Michigan Law Review

Volume 97 | Issue 6

1999

Foreword

Jeffrey Rosen
George Washington University Law School

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*Jeffrey Rosen**

America now is a society addicted to legalism that has lost its faith in legal argument. The impeachment of Bill Clinton was only the most visible manifestation of this paradox. Both Democrats and Republicans professed a rhetorical commitment to the rule of law while revealing a deep pessimism about the ability of courts, legislatures, or even citizens to transcend their biases and to converge, through deliberation, on impartial and democratically acceptable outcomes. The simplistic Supreme Court decisions that precipitated the impeachment — in particular, *Morrison v. Olson*,[1] upholding the Independent Counsel law, and *Jones v. Clinton*,[2] denying the President temporary immunity from civil suits while in office — were based on the principle that the President should not be above the law, a principle repeatedly invoked by both parties in the House and the Senate; but the content of the congressional deliberations revealed an unsettling cynicism about the malleability of legal argument. Both sides embraced interpretive methodologies that they had rejected on previous occasions, as the President's accusers praised the virtues of a living Constitution while the President's defenders insisted on the importance of original understanding. Perhaps most jarringly, after declining to engage each other's arguments, the two parties in the House and Senate divided more or less along party lines. The partisan character of the votes on the articles of impeachment seemed to reinforce the partisan character of law itself.

There is nothing new, of course, about the insight that judges and jurors sometimes find it hard to transcend their own biases, and that courts should hesitate, for this reason, to usurp the decisions of the democratically accountable political branches. This has been the refrain of political and academic critics of the Warren Court ever since the 1950s, and it has now transformed our legal culture. But then something odd happened. At the very moment that

* Associate Professor, The George Washington University Law School. A.B. 1986, Harvard; B.A. 1988, Oxford, U.K.; J.D. 1991, Yale. Portions of this essay appeared in a different form in the *New Republic*. — Ed.

1. 487 U.S. 654 (1988).

2. 520 U.S. 681 (1998).

judges began to agree about the virtues of deference to the political branches, legal scholars began to wonder whether the political branches deserved all that much deference after all. Public choice theory called into question the claim that self-interested legislators were well-equipped to reflect the will of the majority. The New Chicago School of Social Norms pointed to the ways that norms can influence behavior more effectively than law can, and ways that norms and law can influence each other, sometimes in perverse ways. Critical race and feminist theories insisted that objective truth is unknowable because we are all prisoners of racially, sexually, and economically determined perspectives that can never be transcended through reasoned deliberation. (And contemporary pragmatists added to the rampantly subjectivist atmosphere.) And an explosion of federal lawmaking during the past decade raised questions about whether Congress deserved deference because of its purported ability to transcend factionalism, as it federalized great patches of regulatory authority, often for the cheapest symbolic reasons, that had previously been left to the states.

Many of the books reviewed in this volume reflect the growing skepticism of scholars not only with judicial policymaking but also with policymaking by the political branches and the people themselves. To take just a small sample, libertarians such as Richard Epstein, in *Principles for a Free Society,*[3] Randy E. Barnett, in *The Structure of Liberty,*[4] and Peter W. Huber, in *Law and Disorder in Cyberspace,*[5] explore the ways that common law baselines may regulate social and economic behavior more effectively and fairly than statutory or administrative law. Other scholars, such as James B. Jacobs and Kimberly Potter, focus on the unanticipated effects of laws that create new federal crimes; in *Hate Crimes: Criminal Law & Identity Politics,* Jacobs and Potter argue cogently that in addition to threatening First Amendment values, federal hate crimes laws are often violated by the groups they were designed to protect and may inflame prejudice rather than eradicate it.[6]

Even the popular initiative process, embraced during the Progressive era as the purest expression of direct democracy, is now being questioned for its undeliberative quality. In *Lawmaking by*

3. RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY (1998).

4. RANDY E. BARNETT, THE STRUCTURE OF LIBERTY (1998).

5. PETER W. HUBER, LAW AND DISORDER IN CYBERSPACE (1997).

6. JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS (1998).

Initiative: Issues, Options and Comparisons,[7] by Phillip L. Dubois and Floyd Feeney, and *Paradise Lost: California's Experience, America's Future,*[8] by Peter Schrag, the authors examine the political process failures that, in their view, make initiatives in the 1990s poor barometers of popular will: voters often do not understand deceptively drafted, overly complicated ballot questions; professional signature collectors are more concerned with efficiency than measuring the breadth or depth of voter preferences; low turnout makes initiatives vulnerable to capture by special interests; and piecemeal decisionmaking entrenches shortsighted policy choices. In a vivid illustration of these problems, William G. Bowen and Derek Bok, in *The Shape of the River,* note that some supporters of Proposition 209 in California had second thoughts after the University of California responded to the anti-affirmative action initiative in ways that they hadn't anticipated. In particular, the supporters were troubled by the impulse to maintain racial diversity without racial preferences by redefining the central mission of the research university in a way that lowers standards for all students.[9]

The new skepticism about the unanticipated effects of judicial and legislative policymaking seems to be reflected in a turning away from grand theory and toward empirical analysis. In *Judicial Policy Making in the Modern State: How the Courts Reformed America's Prisons,*[10] Malcolm M. Feeley and Edward L. Rubin insist that judicial policymaking is a separate enterprise from judicial interpretation, and they use the prison reform litigation cases of the 1960s and 1970s to offer a sociological description of what, precisely, judicial policymaking involves: how judges created legislative rules for governing America's prisons; how their choices were constrained by moral and political background norms; how successfully the rules were implemented; and how the perceived success of the reform movement in replacing torture with efficiency has put new social pressures on prisons that they are, in many respects, ill-equipped to bear. In her review of Feeley and Rubin's book, Margo Schlanger suggests that scholars might cast further light on the subject by

7. PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS (1998).

8. PETER SCHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE (1998).

9. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 288 (1998).

10. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING IN THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998).

moving even closer to the ground: in addition to asking how judges make policy, she suggests, scholars of judicial policymaking should also ask how courts function as an arena of policy disputation by examining the realities of litigation, including pretrial settlements and the strategic incentives of counsel, that shape constitutional outcomes at least as dramatically as judges do. In an age when top-down theorizing is increasingly unfashionable, bottom-up empirical analysis seems increasingly appealing.

Perhaps the most revealing indication of the pragmatic temper of legal scholarship today is the growing impatience with constitutional theory even among constitutional theorists themselves. And in this regard, no book published this year is more representative than Cass Sunstein's *One Case at a Time: Judicial Minimalism on the Supreme Court.*[11] With his new book, Sunstein has joined a distinguished line of liberal constitutional theorists who have defended the democratic value of judicial modesty. Although some of his earlier work had embraced less diffident visions of constitutional interpretation, he now places himself squarely in the tradition of Felix Frankfurter and his disciple, Alexander Bickel, who famously advocated the "passive virtues" of declining to decide cases in certain circumstances so as to promote democratic debate. Sunstein's prescription is more comprehensive than Bickel's, which makes it uniquely well-suited to an age that has lost its constitutional faith. Like the Unitarian who believes that there is at most one God, Sunstein urges the Supreme Court to be self-mortifying about the limits of its knowledge. It should refuse to decide certain cases and agree to decide other cases as narrowly as possible, so as to preserve spaces for contested issues to be debated democratically. But Sunstein's interpretive approach, which he calls "judicial minimalism," is not a recipe for deference to the people and their representatives in all circumstances. Although minimalists "disfavor broad rules that would draw a wide range of democratically enacted legislation into question," Sunstein writes, they "are not committed to majority rule in all contexts. Majoritarianism is itself a form of maximalism."[12] Sunstein argues for a jurisprudence of mixed results, counseling courts to strike down laws in some circumstances and to uphold them in others, but always to be guided by what he calls "democracy-promoting minimalism."[13]

11. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

12. *Id.* at x.

