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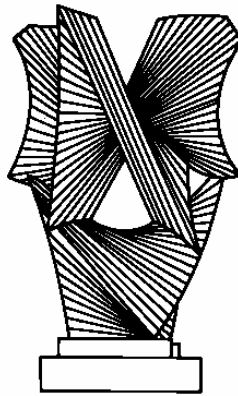
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Second-Order Perfectionism

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Second-Order Perfectionism

Cass R. Sunstein *

Abstract

In constitutional law, first-order perfectionism represents an effort to cast the Constitution's ideals in the best constructive light. Ronald Dworkin's conception of law as "integrity" can be seen as a form of first-order perfectionism. By contrast, second-order perfectionism attempts to set out an account of constitutional adjudication that is sensitive to the fallibility of federal judges. Originalism is best defended as a form of second-order perfectionism; the same can be said of Thayerism, captured in the view that judges should uphold statutes unless they are unquestionably violative of the Constitution. Minimalism, which calls for narrow, incompletely theorized judgments, is another form of second-order perfectionism. Whether first-order perfectionism is best, and what kind of second-order perfectionism might be chosen instead, cannot be decided without an appreciation of the characteristics of relevant institutions. Under certain institutional assumptions, originalism is preferable; under other assumptions, first-order perfectionism, Thayerism, or minimalism may be the right approach. Freestanding normative assessments are also inescapable. For example, originalism cannot be evaluated without some kind of assessment of the results that it would produce. These claims have implications for first-order perfectionism of the sort defended by Dworkin and more recently by James Fleming.

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I. Thayerville, Bergerton, and Other Places

No approach to constitutional interpretation makes sense in every possible world. The argument for any particular approach must depend, in part, on a set of judgments about institutional capacities.¹

Consider the view, associated with James Bradley Thayer, that courts should uphold legislation unless it is plainly in violation of the Constitution.² Few people accept this position today. But imagine a society—let us call it Thayerville—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. In Thayerville, racial segregation does not occur; political speech is not banned; the legitimate claims of religious minorities and property holders are respected; the systems of federalism and separation of powers are safeguarded, and precisely to the right extent, by democratic institutions. Imagine too that in Thayerville, judicial judgments are highly unreliable. For example, judges make systematic blunders, from the standpoint of political morality, when they attempt to give content to constitutional terms such as “equal protection of the laws” and “due process of law.” In such a society, a Thayerian approach to the Constitution would make a great deal of sense, and judges should be persuaded to adopt it.³

Or consider originalism: the view that the Constitution should be construed to fit with the original public meaning of the document.⁴ Imagine a society—let us call it Bergerton⁵—in which the original public meaning is quite excellent, in the sense that it ensures well-functioning institutions and protects a robust set of rights, in a way that fits with a reasonable account of both democracy and autonomy. Imagine that in Bergerton,

¹ An illuminating and vigorous argument to this effect can be found in Adrian Vermeule, *Judging Under Uncertainty* (2005).

² See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129 (1893)

³ I put to one side the evident fact that Thayerism is not a complete account of constitutional interpretation. We might agree that courts should strike down statutes only when the violation of the Constitution is clear; but how do we know when the violation is clear? To work, Thayerism needs to be supplemented by some kind of account of constitutional meaning.

⁴ Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1998).

⁵ See Raoul Berger, *Government by Judiciary* (1977). Berger is concerned with original intentions, rather than original meaning, but for present purposes we can put that disagreement to one side, as a within-the-family issue in Bergerton.

the democratic process is also very fair and good, in part because of the excellence of the Constitution, and that it is entirely able to make up for any inadequacies in the founding document. Suppose finally that in Bergerton, judges, unleashed from the original public meaning, would do a great deal of harm, unsettling well-functioning institutions and recognizing, as rights, interests that do not deserve that recognition. In such a society, an originalist approach to constitutional interpretation would seem best.

Or consider minimalism: the view that judges should take narrow, theoretically unambitious steps, at least when they lack the experience or the information to rule broadly or ambitiously.⁶ Imagine a society—it happens to be called Smallville—in which the original public meaning of the Constitution is not so excellent, in the sense that it does not adequately protect rights. Imagine that in Smallville, the democratic process is good but not great, in the sense that it sometimes produces, or permits, significant injustices. Suppose finally that in Smallville, judges will do poorly if they strike out on their own, but very well if they build modestly on their own precedents, following something like the common law method. In such a society, a minimalist approach to the Constitution would have a lot to be said for it.⁷

Or consider perfectionism: the view that the Constitution should be construed in a way that makes it best, and in that sense perfects it.⁸ Imagine a society—proudly called Olympus—in which the original public meaning of the document does not adequately protect rights, properly understood. Imagine that the text is general enough to be read to provide that protection. Imagine finally that Olympian courts, loosened from Thayerian strictures, or from the original understanding, or from minimalism, would generate a far better account of rights and institutions, creating the preconditions for both democracy and autonomy. In Olympus, a perfectionist approach to the Constitution would be entirely appropriate.

