

# Securing Constitutional Democracy: The Case of Autonomy

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The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men

Justice Louis D. Brandeis

## I. Securing Constitutional Democracy

- A. Let me begin by acknowledging the ambiguity of my title, Securing Constitutional Democracy.
- B. First, let me read a famous passage by Justice Brandeis: read from above.
- C. My theory of securing constitutional democracy, in the spirit of Justice Brandeis's famous formulation concerning the right to privacy, undertakes to "secure conditions favorable to the pursuit of happiness."
- D. My book is not about national security.
- E. I do have a chapter on securing constitutional democracy itself in circumstances of war and crisis, but that is not my central focus.
- F. To clear up the ambiguity, University of Chicago press added the subtitle: "The Case of Autonomy."

## II. The Problem of Grounding Autonomy in Constitutional Law

- A. Justice Brandeis's famous celebration of the constitutional right to privacy or autonomy as the "right to be let alone" sowed the seeds of paradox in constitutional law.
  - 1. The right is "the most comprehensive of rights," yet constitutional scholars and jurists have devoted more effort to narrowing, bounding, or "cabining" it than they have given any other right.

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2. It is "the right most valued by civilized men," yet scholars and jurists have repeatedly claimed either that it is trivial or that it is wild, unruly, and dangerous.
3. Indeed, controversy over the meaning, scope, and constitutional status of this right is so widespread and durable that it all but defines the post-1960s era of constitutional adjudication.
  - a. Conservative Robert H. Bork calls the right to privacy "a loose canon in the law" and its announcement in *Griswold v. Connecticut* (1965) the "construction of a constitutional time bomb."
  - b. Feminist Catharine A. MacKinnon attacks it as "a right of men 'to be let alone' to oppress women one at a time" in private realms of sanctified isolation.
  - c. Civic republican Michael J. Sandel and communitarian Mary Ann Glendon contend that theorists who defend the right to autonomy conceive persons as "lone rights-bearers" who are "unencumbered" by the bonds of community.
  - d. And liberal John Hart Ely belittles "the right to be different" as an upper-middle-class right: "the right of my son to wear his hair as long as he pleases."
4. Can a right with such prominent critics from across the ideological spectrum be grounded in constitutional law?
5. The most dramatic recent occasion for this question was *Lawrence v. Texas* (2003), in which a bitterly divided Supreme Court held that a law criminalizing same-sex sodomy violated a homosexual's right to privacy or autonomy.
  - a. Justice Anthony Kennedy's opinion for the Court proclaimed that decisions about sexual conduct and relationships involve "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy" and that "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state" (quoting *Planned Parenthood v. Casey* [1992], which reaffirmed the central holding of *Roe v. Wade* [1973] that the right to privacy encompasses the right to abortion). Kennedy declared that it "demeans the lives" of homosexuals to respect the right of heterosexuals to autonomy without respecting an analogous right for them.

b. In dissent, Justice Antonin Scalia ridiculed this "sweet-mystery-of-life passage" from *Casey* and chastised the Court for "mak[ing] no effort to cabin the scope of its decision." He castigated Kennedy's opinion for putting the Court on a slippery slope leading to "the end of all morals legislation." If, said, Scalia, states may not enact their moral disapproval of homosexual sodomy, they may not in principle enact their disapproval of "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity." For him, homosexuals' intimate sexual conduct is analogous to such traditional morals offenses, not to heterosexuals' autonomy regarding intimate associations. Scalia further scolded the Court for "tak[ing] sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."

B. I respond to these controversies by grounding autonomy in a theory of securing constitutional democracy, a guiding framework with two fundamental themes:

1. first, securing the basic liberties that are preconditions for *deliberative democracy* to enable citizens to apply their capacity for a conception of justice to deliberating about and judging the justice of basic institutions and social policies as well as the common good, and
2. second, securing the basic liberties that are preconditions for *deliberative autonomy* to enable citizens to apply their capacity for a conception of the good to deliberating about and deciding how to live their own lives.
3. Together, these two themes afford everyone the status of free and equal citizenship in our morally pluralistic constitutional democracy.
4. They reflect two bedrock structures of our constitutional scheme: deliberative political and personal self-government.
5. As against charges that rights of autonomy like those defended in *Lawrence* and *Casey* are anomalous, unruly, or rootless, I show that deliberative autonomy is rooted, along with deliberative democracy, in the language and overall design of the Constitution.
6. Each theme has a structural role to play in securing and fostering our constitutional democracy.

