

VOLUME X, NUMBER 4, FALL 2010

CLAREMONT

REVIEW OF BOOKS

A Journal of Political Thought and Statesmanship

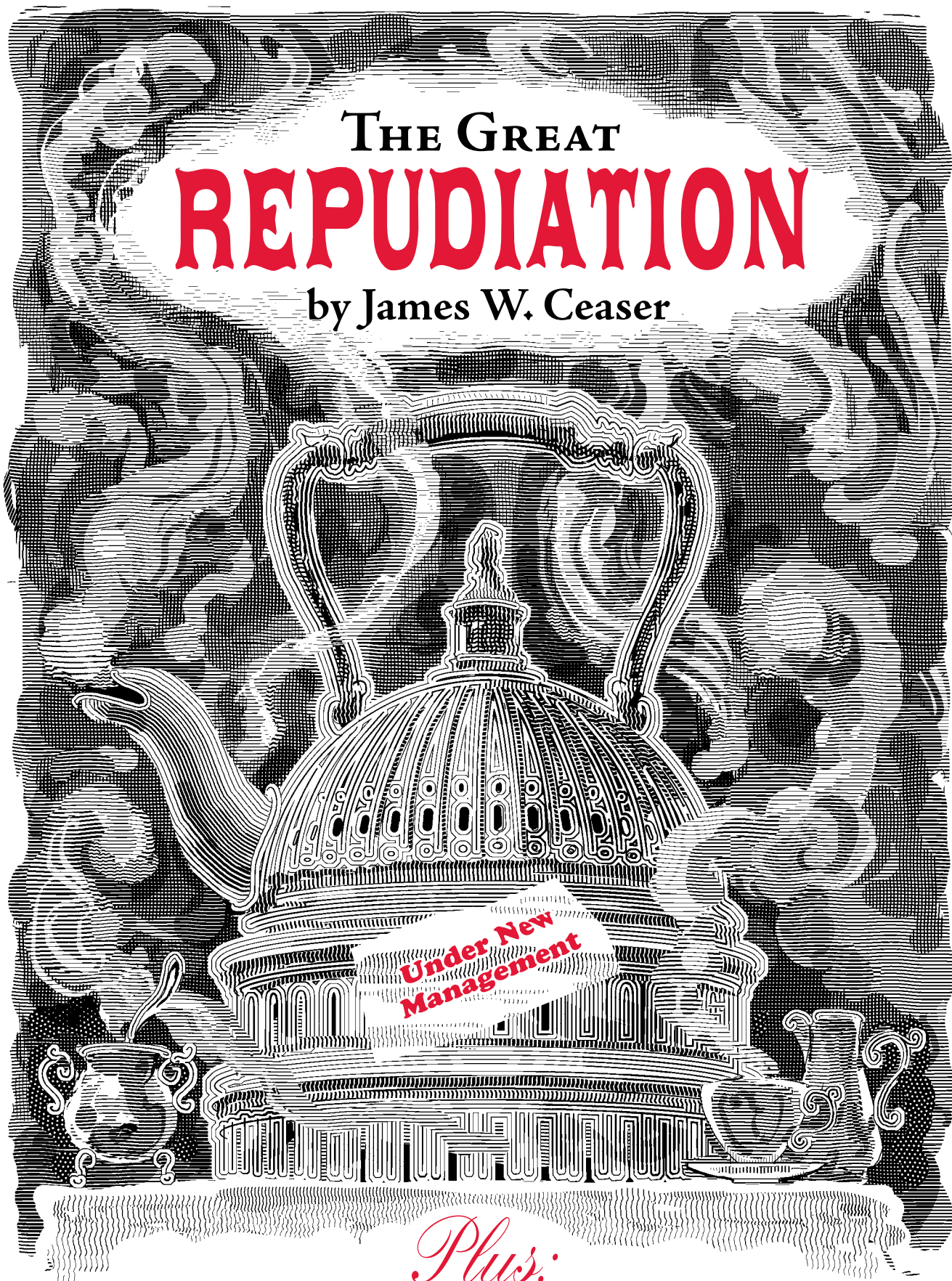
William Voegeli:
**JFK and the
Neocons**

Joseph
Postell:
**Cass
Sunstein**

James Piereson:
**Arthur Brooks's
Battle**

Jeremy
Rabkin:
**The Apology
Industry**

John
Derbyshire:
Arthur Koestler



Mark Helprin:
**Why Israel
Needs Nukes**

R. Shep
Melnick:
**James Q.
Wilson**

Harvey C.
Mansfield:
**Liberty, Equality,
Servility**

Christina Hoff
Sommers:
**Rereading
The Second
Sex**

Cheryl Miller:
**Somerset
Maugham**

Plus:

Christopher Caldwell and Matthew Continetti on Barack Obama

PRICE: \$6.95

IN CANADA: \$7.25



Essay by Joseph Postell

A CZAR IS BORN



ASPECTER IS HAUNTING LIBERALISM—THE specter of postmodernism. Liberalism came to dominate American politics in the last century as the embodiment of progressivism, which saw History moving in an objectively good direction, discernable by trained and enlightened reason, inevitably yielding “progress.” Progressivism, derived from Hegel (and in America, John Dewey), trusted scientific experts to ascertain what progress meant and required, and then rule accordingly.

