

Book Review

Letters from Beyond the Regulatory State

After the Rights Revolution: Reconceiving the Regulatory State. By Cass R. Sunstein.* Cambridge: Harvard University Press, 1990. Pp. xi, 284.** \$25.00.

Ronald F. Wright†

We all need help finding our way around the American administrative state. An important guidebook has now arrived. The publication of Cass Sunstein's *After the Rights Revolution* is a significant event for those interested in administrative law and regulation, as well as for those concerned with the theory of legal interpretation.

The book has two primary aims. First, Professor Sunstein identifies the different types of regulation and develops a theoretical defense for government regulation based on fifty years of post-New Deal history. Second, he exhaustively describes various approaches to statutory interpretation, criticizing those based on misguided assumptions about regulation. Through this analysis, Sunstein endeavors to bring interpretive practice into line with regulatory experience by offering a collection of "background norms" that courts should

* Karl N. Llewellyn Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago.

** Hereinafter cited by page number only.

† Assistant Professor of Law, Wake Forest University School of Law. B.A. 1981, College of William and Mary; J.D. 1984, Yale Law School. I would like to thank my faithful and provocative correspondents—Kathryn Abrams, Akhil Amar, Cynthia Farina, Michael Gerhardt, David Logan, Alan Palmiter, and Thomas Steele—for their attention to earlier drafts. Victoria Roberson provided exceptional research assistance.

use to interpret statutes—norms that he suggests will improve the operation of regulatory statutes.

Sunstein uses the book's historical perspective to engage and criticize the work of eminent, but now-departed, members of the legal community. He repeatedly challenges the views of Karl Llewellyn, Oliver Wendell Holmes, Henry Hart, and others on questions of regulation and interpretation. These scholars might appreciate an opportunity to reply. What follows is a glimpse at some of the letters we might imagine are circulating among this invisible host of readers in response to Sunstein's book. The letters contain the reactions of a jurist (Oliver Wendell Holmes, Jr.),¹ a legal scholar (Karl Llewellyn),² and a political theorist (Hannah Arendt)³ to this work.⁴

Llewellyn's letters suggest that Sunstein, while writing a book about statutes, unconsciously mimics the common law perspective of an appellate court.⁵ Llewellyn remains uncertain how Sunstein's principles for interpreting

1. Oliver Wendell Holmes, Jr. was born in Boston in 1841. After service in the Civil War, he graduated from Harvard Law School in 1866 and entered private practice. After a brief time as a law professor at Harvard, Holmes served on the Massachusetts Supreme Judicial Court from 1882 to 1902. (Sunstein later served as a law clerk for Justice Benjamin Kaplan of the same court, who delivered the Holmes lectures at Harvard Law School.) Holmes moved on to be an Associate Justice of the U.S. Supreme Court in 1902, and remained on the bench until 1932. S. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 379-82* (1989). See Kaplan, *Encounters with O.W. Holmes, Jr.*, 96 HARV. L. REV. 1828 (1983). Holmes is an ubiquitous figure in American jurisprudence. Many of his judicial opinions remain staples of legal education. His studies of the common law tradition, contained in *The Common Law* and a collection of law review articles, express many ideas fundamental to jurisprudence in this century. It is no accident, therefore, that Sunstein refers several times to Holmes in this book about regulation and statutes. See pp. 113, 121, 126, 263, 265. To understand Holmes' likely positions on these matters is, in large part, to understand the changes in American public law in this century.

2. Karl Nickerson Llewellyn was born in Seattle in 1893 and attended secondary school in Mecklenburg, Germany. Llewellyn graduated from Yale Law School in 1918. He taught at Columbia Law School from 1924 to 1951, and at the University of Chicago Law School from 1951 until his death in 1962. He was the leading figure in the Legal Realist movement in American legal theory; he pioneered efforts to explore connections between law and sociology and economics; and he had a formative influence on the Uniform Commercial Code and commercial law generally. Llewellyn visited at the University of Leipzig, and was a fluent speaker and writer of German. W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT 87-113* (1973).

3. Hannah Arendt was born in 1906 in Hannover, Germany. She did graduate work in philosophy with Martin Heidegger and Karl Jaspers. She fled Germany in 1933 for Paris to escape the Nazis and later emigrated to the United States, where she wrote *THE ORIGINS OF TOTALITARIANISM* (1951), the work that established her reputation as a political theorist. Arendt taught at a number of institutions, including Princeton University, University of California at Berkeley, Brooklyn College, the New School for Social Research, and the University of Chicago. She lectured at the University of Chicago in 1956 and early in 1962, at the end of the German-speaking Llewellyn's career at Chicago. E. YOUNG-BRUEHL, *HANNAH ARENDT: FOR LOVE OF THE WORLD* (1982) (detailing Arendt's nomadic academic career). Professor Sunstein now teaches at the University of Chicago.

4. Annotations are provided to clarify the intent of the letter-writers. I make no sustained effort to replicate the writing style of each correspondent, apart from characteristic salutations and closings. However, I do attempt to represent their likely reactions to Sunstein's arguments.

5. Llewellyn devoted many years to the study and description of the activity of common law courts. His increasingly complex set of views regarding the common law system appear in *K. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (tentative ed. 1930) [hereinafter *BRAMBLE BUSH*]; *K. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA* (1989) (written in Germany in the early 1930's) (first published in German in 1933 and translated into English in 1989) [hereinafter *CASE LAW SYSTEM*]; *K. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS* (1960) [hereinafter *COMMON LAW*].

vague statutory language would operate in future cases, concluding that Sunstein's approach, like the common law method, is more helpful in synthesizing the past than in facing the future. Holmes builds on Llewellyn's observations by arguing that Sunstein does not take proper care to explore the different contributions that Congress, the courts, and the executive branch make to the interpretive enterprise.

Arendt, setting aside all issues concerning interpretation and institutional roles, takes issue with Sunstein's defense of regulation. Arendt commends Sunstein for his attempt to create a realm for politics that transcends individual interests, but criticizes his incomplete vision of regulation. She claims that, while he offers a number of reasons for government to regulate, he offers no method to judge whether various types of collective action will promote or extinguish freedom.

While each of the correspondents criticizes Sunstein for the pivotal questions he leaves unaddressed, all of them clearly admire *After the Rights Revolution*. Each writer has witnessed the tremendous changes in government in this century traced by Sunstein.

* * * *

Llewellyn to Arendt

Dear Professor Arendt,

I would like to suggest that we read for our next afternoon book discussion the recent effort by Cass Sunstein, the Karl N. Llewellyn Professor of Jurisprudence at our old stomping ground in Chicago. To whet your appetite, I will try my hand at reconstructing his argument here, withholding my criticisms until later.

Sunstein prefaces his argument by quoting me: "Technique without morals is a menace; but morals without technique is a mess."⁶ He explores both morality and technique (although more of the latter) by tracing "the rise of social and economic regulation" and its relationship to American constitutional government and statutory interpretation.⁷

Sunstein begins with a history of regulation in America, drawing on his earlier work⁸ and focusing first on James Madison's republic. In his account, Madison designed a powerful national government because he was convinced that representatives in a larger republic could better insulate themselves from

6. P. xi.

7. Pp. 1, 4, 9-10.

8. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) [hereinafter *New Deal*]; Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter *Interest Groups*]; Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) [hereinafter *Naked Preferences*].

the pressure of "factions," or interest groups.⁹ National representatives would then be free to engage in the deliberative task of politics.¹⁰ Because of the ever-present danger of factions, moreover, Madison linked this "deliberative" vision of representation to a limited government that preserved a broad arena for private ordering.¹¹

Several of the fundamental features of the constitutional structure, including checks and balances and federalism, reflected this effort to limit the realm of government and the effects of faction in government.¹² During the early life of the Republic, the courts maintained limits on governmental activity through common law principles, which gradually "came to be treated as largely neutral and prepolitical."¹³

The New Deal transformed these original constitutional arrangements in two respects.¹⁴ First, it called into question all forms of common law ordering. Common law entitlements came to be viewed not as a neutral condition produced through government inaction, but as a product of political choices sustained by government action.¹⁵ New Dealers found the common law inadequate because it failed to protect the disadvantaged and prevented the government from stabilizing the economy. Second, the New Deal shifted power from state governments and the state and federal judiciary to the federal executive.¹⁶ The federal bureaucracy expanded at a remarkable rate. Separation of powers principles gave way to accommodate an "autonomous" administration thought necessary to respond to the complex responsibilities of modern government.

Sunstein points to the "Rights Revolution" of the 1960's and 70's as the final milestone in the history of the regulatory state. During this time, Congress and the President took bold regulatory initiatives in areas such as discrimination

9. Factions in a larger republic "would be so numerous that they would cancel each other out." Pp. 14-15; see also Sunstein, *Interest Groups*, *supra* note 8, at 40-42.