Is any one of these approaches ruled off the table by the Constitution itself? If the founding document set out the rules for its own interpretation, judges would be bound by

⁶ See Cass R. Sunstein, *One Case At A Time* (1999).

⁷ Of course there are many different kinds of minimalism; to say that courts should take small, incompletely theorized steps is not to say where they should go. For discussion, see Cass R. Sunstein, *Burkean Minimalism*, *Mich L Rev* (forthcoming 2006).

⁸ See Ronald Dworkin, *Law's Empire* (1985); James Fleming, *Securing Constitutional Democracy* (2006).

those rules (though any such rules would themselves need to be construed). But the document sets out no such rules. It does not say that judges, or others attempting to interpret the document, should be Thayerians, originalists, minimalists, perfectionists, or something else. For this reason, any approach to the document must be defended by reference to some account that is supplied by the interpreter. The Constitution is rightly taken as binding, but to this extent, the Constitution must be made rather than found.

It is possible to go further. Any approach to the founding document must be perfectionist in the sense that it attempts to make the document as good as it can possibly be. Thayerism is a form of perfectionism; it claims to improve the constitutional order. Originalism, read most sympathetically, is a form of perfectionism; it suggests that constitutional democracy, properly understood, is best constructed through originalism. Minimalism is a form of perfectionism too; it rejects Thayerism and originalism on the ground that they would make the constitutional system much worse.⁹ It would appear that the debate among Thayerians, originalists, minimalists, and perfectionists must be waged on the perfectionists' own turf. And if this is so, perfectionists are right to insist that any approach to the Constitution must attempt to fit and to justify it. Perhaps the alternatives to perfectionism are all, in one or another sense, perfectionist too.

Some people might resist this conclusion. Pragmatists might not much care about "fit"; on one view, consequences are what matter, and a forward-looking approach, compromising fit for the sake of good consequences, might well be justified.¹⁰ Perhaps Thayerians and originalists would compromise fit as well. For some originalists, illegitimate precedents, departing from the original understanding, have little standing.¹¹ But if we understand perfectionism with sufficient capaciousness, its critics are actually perfectionists too. Pragmatists care deeply about fit, if only for pragmatic reasons; an approach to the Constitution that jettisons precedents, or that pays no attention to the document itself, would be difficult to defend on pragmatic grounds. Many originalists do care about fit with precedents.¹² Those who do not, or who are willing to reject

⁹ See Sunstein, *Radicals in Robes*, for an elaboration.

¹⁰ See Richard A. Posner, *Law, Pragmatism, and Democracy* (2002).

¹¹ See the discussion of Justice Thomas' views in Sunstein, *supra* note.

¹² See the discussion of Justice Scalia's views in *id.*

precedents that they deem illegitimate, certainly care about fit—but what matters is fit with the original understanding, not with the decisions that departed from it.

The ideas of “fit” and “justification” leave many ambiguities. “Fit” with what? Justified by reference to what? But if we understand the two ideas broadly enough, all reasonable views about constitutional interpretation are perfectionist in character. Even those who emphasize occasional or frequent unhappy endings to constitutional adjudication, in the form of judicial decisions that produce particular results that they abhor, believe that the ultimate ending is good rather than bad, in the sense that it produces more in the way of self-government, or legitimacy, or other important values.

My basic goal in this Essay is to sketch the argument for *second-order perfectionism*—a form of perfectionism that is alert to institutional limits on the part of those who are entrusted with interpreting the founding document. Because of my focus on institutional capacities, I shall be focusing throughout on constitutional interpretation by the judiciary. From the discussion of Thayerville, Bergerton, and their surrounding communities, it should be clear that there is no reason that citizens and their representatives should be required to adopt the same method that judges favor.¹³ On the view that I shall be defending, it is possible that citizens will adopt first-order perfectionism, while judges will settle on a second-order variety. We might believe, for example, that citizens might interpret the Constitution to require states to permit same-sex marriage, or to ban affirmative action, without thinking that judges should interpret the Constitution the same way. Of course it is also possible that citizens do not need constitutional ideals, or constitutional text, to pursue their preferred views. Perhaps their own ideals will do the trick.

II. On the Very Idea of Interpretation

Does the idea of interpretation, standing by itself, require acceptance of any particular approach to the Constitution? Some people believe so.¹⁴ To understand second-order perfectionism and the alternatives, it is necessary to address this question.

¹³ The idea of constitutional interpretation outside of courts is explored from various angles in James Fleming, *Securing Constitutional Democracy* (2006); Cass R. Sunstein, *The Partial Constitution* (1993).