This “Vital Center” liberalism was pleased to think of itself as flexible and realistic, the only intelligent alternative to the stale, pernicious ideologies of the Left and Right. That left it totally unprepared to defend itself against an even more radically skeptical critique, the one issued by postmodern progressivism, which jettisoned the idea of progress along with other objective standards of thought and action. Postmodern progressivism, indebted more to Nietzsche (and in America, to thinkers like Richard Rorty), despises “logocentric” answers to political problems. In its view, the fatuous blowhards who imagine they’re serving the dictates of Objective Reality include not just Stalinist hacks and capitalist plutocrats—but earnest liberals who delude themselves into thinking they know where we are going, and how to get there. Having demolished liberalism’s Potemkin Village, postmodern progressives take an iconoclastic pride

in boasting that their political preferences, like all political preferences, *have* no objective justification. Instead, they proudly stand on their “commitments,” and scoff at questions about the principled ground of those commitments.

The tension between the modern and postmodern varieties of progressivism has, inevitably, launched dozens of excruciating academic conferences and journal symposia. It raises however, a pressing political question in a democracy, where the rulers need to justify themselves to the ruled. The old progressives said to the voters, “We understand the better future, and know how to lead the country to it.” The new progressives, believing their predecessors’ claims to knowledge and authority—like all claims to knowledge and authority—are completely without merit, wind up saying to the voters, “Empower us because we’re smarter, better, and, well, cooler than anyone you know.”

This political dilemma has now taken up residence in the Obama White House, specifically in the Office of Information and Regulatory Analysis (OIRA), whose administrator is Cass Sunstein, one of the most prolific legal scholars of his generation. Currently on leave from Harvard Law School, Sunstein is, in Obama’s parlance, the Regulatory Czar. Prior to joining the faculty at Harvard, Sunstein taught for many years at the University of Chicago, which had a lasting effect on his thinking and career. He not

only absorbed behavioral economics at Chicago, but also met and developed a friendship with the current president, with whom he taught on the law faculty. Reading through Sunstein’s considerable *oeuvre* can leave one puzzled on many points, but it is impossible to miss the profound similarities between his brand of liberalism and his boss’s.

Progressivism Old and New

SUNSTEIN’S WRITINGS SPAN MANY ASPECTS of the post-New Deal state. His thoughts on the Constitution display some of the confusions of contemporary progressivism and at the same time raise important questions for conservatives.

Sunstein seems sometimes to side with the postmodern liberals, as in his book on constitutional interpretation, *The Partial Constitution* (1993). There, in the context of criticizing textualism and originalism as conservative approaches to reading the Constitution, he makes a point he repeats frequently in his writing: “that no text has meaning apart from the principles held by those who interpret it, and those principles cannot be found in the text itself.” In the same discussion, he accurately describes “deconstructionism” as an approach to texts, including the Constitution, that assumes “meaning is created rather than found, and hence a



function of one's perspective." This would seem to be in perfect agreement with his own view. Yet Sunstein proceeds to condemn deconstructionism, which takes "the inevitably situated and value-laden character of interpretation as reasons to give up on notions of truth and objectivity altogether." "It is right," he argues, "to say that there is no external perspective, that interpretive principles are inevitable, and that legal meaning cannot be grounded without language or culture. But this does not mean that all argument is manipulation or that good reasons cannot be offered on behalf of one view rather than another."

In the notes to these passages, Sunstein cites various writings of the old progressive John Dewey against the postmodern progressive Richard Rorty. In fact, he cites Dewey constantly throughout his many books and often explicitly prefers the old progressivism to the new. But like a good postmodern, he never offers a justification for this preference.

