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DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO

By Cass Sunstein

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Cass Sunstein is prolific. In just over a decade he has produced more than a dozen major works on constitutional law and theory. This is on top of the 150 or so law review articles, op-ed pieces and conference papers that now make up his body of work. Books such as *After the Rights Revolution* (1990), *The Partial Constitution* (1993), *Democracy and the Problem of Free Speech* (1993) and *One Case At A Time* (1999) are becoming classics in the area. Sunstein is also a prominent member of the 'revivalist' movement that reinstated republican theory at the heart of American constitutional thought.[1] No one could doubt the significance that he now plays in American constitutional thought.

Keeping up with Sunstein's output is a task in itself. His recent work, *Designing Democracy* continues his familiar academic approach of exploring 'hard' constitutional issues through the prism of his now well developed theoretical perspectives. *Designing Democracy* has at its core the interaction of two critical concepts in the modern liberal state: democracy and constitutionalism. As Sunstein states:

> In my view, the central goal of a constitution is to create the preconditions for a well-functioning democratic order, one in which citizens are generally able to govern themselves.[2]

In his introduction, Sunstein twins this truism with the equally nebulous concept of 'deliberative democracy', which has become another catch-phrase in modern democratic theory. At the outset the work appears to be heading in the direction of abstraction where statements and assertions are made in a manner that is difficult to

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1 C Sunstein, 'Beyond the Republican Revival' (1988) 98 *Yale Law Journal* 1539.

2 C Sunstein, *Designing Democracy: What Constitutions Do* (2001) 6.

find fault with, but also equally difficult to find application to particular circumstances.

The first three chapters of the book, 'Deliberative Trouble', 'Constitutional Principles without Constitutional Theories' and 'Against Tradition', develop the theoretical architecture of the work. It is the argument and conclusions made in these chapters that are deployed in the rest of the book. The remaining six chapters deal with specific cases such as succession, the impeachment of the President, homosexuality and the Constitution, sex equality and social and economic rights.

This book is a product of current constitutional developments in the United States and beyond. The question of the impeachment of President, while cast in general terms, is in reality a constitutional argument against the treatment by the Republicans in the United States Congress of President Clinton. The drafting of new constitutions for the states of the former Soviet Union and the new South Africa have also heavily influenced the author. South Africa, he says, has 'the most admirable constitution in the history of the world'.[3]

As with other books by Sunstein much of the contents of this volume have appeared in other forms. Indeed, all ten chapters have been previously published in various law reviews or edited collections. Whilst the author acknowledges the earlier publications, he assures the reader that 'much of this book is new'.[4] One obvious criticism, however, of the work, is the selection of topics that make up the exemplary chapters. While interesting in themselves, they provide slightly disconnected examples of the deliberative democracy in action. Why for instance choose the impeachment of the President and not the election of the President? What is the relationship between impeachment and what is described as the 'Anticaste principle'? While the deliberative democracy theme links all the chapters, it is not so clear whether or not the topics are of equal importance or merely of academic interest to the author. To be fair to Sunstein, many of the other issues, such as the role of the judiciary and the importance of rights, are considered in his other major works.

The major overarching argument in chapter 1 relates to the concept of deliberative democracy. Sunstein concedes that, in some circumstances, 'all the deliberation in the world will not dissolve disagreement'.[5] What he seeks to anticipate is how constitutional arrangements may seek to elevate the problems of modern pluralistic democracies. In particular, he focuses on the problem of 'group polarisation'. Briefly, Sunstein argues that in all societies there are innumerable groups such as churches, political, ethnic, legislative bodies, juries, womens' groups, and so on.

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3 Ibid 261.

4 Ibid 262.

5 Ibid 8.

The existence of these and other groups may appear to underscore the wealth of a deliberative democracy. Yet these groups may, given the wrong circumstances, tend to group polarisation. Such polarisation means that 'members of a deliberating group predictably move to a more extreme point in the direction indicated by the members' predeliberation tendencies'.[6] Thus, deliberation can become the problem not the solution.

It is argued that the principle mechanisms underlying this movement are 'social influence on behaviour' and the limited 'argument pools' within any group. In the first chapter Sunstein explains how and why groups polarise. It is interesting to note that Sunstein does not only see this as a phenomenon limited to political or social groups. Citing the work of Richard Revesz[7] and Frank Cross and Emerson Tiller[8] he argues that:

> If a court consists of three or more like-minded judges, it may well end up with a relatively extreme position, more extreme in fact than the positions it would occupy if it consisted of two like-minded individuals and one of a different orientation…The fact that like-minded judges go to extremes seems to provide clear evidence of group polarization in action.[9]

How to resolve these and other examples of polarisation results in a conundrum. In societies with dominant groups it is important to allow enclaves for minority groups to deliberate free from the pressure of the influential groups. Yet, such isolation leaves minority groups susceptible to going to extremes. The constitutional answer to this problem is taken up in the examples in the book. In essence Sunstein argues, as the title of the book suggests, for good constitutional design — a design that both ensure shifts in deliberative position as well as checking the harmful consequences of group discussion.

