MINIMALISM IN LEGAL SCHOLARSHIP: A RESPONSE TO IF PEOPLE WOULD BE OUTRAGED BY THEIR RULINGS, SHOULD JUDGES CARE?

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INTRODUCTION

In at least some hard cases, the justices of the United States Supreme Court almost certainly moderate their decisions or avoid deciding altogether so as not to provoke the public. Cass Sunstein’s characteristically insightful and engaging article is an attempt to justify this practice, and in the process, to define its proper limits. In this, Sunstein follows in the footsteps of Alexander Bickel, whose path-breaking The Least Dangerous Branch was devoted to the same cause. Their emphases are different, however. The heart of Bickel’s book is his account of the “passive virtues,” such as the justiciability and vagueness doctrines, that courts use to avoid decision or to rule narrowly where a broad decision might unduly provoke the public.


Sunstein’s focus is why judges should care about public outrage in the first place.

He identifies two reasons: one consequentialist, the other epistemic. The consequentialist reason is just what it sounds like. Where public outrage would lead to particularly bad consequences, it may be prudent rather than cowardly for judges to take those consequences into account. The epistemic reason is more complicated. The basic idea is that, under certain conditions, public outrage may embody a collective wisdom superior to the judgment of individual persons, including judges. Where these conditions are met, judges might attend to public outrage out of humility.

There is much to admire in Sunstein’s account. He is correct that there are legitimate reasons for judges to care about public outrage, and the two he identifies provide an excellent framework for discussion. He is also correct in recognizing that the strength of these reasons (and any others, though he seems to think others don’t exist) depends on a variety of controversial empirical assumptions about the capacities of real-world judges. For instance, if judges cannot reliably predict the incidence, the extent, or the effects of public outrage, the conventional taboo against considering it might be justified in practice, even if there is no convincing reason for judges to ignore public outrage in principle. This is a familiar but extremely important point, and Sunstein’s explication of it is superb. Particularly illuminating are his vivid use of hypotheticals to illustrate the complex and often surprising consequences of public outrage and his discussion of the cognitive biases that may lead judges to exaggerate or otherwise misjudge these effects.

So far, so good. But we have still not reached the heart of the question posed in Sunstein’s title. To determine whether judges should care about the consequences of public outrage, we need to know whether judges should care about consequences at all (as opposed, say, to original meaning). Assuming they should, we need to know how they should assess the desirability and weight of particular consequences. Perhaps most

2 Consider the following, nonexhaustive list: an amendment reversing the court’s decision; effective resistance to a remedial decree, rendering the decision futile; a tectonic shift in the balance of power between the major political parties; withering attacks on the courts. Now add to the mix counter-reactions to all of these reactions—and, of course, counter-counter-reactions—and place the whole mélange on the scale opposite the presumably good consequences driving the decision on the merits. Cass R. Sunstein, If People Would Be Outraged by Their Rulings, Should Judges Care?, 60 STAN. L. REV. at 19-21. For an illuminating historical discussion of these factors, see Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 MICH. L. REV. 431, 453-59 (2005) (tracing complex chain of consequences flowing from public reaction to Brown v. Board of Education, 347 U.S. 483 (1954)).

3 Most notably, the special salience attacks on the judiciary have for judges may cause them to exaggerate the likelihood and effects of public outrage.
important we need to know whether judges should attach any weight to public outrage as such—not the hedonic state outrage implies, or the information it conveys about some exogenously defined constitutional meaning, but the brute fact, arguably significant in a democracy, that a majority of the supposedly sovereign people is bitterly opposed to a particular result.

On these issues, Sunstein has little to say. Taking an approach that distinctly resembles the judicial minimalism he has championed elsewhere, he seems determined to speak to a theoretically diverse audience and therefore to avoid deep theoretical questions—or, as he may regard them, deep theoretical black holes. This approach, which we might call “minimalism in legal scholarship,” has an undeniable appeal. In an area fraught with controversy, it enables Sunstein to say something of interest to originalists, pragmatists, and moral rights theorists of all stripes. And it frees him to focus on the narrow subject at hand without the distraction of deep theoretical questions at every turn. Nevertheless, where a great deal turns on such questions—as Sunstein acknowledges a number of times that it does here—his minimalist approach has serious drawbacks.

This Response will address three of them. First, refusing to confront deep theoretical questions can seriously limit the interest of the remaining avenues for discussion, at least where the deep questions are really central. Part I develops this point in connection with two aspects of Sunstein’s consequentialist argument. Second, ruling deep questions off limits can make superficial explanations appear more compelling than they really are while obscuring important deep theoretical alternatives. This point is discussed briefly in Part I and at greater length in Part II in connection with Sunstein’s epistemic argument. Third, examining deep questions in a fresh context can cast them in a revealing new light. Sunstein’s approach forecloses this possibility, resulting in missed opportunities, one of which is discussed in some depth in Part III.

A recurring theme is Sunstein’s conspicuous neglect of the possibility that judges should care about public outrage out of respect for democracy. When judges invalidate the act of a coordinate branch against the manifest wishes of an outraged majority, they are overruling not just the people’s

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4 In an interesting discussion, Sunstein rightly concludes that judges are so ill-equipped to predict affective reaction to their decisions that they are better off ignoring it altogether. This, even though in theory, judicial decisions have “existence value,” in the same way as the bald eagle or the Grand Canyon. See Sunstein, supra note __, at 25-27.
7 Sunstein, supra note __, at 31, 48.
representatives but—in a real sense—the people themselves. That does not mean judges should necessarily stay their hand, but in most cases it means that they should proceed with caution. Or so I shall suggest. It would be impossible to provide a complete defense of this large claim in a brief Response. But Part IV provides a preliminary sketch of what such a defense might look like.\(^8\)

Following Sunstein, I shall focus throughout on cases where Supreme Court invalidation of federal or state statues on constitutional grounds would be likely to outrage a strong majority of the American public. For reasons of space, I offer only a few isolated observations on judicial validation of statutes, statutory interpretation, outraged minorities, and nonjudicial actors.

I. MINIMALISM MEETS CONSEQUENTIALISM

Sunstein’s discussion of the consequentialist reason for judges to care about public outrage is limited by his reluctance to engage two deep theoretical questions: Should judges care about consequences at all? And if they should care about consequences, how should they assess the desirability of particular consequences?

A. Consequentialism (Sort of ) Defended

The first of these questions is obviously fundamental to Sunstein’s consequentialist argument. If the answer is negative, his argument is stillborn. Yet Sunstein’s primary response is not to mount a vigorous theoretical defense. Instead, he hedges his bets, considering the strength of the consequentialist reason from the perspective of consequentialism, originalism, and moral rights theory in turn. In effect, he replaces the deep question of “Should judges care about consequences at all?” with the shallower, “Should judges whose theoretical commitments are taken as given care about the consequences of public outrage?” The answer to the latter, of course, depends on the substance of the theoretical commitments we take as given. If and to the extent those commitments make consequences relevant, judges subscribing to them should care about the consequences of public outrage; if and to the extent they do not, not. In this sense, the question is empty. It invites a response that tells us nothing, or next to nothing, that was not implicit in the definition of the theoretical commitments we began by taking as given.

Consider Sunstein’s treatment of consequentialism, as exemplified by his fictional Judge Bentham. When Sunstein tells us that Bentham is a consequentialist, he is by definition saying that Bentham cares about all the consequences of his decisions, as well as the consequences of the decision to consider those consequences. We need very little additional information

\(^8\) I hope to fill out some of the details in a future article, tentatively titled “Popular Constitutionalism for Pragmatists.”
about the world, and no fancy reasoning, to conclude that Bentham should care about public outrage if and when it makes his decisions futile or perverse or has other bad consequences, unless he is unable to predict or assess these consequences reliably or unless considering them will invite harmful strategic behavior. So long as Sunstein is committed to bracketing deep theoretical questions, he can tell us little more than this.

The same holds true for Sunstein’s treatment of originalism and moral rights theory, as exemplified by the notional Judges Berger and Hercules. Once we know what Sunstein means by originalism and moral rights theory—in particular, what role he understands each of these theories to permit consequences to play in judicial reasoning—it is a matter of simple deduction (bracketing empirical questions) to determine when and whether Berger and Hercules should consider the consequences of public outrage. It is not so different from asking, “Should a judge who does not much care about consequences much care about consequences?” The interesting question—or at least the operative one; it may be too familiar to be truly interesting—is which of Sunstein’s archetypal judges, if any, we should want real-world judges to emulate. But again, on this matter, he has little to say.

Little, not nothing. In two short subsections in the second part of the Article, Sunstein undertakes to defend consequentialism against “Kantian adjudication.” What exactly he means by Kantian adjudication is unclear. Initially, he says that Kantians believe that “[t]he role of the Court is to say what the law is (under the appropriate interpretive method), and its conclusions on that point should be unaffected by the public will.” Read literally, this would make a Kantian of almost anyone who thinks courts should ignore popular opinion, from nonconsequentialist originalists to rule consequentialists who believe judges are likely to be poor prognosticators.
of public outrage and its effects. Later, however, Sunstein observes that “[t]he core Kantian claim is that people should be treated as ends, not as means.” This suggests he is envisioning a much smaller group, comprising only moral rights theorists committed to the specific tenets of Kantian ethical theory—a species rarely found in the wild, at least in the American judiciary.

The crux of Sunstein’s brief defense of consequentialism is directed against only the latter group, and needn’t much concern us for that reason. But he also offers a broader defense—of the “constitutional law is not a suicide pact” variety. “If total catastrophe really would ensue,” the argument goes, “judges should not rule as they believe principle requires.” This is very difficult to disagree with. It cannot, however, provide a general defense of consequentialism. As Sunstein notes, many nonconsequentialist theories, narrowly Kantian and otherwise, recognize the need for a consequentialist override in extreme cases, and do so without surrendering their nonconsequentialist bona fides. Judge Berger, for example, might believe the principle of popular sovereignty limits her judicial authority to enforcing the original meaning of the Constitution, come what may. But she could still be willing to consider “resigning from the bench … or engaging in a form of civil disobedience in truly extreme cases.” This condition was probably satisfied in *Dred Scott v. Sandford*, but it is difficult to think of another case where the actual or potential consequences of public outrage have risen to the level of “total catastrophe.” To give Sunstein’s consequentialist reason practical bite outside this exceptional context, a broader defense of consequentialism is required.