### III. Beyond Process-Perfecting Theories to a Constitution-Perfecting Theory

A. I put forward a "Constitution-perfecting" theory as an alternative to the well-known

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"process-perfecting" theories advanced by John Hart Ely in *Democracy and Distrust* and Cass Sunstein in *The Partial Constitution*.

1. According to their theories, the Constitution's core commitment is to democracy, and judicial review is justified principally when the processes of democracy, and thus the political decisions resulting from them, are undeserving of trust.
2. Many find such theories alluring because of their promise that judicial review might be supportive of rather than inconsistent with democracy.
3. Process-perfecting theories, however, are vulnerable to the criticism that they reject certain substantive liberties (such as privacy, autonomy, liberty of conscience, and freedom of association) as anomalous in our scheme, except insofar as such liberties can be recast as procedural preconditions for democracy.
4. Yet process-perfecting theories persist, notwithstanding such criticisms, because no one has done for "substance" what Ely has done for "process."
5. That is, no one has developed an alternative substantive Constitution-perfecting theory--a theory that would reinforce not only the procedural liberties (those related to deliberative democracy) but also the substantive liberties (those related to deliberative autonomy) embodied in our Constitution and presupposed by our constitutional democracy--with the elegance and power of Ely's process-perfecting theory.

B. That is what I aspire to do in this book.

1. I develop a Constitution-perfecting theory that secures both the substantive liberties associated with autonomy and the procedural liberties associated with democracy as fundamental, without deriving the former from the latter or, worse, failing to account for substantive liberties altogether.
2. My theory also shows how basic liberties associated with personal autonomy, in conjunction with those related to democratic participation, fit together as a coherent scheme of basic liberties that are integral to our constitutional democracy.
3. Finally, I show that competing theories rest on incomplete and inadequate conceptions of democracy.

IV. Constitutional Democracy and Trustworthiness

A. My Constitution-perfecting theory is thus a theory of constitutional democracy and

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trustworthiness, an alternative to Ely's theory of representative democracy and distrust and to Sunstein's theory of deliberative democracy and impartiality.

1. I mean trustworthiness in the sense of Rawls's remark: "By publicly affirming the basic liberties citizens . . . express their mutual respect for one another as reasonable and trustworthy, as well as their recognition of the worth all citizens attach to their way of life."
2. Each of constitutional constructivism's two themes seeks to secure a type of precondition for the trustworthiness of political decisions in our constitutional democracy.
3. To be trustworthy, a constitutional democracy must secure and respect not only the procedural preconditions for deliberative democracy but also the substantive preconditions for deliberative autonomy.
4. Ely's and Sunstein's process-perfecting theories secure only the former type of precondition for trust or impartiality.
5. Hence constitutional constructivism is a fuller theory of perfecting the trustworthy and impartial Constitution than are Ely's and Sunstein's process-perfecting theories.

V. What is a constitutional constructivism?

- A. My conception of the structures and design of the Constitution stems from a "constitutional constructivism,"
  1. which I mean in both a methodological sense--as a method of interpreting the Constitution--
  2. and a substantive sense--as the substantive political theory that best fits and justifies our constitutional document and our underlying constitutional order.
  3. I develop such a theory by analogy to John Rawls's political constructivism, a theory he developed in *Political Liberalism*.
- B. My theory of constitutional constructivism charts a third way between a universalist view of human rights and legal positivism.
  1. Here I follow Rawls, who advances a political constructivism that seeks to construct principles of justice that provide fair terms of social cooperation on the basis of mutual respect and trust among free and equal citizens in a morally pluralistic constitutional democracy like ours; he does not try to discover principles of justice true for all times and places.

