

2007

## Second-Order Perfectionism

Cass R. Sunstein

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



Part of the [Law Commons](#)

---

### Recommended Citation

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

Available at: <https://ir.lawnet.fordham.edu/flr/vol75/iss6/6>

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

---

## Second-Order Perfectionism

### Cover Page Footnote

Karl N. Llewellyn Distinguished Service Professor, Law School and Department of Political Science, University of Chicago. This essay was originally prepared for a symposium at Fordham Law School entitled Minimalism Versus Perfectionism in Constitutional Theory Participants in that Symposium provided valuable help. I am also grateful to Abner Greene and Brian Leiter for excellent comments on a previous draft.

## SECOND-ORDER PERFECTIONISM

Cass R. Sunstein\*

### 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.<sup>1</sup>

Consider the view, associated with James Bradley Thayer, that courts should uphold legislation unless it is plainly in violation of the Constitution.<sup>2</sup> 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; and the systems of federalism and separation of powers are safeguarded, 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.<sup>3</sup>

Or consider originalism: the view that the Constitution should be construed to fit with the original public meaning of the document.<sup>4</sup> Imagine

---

\* Karl N. Llewellyn Distinguished Service Professor, Law School and Department of Political Science, University of Chicago. This essay was originally prepared for a symposium at Fordham Law School entitled *Minimalism Versus Perfectionism in Constitutional Theory* Participants in that Symposium provided valuable help. I am also grateful to Abner Greene and Brian Leiter for excellent comments on a previous draft.

1. An illuminating and vigorous argument to this effect can be found in Adrian Vermeule, *Judging Under Uncertainty* (2006).

2. See generally James B. 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. See generally Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997).

a society—let us call it Bergerton<sup>5</sup>—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. Imagine that 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 those 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.<sup>6</sup> 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 be quite attractive.<sup>7</sup>

Or consider perfectionism: the view that the Constitution should be construed in a way that makes it best, and in that sense perfects it.<sup>8</sup> 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 seem to be entirely appropriate.<sup>9</sup>

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

---

5. See generally Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (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.

6. See generally Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (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 further discussion, see Cass R. Sunstein, *Burkean Minimalism*, 105 Mich. L. Rev. 353 (2006).

8. See generally Ronald Dworkin, *Law's Empire* (1986); James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* (2006).

9. I put to one side potential conflicts between Olympian practices and democratic self-government on the ground that by hypothesis Olympian judges create no such conflicts.

be bound by 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 anything 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.<sup>10</sup> It would appear that the debate among Thayerians, originalists, minimalists, and perfectionists must be waged on the perfectionists' own turf. 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 some sense, perfectionist too.

Some people might resist this conclusion. Pragmatists might not care very much 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.<sup>11</sup> Perhaps Thayerians and originalists would compromise fit as well. For some originalists, illegitimate precedents, departing from the original understanding, have little standing.<sup>12</sup> But if we understand perfectionism with sufficient capaciousness, its critics are actually practitioners too. Sensible 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.<sup>13</sup> Those who do not, or who are willing to reject 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? 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

---

10. For an elaboration, see Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* (2005).

11. See generally Richard A. Posner, *Law, Pragmatism, and Democracy* (2003).

12. See Sunstein, *supra* note 10, at 26 (discussing Justice Clarence Thomas's views).

13. See *id.* (discussing Justice Antonin Scalia's views).

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.<sup>14</sup> On the view that I shall be defending, it is fully possible that citizens will adopt first-order perfectionism, while judges will settle on a second-order variety. We might believe, for example, that citizens should interpret the Constitution to require states to permit same-sex marriage, or to ban affirmative action, or to provide broad protection of property rights, 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.<sup>15</sup> To understand second-order perfectionism and the alternatives, it is necessary to address this question.

### A. *Meaning and Intentions*

Perhaps some form of originalism is mandated by the very notion of interpretation.<sup>16</sup> 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 which Chinese restaurant you like best, or which Chinese restaurant your favorite restaurant critic prefers. 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 a speaker's intentions are what matter, it is for pragmatic reasons, not because of anything inherent in

---

14. The idea of constitutional interpretation outside of courts is explored from various angles in Fleming, *supra* note 8, and Cass R. Sunstein, *The Partial Constitution* (1993).

