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# THE INCREDIBLE SHRINKING CONSTITUTIONAL THEORY: FROM THE PARTIAL CONSTITUTION TO THE MINIMAL CONSTITUTION

James E. Fleming\*

## INTRODUCTION: MINIMALISM VERSUS PERFECTIONISM IN CONSTITUTIONAL THEORY

Cass Sunstein and I have written fundamentally different books. My *Securing Constitutional Democracy: The Case of Autonomy*<sup>1</sup> puts forward a liberal Constitution-perfecting theory, one that aspires to interpret the American Constitution so as to make it the best it can be. Sunstein's *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America*<sup>2</sup> advances a minimalist critique of radical conservative constitutional theories of "fundamentalism" that call for restoring the "Constitution in exile."

What are the justifications for pairing these two books in this series of symposia? First, most obviously, I devote one and one-half chapters of my book to criticizing Sunstein's constitutional theories as presented in his earlier works. In Chapter 2, I critique his book, *The Partial Constitution*,<sup>3</sup> using it as a foil to justify moving beyond John Hart Ely's process-perfecting theory of reinforcing representative democracy<sup>4</sup> to my own Rawlsian Constitution-perfecting theory of securing constitutional

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\* Leonard F. Manning Distinguished Professor of Law, Fordham University School of Law. I prepared this essay for the Symposium on *Minimalism Versus Perfectionism in Constitutional Theory*, based on my book, *Securing Constitutional Democracy: The Case of Autonomy*, and Cass R. Sunstein's book, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America*, held at Fordham University School of Law, December 8, 2006. I am grateful to Abner Greene and Ben Zipursky for organizing the Symposium, to Cass Sunstein for writing such a thoughtful essay on my book, and to not only Abner Greene and Ben Zipursky but also Charles Kelbley, Jae Lee, and Bill Treanor for writing insightful essays on both of our books. I also am indebted to Sotirios Barber, Samuel Freemann, Mark Graber, Linda McClain, and Larry Solum, along with my research assistants Lauren Cowan and Stacey Daniel, for helpful comments.

1. James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* (2006) [hereinafter Fleming, *Securing*].

2. Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* (2005) [hereinafter Sunstein, *Radicals*].

3. Cass R. Sunstein, *The Partial Constitution* (1993) [hereinafter Sunstein, *Partial*].

4. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) [hereinafter Ely, *Democracy and Distrust*].

democracy. Ironically, the very perfectionism of Sunstein's book made it useful for this purpose: I interpreted it as a process-perfecting theory of securing deliberative democracy that was superior, in certain respects, to Ely's theory.<sup>5</sup> In Chapter 7, I critique Sunstein's *Legal Reasoning and Political Conflict*<sup>6</sup> and his *One Case at a Time*<sup>7</sup> in considering what form constitutional interpretation and judicial review should take in circumstances of moral disagreement and political conflict about basic liberties such as the right to privacy or autonomy. I use his "minimalism," together with Michael Sandel's civic republicanism in *Democracy's Discontent*,<sup>8</sup> as diametrically opposed republican foils: they unwittingly show the superiority of a liberal republican theory like mine in circumstances of reasonable moral pluralism.<sup>9</sup>

Second, also obviously, Sunstein develops a minimalist critique not only of conservative "fundamentalism," but also of liberal "perfectionism."<sup>10</sup> My liberal Constitution-perfecting theory certainly is a form of perfectionism. And so, presumably, his criticisms are aimed at theories like mine.

Third, notwithstanding the association of "Constitution in exile" with conservative constitutional theory, Sunstein and I are proponents of progressive and liberal conceptions of the Constitution that are very much in exile at the present time.<sup>11</sup> Many conservatives have argued that the real Constitution has been in exile since the New Deal and that it is time to restore it.<sup>12</sup> Sunstein squarely takes aim at such conservative views.<sup>13</sup> At the same time, Sotirios A. Barber has defended a largely forgotten understanding of the Constitution (advanced by James Madison and Abraham Lincoln) as a charter of positive benefits under which government has affirmative duties to pursue the well-being of all the people.<sup>14</sup> And Lawrence G. Sager has argued that the Constitution imposes affirmative obligations that are judicially underenforced but nonetheless binding outside the courts on legislatures and executives.<sup>15</sup> I endorse such a view.<sup>16</sup>

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5. Fleming, *Securing*, *supra* note 1, at 37-60.

6. Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996) [hereinafter Sunstein, *Legal Reasoning*].

7. Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999) [hereinafter Sunstein, *One Case at a Time*].

8. Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (1996).

9. Fleming, *Securing*, *supra* note 1, at 141-71.

10. Sunstein, *Radicals*, *supra* note 2, at 31-41.

11. I am indebted to Mark Graber for emphasizing this point.

12. *See, e.g.*, Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004); Douglas H. Ginsburg, *On Constitutionalism*, 2003 *Cato Sup. Ct. Rev.* 7. *But see* Randy E. Barnett, *Restoring the Lost Constitution, Not the Constitution in Exile*, 75 *Fordham L. Rev.* 669 (2006) (distinguishing between "restoring the lost Constitution" of 1789 and restoring the Constitution that supposedly has been in exile since 1937).

13. Sunstein, *Radicals*, *supra* note 2, at 1-19.

14. Sotirios A. Barber, *Welfare and the Constitution* 1-22 (2003).

15. Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* 95-102 (2004).

Sunstein, in *The Partial Constitution*<sup>17</sup> and especially in *The Second Bill of Rights*,<sup>18</sup> has advanced a similar view. Our books together implicitly pose the question: What are the merits of and prospects for these competing conservative and liberal or progressive accounts of “Constitutions in exile”?

In this essay, I am going to focus on the second point, minimalism versus perfectionism. First, I take up perfectionism: What is perfectionism? What are Sunstein’s critiques of it? Do those critiques apply to my Constitution-perfecting theory? What responses can I offer in defending my theory? Second, in particular, what are Sunstein’s criticisms of liberal perfectionist justifications for the right of privacy? What responses can I give to those criticisms? Third, I turn to minimalism: What is minimalism? Is it just a theory of judicial review (or judicial strategy), or does it amount to a theory of the Constitution itself? Is minimalism a theory for all times and circumstances or only for circumstances of moral disagreement and political conflict? Is minimalism itself a form of perfectionism? Finally, I examine the journey from Sunstein’s *The Partial Constitution* to his minimal Constitution: herein of the incredible shrinking constitutional theory to which I refer in my title.

## I. PERFECTIONISM

### A. *What Is Perfectionism?*

I want to distinguish eight (!) varieties of perfectionist constitutional theory. Doing so will sharpen our understanding of my project and refine our assessment of Sunstein’s critique of perfectionism.

First, there is perfectionism in political philosophy as it might be applied to constitutional theory. Sunstein states that “[t]he perfectionist approach to constitutional law should not be confused with perfectionism in political philosophy,” citing John Rawls, *Political Liberalism*.<sup>19</sup> Rawls distinguishes between political liberalism and perfectionist liberalism (as well as perfectionist political philosophies more generally): Perfectionists of all stripes believe that statecraft is soulcraft, and that the state must inculcate civic virtues or even moral excellence in the citizenry. Despite Sunstein’s remark, we should acknowledge the variety of constitutional perfectionism that brings perfectionist political philosophy to bear on constitutional theory. The best example is the work of my frequent coauthor Sotirios A. Barber, such as in his book, *Welfare and the Constitution*,<sup>20</sup> and his book in

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16. Fleming, Securing, *supra* note 1, at 70-71, 195, 205-09, 214-15.

17. Sunstein, *Partial*, *supra* note 3, at 138-41, 148-49.

18. Cass R. Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More than Ever* 139-47, 209-34 (2004) [hereinafter Sunstein, *Second Bill of Rights*].

19. Sunstein, *Radicals*, *supra* note 2, at 254 n.9 (citing John Rawls, *Political Liberalism* (1993)).

20. See Barber, *supra* note 14, at 53-64, 118-42.

progress, *Constitutional Failure*.<sup>21</sup> In Barber's view, we ultimately must face up to the challenge of "supplying . . . the defect of better motives," not just by relying upon checks and balances and making "[a]mbition . . . counteract ambition"—Madison's strategy in *The Federalist No. 51*<sup>22</sup>—but also by inculcating civic virtues that are necessary for responsible citizenship and for the success of the constitutional order.

Second, there is also perfectionism in the sense of John Hart Ely's "process-perfecting" theory of reinforcing representative democracy. Sunstein refers to this version as "democratic perfectionis[m]."<sup>23</sup> According to Ely's theory in *Democracy and Distrust*, the Constitution's core commitment is to representative democracy, and judicial review is justified principally when the processes of representative democracy, and thus the political decisions resulting from them, are undeserving of trust.<sup>24</sup> Ely argues that courts should reinforce or perfect the procedural preconditions for the trustworthiness of the outcomes of the political processes. In my book, I argue that Sunstein's theory in *The Partial Constitution* has close affinities to Ely's theory—affinities Sunstein acknowledges<sup>25</sup>—and I interpret his theory in that work as a process-perfecting theory of securing deliberative democracy.<sup>26</sup> In *Radicals in Robes*, any such affinities are faint. Still, his critique of perfectionism is virtually silent with respect to democratic perfectionism. That is not his primary target.

Third, I distinguish perfectionism in the sense of my substantive Constitution-perfecting theory of securing constitutional democracy.<sup>27</sup> I criticize process-perfecting theories like Ely's and Sunstein's for rejecting certain substantive liberties (such as privacy or autonomy) as anomalous in our constitutional scheme. I aspire to do for "substance" what Ely has done for "process." That is, I develop a substantive Constitution-perfecting theory—a theory that would reinforce not only the procedural liberties (those related to deliberative democracy), but also the substantive liberties (those related to deliberative autonomy) embodied in our Constitution and presupposed by our constitutional democracy. My Constitution-perfecting theory is a theory of constitutional democracy and trustworthiness, an alternative to Ely's theory of representative democracy and distrust (and to Sunstein's theory of deliberative democracy and impartiality). To be trustworthy, a constitutional democracy must secure and respect not only the procedural preconditions for deliberative democracy, but also the substantive preconditions for deliberative autonomy. Put another way, we

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21. See Sotirios A. Barber, *Constitutional Failure* (Nov. 2006) (unpublished manuscript, on file with the author).

22. *The Federalist No. 51*, at 322 (James Madison) (Clinton Rossiter ed., 1961).

23. Sunstein, *Radicals*, *supra* note 2, at 38, 254 n.14 (citing Ely, *Democracy and Distrust*, *supra* note 4).

24. Ely, *Democracy and Distrust*, *supra* note 4, at 73-104.

25. Sunstein, *Partial*, *supra* note 3, at 143-44.

26. Fleming, *Securing*, *supra* note 1, at 37-60.

27. *Id.* at 4-6, 73-74, 210-11.

need to secure or perfect both the substantive and the procedural preconditions for the outcomes of the political processes in our constitutional democracy to be trustworthy.

Sunstein refers to theories like Ronald Dworkin's (and, by implication, mine) as "rights perfectionis[m]." <sup>28</sup> Despite the differences between Ely's and my varieties of perfectionism, they share the view that the Constitution should be interpreted as embodying a scheme of basic liberties that are preconditions for the trustworthiness of the outcomes of the political processes. Both Ely and I also argue that judicial review is justified to secure these preconditions. Our perfectionist theories differ in their conceptions of the form of government that the Constitution establishes: representative democracy versus constitutional democracy. <sup>29</sup> Accordingly, these theories differ in their conceptions of the basic liberties that are the preconditions for trustworthiness. But they are similar in that both argue for perfecting the Constitution as they conceive it. Although Sunstein mentions both of these types of perfectionism, he does not squarely engage with their common, core claim: that they propose to perfect the Constitution and the form of democracy it embodies on their own terms and thus that they are not ultimately "undemocratic" in a way that is unjustifiable.

