Minimalism, Perfectionism, and Common Law Constitutionalism: Reflections on Sunstein's and Fleming's Efforts to Find the Sweet Spot in Constitutional Theory

Benjamin C. Zipursky
Fordham University School of Law

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol75/iss6/12

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
MINIMALISM, PERFECTIONISM, AND COMMON LAW CONSTITUTIONALISM: REFLECTIONS ON SUNSTEIN’S AND FLEMING’S EFFORTS TO FIND THE SWEET SPOT IN CONSTITUTIONAL THEORY

Benjamin C. Zipursky*

INTRODUCTION

It has been a great pleasure to read and to comment upon two fine books in constitutional theory—Cass Sunstein’s *Radicals in Robes*¹ and Jim Fleming’s *Securing Constitutional Democracy.*² Professor Sunstein, as exemplified in this important new book, epitomizes what most of us think of as the great law professor—a searing intellect, a penchant for public engagement, a capacity to opine wisely on important legal, moral, and political issues while at the same time offering legal theories that are both imaginative and learned. My good friend Jim Fleming exemplifies those very same qualities in *Securing Constitutional Democracy.* As a friend, colleague, and coauthor, I am familiar with many other important roles he has played. Three deserve special mention here: builder of Fordham Law School as an important home of a diverse and cutting-edge array of constitutional theorists; constant nurturer of and inspiration to junior (and not-so-junior) colleagues; and personal interlocutor with many of us on the toughest issues of jurisprudence and constitutional theory. I want to thank Professor Sunstein for participating in this special symposium; I want to thank Professor Fleming for being here as a constant presence.

Like many philosophical thinkers, both Sunstein and Fleming are attracted to a dialectical method that orients the reader through the presentation of two unacceptable options whose juxtaposition sounds a call for a third way, a synthesis, a middle path, the sweet spot, or whatever post-Hegelian metaphor one likes. Sunstein gives us the fundamentalist and the

* Professor and James H. Quinn Chair in Legal Ethics, Fordham Law School. I am grateful to the participants in this Symposium, and in particular to Cass Sunstein and Jim Fleming, whose books and appearance made this possible. Fordham Law School’s support is gratefully acknowledged. Finally, I thank John Goldberg and Abner Greene for valuable comments.


2997
perfectionist, and shows us the golden mean of the minimalist. Fleming points out the positivist and the no-holds-barred natural law perfectionist, and then trots out the constitutional constructivist as the middle path. I will confess at the outset—and mention briefly at the end—that I am no different. We see the super-cautious and antitheoretical minimalist in Sunstein, and the bold Rawlsian constitutional constructivist in Fleming. My question, in a few concluding remarks, is whether we might not find a middle path in a common law constitutionalism.

I. SUNSTEIN’S MINIMALISM

Sunstein’s book is a critique of fundamentalism, a view adhered to by a cluster of Justices, judges, and scholars with a particular conservative agenda for the Supreme Court and the courts more generally. The principal shortcoming of Sunstein’s book as a work of constitutional theory is that the minimalism that Sunstein puts forward as a basis for the critique of fundamentalism fails to engage fundamentalism in two of the ways that one hopes it would. First, the defects of fundamentalism are largely independent of the merits of minimalism. Second, what characterizes fundamentalism as a constitutional theory is a set of commitments that minimalism does not even address, let alone criticize or replace. Each of these concerns requires a bit of explanation.

A. The Defects of Fundamentalism

Sunstein has so many things to say about the shortcomings of fundamentalism that it is hard for him to know where to begin. The most serious, however, is that the core positions of fundamentalists are simply inconsistent with their alleged commitment to original understanding. In other words, says Sunstein, some fundamentalists are “false fundamentalists.”3 Perhaps the best example of this is affirmative action. There is simply no evidence that affirmative action is inconsistent with original understanding of the Equal Protection Clause and, indeed, there is considerable evidence to the contrary.4 The critique of national security fundamentalism runs along similar lines: “Here, as with affirmative action, many fundamentalists do not follow their own creed.”5 More broadly, fundamentalists’ views on separation of powers and the non-delegation doctrine in particular are unsupported by their own methodology.6 And the list goes on and on ofpivotally important planks of the fundamentalists’ theoretical platform (for example, gun control, campaign finance, and commercial speech libertarianism) that must be torn off if one takes seriously their claim to be committed to original understanding as revealed through text and history.

