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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 pathbreaking *The Least Dangerous Branch*[1] was devoted to the

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1. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

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 is his vivid use of hypotheticals to illustrate the complex and often surprising consequences of public outrage[2] and his discussion of the cognitive biases that may lead judges to exaggerate or otherwise misjudge these effects.[3]

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

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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. 155, 170-75 (2007). For an illuminating historical discussion of these factors, see Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 452-58 (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 judges to exaggerate the likelihood and effects of public outrage.

weight of particular consequences. Perhaps most important, we need to know whether judges should attach any weight to public outrage as such—not the hedonic state outrage implies,[4] 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.[5]

On these issues, Sunstein has little to say. Taking an approach that distinctly resembles the judicial minimalism he has championed elsewhere,[6] 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[7]—his minimalist approach has serious drawbacks.

This Response will address two 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.

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 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

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4. Sunstein rightly concludes that judges are so ill-equipped to predict affective reaction to their decisions that they are better off ignoring it altogether, 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 2, at 180-81.

5. *Cf.* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

6. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006); Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899 (2006).

7. Sunstein, *supra* note 2, at 184, 200.

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 III 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 statutes 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 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

8. I hope to fill out some of the details in a future article, tentatively titled "Popular Constitutionalism for Pragmatists."

bad consequences,[9] unless he is unable to predict or assess these consequences reliably or unless considering them will invite harmful strategic behavior.[10] 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.[11] 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.[12] 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 as 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 (using the appropriate interpretive method), and its conclusions on that point should be unaffected by the public's will."[13] 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."[14] This suggests he is envisioning a much smaller group, comprising only moral rights theorists

9. *See* Sunstein, *supra* note 2, at 170-71 (positing three reasons that outrage might lead to bad consequences—futility, perversity, and overall harm). In explaining the category of overall harm, Sunstein rather puzzlingly points to Justice Jackson's concern for national security in *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting), which of course had nothing to do with public outrage. Outrage may have been a predictable result had the Court decided *Korematsu* the other way, but it would have been an effect, not a cause, of the perceived threat to national security. The same is true in Sunstein's troop deployment hypothetical. *See* Sunstein, *supra* note 2, at 162.

10. I simplify slightly. Reliability is a matter of degree, as is the harm of strategic behavior, so what a consequentialist judge would really want to know is whether she could predict public outrage and assess its consequences *reliably enough*. The test would be whether considering public outrage generated benefits exceeding the costs of decision plus the costs of error plus the costs of any resultant strategic behavior. *See* Sunstein, *supra* note 2, at 177.

11. *See id.* at 201, 203.

12. The short answer: maybe never, definitely less often than Judge Bentham.

13. *See* Sunstein, *supra* note 2, at 164.

14. *See id.*

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[15] 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.[16] "If total catastrophe really would ensue," the argument goes, "judges should not rule as they believe that principle requires."[17] 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.[18] 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.[19] This condition may have been satisfied in *Dred Scott v. Sandford*,[20] 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."[21] 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."[22] I happen to agree with 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."[23] The analogies he offers are not much help. It is true, for example, that a defense attorney's duty

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15. *See id.* at 165 ("The second and more fundamental reason is that it is not clear that the principle of Kantian adjudication makes much sense, at least if it is defended on Kantian grounds.").

16. *Cf.* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

17. Sunstein, *supra* note 2, at 165.

18. *Id.* at 178.

19. *Id.*

20. 60 U.S. 393 (1856). *But see* Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 CHI.-KENT L. REV. 49, 89-93 (2007) (questioning the conventional wisdom that *Dred Scott* hastened the onset of the Civil War).

21. Sunstein, *supra* note 2, at 178.

22. *Id.* at 179.

23. *Id.* at 166.

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.[24] 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."[25] 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.[26] 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.

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24. *Cf.* Barbara Allen Babcock, Commentary, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 178 (1983).