Fourth, I also distinguish perfectionism in the sense of a theory of constitutional interpretation entailing that we should interpret the Constitution so as to make it the best it can be. <sup>30</sup> On this view, as Sunstein puts it, constitutional interpretation is a matter of putting the existing legal materials "in their best constructive light," or of making them "the best they can be." <sup>31</sup> Furthermore, constitutional interpretation is the quest for the interpretation that provides the best fit with and justification of the constitutional document and underlying constitutional order. <sup>32</sup> This sense of perfectionism—which we might call "interpretive perfectionism"—is famously associated with Dworkin, and Sunstein mentions Dworkin as a proponent of it. <sup>33</sup> I embrace this sense. <sup>34</sup> In *Radicals in Robes*, Sunstein does not fully engage with interpretive perfectionism (though he briefly mocks it <sup>35</sup>). In his essay for the Symposium, Sunstein accepts a more

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28. Sunstein, *Radicals*, *supra* note 2, at 39.

29. Fleming, *Securing*, *supra* note 1, at 10, 77, 79-81, 234 n.43.

30. Sunstein, *Radicals*, *supra* note 2, at 32; *see* Fleming, *Securing*, *supra* note 1, at 16, 211, 225.

31. Sunstein, *Radicals*, *supra* note 2, at 32 (quoting Ronald Dworkin, *Law's Empire* 229 (1986)).

32. Fleming, *Securing*, *supra* note 1, at 5, 24, 63, 84; *see* Dworkin, *supra* note 31, at 239; Cass R. Sunstein, *Second-Order Perfectionism*, 75 *Fordham L. Rev.* 2867, 2869-70, 2872-74 (2007) [hereinafter Sunstein, *Second-Order Perfectionism*].

33. Sunstein, *Radicals*, *supra* note 2, at 32.

34. Fleming, *Securing*, *supra* note 1, at 5, 24, 63, 84.

35. Sunstein, *Radicals*, *supra* note 2, at 38.

generic form of such a perfectionism, which he calls "second-order perfectionism."<sup>36</sup>

Fifth, there is perfectionism in Henry P. Monaghan's well-known sense of theories of "Our Perfect Constitution": constitutional theories that entail that the Constitution, properly interpreted, requires the results that the theorist's normative political theory recommends.<sup>37</sup> Note that the political theory could be liberal or conservative, progressive or libertarian. Sunstein does not name this type of perfectionism, but he clearly criticizes constitutional perfectionism in this sense. In fact, it seems to be his primary target. Most of his criticisms are not directed at process-perfecting, Constitution-perfecting, or interpretive perfectionist theories like Ely's, mine, or Dworkin's as such; rather, Sunstein primarily takes aim at liberals who argue as if they believe that the Constitution protects whatever rights normative liberal political theory and a perfect liberal Constitution would protect. Perfectionism in Monaghan's sense is more morally ambitious than interpretive perfectionism, and is less constrained by the requirements of fit and justification.<sup>38</sup> Also, unlike Ely's and my forms of perfectionism, it does not strive rigorously to articulate any sense in which a given basic liberty is a precondition for the trustworthiness of the outcomes of the political processes. That Sunstein mainly targets perfectionism in Monaghan's sense is confirmed by the fact that when he criticizes "false fundamentalists" for really being conservative constitutional perfectionists in disguise, he takes them to task for arguing as if they believe that the Constitution perfectly embodies the current political program of the extreme conservative wing of the Republican Party.<sup>39</sup>

Sixth, there is also perfectionism in the sense of what I will call "taking rights seriously" liberalism. This form of perfectionism is not so much a conception of the *content* of constitutional rights as a conception of their *stringency*. These so-called "perfectionists" demand that we must take rights seriously in all circumstances, including war and crisis, though the heavens (or at least the republic) may fall. They are liberal rights absolutists like David Cole, whom Sunstein calls the "Liberty Perfectionists" as against the "National Security Fundamentalists."<sup>40</sup> These "perfectionists" are not perfectionists in any of the foregoing senses (except possibly Monaghan's sense). And the perfectionists in the foregoing senses

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36. Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2870.

37. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981).

38. See Abner S. Greene, *The Fit Dimension*, 75 Fordham L. Rev. 2921, 2921, 2941 (2007) (distinguishing "aspirationalist perfectionism," which "pays virtually no attention to fit and focuses almost entirely on justification," from a "coherentist" perfectionism).

39. Sunstein, *Radicals*, *supra* note 2, at 34, 37-38, 217-18, 244, 252. I take some comfort in Bill Treanor's statements that my theory, perfectionist though it may be, is closer to "a true originalist approach" than is the "fundamentalist-originalist approach" that Treanor and Sunstein criticize. See William Michael Treanor, *Process Theory, Majoritarianism and the Original Understanding*, 75 Fordham L. Rev. 2989, 2994 (2007).

40. Sunstein, *Radicals*, *supra* note 2, at 151-52, 260 n.2 (citing David Cole as a "Liberty Perfectionist").

are not necessarily perfectionists in this sense. Dworkin is not a perfectionist in this sense, even though he wrote the famous book with the title "Taking Rights Seriously,"<sup>41</sup> the term I have appropriated to label these folks. I certainly am not (see my Chapter 9 on securing constitutional democracy in circumstances of war and crisis).<sup>42</sup> We might better conceive these folks, not as perfectionists, but simply as rights-absolutist liberals, for example, of the ACLU or Center for Constitutional Rights varieties. These liberals are strongly anti-pragmatic, strongly opposed to balancing rights against other considerations like national security, deeply distrustful of government, and strongly protective of individual rights, come what may. We can also imagine "taking rights seriously" conservatives (most likely libertarians).<sup>43</sup>

Seventh, a still more inchoate sense of "perfectionism" criticized by Sunstein is simply whatever views mainstream liberal constitutional scholars typically hold. For example, in the chapter on "Guns, God, and More," the "perfectionists" Sunstein speaks of embrace the state militia (rather than individual rights) reading of the Second Amendment right to bear arms, and the "political safeguards of federalism" argument against the need for aggressive judicial enforcement of federalism.<sup>44</sup> For the latter, he cites Herbert Wechsler and Jesse Choper.<sup>45</sup> Sunstein calls these positions "perfectionist," but he does not articulate what is perfectionist about them. There is nothing recognizably perfectionist in any of the foregoing senses about these positions. They seem to be nothing other than positions that mainstream liberal constitutional scholars have taken. As I see it, Sunstein labels these positions as "perfectionist" simply because he is using them as liberal foils against which to present his minimalism: Everywhere else, liberal calls for *aggressive judicial protection* of rights are foils for his minimalism, while here liberal calls for *judicial deference* to the political processes are his foils!

Finally, we might distinguish a highly generic form of "perfectionism": the idea that every theory is ultimately perfectionist in the sense that its proponents think that adoption and application of the theory will improve the constitutional order, even make the Constitution the best it can be in a general sense. Here I allude to Sunstein's statements to the effect that the battle among competing constitutional theories must be fought on perfectionist ground in one sense: Theorists must show that adoption and application of their theory will improve the constitutional system as a whole.<sup>46</sup> He confirms and sharpens this sense in his essay for this

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41. Ronald Dworkin, *Taking Rights Seriously* (1977).

42. Fleming, *Securing*, *supra* note 1, at 195-209.

43. The Cato Institute offers illustrations. *See, e.g.*, Brief of the Cato Institute as Amicus Curiae in Support of Petitioner, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184); Cato Inst., *Cato Handbook for Congress: Policy Recommendations for the 108th Congress*, chs. 12, 13, 19 (2003), available at <http://www.cato.org/pubs/handbook/handbook108.html>.

44. *See* Sunstein, *Radicals*, *supra* note 2, at 222, 237.

45. *Id.* at 267 n.25.

46. *Id.* at 41.



Symposium, where he defends "second-order perfectionism."<sup>47</sup> The upshot of this is that we can see that Sunstein is criticizing perfectionism of many shapes and sizes; fundamentalists, too, might observe that he is discussing fundamentalisms of many varieties. Some of Sunstein's criticisms may apply forcefully to some versions of perfectionism but not as well or not at all to others.

### B. *What Are Sunstein's Criticisms of Perfectionism?*

What are Sunstein's criticisms of perfectionism, and are they well taken against my Constitution-perfecting theory? I shall distill his many criticisms of perfectionism into six somewhat interrelated objections. One, perfectionism is undemocratic.<sup>48</sup> But, as Sunstein himself has argued, democracy is not a self-defining idea, and judicial review protecting rights may well be "counter-majoritarian" (in the sense that it is contrary to what current majorities want) without necessarily being contrary to our form of constitutional self-government (i.e., not for that reason undemocratic in an unjustifiable way).<sup>49</sup> For example, we can distinguish (and Sunstein does distinguish) at least the following four conceptions of democracy (I will just use shorthand labels here): (1) *majoritarian democracy*, as illustrated by James Bradley Thayer and Justice Oliver Wendell Holmes, Jr. (also Judge Learned Hand, whom Sunstein repeatedly invokes concerning the spirit of liberty);<sup>50</sup> (2) *representative democracy*, as represented by Ely's *Democracy and Distrust*;<sup>51</sup> (3) *deliberative democracy*, as illustrated by Sunstein's *The Partial Constitution*;<sup>52</sup> and (4) *constitutional democracy*, as illustrated by Rawls's, Dworkin's, and my work.<sup>53</sup> Under the last three of these conceptions, judicial protection of rights that are preconditions for democracy is "counter-majoritarian" but is not contrary to our Constitution's form of democracy rightly understood.

To decide whether a theory or practice is problematically undemocratic, we need to decide what conception of democracy best fits and justifies our Constitution and underlying constitutional order. In *The Partial Constitution*, Sunstein clearly recognizes this important point.<sup>54</sup> But in *Radicals in Robes*, he seems to work from a less rigorous conception of what it means to be objectionably undemocratic. In my book, I argue at length that my conception of constitutional democracy, which comprehends basic liberties that are preconditions for both deliberative democracy and

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47. Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2870.

48. Sunstein, *Radicals*, *supra* note 2, at 35, 39, 51, 247, 251.

49. See Sunstein, *Partial*, *supra* note 3, at 103-07, 125, 134, 143, 163.

50. Sunstein, *Radicals*, *supra* note 2, at 35, 44-50 (discussing the views of Thayer and Holmes as "majoritarians").

51. Ely, *Democracy and Distrust*, *supra* note 4, at 77-88.

52. Sunstein, *Partial*, *supra* note 3, at 133-41.

53. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 17-26, 32 (1996) [hereinafter Dworkin, *Freedom's Law*]; Fleming, *Securing*, *supra* note 1, at 61-83; John Rawls, *Justice as Fairness: A Restatement* § 44 (2001).

54. See Sunstein, *Partial*, *supra* note 3, at 143-44.

deliberative autonomy, better fits and justifies our constitutional document and underlying constitutional order than does Ely's conception of representative democracy or Sunstein's conception of deliberative democracy (to say nothing of conceptions of majoritarian democracy).<sup>55</sup> To make the case that my Constitution-perfecting theory of securing constitutional democracy is problematically undemocratic, one has to show that it does not well fit and justify our constitutional document and underlying constitutional order.

