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Privacy, Minimalism, and Perfectionism

Cover Page Footnote

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PRIVACY, MINIMALISM, AND PERFECTIONISM

Charles A. Kelbley*

INTRODUCTION

Professor James Fleming and Professor Cass Sunstein have written extremely interesting, thought provoking, and quite different books. If we look only at their titles, these two books would seem to have opposite themes: Sunstein's is provocative, suggesting that some judges are radicals who threaten the stability of our democracy and our rights,¹ but Fleming suggests his book's purpose is to make our democracy more secure.² This assessment, however, confirms that you cannot judge a book by its title, no more than by its cover, for both Fleming and Sunstein are fundamentally concerned with the same issues, but from different perspectives: How should judges understand their role and properly apply the Constitution to some of the most troubling and important legal issues of our time? Sunstein's and Fleming's respective answers both unite and divide them, but to some extent their differences are less real than they may seem.

Unlike many of Sunstein's scholarly books,³ *Radicals in Robes* is more of a timely set of reflections by a public intellectual, warning the citizenry of the dangers of a radical group of constitutional revisionists who want to return the Constitution to the pre-New Deal era of the early 1930s, a period when the original meanings of the Constitution, the revisionists say, were still largely respected by the U.S. Supreme Court.⁴ It is difficult to emphasize enough the salience of his review and evaluation of the dangers posed by "radical" judges as he analyzes the various contenders for the correct or right kind of judges—"fundamentalist," "minimalist," "perfectionist," or "majoritarian"—who best illustrate how our Constitution should be interpreted and applied today and in the foreseeable future. By contrast, Fleming's *Securing Constitutional Democracy* is a very scholarly work (with nearly ninety pages of notes following the text). He examines with meticulous care other scholarly works, including Sunstein's and

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

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

3. See, e.g., Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996) [hereinafter Sunstein, *Legal Reasoning and Political Conflict*]; Cass R. Sunstein, *The Partial Constitution* (1993) [hereinafter Sunstein, *Partial Constitution*].

4. See Sunstein, *supra* note 1, at 1-19 (discussing the "Constitution in exile").

Michael Sandel's, both of which, according to Fleming, fail to present the American Constitution in as good a light as his own, especially with reference to democracy and the central issues of privacy or autonomy.

Fleming's is an elegant theory that attempts to do for the substantive liberties, particularly autonomy or privacy, what John Hart Ely's famous book *Democracy and Distrust*⁵ did for the procedural liberties. Here, too, it is difficult to exaggerate the salience of Fleming's new theory for our understanding of the substantive rights to privacy or to autonomy that our Constitution may be said to support, notwithstanding the fact that not all of the rights with which he is concerned are listed in the text of the Constitution. Fleming presents what he calls a "Constitution-perfecting theory," which "aspires to interpret the American Constitution so as to make it the best it can be."⁶ Although Sunstein certainly wants to defend the Constitution, he objects to what he calls "perfectionism," complaining that perfectionists like Fleming and Ronald Dworkin "want to make the Constitution the best that it can be,"⁷ which of course is precisely Fleming's stated goal. Perfectionists follow the text of the Constitution, but, Sunstein says, "they are entirely willing to understand that text in a way that reflects their own deepest beliefs about freedom of speech, equal protection of the laws, the power of the President, and other fundamental questions."⁸ From Sunstein's perspective, understanding the text in that way is one of the principal reasons why we should oppose Fleming's and Dworkin's "perfectionism." In assessing whether Sunstein's view is correct, we must try to determine whether his minimalist theory establishes compelling or at least adequate grounds for eschewing a perfectionist approach to the Constitution.

Unlike Fleming, Sunstein wants to defend a less ambitious way of interpreting and applying the Constitution. He calls it "minimalism," which supports "narrow, incremental" decisions that avoid announcing new rights and liberties lacking a foundation in our traditions and practices.⁹ Minimalists want courts to take small, cautious steps, avoid broad agendas, and decide one case at a time without deciding difficult issues.¹⁰ "Above all," Sunstein writes, "minimalists attempt to reach *incompletely theorized agreements* in which the most fundamental questions are left undecided,"¹¹ a point that laypersons may find hard to comprehend if they think, as many do, that one of the paramount purposes of a court of law is precisely to make decisions about difficult and fundamental questions. But Sunstein argues that incompletely theorized agreements were more appropriate ways

5. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

6. Fleming, *supra* note 2, at ix.

7. Sunstein, *supra* note 1, at xii.

8. *Id.*

9. *Id.* at xiii.

10. See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

11. Sunstein, *supra* note 1, at 28.

to resolve the underlying issues in many controversial landmark Supreme Court decisions, such as *Griswold v. Connecticut*¹² and *Lawrence v. Texas*.¹³ As he views them, both *Griswold* and *Lawrence* involved statutes that either were unenforced or underenforced and were without substantial support in modern convictions. At least in those circumstances, the Court, Sunstein argues, should have struck down those statutes on procedural grounds alone by means of the theory of “desuetude” or obsolescence without announcing new constitutional rights—the right to privacy in *Griswold* and the right to same-sex intimate association in *Lawrence*.

Fleming’s theory of deliberative democracy is a serious challenge to Sunstein’s approach to these and other autonomy or privacy cases. Fleming argues, for example, that a string of privacy or autonomy cases decided in the twentieth century recognized “unenumerated” fundamental rights that are the “bare bones” that fit together and constitute a coherent structure of “deliberative autonomy,” nourishing citizens’ moral capacity for making unusually important decisions affecting their independence and the direction of their lives. But by “perfecting” the Constitution and making it “the best it can be,” Fleming is not defending or espousing an unrealistic or “utopian” constitution that includes *all* the rights and responsibilities of government that he and others believe it “should” ideally contain. Rather, his aim is to present a coherent structure of the Constitution that we *have* based on how it has been interpreted over time with special emphasis on the rights that are *preconditions* for citizens to exercise their two fundamental moral powers, which John Rawls identified as the twin capacities to develop a conception of justice and a conception of the good.¹⁴ Fleming then pairs these two moral powers to the twin goals of his book: securing deliberative democracy and securing deliberative autonomy, revealing a fascinating study of constitutional rights at the intersection of political theory and constitutional law.

