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Recommended Citation

Linda McClain & James Fleming, *Dworkin's Perfectionism*, No. 15-45 Boston University School of Law, Public Law Research Paper (2015).

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DWORKIN'S PERFECTIONISM

Boston University School of Law
Public Law & Legal Theory Working Paper No. 15-45

October 29, 2015

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Dworkin's Perfectionism

James E. Fleming & Linda C. McClain¹

I. Ronald Dworkin: A Eulogy

Ronald Dworkin is widely and rightly viewed as the most important legal philosopher and constitutional theorist of our time and as one of the leading figures in moral and political philosophy. In the words of Marshall Cohen, Dworkin's jurisprudential writings "constitute the finest contribution yet made by an American writer to the philosophy of law."² And Cohen wrote those words when Dworkin published his first book, *Taking Rights Seriously*, in 1977! His many outstanding subsequent books and articles made good on that early, prescient assessment. Dworkin is unmatched and unrivaled in legal philosophy and constitutional theory.

In the words of T.M. Scanlon, Dworkin is "our leading public philosopher."³ He regularly published essays on legal and political subjects in the *New York Review of Books* from 1968 through 2013. Like many readers, we eagerly opened each issue hoping to find a new piece by Dworkin. We shall miss that. Dworkin had the rare gift of being able to write abstractly in legal philosophy and constitutional theory yet also to write accessibly for the general educated citizen. He brought out the issues of moral and political principle at the heart of the major political and constitutional issues of the day. His writing not only bristles with brilliant insights but also exhorts and uplifts. Moreover, in courageous and spirited exchanges with leading conservatives, like Richard Posner, Robert Bork, and Antonin Scalia, he gave as good as he got and then some!⁴

Over the years, one of us (Fleming) has organized a number of conferences in constitutional theory and Dworkin was often the most appropriate keynote speaker. In conferences at Fordham University School of Law on "Fidelity in Constitutional Interpretation" and "Rawls and the Law" and at Boston University School of Law on his book, *Justice for Hedgehogs*, Dworkin delivered powerful and eloquent keynote lectures.⁵ The readers of this book are likely familiar with the countless accounts of Dworkin's brilliance as a lecturer: of how he spoke without notes and with great flair, making it all seem so graceful and effortless. Even more impressive, in our experience, was how seriously he took his lectures and how energetically he responded to his interlocutors. In the conference at Boston University on *Justice for Hedgehogs*, held when Dworkin was 78 years old, he demonstrated his characteristic energy

by responding extemporaneously to all 31 commentators, one panel at a time, and elaborating those initial thoughts in a published response.⁶ One of us had the privilege of writing the biographical entry on Dworkin in the *Yale Biographical Dictionary of American Law*, and closed that entry by stating: “His work abounds with indefatigable energy, giving the impression that he will not stop making arguments until he has put the clamps of reason upon every rational being.”⁷

Dworkin’s famous Colloquium in Legal, Political, and Social Philosophy at New York University (with Tom Nagel and sometimes Jeremy Waldron) set the standard for rigorous, vigorous, and constructive dialogue concerning important scholarship in those fields. Many other colloquia have been modeled upon it, but none has equaled it. Dworkin, Nagel, and Waldron gave incisive summaries of the works being presented, asked apt questions, and pressed probing and constructive criticisms. The command and vigor with which they did so was an inspiration to all who presented work in the Colloquium and to all who participated. One of us (McClain) benefitted both from the formative experience of being a student in the Colloquium and, years later, from receiving the generous input of Dworkin and Nagel when presenting a paper in the Colloquium.⁸

Dworkin’s work in legal philosophy and constitutional theory was so powerful and fecund that it could inspire many careers wholly dedicated to building upon it and working out its implications. Dworkin (along with John Rawls) has been a powerful inspiration for our own work in constitutional theory. Fleming’s *Securing Constitutional Democracy: The Case of Autonomy* puts forward a “Constitution-perfecting theory” that aims, in the spirit of Dworkin, to interpret the American Constitution so as to make it the best it can be.⁹ Sotirios Barber’s and Fleming’s book, *Constitutional Interpretation: The Basic Questions*, is a response to Dworkin’s call, in *Taking Rights Seriously*, for a “fusion of constitutional law and moral theory.”¹⁰ Our book, *Ordered Liberty: Rights, Responsibilities, and Virtues*, responds to charges that liberals like Dworkin “take rights [too] seriously,” developing a civic liberalism that takes responsibilities and civic virtues – as well as rights – seriously.¹¹ And Fleming’s recent book, *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms*, joins Dworkin in defending a moral reading or philosophic approach to constitutional interpretation

over and against all forms of originalism.¹² Finally, in evaluating new decisions by the United States Supreme Court and addressing new challenges, McClain has found it fruitful to ask: “What would Dworkin do?” or “What would Dworkin say?”¹³

Dworkin’s successor as Professor of Jurisprudence at Oxford University, John Gardner, put it well when he said: “The loss of Ronnie takes a bit of the sparkle out of life as a philosopher of law.”¹⁴ But those who knew Dworkin and learned from his teaching and writing will never forget the thrill of engaging with him and building upon his work. His sparkling prose, the staggering ambition and monumental achievements of his works, and the flair and gusto of his arguments and insights will never cease to illuminate and inspire. We shall not look upon his like again. Ronald Dworkin made legal philosophy and constitutional theory the best they can be.