10. See Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1558-64 (1988) (elaborating Madisonian vision of representation). Although sharing some common ground with republicanism, such as a belief in a politics that transcends individual interests, Madison's ideal of representation departs from republican thought in important ways. It downplays citizen participation in government and discounts the importance of education and civic virtue among citizens. Pp. 14-15; Sunstein, *Interest Groups*, *supra* note 8, at 38-42.

11. Sunstein makes an important qualification, however. The Constitution's attempt to protect life, liberty, and property required the government to "protect citizens from private aggression by the provision and indeed redistribution of security," and therefore went beyond a negative view of government. P. 17. Sunstein does not elaborate on the implications of this view for the various state action requirements in the Constitution.

12. The system of checks and balances (including judicial review) and federalism were both means to divide governmental power and "diminish the risk of tyranny." P. 16. The individual rights stressed in the original document were private property rights. The contracts clause, privileges and immunities clause, and eminent domain clause served similar purposes. Pp. 16-17.

13. P. 18.

14. See also B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984) (describing transformation of legal practice and theory during New Deal).

15. P. 19; Sunstein, *The Beard Thesis and Franklin Roosevelt*, 56 GEO. WASH. L. REV. 114, 120-21 (1987).

16. Pp. 22-24; Sunstein, *New Deal*, *supra* note 8, at 440-46.

(with the Civil Rights Act of 1964) and health and safety risks (with the Occupational Safety and Health Act of 1970, the Clean Water Act of 1977, and others).¹⁷ All three branches of the federal government abandoned the New Deal faith in administrative autonomy, because autonomy apparently produced “captured” agencies. The Rights Revolution ended in the 1980’s, as economic difficulties created a willingness to deregulate certain sectors of the economy.¹⁸

Sunstein moves next to his theoretical defense of regulation.¹⁹ He sees the primary challenge to regulation coming from those who argue for minimal government based on notions of liberty: because individuals know their preferences, their choices should remain untouched whenever they do no harm to others.²⁰ Sunstein counters with several answers, which I have rearranged somewhat. Each is a more comprehensive critique than the last, and each suggests that regulation can increase social welfare and autonomy.

The first, and most modest, answer to opponents of regulation emphasizes the difficulties of coordinating individual choices and attempts to correct market failure. That is, regulation overcomes the failure of a market to satisfy people’s preferences where they need to act together. For instance, regulation of a public good, such as national defense, provides collective protection. Without coercion, nobody would pay for their preferences, hoping instead that others would pay. Regulation perfects the market by helping persons satisfy their existing preferences, without making others worse off.²¹

A second level of response, which I call the “aspirational” strategy, recognizes that people have complicated preferences. They may act in one way, yet aspire to act differently. A person’s behavior as a market actor might diverge from her aspirations as a voter or citizen: she could choose to watch only situation comedies on television and yet prefer that more diverse programs remain available.²² Similarly, a person may choose to commit himself early to a particular course of action, attempting to prevent a shortsighted choice at some later time.²³ Regulation can translate aspirations such as these into action where the market would not do so.

The most comprehensive answer, which I call the “preference formation” strategy, goes beyond the market’s failure to translate existing desires into

17. Pp. 24-31 (listing statutes).

18. P. 31; see also McGarity, *Regulatory Reform in the Reagan Era*, 45 MD. L. REV. 253, 260-68 (1986) (detailing the regulatory reform movement of the 1970’s and 1980’s); Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1315-19 (1986).

19. Pp. 32-46.

20. Pp. 35-38; see generally R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (exploring constitutional and philosophical bases for libertarianism).

21. Pp. 34-35, 48-55. This regulatory strategy allows for Pareto-optimal improvements in welfare—which make at least one person better off without making anyone worse off—and therefore avoids the difficulty of making interpersonal comparisons of utility.

22. Pp. 38-39, 57-60.

23. Pp. 57-60, 67-69.

public policy. In this view, regulation not only helps persons attain their preferences, but also helps improve the process of *forming* preferences.²⁴ Preferences are questionable when they are based on inadequate information or on opportunities limited by current legal rules, such as opportunities for interaction between racial groups under laws tolerating segregation.²⁵ Hence, regulation might provide better information to those forming preferences,²⁶ or it might promote diversity of experience to enable people to scrutinize critically their current preferences and perhaps form new ones.²⁷

Sunstein translates this theoretical case for regulation into a more detailed taxonomy of the purposes of regulatory statutes. He creates categories of purposes as a reminder that we must evaluate each regulatory scheme on its own terms, since different programs have different aims. Sunstein lists eight purposes for regulation:²⁸ (1) remedying market failure, (2) redistributing wealth, (3) carrying out collective desires and precommitment strategies, (4) creating diversity of experience and opportunities for preference formation,²⁹ (5) ending social subordination, (6) surmounting preferences endogenous to the legal and social order,³⁰ (7) protecting future generations from irreversible decisions, and (8) transferring income to interest groups.³¹

This list, it seems to me, is a bit unwieldy, for any given regulatory statute might serve several of these purposes. This is true, not only because statutes have multiple objectives, but also because the classifications themselves contain overlapping categories.³² The overlapping quality is troubling because Sunstein uses the categories to distinguish different forms of regulation, invoking different criteria to evaluate different categories of regulation. In addition, some categories present complex rationales for regulation because they combine the three regulatory strategies already described: coordinating preferences, following complex preferences, and shaping preferences. For instance, regulation attempting to eliminate social subordination seeks to reshape the preference for discrimination³³ and further the aspirations of those who wish to eliminate race

24. Pp. 34-35, 41-42; Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986).

25. Pp. 61-64.

26. Pp. 52-53, 67.

27. Pp. 60-61.

28. Pp. 47-73 (Ch. 2, "The Functions of Regulatory Statutes").

29. This rationale for regulation applies when private choices push toward homogeneity. This problem may require some regulation to promote diversity and to encourage the formation of different preferences. Pp. 60-61.

30. This category includes a variety of regulations in instances where preferences are a function of legal rules or existing practices. Pp. 64-67.

31. This is, of course, an unjustified aim of regulation. Sunstein argues that this category only applies to regulation that does not plausibly fall within any other regulatory purpose. Pp. 69-71.

32. For instance, Sunstein discusses separately "interest-group transfers" and "redistributive" statutes. See pp. 61-64, 66-67 (antidiscrimination laws discussed under two headings); pp. 52-53, 67 (inadequate information discussed under multiple headings).

33. Such measures recognize that private choices will perpetuate discrimination because people learn to adapt to existing injustice; for instance, both beneficiaries and victims of discrimination may tend to

or gender bias, but who fear reprisals from others in the marketplace for doing so.³⁴

The argument up to this point left me convinced that there are many reasons to regulate. Sunstein also provides, however, an equally dizzying set of reasons not to regulate.³⁵ Either at the time of design or at the time of implementation, government actors may ignore or forget two likely sources of regulatory failure: (1) preferences blocked by regulation will likely reappear in other, more destructive forms, and (2) regulators have incentives to favor some private interests over others (the "capture" argument). These forces frequently produce "paradoxes of regulation," which "bring about results precisely opposite to those that are intended."³⁶

Regulatory failures are commonly the result of interest-group influence, as occurred, for example, when producers of dirty, high-sulphur coal convinced Congress to pursue an antipollution strategy that disadvantaged the clean-coal producers.³⁷ Sunstein indicts regulatory statutes for failing to remain flexible about the best means to a desired outcome. The use of an uncompromising rhetoric of "rights" contributes to this lack of flexibility.³⁸

In Sunstein's view, the Framers of the Constitution created a structure that responds well to many possible regulatory failures. The potential problem of interest group dominance was addressed by a system of checks and balances.³⁹ The effort to ensure both deliberation and accountability in government also improves many regulatory schemes.⁴⁰ According to Sunstein, federalism allows different states the flexibility necessary to respond to differing conditions

"blame the victim." Antidiscrimination laws attempt to change these attitudes. Pp. 61-64, 66-67.

34. Another category of regulation that combines the three strategies is labeled "Irreversibility, Future generations, Animals, and Nature." Pp. 67-69. Some choices may be sensible for an individual making a choice today, but their consequences (such as environmental degradation) will be felt by others in the future and will be difficult to reverse. Regulation in this setting responds to an externality, costs falling on those not responsible for the decision. Pp. 54-55. It also might seek to change preferences formed with inadequate information, or to carry out aspirations of protecting the interests of future generations or other species.

35. See pp. 74-110 (Ch. 3, "How Regulation Fails").

36. P. 74; see also Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 412-13 (1990).

37. P. 85; see also B. ACKERMAN & W. HASSLER, *CLEAN COAL/DIRTY AIR* 26-58 (1981); see Macey, *Special Interest Groups Legislation and the Judicial Function: The Dilemma of Glass-Steagall*, 33 EMORY L.J. 1, 17-21 (1984) (arguing banking legislation resulted from conflict between commercial and investment bankers).

