Cass R. Sunstein

Incompletely Theorized Agreements in Constitutional Law

IN MANY NATIONS, CITIZENS MUST PROCEED IN THE FACE OF CONFLICT and disagreement on the most fundamental matters. The existence of diverse values seems to threaten the very possibility of a constitutional order and social stability. People disagree on rights, on the good life, on equality and liberty, on the nature and the existence of God. How can constitutional decisions be feasible in these circumstances? The problem might seem especially serious for democratic societies, which aspire to self-governance amidst a great deal of heterogeneity. In this essay I deal with two issues—constitution-making and constitutional interpretation—in an effort to make some progress on that question.

My basic suggestion is that people can often agree on constitutional *practices*, and even on constitutional rights, when they cannot agree on constitutional *theories*. In other words, well-functioning constitutional orders try to solve problems through *incompletely theorized agreements*. Sometimes these agreements involve abstractions, accepted as such amid severe disagreements on particular cases. Thus people who disagree on incitement to violence and hate speech can accept a general free speech principle, and those who argue about same-sex relationships can accept an abstract antidiscrimination principle. This is an important phenomenon in constitutional law and politics; it makes consti-

tution-making possible. Constitution-makers can agree on abstractions without agreeing on the particular meaning of those abstractions.

But sometimes incompletely theorized agreements involve concrete outcomes rather than abstractions. In hard cases, people can agree that a certain practice is constitutional, or is not constitutional, even when the theories that underlie their judgments sharply diverge. In the day-to-day operation of constitutional practice, incompletely theorized agreements on certain rules and doctrines help to ensure a sense of what the law is, even amid large-scale disagreements about what, particularly, accounts for those rules and doctrines.

This latter phenomenon suggests a general strategy for handling some of the most difficult decisions. When people disagree or are uncertain about an abstract issue—Is equality more important than liberty? Does free will exist? Is utilitarianism right? Does punishment have retributive aims?—they can often make progress by moving to a level of greater particularity. They attempt a *conceptual descent*. This phenomenon has an especially notable feature: it enlists silence, on certain basic questions, as a device for producing convergence despite disagreement, uncertainty, limits of time and capacity, and heterogeneity. In short, silence can be a constructive force. Incompletely theorized agreements are an important source of successful constitutionalism and social stability; they also provide a way for people to demonstrate mutual respect.

Consider some examples. People may believe that it is important to protect religious liberty while having quite diverse theories about why this is so. Some people may stress what they see as the need for social peace; others may think that religious liberty reflects a principle of equality and a recognition of human dignity; others may invoke utilitarian considerations; still others may think that religious liberty is itself a theological command. Similarly, people may invoke many different grounds for their shared belief that the Constitution should ensure an independent judiciary. Some may think that judicial independence helps ensure against tyranny; others may believe that it makes government more democratic; still others may think that it leads to greater efficiency in economic terms.

The agreement on particulars is incompletely theorized in the sense that the relevant participants are clear on the practice or the result without agreeing on the most general theory that accounts for it. Often people can agree that a rule—protecting political dissenters, allowing workers to practice their religion—makes sense without entirely agreeing on the foundations of their belief. They may accept an outcome—affirming the right to marry for heterosexual couples, protecting sexually explicit art, banning racial segregation—without understanding or converging on an ultimate ground for that acceptance. Often people can agree not merely on the outcome, but also on a rationale offering low-level or mid-level principles on its behalf. But what ultimately accounts for the outcome, in terms of a full-scale theory of the right or the good, is left unexplained.

There is an extreme case of incomplete theorization, offered when disagreement is especially intense: *full particularity*. This phenomenon occurs when people agree on a result without agreeing on any kind of supporting rationale. They announce what they want to do without offering a reason for doing it. Any rationale—any reason—is by definition more abstract than the result that it supports. Sometimes people do not offer reasons at all, because they do not know what those reasons are, or because they cannot agree on reasons, or because they fear that the reasons that they have would turn out, on reflection, to be inadequate and hence to be misused in the future. This is an important phenomenon in Anglo-American law. Juries usually do not offer reasons for outcomes, and negotiators sometimes conclude that something should happen without saying why it should happen. I will not emphasize this limiting case here, and shall focus instead on outcomes accompanied by low-level or mid-level principles.

My emphasis on incompletely theorized agreements is intended partly as descriptive. These agreements are a pervasive phenomenon in constitution-making and constitutional law. Such agreements are crucial to the effort to make effective decisions amidst intense disagreement. But I mean to make some points about constitutionalism amid pluralism as well. In short, there are special virtues to avoiding large-

scale theoretical conflicts. Incompletely theorized agreements can operate as foundations for both rules and analogies, and such agreements are especially well suited to the limits of many diverse institutions, including legislators and courts. Incompletely theorized agreements have their place in the private sector as well. They can be found in university faculties, in the workplace, and even within families. At the same time, there are many puzzles about the limits of incomplete theorization, and about the relationship between incomplete theorization and self-consciously traditionalist approaches to constitutional law and social life in general.

