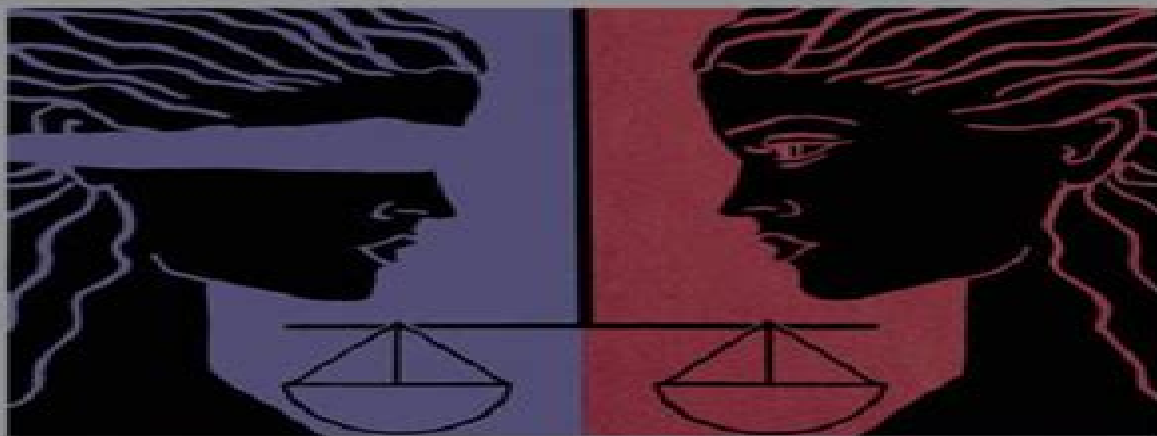


LEGAL REASONING AND POLITICAL CONFLICT



CASS R. SUNSTEIN

Legal Reasoning And Political Conflict

Kenneth D. Ward, Cecilia R. Castillo



Legal Reasoning And Political Conflict:

Legal Reasoning and Political Conflict Cass R. Sunstein, 1966 **Legal Reasoning and Political Conflict** Cass R. Sunstein Karl N. Llewellyn Distinguished Service Professor of Jurisprudence and Co-Director of the Center on Constitutionalism in Eastern Europe University of Chicago, 1996-04-04

The most glamorous and even glorious moments in a legal system come when a high court recognizes an abstract principle involving for example human liberty or equality Indeed Americans and not a few non Americans have been greatly stirred and divided by the opinions of the Supreme Court especially in the area of race relations where the Court has tried to revolutionize American society But these stirring decisions are aberrations says Cass R Sunstein and perhaps thankfully so In *Legal Reasoning and Political Conflict* Sunstein one of America's best known commentators on our legal system offers a bold new thesis about how the law should work in America arguing that the courts best enable people to live together despite their diversity by resolving particular cases without taking sides in broader more abstract conflicts Sunstein offers a close analysis of the way the law can mediate disputes in a diverse society examining how the law works in practical terms and showing that to arrive at workable practical solutions judges must avoid broad abstract reasoning Why For one thing critics and adversaries who would never agree on fundamental ideals are often willing to accept the concrete details of a particular decision Likewise a plea bargain for someone caught exceeding the speed limit need not indeed must not delve into sweeping issues of government regulation and personal liberty Thus judges purposely limit the scope of their decisions to avoid reopening large scale controversies Sunstein calls such actions incompletely theorized agreements In identifying them as the core feature of legal reasoning and as a central part of constitutional thinking in America South Africa and Eastern Europe he takes issue with advocates of comprehensive theories and systemization from Robert Bork who champions the original understanding of the Constitution to Jeremy Bentham the father of utilitarianism and Ronald Dworkin who defends an ambitious role for courts in the elaboration of rights Equally important Sunstein goes on to argue that it is the living practice of the nation's citizens that truly makes law For example he cites *Griswold v Connecticut* a groundbreaking case in which the Supreme Court struck down Connecticut's restrictions on the use of contraceptives by married couples a law that was no longer enforced by prosecutors In overturning the legislation the Court invoked the abstract right of privacy the author asserts that the justices should have appealed to the narrower principle that citizens need not comply with laws that lack real enforcement By avoiding large scale issues and values such a decision could have led to a different outcome in *Bowers v Hardwick* the decision that upheld Georgia's rarely prosecuted ban on sodomy And by pointing to the need for flexibility over time and circumstances Sunstein offers a novel understanding of the old ideal of the rule of law Legal reasoning can seem impenetrable mysterious baroque This book helps dissolve the mystery Whether discussing the interpretation of the Constitution or the spell cast by the revolutionary Warren Court Cass Sunstein writes with grace and power offering a striking and original vision of the role of the law in a diverse

