BOOK REVIEW

THE JUDICIAL BREZHNEV DOCTRINE

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Review Essay on CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) and MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

I.

For years—for decades really—liberal law professors spilled much ink and filled many pages defending the judicial activism of the Warren and Burger Courts. When conservative scholars tried to remind their liberal colleagues that the creation of new rights was the province of the legislature, not the judiciary, they were met with scorn and—in Robert Bork's case—with character assassination. Some liberal academics even went so far as to argue that *the judiciary* was speaking for the people when it invalidated laws passed by the people's elected representatives.[1]

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1. *See, e.g.*, CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960) (defending judicial review as serving the people's interests by constraining state and federal government and serving a legitimating function); *see also* 1 BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (advocating a dualist approach to government, whereby Congress conducts normal politics and the Supreme Court engages in higher lawmaking by mandate from the American people during "constitutional moments"); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1493-94 (1988) [hereinafter Michelman, *Law's Republic*] ("[B]oth legislative politics and constitutional adjudication [are] forms of self-revisionary normative dialogue through which personal moral freedom is also achieved."); Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4, 74 (1986) [hereinafter Michelman, *Traces*] ("[T]he courts, and especially the Supreme Court, seem to take on as one of their ascribed functions the modeling of active self-government that citizens find practically beyond reach."). *See generally* Scott D. Gerber, *The Republican Revival in American Constitutional Theory*, 47 POL. RES. Q. 985 (1994) (examining ACKERMAN, *supra*; Michelman, *Law's Republic*, *supra*; Michelman, *Traces*, *supra*; and CASS R. SUNSTEIN, THE PARTIAL

Now that conservative jurists control the federal judiciary in general and the Supreme Court in particular, liberal law professors have suddenly found the religion of judicial restraint. Liberals are stealing so many plays from the conservative playbook that some—Yale Law Professor Akhil Reed Amar, in particular—are trying to claim Bork's theory of original intent for liberal purposes.[2] Clearly, Al Smith[3] got it right when he quipped in the simpler days of yore that everything—at least everything in politics—"depends on whose ox is being gored."[4] Nowhere is the current liberal disenchantment with the judiciary more plainly seen than in two recent books by Mark Tushnet of Georgetown University and Cass Sunstein of the University of Chicago.[5]

Tushnet and Sunstein are two of the most prolific scholars in the legal academy. Both clerked for the late Supreme Court Justice Thurgood Marshall—a judicial activist if there ever was one[6]—and both are unquestionably leftist in political orientation.

II.

Tushnet's *Taking the Constitution Away from the Courts*[7] is the more extreme of the two books. (Tushnet describes himself as a "radical" law professor.[8] Sunstein doesn't go quite that far.) The book's title means precisely what it says: Tushnet calls for a

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CONSTITUTION (1993)).

2. *See* Scott D. Gerber, *One More from the Republican Revival*, H-NET REVIEWS (2000), *at* http://www2.h-net.msu.edu/reviews (reviewing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998)). *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (arguing that the temptation for judges to read their own personal values or policy preferences into the Constitution under the guise of interpretation must be resisted by adherence to the theory of original understanding).

3. Smith served four terms as Governor of the State of New York from 1918 to 1928.

4. HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 5 (7th ed. 1998) (quoting Al Smith).

5. Both books consist in large part of material that had appeared previously in law journals. Most notable in this regard is Sunstein's foreword to the *Harvard Law Review*'s summary of the Supreme Court's 1995 Term. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (discussing and advocating decisional minimalism).

6. Marshall was, of course, one of the most significant civil rights lawyers in the history of the United States (and likely the most significant). However, he clearly brought his activist-orientation to his role as a judge.

7. MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

8. *See* Tony Mauro, *Should We Just Ignore Thomas?*, LEGAL TIMES, Dec. 4, 1995, at 11 (quoting Tushnet).

constitutional amendment overruling *Marbury v. Madison*,[9] the landmark 1803 decision by Chief Justice John Marshall that is widely credited with establishing the Supreme Court's power of judicial review.[10] In its place, Tushnet advocates "populist constitutional law": a constitutional law that is defined *outside* of the courts by the people themselves, "whether we act in the streets, in the voting booths, or in legislatures as representatives of others."[11]

Tushnet divides *Taking the Constitution Away from the Courts* into eight chapters, together with a preface and a prologue. Chapter One, "Against Judicial Supremacy," is devoted to establishing his basic framework, with particular attention being afforded to differentiating between, in Tushnet's unnecessarily clunky language, the "thin Constitution" (in other words, rights questions) and the "thick Constitution" (powers questions). Although the book is primarily about the "thick" question of judicial review, Tushnet spends most of his time addressing "thin" questions of private rights, which suggests that his *real* objective—as explained in Part IV below—is to protect *liberal* rights precedents.

