

COPYRIGHT NOTICE:

Cass R. Sunstein: A Constitution of Many Minds

is published by Princeton University Press and copyrighted, © 2009, by Princeton University Press. All rights reserved. No part of this book may be reproduced in any form by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without permission in writing from the publisher, except for reading and browsing via the World Wide Web. Users are not permitted to mount this file on any network servers.

Follow links for Class Use and other Permissions. For more information send email to: permissions@press.princeton.edu

I N T R O D U C T I O N



Jefferson's Revenge

AN OLD DEBATE

In the earliest days of the American Republic, James Madison and Thomas Jefferson offered radically different views about the nature of constitutionalism in their young nation. Madison insisted that the Constitution should be relatively fixed. In his view, the founding document had been adopted in a uniquely favorable period, in which public-spirited people had been able to reflect about the true meaning of self-government. Miraculously, We the People had succeeded in producing a charter that would be able to endure over time. The Constitution should be firm and stable; the citizenry should take the document as the accepted background against which it engages in the project of self-government.

To be sure, Madison did not believe that the Constitution ought to be set in stone. He accepted the Constitution's procedures for constitutional amendment; indeed, he helped to write them. But he thought that amendments should be made exceedingly difficult. In his view, constitutional change ought to be reserved for "great and extraordinary occasions."¹ Madison wanted the work of the founding generation to last; alterations should occur only after surmounting a formal process that would impose serious obstacles to ill-considered measures based on people's passions or their interests. This, then, was a key component of Madison's understanding of the constitutional system of deliberative democracy: A system in which the constitutional essentials were placed well beyond the easy reach of succeeding generations.

¹ The Federalist No. 49 (Madison).

Thomas Jefferson had an altogether different view. Indeed, he believed that Madison's approach badly disserved the aspirations for which the American Revolution had been fought. Jefferson insisted that "the dead have no rights."² He thought that past generations should not be permitted to bind the present. In his view, the founders should be respected but not revered, and their work ought not to be taken as any kind of fixed background. In a revealing letter, Jefferson contended that those who wrote the document "were very much like the present, but without the experience of the present."³ In other words, the present knows more than the past, if only because it is, in a sense, older. For these reasons, Jefferson urged that the Constitution should be rethought by the many minds of every generation, as the nature of self-government becomes newly conceived in light of changing circumstances. We the People should rule ourselves, not simply through day-to-day governance under a fixed charter, but also by rethinking the basic terms of political and social life.

According to the standard account, history has delivered an unambiguous verdict: Madison was right and Jefferson was wrong. The United States is governed by the oldest extant constitution on the face of the earth. In most of its key provisions, it remains the same as it was when it was ratified in 1787. Many of its terms have not been altered in the slightest. Just as Madison had hoped, the work of the founders endures. For all his ambition, Madison would likely have been amazed to see that well over two hundred years after the founding—roughly the same number of years that separate the birth of the document from the birth of Shakespeare—much of his generation's labor would continue to govern in essentially unaltered form.

Those who emphasize Madison's triumph acknowledge some important qualifications. The most important change may have been the Bill of Rights, added in 1789—but that early catalogue of rights is best understood as continuous with, or as a completion of, the original document. It is also true that significant amendments were made in the period after the Civil War—abolishing slavery, guaranteeing African-Americans the right to vote, and generally increasing the power of the national government over the states. Other constitutional amendments have introduced important changes by ensuring direct election of senators and the president

² Letter of Thomas Jefferson to Samuel Kercheval (June 12, 1816), available at <http://teachingamericanhistory.org/library/index.asp?document=459>.

³ *Id.*

and by granting women the right to vote. But to a remarkable degree, America continues to be ruled by the document originally ratified by the founding generation.

THE CHANGING CONSTITUTION

Or so it is generally believed. In crucial ways, however, the tale of constitutional stability is a myth. Jefferson has had his revenge—not through formal amendments, but through social practices and interpretations that render our Constitution very different from the founders' Constitution. What I mean to emphasize here is that those practices and interpretations have everything to do with public judgments as they have extended through time. In other words, constitutional change has occurred through the judgments of many minds and succeeding generations, in a way that captures some of Jefferson's hopes. In countless domains, Madison's victory is quite illusory. There have been numerous founders, and they can be found in many generations. Ours is a constitution of many minds.