3. Sunstein, supra note 1, at 134 (emphasis omitted).
4. Id. at 138-42.
5. Id. at 152.
6. Id. at 204-06.
These are important points to which I neither could nor wish to offer responses. But they are points that have little or nothing to do with the merits of minimalism. One does not need to be any kind of minimalist to see that there is a problem with failing to apply one's own methods in an accurate, or even plausible way. In an important sense, they do not have all that much to do with Sunstein's title theme: Basing one's normative claims on unsound arguments and being radical in following one's political goals are quite different shortcomings. Indeed, a different sort of view than minimalism—the form of original understanding that the fundamentalists themselves espouse—would be sufficient to accommodate Sunstein's criticisms on all of these points. There is really nothing here to support minimalism.

On most of the other issues Sunstein addresses—those regarding privacy, the establishment of religions, and the power of Congress to pass environmental laws and antidiscrimination laws, for example—quite a different kind of argument emerges. Of course, it is not that Sunstein concedes the argument from text and history on these points (although he is commendably willing to recognize weaknesses as to some of them). It is that he identifies a kind of reason for rejecting the fundamentalists' position that goes beyond their inconsistency. In a subsection entitled "Why Fundamentalism is Indefensible," Sunstein offers the simple answer: Fundamentalism would produce "bad results." "Is it unacceptably 'result-oriented' to object to fundamentalism on the ground that it would lead to intolerable consequences? Actually it isn't. Any approach to interpretation has to be defended, not just celebrated, and if an approach would produce intolerable results, it is hard to defend." 

A sharp example is provided by Sunstein's discussion of the Establishment Clause. Sunstein describes Justice Clarence Thomas's position that a state can select a particular religion that it wishes to favor and do so officially within the state. The First Amendment's Establishment Clause was in particular intended to forbid the federal government from doing so, but to permit the states to do so. Sunstein writes, "This view is not implausible as a matter of history, but it would produce radical changes in American law and life." And that, for him, seems to be the end of the matter. He also argues that there is a similar line of argument with regard to rights of privacy, and with regard to the existence of the regulatory state (although here, there is a bit less credence given to the cogency of the interpretive argument).

Certainly, minimalism seems more relevant to the rejection of these positions. For these are, at a practical level, radical proposals, and minimalism is both not radical and not in favor of large changes. The

---

7. Id. at 71-73.
8. Id. at 72-73.
9. Id. at 223-27.
10. Id. at 225.
problem is that the argument seems to beg the question. The argument that we can simply reject these conclusions because we view them as having intolerable results is an argument that moves too quickly to invite judges to interpret the law based on which set of results they like. Many thinkers—including the fundamentalists—do not think the results would be bad. They think such results would be good. So even assuming that Sunstein is right that results should be taken into account, it is not clear why a fundamentalist should regard the argument as presenting a sound minimalist critique of their position.

B. The Theoretical Core of Fundamentalism

Someone who picks up *Radicals in Robes* will quickly be convinced of one of the implicit claims of its title: that the fundamentalist agenda is an agenda for radical change. But there is another implicit claim, which is that the sort of radicalism advanced by the fundamentalists is inconsistent with their role as judges. The jarringness of the title, “Radicals In Robes,” is not alliteration for its own sake. The point is almost to suggest a kind of misrepresentation through the image of radicals hiding under judicial “robes.” But this second sort of claim about radicalism only works as a criticism if the case is made that the sense in which Justices would be pursuing major changes involves a sort of change that is inconsistent with a judge’s proper role in constitutional law. After all, Justices Antonin Scalia and Clarence Thomas do not often hide from their own important stations and from their agenda to move certain issues from the U.S. Supreme Court. The problem is particularly acute if one believes that they are basically right on some of these issues about what the Constitution actually means. If this is so, then the radicalism of the *Roe* Court, for example, was twofold: First, it was a large change precipitated by a bold interpretive step; and second, the change made was beyond the proper power of a Justice—it was a usurpation of a power allocated by our system to states. The radicalism of the fundamentalists, assuming they are radicals and assuming that they are right about how the Constitution is best interpreted on abortion, for example, is different for they are applying what the Constitution should be understood to say. The radicalism of ignoring stare decisis on a mistake is a different type of thing from the radicalism of taking a misinterpretation of the Constitution, selected only because it supports one’s political agenda, to authorize great change.

So let us focus on what Sunstein has to say about the form of originalism that the fundamentalists adopt, and let us put aside questions about their inconsistency in applying it and their exaggerations about its clarity of application. Let us ask the question of whether fundamentalists’ claim to have the correct interpretation of various parts of the Constitution is plausible where their evidence about original understanding is stronger, rather than weaker.