Two, perfectionism is not well suited to circumstances of moral disagreement and political conflict about basic liberties.<sup>56</sup> In Chapter 7, I respond to Sunstein's and Sandel's diametrically opposed republican challenges to liberal theories like Rawls's, Dworkin's, and mine.<sup>57</sup> I argue that Sandel's civic republicanism—which calls for substantive moral arguments about the goods furthered by protecting constitutional freedoms instead of autonomy arguments alone—is too thick. Sandel's theory requires deeper agreement on goods or virtues than seems feasible, given the fact of reasonable moral pluralism, without intolerable state oppression. Conversely, I argue that Sunstein's minimalism—which calls for avoiding substantive moral arguments about goods as well as autonomy arguments—is too thin. In the face of such pluralism, it settles for shallower agreement than is necessary to secure constitutional freedoms. I make a Goldilocks argument: that Sandel's and Sunstein's diametrically opposed challenges and shortcomings unwittingly show that a liberal republican theory like mine, with affinities to Rawls's political liberalism, is just right for circumstances of reasonable moral pluralism. I will not reiterate those arguments here.<sup>58</sup>

Three, perfectionism is highly indeterminate and has made a “mess” of constitutional law, for example, with respect to the right of privacy.<sup>59</sup> I will make three responses and say more in the next section on the right to privacy in particular. First, in my book, I argue that due process jurisprudence is not as unruly as its critics allege. I argue that the leading decisions under the Due Process Clause—as represented on a list of “unenumerated” fundamental rights—can be justified on the ground of a criterion of *significance* for deliberative autonomy. I show the coherence and structure of the cases protecting the rights on that list, carrying forward the “unfinished business of Charles Black”: constructing a structure of fundamental rights integral to free and equal citizenship.<sup>60</sup>

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55. Fleming, Securing, *supra* note 1, at 29-35, 43-51, 80-83.

56. Sunstein, Legal Reasoning, *supra* note 6, at 3-7, 46-48; Sunstein, One Case at a Time, *supra* note 7, at 5, 50-51; Sunstein, Radicals, *supra* note 2, at 35, 100-01, 129.

57. Fleming, Securing, *supra* note 1, at 141-71.

58. I would note, however, that my conception of “deliberative autonomy” is thinner than the kind of conception of autonomy that Jae Lee seems to contemplate bringing to bear on criminal law. See Youngjae Lee, *Valuing Autonomy*, 75 Fordham L. Rev. 2973 (2007).

59. Sunstein, Radicals, *supra* note 2, at 88.

60. Fleming, Securing, *supra* note 1, at 89-98. Charles Kelbley expresses a similar view that the cases protecting a right of privacy or autonomy are not the “mess” that Sunstein

Second, even if we concede that the Supreme Court's decisions in the area of substantive due process are a mess, they are no greater a mess than the decisions in areas like equal protection and the First Amendment. Welcome to the law. Let us begin with the First Amendment. Many First Amendment absolutists see the First Amendment frameworks and doctrines as a mess—they see the categories of unprotected expression as making a mess of our system of well-nigh absolutist freedom of expression.<sup>61</sup> Sunstein, however, justifies a two-track framework for the First Amendment that stringently protects speech that is significant for deliberative democracy, and less stringently protects speech that is relatively insignificant for deliberative democracy (speech within the categories of unprotected expression).<sup>62</sup> I argue that substantive due process jurisprudence has an analogous, but inverted structure; I argue that a criterion of *significance for deliberative autonomy* can account for and make sense of the *categories of protected decisions* under the Due Process Clause, just as a criterion of *significance for deliberative democracy* can account for and make sense of the *categories of unprotected expression* under the First Amendment. I develop homologies between the structures of deliberative autonomy and deliberative democracy, and between substantive due process jurisprudence and First Amendment jurisprudence; they are mirror images of one another with regard to judgments of significance for deliberative autonomy and deliberative democracy, respectively. The point is that we have been making judgments about the significance of asserted basic liberties all along, and that doing so in both contexts is more structured than is commonly appreciated.<sup>63</sup>

Third, I want to note some unacknowledged similarities between due process and equal protection. Sunstein sympathetically quotes Justice Antonin Scalia's statement to the effect that the Due Process Clause is the *due process of law* clause (and it says nothing about the substance of the laws much less about the liberty that is due),<sup>64</sup> as in "nor shall any state deprive any person of life, liberty, or property, without due process of law, whatever the law is." Sunstein, like Scalia, presents this as an incubus on the back of substantive due process and the right of privacy or autonomy.<sup>65</sup> But one can make an analogous argument about the Equal Protection

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presents them as being. See Charles A. Kelbley, *Privacy, Minimalism, and Perfectionism*, 75 Fordham L. Rev. 2951, 2961-65 (2007).

61. See, e.g., Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make it Particularly Urgent for the Supreme Court to 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. 883 (1996).

62. Cass R. Sunstein, *Democracy and the Problem of Free Speech* 121-29 (1993); Sunstein, *Partial*, *supra* note 3, at 232-56.

63. Fleming, *Securing*, *supra* note 1, at 127-32.

64. Sunstein, *Radicals*, *supra* note 2, at 81 (quoting *Lawrence v. Texas*, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting)); *id.* at 86-88.

65. *Id.* at 86-88; Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2876-77.

Clause: that it is the *equal protection of the laws* clause (and it says nothing about the substance of the laws that are to be applied equally to everyone), as in “nor shall any state deny to any person within its jurisdiction the equal protection of the laws, whatever the laws are.” Of course, the Supreme Court has rejected the “equal protection of the laws, whatever the laws are” reading, in favor of the view that the Equal Protection Clause embodies a principle of equality.<sup>66</sup> But the Court also has rejected the “due process of law, whatever the law is” reading, in favor of the view that the Due Process Clause embodies a principle of liberty.<sup>67</sup> (As the authors of the joint opinion put it in *Casey*, the “controlling word” in the Clause is “liberty.”)<sup>68</sup> My point is that we should no more credit Sunstein’s and Scalia’s arguments about the Due Process Clause than we should credit the analogous argument about the Equal Protection Clause.

Similarly, Sunstein, like Scalia, thinks it practically dispositive to object that the right of privacy or autonomy is not “enumerated” in the text of the Due Process Clause.<sup>69</sup> But neither is the right of interracial marriage “enumerated” in the text of the Equal Protection Clause. Nor is an anti-caste or anti-subordination principle of equality listed in that text. Nor is the right to protection against discrimination on the basis of gender. Come to think of it, the right to abortion is no more “enumerated” in the Equal Protection Clause than in the Due Process Clause. Sunstein accepts the protection of these rights under the Equal Protection Clause even though they are not enumerated in that text. The point is that we need theories of “equal protection” to make decisions about the contents of the Equal Protection Clause—and its contents are not “enumerated” in the text of the Constitution—just as we need theories of “liberty” to make judgments about the contents of the Due Process Clause. Thus, the fact that the contents of the Due Process Clause are not “enumerated” in the text of the Constitution is not a dispositive objection (any more than it is for the Equal Protection Clause). An analogous argument applies to the First Amendment’s protection of “freedom of speech,” as Dworkin has lucidly shown: The right to burn flags is no more “enumerated” in the text of the First Amendment than is the right to abortion “enumerated” in the Due Process Clause or the Equal Protection Clause.<sup>70</sup> The objection to protecting the right to privacy on the ground that it is “unenumerated” is

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66. *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (rejecting the “equal application” theory of Equal Protection Clause expressed in *Pace v. Alabama*, 106 U.S. 583 (1883)).

67. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (rejecting the interpretation of the Due Process Clause as “govern[ing] only the procedures by which a State may deprive persons of liberty”).

68. *Id.*

69. Sunstein, *Radicals*, *supra* note 2, at 86; Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2880.

70. Ronald Dworkin, *Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* 127, 131 (1993) [hereinafter Dworkin, *Life’s Dominion*].

"bogus" and "spurious," as Dworkin and Charles Black have shown.<sup>71</sup> In my book, as well as here, I have built upon their arguments.<sup>72</sup>

Four, perfectionists would interpret the Constitution to protect "off the wall" rights (my term, not Sunstein's), rights that have no basis in the text, history, or structure of the Constitution. Sunstein says that liberal perfectionists argue that the Constitution protects rights like the right to prostitution.<sup>73</sup> I would expect caricatures of liberal perfectionism concerning the right of privacy from Scalia, but not from Sunstein. Sunstein states that Scalia's arguments in dissent in *Lawrence v. Texas*—that the Court's protection of the right of homosexuals to intimate association puts us on a slippery slope to "the end of all morals legislation"—are "wildly overstated."<sup>74</sup> But he ends up making similar arguments when he ridicules liberal "perfectionists" concerning where they will draw the line concerning liberty and privacy. He imputes to liberal perfectionists the view that the Constitution enacts John Stuart Mill's *On Liberty*, in particular, its "harm principle."<sup>75</sup> As I acknowledge in my book, there may have been liberals who held that view in the 1970s.<sup>76</sup> But I have not seen anyone argue for anything resembling that view in recent years—not even those who interpreted *Lawrence* as Justice Anthony Kennedy's "libertarian revolution" took that view.<sup>77</sup> The libertarianism that people like Randy Barnett saw in Kennedy's opinion was more, well, libertarian. In my book, I specifically distinguish my idea of deliberative autonomy from Mill's harm principle.<sup>78</sup> The greatest perfectionists of our time have not made the arguments that Sunstein attributes to perfectionism here. Can you imagine Dworkin or Laurence Tribe arguing that the Constitution protects a right to prostitution? No responsible liberal perfectionist—indeed, no responsible liberal defender of the right to privacy or autonomy—argues for these rights with which Sunstein (somewhat like Scalia) mocks due process and liberal perfectionism.

What is more, Sunstein takes an uncharacteristic cheap shot at liberal perfectionists. He says that liberal perfectionists have argued that the Constitution protects welfare rights, seemingly implying that this view is beyond the pale.<sup>79</sup> Yet he surely knows, for example, that the most prominent perfectionist, Dworkin, has argued that the Constitution does *not*

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71. Dworkin, *Freedom's Law*, *supra* note 53, at 72, 76-81; Dworkin, *Life's Dominion*, *supra* note 70, at 129-31, 143-44; Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 Colum. L. Rev. 1103, 1108-11 (1986).

72. Fleming, *Securing*, *supra* note 1, at 90-91, 105-06.

73. Sunstein, *Radicals*, *supra* note 2, at 82.

74. *Id.* at 96 (discussing *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting)).

75. Sunstein, *Radicals*, *supra* note 2, at 89.

76. Fleming, *Securing*, *supra* note 1, at 132-34.

77. See Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2002-2003 Cato Sup. Ct. Rev. 21.

78. Fleming, *Securing*, *supra* note 1, at 132-34.

79. Sunstein, *Radicals*, *supra* note 2, at 33.

protect welfare rights.<sup>80</sup> And let us not forget that Sunstein himself has argued that the Constitution *does* secure welfare rights, or freedom from desperate conditions, or even a second Bill of Rights. Sunstein, though, argues that such rights are to be judicially underenforced and left for their fuller enforcement through legislatures in the Constitution outside the courts.<sup>81</sup> This is essentially the position taken by well-known liberal proponents of constitutional welfare rights such as Lawrence Sager and Frank Michelman.<sup>82</sup> It is also the position I take in my book.<sup>83</sup>

Below I take up the fifth and sixth objections: (5) Perfectionism harbors hollow hopes that courts can bring about liberal social change and ignores risks of unintended consequences and backlash;<sup>84</sup> and (6) perfectionism does not appreciate the limited institutional capacities of courts.<sup>85</sup>

## II. THE RIGHT OF PRIVACY

Next, I am going to look more particularly at Sunstein's specific criticisms of Supreme Court decisions relating to the right of privacy. I will not reiterate the arguments I make in Chapter 7 of my book concerning Sunstein's proposed minimalist justifications for *Griswold v. Connecticut* and *Lawrence v. Texas* (on grounds of desuetude) and *Roe v. Wade* (recognizing a right to abortion only in cases of rape and incest). Instead, I am going to focus on Sunstein's discussion of the roots of (or precedents for) the right to privacy. I will address his parallel refrain—"It all began with"—with respect to *Roe*, *Lochner*, and *Dred Scott*.

