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Securing Deliberative Democracy

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INTRODUCTION

The brochure for the conference frames the questions for our panel on *The Constitutional Essentials of Political Liberalism* as "What are the implications of Rawls's conceptions of justice as fairness and political liberalism for constitutional theory? Might his account of constitutional essentials provide a useful guiding framework for conceiving the scheme of basic liberties embodied in the American Constitution? How thin are the commitments of our Constitution as compared with our richer commitments to constitutional justice and political justice? What are the implications of Rawls's work for theory of judicial review and for enforcement of constitutional rights and obligations outside the courts through legislative and executive institutions?" My Article will focus on the first and second questions. But it will have implications for the third and fourth as well.

The Article has three parts. In Part I, I outline a constitutional constructivism that is analogous to the political constructivism that Rawls develops in *Political Liberalism*.[1] I reprise previous work, in which I have developed a constitutional theory with two fundamental themes: first, securing the basic liberties that are preconditions for *deliberative democracy*, and second, securing the basic liberties that are preconditions for *deliberative autonomy*.[2] In prior work, I have

* I prepared this Article for the Conference on Rawls and the Law, held at Fordham University School of Law on November 7-8, 2003. I want to thank Linda McClain and Ben Zipursky for helpful comments and Carrie Tendler and Devon Filas for helpful research assistance. I especially want to thank Tim Scanlon for writing a thoughtful, characteristically insightful and incisive comment on the Article.

I had the good fortune to study with Professor John Rawls while I was a student at Harvard Law School from 1982-85. I took his graduate seminar in Political Philosophy and the graduate section of his undergraduate course in Social and Political Philosophy. He was quite encouraging and helpful to me as I attempted to work up my ideas in the papers for his courses, in my Ph.D. dissertation in the Department of Politics at Princeton University, and in my first several published articles. I have been deeply honored to know and to learn from John Rawls. And I have greatly appreciated the opportunity to organize the live conference and this symposium volume to reflect upon the implications of his work for law. For that opportunity, I am grateful to the support of Dean William Michael Treanor. For advice at every stage, I am indebted to Ben Zipursky and Linda McClain.

1. John Rawls, Political Liberalism (1996).

2. James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex. L. Rev. 211 (1993).

elaborated upon the second fundamental theme.[3] In Part II, I sketch certain aspects of the first fundamental theme. I take up the commitments to guaranteeing the fair value of the equal political liberties and protecting free and informed political processes. I explore what the structure of First Amendment law would look like if we were committed, not to protecting an absolutist First Amendment in isolation from the rest of the Constitution, but to securing a fully adequate scheme of the basic liberties as a whole.

In Part III, I continue this exploration by focusing on four important Supreme Court cases that involve clashes between the First Amendment's protection of freedom of expression and the Equal Protection Clause's concern for equal citizenship. In three out of four of these cases, the Court protected freedom of expression to the exclusion (or indeed erasure) of equal citizenship. First, I present Rawls's own critique of *Buckley v. Valeo*[4] as an exemplar of how to secure equal protection or equal participation together with freedom of expression. Second, I sketch an analogous critique of *R.A.V. v. City of St. Paul*[5] for privileging freedom of expression over equal protection. Third, I analyze *Roberts v. United States Jaycees*[6] as an exemplar of how the Supreme Court itself on occasion has taken equal citizenship seriously in the context of freedom of expression and association. Finally, with this example on hand, I criticize *Boy Scouts of America v. Dale*[7] for privileging freedom of association over equal protection. Throughout, my aim is to suggest that a Rawlsian guiding framework of basic liberties might help frame our judgments concerning what to do when confronting clashes between freedom of expression and equal protection. Those judgments would be guided by the aspiration to accord priority to the family of basic liberties as a whole, not to give priority to freedom of expression over equal protection.

I. AN OUTLINE FOR A CONSTITUTIONAL CONSTRUCTIVISM

A. *A Guiding Framework for Securing Deliberative Democracy and Deliberative Autonomy*

Constitutional constructivism advances a guiding framework with two fundamental themes, securing deliberative democracy and securing deliberative autonomy. I develop this guiding framework by analogy to Rawls's political constructivism, but I make no claim that

3. James E. Fleming, *Securing Deliberative Autonomy*, 48 Stan. L. Rev. 1 (1995). The material contained in Part I is drawn from *id.* at 17-23. *See also* Fleming, *supra* note 2, at 281-97 (developing a fuller outline for a constitutional constructivism).

4. 424 U.S. 1 (1976).

5. 505 U.S. 377 (1992).

6. 468 U.S. 609 (1984).

7. 530 U.S. 640 (2000).

everything Rawls argues is required by justice is also mandated by our Constitution. Nor do I rely upon Rawls as an authority for what the Constitution means. I simply use the guiding framework because it suggests certain interpretive strategies to help orient our deliberations, reflections, and judgments about our Constitution and our constitutional democracy.[8] The usefulness of the framework is to be assessed by ordinary criteria for an acceptable theory of constitutional interpretation and judicial review.[9] To explain that framework, I must put forth several abstract conceptions from Rawls's theory.

1. Political Conception of Justice: Fair Terms of Social Cooperation on the Basis of Mutual Respect and Trust

In *Political Liberalism*, Rawls reformulates his well-known theory—justice as fairness—as an example of a political liberalism or a political conception of justice, as distinguished from a comprehensive religious, philosophical, or moral conception of the good.[10] First, political liberalism accepts the "fact of reasonable pluralism"—the fact that a diversity of reasonable yet conflicting and irreconcilable comprehensive religious, philosophical, and moral doctrines may be affirmed by citizens in the free exercise of their capacity for a conception of the good—as a feature of the political culture of a constitutional democracy, not to be regretted and not soon to pass away.[11] Second, political liberalism emphasizes the related "fact of oppression"—the fact that a single comprehensive religious, philosophical, or moral doctrine could be established as a shared basis of political agreement or public justification in a constitutional democracy only through the intolerably oppressive use of coercive political power—as an entailment of accepting the fact of reasonable pluralism.[12] Political liberalism generalizes the principle of religious toleration to apply to reasonable conceptions of the good.[13]

Despite these two related facts, Rawls argues that citizens in a constitutional democracy who hold opposing and irreconcilable

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8. *See* Rawls, Political Liberalism, *supra* note 1, at 156, 368 (arguing that the proper role of his conception of justice is as a framework which may help others in their deliberations on constitutional essentials).

9. *See* Fleming, *supra* note 2, at 298-300 (arguing that constitutional constructivism better satisfies John Hart Ely's three criteria for an acceptable theory than does his own theory). Ely's three criteria are: (1) how well the theory fits and justifies the constitutional document and underlying constitutional order; (2) whether it is consistent with and supportive of the underlying political system; and (3) whether it assigns judges a role that they are well situated to perform. *See* John Hart Ely, Democracy and Distrust 87-104 (1980).

10. *See* Rawls, Political Liberalism, *supra* note 1, at xvii-xix.

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

12. *Id.* at 37.

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

conceptions of the good, such as comprehensive religious, philosophical, or moral doctrines, may be able to find a shared basis of reasonable political agreement or public justification through an overlapping consensus concerning a political conception of justice. This sort of consensus would obtain where different persons, from the standpoint of their own divergent conceptions of the good, affirmed a shared political conception of justice.[14] Such a political conception of justice, with the following basic liberties embodied in a constitution, would provide fair terms of social cooperation on the basis of mutual respect and trust that citizens might reasonably be expected to endorse, whatever their particular conceptions of the good.

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

2. Conception of Citizens as Free and Equal Persons: The Two Moral Powers

Constitutional constructivism, like Rawls's political liberalism, understands our basic liberties as being grounded on a conception of citizens as free and equal persons, together with a conception of society as a fair system of social cooperation.[15] It views such persons engaged in such cooperation as having *two moral powers*.

The first moral power is *the capacity for a sense of justice*—the capacity to understand, apply, and act from (and not merely in accordance with) the political conception of justice that characterizes the fair terms of social cooperation in a constitutional democracy. Citizens apply this capacity in deliberating about and judging the justice of basic institutions and social policies, as well as about the common good.[16]

The second moral power is *the capacity for a conception of the good*—the capacity to form, revise, and rationally pursue a conception of the good, individually and in association with others, over a complete life. A conception of the good is a conception of what is valuable in human life. It typically consists of ends and aims derived from certain religious, philosophical, or moral doctrines, as well as attachments to other persons and loyalties to various groups and

14. *Id. passim.*
15. *See id.* at 15-20, 29-35, 299-304.
16. *Id.* at 19, 302, 332.

associations. Citizens apply this capacity, their power of deliberative reason, in deliberating about and deciding how to live their own lives.[17]

The basic idea is that by virtue of their two moral powers, persons are free, and their having these powers makes them equal. Possession of the two moral powers constitutes the basis of the status of free and equal citizenship.[18] The basic liberties are understood as preconditions for the development and exercise of the two moral powers.[19]

3. Deliberative Democracy and Deliberative Autonomy: The Two Fundamental Cases

Constitutional constructivism arranges our basic liberties so as to show their relation to the *two fundamental cases* in which citizens exercise their two moral powers. The first fundamental case is that of *deliberative democracy*: The equal political liberties and freedom of thought enable citizens to develop and exercise their first moral power (their capacity for a sense of justice) in understanding, applying, and acting from their conception of justice in deliberating about and judging the justice of basic institutions and social policies, as well as about the common good.[20] In the first instance, the Constitution is seen as establishing a "just and workable political procedure" without imposing any explicit constitutional restrictions on legislative outcomes.[21] It incorporates the equal political liberties and seeks to guarantee their fair value, so that the processes of political decision will be open to all on a roughly equal basis.[22] It also

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

18. *Id.* at 19, 29-35, 79, 109; John Rawls, A Theory of Justice § 77, at 441-49 (rev. ed. 1999).

19. Rawls, Political Liberalism, *supra* note 1, at 332. For an insightful analysis of Rawls's political conception of the person, see Frank I. Michelman, *The Subject of Liberalism*, 46 Stan. L. Rev. 1807 (1994) (reviewing Rawls, Political Liberalism, *supra* note 1).

20. *See* Rawls, Political Liberalism, *supra* note 1, at 332-35. For the sake of simplicity, I use the term "deliberative democracy" to refer to this first fundamental case or theme. James W. Nickel has criticized Rawls's idea of the first fundamental case as being too narrowly defined. James W. Nickel, *Rethinking Rawls's Theory of Liberty and Rights*, 69 Chi.-Kent L. Rev. 763, 781-83 (1994). I broaden it by proposing a theme of deliberative democracy that is quite similar to Cass Sunstein's principal (and general) theme of deliberative democracy. *See* Fleming, *supra* note 2, at 256, 292-93 (analyzing Cass R. Sunstein, The Partial Constitution (1993)).

21. Rawls, Political Liberalism, *supra* note 1, at 337.

22. As discussed below, Rawls explains that the guarantee of "fair value" means that "the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions." *Id.* at 327. "Formal equality is not enough" where the equal political liberties are concerned. *Id.* at 361. For a provocative analysis that has affinities to Rawls's idea, see Edward B. Foley, *Equal-Dollars-Per-Voter: A*

protects freedom of thought (including freedom of speech and press, freedom of assembly, and the like), so that the exercise of those liberties in those processes will be "free and informed."[23]

The second fundamental case is that of *deliberative autonomy*: Liberty of conscience and freedom of association enable citizens to develop and exercise their second moral power (their capacity for a conception of the good) in forming, revising, and rationally pursuing their conceptions of the good, individually and in association with others, over a complete life—that is, to apply their power of deliberative reason to deliberating about and deciding how to live their own lives.[24] In the second instance, the Constitution is seen as establishing constitutional restrictions upon the grounds for political decisions.[25] It protects liberty of conscience and freedom of association both to secure citizens' free exercise of deliberative autonomy and to assure that political decisions will not be justifiable solely on the basis of comprehensive religious, philosophical, or moral conceptions of the good.

