Boston University School of Law
Scholarly Commons at Boston University School of Law

Faculty Scholarship

12-1997

In Search of a Substantive Republic

James E. Fleming
Boston University School of Law

Linda C. McClain
Boston University School of Law

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

 Part of the Constitutional Law Commons

Recommended Citation

James E. Fleming & Linda C. McClain, *In Search of a Substantive Republic* , *in* 76 Texas Law Review 509 (1997).
Available at: https://scholarship.law.bu.edu/faculty_scholarship/2805

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

76 Tex. L. Rev. 509

Texas Law Review
December, 1997

Book Review

James E. Fleming [a1] Linda C. McClain [aa1]

Copyright (c) 1997 Texas Law Review Association; James E. Fleming, Linda C. McClain

IN SEARCH OF A SUBSTANTIVE REPUBLIC

Democracy's Discontent: America in Search of a Public Philosophy. by Michael J. Sandel. [d1] Cambridge: the Belknap Press of Harvard University Press, 1996. Pp. xi, 417. $24.95. [r1]

Legal Reasoning and Political Conflict. By Cass R. Sunstein. [dd1] New York: Oxford University Press, 1996. Pp. x, 220. $25.00. [rr1]

WESTLAW LAWPRAC INDEX

LIT--Literature Reviews & Analyses

The publication of Michael J. Sandel's Democracy's Discontent: America in Search of a Public Philosophy is a long-awaited and important event in political and constitutional theory. In 1982, through his first book, Liberalism and the Limits of Justice, [1] Sandel emerged as a leading communitarian or civic republican critic of liberalism. That book became prominent, not because its criticisms of liberalism were dispositive, but because it eloquently and elegantly captured discontent with liberalism and evoked yearnings for an alternative. Since then, Sandel has occupied a position on the American intellectual landscape as a placeholder for a ***510** communitarian or civic republican alternative not yet fully developed. In Democracy's Discontent, he carries forward his critique of liberalism. What is distinctive about his new book is its application of the critique to an analysis of the competing liberal and republican strands of the American political and constitutional tradition. Sandel calls for a reinvigoration of the republican strand and intimates a republican constitutional theory. Meanwhile, some prominent constitutional theorists, including Cass R. Sunstein, have sought to develop a synthesis of liberalism and republicanism, and Sunstein's recent book, Legal Reasoning and Political Conflict, [2] puts forward a model of legal reasoning appropriate for a liberal republic.

The appearance of Democracy's Discontent and Legal Reasoning and Political Conflict provides a good occasion for asking: What have the calls for rejuvenating republicanism in constitutional theory come to? Against the backdrop of that question, Sandel and Sunstein make an illuminating pair. Both are important proponents of reconstructing republicanism, yet their theories, back to back, are the converse of one another with respect to their prescriptions for the form that a republican constitutional theory should take and for the character that legal reasoning in constitutional interpretation should assume in the face of moral disagreement and political conflict in a pluralistic polity.

Sandel charges that our reigning public philosophy represents a “minimalist liberalism” and an impoverished vision of the “procedural republic,” and he exhorts us to embrace a robust republicanism and a richer conception of what we will call a “substantive republic.” Sunstein, by contrast, objects that liberal constitutional theory sponsors “maximalist” constitutional interpretation by the judiciary and too thick a vision of the substantive Constitution. He develops a “minimalist” republican

constitutional theory and advocates judicial reinforcement of the procedural preconditions for deliberative democracy, his version of the procedural republic. For Sunstein, the domain of any substantive republic is outside the courts, in the realm of deliberative democracy.

Furthermore, in addressing the problem of moral disagreement and political conflict in a pluralistic polity, Sandel and Sunstein proceed in diametrically opposed directions. Sandel argues that in interpreting constitutional freedoms courts should stop bracketing conceptions of the good and move beyond liberal toleration or autonomy arguments about ***511** protecting individual choices to republican moral arguments about fostering substantive human goods or virtues or ends by securing those freedoms. To the contrary, Sunstein contends that courts should bracket not only the good but also the right, by eschewing both toleration or autonomy arguments about choices and moral arguments about the good in favor of lawyerly methods of seeking incompletely theorized agreements on particular outcomes, engaging in reasoning by analogy from case to case, and leaving things undecided in order to allow democratic deliberation to proceed.

In this essay, we analyze Sandel's and Sunstein's versions of republican constitutional theory. In Part I, we assess Sandel's critique of liberalism's "Constitution of the procedural republic," using Sunstein's conception of the Constitution of deliberative democracy as a foil. In Part II, we explore Sandel's intimations of an alternative republican vision, which we will call the "Constitution of the substantive republic," again using Sunstein's theory as a foil. We focus on their approaches to constitutional interpretation in circumstances of moral disagreement and political conflict, examining their critiques of constitutional law cases protecting a right of privacy or autonomy. Finally, in Part III, we consider which alternative, that of Sandel or Sunstein, offers the more attractive republican theory.

Our basic contentions are that Sandel is in search of too thick a republican constitutional theory for a substantive republic and that Sunstein has developed too thin a republican theory. By "too thick," we mean that Sandel's theory presupposes or requires more or deeper agreement on goods or virtues or ends than seems feasible, given the fact of reasonable pluralism, without intolerable state oppression; [3] by "too thin," we mean that Sunstein's theory, in the face of moral pluralism, aims for less or shallower agreement than is necessary adequately to secure fundamental constitutional freedoms. We further contend that, despite his search, Sandel fails to deliver the goods for a substantive republic. Instead, he provides a call for a republican form of argument or justification for constitutional freedoms and a commitment to a process of deliberation. Ironically, what Sandel delivers, like what Sunstein develops, is a form of procedural republic.

Sandel's and Sunstein's theories, through their opposing shortcomings, unwittingly show that we should construct a liberal republican constitutional theory that would secure the basic liberties that are preconditions for self-government in two senses: not only deliberative democracy, whereby citizens apply their capacity for a conception of justice to deliberating about the justice of basic institutions and social policies, as well as about the ***512** common good, but also deliberative autonomy, whereby citizens apply their capacity for a conception of the good to deliberating about and deciding how to live their own lives. [4]

I. The Constitution of the Procedural Republic

A. Contemporary Liberalism and the Procedural Republic

Sandel argues that our democracy is engulfed by discontent because our public philosophy--"the political theory implicit in our practice, the assumptions about citizenship and freedom that inform our public life"--is impoverished and inadequate to the challenges of self-government. That public philosophy, he contends, is a form of liberal political theory whose central idea is that, since citizens disagree about the best way to live, the government should be neutral and not affirm in law any particular conception of the good life. Instead, it should provide a framework of rights that respects persons as free and independent selves, capable of choosing their own values and ends. Because this liberalism "asserts the priority of fair procedures over particular ends," Sandel suggests, "the public life that it informs might be called the procedural republic." [5]

In searching for the "public philosophy implicit in our practice," Sandel focuses on constitutional law, "for it is here that the assumptions and commitments of the procedural republic"--its aspiration to neutrality and its conception of the freely choosing, "unencumbered self"--"most vividly appear." [6] In criticizing contemporary liberalism, Sandel covers some of the same ground

as his earlier critique of John Rawls's A Theory of Justice. [7] To Rawls's more recent argument that his liberal conception of justice as fairness is "political not metaphysical," [8] Sandel replies that Rawls aspires to a "minimalist liberalism" that "stays on the surface, philosophically speaking," by "bracketing moral and religious questions where politics is concerned." [9]

***513** Sandel sharply contrasts such liberalism with republicanism, a strand of the American political and constitutional tradition that has waxed and waned over the course of our history. The most salient contrast concerns their respective conceptions of freedom and of the role of government in fostering such freedom. For liberalism, freedom consists of the "capacity to choose our ends." [10] Accordingly, "government should be neutral toward the moral and religious views its citizens espouse," take existing preferences as given, and merely "provide a framework of rights" within which citizens may pursue the ends and values that they choose. [11] In contrast, within the republican tradition, to be free is to be capable of sharing in self-government, which involves "deliberating with fellow citizens about the common good and helping to shape the destiny of the political community." [12] Because self-government requires certain qualities of character, or civic virtues, government cannot be neutral but instead must engage in a formative project to cultivate such qualities. Sandel contends that the liberal conception of freedom is attractive as a response to the circumstances of moral pluralism, but flawed, because it gives up too much--the republican formative project and its ideal of self-government. [13]

In his previous book, The Partial Constitution, Sunstein claimed to move beyond the clash between liberalism and republicanism to a synthesis, liberal republicanism. [14] Indeed, Sunstein's liberal republican conception of deliberative democracy set out there might seem to be a standing refutation of (or at least counterexample to) Sandel's claims about contemporary liberal political and constitutional theory. First, Sunstein's central commitment is to deliberative democracy, in which citizens deliberate about the common good instead of merely aggregating self-interested preferences. Second, Sunstein believes that liberalism is compatible with a mild form of perfectionism, pursuant to which government tries to help people lead good lives. Like Sandel, Sunstein shows concern for developing in citizens the capacity for self-government. Rather than merely facilitating choice and respecting existing preferences, government may try to shape and transform preferences in light of citizens' "collective aspirations" as well as on grounds of freedom or autonomy. [15] ***514** Moreover, Sunstein states that he draws upon the liberalism of Rawls, John Stuart Mill, and John Dewey, and that he believes his account is compatible with Rawls's. [16] Although our focus here is on constitutional theory, we should note that one of the disappointments of Sandel's book is his failure to acknowledge and reckon with a considerable body of work that calls into question his treatment of liberal political theory. That work shows that much liberal theory is more "republican" or more concerned with civic virtue, the formative project of politics, and deliberative democracy than Sandel's sketch of the landscape countenances. [17]

In Legal Reasoning and Political Conflict, Sunstein further develops his constitutional theory, advancing a model of legal reasoning appropriate to a deliberative democracy as he understands it. He calls for courts to avoid both moral arguments about the good and toleration or autonomy arguments about the right in constitutional law. Indeed, Sunstein recommends that courts eschew arguments about abstract moral principles generally. On his view, it cheats deliberative democracy when courts, conceiving themselves to be "the forum of principle," grandly theorize and reach "maximalist" decisions that take issues of moral principle off the political agenda. [18] Instead, Sunstein argues for judicial "minimalism." He claims that law's distinctive approach to the problem of political conflict and moral pluralism is to seek "incompletely theorized agreements" on particular outcomes, accompanied by "agreements on the narrow or low-level principles that account for them." [19] Moreover, courts should engage in reasoning by analogy from case to case, deciding cases narrowly (or "leaving things undecided") so as to leave room for political deliberation. [20] Because the republican constitutional theory put forward by Sunstein appears to differ markedly from the republican theory intimated by Sandel, the former provides an excellent foil for assessing the latter.

B. Sandel's Critique of the Constitution of the Procedural Republic

1. The Irony and Meaning of Sandel's Critique of Liberalism's "Procedural Republic."--It is ironic that Sandel advances a republican ***515** critique of liberalism for sponsoring a Constitution of the "procedural republic." Liberals are usually criticized for holding a substantive conception of democracy instead of a procedural conception. For example, in political theory, Jürgen

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

Habermas objects that Rawls's liberal conception of justice as fairness is substantive rather than procedural.[21] Similarly, in constitutional theory, John Hart Ely protests that Ronald Dworkin's liberal conception of constitutional democracy is substantive as opposed to procedural.[22] Indeed, republicans usually criticize liberals for advancing substantive rather than procedural theories. At the same time, liberals commonly fault republicans for espousing procedural instead of substantive conceptions. For example, just as Dworkin and Laurence Tribe charged Ely with taking a "flight from substance" to process, so some have charged Sunstein with doing so.[23] Thus, in criticizing liberals like Rawls and Dworkin for holding a procedural rather than a substantive conception, Sandel is inverting the conventional categories of substance and procedure in political and constitutional theory.

What does the usual criticism of liberalism for being substantive rather than procedural mean? Basically, it means that liberals typically argue for limiting the procedures of democratic self-government, even if those procedures are otherwise functioning perfectly and worthy of trust, through ***516** protecting "substantive" rights of autonomy, privacy, moral independence, liberty of conscience, and the like. Sandel certainly acknowledges that such liberals would constrain the procedures of democratic self-government by protecting those "substantive" rights. What, then, does he mean by criticizing liberalism for espousing the "procedural republic" ?

To understand Sandel's formulation and criticism, we need to draw two basic distinctions. First, we must distinguish two kinds of substantive theories: those that emphasize substantive rights like autonomy as limiting the procedures of democratic self-government, and those that emphasize substantive ends or goods or virtues as constraining or guiding the procedures of democratic self-government. And second, we must distinguish two subjects or loci of self-government: the polity or the people engaging in democratic self-government, on the one hand, and the individual or the person engaging in personal self-government, on the other.[24]

With these distinctions in mind, we can see two things. One, Sandel is criticizing liberalism for seeking to avoid being substantive in the sense of interpreting and justifying constitutional freedoms in light of the substantive ends or goods or virtues that they foster. He is objecting that liberals flee substance in the sense of fostering ends or goods or virtues, as it were, for substance in the sense of protecting autonomy rights. Two, Sandel is claiming that liberals celebrate personal self-government afforded through autonomy rights and wish to throw off any substantive constraints along the lines of ends or goods or virtues imposed through democratic self-government. On his view, liberals problematically aspire to a procedural republic of unencumbered selves engaging in personal self-government rather than to a substantive republic of citizens engaging in democratic self-government.