Sunstein does have another string to his bow. A “consequentialist justification,” he insists, “is required for most judgments about what is appropriately considered by either private or public actors.” For this reason, he thinks most purportedly nonconsequentialist accounts of adjudication are best explained as resting on rule-consequentialist judgments that “the overall consequences are much better if institutions refuse to take account of certain consequences.” I happen to agree with

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14 See Sunstein, supra note __, at 10-11 (“The second and more fundamental reason is that the principle of Kantian adjudication does not make much sense, at least not if it is not defended on Kantian grounds. … Is Kantian adjudication necessary to ensure that people are treated as ends rather than means? It is hard to see why.”)
16 Sunstein, supra note __, at 10.
17 Sunstein, supra note __, at 23
18 Sunstein, supra note __, at 24.
20 Sunstein, supra note __, at 24.
21 Sunstein, supra note __, at 24
these views. But as Sunstein says of the Kantian exhortation that judges “must remain faithful to the law,” they are, at least as stated, “conclusion[s] in search of an argument.” The analogies he offers are not much help. It is true, for example, that a defense attorney’s duty to represent even guilty clients zealously might be explained by reference to its systemic effects. But this duty might as easily be defended on deontological grounds, such as the dignity interest of all persons in having competent legal counsel to mediate their encounters with the awesome machinery of the state. At any rate, nothing in Sunstein’s discussion rules out this possibility, certainly not the fact that “assessing institutional morality [as a form of rule consequentialism] permits us to explore whether … any particular taboo can be justified in consequentialist terms.” Besides begging the question it purports to answer, this would require a normative account assigning values to public safety, personal dignity, etc. Perhaps most important, Sunstein does not so much as mention, much less engage, plausible nonconsequentialist arguments that some obligations—for example to the principle of popular sovereignty—bind judges regardless of their consequences. A robust defense of consequentialism would have to accord at least this modicum of attention to plausible opposing views.

I do not mean to be ungenerous. Sunstein does make some case for consequentialism. He just doesn’t make it with the focus or vigor one would expect, given that the better part of his argument is at stake and that those most skeptical of his claims are likely to be skeptical on just this ground.

B. The Need for a Normative Account

At best, Sunstein’s defense of consequentialism delivers us to the doorstep of another deep theoretical question on which he has even less to say: how are consequentialist judges like Bentham to assess the relative desirability of various outcomes? As Ronald Dworkin has frequently observed (occasionally in reference to Sunstein), consequentialism as such is an empty vessel. It instructs judges to base their rulings on consequences but provides no guidance about which consequences should be considered good or bad. Sometimes there will be broad agreement on that question, but often there will not be, especially in the kinds of

22 Sunstein, supra note __, at 11.
25 See, e.g., RONALD DWORk, JUSTICE IN ROBES 64-65, 91-92 (2006); see also ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 6-7 (2006).
controversial cases likeliest to provoke public outrage. Even easy cases turn to some degree on the prevailing normative theory;\(^ {26}\) the hardest cases may turn almost entirely on it.\(^ {27}\) Consider that Dworkin and his perennial antagonist Judge Richard Posner—who agree on little else\(^ {28}\)—both regard themselves as consequentialists. Are they any more likely to agree about the normative weight of the consequences of public outrage than about the normative weight of other consequences? If not, then a commitment to consequentialism tells us only a small part of what we need to know to determine whether judges should care about public outrage. Most of what it does tell us, moreover, we could have deduced from its simple definition.

Sunstein is alert to this difficulty. In fact, he flags it several times. But as with other deep theoretical questions, he seems determined to avoid addressing it head on. Instead, he repeatedly uses it as a springboard for pointing out that “the difficulty or contentiousness of the [normative] assessment” might provide a good rule-consequentialist reason for excluding some consequences from consideration altogether.\(^ {29}\) This may well be true, but it begs an obvious question: how are we to assess the desirability of the proposed exclusionary rule? Consider the case of abortion, one of Sunstein’s examples. Determining what normative valence and magnitude to assign to a practice regarded by many people as infanticide and by many others as a woman’s fundamental right is about as contentious a question as American judges are likely to face. In any circumstances, resolving such a question would obviously involve significant decision costs, and if we turn back the clock to 1973,\(^ {30}\) resolving it the way the Court did might have been predicted to provoke public outrage (albeit among a minority\(^ {31}\)), with perhaps serious negative


\(^{27}\) See Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 73 (2005) (“When premises for decision are shared, instrumental reason can generate conclusions that will convince all participants and observers; and collective deliberation may be extremely valuable in deriving conclusions from common premises. … But in most constitutional disputes, consistent with my emphasis on their political character, the disputants are not arguing from common premises.”).


\(^{29}\) See Sunstein, supra note __, at 18, 20.

\(^{30}\) This, of course, is the year the Court decided Roe v. Wade, 410 U.S. 113 (1973).

repercussions for the sex equality movement, among other things.\textsuperscript{32} A good consequentialist would, as Sunstein suggests, need to consider all these consequences and in particular the possibility that the costs of considering the morality of the abortion issue would outweigh the benefits. But one could not begin to make such an assessment without a fairly thick (and therefore controversial) normative theory assigning weights and values to the sundry consequences of deciding and not deciding. Most basically, for such a normative theory to be helpful in assessing the potential futility or perversity of a decision invalidating abortion laws, it would have to be thick enough to tell us whether the consequences sought to be achieved by invalidation were desirable or undesirable. Sunstein clearly knows this. But to articulate and defend such a normative account would require an excursion into the deep theoretical wilderness, which his minimalist approach does not permit him to undertake.

Sunstein’s same-sex marriage example reveals the scenery he is missing out on. He begins by asking whether a consequentialist judge (our old friend Bentham) should care if his decision invalidating bans on same-sex marriage would be overturned by constitutional amendment. That depends, Sunstein suggests, on whether Bentham’s personal convictions (strongly pro-same-sex marriage) matter or only his legal judgment. If the latter, it will be none of his concern whether the decision is overturned by amendment. “This is a plausible view,” Sunstein concludes, but it “ultimately requires some kind of consequentialist defense—as, for example, in the view that judges will do best if they [ignore] the risk that their decisions will be rejected through amendment.”\textsuperscript{33}

What might it mean for judges to “do best” in this context? The phrase is a small marvel of opacity, but Sunstein shows little curiosity about this question. Perhaps he has in mind something relatively shallow\textsuperscript{34} like the possibility that judges will systematically overestimate the risk of amendments and so would do better on any standard by ignoring this risk. Perhaps he is conscious that a deeper question lies submerged and, for minimalist reasons, chooses deliberately to avoid it. Perhaps both. But whatever the case may be, there is a deep and interesting question here that goes well beyond whether Bentham should consider the risk that his decision will be reversed by amendment. The question is this: Given that


\textsuperscript{33} Sunstein, supra note __, at 19 (emphasis added).

\textsuperscript{34} I use the word in Sunstein’s particular sense, meaning agnostic on deep theoretical questions. See, e.g., Sunstein, “Burkean Minimalism,” supra note __, at 364.
“doing best” can ultimately be assessed only by reference to a normative theory, whose theory should we want Bentham to follow in assessing the consequences of his decision? In the ordinary case, where the public is indifferent or shares the Bentham’s normative view, it might be quite sensible to allow him to pursue the consequences he thinks best, assuming the relevant legal materials permit or require consequential judgments. But in the extraordinary case of Sunstein’s example, where it is foreseeable that invalidating legislation would outrage a majority of the American public, where almost by definition the issue is debatable, why would we want the normative views of unelected judges like Bentham to override the strongly held views of the people?

The question is not rhetorical. It is a version of the question Alexander Bickel wrestled with throughout The Least Dangerous Branch and that has preoccupied—even obsessed—constititutional law scholars ever since: the dreaded “countermajoritarian difficulty.” It has become a commonplace that Bickel exaggerated the extent of this difficulty. Courts are more majoritarian than he allowed, and legislatures and administrative agencies less. But a ruling that would predictably outrage a majority of the American people poses the issue starkly; one might say it is the countermajoritarian difficulty’s paradigm case. Much more is needed to establish the significance of this fact, and I shall attempt to provide some of it in subsequent Parts. For now, it is enough to point out that Bickel’s

35 See sources cited in note ___ supra.
36 Richard A. Posner, LAW, PRAGMATISM, AND DEMOCRACY 71 (2003); but see Ronald Dworkin, supra note __, at 103 ("since judges, like everyone else, disagree about the relative value of different possible consequences of their decisions, telling them to decide by weighing consequences is only—as Posner conceded many people think it is—an invitation to lawlessness).
37 Bickel, supra note __, at 21.
42 Sunstein is surely right, for example, that “no conclusions about the proper response to outrage, popular constitutionalism, or judicial review can be established in the abstract, or through large-scale claims about the goals and nature of self-government” alone. Sunstein, supra note __, at 6. But neither can such conclusions be established without deep theoretical analysis. This is the essential weakness of Sunstein’s minimalist approach.
central intuition—that in a democracy the will of a popular majority should enjoy at least a presumption of validity—remains remarkably resonant 45 years later. That Sunstein thinks it unnecessary even to address this point—though his consequentialist reason builds directly and explicitly on Bickel’s work—is perhaps the strongest indictment of his minimalist approach. Not only does it avoid deep questions, it tends to obscure their existence.

II. THE SIREN SONG OF THE CONDORCET JURY THEOREM

At first blush, Sunstein’s epistemic reason—that public outrage might convey a kind of collective wisdom greater than the wisdom of any individual judge—appears more promising. Of course, like his consequentialist reason, the epistemic reason must be supplemented by an interpretive theory to determine whether the public’s view sheds light on a question relevant to constitutional interpretation. Unlike the consequentialist reason, however, the epistemic reason promises to give judges who have settled on an interpretive theory real guidance: where the public has a relevant view, follow it! More tantalizing still, Sunstein raises the possibility that public opinion—and thus public outrage—might shed epistemic light on deep questions of constitutional law, including the question of which theory of interpretation judges should adopt. This would make the epistemic reason a kind of minimalist holy grail, capable of resolving deep theoretical controversies without deep theoretical argument.

Alas, this turns out not to be the case. In fact, the validity conditions of the epistemic reason are too stringent, and a judge’s assessment of them too likely to be influenced by her own prior views, for the argument to carry much weight at all. Sunstein acknowledges these limitations with his usual candor. Nevertheless, he is tempted—and how could a minimalist not be?—to press the epistemic reason into additional service. Specifically, he attempts to cast it as the implicit rationale behind “shocks-the conscience” due process doctrine and James Bradley Thayer’s rule of clear error. The

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43 Nor can this presumption be reduced to Sunstein’s consequentialist and epistemic reasons. See Sunstein, supra note __, at 48 n. 128 (hinting that respect for democracy might be so explained). Bickel himself grounded it in the “idea that … morally supportable government is possible only on the basis of consent, and that the secret of consent is the sense of common venture fostered by institutions that reflect and represent us and that we can call to account.” Bickel, supra note __, at 20 (emphasis in original). I shall return to this point in Part IV.