HOW PEOPLE CONVERGE

It seems clear that outside of law, people may agree on a *correct* outcome even though they do not have a theory to account for their judgments. You may know that dropped objects fall, that bee stings hurt, that hot air rises, and that snow melts without knowing exactly why these facts are true. The same is true for morality, both in general and insofar as it bears on constitutional law. You may know that slavery is wrong, that government may not stop political protests, that every person should have just one vote, and that it is bad for government to take your land unless it pays for it without knowing exactly or entirely why these things are so. Moral judgments may be right or true even if they are reached by people who lack a full account of those judgments (though moral reasoners may well do better if they try to offer such an account, a point to which I will return). The same is true for law, constitutional and otherwise. A judge may know that if government punishes religious behavior, it has acted unlawfully, without having a full account of why this principle has been accepted as law. We may thus offer an epistemological point: people can know *that* X is true without entirely knowing *why* X is true.

There is a political point as well. Sometimes people can agree on individual judgments even if they disagree on general theory. In American constitutional law, for example, diverse judges may agree that *Roe v. Wade* (410 U.S. 113, 1973),[1] protecting the right to choose

abortion, should not be overruled, though the reasons that lead each of them to that conclusion sharply diverge. Some people think that the court should respect its own precedents; others think that *Roe* was rightly decided as a way of protecting women's equality; others think that the case was rightly decided as a way of protecting privacy; others think that the decision reflects an appropriate judgment about the social role of religion; still others think that restrictions on abortion are unlikely to protect fetuses in the world, and so the decision is good for pragmatic or consequentialist reasons. We can find incompletely theorized political agreements on particular outcomes in many areas of law and politics—on both sides of disputes over national security, on both sides of discrimination controversies, both sides of disputes over criminal justice, both sides of disputes over taxation.

Within the United States, there are incompletely theorized agreements within the Republican Party and among Republican-appointed judges. There are similar agreements within the Democratic Party and among Democratic-appointed judges. Political parties are held together by incomplete theorization; when such parties fracture, or fall apart, it is sometimes because theorization must become more complete. Some of the most interesting agreements can be found not within but across the parties. In the United States, Republicans and Democrats agree on a great deal, not necessarily because they accept the same foundational commitments, but because people of diverse commitments can converge on the same practices and even principles.

RULES AND ANALOGIES

Rules and analogies are the two most important methods for resolving constitutional disputes without obtaining agreement on fundamental principles. Both of these devices—keys to public law in many nations—attempt to promote a major goal of a heterogeneous society: *to make it possible to obtain agreement where agreement is necessary, and to make it unnecessary to obtain agreement where agreement is impossible.*

People can often agree on what constitutional rules are even when they agree on very little else. Their substantive disagreements, however

intense, are usually irrelevant to their judgments about the meaning and the binding quality of those rules.[2] And in the face of persistent disagreement or uncertainty about what justice and morality require, people can reason about particular constitutional cases by reference to analogies. They point to cases in which the legal judgments are firm. They proceed from those firm judgments to the more difficult ones. In fact this is how ordinary people tend to think.

We might consider in this regard Supreme Court Justice Stephen Breyer's discussion of one of the key compromises reached by the seven members of the United States Sentencing Commission (Breyer, 1988: 14-19). As Breyer describes it, a central issue was how to proceed in the face of highly disparate philosophical premises about the goals of criminal punishment. Some people asked the commission to follow an approach to punishment based on "just deserts"—an approach that would rank criminal conduct in terms of severity. But different commissioners had very different views about how different crimes should be ranked. In these circumstances, Justice Breyer reports, there could be an odd form of deliberation in which criminal punishments became more and more irrationally severe, because some commissioners would insist that the crime under consideration was worse than the previously ranked crimes. In any case, agreement on a rational system would be unlikely to follow from efforts by the seven commissioners to rank crimes in terms of severity.

Other people urged the commission to use a model of deterrence. There were, however, major problems with this approach. No good empirical evidence links all possible variations in punishment to prevention of crime. In any case, the seven members of the commission were highly unlikely to agree that deterrence provides an adequate account of the aims of criminal sentencing. To many people, it is controversial to suggest that deterrence is the sole or even principal goal of punishment. An approach based on deterrence seemed no better than an approach based on just deserts.

In these circumstances, what route did the commission follow? In fact, the commission abandoned large theories altogether. It adopted

no general view about the appropriate aims of criminal sentencing. Instead, the commission abandoned high theory and adopted a rule—one founded on precedent: "It decided to base the Guidelines primarily upon typical, or average, actual past practice." Consciously articulated explanations, not based on high theory, were used to support particular departures from the past. The decision to adopt this approach must have been based on a belief that the typical or average practice contained sense rather than nonsense—a belief that can be supported by reference to the frequent "wisdom of crowds."[3]

Justice Breyer sees this effort as a necessary means of obtaining agreement and rationality within a diverse, multimember body charged with avoiding unjustifiably wide variations in sentencing. Thus his more colorful oral presentation: "Why didn't the Commission sit down and really go and rationalize this thing and not just take history? The short answer to that is: we couldn't. We couldn't because there are such good arguments all over the place pointing in opposite directions. . . . Try listing all the crimes that there are in rank order of punishable merit . . . Then collect results from your friends and see if they all match. I will tell you they don't" (Rosen, 1994: 19, 25).