¹⁴ See, e.g., Prakash, *Radicals in Tweed Jackets: Why Left-Wing Law Professors Are Wrong for America*, *Colum L Rev* (forthcoming 2007).

A. Meaning and Intentions

Perhaps some form of originalism is mandated by the very notion of interpretation.¹⁵ In ordinary life, we interpret words by asking about the speaker's original intentions. If a friend asks you to meet her at "the best Chinese restaurant in town," you will probably ask what, exactly, she had in mind. You will not ask what Chinese restaurant you like best, or which Chinese restaurant is preferred by your favorite restaurant critic. Perhaps legal interpretation is not fundamentally different; perhaps some form of originalism is built into the concept of interpretation.

This idea is tempting but mistaken. When speaker's intentions are what matters, it is for pragmatic reasons, not because of anything inherent in interpretation as a social practice. We ask about the intentions of the speaker because and to the extent that the goal of communication will go badly, or at least less well, if we do not. When a friend asks me to meet her, or to do something for her, I am likely to ask about her intentions, because I want to meet her, or to do what she would like. Or consider communication within some hierarchical organization. If a supervisor tells an employer what to do, it is plausible to think that in ordinary circumstances, the employee ought to ask: "What, exactly, did my supervisor mean by that?"¹⁶ The employee asks this question, if he does, for pragmatic reasons. Employees should generally follow the instructions of their supervisors, and the practice of following instructions, in hierarchical organizations, usually calls for close attention to subjective intentions.

But it is easy to think of cases in which interpretation does not operate by reference to speaker's intentions. In fact the most sophisticated originalists contend that what matters is the original public meaning, not intentions at all.¹⁷ Their interest in the original public meaning, as opposed to intentions, is defended on the plausible ground that public meaning is objective, not subjective, and that what matters is the standard understanding among the Constitution's ratifiers, not what any authors "intended." After all, the ratifiers, and not the authors, turned the Constitution into law. Of course those

¹⁵ Id.

¹⁶ The qualification "in ordinary circumstances" is necessary because even subordinates will sometimes ask about something other than speaker's intentions. Everything depends on the role of the subordinate.

¹⁷ See Scalia, *supra* note.

who make this claim insist on originalism, but they do not care about subjective intentions. By itself, this understanding of originalism should be enough to show that attention to subjective intentions is hardly built into the very idea of interpretation.

In fact those who emphasize the original meaning tend not to argue that their approach is what interpretation necessarily is, but to adopt a form of second-order perfectionism.¹⁸ They stress the risks associated with judicial discretion; they focus on the goal of democratic self-government. Consider the illuminating suggestion by Randy Barnett, a committed originalist: “Given a sufficiently good constitutional text, originalists maintain that better results will be reached overall if government officials—including judges—must stick to the original meaning rather than empowering them to trump that meaning with one that they prefer.”¹⁹ Many originalists contend that their preferred approach justifies the Constitution and of course fits with it. And prominent originalists are concerned too to show that their approach fits not only with the document but also with a great deal of existing doctrine, or at least with those aspects of it that seem least dispensable.²⁰ The point is that those who stress original meaning do not contend that their approach is built into the very idea of interpretation.

Indeed, it is perfectly conventional to find domains in which interpretation occurs without the slightest reference to either original intentions or original meaning. Suppose that the Supreme Court is interpreting a precedent—say, its decision in *Lawrence v. Texas*.²¹ The Court is most unlikely to ask about the subjective intentions of Justice Kennedy, the author of the majority opinion; and it is equally unlikely to inquire into the subjective intentions of those who joined the opinion. Perhaps there is no such intention with respect to the question at hand; perhaps it is not accessible even if it exists. In any case the Court shows no interest in it. Nor will the Court pay attention to the original public meaning of its decision (whatever that might mean!). Interpretation of a precedent has little to do with original intentions or original meaning. The appropriate conclusion is that originalism is one approach to interpretation, but it is merely one. The question is whether it is the right one, and that question requires attention not to the concept of

¹⁸ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U Cin L Rev 849 (1989).

¹⁹ Available at http://legalaffairs.org/webexclusive/debateclub_cie0505.msp.

²⁰ See Akhil Amar, *Rethinking Originalism*, Slate (2005), available at <http://www.slate.com/id/2126680/>

²¹ 539 U.S. 558 (2003).

interpretation but to the consequences of the recommended approach—to whether it would make our constitutional order better or worse.

B. Fit and Justification

Evidently building on judicial approaches to precedents, Ronald Dworkin suggests that interpretation requires an effort both to fit and to justify the existing legal materials.²² The requirement of “fit” calls for fidelity to the material that is being interpreted. The requirement of justification means that when more than one possibility “fits,” the judge must bring forward what seems to be the best principle that accounts for the existing materials. Dworkin believes that the ideas of fit and justification—captured in his notion of “integrity”—capture the nature of interpretation in many domains.²³ Dworkin may even believe that as a social practice, interpretation *is* a search for integrity in his sense. Strongly influenced by Dworkin, James Fleming offers a similar understanding in his illuminating and impressive book on constitutional interpretation.²⁴ I shall turn to Fleming’s particular arguments shortly; for the moment, let us consider the ideas of fit and justification in connection with first-order and second-order perfectionism.