In this essay, we shall interpret Dworkin’s constitutional theory in light of three varieties of perfectionism: (1) the idea that government should undertake a formative project of inculcating civic virtues and encouraging responsibility in the exercise of rights; (2) the idea that we should interpret the American Constitution so as to make it the best it can be; and (3) the idea that we should defend a Constitution-perfecting theory that would secure not only procedural liberties essential for democratic self-government but also substantive liberties essential for personal self-government. We shall identify three gaps left by Dworkin’s work and sketch how we have sought to fill those gaps in the spirit of his work through developing a mild form of constitutional perfectionism.

II. Taking Not Only Rights But Also Responsibilities and Virtues Seriously

First, there is perfectionism in political philosophy as it might be applied to constitutional theory. In criticizing perfectionism in constitutional theory, Cass Sunstein states that “[t]he perfectionist approach to constitutional law should not be confused with perfectionism in political philosophy,” citing John Rawls, *Political Liberalism*.¹⁵ Rawls distinguishes between political liberalism and perfectionist liberalism (as well as perfectionist political philosophies more generally): Perfectionists of all stripes generally believe that statecraft is soulcraft, and that the state must inculcate civic virtues or even moral excellence in the citizenry. Despite Sunstein’s remark, we should acknowledge the variety of constitutional perfectionism that brings perfectionist political philosophy to bear on constitutional theory. The two best examples are the

work of Sotirios A. Barber¹⁶ and that of Michael J. Sandel.¹⁷ On Barber's view, we ultimately must face up to the challenge of "supplying . . . the defect of better motives," not just by relying upon checks and balances and making "[a]mbition . . . counteract ambition" – James Madison's strategy in *The Federalist* No. 51¹⁸ – but also by inculcating civic virtues that are necessary for responsible citizenship and for the success of the constitutional order. Similarly, Sandel argues not only that government should undertake such a formative project but also that in justifying constitutional rights like privacy, we should make recourse to substantive moral goods or virtues and a conception of justice as cultivating virtues. In our book, *Ordered Liberty*, we embrace a mild form of perfectionist constitutional theory along these lines.¹⁹ Strikingly, although Dworkin rejected Rawls's political liberalism in favor of a comprehensive ethical liberalism, and he recognized considerable latitude for governmental encouragement of responsibility in the exercise of rights, he never fully developed a perfectionist theory of governmental responsibility to inculcate civic virtues.

A. Respecting Freedom and Cultivating Virtues

Dworkin, alongside Rawls, is the leading contemporary proponent of a liberal conception of justice.²⁰ As Sandel interprets these liberals, they think about justice in terms of *respecting freedom* as distinguished from *maximizing welfare* or *cultivating virtues*.²¹ Sandel himself is the leading civic republican critic of such liberal conceptions of justice, interpreting them as holding (1) that law should be neutral concerning competing conceptions of virtue or the best way to live and (2) that "a just society respects each person's freedom to choose his or her conception of the good life."²² And he is the most prominent civic republican proponent of conceiving justice in terms of cultivating virtues. Nonetheless, we want to point out some notable and unexpected affinities between Dworkin's and Sandel's conceptions of justice as put forward respectively in *Justice for Hedgehogs* and *Justice: What's the Right Thing to Do?*

First, in *Justice for Hedgehogs*, Dworkin rejects neutrality and criticizes Rawls's political liberalism for bracketing conceptions of the good life in arguments about justice.²³ Instead, Dworkin defends a comprehensive ethical liberalism and argues for the integration of ethics, morality, and justice.²⁴ He introduces two ethical principles that "state fundamental requirements of living well":

The first is a principle of self-respect. Each person must take his own life seriously: he must accept that it is a matter of importance that his life be a successful performance rather than a wasted opportunity. The second is a principle of authenticity. Each person has a special, personal responsibility for identifying what counts as success in his own life; he has a personal responsibility to create that life through a coherent narrative or style that he himself endorses.

He concludes: “Together the two principles offer a conception of human dignity.”²⁵ Dworkin develops two related political principles, arguing that “[n]o government is legitimate unless it subscribes to two reigning principles”: “First, it must show equal concern for the fate of every person over whom it claims dominion. Second, it must respect fully the responsibility and right of each person to decide for himself how to make something valuable of his life.”²⁶ So, too, Sandel criticizes Rawls’s political liberalism, arguing that we cannot separate arguments about justice from arguments about competing conceptions of the good life and of the virtues that a good society should promote.²⁷

Second, in *Justice for Hedgehogs*, Dworkin is concerned to articulate the right process of moral reasoning. In doing so, he looks back to Aristotle for an example of a holistic approach to such reasoning and also looks to the relationship between questions of the good life and those of the good polity.²⁸ So, too, Sandel turns to Aristotle for a virtue-centered approach that integrates moral reasoning about justice with reasoning about moral virtues and conceptions of the good life.²⁹