38. Pp. 89-91. Statutes may fail to account for side-effects of regulation, or they may use a regulatory tool that is mismatched to the regulatory problem. Pp. 88-89, 91-94; see also S. BREYER, *REGULATION AND ITS REFORM* 191-96 (1982). The factual assumptions regarding some regulatory statutes, such as banking or telecommunications laws, may be undermined by technological or social changes. Pp. 94-96. Even if a statute passes through this steeplechase of possible failures, the regulatory agency might implement it poorly. The agency might seek to increase its own power and prestige, by responding to the most powerful political group that approaches it with a request, or simply by pursuing an agenda inconsistent with the statute. Pp. 97-102. But see Jaffe, *The Independent Agency—A New Scapegoat*, 65 YALE L.J. 1068, 1073 (1956) (attributing most regulatory failure to statutory design). By contrast, the agency might also hesitate to act without complete information, even though information is never complete. P. 98.

39. Pp. 107-09; see also Sunstein, *New Deal*, *supra* note 8, at 452-500; Sunstein, *Naked Preferences*, *supra* note 8, at 1691-92. Sunstein posits checks and balances as a mechanism for controlling factional influence in creating statutes, but not at the level of implementation.

40. Pp. 101-02, 187.

throughout the country.⁴¹ The unitary executive envisioned by the Constitution would give the President power to coordinate policy and promote accountability.⁴² Restoring these constitutional understandings to the status they lost during the New Deal would, in his view, help prevent regulatory failure.⁴³

The final half of the book deals with the contribution of courts to a successful regulatory program.⁴⁴ In particular, Sunstein outlines an approach to interpreting statutes, which requires that the courts "sympathetic[ally] engage"⁴⁵ the statute and draw upon "background" understandings that recognize the typical failures of regulation.⁴⁶

Sunstein stakes out his own theory of statutory interpretation through a process of elimination, attempting to catalog and avoid the shortcomings of other approaches. He begins with the various "agency" theories, which view courts as agents carrying out the will of the legislature.⁴⁷ Sunstein finds each such approach to be inadequate. An interpreter, he says, must derive the meaning of words from background understandings drawn from the cultural context.⁴⁸ Usually the norms are widely shared and noncontroversial, but at times the choice of norms will be highly controversial. The need for background norms will be most striking where a statute is silent, addresses a situation ambiguously, or delegates lawmaking power to the courts.⁴⁹ The need will also be present where the statute seems to be overinclusive, underinclusive,

41. Pp. 102, 108-09; see also Sunstein, *New Deal*, *supra* note 8, at 501-08.

42. Pp. 107-08; see also Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 197-202 (1986).

43. Sunstein closes Chapter 3 by tying various regulatory failures to the seven forms of regulation they afflict most often. For instance, statutes that "promote public-spirited redistribution" often have a "weak understanding of the ways in which regulation interacts with the market." P. 103. Statutes that "respond to a short-term public outcry" tend to interfere excessively in the market. P. 105. Finally, regulatory statutes "fail quite generally as a result of the absence of political accountability or political deliberation, changed circumstances or obsolescence, a misunderstanding of systemic effects, and lack of coordination." P. 105. He cautions that "[a]ll of these generalizations are of course subject to exceptions." P. 105.

44. The *Harvard Law Review* published a revised version of the manuscript of these three chapters in December 1989, several months before publication of the book. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

45. P. 73.

46. Pp. 111-12.

47. One manifestation of the agency view is "textualism," which calls on courts to give meaning to the statutory text without reference to any "outside" sources such as current conditions or the statute's history or larger purposes. Pp. 113-22. Other agency theories include the structural approach, which resolves interpretive difficulties by choosing the meaning that creates the best fit among various statutory provisions, pp. 122-23, and the purposive approach, which looks to the legislature's underlying intent regarding the matter at hand. Pp. 123-33.

The agency approach, in Sunstein's view, contains an important truth: it recognizes the democratic pedigree of the legislature and, particularly, of the statutory language it chooses. The legislature enacts words, not a history or an intent. Cf. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 671 (1990); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 338-58 (1985); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 871-72 (1930).

48. Pp. 135-37; see also Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 33 (1988).

49. Pp. 116-18, 124. Ambiguities in the legislature's meaning are especially likely to occur where the court looks beyond the text to ascertain the underlying "intent" of a collective body. Legislators are likely to have multiple purposes that cannot be aggregated into a single legislative intent. Pp. 124-28; see also Radin, *supra* note 47, at 869-71.

or outdated, and therefore produces absurd results.⁵⁰ Where the statutory language does not clearly resolve the issue, no constitutional consideration prevents a court from reaching an alternative, arguably better, rule based on background understandings.⁵¹

An interpretive theory one step removed from the agency theories looks to the overriding "purpose" of the legislation, rather than to the legislative intent on a specific issue. Sunstein places me in this category, along with Ronald Dworkin, and Legal Process scholars Henry Hart and Albert Sacks.⁵² Each of us has urged courts to seek out the most sensible purpose of the statute, and to construe it in a way that best furthers that purpose.⁵³ Sunstein, however, finds that advice too open-ended in a society where there is likely to be conflict over what is "reasonable" or most "sensible."⁵⁴ While I take issue with this criticism, I will press ahead with Sunstein's argument for now.

Several interpretive theories rely on extratextual norms that are more specific than "reasonableness," but Sunstein finds them wanting for other reasons. Under the public choice theory, statutes are nothing more than incoherent compromises or "deals" between interest groups and legislators. The role of the courts therefore is simply to enforce legislative deals rather than to fathom the "purpose" of a compromise outcome.⁵⁵ While Sunstein accepts the descriptive force of public choice theory for some (but not all) statutes, he rejects the claim that judges should enforce deals.⁵⁶ A more attractive legal order will be possible only if judges push statutes in directions that further broad public purposes rather than interest group preferences.⁵⁷

50. Pp. 118-22; see also Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431 (1989).

51. Pp. 135-37; see also Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989).

52. Pp. 130-33.

53. K. LLEWELLYN, *COMMON LAW*, *supra* note 5, at 371-82; R. DWORKIN, *LAW'S EMPIRE* 313-54 (1986); H. HART & A. SACKS, *THE LEGAL PROCESS* 1415 (tentative ed. 1958); see also R. POSNER, *THE FEDERAL COURTS* 287 (1985); Horack, *In the Name of Legislative Intention*, 38 W. VA. L.Q. 119 (1932) (arguing that judicial speculation about how legislature might have resolved a question never presented to them necessarily involves judicial selection of policy).

54. P. 131.

55. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984); Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975).

56. See Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 226-27 (1986) (accepting descriptive force of public choice theory but concluding that judges should counteract rather than enforce deals).

57. Pp. 137-41; see also Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1017-19 (1989). Sunstein also considers the twin approaches of despair: indeterminacy, which claims that there is no principled approach to statutory interpretation superior to others because they all fail to provide reliable answers, and conventionalism, which maintains that interpretive practices can only be practiced in a community and cannot be articulated or criticized. See S. FISH, *DOING WHAT COMES NATURALLY* (1989); J. FRANK, *LAW AND THE MODERN MIND* 190-92 (1930); R. Unger, *KNOWLEDGE AND POLITICS* 104-10 (1975). In response to both, Sunstein maintains that interpreters consciously choose their strategies, and that choice is in many cases predictable. The fact that the interpretive strategies employ value choices or community practices does not mean there is no basis for evaluating different approaches. Pp. 144-47.

After Sunstein completes his target practice, the only approach left standing depends on "canons of construction." Canons of construction provide instructions to courts and others facing recurring difficulties interpreting statutes. He feels that I destroyed the credibility of canons forty years ago when I mischievously paired canons suggesting one outcome with other canons suggesting the opposite outcome.⁵⁸ Although I have discussed these canons in half-jesting mockery, Sunstein finds them useful as tools to orient readers within a text or to improve lawmaking and institutional functions.⁵⁹

Sunstein's distinctive contributions to statutory interpretation are, first, to retrieve statutory canons from the grave I dug for them, and second, to insist that the choice of canons reflects fundamental regulatory choices and experiences of the last half century. These background norms do not supplant textual and contextual aspects of the specific statute, but supplement them when they inevitably produce ambiguity.⁶⁰

Sunstein groups his sizeable arsenal of canons into three categories: canons that further constitutional norms that otherwise go underenforced,⁶¹ canons that counteract the most typical institutional failures of government bodies,⁶² and canons that counteract the most common failures of regulatory statutes.⁶³ With regard to the first category, Sunstein urges courts to read statutes in ways that will promote political deliberation and to construe narrowly interest group deals. They should limit delegation of authority to agencies and attempt to heighten the political accountability of regulators. Further, they should insist on clarity to uphold the rule of law and to give notice to the public; they should read ambiguous language to protect disadvantaged groups, as well as property and contract rights; and they should interpret narrowly any statute purporting to limit rights to hearings or to judicial review. Finally, courts should read statutes to preserve the relative power of states within the federal system.⁶⁴

An equally large group of canons attempts to respond to the regulatory problems Sunstein identified earlier. This group includes the suggestions that courts read statutes to favor diffuse regulatory beneficiaries, coordinate policies in related areas of regulation, account for technology or social change that has made a statute obsolete, account for systemic effects of regulation, keep regulatory benefits proportional to regulatory costs, and avoid irrationality.⁶⁵

His long checklist of possible regulatory failures guarantees that the list of responsive canons will be equally long. Mindful of possible conflict, Sunstein

58. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950).