A Pragmatic Progressive

HOWEVER AMBIGUOUS HIS THEORY, IN practice it's clear where Sunstein stands. He is a staunch defender of government intervention in economic and social affairs. In *The Partial Constitution*, *After the Rights Revolution* (1993), and *The Second Bill of Rights* (2006), he works diligently to defend the regulatory state against the objection that it artificially appoints winners and losers in place of the free market's "natural," "neutral," "prepolitical" outcomes. The market's outcomes are not neutral or prepolitical, he insists, but are themselves reflections of the distribution of power in society. There is no such thing as "status quo neutrality." Markets are never "free" in the sense of operating by voluntary, spontaneous transactions, because "governmental rules are implicated in, indeed constitute, the distribution of wealth and entitlements in the first instance," and this distribution is far from being equal or fair. Pre-New Deal legal theories had treated property rights, and other rights, as natural standards of justice to which the laws must adhere; they refused to recognize that these rights were themselves products of law. The New Deal, "and especially the legal revolution of 1937, should be understood above all as a rejection of these conceptions," argues Sunstein. He insists that rights "do not come from minimizing government but are a product of government," and cites Jeremy Bentham's maxim that "Before the laws there was no property; take away the laws, all property ceases."

Few would deny that government is necessary to protect property rights and enforce con-

tracts, and that it has a role to play in preserving markets and voluntary exchanges of goods. But it is the worst kind of slippery slope reasoning to maintain that government intervention to prevent theft and murder justifies, by being essentially the same thing as, government intervention to redistribute wealth from one person to another. In one case, so the founders thought, government acts to protect natural liberty and equality; in the other it infringes upon that liberty and its underlying equality of rights. Rather than make an argument defending a

best results on balance, the argument for originalism would be very powerful," he concedes.

Sunstein has written that pragmatism is an approach to solving otherwise interminable questions about first things. The approach of pragmatism is to test each notion about these first things by tracing and evaluating its consequences. But the criteria for evaluating those consequences are derived from—what, exactly? Surely not our immediate preferences, for those have to be "nudged" from time to time. In order to define what works, pragmatism must have recourse to some principle outside itself. Unfortunately, too often pragmatists such as Sunstein leave it at "the best results on balance," without defending the implicit assumption about those best results. We are left with platitudes about being empirical, nuanced, and avoiding dogmatism, without a serious discussion of the important questions that are so carelessly glossed over. The platitudes provide cover for ignoring those assumptions, and framing one's position as based on facts, rather than "values" derived from metaphysical reasoning. This kind of pragmatism is characteristic of both Sunstein and Obama, who recently told an audience, "Part of the reason that our politics seems so tough right now and facts and science and argument does [*sic*] not seem to be winning the day all the time is because we're hardwired not to always think clearly when we're scared."

Regulatory Philosophy

WHATEVER MAY BE THE LIMITS OF SUNSTEIN'S political and legal philosophy, his regulatory philosophy is interesting and nuanced. Anyone who wants to know more about our modern administrative state would do well to read his book on the subject, *After the Rights Revolution*, in which he astutely analyzes the costs and benefits of regulatory initiatives and advocates a series of reforms based on his findings.

One of his conclusions is that regulations frequently are "self-defeating in the sense that they bring about precisely the opposite of their intended purposes." Regulators pursue policies that impose high costs and bring about minimal gains—because statutes are poorly written, regulators are captured by regulated entities, or simply due to unanticipated consequences. Sunstein argues that we should grapple pragmatically with regulatory initiatives that do not fulfill the promise of their statutory enactment.

The impulse to analyze the consequences of regulatory policy and adjust accordingly distinguishes him as an old-fashioned progressive rather than a postmodern one. This sometimes gets him in trouble with the contemporary Left. When Obama nominated Sunstein to head

Books by Cass R. Sunstein discussed in this essay:

The Partial Constitution. Harvard University Press, 423 pages, \$36.50

After the Rights Revolution: Reconceiving the Regulatory State. Harvard University Press, 296 pages, \$28.50

The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need it Now More than Ever. Basic Books, 304 pages, \$16.95

Nudge: Improving Decisions about Health, Wealth, and Happiness, co-written by Richard H. Thaler. Yale University Press, 293 pages, \$26

Designing Democracy: What Constitutions Do. Oxford University Press, 296 pages, \$27

A Constitution of Many Minds: Why our Founding Document Doesn't Mean What it Used to Mean. Princeton University Press, 240 pages, \$27.95

Radicals in Robes: Why Extreme Right-Wing Courts are Wrong for America. Basic Books, 320 pages, \$16.95

foundational principle, Sunstein takes down a straw man. The position he opposes—that government intervention as such is always bad—is not intellectually respectable on either the Left or the Right. Those who hold that position are called anarchists, not originalists.

