

2007

## The Fit Dimension

Abner S. Greene

*Fordham University School of Law*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Abner S. Greene, *The Fit Dimension*, 75 Fordham L. Rev. 2921 (2007).

Available at: <https://ir.lawnet.fordham.edu/flr/vol75/iss6/8>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## The Fit Dimension

### Cover Page Footnote

Professor, Fordham University School of Law.

## THE FIT DIMENSION

Abner S. Greene\*

As a matter of constitutional methodology, Jim Fleming's and Cass Sunstein's books, *Securing Constitutional Democracy*<sup>1</sup> and *Radicals in Robes*,<sup>2</sup> are quite different. Fleming develops an elaborate constitutional architecture, which he calls constitutional constructivism, pressing courts to secure the preconditions for deliberative democracy and deliberative autonomy, so that citizens may exercise their two moral powers, a capacity for a sense of justice and a capacity for a conception of the good. Sunstein advances a more cautious agenda, which he calls minimalism, favoring shallow and narrow judicial rulings, asking courts to avoid taking stands on big, contested constitutional questions and to decide only what needs to be decided in the case at hand. Yet, despite their obvious differences in methodology, Fleming's and Sunstein's theories share two important features. Both theories advance a view of constitutional perfectionism that insists that justification be constrained by fit. And both theories rely on a view of fit that pays attention not to original meaning or understanding, but rather to precedent: to how constitutional law develops in a common-law-like fashion. In this essay, I will focus on these shared qualities, and will argue that it is difficult—and undesirable—for constitutional theory to avoid a broader perfectionism, where fit, even of the precedential sort, must always take a back seat to justification.

### I. WHAT WE TALK ABOUT WHEN WE TALK ABOUT PERFECTIONISM

Three different types of constitutional perfectionism make an appearance in Fleming's book. The first, aspirationalist perfectionism, pays virtually no attention to fit and focuses almost entirely on justification. For example, Fleming opens his acknowledgments with this: "In this book, I put forward a Constitution-perfecting theory, one that aspires to interpret the American Constitution so as to make it the best it can be."<sup>3</sup> His last chapter returns to this kind of formulation. He says, "[W]e should embrace a Constitution-perfecting theory of interpretation, which proudly aims at happy endings

---

\* Professor, Fordham University School of Law.

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

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

3. Fleming, *supra* note 1, at ix.

rather than reveling in the imperfections that the Constitution might be interpreted to embody.”<sup>4</sup> And the peroration is unabashedly aspirationalist. On the last page, Fleming says that his theory

does not conceive the commitment to fidelity to the Constitution as commanding us to follow the authority of the past. It exhorts us to conceive fidelity in terms of *honoring* our aspirational principles rather than merely *following* our historical practices and concrete original understanding, which no doubt have fallen short of those principles.<sup>5</sup>

A second type of perfectionism, which we might call coherentism, appears once in the book, but early, as an important footnote. In his opening substantive chapter, Fleming says that “no one has developed an alternative substantive Constitution-perfecting theory”<sup>6</sup> and drops the following footnote: “I mean ‘perfecting’ in the sense of interpreting the Constitution with integrity so as to render it a coherent whole, not in Henry Monaghan’s caricatured sense of ‘Our Perfect Constitution’ as a perfect liberal utopia or an ‘ideal object’ of political morality.”<sup>7</sup>

Fleming seems most committed, though, to splitting the difference between aspirationalism and coherentism, between reading the Constitution as reaching happy endings and reading it to be internally coherent. This third type of perfectionism we might call Dworkinian, for it is Ronald Dworkin who has most famously argued that constitutional interpretation involves fit plus justification.<sup>8</sup> We must search for the constitutional interpretation “that best fits and justifies the constitutional document and underlying constitutional order,”<sup>9</sup> maintains Fleming. He says his theory is one “of constructing *our* Constitution, not one that is *perfectly just* (unmoored by the constraints of our constitutional text, history, and structure, or by those of our practice, tradition, and culture).”<sup>10</sup> And in a formulation he often repeats, Fleming maintains that “constitutional constructivism recognizes that while our principles may fit and justify most of our practices, they enable us to criticize some of those practices for failing to live up to our constitutional commitments.”<sup>11</sup> Again echoing Dworkin, Fleming contends that a constitutional constructivist has “a

---

4. *Id.* at 211; *see also id.* at 225 (advancing a “happy endings”/anti-constitutional evil position).

5. *Id.* at 226-27.

6. *Id.* at 4.

7. *Id.* at 230 n.15.

8. *See, e.g.,* Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 7-12 (1996).

9. Fleming, *supra* note 1, at 70; *see also id.* at 84.

10. *Id.* at 6; *see also id.* at 61; *id.* at 83 (“Nor does it make a far-fetched Panglossian claim that our Constitution establishes a perfect liberal utopia.”).

11. *Id.* at 6; *see also id.* at 98, 118, 232 n.26.

responsibility to construct”<sup>12</sup> the skeleton of a Constitution from, *inter alia*, fixed points of U.S. Supreme Court case law.<sup>13</sup>

Sunstein critiques both fundamentalists (who claim to rely on the original meaning of constitutional text) and perfectionists (who grant courts power to read the Constitution in the “best possible light”).<sup>14</sup> But in his essay for this Symposium, Sunstein admits that, in an important sense, all theories of constitutional interpretation are perfectionist, if (a) by perfectionist we mean fits plus justifies, and (b) we can include concerns about allocation of institutional responsibilities (between courts and the political branches of government) in determining how to read the Constitution to be the best it can be.<sup>15</sup>

## II. PERFECTIONISM AND INSTITUTIONAL CAPACITY

So both Fleming and Sunstein agree that constitutional interpretation involves accounting for fit points—such as text and precedent<sup>16</sup>—and developing an understanding of constitutional principle in light of such fit points. They differ, though, about institutional capacity, with Fleming much more likely to deem courts the appropriate governmental organ to develop and apply constitutional meaning. For Fleming, courts are needed to secure the preconditions for deliberative democracy (for example, speech, press, and voting rights) and for deliberative autonomy (for example, intimate association and dominion over one’s body). He writes, “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.”<sup>17</sup> He distinguishes the judicially enforceable Constitution from the Constitution itself,<sup>18</sup> “call[ing] for judicial enforcement of constitutional norms in situations where the political processes are systematically untrustworthy, but for . . . enforcement of constitutional norms outside the courts in situations where the political processes are systematically trustworthy.”<sup>19</sup> The latter include “enforcement of commitments to federalism, states’ rights, and separation of powers as well as commitments to property rights and economic liberties.”<sup>20</sup>

---

12. *Id.* at 93.

13. *See infra* text accompanying notes 44-55.

14. Sunstein, *supra* note 2, at 32.

15. *See* Cass R. Sunstein, *Second-Order Perfectionism*, 75 Fordham L. Rev. 2869-70 (2007).

16. Neither is keen on original meaning or understanding, and I will not otherwise discuss that point here.

17. Fleming, *supra* note 1, at 71.

18. *See id.* at 35, 71, 74, 135, 169, 214-15.

19. *Id.* at 74.

20. *Id.*

Sunstein's minimalism provides a smaller role for the judiciary, and a larger one for the elected branches and the people. He has various arguments for this result: (a) The virtue of leaving things to elected officials. Here Sunstein joins scholars such as Jeremy Waldron (although Waldron goes further<sup>21</sup>) in advancing a conception of democracy that would defer substantially to legislative majorities.<sup>22</sup> (b) Judicial fallibility. Many constitutional cases involve tough, contested questions with vague constitutional text, and judges may get answers wrong.<sup>23</sup> (c) Judicial creativity. Sunstein critiques aspirationalist perfectionism of the judicial review variety for giving judges too much power to pick and choose among readings of the Constitution, without a sufficient anchor.<sup>24</sup> (d) Unintended bad consequences of judicial review. Sometimes resolving contested issues judicially will lead to worse results, for a variety of backlash-type reasons, than if the courts had left things to the political process.<sup>25</sup>

In my judgment, Fleming fails to defend adequately his dividing line between what is judicially enforceable and what is not, while Sunstein fails to defend adequately the deference he would give to legislative majorities. In an impressive critical part of his book, Fleming goes after theorists such as John Hart Ely for promoting a theory of judicial review linked only to ensuring the smooth flowing of political processes and to correcting process failures.<sup>26</sup> It is more than a bit odd, then, to see Fleming pronounce a distinction between the judicially enforceable Constitution and the Constitution itself, based . . . on a theory of political process failure! More importantly, it is doubtful whether Fleming's line between systematically trustworthy and untrustworthy political processes can withstand scrutiny. Although he does not explain why, I assume he relegates protection of federalism, separation of powers, and economic rights to political processes because these are matters for which well-established institutional players (states, for federalism; Congress and the President, for separation of powers) or well-heeled interests with abundant allies (economic rights) can fend for themselves without needing an independent judiciary. But Fleming never explains how various items on his list of liberties needed to secure the preconditions for deliberative autonomy are vulnerable and in need of judicial protection. Consider two: intimate association and the right to marry. One would think that these are liberties that affect millions of Americans, of all economic levels, races, etc. Thus, one would think that these are liberties that would be well protected in the political process, and that if a healthy public debate occurs regarding the need to restrain one of these liberties, to protect against a certain type of perceived social harm,

---

21. See Jeremy Waldron, *Law and Disagreement* (1999).

22. See Sunstein, *supra* note 2, at 35, 50, 112, 247-52.

23. See *id.* at 35, 50, 100, 123.

24. See *id.* at 40, 89.

25. See *id.* at 35-36, 100.

26. See Fleming, *supra* note 1, at 30-36.

that there would be nothing systematically untrustworthy about the political processes that produced such results.<sup>27</sup> Note that I am not saying I disagree with Fleming in the end; I happen to agree with him that courts have an important role to play in securing liberties related to deliberative autonomy. I believe that to be the case, however, in spite of what may well be systematically trustworthy political processes; I would base a theory of judicial review here on a more openly normative theory of what sorts of liberties must remain immune from majoritarian infringement<sup>28</sup> and on a more openly normative theory of what sorts of reasons and arguments should be deemed legitimate for legislative majorities to rely upon.<sup>29</sup>

Sunstein, on the other hand, seems to have a one-way concern with fallibility and self-doubt. He starts the book as if this were a broader concern, not institutionally specific. He sets forth two epigraphs; the first one is from Learned Hand: "The spirit of liberty is that spirit which is not too sure that it is right."<sup>30</sup> When Sunstein repeats the quotation in the argument, he does say that "Hand's comment has strong implications for both elected representatives and citizens," adding that when we disagree we ought to think "I might be wrong."<sup>31</sup> But in the text that follows, here and elsewhere in the book, he talks only about judicial fallibility and the need for judicial self-doubt, and not about legislative fallibility and the need for legislative self-doubt. Most of Sunstein's arguments have no obvious special application to federal judges—do they really possess *less* expertise

---

27. We would have to distinguish restrictions on such liberties based on bias against a politically vulnerable minority (such as gays and lesbians) from restrictions on such liberties more generally. The former type of restriction would raise equal protection questions in addition to liberty questions.