At bottom, the question of which account of self-government is substantive and which is procedural raises the question: what is the self who is entrusted with the right and the power of self-government? From the standpoint of the people, or democratic self-government, liberal conceptions seem to be "substantive," for they seek to constrain the procedures of democratic self-government with "substantive" rights of autonomy to reserve a sphere of personal self-government or self-determination. But from the standpoint of the individual self, or personal self-government, liberal conceptions can be seen to be "procedural," for they seek to throw off the constraints of democratically imposed substantive goods or ends or virtues to ensure a realm of personal self-government. In this sense, liberal ***517** theories seek to keep the procedures of personal self-government free of and unfettered by such "substantive" limitations.

Sandel's ironic and inverted formulation, that liberalism is a theory of the procedural republic, is confusing and unfortunate. Sunstein's theory of deliberative democracy, however, accords with the familiar view that republicanism, not liberalism, is a theory of the procedural republic.

C. The Constitution of Procedural and Substantive Liberties

As stated above, Sandel contends that constitutional law is the fullest or clearest manifestation of our public philosophy and the procedural republic. Remarkably, Sandel's account of the Constitution, and indeed his view of where the procedural republic resides, are the obverse of Sunstein's: Sunstein views the Constitution as principally protecting procedural liberties and neglects "substantive" liberties such as privacy or autonomy as anomalous, whereas Sandel emphasizes those very "substantive" liberties as the core of the Constitution of the "procedural republic."

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

Sunstein's account of the Constitution is similar to Ely's well-known view in Democracy and Distrust in important respects. [25] In The Partial Constitution, he argues that the Constitution is principally concerned with establishing a framework of deliberative democracy, and he conceives our constitutional freedoms principally as procedural preconditions for deliberative democracy. [26] Like Ely, Sunstein denies that the Constitution protects the "substantive" right of privacy or autonomy. Ely admits that there are numerous manifestations of substantive values, as distinguished from procedural values, on the face of the Constitution (for example, the First Amendment's protection of religious liberty and of some free speech that is not central to the functioning of the political process [27]). Yet he suggests that to represent such concerns for substantive liberties "as a dominant theme of our constitutional document one would have to concentrate quite single-mindedly on hopping from stone to stone and averting one's eyes from the mainstream." [28] Sunstein makes even fewer concessions to substantive liberties than Ely does. Sunstein all but ignores religious liberty and liberty of conscience, he develops a full-blown theory of free speech in relation to deliberative democracy as opposed to ***518** autonomy, and he either ignores substantive liberties like privacy and autonomy or recasts them in terms of procedural liberties or equality. [29] Therefore, if anything, substantive liberties are even more anomalous in Sunstein's analysis than in Ely's.

In his critical account of the liberal Constitution of the procedural republic, Sandel concentrates single-mindedly on these manifestations of substantive liberties in constitutional law, which Ely and Sunstein dismiss as anomalous "stones," as themselves being the dominant theme of the "procedural republic." Sandel devotes a chapter to the First Amendment's protection of religious liberty and liberty of conscience, as well as of free speech that is not central to democratic self-government, and a chapter to privacy rights. Two points are important to note. One, Sandel conceives these liberties to be the cornerstones of the "procedural republic," whereas Ely and Sunstein conceive them as "substantive" liberties. Two, Sandel regards them as core and generalizes from them, whereas Ely and Sunstein regard them as anomalous and attempt to cabin or extrude them from the Constitution. In short, Sandel's Constitution of the procedural republic is the obverse of Sunstein's Constitution of deliberative democracy. Sunstein extrudes, as anomalous in relation to his conception of the procedural republic, what Sandel views as the core of his conception of the procedural republic.

Sandel's and Sunstein's accounts, as obverses, complement or correct one another. They unwittingly show that an adequate theory of the whole Constitution would strive, in Dworkin's terms, [30] to fit and justify both the procedural liberties associated with Sunstein's view and the substantive liberties related to Sandel's picture, not one to the exclusion of the other. Such a theory would secure not only the basic liberties associated with deliberative democracy but also those related to deliberative autonomy.

We will make three further points about Sandel's and Sunstein's accounts of the Constitution, each of which has the following feature: At every turn where Sandel laments the triumph of the liberal procedural republic over a republican interpretation, Sunstein offers a republican interpretation that casts doubt on Sandel's analysis. First, Sandel laments what he believes to be the breakdown of the republican, democratic self-government account of the First Amendment in favor of the liberal, autonomy account. [31] Meanwhile, Sunstein has written an entire book ***519** arguing that the democratic self-government account continues to be dominant and superior to the autonomy account. [32]

Second, Sandel criticizes the shift from what he calls the "old privacy," which shielded certain information or protected certain valuable relationships and worthy institutions from public view, to the "new privacy," which protects individual autonomy to make certain decisions and choices free of governmental intrusion. [33] He characterizes this shift as a movement away from republicanism to liberalism. Yet Sunstein disparages both the old and the new privacy, rejecting them as anomalous or recasting rights usually justified in terms of privacy in terms of procedural liberties or equality. [34] Their commentaries on Planned Parenthood v. Casey [35] are striking in this regard. For Sandel, the "notion of privacy as autonomy found perhaps its fullest expression" in Casey, showing that the march of the new privacy through constitutional law proceeds apace. [36] For Sunstein, though, Casey shows that the dominant principle of equality has the anomalous principle of privacy on the ropes. He emphasizes that the joint opinion, along with the concurring opinions of Justices Blackmun and Stevens, recognized the significance of the right to abortion in securing equality for women. [37]

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

The third point concerns welfare rights. Sandel argues that the triumph of the procedural republic has vanquished the discourse of "the political economy of citizenship" and diverted attention away from questions such as: "What economic arrangements are hospitable to self-government?" [38] If Sandel were right, we would expect constitutional theorists arguing that the Constitution guarantees a social minimum--of goods and services to meet the basic needs of all citizens--to make procedural republic arguments, emphasizing providing persons the wherewithal to enable them to choose and pursue their own conception of the good. Instead, the leading theorists who argue for constitutional welfare rights, such as Frank Michelman, make republican, citizenship arguments, emphasizing providing citizens the wherewithal to enable them to participate meaningfully in the democratic process or to assure them a minimum stake in the polity. [39] Sunstein's argument for welfare rights is quite similar to ***520** Michelman's. [40] Sandel, however, does not acknowledge such arguments. (Notably, the only constitutional theorist he mentions in the text of his book in connection with welfare rights is Charles Reich. [41] Admittedly, Reich argues for welfare rights as "new property" rights to enable persons to choose and pursue their own way of life, but he also invokes republican themes of self-sufficiency permitting community membership. [42]) Thus, in these three respects Sunstein's republican analysis of constitutional law casts doubt upon Sandel's republican analysis of it.

II. The Constitution of the Substantive Republic

Sandel calls for the development of a republican understanding of the Constitution as an alternative to that of liberalism. For purposes of contrast with Sandel's notion of liberalism's Constitution of the procedural republic, we will call it the Constitution of the "substantive republic." (Here we mean substantive in the sense of promoting goods or ends or virtues, not simply protecting rights of autonomy.) Sandel does not fully develop a republican vision of the Constitution of the substantive republic. Nor does he elaborate a republican conception of constitutional interpretation and judicial review in such a republic. Nonetheless, the intimations of Sandel's vision are clear enough to bear explication and analysis. In this Part, we explore some of those intimations in considering what a Sandelian republican constitutional theory--for the Constitution of the substantive republic--might look like and how it might differ from other available republican theories. We then examine Sandel's and Sunstein's critiques of constitutional law cases protecting a right of privacy or autonomy.

A. Three Republican Alternatives

1. Sandel's Substantive Republicanism.--First, what are the broad outlines of Sandel's Constitution of the substantive republic? Sandel calls for substantive moral argument in justifying and interpreting the Constitution. He argues that in interpreting constitutional freedoms courts should not bracket conceptions of the good, as they do in liberalism's procedural republic. They should move beyond liberal toleration or autonomy arguments, which justify protecting freedom to choose independent of the moral worth of what is chosen, to republican moral arguments, which justify securing freedoms on the basis of the substantive human goods or virtues or ends that they foster. Moreover, Sandel argues for viewing ***521** constitutional freedoms as preconditions for citizenship and self-government on a republican model. Within the substantive republic, courts engaging in moral argument would secure the freedoms that are preconditions for the substantive republic.

Sandel's call for substantive moral argument in constitutional law is a form of what Dworkin calls "the moral reading" of the Constitution. [43] In other words, like Dworkin, Sandel would interpret the Constitution as embodying principles of political morality, and would argue that courts should make recourse to those principles in interpreting it. (Of course, their moral readings would differ, because their principles would differ.) We should note that Sandel does not develop a division of institutional roles or a conception of different types of arguments appropriate for courts and legislatures. He seems to contemplate that courts, as well as legislatures, will engage in moral argument in interpreting the Constitution.

It is important to avoid a possible confusion. Sandel's claim that courts interpreting constitutional freedoms should engage in substantive moral argument about the good does not always entail removing moral issues from the political process of deliberative democracy. For example, in the context of interpreting the First Amendment's protection of freedom of speech, a court engaging in substantive moral argument about the good or worth of certain categories of expression--e.g., group libel, fighting words, and pornography-- might decide that those categories are of low value for self-government and deliberative democracy and therefore that they should be subject to regulation through the political process. [44] By contrast, in the context

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

of interpreting the Fourteenth Amendment's protection of liberty, a court engaging in substantive moral argument might decide that certain types of association are of high value and therefore should not be subject to regulation through the political process of deliberative democracy. [45]

Just what is the substance of the substantive republic? What are the republican goods or virtues or ends that the Constitution should be interpreted to foster or further? Alas, Sandel fails to deliver the goods for a substantive republic. Indeed, he does not offer a substantive account of goods or virtues or ends so much as a call for a republican form of argument or justification for constitutional freedoms, and a commitment to a process of deliberation. He distances himself from the substance of classical republicanism, with its exclusiveness, coerciveness, and inegalitarianism, and instead emphasizes the need for a pluralistic republicanism ***522** in a diverse and mobile society. Moving beyond the encumbered self (with which he contrasted the liberal "unencumbered self" in his earlier work [46]), he advocates a republicanism that can accommodate "multiply situated selves" with conflicting loyalties and obligations. [47] And he contends that contemporary republicanism need not have a "unitary and uncontestable" conception of the common good but can be pluralistic. [48]

But how is this pluralistic republicanism possible? In what sense is such a capacious conception republican? What does it provide that liberalism lacks? What does it require that liberalism cannot provide? To the extent Sandel hints at substance, his republican virtues suitable for multiply situated selves sound suspiciously liberal or at least compatible with liberalism, leading us to question whether there is a significant distance between his pluralistic republicanism and the most attractive form of liberalism. To the extent Sandel's republicanism rejects central values of liberalism, like autonomy, we question its feasibility and attractiveness.

2. Traditional Deferential Republicanism.--It is notable that Sandel does not make, or even intimate, the traditional republican argument for judicial deference to the democratic process. This argument is associated most famously with James Bradley Thayer and Judge Learned Hand. [49] Thayer's basic argument is that in a self-governing democratic republic, the people, not the courts, have the primary authority to interpret the Constitution and to decide questions of justice, wisdom, and the common good. [50] "It is a postulate . . . that the people are wise, virtuous, and competent to manage their own affairs." [51] That postulate entails judicial deference to the democratic process, unless legislatures or executives have taken an action that involves a clear mistake or is unconstitutional beyond a reasonable doubt. [52]

Furthermore, according to the traditional republican view, judicial review debilitates the democratic process. The tendency of "easy resort" to judicial review, as Thayer put it, "is to dwarf the political capacity of ***523** the people, and to deaden its sense of moral responsibility." [53] Hand argued against judicial review altogether where questions of justice and morality are concerned (for example, in interpreting the Due Process Clause and the Equal Protection Clause) on the ground that such judicial intervention into politics denies citizens a sense of participation in a "common venture." [54] And both Thayer and Hand warned that courts cannot "save a people from ruin." [55] Finally, this view entails that in the long run judicial review makes the protection of our freedoms less secure, and it impoverishes our politics. It drives out questions of justice, wisdom, and the common good in favor of questions of constitutionality and rights, leading to a nation of vigilant litigants rather than one of active, responsible citizens.

Sandel does not explicitly endorse the traditional republican view. Indeed, his call for moral argument in constitutional law may be anathema to it. For that view entails minimal judicial intervention into politics, especially where questions of morality, virtue, and the like are concerned, whereas his argument entails greater judicial intervention in the sense that courts would weigh in on rather than bracket controversial moral and political issues. Sandel does express anxiety about our freedoms being rendered less secure in the procedural republic, but his is a worry about the procedural republic in general, not about judicial review as such.