The example suggests a more general point. Through both analogies and rules, it is often possible for participants in constitutional law to converge on both abstract principles and particular outcomes without resolving large-scale issues of the right or the good. Indeed, the Universal Declaration of Human Rights was produced through a process akin to that described by Justice Breyer, with a refusal to engage high theory and instead an effort to build on widespread understandings (see Glendon, 2001). The basic enterprise operated by surveying the behavior of most nations, and by building a "universal declaration" on the basis of shared practices. A philosophers' group, involved in the project, "began its work by sending a questionnaire to statesmen and scholars around the world" (Glendon, 2001: 51).

At a key stage, the people involved in drafting the declaration produced "a list of forty-eight items that represented . . . the common core of" a wide range of documents and proposals, including judgments

from "Arabic, British, Canadian, Chinese, French, pre-Nazi German, Italian, Latin American, Polish, Soviet Russian and Spanish" nations and cultures (Glendon, 2001: 57). The Universal Declaration of Human Rights emerged from this process. Thus Jacques Maritain, a philosopher closely involved in the Universal Declaration, famously said, "Yes, we agree about the rights, but on condition no one asks us why" (Glendon, 2001: 77). The general point is that a judgment in favor of a set of rights can emerge across disagreement or uncertainty about the foundations of those rights.

FEATURES OF ANALOGY

Analogical thinking is pervasive in law and in everyday life. In ordinary discussions of political and legal questions, people proceed not by reference to first principles or ambitious theories but analogically. You think that racial hate speech is not protected by the first amendment; does this mean that government can silence political extremists? A familiar argumentative technique is to show inconsistency between people's claim about case X in light of their views on case Y. The goal is to reveal hypocrisy or confusion, or to force the claimant to show how the apparently deep commitment on the case about which the discussants agree can be squared with the claimant's view about a case on which they disagree.

In analogical thinking as I understand it here, deep theories about the good or the right are not deployed. In constitutional law, such theories are not usually invoked on behalf of one or another result. On the other hand, analogizers cannot possibly reason from one particular to another particular without saying something at least a little abstract (Dworkin, 2006). They must invoke a reason of principle or policy to the effect that case A was decided rightly *for a reason*, and they must say that that reason applies, or does not apply, in case B. This method of proceeding is ideally suited to a legal system consisting of numerous judges who disagree on first principles and who must take most decided cases as fixed points from which to proceed. For the same reason, those outside of law often think analogically in difficult cases.

Consider some examples. We know that an employer may not fire an employee for agreeing to perform jury duty; it is said to "follow" that

an employer is banned from firing an employee for refusing to commit perjury. Turning to a constitutional issue, we know that a speech by a member of the Ku Klux Klan, advocating racial hatred, cannot be regulated unless it is likely to incite and directed to inciting imminent lawless action (see *Brandenburg v. Ohio*, 395 U.S. 444, 1969); it is said to follow that the government cannot forbid members of the Nazi Party to march in Skokie, Illinois. We know that there is no constitutional right to welfare, medical care, or housing (see *Dandridge v. Williams* , 397 U.S. 471, 1970); it is said to follow that there is no constitutional right to government protection against domestic violence.

From a brief glance at these cases, we can get a sense of the characteristic form of analogical thought in law. The process appears to work in five simple steps: 1) Some fact pattern A—the "source" case—has certain characteristics; call them X, Y, and Z. 2) Fact pattern B—the "target" case—has characteristic X, Y, and Q, or characteristics X, Y, Z, and Q. 3) A is treated a certain way in law. 4) Some principle, created or discovered in the process of thinking through A, B, and their interrelations, explains why A is treated the way that it is. 5) Because of what it shares in common with A, B should be treated the same way. It is covered by the same principle.

Some people think that analogical reasoning is really a form of deduction; but this is a mistake. To be sure, analogical reasoning cannot proceed without identification of a governing idea—a principle, a standard, or a rule—to account for the results in the source and target cases. This is the crucial step 4 above. But the governing idea is not given in advance and applied to the new case. Instead, analogical reasoning helps identify the governing idea and is indispensable to its acceptance; we do not know what the idea is until we have assessed the cases. Analogy and disanalogy are created or discovered through the process of comparing cases, as people discern a principle that makes sense of their considered judgments. They did not know, in advance, to what principle they might become committed. In this sense, there is a relationship between analogical reasoning, as it operates in law, and Rawls' understanding of the search for reflective equilibrium (see Rawls, 1971; on the relationship, see Sunstein, 1996).