society In his flexible practical approach to legal reasoning he moves the debate over fundamental values and principles out of the courts and back to its rightful place in a democratic state the legislatures elected by the people Legal Reasoning and Political Conflict Cass R. Sunstein, 1998-02-26 The most glamorous and even glorious moments in a legal system come when a high court recognizes an abstract principle involving for example human liberty or equality Indeed Americans and not a few non Americans have been greatly stirred and divided by the opinions of the Supreme Court especially in the area of race relations where the Court has tried to revolutionize American society But these stirring decisions are aberrations says Cass R Sunstein and perhaps thankfully so In Legal Reasoning and Political Conflict Sunstein one of America s best known commentators on our legal system offers a bold new thesis about how the law should work in America arguing that the courts best enable people to live together despite their diversity by resolving particular cases without taking sides in broader more abstract conflicts Sunstein offers a close analysis of the way the law can mediate disputes in a diverse society examining how the law works in practical terms and showing that to arrive at workable practical solutions judges must avoid broad abstract reasoning Why For one thing critics and adversaries who would never agree on fundamental ideals are often willing to accept the concrete details of a particular decision Likewise a plea bargain for someone caught exceeding the speed limit need not indeed must not delve into sweeping issues of government regulation and personal liberty Thus judges purposely limit the scope of their decisions to avoid reopening large scale controversies Sunstein calls such actions incompletely theorized agreements In identifying them as the core feature of legal reasoning and as a central part of constitutional thinking in America South Africa and Eastern Europe he takes issue with advocates of comprehensive theories and systemization from Robert Bork who champions the original understanding of the Constitution to Jeremy Bentham the father of utilitarianism and Ronald Dworkin who defends an ambitious role for courts in the elaboration of rights Equally important Sunstein goes on to argue that it is the living practice of the nation s citizens that truly makes law For example he cites *Griswold v Connecticut* a groundbreaking case in which the Supreme Court struck down Connecticut s restrictions on the use of contraceptives by married couples a law that was no longer enforced by prosecutors In overturning the legislation the Court invoked the abstract right of privacy the author asserts that the justices should have appealed to the narrower principle that citizens need not comply with laws that lack real enforcement By avoiding large scale issues and values such a decision could have led to a different outcome in *Bowers v Hardwick* the decision that upheld Georgia s rarely prosecuted ban on sodomy And by pointing to the need for flexibility over time and circumstances Sunstein offers a novel understanding of the old ideal of the rule of law Legal reasoning can seem impenetrable mysterious baroque This book helps dissolve the mystery Whether discussing the interpretation of the Constitution or the spell cast by the revolutionary Warren Court Cass Sunstein writes with grace and power offering a striking and original vision of the role of the law in a diverse society In his flexible practical approach to legal reasoning he moves the debate over fundamental values and principles out of the courts and back to its