15. See, e.g., Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 *Colum. L. Rev.* 2207 (2006) (reviewing Sunstein, *supra* note 10)).

16. *Id.* at 2226-32.

interpretation as a social practice. We ask about the speaker's intentions 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 employee 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?"<sup>17</sup> 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 the speaker's intentions. In fact, the most sophisticated originalists contend that what matters is the original public meaning, not intentions at all.<sup>18</sup> They defend their interest in the original public meaning, as opposed to the original intentions, 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 who make this claim insist on originalism, but they do not care about subjective intentions. My point is not to say that the original meaning should be taken as binding. It is only to say that this understanding of originalism—as involving public meaning rather than intentions—should be enough to show that attention to subjective intentions is hardly built into the very idea of interpretation.

In fact, many of 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.<sup>19</sup> 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."<sup>20</sup> Many originalists contend that their preferred approach justifies the Constitution and, of course, fits with it. Prominent originalists also want to

---

17. 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.

18. See Scalia, *supra* note 4, at 129-49.

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

20. Posting of Randy Barnett to [http://legalaffairs.org/webexclusive/debateclub\\_cie0505.msp](http://legalaffairs.org/webexclusive/debateclub_cie0505.msp) (May 2, 2005, 13:43 EST).

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.<sup>21</sup> The point is that those who stress original meaning do not contend that their approach is built into the very idea of interpretation.

To be sure, that idea does impose constraints; not everything can be counted as “interpretation.” Even if it is pragmatically best to substitute the best Constitution for our own, the substitution cannot qualify as interpretation. But the idea of interpretation does not compel any form of originalism. 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 U.S. Supreme Court is interpreting a precedent—for example, its decision in *Lawrence v. Texas*.<sup>22</sup> The Court is most unlikely to ask about the subjective intentions of Justice Anthony Kennedy, the author of the majority opinion,<sup>23</sup> 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. That question requires attention not to the concept of 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.<sup>24</sup> 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”—help explain the nature of interpretation in many domains.<sup>25</sup> 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

---

21. See Akhil Reed Amar, *Rethinking Originalism: Original Intent for Liberals (and for Conservatives and Moderates, Too)*, *Slate*, Sept. 21, 2005, <http://www.slate.com/id/2126680/>.

22. 539 U.S. 558 (2003).

23. *Id.* at 561.

24. See generally Dworkin, *supra* note 8.

25. See *id.*



and impressive book on constitutional interpretation.<sup>26</sup> 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 a court in Iraq do?

On Dworkin's view, the Iraqi 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.<sup>27</sup> Offhand, we might imagine a reading that restricts the clause to facial discrimination (call this the “antidiscrimination” principle); we might also imagine a reading that calls on government to justify itself in convincing terms 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 Iraqi court ought to choose it.<sup>28</sup> But consider another possibility. 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 under-enforced by the judiciary; 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.<sup>29</sup> Second-order perfectionism, with respect to an equality guarantee, can hardly be ruled out of bounds.

---

26. See Fleming, *supra* note 8, at 210-27.

27. See generally Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996).

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

29. Fleming, unlike Dworkin, agrees that some constitutional protections are under-enforced by the judiciary, and rightly so. See Fleming, *supra* note 8, at 215.

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.

To be a bit more systematic: 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 purely 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. 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 or 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 is now.<sup>30</sup> 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 of them.<sup>31</sup> 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

---

30. See Sunstein, *supra* note 10, at 54-78.

31. In so saying, I am not endorsing Dworkin's particular understanding of fit and justification, nor am I denying the possibility that fit should be emphasized for purely pragmatic reasons.

Fleming.<sup>32</sup> 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 nothing wrong with that fact.<sup>33</sup> 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 safeguard deliberative autonomy by protecting a robust right of self-determination. The latter right is “underwrit[ten]” by liberty of conscience and freedom of association, though it is not limited to them.<sup>34</sup> 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.”<sup>35</sup> As a way of investigating this form of perfectionism, I focus on Fleming’s claims on behalf of deliberative autonomy, exploring deliberative democracy largely by way of comparison.<sup>36</sup>

#### A. *Deliberative Autonomy*

As Fleming describes it, the idea of 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.”<sup>37</sup> But it does protect a wide range of individual rights, including the right of gays and lesbians to engage in intimate association, evidently on the ground that heterosexual intimate association receives similar protection.<sup>38</sup> 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 children, including the rights to procreate, to use

---

32. See Fleming, *supra* note 8.

33. *Id.* at 210-15.

