Book Reviews

Populism and Progressivism as Constitutional Categories

Democracy and the Problem of Free Speech. By Cass R. Sunstein.* New York: The Free Press, 1993. Pp. xx, 300. \$22.95.

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I. INTRODUCTION: CHANNEL SURFING USA

It's been a tough day. I've spent most of it worrying about the Free Speech Principle. Or at least, the Free Speech Principle described in Cass Sunstein's *Democracy and the Problem of Free Speech*,¹ a book by an author I greatly admire. According to Sunstein, the primary purpose behind free speech is promoting democratic deliberation about issues of public policy.² Hence he divides speech into higher and lower tiers of protection. Speech most worthy of government protection is concerned with deliberation about public issues; the rest is subject to varying degrees of government regulation.³ It is a thesis with a considerable historical pedigree. Alexander Meiklejohn made

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1. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

2. *Id.* at 252.

3. *Id.*

a similar claim in the 1940's.⁴ Moreover, like Meiklejohn, Sunstein emphasizes that the scope of individual rights should consciously be shaped in order to promote the goals of democratic deliberation. Conversely, we should be less concerned about regulation of other types of speech—for example, advertising and pornography—because they do not contribute to democratic deliberation.⁵

I have been worrying about this thesis all day. Now I am driving home on I-95. I say it's been a tough day, but in fact, I realize that I have it pretty easy. I spend most of my life reading interesting books and articles and talking to other people about what I have read. Because I teach law, it's my job to be informed about "public affairs." But I recognize that most other people in this country have different sorts of jobs. They cook, clean, assemble objects, answer phones, file papers, care for children. They have hard days too, harder than I do. And, in most cases, their jobs do not require (or even permit) them to spend much time working with "public issues."

I travel over the Quinnipiac bridge to Branford, Connecticut. Usually there is a lot of traffic; it takes about twenty-five minutes on a good day. When I'm in the car, I usually listen to FM radio; AM is full of talk radio—right-wing talk shows like Rush Limbaugh, or "shock jocks" like Howard Stern—which many people are quite devoted to. At least they let folks sound off a bit. I wonder if political theorists who emphasize dialogue had talk radio in mind. (Live from New York, it's the Jürgen Habermas show! Three hours of unconstrained dialogue under ideal social conditions with your wild and rational host, Jürgen Habermas!)

There is also public radio, which is supported by public grants and listener contributions, but most people listen to popular music on stations supported by commercial advertising. There are lots of news reports on public radio—too many at the end of a long day. Often I simply pop a cassette in my car stereo. On those days I never listen to the radio at all.

I turn up the volume and think about Sunstein's book.

[T]o succeed at all, the system [of democratic deliberation] . . . *must reflect broad and deep attention to public issues*. . . . [S]erious issues must be covered, and they must be covered in a serious way. Indeed, the mere availability of such coverage may not be enough if few citizens take advantage of it, and if most viewers and readers are content with programming and news accounts that do not deal well or in depth with public issues.⁶

4. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), reprinted in *POLITICAL FREEDOM* 3 (1960) [hereinafter MEIKLEJOHN, *POLITICAL FREEDOM*].

5. SUNSTEIN, *supra* note 1, at 123, 127, 159–65.

6. *Id.* at 20.

When I get home it is usually a little before 7:00 p.m. I am tired. I say hello to my wife. I sit on the couch and turn on the television. Our house was built in 1971. It has an "open" floor plan—there is no wall separating the kitchen and family room. Apparently this was a popular architectural style at the time the house was built; it is still popular to this day, although now people add cathedral ceilings and whatnot (giving it that authentic midwestern gothic look). One of the advantages of the open floor plan is that you can watch the kids in the family room if you are working in the kitchen. The other great advantage is that you can watch the television.

Margret and I sit on the sofa and eat our dinner and watch the tube. We flip through the channels determinedly. We are couch potatoes. Sofa spuds. We are on a mission from God. We are looking for entertainment.

