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Response

Liberal Constitutionalism and Liberal Justice

Cass R. Sunstein*

The Framers of the American Constitution hoped to create a deliberative democracy. They also believed in a modest role for the judiciary. Both the hope and the belief were deepened during the Civil War and New Deal periods. If modern constitutional interpreters were guided by the same basic idea of deliberative democracy—with its apparently limited role for the judiciary—what would happen to our constitutional rights as we now know them?

It seems clear that a well-functioning deliberative democracy would include a large set of rights, including, above all, rights of political participation and political (not economic) equality.¹ Nonetheless, a system of deliberative democracy might well fall short of what would be required in a fully just society. Broad rights of privacy would not necessarily flourish in such a system. So, too, a system of deliberative democracy might slight at least some rights of conscience, including the right to speak freely when politics is not involved. It therefore seems reasonable to ask whether we might not be quite wrong to root our theory of constitutionalism or constitutional interpretation in a theory of democracy, whether deliberative or otherwise. Would not such an effort provide an unnecessarily truncated system of rights? Many of the great liberals, including Mill and Rawls, offer considerable support for deliberative democracy.² But most of the

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1. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 133-41 (1993).

2. See, e.g., JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 42 (Currin V. Shields ed., 1958) (1861) (describing the ideal form of government as one in which every citizen participates); JOHN STUART MILL, *ON LIBERTY*, in *ON LIBERTY AND OTHER WRITINGS* 5, 102 (Stefan Collini ed., 1989) (1859) [hereinafter MILL, *ON LIBERTY*] (discussing the right of citizens to make decisions by mutual agreement); JOHN RAWLS, *POLITICAL LIBERALISM* 5-6 (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*] (reasoning that each citizen in a constitutional democracy is entitled to an adequate scheme of rights in which political liberties are guaranteed their fair value); *id.* at 227 (discussing constitutional essentials); *id.* at 356-63 (arguing for fair value of political liberty); JOHN

great liberals, emphatically including Mill and Rawls, point to a far broader set of rights than those that follow from democracy alone.³

Invoking ideas of this sort, Professor Fleming's illuminating paper argues that deliberative democracy is too partial and thin a source of constitutional safeguards.⁴ This guiding ideal fails to furnish the full set of guarantees that emerge from a proper exercise in constitutional constructivism.⁵ In his view, the ideal stresses republican rights⁶ without sufficiently respecting liberal protections against government intrusions into what is properly taken as the private sphere.⁷ Thus Professor Fleming argues for constitutional protection of liberty of conscience, autonomy, and freedom of association, even if these rights cannot be associated with democracy itself.⁸ More particularly, Professor Fleming argues that the rights to choose abortion and to engage in consensual sexual activity find a secure home in autonomy principles even if democratic equality is not at stake.⁹

There is an obvious affinity between Rawlsian principles and those that emerge from deliberative democracy.¹⁰ But Professor Fleming argues for what he considers to be a more thoroughly Rawlsian approach to constitutional interpretation,¹¹ an approach that would stress the interest in

RAWLS, A THEORY OF JUSTICE 356-62 (1971) (contrasting deliberative democracy with market conceptions of democracy).

3. See MILL, ON LIBERTY, *supra* note 2, at 15-16 (arguing that a free society cannot place unwarranted limitations on the liberties of conscience, preference, and association); RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 5-6 (including nonpolitical rights among those protected by the two principles of justice).

4. See James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 278 (1993).

5. I do not discuss here the question whether, at the level of constitutional method, it might be best to adopt an alternative to constitutional constructivism. At the broadest level, all theories of interpretation—including, for example, those of Judge Bork and Justice Scalia—are exercises in constructivism, at least in the very general sense that they attempt to make sense rather than nonsense out of the constitutional system. The real question is: Constructivism of what sort?

6. These rights are emphatically liberal too; they are crucial liberties of the moderns. See SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 264-75 (1993) (describing a liberal commitment to government by discussion); MILL, ON LIBERTY, *supra* note 2, at 15 (noting that the rights and interests of every person are secure from being disregarded only where every person is able to assert them); RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 5-6 (stating that political rights are essential to political liberty).

7. Of course, the private sphere, including property rights, might well be seen as a precondition for a well-functioning democracy. See JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 9-10 (1988) (noting, for example, the utilitarian argument that private ownership of property promotes efficiency and social prosperity).