This point is likely to seem jarring, and not only because of my claim that American history has, to an unacknowledged extent, fit Jefferson's project. The initial problem is that when Americans think of constitutional change, they focus on judicial interpretations, not on the role of their elected representatives or of citizens themselves. This is a major mistake. It is true that in some of its decisions, the Court, not the public, has been a prime mover. In banning school prayer, protecting the right to choose abortion, and striking down affirmative action programs, the Court has gone well beyond the original meaning of the document, and its own judgments have been crucial. What is much less noticed and far more important, and what I mean to stress here, is the extent to which changes in constitutional arrangements and understandings have been a product of ordinary democratic processes, producing adjustments in constitutional understandings over time. Self-government, far more than judicial innovation, has been responsible for those adjustments.

Sometimes the relevant changes do not involve courts at all. Consider, for example, the immense authority of the president in the domain of national security. That authority owes everything to decisions by the president and by Congress, ensuring that the nation's leader has far greater power than originally anticipated. And when the president and Congress act, they

are responsive to the public as a whole. The current authority of the president has rarely been assessed by the Supreme Court and is hardly a judicial creation. It is a product of judgments of a variety of persons and institutions and, in an important sense, of We the People.

Sometimes changes in constitutional understandings are initially driven by the elected branches and ultimately ratified by the courts. Consider the large increase, after the New Deal, in the authority of the national government—an increase deplored by many who emphasize that ours is a federal system in which states have a substantial role. The authority of the national government is a product of democratic processes, not of the federal judiciary; the Court's role has been largely to ratify what citizens and their representatives have done. Or consider the rise of the immensely important “independent regulatory commissions,” such as the National Labor Relations Board, the Federal Reserve Board, the Federal Communications Commission, and the Securities and Exchange Commission. These agencies exercise broad discretionary power without close control from the president of the United States. The Court has permitted such agencies to exist; but the prime movers have been the president and the Congress, not the judiciary.

True, the Supreme Court sometimes entrenches a new constitutional principle or a novel understanding of an old principle. But even when it does so, it is never acting in a social vacuum. Often it is endorsing, fairly late, a judgment that has long attracted widespread social support from many minds. The ban on racial discrimination, signaled above all by the Court's invalidation of school segregation, attracted strong support in the nation long before the Court acted. The dismantling of racial segregation in the South was eventually produced by the political branches, not the Court.⁴

In striking down sex discrimination, the Court's decisions can be seen as responsive to a social movement that produced what was a kind of Jeffersonian moment—a moment in which large numbers of people rethought previous constitutional commitments. Nor have the (few and tentative) judicial decisions banning discrimination on the basis of sexual orientation come as bolts from the blue. Those decisions emerged from a social context in which such discrimination seems increasingly difficult to defend—in

⁴ See Gerald Rosenberg, *The Hollow Hope* (Chicago: University of Chicago Press, 1991).

which We the People have been coming, in fits and starts, to think that gays and lesbians should not be put in jail for consensual relationship, and that discrimination against them, at least by government, is hard to defend. If the Court ever does conclude that states cannot ban same-sex marriage, it will only be after much of the public has already done so.

In 2008 the Supreme Court ruled, for the first time, that the Second Amendment confers an individual the right to own guns for nonmilitary purposes. In doing so, the Court was greatly influenced by the social setting in which it operated, where that judgment already had broad public support. In recent years, there has come to be a general social understanding that the Second Amendment does protect at least some kind of individual right; and that understanding greatly affects American politics. The Supreme Court's ruling in favor of an individual's right to bear arms for military purposes was not really a statement on behalf of the Constitution, as it was written by those long dead; it was based on judgments that are now widespread among the living.