Suppose that a nation—say, Iraq—has ratified a constitutional provision that forbids any denial of “equality under the law on the basis of sex.” Suppose that the government adopts a height and weight requirement for its security forces and that the requirement turns out to have a disproportionate adverse effect on women. Suppose, finally, that if the government is forced to justify the height and weight requirement on grounds of job-relatedness, it will not find it easy to do so. If the requirement is challenged as a denial of “equality under the law,” what should the Court do?

On Dworkin’s view, the Court must give a “moral reading” to the constitutional provision, in the sense that the Court should generate the best moral principle that accounts for it.²⁵ Offhand, we might imagine a reading that restricts the clause to facial discrimination (call this the “antidiscrimination” principle); we might also imagine a

²² See Ronald Dworkin, *Law’s Empire* (1985).

²³ See *id.*

²⁴ See James Fleming, *Securing Constitutional Democracy* (2006).

²⁵ See Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (2001).

reading that calls on government to account for itself whenever it has imposed a distinctive burden on women (call this the “anticaste” principle). Dworkin’s characteristic style is to identify at least two opposing principles and to suggest that because one is better, the Court ought to choose it.²⁶ But consider another possibility. Perhaps the Court might prefer the anticaste principle as a matter of abstract theory, believing that it makes better sense of the guarantee of equality under the law. But at the same time, the Court might select the antidiscrimination principle, on the ground that it ensures that judges will not be forced to undertake inquiries for which they are ill-suited. The Court might believe that judgments about whether a requirement is sufficiently job-related are extremely burdensome; it might also believe that if judges attempt to make such judgments, they will often blunder. In this respect, judges might conclude that the equality guarantee is properly underenforced by the judiciary; and they might adopt the antidiscrimination principle for that reason.

If courts reason in this way, are they attempting both to fit and to justify our (legal) practices? In one sense, the answer is clear: They are. But even in this mundane example, their perfectionism is second-order, not first-order. They are refusing to adopt the morally preferred account of equality, simply because of a sense of their own fallibility.²⁷

Now imagine that the government has argued not only that the antidiscrimination account is the better one, but also that the Court should uphold sex discrimination so long as it is minimally rational. For the equality guarantee, the government argues that the Court should proceed as it would in *Thayerville*. In my view, that would be an unfortunate reading of an equality guarantee, because it would undermine that guarantee so severely, and because most nations, including contemporary Iraq, are not *Thayerville*. But in the end, that view must also be sensitive to institutional capacities, and it must be defended with close reference to them. Suppose that judges, deciding sex equality cases, would produce worse-than-random decisions. If so, we may be in *Thayerville*, and perhaps the rational basis test would be desirable after all.

²⁶ See, e.g., Ronald Dworkin, *How to Read the Civil Rights Act*, in *A Matter of Principle* 316 (1985).

²⁷ Fleming, unlike Dworkin, agrees that some constitutional protections are underenforced by the judiciary, and properly so. Fleming, *supra* note, at 215.

To be a bit more formal: An approach to the Constitution might impose two kinds of costs. It might impose decision costs, and it might impose error costs. Without making the ludicrous claim that these ideas should be understood in economic terms, we can insist that judges do well to consider the decisional burdens of one or another approach to the founding document. Those burdens, or costs, might be faced by judges or by others, including legislators, members of the executive branch, and citizens themselves, who must pay the cost of uncertainty. A Thayerian approach to the Constitution would certainly impose low decision costs. But it is also important to consider the number and the magnitude of errors. If judges uphold sex discrimination whenever it is rational, they would (in my view) permit a large number of serious errors; and it is for this reason that in the United States, the rational basis test would make no sense in the domain of sex discrimination. We may be in Smallville; we may be in Olympus. But we are certainly not in Bergerton or Thayerville.

The broader point is that no approach to interpretation is dictated by the very idea of interpretation. Originalism is certainly a candidate; it cannot be rejected on a priori grounds. The problem with originalism is that it would make the American system of constitutional law much worse than it now is.²⁸ I believe that while the question is closer, the same is true for Thayerism. Whatever one's judgment about the particulars, some form of perfectionism is inevitable. It is important to fit our practices; it is also important to make sense out of them.²⁹ But in my view, minimalism, as a form of second-order perfectionism, is far better than the first-order variety.