In the final analysis, all Sunstein offers in defense of his preference for redistributive government intervention is a crude pragmatism: he rejects originalism and pre-New Deal philosophies of government because they produce, in his view, bad outcomes. "If originalism would produce the



OIRA, many on the Left objected to the new regulatory czar because he defends and practices “cost-benefit analysis.” This does not mean that Sunstein’s approach to regulation will be satisfying to many on the Right. He admits that “New Deal constitutionalism,” which he defends, has “contributed to a number of problems that the original Constitution sought to remedy.” But he thinks the resulting administrative state can be easily salvaged, and should be. The most important means of reforming it, in Sunstein’s view, is for courts and administrative agencies to use *interpretation* to improve upon the statutes that Congress passes: “legislative reform must overcome an enormous burden of inertia. It is through interpretation, in the courts and the executive branch, that regulatory improvements... can be brought about most easily.”

Despite his recognition of its inherent defects, Sunstein is never willing to call the regulatory state into question. He acknowledges that one can question the legitimacy of the regulatory state based on “a belief in individual autonomy, freedom, or rights.” But, he responds, autonomy is not really threatened by the regulatory state because liberty and autonomy are strengthened, even granted, by government interference rather than its absence. For Sunstein, the purpose of law “is not merely to ensure autonomy by allowing satisfaction of preferences, but also and more fundamentally to promote autonomy in the processes of preference formation.” This duty of law to form preferences “casts severe doubt on the notion that a democratic government ought to respect private desires and beliefs in all contexts.” Rather, preferences should only be respected by government if doing so “will serve human freedom and welfare.” Once again, Sunstein begs the question. He says nothing about the competing—even contradictory—views of freedom and welfare that might be advocated.

Architects of Choice

IN SUNSTEIN’S ANALYSIS, AUTONOMY IS NOT acting in accordance with one’s preferences made in the absence of government interference; it is acting in accordance with preferences formed and enlightened by government. *Nudge* (2008), co-authored with Richard Thaler, a University of Chicago economist, is Sunstein’s prescription for translating the old progressivism into contemporary policy, with a generous bow to the critique of central planning that Friedrich Hayek and others mounted in the last century. Sunstein acknowledges, in fact, that direct central planning of the economy has been repudiated, but he recommends an alternative approach to attain the same results: “libertarian paternalism,” he dubs it, the paradoxical combi-

nation of a lack of faith in planning and a lack of faith in markets.

Libertarian paternalism, Sunstein and Thaler explain, occurs when “choice architects” frame decisions in such a way that people are induced to make the proper choice on their own. (A choice architect is someone who “has the responsibility for organizing the context in which people make decisions.”) The freedom to choose is not formally curtailed, but the choice architects package the choice in such a way that people are induced to exercise their freedom responsibly. The experts manipulate the default options, but individuals may always opt out. This, according to the authors, is the “true, third way” between planning and *laissez-faire*.

Though *Nudge* deals successfully with several possible objections to libertarian paternalism, the book neglects to confront the most fundamental objections. One important difficulty with the argument is that one man’s nudge is another man’s shove. The authors praise a New

One important difficulty with the argument is that one man’s nudge is another man’s shove.

York law compelling restaurants to provide caloric information on their menus. This is certainly a nudge to the consumer but to the proprietor it is a mandate.

And tellingly, the authors clearly like libertarian paternalism in some respects, but not in others. Would Sunstein and Thaler support a default option of opening each school day with readings from the Bible, so long as students are free to opt out? It’s unlikely.

In *Nudge*, the decision when to employ a choice architect and when to allow for uninfluenced choice ultimately hinges on whether the authors like the architect and his design. The choice architects are not themselves subject to nudges fashioned by meta-choice architects.

Nudge once again illustrates a profound, unresolved tension between old and postmodern progressivism. The former camp retains its affinity for centralized administration and planning by experts based on a faith in science, objective truth, and History. But postmodernism’s denial of objective truth and even the legitimacy of science itself has resulted in liberal indifference or even outright hostility to government

control over individual choices and lifestyles. Libertarian paternalism attempts to square this circle by authorizing experts to influence us, but giving each of us permission to opt out.

Ultimately, *Nudge* relies on the idea that there are “choice architects” with objective knowledge of what is best for us, who should frame choices in order to get us to understand what is in our best interest. But these are the same sort of experts who failed, miserably, to predict the consequences of President Obama’s stimulus bill on the rate of unemployment. Sunstein and Thaler cannot get around the *knowledge* problem: how do we know which nudges will be helpful and which will be harmful? And then there’s the *knower* problem: who out there is qualified to be a choice architect?

