constructivism is dualist.*

Constitutional constructivism embraces both deliberative autonomy and deliberative democracy as integral to our scheme of government because it conceives that scheme as "dualist" in three ways. Many claims that rights of autonomy are anomalies or mere add-ons¹³⁴ stem from impoverished views of our scheme as a "monist" or majoritarian representative democracy. Constitutional constructivism provides a richer and better account, normatively and historically, of our constitutional tradition, practice, and culture than do such views.

First, constitutional constructivism is dualist in the general sense that it distinguishes between the constituent power of We the People, expressed in the higher law of the Constitution, and the ordinary power of officers of government, expressed in the ordinary law of legislative bodies.¹³⁵ Moreover, it reconstructs the classical, dualist justification of judicial review: to preserve the fundamental rights ordained and established by the higher law of the Constitution against encroachments by ordinary law.¹³⁶ Thus, it rejects monist

131. By homology or homologous, I mean "having the same relation to an original or fundamental type; corresponding in type of structure." 5 THE OXFORD ENGLISH DICTIONARY 359 (1933). Homology also connotes "symmetry in organization." *Id.* For a sophisticated analysis of homologies in constitutional interpretation, see WILLIAM F. HARRIS, II, THE INTERPRETABLE CONSTITUTION (1993).

132. Cf. Black, *Ninth*, *supra* note 18, at 349 ("This process of combination has naturally engendered some new ideas; even two musical tones, sounded together, produce a third.").

133. See text accompanying notes 371-395 *infra*.

134. In speaking of "anomalies," I echo THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 52-53 (enlarged 2d ed. 1970). In referring to "add-ons," I am following Freeman, *supra* note 112, at 41.

135. Thus, it is similar to Ackerman's theory of dualist democracy. See ACKERMAN, *supra* note 30, at 3-33. Elsewhere, I have argued that constitutional constructivism can be dualist in a general sense without being committed to dualism in Ackerman's specific sense. See Fleming, *supra* note 7, at 290 n.405; Fleming, *supra* note 30, at 356 n.3. That is, one can accept the idea of two tracks of lawmaking without endorsing his complex apparatus of higher lawmaking through "structural amendments" to the Constitution outside the formal Article V amending procedures. Nor need one embrace 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 to the Constitution might be unconstitutional (such as ones repealing constitutional protection for liberty of conscience or freedom of speech). *Id.* at 366-73; Rawls, *Reply*, *supra* note 87, at 158 n.40. I argued that Ackerman has not established his case for dualism over rights foundationalism as the better account of the American scheme of government through his contrast between the American Constitution and the German Basic Law with respect to explicit entrenchment of constitutional provisions against subsequent amendment. Fleming, *supra* note 30.

136. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803); THE FEDERALIST NO. 78, at 467, 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

views of our scheme, which emphasize popular sovereignty and majoritarianism over and against fundamental rights, and therefore tend to equate popular sovereignty with the British model of parliamentary sovereignty.¹³⁷

Second, constitutional constructivism is dualist in the substantive sense that it conceives the content of the higher law of the Constitution as a synthesis of the conflicting traditions of civic 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.¹³⁸ Despite arguments that liberalism triumphed over republicanism at the founding,¹³⁹ the conflict has resurfaced periodically in various guises throughout our history in attempts to recover the communitarian aspirations of the republican tradition and to critique the individualist presuppositions of the liberal tradition.¹⁴⁰ Constitutional constructivism seeks to resolve this conflict by combining a "republican" theme of securing the preconditions for deliberative democracy (or the liberties of the ancients) with a "liberal" theme of securing the preconditions for deliberative autonomy (or the liberties of the moderns).¹⁴¹

Third, constitutional constructivism is also dualist in another substantive sense: It understands our scheme of government as a hybrid of the competing traditions of constitutionalism and democracy, or a constitutional democracy. In their purest forms, constitutionalism is concerned with *limited government* and democracy with *unfettered majority rule*.¹⁴² Democracy gives primacy to

137. See ACKERMAN, *supra* note 30, at 7-10, 35 (coining the term "monism").

138. RAWLS, *supra* note 7, 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), in BENJAMIN CONSTANT, *POLITICAL WRITINGS* 307 (Biancamaria Fontana ed. & trans., 1988)); see RAWLS, *supra* note 23, at 201; Rawls, *Kantian Constructivism*, *supra* note 87, at 519; Rawls, *Reply*, *supra* note 87, at 150-61; see also STEPHEN HOLMES, BENJAMIN CONSTANT AND THE MAKING OF MODERN LIBERALISM 31-52 (1984) (recounting Constant's distinction between the "liberties of the ancients" and the "liberties of the moderns"). 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).

139. See, e.g., LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955); HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* (1981).

140. See, e.g., J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (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).

141. See Fleming, *supra* note 7, at 249-50, 252-53. I have argued that constitutional constructivism's synthesis of these traditions is superior to Sunstein's synthesis, a liberal republican theory of deliberative democracy, because the latter emphasizes the liberties of the ancients to the neglect of the liberties of the moderns. *Id.* at 256-60, 300-01.

142. For formulations of the tension between the competing traditions of constitutionalism and democracy along these lines, and of constitutional democracy as a hybrid form of government, see, e.g., WALTER F. MURPHY, JAMES E. FLEMING & SOTIRIOS A. BARBER, *AMERICAN CONSTITUTIONAL INTERPRETATION* 41-53 (2d ed. 1995); Walter F. Murphy, *The Art of Constitutional Interpretation: A Preliminary Showing*, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 130, 133-35 (M. Judd Harmon

open political process, while constitutionalism insists that limits exist on what government may do. The tradition of constitutionalism is sounded, for example, in the famous cases of *Calder v. Bull*, where Justice Chase contended that the Constitution includes "certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power,"¹⁴³ and *Coryell v. Coryell*, where Justice Washington proclaimed that the Constitution embraces "those privileges and immunities which are fundamental; which belong, of right, to the citizens of all free governments."¹⁴⁴ ("Free government," a term many early Americans used and which Alpheus Thomas Mason kept alive,¹⁴⁵ is the functional equivalent of constitutional democracy.¹⁴⁶)

Constitutional constructivism melds these competing traditions into a conception of constitutional democracy, and it rejects understandings of our system as a majoritarian representative democracy. 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 majoritarian 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.¹⁴⁷ Thus, a constitutional democracy combines the democratic notion that "the people should govern through those whom they elect" with the constitutionalist idea that "there are critical limitations on both what government — however democratically chosen — may validly do and on how it may carry out its legitimate powers."¹⁴⁸ And so, within a scheme of constitutional democracy, constitutional limitations such as the basic liberties associ-

ed., 1978); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 707-08 (1980); see also HARRIS, *supra* note 131, at 162 (speaking of the "tense juncture of liberalism and democracy which, as substantive political models oriented alternatively to individual- and collective-oriented rights, underlie the American constitutional enterprise"); ALPHEUS THOMAS MASON, *THE SUPREME COURT FROM TAFT TO BURGER* 9-10, 150-173 (3d ed. 1979) (tension between "free government" and "popular sovereignty"); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 7-9, 13-14 (Sanford Levinson ed., rev. 2d ed. 1994) (tension or "dualism" between "fundamental law" and "popular sovereignty"); CHARLES H. MCLWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 129-46 (rev. ed. 1947) (tension between *jurisdictio*, the restriction of power by judicial proclamation of rights, and *gubernaculum*, the concentrated exercise of power for the common good); GIOVANNI SARTORI, *DEMOCRATIC THEORY* 353-83 (2d ed. 1962) (tension between *liberalism*, concerned with limited government, freedom, the rights of the individual, and the rule of law, and *democracy*, concerned with unfettered majority rule, equality, general welfare, and the rule of legislators). Sunstein claims to dissolve "the much-vaunted opposition between constitutionalism and democracy" through his theory of deliberative democracy. See SUNSTEIN, *supra* note 21, at 142. But he does so by either recasting constitutional rights as preconditions for democracy or leaving them out altogether.

143. 3 U.S. (3 Dall.) 386, 388 (1798).

144. 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, J., riding circuit).

145. See ALPHEUS THOMAS MASON & GORDON E. BAKER, *FREE GOVERNMENT IN THE MAKING* (4th ed. 1985); MASON, *supra* note 142, at 9-10.

146. James E. Fleming, *A Critique of John Hart Ely's Quest for the Ultimate Constitutional Interpretivism of Representative Democracy*, 80 MICH. L. REV. 634, 642-43 (1982).

147. See John Rawls, *Justice as Fairness: A Brief Restatement* § 43 (1992) (unpublished manuscript, on file with the author); see also RAWLS, *supra* note 7, at 233-34 (same); Rawls, *Reply*, *supra* note 87, at 158 (stating that in a constitutional democracy, a constitution limits majority rule).

148. MURPHY, FLEMING, & BARBER, *supra* note 142, at 41.

ated with deliberative autonomy are indeed counter-majoritarian but they are not for that reason anomalous or deviant.¹⁴⁹

Thus, constitutional constructivism, with its two themes of deliberative democracy and deliberative autonomy, synthesizes our traditions and practices of higher law and ordinary law, civic republicanism and liberalism, and democracy and constitutionalism, in a conception of dualist constitutional democracy. That conception better fits and justifies our constitutional scheme than do views of the scheme as a monist or majoritarian representative democracy.

5. *Is constitutional constructivism too dualistic?*

My formulation of constitutional constructivism's two fundamental themes as dualist may seem overly dualistic, dichotomous, or schematic. By putting the two themes of deliberative democracy and deliberative autonomy so schematically, I do not mean to imply that the realms of political self-government and personal self-government are entirely distinct.¹⁵⁰ Nor do I intend to deny what Michelman has cogently emphasized, that democracy and autonomy are complementary aspects of one unified vision that coexist in a dialectical relation of mutuality, reciprocity, and entailment.¹⁵¹ Nonetheless, I do mean to contend that an adequate unified account in constitutional theory requires both of these themes instead of just one principal theme of democracy.

The first reason is prophylactic: articulating a constitutional constructivism with these two themes protects us against taking flights from substance to process or to narrowly conceived original understanding by recasting or neglecting substantive liberties.¹⁵² Even if imaginative process-perfecting theorists can recast some of the substantive liberties that are preconditions for deliberative autonomy as preconditions for deliberative democracy, renditions of those liberties in such terms fail to capture what is at stake in some instances or leave out something important in the translation.¹⁵³ Constitutional constructivism is not driven to undertake such reductive flights in the first place, for it does not entertain any (untenable) presupposition that the idea of democracy is relatively uncontroversial and a matter of stable consensus while the idea of autonomy is hopelessly contested and a matter of profound disagreement. It understands that both structures are normatively contested and that both can be elaborated

149. See RAWLS, *supra* note 7, at 233-34. By using "counter-majoritarian" and "deviant," I am echoing Bickel's famous formulation of the idea that judicial review poses a "counter-majoritarian difficulty" or is a "deviant institution" in a representative democracy. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16, 18 (2d ed. 1986).

150. 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 7, at 206.

151. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1524-37 (1988) [hereinafter Michelman, *Law's Republic*]; Frank Michelman, *Private Personal but Not Split: Radin Versus Rorty*, 63 S. CAL. L. REV. 1783, 1790 (1990).

152. See note 13 and text accompanying notes 76-83 *supra*. Constitutional constructivism recognizes the pointlessness or futility of such flights, for it comprehends that perfecting processes and enforcing original understanding inevitably require the sort of substantive constitutional choices that these strategies seek to avoid. Fleming, *supra* note 7, at 213.

153. See Fleming, *supra* note 7, at 267-68, 273-75; texts accompanying notes 34 & 76-81 *supra*.

only through substantive political theory or substantive constitutional choices.¹⁵⁴

A second, related reason is architectonic: Presenting our basic liberties through the guiding framework illustrates that the two fundamental themes of deliberative democracy and deliberative autonomy are co-original and of equal weight.¹⁵⁵ For both themes derive from a common substrate: a conception of citizens as free and equal persons (with two moral powers) and a conception of society as a fair system of social cooperation. Thus, the guiding framework may help meet long-standing objections, such as those stemming from the traditions of civic republicanism and discourse ethics, that liberal theories treat the liberties of the moderns (associated with autonomy) as being "prepolitical" or "prior to all political will formation" and thus as having "priority" over the liberties of the ancients (related to democracy).¹⁵⁶ Similarly, it may rebut objections that the basic liberties associated with autonomy are anomalies while the basic liberties related to democracy are integral.¹⁵⁷ For it shows that both themes are constitutive of and articulate preconditions for the sovereignty of free and equal citizens.

The third, more general reason is heuristic: Articulating our basic liberties through the abstract, simplifying device of the guiding framework with two themes keeps in view that our constitutional scheme is a dualist constitutional democracy, not a monist or majoritarian representative democracy. Hence, doing so fortifies us against being fooled by the tyranny of simple labels like "democracy" into thinking that there is something illegitimate or embarrassing about arguing for rights related to autonomy (or that there is nothing illegitimate or problematic about majoritarian representative democracy).¹⁵⁸ It also

154. Compare Sunstein's critique of Ely for apparently assuming that democracy is a relatively uncontroversial notion. SUNSTEIN, *supra* note 21, at 104-05 (criticizing ELY, *supra* note 20). Yet Sunstein himself is vulnerable to a similar critique regarding autonomy, for he asserts, without justification, that protecting certain rights in the name of reinforcing democracy is "less adventurous" than protecting the very same rights in the name of securing autonomy. See Sunstein, *supra* note 21, at 312 (replying to Fleming, *supra* note 7, at 260-75).

155. My argument here parallels that of Rawls replying to Habermas' charge that Rawls' political liberalism treats the "modern liberties" or "private autonomy" as "prepolitical" or "prior to all political will formation." See Rawls, *Reply*, *supra* note 87, at 156-70 (arguing that the "liberties of the moderns" (which I relate to deliberative autonomy) and the "liberties of the ancients" (which I associate with deliberative democracy) are co-original and of equal weight).

156. For examples of such critiques, see, e.g., BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 30-32, 43-44, 142-43 (1984) (from standpoint of civic republicanism); Habermas, *supra* note 87 (from standpoint of discourse ethics). For Rawls' reply to Habermas' critique, see Rawls, *Reply*, *supra* note 87, at 156-70; note 155 *supra*.

157. For critiques along these lines, see, e.g., BORK, *supra* note 3, at 139; ELY, *supra* note 20, at 100-01 (discussed in text accompanying notes 76-83 *supra*).

158. See RONALD DWORKIN, *FREEDOM'S LAW* (forthcoming 1996) (criticizing "majoritarian" conceptions of democracy that accept "the majoritarian default," or the principle that when a group or polity must make a collective decision, fairness requires the decision favored by a majority of its members; arguing for a "constitutional" conception of democracy that defines democracy as requiring that certain preconditions of democratic legitimacy be satisfied (which for Dworkin include rights of moral independence or autonomy)); Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. Rev. 893, 897-909 (1990) (criticizing majoritarian theories of popular sovereignty on the ground that they are beset by the "majoritarian difficulty" and are irreconcilable with the Constitution, which places limits on majoritarianism).

wards off any illusion that we can accomplish an easy resolution between democracy and autonomy through a unified account of democracy, as in: "democracy and autonomy are one and that one is democracy."¹⁵⁹

A final reason is elegance: the importance of being elegant (though not too reductive) in constructing a constitutional theory.¹⁶⁰ A major reason for the attractiveness of Ely's theory of reinforcing representative democracy is its elegance.¹⁶¹ Ely provides an elegant account of judicial review as perfecting the processes of representative democracy through two intelligible, comprehensive 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.¹⁶² Elsewhere, I have suggested that an important reason for the persistence of process-perfecting theories such as Ely's, notwithstanding the resistance to them, is that no one has done for "substance" what Ely has done for "process." That is, no one has developed an alternative Constitution-perfecting theory — a theory that would reinforce not only the procedural liberties but also the substantive liberties embodied in our Constitution — with the elegance of his process-perfecting theory.¹⁶³ I am attempting to develop a Constitution-perfecting theory with two fundamental themes of deliberative democracy and deliberative autonomy that emulates the elegance of Ely's theory without taking a reductive flight from substance to process like that which he takes.¹⁶⁴

III. CONSTITUTING DELIBERATIVE AUTONOMY

In this Part, I further elaborate the constitution (or Constitution) of deliberative autonomy. First, I sketch the idea of deliberative autonomy. Second, I

159. Cf. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 3 (1989) ("Marxism and feminism are one and that one is Marxism.") (quoting Heidi Hartmann and Amy Bridges, *The Unhappy Marriage of Marxism and Feminism*). I do not mean to imply, at text accompanying note 151 *supra*, that Michelman labors under any such illusion.

160. By "elegant," I mean to suggest the notion of elegance in the construction of scientific theories. Ely emphasizes that the value of *Democracy and Distrust*, which elaborates the *Carolene Products* framework, is that it (elegantly) frames the appropriate set of questions for constitutional interpretation. See *Commentary*, 56 N.Y.U. L. Rev. 525, 528 (1981) (statement of Ely); see also ELY, *supra* note 20, at 75-77 (characterizing his own theory as filling in the outlines of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)). I contend that my guiding framework has a similar value, although of course it frames the appropriate questions differently.

161. For an assessment of Ely's theory that stresses its elegance, see Harry H. Wellington, *The Importance of Being Elegant*, 42 OHIO ST. L.J. 427 (1981).