The question can be put even more sharply. What minimalism principally involves as an affirmative matter is a story about the virtues of
incrementalism, the risks of any full throttle pursuit of a judicial agenda, the values of stare decisis, and the value of giving time and space to difficult social problems so that other institutional forces better suited to producing broad answers can develop some approach over time. However persuasive these points may be—which I think they frequently are—they are points in the normative methodology of adjudication. This dimension often runs perpendicular to the dimension of asking what the most plausible understanding of the Constitution’s meaning is. They relate, in significant part, to determinations about how deferential or restrained or aggressive the Court should be in various scenarios, how quickly the Court should move given what it regards as a sound interpretation of pieces of constitutional text, how much respect should be paid to precedent, and so forth. This is a normative theory about how to fashion a plausible approach to decision making, not to meaning. And so the question is, does Sunstein have anything to say about the theoretical core of the fundamentalists’ position about meaning?

What Sunstein offers on this question is simply a remarkably pragmatic approach to interpretation:

Fundamentalists get a lot of rhetorical mileage out of the claim that their approach is neutral while other approaches are simply a matter of “politics.” But there is nothing neutral in fundamentalism. It is a political choice, which must be defended on political grounds. If it produces a far worse system of constitutional law, that must count as a strong point against it.11

At bottom, there is thus a theoretical assertion that we all must be pragmatists in the end. Obviously, one wants more of an argument for this claim. But we have seen that this makes the debate turn on whether one regards the results as being too bad. I have trouble seeing why this does not beg the question—we are turning to constitutional law because we have different views of whether certain results are desirable or undesirable.

Let me add here a slight nuance. It may be that all grand questions like this one push the interlocutors to this kind of juncture, and that the theorist’s job is not to come up with a knockdown answer, but rather to frame difficult decisions in a way that is irresistibly compelling. I believe that Sunstein has reached such a point in his book at some important places, for example, when he notes that Thomas would permit states to establish churches. Here, the argument is helpfully depicted as follows: (1) This proposal (e.g., permitting states to establish churches) is a completely unacceptable idea; (2) courts should block it on constitutional grounds; (3) we know (1) and (2) just by knowing that it is an impossibly radical idea to permit such a practice (e.g., establishment); (4) (1) through (3) show that judgment about what we as a society can live with is, at the end of the day, the touchstone of what is acceptable in constitutional interpretation, not any particular theory.

11. Id. at 72.
The problem is that even if one accepts the argument, so framed, it leaves open, in an unhelpful way, a wide range of other issues that look somewhat similar, but as to which (1) through (3) do not work rhetorically for large and reasonable audiences. This is so, in my view, with respect to whether \textit{Roe}^{12} and \textit{Casey}^{13} should be overruled: Even assuming that the claim that they should be overruled is a radical claim, it is not one of those claims that is simply off-the-map conversationally. One gets the sense, in reading \textit{Radicals in Robes}, that we are supposed to regard fundamentalism as largely a combination of the false fundamentalist affirmative action type of claims and the off-the-map Establishment Clause claims. I do not think Sunstein has established this.

C. The Argument that There Is Another Alternative to Perfectionism

To be fair to Sunstein, there is another way that minimalism is supposed to defeat fundamentalism, one which is invulnerable to the criticisms put forward thus far. One of the strongest arguments in favor of fundamentalism, one might think, is that its only serious alternative is perfectionism, and that perfectionism is unacceptable. Rather than taking fundamentalism’s inadequacy to be the ground for perfectionism, this argument—the one Sunstein is targeting—takes the inadequacy of perfectionism to be a ground for fundamentalism. Sunstein’s minimalism is meant as a means of refuting this argument—“hey, there is another way to reject perfectionism.” Historically, of course, there is a great deal to be said for reading Sunstein this way. The nomination of Robert Bork, then Scalia and Thomas and the fundamentalist club, was a response to the William Brennan perfectionist strands of the Warren Court and its continuation through the Burger Court. Plainly, Sunstein is aiming to support the Sandra Day O’Connor, David Souter, Anthony Kennedy alternative to this.

What I want to say to this argument is that \textit{of course} fundamentalism is not the only response to that sort of perfectionism. There are myriads of possible responses, of which minimalism is just one. The most salient alternatives, I believe, are an Ely-based, not a particularly minimalist process view that also takes stare decisis seriously but is not minimalist across the board and a form of originalism that is broad and historically serious and takes stare decisis seriously.