44 The consequentialist reason, by contrast, is empty even for judges who embrace consequentialism, unless supplemented by a normative account, which nothing in consequentialism itself (or Sunstein’s discussion of it) helps a judge to choose.

45 Sunstein, supra note __, at 32-33.

46 Sunstein, supra note __, at 38-39.

47 The rule holds that judges should invalidate legislation only where its unconstitutionality is clear beyond a reasonable doubt. See James Bradley Thayer,
attempt is not wholly implausible. But it is not especially convincing either. More important, both of these venerable strands of American constitutional doctrine are better understood in straightforwardly democratic, and thus deep theoretic, terms, which Sunstein’s minimalist approach unfortunately obscures.

A. Limitations of the Epistemic Reason

The epistemic reason begins with the Marquis de Condorcet’s famous jury theorem (“CJT”), which holds that, where the members of a group are each more than fifty percent likely to be right about a binary question, the chance that a majority of the group will be right approaches one hundred percent as the group gets larger. Conversely, if group members are each less than fifty percent likely to be right, the chance that a majority will be right shrinks to zero as size of the group increases. A similar principle holds for the judgments of pluralities on nonbinary questions, where members of the group are likely to provide better than random answers.

Sunstein’s epistemic argument simply applies these principles to one large group in particular (the American public) in one particular domain (constitutional interpretation). If members of the public are likely to answer a relevant question (as determined by the prevailing theory of interpretation) better than randomly, there is very good reason for judges to follow the answer favored by the majority (or the plurality, if the question is nonbinary).

This logic is unassailable, but its application to constitutional interpretation presents two very substantial difficulties. First, the validity conditions for the CJT—(1) that the public has a view on a question relevant to the decision of a case and (2) that the answer of each member is likely to be better than random—will be satisfied only rarely. This renders the epistemic argument essentially irrelevant for originalists, as the public will almost never have well-informed views on questions of original meaning.

Moral rights theorists like Dworkin, who think constitutional interpretation in hard cases often calls for rigorous conceptual analysis, will probably also have grave doubts about the epistemic relevance of public opinion, as the general public rarely if ever engages in such analysis.

The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 17 (1893).

48 Sunstein, supra note __, at 29-30.
49 Sunstein, supra note __, at 30.
50 Sunstein suggests that the CJT may give originalists reason to follow the majority view among historical experts. This is plausible, though most sincere originalists probably don’t need the CJT to tell them that it’s a good idea to go with the majority of experts, absent some good reason to think the experts are wrong. At any rate, this has nothing to do with public outrage, and so is outside the scope of my concern here.
51 See, e.g., Dworkin, supra note __, at 62-63.
Second, and more important, judges will almost never be in a good position to assess whether the CJT’s validity conditions are satisfied. There are three distinct reasons for this. First, judges are unlikely to have good information about the content or the grounds of the public’s views. To take one of Sunstein’s examples, suppose that the deterrent effect of the death penalty is relevant to Judge Condorcet’s assessment of the constitutionality of capital punishment. At least until recently, it might have been predictable that a majority of the public would be outraged by a Supreme Court decision holding the death penalty unconstitutional. But it would have been much less clear what percentage based their view on deterrence, as opposed to retribution, or some other reason altogether. Second, judges will rarely have sufficient information to determine whether members of the public are likely to bat over .500. Suppose Judge Condorcet could confidently determine that a majority of the public believed the death penalty to be a substantial deterrent. Without quite a lot more information, he could only guess whether this view was the result of informed independent judgments, as the CJT requires. Third, a judge’s assessment of whether the members of the public are likely to be right will almost certainly be heavily influenced by his own views. If Judge Condorcet believes the deterrence argument flimsy, he is likely to dismiss the public’s embrace of it as the result of systematic bias or some form of “cascade,” in which the views of the majority are the product of a few widely repeated mistakes, rather than many independent judgments. If he believes the deterrence argument strong, Condorcet is likely to conclude the opposite. As Sunstein puts it, “there is a pervasive risk that any judge, asking whether the preconditions for collective wisdom are met, will answer the question affirmatively only when he already agrees with what people think.”


54 He might, for example, conclude that the public was heavily influenced by widely reported but methodologically flawed studies. Cf. John J. Donahue & Justin Wolfers, Uses and Abuses of the Evidence in the Death Penalty Debate, 58 STAN. L. REV. 791 (2005).

56 This creates a kind of Catch-22: a judge will only be able to determine the reliability of the public’s view if and to the extent that she is well-informed enough to decide the question herself.

55 Sunstein suggests that judges might be able to get around this problem if their theory of interpretation permits them to “consider certain judgments to be ‘biases’ in a constitutionally relevant sense.” See Sunstein, supra note __, at 39. But this is not just a way around the problem of judicial cognitive bias, it is a way around the whole epistemic argument. The theory of interpretation is doing all the work.
course, where this is the case, the epistemic argument is doing no work at all.

B. Other Applications

So much for the holy grail. But despite Sunstein’s clear-eyed recognition of the epistemic reason’s limitations, he refuses to let it rust unburnished. If the CJT cannot provide material aid to judges in individual cases (because analysis of its applicability will be driven mostly by the judge’s prior predilections), perhaps it can justify, or at least explain, more general practices, which because of their generality, may be less susceptible to the problem of judicial bias. As I mentioned earlier, Sunstein suggests two: “shocks the conscience” due process doctrine, which he casts as resting on a Condorcetian rationale for invalidating governmental acts, and Thayer’s rule of clear error, which he casts as enlisting the CJT in the service of judicial restraint. In neither case, is Sunstein’s explanation especially convincing, and in both, his minimalist’s enthusiasm for the CJT causes him to overlook more robust democratic justifications.

1. Condorcet and the Judicial Conscience

In his discussion of “shocks the conscience” doctrine, Sunstein lumps together three distinct doctrines, which it will be helpful to analyze separately: “shocks the conscience” doctrine itself; the Eighth Amendment’s “evolving standards of decency” test; and the Court’s “emerging awareness” rationale for striking down the same-sex sodomy ban in *Lawrence v. Texas*. I shall take up the latter two below. For now, the question is whether the “shocks the conscience” test itself is best understood in Condorcetian terms, as Sunstein argues. This test comes in at least two guises, one traditionalist, the other evolutionist. It may be doubted, however, whether this distinction is more than rhetorical. In both sorts of cases, the Court has been far more anxious to show that its apparently impressionistic moral judgments are based on objective legal principles than to demonstrate their grounding in actual traditions or moral

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57 See Sunstein, supra note __, at 39 (“All in all, the epistemic argument for considering public outrage emerges as intelligible but quite fragile.”).
59 See Part II.B.3 infra.
60 *Rochin v. California*, 342 U.S. 165, 169; *see also County of Sacramento v. Lewis*, 523 U.S. 833, 857 (Kennedy, J., concurring) (“shocks the conscience” test “mark[s] the beginning point” in determining whether “objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution”).
consensus worthy of respect under the CJT. Indeed, so inattentive is the Court to actual tradition and consensus that these rationales—the aspects of “shock the conscience” doctrine Sunstein casts as “implicitly Condorcetian” are difficult to take seriously as anything more than salves for an uneasy judicial conscience. Their most plausible function is not to provide information to a humble Court, as Sunstein suggests, but to reassure the Court of its own legitimacy, which it is prone to questioning for democratic reasons.

The queasiness this implies on the Court’s part brings to mind yet another strand of “shocks the conscience” doctrine, unremarked by Sunstein: Justice Oliver Wendell Holmes’s famous “puke test,” according to which judges should hold a statute unconstitutional only if it makes them want to vomit. Like Thayer’s clear-error rule, of which it is a close cousin, Holmes’s test was intended primarily as a rationale for refusing to invalidate the acts of democratically elected officials. But his idea was emphatically not Sunstein’s notion that democratic processes are likely to arrive at “correct” results through the magic of Condorcetian collective wisdom. Of course, “[i]t is desirable that the dominant power should be wise. But wise or not,” Holmes thought, “the proximate test of a good government is that the dominant power has its way.”

On this view, born out of Holmes’s radical moral skepticism, judges should care about public outrage because their job is to produce good consequences as the majority understands the good. In his heroic efforts to revive the CJT, Sunstein

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\[62\] See, e.g., Rochin, 342 U.S. at (protesting rather too much that substantive due process analysis “does not leave us without adequate guides”; “do[es] not leave judges at large”; and is based on a “judgment not ad hoc and episodic”); Lewis, 523 U.S. at 857-58 (Kennedy, J., concurring) (insisting that, despite “the unfortunate connotation of a standard laden with subjective assessments … objective considerations, including history and precedent, are the controlling principle” in “shocks the conscience” analysis) (emphasis added).

\[63\] Sunstein, supra note __, at 44. The traditionalist form of “shocks the conscience” analysis, if taken seriously, would be more Burkean or Hayekian than Condorcetian. Cf. Rochin, 342 U.S. at 169 (quoting Edmund Burke). Though there is obvious overlap, Condorcet’s particular insight was that widely held views aggregated information from many minds, while Burke’s (on which Hayek built) was that traditions had proven their value by standing the test of time. Sunstein actually makes a point very close to this one elsewhere. See CASS R. SUNSTEIN, INFOTOPIA 124-25 (2006) (comparing Condorcet, Burke, and Hayek).


\[65\] OLIVER WENDELL HOLMES, Montesquieu, in COLLECTED LEGAL PAPERS at 250, 257-58 (1920) (emphasis added). For a splendid discussion of Holmes’s complex views on democracy, see Thomas C. Grey, Holmes, Pragmatism, and Democracy, 71 Or. L. Rev. 521 (1992).
completely overlooks this democratic justification for judges to consider public outrage.

2. Thayer, Deference, and Democracy

The pattern repeats itself in Sunstein’s analysis of James Bradley Thayer’s clear-error rule. Thayer was less of a cynic than Holmes and his vision of democracy correspondingly more edifying. But that was not because he had much greater faith in the wisdom of legislatures or the people, as Sunstein’s Condorcetian explanation for his clear-error rule would suggest. In fact, politically, Thayer was a moderate conservative, who disapproved of much of the progressive legislation of his day. He considered “the legislative actuality (‘untaught …, indocile, thoughtless, reckless, incompetent’)” very far removed from “the ideal (‘competent, well-instructed, sagacious, attentive’),” and believed the people “possess[ed] less sense than they should have of ‘the great range of possible harm and evil that our system leaves open.’” Consistent with these views, Thayer’s celebrated essay on the “American Doctrine of Constitutional Law” contains barely a hint that legislative constitutional interpretations are likely to be right or best, either for the Condorcetian reasons Sunstein suggests or for institutional reasons, such as the superiority of legislative fact-finding. To the contrary, his central premise is that, on most constitutional questions, there is no right interpretation, but rather “a range of choice and judgment.”

