

CASS R. SUNSTEIN (1996) *Legal Reasoning and Political Conflict*.
New York: Oxford University Press. 220 pp., \$25.00.

As suggested by the title of his book, in *Legal Reasoning and Political Conflict* Professor Cass R. Sunstein of the University of Chicago School of Law addresses two issues. First, he provides a description of the process of legal reasoning which explains how judges arrive at their decisions. Second, he argues that this process is used to resolve political conflict, thereby having positive effects that reach beyond the legal system. While he partially succeeds in describing the legal reasoning process, he is ultimately unsuccessful in advocating legal reasoning as a cure for political conflict.

At the core of Sunstein's model is the concept of "analogical reasoning." Rather than proceeding from abstract "first principles," the common law develops piecemeal and gradually taking a corpus of decided cases as given, and then deciding new cases on the basis of their similarity or dissimilarity with these preexisting cases. Thus, law rejects "grand theories" in favor of deciding specific cases on specific facts regardless of the disparate moral intuitions which support that decision.

This process of deciding specific cases on their facts without agreeing on the reasons supporting it gives rise to what Sunstein classifies as "incompletely theorized" agreements. An incompletely theorized agreement is one where many people can agree on a specific *result*, even if they do not agree on the specific *reason* justifying that result. Thus, Sunstein cites *Roe v. Wade* as an example of an "incompletely theorized agreement" because "[d]iverse judges" can agree that abortion restrictions should be invalidated, even though the reasons supporting that shared conclusion differ [7]. "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 . . . the decision is good for pragmatic reasons."

For Sunstein, incompletely theorized agreements provide the link between "legal reasoning" and "political conflict." Because all the court has to do is decide the discrete question of whether legislative restrictions on abortion are unconstitutional, without having to agree upon the reasons for allowing it, incompletely theorized agreement provides a method of resolving the tensions generated from co-existing in a modern pluralistic, multicultural society.

While Sunstein's model of legal reasoning is largely accurate and informative, he is less successful in proving that incompletely theorized agreements can resolve political conflict. Sunstein advocates the use of incompletely theorized agreements to resolve such fundamental and socially divisive issues as abortion, capital punishment, and affirmative action. Occasionally he expresses concerns about the practical efficacy of judges to effect social change [95] or about the analysis used to justify an expansive judicial role in particular cases [155–56], but these complaints are largely ones of tactics. He has no *principled* disagreement with the results of activist judges [176]. Indeed, he expresses disagreement with Supreme Court doctrine only where he believes that it has not gone far enough, such as in *Bowers v. Hardwick* [156] and constitutional protection for homosexuals generally [181].

Sunstein acknowledges no principled or constitutional limits on the role of the judiciary—

the only restraints on judicial lawmaking are prudential. Thus, the problem with *Roe v. Wade* was not a lack of any constitutional basis for a right to abortion, because Sunstein believes that it is “not . . . especially hard to reach the conclusion that laws forbidding abortion are constitutionally troublesome because they discriminate against women, a politically vulnerable group” [180]. For Sunstein, the problem was that the Supreme Court went too far at one time. It should have “proceed[ed] slowly and incrementally, and on grounds that could have gathered wider social agreement and thus fractured society much less severely.” Thus, it “might have ruled that abortions could not be prohibited in cases of rape or incest, or that the law at issue in *Roe* was invalid even if some abortion restrictions might be acceptable.” The value of such an approach is that it “would have allowed democratic processes to proceed with a degree of independence—and perhaps to find their own creative solutions acceptable to many sides.” Sunstein opines that a narrower holding in *Roe* would have been “much healthier for democratic processes in the United States” and that the “other branches of government might have participated in the evolving interpretation of the Constitution, with a possible conclusion, from democratic sources, that the right to sex equality is broader than the Court . . . understands it” [181].

But what if the democratic branches disagreed with even this narrower holding in *Roe*? After all, there would have been no case in the first place if the democratic branches had agreed with Sunstein’s interpretation of what “sex equality” required. For instance, what if the democratic branches concluded that abortion is murder and thus concluded that the “right to sex equality” was *narrower* than Sunstein’s Court would have said it was? Or, what if the other branches of government decided not to “participate[] in the evolving interpretation of the Constitution” (as Sunstein defines it) after Sunstein’s preferred version of *Roe* was handed down? After all, the democratic branches had not even “evolved” to the point of recognizing Sunstein’s limited right to abortion. More critically, where does this limited right to abortion come from and where does it end?

As these hypothetical questions suggest, Sunstein’s professed fealty to the democratic processes really amounts to little more than window dressing because there is no principled or constitutional limit on judicial discretion. Sunstein will give the democratic branches one shot at “getting it right,” after which it is the judges’ responsibility to clean things up. Thus, his argument is simply unresponsive to the fundamental questions of federalism and separation of powers that underlie the dispute in *Roe*.

Sunstein also fails to consider the possibility that eliminating principle from judicial decision-making may encourage judges to make decisions on inappropriate grounds. Consider John Jeffries’s description in *Justice Lewis F. Powell, Jr.: A Biography* of how Powell came to support Blackmun’s opinion in *Roe*: “[Powell] was a well-educated, non-Catholic, upper-class male” who had two sons who were obstetricians, a daughter who was ardently pro-choice, and Powell himself had been personally acquainted with a young man who accidentally killed a woman while trying to perform an illegal abortion. For these reasons, Jeffries concludes, Powell joined the majority opinion in *Roe*. It is likely that most Americans would agree that these purely personal experiences do not justify Powell’s support for the invalidation of multiple state laws regulating abortion.