Sandel is not simply silent concerning the deferential republican view. It is unlikely that a proponent of that view would look to constitutional law if "in search of a public philosophy." Under the deferential republican view, constitutional law is quite thin in the sense that it occupies a narrow domain or evinces considerable moral short-fall as compared with morality, justice, or even political justice. [56] The question of constitutionality is much thinner than the question of morality, justice, or political justice. And the question for a court in constitutional law is thinner still: It is not whether the legislature's or executive's interpretation

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

of the Constitution comports with political justice or even the court's own independent judgment of constitutionality, but simply whether that interpretation lacks any reasonable basis or is a clear mistake.

***524** Sandel, by contrast, looks to constitutional law as the clearest instantiation of our public philosophy. That does not necessarily prove that his view has no affinities with the traditional republican view. After all, one could imagine that a traditional deferential republican might direly prophesy that generations of aggressive judicial review might so debilitate the political process, and so bulk up constitutional law, that our public philosophy would become so thin that we would look to constitutional law to find it. But Sandel does not look to constitutional law in search of our public philosophy for this reason. For him, the chain of causation is the opposite. On his view, we do not have a thin public philosophy because we have looked to courts to develop it through constitutional law. Rather, we look to courts and constitutional law because we have a thin public philosophy. Thus, Sandel's view differs significantly from the deferential republican view.

3. Sunstein's Minimalist Procedural Republicanism.--It is also notable that Sandel does not advance, or even intimate, a theory like Sunstein's minimalist republican argument for judicial reinforcement of the democratic process. On Sunstein's view, constitutional freedoms are conceived principally as procedural preconditions for deliberative democracy. And judicial review is justified principally as reinforcing those procedural preconditions. Sunstein would contend that the domain of the substantive republic is outside the courts, in the realm of deliberative democracy.

In The Partial Constitution, Sunstein makes a republican argument for judicial deference, but not the traditional one. His argument for judicial deference is subject to the proviso that the preconditions for deliberative democracy must be in place. He argues for an aggressive role for courts in two categories of cases in order to secure these preconditions. The first involves "rights that are central to the democratic process and whose abridgement is therefore unlikely to call up a political remedy." [57] The second involves "groups or interests that are unlikely to receive a fair hearing in the legislative process." [58] Without judicial intervention in these two situations, the outcomes of the democratic process are systematically unworthy of trust. [59] But beyond securing such preconditions for deliberative democracy, Sunstein's argument echoes Thayer's plea for judicial deference to political decisions on the ground that easy resort to judicial review deadens the citizenry's sense of political responsibility. Moreover, he contends that certain institutional limits of courts make them ***525** ineffective in bringing about the social change that might be necessary to realize these preconditions. [60]

In Legal Reasoning and Political Conflict and Foreword: Leaving Things Undecided, Sunstein makes an argument for a "minimalist" republicanism, which entails an even more limited role for courts. [61] As noted above, he argues that courts should eschew abstract principles and grand theories about both the good and the right in favor of making recourse to such lawyerly tools or methods as seeking incompletely theorized agreements on low-level principles, engaging in reasoning by analogy from case to case, and leaving things undecided. They should do so, he contends, to leave controversial moral and political issues to the political process of deliberative democracy. Thus, even if there are constitutional principles, such as an anticaste principle of equal citizenship, that courts could readily employ to invalidate social practices denying equal citizenship, they should refrain from doing so and should instead proceed incrementally and minimally. This argument can be seen as a republican argument in the following sense: Sunstein is not only calling for a revival of the Constitution outside the courts but also saying that politically elected institutions, not courts, are the most appropriate forum of principle. This move can be seen as part of a larger republican project of striving to rejuvenate democratic institutions as fora for deliberation about the right as well as the good. If Sandel's charge is that courts are not morally ambitious enough, Sunstein's is that courts are too morally ambitious, to the detriment of democratic institutions. [62]

B. Sandel's Call for a Republicanism that Engages in Substantive Moral Argument

We will assess Sandel's search for a substantive republic through analyzing his approach to the problem of moral disagreement and political conflict in a pluralistic polity and, in particular, by considering his critique of the privacy cases from Griswold v. Connecticut [63] to Planned Parenthood v. Casey. This cluster of Supreme Court decisions concerns the proper scope of substantive liberty protected by the Due Process Clause with respect to intimate association and reproductive freedom.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

***526** Sandel rejects the type of liberal constitutional theory exemplified by the work of Dworkin, especially insofar as it interprets the Due Process Clause as embracing abstract principles of liberty, privacy, or autonomy. [64] Sandel claims that "minimalist liberalism" like Dworkin's, because it attempts to stay on the surface, philosophically speaking, is too shallow to attain agreement upon the justification for and the scope of constitutional rights such as intimate association and reproductive freedom. To attain such agreement, we have to go beyond liberalism's appeal to "autonomy rights alone," and its attempt to bracket questions of the good, to a deeper form of argument that directly engages the moral permissibility of the social practices to be protected by rights. [65] Thus, under Sandel's model of interpretation, we should flee from the substance of autonomy rights to the substance of moral argument about the goods or ends or virtues protected by rights.

Sunstein also rejects abstract liberal principles of liberty, privacy, or autonomy of the sort defended by Dworkin, but he proceeds in the opposite direction from Sandel. Sunstein finds Dworkin's theory too deep and contends that to attain agreement in the face of moral conflict, we have to stay nearer to the surface. He advocates that we flee the substance of autonomy rights for process and for such lawyerly methods as incompletely theorized agreements, reasoning by analogy, and leaving things undecided. He claims that these methods permit judges to make shallower and narrower decisions and thus to avoid deep and controversial issues, leaving those issues open for democratic deliberation. [66] Thus, Sandel calls for a republicanism that engages in substantive moral argument, while Sunstein advocates a minimalist republicanism that avoids such argument.

1. Sandel's Analysis of the Privacy Cases.--Sandel uses the line of privacy cases from Griswold to Casey to chronicle the ascent of the procedural republic and its flawed model of liberal toleration or autonomy. [67] For him, the tale involves the Court's unfortunate move from the "old" privacy to the "new" privacy, and from a justification rooted in substantive moral goods to a justification based on autonomy. [68] The Court began promisingly enough in Griswold, identifying a right of privacy of married couples as limiting the government's authority to ban *527 their use of contraceptives. [69] On Sandel's account, Griswold did not rest on the flawed tenets of liberal toleration: the justification of rights premised on a "voluntarist" conception of the self and on the value of autonomy, independent of the moral goods it secures. [70] Sandel praises the Griswold Court for resting the justification for a right of privacy on a substantive moral judgment about the value of marriage (which it called "intimate to the degree of being sacred," "a harmony in living . . . a bilateral loyalty," and "an association for [a] noble . . . purpose" [71]). [72]

But from this substantive republican justification for a right of privacy, the Court took a dramatic and fateful turn toward the liberal procedural republic in later cases by construing Griswold as enshrining the decisional autonomy of the individual--and the value of choice itself--as the core justification. [73] No longer limited to guarding the precincts of the "sacred" marital bed chamber, privacy became in Eisenstadt v. Baird [74] the "right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [75] That individual right of privacy served as the basis for striking down, in Eisenstadt, a law restricting the distribution of contraceptives to unmarried persons [76] and, in Roe v. Wade, [77] a law forbidding women to terminate their pregnancies. [78] Then, in Carey v. Population Services International, [79] another contraception case, the Court expressly cast the right of privacy as a right of "individual autonomy in matters of childbearing" [80] that extends to individuals independent of their roles or attachments (e.g., in marriage). So transformed, Sandel observes, privacy protects certain kinds of individual decisions rather than certain kinds of morally valuable social practices.

Sandel interprets Casey, which reaffirmed the central holding of Roe, [81] as offering the "fullest expression" of this notion of privacy as autonomy, pointing to Casey's language about the relationship between the abortion decision and a woman's personal "dignity and autonomy." [82] He ***528** uses the language of Casey concerning the scope of "Griswold liberty" to show an explicit link between this notion of privacy and the voluntarist conception of the person: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." [83]

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

How should a republican court have decided these cases interpreting the scope of Griswold liberty? Sandel offers us clues in his critique of Bowers v. Hardwick. [84] For Sandel, Bowers starkly illustrates the limited ability of liberal toleration arguments adequately to ground rights. Justice White, writing for the majority, rejected a challenge rooted in the right of privacy to the application of Georgia's sodomy statute to private, consensual homosexual conduct. [85] He summarily found no analogy or "resemblance" between homosexual sodomy and the choices and conduct protected under Griswold and its progeny. [86] Instead, he analogized homosexual conduct to adultery, incest, and other sexual crimes committed in the home that are properly subject to governmental regulation. [87] Moreover, with no critical evaluation of such belief, White concluded that the presumed belief by the electorate of Georgia in the immorality of homosexual conduct provided a rational basis for the statute. [88] Sandel points to Bowers as an evident anomaly among the Court's new privacy cases in its rejection of the liberal ideal of the neutral state and its acceptance of the state's proper authority to express through criminal law a moral judgment about sexual conduct. [89]

But Sandel does not embrace Justice White's opinion in Bowers as exemplifying republican moral discourse. To the contrary, he suggests that the challenge to Georgia's statute should have directly engaged the question of morality by drawing analogies between the human goods of homosexual intimacy and those of heterosexual unions previously protected by the Court. [90] Such a justification for a right of homosexual intimate association would eschew the liberal ideal of state neutrality concerning citizens' conceptions of the good because it would rest upon the good of the practices that the right protects. Rather than pursue this moral high ground, Sandel contends, the dissenting opinions in Bowers by Justices ***529** Blackmun and Stevens relied wholly on bare autonomy arguments, drawing an analogy to Griswold not as to the goods of marriage, but only as to the importance of choice to the voluntarist self. Worse, he contends, those defending or upholding privacy rights for gays and lesbians frequently bracket the issue of the morality of homosexual intimate association and draw an analogy to Stanley v. Georgia, [91] which upheld the right to possess obscene materials in one's home. [92] Here, for Sandel, is the epitome of the shortcomings of liberal toleration arguments: Like obscenity, homosexuality is defended wholly independent of its moral worth and is demeaned as a "base thing that should nonetheless be tolerated so long as it takes place in private." [93]

Sandel contends that such bare autonomy arguments, because they eschew substantive moral discourse, may fail even to secure toleration. As a practical matter, "it is by no means clear that social cooperation can be secured on the strength of autonomy rights alone, absent some measure of agreement on the moral permissibility of the practices at issue." [94] Even if such arguments for rights succeed in court, they are unlikely to win more than a "thin and fragile toleration." [95] Because these arguments leave unchallenged the negative views about gays and lesbians, they forego the opportunity to move citizens beyond empty toleration of private, disfavored conduct to respect and appreciation of the lives that homosexuals live. [96]

Sandel's republican alternative of grounding rights in the substantive moral good of social practices, he argues, makes possible genuine respect and appreciation among citizens. Republicanism interprets rights in light of their relation to its conception of the good society as a self-governing republic. [97] This link to republican self-government suggests that the full republican argument for a right would go along these lines: The social practice protected by a right allows the realization of something that citizens (through engaging in moral discourse) can recognize to be substantive moral goods, which in turn foster the citizens' engagement in republican self-government. Exactly what this means depends, of course, on the scope that Sandel gives to the term "self-government." His rejection of liberal notions of autonomy makes clear that we should construe the term ***530** to refer to deliberative democracy to the exclusion of deliberative autonomy.

2. A Critique of Sandel's Analysis of the Privacy Cases.--Is Sandel's critique of the "voluntarist conception" said to be dominating the privacy cases persuasive? Is his alternative republican justification altogether missing from such cases? And is it more attractive or persuasive than a liberal justification? We offer three responses.

First, Sandel's critique of the new privacy accurately identifies the emergence of a strong autonomy justification but overstates the supposed dichotomy between the liberal appeal to choice and the republican appeal to moral goods. Undeniably, Sandel points to the central role that the appeal to a principle of autonomy plays in liberal constitutional argument, a principle that Blackmun and Stevens correctly concluded should have led the Court to strike down the statute before it in Bowers. Yet his

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

critique of the Bowers dissents in particular, and of liberal toleration arguments in general, draws too sharp a contrast between protection of rights for the sake of choice in itself and protection of them because of the moral good of what is chosen.

A more complete, less selective, reading of the dissents in Bowers reveals the argument that the protection of choice is important precisely because of the good of such things as marriage, family, and intimate association in persons' lives. As Justice Blackmun puts it: "[o]nly the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.'" [98] This is an admittedly and inescapably liberal argument in the following sense: It is precisely because these matters are so important or significant in persons' lives, and for their pursuit of moral goods, that we protect, in Justice Stevens's words, an "individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny." [99] Arguably, there is an analogical argument here in the contention that homosexual intimate association, like heterosexual sexual intimacy, is central to persons' lives, sense of place in society, identity, and happiness.

