

Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

Summer 2008

The Odyssey of Cass Sunstein

James E. Fleming

Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Administrative Law Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

James E. Fleming, *The Odyssey of Cass Sunstein*, in 43 *Tulsa Law Review* 843 (2008).
Available at: https://scholarship.law.bu.edu/faculty_scholarship/2816

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



THE ODYSSEY OF CASS SUNSTEIN

James E. Fleming*

I. INTRODUCTION: SUNSTEIN'S TRAVELS

I am delighted to participate in this symposium honoring and criticizing the scholarship of Cass Sunstein. Let me begin by stating something so obvious that we typically don't say it: Cass is the most remarkably thoughtful, constructive, and productive scholar of his (and my) generation, the generation of scholars born around the time that *Brown v. Board of Education*¹ was decided. No one has addressed a wider range of important subjects or made a more substantial contribution to our understanding of law. I have been fruitfully engaging with his scholarship from my first article² to my two recent books.³ In this essay, I am going to focus on his theory of minimalism. I examine the journey from Sunstein's *The Partial Constitution*⁴ to his minimal constitution of many minds,⁵ an odyssey of the "incredible shrinking constitutional theory."⁶

II. MINIMALISM

What is minimalism? What is it a theory of? Is it merely a theory of judicial review (or judicial strategy) that is agnostic concerning the character and commitments of the Constitution? Or does it amount to a theory of the Constitution itself? Is minimalism a theory for all times and circumstances? Or only for certain times and circumstances? Is minimalism itself a form of perfectionism?

* Professor of Law and The Honorable Frank R. Kenison Distinguished Scholar in Law, Boston University School of Law. I prepared this Essay for the Symposium on the Scholarship of Cass R. Sunstein, organized by Tulsa Law Review. I have been writing about the scholarship of Cass Sunstein for many years, and I here draw extensively from my recent essay, *The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the Minimal Constitution*, 75 Fordham L. Rev. 2885 (2007).

1. 347 U.S. 483 (1954).

2. James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex. L. Rev. 211 (1993).

3. Sotirios A. Barber & James E. Fleming, *Constitutional Interpretation: The Basic Questions* (Oxford U. Press 2007); James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* (U. Chi. Press 2006).

4. Cass R. Sunstein, *The Partial Constitution* (Harv. U. Press 1993).

5. Cass R. Sunstein, *A Constitution of Many Minds* (Princeton U. Press 2009) [hereinafter Sunstein, *Many Minds*]; Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* (Basic Bks. 2005) [hereinafter Sunstein, *Radicals*].

6. James E. Fleming, *The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the Minimal Constitution*, 75 Fordham L. Rev. 2885 (2007).

A. *The Circumstances for Minimalism*

Officially, in the first instance, Sunstein presents minimalism as a theory of judicial review (or judicial strategy), not a theory of the Constitution itself. Moreover, he argues for minimalism as a theory that is appropriate in certain circumstances—for example, those of moral disagreement and political conflict about our basic liberties.⁷ He concedes that perfectionism might be appropriate in other circumstances, mentioning Chief Justice John Marshall’s “nation-building perfectionis[m]”⁸ in the “young United States,”⁹ as well as the situation of South Africa in “building a new constitutional tradition in the aftermath of apartheid.”¹⁰

Yet there are indications in Sunstein’s work that minimalism in fact turns out to be a theory of judicial review for all times and circumstances. To the extent that Sunstein’s minimalism is rooted in a pragmatic or Burkean distrust of abstract theories and principles,¹¹ it may be a theory for all times and circumstances. To the extent that it reflects a Hand-like humility and skepticism about moral principles—witness Sunstein’s pervasive refrain that “the spirit of liberty is that spirit which is not too sure that it is right”¹²—it likewise may be a theory for all circumstances. Similarly, to the extent that minimalism grows out of concern for the limited institutional capacities of courts,¹³ it may be a theory for all circumstances (unless courts somehow change and become more capable of making the kinds of judgments that those who are preoccupied with limited institutional capacities of courts think they are not capable of making, which is unlikely). And to the extent that it is rooted in a conception of common law constitutionalism, understood in a minimalist way, it may be a theory for all circumstances. I say “understood in a minimalist way” because we might understand common law constitutionalism to be more ambitious theoretically than is minimalism. This is exemplified in the jurisprudence of Justice Harlan, for example, in his dissent in *Poe v. Ullman*,¹⁴ which was embraced by the joint opinion in *Planned Parenthood v. Casey*.¹⁵ Finally, though Sunstein says minimalism is appropriate to circumstances of moral disagreement and political conflict, he probably would add that these are perennial circumstances in a constitutional order like our own. He might well invoke Rawls’s characterization of the fact of reasonable moral pluralism as a permanent feature of a

7. Sunstein, *Radicals*, *supra* n. 5, at 27–30, 247.

8. *Id.* at 35.

9. *Id.* at 34.

10. *Id.* at 35.

11. Sunstein, *Many Minds*, *supra* n. 5, at 36, 41–46; Sunstein, *Radicals*, *supra* n. 5, at 12; Cass R. Sunstein, *Burkean Minimalism*, 105 Mich. L. Rev. 353 (2006).