13. *Id.* at 24.

It is rare that a work of constitutional theory so enthusiastically celebrates, and so precisely expresses, the mood of a particular Supreme Court. For nearly forty years, politicians and legal scholars have focused on different responses to the perceived overexpansiveness and lack of humility that characterized the decisions of the Warren Court. The great constitutional theorists of the previous generation, from Bickel to John Hart Ely, displayed a critical tone toward the Justices of their era that combined theoretical dismay with barely concealed contempt. Sunstein, by contrast, is Whiggish in every way. He has warm praise for "[s]everal of the justices, most notably O'Connor (but also Justices Breyer, Ginsburg, Stevens, and Souter), [who] are cautious about broad rulings and ambitious pronouncements. Usually, they like to decide cases on the narrowest possible grounds."[14] Sunstein contrasts these heroes with the villains of his story, Chief Justice Rehnquist and Justices Antonin Scalia and Clarence Thomas, who "think that it is important for the Court to lay down clear, bright-line rules, producing stability and clarity in the law."[15] No other scholar has captured the temper of the current majority as neatly as Sunstein, nor has anyone else attempted to provide a theoretical justification for what other observers took to be ad-hockery or improvisation. For these reasons Sunstein's book deserves close attention.

Sunstein wants to reformulate the terms of constitutional debate by focusing on minimalism and maximalism, rather than activism and restraint. "Judicial restraint" is a notoriously imprecise term — it can include a range of deferential judicial behavior, from deference to legislatures to deference to constitutional text or history or precedent, all of which may point in very different directions. The Justices that Sunstein criticizes, as well as those that he praises, have identified themselves, at various times, as acolytes of judicial restraint; but it is hard to consider the Rehnquist Court, as a whole, to be a restrained Court. Although it is less willing than its predecessors to create and to expand broad rights of personal autonomy — as demonstrated by its refusal to recognize a sweeping right to die[16] — the Rehnquist Court is more willing to strike down federal statutes as violations of federalism or the separation of powers. (In 1997 alone, it struck down four federal laws[17]; and in more recent

14. *Id.* at xiii.

15. *Id.*

16. *See* Washington v. Glucksberg, 521 U.S. 702 (1997); *see also* Vacco v. Quill, 521 U.S. 793 (1997).

17. *See* Printz v. United States, 521 U.S. 898 (1997) (invalidating part of the Brady Handgun Violence Protection Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993)); Reno v. ACLU, 521

cases, like *Clinton v. City of New York*,[18] invalidating the line item veto, its attitude toward Congress can only be described as cavalier.) Sunstein recognizes that the most distinctive quality of the Rehnquist Court is not its commitment to restraint but its aversion to ambitious theorizing, its preference for saying as little as possible, its instinct for consensus rather than confrontation (a surprising number of important opinions are unanimous), and its proclivity for handing down bold rulings without bothering to agree on very deep reasoning to explain its decisions.

Is this aversion to reason-giving something to be celebrated, as Sunstein suggests, or is it a form of judicial self-aggrandizement masquerading as modesty? Sunstein models his theory on what Bickel called the "passive virtues," which Bickel defined as the use of judicial avoidance techniques to delay decisions in important cases that might be further clarified by democratic debate.[19] However, for the Justices to extend Bickel's notion of "passive virtues" to a judicial opinion itself, refusing to say what they think about a constitutional issue after they have promised to do so, is a peculiarly coy vision of the judicial role. It seems not so much passive as passive-aggressive.

The most fundamental characteristic of judicial minimalism, as Sunstein defines it, is a commitment to leaving important questions unresolved. He argues persuasively that the most effective judicial decisions are those that preempt democratic deliberation as little as possible. But it is hard to see how citizens can deliberate meaningfully about constitutional issues when the Court refuses to share its own views about the rules of debate.