This essay briefly explores a number of themes that help explain the clash between Fleming and Sunstein. My remarks, however, mainly concern issues raised by Sunstein’s work. Thus, although there is much to admire in *Radicals in Robes*, Part I discusses a number of questions and doubts about the soundness of Sunstein’s theory of minimalism and incompletely theorized agreements. Part II examines certain aspects of Fleming’s theory of privacy or autonomy, and discusses how his theory avoids Sunstein’s critique of perfectionism. Part III is a short discussion of Ronald Dworkin’s contention that there are no significant differences between his theory of law as integrity and Sunstein’s theory of

12. 381 U.S. 479 (1965).

13. 539 U.S. 558 (2003).

14. See John Rawls, *Political Liberalism* (1996). “[I]n virtue of their two moral powers (a capacity for a sense of justice and for a conception of the good) and the powers of reason (of judgment, thought, and inference connected with these powers), persons are free. Their having these powers to the requisite minimum degree to be fully cooperating members of society makes persons equal.” *Id.* at 19.

minimalism.¹⁵ Finally, Part IV adds some further reflections in response to Sunstein's symposium essay, in which he distinguishes between "first-order" and "second-order" perfectionism. I should preface the following remarks by stating the obvious: Fleming's and Sunstein's books involve complex theories and deserve, and no doubt will receive, a far more extensive evaluation than this essay can hope to accomplish.

I. SUNSTEIN ON MINIMALISM AND INCOMPLETENESS

For most purposes, "minimalism" and "incompletely theorized agreements" appear to be interchangeable concepts, but they are not necessarily identical. If a court decision is deliberately left incompletely theorized, it will also be minimalist: By leaving something out and undecided, the decision is minimalist by comparison to the more complete decision that decides everything. Conversely, a minimalist decision is not necessarily incompletely theorized, since there may be many reasons for minimalist decisions besides the avoidance of a fuller theorization. A court, for example, will sometimes find that it can (and should) avoid deciding a case on constitutional grounds by reaching a decision on narrower, nonconstitutional grounds; such a decision is minimalist but not incompletely theorized because there was no need for a more robust theorization in the first place.

Another reason for minimalism, and one that Sunstein appears to emphasize especially, is judicial "uncertainty." In the epigraph to his book, Sunstein cites the words of Judge Learned Hand: "The spirit of liberty is the spirit which is not too sure that it is right."¹⁶ But does this "spirit of liberty" justify minimalism or incompletely theorized decisions? As I explain below, a judge who is "not too sure" he is right may still be reasonably confident that he is right about the correctness of his decision. In that event, minimalism or incomplete theorization may be inappropriate and unjustified. Of course, if a judge is truly uncertain in the sense of lacking conviction about the right course of action, then, in such circumstances, minimalism may be an appropriate and perfectly sensible course of action. I note that the book's epigraph also includes Thomas Jefferson's proposition that "The dead have no rights,"¹⁷ which is expressive of what is undoubtedly Sunstein's most negative critique in his book, the critique of "fundamentalism," which is his term for "originalism." Taken together, the epigraph's references to Hand and Jefferson suggest that Sunstein has two primary battles to wage in *Radicals in Robes*: one against judges' excessive confidence in the correctness of their opinions,

15. See Ronald Dworkin, *Justice in Robes* (2006).

16. Sunstein, *supra* note 1, at vii (quoting Learned Hand, *The Spirit of Liberty* (May 21, 1944), reprinted in *The Spirit of Liberty: Papers and Addresses of Learned Hand* 189, 190 (Irving Dilliard ed., 1953)).

17. *Id.*

and another against a narrow, and perhaps dogmatic, form of "original understanding" philosophy, which he calls "fundamentalism."

It is, of course, germane to enlist Jefferson in the cause against extreme forms of originalism or, for that matter, against originalism as such, which is the very idea of being guided or governed by original understandings of the Constitution. Jefferson, however, quite literally cuts off the potency of original meanings or understandings of laws and the Constitution by advocating their *replacement* at the end of each generation. That is, Jefferson seriously entertained the extraordinary idea that the Constitution and all laws should expire every nineteen years and then be replaced by new ones more suitable to the values of the succeeding generation.¹⁸ On the other hand, the relevance of Hand's statement is ambiguous: Are all of our judgments about liberty uncertain? Can we never have or express great confidence in them, particularly if we are Justices of the Supreme Court? Here I am less concerned with Sunstein's valuable critique of originalism or fundamentalism and instead focus on his other principal emphasis: uncertainty and disagreement about liberty within the judiciary.

Consider now some cases that raise issues of uncertainty and disagreement as well as cases that demonstrate reasonable convictions of both individual judges and those serving on a multi-judge court.

A. *Uncertainty and Disagreement*

When judges on a multi-judge court are uncertain of the proper way to decide a case, then either they must continue to wrestle with the issues until they reach a respectable degree of confidence on some decision, or decide the case on narrower grounds in order to avoid making a mistake. If, in addition to uncertainty, a case arises where there is deep and widespread disagreement among the judges, then one or more judges may have to find common ground, perhaps deciding the case on minimalist or narrow enough grounds on which the other judges can agree, or on grounds that are incompletely theorized. Now all of this seems self-evident and a matter of common sense. When these and similar kinds of cases arise, judges on a multi-judge court will sometimes be driven to embrace minimalism or incompletely theorized agreements.

But does the foregoing account also apply to the *individual* judge who decides a case independently of other judges? Not entirely. Of course an individual judge is also vulnerable to uncertainty about the best way to resolve a case, and so she may likewise decide on narrow, minimalist grounds in order to avoid a major mistake. But since she is making her decision in isolation from other judges, she does not face the problem of deep disagreement encountered on a multi-judge court. On the other hand,

18. See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 The Papers of Thomas Jefferson 392, 392-96 (Julian P. Boyd ed., 1958). For a relevant discussion of Jefferson's position, see Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* 21-22 (2001).

where she is reasonably confident of the correctness of her decision, minimalism or incomplete theorization is uncalled for. The same may be true for a judge on a multi-judge court; he may be reasonably convinced of the correctness of his decision and therefore unwilling to compromise.

B. *Reasonable Conviction*

There are many cases in which there is no uncertainty on the part of any of the judges on a multi-judge court as to how a case should be decided, yet there is some disagreement among them on *which* of their several opinions is the soundest or best. That is, each judge has a more or less complete theory for how the case should be decided and is reasonably confident (but not too sure) that his is the correct way to view the law. In these circumstances neither minimalism nor incomplete theorization is necessarily the correct approach for any of these judges to take; indeed, it may be far better if each judge sticks with his initial opinion, perhaps especially in cases where an important constitutional right is in play and no agreement on a single theory is deemed possible.