12. Sunstein, *Radicals*, *supra* n. 5, at 35 (quoting Learned Hand, *The Spirit of Liberty*, in *The Spirit of Liberty: Papers and Addresses of Learned Hand* 190 (Irving Dilliard ed., Alfred A. Knopf 1952)). Note that this idea applies not only to judges but also to citizens.

13. Sunstein, *Many Minds*, *supra* n. 5, at 19–26; Sunstein, *Radicals*, *supra* n. 5, at 35, 127; Cass R. Sunstein, *Second-Order Perfectionism*, 75 Fordham L. Rev. 2867, 2867–70 (2007); *see infra* text accompanying nn. 82–96.

14. 367 U.S. 497, 541–43 (1961) (Harlan, J., dissenting).

15. 505 U.S. 833, 847–50 (1992) (discussing *Poe*, 367 U.S. at 541–43 (Harlan, J., dissenting)). For analysis of more and less theoretically ambitious conceptions of common law constitutionalism, see generally Benjamin C. Zipursky, *Minimalism, Perfectionism, and Common Law Constitutionalism: Reflections on Sunstein’s and Fleming’s Efforts to Find the Sweet Spot in Constitutional Theory*, 75 Fordham L. Rev. 2997 (2007).

constitutional democracy such as our own, not to be regretted and not soon to pass away.¹⁶

B. *Minimalism Itself as a Form of Perfectionism*

Sunstein's "minimalism" is best understood in terms of what motivates it: the concern that "theoretically ambitious" federal judges are removing too many issues (for example, abortion and sexual orientation) from the purview of elected legislatures and therewith popular choice.¹⁷ Perfectionist theories of constitutional interpretation like Ronald Dworkin's and mine, Sunstein says, invite theoretically ambitious decisions (like *Roe v. Wade*¹⁸ and *Lawrence v. Texas*¹⁹) that rob popular majorities of the opportunity to deliberate about, and through deliberation to reach consensus about, divisive moral issues. Sunstein therefore proposes "minimalism": "the view that judges should take narrow, theoretically unambitious steps" in deciding constitutional questions.²⁰

I'll attempt a clearer picture of minimalism momentarily, but I note first something that isn't always clear in Sunstein's argument: his position on interpretation is a two-part affair. Only one of these parts proposes anything fairly described as "minimalist." The minimalist part, moreover, does not deal with *constitutional interpretation*: it does not advise interpreters how to find what the Constitution means. The minimalist part is rather a theory of *judicial strategy*. Its explicit audience is judges. Sunstein says his "focus[] . . . [is] constitutional interpretation by the judiciary."²¹ While he advises judges to adopt minimalism, he leaves "citizens and their representatives" free to adopt what he calls a "first-order perfectionism," which he attributes to Dworkin and me.²² Instead of advising judges and other interpreters on how to find what the Constitution means, minimalism tells judges what to do *after* they've decided that question. In other words, minimalism tells judges the kind of thing they should say to the public in constitutional cases, not how to decide what the Constitution means.

Sunstein, however, does have a theory of how to decide what the Constitution means. This theory comprises the second part of his position. But this second part is not minimalist; it is in fact a version of perfectionism, as we shall see. Unraveling and then recombining the two parts of Sunstein's position leaves us with the following advice to judges: (1) find what the Constitution means essentially as Dworkin does, then (2) tell the people what is best for them to hear. Sunstein's position raises many issues about the role of judges and the nature of constitutional democracy, especially the theory of responsibility in constitutional democracy.²³ But my present interest in his position is

16. John Rawls, *Political Liberalism* 36–37, 136, 144 (Colum. U. Press 1993).

17. Sunstein, *Many Minds*, *supra* n. 5, at 21; Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2876. In this section, I draw upon Barber & Fleming, *supra* n. 3, at 140–44.

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

19. 539 U.S. 558 (2003).

20. Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2868.

21. *Id.* at 2870.

22. Sunstein, *Many Minds*, *supra* n. 5, at 25–26; Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2870.

23. Sotirios Barber and I explore these issues further in Barber & Fleming, *supra* n. 3, at 52–55. See also Sunstein, *Radicals*, *supra* n. 5, at 41; Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2869.

limited. I seek to show only that (1) his approach to constitutional interpretation is philosophic or perfectionist in nature, and (2) his “minimalism” is a theory of what judges should do or say to the public *after* they’ve decided what the Constitution means.