What people now prefer and believe may be a product of insufficient information, limited opportunities, legal constraints, or unjust background conditions. People may think as they do simply because they have not been provided with sufficient information and opportunities. It is not paternalistic, or an illegitimate interference with competing conceptions of the good, for a democracy to promote scrutiny and testing of preferences and beliefs through deliberative processes.⁷

Our cable company offers over seventy channels. About 7:00 p.m. there are mostly sitcoms, game shows, and tabloid TV. The FCC decided to strike a blow for programming diversity by effectively forbidding the major network affiliates to program network-produced shows before 8:00 p.m. Eastern Standard Time.⁸ The major result of this regulation is that the independent stations (and Fox) fill the time with reruns of previous network shows. This means I get to see all the episodes of *Roseanne* I missed over the years. Generally speaking these are shows that appealed to a broad enough segment of the public taste that they have survived long enough to go into syndication. So much for diversity. Meanwhile local network affiliates fill the time with game shows like *Wheel of Fortune* and tabloid shows like *Hard Copy* and *Inside Edition*. So much for attention to serious issues. One station has started showing reruns of *The Simpsons*. I am delighted. Nothing like good, cynical humor that undermines everything honorable about American life.

7. *Id.* at 19–20 (footnote omitted).

8. See Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, Report and Order, 23 F.C.C.2d 382, 384 (1970) (describing and promulgating "Prime Time Access Rule" (PTAR), codified at 47 C.F.R. § 73.658(k) (1993)). By its own terms, the PTAR's prohibition applies only to network affiliates in the top 50 markets, but this effectively makes uniform network programming for the remainder unprofitable. On the PTAR, see THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 72–74, 99–100 (1994).

It may seem controversial or strange to say that there is a problem for the Madisonian system if people do not seek serious coverage of serious issues. Perhaps this suggestion is unacceptably paternalistic; perhaps we should take people however we find them. But as I have noted, the system of deliberative democracy is not supposed simply to implement existing desires. Its far more ambitious goal is to create the preconditions for a well-functioning democratic process.⁹

During the commercials we flip through the channels. We move from *The Simpsons* to the Simpsons—from Homer and Marge to O.J. and Nicole Brown. The *World Tonight* is just ending on CNN. The big story of the day is (as usual) the O.J. Simpson case. At 7:00 p.m. there is *Hard Copy*, followed by *Inside Edition*. They are tabloid journalism, mostly about Prince Charles and Princess Diana, Woody Allen, Madonna, Michael Jackson and Lisa Marie Presley, and endless variations on the O.J. Simpson case. The stories on each show look very much alike. There are lots of flashy pictures and graphics. Most of each show consists of teasers of upcoming segments that promise us juicy details. (In our next segment, Princess Di's podiatrist reveals all!)

If sensationalistic scandals and odd anecdotes not realistically bearing on substantive policy issues are the basic source of political judgments, the system cannot work.¹⁰

On Channel 15, there is an attack ad comparing Senator Frank Lautenberg with State Senator Chuck Haytaian. (Paid for by Citizens for Haytaian.) It looks a lot like a comparison of Anacin with Bufferin. Lautenberg says this but Haytaian says that. Lautenberg has done this but Haytaian will do that. Haytaian has more of the pain relievers doctors recommend. Buy—uh—Vote Haytaian for United States Senate.

On CNN, it's *Crossfire*, a prime example of democratic deliberation in the electronic age. Michael Kinsley and John Sununu are going after the guests, who can't seem to get a word in edgewise. Now they are going after each other. Nobody gets to talk for more than five seconds without being interrupted. I decide to interrupt them. Zap.

We keep flipping. If something doesn't catch our interest in a few seconds, we keep on moving. There is a debate between the gubernatorial candidates for the State of Utah on C-SPAN. Zap. A discussion of educational policy on C-SPAN2. Zap. There are documentaries on the Learning Channel and the Discovery Channel. Zap. Zap. The evening news on CNN. Zap. Catholic TV. Zap. Talk show on CNBC. Zap. Six channels worth of Branford Community Access. Zap. Zap. Zap. Zap. Zap.

9. SUNSTEIN, *supra* note 1, at 21.

10. *Id.* at 20–21.

