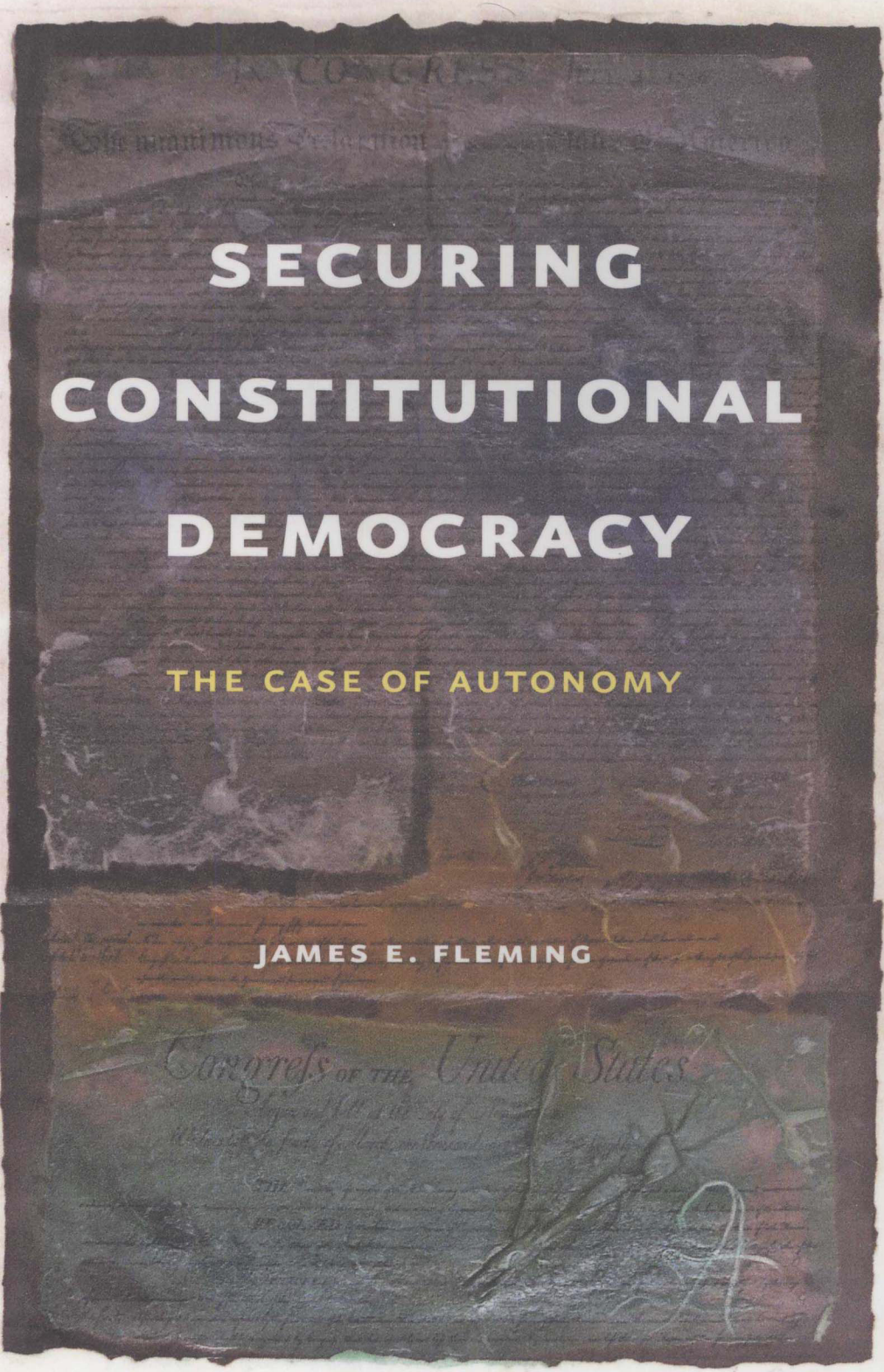

SECURING CONSTITUTIONAL DEMOCRACY

THE CASE OF AUTONOMY

JAMES E. FLEMING

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For Linda, Sarah, and Katherine

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In this book, I put forward a Constitution-perfecting theory, one that aspires to interpret the American Constitution so as to make it the best it can be. A number of friends and colleagues have questioned the prudence of calling my theory "Constitution-perfecting," suggesting that by doing so I am leading with my chin. I have disregarded their advice on that point but I have heeded many other suggestions that I hope have helped make this book the best it can be. Here I wish to acknowledge many debts.