Analogical reasoning in constitutional law usually operates without anything like a deep or comprehensive theory that would account for the particular outcomes it yields. The judgments that underlie convictions about the relevant case are incompletely theorized. Of course, there is a continuum from the most particularistic and low-level principles to the deepest and most general. It is also true that those engaged in analogical reasoning might have to be more ambitious than they like in order to think well about hard cases. I suggest only that analogizers in constitutional law try to avoid those approaches that come close to the deeply theorized or the foundational. Agreement amidst heterogeneity is possible for that reason.

It might be asked at this point: Why is agreement so important, in constitutionalism or elsewhere? The fact that people can obtain an agreement of this sort—about the value and meaning of a right or about the existence of a sound analogy—is no guarantee of a good outcome. Perhaps the Sentencing Commission incorporated judgments that were based on ignorance, confusion, or prejudice. Some of the same things can be said about analogies. People in positions of authority may agree that a ban on same-sex marriages is constitutionally acceptable because it is analogous to a ban on marriages between uncles and nieces; but the analogy may be misconceived, because there are relevant differences between the two cases, and because the similarities are far from decisive. The fact that people agree that some constitutional case A is analogous to case B does not mean that case A *or* case B is rightly decided. Perhaps case A should not be taken for granted. Perhaps case A should not be selected as the relevant foundation for analogical thinking; perhaps case Z is more pertinent. Perhaps case B is not really like case A. Problems with analogies and low-level thinking might lead us to be more ambitious. We may well be pushed in the direction of general theory—and toward broader and perhaps more controversial claims—precisely because analogical reasoners offer an inadequate and incompletely theorized account of relevant similarities or relevant differences.

All this should be sufficient to show that the virtues of decisions by rule and by analogy are partial. But no system of politics and law is

likely to be either just or efficient if it dispenses with rules and analogies. In fact, it is not likely even to be feasible.

CONSTITUTIONS, CASES, AND INCOMPLETELY THEORIZED AGREEMENTS

Incompletely theorized agreements play a pervasive role in constitutional law and in society generally. It is quite rare for a person or group completely to theorize any subject—that is, to accept both a general theory and a series of steps connecting that theory to concrete conclusions. Thus we often have an incompletely theorized agreement on a general principle—incompletely theorized in the sense that people who accept the principle need not agree on what it entails in particular cases. This is the sense emphasized by American Supreme Court Justice Oliver Wendell Holmes in his great aphorism, "General principles do not decide concrete cases" (*Lochner v. New York*, 198 U.S. 48, 69, 1908, Holmes, J., dissenting). The agreement is incompletely theorized in the sense that it is incompletely specified. Much of the key work must be done by others, often through case-by-case judgments, specifying the abstraction at the point of application.

Consider the cases of Poland, Iraq, and South Africa, where constitutional provisions include many abstract provisions on whose concrete specification there has been sharp dispute. Constitutional provisions usually protect such rights as "freedom of speech," "religious liberty," and "equality under the law," and citizens agree on those abstractions in the midst of sharp dispute about what these provisions really entail. Much lawmaking also becomes possible only because of this phenomenon. And when agreement on a written constitution is difficult or impossible, it is because it is hard to obtain consensus on the governing abstractions. Consider the case of Israel, which lacks a written constitution because citizens have been unable to agree about basic principles, even if they are pitched at a high level of abstraction.

Observers of democratic constitutionalism might place particular emphasis on a different kind of phenomenon, of special interest for constitutional law in courts: incompletely theorized agreements

on particular outcomes, accompanied by agreements on the narrow or low-level principles that account for them. There is no algorithm by which to distinguish between a high-level theory and one that operates at an intermediate or lower level. We might consider, as conspicuous examples of high-level theories, Kantianism and utilitarianism, and see illustrations in the many distinguished (academic) efforts to understand such areas as tort law, contract law, free speech, and the law of equality as undergirded by highly abstract theories of the right or the good. By contrast, we might think of low-level principles as including most of the ordinary material of low-level constitutional justification or constitutional "doctrine" —the general class of principles and justifications that courts tend to offer. These principles and justifications are not said to derive from any particular large theories of the right or the good, have ambiguous relations to large theories, and are compatible with more than one such theory.

By the term "low-level principles," I refer to something relative, not absolute; I mean to do the same thing with the terms "theories" and "abstractions" (which I use interchangeably). In this setting, the notions "low-level," "high," and "abstract" are best understood in comparative terms, like the terms "big" and "old" and "unusual." Thus the "clear and present" danger standard for regulation of speech in American law is a relative abstraction when compared with the claim that government may not stop a terrorist's speech counseling violence on the Internet, or that members of the Nazi Party may march in Skokie, Illinois. But the "clear and present" danger idea is relatively particular when compared with the claim that nations should adopt the constitutional abstraction "freedom of speech." The term "freedom of speech" is a relative abstraction when measured against the claim that campaign finance laws are acceptable, but the same term is less abstract than the grounds that justify free speech, as in, for example, the principle of personal autonomy or the idea of an unrestricted marketplace of ideas.