That Sunstein’s approach to constitutional interpretation is philosophic or perfectionist in nature is indicated in a preliminary way by his choice of labels. He calls Dworkin’s approach (and my Constitution-perfecting theory) “first-order perfectionism” and minimalism “second-order perfectionism,”²⁴ which is enough to suggest that minimalism is some diminished form of a philosophic approach or perfectionism. Looking behind these labels to what they stand for, we see that Sunstein distinguishes four strategies of judicial conduct in constitutional cases. The first strategy (associated with James Bradley Thayer) is that judges should let legislation stand unless “legislation “is plainly in violation of the Constitution”—i.e., a “clear mistake”²⁵ in violation beyond reasonable question. The second (associated with Raoul Berger and other originalists) is that judges should ground their judgments in “the original public meaning of the [constitutional] document.”²⁶ The third strategy (Sunstein’s approach) is minimalism, in which judges should “build modestly on their own precedents”²⁷ instead of ruling “broadly or ambitiously.”²⁸ And the fourth strategy (associated with Dworkin) is that judges should represent the Constitution as the best it can be, “and in that sense perfect[] it.”²⁹ None of these strategies is ruled off the table “by the Constitution itself,”³⁰ Sunstein says, and therefore each “must be defended by reference to some account that is supplied by the interpreter.”³¹ These accounts, moreover, must be “perfectionist” in nature—that is, moral or philosophic.

Sunstein is clear and emphatic about this last point. I quote him in full:

Any approach to the founding document must be perfectionist in the sense that it attempts to make the document as good as it can possibly be. Thayerism is a form of perfectionism; it claims to improve the constitutional order. Originalism, read most sympathetically, is a form of perfectionism; it suggests that constitutional democracy, properly understood, is best constructed through originalism. Minimalism is a form of perfectionism too. It rejects Thayerism and originalism on the ground that they would make the constitutional system much worse. It would appear that the debate among Thayerians, originalists, minimalists, and perfectionists must be waged on the perfectionists’ own turf. If this is so, perfectionists are right to insist that any approach to the Constitution must attempt to fit and to justify it. Perhaps the alternatives to perfectionism are all, in some sense, perfectionist too.³²

24. Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2869.

25. *Id.* at 2867.

26. *Id.* (citing generally to Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann ed., Princeton U. Press 1997)).

27. *Id.* at 2868.

28. *Id.* (citing generally to Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harv. U. Press 1999) [hereinafter Sunstein, *One Case at a Time*]).

29. Sunstein, *Many Minds*, *supra* n. 5, at 19–22; Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2867–68 (citing generally to Ronald Dworkin, *Law’s Empire* (Belknap Press 1986) & Fleming, *supra* n. 3).

30. Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2868.

31. Sunstein, *Many Minds*, *supra* n. 5, at 23; Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2869.

32. Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2869 (footnote omitted). *See also* Sunstein, *Many Minds*, *supra* n. 5, at 23; Sunstein, *Radicals*, *supra* n. 5, at 41.

This is an important passage. For here, Sunstein recognizes that a philosophic argument is needed to defend any general approach to constitutional meaning and/or judicial strategy. Here Sunstein says something about his activity as a constitutional theorist. *He* has to offer a philosophic argument for minimalism, just as other theorists have to offer philosophic arguments for their positions. But this proves nothing about the activity of judges deciding concrete constitutional questions. Armed with Sunstein's philosophic argument for minimalism (whatever it may be), can *judges* (or any other interpreters) utilize the tenets of minimalism to decide concrete constitutional questions in a manner free of controversial philosophic choices? To see why the answer is no, I shall consider Sunstein's further observations about minimalism.

Sunstein says that "[n]o approach to constitutional interpretation makes sense in every possible world,"³³ and that the case for each approach "must depend, in part, on a set of judgments about institutional capacities."³⁴ Thus, where "democratic processes work exceedingly fairly and well"³⁵ on their own—for example, where there is no racial segregation, "political speech is not banned,"³⁶ and "federalism and separation of powers are safeguarded[] precisely to the right extent,"³⁷ all without "judicial intervention"³⁸—then it "would make a great deal of sense"³⁹ for judges to adopt Thayer's approach to constitutional adjudication. On the other hand, when representative institutions are behaving badly and "the original public meaning is quite excellent"⁴⁰ from the standpoint of honoring constitutional rights and institutions, then an originalist approach "would seem best."⁴¹ Where original meanings are inadequate and courts are more competent, morally and intellectually, than representative institutions, then Dworkin's approach is best. And minimalism is best when "original [] meaning . . . is not so excellent"⁴² for protecting rights and institutions, "the democratic process is good but not great,"⁴³ and "judges [would] do poorly if they strike out on their own, but very well if they build modestly on their own precedents."⁴⁴

Thus, before a judge can decide whether a minimalist approach is appropriate, she must first decide (1) the best view of constitutional rights and/or institutions, (2) whether the original meaning comports with this best view, (3) how well present democratic processes are progressing toward this best view, and (4) whether judges are presently likely to do a better job than the democratic process in serving this best view. The complexity and theoretical ambition of these moral and non-moral judgments require no elaboration. They are at least as ambitious as anything Dworkin has ever attempted. The

33. Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2867.

34. Sunstein, *Many Minds*, *supra* n. 5, at 19; Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2867.

35. Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2867.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2868.

41. *Id.*

42. *Id.*

43. *Id.*

44. Sunstein, *Many Minds*, *supra* n. 5, at 21; Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2868.

minimalist judge may pretend otherwise to the public. She may say, for example, that a particular prosecution of homosexual intimate conduct is unconstitutional simply because prosecutions under the relevant statute are too rare for the public to know what to expect, and that knowing what to expect is a hallmark of the rule of law. But what she says to the public is one thing, and what she's thinking to herself is another. What she's thinking is that public opinion on homosexuality is heading in the right direction without her help, and that she risks mucking things up if she boldly steps ahead of public opinion and flatly declares a constitutional right of homosexuals to intimate association. If there's minimalism here, it's not in how the judge understands the Constitution, it's in how she presents herself to the public as a matter of judicial strategy.