8. See Fleming, *supra* note 4, at 280.

9. See *id.* at 253-55.

10. Many non-Rawlsian theories push in the same general direction. See SUNSTEIN, *supra* note 1, at 141; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 247-49 (1993) (both noting diverse sources of deliberative democracy).

11. There are considerable difficulties in "applying" Rawls's approach to constitutional inter-

autonomy even if that interest is not clearly connected with democratic considerations.

In this space, I cannot discuss the many valuable points that Professor Fleming raises. Instead I will identify one possible line of response to his challenge to an approach that I have defended, a response that begins by stressing the difference between a theory of a just society on the one hand and a theory of constitutionalism or constitutional interpretation on the other.¹² I do not contend that the interests in freedom of conscience, privacy, and autonomy¹³ do not belong in a good constitution, or that these interests should not be recognized by reviewing courts.¹⁴ But it is at least possible that the interest in deliberative democracy provides a good account of constitutional interpretation even if it offers an inadequate theory of justice, and that it is therefore worthwhile to stress that interest even if we acknowledge that it does not exhaust the appropriate concerns of justice or constitutionalism.

Begin by distinguishing among three sets of rights. The first consists of those that are protected by a good society. The second consists of those that are enumerated in a good constitution. The third consists of those that are safeguarded by courts operating in the name of an existing constitution.

It should be clear that these three sets of rights need not be coextensive.¹⁵ Under imaginable social circumstances, a good constitution might

pretation, as Professor Fleming is of course aware, and so I am not sure whether a Rawlsian form of constitutional constructivism would diverge from one based on deliberative democracy.

12. I do not understand Professor Fleming to reject this distinction. I emphasize it here as background for the discussion of the key issue of judicial interpretation of the Constitution.

13. Autonomy does not, however, require respect for all conceptions of the good, regardless of the reasons offered on their behalf, or of their origins and consequences. For example, we might safeguard autonomy of the perfectionist sort defended by Joseph Raz. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 381 (1986) (describing a form of autonomy that attends to the background conditions under which conceptions of the good are formed). While avoiding perfectionism, Rawls has emphasized background conditions in many places. See, e.g., John Rawls, *The Basic Structure as Subject*, 14 AM. PHIL. Q. 159 (1977). The debate between political and perfectionist forms of liberalism raises many complexities that I cannot address here.

14. For two reasons, a commitment to deliberative democracy should further many of the interests that concern Professor Fleming. First, that commitment calls for protection of some such interests, prominently including liberty of conscience, which is a precondition for democracy. See SUNSTEIN, *supra* note 1, at 142 (describing the repression of opposing views as antithetical to democracy). Second, privacy and autonomy are often at risk because of an absence of political equality, and therefore a kind of democratic failure is at work. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *Roe v. Wade*, 410 U.S. 113 (1973), and *Griswold v. Connecticut*, 381 U.S. 479 (1965) are all examples. See Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 132-37 (1991) (advocating equality principles as a narrower alternative to substantive due process). But Professor Fleming is right to say that democratic concerns do not capture all of what is at stake.

15. Rawls thus distinguishes between the "constitutional essentials" and other requirements of justice, principally on grounds of urgency, ease of determining compliance, and ease of obtaining general social agreement. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 227-30.

omit certain rights that a just society ultimately would furnish.¹⁶ The distinction might be justified on various grounds, including the difficulty of obtaining agreement on the relevant rights at the constitutional stage¹⁷ and the likelihood that those rights will be adequately guaranteed through ordinary political processes. In the United States, for example, it is reasonable to think that freedom of contract or environmental protection are important goods that should not be recognized in the Constitution.¹⁸ In Eastern Europe, we might believe that there is no special reason to constitutionalize the welfare state, even if its guarantees are properly part of a decent society; perhaps there is no risk that the welfare state will be jeopardized by the new regimes. One of a constitution's distinctive roles—especially in the realm of rights—is to counteract predictable problems in the ordinary politics of particular nations. For this reason a constitution might not guarantee rights that, while a part of a good society, are not at particular risk in the politics of the country for which the constitution is designed. More generally, a constitution might be thought to be a mechanism for carrying out certain practical tasks, and if we focus on those practical goals, we might end up with a document that does not by any means track the best theory of justice.

So much for the possibility that the requirements of justice are not coextensive with the requirements of a good constitution. There is also a difference between what a good constitution requires and what courts ought to be willing to mandate during the process of interpreting an existing constitution. Two points are relevant here. First, courts charged with the duty of interpretation should attend to constitutional text, structure, and history, and these constraints on interpretation should produce substantial differences between the meaning of the existing document and (what the judges believe to be) a good constitutional provision on the subject at hand.¹⁹ Second, it is important for judges to build into the interpretive process a considerable degree of modesty stemming from their lack of either fact-finding competence or a good electoral pedigree. It should not

16. I am putting to one side here the complex relations among justice, rights, and the quality of life furnished in a good society.

17. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 227-30.

18. Nothing turns on whether the examples are well chosen. I put to one side the questions raised by positing rights to collective goods.

19. There are complex issues lurking in the background here. No document is self-interpreting; background principles are always at least implicitly at work. For different views, see I BRUCE ACKERMAN, *WE THE PEOPLE* 264 (1991) (arguing that the Supreme Court should integrate the people's "expression of constitutional will" into the existing constitutional framework); RONALD DWORIN, *LAW'S EMPIRE* 360 (1986) ("Every conscientious judge . . . is an interpretivist in the broadest sense: each tries to impose the best interpretation on our constitutional structure and practice, to see these, all things considered, in the best light they can bear."); SUNSTEIN, *supra* note 1, at 93-161 (describing the principles underlying constitutional interpretation).

be necessary to stress that judges are often unable to bring about significant social reform on their own.²⁰ Because of the need for a high level of judicial modesty, we might not be surprised to find significant traces of the seemingly narrow political question doctrine throughout constitutional law in general—as constitutional rights are judicially “underenforced,” and properly so, because of the courts’ distinctive limitations.²¹

These points will lead to sharp differences between judicially enforceable rights on the one hand and, on the other, rights that are a part of a just society or that belong in a good constitution. Even if, for example, rights to subsistence and health care qualify as rights that a good society would recognize, they might well be deemed absent from our Constitution if judges use the ordinary sources of interpretation. And even if such rights can be found through those sources—even if text, structure, and history leave room to maneuver—judges might believe that these rights are not properly subject to judicial enforcement. The courts may lack the tools that are required for successful implementation; their efforts may be futile or counterproductive. In any case, reasonable people might think that judges should be especially cautious in these (and many other²²) areas. It seems, then, that the category of judicially enforceable rights is a subset of the category of genuine constitutional rights, and that the category of genuine constitutional rights is in turn a subset of the category of rights recognized in a just society.

Professor Fleming is convincing in his claim that rights without a source in democratic deliberation nonetheless deserve to be protected in a just society. He is also persuasive in saying that a just society concentrates on rights of autonomy as well as rights of democratic equality.²³ Nor should it be denied that judges interpreting a good constitution, including ours, might protect autonomy under (for example) the free speech guarantee of the First Amendment, the free exercise guarantee of the same amendment, and (here much more controversially²⁴) the Due Process

20. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 336-43 (1992) (contending that courts can effect significant social reform only under special conditions).

21. See Lawrence G. Sager, *Fair Measure: The Legal Status of Unenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1226 (1978) (arguing that a federal court’s refusal to decide an issue because of institutional propriety is not decisive of constitutional substance).

22. To take a recent example, consider the issue of whether homosexuals should be permitted to serve in the military. I do not mean to resolve that issue here, but it is at least plausible to say that courts should not invalidate a discriminatory plan in this complex context, but also to insist that any such plan should be presumed or found unconstitutional by Congress and the President.

23. Some autonomy rights may be necessary, however, in significant part because of the absence of equality. *Bowers v. Hardwick*, 478 U.S. 186 (1986), is a possible example. See *supra* note 14.

24. Part of the controversy stems from the obvious textual obstacle to substantive due process, which is nonetheless well established; perhaps the same basic notion could have had a much happier home in the adjacent clause protecting privileges and immunities. See Akhil R. Amar, *The Bill of*

Clauses of the Fifth and Fourteenth Amendments. There is thus real room for judicial protection of autonomy rights of this kind, even if those rights have little or nothing to do with democracy or deliberation. In these circumstances it seems best to say that deliberative democracy is an important source of both constitutional rights and interpretive principles, but far from exhaustive; the two words capture only a part of the picture.²⁵ On this score I agree with Professor Fleming.

We might, however, want to make some distinctions here, distinctions that are geared to the differences among just societies, just constitutions, and a good role for reviewing courts. First, there is the distinction between what justice requires and what belongs in a just constitution. Undoubtedly a just constitution recognizes autonomy of various sorts; but whether and how it does so depends on a range of highly contingent matters. Property rights, for example, seem important to personal autonomy, but it is at least not clear that the Canadians have made a major mistake in omitting such rights from their Charter of Rights and Freedoms, which has constitutional status.²⁶ The case for firm constitutional protection of property rights—a case often made out in terms of autonomy—has far more force in contemporary Russia than in Canada or the United States.²⁷ I do not mean to argue against giving constitutional recognition to rights of autonomy, privacy, and conscience; but not all such rights belong in every constitution. This is a matter that cannot be resolved on the basis of first principles. We need to know a lot of details.