162. ELY, *supra* note 20, at 75-88.

163. See Fleming, *supra* note 7, at 215. 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. *Id.* at 215 n.21 (citing numerous works).

164. A final, related reason for presenting constitutional constructivism as having two fundamental themes is the imperative of being superficial—or staying near the surface—in constitutional theory. Even if there is some deeper common substrate or unified vision of democracy in political philosophy from which the two themes derive, constitutional theory may do better to articulate it through two themes, for the reasons stated in the text. Although constitutional theory delves into fundamental matters, it should stay near the surface and not resort to, much less impose, deep or controversial philosophical conceptions.

take up its underpinnings and scope and defend it against certain criticisms. Finally, I put forward two additional structural justifications for securing it. The first is that deliberative autonomy constitutes a realm of personal sovereignty contemplated by the Ninth and Tenth Amendments; the second is that it secures an "exit" option from majoritarian oppression.

A. *The Idea of Deliberative Autonomy*

1. *The term "deliberative autonomy."*

Why do I use the term "deliberative autonomy" instead of simply "autonomy"? In a word, to differentiate it from the welter of usages of the term "autonomy" in contemporary discourse. Gerald Dworkin has observed:

[Autonomy] is used sometimes as an equivalent of liberty (positive or negative in Berlin's terminology), sometimes as equivalent to self-rule or sovereignty, sometimes as identical with freedom of the will. It is equated with dignity, integrity, individuality, independence, responsibility, and self-knowledge. It is identified with qualities of self-assertion, with critical reflection, with freedom from obligation, with absence of external causation, with knowledge of one's own interests. It is even equated by some economists with the impossibility of interpersonal comparisons. It is related to actions, to beliefs, to reasons for acting, to rules, to the will of other persons, to thoughts, and to principles.¹⁶⁵

Nevertheless, the etymology of the term suggests the basic idea underlying the concept of autonomy: *autos* (self) and *nomos* (rule or law).¹⁶⁶ Familiar formulations such as "self-rule," "self-determination," "self-government," "independence," or "sovereignty" express this underlying meaning.¹⁶⁷ Moreover, commentators apply these terms both to nation-states and to individuals, or to refer to self-government in a political sense and a personal sense.¹⁶⁸

I speak of "deliberative autonomy" for four reasons: first, to emphasize that the idea builds upon Rawls' idea of persons' second moral power, the capacity for a conception of the good, as the power of "deliberative reason";¹⁶⁹

165. GERALD DWORIN, *THE THEORY AND PRACTICE OF AUTONOMY* 6 (1988); see also John Christman, *Introduction*, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 3 (John Christman ed., 1989) (analyzing many different conceptions of autonomy in contemporary discourse).

166. See DWORIN, *supra* note 165, at 12; JOEL FEINBERG, *HARM TO SELF* 27 (1986).

167. FEINBERG, *supra* note 166, at 27-28.

168. See, e.g., *id.* at 27-28, 49-51 (distinguishing between national sovereignty and personal sovereignty and referring to personal autonomy as "the realm of inviolable sanctuary most of us sense in our own beings"); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 55-56 (1986) (stating that the conflict between "two principles—of 'individual' and 'community' self-determination—reflects a characteristic tension in the general concept of self-government"); see also DWORIN, *supra* note 36, at 53 (referring to privacy or autonomy as a matter of "sovereignty over personal decisions"); Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 877-78 (1994) (distinguishing between "descriptive" autonomy, which refers to the actual condition of persons, and "ascriptive" autonomy, which "marks a moral right to personal sovereignty").

169. See text accompanying notes 103 & 110 *supra*. For another application of "deliberative" to refer to an idea similar to Rawls' idea of the capacity for a conception of the good, see David O. Brink, *Mill's Deliberative Utilitarianism*, 22 PHIL. & PUB. AFF. 67 (1993) (arguing that Mill advanced a "deliberative conception of happiness"); see also DWORIN, *supra* note 36 (referring to exercise of autonomy as involving deliberation).

second, to recognize its similarity to Justice Stevens' analysis of "decisional autonomy" in terms of "deliberation" about important decisions concerning how to live one's own life;¹⁷⁰ third, to suggest parallels between the structure of "deliberative" autonomy and that of "deliberative" democracy;¹⁷¹ and fourth, to acknowledge affinities between constitutional constructivism and other theories that conceive our Constitution as a scheme of deliberative or reflective self-government.¹⁷²

I should clarify that constitutional constructivism deploys ecumenical or "thin" conceptions of both "deliberation" and "autonomy." They are compatible with, and have affinities to, a number of "thicker" conceptions drawn from diverse constitutional and political theories, whose common concern is the centrality of freedom to form, revise, and pursue a conception of the good.¹⁷³ But the main idea in developing the theme of deliberative autonomy is to articulate a structure that houses basic liberties associated with autonomy, not to advance a sectarian or "thick" conception of autonomy.

2. *The idea of deliberation.*

What, in general, is "deliberative" about deliberative democracy and deliberative autonomy? In what senses do the basic liberties associated with both themes secure preconditions for deliberation? First, the two fundamental cases in which persons apply their two moral powers involve deliberation: deliberation about justice or the common good and deliberation about their own good or way of life, respectively. Second, deliberation in each fundamental case is a process whereby persons engage in self-governance, realizing their freedom and, indeed, their sovereignty. Thus, both themes safeguard processes for deliberation rather than imposing outcomes.¹⁷⁴ To acknowledge this structural affinity between constitutional constructivism and process-perfecting theories,

170. See text accompanying notes 40 & 45 *supra*.

171. See text accompanying notes 127-133 *supra* and text accompanying notes 371-395 *infra*.

172. See, e.g., STEPHEN MACEDO, *LIBERAL VIRTUES* 163-202 (1990) (analyzing the Constitution as reflecting a liberal scheme of "reasonable self-government" or "reflective self-governance"); ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 198-259 (1985) (analyzing the Constitution as embodying a liberal scheme of "rational liberty," "deliberative self-direction," or "reflective self-governance"). Smith, however, presents his liberal theory, derived from Locke, as an alternative to neo-Kantian and Rawlsian theories. *Id.* at 216-25; see also Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 195-96, 204-05 (1982) (contrasting his Lockean conception of "rational liberty" with conceptions of autonomy derived from Kant and Rawls). I believe that Smith may overstate the differences between his own theory and Rawlsian theories.

173. There is a rich, sophisticated, and powerful literature discussing substantive liberties embraced by deliberative autonomy in terms of privacy, autonomy, or liberty. There is also a similarly rich literature analyzing deliberation about and pursuit of conceptions of the good. See, e.g., DWORKIN, *supra* note 36; MACEDO, *supra* note 172; DAVID A.J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* (1993) [hereinafter RICHARDS, *CONSCIENCE*]; DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986) [hereinafter RICHARDS, *TOLERATION*]; SMITH, *supra* note 172; see also WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202 (1992).

174. The two themes protect processes for deliberative self-governance against the authoritarianism of majoritarianism (might makes right). For a view of Bork's majoritarianism as a form of "legal authoritarianism," or "might makes right," see SUNSTEIN, *supra* note 21, at 107.

while also recognizing that the former theory secures two types of preconditions for deliberation rather than just one, I have characterized it as a Constitution-perfecting theory.¹⁷⁵

In our scheme of deliberative self-governance, some matters are committed to resolution through the process of democratic deliberation and others are reserved to resolution through the process of personal deliberation, individually and in association with others. For example, just as the right to vote is justified as an essential precondition for the process of deliberating about the common good, so too, liberty of conscience and the right of procreative autonomy are justified as essential preconditions for the process of deliberating in forming, revising, and pursuing one's conception of the good.

Both deliberative democracy and deliberative autonomy may involve individual or collective deliberation. "Deliberative democracy" may conjure up for us a citizen making her decision in the secrecy of the voting booth; here, self-government manifests itself through an individual act of deliberation. Or, we might picture a citizen participating in a town meeting, speaking or listening at a political rally, or discussing matters of public concern with fellow citizens; here, we see a collective dimension of deliberation. Similarly, "deliberative autonomy" may connote a person making a decision, deemed private and intimate, about her sexual or reproductive life. Although "deliberative autonomy" in this sense stresses that the individual person is the unit of deliberation and decision making,¹⁷⁶ the term also allows room for a social dimension.¹⁷⁷ It contemplates that exercises of deliberative autonomy may include consulting with others, taking their views into account, and associating with them. The crucial point is that in an important way, the individual person is the locus of moral agency, responsibility, and independence.¹⁷⁸

What, in particular, is "deliberative" about liberty of conscience and freedom of association, along with the foregoing "unenumerated" fundamental rights?¹⁷⁹ How do these basic liberties come within a structure of deliberative autonomy? For one thing, all of them implicate deliberations, or the capacity to deliberate, concerning certain fundamental decisions affecting persons' identity, destiny, or way of life. They reserve to persons the power to deliberate about and decide how to live their own lives, concerning certain matters that

175. See text accompanying notes 84-85 *supra*.

176. Deliberation is dialectical or Socratic—a quest for reflective equilibrium between considered judgments and underlying principles. See RAWLS, *supra* note 23, at 49. Socrates characterized the dialectic as a dialogue of the soul with itself. See PLATO, *supra* note 129, at Book VII, 531c-535a.

177. Liberal theorists rarely hold as self-determining or "unencumbered" a view of the self as communitarians and deconstructionists assign to them, but usually recognize the important shaping role of society. See, e.g., STEPHEN HOLMES, *THE ANATOMY OF ANTILIBERALISM* 176-79, 190-97 (1993); RAWLS, *supra* note 7, at 27. They typically, however, reject strong social constructionist models of the self because such models undermine the possibility of a commitment to agency and autonomy. Cf. SEYLA BENHABIB, *SITUATING THE SELF* 228-29 (1992) (arguing that a strong version of postmodernism would undermine "feminist commitment to women's agency and sense of selfhood").

178. See DWORKIN, *supra* note 36, at 148-68. Many communitarians and perfectionists dispute the idea of the individual as the site of moral agency, responsibility, and independence. See, e.g., ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 83-109, 129-60 (1993); SANDEL, *supra* note 5, at 15-65.

179. See note 27 *supra* and accompanying text.

are unusually important or significant for such personal self-governance, over a complete life.

For another, the landmark cases and powerful dissents that I have offered as illustrations of deliberative autonomy¹⁸⁰ reflect an antitotalitarian principle concerned with safeguarding against the danger of "creeping totalitarianism, an unarmed *occupation* of individuals' lives,"¹⁸¹ or coercion of conformity concerning "the most intimate and personal choices a person may make in a lifetime."¹⁸² If persons do not have the freedom to deliberate about and make such decisions, they are not free.

The idea of "deliberation" in deliberative autonomy does not stem from an abstract philosophical conception that lacks roots in our constitutional practice. Rather, our constitutional practice has identified basic liberties such as those on the foregoing list as involving central "attributes of personhood"¹⁸³ and as being "essential to the orderly pursuit of happiness"¹⁸⁴ by free persons. The deliberations and decisions encompassed by the list typically figure prominently in conflicting and irreconcilable comprehensive religious, philosophical, and moral conceptions of the good that reside in the background culture of our constitutional democracy. These basic liberties are and will remain controversial, precisely because of the centrality of such matters in conflicting comprehensive views. Governmental restriction or regulation of such personal decisions triggers the risk of majoritarian oppression and transgression of the limits of public reason.

The basic liberties on the foregoing list do not define or exhaust deliberative autonomy. My project here is not to delineate the exact scope of this structure but simply to outline its parameters so as to tether the right of autonomy in constitutional law. As explained below, its general scope is limited to securing significant basic liberties. Deliberative autonomy is much narrower than comprehensive libertarian or liberal principles of autonomy or individuality.

3. *Avoiding misconceptions about the idea of deliberative autonomy.*

It is important to recognize that deliberative autonomy is concerned with securing basic liberties that are *preconditions* for the development and exercise of persons' capacity for a conception of the good in deliberating about and making decisions concerning certain fundamental matters, and does not *guarantee* or *require* actual conscientious deliberation in applying that capacity. This theme reflects general assumptions about persons' second moral power, and does not call for or require an inquiry by the government into the actual deliberations, responsibility, and judgment of particular exercises of that

180. See text accompanying notes 39-72 *supra*.

181. Rubinfeld, *supra* note 60, at 784.

182. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992); DWORKIN, *supra* note 36, at 150-59 (distinguishing between encouraging responsibility and coercing conformity).

183. *Casey*, 112 S. Ct. at 2807.

184. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

power.¹⁸⁵ Indeed, such an inquiry concerning most of those important decisions (encompassed by the foregoing list)¹⁸⁶ would be intolerably intrusive or oppressive.

To be sure, military conscription statutes might provide for draft boards to interview draftees seeking conscientious exemption from service in order to insure that their objections are rooted in conscience.¹⁸⁷ But restrictive abortion laws may not require a pregnant woman to demonstrate that her decision to have an abortion is for her a matter of conscience or a responsible exercise of her reproductive freedom.¹⁸⁸ Even if the government tries to *encourage* a pregnant woman to deliberate conscientiously or responsibly about her decision through measures like the 24-hour waiting period and informed consent requirements upheld in *Casey*,¹⁸⁹ it may not *compel* her to give testimony proving that she has done so or to provide reasons for her decision.¹⁹⁰

Perhaps this feature of deliberative autonomy — that it secures basic liberties as preconditions for deliberation without guaranteeing or requiring actual deliberation — will seem less peculiar or problematic if we draw an analogy between a basic liberty associated with deliberative autonomy and one related to deliberative democracy. The “unenumerated” right to vote is justified because it is a significant precondition for deliberative democracy,¹⁹¹ just as the

185. See MACEDO, *supra* note 172, at 214-27; Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989, 1070-75 (1994).

186. See note 27 *supra* and accompanying text.

187. See, e.g., *Gillette v. United States*, 401 U.S. 437, 441 (1971) (upholding, against a challenge under the Free Exercise Clause, a statute exempting from military conscription any person who “is conscientiously opposed to participation in war in any form” and requiring a showing that the objection must have a grounding in “religious training and belief”).

188. Nonetheless, Robin West has suggested that support for reproductive freedom “should rest upon the demonstrated capacity of pregnant women to decide whether to carry a fetus to term or to abort responsibly.” Robin West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 82-83 (1990). But see Linda C. McClain, “Atomistic Man” Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1252-53 (1992) (expressing concern that West’s approach might open the door to requiring individual women to demonstrate that they have exercised their reproductive freedom responsibly).

189. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2818, 2821 (1992) (stating that the government “may enact rules and regulations designed to encourage [a pregnant woman] to know that there are philosophic and social arguments of great weight . . . in favor of continuing the pregnancy to full term,” for “[w]hat is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so”). But see *id.* at 2840 (Stevens, J., concurring in part and dissenting in part) (agreeing with the joint opinion that the government “may take steps to ensure that a woman’s choice ‘is thoughtful and informed,’” but insisting that “[d]ecisional autonomy must limit the State’s power to inject into a woman’s most personal deliberations its own views of what is best”).

190. See DWORKIN, *supra* note 36, at 150-59 (distinguishing between encouraging responsibility and compelling or coercing conformity); McClain, *supra* note 185, at 1083-88 (same). I nonetheless believe that *Casey* was wrong in upholding the 24-hour waiting period and certain aspects of the informed consent requirements. In time of war, we may have a regime of compulsory military service, absent demonstration of conscientious refusal. But we do not have a regime of compulsory motherhood, forcing women to be mothers against their will, absent an analogous showing. (Nor, for that matter, should we have a regime of compulsory heterosexuality, or of compulsory life sentences on life support systems.)

191. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966). It may be long since forgotten that the right to vote (at least in state elections) is an “unenumerated” fundamental right, and that cases such as *Reynolds* and *Harper*, like *Griswold* and *Roe*, met with charges by commentators and judges that the Court was engaging in “Lochnering.” See,

"unenumerated" right to abortion is justified on the ground that it is a significant precondition for deliberative autonomy. This justification for the right to vote is not undercut by the observation that not everyone who votes actually conscientiously or responsibly deliberates about the common good before casting a vote. Nor is this justification for the right to abortion undermined by the objection that not every woman who has an abortion actually conscientiously or responsibly deliberates about a conception of the good life before having an abortion.¹⁹² The best justification for each right is still framed in terms of securing the preconditions for deliberation, even if that justification cannot vouchsafe the deliberativeness, much less the responsibility, of each individual decision.

Furthermore, constitutional constructivism does not stem from an overly rationalistic or romantic conception of the person that presupposes or demands too much deliberation to be attractive, realistic, or useful. First, its conception of the person is a political conception that is advanced to provide a ground for justifying basic liberties in our constitutional democracy; it is not a biological or psychological conception of the human being as such.¹⁹³ Second, this political conception of the person is not part of what Rawls calls a comprehensive moral view with respect to either democracy or autonomy.¹⁹⁴ Thus, constitutional constructivism does not subject the first moral power (and the theme of deliberative democracy) to the demands, rigors, and commitments of comprehensive moral views like those associated with civic humanism, which idealize taking part in politics "as the privileged locus of the good life."¹⁹⁵ Nor does it subject the second moral power (and the theme of deliberative autonomy) to the challenges, reflectiveness, and experiments of comprehensive moral views like those exemplified by Kant's or Mill's theories, which idealize autonomy or individuality as a way of life.¹⁹⁶ In sum, constitutional constructivism's political conception of the person is simply an abstract device to model the capacities of citizens which are most salient to grounding our basic liberties and interpreting our constitutional order. It does not glorify a life of deliberation.