Also re-emerging in this work is Sunstein's belief in 'incompletely theorized agreement'.[10] In short:

> [p]eople can often agree on constitutional *practices*, and even on constitutional rights, when they cannot agree on constructional *theories*. In other words, well-functioning constitutional orders try to solve problems, including problems of deliberative trouble, through reaching *incompletely theorized*

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6 Ibid 15.

7 R L Revesz, 'Environmental Regulation, Ideology, and the D.C. Circuit' (1997) 83 *Virginia Law Review* 1717.

8 F Cross and E Tiller, 'Judicial Partnership and Obedience to Legal Doctrine' (1998) 107 *Yale Law Journal* 2155.

9 C Sunstein, above n 2, 37.

10 C Sunstein, *Legal Reasoning and Political Conflict* (1996) 35–61.

> *agreements*. Sometime these agreements involve abstractions, accepted amid severe disagreements on particular cases.[11]

The 'incompletely theorized agreement' thesis is attractive to a common law country like Australia where change is incremental and bold theoretical pronouncements are generally eschewed. For instance, McHugh J in *McGinty* firmly rejects the notion of theories of interpretation external to the text itself.

> Underlying or overarching doctrines may explain or illuminate the meaning of the text or structure of the Constitution but such doctrines are not independent sources of the powers, authorities, immunities and obligations conferred by the Constitution. Top-down reasoning is not a legitimate method of interpreting the Constitution.[12]

The obvious criticism of the 'incompletely theorized agreement' thesis is that it tends to suggest that an atheoretical or 'practical' world is preferable to one where constitutional theory is in the ascendancy. Sunstein's argument cannot sensibly be a recourse to a wholly practical approach. Indeed, the reason for the 'don't ask don't tell' approach to agreement-making is that various groups come at issues from entrenched ideological or philosophical positions. So too the existence of divergent constitutional theoretical positions does not necessarily close off possible agreement. Thus Sunstein must be seen as focusing on agreement-*making*, rather the defining of the parameters of the dispute. By focusing on the agreement-making Sunstein argues that polarisation of groups can be elevated.

This theme of finding means of avoiding polarisation is taken up in chapter 3, entitled 'Against Tradition', which examines the argument that following tradition avoids the need to resolve 'hard issues'. Such a view, according to Sunstein, is dependent upon the type of constitution a country has. 'Preservative' constitutions, such as the United States and presumably Australia, 'attempt to protect long-standing practices that, it is feared, will be endangered by momentary passions'.[13] 'Transformative' constitutions on the other hand, 'attempt not to preserve an idealized past but to point the way forward to an ideal future'. The most obvious example of this type of constitution is the post-apartheid Republic of South Africa. Sunstein argues that tradition is not the appropriate source for rights in that it tends to privilege.

As noted above, chapters 4, 5, 6, 8, 9 and 10 deal with particular instances to which the deliberative democracy principles can be applied. Chapter 7, dealing with the 'Anticaste Principle', links to the opening three chapters and develops a further

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11 C Sunstein, above n 2, 50. (Emphasis original.)

12 *McGinty v Western Australia* (1996) 186 CRL 140, 231–2.

13 C Sunstein, above n 2, 67.

aspect of deliberative democracy. In chapter 4, the issue of whether there should be a right to secession is considered. Surprisingly, Sunstein does not consider the issue by looking north to Canada. The Supreme Court's decision regarding the sovereignty aspiration of Quebec canvases many of the questions that Sunstein comments upon.[14] In chapter 8, Sunstein questions whether or not homosexuality should, in constitutional terms, be considered within the paradigm of anti-discrimination or what he describes as the 'anticaste principle'. He takes a cautionary approach on the issue of same-sex marriages, arguing that more deliberation is needed and a Supreme Court decision could have deleterious effects.

> If the Supreme Court of the United States accepted the argument [of equal protection] in the near future, it might cause a constitutional crisis, a weakening of the legitimacy of the Court, an intensifying of homophobia, a constitutional amendment overturning the Court's decision, and much worse. Any Court, even committed to the basic principle, should hesitate in the face of such prospects. It would be far better for the Court to start cautiously and to proceed incrementally.[15]

It is in the section on homosexuality and constitution law that Australia gets its sole citation. Sunstein suggests, wrongly, that:

> It is noteworthy too that many democracies, responding to concerns about both equality and dignity, have eliminated prohibitions on same-sex relations, with decriminalization of sodomy occurring in the United Kingdom, Ireland, Australia (with the exception of Tasmania), New Zealand, Canada, and most of western Europe.[16]

Tasmania has repealed section 123 of the *Criminal Code* and now has passed the *Anti-Discrimination Act* 1998.

As a writer, Sunstein anticipates his critics. His work has a fine logic to it and commences with a prepositional statement of the argument that he seeks to develop. Coupled with this refreshing clarity is his ability to anticipate the reader's obvious criticism to his proposition.

While not breaking new ground, *Designing Democracy* does provide greater detail on themes that Sunstein has previously discussed. *Designing Democracy* is something of a 'best of' album. While not essential listening, it is always good to have on your shelf.

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14 *Reference re Secession of Quebec* [1998] 2 SCR 217.

15 C Sunstein, above n 2, 206.

16 C Sunstein, above n 2, 185.