25. Sunstein, *supra* note 2, at 179.

26. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1990); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 110-59 (1999). This suggests a third limitation of Sunstein's minimalist approach that I shall not be able to explore here: it 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 in the context of public outrage, which as it happens, poses a significant challenge for originalists. The crux of the popular sovereignty argument is that judges are bound to the original public meaning of the Constitution (and thus should refuse to consider public outrage) because this is the meaning that was ratified by a supermajority of the American people. 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 is the famous dead hand objection, which the context of public outrage poses in a particularly stark light. The missed opportunity to examine the objection in this context is especially unfortunate since many of the best recent originalist responses to it have gone largely unanswered. *See, e.g.*, Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998). For an attempt to answer some of them, see Andrew B. Coan, Only a Necessity, Not a Duty: The Dead Hand Problem Revisited (Oct. 8, 2007) (unpublished manuscript, on file with author).

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.[27] 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 controversial cases most likely to provoke public outrage. Even easy cases turn to some degree on the prevailing normative theory;[28] the hardest cases may turn almost entirely on it.[29] Consider that Dworkin and his perennial antagonist Judge Richard Posner—who agree on little else[30]—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 "[t]he difficulty and contentiousness of the [normative] assessment" might provide a good rule-consequentialist reason for excluding some consequences from consideration altogether.[31] 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

27. *See, e.g.*, RONALD DWORKIN, JUSTICE IN ROBES 64-65, 91-92 (2006); *see also* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 6-7 (2006).

28. Many of the easy cases—and some of the hard ones—turn on the convergence of several overlapping normative theories, making choice among them unnecessary. *See* Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995). But at least one normative theory is always necessary.

29. *See* Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 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.").

30. *Compare* Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353 (1997), *with* Richard A. Posner, *Conceptions of Legal "Theory": A Response to Ronald Dworkin*, 29 ARIZ. ST. L.J. 377 (1997).

31. Sunstein, *supra* note 2, at 175; *see also id.* at 175-77.

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,[32] resolving it the way the Court did might have been predicted to provoke public outrage (albeit among a minority),[33] with perhaps serious negative repercussions for the sex equality movement, among other things.[34] 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 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 might ultimately require some kind of consequentialist defense—as, for example, in the view that *judges will do best* if they do not take account of the risk that their decisions will be rejected through amendment."[35]

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[36] like the possibility that judges will systematically overestimate the risk of amendments and so would

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32. This, of course, is the year the Court decided *Roe v. Wade*, 410 U.S. 113 (1973).

33. *U.S. Attitudes Toward* Roe v. Wade, WALL ST. J. ONLINE, http://online.wsj.com/public/resources/documents/info-harris0503.html (last visited June 14, 2007).

34. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 173-265 (1991); Cass R. Sunstein, *From Theory to Practice*, 29 ARIZ. ST. L.J. 389, 394 (1997). *But see* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 406-31) (disputing the conventional wisdom that *Roe* hurt the women's movement).

35. Sunstein, *supra* note 2, at 173 (emphasis added).

36. I use the word in Sunstein's particular sense, meaning agnostic on deep theoretical questions. *See, e.g.*, Sunstein, *Burkean Minimalism*, *supra* note 6, at 365.

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 "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 Bentham's normative view,[37] 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.[38] 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*[39] and that has preoccupied—even obsessed[40]—constitutional law scholars ever since: the dreaded "countermajoritarian difficulty." It has become a commonplace that Bickel exaggerated the extent of this difficulty.[41] Courts are more majoritarian than he allowed,[42] and legislatures and administrative agencies less.[43] 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,[44]

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37. *See, e.g.*, ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003).

38. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 71 (2003). *But see* DWORKIN, *supra* note 27, at 103 ("[S]ince 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.").

39. BICKEL, *supra* note 1, at 21.

40. *See* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

41. *See id.* at 163-67.

42. *See* sources cited *supra* note 37.

43. *See* Friedman, *supra* note 40, at 166; Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) (summarizing literature).

