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FIDELITY, BASIC LIBERTIES, AND THE SPECTER OF *LOCHNER*

JAMES E. FLEMING*

INTRODUCTION

I want to begin by frankly acknowledging that the group of scholars participating in the conference is more conservative than the crowd with whom I usually travel. Accordingly, at the outset, I want to say something ingratiating. Then, I will say something provocative. Here is the ingratiating part: economic liberties and property rights, like personal liberties, are fundamental rights secured by our Constitution. In fact, economic liberties and property rights are so fundamental in our constitutional scheme, and so sacred in our constitutional culture, that there is neither need nor good argument for aggressive judicial protection of them. Rather, such liberties are understood properly as "judicially underenforced norms," to use Lawrence G. Sager's term.[1] As Cass Sunstein would put it, their fuller enforcement and protection is secure with legislatures and executives in "the Constitution outside the Courts."[2]

Here is the provocative part: Recently, I was invited to participate in a *Constitutional Commentary* symposium entitled

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1. Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norm*, 91 HARV. L. REV. 1212, 1213 (1978) [hereinafter Sager, *Fair Measure*]; Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 419 (1993) [hereinafter Sager, *Thinness*].

2. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 9-10 (1993).

"Constitutional Chaos: The Joys and Hazards of Stomping Legal Butterflies." The symposium invited contributors to choose any single development in American constitutional history—such as an amendment, an episode at the Constitutional Convention, a case, or even a Supreme Court appointment—and to extinguish it utterly from legal memory. I declined the invitation. If I had accepted it, however, I would have written about Justice Scalia's and Chief Justice Rehnquist's sham conservative methodologies for interpreting the Due Process Clause, focusing on *Michael H. v. Gerald D.*[3] and *Washington v. Glucksberg*.[4] In prior work, I criticized Scalia's *Michael H.* methodology, arguing that we should chart a middle course between Scalia—the rock of liberty as "hidebound" historical practices—and Charybdis—the whirlpool of liberty as unbounded license.[5] In a symposium on "Constitutional Tragedies," I argued that it was a constitutional tragedy for the Supreme Court to hold in *Glucksberg* that the Constitution does not protect the right to die, including the right of terminally ill persons to physician-assisted suicide.[6]

Elsewhere, I also have defended a conception of the due process inquiry that has affinities to, although it differs from, Justice Harlan's formulation in his dissent in *Poe v. Ullman*,[7] the conception of the joint opinion in *Planned Parenthood v. Casey*,[8] and Justice Souter's formulation in his concurrence in *Glucksberg*.[9] This Article criticizes Rehnquist's formulation of the due process inquiry in *Glucksberg*—as requiring a "careful description" of the asserted right—showing that he uses a "whipsaw" between specific and abstract levels of generality to rig the description in order to make it easy for the Court to reject the right.[10]

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3. 491 U.S. 110 (1989) (plurality opinion).

4. 521 U.S. 702 (1997).

5. *See* James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 271-73 (1993) [hereinafter Fleming, *Constructing*]; James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 56-64 (1995) [hereinafter Fleming, *Securing*].

6. *See* James E. Fleming, *Constitutional Tragedy in Dying: Or Whose Tragedy Is It, Anyway?*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 162, 162-68 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

7. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

8. 505 U.S. 833, 841 (1992) (joint opinion) (O'Connor, Kennedy, & Souter, JJ.).

9. *See Glucksberg*, 521 U.S. at 752 (Souter, J., concurring).

10. *See infra* text accompanying notes 60-97.

True to its title—*Fidelity, Basic Liberties, and the Specter of Lochner*—this Article focuses on three points. The first relates to fidelity in constitutional interpretation, bringing the best conception of fidelity—integrity with the moral reading of the Constitution—to bear in interpreting the Due Process Clauses. The second relates to basic liberties, conceding that economic liberties and property rights are fundamental in our constitutional scheme, but arguing that they are properly judicially underenforced. The third relates to the specter of *Lochner v. New York*,[11] arguing that on the best understanding of what was wrong with *Lochner*—status quo neutrality—aggressive judicial protection of economic liberties would involve illegitimate "Lochnering," but that aggressive judicial protection of personal liberties does not. This Article merely will sketch the lines of argument that I plan to pursue in further work. Before outlining these points, I shall take up *Lochner*, 1937, and the flights from substance in constitutional theory.[12]

A specter is haunting constitutional theory—the specter of *Lochner*.[13] In the *Lochner* Era, the Supreme Court gave heightened judicial protection to substantive economic liberties through the Due Process Clauses.[14] In 1937, during the constitutional revolution wrought by the New Deal, *West Coast Hotel Co. v. Parrish*[15] officially repudiated the *Lochner* Era, marking the first death of substantive due process.[16] Nevertheless, the ghost

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11. 198 U.S. 45 (1905).

12. In this section, I draw upon my analysis in Fleming, *Constructing*, *supra* note 5, at 211-14.

13. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873 (1987) (characterizing *Lochner* as an infamous "defining case" in constitutional law, and a "spectre" that "has loomed over most important constitutional decisions"); *cf.* KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY (1848), *reprinted in* THE MARX-ENGELS READER 469, 473 (Robert C. Tucker ed., 2d ed. 1978) ("A spectre is haunting Europe—the spectre of Communism.").

14. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923) (striking down a federal minimum wage law for women and minors as violative of the Due Process Clause of the Fifth Amendment); *Lochner*, 198 U.S. at 61 (invalidating, under the Due Process Clause of the Fourteenth Amendment, a state maximum hours law that the Court described as "mere meddlesome interference[] with the rights of the individual" to liberty of contract).

15. 300 U.S. 379 (1937) (upholding a state minimum wage law and signaling the demise of the *Lochner* Era by overruling *Adkins*).

16. For accounts of the official demise of *Lochner*, see, for example, LAURENCE H.

of *Lochner* has perturbed 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.[17]

The cries of Lochnering have been most unrelenting with respect to *Roe v. Wade*,[18] 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 women to decide whether or not to terminate a pregnancy.[19] In a well-known critique, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* John Hart Ely attacked the Court for engaging in Lochnering, arguing that to avoid doing so it must confine itself to perfecting the processes of representative democracy,[20] as intimated in Justice Stone's famous footnote four of *United States v. Carolene Products Co.*[21]

Despite these cries, *Casey* officially reaffirmed the "central holding" of *Roe* instead of marking the second death of substantive due process by overruling it.[22] In an apoplectic dissent,

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TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-6 to -7 (2d ed. 1988); Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 36-38; Sunstein, *supra* note 13, at 873-83. For attempts to resurrect stringent judicial protection of economic liberties, see, for example, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980). There is a considerable body of revisionist literature concerning the *Lochner* Era. *See, e.g.*, David E. Bernstein, Lochner, *Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999).

17. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 42-49, 99, 224-25 (1990); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 944 (1973) (coining the term "Lochnering" or "to Lochner").

18. 410 U.S. 113 (1973).

19. *See id.* at 164.

20. *See* Ely, *supra* note 17, at 933-45.

21. 304 U.S. 144, 152 n.4 (1938).