III. Deliberative Democracy and Deliberative Autonomy

To understand these various claims, and the limits of first-order perfectionism, I now turn to the instructive recent discussion by James Fleming.³⁰ Fleming offers a careful and sustained account of what, in his view, constitutional perfectionism requires. One of the many virtues of his book is the unabashed quality of his version of perfectionism. As he understands the Constitution, it does in fact guarantee “happy endings,” and there is

²⁸ See Sunstein, *Radicals in Robes*, *supra* note.

²⁹ In so saying, I am not endorsing Dworkin's particular understanding of fit and justification.

³⁰ See Fleming, *supra* note.

nothing wrong with that fact.³¹ If our goal is to fit and to justify our practices, why should we settle for unhappy endings? The second-order perfectionist has an answer, but that answer ensures that the ending is not quite unhappy, despite some bad bumps along the way. The first-order perfectionist seeks to avoid the bumps.

Designed under the evident influence of John Rawls, Fleming's form of perfectionism is emphatically first-order. He believes that courts should protect deliberative democracy by securing its preconditions, which entail both reflection and accountability. More controversially, Fleming believes that courts should protect deliberative autonomy by protecting a robust right of self-determination. The latter right is "underwritten" by liberty of conscience and freedom of association, though it is not limited to them.³² A more general claim is that we should attempt "to give full meaning to our constitution of principle, a covenant of aspirations and ideals that guarantee the promise of liberty and that must survive more ages than one."³³ As a way of investigating this form of perfectionism, I shall focus on Fleming's claims on behalf of deliberative autonomy, exploring deliberative democracy largely by way of comparison.³⁴

A. Deliberative Autonomy

As Fleming describes it, the idea of deliberative autonomy "tends to expand the categories of protected significant decisions and thus to protect virtually all decisions that persons might make in exercising their capacity for a conception of the good."³⁵ Properly understood, deliberative autonomy does not require libertarianism, in the form of a full-scale attack on the regulatory state; indeed, it "does not justify special judicial protection of economic liberties."³⁶ But it does protect the right of gays and lesbians to engage in intimate association, evidently on the ground that heterosexual intimate association

³¹ Id. at 210-15.

³² Fleming, *supra* note, at 106.

³³ Id. at 127.

³⁴ Sunstein, *supra* note, emphasizes an approach to the Constitution rooted in deliberative democracy; I do not exactly repudiate the approach there, but I believe that the discussion would have been better if it had grappled with the theory-building limitations of the federal judiciary, and explored whether and to what extent a minimalist approach to interpretation might, in the end, fit with one rooted in the ideal of deliberative democracy.

³⁵ Fleming, *supra* note, at 131.

³⁶ Id. at 135.

receives similar protection.³⁷ More generally, deliberative autonomy calls for “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 a children, including the rights to procreate, to use contraceptives, and to terminate a pregnancy; the right to direct the education and rearing of children; and the right to exercise dominion over one’s body, including the right to bodily integrity and ultimately the right to die.”³⁸

To evaluate Fleming’s proposal, we need to ask at the outset: What is the textual source of deliberative autonomy? The first amendment provides an evident textual foundation for “liberal of conscience and freedom of thought,” and also for “freedom of association,” at least of certain kinds. Insofar as people are attempting to speak on political questions or to associate for political purposes, their rights seem constitutionally secure as a textual matter. If a theoretically ambitious account is required, the idea of deliberative democracy, which certainly has historical roots in the founding period,³⁹ is enough; we need not speak of autonomy at all. Protection of some forms of speech may, however, be difficult to defend by reference to deliberative democracy alone. Nonpolitical literature, for example, might be best understood by reference to deliberative autonomy rather than deliberative democracy, and here existing understandings of free speech certainly fit with Fleming’s concerns. The text of the first amendment refers to “freedom of speech,” not “freedom of political speech,” and hence an idea of autonomy, with respect to speech, is not textually out of bounds.⁴⁰

But let us put speech to one side. Insofar as Fleming is stressing autonomy rights outside of the domain of the first amendment, most of his catalogue of rights must be defended by reference to the due process clause, not the first amendment.⁴¹ It should be unnecessary to emphasize that it is a large textual stretch to use the due process clause to protect deliberative autonomy, because the clause speaks in terms of process alone. The

³⁷ Id. at 137.

³⁸ Id. at 11.

³⁹ See William Bessette, *The Mild Voice of Reason* (1985).

⁴⁰ Cass R. Sunstein, *Democracy and the Problem of Free Speech* (1993), defends a two-tier conception of free speech, placing political speech in a preferred position.

⁴¹ I put to one side the question whether the privileges and immunities clause provides a more secure home for autonomy rights.

textual awkwardness of “substantive due process” casts a large and dark shadow over ambitious efforts to protect autonomy in general. On the other hand, some form of substantive due process is an established part of existing law,⁴² and so long as existing law is accepted, the textual stretch is not a decisive objection to Fleming’s proposal.