Finally, deliberative autonomy does not entail that every exercise of the police power concerning fundamental decisions affecting persons' identity, destiny, or way of life is presumptively illegitimate. Far from it. Precisely

e.g., Ely, *supra* note 13, at 935-37, 943-45 (criticizing such pre-*Roe* charges by analogy to the fable of the boy who cried "wolf"). Technically, *Harper* did not decide whether the Constitution protects a right to vote in state elections, for the Court stated: "[I]t is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause" 383 U.S. at 665.

192. One could press the analogy between voting and abortion further. Literacy tests for voting can be seen as analogous to informed consent requirements for abortion. Many measures that were once defended as safeguarding deliberative or responsible voting, such as literacy tests, poll taxes, and property requirements, have been invalidated. *See, e.g.*, U.S. CONST. amend. XXIV (prohibiting poll tax for federal elections); Voting Rights Act of 1965, 42 U.S.C. § 1973b (1988) (banning states from requiring certain literacy tests); *Harper*, 383 U.S. at 666 (invalidating poll tax for state elections).

193. *See* RAWLS, *supra* note 7, at 18 n.20, 86-88.

194. *See id.* at 13, 175.

195. *Id.* at 206 (mentioning, as an example, HANNAH ARENDT, *THE HUMAN CONDITION* (1958)).

196. *Id.* at 37, 78, 145, 199-200 (discussing the comprehensive liberalism of Kant and Mill).

because those matters are so important or significant, a government dedicated to securing the preconditions for deliberative autonomy and deliberative democracy would enact many legislative measures to foster the development and exercise of persons' moral powers. Deliberative autonomy hardly rules out such measures; it does, however, safeguard against legislation that coercively standardizes persons with respect to such matters. Justice Jackson's famous words in *Barnette* remind us that freedom embraces "the right to differ as to things that touch the heart of the existing order."¹⁹⁷

B. *The Underpinnings and Scope of Deliberative Autonomy*

1. *The matrix values underwriting deliberative autonomy: liberty of conscience and freedom of association.*

Why do I stress liberty of conscience and freedom of association in developing the fundamental theme of deliberative autonomy instead of just using the more common ideas of privacy, autonomy, or liberty? I do so because those basic liberties are matrix values that underwrite deliberative autonomy.

First, I emphasize liberty of conscience to make clear that this theme involves persons' deliberations and decisions concerning unusually important matters of conscience or basic decisions implicating beliefs that "could not define the attributes of personhood were they formed under compulsion of the State."¹⁹⁸ Liberty of conscience is more abstract than freedom of religion (or the religion clauses of the First Amendment) and so it undergirds free exercise not only of religion but also of deliberative autonomy as to certain fundamental decisions.

Thus, constitutional constructivism generalizes liberty of conscience from a narrow principle applicable only to religious persons to a general principle applicable to all persons. It generalizes the principle of religious toleration to apply not only to traditional religious conceptions of the good but also to reasonable moral and philosophical conceptions of the good.¹⁹⁹ Given the fact of reasonable pluralism, conceiving liberty of conscience narrowly would unfairly privilege traditional religious conceptions.²⁰⁰ In a morally pluralistic constitutional democracy such as our own, liberty of conscience secures preconditions for the development and exercise of all persons' capacity to pursue their conception of the good; it does not merely confer a privilege upon religious persons to obey the commands or dictates of their conception of a God.²⁰¹

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

198. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992).

199. See RAWLS, *supra* note 7, at 9-10, 154. Ronald Dworkin and David Richards have already compellingly generalized liberty of conscience beyond narrow, traditional religious liberty. See, e.g., DWORKIN, *supra* note 36, at 160-68; RICHARDS, CONSCIENCE, *supra* note 173; RICHARDS, TOLERATION, *supra* note 173.

200. For a valuable discussion of the difference between privileging and protecting religious conceptions of the good, see Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1250-54 (1994).

201. For contrary views that liberty of conscience should be interpreted narrowly to protect only religious liberty, rather than broadly to protect autonomy, see Michael W. McConnell, *The Origins and*

To be sure, some religious persons may view liberty of conscience, not as involving deliberation about their conception of the good at all, but instead as involving obedience to God. That fact does not undermine the justification for liberty of conscience as a precondition for deliberative autonomy—any more than the fact that such persons may view themselves as voting the commands and dictates of conscience, rather than engaging in deliberation about the common good, undercuts the justification for the right to vote as a precondition for deliberative democracy.²⁰²

Second, I emphasize freedom of association to bring out that deliberative autonomy relates to persons' deliberations and decisions in pursuing their conceptions of the good, individually and in association with others. It is not, contra Sandel and Glendon, merely a right of "unencumbered selves" or "lone rights-bearers" to be "let alone."²⁰³ Freedom of association includes both expressive association and intimate association.²⁰⁴ Furthermore, constitutional constructivism recognizes the human goods promoted through freedom of association and not simply the individual choices protected by that freedom.²⁰⁵

Third, the fundamental theme of deliberative autonomy, underwritten by liberty of conscience and freedom of association, may provide a more secure basis for certain "unenumerated" fundamental rights²⁰⁶ deemed "essential to the orderly pursuit of happiness"²⁰⁷ than does privacy or due process. Even narrow originalists, deeply skeptical about rights of privacy, autonomy, or liberty when unconnected to specific provisions of the Constitution or when connected to the Due Process Clauses, are hard pressed to deny that liberty of conscience and freedom of association have firm First Amendment roots.²⁰⁸ Ronald Dworkin and Charles Black have argued persuasively that the distinction between "enumerated" and "unenumerated" rights in our constitutional practice is largely "spurious" or "bogus," and that objections to recognizing

Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1410, 1488-1500 (1990) [hereinafter McConnell, *Historical Understanding*]; Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 172-75 (1992) [hereinafter McConnell, *Crossroads*]; Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, in ARTICLES OF FAITH, ARTICLES OF PEACE 74, 87-92 (James Davison Hunter & Os Guinness eds., 1990).

202. It is not my project here, however, to put forward a theory of the religion clauses or of the relationship between those clauses and liberty of conscience generally. While much important work remains to be done in this regard, which I hope to pursue elsewhere, many scholars of the religion clauses have already taken up such matters. See, e.g., RICHARDS, CONSCIENCE, *supra* note 173; RICHARDS, TOLERATION, *supra* note 173; Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

203. See SANDEL, *supra* note 5, at 182; GLENDON, *supra* note 5, at 47-61.

204. See *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984) (distinguishing "expressive association" from "intimate association"); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

205. But see Sandel, *supra* note 10, at 533-38.

206. See DWORKIN, *supra* note 36, at 160-68 (suggesting that there is no dearth of "textual homes" for such rights, including the Due Process Clauses, the Equal Protection Clause, and the First Amendment, to say nothing of the Privileges or Immunities Clause).

207. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

208. Nonetheless, narrow originalists resist generalizing liberty of conscience (or freedom of association) to embrace ideas like deliberative autonomy. See McConnell, *Crossroads*, *supra* note 201, at 172-75; McConnell, *Historical Understanding*, *supra* note 201, at 1488-1500.

asserted rights on the ground that they are "unenumerated" are often overstated or off the mark.²⁰⁹ Nonetheless, the incubus of such objections does (for some people) encumber the ideas of privacy, autonomy, and liberty. Liberty of conscience and freedom of association may offer a fresh start in undergirding those basic liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."²¹⁰

It may be instructive to revisit *Griswold*, the first case explicitly to recognize the "unenumerated" right of privacy. There Justice Douglas recast *Meyer* and *Pierce*, two substantive due process cases from the *Lochner* era, as securing First Amendment freedoms.²¹¹ Justice Harlan did likewise in dissent in *Poe*.²¹² Indeed, even Bork, for whom substantive due process and the right of privacy are anathema, concedes that *Meyer* and *Pierce* are justifiable on First Amendment grounds.²¹³ Also, an early draft of Justice Douglas' opinion in *Griswold* framed the right in question as freedom of association secured by the First Amendment.²¹⁴ With the specter of *Lochner* haunting constitutional law, grounding the right of privacy in freedom of association might have seemed less frightening or spooky to some people than summoning forth penumbras and emanations from the First, Third, Fourth, Fifth, and Ninth Amendments.²¹⁵

Finally, I should explain what I mean when I state that liberty of conscience and freedom of association "underwrite" the theme of deliberative autonomy rather than, say, "enumerate" it. These basic liberties underwrite deliberative autonomy in the sense that they are, in Justice Cardozo's terms in *Palko v. Connecticut*, "matrix values," or "indispensable conditions" for nearly every other form of freedom associated with it.²¹⁶ Similarly, the equal political liberties and freedom of thought are matrix values underwriting deliberative democ-

209. DWORKIN, *supra* note 36, at 129-31, 143-44 ("spurious"); BLACK, *DECISION*, *supra* note 18, at 41-54; Black, *Livelihood*, *supra* note 18, at 1108-11; Black, *Ninth*, *supra* note 18, at 342-49; Dworkin, *supra* note 37, at 381, 381-91 ("bogus").

210. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (citations omitted); *see also* Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, J., riding circuit) (proclaiming that the Privileges or Immunities Clause embraces "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments"); *cf.* Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHL.-KENT L. REV. 131, 145 (1988) (offering as one possible explanation of recent attention to the Ninth Amendment, rather than the Privileges or Immunities Clause of the Fourteenth Amendment, the "clean slate" and lack of embarrassing precedent attributable to the former).

211. *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965).

212. *Poe v. Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) ("[T]oday those decisions would probably have gone by reference to the concepts of freedom of expression and conscience . . .").

213. BORK, *supra* note 3, at 48-49.

214. GARROW, *supra* note 71, at 245-56.

215. I do not concede that there is anything spooky or scary about penumbras and emanations, whether from particular provisions, *Griswold*, 381 U.S. at 483-85, or from the "totality of the constitutional scheme under which we live," *Poe*, 367 U.S. at 521 (Douglas, J., dissenting). I simply observe that in our constitutional culture many people are frightened by such talk. I should like to write an article entitled *Rewriting Griswold*. *Cf.* Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979) (articulating an equal protection justification for *Roe* against the background of samaritan law as an alternative to the privacy justification advanced in *Roe*).

216. 302 U.S. 319, 327 (1937) ("Of that freedom [of thought and speech] one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."). My discussion of "matrix values" benefits from, though is not the same as, the analysis in HARRIS, *supra* note 131, at 97.

racy, for they are "preservative of all rights."²¹⁷ Both types of basic liberties are rooted in "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."²¹⁸

To contend that liberty of conscience and freedom of association underwrite deliberative autonomy is not necessarily to argue that they or the First Amendment provide a new "textual home" or doctrinal basis for every hitherto "unenumerated" fundamental right associated with deliberative autonomy that has been protected through the Due Process Clauses or the Equal Protection Clause.²¹⁹ These basic liberties instead provide a matrix, or undergirding structure, for such "unenumerated" rights. Therefore, such rights have a deeper basis in our constitutional "scheme of ordered liberty"²²⁰ than is acknowledged by proponents of a "constitution of detail," who demand to know where these rights are "enumerated" in the expressions "liberty" or "equal protection."²²¹

Furthermore, even if as a doctrinal matter the textual home of "unenumerated" fundamental rights associated with deliberative autonomy largely remains "liberty" of the Due Process Clause, that does not mean that deliberative autonomy rests on that clause alone. The clauses of the Constitution are not isolated, self-contained units. Within our "constitution of principle," as Dworkin argues, we should not be surprised to find underpinnings for basic liberties in more than one clause.²²² Conceiving liberty of conscience and freedom of association as matrix values in an underlying structure shows that "unenumerated" fundamental rights such as those on the foregoing list²²³ "emanate[] from the totality of the constitutional scheme under which we live,"²²⁴ even if they are not dictated by a particular clause.²²⁵ Put another way, the basic liberties associated with deliberative autonomy are implicit in a "transcendent structure" embodied in the scheme as a whole.²²⁶

217. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

218. *Palko*, 319 U.S. at 325, 328 (citation omitted).

219. See DWORKIN, *supra* note 36, at 160-68 (arguing that the First Amendment, along with the Due Process Clause and the Equal Protection Clause, provides a "textual home" for the right of procreative autonomy).

220. *Palko*, 319 U.S. at 325.

221. See DWORKIN, *supra* note 36, at 166 (criticizing the "odd taste for neatness" of proponents of a "constitution of detail" who "want rights mapped uniquely onto constitutional clauses with no overlap").

222. *Id.* But see Richard A. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 441-42 (1992) (characterizing *Roe* as "the Wandering Jew of constitutional law" because the efforts to justify the decision have traveled through so many clauses).

223. See note 27 *supra* and accompanying text.

224. *Poe*, 367 U.S. at 521 (Douglas, J., dissenting).

225. See ELY, *supra* note 20, at 12 (criticizing a narrow "clause-bound" approach to interpretation in favor of a holistic approach, which looks to "general themes of the entire constitutional document").

226. For a sophisticated development of the idea of "transcendent structuralism," see HARRIS, *supra* note 131, at 144-58. Harris explains: "Transcendent structuralism looks for structures and coherent wholes outside the Constitution which are signaled by the document." *Id.* at 152. He continues: "This style of interpretation calls for a nondocumentary but still bounded theorizing about the fundamental principles that justify the nature and composition of a set of given political institutions." *Id.* at 152-53. Cf. BLACK, *DECISION*, *supra* note 18, at 53 ("[T]he Ninth Amendment . . . makes possible fully rational discourse in the formation of personal rights law, toward the construction of a coherent system

2. *The scope of deliberative autonomy: limited to significant basic liberties.*

Why do only the foregoing "unenumerated" fundamental rights appear on the list that illustrates deliberative autonomy?²²⁷ Constitutional constructivism's answer, and its criterion for specifying the basic liberties in interpreting the Constitution as a coherent scheme, is in terms of the *significance* of such liberties for deliberative autonomy or deliberative democracy. Rawls explains the criterion of significance: "[A] liberty is more or less significant depending on whether it is more or less essentially involved in, or is a more or less necessary institutional means to protect, the full and informed and effective exercise of the moral powers in one (or both) of the two fundamental cases."²²⁸ Constitutional constructivism limits the scope of autonomy to protecting basic liberties that are significant preconditions for deliberative autonomy in this sense. All of the liberties on the foregoing list satisfy this criterion. Below, I distinguish deliberative autonomy from comprehensive libertarian and liberal principles of autonomy or individuality, which are broader and encompass liberties that are not significant in this sense.²²⁹

This criterion for specifying the basic liberties is not one of significance *simpliciter*, or simply whether an asserted "unenumerated" fundamental right is significant or important in the abstract (or in someone's subjective scheme of values). Rather, the criterion frames the inquiry in terms of whether an asserted liberty is significant for the development and exercise of one (or both) of the two moral powers in one (or both) of the two fundamental cases. This criterion requires reasoned judgment rather than providing a formula or bright-line rule, but it structures the inquiry along constitutionally appropriate lines.²³⁰

Furthermore, applying the criterion of significance does not call for judgments based on subjective interpersonal comparisons of incommensurable values. Within constitutional constructivism, basic liberties are conceived as primary goods (or all-purpose goods) that are in principle significant for all

.... In this transcendent sense, the Ninth Amendment could be the gate to the best kind we can attain of decision according to law.").

227. See note 27 *supra* and accompanying text.

228. RAWLS, *supra* note 7, at 335.

229. See text accompanying notes 244-266 *infra*.

230. The Supreme Court has rejected the "importance" of an asserted right as the criterion for deciding whether the Constitution protects it in the context of the Equal Protection Clause. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973). I have several responses. First, the Court rejected a criterion of significance *simpliciter*. Second, the early Burger Court was at pains to cabin equality, especially where the expenditure of money was involved. For institutional reasons, it is understandable that the Court would shy away from ordering exact equality in education and the restructuring of school financing schemes. But *Rodriguez*, even while it rejected the importance of an asserted right as the criterion for deciding whether "to create substantive constitutional rights in the name of guaranteeing equal protection of the laws," *id.* at 33, did seem practically to assume that education was so significant or important for democracy that there might be a constitutional right to a minimally adequate education. *Id.* at 36-37. Third, constitutional constructivism acknowledges that certain basic liberties that are significant for deliberative autonomy or deliberative democracy nonetheless may be judicially unenforceable or underenforced norms, especially if they implicate institutional limits of courts. See text accompanying note 119 *supra*.

persons, whatever their particular conceptions of the good.²³¹ And so, the question framed by the criterion of significance is not: "What liberties does a particular person need to enable him or her to pursue his or her particular conception of the good?" It is, instead: "What liberties are in principle significant for everyone, regardless of their particular conceptions of the good and irrespective of whether particular persons happen to value those liberties?" In recognizing the significance of the basic liberties on the foregoing list,²³² and of the rights of persons to make fundamental decisions of the sort encompassed by it, we need not embrace any particular view of the ultimate meaning or importance of such decisions within any specific comprehensive conception of the good (though we might well find considerable overlap among a variety of such conceptions).