34. *Id.* at 106.

35. *Id.* at 126-27.

36. Sunstein, *supra* note 10, 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.

37. Fleming, *supra* note 8, at 135.

38. *Id.* at 137.

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.<sup>39</sup>

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 "liberty of conscience and freedom of thought,"<sup>40</sup> and also for "freedom of association,"<sup>41</sup> at least of certain kinds.<sup>42</sup> Insofar as people are attempting to speak on political questions or to associate for political purposes, their rights seem constitutionally secure or at least plausible 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,<sup>43</sup> 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; 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.<sup>44</sup>

But let us put speech to one side. Insofar as Fleming stresses autonomy rights outside 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.<sup>45</sup> 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.<sup>46</sup> The textual awkwardness of "substantive due process" casts a large and dark shadow over ambitious efforts to protect autonomy in general. Notwithstanding this problem, it is true that some form of substantive due process is an established part of existing law,<sup>47</sup> and so long as existing law

---

39. *Id.* at 11.

40. *Id.*

41. *Id.*

42. *See* U.S. Const. amend. I.

43. *See generally* Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (1994).

44. *See generally* Cass R. Sunstein, *Democracy and the Problem of Free Speech* (1993) (defending a two-tiered conception of free speech, placing political speech in a preferred position).

45. I put to one side the question of whether the Privileges and Immunities Clause provides a more secure home for autonomy rights. *See* U.S. Const. amend. XIV, § 1.

46. *See id.* ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

47. *See* *Lawrence v. Texas*, 539 U.S. 558 (2003).

is accepted, the textual stretch might not be taken as 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.<sup>48</sup> But suppose that we seek deliberative autonomy as such. 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. Fleming, of course, is not unaware of this point, but I think it raises serious questions about his proposal.

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. Imagine that people want to ride motorcycles without wearing helmets or drive cars without wearing seatbelts; that they would like to use heroin, marijuana, cocaine, 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; or that they would like to clone themselves or their children. Or 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.<sup>49</sup> Perhaps they would like to be interior designers, and the government is standing in their way with a restriction that is evidently arbitrary or at least weakly justified.<sup>50</sup>

---

48. See Fleming, *supra* note 8, at 89-140.

49. See *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (holding that a Kansas law requiring debt adjusters to have law degrees did not offend constitutional principles of equal protection).

50. See Institute for Justice, *Economic Liberty Cases: New Mexico Interior Design*, [http://www.ij.org/economic\\_liberty/nm\\_interiordesign/index.html](http://www.ij.org/economic_liberty/nm_interiordesign/index.html) (last visited Mar. 30, 2007) (discussing a challenge to the New Mexico law that prohibits people from calling themselves "interior designers" without a government license).

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 about and attempting to implement their own conception of the good. Does Fleming seek to protect them as well? If not, an explanation must be offered.<sup>51</sup> If so, the idea of deliberative autonomy might well seem to have (unacceptably?) radical implications. To be sure, Fleming builds on existing doctrine and attempts to rationalize it. But might it not be a problem if the rationalization would lead, possibly or certainly, to many results that the Court is unprepared to reach, and that it probably should decline to reach?

It would not be unreasonable to fear that the Constitution would be made worse, not better, with the judicial protection of deliberative autonomy as such. 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.<sup>52</sup> Even if this argument is rejected, it remains possible that, if the right is created, it will operate in practice to give doctors, not patients, the authority to make decisions about life and death.<sup>53</sup> If this empirical prediction turns out to be correct, there are serious problems, from the perfectionist point of view, with creating the right to physician-assisted suicide.