rightful place in a democratic state the legislatures elected by the people Human Dignity in Asia Jimmy Chia-Shin Hsu, 2022-09-15 Using interdisciplinary methods this book is a pioneering exploration of Asian understandings of human dignity and human rights It encompasses rigorous scrutiny of dignity jurisprudence in major Asian apex courts detailed philosophical analysis of dignity in religious traditions and contextualized socio political analysis of religious dignity discourse in several Asian societies This is an innovative systematic survey of how human dignity is understood in Asia demonstrating how those understandings converge and diverge with other parts of the world Synthesising legal philosophical and sociological expertise this volume furthers the dialogue between Asia and the West and advances debates on whether human rights are universal or particular to any one region As many of the world s liberal democracies are challenged by polarization and populism this comparative study of human dignity broadens our horizons and offers a potential alternative to a rigidified social imagination **The Negotiable Constitution** Grégoire C. N. Webber, 2009-11-26 Gr goire C N Webber explores how open ended constitutional rights leave a constitution open to re negotiation by the political process **A Pluralist Theory of Age Discrimination** Stuart Goosey, 2021-01-28 This book provides a comprehensive theory of age discrimination that can guide the direct and indirect age discrimination provisions of the Equality Act 2010 The Act holds that unequal treatment on the grounds of age and measures that are on their face age neutral but have the effect of disadvantaging particular age groups are lawful only if the treatment can be shown either to be a proportionate means of achieving a legitimate aim or if the treatment fits into a specifically prescribed exception In this way the proportionality test distinguishes justified and unjustified age differential treatment with only the former legally permissible This book outlines and defends a pluralist theory of age discrimination that assists in making the distinction between justified and unjustified age differential treatment The theory identifies the principles that explain when and why age differential treatment wrongs people and the principles that can justify this treatment It is a pluralist theory because it recognises that age differential treatment can wrong people for a number of different overlapping reasons and these different reasons should inform how we apply age discrimination law The pluralist approach to age discrimination theory can improve legal reasoning in age discrimination cases by articulating the relevant principles and competing interests that are at stake in age discrimination claims In constructing the theory the book adopts the reflective equilibrium method This requires that we examine our initial moral beliefs about age discrimination by seeking coherence with beliefs we have about similar moral and philosophical issues and revising the initial beliefs as a result of challenges to them In applying this method the book identifies the following five principles to form a pluralist theory of age discrimination equality of opportunity social equality respect autonomy and efficiency *It's All in the Game* Allan C. Hutchinson, 2000-01-24 The author argues for an understanding of judging that rejects foundationalism the effort to ground legal thought on something attempts to carve out a middle way between formalist and the political visions of law and offers a reconceptual In Defense of a Political Court Terri Jennings

Peretti,2001-10-29 Can the Supreme Court be free of politics Do we want it to be Normative constitutional theory has long concerned itself with the legitimate scope and limits of judicial review Too often theorists seek to resolve that issue by eliminating politics from constitutional decisionmaking In contrast Terri Peretti argues for an openly political role for the Supreme Court Peretti asserts that politically motivated constitutional decisionmaking is not only inevitable it is legitimate and desirable as well When Supreme Court justices decide in accordance with their ideological values or consider the likely political reaction to the Court s decisions a number of benefits result The Court s performance of political representation and consensus building functions is enhanced and the effectiveness of political checks on the Court is increased Thus political motive in constitutional decision making does not lead to judicial tyranny as many claim but goes far to prevent it Using pluralist theory Peretti further argues that a political Court possesses instrumental value in American democracy As one of many diverse and redundant political institutions the Court enhances both system stability and the quality of policymaking particularly regarding the breadth of interests represented

Designing Democracy Cass R. Sunstein,2001-09-27 A fresh examination of constitutionalism is presented by one of the nation s most respected legal scholars

New Essays on the Nature of Legal Reasoning Mark McBride,James Penner,2022-05-19 This is the first book to bring together distinguished jurisprudential theorists as well as up and coming scholars to critically assess the nature of legal reasoning The volume is divided into 3 parts The first part General Jurisprudence and Legal Reasoning addresses issues at the intersection of general jurisprudence those pertaining to the nature of law itself and legal reasoning The second part Rules and Reasons addresses two concepts central to two prominent types of theory of legal reasoning The essays in the third and final part Doctrine and Practice delve into the mechanics of legal practice and doctrine from a legal reasoning perspective

Securing Constitutional Democracy James E. Fleming,2006-10-02 Famously described by Louis Brandeis as the most comprehensive of rights and the right most valued by civilized men the right of privacy or autonomy is more embattled during modern times than any other Debate over its meaning scope and constitutional status is so widespread that it all but defines the post 1960s era of constitutional interpretation Conservative Robert Bork called it a loose canon in the law while feminist Catharine MacKinnon attacked it as the right of men to be left alone to oppress women Can a right with such prominent critics from across the political spectrum be grounded in constitutional law In this book James Fleming responds to these controversies by arguing that the right to privacy or autonomy should be grounded in a theory of securing constitutional democracy His framework seeks to secure the basic liberties that are preconditions for deliberative democracy to allow citizens to deliberate about the institutions and policies of their government as well as deliberative autonomy to enable citizens to deliberate about the conduct of their own lives Together Fleming shows these two preconditions can afford everyone the status of free and equal citizenship in our morally pluralistic constitutional democracy

German Ideologies Since 1945 J. Muller,2003-02-21 The contributors of this volume seek to answer such questions as How did the Germans overcome