Admittedly, "unenumerated" liberties such as those on the foregoing list are controversial, but that is not because they are merely subjective, insignificant, or readily disparaged as "liberty as license." To the contrary, they are controversial precisely because they are significant for deliberative autonomy. The criterion of significance is double-edged, for a government may have obligations with respect to certain matters because of their importance for deliberative autonomy, or for the ordered reproduction of society over time, but nonetheless be prohibited from standardizing people with respect to such matters precisely because they are so important.

In contemporary American society, where "rights talk" is pervasive, persons may try to dress up relatively insignificant liberty claims in the garb of "unenumerated" fundamental rights to privacy, autonomy, or liberty.²³³ This fact poses no special difficulty for constitutional constructivism. First, many such claims are frivolous as constitutional claims. And second, many of the claims that could pass that threshold still would not trump the government's compelling, important, or even merely legitimate interests.²³⁴ According to constitutional constructivism, the constitutional protection afforded such liberty claims is merely that of "a general presumption against imposing legal and other restrictions on conduct without sufficient reason,"²³⁵ generally requiring that political decisions be justifiable on the basis of public-regarding reasons and public reasons. Only significant basic liberties, including those on the foregoing list and others of similar significance for one or both of the two fundamental cases, have the much-vaunted priority over the polity's pursuit of

231. See RAWLS, *supra* note 7, at 178-79.

232. See note 27 *supra* and accompanying text.

233. See generally GLENDON, *supra* note 5 (popularizing the term "rights talk"). For a critique of Glendon's analysis of "rights talk" and of the assertion of frivolous rights in contemporary American society, see McClain, *supra* note 185, at 1001-08, 1046-54.

234. See DWORKIN, *supra* note 23, at xi (coining the phrase "rights as trumps").

235. RAWLS, *supra* note 7, at 292.

conceptions of the public good or imposition of perfectionist virtues.²³⁶ Those are the basic liberties to which the call for "taking rights seriously" applies.²³⁷

Rawls issues an important caveat concerning the application of the criterion of significance in specifying basic liberties in a constitutional democracy such as our own: "It is wise, I think, to limit the basic liberties to those that are truly essential in the expectation that the liberties which are not basic are satisfactorily allowed for by the general presumption [referred to above]."²³⁸ He explains: "Whenever we enlarge the list of basic liberties we risk weakening the protection of the most essential ones and recreating within the scheme of liberties the indeterminate and unguided balancing problems we had hoped to avoid by a suitably circumscribed notion of priority."²³⁹ Some champions of the right of autonomy have advocated constitutional protection for liberties that are not essential or significant in this sense. But constitutional constructivism heeds this caveat.

By accepting this caveat, I do not mean to imply that the basic liberties analyzed above and the "unenumerated" fundamental rights on the foregoing list²⁴⁰ make up a complete, closed list of basic liberties that are significant for deliberative autonomy. For the unfinished business of Charles Black will never be completed; the structure or *corpus juris* of fundamental rights significant for deliberative autonomy "will always be building."²⁴¹ But tethering the right of autonomy by limiting it to protecting basic liberties that are significant for deliberative autonomy may render it less vulnerable to the caricatures I began with, to say nothing of making autonomy less frightening to the conservative justices and progressive scholars who are tempted to flee it.²⁴² Limiting deliberative autonomy to significant basic liberties may also provide a partial response to the exaggerated complaints that "rights talk" has led to the

236. See *id.* at 294-99. Constitutional constructivism accords priority to the whole family of equal basic liberties. No single basic liberty by itself is absolute. This understanding of priority entails that such significant basic liberties as freedom of association may in many instances have to be regulated or adjusted in order to secure other basic liberties, or the whole family of such liberties, for all citizens. *Id.* For example, the Supreme Court, in upholding application of a Minnesota statute that prohibited sex discrimination in public accommodations to the Jaycees, correctly decided *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), notwithstanding the male Jaycees' freedom of association claims. It also rightly decided *Brown v. Board of Education*, 347 U.S. 483 (1954), despite the white parents' and students' freedom of association claims. (One of the things that troubled Herbert Wechsler, in his well-known critique of *Brown*, was that it did not adequately take into account whites' claims to freedom of association. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).) In these instances, the importance of free and equal citizenship for women and African-Americans properly prevailed over the freedom of association claims.

237. DWORKIN, *supra* note 23.

238. RAWLS, *supra* note 7, at 296.

239. *Id.*; cf. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 415 (1992) (Blackmun, J., concurring) (arguing that "[i]f all expressive activity must be accorded the same protection, that protection will be scant" and thus that decisions purporting to expand First Amendment protection may actually weaken it).

240. See note 27 *supra* and accompanying text.

241. Black, *Ninth*, *supra* note 18, at 343.

242. See texts accompanying notes 249-254, 327-346 *infra* (discussing conservative justices' flight from autonomy); text accompanying notes 267-282 *infra* (discussing progressive (and feminist) scholars' flight from autonomy).

"impoverishment" of political and constitutional discourse and to the debilitation of the responsible citizenry upon which our institutions depend.²⁴³

3. *What deliberative autonomy is not.*

Now that I have outlined what deliberative autonomy is, I shall briefly distinguish it from certain familiar understandings and caricatures of privacy, autonomy, or liberty. I contend that many criticisms of these ideas are not well taken as against deliberative autonomy.

Deliberative autonomy is not a comprehensive liberal "right to be different." Ely mocks the right to autonomy as "the right to be different," belittling it as being an "upper-middle-class right," or as reflecting the values of the "reasoning class."²⁴⁴ Moreover, because the best-known liberal conception of autonomy or individuality is that of Mill, Ely rolls out the inevitable paraphrase of Justice Holmes' dissenting opinion in *Lochner* protesting against resort to political or economic theory in constitutional interpretation: "If the Constitution does not enact Herbert Spencer's *Social Statics*, does it enact John Stuart Mill's *On Liberty*?"²⁴⁵

Constitutional constructivism does not embrace a comprehensive liberal "right to be different" that extends constitutional protection to everyone's pursuit of individuality or autonomy in a broad sense.²⁴⁶ Indeed, as I discuss below, there are affinities between my structural argument for deliberative autonomy as an "exit" option and Ely's own analysis of the right of "dissenting or 'different'" individuals to relocate.²⁴⁷ I do not consider a right to wear one's hair as long as one pleases (which Ely mocks²⁴⁸) or a right to loaf to be illustrations of deliberative autonomy. With all due respect to Justices Marshall and Douglas, who argued during the early years of the Burger Court that the Constitution does protect such rights,²⁴⁹ I fear that they may have extended the idea of autonomy too far, well beyond constitutional essentials to a romantic ideal of self-fulfillment or the development of one's individuality, tastes, and personality.²⁵⁰ Constitutional constructivism limits the scope of autonomy to protecting significant basic liberties. The "unenumerated" fundamental rights

243. See, e.g., GLENDON, *supra* note 5.

244. See ELY, *supra* note 20, at 59 n.**; 94; Ely, *supra* note 6, at 405.

245. Ely, *supra* note 6, at 401 (quotation omitted); see Fleming, *supra* note 7, at 301-04 (responding to a similar paraphrase of Justice Holmes' *Lochner* dissent with respect to Rawls' *A Theory of Justice* and *Political Liberalism*).

246. Rawls distinguishes political liberalism and the comprehensive liberalism of Mill and Kant. RAWLS, *supra* note 7, at 98-100, 154-58, 199-200. A comprehensive liberalism is itself a comprehensive philosophical conception of the good, from which Rawls distinguishes his own political conception of justice. *Id.* at 154-58.

247. See ELY, *supra* note 20, at 178; text accompanying notes 314-325 *infra*.

248. See Ely, *supra* note 6, at 405; text accompanying note 6 *supra*.

249. *Kelley v. Johnson*, 425 U.S. 238, 249-53 (1976) (Marshall, J., dissenting) (hair); *Doe v. Bolton*, 410 U.S. 179, 213 (1973) (Douglas, J., concurring) (loaf).

250. See SMITH, *supra* note 172, at 234-35 (critiquing the "romantic liberalism" associated with Justices Douglas and Marshall); Smith, *supra* note 172, at 189-90 (noting the broad range of freedoms protected under the "privacy as autonomy" view of Justices Douglas and Marshall).

on the foregoing list,²⁵¹ which I have characterized as significant for deliberative autonomy, do not have an elitist cast.²⁵²

I do not mean to trivialize the significance of hair length or loafing in any particular conception of the good or ideal of self-fulfillment²⁵³ or to deny that there may be good arguments against regulations that encroach on such liberty claims. But advancing such claims as constitutional rights has provided fodder for those who would trivialize the more significant "unenumerated" fundamental rights mentioned above, making it too easy to caricature arguments for such significant rights. Perhaps notions of autonomy or self-fulfillment like those expressed by Justices Marshall and Douglas frightened the conservative Burger and Rehnquist Courts and fueled their flight from aspirational principles to historical practices in the due process inquiry.²⁵⁴

My response to Ely's paraphrase of Holmes' dissent in *Lochner* involves a strategy of confession and avoidance. The confession is to admit that the first wave of Rawlsian constitutional theorists, after the publication of Rawls' *A Theory of Justice*, may have zealously extended arguments for constitutional rights of autonomy too far: beyond essential basic liberties that are significant within a political conception of justice, to something like a comprehensive moral view, such as Millian individuality or autonomy. They may have embraced what Rawls now calls a comprehensive liberalism as distinguished from a political liberalism.²⁵⁵ However attractive such comprehensive moral views may be from a normative standpoint, they cannot fit and justify, but must criticize as mistaken, a great deal of our constitutional law that fails to recognize rights to develop one's individuality or autonomy.

The avoidance is to contend that the second wave of Rawlsian constitutional theorists, after the publication of Rawls' *Political Liberalism*, should tether constitutional rights of autonomy to the structure of basic liberties that are significant for deliberative autonomy within a political conception of justice (or political liberalism). They should not try to secure, as constitutional rights, whatever liberties are entailed by comprehensive moral views of individuality or autonomy. Understandably, the first wave of Rawlsian constitutional theorists did not appreciate the distinction between a political liberalism and a comprehensive liberalism; in fact, Rawls himself did not.²⁵⁶ In working out a constitutional constructivism, I invoke this distinction to avoid or deflect Ely's criticism and paraphrase of Holmes' dissent in *Lochner* by basically agreeing with it. The Constitution no more enacts Mill's comprehensive moral view of individuality or autonomy than it establishes the Catholic Church or a Christian Nation or any other comprehensive conception of the good.

251. See note 27 *supra* and accompanying text.

252. Cf. DWORKIN, *supra* note 165, at 17 (responding to similar charges about ideas of autonomy generally).

253. Especially, for example, if hair length is related to religious or cultural practices. Anti-loafing ordinances might also pose problems if aimed against homeless persons.

254. See, e.g., Smith, *supra* note 172, at 200-01; see also text accompanying notes 327-346 *infra*.

255. See RAWLS, *supra* note 7, at 98-100, 199-200.

256. See *id.* at xvi-xvii.

Deliberative autonomy is not a comprehensive libertarian principle of autonomy. Some libertarians might object that deliberative autonomy is too bounded or does not go far enough in securing autonomy. Indeed, deliberative autonomy is not a comprehensive libertarian principle of autonomy or limited government that deems every exercise of the police power of the state presumptively illegitimate. For it is rooted in constitutional constructivism, which is not a libertarian view but instead a synthesis of liberalism and civic republicanism.²⁵⁷ Constitutional constructivism accords priority not to a libertarian right to liberty as such, but rather to the scheme of basic liberties that is articulated through the two fundamental themes.²⁵⁸

As noted above, the right to personal property is a constitutional essential and indeed a precondition for both deliberative democracy and deliberative autonomy.²⁵⁹ But constitutional constructivism does not justify special judicial protection of economic liberties. Property rights are properly judicially under-enforced, for there is every indication that they can and do fend well enough for themselves in the political process. The regulation of property rights does not present a situation of distrust that would warrant more searching judicial protection.²⁶⁰ Thus, despite the views of economic libertarians like Richard A. Epstein, the opportunity for consenting adults to perform capitalistic acts in private without governmental regulation is not among the stringently judicially enforced preconditions for deliberative autonomy, any more than for deliberative democracy.²⁶¹ Much regulation that would be, as *Lochner* put it, "meddlesome interferences with the rights of the individual"²⁶² in a libertarian private society is legitimate, important, or even compelling in a constitutional democracy.

Nor does deliberative autonomy place off limits certain commonplace, minimal forms of paternalism to which some libertarians might object, such as social insurance, drug laws, and automobile safety requirements.²⁶³ Unlike laws regulating or restricting the "unenumerated" fundamental rights on the foregoing list, such paternalistic laws typically do not implicate the concerns of the antitotalitarian principle of liberty, infringe on significant basic liberties, or run afoul of the limits of public reason. There may well be forceful libertarian autonomy arguments (as well as pragmatic arguments) against some laws of this sort. But no plausible principle of autonomy secured by our Constitution prohibits them, for too much of our practice does not square with such a princi-

257. See text accompanying notes 138-141 *supra*.

258. See RAWLS, *supra* note 7, at 291-92, 294-98.

259. See text accompanying note 113 *supra*.

260. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 855-87 (1995). *Contra* Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 47-59 (1992).

261. See, e.g., RICHARD A. EPSTEIN, *TAKINGS* (1985); Richard A. Epstein, *Modern Republicanism—Or the Flight From Substance*, 97 YALE L.J. 1633, 1645-46 (1988). But see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 163 (1974) (stating that a hypothetical "socialist society would have to forbid capitalist[ic] acts between consenting adults").

262. *Lochner v. New York*, 198 U.S. 45, 61 (1905).

263. See MACEDO, *supra* note 172, at 209 (arguing that liberalism does not rule out certain mild forms of paternalism).

ple. Moreover, the liberty claims infringed by such measures do not satisfy the constructivist criterion of significance for deliberative autonomy.

Indeed, a constitutional democracy dedicated to securing deliberative autonomy might adopt many legislative measures aimed at preventing or discouraging persons from "destroying those basic rational capacities that make them moral beings worthy of respect."²⁶⁴ It certainly would pass many legislative programs designed to promote the development and exercise of those capacities.²⁶⁵ There are limits to what measures legislatures may take, but minimal forms of paternalism such as those mentioned do not transgress those limits. In sum, deliberative autonomy would not unduly constrain deliberative democracy with a comprehensive libertarian right of autonomy.²⁶⁶

Deliberative autonomy is not a "right of men 'to be let alone' to oppress women." Some progressives and feminists have been wary of ideas like privacy, autonomy, or liberty because they believe that privacy may be a veil to mask abuse and oppression. Instead, they emphasize ideas such as deliberative democracy and an anticaste principle of equality in grounding basic liberties. For example, Catharine A. MacKinnon has argued that rights of privacy, autonomy, and liberty may readily prove, for women, to be "an injury got up as a gift"²⁶⁷ or a "right of men 'to be let alone' to oppress women one at a time."²⁶⁸ 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.²⁶⁹ More generally, feminists have drawn attention to the social costs of rights (not only privacy but also rights protected by the First Amendment) to women's equality and liberty, as well as their physical security.²⁷⁰

These important concerns do not, however, warrant neglecting the preconditions for deliberative autonomy or overlooking the vital importance of such

264. *Id.*; see also SMITH, *supra* note 172, at 213 (arguing that liberalism allows prohibition of actions that "endanger[] persons' continuing capacities for rational deliberation").

265. Admittedly, some forms of paternalism (or other laws) may drive some people who feel that "they've had enough" to exercise their "exit" option, pull up stakes, and seek a "last frontier." See, e.g., *They've Had Enough: Off the Grid*, N.Y. TIMES MAG., Jan. 8, 1995, at 24 ("Enter government-hating, home-schooling, Scripture-quoting Idaho, the new leave-me-alone America at its most extreme."). To do precisely that is itself one of such persons' "unenumerated" fundamental rights encompassed by the foregoing list. See note 27 *supra* and accompanying text. For analyses of the "exit" option or the "frontier" in constitutional law, see note 314 *infra* and text accompanying notes 314-325 *infra*.

266. Thus, the idea of deliberative autonomy is not nearly as broad as the general libertarian slogan "don't tread on me." In a free society, we should be grateful to the libertarians, for they serve as a salutary reminder that the exercise of coercive political power always requires a justification and always entails some loss of liberty; but we should not confuse their slogan and beliefs with constitutional essentials such as deliberative autonomy.

267. MACKINNON, *supra* note 4, at 100.

268. *Id.* at 102.

269. See *id.* at 100-02; Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 453-55 (1992); Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 454-61 (1992).

270. See CATHARINE A. MACKINNON, ONLY WORDS 71-110 (1993); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991); West, *supra* note 269, at 454-61.

autonomy to women's, as well as men's, free and equal citizenship.²⁷¹ Constitutional constructivism's theme of deliberative autonomy does not secure a private realm or "hellhole" of sanctified isolation wherein men may oppress women.²⁷² I have two responses to MacKinnon's critique.