Third, in *Justice for Hedgehogs*, Dworkin explains that the idea of “living well” means “creating not just a chronology but a narrative that weaves together values of character – loyalties, ambitions, desires, tastes, and ideals.”³⁰ Sandel has long criticized views like Dworkin’s as forms of “voluntarist” liberalism that conceive the person as a freely choosing, “unencumbered self” who is the “author” of his or her own ends and who can stand apart from relationships and commitments.³¹ Yet in *Justice*, Sandel, like Dworkin, stresses the importance of a “narrative quest that aspires to a certain unity or coherence”³² and contends that we are “storytelling beings” and “we live our lives as narrative quests.”³³

Finally, in *Justice for Hedgehogs*, just as in *Life’s Dominion*, Dworkin argues not only for “taking rights seriously,” but also for “taking responsibilities seriously.”³⁴ Dworkin stands in contrast to other forms of liberalism grounded in the idea that the state must be neutral between

competing conceptions of the good life and the idea that rights insulate right-holders from moral judgments about their exercise. Rather, Dworkin argues that the state may encourage people to exercise their rights responsibly, short of compelling them to do what the government thinks is the responsible thing to do.³⁵ Sandel, much like Dworkin, has criticized those very liberal conceptions of neutrality and of rights as insulating right-holders from moral judgments.³⁶

And so, we must ask, are Dworkin's comprehensive ethical liberalism and Sandel's perfectionist civic republicanism as far apart as Sandel's criticisms of liberal conceptions of justice might lead us to expect? In other work, we have suggested that the contrasts between justice as respecting freedom and justice as cultivating virtues are not as stark as Sandel has put them. The work of some liberal political theorists, most prominently William Galston and Stephen Macedo, has narrowed the distance between these two conceptions. These theorists have developed attractive conceptions of civic liberalism, arguing persuasively that liberalism has a proper concern with cultivating civic virtues.³⁷ We too work on this terrain of civic liberalism in our book, *Ordered Liberty*.³⁸

We shall suggest that the convergences between Dworkin, on the one hand, and the civic liberals and civic republicans, on the other, are closer with respect to recognizing considerable latitude for governmental promotion of responsible exercise of rights than they are with respect to recognizing the need for governmental inculcation of civic virtues. That is, Dworkin developed a theory of taking not only rights but also responsibilities seriously, but he for the most part eschewed developing a perfectionist project of cultivating civic virtues.

B. Taking Responsibilities as well as Rights Seriously

In *Life's Dominion*, Dworkin propounds a notably "moralized" liberalism, making moral arguments for the right to procreative autonomy and the right to die while defending the authority of government to moralize concerning persons' exercise of these rights. He writes that America's political heritage is characterized by "two sometimes competing traditions." "The first is the tradition of personal freedom. The second assigns government responsibility for guarding the public moral space in which all citizens live." Dworkin continues: "A good part of constitutional law consists in reconciling these two ideas." And he asks: "What is the appropriate balance in the case of abortion?"³⁹

This passage may have surprised many readers, both critics and allies, for two basic reasons. First, critics who associate liberals like Dworkin with exaltation of the tradition of personal freedom may be heartened that he acknowledges the legitimacy of the tradition that assigns government responsibility for guarding the public moral space. And allies who celebrate personal freedom may be alarmed that he sanctions governmental protection of the moral or ethical environment. (Scanlon, a friendly liberal ally, conceded that liberals including Dworkin have not talked very much about the latter tradition or about government promoting respect for intrinsic values like the sanctity of life. Indeed, he found Dworkin's reference to "maintaining a moral environment" a "slightly surprising phrase."⁴⁰)

Second, critics and allies commonly associate Dworkin with the notion of "rights as trumps" and thus with the idea that "taking rights seriously" practically precludes reconciling rights with, or balancing rights against, governmental concern for the guarding the public moral space.⁴¹ Indeed, some readers might have expected a book by Dworkin on the right of procreative autonomy and the right to die to defend these rights solely on the basis of an argument about personal freedom. And they might have expected Dworkin to argue that these rights trump the very concerns regarding the moral or ethical environment that he here acknowledges as part of the American political heritage and constitutional law.

Dworkin's recognition of the place of the second tradition in the American political heritage is significant. Both as a matter of fit with American constitutional precedents and practice and as a matter of a plausible conception of government's proper authority, Dworkin is right to recognize that there are legitimate channels through which government may seek to promote the moral or ethical environment. At the same time, there is no denying that this tradition has been invoked to try to justify appalling deprivations of freedom and equality, for example censorship of great works of literature and prohibition of interracial marriage.⁴² For this reason, it is understandable that many liberals have sought to deny, avoid, or eradicate this tradition. Yet Dworkin is right to see that the risks of this tradition do not justify rejecting it entirely. Instead, he attempts to work with, and to work within, this tradition and to make it safe for liberals and for fundamental principles of freedom and equality, together with commitments to equal concern and dignity.