Consider a somewhat different case: Five Justices of the Supreme Court agree on a rationale for deciding a particular case. In addition to the majority opinion, one Justice writes a concurring opinion, with two other Justices concurring in the judgment, while the two remaining Justices dissent. Each of these opinions defends a different theory of how the case should be decided, and each Justice offers reasonable arguments for his theory. Now of course there is nothing at all wrong with a split of opinion in such a case. Indeed, the case is resolved and remains an important precedent of the Court for several decades; in fact, it is now viewed as a "fixed star" in our constitutional firmament.¹⁹ The case I have in mind is *Griswold v. Connecticut*,²⁰ which recognized the constitutional right to privacy in 1965.

Writing for the majority, Justice William Douglas held that the right to privacy was implicit in the Constitution, particularly in several rights listed in the Bill of Rights.²¹ In addition, Justice Arthur Goldberg's concurring opinion, in which he was joined by Chief Justice Earl Warren and Justice William Brennan, Jr., emphasized the relevance to the right to privacy of the Ninth Amendment,²² which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."²³ Douglas had likewise mentioned the Ninth Amendment in his majority opinion as a possible source of the right to privacy, but one he did not choose to rely upon.²⁴ Both Justices John

19. Fleming, *supra* note 2, at 96.

20. 381 U.S. 479 (1965).

21. *Id.* at 484.

22. *Id.* at 486-87 (Goldberg, J., concurring).

23. *Id.* at 488 (citation omitted).

24. *Id.* at 484 (majority opinion).

Marshall Harlan and Byron White concurred in the judgment. Harlan did not join in Douglas's reasoning because, unlike Douglas, he did not think the liberties protected by the Due Process Clause were restricted to those mentioned in the Bill of Rights. For Harlan, "The Due Process Clause of the Fourteenth Amendment stands . . . on its own bottom."²⁵ And like Harlan, White, concurring in the judgment, thought that the Connecticut statute under review deprived married couples of liberty without due process of law.²⁶ In discussing the nature of that liberty, White pointed out that the Court had said on many occasions that Fourteenth Amendment liberties included the right to marry, establish a home, and direct the upbringing and education of children, and that these are among the basic civil rights of man.²⁷ Those decisions, he said, establish that there is a "realm of family life which the state cannot enter" without substantial justification."²⁸ But since Connecticut had failed, in White's opinion, to show a compelling reason why it was justified in curtailing the marital privacy liberty, the anti-contraception statute had to be struck down.²⁹ The foregoing briefly characterizes the nature of the opinions of the seven Justices who voted to strike down the Connecticut law prohibiting married couples' use of contraceptives and thereby invaded the "realm of family life the state cannot enter." Each of those opinions arguably contains a fairly full theorization of the respective Justices' views, and there is no evidence that any Justice expressed doubt about the correctness of his theory.³⁰ Now in such circumstances, would Sunstein have an objection to a more or less fully theorized decision like *Griswold*?

Drawing upon one of Sunstein's earlier books, where he devoted an entire chapter to the subject of incompletely theorized agreements,³¹ there is much to at least suggest that he would not oppose the *Griswold* decision. There he allows that "[i]f judges on a panel have actually agreed on a general theory, and if they are really committed to it, they should say so. Judges and the general community will learn much more if they are able to discuss the true motivating grounds for outcomes."³² In fact, the *Griswold* majority did agree on a general theory, and they seemed to be "really committed" to it, and they said so. Sunstein even says that "judges have . . . a duty to invoke relatively large-scale principles, seen as part and parcel of

25. *Id.* at 500 (Harlan, J., concurring).

26. *Id.* at 507 (White, J., concurring).

27. *Id.* at 502.

28. *Id.* at 502 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

29. *Id.* at 505-07.

30. Sunstein does not appear to define precisely or describe what we might call a "full" or "fuller" theorization by contrast to "incomplete theorization." No doubt "full" theorization is not susceptible to precise definition. But perhaps any decision that reaches the merits and fully resolves the issues litigants present qualifies as a "full" theorization. From this perspective, there may be degrees of full theorization depending upon how deeply an opinion goes in the direction of justification.

31. See Sunstein, *Legal Reasoning and Political Conflict*, *supra* note 3, ch. 2.

32. *Id.* at 44.

the Constitution as democratically ratified. . . . Certainly there are occasions on which this practice is legitimate and even glorious.”³³ Of course the majority and the concurring opinions did claim that the right to privacy was, in effect, “part and parcel” of the Constitution on several grounds: first as a right implied by explicit provisions of the Bill of Rights, alternatively as a right “retained by the people” pursuant to the Ninth Amendment, or as a consequence of the liberty protected by the Fourteenth Amendment’s Due Process Clause. And finally, Sunstein acknowledges that “[s]ome cases cannot be decided *at all* without introducing a fair amount in the way of theory,” and even that “some cases cannot be decided *well* without introducing theory. If a good theory is available and if judges can be persuaded that the theory is good, there should be no taboo on its judicial acceptance.”³⁴ Here, too, the *Griswold* majority arguably thought the theory (or theories) underlying the privacy right *was* a good and persuasive theory.

Given the above considerations, *Griswold* would seem to be one of those “occasions” when the Justices had a “duty to invoke relatively large-scale principles.” To be sure, Douglas used some unusual language in his opinion, which many commentators have objected to and even ridiculed. I refer to his use of the terms “penumbras” and “emanations” as a way to describe the emergence of a constitutional right from the rights listed in the Bill of Rights.³⁵ A good example of this line of criticism can be found in Sunstein³⁶ as well as in Robert Bork’s critique of *Griswold*.³⁷ As for Bork, despite his objection to “emanations” and “penumbras,” he nonetheless seems to agree with Douglas’s main point. Bork writes, “Courts often give protection to a constitutional freedom by creating a *buffer zone*, by prohibiting a government from doing something not in itself forbidden but likely to lead to an invasion of a right specified in the Constitution.”³⁸ Bork’s observation about a “buffer zone” is fairly comparable to the claim Douglas was making about “penumbras.” But as one scholar has noted, “Douglas could have replaced penumbra with periphery or fringe with no loss of meaning or force.”³⁹ To be sure, the fact that he did not use more common terms was certain to invite criticism, whether deserved or not. As David Garrow observes, Douglas’s “usage of so unusual a word [as ‘penumbra’] in such a central role in the opinion became an easy target for those whose objections to either Douglas’s formulation or the decision itself

33. *Id.* at 46 (emphasis added).