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Warm thanks go to the artist whose painting serves as the basis for the jacket of this book, my good friend Linda Hyatt Wilson. That painting has

hung in my living room for more than fifteen years, and it now serves beautifully in graphically raising the question of what it means to secure conditions favorable to the pursuit of happiness.

I dedicate this book to my wife and our two daughters. Linda McClain and I have had a wonderful and fruitful collaboration: we have coauthored three law review articles (one of which appears here in revised form as chapter 7) and have two children, Sarah McClain Fleming and Katherine Amelia McClain Fleming. Sarah's and Katherine's clever sketches of me teaching my class in constitutional law never fail to amuse me. And they have given me hope that through the tireless, committed efforts of a critical, engaged constitutional citizenry, we might indeed ultimately interpret the Constitution so as to make it the best it can be.

Contents

CHAPTER ONE

Securing Constitutional Democracy

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

The Problem of Grounding Autonomy in Constitutional Law

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. 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. 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. 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."[2] 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.[3] 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.[4] 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."[5] The right to privacy or autonomy on the loose in these caricatured renditions is so unruly, dangerous, or rootless that one might wonder whether such a right can be grounded in constitutional law. Can a right with such prominent critics from across the ideological spectrum be a genuine constitutional right?

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.[6] 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'"[7] (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).[8] Kennedy declared that it "demeans the lives" of homosexuals to respect the right of heterosexuals to autonomy without respecting an analogous right for them.[9]

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."[10]

As debated by Kennedy and Scalia, the question in *Lawrence* involved not merely the morality of homosexual sodomy but also important interpretive and institutional questions. The interpretive questions include: What does the Constitution mean? How are interpreters to decide what it means? What are the legitimate sources of constitutional meaning?

What form of democratic government does the Constitution as a whole embody—specifically, is it a scheme of constitutional democracy that guarantees substantive rights like autonomy or, to the contrary, a scheme of majoritarian representative democracy that guarantees neutral processes for representing conflicting interests but no such substantive rights? The institutional questions include: What should be the role of courts in protecting substantive rights such as autonomy? More generally, what should be the role of courts as compared with legislatures in deciding cases implicating substantive moral disagreement in our morally pluralistic polity?

Every significant case regarding privacy or autonomy to reach the Court in the last forty years—from contraception and abortion to euthanasia and sodomy—has implicated such interpretive and institutional questions, and, at bottom, the place of these substantive liberties in our constitutional order. These cases bring out two characteristic forms of uneasiness about privacy or autonomy: the flights from protecting substantive liberties to preserving original understanding of the Constitution (narrowly conceived) and to reinforcing procedural liberties in the Constitution (to the exclusion of substantive liberties). In *Lawrence* and *Casey,* the dissenters urged taking such retreats—and thus declining to recognize rights to privacy or autonomy because they are not specifically enumerated in the text of the Constitution or are not essential to traditional procedures—but the Court resisted hankerings to do so. To secure the rights to privacy or autonomy against these flights, we must construct an overarching substantive theory that can provide a better grounding for them in our constitutional order. We need a theory that firmly connects privacy or autonomy to the substance and structures of constitutional democracy and to the roles and responsibilities of courts and legislatures in protecting constitutional norms. Meeting this challenge is the object of this book.

I ground autonomy in a theory of securing constitutional democracy, a guiding framework with two fundamental themes: 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 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. Together, these themes afford

everyone the status of free and equal citizenship in our morally pluralistic constitutional democracy. They reflect two bedrock structures of our constitutional scheme: deliberative political and personal self-government. 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. Each theme has a structural role to play in securing and fostering our constitutional democracy.

My conception of the structures and design of the Constitution stems from a "constitutional constructivism," which I mean in both a methodological sense—as a method of interpreting the Constitution—and a substantive sense—as the substantive political theory that best fits and justifies our constitutional document and our underlying constitutional order. I develop such a theory by analogy to John Rawls's political constructivism, a theory he developed in *Political Liberalism.*[11]

Beyond Process-Perfecting Theories to a Constitution-Perfecting Theory

I put forward a "Constitution-perfecting" theory as an alternative to the well-known "process-perfecting" theories advanced by John Hart Ely in *Democracy and Distrust*[12] and Cass Sunstein in *The Partial Constitution.*[13] Ely's book, published in 1980, is undoubtedly the most celebrated book in the history of constitutional theory, and Sunstein's more recent book has close affinities to it. 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. Many find such theories alluring because of their promise that judicial review might be supportive of rather than inconsistent with democracy. 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.