2. Similarly, my constitutional constructivism seeks to interpret our Constitution so as to make it the best it can be.
  3. But it is a theory of constructing *our* Constitution, not one that is *perfectly just* (unmoored by the constraints of our constitutional text, history, and structure, or by those of our practice, tradition, and culture).
- C. In other words, constitutional constructivism is not a theory of natural law or natural rights; it does not conceive constitutional principles and rights as prepolitical and given by a prior and independent order of moral values that is binding for all times and places.
1. Instead, it is what Frank Michelman, analyzing Rawls's political constructivism, calls an "interpretative theory" drawn from the ongoing political practice of a constitutional democracy. Constitutional constructivism draws our principles and rights from our constitutional democracy's ongoing practice, tradition, and culture.
  2. These principles are aspirational--the principles to which we as a people aspire and for which we as a people stand--and though they have a firm footing in our scheme, they may not be fully realized in our historical practices, statute books, and common law.
  3. Accordingly, constitutional constructivism recognizes that while our principles may fit and justify most of our practices, they enable us to criticize some of those practices for failing to live up to our constitutional commitments.
- VI. Constructing Deliberative Autonomy from a List of Familiar "Unenumerated" Fundamental Rights
- A. My argument is not a purely normative argument; instead, it is a constructivist argument. I argue that my theory provides the best fit with and justification of salient features of our Constitution and underlying constitutional order.
  - B. Here is the tack I take: Imagine that you are a constitutional archaeologist who digs up the following bones and shards of a constitutional culture:
    1. Liberty of conscience and freedom of thought;
    2. freedom of association, including both expressive association and intimate association, whatever one's sexual orientation;
    3. the right to live with one's family, whether nuclear or extended;

4. the right to travel or relocate;
  5. the right to marry; the right to decide whether to bear or beget children, including the rights to procreate, to use contraceptives, and to terminate a pregnancy;
  6. the right to direct the education and rearing of children;
  7. and the right to exercise dominion over one's body, including the right to bodily integrity and ultimately the right to die.
- C. You may recognize this as a list of familiar "unenumerated" fundamental rights. The Supreme Court has recognized most of these rights under the categories of privacy, autonomy, or substantive due process. The challenge that you face is to decide whether these bones and shards fit together into, and are justifiable within, a coherent structure.
- D. Let us consider how originalist, process-perfecting, and constructivist archaeologists might view these materials.
- E. If you were an **originalist** archaeologist you might conclude that, because these bones and shards were not specifically enumerated in the constitutional document, you had unearthed the junk pile of the constitutional culture.
1. From that viewpoint, the only thing these relics have in common is that they are anomalies that have nothing to do with the language and design of the Constitution.
  2. Or you might decide that what they have in common is that they evince the hubris and futility of judges episodically succumbing to the temptation of imposing their personal visions of utopia on the polity in the guise of interpreting the Constitution.
  3. Indeed, you might speculate that you had exhumed a ghost town, and that these shards were lying here together because judicial protection of them culminated in the destruction of the Supreme Court and the Constitution.
- F. If you were a **process-perfecting** archaeologist you might conclude, from the fact that many of these bones do not readily fit the procedural mold of representative or deliberative democracy, that they were alien substances, malformed growths on the body of the Constitution.
1. Yet, if you were imaginative, you might reconstruct or recast some of these substantive growths as legitimate procedural appendages to the skeleton.