But it is easy to imagine two kinds of challenges to that proposal, based on first-order and second-order perfectionism respectively. My major concern is the latter. I spend some time on the former not to show that Fleming is wrong on first-order grounds, but to pave the way toward a second-order alternative.

B. Internal Challenges

The first-order challenge could take various forms. Fleming purports to build directly on established law—to defend it far more than to revise it. But suppose that we seek “to protect virtually all decisions that persons might make in exercising their capacity for a conception of the good.” If so, it is most unlikely that we would single out, for special protection, the particular set of interests that Fleming has catalogued. Most of those interests would be strong candidates for inclusion, but the list would be much longer, and it is doubtful that all of those mentioned by Fleming would come near the top.

If deliberative autonomy is involved, Fleming’s catalogue seems both over-inclusive and under-inclusive. Some sex acts are not simple to understand in terms of “deliberative” autonomy; some such acts are impulsive, not deliberative. Does Fleming mean to exclude one-night stands, or one-afternoon stands, or a one-shot visit to a prostitute from the ambit of his proposal? If not, deliberation might not be at the heart of his claims after all. More fundamentally, his list of protected interests seems far too narrow, at least if we focus on the ideal of deliberative autonomy, protecting decisions made as people exercise “their capacity for a conception of the good.” Imagine that people want to ride motorcycles without helmets or cars without seatbelts; that they would like to use heroin, marijuana, or LSD; that they seek a medical treatment unauthorized by the Food and Drug Administration; that they would like to work more hours than is permitted by the Fair Labor Standards Act; that they would like to be prostitutes or drug-dealers; that they would like to clone themselves or their children. Or

⁴² See *Lawrence v. Texas*, 539 US 558 (2003).

imagine that people would like to have a chance to enter some profession. Perhaps they would like to be debt-adjusters, even without a law degree.⁴³ Perhaps they would like to be interior designers, and government is standing in their way with a restriction that is evidently arbitrary or at least weakly justified.⁴⁴

To be sure, it is possible that third-party effects provide a sufficient answer to some of these claims; perhaps the interest in autonomy is overridden because of the effects of free choices on those who are affected by them. But such effects are most unlikely to provide an adequate answer in all or even many of these cases. We might well conclude that people who assert these rights—and many others—are deliberating and attempting to implement their conception of the good. Does Fleming seek to protect them as well? If not, an explanation needs to be offered.⁴⁵ If so, the idea of deliberative autonomy might well seem to have (unacceptably?) radical implications.

On a plausible view, the Constitution would be made worse, not better, with the judicial protection of “all decisions that persons might make in exercising their capacity for a conception of the good.” Suppose, for example, that protection of the right to physician-assisted suicide would lead many people to choose death not after sufficiently considered reflection, but as a result of intense, short-term fears and anxieties. If so, there is a plausible argument that such a right should not exist, because it is not in the interest of the very people on behalf of whose autonomy it is created.⁴⁶ Suppose that this argument is rejected. Even so, it remains possible that if the relevant right is created, it will operate in practice to give doctors, not patients, the authority to make decisions about life and death.⁴⁷ If this empirical prediction turns out to be right, there are serious problem with creating the right to physician-assisted suicide from the perfectionist point of view.

⁴³ See *Ferguson v. Scrupa*, 372 US 726 (1963).

⁴⁴ See http://www.ij.org/economic_liberty/nm_interiordesign/index.html

⁴⁵ Fleming does contend that his approach does not require a general libertarian principle, *Securing Constitutional Democracy*, *supra* note, at 134-37, but there is certainly an overlap between the two is approaches, and I am not sure that he has successfully separated them. He urges that paternalistic laws, of the sort disfavored by libertarians, “typically do not implicate the concerns of the antitotalitarian principle of liberty r infringe on significant basic liberties.” *Id.* at 136. But why not?

⁴⁶ Herbert Hendin, *Seduced By Death* (1996).

⁴⁷ *Id.*

The example could easily be generalized. Many decisions that people “make in exercising their capacity for a conception of the good” turn out not to promote, but instead to undermine, their own well-being.⁴⁸ A detailed literature investigates failures in “affective forecasting,” as when people misjudge the effects of their decisions on their own lives.⁴⁹ Constitutional protection of decisions produced by “miswanting,”⁵⁰ in the form of choices that do not improve people’s welfare, would not seem to be in the interest of the people whose decisions are at stake.

Fleming believes that the Constitution protects the right to marry. But what, exactly, does this mean? On one account of deliberative autonomy, adults should be permitted to marry their cousins or their siblings, or perhaps their parents, or to have multiple spouses. Is the right to polygamy guaranteed by the right to deliberative autonomy? On perfectionist grounds, it would be possible to worry that any such right would turn out harm the interests of some or many people—including, perhaps, many women and children. Perhaps Fleming would conclude that the right to marry is properly limited to two adults, and that the ban on incestuous marriages is consistent with the basic principle, properly conceived. But if the underlying concern is deliberative autonomy, why, exactly, is this limitation justified?