34. *Id.* at 54.

35. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

36. See Sunstein, *supra* note 1, at 83.

37. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 95-100 (1990).

38. *Id.* at 97 (emphasis added).

39. Henry T. Greely, *A Footnote to “Penumbra” in Griswold v. Connecticut*, 6 Const. Comment. 251, 260 (1989), *quoted in* David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* 264 (1994).

were otherwise more diffuse.”⁴⁰ But in fairness to Douglas, Garrow also notes that many critics failed to realize that the term “penumbra” had already been used more than twenty times in earlier Supreme Court opinions, including those of Justices Oliver Wendell Holmes and Benjamin Cardozo.⁴¹

C. *The Problem of Legitimacy*

For Sunstein, however, there is another factor that presents a more difficult hurdle that needs to be overcome before he could embrace *Griswold*: its declaration of a new constitutional right that has not received prior support from democratic institutions, thus raising the issue of “legitimacy.” In his brief remarks on this subject, Sunstein mentions Dworkin’s conception of law as integrity and the related idea of “principled consistency” as a possible theory of legitimacy.⁴² While he acknowledges the many advantages of principled consistency, he nonetheless thinks it is not a convincing theory, “neither necessary nor sufficient for legitimacy.”⁴³ Instead, legitimacy, he says, “stems not simply from principled consistency on the part of adjudicators, but from a justifiable exercise of authority, which requires a theory of just institutions . . . founded in democratic considerations, suitably constrained by an account of what interests should be immunized from democratic intrusion.”⁴⁴ This seems to express a principle that characterizes much of Sunstein’s writing about the Court, including *Radicals in Robes*. As one commentator says, “Sunstein sees the Court as a ‘democracy forcing’ facilitator, encouraging elected government and the people to engage in constructive constitutional dialogues.”⁴⁵

Sunstein’s linking of democracy with legitimacy, however, seems to amount to no more than a *recommendation* that the Court should be cautious and prudent in exercising its judicial review power, except when an important interest of the people that is “immunized from democratic intrusion” is at stake. Of course the various opinions in *Griswold* did hold that the right to privacy was one such interest that state legislation may not intrude upon. But Sunstein contends that if the Court acts prematurely in announcing a new constitutional right it may compromise that very right by triggering unintended bad consequences, which may be a legitimate concern in some contexts. “Imagine,” he suggests, “the Court had held, in 1990, that the Due Process Clause requires states to recognize same-sex marriages.”⁴⁶ Supposing that the Court “was responding to the right

40. Garrow, *supra* note 39, at 264.

41. *Id.*

42. See Sunstein, Legal Reasoning and Political Conflict, *supra* note 3, at 53.

43. *Id.*

44. *Id.*

45. Neal Devins, *The Democracy-Forcing Constitution*, 97 Mich. L. Rev. 1971, 1971 (1999) (reviewing Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999)).

46. Sunstein, *supra* note 1, at 100.

conception of liberty . . . [it] would undoubtedly have produced a large-scale social backlash, and very likely a constitutional amendment that might have made same-sex marriage impossible and set back the cause of gay rights for decades.”⁴⁷ This is easily conceded, but it hardly states a new principle that can guide us *prospectively*. Looking back, we can always speculate about the consequences that *might* have accompanied various decisions if they had been decided years earlier, which is to say “out of time” and in disregard of considerations of “ripeness,” appropriateness, or adequate preparation in the lower courts. In the abstract, it is certainly difficult to imagine *Brown v. Board of Education*⁴⁸ being decided ten or twenty years earlier than it was actually decided. Yet it is even more difficult to speculate on what might have resulted if *Roe v. Wade*,⁴⁹ for example, had been decided several years *later* than it actually was, as Sunstein thinks it should have been. Here, fallible speculation can go in either of two directions: abortion rights may have been more favorably received at a later time *or* the “clash of absolutes” may have deepened even more if the Court had waited. Sunstein’s cautious, “one step at a time” approach counsels that abortion rights would have gained strength from incremental steps rather than announcing a new right at the outset. But that forecast remains a speculative conclusion that cannot serve as a reliable guide for future decisions; moreover, it hardly justifies minimalism or incompletely theorized judgments. As Jack Balkin has argued, we can learn some lessons about the importance of “timeliness” to the immediate success and enduring resolution of controversial constitutional issues, but it is quite difficult to extract from those lessons hard and fast *rules* to lay down for when the Supreme Court should exercise caution and restraint along the lines recommended by Sunstein.⁵⁰ In short, Sunstein’s theory of just institutions is not convincing and neither necessary nor sufficient for legitimacy.

D. Desuetude and Legitimacy

As noted earlier, a minimalist like Sunstein thinks that the real issue in many of the privacy cases, perhaps especially in *Griswold* and *Lawrence*, is a *procedural* problem that does not require the recognition of new, substantive constitutional rights. Instead, he proposes a minimalist solution that draws upon the “old English idea of desuetude.”⁵¹ According to this idea, a law that is seldom or rarely enforced and with little or no public

47. *Id.*

48. 347 U.S. 483 (1954).

49. 410 U.S. 113 (1973).

50. See Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 Va. L. Rev. 1537 (2004).

51. See Sunstein, *supra* note 1, at 97 (emphasis omitted); Sunstein, *Legal Reasoning and Political Conflict*, *supra* note 3, at 155. Desuetude is a term that refers to laws that are no longer or infrequently enforced. They have become obsolete and fallen into disuse or desuetude.

support may be struck down on procedural grounds alone because it is moribund, or on the verge of becoming obsolete, and contrary to what Chief Justice Earl Warren once called the “evolving standards of decency that mark the progress of a maturing society.”⁵² Sunstein argues that the lack of general enforcement of the Connecticut statute that proscribed the use of contraceptives by married couples was due in part to the fact that many people in Connecticut opposed this restriction and would not stand for the prosecution of husbands and wives for engaging in the practice of birth control. Moreover, such statutes lend themselves to being used in discriminatory ways, as tools of harassment by police and prosecutors. A law that is not uniformly and consistently applied to all persons who are similarly situated is also a clear violation of the rule of law, which forbids arbitrariness, vindictiveness, or biased enforcement on the rare occasions a statute is enforced. So according to Sunstein, striking down such laws on procedural grounds is, following the doctrine of desuetude, an adequate remedy.