First, MacKinnon mistakenly conflates different senses of privacy, confusing "territorial privacy" with "sovereignty over personal decisions" (or deliberative autonomy).²⁷³ Consequently, she mistakenly views the right of privacy that justifies *Roe* as also shielding a realm of male-perpetrated domestic violence and oppression. As against that right, she supports an antisubordination principle of sex equality that would protect and secure equal citizenship for women.²⁷⁴ MacKinnon persuasively illustrates the problematic history of treating a private realm of family life as beyond state intervention. But she does not persuasively link constitutional protection of the right of privacy to such wrongs. As some feminist defenders of privacy have pointed out, courts have not invoked the constitutional right of privacy or autonomy, or cited cases such as *Griswold*, *Eisenstadt*, or *Roe*, to defend marital rape exemptions or to shield domestic violence from state intervention.²⁷⁵ To the contrary, courts have invoked the right of privacy or autonomy, and cited such cases, to justify invalidating marital rape exemptions and to protect against domestic violence.²⁷⁶ The idea of deliberative autonomy has affinities with the latter notions of privacy or autonomy, which emphasize women's dignity, decisional autonomy, and bodily integrity. Deliberative autonomy is an antitotalitarian principle of liberty that works in tandem with, rather than as a shield against, an anti-subordination or anticaste principle of equality.

Second, MacKinnon erroneously conflates the right of privacy with the idea of the Constitution as a charter of negative liberties.²⁷⁷ On her view, the right of privacy recognized in *Roe* directly led to decisions denying rights to affirmative liberties, such as a right to abortion funding in *Harris v. McRae*²⁷⁸ and ultimately a right to protection against domestic violence in *DeShaney v. Winnebago County*.²⁷⁹ It is quite telling against MacKinnon's critique that the

271. For works defending privacy from feminist viewpoints, see ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988); McClain, *supra* note 188, at 1176; Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195 (1995) [hereinafter McClain, *Inviolability*]; Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 124-50 (1992); Schneider, *supra* note 270, at 975.

272. See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991).

273. See DWORKIN, *supra* note 36, at 53-54.

274. MacKinnon, *supra* note 4, at 100-02.

275. See, e.g., McClain, *Inviolability*, *supra* note 271, at 207-20. McClain observes that neither MacKinnon nor Robin West offers any examples of courts using these privacy precedents to justify marital rape exemptions, and states that she has found no such examples. *Id.* at 217.

276. See *id.* at 216-20.

277. By "negative liberties," I mean rights that limit what government may do to persons, as distinguished from "affirmative liberties," or rights that impose obligations on government to provide certain services to persons. The distinction, though, is problematic. See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

278. 448 U.S. 297 (1980); see MacKinnon, *supra* note 4, at 96-102.

279. 489 U.S. 189 (1989).

greatest champions of the right of privacy on the Supreme Court, Justices Blackmun, Brennan, and Marshall, have been the greatest critics of the idea of the Constitution as a charter of negative liberties. For example, all of them wrote or joined in powerful dissents in *Harris* and *DeShaney*.²⁸⁰ Furthermore, the greatest critics of the right of privacy, Chief Justice Rehnquist and Justice Scalia, have been the greatest champions of the idea of the negative Constitution.²⁸¹ In any event, MacKinnon's critique does not apply here because the idea of deliberative autonomy does not entail the idea of the negative Constitution.

Progressives and feminists correctly argue that the Constitution, interpreted as a charter of negative liberties, does not secure the affirmative liberties needed fully to guarantee free and equal citizenship for women and men. But that deficiency is one of a negative Constitution, not a shortcoming of deliberative autonomy. Within Rawls' political constructivism, the protection of basic liberties includes protecting individuals not only from the government but also from each other, including within families.²⁸² Both women and men are due the status of free and equal citizenship. Progressives and feminists should not and need not flee deliberative autonomy for deliberative democracy, or liberty for equality, but should pursue basic liberties that are grounded in both.

C. Further Structural Justifications for Securing Deliberative Autonomy

1. *Deliberative autonomy constitutes a realm of personal sovereignty: remembering the Ninth and Tenth Amendments.*

As stated above, autonomy in some usages connotes the idea of sovereignty—the power or right of self-government—whether that of a people or that of a person.²⁸³ Thus, we find references both to popular sovereignty and to

280. See *Harris*, 448 U.S. at 329 (Brennan, J., dissenting, joined by Justices Marshall and Blackmun); *id.* at 337 (Marshall, J., dissenting); *id.* at 348 (Blackmun, J., dissenting); *DeShaney*, 489 U.S. at 203 (Brennan, J., dissenting, joined by Justices Marshall and Blackmun); *id.* at 212 (Blackmun, J., dissenting).

281. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2855 (1992) (Rehnquist, C.J., dissenting in part); *id.* at 2873 (Scalia, J., dissenting in part); *DeShaney*, 489 U.S. at 191 (Rehnquist, C.J. and Scalia, J., joining majority); *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989) (Scalia, J., writing for the plurality, with which Rehnquist, C.J., joined); *Roe v. Wade*, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

282. See RAWLS, *supra* note 7, at 221 n.8; accord Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1567 (1988) (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"). John Stuart Mill, another important liberal thinker, criticized misplaced protection of liberty permitting the "almost despotic power of husbands over wives" and argued that "wives should have the same rights, and should receive the protection of the law in the same manner, as all other persons." JOHN STUART MILL, *ON LIBERTY* 97 (David Spitz ed., 1975) (1859); see also SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 89-109 (1989); Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 99 ETHICS 229 (1989) (both setting forth a feminist argument that Rawls' liberal conceptions provide a basis for a critique of gender inequality). This is not to suggest that our Constitution in general requires protection from private power, but rather to observe that Rawls' political liberalism does.

283. See note 168 *supra* and accompanying text; see also PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 154-209 (1992) (analyzing the "locus of will" in constitutional theory in both individual autonomy and community).

personal sovereignty.²⁸⁴ For scholars of constitutional law and jurisprudence, the idea that more than one sovereign could occupy a given territory may be at once puzzling and familiar. It may be puzzling because on some views, especially those of legal positivists, sovereignty by definition is unitary, not dual: The sovereign is "a legally untrammelled will" or "a legally illimitable supreme lawgiver."²⁸⁵ Nonetheless, the idea that sovereignty is dual is familiar through the notion that the structure of our system of federalism is one of "dual sovereignty": that of the national government and state governments sharing sovereignty. I shall advance a different model of tripartite sovereignty: that of governments (national and state) and persons sharing sovereignty.²⁸⁶ Within this structure, the basic liberties associated with deliberative autonomy constitute a realm of personal sovereignty.

Throughout this section, I speak of "sovereignty" in the general sense of allocation of decision making power under our existing Constitution, not the strict sense of "constituent power" to establish or revise a regime. Strictly speaking, national governments and state governments do not have sovereignty, much less share it. They merely have and share the "ordinary power" of officers of government under an existing regime.²⁸⁷ In speaking of personal sovereignty, I simply mean that persons retain or reserve the right or power to make certain decisions under our Constitution. I intend here to bracket, and not take a position on, deeper issues in political philosophy and constitutional theory concerning the character and locus of sovereignty in the sense of constituent power.²⁸⁸

Analogies between these conceptions of dual and tripartite sovereignty may be fruitful from the standpoint of carrying forward the unfinished business of Charles Black by making structural arguments for securing deliberative autonomy. Interpreting the idea of dual sovereignty in the context of federalism involves structural inferences, and the derivation of "unenumerated" limits on national power, from a political theory of federalism. The aim is to preserve a realm of sovereignty reserved to state governments: the power to make decisions regarding essential attributes of statehood.²⁸⁹ By analogy, construing the idea of tripartite sovereignty suggested here requires structural reasoning, and

284. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458 (1994) (popular sovereignty); DWORKIN, *supra* note 36, at 53 (personal sovereignty).

285. H.L.A. HART, *THE CONCEPT OF LAW* 51, 149 (2d ed. 1994) (analyzing early British legal positivists).

286. Cf. Abner S. Greene, *Uncommon Ground*, 62 GEO. WASH. L. REV. 646, 672 (1994) (reviewing RAWLS, *supra* note 7, and DWORKIN, *supra* note 36) [hereinafter Greene, *Uncommon*] (describing sovereignty in a liberal democracy as "permeable" rather than unitary because there are non-governmental sources of authority and norms); Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. (forthcoming 1996) [hereinafter Greene, *Mistakes*] (same).

287. See RAWLS, *supra* note 7, at 231 (discussing "constituent power," which is expressed in the higher law of the Constitution, and "ordinary power," which is expressed in ordinary legislation).

288. For a learned and thorough discussion of these matters with respect to our Constitution, see WAYNE D. MOORE, *CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE* (forthcoming 1996).

289. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833, 844-45, 851-52 (1976) (holding that Congress may not impose federal minimum wage and maximum hour requirements on state and municipal employers), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

the derivation of "unenumerated" limits on (or "unenumerated" rights against) national and state governmental power, from a political theory of constitutional democracy. The aim is to preserve a realm of sovereignty reserved to or retained by persons: the right or power to make decisions concerning central attributes of personhood.²⁹⁰

Remarkably, some of the justices who rail most bitterly against deriving "unenumerated" rights in order to secure personal autonomy (or sovereignty) are the ones who engage most actively in inferring "unenumerated" limits on national power in order to preserve state autonomy (or sovereignty).²⁹¹ That is, the justices who are most skeptical about deriving central attributes of personhood are the ones who are least skeptical about inferring essential attributes of statehood (and perhaps vice versa).²⁹²

It may be instructive to recall that the Tenth Amendment has served as a textual basis for the idea of dual sovereignty in the context of federalism, and that the Ninth Amendment has provided a textual underpinning for the idea that the Constitution protects "unenumerated" fundamental rights that are central to personhood.²⁹³ Laurence Tribe has observed that "both the ninth and the tenth amendments may be regarded as meta-constitutional rules for interpreting the document as a whole," adding that "[t]he ninth amendment is a uniquely central text in any attempt to take seriously the process of *construing* the Constitution."²⁹⁴ I contend that the Ninth Amendment, in conjunction with the Tenth, is a rule of construction that calls for us to construe the Constitution as a whole

See generally BLACK, *supra* note 16, at 8-32 (engaging in structural reasoning with respect to federalism and commerce power).

290. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805 (1992) ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."); TRIBE, *supra* note 10, at 1302-1435 (analyzing rights of privacy and personhood).

291. Compare Rehnquist's majority opinions in *National League of Cities*, 426 U.S. at 833 and *United States v. Lopez*, 115 S. Ct. 1624 (1995), with his dissent in *Roe v. Wade*, 410 U.S. 113, 171 (1973). See Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 97-105 (1987) (contrasting Rehnquist's approaches to "unenumerated" limits on powers and to "unenumerated" rights). Note also the contrast between Scalia's grand structural inferences concerning separation of powers in the service of a political theory of the "unitary executive" and his hostility to the idea of deriving "unenumerated" individual rights. Compare Scalia's dissent in *Morrison v. Olson*, 487 U.S. 654, 697 (1988), with his dissent in *Casey*, 112 S. Ct. at 2873. See Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 318-19 (1992) (criticizing the asymmetry in Scalia's approaches); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. (forthcoming 1996) (same).

292. The most vigorous defenders of personal autonomy may also take asymmetric approaches to powers and rights. Compare Blackmun's majority opinion in *Garcia*, 469 U.S. at 537-47 (expressing skepticism about inferring traditional governmental functions of state governments and essential attributes of state sovereignty), with his majority opinion in *Roe*, 410 U.S. at 152-53 (recognizing a woman's right to decide whether to terminate a pregnancy as "implicit in the concept of ordered liberty").

293. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. 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.

294. Tribe, *supra* note 291, at 100; see also LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 54-55, 110-11 (1991) (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).

as manifesting a tripartite structural allocation of sovereignty or decision making power within which persons retain or reserve the rights or powers to make certain fundamental decisions: a realm of personal sovereignty or deliberative autonomy.²⁹⁵

Charles Black and John Hart Ely have moved and seconded that the neglected Ninth Amendment "at long last be adopted."²⁹⁶ Ely argues 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."²⁹⁷ Likewise, Black contends that the Ninth Amendment provides, on the face of the Constitution, an "existence proof" that there are enforceable constitutional rights other than those specifically named in the constitutional document. He also has called for and offered "constructive proofs" of what those rights are, arguing that we should read and use the Ninth Amendment to justify the construction of a coherent system of fundamental rights.²⁹⁸ Constitutional constructivism conceives the Ninth Amendment as a rule of construction for the Constitution as a whole. Its guiding framework provides "constructive proofs" for constitutional rights that are significant for deliberative autonomy and deliberative democracy.

Some proponents of narrow theories of originalism have been horrified by the "recent discovery"²⁹⁹ of the long "forgotten"³⁰⁰ Ninth Amendment. For the natural interpretation of the Ninth Amendment expressed by Ely and Black is an embarrassment to their theories, which presuppose that the only constitutional rights are those specifically enumerated in the Constitution. Also, some proponents of monist theories of majoritarian representative democracy have sought to contain the Ninth Amendment. After all, the existence of "unenumerated" fundamental rights that limit majoritarian representative democracy would suggest the inadequacy of their theories. Such concerns have led to three accounts that read the Ninth and Tenth Amendments together to deny and disparage the idea that the Ninth Amendment contemplates constitutional protection of "unenumerated" fundamental rights central to personhood.

The first account is the *rights/powers* conception or *residual rights* reading, which is the traditional federalism account: The Ninth Amendment overlaps with the Tenth, and the people retain rights to what is left over from grants of

295. The Ninth Amendment is a rule of construction for the Constitution as a whole. It 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, and the underlying constitutional order. Because the Constitution as a whole includes manifestations of substantive liberties associated with deliberative autonomy, as well as procedural liberties related to deliberative democracy, a constructivist conception of the Ninth Amendment calls for deriving both types of liberties.

296. BLACK, DECISION, *supra* note 18, at 43-44 (referring to ELY, *supra* note 20, at 34-41).

297. ELY, *supra* note 20, at 38. Ely nonetheless attempts to limit the Ninth Amendment to justify his recognition of only "unenumerated" process-oriented rights. See *id.* at 87-101.

298. BLACK, DECISION, *supra* note 18, at 44, 53; Black, *Unfinished Business*, *supra* note 17, at 36-37.

299. *Griswold v. Connecticut*, 381 U.S. 479, 518 (1965) (Black, J., dissenting).

300. *Id.* (referring to BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955)).

power to the federal and state governments. Proponents of this view do not see rights as constraints or limits on granted powers, but instead define them residually from grants of power.³⁰¹

Adopting this conception in his dissenting opinion in *Griswold*, Justice Black wrote that the Ninth Amendment was adopted not to protect "unenumerated" rights but, "as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication."³⁰² The common rejoinder is that every student of history knows that the *Tenth* Amendment, not the *Ninth*, was adopted for that purpose. The Tenth Amendment refers to *undellegated powers* reserved to the states (or to the people), and thus addresses the fear of which Justice Black spoke, whereas the Ninth concerns *unenumerated rights* retained by the people. Hence, the common rejoinder to the traditional federalism account is that it renders the Ninth Amendment *redundant* with the Tenth and therefore gives the Ninth no effect whatever.³⁰³

The second reading is the *state law rights* thesis, another federalism account, which has been advanced by Russell L. Caplan and embraced by Robert Bork: The people retain certain rights protected by state constitutions, statutes, and common law, notwithstanding the enumeration of certain federal constitutional rights in the Constitution.³⁰⁴ This thesis, if it had any real force in protecting state law rights, would seem to collide with the Supremacy Clause of Article VI.³⁰⁵ In fact, it does not, because the rights supposedly protected by state law against federal denial or disparagement under this thesis are not enforceable against and in no way limit the federal government.

Rather, Caplan and Bork argue that the Ninth Amendment "simply provides that the individual rights contained in state law are to continue in force under the Constitution until modified or eliminated by state enactment, by federal

301. See, e.g., Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, in 1 *THE RIGHTS RETAINED BY THE PEOPLE*, *supra* note 18, at 1, 3-19 (distinguishing between the "rights/powers" conception and the "power constraint" conception of rights, and criticizing the former); Raoul Berger, *The Ninth Amendment*, 66 *CORNELL L. REV.* 1 (1980), *reprinted in* 1 *THE RIGHTS RETAINED BY THE PEOPLE*, *supra* note 18, at 191 (advancing the rights/powers conception); Thomas McAfee, *The Original Meaning of the Ninth Amendment*, 90 *COLUM. L. REV.* 1215 (1990) (defending the "residual rights" reading).

302. 381 U.S. at 520.

303. See, e.g., ELY, *supra* note 20, at 34-36; Barnett, *supra* note 301, at 6-10. *But see* McAfee, *supra* note 301, at 1305-07 (arguing that the "residual rights" reading does not render the Ninth Amendment redundant with the Tenth).

304. BORK, *supra* note 3, at 184-85 (citing Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 *VA. L. REV.* 223 (1983), *reprinted in* 1 *THE RIGHTS RETAINED BY THE PEOPLE*, *supra* note 18, at 243). Bork also has tried to read the Ninth Amendment (along with the Privileges or Immunities Clause of the Fourteenth Amendment) out of the Constitution with his famous "ink blot" thesis. See *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) (analogizing the Ninth Amendment to a text whose meaning cannot be known because it is covered by an "ink blot"); BORK, *supra* note 3, at 166 (likening the Privileges or Immunities Clause to a provision that has been "obliterated past deciphering by an ink blot").