I want to recapitulate two main points. One, Sunstein has come out as a perfectionist: He claims that his theory of minimalism, like every theory, claims to fit and justify the Constitution and to make it the best it can be. Two, Sunstein's "minimalist" judgments about cases protecting the right to privacy or autonomy (which I assess more fully in Chapter 7 of my book, *Securing Constitutional Democracy*) are no less "theoretically ambitious"⁴⁵ than are my "perfectionist"⁴⁶ analyses grounded in autonomy, just as his procedural theory of deliberative democracy is no less "theoretically ambitious"⁴⁷ than is my substantive theory of constitutional democracy. In sum, there is nothing minimalist about the theoretical and strategic judgments called for by Sunstein's minimalism.

III. FROM THE PARTIAL CONSTITUTION TO THE MINIMAL CONSTITUTION OF MANY MINDS: THE INCREDIBLE SHRINKING CONSTITUTIONAL THEORY

You may have seen (or heard of) the cult science fiction film, *The Incredible Shrinking Man* (or its take-off, *The Incredible Shrinking Woman*).⁴⁸ I hope Cass will not be offended if I suggest that the odyssey of his theory from *The Partial Constitution* to the minimal Constitution in *Radicals in Robes* and *A Constitution of Many Minds* is that of an incredible shrinking constitutional theory. I assume he will not be since he names the fictional society for which his theory is appropriate "Smallville."⁴⁹

A. *Thinning Deliberative Democracy Down*

Sunstein's theory has shrunk from a theory of perfecting deliberative democracy—or judicial *reinforcement* of the preconditions for its legitimacy—to a theory of largely permitting the political processes to proceed, such as they are—or largely judicial *deference* to the representative processes, such as they are. Ironically, I was drawn to engage with Sunstein's *The Partial Constitution* in the first place because of its evident perfectionism: it was a process-perfecting theory to beat John Hart Ely's analogous

45. Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2876.

46. *Id.* at 2878.

47. *Id.* at 2876.

48. *The Incredible Shrinking Man* (Universal Studios 1957) (motion picture); *The Incredible Shrinking Woman* (Universal Pictures 1981) (motion picture).

49. Sunstein, *Many Minds*, *supra* n. 5, at 21; Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2868.

theory.⁵⁰ Sunstein criticized Ely's theory for not adequately developing a substantive theory of democracy that courts were to reinforce.⁵¹ He criticized Ely's interest-group pluralist conception of representative democracy and offered instead a liberal republican conception of deliberative democracy.⁵² Yet Sunstein agreed with Ely that the structure of a theory should be process-perfecting: securing the preconditions for democracy.⁵³ I criticized Sunstein's theory for being, even then, merely a theory of "the partial Constitution" as distinguished from the whole Constitution: it emphasized the preconditions for deliberative democracy to the neglect of those for deliberative autonomy. Thus, it fell short of a full Constitution-perfecting theory.⁵⁴

The Partial Constitution provides Sunstein's fullest exposition of a substantive vision of the Constitution as embodying a deliberative democracy. There he develops a substantive theory of the Constitution and the form of government that it embodies, as well as a theory of judicial review. His theory of judicial review would secure the preconditions for deliberative democracy though it would leave fuller realization of some of those preconditions to legislatures and executives in the Constitution outside the courts.

Since then, Sunstein has focused on developing a theory of judicial review (or judicial strategy) over and against a theory of the Constitution, that is, on the role of courts more than on the commitments of the Constitution itself. In his subsequent work, we see less and less elaboration of the substantive commitments of our Constitution and underlying constitutional scheme, conceived as a deliberative democracy. We see more and more elaboration of the problems with judicial review—the limited institutional capacities of courts; the circumstances of moral disagreement and political conflict; the brakes that social resistance, unintended consequences, and backlash put upon courts bringing about liberal social change; and the like.

Worse yet, we see an erosion or narrowing of Sunstein's commitments to deliberation and agreement. Deliberation, once the heart and soul of his conception of deliberative democracy, is now worrisome: it leads not to reasonable agreement but to polarization.⁵⁵

And agreement itself shrinks from a regulative ideal to be sought through deliberation to shallow, narrow, minimal agreements that "leave things undecided."⁵⁶ We should seek, at most, "incompletely theorized agreements."⁵⁷

What is more, his once rich conception of deliberative democracy has withered away into a minimal conception of democracy that is practically majoritarianism. In *The*

50. Sunstein, *supra* n. 4, at 104–05, 142–45 (discussing John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harv. U. Press 1980)).

51. *Id.* at 104–05, 143–44.

52. *Id.* at 104–05, 142–44.

53. *Id.* at 104–05, 142 (discussing Ely, *supra* n. 50).