Finally, constitutional constructivism connects the remaining (and supporting) basic liberties to the two fundamental cases by noting that it is necessary to secure them in order to guarantee properly the preceding basic liberties associated with deliberative democracy and deliberative autonomy. These remaining and supporting liberties include "the liberty and integrity of the person (violated, for example, by slavery and serfdom, and by the denial of freedom of movement and occupation) and the rights and liberties covered by the rule of law."[26] The constitutional essentials also include due process of law, equal protection of the laws, the right to personal property, and the right to basic necessities.[27] In other words, guarantees of these basic

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Constitutional Principle of Campaign Finance, 94 Colum. L. Rev. 1204 (1994); *see also* Bruce Ackerman & Ian Ayres, Voting with Dollars: A New Paradigm for Campaign Finance (2002).

23. Rawls, Political Liberalism, *supra* note 1, at 335, 337.

24. *See id.* at 332-35. Deliberative autonomy includes not only deliberation but also decision making. For the sake of simplicity, I intend to encompass the concepts of "deliberating about and deciding how to live their own lives" within the expressions "deliberative autonomy" or "deliberating about their conception of the good." For an explanation of my usage of the term "deliberative autonomy" to refer to this second fundamental case or theme, see Fleming, *supra* note 2, at 253 n.210 and Fleming, *supra* note 3, at 30-31. Nickel has criticized Rawls's idea of the second fundamental case as being too broadly defined. Nickel, *supra* note 20, at 782-83. I narrow it by outlining a theme of deliberative autonomy that is bounded by a criterion of significance. *See* Fleming, *supra* note 3, at 40-43.

25. *See* Rawls, Political Liberalism, *supra* note 1, at 337-38.

26. *Id.* at 335. The rights and liberties covered by the rule of law include, for example, procedural due process, habeas corpus, freedom from unreasonable searches and seizures, and freedom from self-incrimination. *See* Rawls, A Theory of Justice, *supra* note 18, § 38, at 206-13; Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 Phil. & Pub. Aff. 3, 26, 31 (1992).

27. Notably, the constitutional essentials do not include Rawls's famous "difference principle," that "[s]ocial and economic inequalities . . . are to be to the

liberties are preconditions for securing both deliberative democracy and deliberative autonomy.

Possession of this whole family of basic liberties constitutes the common and guaranteed status of free and equal citizenship.[28] Moreover, the preconditions for both deliberative democracy and deliberative autonomy are preconditions for the sovereignty of free and equal citizens.[29]

B. *The Constitution as Securing Deliberative Democracy and Deliberative Autonomy: The Two Fundamental Themes*

Constitutional constructivism conceives our Constitution as a "constitution of principle," which embodies (or aspires to embody) a coherent scheme of basic liberties, or fair terms of social cooperation on the basis of mutual respect and trust, for our constitutional democracy. The Constitution is not merely a "constitution of detail," which enacts a discrete list of particular rights narrowly conceived by framers and ratifiers.[30] Nor does it simply establish a procedural

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greatest benefit of the least advantaged members of society." Rawls, Political Liberalism, *supra* note 1, at 6-7, 228-30, 337. Moreover, the right to basic necessities may not be judicially enforceable in the absence of legislative or executive measures. Similarly, the right to personal property may be judicially underenforced. Fleming, *supra* note 3, at 45. In *The Law of Peoples*, Rawls argues that a liberal political conception of justice, and a reasonably just constitutional democracy, must assure "sufficient all-purpose means to enable all citizens to make intelligent and effective use of their freedoms." John Rawls, The Law of Peoples 49 (1999). He mentions five kinds of institutions or arrangements that are necessary to prevent "social and economic inequalities from becoming excessive" and to achieve stability: (a) "[a] certain fair equality of opportunity"; (b) "[a] decent distribution of income and wealth"; (c) "[s]ociety as employer of last resort"; (d) "[b]asic health care assured for all citizens"; and (e) "[p]ublic financing of elections and ways of assuring the availability of public information on matters of policy." *Id.* at 49, 50.

28. *See* Rawls, Political Liberalism, *supra* note 1, at 335. For a critique of Rawls's list of basic liberties, see Nickel, *supra* note 20, at 766-72 (proposing a reconstructed list).

29. *See* Freeman, *supra* note 26, at 30-33 (arguing that equal political rights and other basic liberties such as liberty of conscience and freedom of association are essential to democratic sovereignty).

30. *See* Ronald Dworkin, Life's Dominion 119, 126-29 (1993) (contrasting a "constitution of principle" (a scheme of abstract, normative principles) with a "constitution of detail" (a list of particular, antique rules) (emphasis omitted)); *see also* Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003) ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight.... As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); Planned Parenthood v. Casey, 505 U.S. 833, 901 (1992) (conceiving the Constitution as a "covenant" or "coherent succession" embodying "ideas and aspirations that must survive more ages than one"); *id.* at 913-21 (Stevens, J., concurring in part and dissenting in part) (interpreting the constitutionally protected concept of liberty as embodying abstract principles); *id.* at 940 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (construing the Court's personal-liberty cases as protecting the

framework of democracy. Furthermore, constitutional constructivism views interpreting the Constitution as specifying basic liberties in terms of the significance of an asserted liberty for the development and exercise of one (or both) of the two moral powers in one (or both) of the two fundamental cases.[31]

But constitutional constructivism distinguishes between the partial, judicially enforceable Constitution and the whole Constitution that is binding outside the courts upon legislatures, executives, and citizens generally.[32] In other words, it is a theory of *the Constitution*, not merely a theory of *judicial review*. Certain constitutional norms, including aspects of deliberative democracy and deliberative autonomy, may be judicially underenforced because of the institutional limits of courts, and left to the political processes for fuller enforcement. For example, the Constitution might impose affirmative obligations upon the legislative and executive branches to provide basic necessities for all citizens, but it might not afford a judicially enforceable right to these necessities in the absence of legislative or executive measures.[33]

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

Constitutional constructivism's first theme emphasizes the equal

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general right of privacy rather than a "laundry list of particular rights").

31. *See* Rawls, Political Liberalism, *supra* note 1, at 332-40; Freeman, *supra* note 26, at 30-33.

32. Fleming, *supra* note 2, at 291; *see also* Rawls, Political Liberalism, *supra* note 1, at 240. Others have expressed similar views concerning the gap between the partial, judicially enforceable Constitution and the whole Constitution that is binding outside the courts. *See, e.g.*, Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 Fordham L. Rev. 1407 (2004); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1213 (1978); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410, 419 (1993); Lawrence G. Sager, *The Why of Constitutional Essentials*, 72 Fordham L. Rev. 1421 (2004); Sunstein, *supra* note 20, at 9-10, 138-40, 145-61, 350.

33. *See, e.g.*, Sunstein, *supra* note 20, at 145-53; Fleming, *supra* note 2, at 291-92. It is not the role of courts to say in the first instance what arrangements are necessary to secure the preconditions for deliberative democracy and deliberative autonomy, but to assure that the arrangements enacted by legislatures do not flout these preconditions. *See* Rawls, Political Liberalism, *supra* note 1, at 362.

political liberties and freedom of thought. This theme resembles Cass Sunstein's principal theme of securing deliberative democracy and, to a lesser extent, John Hart Ely's dominant theme of reinforcing representative democracy.[34] It seeks to secure the preconditions for political self-government, conceiving our political system as a public facility for deliberation concerning the common good, not a veritable political market for aggregation of self-interested preferences.[35] This theme aims to assure that political decisions will be impartial in the sense that they are justifiable on the basis of *public-regarding reasons* (common good), not merely the self-interested preferences of private groups or individuals. Also, it forbids political decisions that violate the constraints of impartiality by denying equal citizenship on the basis of morally irrelevant characteristics, such as race, sex, or sexual orientation.

Constitutional constructivism's second theme is underwritten by liberty of conscience and freedom of association. This theme articulates and unifies the concerns for substantive liberties that process-perfecting theories such as those of Sunstein and Ely recast or neglect: liberty of conscience, freedom of intimate association, decisional autonomy, decisional privacy, spatial privacy, bodily integrity, and an antitotalitarian principle of liberty.[36] It seeks to secure these preconditions for personal self-government, or deliberation and decision by citizens, individually and in association with others, about how to lead their own lives. Moreover, at least where constitutional essentials and matters of basic justice are at stake, this theme aspires to assure that political decisions will be impartial in the sense that they are justifiable on the basis of *public reasons* (common ground)—on grounds that citizens generally can reasonably be expected to accept, whatever their particular conceptions of the good, because they come within an overlapping consensus concerning a political conception of justice.[37] These constitutional restrictions must be honored if free and equal citizens are to engage in social cooperation on the basis of mutual respect and trust in a constitutional democracy such as our own, which is characterized by the fact of reasonable pluralism and which recognizes the related fact of oppression. Constitutional constructivism conceives our polity as being subject to the limits of public reason, rather than being free to make collective judgments

34. *See* Fleming, *supra* note 2, at 256, 292-93.

35. *See* Rawls, Political Liberalism, *supra* note 1, at 219-20, 359-63; Rawls, A Theory of Justice, *supra* note 18, § 36, at 194-200, § 54, at 313-18.

36. *See* Fleming, *supra* note 2, at 233-35, 256-60, 294-95.

37. *See* Rawls, Political Liberalism, *supra* note 1, at 213-20, 223-30; Freeman, *supra* note 26, at 17, 20-29.

founded solely on comprehensive religious, moral, or philosophical conceptions of the good.[38]

Thus, constitutional constructivism is concerned with securing preconditions for processes of deliberation and decision with respect to both deliberative democracy and deliberative autonomy. By virtue of these concerns, it is a theory of constitutional democracy and trustworthiness, an alternative to Ely's theory of representative democracy and distrust. I mean trustworthiness in the sense of Rawls's remark: "By publicly affirming the basic liberties citizens . . . express their mutual respect for one another as reasonable and trustworthy, as well as their recognition of the worth all citizens attach to their way of life."[39] Constitutional constructivism is a fuller theory of perfecting the trustworthy Constitution than is Ely's (or Sunstein's) process-perfecting theory.

The guiding framework also demonstrates that constitutional constructivism's conception of citizens (with two moral powers) is writ large in its conception of our Constitution (with two fundamental themes).[40] It presents our Constitution as embodying (or aspiring to embody) a coherent scheme of basic liberties fit for use by free and equal citizens, rather than as enacting an antique list appropriate for ancestor worship.[41] And constitutional constructivism frames questions of constitutional interpretation in terms of the significance of an asserted liberty for such citizens' application of their two moral powers in the two fundamental cases that arise in our constitutional scheme.

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38. Rawls speaks of the limits of public reason as imposing "a moral, not a legal, duty—the duty of civility." Rawls, Political Liberalism, *supra* note 1, at 217. He subsequently added: "I emphasize that [the moral duty of civility] is not a legal duty, for in that case it would be incompatible with freedom of speech." John Rawls, *The Idea of Public Reason Revisited* (1997), *reprinted in* John Rawls, Collected Papers 573, 577 (Samuel Freeman ed., 1999). Elsewhere, I plan to elaborate upon the constraints of public reason in our constitutional democracy. For valuable discussions and applications of Rawls's idea of public reason to constitutional theory, see Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 Chi.-Kent L. Rev. 619 (1994); Lawrence B. Solum, *Inclusive Public Reason*, 75 Pac. Phil. Q. 217 (1994); *see also* Samuel Freeman, *Public Reason and Political Justifications*, 72 Fordham L. Rev. 2021 (2004).

39. Rawls, Political Liberalism, *supra* note 1, at 319; *see* Ely, *supra* note 9, at 101-04.

40. *Cf.* The Republic of Plato II, at 55, VIII, at 266-68 (Francis MacDonald Cornford trans., 1941) (suggesting that the constitution of individuals is writ large in the constitution of a state).

41. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 222 (1824) (Marshall, C.J.) (criticizing antifederalists, who argued for a narrow construction of the Constitution in general and the commerce power in particular, contending that they would "explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use"). On narrow conceptions of originalism as forms of "ancestor-worship," see Freeman, *supra* note 26, at 16.