Some people, above all Bruce Ackerman, have urged that the American constitutional tradition includes not merely formal amendments but also "constitutional moments," in which We the People make large-scale changes in our understandings. These changes ultimately have consequences for the meaning of the Constitution.⁵ And some periods do produce unusually large alterations in constitutional principles; Franklin Delano Roosevelt's New Deal, which involved no formal amendment, is the most obvious example. After the New Deal, the power of the national government was greatly increased; the president's authority became much broader; there were changes as well in prevailing understandings of individual rights, including diminished protection of freedom of contract and private property. Because it reflected the commitments of many citizens, the New Deal nicely fits the Jeffersonian story I am telling here. Roosevelt's New Deal was not a return to the founding. It was a reflection of the beliefs and commitments of We the People.

But constitutional change is not merely a product of "moments" in which mobilized citizens support large-scale reforms. There is a continuum from small changes, produced in periods of relative stability, to major ones,

⁵ See Bruce A. Ackerman, *We the People*, vol. 1, *Foundations* (Cambridge: Harvard University Press, 1993).

produced when crises or social movements call for significant departures. Just as Jefferson hoped, 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. As one example, consider the increased power of the presidency after the attacks of 9/11. President Bush made broad claims about his authority, and he acted on the basis of those claims, originally with strong public support. Notwithstanding some important losses in court, and other defeats in the court of popular opinion, the president's power has, in important respects, grown as a result of the terrorist attacks. Future presidents will benefit from those increases in power.

Nor is constitutional reform limited to unusual periods of crisis, or large-scale rethinking of preexisting commitments. The federal system has some important virtues here. Many minds in California, Texas, or Wisconsin may reach a conclusion—about same-sex sexual relations, about religious liberty, about the role of firearms—that yields an experiment that turns out to have considerable appeal to the many minds of Americans as a whole. Changes in constitutional understandings may be a consequence.

In emphasizing that the American Constitution is a product of the work of many minds, I do not mean to suggest that our constitutional order has fully incorporated Jefferson's plea for popularly driven constitutional change. In keeping with Madison's hopes, our mechanisms of change rarely invoke formal procedures. The public is not asked to reassess the value or meaning of constitutional provisions governing free speech, religious liberty, property rights, and gun ownership, or the allocation of war-making authority between the president and Congress. In addition, much of constitutional change has occurred through an incremental process, not through the large-scale generational rethinking that Jefferson favored. Evolving traditions, rather than sudden breaks, are the usual American way. And those who believe that the original document is fundamentally flawed, or that a constitutional convention would promote a range of desirable goals, will not be convinced by the argument here.⁶

Nor do I mean to deny the occasionally creative role of the judiciary, interpreting the Constitution to fit with its own preferred views. But as a matter of actual practice, the views of the public and its representatives

⁶ See the provocative and highly illuminating discussion in Sanford Levinson, *Our Undemocratic Constitution* (New York: Oxford University Press, 2006).

have turned out to be crucial. When we think about constitutional change, we pay far too little attention to the importance of those views.

MANY MINDS

Some of the most important constitutional debates raise a single question: If many people have accepted a particular view about some important issue, shouldn't the Supreme Court, and others thinking about the meaning of the Constitution, consult that view?

That very question will seem jarring to those who believe that the Court's role is simply to announce "the law." If that is the Court's role, then it might seem senseless to ask about the judgments of others—whether those judgments are reflected in long-standing traditions, the current commitments of American citizens, or the views of those in foreign countries. And indeed it is true that on certain understandings of constitutional law, such consultation is senseless. If the judge is supposed to speak for the original public meaning of the document, a long-standing practice or an intensely held public conviction is almost certainly⁷ neither here nor there.

Suppose, however, that we reject the view that the Constitution's meaning is settled by the original public meaning. Suppose too that constitutional law is frequently "shallow," in the sense that the document itself and judicial decisions do not offer a deep theory of (for example) free speech, equal protection of the laws, or executive power. As we shall see, there are large advantages to a situation in which constitutional understandings do not reflect a theoretically ambitious account of disputed provisions. Suppose that judges have long refused to accept a particular, controversial account of constitutional principles. Suppose finally that constitutional decisions are often "narrow," in the sense that they focus on the situation at hand, and do not resolve problems that arise in the future. Where, exactly, should judges look, in deciding how to settle difficult controversies?