Of course, Sandel would find this fuller account of liberal toleration unsatisfying, for it is undeniably "voluntarist" in emphasizing the relationship between autonomy and personal identity. Here Sandel's analysis highlights that there is an undeniable and unbridgeable gap between liberal and republican justifications for rights of the sort he advocates. This gap has ***531** one basic source: Sandel's rejection of the moral principle of autonomy and its value (as liberals understand it) and his apparent exclusion of such autonomy from his conception of self-government. Notwithstanding Sandel, liberal justifications for rights such as privacy can and do make recourse to substantive moral goods, but they do so to augment rather than to supplant the appeal to autonomy. Furthermore, if, as Sandel argues, rights are to be justified with regard to their facilitation of self-government, a liberal argument must insist on a conception of self-government that includes not only deliberative democracy but also deliberative autonomy. This liberal commitment to a more complete conception of self-government reflects a moral judgment about the centrality of self-determination in securing the status of free and equal citizenship for everyone, and here liberals can only plead guilty to Sandel's charge.

Rather than flee the liberal commitment to autonomy, we would turn the tables on Sandel and ask: Is there no room in a republican justification of rights for a principle of protecting individual choice and autonomy? Sandel's republican model artificially separates moral goods from the process of choosing them. For example, marriage is an association and a social practice, but (absent a regime of arranged marriages) we do not just find ourselves in a marriage; we make a choice. While there are often constraints on choices and social norms and roles may shape choices, it is generally the case that procreation, parenthood, and other practices protected under the rubric of privacy or autonomy entail some element of choice. [100] If republicanism's concern is simply that citizens engage in morally worthy social practices, then a regime that places no value on choice could simply assign citizens to engage in those practices. If Sandel objects that forcing persons into particular relationships and practices compromises the moral worth of those practices, he must implicitly assume that there is some value attached to the element of choice, autonomy, or personal self-government. [101] And if so, the gap narrows between Sandel and Justice Blackmun, who contends that "much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds." [102]

***532** We question whether Sandel's distinction between liberalism's supposedly unencumbered or voluntarist selves choosing their ends, and pluralistic republicanism's "multiply-situated selves" claimed by "multiple loyalties," is as fundamental as he claims. Consider one of the specific examples he offers of the substance of his republicanism: "The civic virtue distinctive to our time is the capacity to negotiate our way among the sometimes overlapping, sometimes conflicting obligations that claim us, and to live with the tension to which multiple loyalties give rise." [103] Surely this capacity for self-direction bears a family resemblance to such liberal notions as revisability, or the capacity to form and to revise one's conception of the good life, including the capacity to enter into and to exit attachments and communities. [104] If so, Sandel practically embraces autonomy by another name. If we are correct, perhaps Sandel's republicanism can move closer to liberalism than his book suggests.

And perhaps liberalism can move closer to Sandel's republicanism than he allows. The justification for the right to abortion is illustrative. Sandel offers Casey as the fullest expression of the notion of privacy as autonomy, yet he ignores the role that substantive moral discourse plays in that case. In articulating a pregnant woman's liberty interest, the joint opinion speaks of the "unique" condition of pregnancy, stressing not only the moral good that women may bestow on children through childbirth

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

and motherhood, but also the moral harm of denying women choice, due to the deeply personal nature of the pain and suffering of pregnancy, childbirth, and motherhood. [105] Casey sounds themes of self-government both in the liberal sense of autonomy, when it speaks of the role that procreation plays in a woman's self-definition and self-determination, [106] and in a more republican sense, when it notes the vital role that the "ability to control their reproductive lives" has played in facilitating the "ability of women to participate equally in the economic and social life of the Nation." [107] Sandel's analysis of Casey also completely leaves out any discussion of sex equality as a component of women's full citizenship, a principle that Sunstein emphasizes in justifying the right to abortion. [108]

Most interestingly, Sandel does not comment on perhaps the most republican aspect of the joint opinion in Casey: the latitude that it gives to ***533** the state to shape women's decisionmaking process in favor of childbirth over abortion to encourage "wise" or responsible decisions, in part because of the "consequences" of the abortion decision for women, the community, and prenatal life. [109] Contrary to Sandel's characterization of the abortion cases as minimalist in their bracketing of the moral issues regarding abortion, Casey acknowledges that abortion is a matter as to which "men and women of good conscience" may always disagree [110] and yet does not require that the state be neutral because of this moral conflict. Rather, that case permits the state, due to its "profound interest in potential life," to take sides by seeking to persuade women in favor of childbirth, so long as its measures aim to enhance informed decisionmaking rather than to impose an undue burden on decisionmaking. [111]

Furthermore, it is telling against Sandel's account of the liberal procedural republic that he fails to acknowledge Dworkin's praise of the Casey joint opinion for recognizing a proper role for government in encouraging responsibility, in the sense of reflective decisionmaking, when intrinsic values, such as respect for the sanctity of life, are at issue. [112] Dworkin contends that the constitutional right to procreative autonomy rests on a right to make essentially religious decisions for ourselves; yet such a right entails a moral responsibility of reflective exercise, which government may encourage. Dworkin's analysis may remain too liberal for Sandel because it holds to a strong principle of ethical individualism, a right to decide for ourselves, and even to make an immoral, or wrong, decision. (And Dworkin's apparent endorsement of Casey's conflation of one-sided persuasion with facilitation of reflective decisionmaking raises concerns on liberal and feminist grounds. [113]) Yet his argument is notable as an attempt within liberalism to reconcile a principle of ethical individualism with a proper governmental role of shaping citizens and encouraging them to exercise their rights responsibly. Dworkin's attempt to give some credence to arguments about the ethical environment and a community's interest in its members' decisions suggests some common ground with a republican formative project. [114] Moreover, Dworkin's argument for toleration on the ***534** issue of abortion seems far from minimalist, for it attempts to move citizens beyond pale civility and grudging toleration by recasting the abortion debate as a conscientious disagreement as to the interpretation of how best to respect the intrinsic value of the sanctity of life in particular circumstances.

Second, even assuming that Sandel's republican alternative offers a better justification for rights than liberal models, Sandel may overestimate the power of analogy about moral goods to move citizens from grudging toleration to respect and appreciation. To be sure, some critics of liberal toleration may find Sandel's critique, and his plea to move from toleration to respect and appreciation, inspiring and sound. For example, proponents of gay and lesbian rights might wager that engaging in and winning a substantive moral debate could lead to full citizenship and acceptance more readily than making toleration arguments. [115] But Sandel tells us little about how the appeal to moral goods should actually be made and how judges, legislators, and citizens should evaluate such goods. Using his critique of Bowers as illustrative, we presume that his approach would encourage advocates of same-sex marriage to draw analogies between the goods realized in heterosexual marriage and those attained in same-sex relationships. Griswold spoke of the goods of bilateral loyalty and a harmony in living; contemporary accounts of marriage identify many goods, such as companionship, security, emotional commitment, and children. We assume that similar analogical arguments could be made concerning the moral goods of gay and lesbian families in order to secure rights to procreation and parenting.

Sandel may underestimate the intensity of moral disagreement about how persuasive these analogical arguments are, especially in the absence of any clear criteria for what counts as a moral argument. Suppose proponents of same-sex marriage offer numerous testimonials concerning the goods of gay and lesbian intimate association, along with psychological and sociological studies confirming such goods and further supporting gay and lesbian parenthood. And suppose opponents argue against the moral worth of such unions and contend that they are harmful to the participants and threaten the institution of marriage on

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

these bases: Biblical verses and religious teachings and convictions; philosophical arguments that the goods of marriage are realizable only by heterosexuals (e.g., Catholic natural law arguments [116]); arguments about gay male promiscuity and the fear of ***535** AIDS; and arguments about alleged gender role confusion in children raised in same-sex marriages.

Sandel does not offer us guidance as to any requirements that his model would place upon citizens concerning what would count as a moral argument or as to any criteria to be used by judges or legislators in evaluating moral arguments. For example, he is critical of Rawls's requirement of public reason: that political and legal decisions be justifiable on grounds that citizens generally can reasonably be expected to accept. [117] Without knowing more about how the moral reasoning process is to unfold--whether judges or legislators may reasonably reject arguments rooted in homophobia, ignorance, and fear, and how they ultimately are to resolve matters of genuine moral conflict--we find Sandel's alternative to be perilous. Sandel seeks to open the "naked" public square to persons' substantive moral and religious convictions, but he gives little guidance about how to guard against the triumph of "intolerant moralisms." [118] As the unfolding battle over same-sex marriage suggests, moral argument in service of gay and lesbian rights may prevail in some judicial and legislative arenas, but its success depends critically on the framing of the moral debate.

For example, Baehr v. Miike, [119] the recent Hawaii case holding that the state failed to demonstrate a compelling interest for its ban on gay marriage, appears to be a successful example of engaging in moral argument. Hawaii asserted that the optimal development of children depended upon being raised by their two biological parents (or at least by a married male and female), but the court found, based on expert testimony, that gays and lesbians can do as well as heterosexuals in parenting. This favorable outcome for gay and lesbian rights hinged on demonstrating sameness between homosexual and heterosexual parents, and the framing of the issue in terms of parental competence bounded moral discourse to consideration of the proper function of families and of what makes for good parenting. This issue was assessed, not through a judgment about the competing moral convictions of citizens concerning the comparative competency of hetero-sexual, ***536** gay, and lesbian parents, but through expert testimony, which led to the court's conclusion that children do best when they have a loving, nurturant parent, and that even the state's own experts conceded that gay and lesbian parents can be such parents. [120]

What was conspicuously absent from the Hawaii court's decision was reliance upon heated rhetoric about the morality or immorality of homosexuality. [121] In contrast, in the debate surrounding the Defense of Marriage Act, which Congress passed by an overwhelming vote, legislators deployed passionate rhetoric about saving marriage, the family, and the public from the immorality of homosexual intimate association and a parade of horribles that would follow in the wake of recognizing same-sex marriage. [122] The challenge posed by opponents of the Act to explain how a loving, committed relationship between two persons of the same sex threatened anyone's heterosexual marriage was given no serious answer. [123]

Assessing the promise and peril of Sandel's republican justification for rights also requires a clearer elaboration than Sandel advances of its capaciousness and attention to whether his analogical method would move in a conservative or a more critical, transformative direction. A reasonable interpretation of his appeal to analogy is that it is inherently conservative because it entails that analogies in support of gay and lesbian intimate association be made to the human goods shared with relationships traditionally protected by the courts, namely, heterosexual marriage. Persons who cannot show the sameness of the goods of their relationship to those of such a traditionally protected relationship fail to secure protection.

Requiring such a demonstration of sameness may prevent Sandel's analogical method from taking a more critical and potentially transformative direction, whereby arguments for same-sex marriage would stress the ***537** different and distinctive goods of such unions. For example, consider the feminist argument that lesbian marriage offers a valuable alternative model to traditional heterosexual marriage: It is premised on love and commitment between equals, and it is free of an institutional history as an unjust, hierarchical relationship within which inequality inheres in the differentiated gender roles themselves, and within which women had little or no protection against assaults on their bodily integrity. [124] This type of moral argument, far from sanctifying existing social practices, offers a fulcrum from which to criticize them.

If Sandel's republicanism were capacious enough to embrace such arguments, it would not confine itself to the search for sameness but would allow room for protection of a diversity of morally valuable social practices, and thus would be open to

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

moral evolution and changing understandings of the worth of social practices. [125] If so, this would confirm our interpretation of Sandel's republicanism as wedded less to any particular substance (e.g., the good of traditional marriage) than to a form of argument or process of justification, which might prove open to different conceptions of moral worth. And if this type of argument is possible within Sandel's republicanism, how can he reject an argument for same-sex marriage rooted in a liberal commitment to diversity and the idea that there may be more than one morally valuable way of life (as Blackmun suggested in dissent in Bowers)? [126] Or how can he reject the liberal idea that society benefits from different "experiments of living" because they may be worth emulating (to invoke Mill)? [127]

Third, and finally, Sandel may be right that it is difficult to secure public support for constitutional freedoms on the strength of the appeal to autonomy alone. Yet, to jettison autonomy arguments entirely, rather than to supplement them with arguments based on substantive moral goods, may ***538** prove an even more difficult strategy for securing such freedoms. For example, the idea that even if one believes that it is morally wrong for a pregnant woman to have an abortion, it is wrong for government to prevent her from making that decision, has a powerful hold on the public. This suggests that, given the fact of reasonable moral pluralism, liberalism may have things about right: We should attempt to secure agreement on a principle of autonomy rather than to aim for moral agreement on the good. Or, as Rawls puts it, we should aim for an overlapping consensus on a political conception of justice, not for agreement on a comprehensive conception of the good. [128]

In some cases of persistent moral conflict, liberal toleration is a necessary starting point and may even be the most that can be achieved. But toleration need not be grudging and fragile if its proponents persuasively make a moral argument for it and its possible tempering of the formative project: Autonomy is a human good, as are diversity, equal citizenship, and toleration itself; and a commitment to protecting those goods should often (but not always) constrain government from coercively acting to make citizens lead good lives by compelling "moral" and prohibiting "immoral" choices. [129] To the extent toleration, by its very definition, is "empty" in that it does not require respect and appreciation, [130] liberalism itself may be said to attempt to go beyond a model of "empty" toleration to a model of toleration as respect (and even appreciation) through the appeal to such a moral argument. [131] In any event, securing agreement on a principle of autonomy does not rule out more ambitious moral argument and attempts to persuade citizens concerning the moral goods realized through different choices and ways of life. Nor does it preclude an appeal in democratic arenas for expanded protections of rights premised on moral goods.