This example could easily be generalized. Many decisions that people make as part of what they might well consider to be their deliberative autonomy turn out not to promote, but instead to undermine, their own well-being.<sup>54</sup> Bounded rationality is often the problem. A detailed literature investigates failures in “affective forecasting,” as when people

---

51. Fleming does contend that his approach does not require a general libertarian principle. Fleming, *supra* note 8, at 134-37. But there is certainly an overlap between the two 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 or infringe on significant basic liberties.” *Id.* at 136. But why not?

52. See generally Herbert Hendin, *Seduced By Death: Doctors, Patients, and Assisted Suicide* (1998).

53. See *id.* at 215-28 (discussing who should decide for patients in a coma or diagnosed with dementia).

54. See generally Daniel T. Gilbert & Timothy D. Wilson, *Miswanting: Some Problems in the Forecasting of Future Affective States*, in *Feeling and Thinking: The Role of Affect in Social Cognition* 178 (Joseph P. Forgas ed., 2000) [hereinafter Gilbert & Wilson, *Miswanting*]; Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 *Advances Experimental Soc. Psychol.* 345 (2003) [hereinafter Wilson & Gilbert, *Affective Forecasting*].

misjudge the effects of their decisions on their own lives.<sup>55</sup> Constitutional protection of decisions produced by “miswanting,”<sup>56</sup> 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.

Perhaps autonomy, rather than welfare, should be our lodestar; Fleming appears to think so.<sup>57</sup> But this is a controversial view within political philosophy, and even if autonomy is our guiding principle, it is unclear that governments must respect decisions produced by bounded rationality.

Fleming believes that the Constitution protects the right to marry.<sup>58</sup> But what, exactly, does this mean? On one account of deliberative autonomy, adults should be permitted to marry their cousins, 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 to 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 indicated by Fleming’s catalogue of protected rights. Fortunately, Fleming does not offer a “top down” account of constitutional doctrine; his own catalogue is largely anchored on settled law<sup>59</sup>—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.

### 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

---

55. See Wilson & Gilbert, *Affective Forecasting*, *supra* note 54, at 345-46.

56. See Gilbert & Wilson, *Miswanting*, *supra* note 54.

57. See Fleming, *supra* note 8, at 3.

58. *Id.* at 11.

59. *Id.* at 92.

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 Olympos, 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 on high ideals, loses some of its appeal, at least as an enterprise for judges.<sup>60</sup>

Recall here the suggestion that originalism might produce the best overall consequences.<sup>61</sup> 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 holders and gun owners, and allow the national and state governments to discriminate on the basis of sex. (I do not contend 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, but also with moral evaluations of the relevant results. A central objection to originalism is that it would produce morally unacceptable outcomes. The same objection could plausibly be made against Thayerism as well. I believe Fleming’s (and Dworkin’s) approach 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

---

60. Of course Fleming is not focused solely on judges, and my objections here do not go to his proposals for constitutional interpretation outside of the judiciary.

61. See Posting of Randy Barnett, *supra* note 20.



possible<sup>62</sup>). 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.<sup>63</sup>

Here is another way to illustrate the point: Heavily influenced by John Rawls, Fleming wants to secure the conditions for free and equal citizenship.<sup>64</sup> Rawls’s 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.”<sup>65</sup> 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 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.<sup>66</sup> In short, minimalists want to leave political philosophy as it is—to put to one side, whenever possible,<sup>67</sup> 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

In this essay I have tried 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

---

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

63. For this reason, Edward H. Levi’s *An Introduction to Legal Reasoning*, with its emphasis on “reasoning by example,” continues to offer useful guidance about legal reasoning in the constitutional domain. Edward H. Levi, *An Introduction to Legal Reasoning* 1 (1949).

64. See, e.g., Fleming, *supra* note 8, at 14.

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

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

67. *But see* Dworkin, *supra* note 62 (emphasizing the need for conceptual ascent in some cases).

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 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.<sup>68</sup> 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.<sup>69</sup> The question of institutional capacity is different when judges attempt 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 entail. For judges, an effort to protect autonomy, or deliberative autonomy, would

---

68. This seems to me the direction indicated by Dworkin, *supra* note 27.

69. Justice Stephen Breyer makes an argument to this general effect. See generally Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2006).

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 suggest 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 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 great appeal.

*Notes & Observations*