59. Pp. 150-57.

60. Pp. 157-59.

61. Pp. 163-68.

62. Pp. 169-70.

63. Pp. 170-86.

64. P. 164.

65. Pp. 170-82.

orders them by making those canons which enhance political accountability and deliberation the two most important, followed next by other constitutionally inspired canons and those canons calling for proportionality of benefits and costs.⁶⁶

After applying the canons to a series of illustrative cases,⁶⁷ Sunstein closes with an observation about the persistence of interpretive techniques that reflect pre-New Deal understandings of government regulation. Many issues of statutory construction “amount to a confrontation between regulatory regimes and the pre-New Deal premises they appear to repudiate.”⁶⁸ The New Deal attack on common law private ordering, adopted by the democratic branches, recognizes that regulation can promote welfare and distributive justice. Such disputes between past and present are best resolved by synthesizing the best of the prior constitutional systems within a framework hospitable to modern regulation.

While I realize you remain terribly busy and may not take much interest in lawyers’ squabbles over interpretation, I am quite sure you will have a response to Sunstein’s ideas. His view of regulation, which he distinguishes at several points from totalitarianism,⁶⁹ seems to have some bearing on your long-standing concern with public action and the private sphere.⁷⁰ It would interest me to hear your reactions.

Sincerely yours,
Karl N. Llewellyn

* * * *

Holmes to Llewellyn

My dear Llewellyn,

Thank you for recommending Sunstein’s book. It is indeed an important and ambitious work, all the more so because it addresses a topic—statutory interpretation—that has provoked a feeding frenzy among legal scholars today. I would suggest that Sunstein, like many others writing about interpretation, seems preoccupied with the number of considerations an interpreter should consider. Unfortunately, he appears less concerned with who interprets the statute or with the best method to handle conflicting interpretive considerations.

66. Pp. 186-89.

67. Pp. 194-207.

68. P. 207; *see also* Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 875 (1987) (arguing that *Lochner*-like use of common law assumptions is still employed in several areas of constitutional law).

69. P. 47; *see also* pp. 11, 42.

70. *See, e.g.*, H. ARENDT, *BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT* 143-71 (1954) [hereinafter *PAST AND FUTURE*]; H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* 323-26 (1966) [hereinafter *ORIGINS*].

The current debate over interpretation, like similar debates in the past, centers on enumerating the considerations an interpreter should include or exclude. The arresting aspect of the current debate is its linear quality. Most of the commentators move along a familiar path, beginning with the statute's language and including more and more considerations as they proceed through the interpretive enterprise, until they reach a point where they feel it is proper to exclude a consideration. Those who stop at a given point tend to agree that everything else further down the path should be excluded. They generally include the same considerations as other theorists who have reached the same point on the path. Hence, disagreements all focus on the proper length of the interpretive path.⁷¹ This underlying consensus sets the current debate apart from earlier discussions about interpretation.

Those who rely on statutory text and structure alone—such as Justice Antonin Scalia and Judge Frank Easterbrook⁷²—make the most ambitious case for exclusion. They would exclude any evidence of legislative “intent” or “purpose” because it has no force of law and because it is so easily manipulated. Instead, they would interpret the statute by looking only to its structure and to the plain meaning of its words. Current theorists of statutory construction also put me in this category, although I would dispute this placement.⁷³ Others concede that the text is relevant, but move beyond the text to formal historical evidence of the legislature's intent regarding the statute in question. They would exclude, however, other evidence of legislative preference and the views of

71. This trend in statutory interpretation to include numerous relevant considerations and to argue only about (1) whether to include certain peripheral considerations and (2) the relevant weight of those considerations, is part of a larger jurisprudential trend favoring “balancing.” See Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987); Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127 (1984).

72. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-55 (1987) (Scalia, J., concurring); *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989) (Easterbrook, J.); Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 64-65 (1988); Starr, *Observations about the Use of Legislative History*, 1987 DUKE L.J. 371; see also Eskridge, *supra* note 47, at 623, 643; Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277 (1990) (concluding that textualism is gaining ground in Supreme Court's statutory interpretation).

73. Easterbrook, *supra* note 72, at 61; Starr, *supra* note 72, at 378. In *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899) [hereinafter *Legal Interpretation*], Holmes espoused an “objective” approach to interpretation that would consider the statutory text and any contemporary evidence (including statements of legislators) of the common meaning of the statutory language at the time of enactment: “We do not inquire what the legislature meant; we ask only what the statute means.” *Id.* at 419. Holmes had no objection to using legislative history, but employed it to ascertain the common meaning of statutory language at the time of enactment, and not because the subjective intent of legislators was binding. See *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (using legislative history to interpret statute); *United States v. Whitridge*, 197 U.S. 135, 143 (1905) (resorting to “general purpose” of statutory language to ascertain its common usage).

Holmes' “objective” view of legislative intent makes his approach a variation on the plain meaning approach. Thus, he does not fall squarely into the modern linear pattern of interpretation theories, since he allows courts to look to the statutory language, the history of its passage, and other contemporary evidence, all the while maintaining the irrelevance of legislative intent as such. See also Holmes, *Codes, and the Arrangement of the Law*, 44 HARV. L. REV. 725 (1931) (advice for those drafting and codifying statutes).

those outside the legislature.⁷⁴ The next most inclusive step would allow evidence of the enacting legislature's general purpose in passing the statute, by identifying the problems facing the legislature when it took action.⁷⁵ Beyond that, one might derive the legislature's intent or purpose from any source, including, for example, an historical survey of the era.⁷⁶

Further steps along the path of inclusion might encompass the views of subsequent legislatures. Such views would be determined by looking to statutes on related topics and other forms of legislative activity.⁷⁷ One might even use significant social changes as evidence of the views of subsequent legislatures.⁷⁸ Each of these approaches would attempt to discover and replicate a legislative perspective on the statute.

Others would go further to include considerations not even loosely attributable to the legislature, past or present. For example, the interpreter might look to the views of the agency administering the statute.⁷⁹ Or, a judge might go beyond agency views, and decide for herself the desirability of particular consequences, measured by criteria such as "efficiency," "justice," or "politics."⁸⁰

74. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988) (separation of powers requires courts to look only to legislative intent and text when interpreting statutes); Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 B.U. L. REV. 737 (1985) (criticizing efforts to interpret statutes using materials other than statutory language and specific legislative history); Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989).

75. R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES 87-102* (1975); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 14-19 (1957); Macey, *supra* note 56, at 250-51.

76. W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 572-97* (1987); H. HART & A. SACKS, *supra* note 53, at 1144-47, 1415. This approach to statutes is akin to Robert Bork's vision of constitutional interpretation. See R. BORK, *THE TEMPTING OF AMERICA 5* (1989).

77. See Farber, *supra* note 51, at 305-18 (post-enactment events may justify interpreter's departure from statutory text, but changes in public opinion are not sufficient). William Eskridge argues that the Supreme Court has taken such an approach. Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 70-71 (1988). Some interpretive decisionmakers argue that interpreters should promote the overall "coherence" of the law. This argument might be taken to mean that a statute should be read in light of all other statutory enactments, so that the interpreter fulfills the "convictions" selected by legislators. See R. DWORIN, *supra* note 53, at 327-30. On the other hand, such a notion of "coherence" may call for a decisionmaker to promote a more general notion of logical and philosophical coherence.

78. This appears to be the position of William Eskridge, who has argued in a series of law review articles that interpreters should employ a "dynamic" approach to statutory interpretation, reshaping old statutes to promote current policy. Eskridge focuses primarily, if not exclusively, on legislative activity as the measure of current policy. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); see also J. HURST, *DEALING WITH STATUTES 31-65* (1982); Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 614-19 (1988) (judges look to statutory patterns in collaborative effort to create policy).

79. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368 (1986); Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 559-61 (1985).

80. Aleinikoff, *supra* note 48, at 20-22, 46-54 (judges reformulate statutory purpose to be consistent with broad prevailing norms); Moore, *supra* note 47, at 338-58; see also Macey, *supra* note 57, at 226-27 (interpreter should promote efficiency). Professor Moore's views appear to be an exception to the general trend of including all sources of legislative intent before arriving at nonlegislative "natural law" considerations. He would consider only the text and the interpreter's views on justice. Moore, *supra* note 47, at 338-

Sunstein would allow judges to consider the statutory text, along with evidence of the enacting or subsequent legislature's intentions or purposes.⁸¹ Furthermore, he would draw on regulatory experience to ask whether a particular interpretation of a statute would accomplish one of the regulatory purposes or fall prey to a typical regulatory failure.⁸² In other words, he asks judges to save the legislature from itself.