C. Sunstein's Call for a Minimalist Republicanism that Avoids Substantive Moral Argument

1. Sunstein's Analysis of the Privacy Cases.--Unlike Sandel, who seeks to replace the new privacy in the line of cases from Griswold to Casey with a republican justification for privacy rooted in substantive moral argument about goods, Sunstein would abandon the privacy ***539** justification entirely. For Sunstein, judicial enforcement of broad privacy rights is too "adventurous," because the Due Process Clause too readily engenders expansive, anti-democratic rights of autonomy. [132]

Thus, Sunstein's justification for Griswold would look neither to the old nor to the new privacy, neither to substantive moral goods nor to autonomy. Instead, Sunstein believes that the Court was too ambitious in Griswold. Rather than recognizing a right of privacy, the Court should have struck down Connecticut's contraceptive ban on the ground that "citizens need not comply with laws, or applications of laws, that lack real enforcement and that find no support in anything like common democratic conviction." [133] Sunstein contends that enforcement of the statute at issue in Griswold against a married couple would have lacked support; the real function of the statute was to deter birth control clinics from assisting poor people. [134] Here Sunstein seeks to build upon and invigorate the idea of desuetude as a constitutional basis for courts to strike statutes. He argues that a judgment based on desuetude "would have had the large advantage of producing a narrow and incompletely theorized outcome. It might have obtained a range of agreement from people who reject any 'right of privacy' or are uncertain about its foundations and limits." [135] His minimalist approach, on which courts decide the case before them on the narrowest ground available, would seek and secure agreement on the result--invalidation of the statute--based on the low-level or narrow principle against the enforcement of obsolescent and underenforced or selectively enforced laws and would avoid recourse to abstract, broad, and contested rights.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

Sunstein finds a ready analogy between Griswold and Bowers. Like Griswold, Bowers involved an old, unenforced law, a ban on sodomy. Indeed, the law mainly served as a tool for harassment through selective enforcement on "invidious grounds." [136] Therefore, the Court could have invalidated the statute on the narrow ground of desuetude. By doing so, it could have avoided abstract moral reasoning about the right or the good, and avoided even an anticaste principle of equality, and simply struck down the old law.

Obviously, the principle of desuetude cannot do the work in cases in which a legal prohibition lacks neither real enforcement nor contemporary democratic support. Restrictive abortion laws prior to Roe v. Wade and current bans on same-sex marriage offer two illustrations. Sunstein's ***540** approach to abortion and same-sex marriage suggests just how much his commitment to deliberative democracy constrains his conception of judicial role and legal reasoning. In each case, Sunstein believes that the Equal Protection Clause, properly interpreted to incorporate an anticaste principle, forbids such laws as impermissible discrimination on the basis of sex or sexual orientation. [137] However, in both cases, Sunstein contends that it would be wrong for a court to give full vindication to that principle, because that would rob the democratic process of a chance to "participate[ ] in the evolving interpretation of the Constitution." [138]

Restrictive abortion laws, Sunstein argues, selectively impose upon women a duty to devote their bodies to render aid to the vulnerable (i.e., fetuses), a burden that the state does not impose upon men (e.g., parents are not required to donate kidneys to their children). [139] This selective imposition stems from stereotyped "conceptions of women's proper role" and perpetuates women's "second-class citizenship." [140] Thus, abortion restrictions are a form of sex discrimination. Moreover, Sunstein argued in an earlier work that just as miscegenation laws, rooted in an ideology of white supremacy, impermissibly perpetuated a racial caste system, so bans on same-sex marriage serve to perpetuate a gender caste system or gender hierarchy based on the "natural" and unequal roles of men and women. [141]

Nonetheless, Sunstein concludes that, in each instance, courts should proceed incrementally, narrowly, and cautiously. Thus, in the case of abortion, he critiques the ambitious "maximalist" decision of Roe, whose holding had the effect of invalidating the abortion laws of almost every state and suggests that the Court should have proceeded slowly and incrementally, perhaps beginning with striking laws that did not permit abortion in cases of rape and incest. [142] Meanwhile, democratic bodies could wrestle independently with the moral questions and come to resolutions, perhaps ultimately protecting a more expansive right to reproductive freedom, rooted in sex equality, than that recognized by the Court in Roe. [143]

***541** Similarly, with respect to state statutes excluding gays and lesbians from marrying, it would be wrong for a court to announce the unconstitutionality of such laws "now or as soon as it can"; such a broad ruling would be inconsistent with deliberative democracy. [144] (Nor would Sunstein invoke any fundamental constitutional right to marry, a right that he argues the Court, had it been properly minimalist, would not have recognized. [145]) Because the debate over the legal treatment of sexual orientation, including same-sex marriage, involves a fundamental moral conflict, courts should not rob the people of their right to deliberate by purporting to settle the issue and to take it off the political agenda. By invalidating all discrimination on the basis of sexual orientation rather than proceeding incrementally, courts would preempt democratic deliberation about whether there are legitimate governmental interests for such discrimination. Instead, courts should proceed cautiously and narrowly, and allow the democratic process to come to terms with the broader and deeper issues. [146] A principle of democratic legitimacy is at stake here.

For such reasons, Sunstein generally applauds the judicial minimalism of the Supreme Court's decision in Romer v. Evans, [147] which invalidated Colorado's Amendment 2, a categorical proscription of protection against discrimination aimed at gays, lesbians, and bisexuals. [148] Romer appears to rest on the principle that the Equal Protection Clause does not permit a state to make a class of citizens a "stranger to its laws," and the conclusion that the very sweep of Amendment 2 belied any assertion of legitimate interests and suggested that "a bare . . . desire to harm a politically unpopular group" underlay it. [149] Sunstein suggests that, by its "narrow and shallow" decision, the Court proceeded incrementally, perhaps in recognition of the need for democratic rather than judicial conclusions, and left unanswered the question of whether a more closely tailored prohibition justified in terms of legitimate public purposes could pass muster. [150]

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

2. A Critique of Sunstein's Analysis of the Privacy Cases.--Is Sunstein's argument for judicial minimalism persuasive and sound, or does such minimalism amount to a troubling withering away of the proper role and responsibility of courts as vindicators of constitutional rights? We ***542** believe that Sunstein's judicial minimalism represents a significant and disturbing retreat from what began, in The Partial Constitution, as a potentially robust interpretation of the Equal Protection Clause, assigning courts a role to play in protecting citizens from laws perpetuating second-class citizenship. In The Partial Constitution, he argued for an anticaste principle of equal citizenship pursuant to which society may not turn morally irrelevant characteristics--most obviously race and sex, but also sexual orientation--into systemic sources of social disadvantage. [151] To be sure, from the outset he contended that the legislative and executive branches should play the primary role in enforcing the anticaste principle because courts have limited capacities to implement any general attack on such systemic disadvantage. Nonetheless, he clearly contemplated some role for courts, leading to the reasonable conclusion that, although he rejected any broad principle of autonomy or privacy as a basis for rights, his principle of equality might secure similar protections. [152] Thus, he defended Roe not on privacy grounds, but by analogy to Brown v. Board of Education [153] and through a link between race and sex discrimination: like Brown, Roe was a "judicial invalidation of a law contributing to second-class citizenship for a group of Americans defined in terms of a morally irrelevant characteristic." [154] And Sunstein strongly hinted that an analogy to Loving v. Virginia [155] offered a foundation for judicial invalidation of bans on same-sex marriage (an analogy that he now calls "highly controversial"). [156]

In his recent writings, however, Sunstein's position is that courts should not fully enforce such constitutional principles or give full scope to such analogies, even if they are sound; rather, courts should apply those principles very narrowly and make far more modest use of analogical reasoning. [157] Such morally ambitious constitutional interpretation is simply not in the judge's tool box of lawyerly methods. Sunstein's view seems to be that so long as deliberative democracy will eventually vindicate constitutional principles, courts should defer to the democratic process. In contrast with Dworkin's liberal model of courts as aggressive vindicators of constitutional rights, Sunstein's model of judicial minimalism comes perilously close to sacrificing such rights for the sake of deliberative processes. For how long should the courts stay their hand? What of the human cost to the individuals who may have legitimate claims to constitutional ***543** protection but whose rights are underenforced by the courts and who must await protection in the democratic arena? Justice delayed is not, for Sunstein, justice denied. Or perhaps justice delayed is, all things considered (especially the benefits to deliberative democracy of such a delay), justifiably denied.

Sunstein, of course, does recognize that the democratic process may have flaws and that courts have an appropriate role in protecting persons who are disadvantaged in that process. Yet his strong commitment to judicial minimalism leads to a judicial incrementalism that appears to undercut that protection for the sake of democratic process. To return to the example of abortion, women, he argues, are a group who suffer disadvantage in the democratic process, and the courts should play a role in striking down restrictive abortion laws. But Sunstein suggests that judicial incrementalism (e.g., beginning with invalidating laws that prohibited abortion even in cases of rape and incest) would have been a better course than the "maximalist" approach of Roe, and he justifies it with the wager that it might have led to legislatures fashioning a broader and more accepted right of sex equality and reproductive freedom than Roe. [158] It is a point of considerable controversy whether, without Roe, state legislatures would have done so. [159] In any event, abortions sought because of rape and incest are a tiny portion of all abortions, and such a limited right would leave most pregnant women who seek to terminate their pregnancies with no legal recourse. And here, justice delayed, given the temporal nature of pregnancy, is certainly justice denied. If there are, as Sunstein contends, strong arguments for abortion rights rooted in an anticaste principle of sex equality (under the Equal Protection Clause), why must women wait for democratic vindication? This is an especially troubling prescription, given that the abortion issue has illustrated repeatedly that highly mobilized minorities opposing abortion rights can have dramatic effects on legislatures. [160]

Similarly, perhaps the Court should be praised for judicial minimalism in cases like Romer. But Romer's utter silence about Bowers, in which the Court concluded that the majority's presumed belief in the immorality of homosexual sodomy afforded a rational basis for its proscription, is problematic. Romer may be read either as an implicit overruling of Bowers ***544** or as a postponement of the evident conflict between these two decisions. For, as Justice Scalia points out in dissent, the "mere animus" that the Court condemns as inadequate to justify civil disabilities in Romer was the very moral condemnation that justified criminal penalties in Bowers. [161] Sunstein seeks to reconcile these cases by drawing an unpersuasive distinction (which, he

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

suggests, a minimalist decision in Romer could have drawn) between the "forward looking" or critical function of the Equal Protection Clause and the "backward looking" or status-quo preserving function of the Due Process Clause. [162] But surely Dworkin has a point, from the standpoint of a concern for principle and integrity, that the Court (if it had the votes to do so) should have reached more directly the underlying question of whether moral condemnation of gay and lesbian sexual orientation affords a sufficient justification for unequal treatment of citizens on the basis of such orientation or offends constitutional principles of liberty and equality. [163]

We conclude our assessment of Sunstein's theory with four points. First, Sunstein's commitment to judicial minimalism cannot be understood simply as an entailment of his theory of legal reasoning, with its advocacy of such tools as analogical reasoning. To the contrary, as the example of same-sex marriage illustrates, his commitment to judicial minimalism constrains even the process of analogical reasoning. As Sunstein explains, the crucial step in analogical reasoning comes at the point where a court must interpret the principle, rule, or standard that accounts for the result in the prior case and apply it to the new case. This is an act of creativity, for the "meaning of an analogous case may be inexhaustible." [164] It is this very openness that allows for moral evolution within the law in light of new facts, ideas, and values. Whether analogical reasoning takes a conservative or a critical view of social practices depends, he says, not on the method itself, but on the "principles brought to bear on disputed cases." [165] Yet Sunstein concludes that while it would be possible for a court to use analogical reasoning to conclude that bans on abortion and same-sex marriage are unconstitutional, courts should instead resist the full import of such analogies and decide cases as narrowly as possible. This constraint upon the use of analogy is puzzling given that Sunstein also ***545** claims that courts can and do interpret high-level principles like equal protection by drawing analogies between race and other classifications without recourse to abstract moral theory about the meaning of equality. [166]

As Sunstein's ambiguous treatment of the race-sex analogy suggests, there is reason to doubt that a court really could engage in analogical reasoning or use a tool box of legal methods without recourse to some broader principle or grander theory in interpreting the proper scope of equality, whether it be an anticaste principle or a principle of equal concern and respect. If we are correct, then equality is not necessarily less "adventurous" than privacy or autonomy as a constitutional ground for invalidating statutes. (Indeed, Sunstein should make room within his synthesis of liberalism and republicanism for not only a principle of self-government in the sense of deliberative democracy but also a principle of self-government in the sense of deliberative autonomy. [167]) Arguably, constitutional theory that deploys abstract principles developed, as a discipline, in part due to a recognition that the lawyers' tool box conception of law is inadequate. Remarkably, Sunstein practically appears to yearn for an age that antedates the flourishing of constitutional theory. If only Griswold and Roe had not spawned constitutional theory of the sort epitomized by Dworkin. If only we could return to the lawyers' tool box notion of legal reasoning. But we cannot and should not do so.