54. Fleming, *supra* n. 3, at 59–60.

55. Compare Sunstein, *supra* n. 4, at 134–35, 162–94 with Sunstein, *Radicals*, *supra* n. 5, at 167–69 and Cass R. Sunstein, *Why Societies Need Dissent* 111–44 (Harv. U. Press 2003).

56. Compare Sunstein, *supra* n. 4, at 137 with Sunstein, *Radicals*, *supra* n. 5, at 27–29 and Cass R. Sunstein, *Legal Reasoning and Political Conflict* 4–5, 35–61 (Oxford U. Press 1996) [hereinafter Sunstein, *Legal Reasoning*].

57. Sunstein, *Legal Reasoning*, *supra* n. 56, at 35–61.

Partial Constitution, Sunstein argued for deliberative democracy over and against interest-group pluralist conceptions of representative democracy like Ely's and majoritarian conceptions of democracy like Holmes's.⁵⁸ He also criticized Ely for apparently thinking that democracy was self-defining rather than arguing for one conception over other available conceptions.⁵⁹ Yet in *Radicals in Robes*, we see Sunstein talking, against perfectionists, almost as if democracy is self-defining. And as if judicial review that is "counter-majoritarian" is for that reason objectionably undemocratic.⁶⁰ To be sure, he still distinguishes minimalism from majoritarianism.⁶¹ My point is that the gap between these two conceptions has shrunk considerably in *Radicals in Robes* as compared with the huge gulf between deliberative democracy and majoritarian democracy in *The Partial Constitution*.

B. *From Theory of Judicial Review (or Judicial Strategy) to Theory of the Constitution Itself*

Furthermore, it appears that Sunstein's constitutional aspirations and commitments have atrophied as minimalism has expanded from being a theory of judicial review (or judicial strategy) to practically being a theory of the Constitution itself. In *The Partial Constitution*, the distinction between theory of the Constitution and theory of judicial review was clear, and it was clear Sunstein had a progressive substantive vision of the Constitution. Yet, because of concerns about the institutional limits of courts, he argued that some provisions of the Constitution should be judicially underenforced and should be more fully enforced by legislatures and executives as part of the Constitution outside the purview of the courts.⁶² In *Legal Reasoning and Political Conflict* and *One Case at a Time*, Sunstein developed minimalism as a theory of judicial review (or judicial strategy). It was theoretically possible to hold a perfectionist theory of the Constitution (like mine) while holding a minimalist theory of judicial review. Sunstein still acknowledges this possibility.⁶³ For example, a perfectionist might believe that the best strategy for realizing our constitutional commitments in certain circumstances is minimalist judicial review. I have observed elsewhere that minimalism may be attractive to both liberals and conservatives as a strategy of damage control during a transition from a moderately liberal or conservative constitutional order to a (possibly) counter-revolutionary one.⁶⁴

But in *Radicals in Robes* and *A Constitution of Many Minds*, the distinction between theory of the Constitution and theory of judicial review (or judicial strategy) becomes blurred. Indeed, we should ask whether those works express or presuppose a

58. Sunstein, *supra* n. 4, at 104–05, 144–45 (criticizing Ely's interest-group pluralist conception of representative democracy); *id.* at 124–27 (criticizing Holmes's majoritarian conception of democracy).

59. *Id.* at 143–44.

60. See Sunstein, *Radicals*, *supra* n. 5, at 35, 39, 51.

61. *Id.* at 44, 50, 51, 251.

62. Sunstein, *supra* n. 4, at 145–49.

63. Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2869–70. See also Sunstein, *Many Minds*, *supra* n. 5, at 23.

64. James E. Fleming, *The New Constitutional Order and the Heartening of Conservative Constitutional Aspirations*, 75 *Fordham L. Rev.* 537, 540 (2006).

minimalist conception of the Constitution itself. What might one think if one held a minimalist view of the Constitution itself? One might think that the commitments of the Constitution are relatively thin and themselves leave most questions concerning their meaning and application undecided. And one might think that the Constitution simply says nothing about many or most things.⁶⁵ And one might think, as Holmes famously put it in dissent in *Lochner v. New York*,⁶⁶ that a Constitution “is made for people of fundamentally differing views.”⁶⁷ And one might think, as Hand famously put it, “that ‘the spirit of liberty . . . is not too sure that it is right,’”⁶⁸ whether about the obligations of justice or the commitments of the Constitution.⁶⁹ And one might be skeptical or distrustful of abstract moral principles generally, fearing that such principles are divisive and polarizing.⁷⁰ Finally, one might think that “ought implies can,” that courts have limited institutional capacities to interpret a Constitution any thicker or more ambitious than the foregoing propositions entail,⁷¹ and therefore, that we ought to conceive of the Constitution itself as being thin enough and modest enough for their limited institutional capacities to be adequate to interpret and apply it. Here we can see a downsizing, recasting, or retrofitting of the Constitution itself to fit a conception of limited judicial capacities. Sound familiar? All of these ideas are expressed in one form or another in *Radicals in Robes* and *A Constitution of Many Minds*. To the extent they are, perhaps those works do indeed express or presuppose a minimalist view of the Constitution itself.