II. SECURING DELIBERATIVE DEMOCRACY

In previous work, I have elaborated upon the second fundamental theme: securing deliberative autonomy.[42] Here I shall sketch certain features of the first fundamental theme: securing deliberative democracy. As stated above, constitutional constructivism views the Constitution as incorporating the equal political liberties and seeking to guarantee their fair value, so that the processes of political decision will be open to all on a roughly equal basis. The Constitution also protects freedom of thought (including freedom of speech and press, freedom of assembly, and the like), so that the exercise of those liberties in those processes will be free and informed.[43] In Part II.A., I discuss the priority of the basic liberties, including those related to the first fundamental theme. In Part II.B., I take up the commitment to a free and informed political process. Finally, in Part II.C., I pursue the idea of guaranteeing the fair value of the equal political liberties.

It is because of their role and significance in relation to the political process and hence to the exercise of the first moral power in the first fundamental case that a Rawlsian constitutional constructivism treats the equal political liberties in a special way as expressed by the guarantee of their fair value.[44] The equal political liberties are in this sense *primus inter pares*, first among the equal basic liberties that as a family have priority over the pursuit of utilitarian public good and the imposition of perfectionist values. Rawls's constructivist framework in this respect parallels the doctrine of "preferred freedoms" or "preferred position" outlined in footnote four of *United States v. Carolene Products Co.*[45] and elaborated in Ely's *Democracy and Distrust*.[46]

My larger project is to develop a *Constitution-perfecting theory* as an alternative to the *process-perfecting theory* advanced by Ely (as well as to that propounded by Sunstein).[47] My general tack is to argue that a constitutional constructivism in the spirit of Rawls's political liberalism is superior to Ely's theory. I shall take the same tack here, building upon Ely's analysis of the Constitution's commitments to

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42. *See* Fleming, *supra* note 3.

43. Rawls, Political Liberalism, *supra* note 1, at 335, 337.

44. *Id.* at 330. Rawls argues that "[i]t is not because political life and the participation by everyone in democratic self-government is regarded as the preeminent good for fully autonomous citizens." *Id.* Even so, Rawls does not side with that strand of modern liberalism that regards the political liberties as having only instrumental value, and as lacking intrinsic value. *See id.* at 298-99. He is, after all, trying to dispel the conflict between the traditions of democratic thought associated with Constant's distinction between the liberties of the moderns and the liberties of the ancients. *Id.* at 299.

45. 304 U.S. 144, 152-53 n.4 (1938).

46. *See* Ely, *supra* note 9, at 75-77.

47. *See* James E. Fleming, Securing Constitutional Democracy (book in progress under contract with University of Chicago Press); Fleming, *supra* note 3; Fleming, *supra* note 2.

open political process, but suggesting that a Rawlsian theory might provide a better account in certain respects. I shall deploy a Rawlsian guiding framework in exploring what the structure of First Amendment law would look like if we were committed, not to protecting an absolutist First Amendment in isolation from the rest of the Constitution, but to securing a fully adequate scheme of the basic liberties as a whole.

A. *The Priority of the Basic Liberties, or Taking Rights Seriously*

Let us recall two familiar refrains within liberal political philosophy and constitutional theory about the status of basic liberties or rights. One, associated with Rawls, is about the "priority of the basic liberties."[48] The other, associated with Ronald Dworkin, is about "taking rights seriously."[49] These two formulations arose in part in response to concerns that utilitarians, pragmatists, and balancers of all stripes do not appreciate or honor the nerve or force of claims of basic liberties or rights. To generalize, there is a twofold worry: (1) that these balancers reduce claims of basic liberties or rights of individuals to mere claims of interests or (2) that they elevate mere claims of interests of government into claims of rights.

Justice Felix Frankfurter—balancer par excellence and bête noire of any serious proponent of "taking rights seriously"—famously illustrates both moves. In *Dennis v. United States*,[50] in concurrence, he reduces the First Amendment freedom of expression of individuals to a mere interest which Congress may balance against the claims of the whole nation to national security. And in the two flag-salute cases, *Minersville School District v. Gobitis* (for the majority)[51] and *West Virginia Board of Education v. Barnette* (in dissent),[52] he frames the clash between Jehovah's Witnesses' freedom of religion and freedom of expression, on the one hand, and the government's interest in inculcating patriotism, on the other, as a "clash of rights."[53]

In both instances, Frankfurter was nailed for making these moves. In *Dennis*, Justice Hugo Black did so in dissent, powerfully arguing that the First Amendment is an absolute that is not simply to be balanced away out of concern for national security.[54] In *Barnette*, Justice Robert Jackson for the majority (over Frankfurter's dissent) pointedly argued that there was no clash of rights here: Instead, there

48. Rawls, A Theory of Justice, *supra* note 18, § 82, at 474-80; Rawls, Political Liberalism, *supra* note 1, at 294-99.

49. Ronald Dworkin, Taking Rights Seriously (1977).

50. 341 U.S. 494, 517-61 (1951) (Frankfurter, J., concurring).

51. 310 U.S. 586 (1940).

52. 319 U.S. 624, 646-71 (1943) (Frankfurter, J., dissenting).

53. Walter F. Murphy, James E. Fleming, Sotirios A. Barber & Stephen Macedo, American Constitutional Interpretation 1267-69 (3d ed. 2003) (reprinting letter from Felix Frankfurter to Harlan Fiske Stone concerning *Minersville*).

54. *Dennis*, 341 U.S. at 579-81 (Black, J., dissenting).

was a clash of individual rights of the Jehovah's Witnesses against the claims of governmental authority to inculcate orthodoxy.[55]

Both of these cases involved the First Amendment, and constitutional and political theorists who give "priority" to basic liberties or who "take rights seriously" are rightly proud to take their stand with Black and Jackson and against Frankfurter in these battles.[56] Moreover, many of the issues of the 1950s, 1960s, and 1970s that gave rise to the refrains about priority and taking rights seriously involved clashes between individual rights against the government and claims of governmental authority to restrict or regulate those rights to pursue the national security or the good of all.[57] And those clashes arose in situations where liberals rightly feared that the government was overestimating the threat and also exaggerating the fragility of our institutions and our way of life.

But all this should not blind us to the possibility that there might be genuine clashes of rights, or more precisely, clashes of higher order values or interests that underlie rights[58]—unlike Frankfurter's wrongheaded conception of a clash of rights—in which giving priority to the family of basic liberties as a whole may preclude according "absolutist" protection to First Amendment freedoms. Put another way, we should face up to the possibility that in rightly being "anti-balancing," we have overlooked the possibility of genuine clashes of rights or values or interests, and we have failed to provide a framework for thinking about how to address such clashes. The general type of clash that I discuss below is the clash between concern to protect freedom of expression, on the one hand, and concern to secure equal citizenship for all, including racial, sexual, or sexual orientation minorities, on the other.

In Part II.B., I consider how a conception of the First Amendment inspired by a Rawlsian guiding framework might advance the debates concerning absolutism versus balancing in the context of freedom of

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55. Barnett, 319 U.S. at 630-31.

56. For examples of leading constitutional theorists who proudly took their stand in favor of absolutism (or stringent protection of fundamental rights) over and against balancing, see, for example, C. Edwin Baker, Human Liberty and Freedom of Speech (1989); Dworkin, *supra* note 49; Ely, *supra* note 9; Thomas I. Emerson, The System of Freedom of Expression (1970); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245. Leading political philosophers who take a similar stance include Rawls. *See* Rawls, Political Liberalism, *supra* note 1, at 344, 352-56; T.M. Scanlon, *infra* notes 64-65.

57. No one made this clearer than Ronald Dworkin, in his famous call for taking rights seriously and in his arguments that individual rights are not simply to be balanced against governmental claims of authority. *See* Dworkin, *supra* note 49, at 184-205.

58. T.M. Scanlon perceptively and rigorously argues that we should acknowledge clashes of such higher order interests or values, but not clashes of institutionally specified rights. *See* T.M. Scanlon, *Adjusting Rights and Balancing Values*, 72 Fordham L. Rev. 1477, 1478-79 (2004).

expression. In Part II.C., I consider how such a guiding framework would apply to conflicts between protecting freedom of expression and guaranteeing the fair value of the equal political liberties. Finally, in Part III, I take up how it might apply to other conflicts between freedom of expression and equal citizenship.

B. *Free and Informed Political Process*

The recurring debate in the jurisprudence of the First Amendment between the "absolutists" and the "balancers"—epitomized in a previous generation by the battles between Justice Black,[59] on the one hand, and Justices Frankfurter[60] and John Marshall Harlan,[61] on the other—has been advanced considerably by Ely's (to say nothing of Laurence H. Tribe's[62]) two-track analytical framework[63] and T.M. Scanlon, Jr.'s theory of freedom of expression[64] and categories of expression.[65] I shall offer Rawls's framework of the basic liberties and their priority[66] as a theoretical structure that, like Ely's, promises to assure a free and informed political process but that, unlike Ely's, might satisfy hankerings to break out of a two-track framework for analysis of the First Amendment. It also promises to advance the debate about absolutism and balancing in this generation between Justice Scalia, on the one hand, and Justice Stevens, on the other.

1. Ely's Two-Track Analytical Framework

Ely initially argued that the two contending approaches to the First Amendment need not be regarded as mutually exclusive general theories, but should be employed in tandem, with "categorization" and "balancing" each playing its own legitimate and indispensable role.[67] He subsequently recast these complementary approaches as an

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59. Justice Black's absolutist view is put most forcefully in Hugo LaFayette Black, A Constitutional Faith (1969), and Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865 (1960).

60. See, for example, Justice Frankfurter's concurring opinion in *Dennis v. United States*, 341 U.S. 494, 517-61 (1951).

61. See, for example, Justice Harlan's opinion for the Court in *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

62. Laurence H. Tribe, American Constitutional Law § 12-2, at 789-94 (2d ed. 1988).

63. Ely, *supra* note 9, at 105-16.

64. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 204 (1972).

65. T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519 (1979) [hereinafter Scanlon, *Categories*]; *see also* T.M. Scanlon, Jr., *Content Regulation Reconsidered*, *in* Judith Lichtenberg, Democracy and the Mass Media 331 (1990).

66. Rawls, Political Liberalism, *supra* note 1, at 334-40.

67. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1500-02 (1975).

absolutist, categorical "unprotected messages" approach and a "specific threat" approach.[68]

Ely argues that the unprotected messages approach is "the only intelligible form of 'absolutism.'"[69] Unlike Justice Black's version of absolutism, Ely's version "does not purport to hold all expression or speech constitutionally immune to government regulation, but rather immunizes all expression *save that which falls within a few clearly and narrowly defined categories*."[70] Ely cautions that "[w]here the evil the state is seeking to avert is one that is thought to arise from the particular dangers of the message being conveyed, . . . the hazards of political distortion and judicial acquiescence are at their peak."[71] For this reason, he argues, Justice Frankfurter's approach—"ad hoc balancing [evaluations of specific threats] tempered with substantial deference to the legislative judgment"[72]—"mocks our commitment to an open political process."[73] Ely contends:

> If the First Amendment is even to begin to serve its central function of assuring an open political dialogue and process, we must seek to minimize assessment of the dangerousness of the various messages people want to communicate. That means, where state officials seek to silence a message because they think it's dangerous, that we insist that the message fall within some clearly and narrowly bounded category of expression we have designated in advance as unentitled to protection.[74]

Historically, these categories of unprotected messages included libel,[75] fighting words,[76] obscenity,[77] incitement to imminent lawless action,[78] and commercial speech.[79]

Ely grants, however, that "[w]here the evil the state is seeking to avert is one that is independent of the message being regulated, where it arises from something other than a fear of how people will react to what the speaker is saying[,] . . . a 'specific threat' approach is the only one that can be coherent."[80] This approach must consider context and assess the threat that the particular expressive event poses.