Additionally, minimalism suffers from three kinds of intrinsic problems. First, as mentioned, it is a theory of methodology and style in adjudication, not a theory of the substance. Second, where a theory of substance is available and compelling, it is hard to know why one should be a minimalist. One must begin with a very robust theory of fallibility, of a sort that is usually rejected in a variety of other areas of adjudication.

\begin{itemize}
\end{itemize}
Third, there is a kind of risk aversion built into minimalism that, in other areas of life and law, is regarded as non-optimal because, while it removes certain large negatives, it also removes certain large positives. For example, it is well accepted that we do not want drug companies to be so risk averse that they decline to produce socially valuable products, such as childhood vaccines. Just as a very risk averse company might deprive society of valuable products that it would otherwise develop, so very risk averse courts will deprive society of valuable decisions. Would Brown v. Board of Education have been decided by judges who took a minimalist perspective? Chilling inventive activity has large social costs, and the argument for a norm against risk taking is incomplete without an account of these costs. I would expect to arrive at a position in the normative theory of constitutional adjudication that was—like, for example, John Hart Ely’s—complex and nuanced in a manner that included space for a large amount of risk avoidance by judges (incrementalist and deferential to other branches), while also recognizing some domains in which bolds steps were warranted by both the contingencies of history and the special institutional role filled. Ely aside, it strikes me that this is where we are in constitutional law and have been for quite a long time, and it is not clear to me that the activist-tempering proclivities of minimalism relative to this status quo have been adequately justified.

II. FLEMING’S PERFECTIONISM

This is a good juncture to turn to Fleming’s book, for it takes the opposite position: It counsels greater aggressiveness than, for example, Ely, in a variety of areas, while in principle agreeing to a mix of judicial stances depending on subject area and the relative competencies of other branches. In particular, Fleming is an unapologetic apologist for broad articulation of fundamental individual rights under the Due Process Clause. One of the principal claims of the book is that the conservatives need not worry about “cabining” the range of autonomy-based individual rights. By understanding the structure of deliberative autonomy and deliberative democracy that is laid out by our Constitution, one begins to see that autonomy is firmly rooted in the constitutional order.

A. The Problem of Cabining Autonomy

I want to put forward two concerns about Fleming’s position: one about his capacity to provide the sort of cabining he wishes, and the other about his understanding of Dworkinian constitutional theory. First, Fleming’s effort to cabin autonomy is less promising than he claims. There are two different tasks that he fails to distinguish. One is the task of showing that

constitutional ideas are secure, that they have a foundation that grounds them in some sense. A second is the idea that they are limited, controllable, and cabinable. Fleming’s synthesis of Dworkinian jurisprudence, Rawlsian political theory, and large swaths of constitutional law based in the Bill of Rights, provides a plausible basis for the first task. Just as Ely, for example, cashed out the Bill of Rights in terms of a vision of a properly functioning democracy with robust speech rights and procedural protections of a sort only a Constitution could provide, so Fleming has offered a constitutional vision that takes the requirement of deliberation in lawmaking to support a special, legally entrenched set of constitutional protections that will provide the possibility of conscientious deliberation at both the social and the individual level. But the very breadth of the political theoretic ideals provides reason to be even more skeptical that he will be unable to carry out the second. And, indeed, the Rawlsian political theory provides little basis for confidence on the second—cabining autonomy.

In a section of Chapter V entitled, “The Scope of Deliberative Autonomy: Limited to Significant Basic Liberties,” Fleming states that constitutional constructivism’s “criterion for specifying the basic liberties in interpreting the Constitution as a coherent scheme, is in terms of the significance of such liberties for deliberative autonomy or deliberative democracy.” He indicates that significance is not a question of the strength of subjective preferences for such a form of liberty; it is an objective matter. Moreover, the touchstone of such significance is its being a thing of equal value to everyone, no matter what their conception of the good.

Years ago, when I first confronted similar emphases on “significance” in Fleming’s earlier work, I was baffled that he believed such a bland and wide-open notion could solve the cabining problem. Many people will plausibly take the liberty position that sexual orientation is significant, and many will reject this. Many people will take the position that liberty in deciding whether one’s children shall sing Christmas carols at school is significant, and many will reject this. Many people will think that liberty in deciding whether one’s children are taught evolution is significant, and many will reject this. Perhaps these examples are not well chosen, but I have no confidence in the capacity of a notion as vague and toothless as “significance” to solve any of the cabining or, for that matter, objectivity and determinacy problems that critics have raised. What I appreciate now is that the “cabining problem,” which I believe is real and remains, goes hand in hand with a problem of principle. The problem of principle is figuring out why courts should be empowered to protect any liberty interests that are unenumerated, and why, if they are empowered to protect some, they should not be empowered to protect all. Here I think the constitutional constructivist has an “in theory” answer, even if it is not

17. Id.
actually very comforting at the level of application. The “in theory” answer is that it is not about providing constitutional protection for any liberty that someone feels strongly about; it is about providing protection for a range of liberties that the state must regard as basic to guaranteeing autonomy for all. In this sense, Fleming is indeed “securing” autonomy, but I am much less sure he is cabining it.