28. Fleming also fails to explain why some liberties should be protected as part of deliberative autonomy and others not. Although he attempts to give some shape and limit to the concept, *see id.* at 98-111, what is missing is an answer to the classic, difficult, central question of any theory of rights in a liberal democracy: What sort of harm should be deemed regulable and what sort not? Fleming talks about the "significance" of various personal decisions; for example, he says we should replace Justice John Marshall Harlan's "idea of judgment as a rational process concerning tradition as a 'living thing' with a criterion of the significance of an asserted 'unenumerated' fundamental right for deliberative autonomy." *Id.* at 119; *see also id.* at 132. Although he spends some time on how certain liberties are significant, Fleming does not address the theories of harm that legislative majorities may offer for regulating such things as marriage, procreation, intimate association, and the like. Many legislative arguments for regulation in these areas turn on inappropriate reference to religious conceptions of the good or to theories of harm based in disgust or similar emotional qualities that should be deemed off limits for regulation. But Fleming fails to develop a theory of regulable harm to undergird his theory of deliberative autonomy, and this is perhaps the central weakness of the book.

29. *See, e.g.,* Abner S. Greene, *The Incommensurability of Religion, in Law and Religion: A Critical Anthology* 226 (Stephen M. Feldman ed., 2000); Abner S. Greene, *Is Religion Special? A Rejoinder to Scott Idleman*, 1994 U. Ill. L. Rev. 535; Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 Yale L.J. 1611 (1993).

30. Sunstein, *supra* note 2, at vii (emphasis omitted) (quoting Learned Hand, *The Spirit of Liberty* 190 (Irving Dillard ed., 1953)).

31. *Id.* at 35

in ethics or political theory or a *lesser* ability to foresee the consequences of their decisions than legislators?<sup>32</sup> The principal argument, therefore, for highlighting judicial self-doubt, is that federal judges “lack a strong democratic pedigree; they do not stand for reelection.”<sup>33</sup> This is the classic argument for weak judicial review, but it trades off an assumption that our Constitution is based in legislative majoritarianism, which it is not. It is an irreducible Constitution; deference to legislative majorities is no more central than is ensuring the liberties of the sovereign citizens.<sup>34</sup> Those liberties are positive as well as negative, and legislatures of course have a significant role in protecting our liberties. But legislatures can be just as wrong as courts, and we should allocate the risk of error equally between the elected branches and the courts. Moreover, there are classic problems with the democratic legitimacy of legislatures,<sup>35</sup> and federal judges are not philosophers who alighted on our nation’s soil and assumed interpretive authority. They are placed on the bench via a transparently political process involving the President and the Senate,<sup>36</sup> their jurisdiction is controlled by federal law,<sup>37</sup> and Congress has the power to impeach them.<sup>38</sup> So, although they are not subject to case-by-case political checks and although they do not have to stand for election or reelection, federal judges are still politically checked in three important ways, which should be sufficient to buttress their democratic legitimacy.

### III. THE UNDEREXPLORED DIMENSION OF FIT

#### A. Introduction

As discussed above, both Fleming and Sunstein are perfectionists, if by perfectionist we mean that constitutional interpretation must be done along dimensions of fit and justification (and if we add Sunstein’s caveat that making the Constitution the best it can be includes attention to questions of institutional capacity). For both, the dimension of fit is primarily about text and case law; for neither is it about original meaning or understanding. Fleming says we must attend to “constraints of our constitutional text, history, and structure, or [to] those of our practice, tradition, and culture.”<sup>39</sup> Borrowing expressly from Dworkin, Fleming agrees that “constitutional

---

32. *See id.*

33. *Id.*

34. *See* Abner S. Greene, *The Irreducible Constitution*, 7 J. Contemp. Legal Issues 293 (1996).

35. *See, e.g.,* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va. L. Rev. 423 (1988).

36. *See* U.S. Const. art. II, § 2.

37. *See* Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler’s *The Federal Courts and the Federal System* 319-61 (5th ed. 2003).

38. *See* U.S. Const. art. I, §§ 2-3.

39. Fleming, *supra* note 1, at 6; *see also id.* at 61.

interpretation proceeds back and forth between extant legal materials and underlying principles toward reflective equilibrium between them.”<sup>40</sup> We search for the interpretation “that best fits and justifies the constitutional document and underlying constitutional order.”<sup>41</sup> Central to Fleming’s theory of deliberative autonomy is a particular aspect of the fit story—Supreme Court case law. He lists various rights that the Court has recognized and asks the reader to imagine that he is a “constitutional archaeologist who digs up” these rights, which Fleming calls “bones and shards of a constitutional culture.”<sup>42</sup> As a constructivist, one must accept “these bones as stipulated features (or fixed points) of a skeleton that [one has] a responsibility to construct.”<sup>43</sup>

This last formulation—that a constitutional interpreter has a *responsibility* to attend to precedent—trades off some classic formulations by Dworkin, who argues that constitutional interpretation includes moral principles, but also must satisfy the dimension of fit. His conception of fit is to some extent synchronic (see his argument against “checkerboard solutions”),<sup>44</sup> but it is also diachronic. He calls his general theory of law “law as integrity”<sup>45</sup> and dubs his theory of fit the “doctrine of political responsibility.”<sup>46</sup> He argues that judges have a duty to continue rather than discard a practice;<sup>47</sup> consistency over time is important.<sup>48</sup> By analogy to writing a chain novel, he maintains that just as writers do along the chain, judges have a “responsibility to advance the enterprise in hand.”<sup>49</sup> Common law precedent exerts a gravitational force, he says.<sup>50</sup> Any judicial judgment about rights must take into account institutional history, contends

40. *Id.* at 63.

41. *Id.* at 70; *see also id.* at 84.

42. *Id.* at 92.

43. *Id.* at 93.

44. *See* Ronald Dworkin, *Law’s Empire* 178-84, 227, 435 n.6 (1986) [hereinafter Dworkin, *Law’s Empire*]; Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 *Oxford J. Legal Studies* 1, 17 (2004) [hereinafter Dworkin, *Hart’s Postscript*]; Ronald Dworkin, *Law as Interpretation*, in *The Politics of Interpretation* 249, 254 (W. J. T. Mitchell ed., 1983) [hereinafter Dworkin, *Interpretation*]. The point here is that at any given slice in time, law must be internally consistent. Dworkin’s focus is on consistency in principle of the various acts of the government; another aspect of synchronic integrity is that the law must not simultaneously require both “x” and “not x.”

45. *See* Dworkin, *Law’s Empire*, *supra* note 44, at 225; *see also id.* at 165-66, 176, 411.

46. *See id.* at 132, 165, 180, 249, 405; Ronald Dworkin, *Taking Rights Seriously* 81, 86-88 (1977).

47. *See* Dworkin, *Law’s Empire*, *supra* note 44, at 87 (noting that it would serve political integrity and justice to read the U.S. Constitution as promoting economic equality, but a judge would violate constitutional integrity with such an interpretation); *see also id.* at 134, 239, 404.

48. *See id.* at 132, 165, 225, 404-05.

49. *See* Dworkin, *Interpretation*, *supra* note 44, at 263; *see also* Dworkin, *Law’s Empire*, *supra* note 44, at 229-31.

50. *See* Dworkin, *supra* note 46, at 111, 113; *see also* Dworkin, *Law’s Empire*, *supra* note 44, at 276-312.