Encouraging judges to preserve space for democratic deliberation, Sunstein provides a series of distinctions. First, minimalist decisions should be narrow rather than broad — that is, minimalist Justices should try to decide the case at hand without laying down a sweeping rule that will bind lower courts and legislatures in similar cases.[20] Second, minimalist decisions should be shallow rather than deep — they should lay down a rule in the case at hand without

U.S. 844 (1997) (invalidating part of the Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 133 (1996)); City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488); Babbit v. Youppe, 519 U.S. 234 (1997) (invalidating an amendment of the Indian Land Consolidation Act of 1984, Pub. L. No. 97-459, 96 Stat. 2515, 2517-19 (codified as amended at 25 U.S.C. §§ 2201-2211 (1994))).

18. 524 U.S. 417 (1998).

19. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1965).

20. *See* SUNSTEIN, *supra* note 11, at 10-11.

giving an ambitious theoretical account of their reasons for doing so. By avoiding foundational questions, and converging on "incompletely theorized arguments, courts can make it unnecessary for people to agree when agreement is impossible."[21] But Sunstein is not a maximalist when it comes to minimalism. Courts should feel free to issue wide and deep decisions, and to speak in the oracular mode, he argues, when they have great confidence in the constitutional merits of a case, or when they have debated an issue incrementally over time and are prepared to converge around an ambitious solution. Alternatively, a broad and deep opinion can reduce uncertainty or "promote democratic goals either by creating preconditions for democracy or by imposing good incentives on elected officials."[22] In ordinary circumstances, however, when judges are proceeding in the face of uncertainty or rapidly changing circumstances, or when the preconditions for democratic self-government are not at stake, or when "the need for advance planning does not seem insistent,"[23] narrow and shallow decisions are what Sunstein recommends.

Sunstein's matrix of categories is certainly provocative, but it seems just as malleable as the categories of activism and restraint that it wishes to usurp. Whether a decision is characterized as narrow or shallow, or deep or broad, seems entirely in the eye of the beholder. Sunstein lists *Brown v. Board of Education* as an example of a wide and deep opinion,[24] but it might just as well be seen as a narrow and shallow one. After all, the Court declared segregation in public schools unconstitutional without explaining very clearly why it was doing so, and without saying anything about the constitutionality of different forms of state-sponsored segregation (on public transportation, for example). As Neil Devins also notes in his review of the book, the indeterminacy of Sunstein's categories calls their broader utility into question. Moreover, because Sunstein focuses almost entirely on the jurisprudence of the Rehnquist Court, and doesn't tell us what he thinks about many other landmarks of the Warren era, it is hard to say whether his theory is tailor-made for a particular group of Justices, or whether it has a more general application.

If the Supreme Court were the only court in the nation, it might be able to embrace a highly personalized, "the law is what we say it

21. *Id.* at 14.

22. *Id.* at 57.

23. *Id.*

24. 347 U.S. 483 (1954); *see* SUNSTEIN, *supra* note 11, at 17 tbl.1.1.

is" jurisprudence, without worrying about giving very clear reasons for why it is doing so, and without tipping its hand about how it is likely to decide similar cases in the future. In the American system, however, the Supreme Court sits at the top of a pyramid of inferior federal courts, all of which are bound to apply its decisions uniformly throughout the nation. When faced with a narrow, shallow Supreme Court decision of the kind that Sunstein praises, lower courts may literally be at a loss about what the opinion means. This is more likely to promote chaos than reasoned deliberation. Sunstein acknowledges that minimalism may shift the burden of making hard decisions from the Supreme Court to lower courts.[25] For this reason, he stresses that when "planning" by lower courts and citizens is important, minimalism may be inappropriate.

