Book Review

*A Constitution of Many Minds: Why the Founding Document Doesn’t Mean What It Meant Before*

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Perhaps the most obvious lesson of Cass Sunstein’s newest book is that constitutional interpretation is a much more complex matter than is often thought. Typically, we place the different approaches to constitutional interpretation into neatly separate and self-contained categories, such as originalists and those who believe in a living constitution. But as Cass Sunstein demonstrates in *A Constitution of Many Minds*, constitutional interpretation is anything but a neatly-defined endeavor.²

Sunstein presents and analyzes three different approaches to constitutional interpretation: traditionalism, populism, and cosmopolitanism. Not only do these three models reflect somewhat newly articulated theories of constitutional interpretation, but Sunstein also takes a new approach in analyzing each of these models. According to Sunstein, each of the three models rest in their own way on a “many minds” argument, which asserts that if many people have settled on a common practice or proposition, the courts should pay careful attention to that practice or proposition. A form of this “many minds” argument underlies each model, even though each model differs significantly from the other. Sunstein then analyzes each of the differing models of constitutional interpretation by scrutinizing the particular form of the “many minds” argument that underlies each of the different models.

Sunstein’s use of the “many minds” argument obviously indicates that he sees constitutional interpretation as a function that extends well beyond the

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Supreme Court. To Sunstein, constitutional interpretation involves the “many minds” of democratic society as a whole. As he explains, “self-government, far more than judicial innovation, has been responsible” for changes in constitutional arrangements and understandings. 3 One such example involves the constitutional changes produced by the New Deal—changes that were effectively implemented through the political process and then only ratified by the Supreme Court. According to Sunstein, it was democratic society, not the nine justices on the Supreme Court, that initiated and implemented the constitutional revolution brought on by the New Deal. 4 As the subtitle to Sunstein’s book indicates, the Constitution does not mean what it meant before because its meaning is not fixed; instead, “every generation produces a degree of constitutional reform, and it does so because of its new understandings of facts or its new judgments of value.” 5

Even though the three constitutional models identified by Sunstein—traditionalism, populism, and cosmopolitanism—encompass very different assumptions and views of the Constitution, Sunstein nonetheless identifies a similar strain within each of these models. This strain relates to the “many minds” argument. 6 In identifying the presence and influence of this argument within each model, Sunstein borrows heavily from the Jury Theorem, which says that the probability of a group reaching a correct answer increases toward 100% as the group gets bigger. 7 According to this theorem, groups will do better than individuals, and large groups better than small ones, so long as two conditions are met: first, that majority rule is used; and second, that each person is more likely than not to be correct. Sunstein shows how the Jury Theorem bears on constitutional law and how it can be used to analyze the usefulness of each of the three approaches to constitutional interpretation. In short, the traditionalist approach to constitutional interpretation reflects the belief that, where the Constitution is ambiguous, courts should defer to longstanding practices, on the ground that those practices reflect the judgments of many people extending over time. 8 The populist approach similarly defers to the present judgments of large groups of people. 9 And finally, the cosmopolitan approach holds that foreign practices should be consulted on the ground that if most nations, or most relevant nations, reject or follow a certain practice, should not the United States also rely on that judgment? 10

Although Sunstein conducts a fairly even-handed analysis of the three approaches, one approach to which he does not give much attention, other than
the occasional criticism, is originalism. Sunstein is definitely no originalist. According to Sunstein, “if we believe that the meaning of the Constitution is settled by the original understanding of the ratifiers, then the people themselves are probably ill-equipped to uncover that meaning, and judges should pay little or no attention to the public desires.”\(^{11}\) However, throughout his entire book, Sunstein essentially argues that the people in one form or another should have a role in interpreting the Constitution. Thus, he essentially dismisses the entire underlying assumption behind originalism. Furthermore, as Sunstein argues, “our ancestors knew much less than we do.”\(^{12}\)