305. The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI.

preemption, or by a judicial determination of unconstitutionality."³⁰⁶ Thus, Caplan and Bork render the Ninth Amendment *pointless* on its own terms: They say that the Ninth Amendment was born of the fear that the federal government might deny or disparage state law rights, yet they also say that the Ninth Amendment in no way prohibits the federal government from doing precisely that.³⁰⁷

And so, these first two accounts read the Ninth and Tenth Amendments together to absorb the Ninth into a conception of federalism that obliterates the idea of "unenumerated" federal constitutional rights. The third reading, illustrated by Akhil Amar, interprets the Ninth Amendment, in conjunction with the Tenth, to incorporate the Ninth into a conception of popular sovereignty that practically eviscerates the idea of "unenumerated" fundamental rights central to personhood that would constitute a realm of personal sovereignty.³⁰⁸ Amar argues that when the Ninth Amendment speaks of the rights retained by "the people," and the Tenth refers to the powers reserved to the states or to "the people," they use the words "the people" in the sense of "We the People" in the Preamble. He believes, moreover, that "We the People" refers to popular sovereignty. Hence, he concludes, "the people" in all three instances refers to popular sovereignty.³⁰⁹ And so, far from signaling the existence of "unenumerated" constitutional rights that limit majoritarian representative democracy, the Ninth and Tenth Amendments together contemplate majoritarian popular sovereignty practically unconstrained by such rights. As for Amar's reading of "the people," we should observe that elsewhere in the Bill of Rights provisions for rights of "the people," such as the Fourth Amendment, refer to rights of persons instead of to popular sovereignty.³¹⁰

306. Caplan, *supra* note 304, at 228; see BORK, *supra* note 3, at 184-85 (citing Caplan).

307. Ely aptly put it when he described such a thesis as "silly": "We thus run up against an inference that seems so silly it would not have needed rebutting. What felt need could there have been to rebut the inference that the Bill of Rights, controlling only federal action, had somehow preempted the efforts of the people of various states to control the actions of state governments?" ELY, *supra* note 20, at 37.

308. See Amar, *supra* note 284, at 492-93; see also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1199-1201 (1991) (referring to the Ninth and Tenth Amendments as the "popular sovereignty amendments"). Amar's reading also partly incorporates the Tenth Amendment and popular sovereignty with federalism. See *id.* at 1200-01.

309. Amar, *supra* note 284, at 492-93; see also Amar, *supra* note 308, at 1200 (referring to the "obviously collective meaning of 'the people'" in the Tenth and Ninth Amendments).

310. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. While arguing that the Fourth Amendment principally protects a collective right, Amar does acknowledge that the "collective reading" is qualified by the appearance of persons in the amendment. Amar, *supra* note 308, at 1177; see also Akhil Reed Amar, *Some Comments on "The Bill of Rights as a Constitution"*, 15 HARV. J.L. & PUB. POL'Y, 99, 110 (1992) ("I do not think in the Fourth Amendment that 'the people' is as strong a phrase as elsewhere, precisely because in this Amendment, but not elsewhere, the phrase is twice modified by the word 'persons,' which is much more individualistic."). For a critique of the argument that the Fourth Amendment primarily protects a collective right, see Kate Stith, *The Role of Government Under the Bill of Rights*, 15 HARV. J.L. & PUB. POL'Y 129, 131-32 (1992).

My strategy is to turn these three accounts on their heads by interpreting the Ninth and Tenth Amendments together as contemplating a realm of personal sovereignty. Charles Black argues that we should read and use the Ninth Amendment to justify constructing a structure of fundamental rights integral to free and equal citizenship.³¹¹ Ely concedes that the Tenth Amendment "advert[s] to a tripartite division of decision 'power' — national, local, *and individual*."³¹² Putting these two ideas together, I argue that the two amendments justify interpreting the Constitution as a whole to manifest such a tripartite structural allocation of decision making power. Therefore, they contemplate that certain rights and powers are retained by or reserved to individuals, in a realm of personal sovereignty.³¹³

Of course, it remains to delineate which powers in this tripartite scheme fall within the domains of national and state sovereignty, and which rights or powers come within personal sovereignty. My general contention is that the core of the realm of personal sovereignty in our constitutional order is deliberative autonomy over certain fundamental decisions that are central to personhood. In sum, the Ninth and Tenth Amendments together support a structural justification for securing deliberative autonomy.

2. *Deliberative autonomy constitutes an "exit" option: the vanishing frontier and the growing right of autonomy.*

Another structural argument for securing deliberative autonomy is rooted in the idea that the basic liberties associated with it constitute an "exit" option from majoritarian oppression. This argument invokes the tradition of dissident or different individuals and groups having the right to pull up stakes and move

To take another (controversial) example, the Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. For readings of the Second Amendment and the Ninth Amendment to support an individual right to bear arms, see Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

311. BLACK, *DECISION*, *supra* note 18, at 53; Black, *Ninth*, *supra* note 18, at 347; Black, *Unfinished Business*, *supra* note 17, at 44.

312. Ely, *supra* note 6, at 402-03 (discussing the Ninth and Tenth Amendments and the Privileges or Immunities Clause of the Fourteenth Amendment, but nonetheless rejecting "the right to be different"). See *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("Th[e] right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); see also Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 10-13, 32 (1973) (advancing a "role-allocation model" and "personal question doctrine" to justify reservation of rights to persons to decide certain questions). But see TRIBE, *supra* note 10, at 1349-50 (partial retraction).

313. I do not intend here to endorse generally the rights/powers conception. Generally, I find the power constraint conception more compelling. My claim is simply that if the rights/powers conception has any force in justifying reading the Ninth Amendment to involve powers, then it also has some force in justifying interpreting the Tenth Amendment to involve rights.

to the frontier to escape prejudice, intolerance, and oppression, and to pursue their own conceptions of the good.³¹⁴

Ely is at pains to maintain, as against arguments for the right to autonomy, that the Constitution does not protect "the right to be different."³¹⁵ But he does derive a right of "dissenting or 'different'" individuals and groups to relocate through an analysis of the general contours of the Constitution.³¹⁶ Ely points out that in *Crandall v. Nevada*, the Supreme Court justified the "unenumerated" right to travel on the ground that "the right to travel freely through the various states is critical to the exercise of our more obviously political rights."³¹⁷ This structural justification links the right to travel with "the idea that it is some kind of handmaiden of majoritarian democracy," or the "voice" option.³¹⁸ Ely constructs an alternative structural justification, which associates such a right with "the notion that one should have an option of escaping an incompatible majority," or the "exit" option.³¹⁹ Referring to the tradition of the frontier, he submits that "a dissenting member for whom the 'voice' option seems unavailing should have the option of exiting and relocating in a community whose values he or she finds more compatible."³²⁰ Thus, Ely claims, the right manifests a structural concern for protecting "process rights, minority style."³²¹

Following Ely's analysis, we should interpret provisions and themes of the Constitution that relate to the right to relocate, and to the plight of dissenting or different individuals and groups, in light of a line of growth or development.³²² Thus, we should ponder whether, to the extent that the frontier has diminished, the right to autonomy has grown and developed. At the present time, the literal frontier has largely vanished, and we have a plurality of divergent conceptions of the good in our morally diverse society that individuals and groups might reasonably entertain and pursue. In such circumstances, an increasingly important analogue to the "exit" option and the tradition of the frontier is the protection of basic liberties that are preconditions for deliberative autonomy.³²³ These basic liberties constitute a partial "exit" option from majoritarian oppres-

314. For discussions of the idea of the "frontier" or an "exit" option in constitutional law, see ELY, *supra* note 20, at 178-79; H.N. HIRSCH, A THEORY OF LIBERTY: THE CONSTITUTION AND MINORITIES 243 (1992); Greene, *Uncommon*, *supra* note 287, at 672; Greene, *Mistakes*, *supra* note 287; see also THE FRONTIER IN AMERICAN CULTURE: ESSAYS BY RICHARD WHITE AND PATRICIA NELSON LIMERICK (James R. Grossman ed., 1994).

315. See Ely, *supra* note 6, at 405 (discussed at text accompanying notes 244-256 *supra*).

316. See ELY, *supra* note 20, at 178.

317. See *id.* (discussing *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868)).

318. *Id.* at 179 (referring to the notion of the "voice" option in ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970)).

319. *Id.* (referring to the notion of the "exit" option in HIRSCHMAN, *supra* note 318).

320. *Id.*

321. *Id.* at 172, 179.

322. See *id.* at 99, 123.

323. In elaborating the idea of a political conception of justice, Rawls assumes a "closed society" that members enter only by birth and exit only by death. RAWLS, *supra* note 7, at 12. In that sense, he assumes for the sake of simplicity that there is no "exit" option. Bruce Ackerman has criticized Rawls for making this simplifying assumption. Bruce Ackerman, *Political Liberalisms*, 91 J. PHIL. 364, 379-81 (1994).

sion because they set aside a figurative "frontier" in which persons, individually and in association with others, may deliberate about and decide how to lead their own lives.³²⁴ Indeed, historical studies have shown that the development of the right of privacy has closely tracked the receding line of the frontier.³²⁵

This structural argument by analogy to the tradition of the frontier does not itself settle the question of what basic liberties we should protect to secure an "exit" option. It might appear that the liberties would be as wild and unruly as the frontier itself. But the argument is self-limiting in the sense that it supports protecting only basic liberties that are significant for deliberative autonomy. After all, it was typically the denial of such significant liberties, not trivial ones, that prompted individuals and groups to pull up stakes and "exit" to the frontier. In our constitutional democracy, our imperfect souls are our own to craft, at least with respect to certain fundamental decisions profoundly affecting our destiny, identity, or way of life.

IV. RECONCEIVING THE DUE PROCESS INQUIRY: BETWEEN SCALIA AND CHARYBDIS

In this Part, I turn from the theoretical underpinnings of deliberative autonomy to the doctrinal heading of substantive due process, which has served as the primary textual basis for recognizing or rejecting "unenumerated" fundamental rights such as those on the foregoing list.³²⁶ First, I argue for reconceiving the due process inquiry in terms of constitutional constructivism's criterion of the significance of an asserted "unenumerated" fundamental right for deliberative autonomy. Second, I attempt to bring a sense of order and discipline to judgments about the significance of certain rights for deliberative autonomy through exploring homologies between the structure of deliberative autonomy and that of deliberative democracy.

A. *The Rational Continuum of Ordered Liberty: Reconceiving the Due Process Inquiry in Terms of Significance for Deliberative Autonomy*

1. *Due process from Palko to Bowers: the flight from aspirational principles to historical practices.*

Between *Palko*, *Griswold*, and *Roe*, on the one hand, and *Bowers*, on the other, an important change occurred in the Supreme Court's conception of the

324. For the idea of religious exemptions from general laws as a "partial" exit option, see Greene, *Uncommon*, *supra* note 286, at 672; Greene, *Mistakes*, *supra* note 286.

325. See Robert F. Copple, *Privacy and the Frontier Thesis: An American Intersection of Self and Society*, 34 AM. J. JURIS. 87 (1989).

326. See note 27 *supra* and accompanying text. There are numerous other manifestations of substantive values on the face of the Constitution. Deliberative autonomy better fits and justifies those substantive values than do process-perfecting theories such as Ely's and Sunstein's. See Fleming, *supra* note 7, at 233-35, 256-60; see also text accompanying notes 76-84 *supra*. For an account of the Bill of Rights as a "structural whole" that is a poem about human freedom and dignity, not merely a process-oriented scheme, see Burt Neuborne, *Reading the Bill of Rights as a Poem* (Jan. 26, 1995) (unpublished manuscript on file with the *Stanford Law Review*). But see Amar, *supra* note 308 (offering a holistic process-oriented reading).

due process inquiry. The Court moved from considering whether an asserted "unenumerated" fundamental right is "of the very essence of a scheme of ordered liberty,"³²⁷ or is required by a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"³²⁸ to considering only whether it historically has been protected against governmental interference.³²⁹ To fix ideas: The former cases call for an inquiry into traditions conceived as *aspirational principles*, while the latter case makes an inquiry into traditions understood as *historical practices*, narrowly conceived.³³⁰ That is, between *Palko* and *Bowers*, the Court took a flight from aspirational principles to historical practices in its understanding of what constitutes a tradition and therefore of the baseline for what due process requires.³³¹ Between these two conceptions of the due process inquiry lie two other famous formulations of it: Justice Powell's formulation for the plurality in *Moore*, "deeply rooted in this Nation's history and tradition,"³³² and Justice Harlan's formulation in his dissent in *Poe*, a "rational continuum" of liberty that views tradition as a "living thing."³³³

Palko, *Griswold*, and *Roe* conceived due process as encompassing the basic liberties implicit in a scheme of ordered liberty embodied in our Constitution—or the fundamental principles of justice to which we as a people aspire and for which we as a people stand ("aspirational principles")—whether or not we actually have realized them in our historical practices, common law, and statute books (collectively, "historical practices").³³⁴ On this view, our aspirational principles may be critical of our historical practices, and our basic liberties and

327. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); see *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (eschewing substantive due process officially but still protecting an "unenumerated" right to privacy because several "specific" constitutional guarantees "have penumbras, formed by emanations from those guarantees that help give them life and substance," that "create zones of privacy"); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (applying Cardozo's formulation in *Palko* in protecting an "unenumerated" right of a woman to decide whether to terminate a pregnancy).

328. *Palko*, 302 U.S. at 325 (citations omitted).

329. See *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986).

330. I do not claim 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 has fulfilled the promise of the *Palko* formulation. Rather, I claim that the Court has altered its conception of the due process inquiry.

331. I put to one side the question of whether the Privileges or Immunities Clause of the Fourteenth Amendment (or, for that matter, the First Amendment) provides a firmer ground for protecting substantive liberties than the Due Process Clause. See, e.g., 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); Karst, *supra* note 204 (arguing for a right of "intimate association" on the basis of not only the Due Process Clause but also the Equal Protection Clause and the First Amendment); text accompanying notes 198-226 *supra*.

332. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion). I have discussed Justice Powell's formulation elsewhere. See Fleming, *supra* note 7, at 268-70.

333. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (dissenting opinion). I discuss Justice Harlan's formulation below. See text accompanying notes 346-364 *infra*.

334. See SOTIROS A. BARBER, ON WHAT THE CONSTITUTION MEANS 84-85 (1984) (drawing a similar distinction between history and tradition); *id.* at 33-37, 54-62 (making a similar analysis of constitutional aspirations); see also Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261, 1312-20 (1991) (dis-

traditions are not merely the Burkean deposit of historical practices. Cases such as *Griswold* and *Roe*, as well as *Bolling v. Sharpe* and *Loving*, broke from historical practices in pursuit of due process and traditions in the sense of aspirational principles.³³⁵

In *Bolling*, Chief Justice Warren wrote, "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."³³⁶ Warren's argument necessarily presupposes a conception of traditions as aspirational principles, 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. Similarly, Warren's statement in *Loving*, that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,"³³⁷ necessarily reflects a conception of aspirational principles, given our shameful historical practice of enacting statutes forbidding interracial marriage.

In *Bowers*, by contrast, the Court per Justice White narrowly conceived the due process inquiry as a backward-looking question concerning historical practices, stripped of virtually any aspirational force or critical bite with respect to the status quo. White simply recounted our nation's historical practices disapproving homosexual sodomy and rudely dismissed the claim that the Due Process Clause protects a fundamental right of homosexuals to engage in acts of consensual sodomy as, "at best, facetious."³³⁸ In fact, even his view of history was narrow and selective. As Justice Stevens stressed in dissent, White flagrantly ignored that the common law and statutes historically condemned all sodomy, both homosexual and heterosexual.³³⁹

Justice Scalia's plurality opinion in *Michael H. v. Gerald D.* represents an attempt to narrow the *Bowers* due process inquiry even further, to limit substantive due process to include only those rights that actually have been protected through historical practices, common law, and statutes.³⁴⁰ Scalia pitches

tinguishing between tradition as historical practice and tradition as abstract norms in analyzing tradition in Justice Brennan's constitutional jurisprudence).

335. See note 327 *supra* (discussing *Griswold* and *Roe*). To be sure, *Bolling* and *Loving* involved equal protection as well as due process, but that supports my thesis that the two clauses overlap and are intertwined. See note 61 *supra*.

336. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (companion case to *Brown*).

337. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

338. *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986). In dissent, Justice Blackmun criticized Justice White's formulation of the right at issue, arguing that the case instead was about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." *Id.* at 199 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). For a critique of *Bowers*' 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 151, at 1496, 1514.

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

340. 491 U.S. 110, 123-27 & 127 n.6 (1989) (plurality opinion); see also *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."). Scalia's approach is a novel statist methodology that is more radical than has been generally recognized. See Benjamin C. Zipursky, *The Pedigrees of Rights and Powers in Scalia's Cruzan Concurrence*, 56 U. PITT. L. REV. 283, 287, 299-

the issue in apocalyptic terms of destruction and salvation. If the Court uses the Due Process Clause to try to protect the citizenry from "irrationality and oppression," he warns, "it will destroy itself."³⁴¹ For the ghost of *Lochner* lurks.³⁴² By contrast, he 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."³⁴³

To avoid the destruction that he fears would follow in the wake of engaging in reasoned judgment concerning aspirational principles—veering into the whirlpool of liberty as unbounded license—Scalia steers into the rock of liberty as "hidebound" historical practices and narrowly conceived original understanding. As Justice Brennan aptly put it in his dissent in *Michael H.*: "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."³⁴⁴ Brennan had taken our Constitution to be one of aspirational principles.