### A. *Roe v. Wade*

"It all began, of course, with *Roe v. Wade*."<sup>86</sup> To read Sunstein's critique of *Roe*, you would think three things: (1) that *Roe* was a triumph of liberal perfectionist arguments and that no one has ever offered "conservative" justifications for this 7-2 Burger Court decision on grounds of consensus and common law constitutionalism; (2) that *Roe*'s justification of the right to abortion is all there is, and that the Supreme Court itself has never offered a fuller, more persuasive justification of the right; and (3) that Sunstein has fully accepted controversial arguments about *Roe* most commonly associated with Mary Ann Glendon, for example, that *Roe* short-circuited the political processes that were proceeding state-by-state toward liberalization of restrictive abortion laws, thus provoking backlash against

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80. Dworkin, *Freedom's Law*, *supra* note 53, at 36.

81. Sunstein, *Partial*, *supra* note 3, at 138-40, 148-49; Sunstein, *Second Bill of Rights*, *supra* note 18, at 139-47, 209-34.

82. Sager, *supra* note 15, at 95-102; Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash. U. L.Q. 659, 684-85.

83. Fleming, *Securing*, *supra* note 1, at 70-71, 214-15.

84. *See infra* text accompanying notes 177-87.

85. *See infra* text accompanying notes 188-99.

86. Sunstein, *Radicals*, *supra* note 2, at 82-83, 104-05 (discussing *Roe v. Wade*, 410 U.S. 113 (1973)).

the right to abortion.<sup>87</sup> I will take up the first and second points here; I will discuss the third below in connection with backlash.<sup>88</sup>

Before we accept an account of *Roe* as a product of liberal perfectionism, we should recall Thomas C. Grey's classic account of *Roe* (in *Eros, Civilization and the Burger Court*) as reflecting not liberal concerns for autonomy and the sexual revolution of the 1960s and 1970s, but conservative concerns for family stability and family planning.<sup>89</sup> Grey's account helps make sense of the fact that it was, after all, the conservative Burger Court (not the liberal Warren Court) that decided *Roe* and that four of the justices in the 7-2 majority were moderate Republicans (Harry Blackmun, Warren Burger, Lewis Powell, and Potter Stewart, including three out of the four Republican Justices appointed by Richard Nixon). The sole Nixon appointee to dissent was William Rehnquist. I guess these moderate, mostly midwestern Republicans (soon joined by that Illinois Republican John Paul Stevens) just did not see the radical counter-revolutionary Republicans<sup>90</sup> (and the culture war) coming.

One could even see Blackmun's opinion in *Roe*<sup>91</sup> as minimalist: an incompletely theorized agreement, and shallow rather than deep. Blackmun, rather than articulating a deep justification for the right to abortion on liberal perfectionist grounds of liberty or autonomy, simply sketched the "roots" of the right in decisions from *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925) up through *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972).<sup>92</sup> Nor did he articulate a deep justification for the right in a liberal or feminist perfectionist ground of an anti-caste or anti-subordination principle of sex equality.<sup>93</sup> What is more, Blackmun offered an incompletely theorized agreement in the sense that he acknowledged that the right could be grounded in "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action" or "in the Ninth Amendment's reservation of rights to the people."<sup>94</sup> He wrote an opinion with which six other Justices, perhaps for their own deeper reasons, could agree. With this incompletely theorized agreement on hand, Blackmun concluded that the right "is broad enough to encompass

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87. *Id.* at 104-05, 248-49, 268 n.4 (citing Mary Ann Glendon, *Abortion and Divorce in Western Law* (1987)).

88. See *infra* text accompanying notes 177-87.

89. Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 *Law & Contemp. Probs.* 83 (1980).

90. Below I distinguish between "preservative conservatives" and "counter-revolutionary conservatives." See *infra* text accompanying notes 138-40.

91. 410 U.S. 113 (1973).

92. *Id.* at 152-53 (citing, among others, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

93. Blackmun subsequently came to accept the gender equality ground for the right to abortion as well as the liberty or privacy ground. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 926-29 (1992) (Blackmun, J., concurring in part and dissenting in part).

94. *Roe*, 410 U.S. at 153.

a woman's decision whether or not to terminate her pregnancy."<sup>95</sup> Granted, Sunstein may say that the "broad enough" is the problem from the standpoint of minimalism. My point is that Blackmun's opinion is hardly the opinion that a liberal perfectionist would have written.

Before accepting the view of *Roe* as reflecting liberal perfectionism, we should also recall that many have justified *Roe* as a consensualist decision or a common law constitutionalist decision as distinguished from a perfectionist decision. Many originally justified *Roe* on grounds of consensus.<sup>96</sup> Given all the controversy that subsequently has surrounded *Roe*, it is easy to forget this. Many have justified it as solidly grounded in common law constitutionalism. They say that the critics are missing the forest for the trees and the like.<sup>97</sup> Despite all the controversy surrounding *Roe*, that is the way Sandra Day O'Connor, Kennedy, and David Souter evidently still see the right to abortion, after all these years, as indicated by their joint opinion in *Casey*.<sup>98</sup> Let us not forget that Justice John Marshall Harlan II is often celebrated as a great common law constitutionalist, and that the joint opinion in *Casey* embraced his conception of the framework for the due process inquiry.<sup>99</sup> Sunstein praises O'Connor, Kennedy, and Souter for their minimalism in certain cases.<sup>100</sup> Souter clearly conceives of himself as the new Harlan in certain respects, most notably, in his common law constitutionalist conception of the due process inquiry (see not only the joint opinion in *Casey* but also his concurrence in *Washington v. Glucksberg*<sup>101</sup>).

In any case, the Supreme Court's justification of the right to abortion in *Roe* was not the Court's last word on the subject. It offered a fuller and more persuasive justification for the right in *Casey*. That justification, again, is in the form of a Harlan-style common law constitutionalism: It builds upon precedents, conceives of liberty as a "rational continuum" rather than an enumerated list, conceives judgment as a "rational process" or "reasoned judgment" rather than mechanical application of a bright-line formula, and conceives tradition as a "living thing" rather than a hidebound historical practice.<sup>102</sup> As I argue in my book, the joint opinion in *Casey*

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95. *Id.*

96. See, e.g., Michael J. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. Rev. 689 (1976); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221 (1973).

97. Philip B. Heymann and Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U. L. Rev. 765 (1973).

98. 505 U.S. at 846-53, 857-59 (joint opinion).

99. *Id.* at 848-50 (quoting *Poe v. Ullman*, 367 U.S. 497, 542, 543 (1961) (Harlan, J., dissenting)).

100. Sunstein, *Radicals*, *supra* note 2, at 29-30, 44, 146, 245 (praising O'Connor); *id.* at 31, 245 (praising Kennedy); *id.* at 188-90 (praising Souter).

101. 521 U.S. 702, 756 n.4, 763-73 (1997) (Souter, J., concurring).

102. *Casey*, 505 U.S. at 848-50 (quoting *Poe*, 367 U.S. at 542, 543 (Harlan, J., dissenting)).



intertwines arguments sounding in deliberative autonomy with arguments sounding in an anti-subordination principle of sex equality.<sup>103</sup>

### B. *Lochner* v. New York

Actually, "[i]t began . . . with *Lochner* v. New York."<sup>104</sup> Yet in *The Partial Constitution* and in "*Lochner's* Legacy," Sunstein develops an insightful and important interpretation of what is wrong with *Lochner*, one that differentiates it from *Roe* and the right to privacy.<sup>105</sup> Sunstein contends that what is wrong with *Lochner* is not, as Ely thought, that the Court gave heightened judicial protection to "unenumerated" substantive fundamental values.<sup>106</sup> Rather, it is the Court's use of status quo neutrality and existing distributions as the baseline from which to distinguish unconstitutionally partisan political decisions from impartial ones.<sup>107</sup> Ironically, the implication of this interpretation is that certain contemporary Justices, such as Scalia, who protest most adamantly against *Lochnering* (as protecting substantive fundamental rights) in fact engage most actively in it (as treating status quo neutrality as a baseline for constitutional interpretation).<sup>108</sup> For Ely, *Roe* is an incarnation of *Lochner* because it involves judicial protection of a substantive fundamental right drawn from the nether world beyond his *Carolene Products* jurisprudence.<sup>109</sup> For Sunstein, by contrast, at least in *The Partial Constitution* and "*Lochner's* Legacy," *Roe* is unrelated to *Lochner* because it does not evince status quo neutrality.<sup>110</sup> Sunstein, like Ely, rejects substantive due process arguments for a right to abortion, whether rooted in privacy, decisional autonomy, or bodily integrity. But Sunstein, unlike Ely, argues for a right to abortion grounded in equal protection and an anti-caste principle, contending that abortion restrictions turn a morally irrelevant characteristic, sex (like race), into a systemic source of social disadvantage.<sup>111</sup> On his view, restrictive abortion laws are invalid because they are "an impermissibly selective co-optation of women's bodies" and they "turn women's reproductive capacities into something for the use and control of others."<sup>112</sup> Sunstein defends *Roe* and *Casey* as necessary to secure equal citizenship for women,

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103. Fleming, Securing, *supra* note 1, at 94-95.

104. Sunstein, Radicals, *supra* note 2, at 84 (discussing *Lochner* v. New York, 198 U.S. 45 (1905)).

105. Sunstein, Partial, *supra* note 3, at 45-62; Cass R. Sunstein, *Lochner's* Legacy, 87 Colum. L. Rev. 873 (1987) [hereinafter Sunstein, *Legacy*].

106. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973).

107. Sunstein, Partial, *supra* note 3, at 45-62, 259-61; Sunstein, *Legacy*, *supra* note 105, at 874-75, 882-83.

108. See Sunstein, Partial, *supra* note 3, at 68-92; Sunstein, *Legacy*, *supra* note 105, at 874-75, 883-902.

109. Ely, *supra* note 106, at 933-45.

110. See Sunstein, *Legacy*, *supra* note 105, at 874-75; Sunstein, Partial, *supra* note 3, at 259-61.

111. Sunstein, Partial, *supra* note 3, at 259.

112. *Id.* at 272.

indeed as tantamount to a *Brown v. Board of Education* for women,<sup>113</sup> not analogous to *Lochner* (or, worse yet, *Dred Scott v. Sandford*<sup>114</sup>).

We are left with a puzzle: Why would Sunstein go to all the trouble to establish (*pace* Ely and Scalia) that what is wrong with *Lochner* is not substantive due process but status quo neutrality, and that *Roe* is analogous to *Brown*, not to *Lochner* and *Dred Scott*, yet now say (*with* Ely and Scalia) that *Lochner* and *Dred Scott* are precedents for *Roe*?<sup>115</sup> *The Partial Constitution* expresses the better view on these matters. The right of privacy did not begin in *Lochner* (or in *Dred Scott*). We turn now to *Dred Scott* itself.

### C. *Dred Scott v. Sandford*

"[*Dred Scott*] really is where it all began."<sup>116</sup> *Dred Scott* is an emblematic, defining case.<sup>117</sup> Proponents of liberal theories of protecting substantive fundamental rights typically contend that *Dred Scott* shows the perils of originalism, that is, approaching constitutional interpretation as if its basic goal were to divine what the founding generation intended or understood the document's words to mean.<sup>118</sup> Advocates of originalism, by contrast, commonly claim that *Dred Scott* illustrates the dangers of protecting "unenumerated" substantive fundamental rights under the Due Process Clauses.<sup>119</sup> Justice Scalia and others condemn *Roe* (and *Casey*) as "the *Dred Scott* of our time."<sup>120</sup> What do people mean when they draw this analogy? I note three possibilities. One, in both *Roe* and *Dred Scott*, the Supreme Court had the hubris to presume to resolve a divisive national controversy, and the results were disastrous.<sup>121</sup> Two, they draw an analogy between laws that deny the undeniable personhood of slaves and laws that

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113. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

114. 60 U.S. (19 How.) 393 (1857).

115. It bears noting that Ely's famous critique of *Roe* in *The Wages of Crying Wolf* was not his last word on the subject. After the Supreme Court reaffirmed *Roe* in *Casey*, Ely wrote a "fan letter" to the three Justices who wrote the joint opinion in that case. Ely praised their opinion as "excellent": "not only reaching what seem to me entirely sensible results, but defending the refusal to overrule *Roe v. Wade* splendidly." Ely added, "*Roe* has contributed greatly to the more general move toward equality for women, which seems to me not only good but also in line with the central themes of our Constitution." John Hart Ely, *On Constitutional Ground* 305 (1996).