In analogical reasoning, incompletely theorized agreements are omnipresent. In the law of discrimination, for example, many people think that sex discrimination is "like" race discrimination, and should

be treated similarly, even if they lack or cannot agree on a general theory of when discrimination is unacceptable. In the law of free speech, many people agree that a ban on speech by a Communist or a terrorist is "like" a ban on speech by a member of a fascist political party, and should be treated similarly—even if they lack or cannot agree on a general theory about the foundations of the free speech principle.

INCOMPLETE THEORIZATION AND THE CONSTRUCTIVE USES OF SILENCE

What might be said on behalf of incompletely theorized agreements about the content of a Constitution, or incompletely theorized judgments about particular constitutional cases? Some people think of incomplete theorization as quite unfortunate—as embarrassing, or reflective of some important problem, or a failure of nerve, or even philistine. When people theorize, by raising the level of abstraction, they do so to reveal bias, or confusion, or inconsistency. Surely participants in politics and constitutional law should not abandon this effort.

There is important truth in these usual thoughts; it would not be sensible to celebrate theoretical modesty at all times and in all contexts. Sometimes participants in constitutional law and politics have sufficient information, and sufficient agreement, to be very ambitious. Sometimes they have to reason ambitiously in order to resolve cases. To the extent that the theoretical capacities of judges, or others, are infallible, theoretical ambition is nothing to lament. But in the face of human fallibility, they help make constitutions and constitutional law possible; they even help make social life possible. Silence—on something that may prove false, obtuse, or excessively contentious—can help minimize conflict, allow the present to learn from the future, and save a great deal of time and expense. What is said and resolved may be no more important than what is left out. There are four points here.

The first and most obvious point is that incompletely theorized agreements about constitutional principles and cases may be necessary for social stability. They are well suited to a world—and especially a legal world—containing social disagreement on large-scale issues. Stability

would be difficult to obtain if fundamental disagreements broke out in every case of public or private dispute. In the nations of Eastern Europe, stable constitution-making has been possible only because the meaning of the document's broad terms has not been specified in advance.

Second, incompletely theorized agreements can promote two goals of a constitutional democracy and a liberal legal system: to enable people to live together, and to permit them to show each other a measure of reciprocity and mutual respect. The use of low-level principles or rules allows judges on multimember bodies and even citizens generally to find a common way of life without producing unnecessary antagonism. At the same time, incompletely theorized agreements allow people to show each other a high degree of mutual respect, civility, reciprocity, or even charity. Frequently, ordinary people disagree in some deep way on an issue—conflicts in the Middle East, pornography, same-sex marriages, the war on terror—and sometimes they agree not to discuss that issue much, as a way of deferring to each other's strong convictions and showing a measure of reciprocity and respect (even if they do not at all respect the particular conviction that is at stake). If reciprocity and mutual respect are desirable, it follows that public officials or judges, perhaps even more than ordinary people, should not challenge their fellow citizens' deepest and most defining commitments, at least if those commitments are reasonable and if there is no need for them to do so. Indeed, we can see a kind of political charity in the refusal to contest those commitments when life can proceed without any such contest.

To be sure, some fundamental commitments are appropriately challenged in the legal system or within other multimember bodies. Some such commitments are ruled off-limits by the Constitution itself. Many provisions involving basic rights have this function. Of course it is not always disrespectful to disagree with someone in a fundamental way; on the contrary, such disagreements may sometimes reflect profound respect. When defining commitments are based on demonstrable errors of fact or logic, it is appropriate to contest them. So too when those commitments are rooted in a rejection of the basic dignity

of all human beings, or when it is necessary to undertake the contest to resolve a genuine problem. But many cases can be resolved in an incompletely theorized way, and this is the ordinary stuff of constitutional law; that is what I am emphasizing here.

The third point is that for arbiters of social controversies, incompletely theorized agreements have the crucial function of reducing the political cost of enduring disagreements. If participants in constitutional law disavow large-scale theories, then losers in particular cases lose much less. They lose a decision, but not the world. They may win on another occasion. Their own theory has not been rejected or ruled inadmissible. When the authoritative rationale for the result is disconnected from abstract theories of the good or the right, the losers can submit to legal obligations, even if reluctantly, without being forced to renounce their largest ideals.

Fourth, and finally, incompletely theorized agreements are especially valuable when a society seeks moral evolution and even progress over time. Consider the area of equality, where considerable change has occurred in the past and will inevitably occur in the future. A completely theorized judgment would be unable to accommodate changes in facts or values. If a culture really did attain a theoretical end-state, it would become rigid and calcified; we would know what we thought about everything. Unless the complete theorization were error-free, this would disserve posterity. Hence, incompletely theorized agreements are a key to debates over equality in both law and politics, with issues being raised about whether discrimination on the basis of sexual orientation, age, disability, and other characteristics are analogous to discrimination on the basis of race; such agreements have the important advantage of allowing a large degree of openness to new facts and perspectives.