Now turn to the issue of judicial enforcement of the Constitution, the central topic here. Building on Ely, I propose that judicial enforcement is most readily defensible when democratic concerns come to the fore—not because such concerns are merely procedural (they are not), and not because democratic rights are more important than anything else (they are not), but because the principles that underlie appropriate judicial modesty are weakest in that setting (which is not to say that they are decisive

Rights and the Fourteenth Amendment, 101 YALE L.J. 1193, 1220, 1264 (1992) (proposing a refined model of incorporation of substantive guarantees into the Fourteenth Amendment's Privileges or Immunities Clause). Part of the controversy stems also from nontextual concerns about judicial definition of fundamental rights, concerns that seem to me legitimate for reasons suggested below.

25. Compare the discussion of capabilities and functionings in AMARTYA SEN, *INEQUALITY REEXAMINED* 4-5, 39-55 (1992), with Martha Nussbaum, *Aristotelian Social Democracy*, in *LIBERALISM AND THE GOOD* 203, 225 (R. Bruce Douglass et al. eds., 1990). The items appearing in these discussions are not limited to democratic considerations, and they could not plausibly all be included in a constitution.

26. See CAN. CONST. (Constitution Act, 1982) pt. I (Charter of Rights and Freedoms), § 7 (excluding a general takings clause, but declaring that everyone has a right to, and the right to be free from the deprivation of, life, liberty, and security of person).

27. See Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 922 (1993) (explaining the need for constitutionally protected property rights in countries like those in Eastern Europe where culture and tradition threaten those rights).

elsewhere).²⁸ If courts do not protect the preconditions for democratic government, the risks to liberty may be very grave. The predicate for judicial caution evaporates when, for example, a group has been disenfranchised or when the right of political protest has been violated. It follows that vigorous judicial protection of political speech is fully justified, indeed more fully justified than judicial protection of many other rights.

To be sure, there is a good argument for judicial protection of free speech on grounds not of democracy but of autonomy; that argument helps explain the grant of constitutional protection to nonpolitical art and literature.²⁹ But for purposes of thinking about judicial review, there is a real difference between censorship of art and censorship of criticism of government, and the difference stems from the fact that ample protection of political speech is a precondition for a well-functioning constitutional democracy. When the state invades rights that follow from the commitment to deliberative democracy, there is reason to fear that political processes will not be able to correct themselves.³⁰ And when there is no problem from the democratic point of view, the relevant intrusions may well be unjust but properly subject to remedy not via the judiciary, but either through (a) public deliberation about constitutional goals or (b) public deliberation unaffected by the Constitution at all. We might reach this conclusion because the Constitution simply does not speak to the intrusions or because the founding document speaks, or should be taken to speak, to the elected branches rather than to courts.

It is important in this connection to note that the category of fundamental rights is highly contested in our society; consider debates over such diverse things as property rights, contractual rights, welfare rights, and rights of sexual choice. Judges are themselves in sharp disagreement on these matters. Even if we think that Professor Fleming's version of constitutional constructivism has it about right, we might believe that the judicial definition of fundamental rights under the Due Process Clause—a definition operating without much textual or historical help—ought to be very cautious, in part because of the difficulty of obtaining broad social agreement on these questions. When we are dealing with judicial protection of non-democratic rights, the risks of error—its likelihood and cost—are very high, and the potential benefits are highly speculative. When courts are protecting democratic deliberation—an ideal built deeply into American constitutionalism and unusually susceptible to both definition and development—the benefits are likely to be great, and the risks are far lower.

28. See JOHN H. ELY, *DEMOCRACY AND DISTRUST* 87-104 (1980).

29. See SUNSTEIN, *supra* note 10, at 137-48. Much more must, of course, be said on the constitutionally central issue of religion. This is a significant gap in *The Partial Constitution*. See SUNSTEIN, *supra* note 1.