Germanic Ideology or did they Why is there no libertarianism in Germany What do German conservatives wish to conserve Emphasizing shared patterns of thought the contributors trace the contours of political thought in a divided nation with a difficult past and in the shadow of the culture and political values of the United States *Courts and Federalism* Gerald Baier, 2011-11-01 *Courts and Federalism* examines recent developments in the judicial review of federalism in the United States Australia and Canada Through detailed surveys of these three countries Gerald Baier clearly demonstrates that understanding judicial doctrine is key to understanding judicial power in a federation Baier offers overwhelming evidence of doctrine's formative role in division of power disputes and its positive contribution to the operation of a federal system *Courts and Federalism* urges political scientists to take courts and judicial reasoning more seriously in their accounts of federal government *Courts and Federalism* will appeal to readers interested in the comparative study of law and government as well as the interaction of law and federalism in contemporary society **A Matter of Dispute** Christopher J. Peters, 2011-01-19 Law often purports to require people including government officials to act in ways they think are morally wrong or harmful What is it about law that can justify such a claim In *A Matter of Dispute* Morality Democracy and Law Christopher J. Peters offers an answer to this question one that illuminates the unique appeal of democratic government the peculiar structure of adversary adjudication and the contested legitimacy of constitutional judicial review Peters contends that law should be viewed primarily as a device for avoiding or resolving disputes a function that implies certain core properties of authoritative legal procedures Those properties competence and impartiality give democracy its advantage over other forms of government They also underwrite the adversary nature of common law adjudication and the duties and constraints of democratic judges And they ground a defense of constitutionalism and judicial review against persistent objections that those practices are counter majoritarian and thus nondemocratic This work canvasses fundamental problems within the diverse disciplines of legal philosophy democratic theory philosophy of adjudication and public law theory and suggests a unified approach to unraveling them It also addresses practical questions of law and government in a way that should appeal to anyone interested in the complex and often troubled relationship among morality democracy and the rule of law Written for specialists and non specialists alike *A Matter of Dispute* explains why each of us individually and all of us collectively have reason to obey the law why democracy truly is a system of government under law *Courts and Political Institutions* Thijmen Koopmans, 2003-09-04 Considers the relation between law and politics including human rights federalism and equal protection *From Political Theory to Political Theology* Péter Losonczi, Aakash Singh, 2010-03-18 During the last two decades we have witnessed what Jos Casanova has characterised as religion going public This has not been a trend exclusive to traditionally religious nations Rather it has been visible in as diverse environments as that of the construction of the new Russian political identity or in the post 9 11 political discourses of the USA Surprisingly important religious manifestations also influenced the political discourses in Britain and more recently in France Partly as a

consequence of these phenomena an intensive debate is now evolving about the compatibility of the neutrality of liberal democracy in relation to religiously motivated opinions in public discourses and the conditions under which such religiously driven contributions could viably go public This book offers a collection of essays on Religion and Democracy which critically discusses the most important questions that characterize these debates at the points of their intersection within political theory political theology and the philosophy of religion and considers both the challenges and the prospects of this new era which following Habermas one may call post secular

The Judiciary and American Democracy Kenneth D. Ward, Cecilia R. Castillo, 2012-02-01 The role courts should play in American democracy has long been contested fueling debates among citizens who take an active interest in politics Alexander Bickel made a significant contribution to these debates with his seminal publication *The Least Dangerous Branch* which framed the problem of defending legitimate judicial authority This book addresses whether or not the countermajoritarian difficulty outlined in Bickel's work continues to have significance for constitutional theory almost a half century later The contributors illustrate how the countermajoritarian difficulty and Bickel's response to it engage prominent theories the proceduralisms of John Hart Ely and Jeremy Waldron the republicanisms of Bruce Ackerman and Cass Sunstein and the originalisms of Raoul Berger Robert Bork and Keith Whittington In so doing this book provides a useful introduction to recent debates in constitutional theory and also contributes to the broader discussion about the proper role of the courts