At one point, we might think that same-sex relations are akin to incest; at another point, we might find the analogy bizarre. Of course, a completely theorized judgment would have many virtues if it were correct. But at any particular moment in time, this is an unlikely prospect for human beings, not excluding judges in constitutional disputes,

or those entrusted with the task of creating constitutional provisions.

Compare practical reasoning in ordinary life. At a certain time, you may well refuse to make decisions that seem foundational in character—about, for example, whether to get married within the next year, or whether to have two, three, or four children, or whether to live in San Francisco or New York. Part of the reason for this refusal is knowledge that your understandings of both facts and values may well change. Indeed, your identity may itself change in important and relevant ways, and for this reason a set of firm commitments in advance—something like a fully theorized conception of your life course—would make no sense. Legal systems and nations are not altogether different.

BURKE AND HIS RATIONALIST ADVERSARIES

Those who emphasize incompletely theorized agreements owe an evident debt to Edmund Burke, who was, in a sense, the great theorist of incomplete theorization. I do not attempt anything like an exegesis of Burke, an exceedingly complex figure, in this space, but let us turn briefly to Burke himself and in particular to his great essay on the French Revolution, in which he rejected the revolutionary temperament because of its theoretical ambition (Burke, 1999).

Burke's key claim is that the "science of constructing a commonwealth, or reforming it, is, like every other experimental science, not to be taught a priori" (Burke, 1999: 442). To make this argument, Burke opposes theories and abstractions, developed by individual minds, to traditions, built up by many minds over long periods. In his most vivid passage, Burke writes:

> The science of government being therefore so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution than any man ought to venture upon pulling down an edifice which has answered in any tolerable degree, for ages the

> common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes (Burke, 1999: 451).

It is for this reason that Burke describes the "spirit of innovation" as "the result of a selfish temper and confined views" (Burke, 1999: 428) and offers the term "prejudice" as one of enthusiastic approval, noting that "instead of casting away all our old prejudices, we cherish them to a very considerable degree" (Burke, 1999: 451). Emphasizing the critical importance of stability, Burke adds a reference to "the evils of inconstancy and versatility, ten thousand times worse than those of obstinacy and the blindest prejudice" (Burke, 1999: 451). Burke's sharpest distinction, then, is between established practices and individual reason. He contends that reasonable citizens, aware of their own limitations, will effectively delegate decision-making authority to their own traditions. "We are afraid to put men to live and trade each on his own private stock of reason" simply "because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages. Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them" (Burke, 1999: 451).

Burke was enthusiastic about reasoning by analogy, and it is easy to imagine an unambivalently Burkean advocate of incompletely theorized agreements. But Burke's enthusiasm for traditions is contentious, and for good reason. In the aftermath of apartheid, should South Africa have built carefully, and in a tradition-bound way, on its own past? Or should it have adopted a constitution on the basis of some kind of account of human liberty and equality? Social practices, and constitution-making, can be incompletely theorized while also being anti-Burkean. The South African constitution itself includes stirring and tradition-rejecting ideals of various kinds, and those ideals can be accepted from many different foundations. In constitutional adjudication, judges who believe in incompletely theorized agreements might

require government to come up with a reason for its practice—and insist that a tradition, or a longstanding practice, is not itself a reason.

In constitutional law, we can imagine fierce contests between Burkeans and their more rationalist adversaries, even if both camps are willing to march under the banner of incomplete theorization (see Sunstein, 2006). Those contests cannot be resolved in the abstract; everything depends on the nature of the relevant traditions and the competence of those who propose to subject them to critical scrutiny. My central point is that Burkeans are committed to incompletely theorized agreements, but those who believe in such agreements need not be Burkeans. The American constitutional tradition generally requires reasons, even if low-level ones, and hence Burkeanism seems self-defeating for the United States, because it cannot easily be fit with American traditions.

CONCEPTUAL ASCENTS FOR CONSTITUTIONAL LAW?

Borrowing from Henry Sidgwick's writings on ethical method (Sidgwick, 1966: 96-104), a critic of incompletely theorized agreements might respond that constitutional law should frequently use ambitious theories.[4] For example, there is often good reason for people interested in constitutional rights to raise the level of abstraction and ultimately to resort to large-scale theory. Concrete judgments about particular cases can prove inadequate for morality or constitutional law. Sometimes people do not have clear intuitions about how cases should come out. Sometimes their intuitions are insufficiently reflective. Sometimes seemingly similar cases provoke different reactions, and it is necessary to raise the level of theoretical ambition to explain whether those different reactions are justified, or to show that the seemingly similar cases are different after all. Sometimes people simply disagree.

By looking at broader principles, we may be able to mediate the disagreement. In any case there is a problem of explaining our considered judgments about particular cases in order to see whether they are not just a product of accident or error. When modest judges join an opinion that is incompletely theorized, they must rely on a reason

or a principle, justifying one outcome rather than another. The opinion must itself refer to a reason or principle; it cannot just announce a victor. Perhaps the low-level principle is wrong because it fails to fit with other cases, or because it is not defensible as a matter of (legally relevant) political morality.