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68. Ely, *supra* note 9, at 105-16.
69. *Id.* at 111.
70. *Id.* at 109-10.
71. *Id.* at 111.
72. *Id.* at 108.
73. *Id.* at 109.
74. *Id.* at 112.
75. *See* Beauharnais v. Illinois, 343 U.S. 250 (1952).
76. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
77. *See* Roth v. United States, 354 U.S. 476 (1957).
78. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).
79. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942). *But see* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (raising the level of protection for commercial expression).
80. Ely, *supra* note 9, at 111.

Ely warns that "[i]t is important that the distinction [between these two approaches] not be misunderstood as, or telescoped into, one simply between 'permissive review' and 'strict review.'"[81] He cautions against allowing the review of measures that are geared to averting an evil other than the perceived dangerousness of the message "to degenerate into what is essentially a 'reasonableness' test."[82] Ely urges instead that courts should employ "the strictest available sort of specific harm test, one that seriously insists on a clear and present danger of a serious evil."[83] For, he argues, courts must "guard against slippage [into unstructured balancing tests] in all contexts."[84] In this sense, "'strict review' is always appropriate where free expression is in issue."[85]

Ely distinguishes between a strong and a weak approach to balancing—a "serious balancing version of less restrictive alternative analysis" and a "weak, nay useless, 'no gratuitous inhibition' approach."[86] The strong approach is put forward, even if not followed, in *United States v. O'Brien*:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[87]

This "serious balancing version of less restrictive alternative analysis" is presumably "the strictest available sort of specific harm test."[88]

Furthermore, Ely admonishes that "[t]o construe the form of review that is appropriate when messages are proscribed on the theory that they are dangerous as anything short of an 'absolute' protection of all speech that does not fall within some unprotected category is to miss the central point of [his] discussion."[89] To do so is "to run the risk of converting that stricter brand of review . . . into simply a more demanding sort of balancing or specific harm test."[90] In the ellipsis of the foregoing quotation, Ely suggests that "unfortunately a few recent decisions seem to do just this,"[91] citing

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81. *Id.* at 115.
82. *Id.*
83. *Id.* at 116.
84. *Id.*
85. *Id.*
86. Ely, *supra* note 67, at 1488-89.
87. United States v. O'Brien, 391 U.S. 367, 377 (1968).
88. Ely, *supra* note 9, at 116.
89. *Id.* at 115.
90. *Id.*
91. *Id.* at 115, 233-34 n.27. "Recent" as of 1980, when Ely wrote, but still timely and significant.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (commercial speech),[92] *Young v. American Mini Theatres, Inc.* (zoning regulation of "adult motion picture theaters" and "adult book stores"),[93] and *Buckley v. Valeo* (campaign finance).[94]

In these cases and their progeny, the Court in effect adapted the test enunciated in *O'Brien*, which on Ely's analysis is appropriate only on the specific threat or "balancing" track, to develop an intermediate level of review between Ely's "absolutist" track of categories of fully protected messages and the categories of unprotected messages.[95] Ely warns that, "to build protective barriers around free expression as secure as words can make them,"[96] we need to police these two tracks more toughly. Indeed, these cases and their progeny pose a great challenge to the two-track analytical framework, for they seem to fall between the tracks. Below, I shall contend that they can be caught by a Rawlsian constructivist framework and thus prevented from sliding into an amorphous balancing test that, like Frankfurter's approach, corrodes basic liberties. In outlining the implications of a Rawlsian scheme for analysis of the First Amendment, I shall use Scanlon's

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92. 425 U.S. 748 (1976).

93. 427 U.S. 50 (1976).

94. 424 U.S. 1 (1976).

95. *Virginia Pharmacy* refers to a "different degree of protection" for commercial speech. 425 U.S. at 771-72 n.24. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), per Justice Lewis F. Powell, applies a "four-step analysis":

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Cent. Hudson, 447 U.S. at 566. This test obviously resembles the test put forward in *United States v. O'Brien*. 391 U.S. 367, 377 (1968). Justice Harry A. Blackmun, concurring in the judgment in *Central Hudson*, saw in the Court's four-part analysis approval of "an intermediate level of scrutiny." 447 U.S. at 573.

In *American Mini Theatres* and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), Justice John Paul Stevens, in opinions for the Court, but whose relevant portions constituted mere opinions for a plurality, argued for a hierarchy of values protected by the First Amendment. Concurring in the judgment and portions of the opinion in *American Mini Theatres*, 427 U.S. at 79, Justice Powell argued instead that it was appropriate to analyze the permissibility of the zoning ordinance under the four-part test of *O'Brien*. He concurred with similar reservations in *Pacifica*, 438 U.S. at 761.

In *Buckley*, 424 U.S. at 16, the Court explicitly rejected the less-exacting standard of *O'Brien* on the ground that the expenditure of money did not introduce a non-speech element, purportedly applying "exacting scrutiny" instead. But this "closest scrutiny," *id.* at 25, turns out, as Ely suggests, to be a stringent balancing test rather than an absolutist, categorical test. Ely, *supra* note 9, at 233-34 n.27. For a discussion of *Buckley* from within a Rawlsian constructivist framework, see *infra* text accompanying notes 178-87.

96. Ely, *supra* note 9, at 116.

theory of freedom of expression (which Ely acknowledges "helped" him in formulating his own framework[97]) to mediate between Ely's and Rawls's theories.

2. Scanlon's Theory of Freedom of Expression and Categories of Expression

In his powerful and influential article, *A Theory of Freedom of Expression*,[98] Scanlon based his theory on a single, audience-related principle that generalized Alexander Meiklejohn's famous theory of free speech in relation to self-government[99] beyond the category of political speech to all categories of expression.[100] Scanlon termed this principle the "Millian Principle":

> There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.[101]

Scanlon defended this Millian Principle by arguing that it was entailed by an idea about the limits of legitimate governmental authority: "that the legitimate powers of government are limited to those that can be defended on grounds compatible with the autonomy of its citizens—compatible, that is, with the idea that each citizen is sovereign in deciding what to believe and in weighing reasons for action."[102] Scanlon suggested that this principle could be seen as "a generalized version of Meiklejohn's idea of the political responsibility of democratic citizens."[103]

Subsequently, Scanlon thoughtfully refined his theory in *Freedom of Expression and Categories of Expression*.[104] There he revises his notion of autonomy in a way that I shall invoke in sketching a Rawlsian conception of securing the preconditions for the development and exercise of the two moral powers in the two fundamental cases. Scanlon initially employed the idea of autonomy

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97. *Id.* at 231 n.15.
98. Scanlon, *supra* note 64.
99. *See* Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948), *reprinted in* Alexander Meiklejohn, Political Freedom 1 (1960).
100. Scanlon, *Categories*, *supra* note 65, at 530-31.
101. Scanlon, *supra* note 64, at 213.
102. *Id.* at 215.
103. *Id.*
104. Scanlon, *Categories*, *supra* note 65.

"as a constraint on justifications of authority."[105] He now invokes autonomy, "understood as the actual ability to exercise independent rational judgment, as a good to be promoted"[106]—for example, through protecting the audience's central interest in expression, namely, "the interest in having a good environment for the formation of one's beliefs and desires."[107]

Scanlon's initial sense of autonomy is echoed in Ely's theme of democracy and distrust and consequent suspicion of governmental suppression of expression that is rooted in a fear of how people will react to the speaker's message.[108] Scanlon still argues that "where political issues are involved governments are notoriously partisan and unreliable," and therefore that "giving government the authority to make policy by balancing interests in such cases presents a serious threat to particularly important participant and audience interests."[109] He suggests, however, that "the assumption that governments are relatively neutral and trustworthy [in the area of commercial speech as contrasted with the struggle between religious or political views] is one reason for our complacent attitude toward regulation of commercial speech."[110]

Hence, from the standpoint of distrust, Scanlon now argues that "political speech stands out as a distinctively important category of expression."[111] He suggests that "Meiklejohn's mistake . . . was to suppose that the differences in degree between this category and others mark the boundaries of first amendment theory."[112] Scanlon continues: "My mistake, on the other hand, was that in an effort to generalize Meiklejohn's theory beyond the category of political speech, I took what were in effect features peculiar to this category and presented them, under the heading of autonomy, as a priori constraints on justifications of legitimate authority."[113]

Scanlon now contends that the appeal of the idea of autonomy in his first sense, that is, as an a priori constraint on justifications of authority, derives entirely from the value of autonomy in his second sense, that is, from the importance of promoting the audience's central interests in freedom of expression.[114] He acknowledges that

105. *Id.* at 533.
106. *Id.*
107. *Id.* at 527.
108. *See* Ely, *supra* note 9, at 105-16.
109. Scanlon, *Categories*, *supra* note 65, at 534.
110. *Id.* at 541-42. Even so, Scanlon grants that "[t]here are many cases that clearly count as commercial speech in which our traditional suspicions of governmental regulation of expression are as fully justified as they are elsewhere"—particularly where an advertising battle has a political element that raises the threat of partisan governmental regulation. *Id.* at 542.
111. *Id.* at 535.
112. *Id.*
113. *Id.*
114. *Id.* at 534.

"[t]o build these interests in at the outset as constraints on the process of justification gives theoretical form to the intuition that freedom of expression is based on considerations that cannot simply be outweighed by competing interests in the manner that 'clear and present danger' or 'pure balancing' theories of the first amendment would allow."[115] "But," Scanlon continues, "to build these audience interests into the theory in this way has the effect of assigning them greater and more constant weight than we in fact give them."[116] Furthermore, "it prevents us from even asking whether these interests might in some cases be better advanced if we could shield ourselves from some influences."[117] Scanlon argues that "[i]n order to meet the objections raised to the Millian Principle, it is necessary to answer such questions, and, in general, to take account of the variations in audience interests under varying circumstances."[118] "But," he concludes, "this is not possible within the framework of the argument I advanced."[119]

Nor is it possible within the framework that Ely advances (or, for that matter, within the framework advanced by the Rehnquist Court). For Ely insists upon rigorously maintaining the dichotomy between absolutely protected and unprotected categories of messages. He argues that "unless the expression in question falls into one of the unprotected categories, it is fully protected against content-directed regulation, irrespective of how it might measure up against other protected expression."[120] (We see similar moves in Scalia's opinion in *R.A.V.*)[121] Ely wrote this statement in response to Justice John Paul Stevens's call for a hierarchy of values protected by the First Amendment and the latter's conclusion that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance."[122] Beyond the ranking of categories of messages as absolutely protected or unprotected, a hierarchy of values protected by the First Amendment is anathema to Ely's theory of democracy and distrust (just as it is anathema to Scalia's theory). But Ely's dichotomy—important though it is to maintain in situations of likely political distortion and judicial acquiescence—is strained, if not arbitrary,

115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. Ely, *supra* note 9, at 234 n.27.
121. 505 U.S. 377 (1992).
122. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 61 (1976); *see also* New York v. Ferber, 458 U.S. 747, 777-81 (1982) (Stevens, J., concurring); Schad v. Mt. Ephraim, 452 U.S. 61, 79-85 (1981) (Stevens, J., concurring); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 544-48 (1980) (Stevens, J., concurring); FCC v. Pacifica Found., 438 U.S. 726, 746 (1978).

when applied to speech within traditionally unprotected categories of messages that the Court has recently elevated to an intermediate level of constitutional protection.

Ironically, Ely's aversion to, or suspicion of, the Court's intermediate level of review of regulations of, or restrictions on, commercial speech (marketplace ideas) might aggravate rather than terminate the new era of *Lochner* ushered in by *Buckley*'s understanding of the First Amendment as a veritable marketplace of ideas.[123] The marketplace of marketplace ideas is not in need of absolute protection by the Court. There is no reason especially to distrust the outcomes of the political process that touch upon commercial speech. But the Rehnquist Court, if forced to choose between full protection and no protection for commercial speech, most likely would choose full protection. Clearing the channels of commercial promotion, however, is not a constitutional imperative on the order of clearing the channels of political change. Commercial speech ought not to be a category of absolutely protected messages, though neither ought it to be a category of unprotected messages.