Political Emotions Thom Brooks, 2022-04-19 How might political emotions contribute to the creation of a decent public sphere Our societies are characterized by difference and contestation Cultivating political emotions can appear counterproductive to stability and peace But there is an increasing recognition that emotions can be harnessed to empower community cohesion and social justice and new ideas about how our political emotions can foster a decent public sphere and overcome intolerance are urgently needed In *Political Emotions Towards a Decent Public Sphere* leading theorists consider the limits and prospects of cultivating our emotions that support social justice All examine this topic from a diversity of disciplinary perspectives breaking new ground and yielding new understandings Issues explored include adaptive preferences capabilities civil religion compassion conscience dignity feminism imagination multicultural citizenship perfectionism political liberalism public sentiments sympathy and much more in a wide ranging exploration of key themes in contemporary political philosophy and Martha C Nussbaum's significant contributions to it in particular that should be of interest to anyone working in these broad areas

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Justice Contained Lisa J. Conant, 2018-10-18 In this probing analysis of the European Union's transnational legal system Lisa Conant explores the interaction between law and politics In particular she challenges the widely held view that the European Court of Justice ECJ has through bold judicial activism brought about profound policy and institutional changes within the EU's member states She argues convincingly that this court like its

domestic counterparts depends on the support of powerful organized interests to gain compliance with its rulings What Conant asks are the policy implications of the ECJ's decisions How are its rulings applied in practice Drawing on the rich scholarship on the U S Supreme Court Conant depicts the limits that the ECJ and other tribunals have to face To illuminate these constraints she traces the impact of ECJ decisions in four instances concerning market competition and national discrimination She also proposes ways of anticipating which of this court's legal interpretations are likely to inspire major reforms Justice Contained closes with a comparative analysis of judicial power identifying the ECJ as an institution with greater similarities to domestic courts than to international organizations The book advances a deeper understanding both of the court's contributions to European integration and of the political economy of litigation and reform

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Table of Contents Legal Reasoning And Political Conflict

1. Understanding the eBook Legal Reasoning And Political Conflict
 - The Rise of Digital Reading Legal Reasoning And Political Conflict
 - Advantages of eBooks Over Traditional Books
2. Identifying Legal Reasoning And Political Conflict
 - Exploring Different Genres
 - Considering Fiction vs. Non-Fiction
 - Determining Your Reading Goals
3. Choosing the Right eBook Platform
 - Popular eBook Platforms
 - Features to Look for in an Legal Reasoning And Political Conflict
 - User-Friendly Interface
4. Exploring eBook Recommendations from Legal Reasoning And Political Conflict
 - Personalized Recommendations

- Legal Reasoning And Political Conflict User Reviews and Ratings
- Legal Reasoning And Political Conflict and Bestseller Lists
- 5. Accessing Legal Reasoning And Political Conflict Free and Paid eBooks
 - Legal Reasoning And Political Conflict Public Domain eBooks
 - Legal Reasoning And Political Conflict eBook Subscription Services
 - Legal Reasoning And Political Conflict Budget-Friendly Options
- 6. Navigating Legal Reasoning And Political Conflict eBook Formats
 - ePub, PDF, MOBI, and More
 - Legal Reasoning And Political Conflict Compatibility with Devices
 - Legal Reasoning And Political Conflict Enhanced eBook Features
- 7. Enhancing Your Reading Experience
 - Adjustable Fonts and Text Sizes of Legal Reasoning And Political Conflict
 - Highlighting and Note-Taking Legal Reasoning And Political Conflict
 - Interactive Elements Legal Reasoning And Political Conflict
- 8. Staying Engaged with Legal Reasoning And Political Conflict
 - Joining Online Reading Communities
 - Participating in Virtual Book Clubs
 - Following Authors and Publishers Legal Reasoning And Political Conflict
- 9. Balancing eBooks and Physical Books Legal Reasoning And Political Conflict
 - Benefits of a Digital Library
 - Creating a Diverse Reading Collection Legal Reasoning And Political Conflict
- 10. Overcoming Reading Challenges
 - Dealing with Digital Eye Strain
 - Minimizing Distractions
 - Managing Screen Time
- 11. Cultivating a Reading Routine Legal Reasoning And Political Conflict
 - Setting Reading Goals Legal Reasoning And Political Conflict
 - Carving Out Dedicated Reading Time
- 12. Sourcing Reliable Information of Legal Reasoning And Political Conflict
 - Fact-Checking eBook Content of Legal Reasoning And Political Conflict

- Distinguishing Credible Sources
- 13. Promoting Lifelong Learning
 - Utilizing eBooks for Skill Development
 - Exploring Educational eBooks
- 14. Embracing eBook Trends
 - Integration of Multimedia Elements
 - Interactive and Gamified eBooks

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