In *Justice for Hedgehogs*, in a passage concerning restricting liberty, Dworkin asks: “Why should [the majority] not be permitted to protect the religious and sexual culture it favors...?” He answers:

We need arguments like those of this book – the distinctions and interconnections among responsibility, authenticity, influence, and subordination that we have reviewed – properly to answer that question. The second principle of dignity makes ethics special: it limits the acceptable range of collective decision. We cannot escape the influence of our ethical environment: we are subject to the examples, exhortations, and celebrations of other people’s ideas about how to live. But we must insist that that environment be created under the aegis of ethical independence: that it be created organically by the decisions of millions of people with the freedom to make their own choices, not through political majorities imposing their decisions on everyone.⁴³

There clearly will be limits on government’s protection of the ethical environment.

Dworkin’s arguments for rights in both *Life’s Dominion* and *Justice for Hedgehogs* are grounded, not in governmental neutrality or in personal autonomy, but in a deontology of state conduct. In other words, Dworkin advances a theory that derives from a conception of the permissible bases for collective decisions. His concern is with respecting limits on the grounds for governmental decisions and with avoiding political majorities imposing their decisions on everyone concerning questions such as how to live or how best to respect the sanctity of life.⁴⁴ Dworkin specifically denied that he was articulating a theory of rights that asks what our fundamental or especially important interests are and what freedoms are necessary to secure or further those interests.⁴⁵ For example, despite Dworkin’s justification for a right of procreative autonomy, his theory differs in important respects from a theory of autonomy rooted in a conception of the person and what is necessary for the development and exercise of moral powers or the like. In this respect, his theory differs from the Rawlsian civic liberal theory of deliberative autonomy that we have developed and applied in *Securing Constitutional Democracy*, *The Place of Families*, and *Ordered Liberty*.⁴⁶

This feature of Dworkin’s theory in part accounts for why he contemplated a relatively large space (compared to most liberals) for governmental moralizing. On his view, there is a large space between complete, hands-off noninterference with liberty, autonomy, dignity, independence, or choice (of the sort strong autonomy theorists advocate) and coercion.

Furthermore, government need not, and should not, be neutral in that large space. It may moralize, encourage responsibility, and the like, so long as it does not coerce the ultimate decision.⁴⁷ Likewise, citizens need not, and should not, be neutral.

At the same time, this feature of Dworkin's theory may help explain why he did not develop a civic liberalism concerned to inculcate civic virtues or to develop the moral powers or capacities for responsible democratic and personal self-government. And why he did not put forward a theory of civic education or of the roles of government and civil society in preparing persons for responsible citizenship and orderly social reproduction. In our book, *Ordered Liberty*, we have elaborated a mild form of civic liberal perfectionism that takes up these projects. It aims to take civic virtues – along with rights and responsibilities – seriously. We think our view is not incompatible with Dworkin's ethical liberalism, even if he himself did not develop such a theory.

III. Making the Moral Reading of the American Constitution the Best It Can Be

A. Interpretive Perfectionism

Second, we distinguish perfectionism in the sense of a theory of constitutional interpretation entailing that we should interpret the Constitution so as to make it the best it can be.⁴⁸ On this view, as Sunstein puts it, constitutional interpretation is a matter of putting the existing legal materials “in their best constructive light,” or of making them “the best they can be.”⁴⁹ Furthermore, it is the quest for the interpretation that provides the best fit with and justification of the constitutional document and underlying constitutional order.⁵⁰ This sense of perfectionism – which we might call “interpretive perfectionism” – is famously associated with Dworkin. We embrace this sense.

Dworkin's interpretive perfectionism takes the form of the “moral reading” of the American Constitution: the Constitution embodies abstract moral principles rather than laying down particular historical conceptions, and interpreting and applying those principles require fresh judgments of political theory about how they are best understood.⁵¹ Dworkin's development of the moral reading makes it sound (1) more utopian and (2) more philosophical than it should. Therefore, he triggers objections that he propounds (1) a theory of the “perfect Constitution”⁵² and (2) a theory that entails that judges should be philosophers.⁵³ To be fair to

Dworkin, he does not claim that the moral reading is a moral realist reading: a reading that is prior to and independent of our own political and constitutional order and practice, and true to the moral order of the universe.⁵⁴ Rather, he contends that the moral reading is constrained by the requirements of fit and integrity: thus, it is bound to account for the legal materials of the existing constitutional order and practice.⁵⁵ And so, even if Dworkin's theory of constitutional interpretation aims to provide the best interpretation of these legal materials – to make the Constitution the best it can be – it is not unbounded.

Nonetheless, some critics charge that Dworkin's moral reading is utopian in two senses. One, it is a moral reading for a perfect liberal utopia: he would interpret the American Constitution to protect every right and produce every outcome that his liberal political philosophy would entail. And two, it is literally a theory for no place: he would give the same moral reading irrespective of the actual history and practice of the constitutional scheme, for example, the same for Britain as for the United States. We do not believe that such critics are right about Dworkin's moral reading, but they certainly are persistent and warrant a fuller response than simply directing them to read Dworkin more carefully.