We need a theory that will attribute a subsidiary function to protecting commercial speech, so as not to leave it untheorized and therefore vulnerable to being incorporated into a notion of the marketplace of marketplace ideas that harkens back to *Lochner*. And we need a framework that can support an intermediate level of review, so as not to degenerate into a sliding scale that slides down into an amorphous balancing test. A Rawlsian constitutional constructivism provides such a theory along with this sort of framework.

3. A Rawlsian Framework of the Basic Liberties and Their Priority

Unlike Ely's two-track framework and Scanlon's first framework, it is possible within a Rawlsian framework to take account of the variations in the audience's interests in freedom of expression under varying circumstances. Scanlon now argues that "[t]he central audience interest in expression . . . is the interest in having a good environment for the formation of one's beliefs and desires."[124] Similarly, Rawls's framework of the basic liberties and their priority is concerned with securing the social conditions necessary for the development and exercise of the two moral powers in the two fundamental cases. The audience's interests in expression vary depending upon the role and significance of the expression under

123. By "the new era of *Lochner*," I do not have in mind Roe v. Wade, 410 U.S. 113 (1973). *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973). Instead, I refer to *Buckley*, insofar as the latter case evinces an understanding of the First Amendment as a veritable "marketplace of ideas." *See infra* text accompanying note 184.

124. Scanlon, *Categories*, *supra* note 65, at 527.

consideration in relation to the application of these moral powers to these fundamental cases.[125]

Rawls does not lay out a framework for analysis of the First Amendment as such, because he is more concerned with freedom of thought in relation to philosophical doctrine.. Nonetheless, in outline, the implications of his philosophical view for analysis of that amendment are clear enough, both from his discussion of some of these implications and from his references to several leading constitutional theorists whose work bears affinities to his own.

Rawls argues that "[i]n understanding the priority of the basic liberties we must distinguish between their restriction and their regulation,"[126] citing Tribe's application of this distinction in formulating a two-track framework for analysis of the First Amendment[127] along with Meiklejohn's distinction between rules abridging the content of speech and rules of order that are essential for regulating free discussion.[128] Rawls also speaks more generally of the distinction between restrictions on content and "reasonable regulations relating to time and place, and the access to public facilities, always on a footing of equality."[129] Finally, Rawls relates his arrangement of the basic liberties, which emphasizes the role of the two fundamental cases and connects these cases with the two moral powers, to Vincent Blasi's classification of the values protected by the First Amendment under the headings of "individual autonomy," "diversity," "self-government," and "the checking value."[130]

These references to leading constitutional theorists may help to domesticate Rawls's philosophical view, to locate it on the terrain of constitutional theory, and to put it to work in the context of the bounded constitutional theorizing of the American constitutional order. But these assurances of familiarity should not blind us to possible novel contributions that Rawls's framework might make to the analysis of our system of freedom of expression. These contributions will come out most clearly through noting both the similarities and differences between Rawls's and Meiklejohn's views.

Rawls acknowledges that his account of the basic liberties and their

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125. *See* Rawls, Political Liberalism, *supra* note 1, at 331-40.

126. *Id.* at 295.

127. *Id.* at 295 n.11 (citing Tribe, *supra* note 62, § 12-2, at 789-94).

128. *Id.* at 296 n.12 (citing Meiklejohn, *supra* note 99).

129. *Id.* at 341; *see also id.* at 336 ("[T]here is no restriction on the content of political speech, but only regulations as to time and place, and the means used to express it.").

130. *Id.* at 335 n.45 (citing Vincent Blasi, *The Checking Value in First Amendment Theory,* 1977 Am. B. Found. Res. J. 521). What is more, Rawls acknowledges his indebtedness to Harry Kalven, Jr.'s work on freedom of political speech in a free society. *Id.* at 342-43 (citing Harry Kalven, Jr., The Negro and the First Amendment (1966)); *id.* at 344 n.53 (citing Harry Kalven, Jr., A Worthy Tradition: Freedom of Speech in America (Jamie Kalven ed., 1988) [hereinafter Kalven, A Worthy Tradition]).

priority, when applied to the constitutional doctrine of a well-ordered society, has a certain similarity to the well-known view of Meiklejohn.[131] Meiklejohn is well known for emphasizing the role of free speech in relation to self-government,[132] and for arguing that the First Amendment is an absolute as far as political speech is concerned.[133] Rawls, however, differentiates his account from Meiklejohn's view along three lines:

> First, the kind of primacy Meiklejohn gives to the political liberties and to free speech is here given to the family of basic liberties as a whole; second, the value of self-government, which for Meiklejohn often seems overriding, is counted as but one important value among others; and finally, the philosophical background of the basic liberties is very different.[134]

These differences lead to broader conceptions of both protection and regulation of political liberties and free speech as well as of the other basic liberties in Rawls's constructivist framework.

Akin to Meiklejohn's idea of regulation of free speech, by analogy to rules of order, to protect the system of self-government is Rawls's notion of the mutual adjustment of basic liberties to secure a fully adequate scheme of the whole family of basic liberties. As Rawls puts it, because "the various basic liberties are bound to conflict with one another, the institutional rules which define these liberties must be adjusted so that they fit into a coherent scheme of liberties."[135] With this in mind, he concedes that "[t]he public use of our reason must be regulated [as distinguished from restricted]."[136] But he argues that "the priority of liberty requires this [regulation] to be done, so far as possible, to preserve intact the central range of application of each basic liberty."[137] And he contends that "[t]he priority of these liberties is not infringed when they are merely regulated, as they must be, in order to be combined into one scheme as well as adapted to certain social conditions necessary for their enduring exercise."[138]

Notwithstanding this regulation or mutual adjustment of the basic liberties, Rawls's framework entails a form of absolutism. For "the priority of liberty means that the first principle of justice assigns the basic liberties, as given by a list, a special status":[139] "They have an absolute weight with respect to reasons of [utilitarian] public good and of perfectionist values";[140] and, for that matter, they have priority

131. Rawls, Political Liberalism, *supra* note 1, at 290 n.1.
132. Meiklejohn, *supra* note 99.
133. Meiklejohn, *supra* note 56.
134. Rawls, Political Liberalism, *supra* note 1, at 290 n.1.
135. *Id.* at 295.
136. *Id.* at 296.
137. *Id.* (citation omitted).
138. *Id.* at 295.
139. *Id.* at 294.
140. *Id.* at 294 & n.10.

over the second principle of justice.[141] Hence, "[t]he priority of liberty implies in practice that a basic liberty can be limited or denied solely for the sake of one or more other basic liberties, and never . . . for reasons of [utilitarian] public good or of perfectionist values."[142]

Rawls urges that "[i]t should be noted that the mutual adjustment of the basic liberties is justified on grounds allowed by the priority of these liberties as a family, no one of which is in itself absolute."[143] This kind of adjustment, he contends, "is markedly different from a general balancing of interests which permits considerations of all kinds—political, economic, and social—to restrict these liberties, even regarding their content, when the advantages gained or injuries avoided are thought to be great enough."[144] He explains: "In justice as fairness the adjustment of the basic liberties [so as to preserve intact the central range of application of each basic liberty[145]] is grounded solely on their significance as specified by their role in the two fundamental cases, and this adjustment is guided by the aim of specifying a fully adequate scheme of these liberties."[146]

The notion of balancing may be weak and truistic—as a metaphor for judgment, which in any event is necessary and so makes the notion trivial.[147] Or it may be strong and corrosive—as a mode of utilitarian cost-benefit calculations along the lines of Judge Learned Hand's formula for negligence;[148] or his "gravity of the evil" test as a formulation of the clear and present danger test;[149] or Justice Frankfurter's mode of ad hoc evaluations of specific threats[150]—none of which takes rights seriously. Rawls's notion of the priority of the basic liberties demands that these liberties be taken seriously.

Hence, a Rawlsian constitutional constructivism shares Ely's

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141. *Id.* at 299.
142. *Id.* at 295.
143. *Id.* at 358.
144. *Id.* at 358-59.
145. *Id.* at 296.
146. *Id.* at 358-59.
147. *See* Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 Colum. L. Rev. 1022 (1978) (distinguishing between "balancing as interpretation" and "balancing as doctrine").
148. *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (L. Hand, J.).
149. *See* United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950) (L. Hand, J.). In *Dennis v. United States*, 341 U.S. 494, 510 (1951), Chief Justice Fred M. Vinson, writing for a plurality of the Supreme Court, adopted Hand's formulation of the clear and present danger test as a gravity of the evil test, which itself is an adaptation of Hand's formula for negligence. This test in effect waters down the "clear and present danger" test (famously articulated in Justice Brandeis's concurrence in *Whitney v. California*, 274 U.S. 357, 375-78 (1927)) to the remote bad tendency test articulated in Justice Sanford's majority opinion in *Whitney*. *See id.* at 646-47, *overruled by* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969); Kalven, A Worthy Tradition, *supra* note 130, at 198.
150. *See* Ely, *supra* note 9, at 108-09 (criticizing Frankfurter's concurring opinion in *Dennis*, 341 U.S. at 517-61).

aversion to balancing on both his absolutist, categorical track and his less restrictive alternative, specific harm track for analysis of the First Amendment. But Rawls's notion of mutual adjustment within the family of basic liberties, in terms of the role and significance of a particular liberty for the free public use of our reason in the two fundamental cases, may appear to smack of a hierarchy of values.

Indeed, there is an affinity between Rawls's scheme and Justice Stevens's call for a hierarchy of values and hankering to break out of a two-track analytical framework.[151] A Rawlsian constructivist framework might well answer that call and satisfy that hankering. We need to break out of a two-track framework, so long as it views the First Amendment in isolation from the scheme of basic liberties as a whole. But we need to remain within a constructivist framework and hence not tolerate limitations on basic liberties for the sake of pursuing utilitarian public good or imposing perfectionist values. That is, the ordering of constitutional values must take place within the constraints of the priority of a fully adequate scheme of basic liberties. This ordering must not be permitted to degenerate into an amorphous balancing of values irrespective of their status in relation to such a scheme.

For a Rawlsian constitutional constructivism, the problem with cases striking down regulations of the financing of electoral campaigns and referenda, such as *Buckley* and *First National Bank*, is not, *pace* Ely, that the Court strayed off an absolutist, categorical track onto the slippery slope of a test that is merely "a more demanding sort of balancing or specific harm test."[152] Rather, the problem is that the Court failed to see the Constitution as a whole, and therefore failed to see that freedom of political expression may be regulated (though not restricted) in order to guarantee the fair value of the equal political liberties.[153] Justice Byron R. White, dissenting in both *Buckley* and *First National Bank*, recognized that freedom of political expression was being regulated for the sake of protecting a system of freedom of expression and that in this sense there were compelling governmental interests in regulation rooted in the First Amendment itself.[154]

Neither absolutism nor balancing, but an intermediate level of review, is in order for such instances of adjustment of one basic liberty

151. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 423 (1992) (Stevens, J., concurring); United States v. Eichman, 496 U.S. 310, 319-24 (1990) (Stevens, J., dissenting); and opinions of Stevens cited *supra* note 122.

152. *See* Ely, *supra* note 9, at 115, 233-34 n.27.

153. *See* Rawls, Political Liberalism, *supra* note 1, at 362.

154. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 803-04 (1978) (White, J., dissenting); *see also* Buckley v. Valeo, 424 U.S. 1, 257-66 (1976) (White, J., dissenting). Rawls indicates that his discussion is in sympathy with White's dissenting opinions in both *First National Bank* and *Buckley*. Rawls, Political Liberalism, *supra* note 1, at 359 n.72.

to another.[155] For it is the family of basic liberties, not one basic liberty in particular, that has absolute weight with respect to the balancing of utilitarian public good and the imposition of perfectionist values. And there can be no more compelling governmental interest than securing a fully adequate scheme of equal basic liberties for all citizens in order to afford for everyone the common and guaranteed status of equal citizenship.