Some critics of the right to privacy will likely share Sunstein’s view of *Griswold*. But consider the view of one of his colleagues, Judge Richard Posner, who embraces Holmes’s “can’t help” or “puke” test, according to which “a statute is unconstitutional only if it makes you want to throw up.”⁵³ As Posner notes, “Holmes was not speaking literally, of course; he meant only that a conviction of error is not enough—there must be revulsion,”⁵⁴ which resonates with Douglas’s use of the term “repulsive” at the end of his *Griswold* opinion.⁵⁵ According to Posner,

A Holmesian might find the statute so appalling (not only because of its theocratic cast, but also because its only practical effect was, by preventing birth control clinics from operating, to deny poor married couples access to contraceptive devices other than condoms) that he would vote to invalidate it despite the difficulty of grounding his vote in the constitutional text.⁵⁶

Posner adds that this is also his reaction to *Griswold*,⁵⁷ which suggests that “revulsion” is another possible basis for grounding the *Griswold*

52. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (construing the Eighth Amendment’s Cruel and Unusual Punishments Clause).

53. Richard A. Posner, *The Supreme Court 2004 Term, Forward: A Political Court*, 119 Harv. L. Rev. 32, 55 (2005) (citing Letter from Justice Holmes to Harold Laski (Jan. 11, 1929), reprinted in 2 Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1124 (Mark DeWolfe Howe ed., 1953); Letter from Justice Holmes to Harold Laski (Oct. 23, 1926), reprinted in 2 Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, *supra*, at 888).

54. Posner, *supra* note 53, at 55.

55. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).

56. Posner, *supra* note 53, at 55 (footnote omitted).

57. *Id.*

decision, but one that would likely require at least a modest excursion into theory to explain the revulsion.

As for the desuetude remedy, certainly the removal of the Connecticut law from the statute books would have helped to ensure that the law is not selectively enforced. In so acting, the Court would not be making a broad ruling about the right to privacy; privacy would not have to enter the picture at all, because the Court would not be making any statement about the affirmative or positive rights of married couples; it would simply be saying that such couples have a *negative* right not to be arrested or prosecuted under a lapsed statute that no longer conforms to modern convictions.

Is there any practical difference between these two solutions, one providing a positive, robust, or affirmative right based on privacy, the other providing a merely negative right *not* to be punished by the state? The practical difference is actually quite significant. The first recognizes a *right* of married people to make quite important decisions about conception, and it also recognizes a right of marital *privacy* in making those decisions. But the second, founded on the concept of desuetude, does not grant married people any significant right that they can highly value; it simply deprives the state of the right to arrest and prosecute them for using contraceptives while saying nothing about the affirmative rights they are arguably entitled to as married couples. As far as the state is concerned, married people's use of birth control devices might still be a morally wrong practice that is looked down upon, but the state would no longer be able to punish them for doing so. We might say that the invocation of desuetude to negate a law simply reflects the state's attitude that it is no longer interested in enforcing a particular statute for any number of reasons, perhaps because some citizens of that state no longer support the prosecution of "morals offenses" that do not involve harm to other people.

The difference between the affirmative right that *Griswold* declared and the negative right that desuetude yields is undoubtedly more consequential when it is a question of the sexual rights at issue in *Lawrence v. Texas*.⁵⁸ There the Court struck down the Texas sodomy law on grounds that were similar to those relied on in *Griswold*. The Court in *Lawrence* affirmed the *dignity* and autonomy rights of gays and lesbians just as it had affirmed the autonomy and privacy rights of married people in *Griswold*. Similar to the statute in *Griswold*, the Texas sodomy statute was rarely enforced and may have suffered from the same procedural defects: discriminatory enforcement and violation of the rule of law. By 2003, when *Lawrence* was decided, the vast majority of states had either repealed their sodomy laws legislatively or their courts had struck them down on state constitutional grounds. Americans' convictions simply had evolved to the point where such statutes were looked upon as anachronistic and no longer valued. Still, according to Sunstein, it would have been a perfect opportunity for the Supreme Court to strike down all the remaining sodomy statutes in the

58. 539 U.S. 558 (2003).

United States on the minimalist theory of desuetude without, however, declaring a new constitutional right. While that would have constituted some improvement in the law, it would surely not have been enough to satisfy the legitimate interests of gays and lesbians, for in *Lawrence* the stakes were far higher. Likewise, in *Griswold*, it was not just a matter of providing a few poor married couples with access to contraceptives in order to allow them to take control over their reproductive lives. (Most married people in Connecticut of modest means had other ways of obtaining birth control devices.)

By contrast, the Texas statute affected the rights of all same-sex persons, rich and poor, who wished to express their sexual feelings without fear of arbitrary arrest and prosecution. But it was not simply freedom from arrest and prosecution that same-sex couples were after. Arguably, they wanted the state to *recognize* their legal right to engage in their sexual lifestyle, which they consider a natural expression of their sexual orientation. The mere declaration by the Court that the Texas statute was void by virtue of desuetude would still allow for the social stigma that homosexuality has lived with for far too long. The negative right that the state may not arrest and prosecute gays and lesbians would therefore have been an insufficient remedy that fails to liberate same-sex relations from the enduring stigma imposed by past traditions.

II. FLEMING ON DELIBERATIVE AUTONOMY

Fleming's approach to the privacy or autonomy decisions is quite opposed to Sunstein's, endorsing neither minimalism nor incomplete theorization, at least in his overall aim of securing deliberative autonomy. As noted earlier, Fleming presents a "constitution-perfecting theory" that interprets the Constitution so as to make it "the best it can be," fully endorsing the core of the Supreme Court's many privacy or autonomy decisions in the twentieth century. For obvious reasons, Sunstein sees this as a form of "perfectionism," but that label requires some cautionary comment at the outset. First, Fleming claims that his is a "theory 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)."⁵⁹ Fleming's may be an ambitious and grand theory, but it is "drawn from the ongoing political practice of a constitutional democracy."⁶⁰ Second, Fleming is careful to elaborate the boundaries of the privacy and autonomy claims that he defends, distinguishing deliberative autonomy from a number of other views or

59. Fleming, *supra* note 2, at 6. ("[C]onstitutional constructivism is not a theory of natural law or natural rights; it does not conceive constitutional principles and rights as prepolitical and given by a prior and independent order of moral values that is binding for all times and places Constitutional constructivism draws our principles and rights from our constitutional democracy's ongoing practice, tradition, and culture.").

