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SUNSTEIN AND BRANDEIS: THE MINIMALIST AND THE PROPHET

Jeffrey Rosen*

Cass Sunstein's achievements are well known: the most cited law professor on any faculty in the United States, the author of more than fifteen books, and an authority on everything from constitutional law to administrative regulation to environmental law to behavioral economics. But what is even more impressive than his academic range is the quality of Sunstein's temperament: his boundless curiosity, theoretical modesty, and above all, intellectual humility. Instead of becoming over-extended or over-confident like some of his peers at the pinnacle of the legal profession, Sunstein approaches each of his books and articles as an opportunity to teach himself and the rest of us something fresh and unexpected about topics that illuminate the connections between law and society. There are scholars and judges who know what they know and want only to instruct; Sunstein is the opposite: a scholar with a genuine sense of humility who is most interested in learning. It is this humility—shared with the self-questioning, minimalist judges that Sunstein most admires—that makes Sunstein the most influential teacher of law in America.

In many ways, Sunstein has inherited the mantle of Louis Brandeis: in his remarkable energy in amassing empirical evidence, his preference for facts and statistics over abstract ideologies, his faith in local experimentation rather than top-down legislation, his belief that the success of democracy turns on the ability of individual citizens to master complicated facts and to develop their cultural and intellectual faculties, his attempts to use his public platform to contribute to public education, and his confidence that, although the courts have an important role to play in protecting liberty, social change should ultimately come from the political arena. To the degree that Sunstein and Brandeis differ—Brandeis wrote deep opinions, driven by his passionate belief in the curse of bigness in both government and business while Sunstein prefers shallow ones, based on his lack of confidence that judges and citizens can agree on fundamental principles of economic and social justice—Sunstein's less ambitious vision captures the spirit of our polarized and uncertain age.

Sunstein's spirit of humility is obvious even in the works that inspire passionate disagreement among his admirers. I, for one, have never been convinced by his effort to revive Meiklejohnian managerialism in *Democracy and the Problem of Free Speech.*

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Like other skeptics of Sunstein's free speech vision, such as Jack Balkin,[1] I am less optimistic than Sunstein that anything can (or, under the First Amendment, should) be done about his frustration with the viewing habits of the American public. He worries "that most people are not watching the shows that he thinks they should be watching—that they prefer 'Studs' to 'C-Span.'"[2] But despite this disagreement, it is hard not to be struck by Sunstein's intellectual consistency. His arguments for judicial deference to regulations of hate speech and pornography are consistent with his defense of judicial minimalism in other contexts. They are also consistent with his general preference for democratic, rather than judicial, resolution of our most contested debates. It is worth noting, too, that Sunstein's free speech vision is now shared by at least one Supreme Court Justice, Justice Stephen Breyer, who is the only member of the current Court explicitly to embrace the view that "government may restrict the speech of a few to promote democratic participation among the many."[3]

Part of Sunstein's intellectual humility comes from his relentless empiricism. Rarely ideological or dogmatic, he lets data drive his conclusions, rather than the other way around. For example, in a conference about sexual harassment law held in the middle of the Clinton impeachment scandal, Sunstein avoided the efforts by other panelists to defend the ideological excesses of harassment law and instead focused modestly and usefully on the way sexual harassment law operates in the cases that actually go to trial. In his presentation, "Sunstein noted that in the nearly 70 reported cases, there was no correlation between the factors that ought to justify higher or lower jury awards—such as coerced sex, bodily contact, or harassment of other employees—and the damages actually awarded."[4]

Sunstein's humility is also informed by his scrupulous historicism. More ideological scholars, after 9/11, insisted that the Bush administration's approach to civil liberties was far worse (or far better) than the response of previous administrations in wartime. Sunstein's more measured verdict was informed by his historical perspective. Along with Jack Goldsmith, he explored a paradox: why was it that, compared with Lincoln, Wilson, and Roosevelt, the Bush administration diminished relatively few civil liberties while media leaders, such as the New York Times, were far more critical of Bush than of FDR?[5]

One explanation, Sunstein and Goldsmith suggested, is that "the Nation is now far less trusting of government, and far more solicitous of the accused, than it was sixty years ago."[6]

In addition to his empiricism and historical sensitivity, Sunstein is also politically moderate by nature, and his moderation is informed by his bipartisan friendships, which

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1. J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 Yale L.J. 1935 (1995) (reviewing Cass R. Sunstein, *Democracy and the Problem of Free Speech* (Free Press 1993)).

2. Jeffrey Rosen, *The Limits of Limits*, 210 New Republic 35, 37 (Feb. 7, 1994).

3. Jeffrey Rosen, *Modest Proposal: Stephen Breyer Restrains Himself*, 226 New Republic 21, 24 (Jan. 14, 2002).

4. Jeffrey Rosen, *In Defense of Gender-Blindness: A Practical and Philosophical Proposal for Sexual Harassment Law*, 218 New Republic 25, 25 (June 29, 1998).

5. Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 Const. Commentary 261 (2002).

6. *Id.* at 289.

reinforce his aversion to ideological extremism. Sunstein himself has generalized this point in his studies of group polarization, noting that after deliberation, members of a group of like-minded people tend to move toward even more extreme versions of their initial positions.[7] Sunstein's insights about group polarization have cast invaluable light on the reaction to the most controversial Supreme Court decisions, from *Bush v. Gore*[8] to *Roe v. Wade*.[9] I (and others) have found his proposed responses to group polarization impractical and constitutionally questionable—such as his tentative suggestion that Internet "[p]roviders of material with a certain point of view might also provide access to sites with a very different point of view."[10] (Once again, people who prefer "Studs" to C-Span are unlikely to click on the diversity links.) But his efforts to engage the vexing problem of the polarization of public discourse, offered in a characteristically modest spirit, embody his intellectual curiosity.

Sunstein's most sustained defense of judicial humility comes in his argument for what he calls "minimalism"—an apt and influential phrase. In *One Case at a Time*, he urged the Supreme Court to be self-aware about the limits of its knowledge—refusing to decide certain cases and agreeing to decide other cases as narrowly as possible in order to save the most hotly contested questions in national life for democratic resolution. Although Sunstein favors minimalism, he makes clear that it is one of several competing constitutional approaches that he later defined in a helpful taxonomy (and one of Sunstein's great skills is his gift for taxonomy). This taxonomy includes "fundamentalists," such as Justices Antonin Scalia and Clarence Thomas, who favor broad and sweeping decisions that would strike down a great number of current laws and practices in the name of the purported original understanding of the Constitution, and "perfectionists," such as Justice William Brennan, who want to interpret the Constitution broadly, to make it as just and fair a document as it can be.[11] In yet another helpful series of distinctions, Sunstein offers a purely neutral definition of judicial activism, which he detects whenever "a court strikes down the actions of other parts of government, especially those of Congress."[12] Emphasizing that activism can be both good and bad, Sunstein also insists that minimalists can sometimes be restrained and sometimes be activist.[13]

Sunstein's categories are useful, but they are also malleable. For example, Sunstein calls "minimalist" both Justice Ruth Bader Ginsburg and Justice Sandra Day O'Connor.[14] However, between 1994 and 2000, Justice Ginsburg voted to strike down fewer state and federal laws than any other justice, and Justice O'Connor voted to strike down more state and federal laws than any of her colleagues, with the exception of Justice Anthony Kennedy. A definition of minimalism that includes "the most restrained

7. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 Yale L.J. 71, 74 (2000).

8. 531 U.S. 98 (2000).

9. 410 U.S. 113 (1973).

10. Cass Sunstein, *Republic.com* 186 (Princeton U. Press 2001).

11. Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* 25–26, 32 (Basic Bks. 2005).

12. *Id.* at 43.

13. *Id.* at 41.

14. *Id.* at 29–30.

judge on the [C]ourt and the second most activist judge on the [C]ourt" is clearly "a very large tent."[15] By the same token, "Sunstein lists *Brown* [*v. Board of Education*[16]] as an example of a wide and deep opinion, but it might just as well be seen [using Sunstein's categories again] as a narrow and shallow one."[17] The Court, after all, declared segregation in public schools unconstitutional without saying clearly why it was doing so, and without resolving the constitutionality of other forms of segregation—on public transportation or places of public accommodation.[18] Still, the fact that people can disagree about how to apply Sunstein's categories has not diminished their influence.

Like any other public intellectual at the center of public controversies, Sunstein has attracted critics who question his commitment to judicial humility. He and I were jointly assailed for our criticisms of the conservative movement to resurrect what some have called the "Constitution in Exile," referring to limitations on federal power that have been dormant since the New Deal.[19] Although the scope of the "Constitution in Exile" movement remains to be seen, it describes a strain of activist libertarianism that is the antithesis not only of Sunstein's principled minimalism, but of the judicial deference to economic regulations best championed by Brandeis.

I began by calling Sunstein the heir of Brandeis—in his empiricism, preference for facts over theories, and skepticism of top down social change imposed by judges rather than demanded by citizens. But there are striking differences between Brandeis's and Sunstein's approaches to judicial opinions. If Sunstein praises shallow opinions, Brandeis's greatest opinions were deep. In both economic and civil liberties cases, Brandeis's judicial philosophy was a reflection of his passionate political and economic beliefs—that bigness was dangerous in both government and corporate life, that economic and social experiments should be encouraged through federalism, that anti-trust laws and unions which limited the effects of economic consolidation should be encouraged, and that limits on federal power to threaten individual liberty through surveillance or suppression of free speech—were rooted in the democratic values of the First and Fourth Amendments.[20] Unlike Brandeis, Sunstein is neither an economic populist nor a Jeffersonian. And it is hard to imagine Sunstein writing opinions as theoretically ambitious as Brandeis's concurrence in *Whitney v. California*, with its poetic defense "that public discussion is a political duty;"[21] or his dissent in *Olmstead v. U.S.*, with its bold attempt to translate the original understanding of the Fourth Amendment in light of new surveillance technologies;[22] or his dissent in *Quaker City Cab Co. v. Pennsylvania*, warning "that the rapidly growing aggregation of capital

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15. Jeffrey Rosen, *Supreme Court Confirmations Are as Messy as They Should Be*, 52 Chron. of Higher Educ. B6, B9 (Nov. 11, 2005).