Although he travels a long way down the inclusive path, Sunstein does exclude some considerations from interpretation. He forbids judges to consider either purely personal visions of sound policy or perspectives already repudiated by the democratic branches.⁸³ Others have maintained that such an exclusion is undesirable or impossible.⁸⁴

Living in a day dominated by common law courts, I never developed fully my thoughts about statutes, though I did make a few observations.⁸⁵ It now occurs to me that Sunstein's decision to include what he does in the interpretive enterprise is consistent in several respects with my own views on statutes and the common law process.

Sunstein shares my sense that an interpreter has no choice but to place statutory language in some larger context in order to ascertain its meaning: "A word is not a crystal."⁸⁶ Sunstein also appears to build on my insistence that law evolves to reflect the needs and values of society as they change over time.⁸⁷ An interpreter should handle silence and uncertainty in a way that best reflects the general outlook of the day, as expressed by the enacting legislature. In other words, the background for interpreting statutes should evolve just as statutes evolve. My contemporary, Roscoe Pound, also insisted that interpreters should use statutes themselves as sources of analogies in interpreting statutory provisions, rather than drawing on common law doctrine at odds with the statutory structure.⁸⁸

58.

81. Pp. 123-33. Although suggesting that Sunstein uses the "linear" model of statutory interpretation, Holmes does not suggest that Sunstein's approach is internally linear. Sunstein does not require the interpreter to consider extra-textual materials in any particular order; rather, he suggests that they are all relevant to the interpreter.

82. Pp. 170-86.

83. P. 142 ("It would be exceptionally presumptuous for courts to invoke laissez-faire principles in support of [judicial protection of private ordering]. Gaps should not be filled in, and ambiguities should not be resolved, by reference to values that counter those of the enacting Congress in particular and the modern regulatory state in general.")

84. Max Radin said it is inevitable that judges will rely primarily on their subjective preferences. See Radin, *supra* note 48, at 882-83.

85. Holmes, *Legal Interpretation*, *supra* note 73. See generally B. ACKERMAN, *supra* note 14, at 6-22 (continued common law focus of Legal Realists).

86. *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.).

87. O. W. HOLMES, *COLLECTED LEGAL PAPERS* 212, 220-21 (1920).

88. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385-88 (1908); Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930) (calling for use of statutory rather than common law sources when interpreting statutes). Some might respond that the background for interpretation should remain stable and not evolve so readily because any departure from the literal terms of the statute awards one party to the statutory "deal" more than he or she bargained for. Easterbrook, *supra* note 55, at 14-16;

Despite my agreement with Sunstein, I recognize some difficult side-effects of his decision to include so many considerations in the interpretive venture. Doing so leaves him the devilish task of describing the interaction and relative importance of the factors. He says that a statutory text will determine many cases, and that the legislative history will determine many others,⁸⁹ yet he also maintains that a judge in some cases (not just those where text and legislative history provide no guidance) should take account of regulatory purposes and failures.⁹⁰

This indeterminacy in Sunstein's interpretive method raises the same sorts of problems you highlighted when you exposed the arbitrariness of selecting among competing canons of construction.⁹¹ Perhaps you would care to comment.

Yours ever,
O.W. Holmes

* * * *

Llewellyn to Holmes

Dear Justice Holmes,⁹²

I agree that the difficulty you noted with Sunstein's interpretive method is nothing new. If everything counts, one's ability to predict an interpretive outcome rests on *how much* a given factor counts. This is precisely the problem that led me to criticize the canons of construction.

The traditional canons of construction contained a bit of everything. They instructed courts to fill in the meaning of statutes by following conventions based on likely legislative desires, or typical uses of language.⁹³ I pointed out what should have been obvious: the canons often gave conflicting advice, and the determinative choice among the canons was not compelled by any visible or logical reason. I am now willing to concede that this criticism was overstated, since the canons do not conflict in every conceivable case.⁹⁴ Still, my proposed response to the difficulty with canons was decidedly *understated*:

Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 539-44 (1983). But the scope of what is covered by the literal terms of a statute might be narrower than the parties are likely to admit, and it would perhaps be unreasonable to expect a stable interpretive background for resolving ambiguity. Those negotiating over language in a statute, if they pay attention to such things, must understand that statutory ambiguity presents a risk that later interpreters will reject the drafters' view of the disputed language.

89. Pp. 157-59, 231-33.

90. Pp. 133-37.

91. Llewellyn, *supra* note 58; K. LLEWELLYN, COMMON LAW, *supra* note 5, at 371-82, 521-35.

92. For Llewellyn's tribute to Holmes, see K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 506-19 (1962).

93. Pp. 150-57; W. ESKRIDGE & P. FRICKEY, *supra* note 76, at 689-95 (1987).

94. Pp. 148-49; Aleinikoff, *supra* note 48, at 24 & n.22 (criticizing Llewellyn's position); Posner, *supra* note 50, at 443.

interpreters should not pretend that canons control outcomes, but should instead seek an outcome that produces sensible consequences just as a common law court might.

I have never denied that the right canon, chosen in the right case, could lead to sound results. Sunstein proposes many appealing canons that could improve the operation of statutes when interpreters choose and use them wisely. But I still insist that the canons of my day were not self-selecting and therefore not self-executing, and neither are Sunstein's; it is all in the selection.

Sunstein provides little direction in choosing the appropriate background norm. He prioritizes his canons, telling interpreters to rely first on constitutional norms.⁹⁵ But this does not offer much guidance, since "accountability" and "deliberation" are the two overarching constitutional values Sunstein invokes. Even if one could say what these amorphous values might mean for a given statute, accountability and deliberation more often than not point in different directions. Recall that Madison favored national representatives precisely because they were less immediately accountable to the voters and therefore more capable of deliberation.⁹⁶

Sunstein also supplies principles of "harmonization" to resolve potential conflicts among background norms. For instance, he proposes that a minor violation of a background norm will give a court only a weak reason to construe a statute in a particular direction.⁹⁷ However, this principle of harmonization is liable to create more uncertainty than it will resolve. It means that even the clearest prioritizing of norms will settle nothing if the most important norm is violated the least.

Perhaps Sunstein's most important contribution to the use of canons is his insistence that some norms are off limits. He argues that interpretive norms must be consistent with the aspirations and experience of the regulatory state rather than repudiated policies of private ordering. This broad appeal to consistency might reduce the number of conflicts between norms.⁹⁸ But given the bewildering variety of regulatory purposes and failures that Sunstein covers, conflicts among canons—even those consistent with regulatory experience—will likely be the rule and not the exception.

Sunstein therefore fails to meet my critique of canons, which focuses on the choice among canons, however wise each of the individual canons might be. In the end, Sunstein invokes "practical reason" to explain how a judge will handle multiple interpretive norms,⁹⁹ which is similar to my "hopelessly banal" advice to make "sense" of our law as a whole.¹⁰⁰ This reliance on

95. Pp. 186-89.

96. Pp. 13-18.

97. Pp. 188-89.

98. Pp. 191-92.

99. Pp. 186, 210; see also Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 345-54 (1990).

100. Pp. 130-31, 148-49; Llewellyn, *supra* note 58.

practical reason—the conviction that one can know the correct action to take in a given situation without a theory to explain why it is correct¹⁰¹—is probably the closest we come to describing or prescribing a process of statutory interpretation. Holmes, you outlined long ago the virtues of a pragmatic legal method that depends primarily on moral intuition as applied to a specific situation.¹⁰² I have called this method the “situation sense” of judges.¹⁰³

Statutory interpretation therefore resembles the vision that you and I share of the common law method.¹⁰⁴ The common law, at its best, recognizes that existing legal principles do not compel outcomes; they only serve as a starting place for extending any given principle to reach the intuitively just outcome in new cases.¹⁰⁵

The very breadth of Sunstein’s book may have obscured one of the only plausible ways of refining the practical reason, or common law, approach to statutes. For particular statutory sub-areas, such as environmental statutes or statutes dealing with commercial sales transactions,¹⁰⁶ one can imagine that interpreters could reach a consensus on regulatory purposes and typical failures. Within the sub-area, interpreters could develop more predictable and desirable interpretive practices, but these practices would not offer much guidance for those interpreting statutes outside the sub-area.¹⁰⁷

Sunstein is more effective, I think, in answering other Legal Realist criticisms of statutory canons. Max Radin and others criticized canons because the canons poorly reflected the typical uses of language and the likely intentions

101. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. VI, chs. 5-11 (H. Rackham trans. 1962). The concept of “practical reason” has proven useful to those with varying perspectives on questions of legal theory and method. See Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 850, 854-58 (1990) (describing “feminist practical reasoning” that focuses on “real-life dilemmas posed by human conflict” and focuses on accounting for “perspectives of the excluded”); Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 838 (1988) (practical reasoning provides method for finding beliefs about matters that cannot be verified by logic or exact observation). But see Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1534-36 (1985) (use of practical reason concedes legitimacy of too many existing social conditions).