When confronted with the “perfect Constitution” challenge,⁵⁶ Dworkin basically pleaded (we paraphrase): “I do not believe the American Constitution is perfect. For example, while I do believe that justice requires welfare rights, I do not believe that the Constitution protects such rights.” To continue our paraphrase: “Your challenge applies to Frank Michelman – not me – because he – not I – believes that the Constitution does protect welfare rights.”⁵⁷ Beyond that, Dworkin was at pains to make clear, as noted above, that the constraints of fit and integrity entail that the actual Constitution is imperfect when measured against the standards of any normative political philosophy or conception of justice.

Our tack here for responding to the perfect Constitution challenge to Dworkin's moral reading is to show how Lawrence G. Sager's justice-seeking account of American constitutional practice helps meet the challenge, in particular, through its accounts of the thinness of constitutional justice and more particularly of the moral shortfall of judicially enforceable constitutional law. Sager argues that certain constitutional principles required by justice are judicially underenforced, yet nonetheless may impose affirmative obligations outside the courts

on legislatures, executives, and citizens generally to realize them more fully.⁵⁸ Sager's view is an important component of a full moral reading or justice-seeking account of the Constitution. For it helps make sense of the evident thinness or moral shortfall of constitutional law. For example, instead of saying that the American Constitution does not secure welfare rights – the move that Dworkin makes – Sager says that the Constitution does secure welfare rights, but it leaves their enforcement in the first instance to legislatures and executives.⁵⁹ Once a scheme of welfare rights and benefits is in place, courts have a secondary role in enforcing it equally and fairly.⁶⁰

Furthermore, if Dworkin's moral reading of the American Constitution, though it embodies abstract moral principles, does not incorporate all of the important principles of justice, we need an account of the difference between the two. Because Dworkin does not offer such an account, he may leave his readers wondering whether his theory entails that the American Constitution is a perfect liberal Constitution. To be sure, the constraints of fit and integrity entail a gap between the Constitution and justice. But Dworkin says little about any such gap, and what he does say implies that the gap may be narrow. For example, he says that the Constitution is abstract, and therefore it should come as no surprise that any right we can argue for as a matter of political morality we can also argue for as a matter of constitutional law.⁶¹ And where he does acknowledge a significant gap between the Constitution and justice, for example, with welfare rights, he does not provide a general account of why the Constitution as he conceives it does not incorporate elements of justice like welfare rights.

Sager's account of the domain of constitutional justice helps in this regard. He distinguishes (1) judicially enforceable constitutional law from (2) constitutional justice, which he in turn distinguishes from (3) political justice and (4) morality generally.⁶² Imagine a series of progressively thicker concentric circles representing these four domains. Dworkin's highly general formulation of the "moral reading" may seem to blur the distinction between constitutional law and constitutional justice, as well as that between constitutional justice and political justice, and indeed that between constitutional law, on the one hand, and political justice and morality generally, on the other. His "hedgehogist" commitment to the integration of ethics, morality, and justice may further blur those distinctions. Sager's justice-seeking account underscores just how thin a moral reading of the Constitution has to be – as compared to our

thicker conceptions of political justice and morality – in order to be credible as an account of American constitutional practice.

Sager's underenforcement thesis may entail a conception of legislative responsibility congenial to the conception that Dworkin's early work promised but never fully provided. We refer to the "doctrine of political responsibility" that Dworkin argued (in "Hard Cases") is incumbent on legislatures as well as courts.⁶³ The doctrine of political responsibility implies that legislatures have an obligation to engage in coherent, responsible legislating with integrity (not precisely as coherent, responsible, and constrained as judging with integrity, but legislating with integrity nonetheless). And in *Law's Empire*, Dworkin spoke of integrity in legislation as well as integrity in adjudication.⁶⁴ Jeremy Waldron opens *The Dignity of Legislation* by suggesting that he aspires to do for legislation what Dworkin "purports to [have done] for adjudicative reasoning."⁶⁵ We interpret Waldron to mean that he aims to develop a conception of legislating with integrity, if not integrity in legislation.⁶⁶ Admittedly, Dworkin himself did not do this. Nor for that matter has Waldron fully accomplished it. We view Sager's idea of judicial underenforcement, coupled with his notion that legislatures have the obligation to enforce constitutional norms and seek constitutional justice, as furthering Dworkin's unfinished business. For one thing, we should view legislatures as constrained by the Constitution outside the courts, not just as legislating in constitutionally gratuitous ways. For another, we should view legislatures as partners with courts in pursuing constitutional justice. Much work remains to be done in articulating a full-blown conception of legislating with responsibility and integrity as an aspect of the moral reading of the American Constitution.

B. Perfecting the Substantive Constitution

Third, we distinguish perfectionism in the sense of theories that interpret the American Constitution to secure or perfect the basic liberties that are preconditions for the legitimacy and trustworthiness of the outcomes of the political processes. John Hart Ely's "process-perfecting" theory of reinforcing representative democracy, put forward in his book, *Democracy and Distrust*,⁶⁷ is the most famous version of such a theory. According to Ely's theory, the American Constitution's core commitment is to representative democracy, and judicial review is justified principally when the processes of representative democracy, and thus the political decisions

resulting from them, are undeserving of trust. Ely argues that courts should reinforce or perfect the procedural preconditions for the trustworthiness of the outcomes of the political processes, but that they should eschew protecting substantive liberties.