Second, the justification for Sunstein's judicial minimalism rests both on his argument concerning legitimacy--that judicial resolution of pressing moral conflicts robs the people of their right to deliberate about them--and on an argument about the limited institutional competence of courts. With respect to competence, he offers a number of prudential arguments 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. [168] He embraces the "hollow hope" argument that courts usually cannot effectively bring about social change and that, even if they seek to vindicate constitutional rights, political and social resistance will weaken those rights and render their efforts ineffectual. [169] Thus, judicial minimalism is appropriate given the relative institutional capacities of courts as compared with politically elected officials.

There are two opposed traditions in constitutional theory concerning courts' and legislatures' relative institutional capacities or positions. On ***546** 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 process. 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. [170] It is not possible to resolve the longstanding dispute between these traditions here. But it is worth recalling Justice Jackson's formulation in the second flag salute case, responding to Justice Frankfurter in the first flag salute case: Rather than deferring to the "vicissitudes" of the political process, courts vindicate constitutional freedoms, "not by authority of [their]

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

competence but by force of [their] commissions." [171] If courts' commission is to preserve the Constitution, including substantive liberties, against encroachment through the political process, they arguably would be abdicating their responsibility were they to side with Sunstein and against Dworkin on this dispute.

Third, Sunstein's development of judicial minimalism can be interpreted, in part, as an answer to his own earlier call (in The Partial Constitution) for taking seriously the idea of "the Constitution outside the courts." [172] One might think that this call means that not just courts, but also legislatures and executives, should be fora of principle. As such, it is a valuable corrective to overdrawn contrasts between courts as the forum of principle and legislatures as the battleground of power politics. But for Sunstein, who argues that legislatures and executives, rather than courts, are the true fora of principle, [173] the slogan "the Constitution outside the courts" practically means "get the Constitution outside of the courts" ! One also might think that the call for the Constitution outside the courts promises to liberate constitutional theory from its court-centeredness--whether it be the court-centeredness of those who are obsessed with courts as vindicators of rights or of those who are obsessed with the institutional limits of courts--or to "delegalize" it. [174] Yet, ironically, Sunstein's recent work may end up shackling constitutional theory to concern for institutional limits of courts--or legalizing it with a vengeance. [175]

***547** Moreover, it is not clear that judicial minimalism will promote democratic deliberation, much less conscientious constitutional interpretation outside the courts. It may simply permit the political processes to proceed, such as they are, and to trample on or neglect basic principles of liberty and equality. For one thing, for courts to leave things undecided so as to permit democratic deliberation to proceed is not necessarily the same thing as to promote, or reinforce, or force democratic deliberation. To the extent Sunstein's theory simply entails judicial deference to democracy--such as it is--rather than judicial reinforcement of democracy--in order to secure the preconditions for the trustworthiness of political decisions--it may have more in common with Thayer's traditional republican view than with Ely's representation-reinforcing view (despite Sunstein's characterization of his own theory). For another, promoting democratic deliberation is not necessarily the same thing as promoting conscientious constitutional interpretation outside the courts. For example, democratic deliberation about the common good is not the same thing as deliberation about the meaning and realization of constitutional principles and obligations. And democratic deliberation about the common good may well lead to flouting the Constitution outside the courts. Indeed, the Constitution properly interpreted outside as well as inside the courts may trump the common good and preclude deliberation about certain matters.

Sunstein's call for taking the Constitution seriously outside the courts began sensibly enough (in The Partial Constitution) by emphasizing certain institutional limitations of courts, especially where spending money and restructuring large institutions were concerned. [176] We worry that Sunstein may have added the circumstance of moral disagreement (especially about basic liberties) as an institutional limitation of courts (in Legal Reasoning and Political Conflict and Foreword: Leaving Things Undecided). This development is troubling because moral disagreement about basic liberties may signal a situation of distrust that should trigger the need for judicial review; [177] it should not be viewed as a situation that disqualifies courts and relegates basic liberties to the Constitution outside the courts.

Finally, Sunstein's espousal of judicial minimalism may stem from a pragmatic or prudential judgment about what sort of constitutional theory promises to do the most good, or avert the most harm, for progressive causes during the reign of the Rehnquist Court: Judicial minimalism may lead to minimal judicial damage to the republic in such regressive times. According to this view, the grand, abstract theories of the right and the good--and of federalism and separation of powers, for that matter--that are ***548** likely to be persuasive to five justices of the Court are likely to do great damage to progressive causes and principles. At the same time, the only good things to be hoped for from five justices are likely to come in minimal doses. For example, while it is hard to imagine the present Court overruling Bowers on the basis of a grand, abstract theory of equality or autonomy, we have seen the Court decide Romer on grounds that a minimalist like Sunstein can approve.

Thus, it might seem prudent to propose judicial minimalism and pursue progressive causes through the political process of deliberative democracy. Then, if any progressive legislative measures were adopted and subjected to constitutional challenge, a minimalist Rehnquist Court could do less damage to them, presumably only minimal damage. We fear that this evidently prudent course might reflect a different sort of "hollow hope": [178] that aggressive and ambitious counter-revolutionaries like Chief Justice Rehnquist, Justice Scalia, and Justice Thomas could be humbled, and held, to such minimalism. [179] In any event,

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

even if there is pragmatism and prudence in favor of the course of minimalism, some citizens, including some constitutional theorists, may yearn for something grander and nobler: a constitutional theory that exhorts us to elaborate and pursue our highest aspirations as a people, both inside and outside the courts.

III. Whither Republican Constitutional Theory?

Which alternative, that of Sandel or Sunstein, provides the more attractive republican constitutional theory? The answer depends upon the criteria that one uses in addressing the question. We shall consider the question briefly with respect to three possible criteria.

First, if the question were which alternative offers the richer account of the republican tradition in political and constitutional theory, the answer would surely be Sandel's. After all, Sandel's aim is to reinvigorate the republican tradition as opposed to the liberal tradition, whereas Sunstein's project is to synthesize the liberal and republican traditions in a liberal republican theory (and one that is tempered by judicial minimalism at that). Therefore, it is hardly surprising that Sunstein's rendition of the republican tradition is thinner than Sandel's.

The very thinness of Sunstein's liberal republican theory poses an important, but largely unaddressed, question: Why do we not already have ***549** a thicker republican constitutional theory of the sort that Sandel yearns for but only intimates? Our hypothesis is that in the 1980s, when the hopes for a revival of civic republicanism were at a high point, the discipline was poised to receive such a conception. But then Michelman and Sunstein, both liberals, emerged as the leading proponents of reconstructing republicanism in constitutional law. [180] Both sought to synthesize liberalism and republicanism rather than to develop a thick republican vision. Their syntheses shaped our understanding of what a republican conception looks like. Sandel can be seen as attempting to recover a thicker republican vision for constitutional theory, to salvage it from thinner syntheses like those of Michelman and Sunstein. If there is anything to our hypothesis, it is all the more incumbent on Sandel to develop his intimations, to show us what a richer substantive republican conception would look like, and to defend it.

Second, if the question were which republican alternative better fits and justifies the constitutional document and underlying constitutional order, the answer certainly would be Sunstein's. Indeed, the reasons why Sunstein's account is a thinner republican view than Sandel's are the reasons why it provides a better fit with and justification of the Constitution. After all, our constitutional practice includes both the liberal and republican traditions, and so Sunstein's account, as a synthesis of those two traditions, better satisfies these criteria than would Sandel's. As a political theorist, Sandel is entitled to advance a republican conception of self-government that excludes a liberal conception of deliberative autonomy, because he labors under no obligation to attempt to fit and justify our constitutional tradition. But as a constitutional theorist, he should give autonomy greater weight because it is central to the liberal strand of our constitutional tradition. For the same reason, Sunstein's liberal republican theory, although it attains a better fit than Sandel's theory, is not the most attractive account of the Constitution. A constitutional theory with the two fundamental themes of deliberative democracy and deliberative autonomy not only offers a better synthesis of liberalism and republicanism than does Sunstein's theory but also provides a better fit with and justification of the Constitution. [181]

Finally, if the question were which republican theory offers greater hope for mitigating "democracy's discontent," Sandel's might seem to be more promising. For his theory, with its formative project of cultivating civic virtue in citizens and its emphasis on interpreting constitutional ***550** freedoms in relationship to citizenship and self-government, might seem to go deeper in addressing the roots of democracy's discontent than Sunstein's theory, which deliberately stays near the surface. Yet Sunstein could argue that his theory, by reinforcing the preconditions for the trustworthiness of the outcomes of the political process, is well suited to alleviating "democracy's distrust," if you will. [182] The answer would depend upon what analysis of hope and discontent one adopted. Sunstein would caution that looking to courts to alleviate discontent with democracy is pursuant to a "hollow hope," [183] just as Thayer and Hand would admonish that courts cannot save a people from ruin. Dworkin and, on our interpretation, Sandel might concede that courts are not our only hope but still contend that courts might serve as exemplars of an aspirational or hortatory constitutionalism that makes recourse to our noblest commitments and highest aspirations as a people--whether as a forum of principle or as a forum of substantive moral argument.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

We cannot resolve this longstanding dispute here. Sunstein's cautions offer a salutary corrective to persons who put their only hopes, or high hopes, on courts to vindicate substantive constitutional freedoms. But they seem to be overstated with respect to persons who look to courts along with politically elected officials and the citizenry generally for a rejuvenation of republican responsibility. Furthermore, Sunstein's emphasis on the Constitution outside the courts should be taken seriously in a polity that takes its republicanism and indeed its liberalism seriously. But his suggestion that the substantive republic should flourish outside the courts, while only a procedural republic should be secured inside the courts (and minimally at that), should be greeted with some skepticism. Sunstein, in criticizing Dworkin's view, said that "Earl Warren is [d]ead." [184] True enough, but he is not forgotten. Even if courts cannot save a people from ruin, they may be able to make democracy more trustworthy and to mitigate some of the discontent with it by recalling, and reinforcing, its substantive along with its procedural preconditions.

IV. Conclusion

In conclusion, the flaw of Sandel's form of republican constitutional theory is that it is too thick, and that of Sunstein's is that it is too thin. It is at once the appeal and the shortcoming of Sandel's project that he has not yet delivered enough. His republicanism seems more evocative than ***551** elaborated. (Indeed, this is often the case with works growing out of the republican tradition. [185]) He has done a more compelling job of showing us what we have lost than of showing us how we might reconstruct it for our time. Ultimately, Sandel fails to deliver the goods for a substantive republic. The few republican goods or virtues that he specifies fit comfortably within liberalism, and the liberal substance that he leaves out (especially autonomy) renders his republicanism problematic and perilous. What he provides is a call for a republican form of argument or justification for constitutional freedoms, and a commitment to a process of deliberation that he claims will ameliorate discontent with democracy. In the end, this is Sandel's procedural republic. That Sandel does not provide more may suggest just how formidable a task it is to articulate a republicanism that is appropriate for a pluralistic polity.

By contrast, it is both the appeal and the drawback of Sunstein's project that he has already delivered too much. His earlier book, The Partial Constitution, was an outstanding work of grand theory, developing principles of deliberative democracy that had considerable critical bite with respect to existing practices that denied persons the status of equal citizenship. But Legal Reasoning and Political Conflict blunts that critical bite, at least as far as judicial vindication of those principles is concerned. Indeed, his minimalism may practically entail that courts should wither away as vindicators of constitutional rights. Our polity does need more democratic deliberation, but it is doubtful that judicial minimalism will significantly enhance or increase such deliberation. We fear that Sunstein's call for a judicial minimalism may suggest that his form of republican constitutional theory has gone off the shallow end. Or that in his complex synthesis of intellectual traditions, including liberalism, republicanism, feminism, and pragmatism, his pragmatism has gotten the upper hand.

It remains an open question whether we should wish to revitalize the republican tradition and to search for a substantive republic. But even if we should, most of the work of developing a moral reading of the Constitution of the substantive republic remains to be done.

Footnotes

d1 Professor of Government, Harvard University.

r1 Hereinafter cited by title and page number only.

dd1 Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago Law School.

rr1 Hereinafter cited by title and page number only.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

a1 Associate Professor of Law, Fordham University School of Law. Ph.D. 1988, Princeton University; J.D. 1985, Harvard University; A.B. 1977, University of Missouri.

aa1 Professor of Law, Hofstra University School of Law. LL.M. 1991, New York University; J.D. 1985, Georgetown University; A.M. 1981, University of Chicago; A.B. 1980, Oberlin College.