60. *Id.*

caricatures of these concepts. He thus clarifies that autonomy is not a "Comprehensive Liberal Right to Be Different," or a "Comprehensive Libertarian Principle of Autonomy," and not a "Right of Men To Be Let Alone to Oppress Women,"⁶¹ which are some of the standard complaints about the right to privacy or autonomy. In short, the conception of privacy and autonomy that Fleming defends is bounded and hardly "wild, unruly, and dangerous,"⁶² and certainly not the "Construction of a Constitutional Time Bomb," as Robert Bork said of *Griswold*.⁶³ In his essay for this Symposium, Sunstein's expressed reservations about Fleming's ability to constrain the evolution of the rights that might fall under the rubric of deliberative autonomy fails to consider the prudent way in which Fleming has bounded the expansion of the right to autonomy.

The reasons that drive Fleming's engagement with theory are practical and provide valuable and persuasive insights into the underlying structure of our Constitution. In effect, Fleming imagines a "constitutional archaeologist" who discovers a collection of "bones and shards of a constitutional culture" and challenges us "to decide whether these bones and shards fit together into, and are justifiable within, a coherent structure."⁶⁴ The remains of this "constitutional culture," as Fleming describes them, include the following rights:

liberty of conscience and freedom of thought

freedom of association, including both expressive association and intimate association, whatever one's sexual orientation

the right to live with one's family, whether nuclear or extended

the right to travel or relocate

the right to marry

the right to decide whether to bear or beget children, including the rights to procreate, to use contraceptives, and to terminate a pregnancy

the right to direct the education and rearing of children

the right to exercise dominion over one's body, including the right to bodily integrity and ultimately the right to die.⁶⁵

If we were to consider each of those rights—the "bones" of a constitutional culture and the decisions that recognized them—in isolation from each other (as I largely did above in discussing the *Griswold* case), we

61. *Id.* at 132-39 (internal quotation marks omitted).

62. *Id.* at 132.

63. Bork, *supra* note 37, at 95.

64. Fleming, *supra* note 2, at 92.

65. *Id.* As Fleming notes, the Supreme Court has recognized all of these rights with the one exception of the "right to die" in the sense of physician-assisted suicide. *See id.* at 269 n.18.

might well miss their significance when taken *together* and seen, as Fleming does, as constituting a justifiable and coherent structure. Fleming proceeds to make a very credible case that this structure of rights underwrites "deliberative autonomy" as a theme that emerges from a consistent and repeated interpretation of the Constitution by the Supreme Court over the course of several decades. It should be noted that Fleming's implicit method employs a fairly "holistic" understanding of constitutional law,⁶⁶ perhaps especially in marked contrast to Sunstein, whose "one case at a time" approach may be more than a little antagonistic to drawing inferences from the structure of a whole line of coherent cases that are then used in support of putting the Constitution "in the best light." But in a way, it would seem that one of the implicit claims Sunstein makes about the advantages of incompletely theorized decisions is that they, too, serve to put (or keep) the Constitution in the best light by avoiding "maximalist" decisions that may turn out to be seen in the future as erroneous. In this way, we see that Sunstein's theory of minimalism also incorporates a form of perfectionism.

It might be objected that each of the Court's decisions supporting the "bones" which constitute the string of coherent rights listed above were largely about "unenumerated" rights that have minimal connections to the Constitution's text. Of course, if each of those autonomy rights were in fact listed in the Constitution's Bill of Rights, then there would be little need for Fleming's constitutional constructivism of autonomy or privacy, since those rights would be evidently secured on the face of the Constitution itself. But the same point might be said to apply to Sunstein's claims about incomplete theorization and judicial minimalism: If those concepts were somehow embedded within the Constitution (they are not), then there would be little need to argue at length for their use by the Court. There is therefore a sense in which both Fleming's and Sunstein's views are "constructivist" and moving along parallel paths for understanding the Constitution: Fleming constructs the *substance* of the Constitution based in great part on tradition, precedent, and criteria of coherence and justification that together put the document in the best light, whereas Sunstein constructs *procedures* for applying the Constitution based on criteria of prudence, caution, and incrementalism in the service of protecting the document from inadvertent or reckless misunderstandings that would engender a false light in which to see the Constitution. But Fleming's "constructivism" is tightly anchored in practice, precedent, and principled consistency, whereas Sunstein's is loosely connected to an undeveloped theory of "just institutions."⁶⁷

But does Fleming's defense of deliberative autonomy really fall within the "best light" or within a lesser, perhaps even false light? Consider the relevance of the rights that he assembles under the rubric of deliberative

66. See, e.g., *id.* at 116 ("Only through . . . a holistic reading of the Constitution can we guarantee the promise of liberty rather than merely enforcing historical practices . . .").

67. Sunstein, *Legal Reasoning and Political Conflict*, *supra* note 3, at 53.

autonomy in relation to substantive due process, the principal textual basis that is relevant to the rejection or recognition of "unenumerated" rights. Fleming reviews three available conceptions within the Court's due process jurisprudence concerning what constitutes a "tradition."⁶⁸ He rejects the "concrete historical practices" conception, which is exemplified by Justice Antonin Scalia's plurality opinion in *Michael H. v. Gerald D.*,⁶⁹ which held that liberty includes only those liberties specifically protected in statutes or recognized in the common law when the Fourteenth Amendment was ratified in 1868.⁷⁰ On the other hand, Fleming embraces the "abstract aspirational principles" conception of the due process inquiry as formulated by Cardozo's opinion in *Palko v. Connecticut*,⁷¹ where the Court considered whether a claimed unenumerated right was "of the very essence of a scheme of ordered liberty"⁷² or a requirement of a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁷³ As Fleming notes, there is a great difference between these two conceptions of what a tradition is, at least for purposes of construing what the Due Process Clause protects. The "historical practices" conception that Scalia favors understands traditions in a restricted, concrete sense, limiting substantive due process to those "rights that actually have been protected through historical practices, common law, and statutes."⁷⁴ But the "abstract principles" conception inquires into traditions understood as aspirational principles, "whether or not," Fleming observes, "we actually have realized them in our historical practices, common law, and statute books."⁷⁵ Of course many cases, such as *Griswold*, *Roe*, and *Loving v. Virginia*,⁷⁶ "broke from historical practices" (such as those involved in *Bowers v. Hardwick*⁷⁷ and *Michael H.*) "in pursuit of due process and traditions in the sense of aspirational principles."⁷⁸

Fleming also considers a third conception of tradition within the due process inquiry into the nature of protecting or rejecting claims of fundamental rights.⁷⁹ He calls this conception a "rational continuum" of liberty,⁸⁰ where tradition is a "living thing or evolving consensus,"⁸¹ based in large part on Harlan's dissenting opinion in *Poe v. Ullman*.⁸² But Fleming reconceives Harlan's "rational continuum" of ordered liberty and

68. Fleming, *supra* note 2, at 112.

69. 491 U.S. 110 (1989).