In the last decade, many people have been interested in "the wisdom of crowds"—the possibility that large groups of people, by virtue of their size and independence, are distinctly likely to give good answers to hard ques-

⁷ The qualification is needed because we could imagine that the original understanding would require courts to pay attention, on some occasions, to traditions or public convictions. Indeed, the cruel and unusual punishment clause is often seen as an example.

tions.⁸ Many minds arguments have been immensely influential in multiple domains, including politics, business, and law. As we shall see, the long-standing debate about the role of traditions turns, in large part, on the weight to be given to the views of many minds. So too with the debate over “popular constitutionalism,” embodied in the suggestion that the meaning of the Constitution turns on the judgments of We the People.⁹ So too with the heated debate about whether the Supreme Court should consult the judgments of other nations. Perhaps traditions embody the wisdom of large collections of people, and deserve respect for that very reason. And if most people now believe that discrimination on the basis of sex is unacceptable, perhaps they are right. And if many nations have decided against execution of mentally retarded people, perhaps the United States should join them, on the ground that they are unlikely to be wrong.

These propositions cannot easily be evaluated without asking some questions: Why, exactly, are crowds wise? How and when will it be true that large groups will give good answers to hard questions? Why should we be interested in the practices and judgments of many minds? Some of the most interesting answers are *evolutionary*: If many people have accepted a practice over time, the practice has apparently proved itself to be a good one. Other answers point to the value of *diversity* in generating good predictions. Crowds turn out to beat individuals; with any collection of diverse predictions, the collective prediction is more accurate than the average individual prediction.¹⁰ Still other answers are *Madisonian*: In a system of checks and balances, in which government action is possible only if many independent minds agree to it, we might be able to promote both deliberation and liberty.

I shall spend some time here on arguments from evolutionary pressures, from diversity, and from checks and balances. But a different and more formal answer lies in the Condorcet Jury Theorem, which will play a major role throughout my discussion. To see how the Jury Theorem works, suppose that many people are answering the same question with two possible answers, one false and one true. The question may be whether an American or a Russian was the first person on the moon, whether climate change

⁸ James Surowiecki, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few and How Collective Wisdom Shapes Business, Economies, Societies, and Nations* (New York: Doubleday, 2004).

⁹ See Larry Kramer, *The People Themselves* (New York: Oxford University Press, 2005).

¹⁰ See Scott Page, *The Difference 209–10* (Princeton: Princeton University Press, 2006).

is caused by human activities, whether America's gross national product increased between 1995 and 2000, whether Hank Aaron holds the home run record. Assume too that the probability that each person will answer correctly exceeds 50 percent, and that these probabilities are independent. The Jury Theorem says that the probability of a correct answer, by a majority of the group, increases toward 100 percent as the group gets bigger. The key point is that groups will do better than individuals, and large groups better than small ones, so long as two conditions are met: (a) majority rule is used and (b) each person is more likely than not to be correct.

The Jury Theorem is based on some fairly simple arithmetic. Suppose that there is a three-person group in which each member has a 67 percent probability of being right. The probability that a majority vote will produce the correct answer is 74 percent. As the size of the group increases, this probability increases too. If group members are 90 percent likely to be right, and if the group contains ten or more people, the probability of a correct answer by the majority is overwhelmingly high—very close to 100 percent. Consider in this regard the usual accuracy of the majority or plurality on the television show *Who Wants to Be a Millionaire?* Because many people are more likely to be right than wrong, and because the errors are likely to be random, it should be no surprise that on most questions, most people get it right.

The Jury Theorem is not widely known, but most people respond to its general logic. Suppose that we are unsure about some question or lack enough information. If so, we might well choose to adopt a simple rule in favor of following the majority of relevant others—the “do what the majority do” heuristic. If we do that, we are implicitly concluding that if most people do something, they are probably right. And when confronted with some hard problem, we might well consult a lot of people, and give careful consideration to what most of them suggest.