B. Dworkin, Fidelity, Perfectionism, and “The Best It Can Be”

As to fidelity, Fleming has a negative point and a positive point. As before, I agree with one and not the other. The negative point is a critique of originalists, be they narrow or broad originalists. The point is that the dead hand of the past argument is correct, not in terms of a countermajoritarian problem but in terms of a more fundamental jurisprudential problem. The problem is that the obligation of fidelity to the Constitution is not properly understood as an obligation to comply with the set of rules that the ratifiers understood themselves to have been placing in the Constitution. Fleming and I are willing to grant for the purposes of argument the possibility of discerning original understanding. But we are truly unwilling to accept that original understanding captures what the Constitution means insofar as the Constitution contains rules and principles that we as a people are bound to accept and apply. As Dworkin and Fleming have put the point, the obligations imposed by the Constitution are obligations imposed by the Constitution qua charter of norms that we as a people chose and continue to choose to live under. It is the ongoing mutual understanding of ourselves as governed by a constitutional system that comprises the source of bindingness of the Constitution. As I shall indicate below, it is far from clear that this understanding of what makes the Constitution binding law provides any basis whatsoever for inferring an affirmative theory of constitutional meaning. But what it does is displace an incredibly appealing, but ultimately untenable, theory of what makes the Constitution binding, and that theory—“ratifiers’ command”—is the most powerful font of an originalist theory of meaning. The point can be put in terms of fidelity: It is not the case that fidelity to the Constitution is really a matter of compliance with the commands of the ratifiers, as they expressed them in the Constitution. On this negative point, which I believe to be of very great importance, Fleming and I agree.

But then Fleming has a positive point, which is that we ought to interpret the Constitution so as to make it the best that it can be—so that it deserves our fidelity. And it is quite clear that Fleming, following Dworkin, intends by this that we fashion, in constitutional interpretation, the most justifiable aspirational principles we can while still retaining fit. More particularly, while Fleming insists on a more careful and coherent lawyering of constitutional materials than Dworkin does, Fleming follows Dworkin in at least two further respects, which I might call, provocatively, “the decorative use of history and tradition,” and the “de facto dominance of justification over fit.” And so we end up with an enterprise in political philosophizing
that produces the framework that is most justifiable, so long as a very thin and malleable fit constraint is satisfied. It is this conception of fidelity, so understood, with which I take issue. Of course, it is no accident that Sunstein’s book, and, indeed, his entire minimalist theory, is probably the most sophisticated and extensive non-originalist attack on this kind of perfectionistic constitutional theory. Apart from their agreement on results, on the shortcomings of fundamentalism, and on the need to do some version of accommodating text, history, and structure (a significant caveat), Fleming’s perfectionism and Sunstein’s minimalism are true antagonists of one another.

C. Fleming v. Harlan

Although my labels for points of disagreement with Fleming may be unfairly slanted against him, my general point is one that Fleming directly welcomes, for an important target of his book is Justice John Harlan’s traditionalist vision. Indeed, he expressly and very eloquently addresses what he regards as a schism between a Constitution of ordered liberty, running from Justice Benjamin Cardozo’s Palko opinion to Kennedy’s Lawrence opinion, on the one hand, and a Constitution of ordered liberty that is rooted in our history and traditions, as conceived by Harlan. Fleming decidedly comes down against Harlan, reasoning that “Harlan’s understanding of what constitutes tradition was too traditionalist and not sufficiently aspirational or critical.” Fleming’s own constitutional constructivism “would reconstruct Harlan’s idea of the rational continuum of ordered liberty embodied in the common law constitution, using a constructivist constitution of principle underwritten by a substantive political theory that best fits and justifies the constitutional document and underlying constitutional order as a whole.” Moreover, rather than looking “to common law principles for the sake of carrying them forward without offering a substantive account of what our basic liberties are or what they are for,” Fleming would flesh out unenumerated rights by utilizing the “criterion of significance for deliberative autonomy.”