It is also important to ensure not merely that diversity is available, but also that a significant part of the citizenry is actually exposed to diverse views about public issues.¹¹

We go back to *The Simpsons* (Homer, not O.J.). Homer is screwing things up again. He's a kick. I wonder if I am being a bad citizen. Perhaps I should be informing myself about public issues. Perhaps I should be learning about the General Agreement on Tariffs and Trade. But hey, I did my part. I read Sunstein's book on the First Amendment today. But instead of a law professor, what if I were a steelworker? A bus driver? A waitress? A telephone sales grunt? In short, what if I had a *real* job?

[N]o political regime can or should insist that citizens be thinking about politics all, most, or even much of the time; people have many other things to do. But lack of interest in information about government should not be taken as inevitable or as a product of "human nature." We know enough to know that lack of interest is often a result of inadequate education, perceived powerlessness, unsatisfactory alternatives, or a belief that things cannot really be changed. Indifference to politics is frequently produced by insufficient information, the costs of gaining more knowledge, poor educational background, or, more generally, an unjust status quo.¹²

"Doh!" Homer exclaims.

Margret and I, in an apparent fit of false consciousness, flip to E!, the "Entertainment and News Authority." E! is completely devoted to the news of the entertainment industry. Just as news programs are becoming more like entertainment, so entertainment itself has become an important component of the news. This phenomenon starts at the beginning of the century with the lowly gossip column, and gradually swallows up large parts of news coverage. The lives of celebrities—particularly their private lives—are the events of the day. They *are* public discourse—they are what people are talking about.¹³

Margret and I flip and watch, watch and flip. Poor educational background does not explain why we are watching television this evening. Lack of alternatives does not explain it. Our house is overflowing with books and magazines. They are piled on the floor in front of us. We are not looking at them now. We are watching. Watching television.

Busy people cannot be expected or required to devote all or most of their time to public issues. One of the advantages of a representative system—not to mention one with a large bureaucracy—is that it

11. *Id.* at 22.

12. *Id.* at 21.

13. On the history of this development, see generally NEAL GABLER, WINCHELL: GOSSIP, POWER, AND THE CULTURE OF CELEBRITY (1994).

allows the citizenry to devote its attention to subjects other than politics. But it is hardly unrealistic to assess a system of free expression by examining whether it generates broad and deep attention to public issues, and whether it brings about public exposure to an appropriate diversity of view. These are not utopian goals.¹⁴

Zap. On MTV, Sheryl Crow's new video is just beginning. Sheryl is dressed with just the hint of requisite sluttiness apparently now demanded of women who appear on MTV (with the possible exception of Hillary Clinton and Mother Teresa). She (Sheryl, not Mother Teresa) is wearing glossy lipstick, a short skirt, a metric ton of hair mousse, and 70's-style clunky platform high heels. On MTV, I guess, that's how you have to look.

Stimulate or die.

(You wouldn't want someone to flip past you, now would you?)

Sheryl sings:

All I wanna do is have a little fun before I die
Says the man next to me out of nowhere
It's apropos of nothing
He says his name is William
But I'm sure he's Bill or Billy or Mac or Buddy.
And he's plain ugly to me
And I wonder if he's ever had a day of fun in his whole life.¹⁵

Zap. On C-SPAN there's a discussion of Clinton's foreign policy. I keep flipping. I check out *The Simpsons* again. *Inside Edition*. VH-1. I mistakenly land on C-SPAN. Oops. Zap. Zap. Zap. I keep flipping. I am being a very bad boy.

It might be objected that some of these strategies will merely get people to change the channel, to turn off the television, or to turn to other kinds of entertainment. This risk is especially severe for regulatory strategies that attempt to counter current audience desires for entertainment. A requirement of one hour of public affairs programming per night, for example, would probably produce a large diminution in the audience. This is of course a real possibility, and any regulatory efforts must be attentive to the risk. But it is hardly clear that a decision to turn off the television would be genuinely harmful for the individuals or for society, at least if the relevant programming is low quality and does not contribute to Madisonian or other social goals.¹⁶

14. SUNSTEIN, *supra* note 1, at 22.

15. SHERYL CROW, *All I Wanna Do*, on TUESDAY NIGHT MUSIC CLUB (A&M Records 1993).

16. SUNSTEIN, *supra* note 1, at 89.

Zap. Sheryl and her band stand outside the corner of an abandoned movie theater. The passersby hear her music. They throw quarters into her guitar case. Magically, they expand as if filled up with helium, and float delightedly, like huge human balloons, towards the stars.