But isn't "planning" important in every case that the Supreme Court agrees to hear? In an age in which the Supreme Court is deciding fewer and fewer cases, and selecting the handful of cases that it agrees to hear by looking for areas of disagreements among the lower courts, it seems inefficient and even irresponsible for the Justices to refuse to lay down clear rules in the few cases in which they have promised to do so. Surely it is hard to argue that the legal questions in these cases would benefit from further debate in the lower courts, since it was the existence of vigorous disagreement in the lower courts that led the Supreme Court to agree to hear the case in the first place. When the Supreme Court issues terse, elliptical opinions in which the reasoning is hard to discern, it compounds the confusion of inferior courts in precisely those cases in which the relevant actors are pleading for a clear resolution. The result is a national exercise in clairvoyance as lower courts and legislatures spend great energy and expense trying to puzzle through problems that the Supreme Court promised but then refused to resolve.

Because Sunstein presents no empirical evidence about the degree to which legislatures or citizens may respond differently to shallow as opposed to deep decisions, it is hard to say with confidence whether or not an opaque or shallow opinion can, in fact, provoke more democratic deliberation than a deep one can. Since the subset of lawyers who regularly read Supreme Court opinions after they have graduated from law school is tiny, and the subset of non-lawyers who read Supreme Court opinions is far smaller, it is

25. *See* SUNSTEIN, *supra* note 11, at 48 ("A court that economizes on decision costs for itself may in the process 'export' decision costs to other people, including litigants and judges in subsequent cases who must give content to the law.").

possible that the shallowness or depth of an opinion has little influence on the degree to which it influences political debate. (Most citizens get their knowledge of Supreme Court opinions from television, which suggests that Sunstein's central premise that the courts can participate in an informed dialogue with citizens may be idealistic.) Yet shallow opinions seem especially unlikely to provoke reasoned deliberation, because they give citizens and legislators so little to deliberate about, except to try to predict the future votes of the Justices who produced them.

Sunstein recognizes the democratic virtues of deep opinions as opposed to shallow ones: they help to promote the rule of law, he notes, by limiting judicial discretion and improving predictability. But he defends shallow decisions nevertheless, on the grounds that they permit citizens with "diverse theoretical commitments" to converge around outcomes when they are unable to converge around abstract principles. The voting rights experiment, however, calls even that modest claim into question: an incompletely theorized case like *Shaw v. Reno*[26] gives citizens no basis for knowing what, precisely, they are being asked to accept in redistricting rulings, beyond the unsatisfying claim that a voting district is unconstitutional if the swing vote, Justice O'Connor, thinks it is.

By embracing shallowness as a judicial virtue, Sunstein is advocating a version of the personalized jurisprudence of Justice O'Connor; but in this area, instead of promoting reasoned deliberation, O'Connor's minimalism entangles individual Justices in the political process to the most minute and confusing degree. Because O'Connor has not explicated the rules or standards that, in her view, distinguish constitutional from unconstitutional districts, the process of redistricting in the wake of the 1990 census has largely become an exercise in reading Justice O'Connor's mind. Justice Stewart's famous test for obscenity — "I know it when I see it" — was based on the conviction that there was a social consensus about what is obscene, but that it reflected too many legal and moral permutations to be captured in a single judicial rule. Justice O'Connor's focus on "oddly shaped districts," by contrast, seems to rest on no broader aesthetic than the sensibility of O'Connor herself.

In a powerful article called *Judges as Advicegivers,* Neal Kumar Katyal argues that the best way for courts to achieve Sunstein's goal — avoiding interference with the political branches and encourag-

26. 509 U.S. 630 (1993).

ing settlement of constitutional issues politically rather than judicially — is to write narrow but deep opinions. That is, opinions explaining their carefully confined holdings with a generous reliance upon dicta, or nonbinding advice, that provide clear guidance to legislators and citizens about the rationale and assumptions behind a decision.[27] The narrowness of the holding would ensure that democratic prerogatives are preserved across a range of issues, and the clear advice would permit the political branches to make informed decisions about the constitutional limits on their powers, rather than trying to read judicial tea leaves. For example, Katyal argues, about *Clinton v. Jones*,[28] that the Court could have written a narrow opinion siding with Jones, rather than a hyperbolic opinion declaring that text and history provide "no substantial support" for claims of presidential immunity. After acknowledging the closeness and uncertainty of the question, the Court could have declined to create the presidential immunity that Clinton requested, on the grounds that a constitutional solution to the problem would freeze the matter permanently. But the opinion could have included clarifying dicta, informing Congress about the potential constitutional problems, and strongly suggesting that a legislative grant of immunity would be the most appropriate way to address them.[29]