As I understand it, there are three kinds of arguments that Fleming would run against Harlan. First, traditionalism and historicism often trap us; we must not be harnessed by history and tradition in such a way that we fail to root out immoral and unjust practices. This is meant as a point of political morality and a point of constitutional theory—perhaps even as a point of constitutional law. Second, even if we are not stuck with or trapped by historical practices, we should not be constrained by them if such constraints prevent moral progress, and using history as a touchstone will at

20. Fleming, supra note 2, at 118.
21. Id.
22. Id. at 119.
least slow us down or significantly constrain our progress. Third, the
selection of historically accepted principles as authoritative is wrongheaded,
at least where the rationales in deliberative autonomy that provide the
justification for most of our other basic principles would actually cut
against these practices. For it is really the scheme of deliberative autonomy
that is the foundation for our constitutional order.

The first point is that historical practices should not lock out moral
progress in the articulation of constitutional rights; the second point is that
historical practices should not weigh against a liberty-enhancing reading of
the Constitution and thereby slow down progress; the third point is the more
basic underlying importance of deliberative autonomy that grounds our
whole constitutional scheme anyway, and therefore, the historical practice
does not measure up in terms of authority either.

The first, no lock-out point, is probably not a view that Harlan would
have accepted. The idea of a living constitution, or a continuum, or an
organic growth pattern is very different from a lock-out problem. Harlan
clearly thought that change was significant and that the common law
provides a nice baseline, from which we can grow. That is the point of the
“living Constitution” metaphor. Things are different as to the second point,
however; history and tradition are clearly important, albeit in a
nonmeasurable and non-dispositive way. To be sure, if one shares
Fleming’s politics, it is disappointing to be slowed down. But one cannot
argue that this undercuts the plausibility of Harlan’s approach unless either
(a) the wrongness of having progress slowed down is obviously clear as a
desideratum of a constitutional theory, or (b) there is some jurisprudential
picture that cuts against the “slowing down” tendencies. Although point (a)
is tempting (as in Thomas on the Establishment Clause\textsuperscript{23}), I think it is
utterly untenable as to the “slowing down” problem. If it is tenable, it is
tenable as to the locking-out change problem, but we see that this is not
Harlan’s position. So I believe we are left with the need for a
jurisprudential argument against the plausibility of a constitutional theory
that permits history and tradition to constrain the kind of progress in the
recognition of rights that occurs through constitutional law. Needless to
say, this is really where Fleming and Sunstein meet. Sunstein’s minimalism
is, in certain ways, well designed to take exactly the opposite view.
Fleming’s entire theory is set up to respond to the challenge, so put.

D. A Critique of Fleming and Dworkin on the Place of Abstract Theory

I believe the jurisprudential answer Fleming would offer is one and the
same as the third criticism of Harlan: It is the abstract scheme of
deliberative autonomy that is the essence of our constitutional order, and
insofar as the Constitution has authority over us, it is this scheme that has
the authority. To take the particular historical and traditional principles that

\textsuperscript{23.} \textit{See supra} notes 9-10 and accompanying text.
we have recognized at any particular point in time to be the constitutional law is to make a conceptual and jurisprudential mistake of the kind that Holmes famously ridiculed in The Path of the Law. A Vermont justice of the peace dismissed an action brought against a defendant who had broken the plaintiff’s churn because he had found nothing about churns in the statutes or case law. The point is that one can fail to see what the law really is by failing to discern what the law is at a sufficiently high level of generality.

This argument is plainly Dworkinian in its nature: The law just is what it would be interpreted to be in an interpretation that pushed us as far as we could be pushed in the direction of understanding our entire legal framework in a manner that rendered it a coherent, intelligible whole that enjoyed to the fullest degree a justification that resonated with the legal materials already extant.

Although I am, broadly speaking, an adherent of Dworkin’s jurisprudential critique of legal positivists generally and of other constitutional theorists more particularly, I do not believe either Fleming’s or Dworkin’s position here is tenable, and I think the mistake points back in the direction of Harlan. I have time and space for only a brief indication of why I hold this view.