Dworkin famously criticized Ely's theory for taking a "flight from substance" to process,⁶⁸ including fleeing protecting substantive liberties like an individual's "freedom to make ethical choices for himself"⁶⁹ to protecting only procedural liberties like the right to vote. And he developed a substantive conception of constitutional democracy – or a "partnership" view – as an alternative to Ely's procedural conception of majoritarian democracy. The partnership view of democracy holds that "the people govern themselves each as a full partner in a collective political enterprise so that a majority's decisions are democratic only when certain further conditions are met that protect the status and interests of each citizen as a full partner in that enterprise."⁷⁰ Majority support, just on its own, does not supply a "moral reason" for what the majority supports; ideas drawn from political morality about "justice, equality, and liberty" should inform our views about what is a democratic decision.⁷¹ Thus, "[t]he partnership conception ties democracy to the substantive constraints of legitimacy."⁷² Dworkin is persuasive in contending that protection of, and respect for, rights that are the conditions for moral membership in our political community – rooted in equal concern and dignity – are themselves preconditions for the legitimacy of the outcomes of majoritarian political processes.⁷³ Here Dworkin – despite his criticism of Ely – appears to have taken a page out of Ely's book in conceiving our rights as "democratic conditions" and in arguing that courts protecting constitutional rights guarantee democracy rather than compromise it. But unlike Ely, Dworkin would include, among the conditions of democracy, certain "substantive" rights rooted in equal concern and dignity in addition to "procedural" rights.⁷⁴

Dworkin has powerfully expressed the conditions of moral membership in our political community. But we would recast the architecture of his constitutional theory to differentiate it more sharply from that of Ely's process-perfecting theory. Characterizing all of our substantive and procedural rights as "democratic conditions," as Dworkin does, may lead to unnecessary trouble and resistance. Many readers may resist his argument that substantive rights grounded in equal concern and dignity are "democratic conditions." They may suspect that Dworkin is pulling

a fast one or being too clever by packing all of the substantive rights that constrain majoritarian political processes into the “democratic conditions.”⁷⁵

One of us has sought to develop a substantive *Constitution-perfecting theory* as an alternative to the *process-perfecting theory* advanced by Ely.⁷⁶ Such a theory would reinforce not only the procedural liberties (those related to democratic participation) but also the substantive liberties (those related to personal autonomy and ethical independence) embodied in the American Constitution and presupposed by its constitutional democracy. *Securing Constitutional Democracy* puts forward 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. They reflect two bedrock structures of deliberative political and personal self-government.⁷⁷ Unlike process theories, this Constitution-perfecting theory provides a firm grounding for rights of 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. This theory also shows how basic liberties associated with personal autonomy, along with those related to democratic participation, fit together into a coherent scheme of basic liberties and constitutional essentials that are integral to the American Constitution and its underlying constitutional democracy. The architecture of such a Constitution-perfecting theory can comfortably house all of what Dworkin conceives as the conditions of moral membership in our political community without recasting substantive liberties constraining majorities as “democratic conditions.” On this theory, we perfect the whole substantive Constitution, not merely the partial procedural Constitution.

Through offering this account of the moral shortfall of the moral reading and developing a substantive Constitution-perfecting theory, we aspire to make the moral reading of the American Constitution the best it can be.

NOTES

1. Fleming is The Honorable Paul J. Liacos Professor of Law at Boston University School of Law. McClain is Professor of Law and Paul M. Siskind Research Scholar at Boston University School of Law. In this essay, we have drawn from previous pieces engaging with Ronald Dworkin's work.

2. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) (blurb on dust jacket). In this introduction, we draw from James E. Fleming, "Ronald Dworkin: A Eulogy," <http://balkin.blogspot.com/2013/02/ronald-dworkin-eulogy.html>.

3. T.M. Scanlon, "Partisan For Life," in *New York Review of Books*, July 15, 1993, 45, 45 (reviewing Ronald Dworkin, *Life's Dominion* (New York, NY: Knopf, 1993)).

4. Ronald Dworkin, "Darwin's New Bulldog," *Harvard Law Review* 111 (1998): 1718, reprinted in Ronald Dworkin, *Justice in Robes* (Cambridge, MA: Harvard University Press, 2006), 75 (criticizing Posner); Ronald Dworkin, "Bork's Own Postmortem," in Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996), 287 (criticizing Bork); Ronald Dworkin, "Comment," in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1997), 115 (criticizing Scalia).

5. Ronald Dworkin, "The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve," *Fordham Law Review* 65 (1997): 1249, reprinted in Dworkin, *Justice in Robes*, 117; Ronald Dworkin, "Rawls and the Law," *Fordham Law Review* 72 (2004): 1387, reprinted in Dworkin, *Justice in Robes*, 241; Ronald Dworkin, "Justice for Hedgehogs," *Boston University Law Review* 90 (2010): 469.

6. Ronald Dworkin, "Response," *Boston University Law Review* 90 (2010): 1059.

7. James E. Fleming, "Ronald Dworkin," in *The Yale Biographical Dictionary of American Law*, ed. Roger K. Newman (New Haven, CT: Yale University Press, 2009), 178-79.