116. Sunstein, *Radicals*, *supra* note 2, at 86 (discussing *Dred Scott*, 60 U.S. 393).

117. *Cf.* Sunstein, *Legacy*, *supra* note 105, at 873 (discussing *Lochner* and *Brown* as examples of "defining cases").

118. Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 Const. Comment. 37 (1993).

119. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 28-34, 43 (1990).

120. *See* Planned Parenthood of Se. Pa. v. *Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); Richard John Neuhaus, *The Dred Scott of Our Time*, Wall St. J., July 2, 1992, at A8.

121. *See, e.g., Casey*, 505 U.S. at 998-1002 (Scalia, J., concurring in the judgment in part and dissenting in part); Neuhaus, *supra* note 120.

(they claim) deny the undeniable personhood of fetuses.<sup>122</sup> Three, in both cases, they claim, the Court protected “unenumerated” substantive fundamental rights under the word “liberty” in the Due Process Clause. Indeed, *Dred Scott*, they say, gave birth to substantive due process.<sup>123</sup> Sunstein implicitly endorses this third point in *Radicals in Robes* when he says *Dred Scott* “really is where [the right of privacy protected in *Roe*] all began.” (He also may implicitly endorse the first point.)

But is this third point a sound interpretation of *Dred Scott*? No. The Court instead protected the enumerated, “plain words” right of slaveholders to own “property in a slave.”<sup>124</sup> Substantive due process is deriving “unenumerated” rights from the word “liberty,” not protecting property rights protected in the plain words of the text. It is important to appreciate that Chief Justice Roger Taney was emphatic that it “could hardly be dignified with the name of due process of law” to deny these rights to “property” that are “distinctly and expressly affirmed” in “plain words” in the text of the Constitution.<sup>125</sup>

D. *The Restoration of the “Constitution in Exile,” the Banishment of the Right of Privacy*

Have we been playing *Hamlet* without the Prince? The title of Sunstein’s book is *Radicals in Robes: Why Right-Wing Courts Are Wrong for America*. It is largely a critique of radical conservative “fundamentalism” and an argument that restoring the fundamentalists’ “Constitution in exile” would be disastrous for the country. Yet I have said hardly a word about Sunstein’s arguments concerning fundamentalism. I will close this section with a word about Sunstein’s critique of the right to privacy in relation to fundamentalists’ calls for abolishing it.

Sunstein paints a vivid picture of what our constitutional world might look like if the fundamentalists gained a controlling majority on the Supreme Court and implemented the constitutional theory that they profess.<sup>126</sup> He gives powerful and apt examples of radical changes that we might see. This picture should be frightening not only to progressives and liberals but also to moderates (and indeed to what I will call preservative conservatives as distinguished from counter-revolutionary conservatives<sup>127</sup>). I relish the fact that the example with which he opens his scary tale is a fundamentalist court repudiating the right to privacy, specifically *Griswold* and *Roe*.<sup>128</sup> After all, these are decisions that he

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122. See, e.g., John T. Noonan, Jr., *The Root and Branch of Roe v. Wade*, 63 Neb. L. Rev. 668 (1984).

123. See, e.g., *Casey*, 505 U.S. at 998 (Scalia, J., concurring in the judgment in part and dissenting in part); Bork, *supra* note 119, at 28-34, 43.

124. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450-52 (1857).

125. *Id.*

126. Sunstein, *Radicals*, *supra* note 2, at 1-19.

127. See *infra* text accompanying notes 138-40.

128. See Sunstein, *Radicals*, *supra* note 2, at 1.

severely criticizes for their liberal perfectionism. He does not mention that on his preferred minimalist ground for justifying *Griswold*—desuetude<sup>129</sup>—any state legislature may revoke the right to use contraceptives if a majority of the legislature has the political will to do so. Nor does he mention that on his preferred minimalist ground for deciding *Roe*—recognizing the right to abortion only in cases of rape or incest<sup>130</sup>—any state legislature could ban ninety-nine percent of abortions if it had the political will to do so. I am not suggesting that minimalism is as scary as fundamentalism, just that these examples should help bring out why many liberals are afraid that Sunstein's minimalism does not adequately secure fundamental rights.

### III. MINIMALISM

As stated above, I devote half of Chapter 7 of my book to criticizing Sunstein's minimalism, in particular, his minimalist approach to the cases protecting the right to privacy or autonomy.<sup>131</sup> My critique focused on his arguments in his previous books, *Legal Reasoning and Political Conflict* and *One Case at a Time*. I shall not repeat that critique as it would apply to *Radicals in Robes*. I should say, however, that it seems to apply a fortiori to this book, for Sunstein's minimalism now seems even more minimal.

Here I shall raise some questions about minimalism: What is the theory of minimalism? Is it merely a theory of judicial review (or judicial strategy) that is agnostic concerning the character and commitments of the Constitution? Or does it amount to a theory of the Constitution itself? Is minimalism a theory for all times and circumstances or only for certain times and circumstances? Is minimalism itself a form of perfectionism?

#### A. *The Circumstances for Minimalism*

Officially, Sunstein presents minimalism as a theory of judicial review (or judicial strategy), not as a theory of the Constitution itself. Moreover, he argues for minimalism as a theory that is appropriate in certain circumstances, for example, those of moral disagreement and political conflict about our basic liberties.<sup>132</sup> He concedes that perfectionism might be appropriate in other circumstances, mentioning Chief Justice John Marshall's "nation-building perfectionis[m]" in the "young United States" as well as the situation of South Africa in "building a new constitutional tradition in the aftermath of apartheid."<sup>133</sup> I would grant that minimalism is more appropriate in circumstances like the present than in certain other circumstances. Here I draw upon my recent analysis of the question

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129. *Id.* at 97-99.

130. *Id.* at 107.

131. See *supra* text accompanying notes 6-9.

132. Sunstein, *Radicals*, *supra* note 2, at 27-30, 247.

133. *Id.* at 34-35.

whether we are entering, in terms of the title of a conference we held at Fordham, "A New Constitutional Order?"<sup>134</sup>

In *The New Constitutional Order*, Mark Tushnet argues that what Sunstein calls judicial minimalism is the jurisprudence of the new constitutional order.<sup>135</sup> He argues that the Rehnquist Court's constitutional jurisprudence amounted to a chastening of constitutional aspirations rather than a launching of a conservative revolution or counter-revolution. Indeed, it seems that minimalism would be appropriate for a constitutional jurisprudence that aims to chasten constitutional aspirations rather than to usher in a constitutional counter-revolution. But let us ponder the question of to whom minimalism would appeal. In what follows, I suggest doubts about whether minimalism is a positive jurisprudential program for a new constitutional order as opposed to a method of damage control, from both liberal and conservative perspectives, during a period of transition from one order to another.

One, it is understandable that minimalism would appeal to liberals and progressives like Sunstein during a period of transition from a moderately liberal court to a conservative court (and beyond that, to a genuinely new constitutional order where conservative aspirations literally hold court). After all, minimalism might serve as a jurisprudence of damage control for liberals and progressives during such a period: For we inevitably are going to face conservative judges and conservative decisions, but minimalism promises to moderate and minimize the damage wrought by them.<sup>136</sup>

Two, it is understandable that minimalism would appeal to pragmatic, Clinton Democrats like Justices Stephen Breyer and Ruth Bader Ginsburg during such a period. Their judicial temperaments and substantive constitutional sensibilities incline them to embrace minimalism.<sup>137</sup>

Three, it is also understandable that minimalism would hold some appeal for *preservative conservatives* like O'Connor, (sometimes) Kennedy, and Souter, as distinguished from *counter-revolutionary conservatives* like Scalia, Thomas, and (sometimes) Rehnquist (and now perhaps Samuel Alito and John Roberts). I am using a distinction between two types of conservatives—preservative conservatives and counter-revolutionary conservatives—corresponding to two senses of conservative in common parlance.<sup>138</sup> Preservative conservatives, for the most part, preserve precedents rather than overruling them—even if, as an original matter, they might have decided the cases differently—though they may well take a "this far and no further" approach to precedents, draining them of

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134. James E. Fleming, *The New Constitutional Order and the Heartening of Conservative Constitutional Aspirations*, 75 Fordham L. Rev. 537 (2006).

135. Mark Tushnet, *The New Constitutional Order* 130-38 (2003).

136. Fleming, *Securing*, *supra* note 1, at 57.

137. See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185 (1992).

138. Fleming, *Securing*, *supra* note 1, at 117.

generative vitality.<sup>139</sup> Counter-revolutionary conservatives, on the other hand, believe that a liberal revolution has occurred (here, the “Warren Court revolution”), and that it is their responsibility to bring about a conservative counter-revolution, and that they must purge the law of precedents manifesting liberal error at the earliest available opportunity. If they do not have the votes to overrule these precedents, they seek to reinterpret them so as to extirpate any generative force from them. To see the difference between preservative conservatives and counter-revolutionary conservatives, look at the clash between the joint opinion of O’Connor, Kennedy, and Souter in *Casey*, on the one hand, and the dissents of Scalia and Rehnquist in the same case, on the other, respectively.<sup>140</sup> Rehnquist’s counter-revolutionary conservatism was moderated somewhat by the fact that he was Chief Justice. Minimalism may especially appeal to preservative conservatives in a time of 5-4 votes. (Obviously, “counter-revolutionary conservative” is my term for the people Sunstein calls “radicals in robes” and fundamentalists.)

Four, it is even understandable that minimalism would appeal in some cases to conservative Chief Justices like Rehnquist and Roberts during such a period of transition. After all, in some cases they may not have the votes to overrule precedents manifesting liberal error, or to reject altogether certain “liberal” arguments. And so, in these cases, it may suit their purposes to vote with the “liberal” majority, to assign the opinion to themselves, and to issue a minimalist decision that controls the damage from their conservative perspectives. But I do not see minimalism holding much, if any, appeal for conservatives if they muster the votes, through new appointments, to move beyond a transition period of chastening liberal and progressive constitutional aspirations to a period of consolidating a conservative revolution or counter-revolution. (Nor would minimalism hold much appeal for liberals if they were to gain a majority on the Supreme Court.)

Yet there are indications in Sunstein’s work that minimalism in fact turns out to be a theory of judicial review for all times and circumstances. To the extent that Sunstein’s minimalism is rooted in a pragmatic or Burkean distrust of abstract theories and principles,<sup>141</sup> it may be a theory for all times and circumstances. To the extent that it reflects a Learned Hand-like humility and skepticism about moral principles—witness Sunstein’s pervasive refrain that “the spirit of liberty is that spirit which is not too sure that it is right”<sup>142</sup>—it likewise may be a theory for all circumstances. Note that this idea applies not only to judges, but also to citizens. Similarly, to

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139. Tushnet, *supra* note 135, at 67; James E. Fleming, *Fidelity, Basic Liberties, and the Specter of Lochner*, 41 Wm. & Mary L. Rev. 147, 152 (1999).

140. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

141. See Sunstein, *Radicals*, *supra* note 2, at 12; Cass R. Sunstein, *Burkean Minimalism*, 105 Mich. L. Rev. 353 (2006) [hereinafter Sunstein, *Burkean Minimalism*].

