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On Avoiding Foundational Questions - A Reply to Andrew Coan

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A REPLY TO ANDREW COAN

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In both legal practice and legal scholarship, it is sometimes best to proceed without attempting to answer the foundational questions. Originalists can inquire into the original public meaning of the Equal Protection Clause without defending originalism. Economic analysts of law can ask how to promote efficiency without defending the view that the law should aim at efficiency. It would be useful to know how utilitarians and retributivists would approach punitive damage awards, without resolving the question whether we should be utilitarians or retributivists. Here, as elsewhere, a division of labor makes good sense. Some people (or some works) take certain judgments for granted and proceed from there; other people (or other works) try to resolve the deepest questions.

On some occasions, the Supreme Court seems to have taken account of the risk or reality of public outrage.[1] Surprisingly, there has been little analysis of the question whether the Court has been right to do so. (This may be the only area of public law in which the positive literature[2] is more developed than the normative literature!) It would seem to be useful to begin by asking how those with different understandings of constitutional interpretation might approach the problem. At first glance, originalists would seem unlikely to approach public outrage in the same way as "moral readers";[3] committed

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1. *See, e.g.*, Naim v. Naim, 350 U.S. 891 (1955) (declining to decide whether bans on racial intermarriage are unconstitutional).

2. For an early treatment, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. PUB. L. 279 (1957). For a recent and broadly compatible discussion, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2006). For a valuable collection, see PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds., forthcoming 2008).

3. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN

consequentialists[4] are likely to have a distinctive view. But perhaps these conclusions are too crude. Perhaps the distinctions are less sharp than we suppose. Perhaps an exploration of different approaches will reveal some surprises.

In my essay on the question,[5] I attempted to explore how different judges, with different approaches to constitutional law, might think about two separate reasons for judicial consideration of outrage: the consequentialist and the epistemic. Perhaps judges should consider outrage with the thought that if they fail to do so, the consequences of their rulings might turn out to be very bad. Or perhaps judges should consider outrage on the ground that if the public feels so intensely, their own conclusions might well be wrong. Learned Hand famously wrote that "[t]he spirit of liberty is the spirit which is not too sure that it is right,"[6] and perhaps judges should pay attention to public outrage out of modesty about their own conclusions. Not surprisingly, the consequentialist and epistemic arguments will be received differently by those with different approaches to constitutional meaning.

In his illuminating response,[7] Andrew Coan makes a number of valuable suggestions, but two seem to me primary. The first is that it is difficult to take a position on the relevance of consequences without taking a position on consequentialism.[8] Avoiding any such position, my own argument does have a minimalist character; it explores how those with different approaches will respond to outrage without taking a stand on those approaches. Coan asks, reasonably enough: how can we know how judges should proceed without knowing what approach is right?[9] Coan's second suggestion is that a good reason to take account of public outrage is to show respect for democracy.[10] In his view, the consequentialist and epistemic arguments are incomplete; democratic considerations should be primary.[11] Let me take up these suggestions in sequence.

Coan is right to say that we cannot know whether to consider consequences without knowing whether to be consequentialists. But the debate over consequentialism raises many complex questions, and surely it is useful to see how those with different approaches to constitutional law might think about

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CONSTITUTION (1996).

4. *See, e.g.*, RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

5. *See* Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007).

6. LEARNED HAND, *The Spirit of Liberty*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189, 190 (Irving Dilliard ed., 3d ed. enlarged 1960).

7. Andrew Coan, *Well, Should They? A Response to* If People Would Be Outraged by Their Rulings, Should Judges Care?, 60 STAN. L. REV. 213 (2007).

8. *Id.* at 216-17.

9. *Id.*

10. *Id.* at 233-39.

11. *Id.*

outrage without answering the question whether judges should accept consequentialism. Without making a general defense of consequentialism, I did mean both to identify and to raise questions about Kantian adjudication, captured in the idea that judges should interpret the law without paying attention to the effects of their rulings.[12] In my view, Kantian adjudication is most naturally defended on (second-order) consequentialist grounds, with the suggestion that things would be much worse if judges routinely asked whether their conclusion would produce bad consequences.[13]

It is easy to understand the deontological claim that people should be treated as ends, not means. It is not so easy to understand the view that judicial consideration of consequences would run afoul of this claim.[14] In short, I attempt to give reasons to reject Kantian adjudication without rejecting Kantianism, and without mounting anything like a full-scale defense of consequentialism.

Coan has a separate argument. By itself, the idea of consequentialism is insufficiently helpful. We need a theory of value to identify consequences as good, and to decide how they should be weighted. (Is it a good consequence if women are allowed to have abortions? How good?) Coan and I are in agreement on this point, which means that a lot of work has to be done to give content to the consequentialist argument for considering public outrage.[15] Nonetheless, we can imagine a range of cases in which diverse people might be able to agree that consequences would be bad. An easy case would be a judicial ruling resulting in the death of many American soldiers. Moreover, those who believe that the Constitution is best construed to require recognition of same-sex marriages might well hesitate to rule to that effect if the consequence would be to inflame hostility against gay and lesbian couples (while also dooming a slow but real movement toward according legal rights to such couples).

The simple point is that in a range of cases, it is unnecessary to resolve hard questions of value in order to recognize certain consequences as bad. Coan is right to say that consequentialism needs a theory of value to get off the ground. But in many cases, we can agree that some results are bad and others good, without attempting to resolve our disagreements about the foundational questions.