C. *Exaggerated Fears about Backlash and Unintended Consequences*

Exaggerated fears about backlash and unintended consequences, too, have contributed to the minimalization or evisceration of constitutional commitments in Sunstein’s work. It is striking to what degree he has incorporated arguments against hollow hopes that courts can bring about liberal social change, together with worries about backlash and unintended consequences, into his minimalism. I grant that as early as *The Partial Constitution*, Sunstein had endorsed Gerald Rosenberg’s famous hollow hopes argument.⁷² Just as we should not harbor *hollow hopes* that courts can bring about liberal social change, so, too, we should not have *exaggerated fears* that courts will provoke backlash, cause unintended consequences, and make things worse when they protect controversial constitutional rights. Sunstein seems to endorse the familiar arguments about *Roe* provoking backlash, spawning the right to life movement, and the like.⁷³ The causes of the emergence of the right to life movement are numerous, and

65. See Sunstein, *Radicals*, *supra* n. 5, at 86.

66. 198 US 45 (1905).

67. Sunstein, *Radicals*, *supra* n. 5, at 47 (quoting *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting)).

68. *Id.* at 35 (quoting Hand, *supra* n. 12, at 190).

69. *Id.*

70. *Id.* at 12.

71. Sunstein, *Many Minds*, *supra* n. 5, at 19–23; Sunstein, *Radicals*, *supra* n. 5, at 127; Sunstein, *Second-Order Perfectionism*, *supra* n.13, at 2867–70, 2878–80.

72. Sunstein, *supra* n. 4, at 375 n. 42 (stating that he “dr[e]w heavily [from Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (U. Chi. Press 1991)] for the discussion of *Brown* and *Roe*”).

73. Sunstein, *Radicals*, *supra* n. 5, at 104–05, 248–49; *id.* at 268 n. 4 (citing Mary Ann Glendon, *Abortion and Divorce in Western Law* (Harv. U. Press 1989)).

most of them have nothing to do with judicial decisions and certainly nothing to do with how broadly or narrowly, deeply or shallowly, judicial opinions are written. The revival of religious fundamentalism generally would have occurred with or without *Roe*. The right to life movement would have been born with or without *Roe*. More generally, the “new right,” neo-liberalism, and neo-conservatism—countless varieties of “antiliberalism,”⁷⁴—would have emerged with or without *Roe*. The “women’s movement” and gains in women’s equality and reproductive freedom, whether furthered through legislation or judicial decision and whether through federal courts or state legislatures, would have provoked backlash with or without *Roe*.⁷⁵

Similarly, if the Supreme Court had never decided *Brown v. Board of Education*, and Congress nonetheless had passed the very civil rights laws that it in fact enacted, we still would have experienced resistance to and backlash against gains in equality and civil rights for African-Americans. I mention this particular example because Sunstein sometimes writes as if there is something inherent in equality that makes it less adventuresome or less intrusive on the political processes than liberty or privacy (and correspondingly less likely to provoke backlash). To take another example, the Supreme Court, after *Shapiro v. Thompson*,⁷⁶ never recognized a constitutional right to welfare,⁷⁷ and gains in the “war on poverty” were mostly pursued through the legislative processes. Nonetheless, we still have experienced backlash against welfare programs, including the “war against the poor” and “welfare reform.”⁷⁸

All of these developments—the right to life movement, resistance to gains in women’s equality and reproductive freedom, resistance to gains of the civil rights movement (culminating in resistance to affirmative action programs), welfare reform, and the like—are part of a larger backlash against the 1960s and its aftermath. Liberal developments in the 1960s and 1970s provoked all manner of anti-liberalism and backlash against liberal gains, however advanced: whether through courts or legislatures, courts together with legislatures, federal or state governments (and, I should add, whether through maximalist or minimalist judicial decisions). To take a hypothetical, does anyone seriously believe that if the Massachusetts Supreme Judicial Court had never decided *Goodridge*,⁷⁹ and if instead, the Massachusetts Legislature on its own initiative had passed a law recognizing same-sex marriage in November 2003, the repercussions for the 2004 elections would have been significantly different? Granted, the attack would not have been on activist liberal judges, but on liberal legislatures, but there would have been similar repercussions. To offer another hypothetical, no one should believe for one second that people like Mary Ann Glendon would have complained about the Supreme Court deciding the matter of abortion for the whole country in one bold stroke

74. Stephen Holmes, *The Anatomy of Antiliberalism* (Harv. U. Press 1993).

75. See the forceful discussion in Susan Faludi, *Backlash: The Undeclared War against American Women* (Crown Publishers, Inc. 1991).

76. 394 U.S. 618 (1969).

77. The most important case in which the Court declined to recognize a right to welfare is *Dandridge v. Williams*, 397 U.S. 471 (1970).

78. Herbert J. Gans, *The War against the Poor: The Underclass and Antipoverty Policy* 90 (Basic Bks. 1995).

79. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

in *Roe* had the Court reached the opposite result and interrupted the state-by-state democratic processes by holding that fetuses are full persons entitled to life and to equal protection along with born persons.⁸⁰ When courts make liberal decisions, they become an easy target for anti-liberal attacks, but we should not let that fool us into thinking that the primary objection is to *courts attempting change* rather than to *liberal change as such*. Law professors, because they are excessively court-centered, are especially vulnerable to falling into this way of thinking.