102. O. W. HOLMES, *supra* note 87, at 200; see also Hantzis, *Legal Innovation within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U.L. REV. 541, 567-75 (1988); Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 805-15 (1989); Note, *Holmes, Peirce and Legal Pragmatism*, 84 YALE L.J. 1123, 1124-25, 1137-39 (1975); Fisch, *Justice Holmes, The Prediction Theory of Law and Pragmatism*, 39 J. PHIL. 85, 92-95 (1942).

103. Llewellyn, *supra* note 58, at 399, 401.

104. K. LLEWELLYN, *CASE LAW SYSTEM*, *supra* note 5, § 62; Holmes, *Legal Interpretation*, *supra* note 73, at 420.

105. K. LLEWELLYN, *CASE LAW SYSTEM*, *supra* note 5, §§ 16, 39, 42.

106. Karl Llewellyn was responsible for the early development of the Uniform Commercial Code. Patterson, *Good Faith, Lender Liability and Discretionary Acceleration: of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169, 186-202 (1989); Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 466-72 (1987). Because that statute deals with a relatively stable group of problems and a relatively homogenous group of persons (merchants), Llewellyn may have overestimated the value of general advice, such as “reason” and “good sense,” to interpreters of statutes generally.

107. Gewirtz, *Editor’s Introduction to K. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA xv-xxiii* (1989).

of a legislature.¹⁰⁸ In other words, these critics directly questioned the canons' content, rather than their propensity towards inconsistency. Sunstein updates some canons to make them reflect the experiences and aspirations of the administrative state. Thus, Sunstein has demonstrated that attention to the content of interpretive norms can improve interpretation, even where it does not make the interpretive method more determinate.¹⁰⁹ While this may only prevent the most foolish and anachronistic readings of statutes, it remains quite an achievement.

Sincerely yours,
Karl N. Llewellyn

* * * *

Holmes to Llewellyn

My dear Llewellyn,

I agree with your concluding observation that Sunstein's attention to the content of canons is a worthwhile effort. But that insight only brings us to more important questions. Who will develop and use these canons? Sunstein pays virtually no attention to the process of developing background norms. The generation of scholars who followed you and Radin—the Legal Process scholars—would find this omission perplexing. Indeed, they might find it distressing that you still do not turn naturally to the question of institutional competence, which is, after all, a way to control who will wield the unconstrained power at work in the law that you have identified.

Legal Process scholars concluded that if substantive principles of law could not constrain the outcome of a decision, perhaps it was more important to focus on the institutional pressures on the decisionmaker than on the arguments he or she would hear.¹¹⁰ To that end, they developed more fully my position that

108. Radin, *supra* note 47, at 873-75; de Sloovere, *Extrinsic Aids in the Interpretation of Statutes*, 88 U. PA. L. REV. 527, 536-44 (1940); Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 966-67 (1940).

109. Llewellyn observes that it is unrealistic to expect a legal method to determine legal outcomes with predictability and certainty, yet maintains certainty as a desirable end of legal analysis. For an argument that certainty of outcome is overvalued as an end of the legal system, see Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 470-73, 535-41 (1988). For thoughtful efforts to point out the strengths of an indeterminate interpretive method, see Eskridge & Frickey, *supra* note 99, at 345-54; Eskridge, *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 679 (1990) (criticizing fetish regarding interpretive method); Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 837-58 (1988) (describing practical reason approach to legal tasks, including interpretation).

110. A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962) (effort to describe implications of judiciary's "countermajoritarian difficulty"); see Amar, *Law Story*, 102 HARV. L. REV. 688, 689-710 (1989) (describing Legal Process School); Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM. 561, 586-99 (1988) (same); Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 239-40 (1983) (distinguishing original Legal Process School from later developments).

judges should leave decisions about certain types of issues to others who are more directly accountable.¹¹¹ Legal Process scholars might join me in asking why Sunstein pins his hopes for developing and using proper background norms on judges rather than other interpreters.¹¹²

Sunstein's interpretive model deviates from mine when he says that a judge must minimize the impact of legislative folly. Sunstein contrasts this position to one I have expressed elsewhere: "If my fellow citizens want to go to Hell I will help them. It's my job."¹¹³

In many cases, this difference in our approaches might not change the outcomes. I would not assert that judges must enhance the perverse side-effects of a statute if Congress did not contemplate such side-effects. If there is a reading of a statute that a reasonable person would likely adopt to avoid foolish consequences, I might be willing to attribute that reading to the legislature.¹¹⁴ But I would only do so where it is quite likely that the enacting legislature would want me to do so.¹¹⁵ Sunstein seems to allow the judge to draw more generally on regulatory experience, even to contradict certain legislative choices.

Judges must interpret statutes using something more than the explicit instructions of Congress, but they must do so with a keen sense of their limited legitimacy and limited abilities.¹¹⁶ The difficulty of judicial legitimacy, a product of the unaccountability of judges, is a familiar topic and I need not review it with you.¹¹⁷ Allow me to focus instead on limited judicial abilities,

111. *Coppage v. Kansas*, 236 U.S. 1, 27 (1915) (Holmes, J., dissenting); *Adair v. United States*, 208 U.S. 161, 190-92 (1908) (Holmes, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

112. Cf. Abrams, *Law's Republicanism*, 97 YALE L.J. 1591 (1988).

113. P. 113 (quoting 1 HOLMES-LASKI LETTERS 249 (M. Howe ed. 1953)).

114. "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. . . . [I]t is not an adequate discharge of duty for courts to say 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1263-64 (1947) (quoting Holmes).

115. See Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189 (1986) (metaphor of judge as field commander receiving garbled instructions from commanders); Maltz, *supra* note 74, at 9-13; Horack, *supra* note 53, at 126-27.

116. Sunstein briefly deals with the possibility that judges, because of the undemocratic nature of their office, should rely on legislative judgments as much as possible. Pp. 133-37. He submits, however, that this will only be possible in the small group of cases in which judges can ascertain what the legislature wanted by using noncontroversial interpretive principles. In other cases, he says, the interpreter will need to select proper interpretive principles to reach sound results. Sunstein's answer points to the advantages of some interpreter resorting to considerations beyond legislative purpose and intent, but he provides an inadequate reason to choose courts as the primary interpreters.

117. Justice Holmes is perhaps wise to emphasize judicial abilities rather than judicial legitimacy, since there are several factors that argue for the legitimacy of certain "value" choices by judges. To begin with, legislatures are less democratically accountable than is generally acknowledged. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1080-87 (1988). In addition, the sharp distinction between "reasoned" exercises of judgment and exercises of political "will" is perhaps philosophically and psychologically naive. Popkin, *supra* note 78, at 546-52.

Sunstein mitigates the legitimacy problem in a couple of ways. First, his prescription for political deliberation and accountability mimics the "process" approach of John Hart Ely, who suggested that judicial review should aim to improve the democratic character of the political process. This is particularly true for Sunstein where judges are employing the constitutionally based background norms. Pp. 165-66; J. ELY,

which present even greater problems for Sunstein's reliance on judges as interpreters.

For Sunstein, it is critical that the interpreter develop and use a set of background norms based on a sophisticated general view of regulation. But the very diversity of adjudication makes it unlikely that judges will develop such a coherent general view. Judges will hear arguments by advocates regarding a particular application of a particular statute; an overarching vision of regulation is unlikely to emerge from the fray. Even if this were a possibility for one judge, there are over one thousand federal judges (appointed by different Presidents) and thousands of state judges interpreting regulatory statutes;¹¹⁸ the chances that such a group would develop a set of norms resembling Sunstein's are remote in the extreme.

Moreover, Sunstein calls on interpreters to be alert to the systemic consequences of different forms of regulation and to anticipate hidden problems that escaped the attention of the legislature.¹¹⁹ Yet an inability to see all the diverse effects of a decision, to look beyond the frame of the controversy that presents itself, is perhaps the greatest weakness of a judicial decision.¹²⁰ Sunstein may be appealing to the interpreters who are least able to see the subtle side-effects of regulation.

If Sunstein had looked to administrative agencies rather than courts, these troubles would have tapered off. To begin with, an agency answers to elected officials and can avoid some of the difficulties of judicial legitimacy. It can make the "value-laden" choice¹²¹ of an interpretive norm without such serious questions concerning its authority to do so.¹²²

An agency could also choose a single set of interpretive norms without the conflicts that would inevitably develop as diverse courts confront the issue. Its perspective on the operation of an entire regulatory program, rather than on one focused, disputed area at the moment, makes the agency better able to anticipate

DEMOCRACY AND DISTRUST 73-75, 102-03 (1981). Second, Sunstein's call for a "sympathetic engagement" with regulatory principles by courts grows out of the need to respect the decisions of the most democratic branches. Pp. 71-73.

