CONSTITUTIONAL VISIONS

BY ROGER PILON

In law as in life, where you start often has a lot to do with where you end. In Eastern Europe and the Soviet Union, for example, they started earlier in the century with the group and have struggled ever since to find any room for the individual, which they now seem to be doing only by starting all over again. In America we were more fortunate in having begun our experiment with the individual. Not that the individual has not lost much ground over the years, but our starting point has proved a powerful anchor in that drift.

After the Rights Revolution begins with FDR's "second Bill of Rights." Our original rights "proved inadequate to assure us equality in the pursuit of happiness," FDR wrote to Congress in January 1944. We have accepted, therefore, "a second Bill of Rights under which a new basis of security and prosperity can be established for all," including the right to a useful and remunerative job, the right to earn enough, the right of farmers to a decent living and of businessmen to be free from unfair competition, the right to a decent home, the right to adequate medical care, the right to a good education, and on and on.

Those are, of course, the "rights" of the modern regulatory state, the state that Cass Sunstein wants to defend "against influential attacks, recently found, for example, in the Reagan and Thatcher administrations and often based on free-market economics and pre–New Deal principles of private right." This is no ordinary defense, however. Steeped in the literature of public choice and law and economics, Sunstein is keenly aware of the shortcomings of the modern state. His principal aim, therefore, is "to suggest reforms and principles that would promote the purposes of statutory programs and of constitutional government, while avoiding these problems."

What emerges, however, is an often sophisticated, often frustrating apology for the modern state, an apology that too often wants to have it both ways. Yes, minimum-wage laws increase unemployment. Still, "labor markets create a prisoner's dilemma that is soluble only through government action." Yes, deliberate preference—shaping of desires and beliefs through governmental control—smacks of totalitarianism. Still, that point should not be taken to deprive citizens of the power to counteract, through laws providing information and opportunities, "preferences and beliefs that have adapted to an unjust or otherwise objectionable status quo." (There's your rationale for PBS: It's for "people who are indifferent to high-quality broadcasting because they have experienced only banal situation comedies.")

In general, Sunstein calls for "a kind of American-style *perestroika*—a restructuring of institutional arrangements and substantive controls that is entirely unembarrassed by the use of government to reflect democratic aspirations, to promote individual autonomy and economic welfare, and to foster distributional equity, but that also insists on strategies that embody the flexibility, adaptability, productive potential, and decentralization characteristic of private markets."

Yet how could Sunstein not be ambivalent—I choose to be charitable—when he takes the central purpose of constitutional government to be the "promotion" of both autonomy and welfare? The effort to actively promote those ends through "deliberate democracy"—"to respect private property and freedom of contract, but also to permit a large range of governmental activity in the interest of economic productivity and protection of the disadvantaged"—necessarily leads to inconsistency, which can be "transcended" only by treating "the satisfaction of private preferences, whatever their content, [as] an utterly implausible conception of liberty or autonomy. The notion of autonomy should be taken to refer instead to decisions reached with a full and vivid awareness of available opportunities, with all relevant information, or, most generally, without illegitimate constraints on the process of preference formation." Hegel could not have put it better.

There is about this book, then, a large measure of the vision that has been upon us since the Progressive Era: Disdainful, in the end, of the private realm, with all its contingent variety, the vision and its adherents would force us, through the democratic device, to be "free." Although their preferred vehicles are the legislative and executive branches, "it is inevitable that some role will remain for the courts," Sunstein avers. And here, "the task of interpretation calls for sympathetic engagement with the modern regulatory state, not for the use of [first] principles conspicuously rejected by the rise of regulation."

Thus "in the aftermath of the New Deal, courts have been reluctant to use the Con-

After the Rights Revolution: Reconceiving the Regulatory State, by Cass R. Sunstein, Cambridge, Mass.: Harvard University Press, 284 pages, $25.00

The Tempting of America: The Political Seduction of the Law, by Robert H. Bork, New York: Free Press, 432 pages, $22.50

stitution's explicit protections of property and contract in a way that would significantly interfere with social and economic regulation." What accounts for this "large shift from the beliefs of the founding generation"? In part, courts understand that they ought to interfere "only in egregious cases" because those measures have "considerable popular support."

Thus do courts cease to be "the bulwark of our liberties," as Madison put it. Yet given the regulatory springboard from which they work, it is through the courts, Sunstein observes, "that regulatory improvements, interstitial to be sure, can be brought about most easily." The branches work hand in hand, *then*, "*renovating the original commitments* to checks and balances, federalism, and individual rights"—not to secure the private order but in "a deliberative effort to promote the common good." Where you start has a great deal to do with where you end.

The contemporary world of academic jurisprudence to which Sunstein belongs—he acknowledges over 40 people in his preface—is a principal target of Robert Bork's *The Tempting of America*. Unlike older constitutional commentators, the modern theorists are undertaking "the alteration of the Constitution...to make it not a document 'addressed to the common sense of the people,' " as Joseph Story characterized our fundamental legal instrument, "but one addressed to a specialized and sophisticated clerisy of judicial power."

Through their teaching and writing, through the lawyers, judges, and judges' clerks they train, those theorists are engaged in a war "for control of the legal culture." Overwhelmingly of the left, they would impose the values of the left upon the American people through the power of the judiciary to say what the Constitution means and hence what our law should be. They would thus politicize the law not so much through the elected representatives of the people as through an unelected judiciary.

In the end, the battle over his confirmation for the Supreme Court was a battle, Bork argues, about the proper role of the courts. And in this, "there are only two sides. Either the Constitution and statutes are law, which means that their principles are known and control judges, or they are malleable texts that judges may rewrite to see that particular groups or political causes win." In Bork's view, the original understanding supports only the former side.