44. Sunstein is surely right, for example, that "no conclusions about the proper response to outrage and its effects, 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 2, at 161. But neither can such conclusions be established *without* deep theoretical analysis. This is the essential weakness of Sunstein's minimalist approach.

and I shall attempt to provide some of it in subsequent Parts. For now, it is enough to point out that Bickel's central intuition—that in a democracy the will of a popular majority should enjoy at least a *presumption* of validity—remains remarkably resonant nearly fifty years later.[45] 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![46] 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.[47] 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.[48] 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.[49] The attempt is not wholly

45. Nor can this presumption be reduced to Sunstein's consequentialist and epistemic reasons. *See* Sunstein, *supra* note 2, at 195 n.134 (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 1, at 20. I shall return to this point in Part III.

46. 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.

47. Sunstein, *supra* note 2, at 185-86.

48. *Id.* at 191-92.

49. The rule holds that judges should invalidate legislation only where its unconstitutionality is clear beyond a reasonable doubt. *See* James B. Thayer, *The Origin and*

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 the size of the group increases.[50] 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.[51] 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.[52] Moral rights theorists like Dworkin, who think constitutional interpretation in hard cases often calls for rigorous conceptual analysis,[53] will probably also have grave doubts about the epistemic relevance of public opinion, as the general public rarely if ever engages in such analysis.

Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129 (1893).

50. Sunstein, *supra* note 2, at 183.

51. *Id.* at 184.

52. Sunstein suggests that the CJT may give originalists reason to follow the majority view among historical experts. Sunstein, *supra* note 2, at 184-85. 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.

53. *See, e.g.*, DWORKIN, *supra* note 27, 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.[54] 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.[55] 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.[56] If he believes the deterrence argument strong, Condorcet is likely to conclude the opposite.[57] 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."[58] Of course, where this is the case, the epistemic argument is doing no work at all.

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54. *But see* Alan Johnson, *Support for Death Penalty Waning*, COLUMBUS DISPATCH, June 10, 2007, at 3B (reporting survey results indicating that 58 percent of Americans support death penalty moratorium).

55. This is an example of what psychologists and behavioral law and economics scholars call the "confirmation bias." *See* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998). The term may be helpful in some instances, but it doesn't add much here.

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

57. 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.

58. Sunstein, *supra* note 2, at 191. 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." *Id.* 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.

B. *Other Applications*

So much for the holy grail. But despite Sunstein's clear-eyed recognition of the epistemic reason's limitations,[59] 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*.[60] I shall take up the latter two below.[61] 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,[62] the other evolutionist.[63] 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 consensus worthy of respect under the CJT.[64] Indeed, so inattentive is

59. *Id.* at 192 ("All in all, the epistemic argument for considering public outrage emerges as intelligible but quite fragile . . . .").

60. 539 U.S. 558, 572 (2003).

61. *See infra* Part II.B.3.

62. *See* Rochin v. California, 342 U.S. 165, 169, 172-74 (1952); *see also* County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) ("[T]he [shocks the conscience] test can be used to mark the beginning point in determining whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution . . . .").

63. *Lewis*, 523 U.S. at 847 n.8 (majority opinion) (asking whether challenged government conduct "may fairly be said to shock the *contemporary* conscience" (emphasis added)).

64. *See, e.g.*, *Rochin*, 342 U.S. at 169, 170, 172 (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"); *see also Lewis*, 523 U.S. at 857-58 (Kennedy, J., concurring) (insisting that, despite "the unfortunate

the Court to actual tradition and consensus that these rationales—the aspects of "shock the conscience" doctrine Sunstein casts as "implicit[ly] Condorcetian"[65]—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.[66] 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."[67] 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 efforts to revive the CJT, Sunstein completely overlooks this democratic justification for judges to consider public outrage.

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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)).

65. Sunstein, *supra* note 2, at 197. 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 171 n.4 (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: HOW MANY MINDS PRODUCE KNOWLEDGE 124-25 (2006) (comparing Condorcet, Burke, and Hayek).