22. *See* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (joint opinion) (O'Connor, Kennedy, & Souter, JJ.). Justices Stevens and Blackmun, who would have reaffirmed *Roe* in its entirety, joined Parts I, II, III, V-A, V-C, and VI of the joint opinion, supplying the fourth and fifth votes necessary to make those parts the opinion of the Court, thus reaffirming *Roe*. *See id.* at 911 (Stevens, J., concurring in part and dissenting in part); *id.* at 922 (Blackmun, J., concurring in part and dissenting in part). The remaining four Justices would have overruled *Roe*. *See id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part, joined by White,

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.[23]

Ely's and Scalia's critiques illustrate the two responses to the specter of *Lochner* that have dominated constitutional theory since *West Coast Hotel Co.* Both strategies have been widely criticized for taking "pointless flights from substance": the flights to process and original understanding, respectively.[24] The substance from which these dominant responses are said to flee is not only substantive liberties like privacy or autonomy, but also substantive political theory in interpreting the Constitution. These flights are said to be pointless because perfecting processes and enforcing original understanding inevitably require the very sort of substantive constitutional choices that these strategies are at pains to avoid.

After *Casey*, the long-anticipated second death of substantive due process is unlikely to come anytime soon—unless it came in *Washington v. Glucksberg*.[25] But *Glucksberg* is probably less analogous to *West Coast Hotel Co.* than to *San Antonio Independent School District v. Rodriguez*.[26] Instead of overruling impor-

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Scalia, & Thomas, JJ.); *id.* at 979 (Scalia, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., White & Thomas, JJ.). Prior to the decision in *Casey*, some scholars believed that the Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), was evidence of "the second death of substantive due process." *E.g.*, Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987).

23. *See Casey*, 505 U.S. at 979-1001 (Scalia, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., White & Thomas, J.J.) (analogizing *Roe* and *Casey* to *Lochner* and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997) (defending an originalist approach to constitutional interpretation); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (same).

24. Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 470 (1981) (arguing that the flights from substance to process and original understanding "end in failure" because "[j]udges cannot decide what the pertinent intention of the Framers was, or which political process is really fair or democratic, unless they make substantive political decisions of just the sort the proponents of intention or process think judges should not make"); *see also* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) (arguing that Ely's theory takes a pointless flight from making substantive constitutional choices to perfecting processes).

25. 521 U.S. 702 (1997).

26. 411 U.S. 1 (1973). *Rodriguez* curbed the expansion of both the fundamental

tant precedents, *Glucksberg* seems to say "this far and no further," while also attempting to gut the precedents of any vitality or generative force. Here, I should praise the brochure concerning this conference for accepting that substantive liberties are here to stay—and indeed the participants in the conference appear to accept that premise—rather than reopening the controversy whether substantive liberties as such are anomalous and illegitimate in our constitutional scheme.

What is needed is a theory of constructing the substantive Constitution that would beware of the specter of *Lochner*, yet also resist the "temptations" to flee from substance to process or original understanding.[27] In other works, I have outlined such a theory, in the form of a Constitution-perfecting theory, which reinforces not only the procedural liberties but also the substantive liberties embodied in our Constitution.[28] This theory constructs the substantive Constitution by securing the preconditions for self-government in our constitutional democracy in two

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rights and the suspect classification branches of equal protection analysis, proclaiming that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Id.* at 33. Just as *Rodriguez* takes a "this far and no further" approach to "substantive equal protection," so *Glucksberg* takes such an approach to substantive due process.

27. In *Casey*, the joint opinion resisted the temptations, in interpreting the Due Process Clause of the Fourteenth Amendment, to take a flight from substantive liberties to procedural liberties or to original understanding. *See Casey*, 505 U.S. at 846-48 (acknowledging that it was "tempting" to abdicate the responsibility of exercising reasoned judgment). The joint opinion discussed the infamous era of *Lochner*. *See id.* at 861-62. It reiterated, however, that the Due Process Clause protects substantive liberties, "a realm of personal liberty which the government may not enter." *Id.* at 847. Justice Scalia replied angrily that the Court's "temptation" is not to abdicate responsibility but rather "in the quite opposite and more natural direction—towards systematically eliminating checks upon its own power; and it succumbs." *Id.* at 981 (Scalia, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., White & Thomas, JJ.). For similar notions of "temptation" and "seduction," see BORK, *supra* note 17, *passim*; Robert H. Bork, *Again, a Struggle for the Soul of the Court*, N.Y. TIMES, July 8, 1992, at A19.

28. I mean "perfecting" in the sense of interpreting the Constitution with integrity so as to render it a coherent whole, not in Henry Monaghan's caricatured sense of "Our Perfect Constitution" as a perfect liberal utopia or an "ideal object" of political morality. *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 356 (1981); *cf.* Frank I. Michelman, *Constancy to an Ideal Object*, 56 N.Y.U. L. REV. 406, 407 (1981) (distinguishing "weak-sense perfectionism" or "constitutional rationalism" from "strong-sense perfectionism"). For the notion of law as integrity, see RONALD DWORKIN, LAW'S EMPIRE 176-224 (1986).

senses: not only *deliberative democracy*, whereby citizens apply their capacity for a conception of justice to deliberate about the justice of basic institutions and social policies, as well as about the common good, but also *deliberative autonomy*, whereby citizens apply their capacity for a conception of the good to deliberate about and decide how to live their own lives.[29]

I. FIDELITY IN CONSTITUTIONAL INTERPRETATION

A. Competing Conceptions of Fidelity and Interpretation of the Due Process Clause

The topic of this conference, "Fidelity, Economic Liberty, and 1937," raises the question of fidelity in constitutional interpretation. In 1996, Fordham University School of Law held a symposium on "Fidelity in Constitutional Theory."[30] In that symposium, I argued that the question of fidelity raises two fundamental questions: "Fidelity to what?" and "What is fidelity?"[31] The short answer to the first—fidelity to the Constitution—poses a further question: *what* is the Constitution? For example, does the Fourteenth Amendment embody abstract moral principles or enact relatively concrete historical rules and practices? Does the Constitution presuppose a political theory of majoritarian democracy or one of constitutional democracy? The short answer to the second—being faithful to the Constitution in interpreting it—leads to another question: *how* should the Constitution be interpreted?[32] Does faithfulness to the Fourteenth Amendment require recourse to political theory to elaborate general moral concepts, or prohibit it and instead require historical research to discover relatively specific original understanding? And does the

29. For development of this theory, see generally Fleming, *Constructing*, *supra* note 5; Fleming, *Securing*, *supra* note 5; James E. Fleming & Linda C. McClain, *In Search of a Substantive Republic*, 76 TEX. L. REV. 509 (1997) (book review).

30. *See* Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997).