Sheryl sings:

All I wanna do
Is have some fun
I've got a feeling
I'm not the only one.
All I wanna do
Is have some fun
'Til the sun comes up over Santa Monica Boulevard.

All over America, millions of cable subscribers, induced no doubt by unjust background conditions, are flipping past *The MacNeil/Lehrer NewsHour*, past the Discovery Channel, past CNN, past the local news. They are watching soap operas, made-for-TV movies, gossip shows dressed up as investigative journalism, interviews with Tom Cruise, silly sitcoms, titillating talk shows, music videos with pouty women writhing in a sea of morphing graphics. What they are watching is fast, funny, raucous, loud, lewd, low-rent, and mesmerizing.

Above all it is entertaining.

There is reason to believe that viewing habits, like many other customs and cultural practices, are extremely vulnerable to large-scale shifts on the basis of relatively mild government interventions. . . . In any case there is no good basis for supposing that current tastes and habits are rigidly fixed.¹⁷

In living rooms around the country, people are engaging in dialogue of a certain sort. They are responding with their remote controls. They are voting with their fingertips. The people are speaking. They are demanding something. They are demanding entertainment.

They want their MTV.

And if they are not entertained, they will exercise their inalienable right to zap.

It is not unacceptably elitist to favor a system of free expression that promotes attention to public issues and diversity of view. Of course, it is possible or even likely that the well-educated will disproportionately enjoy high-quality broadcasting. But this is precisely because they have been educated to do so, and high-quality

17. *Id.* at 90.

education is not something to be disparaged. It has a point. Indeed, we should think of the broadcasting media as part of a system of public education designed to serve all those who need it; and there is nothing elitist about that. Even if higher-quality broadcasting is seen disproportionately by the well-educated, its benefits will hardly be restricted to people who are already well informed. Many people who are not college graduates should benefit a great deal from such programming. Indeed, they may receive disproportionately high benefits.¹⁸

Zap. I flip past CNN, past C-SPAN, past C-SPAN2, past *The Mary Tyler Moore Show*, past the infomercial, past the attack ads on channel 3, past the six channels of Branford public access. I am back to MTV. Sheryl is still there. She sings dreamily, to no one in particular:

All I wanna to do
is have some fun
I've got a feeling
I'm not the only one.
All I wanna do
is have some fun
'Til the sun comes up over Santa Monica Boulevard.

II. THE PROBLEM OF DEMOCRATIC CULTURE

Sunstein's book is an attempt at a new liberal synthesis of First Amendment theory; in particular, he attempts to reconcile the traditional left-liberal defenses of free speech with contemporary problems of campaign finance, mass media regulation, advertising power, pornography, and racist speech.¹⁹ His focus on these problems is not accidental. It reflects the increasing sense among liberals that libertarian solutions in these areas have become unacceptable—an example of a more general phenomenon I call the “ideological drift” of the free speech principle.²⁰ It is a tribute to Sunstein's ingenuity that he succeeds as well as he does in his task of reconciliation. Yet in so doing, he exposes a crucial fault line in theories of free speech and constitutional law generally—a fault line organized around the meaning and value of popular culture.

Although Sunstein calls his book *Democracy and the Problem of Free Speech*, it could with equal justification have been called “Free Speech and the

18. *Id.* at 91.

19. *Id.* at xviii–xix.

20. J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869 (1993); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 375–87 [hereinafter Balkin, *Some Realism About Pluralism*].