Yet process-perfecting theories persist,[14] notwithstanding such criticisms, because no one has done for "substance" what Ely has done for "process." That is, no one has developed an alternative substantive Constitution-perfecting theory[15]—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.[16]

That is what I aspire to do in this book. 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. Unlike process theories, the book provides a firm grounding for rights to privacy and autonomy, along with liberty of conscience and freedom of association, as necessary to secure individual freedom and to promote a diverse and vigorous civil society. 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. Finally, I show that competing theories rest on incomplete and inadequate conceptions of democracy. Throughout, I pose fresh challenges to critics who reject rights to privacy and autonomy like those recognized in *Lawrence* and *Casey.*

My defense of a Constitution-perfecting theory includes conceptions not only of *what* the Constitution is and *how* it ought to be interpreted, but also of *who* may authoritatively interpret it.[17] First, as for *what,* constitutional constructivism conceives our Constitution as a "constitution of principle" that embodies (or aspires to embody) a coherent scheme of equal basic liberties, or fair terms of social cooperation on the basis of mutual respect and trust, for our constitutional democracy. The Constitution is not merely a "constitution of detail" that enacts a discrete list of particular rights narrowly conceived by framers and ratifiers.[18] Nor does it simply establish a procedural framework of democracy.

Second, as regards *how,* constitutional constructivism conceives interpretation as the exercise of "reasoned judgment"[19] in quest of the account that best fits and justifies the constitutional document and underlying constitutional order.[20] Responsible interpretation is not merely exegesis of isolated clauses of the constitutional document or research into the concrete intentions or expectations of the framers and ratifiers.

Finally, with respect to *who* may interpret the Constitution, my theory entails a conception of the roles and responsibilities not only of courts but also of legislatures, executives, and citizens. I distinguish between the partial or judicially enforceable Constitution and the whole Constitution

that is binding outside the courts on nonjudicial institutions and citizens.[21] In other words, constitutional constructivism is a theory of *the Constitution*, not merely a theory of *judicial review*.

My theory of constitutional constructivism charts a third way between a universalist view of human rights and legal positivism. 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.[22] Similarly, my constitutional constructivism seeks to interpret our Constitution so as to make it the best it can be.[23] 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).

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. 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.[24] Constitutional constructivism draws our principles and rights from our constitutional democracy's ongoing practice, tradition, and culture.[25] 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. 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.[26]

Overview

Part I: Constructing the Substantive Constitution

In part I (chapters 2–4) I construct a substantive Constitution-perfecting theory with two fundamental commitments: deliberative democracy and

deliberative autonomy. I argue that such a theory is superior in important respects to Ely's and Sunstein's process-perfecting theories, which recast substantive liberties as procedural liberties or neglect them altogether.

THE FLIGHTS FROM SUBSTANCE IN CONSTITUTIONAL THEORY

A specter is haunting constitutional theory—the specter of *Lochner v. New York.*[27] In the *Lochner* era, the Supreme Court gave heightened judicial protection to substantive economic liberties through the Due Process Clauses.[28] In 1937, during the constitutional revolution wrought by the New Deal, *West Coast Hotel v. Parrish*[29] officially repudiated the *Lochner* era's special judicial protection for business interests, marking the first death of substantive due process.[30] Nevertheless, the ghost of *Lochner* has haunted constitutional theory ever since, manifesting itself in charges that judges are "Lochnering" by imposing their own substantive fundamental values in the guise of interpreting the Constitution.[31]

Charges of Lochnering have been most unrelenting with respect to *Roe v. Wade,*[32] which held that the Due Process Clause of the Fourteenth Amendment protects a realm of substantive personal liberty or privacy broad enough to encompass the right of a woman to decide whether to terminate a pregnancy. In a classic critique, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, Ely argues that the Court, to avoid Lochnering, must confine itself to perfecting the processes of representative democracy,[33] as intimated in Justice Harlan Fiske Stone's famous footnote four of *United States v. Carolene Products Co.*[34]

Despite these cries, *Casey* reaffirmed the "central holding" of *Roe* instead of marking the second death of substantive due process by overruling it.[35] In an apoplectic dissent, Justice Scalia blasted the Court for continuing to engage in Lochnering, protesting that the Court must limit itself to giving effect to the original understanding of the Constitution, narrowly conceived.[36] Scalia made similar criticisms in his angry dissent in *Lawrence.*[37]

Ely's and Scalia's critiques illustrate the two responses to the specter of *Lochner* that have dominated constitutional theory since *West Coast Hotel.* Both strategies have been widely criticized for taking "pointless flights from substance": the flights to process and original understanding, respectively.[38] The substance from which these dominant responses are said to flee is not only substantive liberties like privacy or autonomy, but also the burden of formulating an overarching substantive political