142. Sunstein, *Radicals*, *supra* note 2, at 35, 129 (quoting Learned Hand, *The Spirit of Liberty* 190 (Irving Dilliard ed., 1953)).

the extent that minimalism grows out of concern for the limited institutional capacities of courts,<sup>143</sup> it may be a theory for all circumstances (unless courts somehow change and become more capable of making the kinds of judgments that those who are preoccupied with limited institutional capacities of courts think they are not capable of making, which is unlikely). And, to the extent that it is rooted in a conception of common law constitutionalism, understood in a minimalist way, it may be a theory for all circumstances. I say “understood in a minimalist way” because we might understand common law constitutionalism to be more ambitious theoretically than is minimalism.<sup>144</sup> This is exemplified in the jurisprudence of Justice Harlan, for example, in his dissent in *Poe v. Ullman*, which was embraced by the joint opinion in *Casey*.<sup>145</sup> Finally, though Sunstein says minimalism is appropriate in circumstances of moral disagreement and political conflict, he probably would add that these are perennial circumstances in a constitutional order like our own. He might well invoke Rawls’s characterization of the fact of reasonable moral pluralism as a permanent feature of a constitutional democracy such as our own, not to be regretted and not soon to pass away.<sup>146</sup>

### B. *Minimalism Itself as a Form of Perfectionism*

Sunstein’s “minimalism” is best understood in terms of what motivates it: the concern that “theoretically ambitious” federal judges are removing too many issues (for example, abortion and sexual orientation) from the purview of elected legislatures and therewith popular choice.<sup>147</sup> Perfectionist theories of constitutional interpretation like Dworkin’s and mine, he says, invite theoretically ambitious decisions (like *Roe v. Wade* and *Lawrence v. Texas*) that rob popular majorities of the opportunity to deliberate about, and through deliberation to reach consensus about, divisive moral issues. Sunstein proposes “minimalism,” therefore: “the view that judges should take narrow, theoretically unambitious steps” in deciding constitutional questions.<sup>148</sup>

I will attempt a clearer picture of minimalism momentarily, but I note first something that is not always clear in Sunstein’s argument: His position on interpretation is a two-part affair. Only one of these parts

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143. *Id.* at 35, 127; Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2867-70; *see infra* text accompanying notes 188-99.

144. *See supra* text accompanying notes 97-99.

145. 505 U.S. at 848-50 (discussing *Poe v. Ullman*, 367 U.S. 497, 542, 543 (1967) (Harlan, J., dissenting)). For an analysis of more and less theoretically ambitious conceptions of common law constitutionalism, see Benjamin C. Zipursky, *Neither Minimalism nor Perfectionism: Reflections on Sunstein’s and Fleming’s Efforts to Find the Sweet Spot in Constitutional Theory*, 75 Fordham L. Rev. 2997 (2007).

146. Rawls, *supra* note 19, at 36-37, 136, 144.

147. *See* Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2876. In this section, I draw upon Sotirios A. Barber & James E. Fleming, *Constitutional Interpretation: The Basic Questions* 140-44 (2007).

148. Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2868.

proposes anything fairly described as “minimalist.” The minimalist part, moreover, does not deal with *constitutional interpretation*; it does not advise interpreters how to find what the Constitution means. The minimalist part is rather a theory of *judicial strategy*. Its explicit audience is judges. Sunstein says his “focus . . . is constitutional interpretation by the judiciary.”<sup>149</sup> While he advises judges to adopt minimalism, he leaves “citizens and their representatives” free to adopt what he calls a “first-order perfectionism”<sup>150</sup>—which he attributes to Dworkin and me. Instead of advising judges and other interpreters how to find what the Constitution means, minimalism tells judges what to do *after* they have decided that question. In other words, minimalism tells judges the kind of thing they should say to the public in constitutional cases, not how to decide what the Constitution means.

Sunstein, however, does have a theory of how to decide what the Constitution means. That theory comprises the second part of his position. But this second part is not minimalist; it is in fact a version of perfectionism, as we shall see. Unraveling and then recombining the two parts of Sunstein’s position leaves us with the following advice to judges: (1) Find what the Constitution means essentially as Dworkin does, (2) then tell the people what is best for them to hear. Sunstein’s position raises many issues about the role of judges and the nature of constitutional democracy, especially the theory of *responsibility* in constitutional democracy.<sup>151</sup> But my present interest in his position is limited. I seek to show only that (1) his approach to constitutional interpretation is philosophic or perfectionist in nature, and (2) his “minimalism” is a theory of what judges should do or say to the public *after* they have decided what the Constitution means.

That Sunstein’s approach to constitutional interpretation is philosophic or perfectionist in nature is indicated in a preliminary way by his choice of labels. He calls Dworkin’s approach (and my Constitution-perfecting theory) “first-order perfectionism” and minimalism “second-order perfectionism,” which is enough to suggest that minimalism is some diminished form of a philosophic approach or perfectionism. Looking behind these labels to what they stand for, we see that Sunstein distinguishes four strategies of judicial conduct in constitutional cases. The first strategy (associated with Thayer) is that judges should let legislation stand unless legislation “is plainly in violation of the Constitution”—i.e., a “clear mistake” in violation beyond reasonable question. The second (associated with Raoul Berger and other originalists) is that judges should ground their judgments in “the original public meaning of the [constitutional] document.” The third strategy (Sunstein’s approach) is

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149. *Id.* at 4.

150. *Id.*

151. Sotirios Barber and I explore these issues in Barber & Fleming, *supra* note 147, at 52-55.



minimalism, in which judges should “build modestly on their own precedents” instead of ruling “broadly or ambitiously.” And the fourth strategy (associated with Dworkin) is that judges should represent the Constitution as the best it can be, “and in that sense perfect[] it.”<sup>152</sup> None of these strategies is “ruled off the table by the Constitution itself,” Sunstein says, and therefore each “must be defended by reference to some account that is supplied by the interpreter.”<sup>153</sup> These accounts, moreover, must be “perfectionist” in nature—that is, moral or philosophic.

Sunstein is clear and emphatic about this last point. I quote him in full:

Any approach to the founding document must be perfectionist in the sense that it attempts to make the document as good as it can possibly be. Thayerism is a form of perfectionism; it claims to improve the constitutional order. Originalism, read most sympathetically, is a form of perfectionism; it suggests that constitutional democracy, properly understood, is best constructed through originalism. Minimalism is a form of perfectionism too; it rejects Thayerism and originalism on the ground that they would make the constitutional system much worse. It would appear that the debate among Thayerians, originalists, minimalists, and perfectionists must be waged on the perfectionists' own turf. And if this is so, perfectionists are right to insist that any approach to the Constitution must attempt to fit and to justify it. Perhaps the alternatives to perfectionism are all, in one or another sense, perfectionist too.<sup>154</sup>

This is an important passage. For here, Sunstein recognizes that a philosophic argument is needed to defend any general approach to constitutional meaning and/or judicial strategy. Here Sunstein says something about his activity as a constitutional theorist. *He* has to offer a philosophic argument for minimalism, just as other theorists have to offer philosophic arguments for their positions. But this proves nothing about the activity of judges deciding concrete constitutional questions. Armed with Sunstein's philosophic argument for minimalism (whatever it may be), can *judges* (or any other interpreters) utilize the tenets of minimalism to decide concrete constitutional questions in a manner free of controversial philosophic choices? To see why the answer is no, I shall consider Sunstein's further observations about minimalism.

Sunstein says that “[n]o approach to constitutional interpretation makes sense in every possible world,” and that the case for each approach “must depend, in part, on a set of judgments about institutional capacities.”<sup>155</sup> Thus, where “democratic processes work exceedingly fairly and well” on their own—where there is no racial segregation, for example, and “political speech is not banned,” and “federalism and separation of powers are safeguarded, and precisely to the right extent,” all without “judicial intervention”—then it “would make a great deal of sense” for judges to

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152. Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2868.

153. *Id.* at 3.

154. *Id.* at 3; *see also* Sunstein, *Radicals*, *supra* note 2, at 41.

155. Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2867.

adopt Thayer's approach to constitutional adjudication. On the other hand, when representative institutions are behaving badly and "the original public meaning is quite excellent" from the standpoint of honoring constitutional rights and institutions, then an originalist approach "would seem best." Where original meanings are inadequate and courts are more competent, morally and intellectually, than representative institutions, Dworkin's approach is best. And minimalism is best when original meaning "is not so excellent" for protecting rights and institutions, "the democratic process is good but not great," and "judges will do poorly if they strike out on their own, but very well if they build modestly on their own precedents."<sup>156</sup>

From this it appears that before a judge can decide to go minimalist, she must decide (1) the best view of constitutional rights and/or institutions; (2) whether the original meaning comports with the best view of rights/institutions; (3) how well present democratic processes are progressing toward the best view of rights/institutions; and (4) whether judges are presently likely to do a better job than the democratic processes in serving the best view of rights/institutions. The complexity and theoretical ambition of these moral and nonmoral judgments require no elaboration. They are at least as ambitious as anything Dworkin has ever attempted. The minimalist judge may pretend otherwise to the public. She may say, for example, that a particular prosecution of homosexual intimate conduct is unconstitutional simply because prosecutions under the relevant statute are too rare for the public to know what to expect, and that knowing what to expect is a hallmark of the rule of law. But what she says to the public is one thing, and what she is thinking to herself is another. What she is thinking is that public opinion on homosexuality is heading in the right direction without her help, and that she risks mucking things up if she boldly steps ahead of public opinion and flatly declares a constitutional right of homosexuals to intimate association. If there is minimalism here, it is not in how the judge understands the Constitution, it is in how she presents herself to the public as a matter of judicial strategy.

In closing my assessment of minimalism, I want to recapitulate two main points. One, Sunstein has come out as a perfectionist: He acknowledges that his theory of minimalism, like every theory, claims to fit and justify the Constitution and to make it the best it can be. Two, Sunstein's "minimalist" judgments about cases protecting the right to privacy or autonomy (which I assess more fully in Chapter 7 of my book) are no less "theoretically ambitious" than are my "perfectionist" analyses grounded in autonomy, just as his theory of deliberative democracy is no less "theoretically ambitious" than is my theory of constitutional democracy. In sum, there is nothing minimalist about the theoretical and strategic judgments called for by Sunstein's minimalism.

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156. *Id.* at 1-3.

IV. FROM THE PARTIAL CONSTITUTION TO THE MINIMAL CONSTITUTION:  
THE INCREDIBLE SHRINKING CONSTITUTIONAL THEORY

You may have seen (or heard of) the cult science fiction film, *The Incredible Shrinking Man* (or its take-off, *The Incredible Shrinking Woman*).<sup>157</sup> I hope Cass will not be offended if I suggest that the odyssey of his theory from *The Partial Constitution* to the minimal Constitution in *Radicals in Robes* is that of an incredible shrinking constitutional theory. I assume he will not be since he names the fictional society for which his theory is appropriate "Smallville."<sup>158</sup>

A. *Thinning Deliberative Democracy Down*

Sunstein's theory has shrunk from a theory of perfecting deliberative democracy—or judicial *reinforcement* of the preconditions for its legitimacy—to a theory of largely permitting the political processes to proceed, such as they are (or largely judicial *deference* to the representative processes, such as they are). Ironically, as stated above, I was drawn to engage with Sunstein's *The Partial Constitution* in the first place because of its evident perfectionism: It was a process-perfecting theory to beat Ely's analogous theory.<sup>159</sup> Sunstein criticized Ely's theory for not adequately developing a substantive theory of democracy that courts were to reinforce. He criticized Ely's interest-group pluralist conception of representative democracy and offered instead a liberal republican conception of deliberative democracy. Yet Sunstein agreed with Ely that the structure of a theory should be process-perfecting: it should secure the preconditions for democracy.<sup>160</sup> I criticized Sunstein's theory for being, even then, merely a theory of "the partial Constitution" as distinguished from the whole Constitution: it emphasized the preconditions for deliberative democracy to the neglect of those for deliberative autonomy. Thus, it fell short of a full Constitution-perfecting theory.<sup>161</sup>

*The Partial Constitution* provides Sunstein's fullest exposition of a substantive vision of the Constitution as embodying a deliberative democracy. There he develops a substantive theory of the Constitution and the form of government that it embodies, as well as a theory of judicial review. His theory of judicial review would secure the preconditions for deliberative democracy though it would leave fuller realization of some of those preconditions to legislatures and executives in the Constitution outside the courts.