With characteristic fairmindedness, Sunstein acknowledges the arguments for judicial depth. By refusing to give intelligible reasons for their decisions, he notes, Justices run the risk that litigants in similar cases will not receive equal treatment by lower courts. The main objection that he raises to a deep decision is that "judges may not be good at ambitious theorizing, and may hence blunder — a special problem when they are invalidating legislation."[30] Still, it is not clear that judges are any better at less ambitious theorizing, which may require a subtlety and complexity that more abstract arguments often do not require.

Deep opinions may be as likely to preempt democracy as shallow ones are, although for different reasons. This is a wrinkle that Sunstein's analysis is perfectly able to accommodate: he argues convincingly that the case for shallowness or depth may vary depending on the context in which a particular constitutional issue is being debated in the democratic sphere. A more fundamental criticism of judicial minimalism is that, when push comes to shove,

27. *See* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1711 (1998).

28. 520 U.S. 681 (1997).

29. *See* Katyal, *supra* note 27, at 1757-59.

30. SUNSTEIN, *supra* note 11, at 244.

Sunstein does not really trust democracy at all. He is committed to deliberation in the abstract, but he is willing to override the judgment of the actual citizens in actual debates when they don't coincide with his own intuitions about what a deliberative democracy should embrace. Democracy, Sunstein stresses repeatedly, should not be confused with simple majoritarianism; but at times, the outcomes that Sunstein is willing to credit as genuinely "deliberative," as opposed to "naked preferences" supported by "power but not reasons,"[31] look surprisingly like the outcomes with which Sunstein happens to agree.

Consider affirmative action. "I start with the suggestion that the issue of affirmative action should be settled democratically, not judicially," Sunstein writes.[32] He then praises the Supreme Court's "meandering course, its refusal to issue rules, its minimalism" in the affirmative action cases, which "might be defended as performing a valuable *catalytic* function . . . . to spur, but not to preempt, effective public debate."[33] All this is entirely plausible. At the moment, the Court is closely divided between two wide, deep, and mutually inconsistent readings of the constitutional guarantee of equality. Four Justices — Scalia, Thomas, Rehnquist, and, a little more tentatively, Kennedy — seem to believe that affirmative action is unconstitutional in nearly all circumstances because the Constitution is colorblind. Four Justices — Stevens, Souter, Ginsburg, and Breyer — seem committed to the principle that affirmative action is permissible in most circumstances because the Constitution prohibits only racial classifications that promote racial castes. Sandra Day O'Connor has not made up her mind. The Court's inability to muster five votes for one alternative over the other has resulted in a series of fragmented opinions that have indeed, as Sunstein suggests, provoked a useful debate about the permissible scope of affirmative action in the public sphere. The affirmative action cases show O'Connorism at its most galvanizing: by offering a series of narrow and shallow distinctions — affirmative action may be permissible in universities but not in federal contacting; diversity is a more important goal in the classroom than in federal highway projects — the Court has provoked legislators and citizens to debate a complicated topic in sophisticated ways.

The most important of these debates took place in California, and it culminated in Proposition 209 — adopted by the citizens of

31. *See id.* at 25.

32. *Id.* at 117.

33. *Id.* at 117-18.