Dworkin;<sup>51</sup> rights are no more exogenous to a legal system than are moral principles. Whether we are talking about a game (Dworkin uses chess as an example<sup>52</sup>) or law, an interpreter must protect the character of the enterprise, Dworkin argues;<sup>53</sup> he expresses it at one point as "what it is fair to suppose that the players have done in consenting to the . . . rule."<sup>54</sup> Generally speaking, as a matter of political theory, past political decisions must justify current force, he argues.<sup>55</sup>

Sunstein opens his book with a second epigraph, this time from Thomas Jefferson: "The dead have no rights."<sup>56</sup> One would think, perhaps, that this was the beginning of an attack on all conceptions of diachronic fit—original meaning, original understanding, and precedent. But no, it's meant for the former two, not the last one. Throughout the book, Sunstein effectively critiques various forms of (what he calls) fundamentalism, which trade off various forms of original meaning and understanding. Yet Sunstein has only good things to say about fit conceived as following precedent (although that too, one must note, often involves ceding power to "the dead"). Here is the key passage:

Minimalists celebrate the system of precedent . . . . Judges may not agree with how previous judges have ruled, but they can agree to respect those rulings—partly because respect for precedent promotes stability, and partly because such respect makes it unnecessary for judges to fight over the most fundamental questions whenever a new problem arises.<sup>57</sup>

I will turn next to summarizing the arguments for fit in constitutional interpretation, and then to critiquing them (while leaving room for fit). First, though, note that for Fleming and Sunstein, as for most scholars who deem fit important in constitutional interpretation, interpreters must *defer* to precedent, not merely take it into account. This is enormously important. It is similar to the distinction in administrative law between *Chevron* deference<sup>58</sup> and so-called *Skidmore* deference.<sup>59</sup> Under *Chevron*, courts must defer to reasonable agency constructions of statutes so long as such constructions do not contravene clear congressional intent, *even if the courts would have reached different conclusions de novo*. That is real deference (although there are vast complexities regarding how it works). It

51. See Dworkin, *supra* note 46, at 86-88; see also Dworkin, *Law's Empire*, *supra* note 44, at 401.

52. See Dworkin, *supra* note 46, at 101-05.

53. See *id.* at 102-03; see also Dworkin, *Law's Empire*, *supra* note 44, at 52.

54. See Dworkin, *supra* note 46, at 104-05.

55. See Dworkin, *Law's Empire*, *supra* note 44, at 93-96, 192, 404-06; Dworkin, *Hart's Postscript*, *supra* note 44, at 24-25.

56. Sunstein, *supra* note 2, at vii.

57. *Id.* at 28. On the stability point, see *id.* at 88, 108; on avoiding fights over fundamentals, see *id.* at 27-28, 89; on both points, see also Cass R. Sunstein, *Legal Reasoning and Political Conflict* 40-41 (1996).

58. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

59. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

turns on a content-independent reason, i.e., a reason independent of the direct, all-things-considered calculus in which one would otherwise engage. Under *Chevron*, courts defer because of an institutional reason (the greater policy-making capacity of agencies) that instructs the courts *not* to examine content or substance de novo. Under *Skidmore*, courts look at agency constructions, listen to what the agency has to say, but then determine the meaning of a statutory term de novo. This is not real deference (and thus my “so-called” in front of “*Skidmore* deference” above). We should call it “*Skidmore* listening” rather than “*Skidmore* deference.” Throughout their books, Fleming and Sunstein argue for deference to Supreme Court constitutional precedent. Both allow for mistakes (and I will have more to say about this below), but for neither is Court precedent simply a factor that future interpreters should examine. Court precedent gets *prima facie* weight by virtue of its existence. Thus, Fleming refers to “constraints” of fit points, not merely to their existence as worth examining.<sup>60</sup> Any constitutional theory must “acceptably fit and justify” the “fixed points” of the Constitution’s text, history, and structure.<sup>61</sup> Interpreters have a “responsibility” to construct the Constitution from the “bones,” “stipulated features,” “fixed points” of the constitutional order, which are, for Fleming, Court precedent.<sup>62</sup> Sunstein’s language is somewhat different—he refers to judges “respecting” precedent rather than precedent serving as a “constraint”—but it is clear from throughout the book (particularly in his critiques of the radical changes fundamentalists would bring to constitutional law) that his minimalist approach to constitutional judging requires judges to defer to precedent, even when they deem it wrong.<sup>63</sup> He puts it most clearly when he writes that “when a decision has become an established part of American life, judges should have a strong presumption in its favor.”<sup>64</sup>

### B. Arguments for Fit

We can break down the arguments for fit (understood as *prima facie* deference to Court constitutional law precedent) along five lines: (i) Stability.<sup>65</sup> As we have seen, this is central to Sunstein’s minimalism and

---

60. See Fleming, *supra* note 1, at 6, 61.

61. *Id.* at 84. It is clear that by history Fleming means precedent, not original meaning or understanding.

62. *Id.* at 93.

63. See Sunstein, *supra* note 2, at 28, 88, 108-09, 205-06, 220-21, 225, 232.

64. *Id.* at 108.

65. See Edmund Burke, *Reflections on the Revolution in France* 38, 89, 109 (Thomas H.D. Mahoney ed., H. Regnery Co. 1955) (1790); Sunstein, *supra* note 57, at 41, 76, 96; Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. Rev. 570, 584, 588 (2001); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 Minn. L. Rev. 1173, 1181 (2006); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 749-52 (1988); Gerald J. Postema, *Some Roots of Our Notion of Precedent*, in *Precedent in Law* 9, 14

often invoked by nominees for Court vacancies when explaining to the Senate why they would give weight to Court precedent.<sup>66</sup> Departure from precedent is destabilizing; it disrupts established, and to varying degrees, accepted, understandings of the Constitution; it also disrupts the understanding of constitutional interpretation as independent of the makeup of the current Court. (ii) Avoid fights over fundamentals. As we have seen, this is also central to Sunstein's minimalism.<sup>67</sup> It is similar to David Strauss's argument for establishing common ground for constitutional interpretation.<sup>68</sup> Both Sunstein and Strauss, in turn, owe a debt to John Rawls's account of political liberalism and the need in a diverse society such as the United States to locate, in the political arena, an overlapping consensus of reasonable comprehensive views.<sup>69</sup> Reliance on precedent can do similar work in the judicial arena. (iii) Integrity and the rule of law. This seems central for Fleming, and is developed by Dworkin, as set out above.<sup>70</sup> Legal interpretation, on this account, requires weaving together materials that have been developed over time, including precedent. Connected to this notion of integrity is a rule of law conception—it is unfair to bind people to law that has not been set forth in a reasonably clear fashion, either by legal text or precedent. (iv) Equality. This also stems from Dworkin's account.<sup>71</sup> The idea is that reliance on precedent ensures equal treatment of disparate persons over time. (v) Burkean. Neither Fleming nor Sunstein relies much on Burkean notions,<sup>72</sup> but they are worth mentioning here. The basic idea is that understandings developed over time, through precedent (for example), deserve deference for epistemic

---

(Laurence Goldstein ed., 1987) (discussing Jeremy Bentham's argument); Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 601-02 (1987).

66. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 317-25 (2006) (colloquy with Sen. Arlen Specter); *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 141-49 (2005) (colloquy with Sen. Arlen Specter).

67. See Sunstein, *supra* note 57, at 8, 40.

68. See David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale L.J. 1717 (2003).

69. See John Rawls, *Political Liberalism* 133-72 (1993).

70. See also Sunstein, *supra* note 57, at 200 n.18; Farber, *supra* note 65, at 1179; Monaghan, *supra* note 65, at 724, 749, 772.

71. See also Sunstein, *supra* note 57, at 76; Farber, *supra* note 65, at 1179.

72. But for some nods in this direction, see Cass R. Sunstein, *Burkean Minimalism*, 105 Mich. L. Rev. 353 (2006). Sunstein describes Burkean "minimalists" as respecting traditional practices and distrusting those who would use their own moral/political reasoning to revise such practices. *Id.* at 353. Sunstein prefers what he calls "rational minimalism," which has much in common with the second aspect of Burkean minimalism—distrust of judicial ability to reason through to right answers—but little in common with the first aspect of Burkean minimalism—the epistemic idea that traditional practices reflect wisdom accreted over time. Rational minimalists will critique tradition when necessary, understanding that it may reflect "power, confusion, accident, and injustice, rather than wisdom and sense." *Id.* at 380; see also *id.* at 353, 377, 397.

reasons.<sup>73</sup> That people over time (including judges, as interpreters) have developed an understanding of what law means is evidential of what the law does mean, or should mean.

### C. Responses to the Arguments for Fit

(i) Stability. The argument for precedent based on the need for stability, similarly to the argument against civil disobedience based on concerns about anarchy, is speculative. Departure from precedent is departure from a kind of rule, and any departure from rules raises the specter of instability. But what sort of instability would occur with departure from precedent? How would it occur? What would the costs be? We should put aside the risk of contagion argument, i.e., the concern that if the Court departs from its own precedent, somehow courts and other government officials around the country will stop paying attention to Court precedent. Other governmental actors might consider themselves more strictly bound by Court precedent than the Court itself does, and if they do not, it might be for reasons other than the Court's loose attitude about its own precedent.<sup>74</sup> Furthermore, risk of contagion arguments are always highly speculative; that one actor views a rule or law as nonbinding or loosely binding will not

---

73. See Burke, *supra* note 65, at 37-39, 57, 66, 99, 108, 162, 182, 196-98, 201. Much of Burke's argument lauds what he deems the virtues of slowly developed practices and institutions against the vices of revolutionary change. But Burke's reverence for practice over innovation must be seen in light of the substance of the practice he was confirming—an expressly class-based set of social and political institutions that he viewed as “natural.” For example, he writes, “In all societies, consisting of various descriptions of citizens, some description must be uppermost.” *Id.* at 55. If you let the lower classes rule, “you think you are combating prejudice, but you are at war with nature.” *Id.* at 56. Burke does not offer a metric by which to judge whether the consequences of practice are good ones; rather, he praises the stratified society he sees before him, defending the status quo through his epistemic theory that “circumspection and caution are a part of wisdom,” *id.* at 197, while deriding a “spirit of innovation” as “generally the result of a selfish temper and confined views,” *id.* at 37-38. Burke's argument at times seems a more principled defense of deference to practice over current reasoning. He states, for example, “We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.” *Id.* at 99. However, when combined with his critique of leveling, of social and political equality, Burke's theory of practice over innovation seems less purely procedural and more tethered to the specific class-based power structure of his time.