"The intended function of the federal courts is to apply the law as it comes to them from the hands of others," and in particular from the hands of the legislature. "The judiciary's great office is to preserve the constitutional design," which it does by confining Congress and the president to the powers granted them, by protecting freedoms granted by the Bill of Rights, "but also, and equally important, by insuring that the democratic authority of the people is maintained in the full scope given by the Constitution."

It is democracy, then, that is Bork's starting point. Indeed, our "first principle is self-government, which means that in *wide areas* of life majorities are entitled to rule, if they wish, simply because they are majorities." Our second principle is "that there are nonetheless *some* things majorities must not do to minorities, *some* areas of life in which the individual must be free of majority rule." (Emphasis added.)

A large part of the book is devoted to showing how an activist judiciary, especially over the past 40 years, has taken upon itself the power to rewrite the Constitution, denying the people the right to see their values instituted through their elected representatives. From *Dred Scott* in 1857 (with Justice Taney "determined to prove that the right of property in slaves was guaranteed by the Constitution") to *Lochner* in 1905 (frustrating New York state's attempt to regulate the hours of bakers) to *Roe* v. *Wade* in 1973 (finding a constitutional right to abortion), case after case is examined for evidence of an unrestrained judiciary, running roughshod over the democratic design.

The lengths to which Bork will go in the name of that design are sometimes striking. He quotes the sole dissenter in *Loan Association* v. *Topeka* (1874): "Except where the Constitution has imposed limits upon the legislative power the rule of law appears to be that the power of legislation must be considered as practically absolute, whether the law operates according to natural justice or not in any particular case, for the reason that the courts are not the guardians of the rights of the people of the State, save where those rights are secured by some constitutional provision which comes within judicial cognizance." That "makes the case for the correct judicial role about as well as it can be made," Bork concludes. Ever wary of appeals to "natural justice," to which judges have no special access and over which they

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have no authority, Bork believes that "majoritarian despotism" should be "cured at the polls"—presumably by minority votes.

More deeply, however, it is Bork's conception of constitutional authority that fails to satisfy, for he views the Constitution almost on the model of a contract, for which text, original understanding, and history must be the principal interpretive tools, consent the justifying foundation. With a constitution, that will get us going, until we reach the broad language of the document, with which ours is replete, at which point we must make a choice: Do we turn the interpretation of that language over to the majority, through the legislative branch, or do we ask the judiciary to interpret—or, better, to apply—this part of the document as well?

If the former, as Bork argues, we had better find some warrant in the document, of which there is precious little in ours. And if we do find such a warrant, we are still left with the frail original consent by way of justifying resort to the will of the majority—a consent that has never been deeply satisfying. If we ask the judiciary to do the interpretation, however, we leave ourselves vulnerable as well.

Yet that is the courts' business under a constitutional regime, which is why we make them immune from political pressure. Resort to the judiciary has the further advantage of affording that branch the opportunity to appeal, ideally, to the higher law that was thought, in the American case, to stand behind the broad language of our Constitution, giving the document not only content but legitimacy and authority of a kind that only unanimous consent could otherwise provide. Yet Bork precludes this avenue of authority in his haste to turn the ambiguities of the document over to the far less satisfying authority of the majority.

Despite their manifest political differences, then, Bork and Sunstein both begin as democrats who would give wide berth to the majority to plan and regulate our lives. Unlike Bork, however, Sunstein would invite the judiciary to draw upon a broad range of often doubtful reasons in applying the Constitution—reasons unrelated to the document by text, original understanding, or history—concerning which Bork is rightly critical.

But it will not avail Bork himself to resort to the sweeping majoritarianism that was no part of the original design, was explicitly guarded against by that design, and could not be justified in any event, save by frequent appeal to unanimous consent. Majoritarianism is our inheritance from the Progressive Era, not from the Founding. At the Founding they got it right. They started with the individual.

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THE FIRST INNOCENT ABROAD

BY STEVEN HAYWARD

"What will the Americans do?" That question has plagued the world not just since the United States became a superpower, but indeed since the earliest days of the republic. On the one hand, geography and native disdain for the corruption of Old World politics incline America toward isolation. On the other hand, America's "traditional sense of universal moral mission," in Henry Kissinger's words, leads the United States to intervene around the world for the loftiest of reasons, "to make the world safe for democracy." What other country issues such sweeping proclamations as the Truman Doctrine, or, lately, the Reagan Doctrine? America was the first and remains the only country to assert an indissoluble connection between the prospects for freedom at home and the prospects for freedom abroad. So the problem for foreign leaders is which America will it be this week: the cautious isolationist or the idealistic, crusading, and often reckless interventionist? The wrong answer can carry ruinous consequences. Just ask the Hungarian freedom fighters of 1956, or Saddam Hussein in 1990.

Empire of Liberty: The Statecraft of Thomas Jefferson, by Robert W. Tucker and David C. Hendrickson, New York: Oxford University Press, 360 pages, $24.95

This fundamental problem became a world crisis with the advent of *Pax Americana* (or "The American Century," if you like), starting with Woodrow Wilson and culminating with America's supplanting of the British Empire after World War II. Now, with the Cold War—nay, even history itself—ending, the question of America's bearings in the world needs to be rethought. America's idealistic, crusading posture is fairly easy to carry off against ideological totalitarians. You couldn't ask central casting for villains purer than Nazis or Communists. It becomes a much more difficult and subtle matter to conduct relations with a Soviet Union that is, like Britain in 1800, merely pursuing national or imperial, rather than ideological, interests in the world.

Already the conservative camp is splitting apart, with Pat Buchanan sounding rather like