California on November 5, 1996 — which says, "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting." One would have expected Sunstein to praise Proposition 209 as a democratic settlement of our most hotly contested social question. But in a remarkable passage, Sunstein suggests that Proposition 209 may not deserve to be considered democratic at all:

> Political processes in California on this issue did not appear to be deliberative. The American system is one of representative rather than direct democracy, partly because of a judgment that political deliberation can be best promoted through a representative system. If judicial decisions stimulate poorly functioning referendum processes, little will be gained.[34]

Indeed, Sunstein goes so far as to suggest that the Court might have been justified in striking down Proposition 209 as unconstitutional on the grounds that it "contained a ban that prevented the kind of careful analysis of particulars that has stood behind the Court's own decisions,"[35] although he later retreats from this suggestion.[36] But surely the point of minimalism is to allow citizens to converge around what they consider to be a deep principle of justice that removes some subjects from the judicial realm once and for all; and this should include a political resolution of the affirmative action debate.

The notion that Proposition 209 was not sufficiently "deliberative" is especially hard to sustain in light of recent scholarly insights about the limits of the initiative process in general. In fact, the debate over Proposition 209, like all political debates, was a messy combination of high principle and low politics: it contained appeals to clashing principles (its sponsors, two college professors, are earnest proponents of the view that the Constitution should be color-blind), factual predictions that turned out to be overly optimistic (affirmative action opponents didn't anticipate that the political pressures to continue to admit minority students to the University of California in a post-209 world would result in efforts to lower standards for students across the board), as well as some crude racial appeals. But this is what real debates in real democracies look like. And the work of scholars such as Schrag, Feeney, and Dubois

34. *Id.* at 133.

35. *Id.* at 135.

36. *Id.*

suggests that the debate over Proposition 209 may have been a more accurate reflection of the depth and intensity of popular sentiment about affirmative action than many of the more obscure initiatives that are brought before the distracted electorate.

If the impeachment of Bill Clinton accomplished anything, surely it should have weaned constitutional theorists of the Panglosssian ideal of democratic deliberation in America as a sober, cool, ratiocinative exercise in achieving consensus through reason-giving. In this diverse and truculent country, there are fierce and irreconcilable differences of opinion about the moral and political and cultural battles that ultimately culminated in the Clinton impeachment. To imagine that these philosophical disagreements can be overcome by earnest legislators and citizens persuading each other through reasoned argument will strike anyone who lived through the past year as fanciful; and it displays an abstracted idealization of the process of politics over its substance. Indeed, if there was any poetic justice in the impeachment, it was to display the shallowness of the Clintonian ideal of national conversation as a cure for all political ills. At the same time, the President's acquittal reminded us of the rough wisdom of a constitution founded on popular sovereignty: public opinion about Clinton's transgressions persistently showed more nuance and maturity than the partisanship and the sanctimony that dominated public debate in the media, in Congress, in the White House, and even in the courts. An unsentimental assessment of the limits of political deliberation, in other words, isn't an argument against American constitutionalism. It is an argument *for* American constitutionalism. There are some conversations that are pointless to prolong. At some point, everybody has to shut up and vote.

The events of the past year also reminded us about the constitutional costs of encouraging Supreme Court Justices to reduce themselves to plumbers and tinkerers. The legal forces that culminated in the Clinton impeachment — in particular, the erosion of privacy law, embodied in Fourth and Fifth Amendment protections for individual control over personal information; and the expansion of sexual harassment law, to a point where people can be interrogated about the details of their consensual relationships on the flimsiest of allegations — are the product of surprisingly recent decisions by the Supreme Court. They took place during the three decades from the beginning of the 1970s to the end of the 1990s when the Justices, stung by allegations of activism during the Warren years — self-consciously began to shun the grand style, and to write minimalist

opinions that handed down results without bothering to justify them with coherent reasons. As a result, fundamental constitutional protections were diluted or even abandoned, more out of carelessness than constitutional principle. It was during the 1970s and 80s, for example, that the axiom that private diaries couldn't be subpoenaed as mere evidence in civil or white-collar criminal cases — the paradigmatic example of an unreasonable search and seizure for the Framers of the Fourth Amendment — was allowed to wither away without anyone acknowledging its slow demise.