In his analysis of constitutional interpretation, Sunstein does not deal simply in the abstract.\(^{13}\) As he explains, any examination of the judicial role must take into account the actual capacities and characteristics of courts, democratic institutions, and the citizenry as a whole. Consequently, Sunstein tries to explore the actual strengths and weaknesses of the three approaches. For instance, he concludes that traditionalism has worked well in the areas of separation of powers, federalism and gun rights, where tradition has often been highly relevant to the present.\(^{14}\) In the area of equality, however, traditionalism has been much less useful. In that area, Sunstein claims, the present is a better guide than the past, and so populism should exert more influence. But when populism reflects confusion or bias, then it often makes sense for the courts to follow a more cosmopolitan approach and consult what other nations are doing.

Of all three approaches, Sunstein probably devotes the most attention to traditionalism, or, as he often refers to it, “Burkean minimalism.”\(^{15}\) Under Burkean minimalism, courts should defer to social traditions, with constitutional principles developed incrementally and consistent with longstanding tradition. As Sunstein argues, Burkean minimalism is most useful when three conditions are met: first, when originalism would produce unacceptable consequences; second, when longstanding traditions and practices are trustworthy, by virtue of having broad support; and third, when there is great reason to be skeptical of the independent political and moral judgments of federal judges.\(^{16}\) Furthermore, by fostering narrow rulings, Burkean minimalism reduces the intensity of social conflict, avoiding the kind of erroneous rulings that are difficult to reverse.\(^{17}\)

Burkean minimalism reflects the “many minds” argument, because it depicts traditions as embodying the judgments of many people operating over time, with the persistence of such traditions attesting to their wisdom.\(^{18}\) Therefore,

\(^{11}\) Id. at 126.
\(^{12}\) Id. at 210.
\(^{13}\) SUNSTEIN, supra note 2, at 125.
\(^{14}\) Id. at 92.
\(^{15}\) Id. at 36.
\(^{16}\) Id. at 41.
\(^{17}\) SUNSTEIN, supra note 2, at 44.
\(^{18}\) Id. at 51.
because Burke’s respect for tradition depends on a belief that many minds have participated in their construction, Sunstein argues that the usefulness of Burkean minimalism depends in large part on whether the “many minds argument” holds up.

To Sunstein, a weakness of Burkeanism occurs when traditions keep society from progressing and using what has been learned by recent generations. As Sunstein argues, the present often knows far better than the past. Furthermore, some entrenched traditions might reflect power, confusion, accident and injustice, rather than wisdom and sense. On this point, Sunstein praises the decision in *Lawrence v. Texas*, striking down Texas’s ban on same-sex sodomy, as an example of the Court disregarding the traditions argument previously used in *Bowers v. Hardwick* to sustain such bans. According to Sunstein, any analysis of Burkean minimalism has to focus on determining whether established traditions reflect wisdom rather than accident and force. To make such a determination, the inquiry must be on whether the relevant tradition reflects the independent judgment of many people, or whether it merely reflects a follow-the-herd mentality. Furthermore, if tradition is a result of prejudice or systematic biases, then any endorsement of that “proposition by many minds is no protection against error.” In either case, according to Sunstein, “even if a practice has been ‘longstanding,’ it may lack the credentials that give many minds traditionalism its appeal.”

But perhaps Sunstein has his own bias against tradition. He often argues that traditionalism has not worked well in the area of equality, due to the existence of racial and gender discrimination in the past. Thus, to him, discrimination is a tradition. However, it could just as easily be argued that the ideal of equality is also a tradition, and that this tradition in the long run won out. Sunstein also seems rather denigrating toward traditionalism. For instance, he argues that for those who have an “aspirational conception of constitutional law, traditionalism seems to be a form of cowardice.” He goes on:

But what about constitutional bravery? Is it not best for judges to generate a sense of constitutional commitments that embarks on a new course, or that seizes on emerging understandings to frame and concretize that course? These are the questions posed by constitutional visionaries.