66 See Thomas C. Grey, Thayer’s Doctrine: Notes on its Origin, Scope, and Present Implications, 88 Nw. L. Rev. 28, 40 (1993) (“Thayer believed things that Holmes did not: that the loss of political education and participation that followed when judges took over the duty of screening out bad laws was in itself a bad consequence; that democratic participation was valuable not just as a check against tyranny, but as a positive good.”).
68 See Grey, “Thayer’s Doctrine,” supra note __, at 38 n. 39 (citing James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 17 (1893)).
69 But see Thayer, supra note __, at 135 (“[T]hese questions … require an allowance to be made by judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgment of a legislative body.”)
71 Thayer, supra note __, at 144.
Given this fact, Thayer believed courts should defer to legislatures because legislatures are the primary, and in many areas, the only constitutional interpreter. He pitched his argument in somewhat formalistic terms, but at its core was a powerful practical insight: If legislatures begin to think of constitutional interpretation as primarily or exclusively the province of courts, their own sense of constitutional obligation is likely to atrophy, to the grave detriment of the nation. Democracy can retain its vitality, Thayer argued, only if representative institutions are allowed the freedom, and hence the responsibility, to make mistakes.

Although Thayer did not speak directly to the issue of public outrage, it stands to reason that the enervating effect of aggressive judicial review is likely to be particularly dramatic in the kinds of high-profile, controversial cases where judicial invalidation would outrage the public. If the most burning issues of the day are consigned to judicial resolution, the urgency of democratic participation and debate shrinks considerably, as does the opportunity for compromise and democratic reconciliation. Notably, the example Thayer most frequently invoked in support of judicial deference was the Legal Tender Cases, now largely forgotten, but far and away the most dramatic constitutional controversy of his day. In praising the Supreme Court’s decision upholding the Legal Tender Acts (just two years

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72 This was certainly more true in Thayer’s day than it is now, but there is still a very substantial swathe of governmental affairs into which the Court refuses to insert itself.

73 Thayer, supra note __, at 155-56 (“No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if they are wrong, they say, the courts will correct it.”).

74 History and comparative constitutional law have born out his argument. See, e.g., Mark Tushnet, Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty, 94 Mich. L. Rev. 245 (1995); cf. Cass R. Sunstein, The Partial Constitution 145 (1994) (“The resort to politics tends to mobilize citizens on public matters, and the mobilization is good for individuals and society as a whole. It can inculcate political commitments, broader understandings, feelings of citizenship, and dedication to the community. An emphasis on the judiciary often compromises these broader values. Judicial foreclosure of political outcomes may also have corrosive effects on the democratic process.”).

75 Roe v. Wade, for example, seems to have hardened opposing views on abortion. See Barry Friedman, The Politics of Judicial Review, 84 Tex. L. Rev. 257 (2005); Barry Friedman, “Mediated Popular Constitutionalism,” supra note __, at 2624.


77 James Bradley Thayer, Legal Tender Cases, 1 Harv. L. Rev. 73 (1887); Kenneth W. Dam, The Legal Tender Cases, 1981 Sup. Ct. Rev. 357.
after a differently composed Court had struck them down), Thayer made a particular point to celebrate the intrinsic value of resolving divisive national debates through democratic political processes. On this view, judges should care about public outrage because democratic decision-making is itself a desirable consequence, which judicial invalidation forestalls and distorts.

Of course, the fact that Thayer and Holmes didn’t favor judicial restraint for Condorcetian reasons does not prove no one should. The basic rudiments of the CJT are present in legislative judgments: many legislators, with many sources of information, voting (at least implicitly) in favor of a statute’s constitutionality. But this is not a particularly strong argument, as Sunstein recognizes. The laws the Court is asked to invalidate are often old, in which case the legislative judgment of constitutionality will be premised on outdated facts. Most of the laws the Supreme Court actually invalidates are state laws, which besides being old are often opposed by a national majority, whose views a true Condorcetian might find more cause to respect. There is also the possibility that legislatures, like their constituents, will fall prey to systematic biases or get caught up in a cascade.

The important point, however, is not that a Condorcetian explanation for Thayerism is impossible. It is that the allure of the Condorcetian explanation should not blind us to the much more robust

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78 Grey, “Thayer’s Principle,” supra note __, at 39 (“He wrote of these cases ... that if the laws in question had been struck down, the nation would have been ‘saved some trouble and some harm,’ but would have lost something worth much more: ‘the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience that came out of it all.’”) (quoting JAMES BRADLEY THAYER, JOHN MARSHALL 107 (1901)). The tone of this passage is unmistakably that of civic republicanism and therefore should, one would expect, strike a sympathetic chord with Sunstein. See, e.g., Cass R. Sunstein, Interest Groups in American Law, 38 STAN. L. REV. 29 (1985).

79 Sunstein, supra note __, at 43 n. 128.

80 See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003); Griswold v. Connecticut, 381 U.S. 479 (1965). On the Court’s role in suppressing outliers, see Michael Klarman, Bush v. Gore Through the Lens of Constitutional History, 89 CALIF. L. REV. 1721, 1749-50 (2001). Thayer himself would not have applied his clear-error rule to the review of state court judgments, Thayer, supra note __, at 154, but Sunstein’s discussion of Thayerism omits this detail.

81 It should be emphasized that these are not, by definition, pejorative terms. There are good cascades, and even good systematic biases, but they must be assessed as such on the merits. They cannot draw strength from the CJT because, although widely held, they are based on just a few independent judgments, not many.
democratic explanations that, as a historical matter, seem to have actually motivated Thayer and Holmes.\textsuperscript{82}

3. Moral Consensus in \textit{Roper}, \textit{Atkins}, and \textit{Lawrence}

This still leaves the “evolving standards of decency” test and the “emerging awareness” rationale of \textit{Lawrence}. Here Sunstein’s Condorcetian argument is harder to dismiss, at least at first glance. The idea of an emerging national consensus seems to have played a genuinely important role both in the Court’s recent Eighth Amendment cases (specifically, \textit{Roper v. Simmons}\textsuperscript{83} and \textit{Atkins v. Virginia}\textsuperscript{84}) and in \textit{Lawrence}. It would certainly be possible to deride this as just another rhetorical fig leaf,\textsuperscript{85} no more essential to the Court’s recent decisions than were the phantasmal “notions of justice of the English-speaking people” to \textit{Rochin}.\textsuperscript{86} But in fact, the idea of national consensus appears to have been a significant factor at least in the calculus of Justice Kennedy, who in both \textit{Roper} and \textit{Atkins} voted differently than he had in identical cases in 1989, and Justice O’Connor, who voted differently in \textit{Atkins} but not in \textit{Roper}.\textsuperscript{87} The CJT, however, is not the best explanation for the Court’s reliance on national consensus.

Even if it were, these three cases would be more of an object lesson in the CJT’s limitations than a reason to celebrate it. In all three, the emerging

\textsuperscript{82} Some of the problems with the Condorcetian defense of Thayerism plague the democratic defense as well, but none weakens the democracy argument in cases where judicial invalidation is likely to provoke public outrage.
\textsuperscript{83} 543 U.S. 551 (2005) (application of death penalty to juvenile offenders violates Eighth Amendment).
\textsuperscript{84} 536 U.S. 304 (2002) (application of death penalty to mentally retarded offenders violates Eighth Amendment).
\textsuperscript{85} See Richard A. Posner, \textit{Foreword: A Political Court}, 119 Harv. L. Rev. 31, (2005) (“Strip \textit{Roper v. Simmons} of its fig leaves — the psychological literature that it misused, the global consensus to which it pointed, the national consensus that it concocted by treating states that have no capital punishment as having decided that juveniles have a special claim not to be executed (the equivalent of saying that these states had decided that octogenarians deserve a special immunity from capital punishment)—and you reveal a naked political judgment.”); see also Virginia v. Atkins, 536 U.S. at 322 (Rehnquist, C.J., dissenting) (“the Court's assessment of the current legislative judgment regarding the execution of defendants like petitioner more resembles a post hoc rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency.”).
\textsuperscript{86} Rochin, 342 U.S. at 169. \textit{See supra} notes 60-62 and accompanying text.
\textsuperscript{87} As for \textit{Lawrence}, Justice O’Connor did not join Justice Kennedy’s majority opinion, but her concurrence, 538 U.S. at 579 (O’Connor, J., concurring), is fairly read as a partial reconsideration of her earlier vote in \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986). Justice Kennedy was not on the Court when \textit{Bowers} was decided.
national consensus the Court perceived had developed over relatively short period of time (roughly 15 years in each case) on a moral issue not answerable with reference to any sort of objective indicia, if answerable at all, in policy areas crawling with would-be moral entrepreneurs—the perfect conditions for a cascade. It is possible, of course, that people across the country spontaneously began to undertake serious introspection on gay rights and the execution of juveniles and the mentally retarded all at about the same time, and that their views all moved in the same direction for independent reasons. But this hardly seems likely. More likely the ball got rolling gradually and pretty soon no state wanted to be the last one executing juveniles or bringing criminal charges for same-sex sexual intimacy. The justices themselves may well have been caught in a cascade without realizing it. But even if they weren’t, they showed no interest in assessing whether the moral trends they relied on were the product of independent judgments, as a careful Condorcetian would have. Instead, in each case, their supplemental analysis consisted primarily of exercising their own “independent judgment” on the issue at hand. Thus, at the end of the day, it was the justices’ views, not the public’s, driving the decisions.

Does this mean that national consensus is just a fig leaf after all? Perhaps. But there is another possibility. The Court may take the requirement of national consensus seriously on democratic, rather than Condorcetian grounds. There is a textual hook for this sort of argument in the Eighth Amendment cases, where the Court has interpreted the word “unusual” in “cruel and unusual punishment” to require a challenged practice to be “truly unusual” as measured by “objective indicia of society's standards, as expressed in legislative enactments and state practice.”