31. In this section, I draw from my analysis in James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335 (1997).

32. These questions of *What* and *How*, along with the question of "*Who* is to interpret?" are the basic interrogatives of constitutional interpretation. *See* WALTER F. MURPHY, JAMES E. FLEMING & SOTIRIOS A. BARBER, AMERICAN CONSTITUTIONAL INTERPRETATION 112-18 (2d ed. 1995).

quest for fidelity in interpreting the Constitution exhort us to make it the best it can be, or forbid us to do so in favor of enforcing an imperfect Constitution?[33]

Thus, the question, "What is the best conception of fidelity in constitutional interpretation?," ultimately poses the questions, "*What* is the Constitution and *how* should it be interpreted?" The question of fidelity is not a narrower question about how to follow the original meaning of the text or how to interpret the Constitution so as to fit the historical materials surrounding its framing and ratification. Those narrower questions grow out of particular originalist answers to the question of fidelity. They are not the question of fidelity itself. I fear that the brochure announcing our conference, in its formulation of the topic, may beg the question of fidelity in precisely this way.[34]

Ronald Dworkin has long recognized that these fundamental questions of *what* and *how* are the central questions of fidelity. From his first book, *Taking Rights Seriously*,[35] to his recent book, *Freedom's Law*,[36] he has argued that commitment to interpretive fidelity requires that we recognize that the Constitution embodies abstract moral principles rather than laying down particular historical conceptions, and that interpreting and applying those principles require fresh judgments of political theory about how they are best understood.[37] He now calls this interpretive strategy the "moral reading" of the Constitution.[38] Yet, narrow originalists such as Robert H. Bork and Justice Antonin Scalia have asserted a monopoly on concern for fidelity in constitutional interpretation, claiming that fidelity requires following the rules laid down by, or giving effect to the relatively specific original understanding of, the framers and ratifiers of the Con-

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33. *See* Monaghan, *supra* note 28, at 356.

34. Several of the articles in the conference also beg the question of fidelity in this way. *See* Bernstein, *supra* note 16; John O. McGinnis, *The Inevitable Infidelities of Constitutional Translation: The Case of the New Deal*, 41 WM. & MARY L. REV. 177 (1999); Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3 (1999).

35. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

36. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

37. *See id.* at 1-38, 72-83; DWORKIN, *supra* note 35, at 131-49.

38. *See* DWORKIN, *supra* note 36, at 1-38.

stitution.[39] They have charged that constitutional theorists who reject these claims are "revisionists" who disregard fidelity, thereby subverting the Constitution. Dworkin has vigorously and cogently punctured the narrow originalists' pretensions to a monopoly on fidelity, arguing that commitment to fidelity entails the pursuit of integrity with the moral reading of the Constitution, and that the narrow originalists are the real "revisionists."[40]

More generally, the Fordham Symposium implicitly challenged the narrow originalists' claim to a monopoly on fidelity, for it featured several competing conceptions of fidelity: Dworkin's understanding of fidelity as pursuing integrity with the moral reading of the Constitution;[41] Bruce Ackerman's understanding of fidelity as synthesis of constitutional moments;[42] Lawrence Lessig's understanding of fidelity as translation across generations;[43] and Jack Rakove's understanding of fidelity as keeping faith with the founders' vision.[44] The Fordham Symposium illustrated two strategies for responding to the claim of the narrow originalists. Dworkin took the first: turn the tables on the narrow originalists. He argued that fidelity entails the very approach that they are at pains to insist it forbids, and prohibits

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39. *See generally* BORK, *supra* note 17; SCALIA, *supra* note 23; Scalia, *supra* note 23.

40. *See* DWORKIN, *supra* note 36, at 74-76; RONALD DWORKIN, LIFE'S DOMINION 125-29 (1993). I take the term "integrity" from Dworkin's conception of "law as integrity." DWORKIN, *supra* note 28, at 176-275. For an insightful analysis of Dworkin's general conception of legal reasoning in relation to fidelity, see Gregory C. Keating, *Fidelity to Pre-existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1 (1993).

41. *See generally* Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249 (1997).

42. *See generally* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519 (1997).

43. *See generally* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997) [hereinafter Lessig, *Constraint*]; Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) [hereinafter Lessig, *Fidelity*]; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) [hereinafter Lessig, *Understanding*].

44. *See generally* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587 (1997).

the very approach that they imperiously maintain it mandates.[45] The second was taken by Ackerman and Lessig, to say nothing of Lessig's sometime co-author, Cass Sunstein: beat the narrow originalists at their own game.[46] Ackerman, Lessig, and Sunstein advance fidelity as synthesis and fidelity as translation as "broad" or "soft" forms of originalism that are superior, as conceptions of originalism, to narrow originalism. What is "broad" or "soft" about their forms of originalism is that these theorists conceive original understanding at a considerably higher level of abstraction than do the narrow originalists.[47]

In my essay in the Fordham Symposium, as well as in other works, I have argued that the best conception of fidelity is Dworkin's understanding of fidelity as pursuing integrity with the moral reading of the Constitution.[48] I will not repeat those arguments here. I also have brought that conception of fidelity to bear in interpreting the Due Process Clause.[49] I have argued that the Constitution in general, and the Fourteenth Amendment in particular, embody abstract moral principles of liberty and equality rather than enacting relatively specific historical rules and practices.[50] Put another way, the Fourteenth Amendment embodies a scheme of "aspirational principles" rather than merely being the Burkean deposit of "historical practices."[51]

I realize that such an approach arouses fears about the need to cabin or tether liberty, privacy, or autonomy in constitutional

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45. *See* DWORKIN, *supra* note 40, at 132-33, 144-47.

46. *See* ACKERMAN, *supra* note 42; Ackerman, *supra* note 42; Lessig, *Constraint*, *supra* note 43; Lessig, *Fidelity*, *supra* note 43; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Lessig, *Understanding*, *supra* note 43; *see also* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 171-82 (1996) (proposing a "soft" form of originalism). For other works illustrating the emergence of a form of broad originalism, see generally MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS (1994); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

47. *See, e.g.*, SUNSTEIN, *supra* note 46, at 171-82; Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 325-48 (1992).

48. *See* Fleming, *supra* note 31; James E. Fleming, *Original Meaning Without Originalism*, 85 GEO. L.J. 1849 (1997).

49. Here I summarize, and draw upon, Fleming, *Securing*, *supra* note 5.

50. *See id.* at 56-64.

51. *See id.*; *infra* text accompanying note 64.

law. I have proposed to tether the right of autonomy by grounding it within a constitutional constructivism, a guiding framework for constitutional theory with two fundamental themes: deliberative democracy and deliberative autonomy.[52] I have advanced deliberative autonomy as a unifying theme that shows the coherence and structure of certain substantive liberties on a list of familiar "unenumerated" fundamental rights, commonly classed under privacy, autonomy, or substantive due process.[53] The bedrock structure of deliberative autonomy secures basic liberties that are significant preconditions for persons' ability to deliberate about and make certain fundamental decisions affecting their destiny, identity, or way of life. As against critics' charges that the right of privacy or autonomy is dangerously unruly and unconstrained, I argued that it is rooted, along with deliberative democracy, in the language and design of our Constitution.[54] Each theme, I contended, has a structural role to play in securing the basic liberties that are preconditions for our scheme of deliberative self-governance.