Since then, Sunstein has focused on developing a theory of judicial review (or judicial strategy) over and against a theory of the Constitution,

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157. *The Incredible Shrinking Man* (Universal Studios 1957); *The Incredible Shrinking Woman* (Universal Pictures 1981).

158. Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2868.

159. See *supra* text accompanying note 5.

160. Sunstein, *Partial*, *supra* note 3, at 104-05, 142-44.

161. Fleming, *Securing*, *supra* note 1, at 59-60.

that is, on the role of courts more than on the commitments of the Constitution itself. In his subsequent work, we see less and less elaboration of the substantive commitments of our Constitution and underlying constitutional scheme, conceived as a deliberative democracy. We see more and more elaboration of the problems with judicial review—the limited institutional capacities of courts, the circumstances of moral disagreement and political conflict, the brakes that social resistance, unintended consequences, and backlash put upon courts bringing about liberal social change, and the like.

Worse yet, we see an erosion or narrowing of Sunstein's commitments to deliberation and agreement. Deliberation, once the heart and soul of his conception of deliberative democracy, is now worrisome: It leads not to reasonable agreement but to polarization.<sup>162</sup> And agreement itself shrinks from a regulative ideal to be sought through deliberation to shallow, narrow, minimal agreements that "leave things undecided": We should seek, at most, "incompletely theorized agreements."<sup>163</sup>

What is more, his once rich conception of deliberative democracy has withered away into a minimal conception of democracy that is practically majoritarianism. In *The Partial Constitution*, Sunstein argued for deliberative democracy over and against interest-group pluralist conceptions of representative democracy like Ely's and majoritarian conceptions of democracy like Holmes's.<sup>164</sup> He also criticized Ely for apparently thinking that democracy was self-defining rather than arguing for one conception over other available conceptions.<sup>165</sup> Yet in *Radicals in Robes*, we see Sunstein talking, against perfectionists, almost as if democracy were self-defining—and as if judicial review that is "counter-majoritarian" were, for that reason, objectionably undemocratic.<sup>166</sup> To be sure, he still distinguishes minimalism from majoritarianism.<sup>167</sup> My point is that the gap between these two conceptions has shrunk considerably in *Radicals in Robes* as compared with the huge gulf between deliberative democracy and majoritarian democracy in *The Partial Constitution*.

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162. Compare Sunstein, *Partial*, *supra* note 3, at 133-45, 162-94, with Sunstein, *Radicals*, *supra* note 2, at 167-69, 173, and Cass R. Sunstein, *Why Societies Need Dissent* 111-44 (2003).

163. Compare Sunstein, *Partial*, *supra* note 3, at 137, with Sunstein, *Legal Reasoning*, *supra* note 6, at 4-5, 35-61, and Sunstein, *Radicals*, *supra* note 2, at 27-29.

164. Sunstein, *Partial*, *supra* note 3, at 104-05, 143-44 (criticizing Ely's interest-group pluralist conception of representative democracy); *id.* at 124-27 (criticizing Holmes's majoritarian conception of democracy).

165. *Id.* at 104-07, 143.

166. See Sunstein, *Radicals*, *supra* note 2, at 35, 39, 51; see also *supra* text accompanying notes 48-55.

167. Sunstein, *Radicals*, *supra* note 2, at 44, 50-51, 251.

B. *From Theory of Judicial Review (or Judicial Strategy) to Theory of the Constitution Itself*

Furthermore, it appears that Sunstein's constitutional aspirations and commitments have atrophied (or at least been "chastened") as minimalism has expanded from being a theory of judicial review (or judicial strategy) to practically being a theory of the Constitution itself. In *The Partial Constitution*, the distinction between theory of the Constitution and theory of judicial review was clear, and it was clear that Sunstein had a progressive substantive vision of the Constitution. Yet, because of concerns about the institutional limits of courts, he argued that some provisions of the Constitution should be judicially underenforced, and should be more fully enforced by legislatures and executives as part of the Constitution outside the courts.<sup>168</sup> In *Legal Reasoning and Political Conflict* and *One Case at a Time*, Sunstein developed minimalism as a theory of judicial review (or judicial strategy). It was theoretically possible to hold a perfectionist theory of the Constitution (like mine) while holding a minimalist theory of judicial review. Sunstein acknowledges this possibility in his piece for our Symposium.<sup>169</sup> For example, a perfectionist might believe that the best strategy for realizing our constitutional commitments in certain circumstances is minimalist judicial review. Recall my analysis above of minimalism as damage control during a transition from a moderately liberal or conservative constitutional order to a (possibly) counter-revolutionary one.<sup>170</sup>

But in *Radicals in Robes*, the distinction between a theory of the Constitution and a theory of judicial review (or judicial strategy) becomes blurred. You may say, well, this is understandable or excusable in a book published by a trade press and written for a more general audience than just specialists in constitutional theory. To the contrary, this is the audience for whom this distinction matters most, if we really do believe in taking the Constitution seriously outside the courts—that is, if we really do believe that the people themselves have obligations conscientiously to reflect upon the meaning of our constitutional commitments rather than viewing constitutional interpretation as the exclusive province of the courts. Instead, the Constitution outside the courts evidently has withered away. The book does not seem to conceive the people themselves as reflecting conscientiously upon the meaning of our constitutional commitments. It appears that courts should leave things undecided simply to enable the people to decide divisive moral issues as they wish, leaving the Constitution aside.<sup>171</sup>

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168. Sunstein, *Partial*, *supra* note 3, at 133-49.

169. Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2869.

170. See *supra* text accompanying note 136.

171. See Sunstein, *Radicals*, *supra* note 2, at 126-29; Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2870.

Indeed, we should ask whether *Radicals in Robes* expresses or presupposes a minimalist conception of the Constitution itself. What might one think if one held a minimalist view of the Constitution itself? One might think that the commitments of the Constitution are relatively thin and themselves leave most questions concerning their meaning and application undecided. And one might think that the Constitution simply says nothing about many or most things.<sup>172</sup> And one might think, as Holmes famously put it in his dissent in *Lochner*, that a constitution “‘is made for people of fundamentally differing views.’”<sup>173</sup> And one might think, as Hand famously put it, that “‘the spirit of liberty is . . . not too sure that it is right,’” whether about the obligations of justice or the commitments of the Constitution.<sup>174</sup> And one might be skeptical or distrustful of abstract moral principles generally, fearing that such principles are divisive and polarizing.<sup>175</sup> Finally, one might think that “ought implies can,” that courts have limited institutional capacities to interpret a Constitution any thicker or more ambitious than the foregoing propositions entail<sup>176</sup> and, therefore, that we ought to conceive of the Constitution itself as being thin enough and modest enough for their limited institutional capacities to be adequate to interpret and apply it. Here we can see a downsizing, recasting, or retrofitting of the Constitution itself to fit a conception of limited judicial capacities. Sound familiar? All of these ideas are expressed in one form or another in *Radicals in Robes*. To the extent they are, perhaps that work does indeed express or presuppose a minimalist view of the Constitution itself.

### C. Exaggerated Fears About Backlash and Unintended Consequences

Exaggerated fears about backlash and unintended consequences, too, have contributed to the minimalization or evisceration of constitutional commitments. It is striking to what degree Sunstein has incorporated arguments against hollow hopes that courts can bring about liberal social change, together with worries about backlash and unintended consequences, into his minimalism. I grant that as early as *The Partial Constitution*, Sunstein had endorsed Gerald Rosenberg’s famous hollow hopes argument.<sup>177</sup> Just as we should not harbor *hollow hopes* that courts can bring about liberal social change, so, too, we should not have *exaggerated fears* that courts will provoke backlash, cause unintended consequences,

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172. See Sunstein, *Radicals*, *supra* note 2, at 86.

173. *Id.* at 47 (quoting *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting)).

174. *Id.* at 35 (quoting Hand, *supra* note 142, at 190).

175. See *id.* at 12.

176. See *id.* at 127; Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2867-70, 2878-80.

177. Sunstein, *Partial*, *supra* note 3, at 375 n.42 (stating that he drew “heavily [on Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991)] for the discussion of *Brown* and *Roe*”).

and make things worse when they protect controversial constitutional rights. Sunstein seems to endorse the familiar arguments about *Roe* provoking backlash, spawning the right to life movement and the like (citing Glendon, for example).<sup>178</sup> The causes of the emergence of the right to life movement are numerous, and most of them have nothing to do with judicial decisions—and certainly nothing to do with how broadly or narrowly, deeply or shallowly, judicial opinions are written. The revival of religious fundamentalism generally would have occurred with or without *Roe*. The right to life movement would have been born with or without *Roe*. More generally, the “new right,” neoliberalism, and neoconservatism—countless varieties of “antiliberalism” (to use the term Stephen Holmes has used)<sup>179</sup>—would have emerged with or without *Roe*. The “women’s movement” and gains in women’s equality and reproductive freedom would have provoked backlash with or without *Roe*. Gains in women’s equality and reproductive freedom, whether furthered through legislation or judicial decision, and whether through federal courts or state legislatures, would have provoked backlash. See the forceful discussion in Susan Faludi’s *Backlash: The Undeclared War Against American Women*.<sup>180</sup>

Similarly, if the Supreme Court had never decided *Brown v. Board of Education*,<sup>181</sup> and Congress nonetheless had passed the very civil rights laws that it in fact enacted, we still would have experienced resistance to and backlash against gains in equality and civil rights for African Americans. I mention this particular example because Sunstein sometimes writes as if there is something inherent in equality that makes it less adventuresome or less intrusive on the political processes than liberty or privacy (and correspondingly less likely to provoke backlash). To take another example, the Supreme Court, after *Shapiro v. Thompson*,<sup>182</sup> never recognized a constitutional right to welfare,<sup>183</sup> and gains in the “war on poverty” mostly were pursued through the legislative processes. Nonetheless, we still have experienced backlash against welfare programs, including the “war against the poor” and “welfare reform.”<sup>184</sup>

All of these developments—the right to life movement, resistance to gains in women’s equality and reproductive freedom, resistance to gains of the civil rights movement (culminating in resistance to affirmative action programs), welfare reform, and the like—are part of a larger backlash against the 1960s and its aftermath. Liberal developments in the 1960s and

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178. Sunstein, *Radicals*, *supra* note 2, at 104-05, 248-49, 268 n.4 (citing Glendon, *supra* note 87).

179. Stephen Holmes, *The Anatomy of Antiliberalism* (1993).

180. Susan Faludi, *Backlash: The Undeclared War Against American Women* (1992).

181. 347 U.S. 483 (1954).

182. 394 U.S. 618 (1969).

183. The most important case in which the Court declined to recognize a right to welfare is *Dandridge v. Williams*, 397 U.S. 471 (1970).

184. See, e.g., Herbert J. Gans, *The War Against the Poor: The Underclass and Antipoverty Policy* (1995).

1970s provoked all manner of antiliberalism, and backlash against liberal gains, however advanced, whether through courts or legislatures, courts together with legislatures, federal or state governments (and, I should add, whether through maximalist or minimalist judicial decisions). To take a hypothetical, does anyone seriously believe that if the Massachusetts Supreme Judicial Court had never decided *Goodridge*,<sup>185</sup> and if instead the Massachusetts legislature on its own initiative had passed a law recognizing same-sex marriage in November 2003, the repercussions for the 2004 elections would have been significantly different? Granted, the attack would not have been on activist liberal judges, but on liberal legislatures, but there would have been similar repercussions. To offer another hypothetical, no one should believe for one second that people like Glendon would have complained about the Supreme Court deciding the matter of abortion for the whole country in one bold stroke in *Roe* if the Court had reached the opposite result and interrupted the state-by-state democratic processes by holding that fetuses are full persons who are entitled to life and to equal protection along with born persons.<sup>186</sup> When courts make liberal decisions, they become an easy target for antiliberals' attacks, but we should not let that fool us into thinking that the primary objection is to *courts attempting change* rather than to *liberal change as such*. Law professors, because they are excessively court-centered, are especially vulnerable to falling into this way of thinking.