There is a huge measure of what Albert Hirschman famously called the “rhetoric of reaction”⁸¹ in these tales of court decisions like *Roe* leading to unanticipated consequences and provoking backlash, even to the point of making things worse. Those who oppose liberal change make gloomy predictions and warnings about unintended consequences and backlash. Again, they warn about liberal change through whatever venue: not just courts, but also legislatures and executives; and not just the federal government, but also state governments. On top of these warnings, they pile the argument that liberal do-gooders always make things worse, not only for the world, but even (perhaps especially) for the people they seek to help and for themselves. This kind of thinking is especially rampant among law and economics scholars and those who work in their shadow. In this sense, economics indeed proves to be the “dismal science.” It is important to understand that these “rhetoric of reaction” moves are not simply reactionary; people who make these moves affirmatively aim to demoralize those who push for liberal change. I fear these ideas have affected Sunstein more than is warranted.

D. *Preoccupation with the Limited Institutional Capacities of Courts*

The next aspect of the downsizing of Sunstein’s constitutional theory that I want to mention is his increasing preoccupation with the limited institutional capacities of courts. Sunstein has a revealing footnote in which he says basically that he is not repudiating his arguments in *The Partial Constitution* but that perhaps the discussion there would have been better if he had grappled more fully with the limited institutional capacities of courts.⁸²

Sunstein offers a number of prudential reasons concerning the likelihood that courts will get things wrong and the lack of any special qualities making judges better suited than citizens or legislatures to resolve moral conflicts. Thus, judicial minimalism is appropriate given the relative institutional capacities of courts as compared with politically elected officials.⁸³ There are two opposing traditions in constitutional theory concerning the relative institutional capacities or positions of courts and legislatures. On one account, courts’ independence from politics is their greatest weakness or disqualification for performing a function like elaborating and protecting substantive constitutional freedoms against encroachment through the political processes. Sunstein

80. See Glendon, *supra* n. 73.

81. Albert O. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (Belknap Press 1991).

82. Sunstein, *Many Minds*, *supra* n. 5, at 19 n. 1, 23 n. 8; Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2867 n. 1 (discussing Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harv. U. Press 2006)); see also *id.* at 2875 n. 34.

83. Sunstein, *Radicals*, *supra* n. 5, at 127; Sunstein, *Legal Reasoning*, *supra* n. 56, at 177.

has fully developed a version of this view. On another account, courts' independence from politics is their greatest strength or qualification for discharging such a responsibility. Dworkin has advanced a well-known version of such a view.⁸⁴ It is not possible to resolve the long-standing dispute between these traditions here. But it may be worth recalling Justice Jackson's formulation in the second flag-salute case,⁸⁵ which invalidated a requirement that schoolchildren salute the flag, in response to Justice Frankfurter in the first flag-salute case,⁸⁶ which upheld such a requirement: rather than deferring to the "vicissitudes"⁸⁷ of the political process, courts vindicate constitutional freedoms "not by authority of [their] competence but by force of [their] commissions."⁸⁸ If the commission of the courts is to preserve the Constitution, including substantive liberties, against encroachment by elected officials, courts would be abdicating their responsibility were they to side with Sunstein and against Dworkin on this dispute.

"Ought implies can," and Sunstein and other scholars who are preoccupied with the limited institutional capacities of courts say courts simply are not competent to carry out the commission that Jackson, Dworkin, and I believe they hold.⁸⁹ Such scholars might object that judges simply are not capable of being Dworkin's "Hercules" or Hand's "Platonic Guardians."⁹⁰ I wish Dworkin had never used the alliterative formulation "Hercules"—as in "Hercules" versus "Herbert" (Lionel Adolphus Hart)—in describing judging under his theory of legal interpretation as contrasted with judging under Hart's legal positivism.⁹¹ For Dworkin's formulation makes the responsibilities of judging seem too Herculean (or Olympian). And that plays into or exacerbates the worries of those who are preoccupied with the limited institutional capacities of courts.

In reality, judges throughout American history have shown themselves to be perfectly capable of making the kinds of judgments required by what Dworkin calls a moral reading of the Constitution⁹² and what Sotirios A. Barber and I call a philosophic approach to constitutional interpretation.⁹³ In "Hard Cases," Dworkin said his "rights thesis" is "less radical than it might first have seemed. The thesis presents, not some novel information about what judges do, but a new way of describing what we all know they do."⁹⁴ In *Constitutional Interpretation: The Basic Questions*, Barber and I defend a philosophic approach to constitutional interpretation that does not require judges to be

84. E.g. Ronald Dworkin, *A Matter of Principle* 33–71 (Harv. U. Press 1985); Ronald Dworkin, *Taking Rights Seriously* (Harv. U. Press 1977) [hereinafter Dworkin, *Taking Rights Seriously*].

85. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

86. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled*, *Barnette*, 319 U.S. at 624.