I do not contend that the ideal of deliberative autonomy has no roots in constitutional traditions. Nor do I deny that as a matter of principle, Fleming’s account of autonomy has considerable appeal. In *Olympus*, a judge might well accept an account of that general kind. The question is whether the interest in deliberative autonomy, as Fleming understands it, might have far broader implications than is indicated by Fleming’s catalogue of protected rights. Fortunately, Fleming’s own catalogue is largely anchored on settled law⁵¹—a point to which I will return. But as compared to settled law, the idea of deliberative autonomy has a great deal of generality and ambition; and it might end up leading to outcomes that would make the Constitution less perfect, not more so.

⁴⁸ Daniel T. Gilbert and T.D. Wilson, *Miswanting*, in *Thinking and Feeling: The Role of Affect in Social Cognition* 178 (Joseph P. Forgas ed.) (2000); Timothy D. Wilson and Daniel T. Gilbert, *Affective Forecasting*, 35 *Advances in Experimental Social Psychology* 345 (June 2003).

⁴⁹ See *id.*

⁵⁰ *Id.*

⁵¹ Fleming, *supra* note, at 92.

C. External Challenges: Second-Order Perfectionism

I raise these points not to settle them, but to emphasize a different kind of objection. Suppose that we believe that federal judges are poorly equipped to set out the ingredients of autonomy, deliberative or otherwise. Suppose that we believe that they are likely to blunder—that if they ask about the nature of autonomy in the abstract, they will protect interests that ought not to be protected, and refuse to protect interests that emphatically deserve protection. Some people might fear, for example, that judges are likely to find commercial advertising to be central to autonomy, rightly conceived, or that they will provide undue protection to campaign contributions, or that they will strike down minimum wage and maximum hour legislation. (If this catalogue does not seem especially fearful, it would be easy to produce a catalogue that would.) No one should be surprised by the suggestion that if judges are unleashed to strike down legislation by reference to the idea of “deliberative autonomy,” they might well blunder. Outside of Olympus, there is no guarantee that real-world judges, trained and fallible as they are, will be able to execute Fleming’s project in a way that Fleming or anyone else would approve. If we are concerned about the costs of decisions and the costs of error, in any imaginable form, first-order perfectionism, founded in high ideals, loses some of its appeal.

Recall here the suggestion that originalism might produce the best overall consequences.⁵² To evaluate that suggestion, we need to know something about institutions; we also have to know something about political morality. Suppose that originalism, rightly understood, would greatly limit the powers of the national government, eliminate the right of privacy, strengthen the protection of property and gun owners, and allow the national and state governments to discriminate on the basis of sex. (I am not contending that originalism necessarily would have these consequences.) If so, is the argument for originalism strengthened or weakened? That question cannot be answered without asking whether and to what extent the relevant results are good or bad. We can therefore see that disputes about interpretive approaches have a great deal to do not only with institutional capacities also with moral evaluations of the relevant results. A central objection to originalism is that it would, in fact, produce morally unacceptable

⁵² See Barnett, *supra* note.

outcomes; the same objection seems to me plausibly made against Thayerism as well. I believe that an approach like Fleming's (and Dworkin's as well) would greatly strain judicial capacities, and that in some cases, it would produce results that are questionable from the moral point of view.

Let me offer a simple suggestion in this light. As Fleming shows, our constitutional doctrine is now committed to certain forms of autonomy. Whether these are deliberative forms, and whether they are best understood by reference to a broader right to exercise one's capacities for a conception of the good, might be debated. But there is no question that in specified domains, government may not intrude on people's choices without an exceedingly strong justification. In Smallville, judges value stability and distrust their own capacity to rethink established law from the ground up. Hence they are convinced that they should build on these decisions through rulings that are both narrow and theoretically unambitious (to the extent possible⁵³). Because the abstraction of "deliberative autonomy" is so difficult to handle, the judges of Smallville do not want to march under its banner. They fear that an abstraction of that kind will lead to undue confusion and error. Because they are not too sure that they are right, they proceed by reference to low-level principles that seem at once more manageable and less contentious.⁵⁴

Here is another way to put the point. Heavily influenced by John Rawls, Fleming wants to secure the conditions for free and equal citizenship.⁵⁵ Rawls' own approach to political philosophy seeks to put to one side the great questions in metaphysics and general philosophy, in a way that "leaves philosophy as it is."⁵⁶ (In a wonderful footnote in an unpublished manuscript, Rawls writes: "We post a sign: No deep thinking here. Things are bad enough already.") The goal of political liberalism, as opposed to comprehensive liberalism, is to bracket foundational disputes about human nature, the good, and the like, and to seek general commitments on which diverse people can converge from their different starting points. Minimalists are sympathetic to this goal, but

⁵³ Ronald Dworkin, *Justice in Robes* (2006), rightly insists that judges might have to think fairly ambitiously to resolve hard cases

⁵⁴ For this reason, Edward Levi, *An Introduction to Legal Reasoning* (1949), with its emphasis on "reasoning by example," continues to offer useful guidance about legal reasoning in the constitutional domain.