74. There is a good case for all government officials giving no *prima facie* deference to Court precedent, regardless of how strong the Court itself views its precedent, see Abner S. Greene, *Against Interpretive Obligation (to the Supreme Court)*, 75 Fordham L. Rev. 1661 (2006), but I will not otherwise pursue this argument here. But see Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 Const. Comment. 67, 82 (1993) (arguing that a too cavalier Supreme Court approach to its own precedent would encourage states to “ignore existing rules of law in order to pass legislation to test the resiliency of any decision with which the dissent disagrees”).

necessarily, or even likely, *cause* other actors to take a similar view.<sup>75</sup> What other instability are we concerned with? There might be some public perception that constitutional law is not mechanical, that it turns substantially on the political theories held by a current majority of the Court,<sup>76</sup> but that hardly seems destabilizing;<sup>77</sup> it might, in fact, encourage the people and other government officials to begin developing their own political theories, relevant to the constitutional law issues of the day, to challenge the Court. Such dialogue could be healthy, rather than anarchic.<sup>78</sup> There is also a tendency to make reliance arguments here.<sup>79</sup> For example, Sunstein writes that certain fundamentalist readings would “wreak havoc with established law”; they would “eliminate constitutional protections where the nation has come to rely on them.”<sup>80</sup> We should, though, keep “reliance” as a term for investments that cannot be undone, or cannot be undone without substantial cost. Thus, if a court issues a common law ruling permitting a certain type of contract, and millions of dollars are spent in reliance on that ruling, and then the court says, “oops, we goofed, those contracts are invalid,” it would make sense to say that reliance values cut strongly against departure from precedent (at least with retroactive application).<sup>81</sup> But if the Supreme Court overrules a constitutional precedent, about a right—say a speech right or a substantive due process right—although it makes sense to say that such a ruling might

75. See Richard E. Flathman, *Political Obligation* 268-74 (1972).

76. See Gerhardt, *supra* note 74, at 82; Earl Maltz, *The Nature of Precedent*, 66 N.C. L. Rev. 367, 371-72 (1988); Monaghan, *supra* note 65, at 752-53, 762-63; Lewis F. Powell, Jr., *Stare Decisis and Judicial Precedent*, 47 Wash. & Lee L. Rev. 281, 286, 288 (1990); Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 Harv. J.L. & Pub. Pol’y 67, 70 (1988); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864-69 (1992) (expressing concern that overruling *Roe v. Wade*, 410 U.S. 113 (1973), might threaten the Court’s legitimacy, making its decisions seem unprincipled, a capitulation to public pressure).

77. See Andrei Marmor, *Should Like Cases Be Treated Alike?*, 11 Legal Theory 27, 32 (2005).

78. See William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 754 (1949) (rejecting a strong theory of precedent based on the argument that “the outward appearance of stability is what is important”; concluding instead that “the more blunt, open, and direct course is truer to democratic traditions . . . [and] confidence based on understanding is more enduring than confidence based on awe”).

79. See Sunstein, *supra* note 57, at 76; Fallon, *supra* note 65, at 588; Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 J. Contemp. Legal Issues 93, 112-17 (2003); Gerhardt, *supra* note 74, at 78. Frank Easterbrook argues that the Court should be more willing to overrule recent constitutional precedent, for stability reasons. See Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 431 (1988). But see Greene, *supra* note 74, at 1668-70 (arguing the opposite, based on a generation theory of participation in constitutional interpretation).

80. Sunstein, *supra* note 2, at 81; see also *id.* at 108 (“[W]hen a decision has become an established part of American life, judges should have a strong presumption in its favor.”).

81. For a discussion of theorists who believe we overstate the reliance costs from legal change, see Fisch, *supra* note 79, at 107-10. See also Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 Const. Comment. 257, 266 (2005); David Lyons, *Formal Justice and Judicial Precedent*, 38 Vand. L. Rev. 495, 511 (1985).

change the balance of power between government and citizens, permitting more (or less) government regulation, a much weaker sense of “reliance” is in play here when we say that government and the people must now alter their behavior. Here “reliance” is more a psychological point—one has come to expect a certain regime of powers and rights—but it is not clear why such reliance should carry much weight if the current Court is persuaded that the prior holding was a mistake.<sup>82</sup>

(ii) Avoiding fights over fundamentals. In prior writing, I have explained why Rawls’s overlapping consensus argument improperly favors centripetal over centrifugal forces.<sup>83</sup> My primary concern with the common ground argument for diachronic constitutional interpretation is similar. Asking judges to defer to precedent to avoid a fight over fundamentals is asking them to accept precedent as common ground, even if various judges, other government officials, and citizens, must accept such common ground from disparate comprehensive viewpoints. As a normative matter, insisting that citizens who hold often widely divergent views of the good and of political justice find common ground, in interpretation as well as in acceptance of obligations of citizenship, improperly privileges those comprehensive views that can more easily (or at all) accept the outcomes of such common ground. Many comprehensive views will rest easily in the overlapping consensus, or in precedent; they will find ways from their own perspectives to join with other divergent comprehensive views to accept principles of the good or of political justice, or, relevant here, of interpretive points of agreement. But some comprehensive views will not permit such agreements; they cannot tolerate, from their own perspectives, the outcome of the overlapping consensus, or of precedent. Rawls’s next move is to invoke a doctrine of “reasonableness” to, essentially, ostracize persons who hold comprehensive views that cannot join the overlapping consensus, i.e., to deem their views unreasonable.<sup>84</sup> Similarly, in the setting of interpretive obligation, Strauss says that the common ground argument relies “on arguments that should appeal to all reasonable members of the political community.”<sup>85</sup> To refuse to accept the common ground argument, says Strauss, is to be impermissibly sectarian.<sup>86</sup> It is precisely this move,

---

82. Sunstein does say, once, that “stability is only one value, and for good societies it is not the most important one.” Sunstein, *supra* note 2, at 76. He follows this, however, not by trumpeting the virtues of justification in constitutional interpretation, but rather by deferring to legislative majorities. He next says, “If an approach to the Constitution would lead to a little less stability but a lot more democracy, there is good reason to adopt it.” *Id.* It is clear from the book as a whole that by “democracy,” Sunstein means legislative majorities.

83. See Abner S. Greene, *Constitutional Reductionism, Rawls, and the Religion Clauses*, 72 Fordham L. Rev. 2089 (2004) [hereinafter Greene, *Constitutional Reductionism*]; Abner S. Greene, *Uncommon Ground—A Review of Political Liberalism by John Rawls and Life’s Dominion by Ronald Dworkin*, 62 Geo. Wash. L. Rev. 646 (1994) (book review).

84. See Greene, *Constitutional Reductionism*, *supra* note 83, at 2092-94, 2096-98.

85. Strauss, *supra* note 68, at 1726.

86. See *id.* at 1739.

however, that is so troubling, that renders Rawls (and, it seems, Strauss and Sunstein, the latter by his reliance on the "avoiding fights over fundamentals" argument) comprehensive rather than political liberals, with all of the problems that entails for legitimation in a deeply heterogeneous society. As with political obligation, common ground theory in the setting of interpretive obligation asks citizens who hold divergent comprehensive views to look backwards—to precedent, or perhaps (although not directly relevant here), to framers' text and understanding—to find in those past sources common reference points for resolving contemporary interpretive dilemmas. But it, too, cannot countenance comprehensive views that reject the overlapping consensus, that reject the common ground (which includes precedent)—i.e., that Rawls might deem "unreasonable." Yet, legitimation theory requires full recognition of divergent views of the good and of political justice, and common ground theory cannot grant such full recognition.<sup>87</sup>

The common ground argument is meant to be a tool for reaching settlement, for avoiding interpretive chaos, and thus is connected to the stability argument.<sup>88</sup> But the second-order virtues of settlement cannot, as a wholesale matter, trump individual autonomy (regarding obedience to law); similarly, they cannot, as a wholesale matter, trump individual interpretive autonomy. The key points of the argument against settlement are: that settlement often obscures the responsibility of the actor who must make the current decision (whether to obey law, or how to interpret law); that settlement thus risks inverting the authority structure, fetishizing an external source as an authority; and that settlement cannot achieve the normalcy it claims, because of hard cases that will arise, which in the political obligation setting reveal a law's purpose as unavailing when counterposed against present circumstance, and which, in the interpretive obligation setting, reveal the congeries of interpretive choices the current reader must make.<sup>89</sup> I will return to these points again below, when discussing the inevitable dominance of justification over fit.

---

87. For a related critique of "symbolizing national unity" as a justification for constitutionalism, see Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 Nw. U. L. Rev. 145, 169-75 (1998).

88. See Sunstein, *supra* note 57, at 8, 40, 77; Fallon, *supra* note 65, at 584, 588; Farber, *supra* note 65, at 1177-78; Postema, *supra* note 65, at 26-32 (discussing Hume's view); Schauer, *supra* note 65, at 599; see also Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 Chi.-Kent L. Rev. 93, 94, 102-03 (1989) (focusing on the efficiency of precedent in allowing judges to specialize and rely on the work of other judges).

89. See Maltz, *supra* note 76, at 370. Moreover, the settlement argument works better when drawing a line is more important than getting the answer right, but this won't do for "the more important cases," where we don't deem the choice at all arbitrary. See Theodore M. Benditt, *The Rules of Precedent*, in *Precedent in Law*, *supra* note 65, at 89, 92 (noting, though, that perhaps there is reason to follow precedent, even if seemingly arbitrary resolution, in areas of sharp social disagreement).