Might the Jury Theorem bear on constitutional law? I believe that it does. If we emphasize the arithmetic behind the Jury Theorem, we will have some clues about when many minds arguments make sense and when they fail. More modestly, we might put the Jury Theorem and its arithmetic to one side and make a comparative judgment: Even if all or most people are not likely to be right, it is possible that the average or median answer, from a large population, will be more reliable than the answer of federal judges. This conclusion might depend on the view that some constitutional

problems turn on answers to questions of fact; maybe group answers are better than those of a small number of judges. Or the conclusion might rest on a belief that when moral or political issues are involved, the general population is more reliable than appointees to the federal bench—who, for all their qualities of character and intelligence, tend to come from a small segment of a society, limited to lawyers and usually part of a wealthy elite.

MINIMALISTS VERSUS VISIONARIES

Many people think that where the Constitution is ambiguous, courts do best to attend to long-standing practices, on the ground that those practices reflect the judgments of many people extending over time. As we shall see, this backward-looking approach owes much of its appeal to the arguments of the great conservative theorist Edmund Burke, who emphasized that past practices, even social prejudices, may have a kind of wisdom, out-running the capacities of isolated people who must rely on their “private stock” of knowledge. Constitutional traditionalism is embodied in an approach to constitutional law that I call *Burkean minimalism*.

Burkean minimalism, it turns out, is simply one kind of minimalism. To make a long story short, minimalists like to rule narrowly and unambitiously. They despise revolutions. Burkean minimalists try to build on past practices, on the ground that the many minds that contributed to those practices are likely to have thought pretty well. But some minimalists, while despising revolutions, reject Burkeanism in favor of *rationalism*. They question traditions. They are entirely willing to ask whether long-standing practices are actually based on sense and good faith, or instead on nonsense and prejudice.

On the current Supreme Court, Justices Ruth Bader Ginsburg and Stephen Breyer have often acted as rationalist minimalists. Because they are minimalists, they are very different from such liberal visionaries as William Brennan and Thurgood Marshall. Brennan and Marshall had a large sense of where constitutional law should go, and they were not reluctant to offer ambitious arguments, whether or not it was necessary to do in order to resolve a concrete controversy. Brennan and Marshall were willing to use their own judgments about the requirements of justice in order to move constitutional law in bold new directions—protecting privacy, banning discrimination, and striking down capital punishment. Brennan and Marshall

went so far as to take seriously the possibility that the Constitution requires government to provide the minimal conditions of subsistence, including shelter and an income floor. By contrast, Ginsburg and Breyer seek to build narrowly and cautiously on the Court's own precedents.

In the recent past, one of the most intriguing developments on the Supreme Court has been the emergence of a powerful alliance between two different kinds of conservatives: the visionaries and the minimalists. Justices Antonin Scalia and Clarence Thomas have been the visionaries. In key ways, they are successors to Brennan and Marshall. Their sweeping opinions call for fundamental changes in constitutional law. To date, Chief Justice John Roberts and Justice Samuel Alito appear to be minimalists, with strong Burkean tendencies. They are reluctant to reject the Court's own precedents, and they attempt to rule in a way that preserves them; their opinions tend to be narrow and unambitious.

The conservative minimalists and the conservative visionaries have often made common cause—on abortion, campaign finance law, employment discrimination, student speech, race-conscious policies, and much more. But true Burkeans like to preserve the past. For the long term, the key question is whether the conservative minimalists believe only that precedents should be followed when it is unnecessary to reconsider them—or believe as well that precedents should be followed even when they are challenged head-on. The future of key constitutional principles—involving the right to abortion, affirmative action programs, presidential power in connection with the war on terror, and campaign finance legislation—is likely to turn on the answer.