Coan's more ambitious suggestion is that the consequentialist and epistemic arguments miss something of great importance.[16] In his view, people are entitled to govern themselves. When judges pay attention to public outrage, they show respect for the ideal of self-government. He contends that the consequentialist and epistemic arguments slight democratic considerations,

12. Sunstein, *supra* note 5, at 164-66.
13. *Id.* at 166, 178-79.
14. I do attempt, however, to make some sense of this view. *See id.*
15. *Id.* at 172-75.
16. *Id.* at 175-76.

from which their force derives; indeed, such considerations turn out to be "a necessary prerequisite for determining when and whether we should find those arguments persuasive."[17]

Coan is right to say that consequentialists might well conclude that self-government matters a great deal, and that invalidation of a judgment of the elected branches counts as a bad consequence. I will return to this point. But the epistemic argument must be dealt with separately. There are many accounts of democracy, but one is emphatically epistemic: by virtue of their numbers, the people are more likely to be right.[18] A softer version of this proposition would be comparative: by virtue of their numbers, the people are more likely to be right, on many matters, than are small groups of people, such as federal judges.[19] My own discussion, focused on the narrow question of public outrage directed at judicial decisions, is intended to cast some light on the more general question why and under what conditions the epistemic defense of democracy might be right or wrong.[20] If, for example, people suffer from a systematic bias, and hence are more likely to be wrong than right, the epistemic argument loses its force.

Coan's positive suggestion is that democracy provides an independent reason for judges to attend to public outrage.[21] In the end, he might be right. But the claim runs into immediate problems. What if there is good reason to believe that the people are likely to be wrong on some question of fact or morality? What if the public seeks to restrict speech, or to discriminate against a religious minority, because of some kind of systematic bias? In any case, we should not identify the idea of "democracy" with whatever happens to emerge from the political branches. What if members of those branches are attempting to entrench themselves, at the expense of democracy? At a minimum, the idea of democracy comes with its own internal morality, and judges may well be vindicating that morality when they invalidate laws in democracy's name. If so, does judicial attention to public outrage promote democracy, rightly conceived, or does it do the opposite?

Suppose that a state has banned certain people from voting or restricted their ability to influence the political process. Suppose that the ban or the restriction is challenged on constitutional grounds, and that (most or many) people would be quite outraged if the Court accepted the challenge. Or suppose

17. Coan, *supra* note 7, at 234.

18. *See* Bernard Grofman & Scott L. Feld, *Rousseau's General Will: A Condorcetian Perspective*, 82 AM. POL. SCI. REV. 567 (1988).

19. On diversity and truth, see SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (2007).

20. *See* Sunstein, *supra* note 5, at 186-90.

21. Coan, *supra* note 7, at 233-39. Coan urges that an exploration of public outrage helps to show the problematic relationship between originalism and democracy. *Id.* at 219 n.24. I agree with his general conclusion; for more on the problems with originalism, see CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2006).

that a state has prohibited certain forms of political dissent, and the Court is asked to strike down the prohibition on constitutional grounds, even though invalidation would provoke outrage. The problem should be familiar. If democracy is our lodestar, we might well favor certain judicial invalidations, and in such cases, outrage is neither here nor there. This point raises an obvious question: which invalidations? John Hart Ely's *Democracy and Distrust*[22] might be taken as providing one set of answers, and there are others.[23] My only suggestion is that the idea of democracy, as such, does not counsel attention to public outrage when the public is outraged by judicial efforts to protect democracy's internal morality.

Suppose, however, that invalidations cannot be connected with democratic ideals. Suppose, for example, that judges are asked to strike down a law that bans sexually explicit literature, or that allows the government to eavesdrop on ordinary conversations, or that mandates school prayer. Even if democratic self-government is not at risk, it is possible that judicial invalidation in such circumstances is justified by the right conception of *constitutional* democracy[24]—including the set of individual rights, or political principles, that might be thought to give democracy itself its point. If this is so, judicial attention to public outrage would be perverse. Judges would be creating a kind of public veto on decisions that are entailed by the best understanding of the document.

These points seem to me to raise real questions about Coan's argument. We should be able to understand the view that judges should consider public outrage on the ground that it is a clue that the judicial understanding is not correct (the epistemic argument). We should also be able to understand the view that judicial failure to consider public outrage might produce either counterproductive rulings or overall harm (the consequentialist argument). What is harder to understand is the view that judges should invoke the idea of self-government in order to decline to rule in accordance with the best understanding of constitutional democracy.

I do not deny that the democratic ideal might give judges reason to hesitate in the face of intense popular convictions in some cases, and that in some of those cases the right to self-government is doing real work. But in such cases, the insult to self-government should be seen as a bad consequence—one that consequentialist judges should be willing to take into account. Recall that consequentialism needs a theory of value, and it is certainly possible for consequentialists to recognize an assortment of heterogeneous goods,[25] of which the right to self-government is emphatically one.

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22. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

23. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985).

24. *See* DWORKIN, *supra* note 3.

25. *See* Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035, 1038-39 (1996) (noting possibility of considering rights violations as part of assessment of consequences).

I do not mean to suggest that judges should feel free to understand the Constitution's broad terms in a way that fits with their preferred conception of political morality. In my view, judges should adopt a form of second-order perfectionism,[26] based on an understanding of their own institutional limits. A minimalist approach, including frequent respect for the outcomes of political processes, seems to me an attractive form of second-order perfectionism.[27] And in the end, the epistemic argument for judicial attention to public outrage does turn out to be weak—but in rare but important cases, the consequentialist argument has considerable force not merely for minimalists, but also for others who accept many different approaches to constitutional law.[28] If this conclusion is correct, then we might be able to accept that argument, in those rare but important cases, even as we avoid the foundational questions.

26. *See* Cass R. Sunstein, *Second-Order Perfectionism*, 75 FORDHAM L. REV. 2867 (2007).

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

28. *See* Sunstein, *supra* note 5.