Commercial speech should receive merely intermediate protection for a different reason, which illustrates another rung in a constructivist framework's hierarchy of values protected by the First Amendment. The category of commercial speech does not bring into play the equal basic liberties of Rawls's first principle of justice in the first place; it instead involves the exercise of (non-basic) liberties associated with his second principle of justice.[156] However important the latter liberties may be, they do not have the role and significance in relation to the development and exercise of the moral powers in either or both of the fundamental cases that is requisite for absolutist, categorical protection.

Accordingly, a Rawlsian constitutional constructivism would allow the marketplace of marketplace ideas to be regulated and indeed restricted in order to promote important and compelling governmental interests that would be illegitimate or inapposite with regard to the category of political expression—for example, prohibition of false or misleading advertising.[157] At the same time, such a theory would recognize that some kinds of commercial speech ought not to be wholly unprotected—for example, advertising containing information about prices and the features of products that knowledgeable purchasers use as criteria of evaluation, which has a role to play in the functioning of a workably competitive and efficient market.[158]

Hence, a Rawlsian constitutional constructivism would entail an intermediate level of review that is sensitive to variations in the audience's interests in expression under varying circumstances for the category of commercial speech.[159] In cases following *Virginia*

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155. Rawls suggests that arrangements to secure the fair value of the equal political liberties are compatible with the central range of free political speech and press as a basic liberty, provided that the following three conditions hold:

> First, there are no restrictions on the content of speech .... A second condition is that the instituted arrangements must not impose any undue burdens on the various political groups in society and must affect them all in an equitable manner.... Finally, the various regulations of political speech must be rationally designed to achieve the fair value of the political liberties.

Rawls, Political Liberalism, *supra* note 1, at 357-58.

156. *Id.* at 357, 363.

157. *Id.* at 364.

158. *Id.*

159. *See supra* text accompanying notes 106-19 (discussing Scanlon's view).

Pharmacy,[160] such as *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[161] the Court has developed a "four-step analysis," analogous to the less restrictive alternative analysis of *O'Brien*, that well fits this specification—provided that it is recognized, as Justice Stevens urges in his concurring opinion in *Central Hudson*, that "[b]ecause 'commercial speech' is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed."[162]

Finally, *American Mini Theatres*, which upheld a zoning regulation of "adult motion picture theaters" and "adult book stores," even if their fare were not obscene and therefore unprotected expression,[163] is defensible within the scheme of a Rawlsian constitutional constructivism. "Adult" expression may well have a role and significance in some persons' pursuits of their conceptions of the good, but the central range of application of these persons' two moral powers in the two fundamental cases is secured as long as these sorts of materials are readily available to them—as such materials concededly were in Detroit in *American Mini Theatres*.[164] Besides this audience's interest in the availability of such expression, there is the further interest of bystanders in not being unwillingly exposed to material that they find offensive. A zoning regulation may represent a fair sharing of inconvenience between consenting audiences of adults and unconsenting bystanders and children.[165] Where political expression is concerned, however, the First Amendment requires unwilling bystanders to absorb the "first blow" of protected speech that they find offensive.[166]

In assessing Ely's and the Rehnquist Court's two-track frameworks for First Amendment analysis, we should bear in mind Rawls's suggestion concerning the priority of the basic liberties:

> It is wise, I think, to limit the basic liberties to those that are truly essential . . . . The reason for this limit on the list of basic liberties is the special status of these liberties. Whenever we enlarge the list of

160. 425 U.S. 748 (1976); *see supra* text accompanying notes 92-95 and note 95.

161. 447 U.S. 557, 566 (1980); *see supra* note 95.

162. *Cent. Hudson*, 447 U.S. at 579 (Stevens, J., concurring) (citation omitted).

163. 427 U.S. 50, 62-63 (1976).

164. In the portion of his opinion of the Court joined only by a plurality, Justice Stevens suggested that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* at 71 n.35.

165. *See* Scanlon, *Categories*, *supra* note 65, at 542. *But see id.* at 545-46 (suggesting that "if what the partisans of pornography are entitled to (and what the restrictors are trying to deny them) is a fair opportunity to influence the sexual mores of the society, then it seems that they, like participants in political speech in the narrow sense, are entitled to at least a certain degree of access even to unwilling audiences").

166. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 759 (1978) (Powell, J., concurring); Cohen v. California, 403 U.S. 15, 21-22 (1971).

> basic liberties we risk weakening the protection of the most essential ones and recreating within the scheme of liberties the indeterminate and unguided balancing problems we had hoped to avoid by a suitably circumscribed notion of priority.[167]

Ely's and the Court's two tracks, on the one hand, may provide an inadequate ordering of constitutional values, but too many gradations, on the other, may degenerate into a sliding scale or an unguided balancing test that does not take seriously the priority of the basic liberties. A Rawlsian constructivist framework lies between two tracks and too many gradations. As such, it may help to determine a structure for, or the rungs in, the hierarchy of values protected by the First Amendment. In this section, I have attempted merely to give a preliminary (and incomplete) sketch of the hierarchy entailed by a Rawlsian constitutional constructivism.

C. *Guaranteeing the Fair Value of the Equal Political Liberties*

Rawls states that "[w]hen we . . . consider the distinctive role of the political process in determining the laws and policies to regulate the basic structure, it is not implausible that [the equal political liberties] alone should receive the special guarantee of fair value."[168] "This guarantee," he argues, "is a natural focal point between merely formal liberty on the one side and some kind of wider guarantee [of fair value] for all basic liberties on the other."[169]

Rawls distinguishes between merely formal basic liberties and the fair value of these liberties, or between liberty and the worth of liberty, as follows:

> [T]he basic liberties are specified by institutional rights and duties that entitle citizens to do various things, if they wish, and that forbid others to interfere. The basic liberties are a framework of legally protected paths and opportunities. Of course, ignorance and poverty, and the lack of material means generally, prevent people from exercising their rights and from taking advantage of these openings. But rather than counting these and similar obstacles as restricting a person's liberty, we count them as affecting the worth of liberty, that is, the usefulness to persons of their liberties.[170]

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167. Rawls, Political Liberalism, *supra* note 1, at 296.

168. *Id.* at 328-29.

169. *Id.* at 329.

170. *Id.* at 325-26; *see also* Rawls, A Theory of Justice, *supra* note 18, § 32, at 204-05. As noted above, in *The Law of Peoples*, Rawls argues that a liberal political conception of justice, and a reasonably just constitutional democracy, must assure "sufficient all-purpose means to enable all citizens to make intelligent and effective use of their freedoms." *See* Rawls, The Law of Peoples, *supra* note 27, at 49. He mentions five kinds of institutions or arrangements that are necessary to prevent "social and economic inequalities from becoming excessive" and to achieve stability: (a) "[a] certain fair equality of opportunity"; (b) "[a] decent distribution of income and wealth"; (c) "[s]ociety as employer of last resort"; (d) "[b]asic health care assured

He treats the equal political liberties in a special way: "by including in the first principle of justice the guarantee that the political liberties, and only these liberties, are secured by [affording] their 'fair value.'"[171]

Rawls explains that "this guarantee means that the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions."[172] The guarantee has two noteworthy features:

> First, it secures for each citizen a fair and roughly equal access to the use of a public facility designed to serve a definite political purpose, namely, the public facility specified by the constitutional rules and procedures which govern the political process and control the entry to positions of political authority.... [T]hese rules and procedures are to be a fair process, designed to yield just and effective legislation.[173]

He continues:

> Second, this public facility has limited space, so to speak. Hence, those with relatively greater means can combine together and exclude those who have less in the absence of the guarantee of fair value of the political liberties.... Certainly, in the absence of the second principle of justice [which is not incorporated into the constitution], the outcome is a foregone conclusion; for the limited space of the political process has the consequence that the usefulness of our political liberties is far more subject to our social position and our place in the distribution of income and wealth than the usefulness of our other basic liberties.[174]

"The point to note" concerning the limited "public space" of this governmentally established and maintained public facility, Rawls observes, "is that the valid claims of equal citizens are held within certain standard limits by the notion of a fair and equal access to the political process as a public facility."[175] The guarantee of fair value for the equal political liberties is thus analogous to Meiklejohn's notion of rules of order essential for regulating free discussion in a system of self-government.[176]

Rawls admits that "[i]t is beyond the scope of a philosophical doctrine to consider in any detail the kinds of arrangements required

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for all citizens"; and (e) "[p]ublic financing of elections and ways of assuring the availability of public information on matters of policy." *Id.* at 49, 50.

171. Rawls, Political Liberalism, *supra* note 1, at 327; *see also* Rawls, A Theory of Justice, *supra* note 18, § 40, at 224-27, § 41, at 233-34, § 49, at 277-79, § 62, at 356.

172. Rawls, Political Liberalism, *supra* note 1, at 327.

173. *Id.* at 328.

174. *Id.*

175. *Id.*

176. *See* Meiklejohn, *supra* note 99.

to insure the fair value of the equal political liberties."[177] Nonetheless, he illustrates the problem of maintaining the fair value of the equal political liberties by considering regulations of the financing of electoral campaigns and referenda of the sort struck down in *Buckley v. Valeo*[178] and *First National Bank v. Bellotti*.[179] He argues that these regulations "were admissible attempts to achieve the aim of a fair scheme of representation in which all citizens could have a more full and effective voice."[180] From *Wesberry v. Sanders*[181] and *Reynolds v. Sims*,[182] which had affirmed the principle of one person, one vote, Rawls infers that the right to vote that is protected under the American Constitution involves more than the right simply to cast a vote which is counted equally: "[W]hat is fundamental is a political procedure which secures for all citizens a full and equally effective voice in a fair scheme of representation. Such a scheme is fundamental because the adequate protection of other basic rights depends on it. Formal equality is not enough."[183] Accordingly, he argues:

> If the Court means what it says in *Wesberry* and *Reynolds*, *Buckley* must sooner or later give way. The First Amendment no more enjoins a system of representation according to influence effectively exerted in free political rivalry between unequals than the Fourteenth Amendment enjoins a system of liberty of contract and free competition between unequals in the economy, as the Court thought in the Lochner era.[184]

As against Rawls's understanding of the principle of equal participation, the Court in *Buckley* thus appears to have embraced a notion of the veritable marketplace of ideas: a marketplace in which ideas and candidates are bought and sold.

Furthermore, in saying that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,"[185] the Court in *Buckley* seems to have rejected the idea that Congress may try to guarantee the fair value of the equal political liberties. In doing so, Rawls argues, the Court is failing to see the

177. Rawls, Political Liberalism, *supra* note 1, at 327. He acknowledges that "[h]ow best to proceed is a complex and difficult matter," but he suggests that "one guideline for guaranteeing fair value seems to be to keep political parties independent of large concentrations of private economic and social power in a private-property democracy, and of government control and bureaucratic power in a liberal socialist regime." *Id.* at 328.

178. 424 U.S. 1 (1976).

179. 435 U.S. 765 (1978).

180. Rawls, Political Liberalism, *supra* note 1, at 362.

181. 376 U.S. 1 (1964).

182. 377 U.S. 533 (1964).

183. Rawls, Political Liberalism, *supra* note 1, at 361.

184. *Id.* at 362.

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

Constitution as a whole.[186] It is failing to recognize that freedom of political speech and the equal political liberties, as members of the family of equal basic liberties, may be adjusted to one another in order to guarantee the central range of application of these liberties in the first fundamental case. The Court is also failing to see that securing the fair value of the equal political liberties is arguably justifiable on the basis of the Equal Protection Clause together with the Republican Form of Government Clause.[187] Rawls's critique of *Buckley* (and *Bellotti*) is an exemplar of how to think about securing equal protection or equal participation together with freedom of expression, or securing the central range of application of both freedom of expression and equal participation rather than privileging the former to the exclusion of the other.