We are grateful to Sot Barber, Mike Dorf, Martin Flaherty, Ned Foley, Abner Greene, Sandy Levinson, Sharon Lloyd, Bill Treanor, Mark Tushnet, and Ben Zipursky for helpful comments. We also have benefitted from discussing the arguments in the essay with Frank Michelman, Michael Sandel, and Cass Sunstein. Finally, we would like to thank Mark Hagelin and Melissa Lawton for research assistance. Fleming presented portions of the essay in the Roundtable on Varieties of Constitutional Thinking for the Good Society at the 1997 Annual Meeting of the American Political Science Association.

1 Michael J. Sandel, Liberalism and the Limits of Justice (1982).

2 In this essay, we also analyze two other recent works by Sunstein: Cass R. Sunstein, The Partial Constitution (1993) and Cass R. Sunstein, The Supreme Court, 1995 Term--Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4 (1996). The other leading proponent of synthesizing liberalism and republicanism in constitutional law is Frank Michelman. See, e.g., Frank Michelman, Law's Republic, 97 Yale L.J. 1493 (1988) [hereinafter Michelman, Law's Republic]; Frank I. Michelman, The Supreme Court, 1985 Term--Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4 (1986).

3 See John Rawls, Political Liberalism 37 (1993) (arguing that a single, comprehensive doctrine can be maintained only through the use of oppressive state power).

4 Elsewhere, one of us has outlined and developed such a theory, which builds upon Rawls's political liberalism. See James E. Fleming, Securing Deliberative Autonomy, 48 Stan. L. Rev. 1 (1995) [hereinafter Fleming, Securing]; James E. Fleming, Constructing the Substantive Constitution, 72 Texas L. Rev. 211 (1993) [hereinafter Fleming, Constructing]. Sunstein wrote a reply to the latter article. See Cass R. Sunstein, Liberal Constitutionalism and Liberal Justice, 72 Texas L. Rev. 305 (1993) (arguing that judicial enforcement of rights of autonomy is more adventurous and problematic than that of rights of democratic deliberation).

5 Democracy's Discontent 4. Sandel critiques, in Part I of the book, the emergence of “the Constitution of the procedural republic” and, in Part II, the erosion of “the political economy of citizenship,” both of which mark the triumph of the liberal aspiration to governmental neutrality concerning citizens' conceptions of the good over the republican commitment to a formative project of cultivating civic virtue in citizens. Id. at 3-119, 123-315. In this essay, we focus on the former.

6 Id. at 116.

7 John Rawls, A Theory of Justice (1971).

8 Rawls, supra note 3, at 10, 27 n.29, 97.

9 Democracy's Discontent 18-19 & n.28.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

10 Id. at 5.

11 Id. at 4.

12 Id. at 5.

13 See Michael J. Sandel, The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues, 66 Fordham L. Rev. 1, 2 (1997); see also Democracy's Discontent 6 (arguing that while the liberal version of freedom is attractive, it nevertheless "lacks the civil resources to sustain self-government").

14 Sunstein, supra note 2, at 133-41, 373 n.18.

15 Id. at 173-94.

16 Id. at 141, 175, 186, 376 n.1.

17 See generally, e.g., William A. Galston, Liberal Purposes (1991); Amy Gutmann & Dennis Thompson, Democracy and Disagreement (1996); Will Kymlicka, Liberalism, Community, and Culture (1989); Stephen Macedo, Liberal Virtues (1990); Joseph Raz, The Morality of Freedom (1986).

18 Legal Reasoning and Political Conflict 7 (criticizing Ronald Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469 (1981), reprinted in Ronald Dworkin, A Matter of Principle 33 (1985)).

19 Id. at 4, 37.

20 Sunstein, supra note 2 (applying the theory of judicial minimalism to controversies that the Supreme Court treated during its 1995 term).

21 See Jürgen Habermas, Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism, 92 J. Phil. 109, 131, 126-27 (1995) (contending that his own procedural theory "focuses exclusively on the procedural aspects of the public use of reason and derives the system of rights from the idea of its [legitimate] legal institutionalization," as against Rawls's substantive liberal conception, which "accords liberal basic rights primacy over the democratic principle of legitimation"); John Rawls, Reply to Habermas, 92 J. Phil. 132, 170-80 (1995) (replying to Habermas's objection that Rawls's conception is substantive rather than procedural), reprinted in John Rawls, Political Liberalism 372, 421-33 (paperback ed. 1996). On the relationship between procedural justice and substantive justice, see Joshua Cohen, Pluralism and Proceduralism, 69 Chi.-Kent L. Rev. 589, 600-15 (1994).

22 See John Hart Ely, Democracy and Distrust 87, 43-72, 73-104 (1980) (criticizing theories of discovering and protecting substantive fundamental rights, including the theory put forward by Dworkin in Ronald Dworkin, Taking Rights Seriously (1977), and arguing for a "representation-reinforcing" or process-perfecting theory).

23 See Ronald Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469, 470, 500-16 (1981), reprinted in Ronald Dworkin, A Matter of Principle 33, 34, 57-69 (1985) (arguing that Ely takes a flight from substance to process that "end[s] in failure" because "[j]udges cannot decide ... which political process is really fair or democratic, unless they make

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

substantive political decisions of just the sort the proponents of ... process think judges should not make"); Richard A. Epstein, Modern Republicanism--Or The Flight From Substance, 97 Yale L.J. 1633, 1633 (1988) ("No political theory can concentrate on process and deliberation to the exclusion of substantive concerns. Yet that is precisely what ... Sunstein heroically tr[ies] to do."); Fleming, Constructing, supra note 4, at 252-60 (criticizing Sunstein for taking a flight from substance to process); Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1064 (1980), reprinted as The Pointless Flight from Substance, in Laurence H. Tribe, Constitutional Choices 9, 9-10 (1985) (arguing that Ely's theory takes a pointless flight from making substantive constitutional choices to perfecting processes).

24 By drawing this second distinction so schematically, we do not mean to imply that the realms of democratic self-government and personal self-government are entirely distinct. See Fleming, Securing, supra note 4, at 27.

25 Ely, supra note 22, at 101-03, 73-104 (arguing for a "representation-reinforcing" theory of "democracy and distrust," whereby judicial review is justified in situations where the processes of representative democracy are systematically undeserving of trust).

26 Sunstein, supra note 2, at 123-61 (setting out the core commitments of deliberative democracy and contending that the Constitution establishes such a framework).

27 See Ely, supra note 22, at 93-94.

28 Id. at 101.

29 See Fleming, Constructing, supra note 4, at 260, 256-60 (criticizing the "architecture of Sunstein's theory [for recasting] as preconditions for deliberative democracy certain substantive liberties that are better understood as preconditions for deliberative autonomy").

30 For Dworkin's formulation of the two dimensions of best interpretation, fit, and justification, see, for example, Ronald Dworkin, Law's Empire 239 (1986).

31 See Democracy's Discontent 71-90.

32 See Cass R. Sunstein, Democracy and the Problem of Free Speech (1993). This book further develops the theory of free speech already previewed by Sunstein in The Partial Constitution. See Sunstein, supra note 2, at 197-256.

33 See Democracy's Discontent 93, 91-100.

34 See Legal Reasoning and Political Conflict 155-56, 180-81.

35 505 U.S. 833 (1992).

36 Democracy's Discontent 99.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

37 See Sunstein, supra note 2, at 283-84.

38 Democracy's Discontent 6-7, 123-25.

39 See Frank I. Michelman, Welfare Rights in a Constitutional Democracy, 1979 Wash. U. L.Q. 659, 677-85.

40 See Sunstein, supra note 2, at 137-40 (contending that welfare rights are among the preconditions for political equality, a basic commitment of a liberal republican conception of deliberative democracy).

41 See Democracy's Discontent 286, 288.

42 See Charles A. Reich, The New Property, 73 Yale L.J. 733, 785-86 (1964).

43 Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 1, 1-38 (1996).

44 See Democracy's Discontent 71-90.

45 See id. at 91-108.

46 See Sandel, supra note 1, at 21.

47 Democracy's Discontent 350.

48 Id. at 320.

49 See Learned Hand, The Bill of Rights (1958); James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893). In this essay, we distinguish between "traditional republicanism," illustrated by Thayer and Hand, which argues for judicial deference to the democratic process, and "classical republicanism," associated with Aristotle and Rousseau, which emphasizes government's formative project of inculcating civic virtue in the citizenry.

50 See Thayer, supra note 49, at 130-32.

51 Id. at 149 (quoting Eakin v. Raub, 12 Serg. & Rawle 330, 355 (Pa. 1825) (Gibson, J., dissenting)) (emphasis omitted).

52 Id. at 146.

53 James Bradley Thayer, John Marshall, in James Bradley Thayer, Oliver Wendell Holmes, and Felix Frankfurter on John Marshall 1, 86 (Philip B. Kurland ed., 1967).

54 Hand, supra note 49, at 74, 31-55, 73-74.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

55 Thayer, supra note 49, at 156; see also Learned Hand, The Spirit of Liberty, in The Spirit of Liberty: Papers and Addresses of Learned Hand 189, 190 (Irving Dilliard ed., 3d ed. 1960) ("Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it ....").

56 For this formulation in terms of the "thinness" of constitutional law, we are indebted to Lawrence G. Sager, Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law, 88 Nw. U. L. Rev. 410 (1993). Sager characterizes this thinness as a matter of the considerable "moral short-fall" or "gap" between the reach or domain of constitutional caselaw and the reach or domain of political justice. Id. at 410-12.

57 Sunstein, supra note 2, at 142.

58 Id. at 143.

59 See id. at 142-44. Here, Sunstein follows the argument of Ely, supra note 22, at 102-03.

60 See Sunstein, supra note 2, at 145-49.

61 See Legal Reasoning and Political Conflict 195; Sunstein, supra note 2, at 14-16, 19-21.

62 We should acknowledge, however, that Sandel and Sunstein share the republican goal of promoting deliberation about the good among the citizenry and through the political process. The contrast between their theories may stem in part from the fact that Sandel simply has not attempted to provide a theory of institutional roles, while Sunstein has focused on developing such a theory in his recent writings.

63 381 U.S. 479 (1965).

64 See Ronald Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom 157-68 (1993); Dworkin, supra note 43, at 101-12.

65 Democracy's Discontent 106. On the contrast between shallow and deep argument, and their uses in liberalism, see S.A. Lloyd, Relativizing Rawls, 69 Chi.-Kent L. Rev. 709 (1994).

66 Sunstein elaborates these notions of "shallow," "narrow," and "deep" in Sunstein, supra note 2, at 15-21.

67 See Democracy's Discontent 94-100.

68 See id. at 95-100.

69 Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

70 See Democracy's Discontent 96.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

71 Griswold, 381 U.S. at 486.

72 See Democracy's Discontent 96.

73 See id. at 97-98.

74 405 U.S. 438 (1972).

75 Id. at 453 (emphasis in original).

76 Id.

77 410 U.S. 113 (1973).

78 See id. at 154.

79 431 U.S. 678 (1977).

80 Id. at 687.

81 Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992) (joint opinion).

82 Democracy's Discontent 99 (quoting Casey, 505 U.S. at 851).

83 Casey, 505 U.S. at 857, 851.

84 478 U.S. 186 (1986). For Sander's critique, see Democracy's Discontent 103-08.

85 See Bowers, 478 U.S. at 190.

86 Id. at 190, 190-91.

87 See id. at 195-96.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

88 See id. at 196.

89 See Democracy's Discontent 99-100.

90 See id. at 104-06.

91 394 U.S. 557 (1969).

92 Id. at 559. Sandel gives the example of People v. Onofre, 415 N.E.2d 936 (N.Y. 1980), in which New York's highest court struck down that state's sodomy law on the ground that it violated the right of privacy. See Democracy's Discontent 106 n.57.

93 Democracy's Discontent 107.

94 Id. at 106.

95 Id. at 107.

96 See id.

97 See id. at 25.

98 Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (citation omitted).

99 Id. at 217 (Stevens, J., dissenting) (quoting Fitzgerald v. Porter Mem'l. Hosp., 523 F.2d 716, 719 (7th Cir. 1975)).

100 For a helpful feminist analysis of the problem of the constraining effects of sex inequality upon women's choices and capacity for self-government, see Nancy J. Hirschmann, Toward a Feminist Theory of Freedom, 24 Pol. Theory 46 (1996).

101 Historically, one justification for toleration was the conviction that coercion and compulsion corrupt belief. As translated to contemporary constitutional law, that conviction is present in the statement in Casey that beliefs about "one's own concept of existence, of meaning, of the universe, and of the mystery of human life ... could not define the attributes of personhood were they formed under compulsion of the State." Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (joint opinion); see Linda C. McClain, Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond Empty Toleration to Toleration as Respect, 59 Ohio St. L.J. (forthcoming 1998) (discussing the anti-compulsion rationale for toleration).