CITIZENS AND FOREIGNERS

I have referred to a distinctly Jeffersonian view, also with deep constitutional roots, which sometimes goes by the name of popular constitutionalism. Many people believe that the views of We the People deserve a great deal of attention when judges are deciding on the meaning of the founding document. I shall attempt to show that no less than traditionalism, popular constitutionalism is a many minds argument—one that sees truth, or at least sense and valuable information, in the judgments of large groups of people. While the Supreme Court refers to traditions, and while traditions play an unmistakable role in constitutional doctrine, the role of public con-

victions is more subtle. I shall attempt to make progress in understanding when and why they matter. A particular question is the circumstances under which the Court should respond to the risk or reality of “backlash.” As we shall see, it is sometimes proper for judges to hesitate, simply because an aggressive approach would have bad consequences; and sometimes judges should hesitate because the intensely held views of the public deserve respect.

In recent years, the Supreme Court has occasionally referred to the views of foreign courts in hard constitutional cases. In striking down bans on same-sex sexual relations, and in invalidating capital punishment for young people and the mentally retarded, the Court has asked what other nations do. As we shall see, the argument for consulting foreign practices greatly overlaps with the argument for consulting traditions and public opinion. If most nations, or most relevant nations, reject a certain practice, shouldn't the United States pay attention? Many nations, especially those now establishing constitutional democracy, would do well to consult the practices of other nations. In the end, however, I will suggest that the Supreme Court would do best to restrict itself to domestic sources.

EXPERTS AND POLITICAL VALENCES

My major goal here is to understand the nature of many minds arguments in constitutional interpretation—their characteristic structure, their foundations, and their characteristic weaknesses. I shall also be exploring the relationship between many minds arguments and the practice of minimalism, by which judges issue narrow and shallow rulings. As we shall see, the connection is fairly tight.

A pervasive issue involves the role of expert judgments in law, and the relationship of those judgments to the (less expert) judgments of the many. The issue is important because judges are supposed to be experts on law, and ordinary people are not. Consider an analogy. There is good reason to think that the regular patrons of a large sports bar, taken as a whole, will know more sports statistics than any given patron. There is also good reason to think that the majority view of such patrons will often be right on questions about baseball. But there is no reason to trust the majority of the University of Chicago faculty (large as it is) on any question about baseball.

We should hardly be shocked if any particular patron at a sports bar, picked at random, turned out to do better on questions about baseball than the majority of a university faculty.

In this light we should be able to see that on legal questions, a small group of judges might do a lot better than a large group of nonspecialists. If judges are asked about the meaning of the Constitution's right "to keep and bear arms," perhaps they would do a lot better than traditions do, or than the public as a whole does. If legal specialists are asked whether the president has committed a "high crime or misdemeanor," their judgments might be far more reliable than that of a majority of the public, whose members might favor impeachment simply because they are upset with the president, or think he did something badly wrong.

Does it follow that on questions of constitutional law, the views of non-experts are irrelevant? The answer depends on the prevailing theory of interpretation. If we think that the meaning of the Constitution is settled by the original understanding, the view of the founding generation matters, and the view of the present does not. If we think that the meaning of the Constitution evolves with judicial precedent, the views of the judges may matter a lot more than the views of the public. But if we think that Jefferson was in some sense correct, traditions and public opinion will matter a lot.

While my focus is not on the conventional "left-right" divisions within the Supreme Court, it is important to see that the three many minds arguments have different political valences. Not surprisingly, arguments from traditions tend to appeal to conservatives, who think that the Court should look backward and conserve. Liberals tend to distrust traditionalism, believing that traditions are often unjust and that the Court would do better to look forward to a more just future. Conservatives have been intensely hostile to the Supreme Court's occasional attention to foreign law; they fear that the Court is yielding some of American sovereignty to practices in Germany, the United Kingdom, and France. By contrast, liberals have been more hospitable to consideration of foreign law; they tend to think that the meaning of the Constitution turns on questions of justice, and that the United States may have something to learn about justice by considering the practices of other nations.