(iii) and (iv) Integrity and the rule of law, and Equality. I have several concerns about the Dworkinian integrity/equality based conception of fit, on which Fleming seems to rely. First, Although Dworkin invokes the analogy of a chain novel, in which each subsequent author seeks to continue the plot and maintain the characters, so that what results is a novel and not just a pastiche of chapters, with constitutional interpretation we are dealing with a document, and an interpretive practice, seeking nation-specific principles of political justice that will properly empower and constrain governmental officials in decision making that has direct effect on the lives of the principals—the citizens. Why should we think that constitutional interpretation must flow, must fit from case to case? A novel should make sense as an aesthetic whole; constitutional interpretations are only about a developing plot if one has a particular aesthetic view about constitutions, specifically, about our Constitution. But does our Constitution really have any less integrity if, in a particular area of law (say, the scope of Congress's Commerce Clause powers), the case law looks somewhat erratic, rather than developing in a wholly linear path? If the "plot" of the Commerce Clause is discontinuous, should that be a cause for concern, or, depending upon the reason for the discontinuity, perhaps explicable, and justifiable, by a variety of circumstances? Whether or not we apply a theory of mistake to the specific area of constitutional doctrine in question—for a theory of mistake is meant precisely to deal with disruptions in an otherwise continuous line—my contention is that it is not important that constitutional law fit together as a novel does. What is important is that we get principles of political justice right, at least as right as we can given whatever we deem appropriate endogenous constraints of our constitutional order, which need not be constraints of diachronic fit. It is wrong to import concerns with aesthetic integrity, from the novel or other art forms, into principles of constitutional governance.

Similarly to Dworkin, Anthony Kronman seeks to develop a theory of continuity in law by borrowing from outside law,<sup>90</sup> and once again the conception of diachronic integrity is distorted in the translation. Claiming to be advancing a Burkean conception, Kronman argues that human beings are "cultural creatures as well as biological ones."<sup>91</sup> "Two features of the world of culture are particularly striking. The first is the cumulative, or potentially cumulative, character of its achievements . . . . The second is its destructibility."<sup>92</sup> We must keep up culture or else it will deteriorate.<sup>93</sup> Still discussing the world of culture, Kronman says that we are "bound, within limits, to respect [the past] for its own sake, just as we are obligated

---

90. See Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L.J. 1029 (1990).

91. *Id.* at 1051.

92. *Id.* at 1051-52.

93. *Id.* at 1053.

to respect our parents for a reason that is anterior to all considerations of utility or rights."<sup>94</sup> The past includes precedent in law.<sup>95</sup>

I will leave to the margin my concerns about whether this is really a Burkean argument and whether it makes sense to say we should honor the past "for its own sake"<sup>96</sup> as opposed to for deontological or consequentialist reasons.<sup>97</sup> The main problems with Kronman's argument as a defense for following legal precedent are (a) that it depends on an is-ought move that is not properly defended (if it could be); and (b) that it depends on a symmetry between the cultural world and the world of law that seems hard to defend (and that Kronman does not do much to defend). (a) Kronman makes a point about what it means to be human. He says the attitude that we are custodians of the past "is itself constitutive of our membership in the uniquely human world of culture";<sup>98</sup> his argument is about "status," not "will."<sup>99</sup> From these descriptive points about human beings living in time—having a sense of the past and the future as well as the present and creating culture that itself extends over time—Kronman argues that we have an obligation to keep up the chain and continuity of culture.<sup>100</sup> But what if we prefer to live for the present? What if pressing concerns of economic well-being (for example) cause us (say) to destroy landmark buildings to build housing for low-income persons? You can think of your own favorite example. Kronman might be right that unless we pay attention to keeping up culture, over time it will deteriorate. That is a far cry, however, from demonstrating that we have an obligation to do so.

(b) Kronman never adequately defends the proposition that our (purported) obligation to sustain culture over time extends to an obligation to follow precedent in law. The argument appears to be that law is a product of human culture over time, and thus that to fail to give respect to precedent is tantamount to failing to respect a key aspect of our humanness, our living in and over time. But unlike other aspects of culture, which (I

---

94. *Id.* at 1066.

95. *See id.* at 1032-34 (setting out a defense of precedent in law as the principal point of the piece).

96. *Id.* at 1036.

97. First, although Kronman builds on Burke's observation of how human beings are different from flies (!), *see id.* at 1048-51, Burke's arguments for honoring the past are based on the (purported) wisdom that we can find from practice. Kronman's case for following precedent is not epistemic in the way that Burke's is. Second, it is hard to see how Kronman's argument is about honoring the past "for its own sake." The core of the argument is that if we do not keep up culture it will deteriorate, and that culture is worth keeping up. These are consequentialist arguments. To be sure, Kronman suggests we have no choice but to keep up culture. If that is true, it is hard to see how we have an obligation to do so (can one be obligated to do something one can't help but do?); even here, we would not be honoring the past "for its own sake," but because of some kind of species imperative (as distinguished from a moral one).

98. *Id.* at 1066.

99. *Id.* at 1067.

100. *See id.*

will grant now for argument's sake) need diachronic tending and development, law is a practical aspect of culture, meant to serve specific ends of justice. The past might have something to teach us about law's dominion, but law's past (as embodied in, *inter alia*, precedent) has no worth apart from the ways it enables law's ends today, ends that sound in rights and consequences. The point is similar to the one I made above about Dworkin's chain novel analogy: There might be aesthetic reasons for novels to make sense over a set of chapters; and there might be reasons based in a proper theory of what it means to be human and what role culture plays in our humanness that require cultural outputs to be nurtured over time; but sustaining legal continuity over time has no such aesthetic or cultural value.

Second, Dworkin argues that past political decisions must justify current force. Fleming relies on a similar conception when he argues that constitutional interpreters have a "responsibility" to construct readings of the Constitution from "stipulated features," "fixed points," *i.e.*, Court precedent.<sup>101</sup> This is certainly true in an important, but limited, way. When government seeks to impose criminal or civil sanctions on the people, rule of law concerns require that such sanctions follow reasonably clear rules—set down by statute or regulation—so that the people can know how to order their conduct and so that officials are somewhat circumscribed in their enforcement discretion. Common law is more complex, but here, too, it is more justifiable to hold a party liable in, for example, tort damages for violation of an established principle than it is to make up a new principle and apply it retroactively.<sup>102</sup> To this extent, Dworkin is clearly correct that past political decisions must justify current force. But constitutional law is mostly about determining the powers and limits of officials, not with determining primary conduct rules. Most important constitutional law cases can be decided in a surprising fashion, changing understandings from the past, without risking the jailing or fining of citizens without proper notice. Furthermore, to the extent that surprising constitutional law decisions might lead to sanctions against officials, the Court has developed doctrines of qualified immunity to ensure that such fines are levied only if the officials engaged in what a reasonable official would have understood was a constitutional tort at the time of the action in question.<sup>103</sup>

Third, Given these first two points, it isn't clear what work equality does in a theory of diachronic interpretation. It's one thing to insist that current citizens be treated equally under the law, including the case law. This is

---

101. Fleming, *supra* note 1, at 93.

102. *Cf.* Abner S. Greene, *Adjudicative Retroactivity in Administrative Law*, 1991 Sup. Ct. Rev. 261 (arguing for restricted retroactivity in administrative adjudication when agency is making policy rather than carrying out clear congressional intent).

103. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982).

accounted for by the principle of synchronic coherence.<sup>104</sup> But how important is it that, say, a vague, broad constitutional provision such as “freedom of speech” be construed the same today as it was fifty years ago? If government was permitted to jail political dissidents for general political agitation then, must government be permitted to do so now, even if it’s clear now that a broader principle of permissible protest is warranted? One might say that we need a sophisticated theory of mistake, and that the point about equality is simply that it should have some weight in constitutional interpretation. I have no problem with treating fit just as a factor for judicial consideration, without particular weight, as I will explain below in “Room for Fit.”<sup>105</sup> But Dworkinian scholars go further than this, deeming equal treatment of litigants over time more weighty than just a factor. However, unless we’re talking specifically about concerns with jailing or fining citizens for behavior they reasonably believed legal—dealt with above in the rule of law discussion—it is not clear why equality over time should have much weight at all, especially since the interesting cases will all involve principles that we believe need adjustment.<sup>106</sup> We should not make substantive constitutional principles turn on concerns with adjudicative retroactivity; we can prospectively overrule erroneous decisions if that is the way to get the law right without imposing substantial hits to reliance interests.<sup>107</sup>

(v) Burkean. The argument for deference to accreted sources of meaning shares some territory with Sunstein’s argument for minimalist judicial review based on stability virtues.<sup>108</sup> Both arguments are to some extent based in a sweeping agnosticism—a concern that we can’t really know what the right answers are and, therefore, that judges ought to rely on sources of meaning beyond their own reasoning. Sometimes Sunstein asks judges to

---

104. See Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 Yale L.J. 2031, 2083-84 (1996) (distinguishing the integrity that a legislature may achieve from integrity in adjudication).

105. See *infra* Part III.F.

106. See Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1, 10 (1989); Peters, *supra* note 104, at 2058-62; Schauer, *supra* note 65, at 596-97. Additionally, the equality argument doesn’t logically support precedent as binding. If two cases are similar and they come out differently, that means one result is mistaken, but precedent insists that the second case follow the first. See Benditt, *supra* note 89, at 90; Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, in *Precedent in Law*, *supra* note 65, at 183, 204. David Lyons puts the point this way: Treating like cases alike could be said to implement “a logical constraint of moral consistency.” Lyons, *supra* note 81, at 505. The doctrine of precedent holds that “if a court has attached legal consequence to certain facts because it regards that as appropriate for legal purposes, then that judgment deserves some measure of respect.” *Id.* at 508. But the constraint of moral consistency does not have this conservative bias; “we are free to change our moral opinions honestly.” *Id.*

107. See Greene, *supra* note 102, at 294-300; Maltz, *supra* note 76, at 368-69. But see Fisch, *supra* note 79, at 98, 119 (stating the standard position, which assumes that adjudication will not be purely prospective, in part because that could make it too easy for courts to overrule precedent).