In Chapters Two ("Doing Constitutional Law Outside the Courts"), Three ("The Question of Capability"), and Four ("The Constitutional Law of Religion Outside the Courts"), Tushnet describes how we can contemplate the Constitution without judicial decisions to guide us. In Chapters Five ("The Incentive-Compatible Constitution") and Six ("Assessing Judicial Review"), he maintains that the abolishment of judicial review would not mean less protection for individual and minority rights. This is perhaps the most counter-intuitive portion of the book—after all, most of us were taught that the judiciary's principal function is to *protect* rights—but Tushnet's position is not without precedent in the scholarly literature.[12]

Chapter Seven ("Against Judicial Review"), likely the book's

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9. 5 U.S. (1 Cranch) 137 (1803).

10. For a revisionist account of the significance of both *Marbury* and Chief Justice Marshall, see SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL (Scott Douglas Gerber ed., 1998).

11. TUSHNET, *supra* note 7, at 181.

12. *See, e.g.*, Henry Steele Commager, *Judicial Review and Democracy*, *in* JUDICIAL REVIEW AND THE SUPREME COURT: SELECTED ESSAYS 73 (Leonard W. Levy ed., 1967) ("Congress, and not the courts, emerges as the instrument for the realization of the guarantees of the Bill of Rights.").

most important chapter, suggests how the courts can be denied any role in constitutional interpretation whatever. In Chapter Eight ("Populist Constitutional Law"), Tushnet summarizes his argument—and it *is* a law professor's "argument" in the literal sense of the word—for populist constitutional law.

At the heart of Tushnet's argument is his belief that the Constitution is not so much a set of written provisions as it is a set of aspirational principles set forth in the document's preamble and in the Declaration of Independence that preceded it. Here, Tushnet sounds very much like Clarence Thomas, a Supreme Court justice whose confirmation he strongly opposed and whose service on the Court he seeks to delegitimate. Tushnet is on record as suggesting that the American people not regard the cases decided by the Court by a 5-to-4 vote, with Justice Thomas in the majority, as binding law.[13]

Justice Thomas's commitment to the principles of the Declaration of Independence was stated most dramatically in his concurring opinion in *Adarand Constructors, Inc. v. Peña*,[14] the Rehnquist Court's 1995 broadside against affirmative action. Justice Thomas wrote:

> There can be no doubt that the paternalism that appears to lie at the heart of this [affirmative action] program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").[15]

Tushnet certainly doesn't want to follow Thomas that far. In fact, Tushnet's writings are replete with *support* for affirmative action and other egalitarian policies. For example, in his most recent biography of Thurgood Marshall, Tushnet declares that Justice Marshall's "opinions on equality and fair procedures stand as exemplars of Great Society jurisprudence."[16] However, Tushnet fails to explain how the color-blind principles articulated

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13. *See* Mark V. Tushnet, *Clarence Thomas: The Constitutional Problems*, 63 GEO. WASH. L. REV. 466, 477 (1995) (reviewing JANE MAYER AND JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS (1994)).

14. 515 U.S. 200 (1995).

15. *Id.* at 240 (Thomas, J., concurring in part and concurring in the judgment).

16. MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991, at 196 (1997).

in the Declaration of Independence can be reconciled with the color-conscious policies promoted by Justice Marshall and the other members of the Warren and Burger Courts whom he so admires.[17]

III.

Like Tushnet, Sunstein attempts to assimilate the language of judicial restraint into the politics of legal liberalism. His *One Case at a Time: Judicial Minimalism on the Supreme Court*[18] is subtler than Tushnet's *Taking the Constitution Away from the Courts*. The famed University of Chicago law professor[19] argues for what he calls "judicial minimalism," a theory of judicial review that limits the Court to the specific questions posed by a particular case and discourages it from handing down broad rulings with sweeping social consequences.[20] Sunstein insists that the broad questions—for example, whether abortion should be legal—should be left for the people to decide through the process of "deliberative democracy."[21]

Sunstein organizes his book into three sections in brief-like fashion: "Argument," "Applications," and "Antagonists." The "Argument" section, which non-specialists may find rough-going given Sunstein's penchant for using jargon, is itself divided into four chapters. In these four chapters, the author describes, respectively: (1) what his theory of judicial review entails (although he claims minimalism is not really a "theory" at all[22]); (2) why his theory is "democracy promoting"; (3) how judicial minimalism can minimize the burdens of judicial decisions and the costs of mistakes; and (4) what the "substance" is of the decisionmaking "process" he advocates.

Chapter Four is the most troubling of the "Argument" section: Sunstein formulates "minimalism's substance" in such broad

17. *See* SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 173-75 (1995) (arguing that the Declaration of Independence mandates color-blind constitutionalism).