Sunstein, however, lacks standing to criticize Powell’s decision to write his subjective personal preferences into law. For incompletely theorized agreements, all that seems to

matter is consensus, regardless of the reasons supporting that result. Sunstein has no basis for distinguishing proper from improper reasons, other than a crude and highly subjective utilitarian test of what a particular judge believes will make society better. Thus, judicial whim and judicial principle appear to be equally valid decision-making processes, so long as consensus is reached.

Finally, Sunstein's model of incompletely theorized agreements is so radically indeterminate as to be useless. For instance, one could just as easily fashion an incompletely theorized agreement as to why the supreme court should not recognize a right to abortion. Notions of morality, tradition, protection of the unborn who have no vote, concerns about racial equality, and the limited role of the judiciary in our constitutional republic easily can be combined into such an incompletely theorized agreement. But Sunstein provides no basis for choosing between this agreement and that chosen in *Roe*.

But Sunstein's model has deeper flaws than just its lack of descriptive accuracy or the dubious practical efficacy of incompletely theorized agreements. As common-law theorists such as F. A. Hayek and Bruno Leoni have demonstrated, it is impossible to make sense of the common-law *process* without considering the substance of the common law.

Sunstein, though, attempts to discuss the process of common-law reasoning without reference to common-law substance. In fact, Sunstein undertakes no real discussion of the applicability of his model to *private* law fields, such as contract and property—the areas in which the roots of the entire common-law system can be found. By discussing the process of legal reasoning separate from the substance of the common law, he presents an incomplete model of legal reasoning in a common-law system, as well as obscuring the real explanation for why the common law traditionally worked so well at alleviating political conflict.

As Hayek has shown, the Anglo-American social order premised on the common law really *did* create a community of tolerance, peacefulness, and mutual respect—the goals which Sunstein seeks through incompletely theorized agreements. By identifying and enforcing individual property and contract rights, the classical common law provided spheres of individual liberty that allowed people to act autonomously and peacefully, resulting in freedom and prosperity. The concept of analogical and case-by-case reasoning developed only as a consequence of these substantive rules, as each individual case was seen as a constituent part of the broader common-law tradition. Thus, legal reasoning was derived from the substantive principles of the common law, and served no independent function. By examining legal reasoning independent of common-law substance, Sunstein turns the lesson of the common law on its head.

The reasons underlying Sunstein's reluctance to address the substantive achievements of the common law are only mentioned in passing in this book, but are elaborated in his previous book, *The Partial Constitution*. Although detailed discussion of the issues raised by this argument goes beyond the scope of both Sunstein's current book and this review, Sunstein's refusal to recognize the decisive link between common-law substance and common-law process undermines his entire argument. As a result, it is appropriate to consider his argument briefly.

Sunstein argues that the rules of the common law are simply ideological conventions that represent the conscious choice of judges and politicians [56], and thus are infinitely and consciously malleable at their will. Sunstein may be correct in arguing that a preference

for the common law is an arbitrary ideological choice and is not “natural” in any way, despite the common-law’s development over hundreds of years through a decentralized evolutionary process. Similarly, it may be purely conventional that human beings eat beef, chicken, and pasta rather than worms, grass, and eucalyptus leaves. On the other hand, it may be more reasonable to conclude that survival and development of these practices and their maintenance through hundreds of years suggest something about their compatibility to human happiness and survival that render them more than arbitrary choices. Indeed, as several recent commentators have recognized, the rules of private property and contract are anything but merely conventional, as they have existed in virtually all civilizations throughout human history.

Sunstein also applies his analysis of the common law to questions of statutory and constitutional interpretation, a leap which requires significantly greater justification than that given in the one chapter he dedicates to the matter. In particular, Sunstein either oversimplifies or simply ignores the constitutional questions of separation of powers and federalism raised by problems of statutory and constitutional construction. The common law is a system of judicial law-making. Statutes and constitutions are not. Sunstein inadequately addresses the implications raised by this distinction. Moreover, he does not explain how the common-law method of statutory construction can be squared with the constitutional requirements of bicameralism and presentment. As Justice Scalia argued in his recent essay *A Matter of Interpretation*, common-law methods should have a limited role in construing statutes or the Constitution because applying the common law in these contexts substitutes the will of the judge for that of the body authorized to exercise the legislative and executive power under the Constitution. There is little in Sunstein’s book with which to fashion a response to Scalia’s critique.

Sunstein’s refusal to recognize principled or constitutional limits on the power of the judiciary is characteristic of modern legal thought. Whether in the guise of traditional legal realism, critical legal studies, feminist legal studies, or Sunstein’s pragmatism, the legal academy has taught a generation of lawyers that law is merely politics carried out by other means. Inevitably, this view of law as politics has eroded public confidence in the legal system, respect for lawyers, and the morale of law students and practicing lawyers. By encouraging judges to rely on pragmatism rather than principle, Professor Sunstein regrettably contributes to the view that law is nothing more than politics and further undermines public faith in lawyers and the legal system.

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