In short, the incompletely theorized agreement may be nothing to celebrate. If a judge is reasoning well, he should have before him a range of other cases, C through Z, in which the principle is tested against others and refined. At least if he is a distinguished judge, he will experience a kind of "conceptual ascent" in which the more or less isolated and small low-level principle is finally made part of a more general theory. Perhaps this would be a paralyzing task, and perhaps our judge need not often attempt it. But perhaps it is an appropriate model for understanding law and an appropriate aspiration for evaluating judicial and political outcomes. On one view, judges who insist on staying at a low level of theoretical ambition are philistines, even ostriches.

There is some truth in this response. At least if they have time and competence, moral and constitutional reasoners thinking about basic rights should try to achieve vertical and horizontal consistency, not just the local pockets of coherence offered by incompletely theorized agreements. In democratic processes, it is appropriate and sometimes indispensable to challenge existing practice in abstract terms. But this challenge to incompletely theorized agreements, should not be taken for more than it is worth. Any interest in conceptual ascent must take account of the distinctive characteristics of the arena in which real-world constitutional-makers and judges must do their work.

As I have noted, incompletely theorized agreements have many virtues, including the promotion of stability, the reduction of costs of disagreement, and the demonstration of humility and mutual respect. All this can be critical to successful constitution-making in pluralistic societies. These points bear on constitutional disputes as well. In a well-functioning constitutional democracy, judges are especially reluctant to invoke philosophical abstractions as a basis for invalidating the

outcomes of electoral processes. They are reluctant because they know that they may misunderstand the relevant philosophical arguments and they seek to show respect to the diverse citizens in their nation. A conceptual ascent might be appealing in the abstract, but if those who ascend will blunder, they might stay close to the ground.

There are many lurking questions. How, exactly, do moral and political judgments bear on the content of law in general and constitutional law in particular? What is the relation between provisional or considered judgments about particulars and corresponding judgments about abstractions? Sometimes people interested in constitutional law write as if abstract theoretical judgments, or abstract theories, have a kind of reality and hardness that particular judgments lack, or as if abstract theories provide the answers to examination questions that particular judgments, frail as they are, may pass or fail. On this view, theories are searchlights that illuminate particular judgments and show them for what they really are. But we might think instead that there is no special magic in theories or abstractions, and that theories are simply the (humanly constructed) means by which people make sense of the judgments that constitute their ethical, legal, and political worlds. The abstract deserves no priority over the particular; neither should be treated as foundational. A (poor or crude) abstract theory may simply be a confused way of trying to make sense of our considered judgments about particular constitutional cases, which may be better than the theory.

INCOMPLETELY THEORIZED AGREEMENTS AND DISAGREEMENT

Incompletely theorized agreements have many virtues; but their virtues are partial. Stability, for example, is brought about by such agreements, and stability is usually desirable; but a constitutional system that is stable and unjust should probably be made less stable. Consider two qualifications to what has been said thus far. Some cases cannot be decided *at all* without introducing a fair amount in the way of theory. Some constitutional cases cannot be decided *well* without

introducing more ambitious theory. If a good theory (involving, for example, the right to free speech) is available, and if judges can be persuaded that the theory is good, there should be no taboo on its judicial acceptance. Theoretical depth can hardly be rejected in the abstract.

What of disagreement? The discussion thus far has focused on the need for convergence. There is indeed such a need; but it is only part of the picture. In law, as in politics, disagreement can be a productive and creative force, revealing error, showing gaps, moving deliberation and results in good directions. The American constitutional order has placed a high premium on "government by discussion," and when the process is working well, this is true for the judiciary as well as for other institutions. Agreements may be a product of coercion, subtle or not, or of a failure of imagination.

Constitutional disagreements have many legitimate sources. Two of these sources are especially important. First, people may share general commitments but disagree on particular outcomes. Second, people's disagreements on general principles may produce disagreement over particular outcomes and low-level propositions as well. People who think that an autonomy principle accounts for freedom of speech may also think that the government cannot regulate truthful, nondeceptive commercial advertising—whereas people who think that freedom of speech is basically a democratic idea, and is focused on political speech, may have no interest in protecting commercial advertising at all. Constitutional theorizing can have a salutary function in part because it tests low-level principles by reference to more ambitious claims. Disagreements can be productive by virtue of this process of testing.

Certainly if everyone having a reasonable general view converges on a particular (by hypothesis reasonable) judgment, nothing is amiss. But if an agreement is incompletely theorized, there is a risk that everyone who participates in the agreement is mistaken, and hence that the outcome is mistaken. There is also a risk that someone who is reasonable has not participated, and that if that person were included,

the agreement would break down. Over time, incompletely theorized agreements should be subject to scrutiny and critique, at least in democratic arenas, and sometimes in courtrooms as well. That process may result in more ambitious thinking than constitutional law ordinarily entails.