2. In performing that reconstruction, however, you would have to force fit these bones into the body of the Constitution, lopping them off where necessary and leaving out some of them altogether.
  3. Thus, the fit would be Procrustean, not Herculean.
- G. But if you were a **constructivist** archaeologist, you would accept these bones as stipulated features (or fixed points) of a skeleton that you had a responsibility to construct.
1. You would be able to construct the unity of these bones in a structure of deliberative autonomy that, along with a framework of deliberative democracy, is an integral part of the body of the Constitution.
  2. From that standpoint, you would comprehend that all of these bones constitute rights that reserve to persons the power to deliberate about and decide how to live their own lives, with respect to certain matters unusually important for such personal self-governance, over the course of a complete life (from cradle to grave).
  3. Put another way, the bones represent basic liberties that are significant preconditions for persons' development and exercise of deliberative autonomy in making certain fundamental decisions affecting their destiny, identity, or way of life, and spanning a complete lifetime.
  4. Hence, constructivists would fit these bones together and justify them within a coherent structure of deliberative autonomy in a Constitution that embodies both deliberative autonomy and deliberative democracy as aspects of "a political ideal . . . of a society of citizens both equal and free."
- H. Returning from this imaginary archeological excavation to our constitutional culture, we can find many familiar understandings of deliberative autonomy with respect to the "unenumerated" fundamental rights listed above.
- VII. The Theoretical Architecture of Constitutional Constructivism
- A. The Value of the Apparatus of the Guiding Framework
1. It may be asked why I stress using the apparatus of the guiding framework with two fundamental themes.
  2. I do so because the guiding framework underscores that the basic liberties associated with the second theme of deliberative autonomy, like those related to the first theme of deliberative democracy, have a "structural role to play"

in securing and fostering our constitutional democracy.

3. The guiding framework also demonstrates that constitutional constructivism's conception of citizens (with two moral powers) is writ large in its conception of our Constitution (with two fundamental themes). Here I mean to echo Plato's idea that the constitution of individuals is writ large in the constitution of a state. Constitutional constructivism presents our Constitution as embodying (or aspiring to embody) a coherent scheme of basic liberties fit for use by free and equal citizens, rather than as enacting an antique list appropriate for ancestor worship. And it frames questions of constitutional interpretation in terms of the significance of an asserted liberty for such citizens' application of their two moral powers in the two fundamental cases that arise in our constitutional scheme.
4. Finally, by putting these two fundamental themes of deliberative democracy and deliberative autonomy side by side as reflecting two bedrock structures, the guiding framework invites us to inquire whether homologies exist between these structures (and between the doctrines of constitutional law that they undergird). As Charles Black might put it, rubbing these two stones together may generate some illuminating sparks.

B. Constitutional Constructivism Too Dualistic?

1. Is my formulation of constitutional constructivism's two fundamental themes overly dualistic, dichotomous, or schematic? Does it imply that the realms of political self-government and personal self-government are entirely distinct? I do not mean to suggest this implication. I argue that an adequate unified account in constitutional theory requires both of these themes instead of just one principal theme of democracy.
2. The first reason is **prophylactic**: articulating a constitutional constructivism with these two themes protects us against fleeing from substance to process or to narrowly conceived original understanding by recasting or neglecting substantive liberties.
3. A second, related reason is **architectonic**: presenting our basic liberties by way of the guiding framework illustrates that the two fundamental themes of deliberative democracy and deliberative autonomy are "co-original and of equal weight."
4. The third, more general reason is **heuristic**: articulating our basic liberties through the abstract, simplifying device of the guiding framework with two themes keeps in view that our constitutional scheme is a dualist constitutional democracy, not a monist or majoritarian representative democracy.

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5. A final reason is **elegance**: the importance of being elegant (though not too reductive) in constructing a constitutional theory. A major reason for the attractiveness of Ely's theory of reinforcing representative democracy is its elegance. Ely provides an elegant account of judicial review as perfecting the processes of representative democracy through two intelligible, comprehensive themes: first, keeping the processes of political communication and participation open, and second, keeping those processes free of prejudice against discrete and insular minorities in order to ensure equal concern and respect for everyone alike. By developing a Constitution-perfecting theory with two fundamental themes of deliberative democracy and deliberative autonomy, I attempt to emulate the elegance of Ely's theory without taking a reductive flight from substance to process like that which he takes.