But this is merely a necessary, not a sufficient, condition for the Court to find an Eighth Amendment violation. If it is satisfied, the Court then “must determine, in the exercise of [its] own independent judgment,” whether the challenged practice is “a disproportionate punishment.” In other words, an objective national consensus is a threshold condition, which if satisfied, frees the Court to give the Eighth Amendment the best construction it can bear, as the Court understands it—a kind of qualified Dworkinian perfectionism. On this view, national consensus is not evidence that a punishment is actually indecently excessive; that the Court must judge for

88 It is worth emphasizing one more time that cascades can be good or bad, right or wrong. They just aren’t entitled to respect on Condorcetian grounds because they are based on only a few rather than many independent judgments. I happen to agree with the moral positions the Court embraced in Roper, Atkins, and Lawrence, though this is not necessarily to endorse the decisions themselves.
89 Roper, 543 U.S. at 563.
90 Roper, 543 U.S. at 564 (emphasis added).
91 See, e.g., RONALD DWORKIN, LAW’S EMPIRE (1985).
itself. Instead, national consensus is a kind of practical inoculation against the countermajoritarian difficulty.\textsuperscript{92}

This reading is not obvious on the face of the Court’s opinions, to be sure. But it explains something the CJT cannot: the apparent disjunct between the “objective” and “independent” halves of the Court’s analysis. When the Court exercises its “independent judgment” to determine whether a punishment is excessive, it is not making its own assessment of contemporary values, as a supplement to objective indicia; and it is not asking whether those indicia satisfy the requirements of the CJT. Rather, it is asking whether the punishment “really” is excessive in a moral-philosophical sense, a question on which the Court keeps almost exclusively its own counsel.\textsuperscript{93} The wisdom of this approach may be doubted, as may its democratic justification.\textsuperscript{94} The justices, after all, are not philosophers or penological experts, and they are striking down laws passed by democratically elected state legislatures. But the Court’s approach is undoubtedly more democratic than an unqualified perfectionist approach would be.\textsuperscript{95}

It may be possible to explain \textit{Lawrence} in similar terms, though Justice Kennedy’s opinion is less than pellucid, to put it mildly. The explanation would go something like this: The Court’s “emerging awareness” analysis is primarily an attack on the historical consensus rationale of \textit{Bowers v.}

\textsuperscript{92} This may seem like a variant on the “fig leaf” charge, but honestly applied, the objective national consensus requirement might well serve as an important democratic constraint on the outsized ambitions of the would-be Judge Hercules. The requirement is hardly self-defining, but it certainly does not exist wholly in the eye of the beholder.

\textsuperscript{93} \textit{See}, e.g., \textit{Roper}, 543 U.S. at 571 (concluding that it is “evident that the penological justifications for the death penalty apply to [juveniles] with lesser force than to adults” without a single reference to contemporary values or the objective indicia discussed earlier in the opinion).

\textsuperscript{94} \textit{See} \textit{Roper}, 543 U.S. at 348-49 (Scalia, J., dissenting) (“Beyond the empty talk of a ‘national consensus,’ the Court gives us a brief glimpse of what really underlies today’s decision: pretension to a power confined neither by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) nor even by the current moral sentiments of the American people. … The arrogance of this assumption of power takes one’s breath away. … In the end, it is the feelings and intuition of a majority of the Justices that count—the perceptions of decency, or of penology, or of mercy, entertained … by a majority of the small and unrepresentative segment of our society that sits on this Court.”) (emphasis in original).

\textsuperscript{95} Interestingly, Justice Scalia’s scathing \textit{Roper} dissent, defends a strict national consensus test (with no independent judgment component) on something like the grounds I have suggested here: not that the consensus is likely to be right or to convey valuable information, but that “[o]n the evolving-standards hypothesis, the only legitimate function of this Court is to \textit{identify} a moral consensus of the American people.”543 U.S. at 616 (Scalia, J., dissenting) (emphasis added).
Hardwick, which the Lawrence Court saw as a challenge to the legitimacy of its decision just as the absence of national consensus would have challenged the legitimacy of the Court’s exercise of independent judgment in Atkins and Roper.96 Meanwhile, the affirmative case for striking down the ban on same-sex sodomy, to the extent it is separable from the attack on Bowers, is expressed in high-flown rhetoric strongly suggestive of independent judicial divination.97 It would be a mistake, however, to press this argument too far. The important point is that here, as in the Court’s Eighth Amendment and “shocks the conscience” cases, the Condorcetian explanation is weak, while in many if not all of these contexts Sunstein’s minimalist approach obscures a more robust democratic explanation.

III. PUBLIC OUTRAGE AND THE DEAD HAND OF THE PAST

We have now seen two limitations of Sunstein’s minimalist approach in action: it tends to restrict discussion to relatively pedestrian issues, and it tends to make shallow explanations like the CJT appear more compelling than they really are, while obscuring important deep theoretical alternatives. As a consequence, Sunstein neglects the possibility that judges should care about public outrage out of respect for democracy. This Part turns to a third limitation: minimalism forecloses the possibility of examining deep theoretical questions in the revealing light of a new context. Specifically, it forecloses the possibility of critically examining originalism—consequentialism’s chief contemporary rival—in the context of public outrage, which as it happens, poses a significant challenge for originalists.

As we saw in Part I, originalism holds that judges should not care much, if at all, about public outrage. But Sunstein’s minimalist approach can tell us no more than this; it is indifferent to why originalists hold this view—and also to arguments why they should not. As it happens, many originalists justify their adherence to the original public meaning of the Constitution (and thus their refusal to consider public outrage) on the ground that this meaning was ratified by a supermajority of the American people whose will judges are bound to carry out. If true, this poses a major problem for Sunstein’s consequentialist argument and any other argument that judges should care about public outrage. In most cases, however, the members of the supermajority in question are long dead. If democratic legitimacy is the issue, it is difficult to understand why their will should prevail over the objections of an outraged majority of present-day Americans.

This Part explores this difficulty and critically examines several originalist responses to it in the context of public outrage. The Part has two

96 Lawrence, 539 U.S. at 572-76.
97 See, e.g., Lawrence, 539 U.S. at 562 (“Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.”).
aims: first, to show what Sunstein’s minimalist approach cannot—that originalism’s democratic justification does not provide a persuasive reason for judges to ignore public outrage; second, to clear a path for the argument, to be sketched in Part IV, that respect for democracy requires judges not to ignore public outrage.

A. The Dead Hand Problem

Perhaps the oldest and most central question in constitutional theory is what gives the Constitution its special status as fundamental law. One of the oldest answers, and the answer many originalists still give today, is that the Constitution is the command of the sovereign people, and as such both the source and limit of the powers of the government it establishes.98 Originalism, in its canonical form, may be seen as a corollary of this view. Many have made this point,99 but perhaps none more famously than James Madison, arguing against the Jay Treaty in the House of Representatives in 1796:

[W]hatever veneration might be entertained for the body of men who formed our constitution, the sense of that body could never be regarded as the oracular guide in the expounding of the constitution. As the instrument came from them, it was nothing more than a dead letter, until life and vitality were breathed into it, by the voice of the people, speaking through the several state conventions. If we were to look therefore, for the meaning of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the constitution.100

98 See The Federalist No. 78 (Alexander Hamilton) (“There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.”).
100 James Madison, speech of Apr. 6, 1796, in J.C.A. Stagg, ed., 16 THE PAPERS OF JAMES MADISON 290, 295-96 (1989), quoted in Rakove, supra note __, at 160-61. The reliability of this speech as evidence of Madison’s own original understanding has been questioned, see id., but I quote it only as a representative statement of the view it expresses.
This argument from popular sovereignty is originalism’s answer to consequentialism. Judges, the theory goes, are not free agents; they are the people’s agents, and exercise the judicial power only as such. For them to improvise a constitutional tune as they go along would be to exercise sovereign power without popular consent and thus to usurp the people’s fundamental right to govern themselves.

Almost before this argument was made, however, it attracted a powerful criticism, most commonly associated with Thomas Jefferson, who put the point thusly: 101

I set out on this ground, which I suppose to be self-evident, that the earth belongs in usufruct to the living: the dead have neither powers nor rights over it. … On similar ground it may be proved, that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. 102

This is the famous dead hand objection, which many critics of originalism have thought decisive, even unanswerable. 103 Needless to say, originalists have not been persuaded, and so the debate has raged on, having long since acquired the stale, tendentious, over-rehearsed quality of intellectual theater. It is de rigueur for critics of originalism to point out that originalism is not, in fact, rule by the people, but rule by dead, white, male landowners, whose dictates Article V makes exceedingly difficult (and in some cases impossible104) for the people of today to change. 105 Originalists offer a gleeful canned retort. The dead hand objection is a head fake, they insist. Critics of originalism don’t want to increase flexibility for contemporary majorities, but rather to fit them with the bit and bridle of

101 Similar arguments were made by a number of other well-known figures around the same time, including Adam Smith, Noah Webster and, coincidentally, the Marquis de Condorcet. See Jed Rubenfeld, The Moment and the Millenium, 66 Geo. Wash. L. Rev. 1085, 1088-89 (1998).
103 See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 11 (1980) (describing the popular sovereignty argument as “largely a fake”); Paul Brest, The Misconceived Quest for Original Understanding, 60 Bost. U. L. Rev. 204-238 (1980); cf. Rubenfeld, “The Moment and the Millenium,” supra note __, at 1104 (“Like every good originalist, Bork never had any account—no account at all—explaining why the will of the dead should govern.”).
104 U.S. Constitution Art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”)
judicial tyranny, in the form of “newly discovered” rights under the due process and equal protection clauses.\textsuperscript{106}

It should go without saying that neither of these arguments is particularly convincing in its most frequently repeated form. My intent here, however, is not to score or otherwise rehash the debate. That would be impossible in the space available, and at any rate more than a little dull. Instead I shall briefly examine in the context of public outrage a few of the most notable arguments made on originalism’s behalf.\textsuperscript{107} This will help to illustrate the opportunity costs of Sunstein’s minimalist approach, which overlooks this issue entirely, and will undermine the most plausible democratic argument that judges should not care about public outrage.

B. Originalist Responses

A couple of the more facile arguments may be quickly dispensed with at outset. For instance, originalists occasionally attempt to deflect the dead hand objection by pointing out that most Americans venerate the Constitution.\textsuperscript{108} This argument is patently a nonstarter when judicial invalidation on constitutional grounds would outrage a majority of the public. But in fact it is a nonstarter in any context, not only because most Americans have not read the Constitution, though they haven’t, but because their high opinion of it reflects a large body of nonoriginalist precedents that dictate what the Constitution means in practice. If the Court returned to its pre-\textit{Wickard v. Filburn}\textsuperscript{109} commerce-clause jurisprudence, striking down social security, Medicare, and other major social service programs, the level of Constitution worship would decline markedly.