8. That paper became Chapter 4, "Marriage Promotion, Marriage (E)quality, and Welfare Reform," in Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge, MA: Harvard University Press, 2006), 117.

9. James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* (Chicago, IL: University of Chicago Press, 2006), 4-6, 73-74, 210-11.

10. Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York, NY: Oxford University Press, 2007), xiii (quoting Dworkin, *Taking Rights Seriously*, 149).

11. James E. Fleming and Linda C. McClain, *Ordered Liberty: Rights, Responsibilities, and Virtues* (Cambridge, MA: Harvard University Press, 2013), 1-3.

12. James E. Fleming, *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms* (New York, NY: Oxford University Press, 2015), xi, 3.
13. Linda C. McClain, "Corporate Conscience and the Contraceptive Mandate: A Dworkinian Reading," *Journal of Law and Religion* 30 (2015): 136.
14. John Gardner, quoted in "Ronald Dworkin, 1931-2013," <http://www.law.ox.ac.uk/newsitem=537>.
15. Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* (New York, NY: Basic Books, 2005), 254 n.9 (citing John Rawls, *Political Liberalism* (New York, NY: Columbia University Press, 1993)).
16. See Sotirios A. Barber, *Constitutional Failure* (Lawrence, KS: University Press of Kansas, 2014), 5, 115; Sotirios A. Barber, *Welfare and the Constitution* (Princeton, NJ: Princeton University Press, 2003), 53-64, 118-42.
17. See Michael J. Sandel, *Justice: What's the Right Thing to Do?* (New York, NY: Farrar, Straus & Giroux, 2009).
18. *The Federalist* No. 51, 322 (James Madison), ed. Clinton Rossiter (New York, NY: New American Library, 1961).
19. Fleming and McClain, *Ordered Liberty*, 209.
20. See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); Rawls, *Political Liberalism*. In this section, we draw from Linda C. McClain and James E. Fleming, "Respecting Freedom and Cultivating Virtues in Justifying Constitutional Rights," *Boston University Law Review* 91 (2011): 1311, 1312-14.
21. Sandel, *Justice*, 6-10, 19-21, 140-66.
22. *Ibid.*, 9.
23. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2010), 263-64, 267-68.
24. *Ibid.*, 1-19, 117-20.
25. *Ibid.*, 203-04.
26. *Ibid.*, 2
27. Sandel, *Justice*, 140-66, 246-51.
28. Dworkin, *Justice for Hedgehogs*, 155, 186-88.

29.Sandel, *Justice*, 9, 12, 184-207.

30. Dworkin, *Justice for Hedgehogs*, 244.

31. See Michael J. Sandel, *Liberalism and the Limits of Justice* (New York, NY: Cambridge University Press, 2d ed., 1998), 89-94, 175-83 (criticizing conception of the “unencumbered self”); Michael J. Sandel, “Moral Argument and Liberal Toleration: Abortion and Homosexuality,” *California Law Review* 77 (1989): 521, 522-25, 538 (criticizing liberal conceptions of autonomy as reflecting a “voluntarist” conception of the self).

32.Sandel, *Justice*, 221.

33.Ibid. (citing Alasdair MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1981)).

34. See James E. Fleming, “Taking Responsibilities as well as Rights Seriously,” *Boston University Law Review* 90 (2010): 839, 839, 844 (analyzing Dworkin, *Life’s Dominion*, and Dworkin, *Justice for Hedgehogs*); Dworkin, *Justice for Hedgehogs*, 482 n.7, and Dworkin, “Response,” 1078-79 (indicating that Dworkin carries forward the arguments about taking responsibilities seriously from *Life’s Dominion* to *Justice for Hedgehogs*).

35.Fleming, “Taking Responsibilities as well as Rights Seriously,” 839-40.

36.Sandel, “Moral Argument and Liberal Toleration,” 533-38.

37. See William Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge: Cambridge University Press, 1991); William Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge: Cambridge University Press, 2003); Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford: Clarendon Press, 1990); Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge, MA: Harvard University Press, 2000).

38.Fleming and McClain, *Ordered Liberty*, 3-4.

39.Dworkin, *Life’s Dominion*, 150. In this section, we incorporate portions of Fleming, “Taking Responsibilities as well as Rights Seriously,” 840-43. See also Benjamin C. Zipursky and James E. Fleming, “Rights, Responsibilities, and Reflections on the Sanctity of Life,” in *Ronald Dworkin*, ed. Arthur Ripstein (New York, NY: Cambridge University Press, 2007), 109, 127-30.

40. See Scanlon, “Partisan For Life,” 46, 47.

41. See, e.g., Dworkin, *Taking Rights Seriously*, xv, 269; Robin West, “Foreword: Taking Freedom Seriously,” *Harvard Law Review* 104 (1990): 43, 46-47 (criticizing Dworkin’s “liberal legalist” strategy of “taking rights seriously” and proposing instead a “responsibility-based liberalism” that

would “take seriously not only the individual’s demand for rights but also the burdens of his responsibility”).

42. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (describing one of the state appellate court’s rationales for upholding Virginia’s miscegenation statute as “preserving the racial integrity of its citizens” (citation omitted)).

43. Dworkin, *Justice for Hedgehogs*, 370-71.

44. Dworkin, *Life’s Dominion*, 151.

45. Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 65-66; Dworkin, *Taking Rights Seriously* 272-73.

46. See Fleming, *Securing Constitutional Democracy*, 61-85; Rawls, *Political Liberalism*, 15-20, 29-35, 299-304. See also McClain, *The Place of Families*, 4, 17-19, 64-67; Fleming and McClain, *Ordered Liberty*, 3-4, 9-10, 94, 111, 151.

47. See Fleming and McClain, *Ordered Liberty*, 62-68 (analyzing Dworkin, *Life’s Dominion*). Dworkin made these arguments with respect to the right to abortion and the right to die. It is not clear whether he would take the same view regarding governmental moralizing with respect to all constitutional rights, for example, freedom of speech and religious liberty.

48. Sunstein, *Radicals in Robes*, 32; see Fleming, *Securing Constitutional Democracy*, 16, 211, 225.

49. Sunstein, *Radicals in Robes*, 32 (quoting Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986), 229).

50. Fleming, *Securing Constitutional Democracy*, 5, 24, 63, 84; see Dworkin, *Law’s Empire*, 239; Cass R. Sunstein, “Second-Order Perfectionism,” *Fordham Law Review* 75 (2007), 2867, 2869-70, 2872-74.

51. Dworkin, *Freedom’s Law*, 1-38; Dworkin, *Life’s Dominion*, 118-47. In this section, we incorporate portions of James E. Fleming, “Judicial Review without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts,” *Fordham Law Review* 73 (2005): 1377, 1381-86.

52. See, e.g., Henry P. Monaghan, “Our Perfect Constitution,” *New York University Law Review* 56 (1981): 353.

53. See, e.g., Christopher L. Eisgruber, “Should Constitutional Judges Be Philosophers?,” in *Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin*, ed. Scott Hershovitz (New York, NY: Oxford University Press, 2006), 5.

54. For such moral realist accounts, see, for example, Sotirios A. Barber, *The Constitution of Judicial Power* (Baltimore, MD: Johns Hopkins University Press, 1993); and Michael S. Moore, “Justifying

the Natural Law Theory of Constitutional Interpretation," *Fordham Law Review* 69 (2001): 2087.

55. See Dworkin, *Freedom's Law*, 10-11; Dworkin, *Law's Empire*, 238-75.

56. See Dworkin, *Freedom's Law*, 36. In this paragraph we draw upon James E. Fleming, "Lawrence's Republic," *Tulsa Law Review* 39 (2004): 563, 581.

57. See Dworkin, *Freedom's Law*, 36 (citing Frank I. Michelman, "Foreword: On Protecting the Poor Through the Fourteenth Amendment," *Harvard Law Review* 83 (1969): 7).

58. Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (New Haven, CT: Yale University Press, 2004), 84-128.

59. See *ibid.*, 84-88.

60. See *ibid.*, 95-102.

61. Dworkin, *Freedom's Law*, 73.

62. Sager, *Justice in Plainclothes*, 129-60; see also Lawrence G. Sager, "The Why of Constitutional Essentials," *Fordham Law Review* 72 (2004): 1421, 1423-29 (using concentric circles to illustrate these four domains).

63. See Dworkin, *Taking Rights Seriously*, 87.

64. See Dworkin, *Law's Empire*, 167, 176-84, 217-28.

65. See Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999), 1.

66. See Jeremy Waldron, "Legislating with Integrity," *Fordham Law Review* 72 (2003), 373, 373 (distinguishing between legislating with integrity and integrity in legislation).

67. John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980), 73-104. In this section, we incorporate passages from James E. Fleming, "The Place of History and Philosophy in the Moral Reading of the American Constitution," in *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*, 23, 27-30.

68. Ronald Dworkin, "The Forum of Principle," *New York University Law Review* 56 (1981): 469, reprinted in Dworkin, *A Matter of Principle*, 33.

69. Ronald Dworkin, *Is Democracy Possible Here?* (Princeton, NJ: Princeton University Press, 2006), 146.

70. *Ibid.*, 131. See also Dworkin, *Justice for Hedgehogs*, 382-85.

71. Dworkin, *Is Democracy Possible Here?*, 134.

72. Dworkin, *Justice for Hedgehogs*, 384.

73. Dworkin, *Freedom's Law*, 24; Dworkin, *Life's Dominion*, 123; Dworkin, *Justice for Hedgehogs*, 384-85.

74. Dworkin, *Freedom's Law*, 24-26, 349 n.5; Dworkin, *Is Democracy Possible Here?*, 144, 146; Dworkin, *Justice for Hedgehogs*, 384-85.

75. Sager has made a similar critique of the architecture of Dworkin's theory. See Sager, *Justice in Plainclothes*, 132-37.

76. See Fleming, *Securing Constitutional Democracy*, 19-36 (criticizing the process-perfecting theory defended in Ely, *Democracy and Distrust*).

77. *Ibid.*, 3-4.