Nor is social consensus a consideration that outweighs everything else. Usually it would be much better to have a just outcome, rejected by many people, than an unjust outcome with which all or most agree. A just constitution is more important than an agreed-upon constitution. Consensus or agreement is important largely because of its connection with stability, itself a valuable but far from overriding social goal. As Thomas Jefferson wrote, a degree of turbulence is productive in a democracy.[5] It may well be right to make an unjust constitutional order a lot less stable. We have seen that incompletely theorized agreements, even if stable and broadly supported, may conceal or reflect injustice. Certainly agreements should be more fully theorized when the relevant theory is plainly right and people can be shown that it is right, or when the invocation of the theory is necessary to decide cases. None of this is inconsistent with what I have claimed here.

It would be foolish to say that no general theory about constitutional law or rights can produce agreement, even more foolish to deny that some general theories deserve support, and most foolish of all to say that incompletely theorized agreements warrant respect whatever their content. What seems plausible is something no less important for its modesty: except in unusual situations, and for multiple reasons, general theories are an unlikely foundation for constitutional-making and constitutional law. For fallible human beings, caution and humility about theoretical claims are appropriate, at least when multiple theories can lead in the same direction. This more modest set of claims helps us to appreciate incompletely theorized agreements as important phenomena with their own special virtues.

Incompletely theorized agreements thus help illuminate an enduring constitutional and indeed social puzzle: how members of diverse societies can work together on terms of mutual respect amid

sharp disagreements about both the right and the good. If there is a solution to this puzzle, incompletely theorized agreements are a good place to start.

NOTES

1. On the refusal to overrule Roe, see *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).
2. Ronald Dworkin (1985) rightly suggests that disputes over meaning are sometimes produced by disputes over underlying principles. I am suggesting only that most of the time, disputes over principles are accompanied by agreement over meaning. I do not attempt here to explore disagreements about interpretation, though the basic themes certainly bear on that topic.
3. For a popular treatment, see Surowiecki (2005); a more technical account, with reference to the Condorcet Jury Theorem, can be found in Sunstein (2006).
4. This is the tendency in Dworkin (1985).
5. Thus Jefferson said that turbulence is "productive of good. It prevents the degeneracy of government, and nourishes a general attention to . . . public affairs. I hold . . . that a little rebellion now and then is a good thing" (Letter to Madison in Peterson, 1975).

REFERENCES

Breyer, Stephen. "The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest." *Hofstra Law Review* 17 (1988).

Burke, Edmund. "Reflections on the Revolution in France." *The Portable Edmund Burke*. Ed. Isaac Kramnick. New York: Penguin Books, 1999: 416-451.

Dworkin, Ronald. *Law's Empire*. Cambridge: Harvard University Press, 1985.

———. *Justice in Robes*. Cambridge: Harvard University Press, 2006.

Glendon, Mary Ann. *A World Made Anew*. New York: Random House, 2001.

Peterson, Merrill D., ed. *The Portable Thomas Jefferson*. New York: Viking Press, 1975.

Rawls, John. *A Theory of Justice*. Cambridge: Belknap Press, 1971.

Rosen, Jeffrey. "Breyer Restraint." *The New Republic* (July 11, 1994).

Sidgwick, Henry. *The Methods of Ethics*. 7th ed. New York: Dover Publications, 1966.

Sunstein, Cass R. *Legal Reasoning and Political Conflict*. New York: Oxford University Press, 1996.

———. *One Case At A Time*. Cambridge: Harvard University Press, 1999.

Sunstein, Cass R. "Burkean Minimalism." *Michigan Law Review* 105 (2006).

Sunstein, Cass R. *Infotopia: How Many Minds Produce Knowledge*. New York: Oxford University Press, 2006.

Surowiecki, James. *The Wisdom of Crowds*. New York: Doubleday, 2005.

JEFF MCMAHAN is Professor of Philosophy at Rutgers University and a Visiting Research Collaborator at the Center for Human Values, Princeton. He is the author of *The Ethics of Killing: Problems at the Margins of Life* (2002).

JONATHAN MOORE served as a U.S. Ambassador to the U.N. between 1989 and 1992 and as U.S. Coordinator for Refugees between 1986 and 1989. He is an Associate at the Shorenstein Center for the Press, Politics, and Public Policy at the Kennedy School at Harvard, and works for the U.N. and other international agencies on post-conflict reconstruction.

CASS SUNSTEIN is Karl N. Llewellyn Distinguished Service Professor of Jurisprudence at the University of Chicago Law School, with an appointment in the Department of Political Science. His recent books include *Infotopia: How Many Minds Produce Knowledge* (2006).

EDNA ULLMANN-MARGALIT, Professor of Philosophy and Director of the Center for Rationality at the Hebrew University of Jerusalem, is the author most recently of *Out of the Cave: A Philosophical Inquiry into the Dead Sea Scrolls Research* (2006).