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

19. *See* Lincoln Caplan, *When the Justices Don't Want to Get Involved*, CHI. DAILY L. BULL., June 3, 1999, at 2 (reporting that Sunstein's writings are cited more often than any other law professor of the day).

20. SUNSTEIN, *supra* note 18, at ix-xi.

21. *Id.* at 24-45.

22. *See id.* at 8.

terms (e.g., "the right to vote," "the rule of law," and "no torture, murder, or physical abuse by the government")[23] as to render it both meaningless—the slogan "as American as apple pie" comes quickly to mind when reading this chapter—and infinitely malleable by judges, be they "minimalists" or "maximalists." As explained below, the "Applications" section, where Sunstein applies his theory of judicial minimalism to several substantive areas of constitutional law, and the "Antagonists" section, where he defends it against prospective critics, make plain just how malleable his theory is.

Interestingly, Sunstein does not argue simply that the Court *should* be minimalistic; he also argues that a majority of the current Justices—John Paul Stevens, Sandra Day O'Connor, David Souter, Ruth Bader Ginsburg, and Stephen Breyer—*are* in fact judicial minimalists.[24] And he applauds them for it. This should not be surprising. After all, the Justices Sunstein names are all liberals (okay: nobody really knows what Justice O'Connor's politics are).

Contrast Sunstein's praise for these five Justices with what he says about Justice Thomas, for example. Sunstein labels Thomas a judicial "maximalist:"[25] a jurist who "often urges the Court to provide wider judgments and clearer guidance."[26] This doesn't sound so bad, does it? What's wrong with clear guidance? It sounds bad to Sunstein, though. Indeed, in an interview published in the *Legal Times* shortly after his book went to press,[27] Sunstein singled out Justice Thomas for his "astonishing" concurring opinion in *44 Liquormart, Inc. v. Rhode Island*[28]: an opinion in which Thomas maintained that commercial speech should be treated the same as political speech.[29] Liberals, of course, disdain commercial speech. Burt Neuborne, for one, a New York University law professor and the former director of the American Civil Liberties Union, complained after the Court's

23. *Id.* at 63-67.

24. *See id.* at 9.

25. *See id.* at 11. Sunstein also attaches the "maximalist" label to Chief Justice Rehnquist and Justice Scalia.

26. *Id.*

27. Ted Leventhal, *On Theory-Builders and Threats*, LEGAL TIMES, June 28, 1999, at 62 (quoting Sunstein).

28. 517 U.S. 484 (1996).

29. *See id.* at 522-23 (Thomas, J., concurring in part and concurring in the judgment).

decision in *44 Liquormart* that the First Amendment right to free speech—for decades a favorite among liberals—is now "the favorite argument for corporations and advertisers."[30]

Justice Thomas got it right, though, when he observed in his concurring opinion that the Framers' "political philosophy equated liberty and property," and that there was no "philosophical or historical basis for asserting that 'commercial speech' is of 'lower value' than 'noncommercial speech.'"[31] Put directly, the subordination of commercial speech to noncommercial speech in the hierarchy of judicial protection—like the subordination of economic rights to "personal" rights in general—has been a political decision by Supreme Court Justices who prefer speech about politics, art, or science to speech about commerce.[32]

Sunstein spends little time on commercial speech, though. Instead, he devotes chapters in his "Applications" section to the right to die, affirmative action, discrimination based on gender and sexual orientation, and the regulation of communication technologies such as the Internet. He argues that the nation is currently in "moral flux" on these issues and that the Rehnquist Court should—and correctly does—leave the "fundamental issues undecided" in these areas.[33]

Predictably, however, Sunstein objects when the democratic process—the process in which he suggests the "fundamental issues" should be defined—decides these issues in a conservative way. The issue of affirmative action provides the best example. Remember Proposition 209, the California referendum that outlawed preferential treatment based on race? Sunstein certainly does. However, he declares *that* isn't what he means by democracy. He writes:

> Political processes in California on this issue did not appear deliberative. . . . In the context of affirmative action in particular, there is a danger that referendum outcomes will not be based on a careful assessment of facts and values, but instead on crude "we-they" thinking. This is a particular

30. David G. Savage, *1st Amendment Rulings Are Out of Order, Liberals Complain*, L.A. TIMES, Dec. 18, 1996, at A5 (quoting Burt Neuborne).

31. *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring in part and concurring in the judgment).

32. *See* SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 161 (1999).

33. SUNSTEIN, *supra* note 18, at xi-xiv.

danger in the context of race.[34]

In short, Sunstein appears willing to put decisions about fundamental issues of constitutional law in the hands of the American people *unless the people reach decisions he dislikes.* Indeed, in his "Antagonists" section, Sunstein criticizes Justice Scalia's jurisprudence—which likewise manifests a preference for leaving as many decisions as possible to the democratic process[35]—for failing to promote democracy "rightly understood."[36]

IV.