30. For the classic statement of this view, see ELY, *supra* note 28, at 103.

This judgment cannot be defended by an algorithm, but I think that it is an important lesson of our history, as well as of an inquiry into the institutional characteristics of judges and legislatures. Some platitudes are worth repeating: So long as democratic goals³¹ are met, judges should allow majorities to make (what judges consider to be) some mistakes, even if those mistakes involve (what judges consider to be) injustice. The realm of what is judicially enforced as unconstitutional is not coextensive with the realm of the unjust as judicially conceived, even though some judges may be able to offer especially persuasive accounts.

In light of widespread social disagreements over what justice requires, then, the Constitution should allow considerable scope for experimentation and debate (subject to the significant constraints of deliberative democracy). The same is even more emphatically true of a theory of constitutional interpretation, because the appropriate theory ought to insist on constraining the judges, and because in the absence of judicial agreement on the requirements of justice, courts ought to focus principally on violations of democratic commitments³² and also on what is realistically redressable by judges. For this reason, it is unclear that the interest in privacy or autonomy, standing by itself, provides an adequate defense of *Roe v. Wade*³³ or an adequate attack on *Bowers v. Hardwick*.³⁴ I cannot discuss these complex cases here; no general theory can substitute for concrete engagement with particular problems and particular provisions. But at least it seems less adventurous to rely on equal protection principles, because those principles provide a narrower and, I think, more secure basis for decision.

Let me conclude with a brief summary. A theory of constitutional interpretation³⁵ that amounted to a full-blown theory of just outcomes would offer inadequate room for democratic rule, at least if that theory did not allow judges to permit participants in democracy to make some errors, including errors from the standpoint of justice.³⁶ To state it more precisely:

31. Of course these are contested too. I am arguing that it is appropriate for courts to take the Constitution as sharply delimiting the ingredients of democratic deliberation, while also allowing the political process a measure of discretion in defining fundamental interests.

32. See *Confirmation of Ruth Bader Ginsburg as Supreme Court Justice: Hearings Before the Senate Judiciary Comm.*, 103d Cong., 1st Sess. (July 21, 1993), available in LEXIS, Legis Library, Fednew File (statement of Judge Ginsburg) (“[W]hen political avenues become dead-end streets, judicial intervention in the politics of the people may be essential in order to have effective politics.”).

33. 410 U.S. 113 (1973).

34. 478 U.S. 186 (1986). Here I am not responding to Professor Fleming, who argues for invocation of both liberty and equality, rather than reliance on either standing alone. See Fleming, *supra* note 4, at 253-55.

35. I am speaking here of interpretation within the judiciary; there is less need for constraint when interpretation is occurring elsewhere. See SUNSTEIN, *supra* note 1, at 140 (discussing the meaning of constitutional obligations “outside the courtroom”).

36. On this view, Ronald Dworkin’s influential and powerful conception of constitutional interpretation is not sufficiently democratic, and it does not sufficiently engage the many risks raised

Democracy is itself a requirement of justice, and in any case there are large difficulties in adapting any theory of justice for use in constitutional interpretation, where we are dealing with at best a second-best world, one that requires constraints on judicial discretion. The appropriate theory of justice, adapted for such a world, may well call for a theory of constitutional interpretation based principally—if not exclusively—on deliberative democracy,³⁷ because that theory allows the requisite space for democratic rule, that is, the space implied by the appropriate theory of justice.

To say this is not to deny that a good constitution, including ours, ought to the extent fairly possible³⁸ to be interpreted so as to help counteract the most conspicuous and serious failures of justice, even if those failures cannot be connected with democratic goals. But I hope that I have said enough to show why there is a significant space between a theory of justice and a theory of constitutional interpretation. I think that because of this space, courts should defer to legislative judgments involving some intrusions on privacy and autonomy.

by judicial discretion. See, for example, Dworkin's well-known essay, *Liberalism*, with its three-level theory: Markets are seen as reflecting an appropriate neutrality among competing conceptions of the good, and as having considerable normative force, except that they need correction for market failures of various sorts; democracy offers that correction; but democracy allows for external preferences, and so constitutionalism is a check on it. See RONALD DWORKIN, *Liberalism, in A MATTER OF PRINCIPLE* 181 (1985). I cannot discuss here the many questions raised by this view, but it may be apparent that it allows very little space for democracy between the larger defining ideals of markets and constitutionalism. See also the discussion of Dworkin in SUNSTEIN, *supra* note 1, at 344-45.

37. I think that this suggestion is in the general spirit of Rawls's own approach, which allows some aspects of the preferred theory of justice to be excluded from the constitutional essentials. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 227-30 (proposing that some requirements of justice are not constitutional essentials).

38. I refer here to the constraints of text, history, and structure.