The book’s opening example speaks volumes. A hypothetical expert, with “formal training in nutrition (a master’s degree from the state university),” assembles a team of graduate students to collect and analyze data on the effects of arranging food choices in school cafeterias. The hope is that these experts can use their data to influence the schoolchildren to eat properly by nudging them in the right direction. Americans are portrayed as schoolchildren in need of good guidance from benign experts, formally trained in the methods of social-science data collection and analysis.

Worst of all, libertarian paternalism is confused about what it means to have liberty. Liberty is defined by Sunstein and Thaler as the ability to choose among competing options. But government can deprive someone of liberty even while presenting him with several options; and liberty can exist even when only one option is present. As Friedrich Hayek explained so well in *The Constitution of Liberty*, “the range of physical possibilities from which a person can choose at a given moment has no direct relevance to freedom. The rock climber on a difficult pitch who sees only one way out to save his life is unquestionably free, though we would hardly say he has any choice.” The upshot is clear: choice and liberty are not the same thing. Liberty is possible even where choice does not exist, and choice does not always translate into liberty. Libertarian paternalism turns out to be merely soft paternalism.

Deliberative Democracy

DELIBERATIVE DEMOCRACY IS A FASHIONABLE notion in today’s legal scholarship. Derived from thinkers such as Dewey, and contemporary philosophers such as Joshua Cohen and Amy Gutmann, it is a theme that runs through Sunstein’s political and regulatory philosophy. He discusses it primarily in *The*



Partial Constitution and Designing Democracy (2002). It offers him a convenient means of referring back to the framers, and even invoking them in support of contemporary jurisprudence, without actually examining their principles and conclusions. (The term is also central to President Obama's chapter on the Constitution in *The Audacity of Hope*.)

Deliberative democracy requires that political policies be responsive to the public's wishes... so long as the majority's preferences are the correct ones. Citizens need to be introduced to a diversity of viewpoints in such a way that they abandon their irrational preferences and adopt rational ones. Sunstein writes,

For the Constitution's original framers, it was exceedingly important to produce a political order that combined reflectiveness and reason giving with a degree of popular responsiveness.... Under the constitutional system majorities were not permitted to rule simply because they were majorities. On the contrary, the Constitution created a kind of *republic of reasons*—a system of checks and balances that would increase the likelihood of reflective judgments.

As stated, Sunstein's concept of "deliberative democracy" sounds like a plausible version of the founders' view. After all, Thomas Jefferson famously proclaimed that "though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable." But it is far from apparent that Sunstein's views on such matters line up with the founders'. In the first place, the founders expected the mechanisms and precepts of limited government—including federalism, separation of powers, and a written Constitution that was difficult to amend—to stand guard over deliberative democracy, and to concentrate the virtues of deliberation in the legislative process of the national government. Sunstein's version is more populist and progressive. Accordingly, his criteria for deliberative democracy look (unsurprisingly) like a laundry list of favored progressive policies. Deliberative democracy requires a commitment to "freedom from desperate conditions," so that no one is deprived of food, shelter, or medical care. Because of its commitment to the idea of citizenship, deliberative democracy means that the First Amendment "has positive dimensions" as well as negative ones. For example, government has to intervene in television and radio broadcasting "to ensure that the system of free expression is not violated by legal rules giving too much authority to private persons."

These may or may not be valid policy objectives, but it is a stretch to link them up with the founders' constitutional principles. Deliberative democracy turns out to be a nice catchphrase to obfuscate the extent to which contemporary American government *departs* from the framers' principles—a point Sunstein, confusingly, admits as frequently as he denies.

Sunstein's Constitution

SUNSTEIN CONCEDES IN *THE SECOND BILL of Rights* and *After the Rights Revolution* that by expanding and entrenching our administrative state, Franklin Roosevelt fundamentally altered the constitutional system that the framers devised. Although he perfunctorily throws in some quotes from James Madison and Jefferson to suggest that the administrative state is not entirely at odds with the Constitution, Sunstein has to acknowledge that FDR's "new regulatory state...altered preexisting understandings of the three pillars of the constitutional order: individual rights, checks and balances, and federalism."

New Deal constitutionalism—with its novel administrative state apparatus—"renovated the original constitutional regime" in favor of a new understanding of rights, which required a new theory of the role of government. The Constitution does not seem to endorse this new understanding of rights or the new role of government, and in *The Second Bill of Rights* Sunstein attempts to grapple with this fact. For instance, he half-heartedly mentions Bruce Ackerman's thesis that the New Deal is a "constitutional moment" during which a kind of unwritten, and plebiscitary, constitutional amendment took place. But Sunstein is reluctant to give up on the idea that there is some antecedent to the New Deal in the founding period.