⁵⁵ See, e.g., Fleming, *supra* note, at 14.

⁵⁶ See John Rawls, Reply to Habermas, 92 *J Phil* 132, 134 (1995).

they attempt to go one step further. They seek incompletely theorized agreements—particular judgments and low-level rationales that people can accept notwithstanding their disagreements or uncertainties about foundational questions.⁵⁷ In short, minimalists want to leave political philosophy as it is—to bracket, whenever possible,⁵⁸ controversies over the right form of liberalism, or even between liberalism and its adversaries.

For minimalists, the problem with the ideal of deliberative autonomy is that it extends far beyond the decided cases, and requires judges to ask questions that they are not well-suited to answer. Minimalists do not reject that ideal, but they are not prepared to endorse it. Their commitment to second-order perfectionism prevents them from doing so, on the ground that endorsement of such an ideal threatens to make constitutional law worse rather than better.

Conclusion

My main goal in this Essay has been to suggest the appeal of second-order perfectionism—an approach to constitutional interpretation that recognizes the limitations of the federal judiciary, especially in the domain of political and moral reasoning. We should be willing to agree that in some sense, interpreters of the document have duties of both fit and justification. Where the requirement of fit leaves several possibilities, judges have to think about what approach would be best. Judgments of political morality are in that sense an indispensable part of any view about how to interpret the Constitution. The arguments for and against originalism, and for and against Thayerism, must pay considerable attention to the results that they would generate, and hence those with different evaluative positions will offer different judgments about those results. If originalism and Thayerism would permit racial segregation or sex discrimination, how strongly, exactly, does that fact count against the two approaches?

If the goal is to perfect the Constitution, neither originalism nor Thayerism can easily be ruled out of bounds, at least if we attend to the fallibility of judges; both can be understood as forms of second-order perfectionism. In some possible worlds, originalism is best; Thayerism is best in others. Minimalist approaches also embody a form of

⁵⁷ See Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996).

⁵⁸ But see Dworkin, *supra* note.

second-order perfectionism. And if all this is right, it remains possible to argue that first-order perfectionism makes sense for political participants and their representatives, even if judges should be more firmly constrained.

On its face, the idea of a “moral reading” of the Constitution is ambiguous. That idea could call for case-by-case judgments about what morality requires, constrained by the existing legal materials.⁵⁹ Alternatively, it could accommodate an approach, itself justified on grounds of political morality, that forbids or sharply disciplines those judgments. Certainly it cannot be shown, by reference to the abstract ideas of fit and justification, that second-order perfectionism is inferior to first-order varieties. On the contrary, it is not obviously false to say that a form of minimalism, at least in the most difficult cases, fits our practices and also justifies them.

The ideal of deliberative democracy can be specified in different ways, and if we believe that judges are unlikely to make sensible specifications, we might be skeptical about the suggestion that the Constitution should be construed in light of that ideal. In my view, however, American judges tend to do well, at least in hard cases, when they approach the Constitution’s general phrases with reference to deliberative democracy.⁶⁰ The question of institutional capacity is different when judges are attempting to give content to the ideal of “autonomy,” even if we disregard the apparently procedural character of the due process clause. To be sure, the ideal of autonomy is not undisciplined in the domain of speech and religion, where it can be cabined by reference to both settled law and widely shared intuitions. But for “liberty” in general, reasonable people can and do disagree, more than vigorously, about what autonomy ought to be taken to entail. For judges, an effort to protect autonomy, or deliberative autonomy, would impose serious decisional burdens, and in the end it is not at all clear that American democracy would be better as a result.

With respect to autonomy, I have suggested that judges do best, if they can, to build narrowly from previous rulings, in a way that avoids theoretical abstractions. Of course it is true that in hard cases, a degree of theoretical ambition will become inevitable. It is also true that a number of decisions now protect autonomy of one or

⁵⁹ This seems to me the direction indicated by Dworkin, *Freedom’s Law*, *supra* note.

⁶⁰ An argument to this general effect can be found in Stephen Breyer, *Active Liberty* (2006).

another sort, and current controversies must pay close attention to those decisions. But where there is no problem from the standpoint of self-government, and no unjustifiable inequality, I believe that judges should usually give democratic processes the benefit of the reasonable doubt. However that may be, the largest point remains: Any approach to constitutional interpretation must pay close attention to the problem of judicial fallibility, and for that reason, second-order perfectionism has a great deal of appeal.

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