Finally, I argued for reconceiving the substantive due process inquiry in terms of a criterion of the significance of an asserted liberty for deliberative autonomy, charting a middle course between Scalia—the rock of liberty as "hidebound" historical practices—and Charybdis—the whirlpool of liberty as unbounded license.[55] I acknowledged that my view has affinities to (although it differs from) Justice Harlan's idea, expressed in his dissent in *Poe*, of a "rational continuum" of ordered liberty, and thus to the *Casey* joint opinion's idea of "reasoned judgment."[56] I also was deeply critical of Scalia's approach to interpreting the Due Process Clause in his plurality opinion in *Michael H.* and his concurring opinion in *Cruzan v. Director, Missouri Department of Health*.[57]

Recently, in his concurrence in *Glucksberg*, Justice Souter made a bid to be the Justice Harlan of our time.[58] I want to

52. *See* Fleming, *Securing*, *supra* note 5, at 17-24.
53. *See id.* at 3, 7-14.
54. *See id.* at 36-48.
55. *See id.* at 56-64.
56. *Id.* at 59-63.
57. 497 U.S. 261 (1990).
58. *See* Washington v. Glucksberg, 521 U.S. 702, 756 n.4, 763-73 (1997) (Souter,

applaud Souter's conception of the due process inquiry, despite his erroneous application of it in *Glucksberg* in concluding that the Constitution does not protect a right to die that includes the right of terminally ill persons to physician-assisted suicide.[59] I want to criticize Rehnquist's formulation of the due process inquiry in the majority opinion in *Glucksberg*. The next section argues that if Harlan's methodology represents a "rational continuum" of liberty, Rehnquist's methodology represents a "whipsaw" of liberty between specific and abstract levels of generality in the characterization of asserted rights. The same argument applies to Scalia's methodology in *Michael H.* and *Cruzan*.

B. Rehnquist's and Scalia's Methodologies for Interpreting the Due Process Clause: The Whipsaw of Liberty Between Specificity and Abstraction

In *Glucksberg*, Rehnquist wrote that the Court's "established method of substantive due process analysis has two primary features:"[60]

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," . . . and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed" . . . . Second, we have required . . . a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking" that direct and restrain our exposition of the Due Process Clause.[61]

Rehnquist continued: "Justice Souter, relying on Justice Harlan's dissenting opinion in [*Poe*,] would largely abandon this

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J., concurring) (defending and building upon Justice Harlan's conception of due process). In his paper for this conference, Alan Meese criticizes Justice Souter's formulation of the due process inquiry and his analysis of economic liberty. *See* Meese, *supra* note 34.

59. *See Glucksberg*, 521 U.S. at 770-89 (Souter, J., concurring).

60. *Id.* at 720.

61. *Id.* at 720-21.

restrained methodology . . . . True, the Court relied on Justice Harlan's dissent in *Casey*, but . . . we did not in so doing jettison our established approach."[62]

The second feature, in calling for a "careful description" of the asserted right and an inquiry into "[o]ur Nation's history, legal traditions, and practices," calls to mind Scalia's formulation of the due process inquiry in his plurality opinion in *Michael H.* and in his concurring opinion in *Cruzan*. In *Michael H.*, Scalia famously offered the following methodology for selecting the level of generality in deciding whether an asserted right has been traditionally protected: "We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[63] Clearly, he conceived tradition as "historical practices," not as "aspirational principles." "Aspirational principles" are the fundamental principles of justice to which we as a people aspire and for which we as a people stand, whether or not we actually have realized them in our historical practices, common law, and statute books (collectively, "historical practices").[64] Our aspirational principles may be critical of our historical practices, and they are not merely the Burkean deposit of those practices. In *Cruzan*, Scalia similarly wrote: "[N]o 'substantive due process' claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against state interference."[65]

In *Glucksberg*, however, Rehnquist did not officially follow, or even cite, Scalia's *Michael H.* opinion.[66] Why not? It stands to reason that Rehnquist did not because doing so might have prompted O'Connor and Kennedy to concur separately with respect to due process methodology. For one thing, O'Connor, with Kennedy joining the opinion, concurred in *Michael H.*,

62. *Id.* at 721, 722 n.17 (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Poe v. Ullman*, 367 U.S. 497 (1961)).

63. Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989) (plurality opinion).

64. *See* Fleming, *Constructing*, *supra* note 5, at 269; Fleming, *Securing*, *supra* note 5, at 57.

65. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 294 (1990) (Scalia, J., concurring).

66. *See Glucksberg*, 521 U.S. 702 (1997).

rejecting pointedly Scalia's "mode of historical analysis" because it "may be somewhat inconsistent with our past decisions in this area"[67] and referring favorably to Harlan's dissent in *Poe*.[68] For another, both O'Connor and Kennedy participated in the joint opinion in *Casey*, which rejected Scalia's *Michael H.* methodology as "inconsistent with our law" and embraced Harlan's *Poe* methodology.[69]

We should ask which methodology, that of Rehnquist or Souter/Harlan, is more consistent with our law in the area of substantive due process? That is, which account better fits with and justifies cases such as *Meyer v. Nebraska*,[70] *Pierce v. Society of Sisters*,[71] *Griswold v. Connecticut*,[72] *Loving v. Virginia*,[73] *Roe v. Wade*,[74] *Moore v. East Cleveland*,[75] *Cruzan*, and *Casey*? I submit that the Souter/Harlan methodology wins hands down over Rehnquist's methodology. The former can account for all of these cases—as the joint opinion in *Casey* did through the framework of "reasoned judgment"[76]—while the latter can account for none of them.[77] This should come as no surprise, for it is very likely that, as an original matter, Rehnquist, as well as Scalia, would have dissented in all of these cases; in fact, Rehnquist and Scalia did dissent in some of them.[78] Through his methodology, Rehnquist, like Scalia, is engaging in damage control; his concerns are not merely to decline to extend this line of cases, but also to gut the cases of any vitality or generative force.

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67. *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring).

68. *See id.* (O'Connor, J., concurring).

69. Planned Parenthood v. Casey, 505 U.S. 833, 848-50 (1992). This is notwithstanding Rehnquist's suggestion to the contrary in *Glucksberg*. *See supra* text accompanying note 62.

70. 262 U.S. 390 (1923).

71. 268 U.S. 510 (1925).

72. 381 U.S. 479 (1965).

73. 388 U.S. 1 (1967).

74. 410 U.S. 113 (1973).

75. 431 U.S. 494 (1977).

76. Planned Parenthood v. Casey, 505 U.S. 833, 848-50 (1992).

77. Rehnquist's methodology even fails to account for *Cruzan*. *See infra* text accompanying notes 83-97.

78. *See, e.g.*, *Casey*, 505 U.S. at 922 (Rehnquist, J., concurring in part and dissenting in part); *Roe*, 410 U.S. at 113, 171 (Rehnquist, J., dissenting); *Casey*, 505 U.S. at 979 (Scalia, J., concurring in part and dissenting in part).

The question arises whether Rehnquist, in applying his formulation in *Glucksberg*, did a *Michael H.* analysis. I shall proceed in two stages, looking at traditions and specificity. First, I review traditions. At first glance, it appears that Rehnquist did apply a *Michael H.* analysis. After all, he examined history, legal traditions, and practices, which accords with Scalia's notion of an inquiry into traditions understood as historical practices.[79] Indeed, Rehnquist cited many of the same sources that Scalia drew upon in his concurrence in *Cruzan*.[80] It is important, however, to remember that in *Cruzan*, Scalia drew upon those sources in arguing that there is no traditionally protected right to die, not even the right that the Court "assumed" the Constitution granted: the traditionally protected right of a competent person to refuse unwanted medical treatment including life-saving hydration and nutrition.[81] On that issue in *Cruzan*, Scalia's peers evidently outvoted him eight to one.[82]

In *Glucksberg*, Rehnquist drew upon these same sources in arguing that there is no traditionally protected right to die that includes a right to physician-assisted suicide.[83] But he also claimed, remarkably, that these sources support the traditionally protected right "assumed and strongly suggested" in *Cruzan*,[84] namely, the right of a competent person to refuse unwanted medical treatment including lifesaving hydration and nutrition—notwithstanding Scalia's own argument there that these sources did not support such a right.[85]

Second, I address specificity. Again, at first sight, Rehnquist's call for a "careful description" sounds like Scalia's call in *Michael H.* for a specific or narrow, rather than abstract or broad, formulation of the asserted right. We should examine Rehnquist's

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79. *See* Washington v. Glucksberg, 521 U.S. 702, 705-19 (1997).