More substantive but still a clear nonstarter is the claim of some originalists that a simple majority of the people can lawfully amend the Constitution outside the formal strictures of Article V.\textsuperscript{110} If this were true,

\begin{itemize}
  \item \textsuperscript{107} Most of these arguments are engaged only rarely by critics reciting the dead hand problem, so this Part is intended not only as an addition to the literature on public outrage but also to the literature on the dead hand problem.
  \item \textsuperscript{108} Cf. Michael W. McConnell, \textit{Textualism and the Dead Hand of the Past}, 66 GEO. WASH. L. REV. 1127, 1132 (“If there were persistent demands for significant constitutional amendment, backed by a majority of the people but blocked by the two-level supermajority requirements of Article V, we would have a genuine crisis of legitimacy. In actuality, however, the American people venerate the constitution, and even the more popular proposals—school prayer, flag protection, and balanced budget—amount to tinkering around the edges.”).
  \item \textsuperscript{109} 317 U.S. 111 (1942).
\end{itemize}
and there is substantial evidence that it was thought to be true at the founding, it would go a long way toward mitigating the dead hand problem.\footnote{Amar, supra note __, at 1073-75.} The dead hand would receive only what amounts to a tie-breaking vote, which stability and reliance considerations might well counsel giving it anyway. But there is a serious difficulty with this view—even beyond the need for a rule of recognition, though that is hardly a small concern. It simply isn’t true, in any meaningful sense. Everyone besides a few legal academic cognoscenti believes that the Article V amendment procedures are exclusive.\footnote{Cf. Barry Friedman, “Mediated Popular Constitutionalism,” supra note __, at 2631 (“Think about the large public majority in the Gibson, Caldeira, and Spence study of public knowledge who said the Supreme Court has the final authority to say what the Constitution means.”).}

In light of this fact, to suggest that there is no dead hand problem because the people really have the power to amend the Constitution by simple majority is like saying Dorothy had no wicked witch problem because her ruby slippers really gave her the power to teleport back to Kansas all along. In both cases, the power is meaningless without knowledge of its existence, a point underscored by the fact that national majorities outraged by Supreme Court decisions on subjects such as school prayer and flag burning have felt compelled to proceed through the cumbersome Article V process.

There are several additional responses to the dead hand objection that warrant serious attention, but I shall confine myself to two, which have been somewhat less discussed than the others.\footnote{For a particularly forceful argument that I shall be unable to consider fully here, see Stephen Holmes, “Precommitment and the Paradox of Democracy” in CONSTITUTIONALISM AND DEMOCRACY at 195 (Jon Elster & Rune Slagstad eds., 1988). Holmes’s basic claim is that the dead hand of the past can enable rather than constrain present generations by putting in place democratic institutions and procedures that will function better if they are difficult to change. The key weakness of this argument is that it provides no reason to respect past constitutional commitments as such, only those commitments that are integral to the democratic process. Even as to those commitments, it supplies a consequentialist rather than democratic defense of originalism. The point is that the present generation will do better if its judges rigidly enforce some original commitments, not that the principle of popular sovereignty compels them to do so; other considerations could, at least in theory, outweigh the benefits of rigidity in particular cases. Finally, while it is presumably important to the survival of democracy that not all democratic institutions be subject to change at once, it is also possible that individual commitments ought to be allowed to bend in the face of sufficient exigency lest they break altogether. Cf. POSNER, NOT A SUICIDE PACT, supra note __. Another excellent, though more conventional, response to the dead-hand objection that I shall not discuss here is Frank Easterbrook, Textualism and the Dead Hand of the Past, 66 GEO. WASH. L. REV. ___ (1998).} The first, espoused by the
odd couple of Jed Rubenfeld\textsuperscript{114} and now-Judge Michael McConnell,\textsuperscript{115} is the Burkan claim that “written constitutionalism can only be properly understood, it can only claim legitimate authority, as an effort by a nation to achieve self-government over time.”\textsuperscript{116} It would be impossible to do full justice to their richly textured argument here, but it can be fairly summarized as follows: Human beings exist in time and therefore, to be truly free, they must be able to make decisions and commitments that extend over time. In fact, our ability to make such decisions and commitments is the essence of human freedom. It is what sets us apart from “the flies of summer,” who are free to act for themselves in all cases, “unburdened by the past or the future,” but for this very reason are not free in any recognizably human sense.\textsuperscript{117} The implications for the dead hand objection should be obvious. The concealed premise of that objection, that the people must be free to decide for themselves from moment to moment, would reduce us to the state of mayflies. That may be fine for Jefferson, but Rubenfeld and McConnell prefer Burke’s richer version of freedom, which recognizes that “we are not alone in the present, but part of a historical community” with a corresponding “web of rights and obligations”\textsuperscript{118} arising from our “nation’s struggle to lay down temporally extended commitments and to honor those commitments over time.”\textsuperscript{119}

This is a powerful vision, but ultimately only partially compelling. It is undoubtedly true that human beings would be less free if we could not make commitments that extend over time. This is not just because such commitments, for example to democratic institutions, provide a necessary framework for self-government but also because making temporally extended commitments is itself a major human activity, whether in the form of marriage, parenthood, or the Apollo Space Program. It is very different, however, to say that parents would be meaningfully less free if they could not assume gradually diminishing life-long obligations to their children (obligations which, not incidentally, serve an important social function) than to say that societies would be less free if they could not bind their distant posterities to a fixed constitutional mast. Both statements are

\textsuperscript{114} Rubenfeld, supra note __.
\textsuperscript{115} McConnell, supra note __.
\textsuperscript{116} McConnell, supra note __, at 1134 (quoting, with evident approval, Rubenfeld, supra note __, at 1111) (emphasis in original). The two draw starkly different conclusions on the basis of this claim, but these need not concern us here. Compare McConnell, supra note __, at 1136-40 (defending fairly conventional amalgam of originalism, traditionalism, and restraint) with Rubenfeld, “The Moment and the Millenium,” supra note __, at 1107(defending somewhat idiosyncratic “paradigm-case” method). Rubenfeld’s views are elaborated at greater length in JED RUBENFELD, FREEDOM AND TIME (2002).
\textsuperscript{117} McConnell, supra note __, at 1134 (internal citations omitted). The “flies of summer” metaphor is Burke’s.
\textsuperscript{118} McConnell, supra note __, at 1134.
\textsuperscript{119} Rubenfeld, supra note __, at 1105.
literally true, but it is not clear why we should respect the latter form of freedom. What is it to James Madison or John Bingham\(^\text{120}\) and their contemporaries whether present-day Americans respect the original meaning of the commerce and equal protection clauses?

It might be something to present-day Americans of course. Perhaps the original meaning of the equal protection clause is capacious and, if properly understood, would still be seen as inspiring today.\(^\text{121}\) Perhaps that meaning has so shaped contemporary American understandings of equal citizenship that for judges to depart from it and strike out on their own would be deeply unsettling. Or perhaps the original meaning is cramped, by contemporary standards, but judges will nonetheless do better according to those standards by hewing to it closely because their own preferred readings would be even worse.\(^\text{122}\) All of these possibilities seem quite remote, but if true, they would provide good, present-regarding reasons for contemporary judges to care about original meaning. Much more plausible reasons could be constructed if we substituted “tradition” for “original meaning.” There are two things, however, that cannot provide a good reason for adhering either to original meaning or adhering to tradition. The first is the quasi-mystical idea that we owe a duty to the past for its own sake;\(^\text{123}\) the second is the equally superstitious claim that we are part of a single, historically extended, self-governing abstraction called the American People, whose past decisions are our own and can therefore bind us. The point is nicely summed up in Justice Holmes’s famous dictum: “continuity with the past is only a necessity, not a duty.”\(^\text{124}\) Whatever homage we pay to previous generations, we pay—or ought to pay—for our own sake, not for theirs.

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\(^{120}\) Bingham, of course, was the principal draftsman of the 14th amendment. See Richard L. Aynes, *On Misreading John Bingham and the 14th Amendment*, 103 YALE L.J. 57 (1993).

\(^{121}\) *Cf.* Lawrence Lessig, *Fidelity and Constraint*, 65 FORD. L. REV. 1365 (1997) (arguing that contemporary equal protection doctrine is consistent with original meaning, properly understood).

\(^{122}\) This is another example of Sunstein’s excellent point that all questions of interpretive theory turn, at least in part, on the capacities of real-world judges. See also Vermeule, supra note ___.

\(^{123}\) See Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 369 n. 82 (2006) (“In my view, this idea [that the past has an authority of its own] should be discredited on the ground that it is mystical.”).

\(^{124}\) Oliver Wendell Holmes, *Law in Science and Science in Law* (1899), in *Collected Legal Papers* 210, 226 (1920). For a superb elaboration of Holmes’s point as a central tenet of legal pragmatism, see Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 807 (1989) (“On the one hand, continuity with the past is a necessity—which is merely to repeat that law is always situated. No working system of practice can be built by reasoning from the bare ground of human nature alone. … On the other hand, continuity with the past is no categorical imperative—law is a functional instrument meant to meet present and future human needs.”).
All of this relates back to public outrage in two ways. First, it knocks the stuffing out of the originalist argument that judges are democratically obligated to adhere to original meaning, without regard to the felt needs and interests of present-day majorities. Second, it suggests a strong democratic argument for judicial restraint where adherence to original meaning would override the wishes of an outraged contemporary majority. As Holmes succinctly points out, there can be no categorical objection to the influence of past majorities on contemporary legal and political affairs; it is simply a fact of life. But where adherence to past decisions would provoke outrage among a majority of living Americans, there is good reason to believe those decisions no longer serve a useful purpose—as the American people understand usefulness—in the here and now. At the very least we should want our judges to give this possibility serious consideration.

This point becomes even clearer when we examine Keith Whittington’s response to the dead hand objection. Whittington begins with the forthright admission that “the neutral enforcement of [constitutionally] embodied values will necessarily go against current majoritarianism.” He then goes on to offer a two-part defense of this arrangement. His first, quite straightforward point is that originalism protects the people against the risks associated with agency slack—the discretion of imperfectly accountable government representatives to act against the people’s interests—which he suggests are particular serious in the constitutional context.

His second point is somewhat subtler. Judges should adhere to original meaning, he says, because treating past expressions of popular sovereignty as legally binding is the only way to “render the possibility of [future] expressions meaningful.” Whittington calls this the doctrine of “potential sovereignty” and presents it as the most important democratic argument for originalism.