In *Casey*, the joint opinion rejected Scalia's *Michael H.* jurisprudence, resisting the "temptation" to take such a flight from substantive liberties to original understanding, narrowly conceived, or from aspirational principles to historical practices.³⁴⁵ It instead accepted Justice Harlan's approach to due process in dissent in *Poe* and concurrence in *Griswold*.³⁴⁶

2. *Reconceiving Justice Harlan's rational continuum of ordered liberty in terms of deliberative autonomy.*

Justice Harlan conceived the liberty guaranteed by the Due Process Clause as a "rational continuum" of ordered liberty, not merely as a "series of isolated points pricked out" in the constitutional document. Furthermore, he understood judgment in this area as a "rational process" that views tradition as a "living thing"—"[w]hat history teaches are the traditions from which [this country] developed as well as the traditions from which it broke" — not as a mechanical process of formulas or bright-line rules.³⁴⁷ The joint opinion in *Casey* conceived the due process inquiry as requiring "reasoned judgment" in interpreting

304, 310 (1994) (arguing that Scalia applies a "power pedigree principle": "whether the state's asserted power is an instance of some state power that is historically and traditionally protected").

341. *Cruzan*, 497 U.S. at 300-01.

342. See Fleming, *supra* note 7, at 211-14 (analyzing the "ghost" or "specter" of *Lochner* that is haunting constitutional theory).

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

344. *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).

345. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804-06 (1992). For discussion of the debate in *Casey* between the joint opinion and Justice Scalia concerning the opposing "temptations" to abdicate responsibility and to seize power, see Fleming, *supra* note 7, at 214 n.14.

346. 112 S. Ct. at 2805-06. 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); 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).

347. *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

the Constitution, understood as a "covenant" or "coherent succession" whose "written terms embody ideas and aspirations that must survive more ages than one" and guarantee "the promise of liberty."³⁴⁸ It stated: "We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents."³⁴⁹

Constitutional constructivism provides a guiding framework within which to fulfill the responsibility not to retreat from interpreting the full meaning of our covenant of aspirational principles. Only through such a holistic reading of the Constitution can we guarantee the promise of liberty rather than merely enforcing historical practices that may have failed to live up to that promise. In particular, we should reconceive Harlan's and the *Casey* joint opinion's approach to due process along the lines of a constructivist criterion of significance for deliberative autonomy or deliberative democracy. Here, I focus on deliberative autonomy.³⁵⁰

Justice Harlan's dissent in *Poe* represents a classic formulation of the due process inquiry. Nowadays, liberal and conservative fundamental rights theorists alike, from Laurence Tribe to Charles Fried, celebrate it,³⁵¹ perhaps because it offers a safe harbor from the narrow originalism of Scalia or Bork. Put another way, Harlan's approach epitomizes a *preservative conservatism* as distinguished from the *counterrevolutionary conservatism* of Scalia and Bork.³⁵² Indeed, consider this dramatic testimony concerning how far constitutional law and theory have traveled since Harlan died in 1971: He, the most conservative member of the Warren Court, has become the last best hope of liberal theorists such as Tribe during the era of the Rehnquist Court, as well as the target of an acerbic attack in *Casey* by Justice Scalia,³⁵³ the most conservative member of the Rehnquist Court.

With all due respect, Justice Harlan's formulation of the due process inquiry suffers from two fundamental shortcomings. Consider his conceptions of

348. *Casey*, 112 S. Ct. at 2806, 2833.

349. *Id.* at 2833; see also *id.* at 2804-06 (resisting the "temptation" to abdicate the responsibility to engage in "reasoned judgment" in the due process inquiry).

350. Typically, the Court does not use the Due Process Clause to derive "unenumerated" rights that are preconditions for deliberative democracy; instead, it uses the First Amendment and Equal Protection Clause or, implicitly, the Republican Form of Government Clause. See ELY, *supra* note 20, at 122-23.

351. See CHARLES FRIED, *ORDER AND LAW* 72 (1991); TRIBE & DORF, *supra* note 294, 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.

352. Preservative conservatives mostly attempt to preserve precedents and principles—rather than immediately overruling decisions that they, as an original matter, might have decided differently—perhaps conservatively developing those precedents and principles in subsequent cases rather than liberally expanding them. Counterrevolutionary conservatives seek to purge constitutional law of precedents and principles manifesting liberal error at the earliest available opportunity or—if they do not have the votes to do so—to reinterpret decisions so as to extirpate any generative force from them. See Anders, *supra* note 346, at 924-26 (contrasting the preservative conservatism of O'Connor with the counterrevolutionary conservatism of Scalia); Zipursky, *supra* note 340, at 291-304, 310, 318-21 (contrasting the conservative jurisprudence of Justices Harlan and O'Connor with the statist jurisprudence of Scalia).

353. For Scalia's attack on "reasoned judgment," see *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2875-76, 2884 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

what the Constitution is and how it ought to be interpreted.³⁵⁴ Harlan rightly conceived the Constitution as a "constitution of principle" (for him, basically common law principles) as opposed to a "constitution of detail."³⁵⁵ And he rightly understood interpretation of the Constitution as a rational process of reasoned judgment as opposed to a mechanical process of bright-line rules. But his "common law constitution," to be explained below, is not fully a constructivist "constitution of principle."³⁵⁶

First, as for *what* the Constitution is, Harlan believed that a rational continuum of ordered liberty embodied in the Constitution provided the baseline for deciding what our "living" traditions are. But Harlan conceived ordered liberty by reference to what liberties have been protected through the historical deposit of common law principles (the "common law constitution"). Thus, he insufficiently appreciated that our Constitution reflects a scheme of ordered liberty that provides an alternative baseline of aspirational principles, which may fit and justify most of our historical practices, common law, and statutes but will criticize some of them. The basic reason for this shortcoming is that Harlan's understanding of what constitutes a tradition is too traditionalist and not sufficiently aspirational or critical. The case of Harlan is evidence that tradition is too important to be left to the traditionalists.

Second, as for *how* to interpret the Constitution, Harlan believed that judgment in the due process inquiry is a rational process concerning tradition as a "living thing." But he did not adequately frame the questions of what are our traditions and what are the traditions from which we have broken as distinguished from those which have survived. The basic guideline that he offered is the promise of the ineffable sound judgment or reason of a "first-rate common lawyer."³⁵⁷ Alexander M. Bickel hardly did any better in formulating such questions, asking: "Which values . . . qualify as sufficiently important or fundamental or whathaveyou . . . ?"³⁵⁸ Hence, Harlan and Bickel were relatively easy prey for Ely's well-known critique of tradition, consensus, and reason as sources of substantive fundamental values in constitutional interpretation.³⁵⁹

Constitutional constructivism would reconceive the due process inquiry to redress these two shortcomings. First, it would reconstruct Harlan's idea of the rational continuum of ordered liberty embodied in the common law constitution

354. For an analysis of constitutional interpretation on the basis of the fundamental interrogatives *what* and *how*, along with the interrogative *who* may authoritatively interpret the Constitution, see MURPHY, FLEMING & BARBER, *supra* note 142, at 16-19.

355. DWORKIN, *supra* note 36, at 119-22, 126-29; see *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

356. For a characterization and critique of Harlan's conception of the Constitution as a "common law constitution," see Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. Sch. L. Rev. 5 (1991).

357. Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 101 (1959) ("first-rate lawyers"); see *Poe*, 367 U.S. at 542 ("The best that can be said is that through the course of this Court's decisions [due process] has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.").

358. BICKEL, *supra* note 149, at 55.

359. See ELY, *supra* note 20, at 43-72.

with the idea of a constructivist constitution of principle underwritten by a substantive political theory that best fits and justifies the constitutional document and underlying constitutional order as a whole. That substantive political theory articulates a scheme of ordered liberty to which our Constitution aspires, through the two fundamental themes of deliberative autonomy and deliberative democracy. Thus, the constructivist constitution of principle reflects a scheme of ordered liberty that provides a baseline of aspirational principles, centering on those two themes, which may fit and justify most of our historical practices, common law, and statutes but will criticize some of them for failing to live up to our constitutional commitments.³⁶⁰ If equal protection embodies a forward-looking anticaste principle, criticizing historical practices that flout our aspirations to equality, due process should secure a forward-looking antitotalitarian principle, criticizing historical practices that deny the promise of liberty, instead of merely safeguarding backward-looking historical practices.³⁶¹

Second, constitutional constructivism would reconstruct Harlan's idea of judgment as a rational process concerning tradition as a "living thing" with a criterion of the significance of an asserted "unenumerated" fundamental right for deliberative autonomy. Such a criterion better frames the due process inquiry—concerning what our "living" traditions are and what are the historical practices from which we have broken or are breaking—by focusing it on the question of what are the significant preconditions for deliberative autonomy in our scheme of ordered liberty. Harlan's more formal and traditionalist formulation basically looked to common law principles for the sake of carrying them on without offering a substantive account of what our basic liberties are or what they are for. Also, the criterion of significance for deliberative autonomy better fits and justifies the "unenumerated" fundamental rights on the foregoing list than does Harlan's formulation.³⁶² For example, it is more plausible to argue that we should protect the right to decide whether to terminate a pregnancy, the right to homosexual intimate association, and the right to die in order to secure deliberative autonomy than to contend that we should do so to safeguard long-standing yet evolving common law principles.

The joint opinion in *Casey* embraced Harlan's formulation of the due process inquiry in attempting to account for what the Court has done in this

360. Cf. SUNSTEIN, *supra* note 21, at 353 (referring to the "right baseline" provided by a suitably constructed normative political theory). It is important to remember that constitutional constructivism is not a theory of natural law or natural rights. See text accompanying notes 86-91 *supra*. Instead, it draws our aspirational principles from our constitutional democracy's ongoing practice, tradition, and culture. These principles may not be fully realized in (and certainly are not exhausted by) our historical practices.

361. See Fleming, *supra* note 7, at 263-64, 267-68, 273-75 (criticizing Sunstein's argument that the Equal Protection Clause is forward-looking and critical of existing practices, and that the Due Process Clause is largely backward-looking and supportive of long-standing practices).

362. See note 27 *supra* and accompanying text. Constitutional constructivism may be a grander theory than Harlan's approach (or Bickel's), but it would be less vulnerable to democratic and skeptical objections (such as those advanced by Ely) to theories of protecting substantive fundamental rights. See text accompanying note 359 *supra*. I have addressed such matters in James E. Fleming, *Constitutional Constructivism* (1988) (unpublished Ph.D. dissertation, Princeton University) (on file with the *Stanford Law Review*).

area.³⁶³ But we should distinguish Harlan's formulation both from how he himself would have applied it and from how the joint opinion in *Casey* in fact used it. For it is unlikely that he himself would have applied his method to reach many of the due process decisions that the Court handed down between *Griswold* and *Casey*.³⁶⁴ Yet the joint opinion used his formulation to make sense of those decisions. Indeed, the joint opinion's account of decisions protecting substantive liberties such as decisional autonomy and bodily integrity has more in common with the justification that constitutional constructivism provides for them than with the view that Harlan's method would offer. Put another way, the practice of applying a method like Harlan's, over time, has led to lines of cases that are themselves better fit and justified, retrospectively, on the basis of a criterion of significance for deliberative autonomy. In sum, constitutional constructivism's criterion for framing the due process inquiry is superior, retrospectively and prospectively, to Harlan's more formal and traditionalist methodology.

3. *Between Scalia and Charybdis.*

Constitutional constructivism's guiding framework, with its criterion of significance for deliberative autonomy, would chart a middle course between Scalia—the rock of liberty as hidebound historical practices—and Charybdis—the whirlpool of liberty as unbounded license—in the due process inquiry.³⁶⁵ Haunted by the ghost of *Lochner*, Scalia writes ominously about the dangers that judicial protection of basic liberties through the Due Process Clause, which he finds dangerously unbounded, poses for destruction.³⁶⁶ But we need to recall that veering into either the rock or the whirlpool brings destruction. Tethering the due process inquiry to the structure of deliberative autonomy might help stem the Court's flight from aspirational principles to historical practices in this area.

363. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805-06 (1992).

364. As stated in the text, we should distinguish between Harlan's due process methodology and his own application of it. For example, both Fried and Tribe and Dorf claim to apply Harlan-like methodologies to conclude that *Bowers v. Hardwick*, 478 U.S. 186 (1986), was wrongly decided, despite the fact that Harlan, in his dissent in *Poe v. Ullman*, 367 U.S. 497, 546 (1961), specifically contemplated that states had the power to outlaw homosexual conduct (and, for that matter, the use of contraceptives). See FRIED, *supra* note 351, at 81-85; TRIBE & DORF, *supra* note 294, at 76-79, 116-17. White's opinion for the Court in *Bowers* 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. 478 U.S. at 193-94. That legal transformation from 1961 to 1986 suggests a tradition from which we are breaking, to paraphrase Harlan's dissent in *Poe*, 367 U.S. at 542 (Harlan, J., dissenting). Harlan wrote in 1961, before the tradition that by his account is a "living thing" began to evolve.

Thus, Tribe and Dorf have sought to save Harlan's formulation from how he himself would have applied it. While I applaud their effort and accept its soundness and prudence, I would supplement it by putting forward the criterion of significance for deliberative autonomy. That criterion, though not hostile toward Harlan's formulation, suggests a more focused inquiry and one that is more critical of our historical practices on the basis of our aspirational principles.

365. I assume (or concede) that Harlan and the joint opinion in *Casey* also chart a middle course. But I contend that constitutional constructivism's guiding framework charts a superior middle course.

366. See notes 341-343 *supra* and accompanying text.

Constitutional constructivism does not advocate writing on a blank slate concerning significance for deliberative autonomy. It calls for working within our ongoing constitutional democracy, which has a long-standing practice and tradition of protecting "unenumerated" fundamental rights that are essential to our "scheme of ordered liberty"³⁶⁷ or to the "orderly pursuit of happiness."³⁶⁸ In the first instance, my project here is retrospective, contending that a criterion such as significance for deliberative autonomy accounts for why the categories of personal decisions encompassed by the foregoing list of "unenumerated" fundamental rights are indeed fundamental and should be on the list.³⁶⁹ That established, my proposal is prospective, arguing for using such a criterion in further specifying the basic liberties presupposed by our constitutional document and underlying constitutional order. Needless to say, offering a criterion of significance will not resolve all questions of the scope and content of the basic liberties associated with deliberative autonomy, or concerning the governmental interests that may justify regulating such liberties in particular circumstances. It will, however, help frame and guide our reflections and judgments concerning those questions, which can be resolved only as they arise.

And so, applying the constructivist guiding framework in giving content to our rational continuum of ordered liberty, we should interpret the Constitution to secure the basic liberties that are significant preconditions for deliberative autonomy (to say nothing of deliberative democracy). By interpreting the Constitution in this manner, to recall the joint opinion in *Casey*, we would not abdicate the responsibility to give full meaning to our constitution of principle, a covenant of aspirations and ideals guaranteeing the promise of liberty.³⁷⁰

B. *Exploring Homologies Regarding Significance for Deliberative Democracy and Deliberative Autonomy*

1. *Homologies between the structures of First Amendment and substantive due process jurisprudences.*

Many constitutional theorists and judges assume that democracy and the First Amendment are relatively grounded and settled compared to autonomy and substantive due process, which they regard as free-for-alls that are anathema to constitutional law. They may fear that engaging in "reasoned judgment" concerning which "unenumerated" fundamental rights are significant for deliberative autonomy is, as Scalia put it in dissent in *Casey*, indistinguishable from "Lochnering" or imposing one's own "philosophical predilection[s] and moral intuition[s]" in the guise of interpreting the Constitution.³⁷¹ Using constitutional constructivism's guiding framework with two fundamental themes,

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

368. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

369. See note 27 *supra* and accompanying text. The criterion of significance also can account for why certain other asserted rights are not on the list. See texts accompanying notes 246-254, 257-266 *supra*.

370. See text accompanying notes 348-349 *supra*.

371. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2883, 2884 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

however, I attempt to domesticate supposedly wild and unruly judgments about significance for deliberative autonomy to constitutional law through exploring homologies between the structure of First Amendment jurisprudence and that of substantive due process jurisprudence.³⁷² I contend that First Amendment jurisprudence's refusal to protect certain categories of expression and protection of other expression is a mirror image of substantive due process jurisprudence's protection of certain categories of decision and refusal to protect other decisions. I also suggest that these jurisprudences are illuminatingly seen as efforts to cabin comprehensive principles of autonomy by constructing frameworks requiring judgments concerning significance for deliberative democracy and deliberative autonomy, respectively. For autonomy theories in these areas of constitutional law push toward protecting all expression and all decisions.

Using the guiding framework to bring out such homologies between the First Amendment and substantive due process, or between deliberative democracy and deliberative autonomy, will not itself decide any concrete cases. But it will suggest coherence and structure in the substantive due process inquiry, an area where many have persisted in seeing only periodic interventions by free-wheeling philosopher-judges. Moreover, using the framework will illuminate the structural role of deliberative autonomy in our constitutional democracy in relation to that of deliberative democracy.

First fundamental case: the insignificance of categories of unprotected expression for deliberative democracy. Our First Amendment jurisprudence has distinguished two levels of expression—high value and low value speech—on the basis of judgments about its significance for securing a scheme of deliberative democracy.³⁷³ Rather than making case-by-case judgments about the significance or value of particular expression, however, the Supreme Court has recognized certain categories of *unprotected expression*, in advance, as relatively *insignificant*.³⁷⁴ These categories have included fighting words, obscen-

372. By "homology," I simply mean symmetry in the structures of these two bodies of constitutional law. See note 131 *supra*. For a somewhat analogous attempt to apply doctrinal structures of the First Amendment to the Takings Clause, see Epstein, *supra* note 260, at 47-59.