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19. Id. at 61.
22. SUNSTEIN, supra note 2, at 101.
23. Id. at 107.
24. Id. at 84
25. Id. at 121.
26. SUNSTEIN, supra note 2, at 121.
Sunstein uses the “many minds” argument to reveal the internal conflicts within Burkean minimalism. One of the biggest conflicts involves how a court should deal with a precedent that is based upon an illegitimate decision. What is a court to do about a long-established precedent that was nonetheless illegitimate when it was made? For instance, no Burkean would likely believe that *Roe v. Wade* was correctly decided in the first instance. However, more than three decades after the fact, many Burkeans may now believe that *Roe* has become embedded not merely in constitutional doctrine but also in social practices. Consequently, any decision to overrule it would not only contradict tradition, but would also be too socially destabilizing.

Although Sunstein’s book may give a creative analysis of constitutional interpretation, it also presents assumptions and arguments that can be criticized on various levels. For instance, Sunstein’s analysis of traditionalism seems both vague and unpredictable about what exactly constitutes a tradition. At times, he seems to consider anything that happens in the past to be a tradition. He also seems to be rather hostile to the idea of tradition, seeing it as something that can only oppress future generations. Even when he praises traditionalism, he does so in a rather confusing way. For instance, he states that Burkean minimalism has worked well in the area of separation of powers; however, perhaps he makes this claim only because he likes the way in which separation of powers doctrine has evolved. Moreover, he does not seem to recognize that when the New Deal Court transformed its separation of powers doctrine in the 1930s, it did so by completely ignoring tradition in this area.

Sunstein seems to identify traditionalism with a conservative legal or political theory. But the use of Edmund Burke’s theory of tradition to create a model of constitutional interpretation does create some misperceptions. Burke, for instance, never articulated a theory of judicial review. His defense of tradition applied more to social and political theory. Indeed, many conservatives would not agree with traditionalism as a viable approach to constitutional interpretation; they would instead follow an originalist or textualist model of interpretation. In fact, Sunstein’s revelations of the problems and shortcomings of traditionalism as a means of constitutional interpretation (e.g., as in the Court’s use of substantive due process) come as no surprise to many conservatives.

Even though Sunstein dismisses originalism as a legitimate means of constitutional interpretation, his book, at least to the supporters of originalism, may indirectly reinforce that model as perhaps the most legitimate means of interpretation. Instead of arguing that the Constitution should actually mean what it states or what its drafters and ratifiers meant that it should state,
Sunstein seems to think that it should be up to contemporary judges to determine what the Constitution should mean for the particular time period in which it is being interpreted. This obviously gives courts an unbounded power to redefine the Constitution for each successive generation. In this sense, the Constitution becomes not a historically consistent and enduring document, but only a means for contemporary judges to say what they think the Constitution should mean for any particular time period. To Sunstein, modern standards and values should mean more than historical intent and meaning. Furthermore, Sunstein seems to think that the formal amendment process is an inconvenient and irrelevant means of modifying or updating the Constitution; instead, the process should be done much more quickly through judicial edict.

Sunstein uses the “many minds” argument to analyze and dissect the various models of constitutional interpretation. In examining whether the conditions for the Jury Theorem have been met in different areas of constitutional interpretation, Sunstein exposes the strengths and weaknesses that exist when courts rely on tradition, public opinion, and the law of other nations to interpret the Constitution. This is a novel way of analyzing the different approaches to constitutional interpretation. But even more broadly, Sunstein’s analysis can also be used to show how the “many minds” argument can fall short in other areas of social, political and economic life.

Even for those of us who disagree with many of Sunstein’s conclusions or assumptions, his book offers an original and insightful analysis of constitutional interpretation. He has tried to identify an argument that is consistent between various models of constitutional interpretation, and he has used that argument to try to illustrate when the various approaches succeed and when they fail. Sunstein’s book deserves not only to be read, but to be read especially by those who disagree with him.