In an outstanding article published several years ago, Stephen Perry defended the fundamental role of legal principles in constituting law against a series of criticisms by Larry Alexander, Ken Kress, and others. Perry’s point was helpfully set forth by way of contrasting two different phases in Ronald Dworkin’s jurisprudential writing: an early, Model of Rules phase found in the first half of Taking Rights Seriously, and a later Law’s Empire phase. In the first phase, Dworkin’s point in both jurisprudence and constitutional theory was that the law is constituted, in substantial part, by principles, and that those principles could not be identified in a way consistent with H. L. A. Hart’s positivism (in jurisprudence) or with naïve, putatively morally neutral originalism (in constitutional law), but required an approach that recognized legal reasoning as pervasively coherental and moral in its content. In the second phase, most famously set out in Law’s Empire, Dworkin identified the law with the theoretical framework that would best fit and justify all of the relevant legal

25. Id. at 474-75.
And of course that theoretical framework would be rich with principles, the most justifiable principles that would carry the large, Herculean burden of fit and justification. Perry argued not only that these two views were not identical, but also that the first one was immune to many of the criticisms that had been leveled against the second.

Although I cannot defend the point fully here, I would argue that the fundamental place of principles in the law and the obligation of judges to identify and to apply those principles does not, in and of itself, entail the judicial obligation or even the judicial prerogative to rejigger those principles so as to conform the law more perfectly to the abstract theoretical framework that one views as most effectively justifying those principles. Indeed, although Dworkin is right to deny the possibility of a value-free, pedigree-based approach to identifying the legal principles that are binding in the law, he moves too quickly to the idea that the adjudicative enterprise properly involves selection of moral principles that the judge regards as having a powerful justification and a plausible connection to extant legal materials. And, more pointedly, I do not think that Dworkin’s argument that the abstract framework really is the law is adequately defended. Often, it is justifiable or appropriate for a judge to dig beneath a medium-level principle in order to resolve a close question or to figure out how the law should be extended. But the appropriateness of sometimes going deeper does not yield the conclusion that what is deeper really is the law.

Let us now turn back to Fleming’s critique of Harlan. His most important criticism, in my view, is that a judge ought to go beneath the historically and traditionally held practices and principles, and probe toward the abstract framework of principle from which our historically and traditionally recognized common law rights emerge. I think that Fleming may often be correct about this. But the appropriateness of doing so does not, on my view, emerge from the fact that the abstract constitutional constructivist framework is the constitutional law (rather than the particular common law recognized rights). It is a powerful norm of judicial methodology in sorting out difficult questions. As such, it is one among many norms—including those minimalist ones championed by Sunstein. The common law principles recognize common law rights—these principles have a claim to being part of our body of constitutional law. Hence, jurisprudential considerations properly lead us closer to Harlan’s view.

One more word on fidelity. Insofar as judges have an obligation to apply the law, not their own fantasy (unless they have sufficient reason to believe the law happens to be identical with their fantasy), what matters is applying the principles that are part of our body of constitutional law, and this will sometimes be narrower and more tradition-bound than Fleming would wish. But it may be that the judicial virtue of fidelity to the Constitution is best

30. See generally id.
31. See Perry, supra note 26, at 807-15.
understood in a manner that looks to the underlying scheme of values and strives to stay true to the scheme of values. On my view, the obligation and the virtue frequently—perhaps typically—go hand in hand. Where, however, there is a conflict between them, the obligation applies first, and an extra argument regarding the appropriateness of the exercise of the power would be required. An intended, but, I think, unfortunate, consequence of Fleming and Dworkin’s conception of fidelity is that it denies the possibility of this sort of conflict, wishing away the reality of difficult judgments regarding how aggressive one ought to be in pushing forward to “our highest aspirations.”

III. CONCLUDING REMARKS ON COMMON LAW CONSTITUTIONALISM

Reading Sunstein’s and Fleming’s books has thrown me back into the world of theories of interpretation, which I first engaged in during the 1980s. Great, playful (and sometimes annoying) deconstructive feats of imagination constructed upon the head of a pin were popular then, and occasionally were interjected into legal studies, too. In that spirit, I would like to suggest that perhaps the key passage in Radicals in Robes is to be found on page v. Most of you will not even find page v of this book, for it is not numbered. It is the page that reads simply: “for David A. Strauss.” Strauss is Sunstein’s colleague at Chicago, but he is also the figure in American legal theory most closely associated today with common law constitutionalism. And so page v naturally leads to the question: Is Radicals in Robes a Sunsteinian step toward common law constitutionalism?