102 Bowers, 478 U.S. at 205 (Blackmun, J., dissenting) (emphasis in original).

103 Democracy's Discontent 350.

104 On these liberal notions, see Kymlicka, supra note 17, at 47-73; Nancy L. Rosenblum, Pluralism and Self-Defense, in Liberalism and the Moral Life 207, 207 (Nancy L. Rosenblum ed., 1989).

105 Casey, 505 U.S. at 852.

106 See id. at 851-52.

107 Id. at 856.

108 See Sunstein, supra note 2, at 283-84; supra notes 36-37 and accompanying text. Nonetheless, Sunstein appears to have retreated somewhat from his justification of judicial vindication of the right to abortion on the ground of an anticaste principle of sex equality. See infra notes 137-43, 151-60 and accompanying text.

109 Casey, 505 U.S. at 852.

110 Id. at 850.

111 Id. at 878.

112 See Dworkin, supra note 64, at 151-59.

113 Elsewhere, one of us has criticized Dworkin's analysis on these grounds. See McClain, supra note 101 (arguing that a liberal feminist model of toleration as respect can endorse Dworkin's idea that government has a responsibility to encourage reflective decisionmaking, but criticizing, in the context of abortion, the idea that government facilitates reflective decisionmaking by persuading against the exercise of a protected choice); Linda C. McClain, Rights and Irresponsibility, 43 Duke L.J. 989, 1087 (1994) (arguing that Dworkin's use of "responsibility talk raises significant questions about what government may do in the realm between noninterference and coercion and about precisely how to delineate coercion from persuasion").

114 Similarly, there may be common ground between Sandel's republican formative project and some forms of liberal perfectionism. See McClain, supra note 101 (arguing that Sandel shares with a number of liberal and feminist perfectionists the assumption that government should engage in a formative project to shape citizens and help them lead good, self-governing lives).

115 See, e.g., Chai R. Feldblum, Sexual Orientation, Morality, and the Law: Devlin Revisited, 57 U. Pitt. L. Rev. 237, 304-12 (1996) (arguing for the need to challenge society's view of homosexuality as immoral).

116 See, e.g., John M. Finnis, Law, Morality, and "Sexual Orientation," 69 Notre Dame L. Rev. 1049 (1994) (arguing that same-sex unions cannot realize the goods of marriage). For an argument that Finnis has too narrowly conceived the

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

goods of marriage, see Paul J. Weithman, Natural Law, Morality, and Sexual Complementarity, in Sex, Preference, and Family: Essays on Law and Nature 227 (David M. Estlund & Martha C. Nussbaum eds., 1997).

117 For Rawls's idea of public reason, see generally Rawls, supra note 3, at 212-54; John Rawls, The Idea of Public Reason Revisited, 64 U. Chi. L. Rev. 765 (1997). Sandel criticizes Rawls's idea of public reason in Michael J. Sandel, Political Liberalism, 107 Harv. L. Rev. 1765, 1789-94 (1994) (reviewing Rawls, supra note 3).

118 See Sandel, supra note 117, at 1794. By contrast, Rawls's idea of public reason allows citizens to make arguments in the public square based upon their comprehensive moral doctrines, provided that in due course they give properly public reasons and appeal to political values to support those arguments. See Rawls, supra note 117, at 776, 783-84.

119 CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

120 See id. at *15-19. Thus, the Hawaii case seems wholly compatible with political liberalism's approach to same-sex marriage: Political liberalism requires "no particular form of the family (monogamous, heterosexual, or otherwise)," so long as the family can perform the roles and responsibilities required of it within the basic structure of society. Rawls, supra note 117, at 788 n.60, 779.

121 The state of Hawaii, in attempting to justify its ban on same-sex marriage, articulated such interests as preserving the traditional definition of marriage and protecting against adverse effects of same-sex marriage on the traditional institution of marriage, but the court concluded that the state presented "meager" evidence to support these asserted interests. Baehr, 1996 WL 694235, at *17, *44.

122 See, e.g., 142 Cong. Rec. S10108-11 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd) (invoking biblical prophecies to warn of catastrophic effects of accepting same-sex marriage); 142 Cong. Rec. H7482 (daily ed. July 12, 1996) (statement of Rep. Barr) (alluding to Nero fiddling while Rome burned and arguing that "[t]he very foundations of our society are in danger of being burned" by the recognition of same-sex marriage).

123 See 142 Cong. Rec. H7278 (daily ed. July 11, 1996) (statement of Rep. Frank) (contending that the bill's proponents were unable to explain how heterosexual marriage was threatened).

124 For arguments along these lines, see Robin West, Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law, 65 Fordham L. Rev. 1313, 1329-34 (1997) (highlighting the historical inequality in heterosexual marriages and the exclusion of nonconsensual sexual acts within marriage from the definition of rape); Nan D. Hunter, Marriage, Law, and Gender: A Feminist Inquiry, 1 L. & Sexuality 9, 16-19 (1991) (contending that same-sex marriage has the "potential to expose and denaturalize the historical construction of gender at the heart of marriage" and to disrupt the assumption that marriage is a hierarchical social form).

125 When Robin West offered an argument of this sort in a paper at a conference on Democracy's Discontent at Georgetown University Law Center, April 25, 1997, Sandel replied by expressing receptivity to such an argument about the substantive moral vision offered by same-sex marriage. West's paper is to be published as Gay Marriage and Liberal Constitutionalism: Two Mistakes, in Debating Democracy's Discontent: Essays on American Politics, Law and Public Philosophy (Anita L. Allen & Milton C. Regan, Jr. eds., forthcoming 1998).

126 Bowers v. Hardwick, 478 U.S. 186, 205-06 (1986) (Blackmun, J., dissenting). Elsewhere, one of us has argued that a diversity rationale for toleration supports a right to same-sex marriage. See McClain, supra note 101.

127 See John Stuart Mill, On Liberty 54 (David Spitz ed., Norton 1975) (1859).

128 See Rawls, supra note 3, at 134-35.

129 Michael Moore refers to the "goodness of pluralism, tolerance, and autonomy" in formulating a liberal response to Sandel. Michael S. Moore, Sandelian Antiliberalism, 77 Cal. L. Rev. 539, 550 (1989).

130 A common definition of toleration includes an attitude of disapproval or even disgust toward, and thus an impulse to suppress, the tolerated belief or conduct. See Raz, supra note 17, at 401-02.

131 See McClain, supra note 101 (arguing for a model of toleration as respect over a model of empty toleration).

132 See, e.g., Sunstein, supra note 4, at 312 (suggesting that reliance upon equal protection principles could provide a narrower and more secure basis for judicial decisions).

133 Legal Reasoning and Political Conflict 156.

134 See id. at 155.

135 Id. at 156.

136 Id.

137 See id. at 180-81; Sunstein, supra note 2, at 270-75, 402 n.17.

138 Legal Reasoning and Political Conflict 181.

139 See id. at 180.

140 Id.

141 Sunstein, supra note 2, at 402 n.17.

142 In analyzing Roe, Sunstein notes that Jane Roe alleged in her lawsuit that her pregnancy resulted from rape. See Sunstein, supra note 2, at 49. In her amended complaint, however, she made no such allegation. See Plaintiff's First Amended Complaint at 10, Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (No. CA-3-3690-B). Her autobiographical account

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

states that she initially lied about being raped because she mistakenly believed that rape was an exception to Texas's prohibition of abortion. See Norma McCorvey & Andy Meisler, I Am Roe 109, 122 (1994).

143 See Legal Reasoning and Political Conflict 180-81.

144 Id. at 181.

145 See Sunstein, supra note 2, at 67 n.307 (contending that the opinion in Loving v. Virginia, which ruled that a ban on miscegenation was unconstitutional, was maximalist because it rested in part on a right to marry grounded in substantive due process, not simply on equal protection).

146 See Legal Reasoning and Political Conflict 181.

147 116 S. Ct. 1620 (1996).

148 Id. at 1629. Sunstein discusses Romer in Sunstein, supra note 2, at 53-71.

149 Romer, 116 S. Ct. at 1629, 1628 (quoting USDA v. Moreno, 413 U.S. 528, 534 (1973)).

150 See Sunstein, supra note 2, at 64, 68-69.

151 See Sunstein, supra note 2, at 259.

152 See Fleming, Constructing, supra note 4, at 267-68, 273-75.

153 347 U.S. 483 (1954).

154 Sunstein, supra note 2, at 260.

155 388 U.S. 1 (1967).

156 Legal Reasoning and Political Conflict 95; Sunstein, supra note 2, at 402 n.17.

157 Legal Reasoning and Political Conflict 180-81; Sunstein, supra note 2, at 96-99.

158 See Legal Reasoning and Political Conflict 180-81.

159 Compare Mary Ann Glendon, Abortion and Divorce in Western Law 47, 47-50 (1987) (arguing that a "decision leaving abortion regulation basically up to state legislatures would have encouraged constructive activity by partisans of both

sides"), with Laurence H. Tribe, Abortion: The Clash of Absolutes 49-51 (1990) (stating that "the history of abortion law reform in the United States seriously undermines [Professor Glendon's] claim").

160 See Tribe, supra note 159, at 143-47 (depicting the intensity of anti-abortion pressure on legislatures, resulting in the establishment of barriers to abortion).

161 Romer v. Evans, 116 S. Ct. 1620, 1633 (1996).

162 See Sunstein, supra note 2, at 67-69. For a critique of Sunstein's distinction between due process and equal protection along these lines, see Fleming, Constructing, supra note 4, at 260-68.

163 See Ronald Dworkin, Sex, Death, and the Courts, N.Y. Rev. Books, Aug. 8, 1996, at 44, 49-50; see also Ronald Dworkin, The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve, 65 Fordham L. Rev. 1249, 1268 (1996) (criticizing Romer for not overruling Bowers and criticizing pragmatic approaches to distinguishing those cases: "Lives don't pause while the passive, pragmatic virtues drape themselves in epigrams and preen in law journal articles").

164 Legal Reasoning and Political Conflict 194.

165 Id. at 95.

166 See id. at 79-83.

167 See Fleming, Constructing, supra note 4, at 252-60.

168 Legal Reasoning and Political Conflict 177 (pointing out that judges only confront small-scale pieces of systemic controversies, are drawn from relatively narrow segments of society, and generally lack any philosophical training or other unique bases for moral evaluation).

169 Id. at 176. Here Sunstein endorses the argument in Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991).

170 See, e.g., Dworkin, supra note 22; Dworkin, supra note 23.

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

172 See Sunstein, supra note 2, at 9-10 (suggesting that in constitutional theory too much emphasis has been put on the courts' role and that nonjudicial strategies of interpretation and enforcement should be considered).

173 See Legal Reasoning and Political Conflict 7, 59-60.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

174 See Mark A. Graber, Delegalizing Constitutional Theory, Good Soc'y, Fall 1996, at 47.

175 We grant, though, that Sunstein's judicial minimalism may have as its ultimate aim liberating constitutional theory from the courts for democratic deliberation outside the courts; its focus on institutional limits of courts may just be a preliminary step to allowing constitutional theory outside the courts to flourish.

176 Sunstein, supra note 2, at 145-61.

177 See Fleming, Constructing, supra note 4, at 296-97; Fleming, Securing, supra note 4, at 22-23 (both advancing a notion of constitutional democracy and trustworthiness).

178 See supra text accompanying note 169.

179 In the aftermath of the last term of the Court, some commentators decried the Rehnquist Court's aggressive approach to judicial review and drew parallels between the Rehnquist Court and "the excesses of the Warren Court." See, e.g., Jeffrey Rosen, The New Warren Court: Dual Sovereigns, New Republic, July 28, 1997, at 16, 19. For the characterization of justices like Scalia as "counter-revolutionary conservatives," as distinguished from "preservative conservatives," see Fleming, Securing, supra note 4, at 60.

180 Thus, in a major symposium on the revival of civic republicanism in constitutional law, see Symposium, The Republican Civic Tradition, 97 Yale L.J. 1493 (1988), Michelman and Sunstein wrote the two lead articles. See Michelman, Law's Republic, supra note 2; Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988).

181 See Fleming, Constructing, supra note 4, at 249-60, 300-01.

182 Sunstein's theory, like Ely's, is a theory of "democracy and distrust." Sunstein, supra note 2, at 142-44; see supra text accompanying notes 57-59.

183 See supra text accompanying note 169.

184 Cass R. Sunstein, Earl Warren Is Dead, New Republic, May 13, 1996, at 35 (reviewing Dworkin, supra note 43).

185 See, e.g., Richard D. Parker, Here, the People Rule (1994); Richard D. Parker, The Past of Constitutional Theory--And Its Future, 42 Ohio St. L.J. 223 (1981). For analysis of this aspect of the republican tradition, see Richard H. Fallon, Jr., What Is Republicanism, and Is It Worth Reviving?, 102 Harv. L. Rev. 1695 (1989); Donald Herzog, Some Questions for Republicans, 14 Pol. Theory 473 (1986).

76 TXLR 509

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.