80. *Compare id.* at 710-35, *with* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 266, 293-99 (1990) (Scalia, J., concurring).

81. *See Cruzan*, 497 U.S. at 293-99 (Scalia, J., concurring).

82. The vote was five to four. Presumably, the four members of the five-member majority besides Scalia assumed such a right. Clearly, all four of the dissenters supported a right to die. That makes eight, leaving Scalia as the sole Justice who rejected in principle a right to die.

83. *See Glucksberg*, 521 U.S. at 705-35.

84. *Id.* at 720.

85. *See supra* note 81 and accompanying text.

actual description of the right asserted in *Glucksberg*, however. Here, it is useful to bear in mind Rehnquist's rather specific formulation in *Cruzan* of the right asserted. Instead of framing it abstractly, as the right to die, or the right to commit suicide, he framed it specifically, as the right of a competent adult to refuse unwanted medical treatment including lifesaving hydration and nutrition.[86] Notably, in *Cruzan*, Scalia himself eschewed any such specific formulation in favor of highly abstract formulations—the right to die and the right to commit suicide.[87]

In *Glucksberg*, however, Rehnquist did not formulate the asserted right specifically or narrowly, as he did in *Cruzan*. Rather, he framed it highly abstractly, as "a right to commit suicide which itself includes a right to assistance in doing so."[88] That is, he took the approach that Scalia took in concurrence in *Cruzan*. Notably, Rehnquist did so even though several more specific formulations were readily available to him, formulations that arguably have greater support in our traditions, whether they are understood as historical practices or aspirational principles. For example, Rehnquist did not frame the asserted right as the court of appeals did in its en banc decision: the right of terminally ill, competent adults to control the manner and timing of their deaths by using medication prescribed by their physicians.[89] Nor did he frame it as Breyer did in concurrence: "a right to die with dignity."[90] Nor did he heed Stevens's objections in concurrence that, even if "[h]istory and tradition provide ample support for refusing to recognize an open-ended [or 'categorical'] constitutional right to commit suicide," our Constitution protects a "basic concept of freedom" that "embraces not merely a person's right to refuse a particular kind of unwanted treatment, but also her interest in dignity, and in determining the character of the memories that will survive long after her death."[91]

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86. *See Cruzan*, 497 U.S. at 279.

87. *See id.* at 293-300 (Scalia, J., concurring).

88. *Glucksberg*, 521 U.S. at 723.

89. *See* Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997).

90. *Glucksburg*, 521 U.S. at 790 (Breyer, J., concurring).

91. *Id.* at 740, 743 (Stevens, J., concurring).

What we can see now is that both Rehnquist and Scalia resort to a whipsaw between specificity and abstraction in formulating the level of generality of an asserted right. Sometimes Scalia rejects assertions of rights after framing them highly specifically, as in *Michael H.*: the right of "the natural father to assert parental rights over a child born into a woman's existing marriage with another man,"[92] or the right to have a state "award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child."[93] Other times Scalia rejects assertions of rights after framing them in highly abstract forms, as in *Cruzan*: the right to die and the right to commit suicide. This whipsaw pinches from both sides, specificity and abstraction. Scalia always frames the right in the manner that makes it appear to have the least support in our traditions (understood as historical practices).

Rehnquist's whipsaw is more complex in how it pinches from both sides. He joined Scalia's plurality opinion in *Michael H.* and thus embraced Scalia's highly specific formulation.[94] Yet, in *Cruzan*, he framed the asserted right specifically, *Michael H.* style, and "assumed" that it was protected,[95] while Scalia framed it highly abstractly and rejected it.[96] Then, in *Glucksberg*, Rehnquist framed the asserted right highly abstractly and rejected it.[97] To recapitulate, in doing so, (1) Rehnquist used Scalia's own *Cruzan* analysis rejecting the right to commit suicide, (2) while he suggested that there is a traditionally protected right of the sort assumed in *Cruzan*, (3) notwithstanding Scalia's own analysis in *Cruzan* arguing that there was no such traditionally protected right. I daresay that the right "assumed and strongly suggested" in *Cruzan* fails not only Scalia's test in *Cruzan*, but indeed Rehnquist's test in *Glucksberg*.

Both Rehnquist's and Scalia's usage of this whipsaw between specificity and abstraction shows that their search for a "careful

92. Michael H. v. Gerald D., 491 U.S. 110, 125 (1989).
93. *Id.* at 127.
94. *See id.* at 113.
95. *See* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 277-78 (1990).
96. *See id.* at 293 (Scalia, J., concurring).
97. *See* Washington v. Glucksberg, 521 U.S. 702, 705-07 (1997).

description" involves taking care to describe the asserted right in a manner that makes it easiest for the Court to conclude that there is no support for it in tradition and thus to reject it. Rehnquist's and Scalia's methodologies for interpreting the Due Process Clause are rigged against protecting basic liberties and they are shams; they are not faithful to the abstract moral principles embodied in our Constitution of principle.

II. BASIC LIBERTIES

A. The "Double Standard" Between Economic Liberties and Personal Liberties

Constitutional theorists, in particular, liberal constitutional theorists, are often said to have difficulty justifying a "double standard" regarding economic liberties and personal liberties in the area of substantive due process. They oppose aggressive judicial review protecting economic liberties, for example, *Lochner*, while they propose aggressive judicial review protecting personal liberties, for example, *Griswold*, *Roe*, and *Casey*.[98]

The idea of a "double standard" suggests a grid of four clear positions available on the question of the relationship between economic liberties and personal liberties under the Due Process Clause. One, neither economic liberties nor personal liberties warrant aggressive judicial protection under the Due Process Clause, and for the same reasons: neither are enumerated in the Constitution nor part of the original understanding of it.[99] Two, both economic liberties and personal liberties warrant aggressive judicial protection, and for the same reasons: both are fundamental or integral to personhood, liberty, or autonomy.[100] Three, personal liberties, but not economic liberties, warrant aggressive judicial protection, because the former, but not the latter, are fundamental or integral to personhood, autonomy, or equal concern and respect.[101] Four, economic liberties, but not personal

98. *See, e.g.*, STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION 49-57 (1987).

99. *See, e.g.*, BORK, *supra* note 17, at 36-49, 95-100, 110-26; SCALIA, *supra* note 23, at 24-25, 39; *see also* Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part and dissenting in part).

100. *See, e.g.*, MACEDO, *supra* note 98, at 49-85; SIEGAN, *supra* note 16.

101. *See, e.g.*, DWORKIN, *supra* note 40, at 118-25, 144-46; DWORKIN, *supra* note 35,

liberties, warrant aggressive judicial protection, because the former, but not the latter, are enumerated in the Constitution and part of the original understanding of it.[102] To complicate the grid somewhat, I want to suggest a fifth possibility, which I shall defend below: Personal liberties, but not economic liberties, warrant aggressive judicial protection, because although both are fundamental, the latter should be judicially underenforced.[103]

B. Judicial Underenforcement of Economic Liberties and Property Rights

My argument for judicial underenforcement of economic liberties and property rights should be situated in the context of my larger theory regarding basic liberties. As stated above, I espouse a constitutional theory with two fundamental themes. The first involves securing the basic liberties that are preconditions for *deliberative democracy*, to enable citizens to apply their ca-

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at 278; LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 86 (1990); TRIBE, *supra* note 16, at 1302-12.