It doesn't take a rocket scientist—or a celebrated law professor, for that matter—to figure out what is going on here. Sunstein and Tushnet are clearly afraid that the now-conservative judiciary is rolling back too many of their preferred liberal judicial rulings. They are announcing, if you will, a kind of judicial Brezhnev Doctrine: "what we have, we keep."[37]

Nothing if not honest, Tushnet is unambiguous on the point. He writes in Chapter Seven ("Against Judicial Review"):

> Of course I have many views about what the Constitution means. So do you. And of course if I could guarantee that five justices held exactly the views I have, I would be wildly in favor of judicial review. So would you. The problem, of course, is that your views and mine might be rather different, and neither of us can guarantee that the judges will agree with us all the time.[38]

Tushnet repeats this theme elsewhere. For example, in a 1998 article for *Dissent* magazine entitled *Is Judicial Review Good for the*

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34. *Id.* at 133.

35. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (Amy Gutman ed., 1997) (advocating a textualist theory of interpretation and arguing that it is "simply not compatible with democratic theory . . . that unelected judges decide what [the law means]").

36. SUNSTEIN, *supra* note 18, at 211-12, 262.

37. The "Brezhnev Doctrine" was announced in November 1968 by then-Soviet leader Leonid Brezhnev to justify the Soviet invasion of Czechoslovakia. Brezhnev declared that the Soviet Union had a duty to maintain a "correct" vision of socialism in countries within the Soviet sphere of influence. The doctrine was extended in 1979 by the invasion of Afghanistan to countries not already within the Soviet sphere of influence. It was renounced by Mikhail Gorbachev in 1989. Of course, the Soviet Union is itself now defunct.

38. TUSHNET, *supra* note 7, at 155.

Left?[39] (reprinted as a chapter in *Taking the Constitution Away from the Courts*), he explains at length how judicial review may have been good for the left during the heyday of the Warren and Burger Courts,[40] but not under the Rehnquist Court. Tushnet returns to the subject of affirmative action—*the* sacred cow of the left—to illustrate his point. He writes: "On race discrimination law, it is enough to note that *Brown* [*v. Board of Education*[41]] no longer is the central case dealing with race. Now the Court's anti-affirmative action decisions are central."[42]

Sunstein is careful not to criticize the judiciary's increasingly conservative politics in *One Case at a Time*. However, he was quite willing to do so in an op-ed in the *New York Times* when the book first appeared in print. He wrote:

> Conservative politicians often complain about the decisions of liberal Federal judges who, they say, do not respect the judgments of elected officials. . . . But judicial activism on the part of conservative judges is a much more serious problem, as some Reagan and Bush appointees have proved far too willing to invalidate decisions made by Congress and the executive branch.[43]

To bring home his point, Sunstein described a 1999 D.C. Circuit Court ruling[44] that struck down a provision of the Clean Water Act, and a series of Fourth Circuit decisions[45]—the same

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39. Mark Tushnet, *Is Judicial Review Good for the Left?*, DISSENT, Winter 1998, at 65.

40. The Burger Court was a liberal Court, too. After all, it gave the nation *Roe v. Wade*, 410 U.S. 113 (1973) (legalizing abortion), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (allowing use of race in university admissions).

41. 347 U.S. 483 (1954).

42. Tushnet, *supra* note 39, at 66.

43. Cass R. Sunstein, *The Courts' Perilous Right Turn*, N.Y. TIMES, June 2, 1999, at A25.

44. American Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, Browner v. American Trucking Ass'ns, 120 S. Ct. 2003 (2000).

45. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc) (holding that provision of Violence Against Women Act creating a private right of action for victims of gender-motivated violence exceeded Congress's powers under the Commerce Clause and Section 5 of the Fourteenth Amendment), *aff'd sub nom.* United States v. Morrison, 120 S.Ct. 1740 (2000); Condon v. Reno, 155 F.3d 453 (4th Cir. 1998) (holding Driver's Privacy Protection Act to have violated the Tenth Amendment and exceeded Congress's power under Section 5 of the Fourteenth Amendment), *rev'd*, 120 S.Ct. 666 (2000); United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (striking down provision of Clean Air Act as applied in EPA regulations because it exceeded Congress's power under the Commerce Clause).

circuit that called *Miranda v. Arizona*[46] into serious question[47]—on behalf of states' rights. "All too often," Sunstein concluded, "conservative judicial activists ignore other reasonable interpretations of the Constitution to entrench their own and do so at the expense of democratic self-rule."[48]

Where is Al Smith when we need him?

46. 384 U.S. 436 (1966).

47. United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999) (holding admissibility of confessions in federal court to be governed by statute, which allowed admission of voluntary confessions, rather than by the rule of *Miranda*), *rev'd*, 120 S.Ct. 2326 (2000).

48. Sunstein, *supra* note 43.