Admitting the profound change, he maintains nonetheless that "the transformation involved no violation of constitutional principles. The American Constitution is a flexible instrument, one that allows for a great deal of change over time.... It permits changes in institutional arrangements. That is part of its genius." Of course, changes in institutional arrangements are permissible. That's why there's an amendment process in the Constitution. But he doesn't want to be bothered with such procedural anachronisms: "the American Constitution is not frozen in time. It explicitly provides for its own amendment. But more fundamentally, the Constitution is not frozen because its meaning changes through interpretation."

Sunstein's claim that the Constitution's meaning changes over time coheres with his so-called judicial "minimalism"—the argument

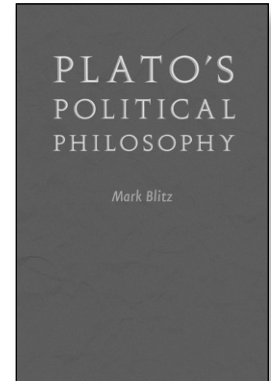
Plato's Political Philosophy

Mark Blitz

Focusing on three of Plato's dialogues—*The Laws*, *The Republic*, and *The Statesman*—Mark Blitz lays out the philosopher's principal interests in government and the strength and limit of the law, the connection between law and piety, the importance of founding, and the status and limits of political knowledge. He reinforces Plato's emphasis on clear and rigorous reasoning in ethics and political life and explains in straightforward language the valuable lessons one can draw from examining Plato's writings.

"An extraordinarily fresh, rich, and thought-provoking introduction to Plato's political philosophy. Blitz takes a synoptic approach, combining in-depth textual analysis of particular dialogues with illuminating thematic discussions. The result is an extremely helpful, general-but-precise analysis of virtually all of the Platonic dialogues."

—Peter J. Ahrens Dorf, Davidson College
\$24.95 paperback



The Politics of Judicial Independence

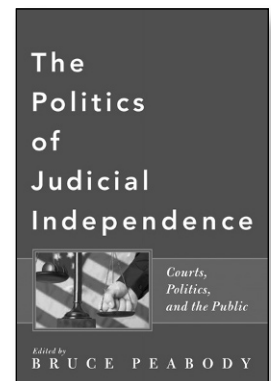
Courts, Politics, and the Public

edited by Bruce Peabody

"This edited volume of essays on the relations between courts (primarily the U.S. Supreme Court) and other branches of government documents and analyzes a remarkable political jousting that has ebbed and flowed throughout the nation's history.

It is a demonstration of the power of political science to reveal rarely acknowledged realities of the judicial process in a democratic society."

—Richard A. Posner, Judge, United States Court of Appeals for the Seventh Circuit, and Senior Lecturer at the University of Chicago Law School
\$28.00 paperback



THE JOHNS HOPKINS UNIVERSITY PRESS
1-800-537-5487 • press.jhu.edu



New from The Library of America

The iconoclastic volumes that changed American culture

H. L. MENCKEN: Prejudices: The Complete Series

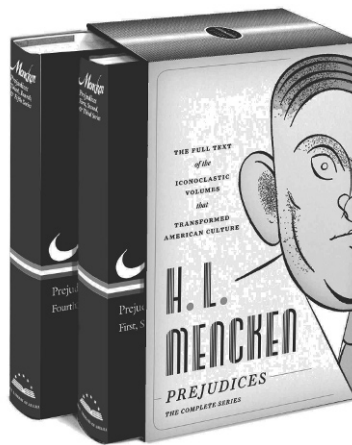
Marion Elizabeth Rodgers, editor

The full text of all six series of Mencken's landmark *Prejudices* (1919–1927), restored to print in a deluxe two-volume boxed set.

"Mencken is the most influential critic in American history, really the *only* influential critic in American history."

—Benjamin Schwarz, *The Atlantic*

1280 pages • \$70



In one volume for the first time, four groundbreaking works by America's foremost economist

JOHN KENNETH GALBRAITH:

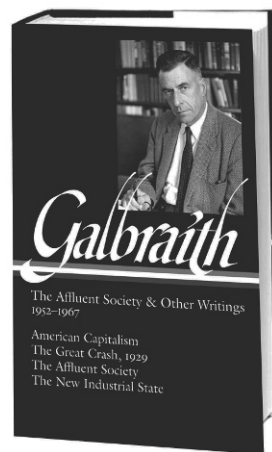
The Affluent Society & Other Writings 1952–1967

James K. Galbraith, editor

The four works collected here established Galbraith as one of the most important and unconventional American thinkers of his time: *American Capitalism*; *The Great Crash, 1929*; *The Affluent Society*; and *The New Industrial State*.

"In the hands of John Kenneth Galbraith, economics becomes a glittering branch of literature." —Arthur Schlesinger, Jr.