Problem of Democratic Culture." The "Problem" that concerns him is nothing less than the accelerating degradation of public culture—a degradation both in the character of the public's viewing choices and the quality of public discourse generally.²¹ This concern motivates and shapes Sunstein's attempts at reconciling liberal demands for greater regulation with traditional liberal defenses of freedom of speech. He harmonizes the two by appealing to an ideal of rational public discourse. The task of law, he believes, is to approach this ideal through wise regulation. Yet this ideal of rational discourse is necessarily posed against existing popular attitudes and preferences; hence it necessarily involves a comparison in which the latter are judged and found wanting.

Of all of the many interesting issues in Sunstein's book, this theme is the most pervasive and the most important. And his crusade to mold public culture nearer to this ideal raises a large if largely obscured issue: What attitude should constitutional theorists take towards the beliefs and attitudes of ordinary citizens and the products of popular culture? I say "constitutional theorist," and not "constitutional theory," for theory is not a bloodless matrix of ideas but a practice of individuals and groups. Theory is always performed by a subject situated within a social setting and within a tradition of practice; it is the product of a subject who brings her subjectivity to an object, and pronounces judgment upon it. Hence the question I ask about the nature of popular culture is equally a question about the nature of the legal academic and her attitudes as an academic towards this culture.²² Sunstein does not pose the question in these terms; yet his book has a distinctive attitude about popular will and popular culture, an attitude that distinguishes and colors all of his constitutional scholarship.

I want to talk about constitutional theory's relationship to popular attitudes and popular culture in terms of two opposed positions—one I shall call populist and the other progressivist.²³ The distinction between populism and

21. Consider, for example, this eloquent *cri de coeur*:

[I]t would not be an overstatement to say that much of the free speech "market" now consists of scandals, sensationalized anecdotes, and gossip, often about famous movie stars and athletes; deals rarely with serious issues and then almost never in depth; usually offers conclusions without reasons; turns much political discussion into the equivalent of advertisements; treats most candidates and even political commitments as commodities to be "sold"; perpetuates a bland, watered-down version of conventional morality on most issues; often tends to avoid real criticisms of existing practice from any point of view; and reflects an accelerating "race to the bottom" in terms of the quality and quantity of attention that it requires.

SUNSTEIN, *supra* note 1, at 23.

22. This inquiry is a special case of the "problem of the subject" that is a central concern of postmodern jurisprudence. See J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105 (1993); Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991).

23. Richard Parker has recently called for a revival of constitutional populism. See RICHARD D. PARKER, *HERE, THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO* (1994). Parker calls the sensibility he opposes "Anti-Populist," and he argues that it is the dominant form of constitutional discourse. *Id.* at 56. His description of this dominant discourse has many affinities to what I call

progressivism is orthogonal to the more familiar distinction between "left" and "right." An opposition between progressivism and populism exists wholly within left-liberal discourse, just as one exists within the discourse of conservatives; we might say that the two sets of oppositions form a box of four.²⁴ However, for purposes of this essay I want to focus primarily on the discourse of left-liberals, because it is the ideological community in which both Sunstein and I (and a great many other legal academics) are located.²⁵

By "populism" and "progressivism," I mean to invoke the spirit of two successive reform movements in American history, the first primarily agrarian and the second urban.²⁶ Despite their differences, progressivism and populism had many similarities, so much so in fact that the two are easily confused. Many of the reforms advocated by populists in the late nineteenth century—for example, direct election of senators, the eight-hour day, graduated income taxation, and currency reform—were put in place by progressives in the early twentieth century, albeit for somewhat different reasons.²⁷ Thus, although I am particularly interested in the ways in which populism and progressivism diverge, the two should not be seen as diametrically opposed. They were and are often uneasy allies, but allies they have been nevertheless. Moreover, when I speak of "populism" and "progressivism" today, I am necessarily extrapolating from events in American history to offer principles that might help us understand trends in contemporary political debates. This is an exercise in the description of ideal types; few people can be said to match the portraits I offer in all respects.²⁸

"progressivism." I prefer the term "progressivism" for two reasons. First, this term links contemporary attitudes to an ongoing historical tradition of political thought. Second, it attempts to give this tradition its due as a coherent and viable way of thinking about politics that is much more than a simple opposition to populism.