Neither of these defenses is persuasive, and examining them in the context of public outrage helps to explain why. Most obviously, Whittington’s agency slack argument has little purchase where judges adhering to original meaning would override the wishes of an outraged public majority, say, by striking down the Clean Air Act as beyond the federal commerce power. Even where the public is indifferent to judicial invalidation, the force of Whittington’s argument may be doubted. The effect of originalism would be to appoint long-dead framers as the people’s agents on constitutional issues—hardly an obvious improvement over their current representatives. But in the context of public outrage, the argument

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125 See Christopher Eisgruber, The Living Hand of the Past: History and Constitutional Justice, 65 Ford. L. Rev. 1611, 1615 (“Whether we have a written constitution or not, we inherit our politics from the past; no people writes on a blank slate.”).
126 Whittington, supra note __, at 44.
127 Whittington, supra note __, at 131.
128 Whittington, supra note __, at 155.
borders on perverse. The potential sovereignty argument is weightier, but still significantly overstated. Popular sovereignty would be fatally undermined only if judges refused to enforce relatively new constitutional amendments in accordance with their original meaning, an approach absolutely no one advocates. Flexible interpretation of the commerce clause, by contrast, poses no threat at all to the people’s sovereign right to pass a fully effective amendment banning flag burning, or for that matter, restoring the horse-and-buggy commerce clause of the early Hughes Court.

Even if Whittington’s potential sovereignty argument were correct, however, it would not be at all clear that a duty of fidelity to the original sovereign ratifiers would compel the Court to follow an originalist interpretive approach. It is, after all, a Constitution the Court is expounding.¹²⁹ In the unforeseeable event that their handiwork survived 200 years, the sovereign people of 1789 may well have preferred the Court to interpret the Constitution with a “statesman’s breadth of view” rather than a “pedantic and academic” originalism.¹³⁰ This might have been doubly true in those cases where original meaning proved so inconsistent with the felt needs and interests of the present day that its enforcement would provoke outrage among a majority of the people.¹³¹

The argument from popular sovereignty can thus provide no democratic justification for judges to ignore public outrage in favor of original meaning. Originalism might still be defended on consequentialist grounds, of course.¹³² But deprived of the trump card of democracy, such a defense will face the substantial difficulty of showing that original meaning, in all its apparently unappealing particulars,¹³³ would yield better results than the

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¹²⁹ Cf., of course, McCulloch v. Maryland, 17 U.S. 316 (1819).
¹³⁰ Thayer, supra note __, at 138. While perfectly plausible—and perhaps even compelled—as a matter of agency theory, this account of fidelity hardly amounts to originalism at all. See Michael Klarman, Antifidelity, 70 S. CAL. L. REV. 381, 395, 411 (1997).
¹³¹ Cf. Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 SUP. CT. REV. 125, 177-78 (“Ordinarily, when a founding constitutional commitment is challenged, it is the duty of the Court to stand up to the challenge, and defend the founding commitment until changed by amendment. This minimum of courage is essential to a system of judicial review. But what the New Deal represents, I suggest, is an important exception to this principle. … When the act of defending principles of fidelity appears more likely to be an act of politics than principle, the Frankfurter constraint may counsel concession on principle, to preserve the institution of judicial review first.”).
¹³² See Sunstein, supra note __, at 50; Randy Barnett, Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism, 75 U. CIN. L. REV. 7, 22 (“Given that we all care about the Constitution because we want a better rather than worse society, the question is which approach [nonoriginalism, faint-hearted originalism, or a consistent respect for original meaning] is preferable.”).
universe of plausible alternatives. Furthermore, a consequentialist defense of originalism will face the same question as every other consequentialist theory: Why should we want judges to rely on their own normative assessment (that originalism would produce the best consequences) when an outraged majority of the American people has reached the opposite conclusion? It is to this question I now turn.

IV. POWER TO THE PEOPLE?

We have now seen that Sunstein has almost nothing to say about the possibility that judges should care about public outrage out of respect for democracy. Indeed his minimalist approach causes him to overlook robust democratic arguments at almost every turn. He offers an intriguing explanation for this oversight, however. No high-level theoretical argument, he suggests, can tell us when and whether we should want the people, rather than judges, to decide constitutional questions. Instead, the answer is actually determined by his consequentialist and epistemic reasons: Judges should defer to the people when doing so would lead to better consequences or when the people know something judges don’t, but not otherwise.

Intriguing though it is, this explanation gets things almost exactly backwards. A normative account of when the people should decide constitutional questions is not derivative of Sunstein’s consequentialist and epistemic arguments. In fact, it is a necessary prerequisite for determining when and whether we should find those arguments persuasive. As we saw in Part I, consequentialism is empty without a normative theory to explain which consequences count as good and bad. Sunstein makes no effort to supply or defend one. Therefore, his consequentialist argument cannot possibly tell us when or whether it would be desirable for judges to defer to the people’s normative assessments or to treat democracy itself as a desirable consequence. The problem with Sunstein’s epistemic argument is similar. Like consequentialism without a normative account, the epistemic argument is empty without a theory of interpretation. If the proper interpretation of the Constitution depends, in whole or in part, on the approach to free speech, religious liberty, and race and sex equality”); Gary Lawson, The Rise and Rise of the Administrative State, 107 HARV. L. REV. 1231 (noting pervasive unconstitutionality of modern administrative state) (1994).

134 Cf. Michael C. Dorf, Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning, 85 GEO. L.J. 1765, 1766 n. 2 (1997) (Consequentialist arguments “do[] not explain why originalists choose original meaning as the vehicle for constraining judges. In my view, most arguments for relying on original meaning rather than some other constraint depend on the claim that the Ratifiers’ views are preferred because their act of consent confers legitimacy on judicial power exercised in the Constitution’s name.”)

135 Sunstein, supra note __, at 48 n. 128.
public’s views (not as information but as such), public outrage becomes primary, not secondary evidence of constitutional meaning.

The claim that judges should care about public outrage out of respect for democracy is too large to mount a full-fledged defense here. But the rest of this Part provides a preliminary sketch of what such a defense might look like. Ironically, for all of my haranguing on the drawbacks of minimalism, this defense will have a minimalist character. But there is a crucial difference between my argument and Sunstein’s. He avoids deep theoretical questions that, as he acknowledges, are essential to the resolution of the question posed in his title. My argument, by contrast, suggests the possibility of an “incompletely theorized agreement” among persons of diverse theoretical commitments.

The defense would proceed along the following lines: First, it would emphasize that judicial decisions overriding the will of an outraged public majority are the paradigm case of the countermajoritarian difficulty. A substantial fraction of American constitutional law scholarship in the 45 years since the publication of *The Least Dangerous Branch* has been dedicated to minimizing the extent of this difficulty or dissolving it altogether. A formidable body of empirical work going back a half century suggests that the Supreme Court rarely falls out of line with public opinion. Public choice theory has demonstrated that the legislative process (to say nothing of the administrative process) is far from perfectly majoritarian itself, and Keith Whittington has made similar arguments on behalf of originalism. This barely scratches the surface. No argument of this form, however, can save judicial review in the case of public outrage, where it is irremediably countermajoritarian.

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136 See Kramer, “The People Themselves,” supra note __.
137 See Sunstein, “Incompletely Theorized Agreements,” supra note __, at __.
138 Bickel, supra note __.
139 See Barry Friedman, “The Countermajoritarian Difficulty,” supra note __ (reviewing literature).
140 See sources cited in supra note __. Based on these studies, it might be argued that decisions provoking public outrage are so rare as to be practically irrelevant. Cf. Michael Klareman, “Bush v. Gore,” supra note __, at 1750 (“On only a relative handful of occasions has the Court interpreted the Constitution in ways opposed by a clear majority of the nation. … The number of times that an overwhelming majority of Americans has opposed the Court's constitutional interpretations probably can be counted on one hand.”). But constitutional theory exists to defend and justify as well as to condemn. The argument I’m sketching here is as much, if not more, a defense of the Court’s apparent reluctance to provoke public outrage as a call for it to pay more heed to the public.
141 See, e.g., MAXWELL L. STEARNS, PUBLIC CHOICE READINGS AND COMMENTARY (1997).
142 See Whittington, supra note __, at 131.
143 Of course, it has yet to be established that judicial review needs saving. But much of the literature just mentioned at least implicitly assumes that it does. See,
Second, the defense would attempt to show that the will of a popular major-ity should enjoy at least a presumption of validity under a number of plausible theories of democracy. This was the intuition behind Bickel’s argument in *The Least Dangerous Branch*, and indeed is at least arguably the animating insight behind democratic theory generally. In Part II, we saw two illustrative examples at quite opposite ends of the American democratic spectrum. On the one hand, Justice Holmes tepidly embraced a no-frills majoritarianism out of radical moral skepticism. On the other, James Bradley Thayer stirringly defended a civic republican vision of “public participation in the processes of government for its own sake.” Yet both converged on the intrinsic significance of majority rule. Both, moreover, would have been especially skeptical of judicial decisions overriding the will of outraged majorities. If the only “proximate test of a good government is that the dominant power has its way,” as Holmes thought, it would seem especially perverse for a group of unelected judges to stymie the will of an aroused public. Thayer, by contrast, believed that the sort of controversy likely to provoke public outrage provided an especially valuable opportunity for “vigorous thinking [and] political debate.” Obviously, the overlap between their decisions would not have been perfect, but it may well have been quite substantial.

e.g., Klarman, “Majoritarian Judicial Review,” supra note __, at 500-01. Process-based theorists like John Hart Ely might want judges to ignore public outrage where judicial invalidation is necessary to protect the political process or vulnerable minorities. See Ely, supra note __. But of course, this class of cases is hardly self-defining, and at least at the margins, where the issue is fairly debatable, even committed process theorists might be hesitant to overrule the wishes of an outraged majority.

As we’ve seen, such a presumption is not a sufficient basis for skepticism of all judicial review, since in many cases judicial invalidations are more in tune with the popular mood than the legislation they strike down. See supra notes 140-44 and accompanying text.

Grey, “Holmes, Pragmatism, and Democracy,” supra note __, at 530-32. For a recent defense of elite democracy in a broadly similar spirit, see Posner, “Law, Pragmatism, and Democracy,” supra note __.


Holmes, “Montesquieu,” supra note __.