Similarly, although it is quite clear that Lawrence v. Texas is, in important respects, emblematic for Fleming of the right way to think about unenumerated rights, no one who knows Fleming would think that he would select Justice Kennedy, the author of Lawrence, as the emblematic judicial reasoner. And he does not. Perhaps Justice Brennan would be his choice for this role. But I did not miss that the trajectory of unenumerated rights thinking that Fleming wants to explore starts with—and indeed the foundational decision for deliberative autonomy is taken to be—Palko v. Connecticut. Unlike his reference to Lawrence, Fleming’s reference to Palko expressly indicates the Justice who decided it: Justice Cardozo. And so the foundational opinion regarding deliberative autonomy, for a very self-conscious Fleming, was a product of the Justice typically considered our most esteemed common law judge: Benjamin Cardozo.

Together, these two observations raise the possibility that Sunstein and Fleming are both, at some level, alive to the possibility that common law constitutionalism is the way to go. Because I am, at the end of the day,

34. 302 U.S. 319 (1937); Fleming, supra note 2, at 112-16.
anything but a deconstructionist, these playful comments do not in fact go very far for me. In very deep respects, both Sunstein and Fleming would seem to reject common law constitutionalism: Sunstein because of his enthusiasm for leaving law to more politically responsive branches, where possible; Fleming because of his lack of enthusiasm regarding the supposed virtues of incrementalism; both because of their distrust of taking too seriously historically entrenched baselines.

On the other hand, perhaps common law constitutionalism would provide us with a middle path. Ironically, it would provide a greater possibility of improving on tradition than Sunstein’s own minimalism, for while the common law is by nature precedent-based, prudent, and cautious, it is not invariably so. The common law contains a wide range of doctrines about when change is appropriate and why; the disposition of courts to dig deep and make big changes is limited by these doctrines and principles regarding their institutional competency, but not ruled out in any blanket manner, as it is by minimalism. Moreover, judges operating in a common law tradition have a self-conception regarding domains of fallibility, and the degrees of minimalism are tied to that self-conception. Finally, the common law constitutionalism rests on a conception of what makes the law binding that is neither as history-bound as that of the fundamentalists nor as unrooted and nearly question begging as that of the perfectionists. While it is true that a great deal of constitutional law concerns the powers and duties of branches and states, not of private persons, that is just to say that the subject matter of constitutional law is different than that of subjects such as torts, contract, or property. A common law constitutionalism, such as ours, itself contains principles regarding the superior institutional competency of the legislature, for example, regarding various issues.

The written nature of our Constitution has always been the largest obstacle to a common law constitutionalist theory, but this concern rests upon a confusion between a striking, but fallacious conceptual point, and a subtler but more genuinely difficult point of constitutional theory. The striking and fallacious conceptual point is that the whole idea of a written constitution is that it, rather than the decisions made by the courts, is the law that governs. This is fallacious because it presupposes an exclusive dichotomy between text and decisions made by courts. Of course, throughout statutory law—and even more notably in contract law—courts are busy articulating rules, reasons, and decisions in a manner that self-consciously and carefully builds upon and applies the text. Like contract law, constitutional law is a form of common law, much of whose substance requires interweaving and interpreting texts.

There is a much more difficult and softer objection which is that courts, even if they end up making the law in some sense, are bound to give a special role to the text in constitutional law because our system self-consciously decided to be one with a written constitution, not simply judge-made law. And so, in effect, the whole style of judicial decision making in constitutional law must be of a different type—far more like applying a
statute than like fashioning rules of liability in torts. This concern is well taken, but does not undercut the very idea of common law constitutionalism. In fact, it is, itself, a piece of common law constitutionalism, just as the parol evidence rule in contract law is a piece of the common law of contracts. To be sure, the problems of constitutional decision making in many—perhaps nearly all—domains are deeply connected to the constitutional text, and this presents both a source of substance and an array of constraints that are central to the adjudicative process. But the application of constitutional law is best understood as the application of a common law of the Constitution, most or all of which places the written constitution in a central place, not as the application of a document, which, lamentably, must be mediated by courts.

Finally, a common law constitutionalism that took Harlan's traditionalism seriously is surely something Fleming rejects. But perhaps he should not. Fleming's claim to cabin autonomy was not sustained, I argued; common law constitutionalism that took history seriously would do a better job, while not ruling out the possibility of moral progress, and while still instantiating the same values. Of course, Fleming also rejects the built-in modesty of the common law constitutionalist, but I think we may ask—with Sunstein—whether this is a wise or prudent agenda. Sunstein's book is, beneath the surface, motivated in part by the idea that perfectionism of a sort that briddles at Burkean prudence is a large part of what got us where we are today, on the verge of being dominated by fundamentalists. In my view, minimalism is overcorrection. But a common law constitutionalism—in addition to providing a very plausible jurisprudential position—may find the sweet spot pragmatically, too.