70. See Fleming, *supra* note 2, at 113.

71. 302 U.S. 319 (1937).

72. *Id.* at 325.

73. *Id.*

74. Fleming, *supra* note 2, at 115.

75. *Id.* at 114.

76. 388 U.S. 1 (1967).

77. 478 U.S. 186 (1986).

78. Fleming, *supra* note 2, at 114.

79. *Id.*

80. *Id.* at 114.

81. *Id.*

82. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

tradition as a “living thing,” supplementing Harlan’s conception “with a criterion of the *significance* of an asserted ‘unenumerated’ fundamental right for deliberative autonomy.”⁸³ Overall, Fleming’s reconception of the due process inquiry in terms of the significance of a right for deliberative autonomy is a *tour de force*, which these brief remarks can only hint at, hardly doing justice to the depth and scope of his theory. It seems safe to say that any scholar who now tries to advance our understanding of the Due Process Clause will surely have to contend with Fleming’s recasting of the due process inquiry.⁸⁴

Seen in the foregoing light, Sunstein’s warning about the dangers of full theorization and “maximalist” decisions does not seem particularly salient to the autonomy rights that Fleming’s book is intent upon securing. As noted earlier, Fleming has carefully considered the abuses that an unrestrained conception of deliberative autonomy could entail, and he has taken great care to explain how his understanding of autonomy avoids those abuses.⁸⁵ Indeed, Sunstein may find himself confronting the horns of a dilemma: Either he must deny the importance, significance, and exigency of those rights for citizens’ deliberative autonomy and contest the correctness, coherence, and significance of a long line of autonomy and privacy decisions stretching across most of the last century, *or* concede that judicial minimalism and incomplete theorization do not apply to the “bones and shards” of the constitutional culture that Fleming’s “archaeologist” excavates and which Fleming interprets in light of a revised understanding of the due process inquiry.

Many controversial cases in the last half-century have admittedly presented problems of enforcement and application at the time or shortly after they were handed down, including problems of public acceptance of some Supreme Court decisions. But the privacy and autonomy decisions, including *Griswold*, *Eisenstadt v. Baird*,⁸⁶ *Planned Parenthood v. Casey*,⁸⁷ and *Lawrence*,⁸⁸ have arguably met with far less resistance and criticism than the short-lived attempt to arrest the extension of the right to privacy in *Bowers*, which *Lawrence* overruled. Those privacy or autonomy cases are still on the books, and even *Roe*, the mother of all controversial cases, despite some setbacks, has managed to survive. Fleming is right: Decisions like *Brown* and *Griswold*, which led to “methodological crises”⁸⁹ in our legal culture, have now become “fixed stars”⁹⁰ in our constitutional law; they are cases that anyone who aspires to a seat on the Supreme Court, “to stand any chance of being confirmed, must say w[ere] rightly

83. Fleming, *supra* note 2, at 119 (emphasis added).

84. *See id.* at 112-40.

85. *See, e.g., id.* at 123-27 (discussing the role of history, tradition, and an evolving consensus in relation to autonomy rights).

86. 405 U.S. 438 (1972).

87. 505 U.S. 833 (1992).

88. 539 U.S. 558 (2003).

89. Fleming, *supra* note 2, at 96.

90. *Id.*

decided.”⁹¹ As Fleming says, “it is in our constitutional culture that the most controversial cases of earlier decades become litmus tests for later decades.”⁹²

III. DWORKIN’S CHALLENGE: IS SUNSTEIN A PERFECTIONIST?⁹³

In my discussion of Fleming’s theory, I have already suggested that he and Sunstein are closer than it would seem with regard to perfectionism. Here I will pursue that theme a bit further by summarizing some key aspects of Ronald Dworkin’s related claim that Sunstein’s position is not really opposed to what Dworkin calls the “embedded view”⁹⁴ or to what Sunstein refers to as perfectionism.

Sunstein has often maintained that Dworkin’s legal theory is a form of “perfectionism.”⁹⁵ Similar to Fleming’s theory, Dworkin aims to put the law “in the best light,” which will sometimes, but surely not always, require judges to engage in a fuller theorization of pertinent principles in order to justify a legal decision. For this reason Sunstein considers Dworkin’s jurisprudence the polar opposite of “minimalism.” Although Dworkin challenges some aspects of Sunstein’s theory of “incompleteness,” he nonetheless claims, in *Justice in Robes*, that there is no real difference, “none at all,” between central aspects of their respective core claims.⁹⁶ How can Dworkin possibly arrive at this surprising conclusion? After all, there is a large gap between minimalism and incompletely theorized judgments, on the one hand, and perfectionism and complete theorization, on the other. So how does Dworkin close this gap to the point that he and Sunstein are maintaining virtually identical positions?

We might begin with a brief description of what Dworkin calls the “embedded view,” which encapsulates the core of his theory of legal reasoning.⁹⁷ Very simply, the embedded view holds that principles are embedded in our legal practice, which means that we justify many legal claims only by showing that there are principles of law supporting those claims and providing the best justification of a particular aspect of legal practice in one or another area of the law.⁹⁸ Any legal argument, Dworkin says, “is vulnerable to what we might call *justificatory ascent*.”⁹⁹ Dworkin explains,

91. *Id.* at 96-97.

92. *Id.* at 97.

93. In light of Sunstein’s symposium essay, the question now is whether his position is really a version of “first-order” perfectionism. *See infra* Part IV.

94. *See* Dworkin, *supra* note 15, ch. 2.

95. *See, e.g.,* Sunstein, *supra* note 1, at 32-33; *see also* Sunstein, *Legal Reasoning and Political Conflict*, *supra* note 3, at 48-49.