108. See Sunstein, *supra* note 72.

rely on legislative majorities; at other times he asks judges to rely on precedent. Precedent can certainly serve as a touchstone (although as we'll see below, its malleability renders precedent a not very sturdy anchor), but separately from its role as a constraint on judicial reasoning, is there good reason to believe the epistemological claim that precedent is evidential of right answers? Do we, as a people, through our court system, get closer to truth (on whatever the interpretive question is) by a developing, interlocking series of judicial decisions? Note that this Burkean argument is somewhat different than the classic one that the common law works itself toward best answers over time. There, the common law is developing the primary rules, not interpreting another source such as the Constitution or a statute. Here, the system of Court precedent is developing understandings of constitutional provisions. That difference aside, the flaws with Burkean arguments are similar in both settings. Both assume that accreted case law deserves at least *prima facie* weight in current judicial decision making for its truth value. But accreted case law might just as easily represent bias piled upon bias, or understandings based on social facts that have changed,<sup>109</sup> or a view of the world distorted by various systemic factors (such as who was eligible to vote or who was protected by antidiscrimination law and thus able to function as a full citizen in the economic marketplace). That is, accreted case law might represent all sorts of things, and whether it represents the best understanding of a specific constitutional provision depends on multiple factors, all of which would need examining, and such examination itself takes away the value of *prima facie* deference to the case law simply by virtue of its existence. We might learn some lessons from accreted case law, and as I will argue below, there are good reasons to leave room for fit, but given all of the factors that might make accreted case law a poor guide to best answers, the Burkean arguments for giving *prima facie* deference to such case law must fail.

#### D. *The Justification Overhang*

Justification always dictates how we view fit points.<sup>110</sup> Fleming and Sunstein acknowledge that precedent might be mistaken, and that it would

---

109. See Douglas, *supra* note 78, at 736 (stating the concern with an interpreter letting "men long dead and unaware of the problems of the age in which he lives do his thinking for him").

110. Michael Moore offers a "natural law theory of precedent as a special case of more general realism about science and morals." Moore, *supra* note 106, at 188. His focus on the irreducibly normative nature of how precedent develops is close to mine. But as do Dworkin, Fleming, and Sunstein, Moore deems fit points to be necessary anchors. For example, he writes that under his theory, "one sees the common law as being nothing else but what is morally correct, all things considered—with the hooker that among those things considered are some very important bits of institutional history which may divert the common law considerably from what would be morally ideal." *Id.* at 210. As I argue throughout the text, the relevance of fit points is clear, but I take the Dworkinian point to be that fit points have authority, which is the position that I reject.

be appropriate in some circumstances for the current Court to overrule its precedent. The alternative to a theory of mistake would be to accept constitutional evil of the precedential variety, i.e., to accept that because case law has developed in a certain direction, we must maintain it as is, and perhaps maintain the directional vector. Very few are willing to say that constitutional evil of this sort must exist; therefore, one must have a theory of mistake. Fleming frequently states that constitutional interpretation may "criticize some [of our practices and precedents] for failing to live up to our constitutional commitments to principles such as liberty and equality."<sup>111</sup> In several instances, moreover, he refuses to accept precedent. Much of the book draws on writing that he did before *Lawrence v. Texas*<sup>112</sup> overruled *Bowers v. Hardwick*,<sup>113</sup> and thus reflects a critical approach to *Bowers* as then-extant precedent; indeed, several times Fleming explains almost by way of apology that he is still discussing certain pre-*Lawrence* critiques of *Bowers* even though *Bowers* has been overruled.<sup>114</sup> He critiques *Washington v. Glucksberg*<sup>115</sup> and (at least part of) *Buckley v. Valeo*<sup>116</sup> as wrongly decided.<sup>117</sup> Fleming develops the principles necessary for these critiques primarily from his broader (and impressive) justificatory apparatus of our two moral powers and our basic liberties. It is helpful for him that some case law supports his justificatory approach, but when case law exists that does not, the case law is critiqued, not assimilated. One final example of his (at least implicit) aspirationalist perfectionism is his treatment of the religion clauses.<sup>118</sup> Rather than giving any weight whatsoever to (a) the fact that the First Amendment's text singles out religion for distinctive treatment<sup>119</sup> (the framers having rejected the use of the word "conscience")<sup>120</sup> and to (b) the fact that a good portion of Religion Clause case law treats religion as distinctive,<sup>121</sup> he argues that we must

---

111. Fleming, *supra* note 1, at 98; see also *id.* at 6, 118, 232 n.26.

112. 539 U.S. 558 (2003).

113. 478 U.S. 186 (1986).

114. For various discussions of *Bowers*, see Fleming, *supra* note 1, at 51-53, 56-59, 90, 94-96, 113-15, 130, 146-49, 165, 221, 225; for the "apologies," see *id.* at 51, 146, 165.

115. 521 U.S. 702 (1997).

116. 424 U.S. 1 (1976).

117. See Fleming, *supra* note 1, at 73, 181, 221-24.

118. I say implicit because, as explained earlier, see *supra* text accompanying notes 8-13, Fleming is explicitly committed to the more standard fit plus justification version of perfectionism.

119. U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

120. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

121. See, e.g., *McCreary County v. ACLU*, 545 U.S. 844 (2005); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (striking down, based on the Establishment Clause, governmental use of religious symbols where governmental use of secular symbols would be unobjectionable); see also *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (expressly granting an exemption to the Amish from compulsory school laws, and stating that nonreligious claims would fail).

“generalize[] liberty of conscience from a narrow principle applicable only to religious persons.”<sup>122</sup> This argument is unabashedly of the aspirationalist perfectionist variety; justification, not fit, is doing the work.

Although Sunstein is willing to accept more precedent than is Fleming, he, too, is critical of some Court case law. For example, he approves of *Lawrence*’s overruling *Bowers*,<sup>123</sup> and he approves of *Brown*’s<sup>124</sup> overruling *Plessy*.<sup>125</sup> Sunstein is critical of the Court’s approach to commercial advertising,<sup>126</sup> and of *United States v. Morrison*.<sup>127</sup> Furthermore, in his essay in this Symposium, in laying out the four different worlds in which constitutional interpretation might occur, he offers a list of constitutional ends toward which any set of government institutions ought aspire, such as no racial segregation, no ban on political speech, legitimate claims of religious minorities, and a working system of federalism and separation of powers.<sup>128</sup> Is Sunstein drawing this list of valued constitutional ends from fit, from extant case law, or from an underlying theory of how a good liberal democracy works? The latter appears to be the answer. Indeed, in other, closely related work, he explicitly endorses the need for override, for a way of determining mistakes in the current terrain of case law.<sup>129</sup>

Critique of precedent requires a theory of mistake, and a theory of mistake turns on justification, which in turn relies on principles of political theory for a liberal democracy such as ours. Neither Fleming nor Sunstein offers purely internal, coherentist critiques of precedent. Their critiques, and their stated constitutional goods, stem from broader commitments of principle. A theory of mistake in constitutional interpretation is similar to a theory of override in Fred Schauer’s presumptive positivism.<sup>130</sup> Schauer allows rules to be overridden, and, as I have argued elsewhere, the justificatory apparatus needed to explain and apply the override case by case greatly weakens the argument for the content-independent reasons for action that rules provide.<sup>131</sup> Mike Klarman makes a similar, and helpful,

---

122. Fleming, *supra* note 1, at 104; *see also id.* at 65.

123. *See* Sunstein, *supra* note 2, at 96-99.

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

125. *Plessy v. Ferguson*, 163 U.S. 537 (1896); *see* Sunstein, *supra* note 2, at 248.

126. *See* Sunstein, *supra* note 2, at 229-30.

127. 529 U.S. 598 (2000); *see* Sunstein, *supra* note 2, at 238-39.

128. *See* Sunstein, *supra* note 15, at 2867 (describing a society “in which democratic processes work exceedingly fairly and well, so that judicial intervention is almost never required from the standpoint of anything that really matters”).

129. *See* Sunstein, *supra* note 57, at 54, 95; Sunstein, *supra* note 72, at 353, 377, 380, 397.

130. *See* Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 203-05 (1991); *see also* Schauer, *supra* note 65, at 592-93.

131. *See* Abner S. Greene, *The Work of Knowledge*, 72 *Notre Dame L. Rev.* 1479, 1492-94 (1997) [hereinafter Greene, *Work of Knowledge*]; *see also* Abner S. Greene, *The Missing Step of Textualism*, 74 *Fordham L. Rev.* 1913 (2006) [hereinafter Greene, *Missing Step*].

point, when he argues that translation theory—applying a constitutional principle from one era to another time by accounting for changed circumstances—requires the interpreter to select a level of generality at which to do the translation, and that selection, normative as it must be, will dictate the outcome.<sup>132</sup> The underlying point of this discussion is that how one sees, accepts, discards, assimilates, and understands various points in our constitutional culture—specifically text and precedent—depends always on one's justificatory approach.

Furthermore, diachronic theories of constitutionalism obscure the responsibility of the interpreter, who is living and breathing and reading and writing and interpreting now, not in the past.<sup>133</sup> Interpretation is necessarily

---

132. See Michael J. Klarman, *Antifidelity*, 70 S. Cal. L. Rev. 381, 394-412 (1997) (critiquing translation theory). In part, Klarman critiques an article of mine, which is unabashedly committed to the fit dimension. See *id.* at 399-401 (critiquing, inter alia, Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123 (1994)); see also Abner S. Greene, *Is There a First Amendment Defense for Bush v. Gore?*, 80 Notre Dame L. Rev. 1643 (2005) (another piece of the "fit" variety).