I do not adopt the view that the First Amendment is solely concerned with process to the exclusion of substance, or with deliberative democracy to the exclusion of deliberative autonomy. Freedom of thought and expression are important for deliberative autonomy as well as for deliberative democracy. I simply am making observations about the structure of First Amendment jurisprudence in relation to that of substantive due process jurisprudence.

373. See, e.g., *TRIBE*, *supra* note 10, at 832-944 (discussing "two-level" theory of freedom of speech based on the Court's assessment of its relative value); see also Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 Sup. Cr. Rev. 1, 10. More than anyone else on the Court today, Justice Stevens appreciates the centrality of judgments of significance in First Amendment jurisprudence. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 421 (1992) (Stevens, J., concurring) ("Speech about public officials or matters of public concern receives greater protection than speech about other topics. It can, therefore, scarcely be said that the regulation of expressive activity cannot be predicated on its content: Much of our First Amendment jurisprudence is premised on the assumption that content makes a difference.").

374. See, e.g., *ELY*, *supra* note 20, at 105-16; CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 8-11, 121-29 (1993).

ity, libel, and incitement to imminent lawless action.³⁷⁵ All of them are relatively insignificant for securing a scheme of deliberative democracy (or for the development and exercise of the first moral power in the first fundamental case³⁷⁶).

Under such a two-level framework, the Court applies most exacting scrutiny to laws that restrict or regulate expression that is *outside* these categories of unprotected or insignificant expression: This is the domain of the "absolute" First Amendment.³⁷⁷ Within the unprotected categories, the Court generally applies less stringent scrutiny to laws that restrict or regulate expression.³⁷⁸ Moreover, Ely and Sunstein, leading theorists advocating reinforcing representative democracy or securing deliberative democracy, have advanced such two-tier frameworks, arguing that they serve the central function of the First Amendment: maintaining democracy.³⁷⁹ Thus, a criterion like significance for deliberative democracy has informed First Amendment jurisprudence.

Second fundamental case: the significance of categories of protected decisions for deliberative autonomy. Likewise, our substantive due process jurisprudence has distinguished two levels of decisions on the basis of judgments about their significance for securing a scheme of deliberative autonomy: unusually important decisions, which are significant for that purpose, and less important decisions, which are relatively insignificant or of no significance for it. Rather than making case-by-case judgments about the significance or value of particular decisions, however, the Court has recognized certain categories of *protected decisions*, in advance, as relatively *significant*. These categories have included most of the decisions encompassed by the foregoing list of "unenumerated" fundamental rights.³⁸⁰ All of them are unusually important or significant for securing a scheme of deliberative autonomy (or for the development and exercise of the second moral power in the second fundamental case).

Applying such a two-level framework, the Court applies more exacting scrutiny to laws that restrict or regulate decisions that come *within* (most of) these categories of protected or significant decisions: This is the realm of personal sovereignty to make certain fundamental decisions, reserved to or re-

375. See *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement to imminent lawless action); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (libel); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (group libel); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words). Admittedly, these categories have eroded over time, partly due to the pressure of autonomy and neutrality theories. See SUNSTEIN, *supra* note 374, at 137-44, 167-208 (defending a two-tier conception of the First Amendment and criticizing autonomy-based conceptions and some neutrality conceptions); TRIBE, *supra* note 10, at 832-944.

376. See RAWLS, *supra* note 7, at 336; text accompanying notes 106-109 *supra*.

377. See, e.g., ELY, *supra* note 20, at 109-11.

378. But see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (extending prohibition on content discrimination and more stringent scrutiny to apply within traditionally unprotected category of fighting words). Content-neutral time, place, and manner regulations, erosion of the categories of unprotected expression, and the development of an intermediate level of protection for commercial speech add complications to this scheme. See TRIBE, *supra* note 10, at 789-94, 890-904.

379. See ELY, *supra* note 20, at 105-16; SUNSTEIN, *supra* note 21, at 232-56; SUNSTEIN, *supra* note 374, at 121-29.

380. See note 27 *supra* and accompanying text.

tained by persons, that the government may not enter.³⁸¹ Outside these protected categories, the Court generally applies relatively lenient scrutiny to laws that restrict or regulate liberty and conduct.³⁸² Thus, a criterion like significance for deliberative autonomy has informed substantive due process jurisprudence.

2. *The language and design of deliberative democracy and deliberative autonomy.*

Some narrow originalists might object to my sketch of First Amendment and substantive due process jurisprudences as mirror images of each other. They might argue that the former secures "enumerated" rights, whereas the latter protects "unenumerated" rights.

Constitutional constructivism has two main responses. First, as argued above, the basic liberties that underwrite deliberative autonomy, liberty of conscience and freedom of association, like freedom of expression, have firm First Amendment roots.³⁸³ Second, none of the categories of unprotected expression is "enumerated" in the language of the First Amendment; the judgments that these types of expression are relatively insignificant for deliberative democracy are instead rooted in inferences of substantive political theory from the underlying structure or design of deliberative democracy.³⁸⁴ Likewise, none of the categories of protected decisions is "enumerated" in the language of the Due Process Clauses; but the judgments that these types of decisions are significant for deliberative autonomy are rooted in inferences of substantive political theory from the underlying structure or design of deliberative autonomy.³⁸⁵

Overblown distinctions between "enumerated" and "unenumerated" rights aside, are there any relevant differences between the First Amendment and sub-

381. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805 (1992); *id.* at 2846 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

382. I put to one side the complications introduced by the Court's development of intermediate levels of scrutiny, undue burden tests, and the like.

383. See text accompanying notes 198-215 *supra*.

384. Nor are these judgments readily made by studying historical facts in the narrow, neutral way that Scalia and Bork contemplate. See *Casey*, 112 S. Ct. at 2884 (Scalia, J., concurring in the judgment in part and dissenting in part); BORK, *supra* note 3, at 139-60, 176-78, 213-14. They can be made only through elaborating a substantive political theory of the Constitution.

385. Remarkably, the theorists who have the most difficulty with the idea of making judgments about the significance of certain types of decisions in the substantive due process area are not uncommonly the ones who have the least difficulty with the idea of making judgments about the significance of certain types of expression in the First Amendment area. Ely and Bork come to mind as leading examples. Bork would limit the language of the "enumerated" First Amendment to protecting political speech on the basis of inferences from the structure of a republican form of government, from which he would also derive the "unenumerated" right to vote, notwithstanding his attacks (a mere 10 pages later) on the right to privacy for being "unenumerated." See BORK, *supra* note 3, at 85-87, 95-100; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 19-35 (1971). But see BORK, *supra* note 3, at 333 (stating that he "later abandoned" the position that the Constitution protects only political speech, not because it "was not true, but because it results in an unworkable rule"). Similarly, Ely would construe the language of the First Amendment principally to protect political expression because it is "critical to the functioning of an open and effective democratic process," despite his critique of theories of protecting "unenumerated" substantive fundamental rights on the ground that they require judgments concerning what rights are fundamental or important. See ELY, *supra* note 20, at 43-72, 87-88, 93-94, 105.

stantive due process with respect to judgments regarding significance? Some narrow originalists would summon the specter of *Lochner* in an attempt to frighten us away from substantive due process, as Justice White did in *Bowers*, arguing that asserted liberties associated with deliberative autonomy have "little or no cognizable roots in the language or design of the Constitution."³⁸⁶ They would claim that the specter of *Lochner* haunts substantive due process but not the First Amendment.³⁸⁷ That putative difference, however, is deeply problematic. For those, such as Scalia, who most vociferously decry "Lochnering" in substantive due process jurisprudence are often the ones who most vigorously engage in "Lochnering" in First Amendment jurisprudence.³⁸⁸ Obviously, complex issues lurk here concerning what was wrong with *Lochner*: that the judiciary gave heightened protection to "unenumerated" fundamental rights as such (White's and Scalia's view), or that the judiciary treated the status quo of existing distributions of wealth and political power as a prepolitical state of nature, or neutral baseline, and therefore held that interfering with it was an impermissibly partisan objective (Sunstein's and my view). I have pursued these matters elsewhere, arguing that securing deliberative autonomy does not involve "Lochnering."³⁸⁹

Thus, First Amendment jurisprudence and substantive due process jurisprudence do not differ in any way that undercuts my homology. Both are derived from "enumerated" rights along with underlying structures. Constitutional interpretation in both areas involves structural reasoning, not just textual exegesis or historical research concerning isolated clauses. Carrying forward the unfinished business of Charles Black, we would become more literate concerning the language and design of the Constitution by comprehending that the basic liberties associated with both deliberative democracy and deliberative autonomy have structural roles to play in our constitutional scheme.³⁹⁰

Furthermore, this analysis illustrates that carving out categories of unprotected expression, like recognizing categories of protected decisions, requires

386. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

387. *But see* SUNSTEIN, *supra* note 21, at 84-85, 223-24 (arguing that the legacy of *Lochner* includes First Amendment decisions such as *Buckley v. Valeo*, 424 U.S. 1 (1976)); *accord* RAWLS, *supra* note 7, at 362; Fleming, *supra* note 7, at 241, 246-48; *see also* Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1387 (1984) ("The first amendment has replaced the due process clause as the primary guarantor of the privileged."). In *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), the Court struck down certain campaign finance restrictions 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." According to Sunstein, *Buckley* is part of the legacy of *Lochner* because it evinces status quo neutrality in the sense that the Court treats the status quo of existing distributions of wealth and political power as a neutral, prepolitical state of nature and therefore holds that interfering with it was an impermissible, partisan objective. SUNSTEIN, *supra* note 21, at 84-85, 223-24.

388. *See* Fleming, *supra* note 7, at 241, 246-49. Scalia embraced *Buckley* in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 683 (1990) (Scalia, J., dissenting).

389. *See* Fleming, *supra* note 7, at 246-49, 302 (contrasting Ely's and Sunstein's understandings of what was wrong with *Lochner*).

390. Black and Dworkin have argued persuasively that the First Amendment is not as different from other constitutional provisions (such as the Due Process and Equal Protection Clauses) with respect to the largely "spurious" or "bogus" distinction between "enumerated" and "unenumerated" rights as narrow originalists are at pains to maintain. *See* note 209 *supra*.

judgments of significance grounded in substantive political theory. It simply is not the case that the former judgments are unproblematically neutral or "process-oriented" while the latter judgments are problematically normative or "ends-driven." The structure of deliberative democracy and the First Amendment is hardly more determinate, neutral, or uncontroversial than the structure of deliberative autonomy and substantive due process. We make judgments of significance for deliberative democracy all the time in the context of the First Amendment. We should not be overanxious about making judgments of significance for deliberative autonomy in the context of substantive due process.

3. *The homologous frameworks for cabining autonomy in First Amendment and substantive due process jurisprudences.*

The constructivist guiding framework suggests another homology between the two fundamental themes of deliberative democracy and deliberative autonomy: The jurisprudences of both the First Amendment and substantive due process, by requiring judgments regarding significance, provide frameworks for cabining comprehensive principles of autonomy that otherwise press toward protecting all expression and all decisions. Indeed, the two main areas of constitutional law where autonomy theories abound are the First Amendment and substantive due process.³⁹¹

Autonomy as a comprehensive principle, brought to bear on First Amendment jurisprudence, tends to erode if not obliterate all of the categories of unprotected insignificant expression and thus to protect virtually all expression. It abhors empowering the government, including courts, to make judgments about the significance of expression for deliberative democracy. All that it would leave of First Amendment jurisprudence would be generally "absolute" freedom of expression, grounded on something like a comprehensive Millian principle of the autonomy or individuality of citizens. Autonomous individuals could hear all expression, no matter how insignificant the government might think it was for deliberative democracy, and decide for themselves the signifi-

391. See, e.g., Fallon, *supra* note 168, at 875-76.

cance of that expression³⁹² (subject, perhaps, to a Millian harm principle or the like).³⁹³

Likewise, autonomy as a comprehensive principle, brought to bear on substantive due process jurisprudence, tends to expand the categories of protected significant decisions and thus to protect virtually all decisions that persons might make in exercising their capacity for a conception of the good. It dreads allowing the government, including courts, to make judgments about the significance of decisions for deliberative autonomy. Substantive due process would become something like a comprehensive Millian principle of the autonomy or individuality of citizens. Autonomous individuals, making decisions according to their own consciences, would become virtually a law unto themselves (subject again, perhaps, to a Millian harm principle or the like).³⁹⁴

Constitutional constructivism embraces neither comprehensive Millian principle of autonomy or individuality — either in First Amendment jurisprudence or in substantive due process jurisprudence. Its guiding framework with two fundamental themes cabins comprehensive principles of autonomy with a criterion of significance for deliberative democracy and deliberative autonomy and prevents such principles of autonomy from unduly constraining deliberative democracy.

Thus, the constructivist guiding framework provides a lens through which we can see that judgments about significance regarding categories of decisions for deliberative autonomy are neither anomalous in constitutional law nor especially unruly, but are like judgments about significance regarding categories of expression for deliberative democracy. Put another way, it shows that the Constitution is Janus-faced: The first theme provides an entrance, opening up deliberative democracy with regard to significant expression, while the second

392. Indeed, we sometimes hear calls for a comprehensive autonomy approach to the First Amendment: to cease allowing regulation of some or all categories of currently unprotected expression, such as fighting words, obscenity, incitement to imminent lawless action, libel, or group libel. See, e.g., Eric M. Freedman, *A Lot More Comes Into Focus When You Remove the Lens Cap: Why the Supreme Court Should Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. (forthcoming 1996).

In referring to "a comprehensive Millian principle of the autonomy or individuality of citizens," I mean to evoke but not to offer an interpretation of T.M. Scanlon's well-known autonomy theory and "Millian principle" of freedom of expression. There are differences between these two sorts of Millian principle. Scanlon generalized Meiklejohn's famous theory of the absolute First Amendment beyond political speech to virtually all speech. See Thomas M. Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972). He subsequently has reconstructed his theory, allowing greater room for continuing to recognize categories of unprotected expression. See T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979); see also T.M. Scanlon, Jr., *Content Regulation Reconsidered*, in DEMOCRACY AND THE MASS MEDIA 331 (Judith Lichtenberg ed., 1990). For other leading autonomy theories of the First Amendment, see, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); RICHARDS, *TOLERATION*, *supra* note 173; David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

393. By "Millian harm principle," I refer to Mill's idea that the only justification for government's interfering with a person's liberty is to prevent harm to others, not harm to self. In other words, government may regulate only "other-regarding," not merely "self-regarding" action. See MILL, *supra* note 282, at 10-11.

394. See, e.g., FEINBERG, *supra* note 166, at 56 (arguing that autonomy implies a right of personal sovereignty that embraces "all those decisions that are 'self-regarding,' that is, which primarily and directly affect only the interests of the decision-maker").

theme offers an exit, an escape from deliberative democracy with respect to significant decisions.³⁹⁵

V. CONCLUSION

In this article, I have sought to secure deliberative autonomy as a bedrock structure of our constitutional document and underlying constitutional order. Through advancing a constitutional constructivism, I have argued that both deliberative democracy and deliberative autonomy have structural roles to play in our scheme of deliberative self-governance, and that both are integral to our dualist constitutional democracy. By tethering the right of autonomy in such a constructivism, I have shown that it is not as unruly, dangerous, and rootless as some of its critics have charged. Furthermore, by limiting the right of autonomy to protection of basic liberties that are significant preconditions for deliberative autonomy, I have charted a middle course between Scalia and Charybdis in the due process inquiry. Constitutional constructivism seeks, in the spirit of Justice Brandeis' famous formulation, to "secure conditions favorable to the pursuit of happiness"³⁹⁶ by securing the preconditions for deliberative autonomy. I have not tried to resolve dispositively all questions of the scope and content of the basic liberties associated with deliberative autonomy, but to outline a structure to help frame and guide our reflections and judgments concerning such questions along constitutionally appropriate lines.

In calling for the construction of a coherent scheme of fundamental rights essential to the pursuit of happiness, Charles Black observed: "[Justice] Holmes once remarked of the first Justice Harlan that the latter's mind resembled a powerful vise, the jaws of which could not be brought closer than two inches apart."³⁹⁷ Black's rejoinder to Holmes was: "[I]n constitutional-law work, jewelers' vises are well enough for tasks of detail, but the lack tremblingly to be feared is the lack of a vise whose jaws can be got *more* than two inches apart, because if you lack such a vise you cannot handle the big beams."³⁹⁸ Constitutional constructivism, with its guiding framework of two fundamental themes, provides a vise for handling the big beams. It enables us to interpret our Constitution as a constitution of principle that aspires to secure for everyone the common and guaranteed status of free and equal citizenship.

395. Cf. Fleming, *supra* note 7, at 274-75 (discussing the Janus-faced Fourteenth Amendment in criticizing Sunstein's analysis of the relationship between due process and equal protection).

396. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Again, I make no claim to be interpreting Brandeis' own conception of "the right to be let alone." See note 10 *supra*.

397. Black, *Livelihood*, *supra* note 18, at 1117.

398. *Id.*