102. *See, e.g.*, EPSTEIN, *supra* note 16; Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159. Clarence Thomas showed sympathy for this view in speeches he gave before his confirmation to the Supreme Court. *See, e.g.*, DWORKIN, *supra* note 36, at 308-11 (analyzing Thomas's views regarding protection of economic liberties and personal liberties, such as the right to abortion).

103. There is also a sixth possibility, which I believe is implicit in Randy Barnett's recent libertarian book. *See* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998). As I interpret Barnett, he argues that both economic liberties and personal liberties warrant aggressive judicial protection, but for different reasons: the former because they come within the fundamental liberty secured by the classical liberal (or libertarian) conception of justice, and the latter because, although they do not come within that fundamental liberty (in the sense that they are not specified in his formulation of the classical liberal conception of justice), they incidentally relate to matters that are simply outside the jurisdiction of government to regulate. *See id.* at 63-83, 214. Thus, Barnett would protect personal liberties not in the name of securing personhood, personal liberty, or personal autonomy, but in the name of enforcing limitations on governmental authority. Indeed, it is striking that Barnett, unlike, Macedo for example, does not seem to try to integrate economic liberties and personal liberties, or to justify them in similar terms. I suppose that doing so might run afoul of his requirement of the parsimony of rights. *See id.* at 91-94, 200 & n.3. I criticize Barnett's theory in a paper that I presented at the 1999 Annual Meeting of the Association of American Law Schools. *See* James E. Fleming, The Parsimony of Libertarianism (Jan. 9, 1999) (unpublished manuscript, on file with author).

pacity for a conception of justice to deliberating about the justice of basic institutions and social policies as well as about the common good. The second entails 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 common and guaranteed status of free and equal citizenship in our morally pluralistic constitutional democracy.[104] I argue for a constitutional constructivism, by analogy to John Rawls's political constructivism, as a guiding framework for interpreting our constitutional document and practice.[105]

Constitutional constructivism is a Constitution-perfecting theory that is an alternative to well-known process-perfecting theories such as those advanced by Ely and Sunstein.[106] According to those theories, the Constitution should be interpreted as establishing a scheme of democracy, and judicial review is justified principally in situations where the processes of democracy, and thus the political decisions resulting from them, are undeserving of trust. Process-perfecting theories are vulnerable to the criticism that they reject certain substantive liberties (such as privacy, autonomy, liberty of conscience, and freedom of association) as anomalous to our scheme, except insofar as such liberties can be recast as procedural preconditions for democracy.[107] I propose an alternative, 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.[108] It is a theory of constitutional democracy and trustworthiness.[109]

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104. *See* Fleming, *Constructing*, *supra* note 5, at 218, 280-97; Fleming, *Securing*, *supra* note 5, at 2-3, 17-23.

105. *See* JOHN RAWLS, POLITICAL LIBERALISM 90-99 (1993).

106. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87-101 (1980); SUNSTEIN, *supra* note 2.

107. I have developed such a criticism in Fleming, *Constructing*, *supra* note 5, at 233-35, 256-60.

108. *See id.* at 215; Fleming, *Securing*, *supra* note 5, at 29.

109. *See infra* text accompanying notes 121-38.

Elsewhere, in developing a constitutional constructivism, I argued that economic liberties and the right to personal property are basic liberties, or constitutional essentials, and are preconditions for both deliberative democracy and deliberative autonomy.[110] But constitutional constructivism does not justify special judicial protection of such liberties. Economic liberties and property rights are properly judicially underenforced.[111] There is every indication that they can and do fend well enough for themselves in the political process. The regulation of such liberties does not present a situation of distrust that would warrant more searching judicial protection.[112] Thus, despite the views of economic libertarians like Epstein, the opportunity for consenting adults to perform capitalistic acts in private without governmental regulation is not among the stringently judicially enforced preconditions for deliberative autonomy, any more than for deliberative democracy.[113] Much regulation that would be, as *Lochner* put it, "meddlesome interferences with the rights of the individual"[114] in a libertarian, private society is legitimate, important, or even compelling in a constitutional democracy. Thayer-style deferential scrutiny of economic regulation is appropriate,[115] for economic liberties and property rights are secure with legislatures and executives in "the Constitution outside the courts."[116]

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110. *See* Fleming, *Constructing*, *supra* note 5, at 289; Fleming, *Securing*, *supra* note 5, at 20, 45.

111. In recent years, nonetheless, the Supreme Court, under the leadership of Justice Scalia, has begun to apply heightened rather than deferential scrutiny to "regulatory takings" under the Just Compensation Clause (not as a matter of substantive due process). *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

112. *See* Treanor, *supra* note 46, at 855-87; *infra* text accompanying notes 121-35. *But see* Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41 (1992).

113. *See, e.g.*, EPSTEIN, *supra* note 16, at 3-6; Richard A. Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 YALE L.J. 1633, 1645-46 (1988). *But see* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 163 (1974) (stating that a hypothetical "socialist society would have to forbid capitalist[ic] acts between consenting adults").

114. Lochner v. New York, 198 U.S. 45, 61 (1905).

115. *See generally* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (making the classic argument for judicial deference to the representative process).

116. SUNSTEIN, *supra* note 2, at 9-10.

It is important to distinguish between the partial, judicially enforceable Constitution and the whole Constitution that is binding outside the courts upon legislatures, executives, and citizens generally in our constitutional democracy, unless and until they amend it.[117] *Constitutional* theory is broader than theory of *judicial review*. We are accustomed to hearing people wax eloquent about institutional limits on the role of courts when they are arguing against judicial efforts to engage in social reform.[118] We should recognize, however, that institutional limits of courts caution against aggressive judicial enforcement of economic liberties and property rights.[119] Nonetheless, those constitutional rights are binding outside the courts upon legislatures, executives, and citizens generally.[120]

I fear that the brochure announcing the topic for our conference does not recognize this distinction between the judicially enforceable Constitution and the Constitution that is binding outside the courts. Apparently, it assumes that if economic liberties are not enforced judicially, they have no protection in our constitutional scheme! What turns on this distinction is whether protection of constitutional rights is to be conceived as confined to judicial enforcement of them or whether it also includes enforcement by legislatures and executives. Also at stake is whether legislatures and executives, when acting in a realm where no judicially enforceable rights are in play, should be seen as being bound by obligations imposed by the Constitution or instead as being free to act in constitutionally gratuitous ways. To say that a right is not judicially enforceable is not to say that it concerns a matter that is constitutionally gratuitous in the sense that legislatures, executives, and citizens generally are free to protect it or not as they wish. A right that is not judi-

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117. *See id.* at v-vi, 9-10, 139-40, 145-61, 350; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 586 (1975); Sager, *Fair Measure*, *supra* note 1, at 1212-28; Sager, *Thinness*, *supra* note 1, at 414-28.

118. *See, e.g.*, DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

119. *See* Sager, *Fair Measure*, *supra* note 1, at 1216-20, 1219 n.22.