118. See 1990 JUDICIAL STAFF DIRECTORY 533-49; THE BOOK OF THE STATES, 1990-91 EDITION 204-07 (1990).

119. Pp. 170-86.

120. See S. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 103-12, 129-35 (1983) (judicial review of EPA focuses on limited set of concerns and distorts agency priorities); Mashaw & Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 262-63 (1987) (limited focus of judicial review of agency rulemaking makes review unpredictable and forces NHTSA to abandon rulemaking).

121. P. 190.

122. The legitimacy of agency policymaking is grounded both in the delegation of policymaking power from the legislature and in the indirect electoral accountability of administrators through the chief executive. Both sources of policymaking legitimacy for agencies are problematic, since (1) there must be some indication that Congress actually chose to give authority to the agency, and (2) the executive's legitimate role is limited to administration and not legislating. Nevertheless, agencies have a claim to policymaking legitimacy that is marginally stronger than the claim of judges. First, it is fair to guess that Congress authorizes agency policymaking more frequently than judicial policymaking. Second, the tasks of administration inevitably encompass some policy decisions.

side-effects that others may have missed.¹²³ And the agency's sustained attention to its regulatory mission will give it the best grasp of pertinent regulatory purposes and the history of past failures. At the same time, it would be familiar with concrete applications of the statute, just as a court would.¹²⁴ In short, Sunstein has created a powerful model for improving agency interpretation of statutes that employs traditional agency strengths. The trouble lies in the fact that he addresses it first to courts.

While Sunstein recognizes that agencies also interpret statutes,¹²⁵ he believes they should do so in the shadow of courts. He rejects any general preference for agency interpretation over judicial, and consigns agency interpretation to the realm of "mixed questions" of law and fact.¹²⁶ This leaves most issues to the courts, since the "pure" questions of law they decide will include the choice of appropriate background norms.

Sunstein's preference for courts over agencies is largely a response to the problem of agency capture by private interests. This is a genuine concern and makes the choice of interpretive institutions all the more difficult. Yet it is not clear how often agency "capture" actually occurs, or actually disables agency interpretations of statutes.¹²⁷ By contrast, the limited perspective judges have seems far more commonplace.

Agencies are not the only alternative to courts as the place for generating interpretive norms. Sunstein also should acknowledge the legislature as a source of interpretive norms. Perhaps Sunstein's set of "canons" might take the shape of an "interpretation statute" of the sort found in the United States Code and many state codes.¹²⁸ In such a construction statute, the legislature decides for itself the approach that interpreters should take in fleshing out the meaning of regulatory statutes. While the construction statute will itself require some judicial or agency interpretation,¹²⁹ it would nevertheless further the process of developing a set of background norms congenial to the regulatory state.

123. See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984).

124. Sunstein lists this as a significant interpretive advantage of courts: "Above all, the focus on the particular circumstances enables judges to deal with applications that any legislature, no matter how farsighted, could not conceivably have envisaged. . . . In this respect, judicial decision of individual cases, allowing an emphasis on the particular context, contains significant advantages for interpretation." Pp. 135-36.

125. Pp. 161-62, 191-92.

126. Pp. 142-44.

127. See generally J. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 90-110, 158-71 (1989) (detailing agency behavior difficult to explain using capture model); S. KELMAN, *MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT* 231-70 (1987).

128. For some representative construction statutes, see 1 U.S.C. §§ 1-6 (1988); CAL. GOV'T CODE § 9603 (West 1980) (referring to interpretation instructions for each code); N.C. GEN. STAT. § 12-3 (1986); TEX. GOV'T CODE ANN. § 311.023 (Vernon 1988).

129. See, e.g., Freund, *Interpretation of Statutes*, 65 U. PA. L. REV. 207, 216 (1917); West, *Adjudication is not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 253-57 (1987).

Sunstein is certainly not alone in his court-centered approach to interpretation. With few exceptions, general discussions of interpretation spotlight judges. Most theorists have not considered why judges, as opposed to agencies, should remain at the center of analysis and debate.¹³⁰ But given the satisfying fit between Sunstein's approach and agency talents, this book may present an opportunity to bring agency interpreters more completely into the discussion.

Aff'ly yours,
Holmes

* * * *

Arendt to Llewellyn

Dear Professor Llewellyn,

Your correspondence with Justice Holmes has stimulated my thinking about Professor Sunstein's views on regulation. You and Justice Holmes, being lawyers, seem terribly concerned with which institutions have interpretive decisionmaking authority, and which method they employ to reach their decisions. However, these methodological and institutional analyses of the interpretive process are pointless if the statutes involved begin with an improper view of regulation and the place of government.

While I find many of Sunstein's views on regulation appealing, I believe his book offers a dangerously incomplete statement of when and how it is appropriate for government to regulate human affairs. While it explains the incredible variety of benefits that citizens might hope for when they regulate, it offers a uni-dimensional account of the dangers of regulation, focusing only on the danger of economic inefficiency. The book does not explore other dangers to freedom and consequently does not develop ways to guard against them.

As I have emphasized in my writing, the best government is one that preserves a public space for freedom.¹³¹ As in the Greek polis, we must create conditions for citizens to make new beginnings and inspire others to action through their words and deeds.¹³² A government succeeds where it makes room for such freedom; it fails where it eliminates freedom and moves toward

130. Of course, administrative law scholars routinely consider the interpretive abilities of agencies and courts. See, e.g., Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1 (1985). Silence on the question of agency interpreters is more common among those who consider statutory interpretation more generally. One notable exception to this silence regarding agency interpreters is William Eskridge, who argues that the prospect of agency "capture" justifies a preference for judicial interpretation. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988).

131. See, e.g., H. ARENDT, *THE HUMAN CONDITION* 51-58 (1958).

132. *Id.* at 192-99; H. ARENDT, *PAST AND FUTURE*, *supra* note 70, at 71 (1961) (Greek emphasis on public sphere for "famous deeds").

totalitarianism, as in Hitler's Germany or Stalin's Soviet Union.¹³³ Although Sunstein himself several times raises the possibility that his vision of regulation might ultimately lead to totalitarianism,¹³⁴ he offers no adequate way to prevent such an outcome.

Sunstein's vision of regulation, however, does have two features I admire greatly. First, Sunstein is right to reject the minimalist state. As I have stated before, freedom of action is only possible where citizens participate *together* in a political order.¹³⁵ A society that merely prevents its members from injuring one another does little to promote the human condition. Indeed, the threat of totalitarianism does not arise merely from destructive collective action; it also arises where there is no forum for the exercise of collective freedom.¹³⁶ The alienation of individuals who do not act together as a plurality paves the way for totalitarianism. Secondly, Sunstein makes an admirable effort to distinguish citizens from market actors. He acknowledges that people may have certain aspirations for themselves or their society, even though they may fail to act on those aspirations when behaving as consumers. He claims that his view of regulation encompasses several different visions of the political order,¹³⁷ including those that emphasize freedom:

[T]he freedom of collectivities or communities [is] embodied in decisions, reached by the citizenry as a whole, about what courses to pursue. This view is closely associated with traditional republicanism, but it has resonances in Madisonian thought as well. On this view, political autonomy can be found in collective self-determination, as citizens decide, not what they "want," but instead who they are—what their values are and what those values require.¹³⁸

I couldn't have said it better myself.

Sunstein makes the distinction between citizens and market actors to establish the possibility of "deliberative" government, where outcomes are not necessarily determined by the economic needs of individuals. Rather, deliberative government is independent of preexisting economic interests, and citizens can persuade one another to take principled action regardless of their usual behavior as consumers.

133. H. ARENDT, *ORIGINS*, *supra* note 70, at 389-459; S. WHITFIELD, *INTO THE DARK: HANNAH ARENDT AND TOTALITARIANISM* 25-52 (1980).

134. Pp. 11, 42, 47; *see also* Sunstein, *supra* note 24, at 1129, 1136, 1170-71.

135. H. ARENDT, *THE LIFE OF THE MIND: WILLING* 201 (1978); H. ARENDT, *supra* note 131, at 176-77 (1958).

136. H. ARENDT, *ORIGINS*, *supra* note 70, at 267-69, 308-18; *see also* Sandel, *Morality and the Liberal Ideal*, *THE NEW REPUBLIC*, May 7, 1984, at 15 (totalitarianism possible under conditions of alienation).

137. *See* Sunstein, *supra* note 24, at 1132-36.

138. P. 35. This passage bears a striking resemblance to some of Arendt's work, where she claimed that political participation reveals "who" citizens are rather than "what" they are. H. ARENDT, *supra* note 131, at 179.