1104 pages • \$40



THE LIBRARY of AMERICA
Classic Writers. Classic Books.

Distributed by Penguin Group (USA) Inc.

that judges owe the elected branches "a large measure of deference and respect." The underlying idea of *A Constitution of Many Minds* (2009) is that Jefferson had the better of the argument in his famous exchange with Madison in 1787 about whether or not constitutions should be continually revised. Though the Constitution's text endures, "the tale of constitutional stability is a myth. Jefferson has had his revenge—not through formal amendments, but through social practices and interpretations that render our Constitution very different from the founders' Constitution." This informal amendment process has not been led by the courts but by multiple generations of Americans. "Ours is a constitution of many minds," he writes. "There have been numerous founders," including "not merely Madison and Hamilton and their compatriots, but also Abraham Lincoln, Susan B. Anthony, Franklin Delano Roosevelt, Martin Luther King, Jr., Lyndon Baines Johnson, Barry Goldwater, Ronald Reagan, Gloria Steinem, and countless other public figures."

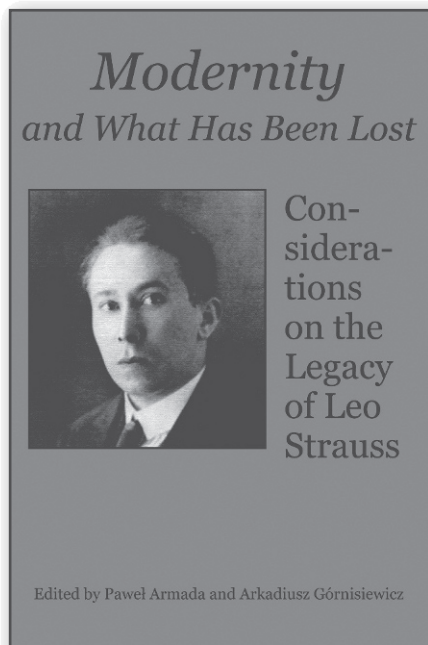
The key link between the living Constitution theory and judicial deference (or minimalism) is that, according to Sunstein, constitutional change occurs and ought to occur not through judicial interpretation but through elected representatives and their choices. To think otherwise "is a major mistake."

Burkean Minimalism

THIS ONE OF SUNSTEIN'S MOST POWERFUL rationales for judicial deference to the administrative state is that the "wisdom of crowds" has endorsed it for generations. "[W]here the Constitution is ambiguous," he writes, "courts do best to attend to long-standing practices, on the ground that those practices reflect the judgments of many people extending over time." This approach, Sunstein volunteers, "owes much of its appeal to the arguments of the great conservative theorist Edmund Burke." "Constitutional traditionalism," then, can be called "Burkean minimalism," the view "that judges should take narrow, theoretically unambitious steps, at least when they lack experience or the information to rule broadly or ambitiously." It is an approach that assumes human reason's frailty and incapacity to foresee results—an assumption shared by Friedrich Hayek, our author notes.

Seen through this lens, conservative originalists look profoundly anti-traditional. "[O]ne of the most intriguing developments on the Supreme Court," he writes, "has been the emergence of a powerful alliance between two different kinds of conservatives: the visionaries and the minimalists." Antonin Scalia and Clarence Thomas are

Modernity and What Has Been Lost Considerations on the Legacy of Leo Strauss



The world we live in, molded by science and historical relativism, may be described as hostile to human dignity or perfection, or abhorrent to those who love the search for wisdom. Straussian teaching consisted in the steady effort to reopen "the quarrel between the Ancients and the Moderns," and refers to the esoteric way of writing practiced by the most profound thinkers of the past which has been apparently forgotten in the last three centuries. Strauss binds the concept of natural right with the question of maintenance of conditions for philosophizing, and it probably seems to him that such defense of philosophy is the highest task in our times.

However, one must be aware that philosophizing always means a perilous way of life. Indeed, it may be destructive of the city (*polis*) itself as far as the city exists due to some crucial beliefs the philosopher might put in doubt. Reflecting on those issues, Strauss engaged in several highly important debates with contemporaries, in an open way with, e.g., Carl Schmitt, Karl Löwith and Alexandre Kojève, and more tacitly with Martin Heidegger.

Essays from Heinrich Meier, Daniel Tanguay, Nathan Tarcov, David Janssens, Paweł Armada, Jürgen Gebhardt, Arkadiusz Górniewicz, Emmanuel Patard, Piotr Nowak, Till Kinzel, and Laurence Lampert.