120. *See* SUNSTEIN, *supra* note 2, at 9-10.

cially enforceable nonetheless imposes obligations upon legislatures, executives, and citizens generally to respect it or indeed to protect it affirmatively. We need to remember that legislatures and executives, as well as courts, have responsibilities to interpret the Constitution conscientiously and to secure our basic liberties.

Here, I would recall 1938, not 1937, and relate my argument to *United States v. Carolene Products Co.*[121] and the preconditions for the trustworthiness of the outcomes of the political processes. In the aftermath of the Court's repudiation of *Lochner* in *West Coast Hotel Co. v. Parrish*,[122] *Carolene Products* presumed that Thayer-style deferential scrutiny is appropriate in general and, in particular, where legislation touching upon economic liberties is concerned.[123] But footnote four intimates three exceptions where a more searching judicial scrutiny may be appropriate: (1) specific prohibitions of the Constitution; (2) restrictions on political processes; and (3) prejudice against discrete and insular minorities.[124]

In *Democracy and Distrust*, Ely famously elaborated the second and third paragraphs of footnote four as presenting situations of distrust: that is, situations where we could not trust the outcomes of the political processes to be legitimate.[125] The regulation of economic liberties and property rights does not present a situation of distrust within the *Carolene Products* framework that would warrant more searching judicial protection.[126] I shall consider briefly two arguments to the contrary: one has been made by Epstein, and the other might be attributed to James Madison.

Epstein has argued for bringing the "politics of distrust,"[127] which has operated in the scrutiny of restrictions upon and regulations of freedom of speech, to bear upon the scrutiny of

121. 304 U.S. 144 (1938).
122. 300 U.S. 379 (1937).
123. *See Carolene Prods.*, 304 U.S. at 152 & n.4.
124. *See id.*
125. *See* ELY, *supra* note 106, at 101-04.
126. *See id.* at 87-104; Treanor, *supra* note 46, at 872-75, 882-83.
127. Epstein, *supra* note 112, at 41.

regulations of economic liberties and property rights.[128] In response, Frank Michelman argued cogently that there are "functional differences between expressive liberties on the one hand, and proprietary and economic liberties on the other, [that] can amply explain and justify a practice of exceptionally strict judicial scrutiny of laws directly infringing expressive liberties" but not proprietary and economic liberties.[129] He argued further that distrust of lawmakers should not be exaggerated into a universal solvent that corrodes the legitimacy of all legislation.[130] As I would put it, *Carolene Products*-style distrust is not a general libertarian distrust of government, nor does it stem from a libertarian theory of limited government that entails distrust of all governmental regulation.

Madison may be invoked in support of the argument that the regulation of property rights constitutes a situation of distrust and poses dangers of a tyranny of the majority.[131] There are three responses to this line of argument. First, in response to his worry about a tyranny of the majority regarding property rights, Madison did not argue for aggressive judicial protection of such rights; instead, he argued for an extended republic as affording the best security against a tyranny of the majority over property rights and, for that matter, rights in general.[132] Second, William Treanor has argued that the original understanding—including Madison's understanding—supports deference to the political processes where regulation of economic liberties and property rights is concerned.[133] Treanor advocates judicial underenforcement of such liberties, except in situations of *Carolene Products*-style distrust, for example, environmental racism.[134] Third, in any event, Madison presumably contemplated a situation more like class warfare, and a tyranny of the majority of nonwealthy over the minority of wealthy. It strains credulity to think that

128. *See id.* at 47-59.
129. Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 106 (1992).
130. *See id.* at 105-14.
131. *See* THE FEDERALIST NO. 10 (James Madison).
132. *See id.*
133. *See* Treanor, *supra* note 46, at 836-55, 887.
134. *See id.* at 882-83.

the regulation of economic liberties and property rights that we see today in our country involves anything like class warfare. There is arguably no country on earth where economic liberties and property rights are more secure than in ours. The only economic phenomenon in the United States approaching class warfare is "the war against the poor,"[135] which is waged not just by the rich but also by the middle class and indeed the working class. In short, it is waged by the nonpoor.

I do not mean to suggest that, because the regulation of economic liberties and property rights does not present a situation of distrust, we simply fall back upon deferential scrutiny by default. Rather, I argue affirmatively that economic liberties and property rights present an appropriate case for judicial underenforcement. Granted, the regulation of personal liberties does not represent a situation of distrust within the *Carolene Products* framework that warrants more searching judicial scrutiny, at least not as it is commonly understood and as Ely has elaborated it.[136] Elsewhere, however, I have argued that the constitutional constructivism I am developing is a theory of constitutional democracy and trustworthiness by analogy to Ely's theory of representative democracy and distrust.[137] 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."[138] Each of constitutional constructivism's two themes seeks to secure a type of precondition for the trustworthiness of political decisions in our constitutional democracy. To be trustworthy, a constitutional democracy must secure and respect a scheme of equal basic liberties that guarantees not only the preconditions for deliberative democracy but also the preconditions for deliberative autonomy. Ely's process-perfecting theory

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135. For discussion of "the war against the poor," see RANDY ALBELDA ET AL., THE WAR ON THE POOR: A DEFENSE MANUAL (1996); HERBERT J. GANS, THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY (1995);

136. *See* ELY, *supra* note 106, at 87-101; John Hart Ely, *Democracy and the Right to Be Different*, 56 N.Y.U. L. REV. 397, 397-400 (1981).

137. *See* Fleming, *Constructing*, *supra* note 5, at 296-97.

138. RAWLS, *supra* note 105, at 319.

secures only the former type of precondition for trust. Hence, constitutional constructivism is a fuller theory of perfecting the trustworthy Constitution than is Ely's theory. On this view, judicial review securing personal liberties essential to deliberative autonomy is a precondition for the trustworthiness of political decisions in our constitutional democracy. Otherwise, citizens cannot engage in social cooperation on the basis of mutual respect and trust. Legislative regulation of economic liberties does not, however, undermine the preconditions for the trustworthiness of political decisions.

Admittedly, there may be some originalists who will insist—situation of distrust or not—that the original meaning of the Due Process Clause was that both economic liberties and personal liberties are fundamental, and therefore that both types of liberties are to be protected through judicial review against legislative encroachment. Put another way, they may argue basically that Justice Field was right in dissent in the *Slaughter-House Cases*[139] (putting aside the question of the relationship between the Privileges or Immunities Clause and the Due Process Clause).[140] On this view, the "whole theory of free government" requires that we interpret the Constitution to protect all "inalienable rights" that, as Justice Bushrod Washington put it in *Corfield v. Coryell*,[141] are "fundamental; which belong of right to the citizens of all free governments."[142] These fundamental rights definitely include economic liberties, even though in recent years many people have invoked this passage from *Corfield* to justify protecting fundamental personal liberties.[143] My argument for judicial underenforcement of economic liberties

139. 83 U.S. (16 Wall.) 36 (1873).

140. *See id.* at 83 (Field, J., dissenting). *Slaughter-House* for all practical purposes reduced the Privileges or Immunities Clause to a dead letter or a cadaver. Recently, in a case with potentially important implications, the Supreme Court anchored the right to travel in that clause and thus at least partly revived it. *See* Saenz v. Roe, 119 S. Ct. 1518 (1999). In doing so, Justice Stevens's opinion for the seven to two majority quoted at length from Justice Bradley's dissenting opinion in *Slaughter-House*. *See id.* at 1526-27.

141. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J., on circuit).

142. *Id.* at 551.

143. *See, e.g.*, TRIBE, *supra* note 16, at 1310 n.16; Fleming, *Securing*, *supra* note 5, at 26.

and property rights still obtains, irrespective of historical evidence concerning original meaning. For the argument for judicial underenforcement of economic liberties acknowledges that economic liberties, no less than personal liberties, are fundamental. It insists that this status alone does not justify more searching judicial scrutiny—especially because we should beware of the specter of *Lochner*, to which the next section returns.

III. THE SPECTER OF *LOCHNER*

When I teach *Lochner*, I ask my students: "What does it mean to charge someone with Lochnering and thus to summon the specter or ghost of *Lochner*?" My response is that it means to charge someone with doing whatever it was that the Supreme Court did in *Lochner* that was so horrible. The response may appear to be vacuous, but it is not. The point is to suggest that *Lochner* functions as a rhetorical club that people use to criticize their theoretical opponents. That is not to say that anything goes, and that Lochnering can mean anything that anyone hurling the epithet says it means. There are better and worse arguments about what is wrong with *Lochner*; and, there are better and worse arguments about the relationship between *Lochner*, on the one hand, and *Roe* and *Casey*, on the other. Here, I sketch the lines of argument concerning the specter of *Lochner* that I plan to pursue in further work.

Initially, I shall catalog four understandings of *Lochner*, and of the relationship between it, *Roe*, and *Casey* (this catalog corresponds to the grid of four positions stated above). One, what was wrong with *Lochner* is that the Court protected "unenumerated" substantive fundamental rights as such through the Due Process Clause.[144] On this view, what was wrong with *Lochner* is also wrong with *Roe* and *Casey*.[145]

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144. One version of this view stems from a narrow originalism. *See, e.g.*, BORK, *supra* note 17, at 44-49. Another version is rooted in a process-perfecting theory. *See, e.g.*, Ely, *supra* note 17, at 937-43.

145. Ely argued that *Roe* involved Lochnering on this understanding of what was wrong with *Lochner*. *See* Ely, *supra* note 17, at 937-43. Ely did not argue, however, that *Casey* should have overruled *Roe* for that reason. *See* JOHN HART ELY, ON CONSTITUTIONAL GROUND 304-06 (1996).

Two, what was wrong with *Lochner* is not that the Court protected substantive fundamental rights as such through the Due Process Clause, but that it protected the wrong substantive fundamental rights, namely, economic liberties as distinguished from personal liberties.[146] On this view, the Court was wrong to protect substantive economic liberties in *Lochner*, but it was right to protect substantive personal liberties in *Roe* and *Casey*.

Three, *Lochner* was decided rightly, and the Court should revive aggressive judicial protection of economic liberties as well as personal liberties through the Due Process Clause.[147] On this view, *Lochner*, *Roe*, and *Casey* were decided rightly—all involved judicial protection of basic liberties that are fundamental or integral to personhood, liberty, or autonomy.

Four, *Lochner* was decided rightly, and the Court should revive aggressive judicial protection of economic liberties, but not of personal liberties.[148] On one version of this view, *Lochner* should have been decided on the basis of the Takings Clause and/or the Contracts Clause, not the Due Process Clause. That is, the Court should aggressively protect "enumerated" economic liberties and property rights; but it should not aggressively protect "unenumerated" fundamental rights like personal liberties. On this view, *Lochner* was decided rightly, but *Roe* and *Casey* were decided wrongly.

I shall mention a fifth understanding of *Lochner*—that of Ackerman—before concluding by considering a final account—that of Sunstein—which I believe is the best account. Ackerman suggests that *Lochner*, rather than being merely the rogue act of lunatic Justices, was at least plausible in its time, if not rightly decided.[149] Ackerman concludes, however, that *Lochner* is wrong today because the New Deal transformed the Constitution outside the formal amending procedures of Article V.[150] I mention Ackerman's account here mainly because I would be remiss if I did not do so in a conference about fidelity and 1937. Elsewhere, I have criticized Ackerman's claims that his

146. *See, e.g.*, DWORKIN, *supra* note 40, at 118-25, 144-47; DWORKIN, *supra* note 35, at 278; TRIBE, *supra* note 101, at 84-86; TRIBE, *supra* note 16, at 1302-12.
147. *See, e.g.*, MACEDO, *supra* note 98, at 49-85; SIEGAN, *supra* note 16.
148. *See, e.g.*, EPSTEIN, *supra* note 16; Epstein, *supra* note 102.
149. *See* ACKERMAN, *supra* note 42, at 63-66, 101-03.
150. *See id.*

theory of dualist democracy and of constitutional amendment and transformation outside Article V is the only theory that fits our constitutional practice and experience, focusing on his arguments that to realize "the possibility of popular sovereignty" and "the possibility of interpretation" we must accept his theory.[151]

Finally, what was wrong with *Lochner* has nothing to do with protecting "unenumerated" substantive fundamental rights: it was the Court's use of "status quo neutrality" and existing distributions as the baseline from which to distinguish unconstitutionally partisan political decisions from impartial ones.[152] On this view, what was wrong with *Lochner* is unrelated to *Roe* and *Casey* because, far from evincing status quo neutrality,[153] the cases are justified on the basis of an anti-caste principle of equality that is critical of the status quo. Indeed, *Roe* and *Casey* are tantamount to a *Brown v. Board of Education*[154] for women.[155] Or as I would put it, they are critical of the status quo for failing to protect personal liberties that are necessary preconditions for deliberative autonomy.[156] The same is true of other leading personal liberties cases under the Due Process Clause.[157] On this view, what was wrong with *Lochner* would be present in any revival of aggressive judicial protection of economic liberties and property rights through the Due Process Clause; but it is not present in aggressive judicial protection of personal liberties under the Due Process Clause.

CONCLUSION

I want to conclude this Article by reiterating the claim I made at the beginning. Economic liberties and property rights are so

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151. *See, e.g.*, James E. Fleming, *We the Unconventional American People*, 65 U. CHI. L. REV. 1513, 1513 (1998); James E. Fleming, *We the Exceptional American People*, 11 CONST. COMMENTARY 355 (1994).

152. *See* SUNSTEIN, *supra* note 2, at 45-62, 259-61; Sunstein, *supra* note 13, at 874-75, 882-83.

153. On this view, *Lochner* is alive and well, not in *Roe* and *Casey*, but in, for example, *Buckley v. Valeo*, 424 U.S. 1 (1976). *See, e.g.*, SUNSTEIN, *supra* note 2, at 84-85, 223-24; Sunstein, *supra* note 13, at 883-84.

154. 347 U.S. 483 (1954).

155. *See* SUNSTEIN, *supra* note 2, at 259-61.

156. *See* Fleming, *Constructing*, *supra* note 5, at 256-60, 273-75.

157. *See id.*

fundamental in our constitutional scheme, and so sacred in our constitutional culture, that there is neither need nor good argument for aggressive judicial protection of them. Such liberties are understood properly as judicially underenforced norms. Their fuller enforcement and protection is secure with legislatures and executives in the Constitution outside the courts. Fidelity in constitutional interpretation does not require the same level of judicial protection for fundamental economic liberties as for fundamental personal liberties.