There is a huge measure of what Albert Hirschman famously called the "rhetoric of reaction"<sup>187</sup> in these tales of court decisions like *Roe* leading to unanticipated consequences and provoking backlash, even to the point of making things worse. Those who oppose liberal change make gloomy predictions and warnings about unintended consequences and backlash. Again, they warn about liberal change through whatever venue: not just courts but also legislatures and executives, not just the federal government but also state governments. On top of these warnings, they pile the argument that liberal do-gooders always make things worse, not only for the world but even (perhaps especially) for the people they seek to help and for themselves. This kind of thinking is especially rampant among law and economics scholars and those who work in their shadow. In this sense, economics indeed proves to be the "dismal science."

It is important to understand that these "rhetoric of reaction" moves are not simply reactionary; people who make these moves affirmatively aim to demoralize those who push for liberal change. I fear that Sunstein has been more affected by these ideas than is warranted. Perhaps this should come as no surprise given that he teaches at University of Chicago, surely the

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185. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

186. See Glendon, *supra* note 87.

187. Albert O. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (1991).



stronghold of “rhetoric of reaction” ideas. Come to think of it, Gerald Rosenberg of hollow hopes fame also teaches at University of Chicago.

*D. Preoccupation with the Limited Institutional Capacities of Courts*

The final aspect of the downsizing of Sunstein’s constitutional theory that I want to mention is his increasing preoccupation with the limited institutional capacities of courts. This preoccupation, too, seems to be an occupational hazard at Chicago (although Sunstein’s former Chicago colleague and sometime coauthor Adrian Vermeule—whose trademark is emphasis on limited institutional capacities<sup>188</sup>—has now moved to Harvard). Sunstein has a revealing footnote in his essay for the Symposium in which he says basically that he is not repudiating his arguments in *The Partial Constitution*, but that perhaps the discussion there would have been better if he had grappled more fully with the limited institutional capacities of courts.<sup>189</sup>

Sunstein offers a number of prudential reasons concerning the likelihood that courts will get things wrong and the lack of any special qualities making judges better suited than citizens or legislatures to resolve moral conflicts. Thus, judicial minimalism is appropriate given the relative institutional capacities of courts as compared with politically elected officials.<sup>190</sup> There are two opposed traditions in constitutional theory concerning the relative institutional capacities or positions of courts and legislatures. On one account, courts’ independence from politics is their greatest weakness or disqualification for performing a function like elaborating and protecting substantive constitutional freedoms against encroachment through the political processes. Sunstein has fully developed a version of this view. On another account, courts’ independence from politics is their greatest strength or qualification for discharging such a responsibility. Dworkin has advanced a well-known version of such a view.<sup>191</sup> It is not possible to resolve the long-standing dispute between these traditions here. But it is worth recalling Justice Robert Jackson’s formulation in the second flag salute case (invalidating a required salute), responding to Justice Felix Frankfurter in the first such case (upholding a required salute): rather than deferring to the “vicissitudes” of the political processes, courts vindicate constitutional freedoms “not by authority of [their] competence but by force of [their] commissions.”<sup>192</sup> If the

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188. See, e.g., Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (2006).

189. Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2867 n.1, 2875 n.34 (discussing Vermeule, *supra* note 188).

190. Sunstein, *Legal Reasoning*, *supra* note 6, at 177; Sunstein, *Radicals*, *supra* note 2, at 127.

191. See, e.g., Ronald Dworkin, *A Matter of Principle* 33-71 (1985); Dworkin, *Taking Rights Seriously*, *supra* note 41.

192. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 640 (1943), *overruling* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

commission of the courts is to preserve the Constitution, including substantive liberties, against encroachment through the political processes, they would be abdicating their responsibility were they to side with Sunstein and against Dworkin on this dispute.

"Ought implies can," and Sunstein and other scholars who are preoccupied with the limited institutional capacities of courts say that courts simply are not competent to carry out the commission that Jackson, Dworkin, and I believe they hold.<sup>193</sup> Such scholars might object that judges simply are not capable of being Dworkin's "Hercules" or "Platonic guardians" (to use Hand's term).<sup>194</sup> I wish Dworkin had never used the alliterative formulation "Hercules"—as in "Hercules" versus "Herbert" (Lionel Adolphus Hart)—in describing judging under his theory of legal interpretation as contrasted with judging under H. L. A. Hart's legal positivism.<sup>195</sup> For Dworkin's formulation makes the responsibilities of judging seem too Herculean (or Olympian). And that plays into or exacerbates the worries of those who are preoccupied with the limited institutional capacities of courts.

In reality, judges throughout American history have shown themselves to be perfectly capable of making the kinds of judgments that what Dworkin calls a moral reading of the Constitution, and what Sotirios A. Barber and I call a philosophic approach to constitutional interpretation, require of them. In "Hard Cases," Dworkin said his "rights thesis" is "less radical than it might first have seemed": "The thesis presents, not some novel information about what judges do, but a new way of describing what we all know they do."<sup>196</sup> In *Constitutional Interpretation: The Basic Questions*, Barber and I defend a philosophic approach to constitutional interpretation that does not require judges to be philosophers.<sup>197</sup> It requires only that they make philosophic choices of the sort that they have been making all along, from John Marshall through Robert Jackson through John Marshall Harlan II through John Paul Stevens through David Souter. And it presupposes that they are capable of (and justified in) making these judgments.

I want to venture a hypothesis about the scholars who are preoccupied with the limited institutional capacities of courts. In the first instance, they write as if they are primarily skeptical about the institutional capacities of *courts* to make the decisions that, for example, perfectionists say courts have a responsibility to make. They want to leave things to be decided by the legislatures, and so we presuppose that they have confidence in the institutional capacities of legislatures. Then it turns out that they are

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193. See Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2867-70, 2878-80; Vermeule, *supra* note 188.

194. Dworkin, *Taking Rights Seriously*, *supra* note 41, at 105; Learned Hand, *The Bill of Rights* 73 (1972) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.").

195. Dworkin, *Taking Rights Seriously*, *supra* note 41, at 105-30.

196. *Id.* at 90.

197. Barber & Fleming, *supra* note 147, at 155-70.

skeptical about the institutional capacities of *legislatures* to make the decisions that it seems they have a responsibility to make. Wait, it turns out that *executives*, too, have limited institutional capacities and are not capable of making the regulatory and other determinations that we might think they have a responsibility to make. The upshot is that they say we should leave decisions to *markets* instead of governmental regulation. (I grant that Sunstein does not go all the way with them in the embrace of markets.)<sup>198</sup> Furthermore, it is not as if these scholars are populists who have confidence in the capacities of the people themselves to make decisions either; they are greatly skeptical of the people's capacities, too. All of this skepticism about the institutional capacities of all of these institutions and the people themselves is based in part on moral skepticism and other forms of skepticism.

But it is important to see that this skepticism about capacities is driven in part by exaggerated, too lofty conceptions of what it is that judges, legislatures, executives, and citizens are said to have responsibilities to do in the first place. For example, those who are preoccupied with limited institutional capacities of courts think that, under a moral reading, a philosophic approach, or a Constitution-perfecting theory, judges must be Herculean or Platonic philosopher judges who are capable of living on Olympus.<sup>199</sup> In fact, again, all these approaches require is that judges be capable of doing what they have been doing all along.

A final word about Chicago and the incredible shrinking constitutional theory. When Ronald Dworkin gave the keynote address for the Fordham Symposium on *Fidelity in Constitutional Theory* a decade ago, he remarked upon how antitheoretical certain scholars at Chicago had become, alluding to Posner and Sunstein. He viewed their opposition to theories of the sort he propounded as rooted in pragmatism.<sup>200</sup> I have suggested that some strains of thinking coming out of Chicago have contributed to the shrinking of constitutional theory. When I think of Chicago, a city I love, I think of Carl Sandburg's poems about Chicago.<sup>201</sup> Whatever happened to the "Stormy, husky, brawling, City of the Big Shoulders" of Sandburg's admiration? Where is that "tall bold slugger set vivid against the little soft cities"? Certainly not in Smallville. Perhaps, you will say, on Olympus. But I do not believe that we have to live on Olympus for Dworkin's moral reading, Barber's and my philosophic approach, and my Constitution-

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198. See, e.g., Cass R. Sunstein, *Free Markets and Social Justice* (1997).

199. Sunstein, *Second-Order Perfectionism*, *supra* note 32, at 2869.

200. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Fordham L. Rev. 1249, 1265-68 (1997) [hereinafter Dworkin, *The Arduous Virtue*]; see also Ronald Dworkin, *Justice in Robes* 57-74 (2006) (criticizing the "Chicago School" represented by Posner and Sunstein).

201. Carl Sandburg, *Chicago Poems* (1916). Dworkin also alluded to Sandburg's poems in suggesting that the empiricist, pragmatic approach championed by Posner and Sunstein was "very *Chicago*. Broad-shouldered hog butcher to the world, and all of that." Dworkin, *The Arduous Virtue*, *supra* note 200, at 1265.

perfecting theories to be appropriate—just down here in the United States of America.

CONCLUSION: THE ODYSSEYS OF ALEXANDER BICKEL AND CASS  
SUNSTEIN

In 1994, when Cass came to Fordham to give the Robert L. Levine Lecture,<sup>202</sup> a colleague of mine (and Harvard Law School classmate of Cass), Jim Kainen, said that he viewed Cass's project as trying to work out a synthesis of the ideas of John Hart Ely and Alexander Bickel. At the time, I got the Ely part, but not the Bickel part. Then, as Sunstein began to develop minimalism, I began to see the Bickel part. In *Democracy and Distrust*, Ely aptly concludes his critique of theories of "discovering fundamental values" with a section called "the odyssey of Alexander Bickel."<sup>203</sup> I want to close by sketching parallels between the odysseys of Bickel and Sunstein.

Sunstein's *The Partial Constitution* is the beginning point in the journey, roughly analogous to Bickel's *The Least Dangerous Branch*.<sup>204</sup> Here Sunstein, like Bickel, has confidence in the capacity of courts to discover or construct substantive principles or theories and to elaborate them. At the same time, Sunstein like Bickel tempers this confidence with a recognition of the institutional limits of courts. Gerald Gunther famously quipped that Bickel had "100% insistence on principle, 20% of the time."<sup>205</sup> For Sunstein at that point, I would say the latter percentage was considerably higher. Though perhaps we should say that Sunstein would have 20% insistence on principle, 100% of the time!

The middle point of the odyssey for Bickel was *The Supreme Court and the Idea of Progress*;<sup>206</sup> for Sunstein, it is *Legal Reasoning and Political Conflict and One Case at a Time*. Bickel became deeply critical of the Warren Court and what he saw as its blueprint for the future and vision of the good society, just as Sunstein became critical of perfectionism and developed minimalism. Bickel became preoccupied with social resistance to judicially pursued change and with the limited institutional capacities of courts. Ditto for Sunstein.

The next point for Bickel (and, tragically, his final point) was his posthumously published *The Morality of Consent*, with its evident Burkeanism;<sup>207</sup> for Sunstein, it may be *Radicals in Robes* or, more clearly and tellingly, "Burkean Minimalism."<sup>208</sup> Perhaps his next book will be an

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202. Cass R. Sunstein, *Conflicting Values in Law*, 62 Fordham L. Rev. 1661 (1994).

203. Ely, *Democracy and Distrust*, *supra* note 4, at 71-72.

204. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

205. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1, 3 (1964).

206. Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (1970).

207. Alexander M. Bickel, *The Morality of Consent* (1975).

208. Sunstein, *Burkean Minimalism*, *supra* note 141.

even clearer counterpart to the Burkeanism of Bickel's *The Morality of Consent*.<sup>209</sup>

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209. Indeed, at the Symposium, responding to my suggestion of parallels between Bickel's thought and his own, Sunstein stated that his next book is on tradition.