181 pages, 6" x 9", paperbound; ISBN: 978-1-58731-511-4; notes, indexes, \$27.00, November 2010

St. Augustine's Press

orders: 800-621-2736; editorial: bruce@staugustine.net * www.staugustine.net



visionaries, according to Sunstein; John Roberts and Samuel Alito are minimalists. The former seek to impose a long-abandoned form of limited government onto a society that has accepted the administrative state through a process of gradual reform. "As against Burkeans, originalists insist that departures from the original understanding are illegitimate, even if those departures are long-standing," while "[f]rom the Burkean perspective, originalism is far too radical, because it calls for dramatic movements in the law."

There is, however, a striking incongruence—incoherence, really—between Sunstein's deference to the wisdom of crowds on the one hand, and his more rationalist theory of deliberative democracy, choice architecture, and the rule of experts, on the other. But he does not unequivocally embrace either Burkeanism or rationalism. Rather, in keeping with his pragmatic approach, he simply aims to show where Burkeanism is defensible and where rationalism can be a better option. He writes, "If we understand Burkean minimalism in pragmatic terms, we will be able to make progress toward specifying the conditions in which that approach is justified." In particular, our so-called tradition produces good results in "the domains of separation of powers, federalism, and gun rights.... But when we are speaking of equality, traditionalism has much less force. In that domain, the present knows more than the past." Traditionalism is to be followed, that is, when we derive agreeable results from it—and abandoned when the results are not to our liking. In most cases, Burkeanism is the best approach

because our recent legal tradition is largely good. The regulatory state is in place.

Of course, "committed Burkeans will be skeptical about any such consequentialist assessment," but Sunstein is not a committed Burkean. He sides with Burkean traditionalism if and only if it produces the results he likes. This stance is clear not only in *A Constitution of Many Minds*, but also in *Radicals in Robes* (2005). It is at least entertaining to read a progressive citing Tradition against conservatives who want to preserve or restore constitutional ideas no longer in vogue in the 21st century.

Yet Sunstein's ability to expose the tension between conservative traditionalism and originalism does not diminish the profound contradictions in his own arguments. In some books he wants judges to defer to tradition and the wisdom of crowds, and to avoid imposing their rationalist blueprints on society. But in others he wants regulators and judges to be free to form citizens' preferences and establish a "deliberative democracy" where people are influenced to think rightly about questions of importance to them. The meaning of the Constitution or a law is not found in the document itself, he claims, and every interpreter must bring his own preferences to the text. But the meaning of such texts is not indeterminate, he warns, lest we give up on reason altogether. On the one hand, the New Deal regulatory state did significant damage to the Constitution. On the other, the meaning of the Constitution changes over time, and FDR's Second Bill of Rights should be the lodestar of

American policy and jurisprudence. Professor Sunstein's own mental constitution is one of many minds.

There is a great deal to be learned from reading the work of Cass Sunstein. He is a brilliant, intellectually honest legal thinker who understands better than most the history of our 20th-century movement towards activist government and away from founding principles. He tends to come up with creative solutions to legitimate public problems, rather than clinging to progressive orthodoxies. But he does not reach questions of core principles. If one wishes to explore the fundamental questions that define American politics—competing conceptions of first principles such as liberty, equality, democracy, and the rule of law—one will be disappointed with Sunstein's arguments. His pragmatism is a convenient cover for effacing the foundational debates of our republic. Not only is he uninterested in debating these fundamental questions; by defining his own position as the pragmatic one, he seeks to end reasonable debate about our principles altogether. What's more, the contradictions in his own writings are apt to leave the reader questioning the coherence of the progressivism that Sunstein so meticulously defends. The final triumph of postmodernism is to avail itself of modern or pre-modern justifications whenever they come in handy, and disparage them when they don't.

Joseph Postell is assistant professor of political science at the University of Colorado, Colorado Springs.

The CLAREMONT REVIEW OF BOOKS is a publication of the CLAREMONT INSTITUTE
FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY.

Subscribe to
the *Claremont Review of Books*

“The Claremont Review of Books fills a crucial gap in the journalism of the Right, bringing criticism to the overblown and unsound, and needed attention to the worthy and uplifting.”

—Steven F. Hayward
author, *The Age of Reagan*

Subscribe to the *CRB* today and save 25%
off the newsstand price. A one-year
subscription is only \$19.95.

To begin receiving America's premier
conservative book review, visit
www.claremont.org/crb
or call (909) 621-6825.

CLAREMONT
REVIEW OF BOOKS
937 W. FOOTHILL BLVD.
SUITE E
CLAREMONT, CA
91711

NON PROFIT ORG.
U.S. POSTAGE PAID
PERMIT NO. 504
CLAREMONT, CA