16. 347 U.S. 483 (1954).

17. Jeffrey Rosen, *The Age of Mixed Results: Why Judges Owe Us an Account of Their Reasons*, 220 New Republic 43, 44 (June 28, 1999) (reviewing Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harv. U. Press 1999)).

18. *Id.*

19. *See* Sunstein, *supra* n. 11, at 25–26; *see also* Jeffrey Rosen, *The Unregulated Offensive*, N.Y. Times Mag. 42, 48 (Apr. 17, 2005).

20. Philippa Strum, *Louis D. Brandeis: Justice for the People* 335, 340 (Harv. U. Press 1984).

21. *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring).

22. 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

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through corporations constitutes an insidious menace to the liberty of the citizen."[23] In each case, Brandeis drew on constitutional history, empirical evidence, and his own deep seated beliefs to make arguments about how to preserve the original spirit of the Constitution in light of technological and social change.

Brandeis, the greatest constitutional prophet of the twentieth century, reminds us of the value of constitutional depth. In judicial opinions, consensus can be achieved with as few reasons as possible, so no one feels slighted, or with as many reasons as possible, so everyone is convinced. Brandeis was able to anticipate future constitutional consensus by generally championing judicial deference and voting to strike down laws only in cases where a series of different constitutional arguments—text, history, facts, and his own pragmatic sense of what social progress required—pointed in the same direction. By giving more, rather than fewer, reasons for his rare decisions to strike down laws, Brandeis's greatest decisions show a unique ability to persuade future generations. And the range of cases vindicating Brandeis—from *Katz v. U.S.*,[24] which overturned *Olmstead* and answered Brandeis's call for extending the Fourth Amendment to protect the privacy of people, not just places, to *Brandenberg v. Ohio*,[25] which embraced Brandeis's vision that speech can only be banned when it poses an imminent threat of provoking serious lawless action—remind us that deep opinions are the ones that tend to be blessed in the court of history.

The strongest case to be made for Brandeis's deep opinions over Sunstein's shallow ones is that they were truly restrained in Sunstein's neutral sense—that is, they called into question the constitutionality of very few laws. Brandeis reserved his judicial activism for surgical interventions against laws that clearly violated liberty by consolidating power, but because Brandeis's reasons were always clear and transparent, the impact of his relatively few activist opinions was often limited to the case at hand. An opinion like *Olmstead* is deep but narrow. By contrast, Sunstein's exaltation of shallow, incompletely theorized opinions increases judicial power rather than constraining it. By defending imprecisely reasoned opinions whose impact is unclear, Sunstein ensures that the last word on the most contested questions in national life is Justice Anthony Kennedy's or Justice Sandra Day O'Connor's. Sunstein writes that minimalist courts are defined by their willingness to leave things undecided; but this indecision and uncertainty increases litigation, as anxious citizens wait for swing justices to decide whether or not to apply the logic of the previous case to the next one. Rather than an example of Bickel's passive virtues, this seems passive-aggressive. And Brandeis would have been pained by the degree to which shallow opinions can short-circuit democratic debate rather than promoting it.

Still, Sunstein's theoretical modesty—his preferences for nudges rather than thunderbolts, for incompletely theorized arguments rather than the prophetic voice—may be better suited to our polarized age. Additionally, the fact that conservatives as well as liberals have embraced judicial minimalism is a sign of Sunstein's unique influence. When he took office, Chief Justice Roberts promised to try to promote unanimity on the

23. 277 U.S. 389, 410 (1928) (Brandeis, J., dissenting).

24. 389 U.S. 347, 353, 358–59 (1967).

25. 395 U.S. 444, 451 (1969) (Douglas, J., concurring).

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court by encouraging narrow, unanimous opinions, framed in theoretically modest ways that liberals as well as conservatives could accept.[26] The opinions in which he has most notably succeeded in this goal—such as *Rumsfeld v. Forum for Academic and Institutional Rights*,[27] rejecting a First Amendment challenge to the law withholding federal funds from schools that ban military recruiters to protest the gays in the military policy—was narrow and shallow in precisely the sense that Sunstein prescribes. By providing a model for understanding the old O'Connor Court and the new Roberts Court, Sunstein has achieved something no other contemporary legal scholar can boast: he has captured the spirit of his age.

26. Jeffrey Rosen, *Roberts's Rules*, 299 A. 104, 105, 110 (Jan./Feb. 2007).
27. 547 U.S. 47, 64-65 (2006).

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