66. Letter from Justice Oliver Wendell Holmes to Harold J. Laski (Oct. 23, 1926), *reprinted in* 2 HOLMES-LASKI LETTERS 887, 888 (Mark DeWolfe Howe ed., 1953). For an elaboration of this test in more traditionally judicial vernacular, see *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Holmes, J., dissenting).

67. OLIVER WENDELL HOLMES, *Montesquieu*, *in* COLLECTED LEGAL PAPERS 250, 258 (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).

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.[68] But that is 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.[69] 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.'"[70] 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,[71] either for the Condorcetian reasons Sunstein suggests or for institutional reasons, such as the superiority of legislative fact-finding.[72] 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."[73]

Given this fact, Thayer believed courts should defer to legislatures because legislatures are the primary and, in many areas, the only constitutional interpreter.[74] 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

68. *See* Thomas C. Grey, *Thayer's Doctrine: Notes on its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28, 40 (1993) ("Thayer believed some things Holmes did not: that the loss of public political education and participation that followed when the 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.").

69. *See* Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9 (1993).

70. *See* Grey, *supra* note 68, at 38 n.39 (quoting Thayer, *supra* note 49, at 149, 156).

71. *But see* Thayer, *supra* note 49, at 135 ("[T]hese questions . . . require an allowance to be made by the 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.").

72. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1994). The superiority of legislative fact-finding capabilities suggests a more familiar but weightier epistemic argument for judicial deference. For recent treatments, see VERMEULE, *supra* note 27; JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

73. Thayer, *supra* note 49, at 144.

74. This was certainly truer 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.

detriment of the nation.[75] Democracy can retain its vitality, Thayer argued, only if representative institutions are allowed the freedom, and hence the responsibility, to make mistakes. History and comparative constitutional law support his argument.[76]

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.[77] Notably, the example Thayer most frequently invoked in support of judicial deference was the *Legal Tender Cases*,[78] now largely forgotten, but far and away the most dramatic constitutional controversy of his day.[79] In praising the Supreme Court's decision upholding the Legal Tender Acts (just two years 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.[80] On this view, judges should care about public

75. Thayer, *supra* note 49, 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.").

76. *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 (1993) ("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 values. Judicial foreclosure of political outcomes might well have corrosive effects on democratic processes.").

77. *Roe v. Wade*, 410 U.S. 113 (1973), for example, seems to have hardened opposing views on abortion. *See* Barry Friedman, *Mediated Popular Constitutionalism*, *supra* note 37, at 2624; Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005).

78. Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869).

79. Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367; James Bradley Thayer, *Legal Tender*, 1 HARV. L. REV. 73 (1887).

80. Grey, *supra* note 68, 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 B. 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 Public Law*, 38 STAN. L. REV. 29 (1985).

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.[81] 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,[82] 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.[83] 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 democratic explanations that, as a historical matter, seem to have actually motivated Thayer and Holmes.[84]

3. *Moral consensus in* Roper, Atkins, *and* Lawrence

This still leaves the "evolving standards of decency" test and the "emerging awareness" rationale of *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, *Roper v. Simmons*[85] and *Atkins v. Virginia*)[86] and in *Lawrence*. It would certainly be possible to deride this as just another rhetorical fig leaf,[87] no more essential to the Court's recent

81. Sunstein, *supra* note 2, at 200 (noting that such legislation may "itself [be] a product of a cascade effect or of group polarization").

82. *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 J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1749-50 (2001).

83. 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.

84. 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.

85. 543 U.S. 551 (2005) (holding that application of death penalty to juvenile offenders violates Eighth Amendment).

86. 536 U.S. 304 (2002) (holding that application of death penalty to mentally retarded offenders violates Eighth Amendment).