### VIII. Constitutional Imperfections and the Pursuit of Happy Endings: Perfecting Our Imperfect Constitution

- A. Finally, in chapter 10 I discuss constitutional imperfections and the pursuit of what Sanford Levinson has called "happy endings" in constitutional interpretation.
  1. Levinson and others have expressed skepticism about constitutional theories like mine on the ground that they always seem to lead to happy endings: that the Constitution, properly interpreted, requires the result that my normative political theory recommends.
  2. Henry Monaghan famously ridicules such theories as conceptions of "our perfect Constitution."
  3. Christopher Eisgruber helpfully frames this type of criticism in terms of a "no pain, no claim" test.
    - a. The basic idea is that a constitutional theory has no serious claim on our attention unless the theorist putting it forward suffers some pain by acknowledging that the Constitution does not secure everything that she or he would protect in a perfect Constitution
    - b. In response to this challenge, many constitutional theorists have been at pains to demonstrate that their theories sanction all manner of imperfections, tragedies and stupidities, and unhappy endings.
- B. My theory--which I present without apology as a Constitution-perfecting theory--invites perfect Constitution challenges more straightforwardly than perhaps any other theory.
  1. In responding to such challenges I resist the peculiar trend in constitutional

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theory to prove my positivist mettle by making a virtue of all the constitutional imperfections, tragedies and stupidities, and unhappy endings that my theory sanctions.

2. Put another way, I question the wisdom of submitting constitutional theories to perfect Constitution challenges or "no pain, no claim" test.
  3. Our Constitution is indeed imperfect in many ways.
  4. But we should strive to interpret it so as to mitigate its imperfections, to avoid interpretive tragedies or stupidities, and to make it the best it can be.
  5. That is, we should embrace a Constitution-perfecting theory of interpretation, which proudly aims at happy endings rather than reveling in the imperfections that the Constitution might be interpreted to embody.
  6. Instead of a "no pain, no claim" test, I embrace what Eisgruber calls a "no gain, no claim" test.
  7. From this standpoint, a constitutional theory has no serious claim on our attention unless it promises some gain, in the sense that adhering to it might help us realize our constitutional aspirations.
  8. My Constitution-perfecting theory abundantly satisfies the latter test, for it promises the considerable gain of securing the basic liberties associated with deliberative democracy and deliberative autonomy that are preconditions for the trustworthiness of our constitutional democracy.
- C. I close the book with three reasons for embracing a no gain, no claim approach and a Constitution-perfecting theory that aspires to interpret our imperfect Constitution in a manner that might deserve our fidelity.
1. The first reason is hortatory: my Constitution-perfecting theory exhorts judges, elected officials, and citizens to reflect on and deliberate about our deepest principles and highest aspirations as a people. It does not conceive the commitment to fidelity to the Constitution as commanding us to follow the authority of the past. It exhorts us to conceive fidelity in terms of *honoring* our aspirational principles rather than merely *following* our historical practices and concrete original understanding, which no doubt have fallen short of those principles.
  2. The second, related reason is critical: my Constitution-perfecting theory encourages, indeed requires, a reflective, critical attitude toward our history and practices rather than enshrining them. It recognizes that our principles may fit and justify most of our practices or precedents but that they will

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criticize some of them for failing to live up to our constitutional commitments to principles such as liberty and equality. Put another way, my theory does not confuse or conflate our principles and traditions with our history, or our aspirational principles with our historical practices. Again, it recognizes that fidelity to the Constitution requires honoring our aspirational principles, not following our historical practices and concrete original understanding. That is, fidelity to the Constitution requires that we disregard or criticize certain aspects of our history and practices in order to be faithful to the principles embodied in the Constitution.

3. The final reason is justificatory: my Constitution-perfecting theory, because it understands that the quest for fidelity in interpreting our imperfect Constitution exhorts us to interpret it so as to make it the best it can be, gives us hope of interpreting our imperfect Constitution in a manner that may deserve our fidelity, or at least may be able to earn it. It does not enshrine an imperfect Constitution that does not deserve our fidelity. No gain, no claim if we are to secure constitutional democracy.