24. For example, in the 1896 election the concept of "the progressive society"—one devoted to rational progress, civic duty, and social order—was offered by the Republican defenders of the values of the Gilded Age against what was thought to be a dangerous populist insurgency. See LAWRENCE GOODWYN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* 272–73 (1978).

25. I should add here that the approach of some critical race theory suggests still another vantage point, which has many affinities to what I am calling "populism" but is by no means identical to it.

26. ROBERT W. CHERNY, *POPULISM, PROGRESSIVISM, AND THE TRANSFORMATION OF NEBRASKA POLITICS, 1885–1915*, at 151–66 (1981); RICHARD HOFSTADTER, *THE AGE OF REFORM* 131–34 (1955).

27. CHERNY, *supra* note 26, at 94; see also GOODWYN, *supra* note 24, at 267–69; HOFSTADTER, *supra* note 26, at 134; SAMUEL E. MORISON ET AL., *A CONCISE HISTORY OF THE AMERICAN REPUBLIC* 439 (1977).

28. The emphasis on an ideal type is especially important because of basic terminological difficulties in assigning a fixed meaning to the word "populist." For example, some historians limit the term to members and followers of the Populist Party because they are particularly interested in why people with roughly similar ideas stayed within the Democratic and Republican Parties. See, e.g., JEFFREY OSTLER, *PRAIRIE POPULISM: THE FATE OF AGRARIAN RADICALISM IN KANSAS, NEBRASKA, AND IOWA 1880–1892* (1993). Others use the term to refer to a more general political movement that was eventually either assimilated into or co-opted by the major political parties and which has echoes in later political developments like the New Deal. See, e.g., JAMES R. GREEN, *GRASS-ROOTS SOCIALISM: RADICAL MOVEMENTS IN THE SOUTHWEST 1895–1943* (1978); MICHAEL KAZIN, *THE POPULIST PERSUASION* (1994); NORMAN POLLACK, *THE HUMANE ECONOMY: POPULISM, CAPITALISM, AND DEMOCRACY* (1990); C. VANN WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 141–66 (1960). Finally, historians have increasingly come to recognize the important differences in the concerns of populists in the South and the Midwest. See,

Although populism and progressivism share a desire for reform, they diverge most significantly in their attitudes towards the beliefs, attitudes, and actions of the mass of ordinary citizens. They take different views about ordinary citizens' private activities, their cultural attachments, and the possibility of their participation in mass politics.

As its name implies, populism sees itself primarily devoted to furthering and defending the interests and attitudes of ordinary citizens. It has traditionally been distrustful of large and powerful organizations, whether public or private. It views massive government bureaucracy and corporate privilege with equal suspicion. Moreover, concentrations of power and privilege held too long by the same persons lead inevitably to moral and political corruption. This view has two consequences: The first is a preference for regular rotations of positions of authority and power. The second is a preference for popular participation in economic and political structures that affect the lives of ordinary citizens.

Because of its concern about corruption and its insistence that people have control over the structures of power that affect them, populism has historically been suspicious of elites—whether academic, social, or political—and their claims to expertise and superior judgment. It has been especially skeptical of factual expertise that parades as moral or political expertise.

The purpose of government has both a public and a private aspect for populists. Government exists to provide individuals and their families and communities with a chance to live their own lives in dignity, and to allow them to form relationships with others free from the hand of powerful public and private forces. Although this description appears to privilege private interest and association, populism has an equally important public side: It demands that ordinary people have a say in the decisions that affect them, that they be able to participate in those structures of power that shape their daily lives. Thus, populism is based on a particular conception of self-rule and self-determination, one in which the active participation of the citizenry—*when they choose to participate*—is encouraged and facilitated. This interrelation

e.g., STEVEN HAHN, *THE ROOTS OF SOUTHERN POPULISM: YEOMAN FARMERS AND THE TRANSFORMATION OF THE GEORGIA UP-COUNTRY, 1850–1890* (1983) (Southern populism); OSTLER, *supra* (midwestern populism); *see also* William F. Holmes, *Why Populism Did Not Flourish in Iowa*, 22 *REVS. AM. HIST.* 608 (1994) (reviewing Ostler). Like Pollack and Woodward, I believe that there is a line of thought that can be called “populist” that is manifested in the political spirit of the 1890’s but that nevertheless transcends its particularities. Moreover, I believe this tradition, though subject to variations, resonates throughout American history from the Revolution to the present day.