87. *See* Posner, *supra* note 29, at 90 ("Strip *Roper v. Simmons* of its fig leaves—the psychological literature that it misused, the global consensus to which it pointed, the national

decisions than were the phantasmal "notions of justice of English-speaking peoples" to *Rochin*.[88] 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 *Roper* and *Atkins* voted differently than he had in identical cases in 1989, and Justice O'Connor, who voted differently in *Atkins* but not in *Roper*.[89] 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 national consensus the Court perceived had developed over a relatively short period of time (roughly fifteen 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.[90] 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.

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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 Atkins*, 536 U.S. at 322 (Rehnquist, C.J., dissenting) ("[T]he 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.").

88. Rochin v. California, 342 U.S. 165, 169 (1952); *see also supra* notes 62-64 and accompanying text.

89. As for *Lawrence*, Justice O'Connor did not join Justice Kennedy's majority opinion, but her concurrence, 539 U.S. at 579 (O'Connor, J., concurring), is fairly read as a partial reconsideration of her earlier vote in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Justice Kennedy was not on the Court when *Bowers* was decided.

90. 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.

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"[91] as measured by "objective indicia of society's standards, as expressed in legislative enactments and state practice . . . ."[92] 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."[93] 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.[94] On this view, national consensus is not evidence that a punishment is actually indecently excessive; that the Court must judge for itself. Instead, national consensus is a kind of practical inoculation against the countermajoritarian difficulty.[95]

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.[96] The wisdom of this approach may be doubted, as may its democratic justification.[97] The Justices, after all,

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91. Roper v. Simmons, 543 U.S. 551, 563 (2005) (quoting *Atkins*, 563 U.S. at 316).

92. *Id.*

93. *Id.* at 564 (emphasis added).

94. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986).

95. 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.

96. *See, e.g.*, *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).

97. *See* Atkins v. Virginia, 536 U.S. 304, 348-49 (2002) (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

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.[98]

It may be possible to explain *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 *Bowers v. 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*.[99] 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.[100] 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. 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

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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." (internal citations and quotation marks omitted)).

98. Interestingly, Justice Scalia's scathing *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 *identify* a moral consensus of the American people." 543 U.S. at 616 (Scalia, J., dissenting) (emphasis added).

99. Lawrence v. Texas, 539 U.S. 558, 572-76 (2003).

100. *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.").

when doing so would lead to better consequences or when the people know something judges don't, but not otherwise. [101]

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 public's views (not as information but as such),[102] 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"[103] 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 forty-five years since the publication of *The Least Dangerous Branch* has been dedicated to minimizing the extent of this difficulty or dissolving it altogether.[104] A formidable body of empirical work going back a half century suggests that the Supreme Court rarely falls out of line with public opinion.[105] Public choice

101. Sunstein, *supra* note 2, at 195 n.134.

102. *See* KRAMER, *supra* note 5.

103. *See* Sunstein, *supra* note 28, at 1739.

104. *See* Friedman, *supra* note 40 (reviewing literature).

105. *See* sources cited *supra* note 37. Based on these studies, it might be argued that decisions provoking public outrage are so rare as to be practically irrelevant. *Cf.* Klarman, *supra* note 82, 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

theory has demonstrated that the legislative process (to say nothing of the administrative process) is far from perfectly majoritarian itself,[106] and Keith Whittington has made similar arguments on behalf of originalism.[107] 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.[108]

Second, the defense would attempt to show that the will of a popular majority should enjoy at least a *presumption* of validity under a number of plausible theories of democracy.[109] 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.[110] On the other, James Bradley Thayer stirringly defended a civic republican vision of "public participation in the processes of government for its own sake."[111] 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

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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.

106. *See, e.g.*, MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997).

107. *See* WHITTINGTON, *supra* note 26, at 134-35 (arguing that originalist judicial review protects the people against the risks associated with agency slack).

108. 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, e.g.*, Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 500-01 (1997). 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* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). 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.

109. 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* sources cited *supra* note 37 and accompanying text; Klarman, *supra* note 82 and accompanying text.