133. Gary Lawson and Mike Paulsen make this point in a dramatic way when they argue that the text and structure of the Constitution require constitutional precedent to be nonbinding. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J.L. & Pub. Pol'y 23 (1994); Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 Alb. L. Rev. 671 (1995); see also Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 Const. Comment. 289 (2005) [hereinafter, Paulsen, *Corrupting Influence of Precedent*]. The argument tracks Paulsen's more general argument for pluralism among constitutional interpreters: All federal officials (legislative, executive, judicial) must swear to uphold the Constitution; the three branches of government are coordinate, none dominant; therefore no one branch has hegemony over constitutional meaning. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217 (1994); see also Douglas, *supra* note 78, at 736. Similarly, Lawson and Paulsen argue that no constitutional interpreter (including the Court itself) is today bound by what the Court (or any other constitutional interpreter) said, in the past, the Constitution means. I share their views about interpretive pluralism, and their general argument against precedential bindingness in constitutional law. But my critique of precedent differs from theirs in at least three ways: (i) They deem the argument started and finished with their points about the oath and coordinacy; I believe other arguments for precedent—such as arguments from stability, common ground, integrity, equality, and the epistemic value of practice—to be not merely prudential, but of constitutional import themselves, and therefore I believe that such arguments must be confronted directly. That is, I believe constitutional theory to be more than the text and structure to which Lawson and Paulsen point; it includes, as well, various consequentialist and deontological arguments about the working and the ends of our constitutional order. (ii) Lawson and Paulsen hold the view that there are objectively right answers to questions of constitutional law, which any constitutional interpreter has the capacity to ascertain. See also Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, in *Precedent in Law*, *supra* note 65, at 73, 79-80 (describing Blackstone's declaratory theory, according to which precedent is not binding, because each judge is seeking to discover the true law, and another judge's view of the true law might be wrong). In this fashion, they get around the argument that constitutional meaning is often murky and that precedent can provide important anchors and commonly accepted solutions. I prefer the view that constitutional meaning is murky (at least regarding the capacity of actual constitutional interpreters, taking no position on whether there are in fact objectively correct answers to all questions of constitutional

a normative task, and it involves the acquisition of knowledge. There is no mechanical interpretation, because texts and precedent are codes of meaning and because human beings are not gods. Even the apparently simplest interpretation—a so-called “easy case”—relies on prior knowledge held by the interpreter that submerges the contested beneath the uncontested, that foregrounds the known and backgrounds the unknown. However, the failure to foreground at all times the work we have done to acquire understandings of texts and precedent to make those texts and precedent appear easy is a failure worthy of the appellation “mystification” or “fetishism” or “bad faith.” This is not to say that interpreters must reinvent the wheel. As I will discuss below in “Room for Fit,”<sup>134</sup> there are good reasons to pay attention to past sources of constitutional meaning, even to establish some rules of thumb. But these rules should always remain unmasked as rules (of thumb),<sup>135</sup> always open to revision and overriding at any moment, always transparent to the substantive good they serve so they can be exposed as dis-serving those or other values as the case may be.

The foregoing suggests a concern with Schauer’s defense of the proposition that precedent *can* constrain. The problem is that the current interpreter’s assessment of which precedents are relevant to the current case, and how they are relevant, may involve so much reasoning unconstrained by precedent as to render precedent not much of a tether at all.<sup>136</sup> Schauer says, “The problem is to determine what constrains a decisionmaker’s control over the categories of assimilation.”<sup>137</sup> After some

---

interpretation). Thus, I must confront (and have in the text) arguments that precedent can serve as an anchoring device and as a way to find common ground among divergent interpretations. (iii) A debate has broken out regarding the relative virtues of originalism versus precedent. Compare, e.g., Paulsen, *Corrupting Influence of Precedent*, *supra*, and Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 Ala. L. Rev. 635 (2006) (both favoring originalism), with, e.g. Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 Const. Comment. 271 (2005) (favoring precedent). In my view, both positions are unjustifiably optimistic about the ability of the past to constrain current interpretive judgments.

134. See *infra* Part III.F.

135. See Schauer, *supra* note 130, at 4-5 (discussing the difference between rules of thumb and mandatory rules).

136. See Schauer, *supra* note 65, at 576-87. Schauer’s argument I discuss here is about precedent that lacks “an articulated characterization.” *Id.* at 581. Precedent that has such a characterization—i.e., where the holding is stated in rule-like fashion—perhaps can constrain more, see Lyons, *supra* note 81, at 500-01, although as Schauer recognizes, the articulated characterization may be just an “obscuring smokescreen,” Schauer, *supra* note 65, at 581. In other words, whether rules can constrain, including rules stated in the holdings of judicial decisions, raises similar questions of determining relevant analogies, levels of generality, etc., as with precedents that lack articulated characterizations. For example, if the holding is “Where ABC occur, therefore D,” we may always ask, “Even if E also occurs? Even if F does not also occur? Etc.” How we describe the predicates will often be incomplete, and future cases may raise questions about such incompleteness. How we determine the answers will involve normative considerations beyond the rule-like holdings.

137. Schauer, *supra* note 65, at 582.

nods toward legal realism, Schauer concludes that "naturalist/formalist perspectives may nevertheless better describe the immediate actions of individual decisionmakers within a given social subculture."<sup>138</sup> "[D]ecisionmaking within the legal structure is constrained by the comparative fixity of those larger societal and linguistic categories . . . . Precedent rests on similarity, and some determinations of similarity are incontestable within particular cultures or subcultures."<sup>139</sup> First of all, look at all the work Schauer has to do to make an apparently simple point—that there are some easy cases! Second, what appears incontestable at any moment is the product of backgrounded normative/purposive considerations; those considerations are always in play because the interpreter is always able to consider whether the norms and purposes behind the categorizations fit in the case at bar. The work of determining relevance overwhelms any purported anchoring gains.<sup>140</sup>

This discussion is another version of the Hart-Dworkin debate about whether there is open texture in the law or whether all questions regarding what the law is at any slice in time have right answers.<sup>141</sup> My argument that precedent can't constrain judicial decision making in any significant way is an acknowledgment of law's open texture. The Dworkinian right-answer approach leads to problems such as that pointed out by Kenneth Kress.<sup>142</sup> Dworkin critiques H. L. A. Hart's approach as, *inter alia*, producing impermissibly retroactive adjudication through judicial discretion to fill the gaps in law's open texture. Dworkin's right-answer approach purports to solve this problem, because judges are always stating what the law is, and not what it should be. But Kress argues that settled law might change between the time of the events being litigated and the time of the adjudication, and this produces, says Kress, a "ripple effect."<sup>143</sup> The

---

138. *Id.* at 584.

139. *Id.* at 585-87. See also David A. Strauss, *Originalism, Precedent, and Candor*, 22 Const. Comment. 299, 300 (2005).

140. See Greene, *Missing Step*, *supra* note 131; Greene, *Work of Knowledge*, *supra* note 131. My argument here echoes that of Michael Moore, who contends that determinations of similarity are inextricably normative. Common law reasoning (Moore's focus in discussing precedent) is non-hermeneutic; it does not involve interpreting canonical texts. Rather, we reason as we do in science, in an inductive, coherentist manner. See Moore, *supra* note 106, at 184-88, 197, 200. Moore critiques conventionalism. A conventionalist "wishes to pretend that he can stand outside his own belief system for just a peek at how the universe is—namely, to see that there is no way that it is. In this we should see an illicit attempt to return to foundationalist epistemology." *Id.* at 207. Instead, Moore offers a "general metaphysical realism, . . . a natural law theory of precedent as a special case of more general realism about science and morals." *Id.* at 188. In the common law, says Moore, "what is to be justified is why a particular case . . . is to be universalized into a rule to govern future cases," and that turns on substantive considerations. *Id.* at 200.

141. See Dworkin, *supra* note 46, at 31-37, 61, 69-71, 280, 332; H. L. A. Hart, *The Concept of Law* 124-36 (2d ed. 1994).

142. See Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 Cal. L. Rev. 369 (1984).

143. *Id.* at 371.

ripple effect argument “requires only that legal truths sometimes change when settled law is enlarged by new decisions and that sometimes such changes occur in legal propositions that are dispositive of cases where the events occurred prior to the change and the adjudication occurs after the change.”<sup>144</sup> To maintain the right answer thesis, and overcome the retroactivity problem, Dworkin necessarily has to say (and does say) that Kress is right only when judges make mistakes rather than continue to spin the seamless web of the law.<sup>145</sup> A Hartian open texture approach, on the other hand, allows us to see many judicial decisions as relatively unconstrained by precedent, and instead as marking out new territory for law’s coverage.

There is a potential retroactivity issue here, of course, but perhaps we should see it not as true retroactivity—where new law is applied to antecedent conduct—but rather as the kind of retroactivity that accompanies the specification of murky legal parameters. Perhaps we have learned to live with this level of legal uncertainty; after all, both parties must insure against guessing incorrectly how open texture will be closed. Purely prospective adjudication can also play a role here, especially in cases involving penalties and truly surprising interpretations.

I believe this approach is consistent with David Lyons’s argument that even in hard cases, where we look beyond standard legal rules, the decisions are being made according to law.<sup>146</sup> Lyons writes,

What the law requires and allows is a function not just of legal rules, but also of considerations without which decisions cannot soundly be made. These considerations are relevant to a judicial decision, so that a court must take them into account and weigh them in the balance in a judicially appropriate way. Their neglect would be a judicial error.<sup>147</sup>

This makes enormous sense: We’re always deciding legal cases based on a variety of types of reasoning that go beyond mechanical application of legal rules. What facts are relevant? What levels of generality to use? What supplemental moral principles to use, and with what weight? It makes no sense to say that all this is extralegal; it’s part of the standard legal process. Open texture, thus, describes the quality of legal interpretation not being fully specified by extant sources such as text, original understanding, and precedent; but open texture is consistent with viewing the further specification of legal answers, drawing on material from outside the law, as legal, rather than as extralegal. Part of interpreting law, in short, involves

---

144. *Id.* at 380 n.63.