The distinction Sunstein makes between citizens and consumers, together with his portrayal of deliberative government, coincides with my vision of a "public space" for freedom. I share his high opinion of the American Revolution, which brought the people together for discussion and action in a forum where economic interests did not predominate.¹³⁹

While Sunstein affirms the possibility of a public space transcending private interests, pointing out a possibility is not enough to ensure freedom. He offers no assurance that representatives will protect free political action within the regulatory context. Indeed, he rejects several promising means of promoting and preserving freedom that I have proposed elsewhere.

First, Sunstein refuses to exclude economic issues from the public forum. While I recognize that my position runs counter to most modern political theory,¹⁴⁰ I have asserted that we should exclude economic considerations from the realm of action,¹⁴¹ because citizens have no freedom to act independent of their economic interests.¹⁴² Their need for food and other necessities forces them to engage in certain predictable behavior, and perhaps to use coercion and violence to obtain what they need.¹⁴³ There is no place in the political realm for the predictable or for coercion and violence.¹⁴⁴ Thus, citizens must meet their economic needs before they engage in politics.¹⁴⁵ On this score, I believe Justice Holmes would side with me against Sunstein. Holmes maintained privately that ownership of property was a destructive issue whenever it arose in politics.¹⁴⁶

Despite the danger to freedom that I perceive in public resolution of economic issues, Sunstein places such economic matters at the center of the regulatory stage. The majority of the regulatory purposes he discusses involve the maximization of social wealth or the distribution of wealth. He shares with Marx and the modern Western political tradition an insistence that economics should be the focal point of public action.

139. H. ARENDT, ON REVOLUTION 153-56 (1963); Sunstein, *Interest Groups*, *supra* note 8, at 35-48.

140. G. TLABA, POLITICS AND FREEDOM: HUMAN WILL AND ACTION IN THE THOUGHT OF HANNAH ARENDT 69-94 (1987).

141. H. ARENDT, *supra* note 131, at 79-174.

142. See Parekh, *Hannah Arendt's Critique of Marx*, in HANNAH ARENDT: THE RECOVERY OF THE PUBLIC WORLD 67 (M. Hill ed. 1979); see also Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 38 (1990).

143. H. ARENDT, ORIGINS, *supra* note 70, at 152-53 (imperialist policy an outgrowth of appeal to economic interest); H. ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 120-34 (1963).

144. H. ARENDT, *On Violence*, in CRISES OF THE REPUBLIC 103 (1969); H. ARENDT, *supra* note 139, at 10.

145. H. ARENDT, *supra* note 131, at 58-67.

146. THE HOLMES-EINSTEIN LETTERS 45, 56 (J. Peabody ed. 1964); PROGRESSIVE MASKS 47-48 (D. Burton ed. 1982) (Holmes states in a letter that the public "habitually confuses consumption with ownership—and thinks that when it has found that the title to a large part of the property in the U.S. is in a few individuals it has discovered an economic grievance."). By contrast, CLS scholars maintain that any attempt to insulate property ownership from public debate involves coercion and controversy. See M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 8-17 (1988).

We would, in my opinion, be safer from totalitarianism if we were to exclude economic matters from the public realm altogether.¹⁴⁷ Alternatively, we might tolerate economic regulation, but maintain the primacy of non-economic issues and the inviolability of public space for discussion.¹⁴⁸ Sunstein, however, does not explore this alternative.

Another preventative measure that Sunstein neglects, and one more in keeping with modern politics than the measures I have just mentioned, is participation. By participating directly in politics, citizens strengthen bonds with one another and exercise the freedom that is the antithesis of totalitarianism.¹⁴⁹ Direct citizen participation was a recurrent element of the republican influence in the nation's founding.¹⁵⁰ Sunstein, however, is unenthusiastic about participation. He asserts that direct participation in government is unworkable, and therefore turns to representative government.¹⁵¹ While calling for greater government accountability to voters, he also praises representation because of its insulation from the desires of citizens. Sunstein, though sympathetic with some aspects of republicanism, settles on a truncated version of this tradition.

I have stated that voting is not an adequate form of participation, because the value of political power comes not from its possession but from its regular exercise.¹⁵² If Sunstein could devote more effort to creating possibilities for direct citizen participation in the affairs of government, there might be reason to believe that the citizens would use forms of regulation that carry out collective aspirations, a possibility Sunstein only raises. The isolation and alienation that can bring on totalitarianism might not take hold.

Perhaps my reservations about Sunstein's regulatory theory are related to your criticism of his account of interpretation. He generates a flurry of conflicting rationales for regulation, just as he offers competing methods of interpretation. In both cases, he sidesteps the most challenging question, how to mediate between these seemingly incongruent rationales and methods of interpretation.

In sum, Sunstein offers many possible activities for government, but does not address the twin dangers I have discussed: on the one hand, citizens could fail to engage in public activities and forfeit the realm for political action, while on the other hand, regulatory activities might themselves destroy freedom. We need more than a description of possible regulatory purposes. We need some

147. H. ARENDT, *supra* note 131, at 248-326; see Thompson, *Constitutional Theory and Political Action*, 31 J. POLITICS 655, 657-59 (1969); Jay, *Hannah Arendt: Opposing Views*, 45 PARTISAN REV. 348, 352-53 (Oct. 1978).

148. G. TLABA, *supra* note 140, at 90-92.

149. H. ARENDT, *ORIGINS*, *supra* note 70, at 323-26; H. ARENDT, *supra* note 139, at 239-42, 256-59 (exploring tension between representation and direct participation in public affairs).

150. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 222-26 (1969); 2 *THE COMPLETE ANTI-FEDERALIST* 73, 110-11 (H. Storing ed. 1981).

151. Pp. 14-15; Sunstein, *Interest Groups*, *supra* note 8, at 39.

152. H. ARENDT, *supra* note 139, at 170; G. KATEB, *HANNAH ARENDT: POLITICS, CONSCIENCE, EVIL* 124-32 (1984).

careful thought about when these purposes provide too little or too much regulatory activity to be consistent with freedom.

Sunstein does begin the related task of finding the best means to a given end. His reasons not to regulate all address the possible inefficiency of regulation as a tool to maximize social wealth. This effort to improve means is important, but it cannot replace the need to choose proper regulatory ends, which will prevent destructive regulation. Our efforts should focus on encouraging citizens to aspire to words and deeds beyond those dictated by economic necessity.

Sincerely,
Hannah Arendt

* * * *

Llewellyn to Arendt

Dear Professor Arendt,

Thank you for passing along your iconoclastic views regarding Sunstein's account of regulation. While you may be right to hope for politics transcending economic interests, it is unlikely that economics will remain outside the political realm in the United States. As you recognize, free political action is not possible if one is preoccupied with feeding oneself. Many citizens therefore face a paradox: they must remain preoccupied with necessity until the polity is reorganized. That can only happen through politics, so they bring issues of necessity into the public forum.¹⁵³

Assuming this is true, it raises another critique of Sunstein's account of regulation. You argued that he dwells unnecessarily on economic regulation without acknowledging its destructive effects apart from wealth maximization and distribution. But it is worth asking whether Sunstein's regulatory principles will offer any real guidance to those who are concerned only with such economic issues. Will he overwhelm them with possibilities?

The sheer number of potential forms of regulation makes it difficult to apply Sunstein's regulatory principles, just as I noted in my letter to Holmes that it is difficult to apply his interpretive principles. As Sunstein puts it, "[t]he appropriate nature and scope of regulation cannot be decided on without knowing a good deal about the facts, including above all the practical effects of various regulatory strategies."¹⁵⁴ Sunstein's approach to regulation simply underscores the importance of further study of specific forms of regulation, in an effort to learn "a great deal about the facts." A regulator choosing appropri-

153. See Habermas, *Hannah Arendt's Communications Concept of Power*, 44 *SOCIAL RESEARCH* 3 (Spring 1977); G. KATEB, *supra* note 152, at 115-24.

154. P. 71.

ate regulatory ends and means from Sunstein's catalogue must look to the facts before her, just as common law courts have always done.

Sincerely yours,
Karl N. Llewellyn

* * * *

Llewellyn to Sunstein

Dear Professor Sunstein,

I enclose copies of some correspondence between myself, O. W. Holmes, Jr., and Hannah Arendt, all discussing your recent book, *After the Rights Revolution*. You addressed certain comments to us throughout the book, so I thought you might be interested to see our replies. While our reactions are at times critical, that should not obscure our admiration for your book. Our criticisms focus primarily not on what you have done, but on what you have left undone. Holmes and I criticize what we believe to be an incomplete interpretive method; Arendt criticizes what is missing concerning an appropriate vision of freedom. Nevertheless, you are still young, with time and skill enough to complete the task you have set for yourself. We eagerly await your future work. Take good care of my chair.

Sincerely yours,
Karl N. Llewellyn

