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Vulnerability in American Constitutionalism:

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Vulnerability in American Constitutionalism

My paper argues that the Constitution – in both theoretical and practical ways – prevents meaningful public engagement with human vulnerability, and will prove to be a weak and unstable tool to establish collective responsibility for many forms of dependency. This is true for 3 reasons:

- A longstanding bias against emotional influences on constitutional interpretation and public decision-making;
- Structural and substantive elements of constitutional law that impair the state's ability to act on behalf of vulnerable populations and the scope of constitutional remedies available to those populations; and
- The use of “vulnerability” in the “war on terror” places vulnerability in conceptual tension with the core purpose of constitutionalism: to establish shared commitments on the appropriate use of governmental power that transcend time and circumstance.

Our Founding Feelings. Emotions are central to public discourse about human vulnerability. Any sustained effort to challenge current paradigms about public responsibility and autonomy requires an ability to see vulnerability in our midst (attention) and the sense of moral responsibility to affirmatively address it (appraisal). New research in social psychology and neurobiology confirms that both elements contain a necessary emotional component: First, social emotions like empathy draw attention to human suffering and enable “perceptive taking” – the ability to see the world through another's eyes. Second, our ability to take moral responsibility for another's welfare is deeply influenced by emotional predispositions and framing that align the instinct to help others with our own goals.

Yet, constitutional culture acts as an obstacle to any systemic effort to engage vulnerability by marginalizing emotion's role in public policy and doctrinal development. Since the Founding, emotions have been treated as a destructive force in constitutional law. The desire to limit emotion's influence on decision-making was a core motivation for central elements of our constitutional design. Moreover, the bias against emotion has been reinforced by generations of constitutional scholars, legal pedagogy, and a constitutional culture that positions rationalistic judges as the sole and final arbiters of what the Constitution means. The result is a constitutional culture that is often incapable of recognizing or accessing the emotional context necessary to address vulnerability and dependency through a lens of collective responsibility.

Our Invulnerable Constitution. Beyond a liberty-oriented approach to social relationships that reinforces the “autonomy myth”¹ and a constrained notion of equality that constrains public interventions to “interrupt patterns of domination, subordination,

¹ See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

and inequality,”² core precepts of constitutional law severely constrain our ability to address the needs of vulnerable populations in a meaningful way. Specifically, the Constitution’s failure to recognize positive rights, structural constraints that make the likelihood of large-scale federal action on behalf of diffuse vulnerable populations unlikely,³ a state action doctrine that renders the Constitution impotent against individual vulnerability to private power, and a restrained notion of constitutional citizenship all prevent both the courts and the political branches from using public law as a tool to address vulnerability. These constraints – most of which transcend ideological shifts in the Court’s membership – are real obstacles that severely limit both the Constitution’s and the federal government’s ability to challenge prevailing notions about autonomy and dependency.

The Vulnerability Paradox. On a theoretical level, vulnerability and constitutionalism have a fraught and ambivalent relationship that makes it difficult to reconcile the two concepts. While certain types of vulnerability – particularly the threat of coercive governmental power – are often invoked to justify structural and substantive constitutional constraints on the state’s ability to act, other types of vulnerability are often invoked to justify exceptions to constitutional rules. This places vulnerability in tension with a core purpose of constitutionalism: to establish social precommitments that transcend time and circumstance.

Throughout our history, assertions that national vulnerability justifies extra-constitutional actions in the name of necessity have inevitably accompanied conduct that operates at the margins of constitutional and international norms. This includes Lincoln’s suspension of habeas corpus during the Civil War, the internment of Japanese-Americans during World War II, and the current Administration’s expansive vision of Article II presidential power in the “war on terror.” This makes the theoretical relationship between vulnerability and constitutionalism extremely unstable – particularly during periods of war or emergency.

In conclusion, any constitution-based approach to vulnerability confronts at least three serious obstacles that reach beyond judge-made doctrine: the anti-emotion bias, core components of constitutional structure, and the theoretical tension between vulnerability and constitutionalism. In turn, these constitutional realities suggest that other legal avenues – such as state constitutions or international human rights norms – may provide more promising avenues for reform.

² Robin L. West, *Constitutional Scepticism*, 72 B.U. L. REV. 765, 778 (1992).

³ These structural elements include bicameralism, the presidential veto, and the anti-majoritarian structure and rules of the United States Senate. SEE SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 25-62 (2006)