96. Dworkin, *supra* note 15, at 72.

97. *See id.* at 51-57.

98. *See id.* at 51-52.

99. *Id.* at 52-53 (emphasis added).

When we raise our eyes a bit from the particular cases that seem most on point immediately, and look at neighboring areas of the law, or maybe even raise our eyes quite a bit and look in general . . . we may find a serious threat to our claim that the principle we were about to endorse allows us to see our legal practices in their best light. For we may discover that that principle is inconsistent with, or in some other way sorts badly with, some other principle that we must rely on to justify some other and larger part of the law.¹⁰⁰

It should be noted, however, that Dworkin's "justificatory ascent," while a constant threat, is not always or even often necessary. "Most of the time," he says,

it will not [materialize], at least in a serious and time-consuming way, and we can cheerfully proceed on the footing of what we might call very local priority—in effect, looking no further in our interpretive arguments than the statutes or cases directly dealing with the matter at hand. But justificatory ascent is always, as it were, on the cards: we cannot rule it out a priori because we never know when a legal claim that seemed pedestrian and even indisputable may suddenly be challenged by a new and potentially revolutionary attack from a higher level.¹⁰¹

From all of this we might conclude that the label of perfectionism does not really suit Dworkin's theory very well. Dworkin himself describes his view as "law as integrity,"¹⁰² which in a way advocates nothing more complicated than principled consistency: If our law contains principles that govern the resolution of cases or controversies, the proper thing is to acknowledge the salience of those principles. What gets Dworkin in trouble with many of his critics, apparently including Sunstein, is the mythical judge he invented, "Hercules," who has an extraordinary, perhaps superhuman, grasp of the law in its entirety.¹⁰³ But Dworkin never meant that Hercules was a model for real lawyers to follow or imitate. Hercules is rather a heuristic device that Dworkin uses to show how a godlike creature would know all the connections between the various departments of law as well as their applicability to an infinite number of cases that fall within one or another area of the law. Moreover, unlike real lawyers and judges, Hercules is pictured as reasoning about the law from the "outside-in," mastering each field of law and the interconnections among all the fields before he considers his first concrete case. But that is not how real lawyers work:

Ordinary people, lawyers, and judges cannot do much of that. We reason from the inside-out: we begin with discrete problems forced upon us by occupation or responsibility or chance, and the scope of our inquiry is severely limited, not only by the time we have available, but by the arguments we happen actually to encounter or imagine. A judge

100. *Id.* at 53.

101. *Id.* at 54.

102. *Id.*

103. *Id.* at 55.

reasoning from the inside-out will rarely find either the time or the need to undertake long, laborious research or argument. Sometimes, however, he will.¹⁰⁴

Dworkin's story of the mythical Hercules, like his story of the mythical goddess of science, Minerva,¹⁰⁵ are in no way models for real judges or scientists, but they help to "explain why the ladder of theoretical ascent is always there, on the cards, even when no one is tempted to take even the first step up it . . . to reexamine some part of the structure [of law or science] from time to time, though we can never be sure, in advance when and how."¹⁰⁶ Lawyers, judges, and scientists can certainly do their work without Hercules and Minerva, that is, without thinking about the vast, interconnected domain of their disciplines. But they know from experience that their arguments and decisions are always vulnerable to "justificatory ascent." As noted earlier, Sunstein acknowledges that some cases cannot be decided "at all" or "well" without an expedition into theory.¹⁰⁷ If we take "Hercules" off the table, since this mythical figure is not an intrinsic or indispensable part of Dworkin's theory of legal reasoning, then Dworkin's claim that there is no difference, "none at all," between his own and Sunstein's views is quite compelling. In the last analysis, perhaps Fleming, Sunstein, Dworkin, and the rest of us are all perfectionists.

IV. POSTSCRIPT

Sunstein's symposium essay, *Second-Order Perfectionism*,¹⁰⁸ confirms my conclusion (and my earlier suggestions in this essay) that he does embrace perfectionism, albeit a restrained or "second-order" perfectionism. What is new here is his claim that some form of perfectionism is not just acceptable but even inevitable, so that he is no longer opposed to perfectionism as such. But since he views minimalism as a form of second-order perfectionism that is superior to the first-order variety that he sees in Dworkin and Fleming, his position has not really changed except for his use of the perfectionist label. Yet the grounds for his reservations about first-order perfectionism remain unpersuasive. He says that "[a]ny approach to constitutional interpretation must pay close attention to the problem of judicial fallibility, and for that reason, second-order perfectionism has great appeal."¹⁰⁹ Minimalists, he argues, must reject the ideal of deliberative autonomy because "such an ideal threatens to make constitutional law worse rather than better."¹¹⁰ As I have argued above, however, the threat that Sunstein wants to avoid by means of minimalism is greatly

104. *Id.* at 54-55.

105. *See id.* at 55-56.

106. *Id.* at 56.

107. *See supra* text accompanying notes 33-36 (discussing Sunstein's position in relation to the *Griswold* case).

108. Cass Sunstein, *Second-Order Perfectionism*, 75 *Fordham L. Rev.* 2867 (2007).

109. *Id.* at 2882.

110. *Id.* at 2881.

exaggerated. For one thing, Dworkin's "embedded view" and the notion of "justificatory ascent" are virtually inevitable characteristics of judicial decision making from time to time: If a judge is persuaded that the resolution of a particular case requires a search for higher justification, the counsel of judicial fallibility is unlikely to restrain a good-faith search for that higher ground.

Sunstein may be right in saying that "there is no guarantee that real-world judges . . . will be able to execute Fleming's project in a way that Fleming or anyone else would approve."¹¹¹ But he overlooks Fleming's careful and disciplined approach to the evolution of the contents of deliberative autonomy. In light of the many cases on autonomy or privacy that constitute the "bones and shards" of Fleming's constitutional culture of deliberative autonomy, it is difficult to take seriously the dangerous aberrations that Sunstein fears would result from the adoption of Fleming's theory.

In the last analysis, first-order and second-order perfectionism can and should coexist, a point that both Dworkin and, I believe, Fleming can accept. Of course, for a variety of reasons, it may be that second-order perfectionism, based on minimalism and incompletely theorized judgments and agreements, will outnumber first-order perfectionist decisions by a substantial margin. What is important is the recognition that first-order perfectionism is both legitimate and, at times, a necessary modality of judicial decisions.

111. *Id.* at 2880.

Notes & Observations