III. THE PRIORITY OF THE FAMILY OF BASIC LIBERTIES: TAKING BOTH EQUAL CITIZENSHIP AND FREEDOM OF EXPRESSION SERIOUSLY

A. *The Priority of the Basic Liberties, or Taking Rights Seriously*

Liberal theorists of freedom of expression and the Supreme Court alike have gotten on the bandwagon of First Amendment absolutism and taking freedom of expression seriously. In doing so, they have ignored or erased concern for securing equal citizenship for all. We need to reflect more on not only taking freedom of expression seriously, but also taking equality seriously. Or, to translate an argument made by my colleague Russell Robinson: (1) the First Amendment absolutists have taken the First Amendment too seriously (to the exclusion of concern for equal protection); (2) the progressives and critical race theorists have taken the Equal Protection Clause too seriously (to the exclusion of concern for freedom of expression); and (3) we need a framework that does not take either too seriously but takes each seriously enough and in the right way.[188]

It should come as no surprise that in a world where First Amendment absolutism is familiar and established (and with it, taking freedom of expression seriously), yet Equal Protection absolutism is not (and with it, taking equal citizenship seriously), we have decisions like *Buckley*, *R.A.V.*, and *Boy Scouts*. The problem with each of these cases is similar: (1) failing (or refusing) to see the Constitution as a

186. Rawls, Political Liberalism, *supra* note 1, at 362.

187. *Cf.* Ely, *supra* note 9, at 122 (arguing that his account of the principle of "one person, one vote" is best justified as "the joint product of the Equal Protection and Republican Form [of Government] Clauses").

188. *See* Russell K. Robinson, *Boy Scouts & Burning Crosses: Bringing Balance to the Court's Lopsided Approach to the Intersection of Equality and Speech* (unpublished manuscript, on file with author).

whole, and thus overemphasizing the commitment to freedom of expression or association; and (2) failing (or refusing) to honor the commitment to securing equal citizenship for all. We need to figure out ways to take freedom of expression and equal protection seriously at once, at least to the extent of securing the core or central range of application of each. Yet we also need to rethink how to do this in order (1) to avoid absolutism of one or the other as well as (2) to avoid sliding into the morass of balancing generally. We need an architecture or structure of basic liberties that promises to secure the central range of application of both and also to avert such a slide.

Here I suggest that a Rawlsian guiding framework, sketched above, might provide such an architecture or structure, and might help frame our judgments regarding what to do when concern to protect freedom of expression and concern to secure equal citizenship clash. Within this framework, again, we accord priority to the whole family of basic liberties over utilitarian and perfectionist conceptions of general welfare or common good—not priority to any particular basic liberty over others. Furthermore, Rawls develops the idea that according priority to the whole family of basic liberties does not preclude regulating or adjusting one basic liberty to secure another, for we may need to regulate or adjust one basic liberty to secure the central range of application of another. This adjustment may be acceptable so long as we secure the central range of application of the former basic liberty, for again, we are seeking to give priority to the whole family of basic liberties, not to pursue an absolutism of particular liberties. But note that this idea does not open the door generally to balancing of rights against governmental interests: The only permissible type of regulating or adjusting of one basic liberty is to secure another basic liberty, not to pursue utilitarian or perfectionist conceptions of general interest, common good, or other ends.

As shown above, Rawls himself applies this guiding framework to *Buckley*. I shall sketch how it might apply to *Roberts*, *R.A.V.*, and *Boy Scouts*. I want to make clear that my aim is not to offer new interpretations of these cases, or even to resolve them; rather, it is to illustrate how we might grapple with these cases through deploying a guiding framework inspired by Rawls's analysis. Throughout, my aim is architectural: to illustrate how we might use the guiding framework to structure the inquiry in such cases. I should add that my aim is to elaborate a *Rawlsian* guiding framework, not to explicate *Rawls's* own views.[189]

189. *Cf.* John Rawls, *Kantian Constructivism in Moral Theory* (1980), *reprinted in* John Rawls: Collected Papers 303-05 (Samuel Freeman ed., 1999) (distinguishing between his own "Kantian" view and "Kant's view").

1. *R.A.V. v. City of St. Paul*

As argued above, *Buckley* was wrongly decided with respect to limitations on campaign expenditures, among other reasons, because the Court failed to see the Constitution as a whole. Therefore, it failed to see that freedom of political expression may be regulated (though not restricted) through campaign finance laws in order to try to assure political equality, or the fair value of the equal political liberties, for equal citizens in a fair scheme of representation. The Court's single-minded focus on the First Amendment without regard to such preconditions for deliberative democracy blinded it to that compelling governmental objective.

A similar blindness may be at work in Justice Scalia's opinion for the Court in *R.A.V.*,[190] which struck down a "Bias-Motivated Crime Ordinance." Scalia and the Court resolutely refused to see the Constitution as a whole and therefore failed to see that freedom of hateful racist expression quite possibly may be regulated (though not restricted) in order to attempt to secure equal citizenship for members of groups who are subject to racial, religious, gender, or sexual orientation hostility (this equality too, is a precondition for deliberative democracy).[191]

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190. 505 U.S. 377 (1992).

191. *Cf.* Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 Harv. L. Rev. 124, 151-60 (1992) (criticizing the Court for ignoring the Reconstruction Amendments). *But see* Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 Harv. L. Rev. 1639, 1657 (1993) (arguing, in response to Amar, *supra*, that the Thirteenth and Fourteenth Amendments are "missing" from *R.A.V.* because "penumbras and emanations are dangerous business," and these provisions' "shadows" are "too tenuous" or "too far" from the First Amendment to be brought to bear on the case).

Scanlon writes of ordinances like that at issue in *R.A.V.*: "But the proposed restrictions would restrict speech on the basis of its *content*, in violation of one of the limitations that Rawls placed on the regulation of campaign finances. This quandary raises the question of whether Rawls should regard this kind of regulation as an impermissible restriction." Scanlon, *supra* note 58, at 1485. Scanlon's formulation here implies that he accepts Scalia's view that the ordinance was discriminatory, whereas I accept Stevens's view that it was evenhanded. In arguing that the ordinance imposed a "viewpoint discrimination" in favor of proponents of racial tolerance and equality, Scalia writes: "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules." *R.A.V.*, 505 U.S. at 392. Stevens retorted:

> The St. Paul ordinance is evenhanded. In a battle between advocates of tolerance and advocates of intolerance, the ordinance does not prevent either side from hurling fighting words at the other on the basis of their conflicting ideas, but it does bar *both* sides from hurling such words on the basis of the target's "race, color, creed, religion or gender." To extend the Court's pugilistic metaphor, the St. Paul ordinance simply bans punches "below the belt"—*by either party*. It does not, therefore, favor one side of any debate.

Id. at 435 (Stevens, J., concurring). In any case, I noted above that my aim is to develop a *Rawlsian* framework, not to explicate *Rawls's* own views. *See supra* text accompanying note 189.

My suggestion regarding what is wrong with Scalia's opinion accords with that of Justice Stevens in his concurring opinion in *R.A.V.* Stevens argues that the First Amendment—in isolation from the whole scheme—is not an absolute.[192] Justice White made a similar argument in *R.A.V.*, mentioning the Equal Protection Clause and stating that "[i]n light of our Nation's long and painful experience with discrimination," the ordinance was plainly reasonable and the interest compelling.[193]

I suspect that even if the Rehnquist Court did see the Constitution as a whole—if it did look at the Equal Protection Clause as well as the First Amendment—it still would come out the same way. Indeed, Scalia officially credits (or pays lip service to) protecting racial minorities as a compelling governmental interest.[194] He proceeds to give short shrift to this point, though, concluding that the ordinance does not survive strict scrutiny, for there were less restrictive alternatives available, such as prosecution under trespass, arson, and similar statutes.[195] White objects that Scalia gives new meaning to strict scrutiny.[196] More importantly, trespass, arson, and the like—the less restrictive alternatives Scalia vaunts—are not less restrictive means to the same end. The aim is not merely to protect the private property of African-American families. It is publicly to affirm their status as equal citizens. Trespass, arson, and other statutes simply are not means to furthering that end.

Scalia might object that the government affirming the equal citizenship of African-Americans over and against racists' views of their inferiority is "thought control" or a move that will put us on the slippery slope toward totalitarianism, just as Judge Frank Easterbrook objected in the context of the government affirming the equal

192. *R.A.V.*, 505 U.S. at 421-23 (Stevens, J., concurring).

193. *Id.* at 407 (White, J., concurring). It is not clear to what extent *Virginia v. Black*, 123 S. Ct. 1536 (2003), has narrowed *R.A.V.* There, the Court held 6-3 that states may make it a crime to burn a cross with a purpose to intimidate, provided that the law clearly puts the burden on prosecutors to prove that the act was intended as a threat and not as a form of symbolic expression. *Id.* at 1550-52. The Court, however, held that the Virginia statute at issue was unconstitutional. *Id.* at 1552. In *Black*, Justice O'Connor's opinion for the Court said that "[a] ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment." *Id.* at 1550. Notably, the arguments in support of the constitutionality of such laws in the case did not emphasize the concern for securing equal citizenship for African-Americans so much as the idea that threats with intent to intimidate are not speech. For example, Justice Thomas argued that the statute addressed only conduct, not speech, and so "there is no need to analyze it under any of our First Amendment tests." *Id.* at 1566 (Thomas, J., dissenting). He argued that the message of cross burning is terror and intimidation that does not qualify as protected expression. *Id.* at 1564-66.

194. *R.A.V.*, 505 U.S. at 395.

195. *Id.* at 380 n.1, 395-96.

196. *Id.* at 403-04 (White, J., concurring).

citizenship of women in regulating pornography.[197] Such arguments are terribly overblown. Consider Canada's approaches to hate speech[198] and indeed to pornography,[199] which are at odds with those in *R.A.V.* and *American Booksellers Ass'n v. Hudnut*.[200] Last time I checked, Canada had not fallen down the slippery slope into totalitarianism regarding hate speech or, for that matter, pornography.[201]

I recognize that there may be pragmatic arguments against adopting ordinances or statutes like those at issue in *R.A.V.* Recall Justice Black's argument in dissent in *Beauharnais* about the Pyrrhic victory—"Another such victory and I am undone"—of racial minorities in winning a decision protecting them against hate speech (and recall that the majority opinion in that case was written by Justice Frankfurter, the balancer par excellence).[202] And perhaps it is better not to make martyrs of racists, but to have their views out in the open to be combated; such concerns are generally put forward in safety valve arguments for protecting their freedom of speech. More generally, perhaps it is better not to fan the flames of conservative worries about "political correctness," worries that Justice Blackmun suggested animated Scalia's opinion for the Court in *R.A.V.*[203] Still, it

197. *See* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

198. *The Queen v. Keegstra*, [1990] 3 S.C.R. 697, sustained an anti-hate speech law very much like St. Paul's. Amendments to Canada's constitutional text adopted in 1982 included Section 2: "Everyone has the following fundamental freedoms . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Can. Const. pt. I, § 2 (Constitution Act, 1982) (Canadian Charter of Rights and Freedoms). Still, a close 4–3 majority reasoned that the law was constitutional because it furthered democratic principles and because racial, ethnic, or religious slurs were not essential to the purposes of free expression. In stark contrast to Scalia's opinion, Chief Justice Dickson stated for the majority: "While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as those other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(*b*)." *Id.* at 760.

199. *Butler v. The Queen*, [1992] 1 S.C.R. 452, while acknowledging that Canada's criminal obscenity law restricted freedom of expression, upheld the law on the ground that it was justifiable to ban pornography that harms women. The decision redefined pornography as sexually explicit material that involves violence or degradation. *Id.* at 485. In explicitly accepting the argument that pornography harms women, the Court stated: "[I]f true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material." *Id.* at 497.

200. 771 F.2d at 323.

201. It is another matter whether Canada's approaches have been effective at moderating hate speech or pornography. Scanlon expresses reservations on this score. Scanlon, *supra* note 58, at 1485.

202. Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting).