Popular convictions present a more complicated picture. In the Warren Court years, many conservatives endorsed a form of popular constitution-

alism.¹¹ This was a period in which the Supreme Court was quite aggressive in a liberal direction—invalidating mandatory school prayer, desegregating schools, requiring a rule of one-person, one-vote, and creating a right of privacy. In that period, conservatives wanted the judiciary to pay respectful attention to the practices and judgments of *We the People*. But in the 1920s and 1930s, it was liberals who endorsed popular constitutionalism, asking the Supreme Court to uphold democratically enacted legislation, including minimum wage and maximum hour laws, the National Labor Relations Act, and the Social Security Act. In the modern period, liberals have reacted to the new judicial conservatism by asking judges to be more deferential.¹² In short, it is not easy to read the interest in popular constitutionalism in political terms, and its political valence shifts dramatically over time.

THE PLAN

The remainder of this book is structured as follows. Part I offers arguments that are necessary conditions for everything that follows. Here I contend that the idea of interpretation, standing by itself, will not permit us to choose among several reasonable approaches to the Constitution. Some people are “originalists”; they believe that the Constitution should be construed to mean what was originally meant. Originalism is certainly a method of interpretation, but it is not the only one. Any particular approach to interpretation must be defended, not merely asserted. Any such defense must pay close attention to the consequences of the approach in question. Traditionalism, populism, and cosmopolitanism are legitimate contenders.

Part II, consisting of chapters 2, 3, and 4, explores traditions. Chapters 2 and 3 focus on Burkean minimalism. Burkean minimalists want to proceed narrowly and unambitiously. They also seek to rule with careful reference to traditions. The Burkean argument is built largely on the claim that long-standing practices are a product of the judgments of many minds, extending over time. Why—Burkeans ask—should judges, with their limited stock of reason, feel free to reject those judgments?

¹¹ Some of the tale is told in Michael J. Klarman, *From Jim Crow to Civil Rights* (New York: Oxford University Press, 2004).

¹² See, e.g., Mark Tushnet, *Taking the Constitution Away from the Courts* (New York: Oxford University Press, 1997).

This question is a good one, but it is not meant to be rhetorical. Chapter 3 investigates the circumstances under which Burkeanism makes sense. Chapter 4 sharpens the focus by asking about the proper understanding of the due process clause—the source of many fundamental rights, including the right to choose abortion and the right to engage in sexual relations. Many judges have argued for a form of due process traditionalism—an approach that would understand the term “liberty,” in the due process clause, as limited to rights that our traditions have long recognized as such. We shall see, however, that due process traditionalism runs into serious problems.

Part III, including chapters 5, 6, and 7, deals with populism. Chapter 5 suggests that it is not possible to specify the appropriate judicial posture toward “public backlash” in the abstract. Here, as with selection of a method of interpretation, everything depends on judgments about the capacities of the judiciary and of elected institutions. Chapters 6 and 7 explore two reasons why judges might care about intensely felt public convictions. The first reason, emphasized in chapter 6, involves the *consequences* of ignoring those convictions. The second reason, explored in chapter 8, involves judicial *humility*. Suppose, for example, that judges ruled that states must recognize same-sex marriage, or that the Constitution forbids the use of the words “under God” in the Pledge of Allegiance. If so, there would be a predictable public outcry, and a range of bad consequences might follow. Judges might also ask: If most people believe that our approach to the Constitution is wrong, should we not listen to them? I conclude that in unusual but important cases, judges should indeed hesitate if many people disagree with their initial inclinations.

Because of how much has preceded it, part IV, consisting of chapter 8, can be relatively brief. It focuses generally on constitutional cosmopolitanism and in particular the intense controversy over whether the Supreme Court should pay attention to foreign law in interpreting the Constitution. If the views of many minds are entitled to respect, perhaps sensible judges, within one nation, should listen carefully to the view of judges outside of that nation. Ultimately I shall suggest that this conclusion is right for many nations, but generally wrong for the United States. The larger lesson has to do with specifying conditions under which many minds, captured in international practice, deserve respectful consideration.

The afterword sets out some broad lessons about many minds arguments. Drawing on the study of traditions, public opinion, and foreign law, it explores when those arguments are strong and when they are characteristically vulnerable. That exploration has implications not merely for constitutional law, but also for traditionalism, populism, and cosmopolitanism in general.