James Bradley Thayer, John Marshall 107 (1901), quoted in Grey, “Thayer’s Doctrine,” supra note __. Cf. Sunstein, “Incomplete-ly Theorized Agreements,” supra note __, at 1753 (“Even more fundamentally, judges lack a democratic pedigree, and it is in the absence of such a pedigree that the system of precedent, analogy, and incompletely theorized agreement has such an important
Third, the defense would emphasize the dynamic effects of aggressive judicial review on democracy. This point would begin but not end with Thayer’s argument that aggressive judicial review saps legislators of their sense of independent constitutional responsibility. As we saw in Part II, this effect seems likely to be especially severe in the kinds of controversial cases likely to provoke public outrage. If the most burning issues of the day are consigned to courts, the urgency of both legislative and popular deliberation is reduced considerably. At least as important is the distorting effect that even the prospect of outrageous judicial decisions can have on the political process. A striking example is the possibility that fears spawned (remotely) by Lawrence v. Texas and (proximately) by Goodridge v. Dep’t of Public Health put President George W. Bush over the top in the 2004 election. If this is true, Lawrence and Goodridge

place. The right to a democratic system is one of the rights to which people are entitled, and in such a system, judicial invocation of large theories to support large decisions against democratic processes should be a rare event.”). The most difficult theories for the defense to accommodate would be the more ambitious sorts of deliberative democracy, which would accord no presumption of validity to majority decisions regarding a very thick set of rights viewed as a precondition to legitimate democratic deliberation. See, e.g., Joshua Cohen, 6 The Economic Basis of Deliberative Democracy, SOC. PHIL. & POL. 25 (1989); Joshua Cohen, Institutional Argument is Diminished by the Limited Examination of the Issue of Principle, 53 J. POL. 221 (1991). Quite apart from the nontrivial possibility that the public would be outraged by judicial protection of the rights deliberative democrats see as constitutive of democracy, public outrage itself is unlikely to satisfy their stringent preconditions for deliberation. For a critique of such views on the ground that they are hopelessly divorced from reality, see Lynn M. Sanders, Against Deliberation, 25 POL. THEORY 347, 353 (1997) (“[D]emocratic citizens as described in these theories seems to live on another planet.”). If anything, Sanders puts the point too mildly. While this effect might be captured in Sunstein’s consequentialist analysis, since it is likely to have real practical impact in the long run, it is the sort of cumulative effect will often be almost invisible case by case, meaning that something like a rebuttable presumption for restraint, rather than an ad hoc consequentialist analysis may be appropriate, at least for the class of cases likely to provoke public outrage. 539 U.S. 558 (striking down same-sex sodomy ban on due process grounds) Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (ordering state to provide equal marriage rights for same-sex couples on state equal protection grounds).

See David E. Campbell & J. Quin Monson, The Religion Card, working paper available at http://psweb.sbs.ohio-state.edu/wartime_election/papers/campbell_religion.pdf (finding qualified empirical support for hypothesis that gay marriage ballot measure accounted for Bush’s margin of victory in Ohio, which accounted for his margin of victory in the electoral college); but see Simon Jackman, “Same Sex Marriage Ballot Initiatives
would have to rank among the most consequential judicial decisions in American history, quite apart from the significance of their holdings. The point is not just that Bush’s second term has been a disaster of world-historical proportions, though that naturally tends to overshadow everything else. Even if we were living in more placid times, it would be seriously unfortunate for judicial decisions on narrow but highly salient social issues to drive national elections that will have much more immediate and dramatic impacts on every other aspect of public policy. A presumption of restraint in cases likely to provoke outrage among a national majority might go a long way toward reducing this kind of political distortion.154

Fourth, the defense would attempt to enlist the support of originalists who believe that popular sovereignty requires that the people retain the power to alter or abolish the Constitution by a simple majority. As explained in Part III, there is strong evidence that this was the prevailing understanding when the Constitution was ratified. But that understanding has obviously withered on the vine, leaving Article V as the only realistic mechanism for ratifying a constitutional amendment. Perhaps originalists who view this situation as unacceptable—indeed as inconsistent with their bedrock principle of popular sovereignty—would be willing to endorse a presumption of judicial restraint, as a kind of second-best solution, where adherence to original meaning would predictably outrage a majority of the public.155

Fifth, and finally, the defense would draw on the rich literature of popular constitutionalism that has taken constitutional theory by storm over and Conservative Mobilization in the 2004 Election,” available at http://jackman.stanford.edu/papers/RISSPresentation.pdf (finding no such effect).

154 Such a presumption would be grounded in the intrinsic importance of popular self-government but also in the rule-consequentialist concern that political distortion is likely to lead to bad policy outcomes. Like Thayer’s argument, this concern might be picked up by Sunstein’s consequentialist analysis, though Sunstein never raises the possibility of a rule-consequentialist argument in favor of judges considering public outrage.

155 See Amar, supra note __, at 1060-66.

156 This logic might also support judicial invalidation where validation would outrage a majority of the public. Article V, in other words, may be every bit as undemocratic in constraining the people’s right to embody their deeply held values in the national charter as it is in preventing them from abolishing existing restrictions. For an argument that popular constitutionalism ought to work just as much in this direction as in the other, see Reva Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA, 94 CAI. L. REV 1323 (2006). For an argument that originalist judges should defer to the political branches where original meaning is unclear, see KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).
the last decade. This literature is extraordinarily diverse but its unifying normative theme is the idea that the Constitution ought not to be “remov[ed] … from the process of self-governing.” Sometimes this is expressed as the idea that the “authority to interpret and enforce the Constitution is not deposited exclusively or ultimately in courts … but remains in politics and with ‘the people themselves.’” At first blush, these ideas might seem plainly supportive of my argument, but Sunstein actually draws on the latter formulation to preemptively dismiss the significance of public outrage for popular constitutionalism. “Perhaps the public’s judgment is not in any sense rooted in a judgment about constitutional meaning,” he suggests. “Perhaps its outrage is a reflection of some kind of policy-driven, constitution-blind opprobrium.”

Undoubtedly this is true of most public reactions to Supreme Court decisions, and for some popular constitutionalists, that might make most instances of public outrage irrelevant. But for others, the public’s strongly held views will matter whether or not they are formulated with specific reference to the Constitution. This group, at least, should be willing to endorse a presumption of restraint where judicial invalidation is likely to provoke public outrage. Even those theorists narrowly committed to self-conscious popular constitutional interpretation might be willing to endorse such a presumption as an intermediate step toward their ultimate goal.

Obviously, this sketch leaves many important questions unanswered. Like any other argument of its kind, it depends in significant part on debatable empirical assumptions about the capacities of real-world judges. Like Sunstein, though, I am convinced that in relatively rare but significant cases, judges are likely to have sufficient information to predict whether their decisions will outrage a majority of Americans. In such cases, a presumption of judicial restraint is the approach most consistent with the role of unelected judges in a democracy. This approach would actually tax the predictive powers of judges less than Sunstein’s, since it requires them to predict only the incidence of outrage, not its effects.

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158 Kramer, “We the Court,” supra note __, at 169.
159 Kramer, “Popular Constitutionalism,” supra note __, at 961 n. 3.
160 Sunstein, supra note __, at 56; cf. Richard A. Posner, “The People’s Court,” THE NEW REPUBLIC, July 19, 2004, p. 32 (reviewing Kramer, “The People Themselves,” supra note __) (“To depict the people as constitutional ‘interpreters’ merely entangles popular constitutionalism in a legalism. … Americans care for results rather than for interpretations. If enough people disapprove of the Supreme Court's decision in a particular case, the Court will, and maybe should, retreat—but not because the people will have sagaciously corrected an error of interpretation.”).
161 See Friedman, “Mediated Popular Constitutionalism,” supra note __, at 2620-23.
162 If these effects are frequently quite bad but difficult to predict, even Sunstein might be willing to embrace a presumption of restraint in cases where judicial invalidation would provoke public outrage.
The harder question is how strong a presumption is called for and what should be allowed to rebut it. Perhaps the presumption should not apply at all in certain areas. Freedom of speech and the rights of despised minorities are two obvious possibilities. Even in these areas, however, the question of who should decide controversial cases at the margin is a difficult one, with much to be said for majoritarian decision-making. Perhaps a presumption is too wooden, and public outrage should merely be one of many factors in a pragmatic judicial analysis. Greater flexibility might allow judges to produce results the public would like better in the long run, by taking a broader historical perspective and by giving appropriate consideration to systemic values such as stability, predictability, and the Court’s institutional legitimacy. Here too, however, it is unclear that fallible judges would do better than a fairly rigid presumption in favor of majoritarian results, at least in the controversial cases likely to provoke public outrage.

CONCLUSION

Should judges care about public outrage out of respect for democracy? I have suggested a number of reasons to think they should. But whether or not these reasons are ultimately persuasive, this question is central to determining the proper judicial response to public outrage. It must be answered one way or the other. Sunstein’s minimalist approach obscures this fact and thereby prevents him from reaching the heart of the question posed in his title.

There are three related problems: First, Sunstein’s reluctance to confront deep theoretical questions seriously limits the interest of the remaining avenues for discussion. Specifically, it causes him to replace the deep question of “Should judges care about consequences at all?” with the shallower, “Should judges whose theoretical commitments are taken as given care about the consequences of public outrage?” It also causes him to sidestep the hard question of how judges should assess the desirability of particular consequences. Without an answer to this question, his consequentialist argument is empty.

Second, ruling deep questions off limits makes superficial explanations appear more compelling than they really are. In particular, it makes Sunstein susceptible to the siren song of the Condorcet Jury Theorem, even though he is keenly aware of its limitations in the context of constitutional adjudication. As a result, he neglects more robust democratic explanations.

164 See supra note 144; see also Kramer, “Popular Constitutionalism,” supra note __, at 997-1001; Waldron, supra note __, at 288; cf. Board of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) (striking down Title I of the Americans with Disabilities Act as applied to state governments).
for Thayer’s clear-error rule, Holmes’s puke test, and the national consensus rationale of the Court’s recent Eighth Amendment cases.

Third, and finally, Sunstein’s minimalist approach forecloses the possibility of examining the famous dead hand objection to originalism in the fresh context of public outrage. This results in a missed opportunity to demolish the argument that popular sovereignty requires judges to follow original meaning, even in the face of an outraged public majority. That argument is a major aspect of the public outrage issue in its own right, one that must be addressed to determine when, whether, and why judges should care about public outrage.

These are serious problems. But they should not obscure the redeeming qualities of Sunstein’s minimalist approach. In an area fraught with controversy, it enables him to say something of interest to originalists, consequentialists, and moral rights theorists of all stripes. It also frees him to focus on the narrow subject at hand without the distraction of deep theoretical questions at every turn. He makes the most of this opportunity, correctly concluding that there are legitimate reasons for judges to care about public outrage and identifying two that provide an excellent framework for discussion. He also helpfully underscores the significance of controversial assumptions about judicial capacities for any question of interpretive theory.

Add to this the usual (and substantial) virtues we’ve come to expect from Sunstein’s work: the almost supernatural clarity of thought and expression; the impressively and helpfully wide range of references from philosophy, political science, and cognitive psychology; the uncanny sense of timing—in this case, addressing the fascinating and vital issue of public outrage just when vituperative attacks on the judiciary, the looming same-sex marriage issue, and scholarly interest in popular constitutionalism have converged to make it a matter of pressing practical, as well as academic, concern. The result is a formidable contribution, albeit one with significant blind spots.