145. See Ronald Dworkin, *Response*, in *Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin* 291, 295 (Scott Hershovitz ed., 2006); see also S. L. Hurley, *Coherence, Hypothetical Cases, and Precedent*, in *Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin*, *supra*, at 69, 95.

146. See David Lyons, *Justification and Judicial Responsibility*, 72 Cal. L. Rev. 178, 188 (1984).

147. *Id.* at 188-89.

going beyond law; we incorporate extralegal standards by reference, as it were. The supplemental principles are not untethered; rather, they are part of a larger universe of principles of political morality that we use—all the time—in doing legal interpretation.

A final thought on this subject: Dworkin insists on right answers to legal interpretive questions, but he also rejects the thesis that legal materials are limited to pedigreed sources, and says that principles are part of law.<sup>148</sup> This might be the same as Lyons's point about law's incorporating principles of political morality. It's not important that I go further here on this. The key points to the discussion are that precedent's power to constrain adjudication is weak; that many normative supplements need be added to determine how to use precedent; and that we need not see such supplements as extralegal.

#### E. *Do We Really Need Two Gaps?*

Especially given the necessary dominance of justification over fit, it is unclear why Fleming and Sunstein insist on a gap between the Constitution and political justice. Both are alert to the gap between the Constitution and the judicially enforced Constitution; both, in separate ways, explain why and how courts should leave some constitutional matters for development in the political process.<sup>149</sup> But it is less clear why each believes (as each does)<sup>150</sup> that we do not have a "perfect" Constitution or, more to the point, that we should not construe it as reaching political justice. There appears to be a different kind of overhang here—perhaps better deemed a hangover—from legal positivism. We are all so used to assuming the separation thesis, i.e., that law and morality need not overlap, that we apply a version of that thesis to the relationship between the Constitution and political justice. But as I have argued elsewhere,<sup>151</sup> we can be legal positivists without being constitutional positivists; that is, we can accept a conceptual gap between law and morality but refuse to accept a conceptual gap between our Constitution and political justice. Our Constitution is an explicitly aspirational document. It begins,

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>152</sup>

---

148. See Dworkin, *supra* note 46, at 22.

149. See *supra* Part II; see also Fleming, *supra* note 1, at 214-15; Sunstein, *supra* note 2, at 127.

150. See Fleming, *supra* note 1, at 16, 211; Sunstein, *supra* note 15, at 2867-70.

151. See Abner S. Greene, *Can We Be Legal Positivists Without Being Constitutional Positivists?*, 73 Fordham L. Rev. 1401 (2005).

152. U.S. Const., pmb1.

The Constitution assigns and limits governmental power to assure all of these things, including liberty (which we may understand as both positive and negative). Once we have explained that the political branches as well as the courts have a role to play in interpreting and implementing the Constitution, it is not utopian to insist that our Constitution be understood as pointing toward a perfect union—"more perfect" than what came before.

#### F. *Room for Fit*

First, basic rule of law virtues must be honored. Insofar as criminal and civil sanctions are involved for primary citizen conduct, interpretations that are wholly surprising or that otherwise depart from clearly established legal principles on which reliance is rightly based should either not be issued as interpretations or should be issued but with prospective remedies only. In this way, basic principles of legality will exert some anchoring force on interpretation.

Second, diachronic fit points may help us learn about the content of political justice, in the shadow of which all questions of legal interpretation must be asked. Whether one believes the constitution of the given political society is perfectionist and should be interpreted always along the vector of political justice or whether one believes the constitution states a limited domain of justice, the texts and precedents and practices of the people may help us gain a better understanding of the content of political justice.<sup>153</sup> This point is related to a third point: As Stanley Fish has often maintained, there is no such thing as constraint-free interpretation, regardless of how one conceptualizes fit points.<sup>154</sup> Interpreters are human beings interpreting in light of everything they know, which includes fit points such as text and precedent. Attention to such fit points is unavoidable, as a psychological matter.

Fourth, just as both political and interpretive authorities should operate with a healthy sense of self-doubt, so should interpreters who seek to challenge authority make self-doubt self-conscious and limiting on their interpretations. Just because diachronic fit points don't have to be followed does not mean they shouldn't be, in many cases. Interpretive challengers are no better positioned to assume the correctness of their views than are the sources and authorities they challenge; to avoid interpretive hubris, attention to the views of others, including past views ensconced in diachronic fit points, must be paid.

This point is related to a fifth point: One of the main arguments in favor of a strong conception of both political and interpretive obligation is that

---

153. See *supra* note 73 and accompanying text. This analysis is the same for statutes, at a different level.

154. See, e.g., Stanley Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, in *The Politics of Interpretation*, *supra* note 44, at 271.

otherwise we are left with chaos borne of self-interest.<sup>155</sup> Law and its interpretation through both diachronic fit points and a supreme court are needed to achieve a kind of communal finality, operating against the self-interest of plural authorities that would exist if obligation were not taken seriously. There is much to this, and checks against ambition and interest are central to the U.S. constitutional story.<sup>156</sup> But we must attend to the problems of self-interest on all sides—on the side of lawmakers, fit points over time, and canonical law interpreters, and on the side of those disobeying law and refusing to follow diachronic fit points and a supreme court. We must develop a rubric for assessing the strength of the claims of (purported) legal authority and the claims of those opposing such authority from positions of moral and interpretive dissent.

Sixth, throughout this piece, I have been rejecting the argument that current interpreters should give *prima facie* deference to diachronic fit points. I have not been rejecting the relevance of those points.<sup>157</sup> One might think this is a thin distinction, but it is critical to my arguments regarding interpretive (and, elsewhere, political) obligation. Theorists supporting such obligations rarely insist that they are absolute; their principal concern is to develop the argument for *prima facie* deference, which can be overridden. My principal concern is the opposite—with attempting to show that the case for even merely *prima facie* deference to these various purported authorities is a weak one.

#### IV. TOWARD A DIFFERENT THEORY<sup>158</sup>

We should understand our Constitution as aspiring toward political justice. Executives and legislatures, as well as courts, must play a role in fleshing out constitutional meaning, and in pointing toward justice. All interpreters must operate with a healthy sense of self-doubt, and must be

---

155. See Burke, *supra* note 65, at 37, 68, 106-08, 290; Sunstein, *supra* note 57, at 76; Sunstein, *supra* note 72, at 395-96.; Farber, *supra* note 65, at 1178 n.23; Postema, *supra* note 65, at 12 (discussing Hobbes).

156. See, e.g., Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967); Gordon S. Wood, *The Creation of the American Republic 1776-1787* (1969); *The Federalist* No. 10 (James Madison), No. 51 (Alexander Hamilton).

157. For example, Gerald Postema describes Hale's traditional conception of how precedent has authority, in the following ways: Precedent has authority not by being decided or settled, but by "having a place within a recognized body of common experience"; it is a product of reflective judgment, itself authoritative because of "its historical links to a shared sense of identity in the community." Postema, *supra* note 65, at 22. Precedent has authority in providing examples of practical judicial reasoning and "the entire body of such cases provides the authoritative context of experience within which such practical reasoning takes place and against which the practical significance of the instant case is interpreted." *Id.* at 23. My argument throughout has been that the arguments for precedent having authority—i.e., that we should defer to it in a content-independent way, giving it peremptory force—are not successful. We should see precedent as relevant, but not authoritative.

158. I am developing some of the ideas in this section in a book project entitled "Against Obligation: A Theory of Permeable Sovereignty."

open to the views of other interpreters. Thus, although I would grant the Supreme Court a greater role in fleshing out constitutional meaning than would Sunstein, I do so only with the caveat that the Court must understand constitutional interpretation as dialogical, and stand down from its occasional hubris about being the only institution that can say what the Constitution means.<sup>159</sup> Furthermore, although I would grant the Court a significant role in constitutional interpretation, I have argued here for a weak view of precedent, and thus constitutional questions remain open for reinvestigation by all branches of government. Despite this plural understanding of constitutional interpretation, laced with a heavy dose of self-doubt all around, our constitutional processes will still yield laws, generally valid, that infringe on the deeply held beliefs of some small numbers of our fellow citizens. There are ultimately no valid arguments for even the *prima facie* political obligation of any of us. Thus, despite their best efforts to achieve political justice, our governmental agents should establish a system of judicial exemptions and legislative accommodations to ease the burden of laws that infringe on conscience, of both the religious and nonreligious sort.<sup>160</sup> These exit options will provide a measure of legitimacy to a government that, even in a liberal democracy such as ours, is ultimately making claims for plenary sovereignty that must yield to a different conception, one of permeable sovereignty. This yielding represents the most profound instantiation of governmental self-doubt—there are other sources of norms that people hold dear, and they must be respected.

---

159. See *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Cooper v. Aaron*, 358 U.S. 1 (1958).

160. This argument for exemptions and accommodations for both religious and nonreligious conscience is not inconsistent with my critique above of Fleming's treatment of the Religion Clauses as improperly arguing for a general right of conscience under our Constitution. See *supra* notes 118-22 and accompanying text. There, I was contending that Fleming's treatment of Religion Clause text and jurisprudence could not be explained by fit; justification was doing the main work. Here, I rely, too, on a justificatory argument. For a different justificatory argument, focusing on the distinctiveness of religion, see sources cited in *supra* note 29.

## *Notes & Observations*