203. 505 U.S. 377, 415-16 (1992) (Blackmun, J., concurring).

is good to answer and combat the *R.A.V.* conception of the First Amendment itself.[204]

2. *Roberts v. United States Jaycees*

The Supreme Court's decision in *Roberts*[205] is decidedly different from *Buckley* in that in the former, unlike the latter, the Court did not view it as "wholly foreign" to regulate freedom of association protected by the First Amendment on the basis of concern for equal protection. *Roberts* held that men's rights to associate with one another (and not to associate with women) in a commercial and civic organization were overridden by women's rights not to be discriminated against in places of public accommodation.[206] The case held that the state of Minnesota had a compelling governmental interest in eliminating gender discrimination in public accommodations.[207]

A Rawlsian constitutional constructivism should readily embrace such a holding as necessary to secure for women and men alike the common and guaranteed status of equal citizenship (also a precondition for deliberative democracy). It bears noting that the case, in distinguishing between freedom of expressive association and freedom of intimate association,[208] suggests that freedom of association comes into play with respect to both moral powers in both fundamental cases, both deliberative democracy and deliberative autonomy.

What might account for the difference between *Roberts* and *Buckley*? One, freedom of association in particular just may not be as strong a right as freedom of expression in general—just not as sheltered from governmental regulation. Two, freedom of association in the commercial context at any rate is not as strong as freedom of expression in the political context. Recall the earlier discussion about commercial expression as a non-basic liberty.[209] And note that Justice O'Connor, concurring in *Roberts*, argued that commercial association does not warrant the stringent protection given to "expressive association"; the former is subject to reasonable regulations.[210] Three, perhaps the concern for equal protection in *Roberts* was better

204. For thoughtful efforts to do so, see, for example, Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. Rev. 1275 (1998); Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 Wm. & Mary Bill Rts. J. 647 (2002); Robinson, *supra* note 188.

205. 468 U.S. 609 (1984).

206. *Id.* at 626-27.

207. *Id.* at 625-26.

208. *Id.* at 617-22.

209. *See supra* text accompanying note 156.

210. *Roberts*, 468 U.S. at 634 (O'Connor, J., concurring in part and concurring in the judgment).

defined or at any rate more bounded than that in *Buckley*: The state of Minnesota was simply trying to afford to women what was already available to men, and therefore there was no potentially complicated question such as how much expression is essential to secure equal participation or a fully effective voice in the political process and the like.

Roberts illustrates how the guiding framework sketched above might work in a situation involving a choice between freedom of expressive association and equal protection for women. Notably, the Court did not simply say, freedom of association is well nigh absolute, and that it is "wholly foreign"[211] or "thought control"[212] for government to take measures that express the view that women are equal citizens. Nor did Brennan's opinion for the Court in *Roberts* do what Rehnquist's opinion for the Court subsequently did in *Boy Scouts*: simply defer to the Jaycees' claims that being forced to admit women would impair their expression or impede their ability to disseminate their views or message.[213] Instead, the Court recognized that the state was furthering a compelling governmental interest and that it was doing so through "the least restrictive means of achieving its ends."[214] At the same time, the Court gave due regard to the claims to freedom of association. It concluded that "the Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association."[215] In particular, the Court held that there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views."[216] We should treat *Roberts* as an exemplar of how the Court might frame clashes between freedom of association and equal protection and of how it might aim to secure the core or central range of application of both freedom of association and equal protection rather than privileging the former to the exclusion of the latter.

At the same time, I should acknowledge that some liberals see *Roberts* as undermining pluralism. For example, Nancy Rosenblum and William Galston see it as enforcing "congruence" between democratic values and the values of associations in civil society.[217] They argue against the appropriateness of governmental intervention

211. Buckley v. Valeo, 424 U.S. 1, 49 (1976).

212. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

213. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

214. *Roberts*, 468 U.S. at 626.

215. *Id.*

216. *Id.* at 627.

217. *See* Nancy L. Rosenblum, Membership and Morals: The Personal Uses of Pluralism in America 158-76 (1998); William A. Galston, *Civil Society, Civic Virtue, and Liberal Democracy*, 75 Chi.-Kent L. Rev. 603, 604-05 (2000).

to enforce gender equality throughout civil society. But it is certainly possible to believe that *Roberts* was rightly decided as a matter of constitutional law on the ground that prohibiting gender discrimination in "places of public accommodation" like the Jaycees is a compelling governmental interest without thinking that it is appropriate for the government to intervene to enforce gender equality throughout civil society. For one thing, most institutions in civil society are not "public accommodations" as a matter of constitutional law and therefore are beyond the reach of the *Roberts* decision. For another, it is appropriate and justifiable in some circumstances for the government to regulate freedom of association in order to attempt to secure equal citizenship for all, including women and racial minorities. Rosenblum herself has acknowledged that the workplace is an important exception to the autonomy of group life and has fully endorsed, for example, Title VII.[218] And so, to reject Rosenblum's conclusion regarding *Roberts* is not necessarily to reject her overall position regarding "the logic of congruence."[219]

3. *Boy Scouts of America v. Dale*

The Supreme Court's decision in *Boy Scouts of America* held that it would violate the Boy Scouts' freedom of expressive association to require them to admit homosexuals because doing so would "materially interfere with the ideas that the organization sought to express."[220] I would argue that *Boy Scouts* was wrongly decided. It should have followed the example of *Roberts*, and upheld New Jersey's attempt to regulate freedom of association in order to further the compelling governmental interest of prohibiting discrimination in public accommodations on the basis of sexual orientation. (New Jersey law listed sexual orientation along with race and gender as prohibited bases of discrimination.)[221] Doing so would have realized a better adjustment of the basic values of concern for freedom of expression and concern for equal citizenship of homosexuals.

What might account for the different outcomes in *Roberts* and *Boy Scouts*? First, one might argue that there is a difference in the character of the freedom of association: that the Jaycees were engaged in commercial association, while the Boy Scouts were involved in civic association; or that the Boy Scouts really were trying

218. *See* Rosenblum, *supra* note 217, at 163-64; Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, *in* Freedom of Association 75, 80, 85 (Amy Gutmann ed., 1998).

219. Linda McClain and I have pursued such issues. Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 Chi.-Kent L. Rev. 301 (2000).

220. Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000).

221. N.J. Stat. Ann. §§ 10:5-4, 10:5-5 (West 2002); *see also Boy Scouts*, 530 U.S. at 645, 661-62.

to communicate a message about moral straightness that required exclusion of homosexuals, whereas the Jaycees had no such message that required exclusion of women. But in *Roberts*, what if the male Jaycees had said that their message was not simply that "commerce is good," but that "commerce by men is good, and commerce by women is bad, because men by nature belong in the marketplace, and women by nature belong in the home"? The Court's reasoning in *Boy Scouts* suggests that the male Jaycees should have prevailed on the ground that forcing them to admit women would "materially interfere with the ideas that the organization sought to express."[222]

Second, one might argue that there is a difference in the governmental interests that could be invoked to justify the regulation of freedom of association in those two cases. The majority opinion in *Boy Scouts* states that "[w]e recognized in cases such as *Roberts* . . . that States have a compelling interest in eliminating discrimination against women in public accommodations."[223] But in *Boy Scouts*, the legislature and Supreme Court of New Jersey implicitly had adopted the view that the State had a compelling interest in eliminating discrimination on the basis of sexual orientation in public accommodations. The United States Supreme Court's decision implicitly rejects this view. It either fails to recognize that view or conclusorily dismisses it. Even if the Court were not ready to go all the way with *Roberts* and hold that a compelling governmental interest is present in *Boy Scouts*, it should have taken at least a few steps in that direction, given its decision in *Romer v. Evans*[224] and now *Lawrence v. Texas*.[225] These two cases hold (1) that governmental measures reflecting animus against a politically unpopular group like homosexuals do not constitute legitimate governmental interests.[226] And they also suggest (2) that government may not take measures that "demean" the lives of homosexual persons.[227] Together, these cases manifest some concern for the status of gays and lesbians as free and equal citizens.[228] Therefore, in adjusting the clash between concern for freedom of association and concern for equal citizenship of homosexuals, the Court should have recognized the latter as a more substantial concern than it did.

Now of course this Court might say that those two cases are different because *Boy Scouts* involved diversity within civil society, and freedom not to associate has greater force there than when government has passed laws relating to homosexual sexual conduct or

222. *Boy Scouts*, 530 U.S. at 657.
223. *Id.*
224. 517 U.S. 620 (1996).
225. 123 S. Ct. 2472 (2003).
226. *See Romer*, 517 U.S. at 626-31; *Lawrence*, 123 S. Ct. at 2482.
227. *Lawrence*, 123 S. Ct. at 2484.
228. See James E. Fleming, Lawrence's *Republic*, 39 Tulsa L.J. (forthcoming 2004).

to homosexuals' status in the community (as was the case in *Lawrence* and *Romer*). Fair enough. But under New Jersey Law, the Boy Scouts constitute a "public accommodation," just as under Minnesota Law the Jaycees do. So the difference between *Roberts* and *Boy Scouts* could come down to the difference between the Court's view of the interest in eradicating gender discrimination and that in eradicating sexual orientation discrimination.

We should acknowledge that had it been the Jaycees rather than the Boy Scouts excluding homosexuals, the case *conceivably* might have come out differently. Here, I allude to the bugaboo of the worry about homosexual scout leaders seducing boys or inspiring them—through their positive role models—to become more tolerant of homosexuals or indeed to become homosexuals (if one becomes a homosexual as distinguished from being one). Presumably there would be no analogous fear about adult Jaycees.

Finally, the majority opinion in *Boy Scouts* states that "we must . . . give deference to an association's view of what would impair its expression" and that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[229] What if a white supremacist/separatist group objected to admitting blacks on the ground that doing so would impair its expression of its separatist view and would force it to send a message that association between whites and blacks is a legitimate form of behavior? The Court in *Roberts* was not bowled over by analogous arguments of the Jaycees, for it held: "[A]ny claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best."[230]

Justice Stevens insightfully brings concerns for equal citizenship into the analysis. He argues that "[u]nder the majority's reasoning, an openly gay male is irreversibly affixed with the label 'homosexual.' That label, even though unseen, communicates a message that permits his exclusion wherever he goes. . . . [R]eliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority."[231] Rehnquist does not even attempt to answer Stevens's powerful critique. Furthermore, Stevens sees the analogy between this symbol of inferiority and that involved in *Loving v. Virginia*[232] and racial prejudices more generally.[233] An anti-caste principle of equal protection would condemn both alike. Here it is well to recall that the

229. *Boy Scouts*, 530 U.S. at 653.
230. *Roberts*, 468 U.S. at 627.
231. *Boy Scouts*, 530 U.S. at 696 (Stevens, J., dissenting).
232. 388 U.S. 1 (1967).
233. *Boy Scouts*, 530 U.S. at 699-700 (Stevens, J., dissenting).

whites in *Brown v. Board of Education*[234] asserted a freedom of association claim: freedom not to associate with blacks.[235] Rehnquist may fail to see the analogy or may reject it.[236] In any case, his opinion does not face up to it.

CONCLUSION

In this Article, I have merely outlined a constitutional constructivism that is analogous to Rawls's political constructivism, focusing on certain aspects of securing deliberative democracy. I have explored what the structure of the First Amendment would look like if we were committed, not to protecting an absolutist First Amendment in isolation from the rest of the Constitution, but to securing a fully adequate scheme of the basic liberties as a whole. My aim has been to suggest that a Rawlsian guiding framework of basic liberties might help frame our judgments concerning what to do when confronting clashes between freedom of expression and equal protection. Those judgments would be guided by the aspiration to accord priority to the family of basic liberties as a whole, not to give priority to freedom of expression over equal protection.

234. 347 U.S. 483 (1954).

235. See the much criticized analysis of whites' claim of freedom not to associate with blacks in Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 34 (1959).

236. Rehnquist may well reject any analogy between discrimination on the basis of race and discrimination on the basis of sexual orientation. Here it is well to recall that Scalia, in dissent in *Romer*, took umbrage at such analogies. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).