87. *Barnette*, 319 U.S. at 638.

88. *Id.* at 640.

89. See Sunstein, *Many Minds*, *supra* n. 5, at 19–23; Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2867–70, 2878–80; Vermeule, *supra* n. 82.

90. Dworkin, *Taking Rights Seriously*, *supra* n. 84, at 105; Learned Hand, *The Bill of Rights: The Oliver Wendell Holmes Lectures, 1958* 73 (Harv. U. Press 1958). "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." *Id.*

91. Dworkin, *Taking Rights Seriously*, *supra* n. 84, at 105–30. See Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2868.

92. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 1–38 (Harv. U. Press 1996).

93. Barber & Fleming, *supra* n. 3, at 155–70.

94. Dworkin, *Taking Rights Seriously*, *supra* n. 84, at 90.

philosophers.⁹⁵ It requires only that they make philosophic choices of the sort that they have been making all along, from John Marshall through Robert Jackson through John Marshall Harlan II through John Paul Stevens through David Souter. And it presupposes that they are capable of (and justified in) making these judgments.

But it is important to see that this skepticism about capacities is driven in part by exaggerated, too lofty conceptions of what it is that judges, legislatures, executives, and citizens are said to have responsibilities to do in the first place. For example, those who are preoccupied with limited institutional capacities of courts think that, under a moral reading, a philosophic approach, or a Constitution-perfecting theory, judges must be Herculean or Platonic philosopher judges who are capable of living on Olympus.⁹⁶ In fact, again, all these approaches require is that judges be capable of doing what they have been doing all along down here in the United States of America.

IV. CONCLUSION: THE ODYSSEYS OF ALEXANDER BICKEL AND CASS SUNSTEIN

In 1994, when Cass came to Fordham (where I then taught) to give the Robert L. Levine Lecture,⁹⁷ a colleague of mine (and Harvard Law School classmate of Cass), Jim Kainen, said he viewed Cass's project as trying to work out a synthesis of the ideas of John Hart Ely and Alexander Bickel. At the time, I got the Ely part, but not the Bickel part. Then, as Sunstein began to develop minimalism, I began to see the Bickel part. In *Democracy and Distrust*, Ely aptly concludes his critique of theories of "[d]iscovering [f]undamental [v]alues"⁹⁸ with a section called "[t]he [o]dyssey of Alexander Bickel."⁹⁹ I want to close by sketching parallels between the odysseys of Bickel and Sunstein.

Sunstein's *The Partial Constitution* is the beginning point in the journey, roughly analogous to Bickel's *The Least Dangerous Branch*.¹⁰⁰ Here Sunstein, like Bickel, has confidence in the capacity of courts to discover or construct substantive principles or theories and to elaborate them. At the same time, Sunstein like Bickel tempers this confidence with a recognition of the institutional limits of courts.¹⁰¹ Gerald Gunther famously quipped that Bickel had "100% insistence on principle, 20% of the time."¹⁰² For Sunstein at that point, I'd say the latter percentage was considerably higher. Though perhaps we should say that Sunstein would have 20% insistence on principle, 100% of the time!

The middle point of the odyssey for Bickel was *The Supreme Court and the Idea of Progress*;¹⁰³ for Sunstein, it is *Legal Reasoning and Political Conflict* and *One Case at a*

95. Barber & Fleming, *supra* n. 3, at 155–70.

96. Sunstein, *Many Minds*, *supra* n. 5, at 22–23; Sunstein, *Second-Order Perfectionism*, *supra* n. 13, at 2868.

97. Cass R. Sunstein, *Conflicting Values in Law*, 62 *Fordham L. Rev.* 1661 (1994).

98. Ely, *supra* n. 50, at 43.

99. *Id.* at 71–72.

100. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill Co. 1962).

101. *See id.*

102. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 *Colum. L. Rev.* 1, 3 (1964).

103. Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (Harper & Row Publishers 1970).

Time.¹⁰⁴ Bickel became deeply critical of the Warren Court and what he saw as its blueprint for the future and vision of the good society, just as Sunstein became critical of perfectionism and developed minimalism. Bickel became preoccupied with social resistance to judicially pursued change and with the limited institutional capacities of courts. Ditto Sunstein.

The next point for Bickel and, tragically, his final point, was his posthumously published *The Morality of Consent*, with its evident Burkeanism;¹⁰⁵ for Sunstein, it may be *Radicals in Robes*, or more clearly and tellingly, *A Constitution of Many Minds*. Fortunately, though his many minds argument has a generically Burkean cast, Sunstein criticizes Burkean minimalism in favor of a rational, critical minimalism.¹⁰⁶ Thus, unlike Bickel, Sunstein through rationalism overcomes the temptation of Burkeanism. And so, he ends with a constitution of many rational minds, not a constitution of many Burkean minimalist minds.

104. See Sunstein, *Legal Reasoning*, *supra* n. 56; Sunstein, *One Case at a Time*, *supra* n. 28.

105. Alexander M. Bickel, *The Morality of Consent* (Yale U. Press 1975).

106. Sunstein, *Many Minds*, *supra* n. 5, at 60–92.