In an effort to avoid the grand style of Warrenism, the Rehnquist Court has swung so far in the other direction that legal scholars today are feeling a little like the man drinking at the bar on the *Titanic*: "I asked for ice," he says, "but this is ridiculous." What has been lost is the basic ingredient of principled decisionmaking, which is a commitment to judicial reason-giving. The problem with the most notoriously maximalist decisions of the Warren and Burger Courts — *Roe* is the paradigm case — was not that they were philosophically ambitious; it was that they were overly simplistic and thinly reasoned. The minimalist decisions of the Rehnquist Court suffer from precisely the same flaw. And so we have the spectacle of a Court exercising great power without offering publicly accountable reasons, which seems hard to reconcile with the vision of democracy that minimalism was designed to promote.

In judicial opinions, as in democracy, there are different ways of achieving consensus. One is to offer as few reasons as possible, so no one can possibly feel slighted. Another is to offer as many reasons as possible, none of which is dispositive, but each of which, like strands in a rope, binds together to strengthen the whole. A minimalist who took seriously the judicial duty of reason-giving might recognize that there are, in this pluralistic age, a range of plausible interpretive methodologies, and that judicial intervention seems most legitimate when it can be justified along as many different axes as possible. The conventional tools of legal interpretation — text, history, precedent, tradition, constitutional structure, and moral argument — often point in very different directions. A minimalist judge who took seriously her responsibility to persuade citizens of "diverse theoretical commitments," as Sunstein puts it, might be inclined to defer in the face of contestability, and to strike down laws only in those rare cases when the different methodological tools all point in the same direction. By giving more reasons, rather than fewer reasons, a decision to invalidate could be justified

in ways that judges and citizens with clashing moral and political and constitutional commitments can understand.

"[T]ruth . . . is the legal system's abiding value," Kenneth Starr said in a recent speech, comparing himself to Atticus Finch in *To Kill a Mockingbird*.[37] In a charming essay in this volume, Steven Lubet expresses skepticism about Finch's claims to exemplify absolute truth and asks us to entertain the possibility that Finch's client was, in fact, guilty. Lubet's thought experiment reminds us that we are living amid the rubble of constitutional fundamentalism, and any successful interpretive approach would do well to embrace the spirit of humility that Sunstein's book embodies. But judicial humility does not involve an aversion to reason-giving but a passion for it. The qualities of a great judicial opinion — transparency, candor in the face of uncertainty, and analytical depth — are precisely those qualities that are most conducive to public accountability.

In light of recent scholarship expressing skepticism about the deliberative powers not only of the courts but also of the political branches and the people themselves, it seems reckless for judges and legal scholars to demand a lower standard of deliberation, reflection, reason-giving, and intellectual accountability from the Justices of the Supreme Court than they demand from the citizens of the United States. At this unexpected moment of legal consensus, as liberals and conservatives are converging around the ideal of theoretical humility, perhaps it is time to recover some of the faith in judges as reason-givers that we have spent the past forty years trying to overcome. I do not mean faith in the over-confident, democracy-thwarting opinions of the Warren era. I mean faith in the ability of chastened judges to justify their restrained decisions with intelligible, publicly accessible, well-reasoned and at times even deep arguments, that provide clear guidance to citizens and legislators. Thanks largely to the transformation of legal culture that the reaction to Warrenism helped to precipitate, the federal bench in general, and the Supreme Court in particular, is now composed of an able group of Democrats and Republicans, whose similarities are more notable than their differences, and who agree more often than they disagree about what distinguishes good legal arguments from bad ones. It is indeed passive-aggressive for this Court to hoard its enhanced authority by retreating into an elliptical and obscurantist unanimity. The philosophical silence of the

37. *See* Kenneth Starr, Whitewater Independent Counsel, Remarks at Mecklenberg Bar Foundation, Charlotte, North Carolina (June 1, 1998) (transcribed by the Federal News Service).

Supreme Court is an antidemocratic silence. Have we all been so spooked by the ghost of Warrenism that we have inadvertently revived it in a different form?