110. Grey, *supra* note 67, at 530-32. For a recent defense of elite democracy in a broadly similar spirit, see POSNER, *supra* note 38.

111. Grey, *supra* note 68, at 39. Sunstein himself has written eloquently in this vein. *See, e.g.*, SUNSTEIN, *supra* note 76, at 45 ("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.").

dominant power has its way,"[112] 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[]."[113] Obviously, the overlap between their decisions would not have been perfect, but it may well have been quite substantial.[114]

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.[115] 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*[116] and (proximately) by *Goodridge v. Department of Public Health*[117]

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112. Holmes, *supra* note 67, at 258.

113. Grey, *supra* note 68, at 39 (quoting JAMES B. THAYER, JOHN MARSHALL 107 (1901)); *cf.* Sunstein, *supra* note 28, 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 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.").

114. The most difficult theories for my 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, *The Economic Basis of Deliberative Democracy*, 6 SOC. PHIL. & POL'Y. 25 (1989); Joshua Cohen, Book Review, 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 seem to live on another planet . . . ."). If anything, Sanders puts the point too mildly.

115. 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 that 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.

116. 539 U.S. 558 (2003) (striking down same-sex sodomy ban on due process grounds).

117. 798 N.E.2d 941 (Mass. 2003) (ordering state to provide equal marriage rights for same-sex couples on state equal protection grounds).

put President George W. Bush over the top in the 2004 election.[118] If this is true, *Lawrence* and *Goodridge* 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.[119]

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.[120] 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[121]—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.[122]

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118. *See* David E. Campbell & J. Quin Monson, The Religion Card: Gay Marriage and the 2004 Election (unpublished manuscript), *available at* http://www.nd.edu/~dcampbe4/RELIGION%20CARD.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, Dep't of Political Science, Stanford Univ., Presentation: Same-Sex Marriage Ballot Initiatives and Conservative Mobilization in the 2004 Election, *available at* http://jackman.stanford.edu/papers/RISSPresentation.pdf (finding no such effect).

119. 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.

120. *See, e.g.*, Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988); McConnell, *supra* note 26, at 1132.

121. *See* Amar, *supra* note 120, at 1060.

122. 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 can work just as much in this direction as in the other, see Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 2005-05 Brennan Center Symposium Lecture (Sept. 19, 2005), *in* 94 CAL. L. REV. 1323 (2006). For an argument that originalist judges should defer to the

Fifth, and finally, the defense would draw on the rich literature of popular constitutionalism that has taken constitutional theory by storm over the last decade.[123] 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."[124] 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.'"[125] At first blush, these views 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."[126] Undoubtedly this is true of most public reactions to Supreme Court decisions,[127] 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

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political branches where original meaning is unclear, see KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

123. For an excellent overview, see Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959 (2004).

124. Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 169 (2001).

125. Kramer, *supra* note 123, at 961 n.3.

126. Sunstein, *supra* note 2, at 207; *cf.* Richard A. Posner, *The People's Court*, NEW REPUBLIC, July 19, 2004, at 36 (reviewing KRAMER, *supra* note 5) ("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.").

127. *See* Friedman, *supra* note 37, at 2620-23.

less than Sunstein's, since it requires them to predict only the incidence of outrage, not its effects.[128]

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.[129] 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.[130] Alternatively, a presumption may be too wooden. Perhaps 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 rule of law. 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 two 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.

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128. 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.

129. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); ELY, *supra* note 108.

130. *See* Kramer, *supra* note 123; *see also* WALDRON, *supra* note 72, at 288; Kramer, *supra* note 123, at 997-1001; *cf.* Bd. of Trs. of the Univ. of Alab. v. Garrett, 531 U.S. 356 (2001) (striking down Title I of the Americans with Disabilities Act as applied to state governments).

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 for Thayer's clear error rule, Holmes's puke test, and the national consensus rationale of the Court's recent Eighth Amendment cases.

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.