The contours of progressivism have similarly generated considerable historical dispute. *See, e.g.*, ELDON J. EISENACH, *THE LOST PROMISE OF PROGRESSIVISM* (1994) (describing progressivism as inherently conflicted and self-subverting); Daniel T. Rodgers, *In Search of Progressivism*, 10 *REVS. AM. HIST.* 113, 123–27 (1982) (describing progressivism not as an intellectual system but as a set of intellectual tools and identifying at least three different strands of progressive thought). I have profited greatly from David Rabban’s fine discussion of progressive intellectuals’ philosophies of free speech and individual rights. David M. Rabban, *The Role of Free Speech in Progressive Social Thought* (1995) (unpublished manuscript; on file with author).

between the public and private aspects of populism is crucial to understanding its distinctive character.

People want to be part of governance, but what they want from government is respect for their ways of living. People wish to participate in government, but they do not wish to be manipulated and shaped by some master plan for effective governance. They want the opportunity to have a say in what affects them, but they also wish to be allowed to live their lives, raise their children, and pursue their own vision of happiness—whether in families, friendships, or communities—free from the hand of bureaucratic planning or corporate overreaching. Populism thus should not be confused either with some atomistic version of individualism or with currently trendy communitarian alternatives. Populism is no more committed to individualism in its private aspects than it is committed to communitarianism in its public ones.²⁹

The dual nature of populism means that political participation is not something to be forced on the citizenry, nor are popular attitudes some sort of impure ore that must be carefully filtered, purified, and managed by a wise and knowing state. From a populist standpoint, such attempts at managerial purification are paternalistic. They typify elite disparagement and disrespect for popular attitudes and popular culture. Government should provide opportunities for popular participation when people seek it, and when they seek it, government should not attempt to divert or debilitate popular will. An energized populace, aroused by injustice and pressing for change, is not something to be feared and constrained; it is the very lifeblood of democracy. Without avenues for popular participation and without means for popular control, governments become the enemy of the people; public and private power become entrenched, self-satisfied, and smug.

Some of these themes will no doubt be familiar; they resonate with parts of the American political tradition from the Revolution onwards.³⁰ Many have more pathological versions that will easily spring to mind. What I would like to stress here, however, is that this way of imagining politics differs from a considerable amount of reformist discourse among left-liberals. The latter

29. Richard Parker's description of populism emphasizes the importance of energizing people to participate in politics, and then respecting this energy. PARKER, *supra* note 23, at 54–65. Because of the particular focus of his book, he does not sufficiently highlight what I am calling the private aspect of populist sensibility. A populist might well be concerned that people are not energized politically because public and private concentrations of power make it difficult for them to be heard and have an influence over the decisions that affect their lives. These barriers to participation should be removed. Yet ordinary citizens might have very good reasons for not being politically energized at certain times, since from their perspective there is considerably more to life than politics—for example, family, friendships, communal associations, leisure, entertainment, and work. Imposition of a public-issues-centered view of life can itself be a form of elite disparagement of populist sensibility. See *infra* part X.

30. For example, we might see elements of populism in revolutionary attitudes towards Britain, in Anti-Federalism, Jeffersonianism, Jacksonianism, and certain versions of the antebellum Free Labor Movement.

approach, which I call progressivism, has a very different attitude towards popular attitudes and popular culture.

Historically, progressivism has stood for good government and enlightened public policy in the public interest. Central to progressivism is a faith that educated and civilized individuals can, through the use of reason, determine what is best for society as a whole. Persuasion, discussion, and rational dialogue can lead individuals of different views to see what is in the public interest. Government and public participation must therefore be structured so as to produce rational deliberation and consensus about important public policy issues. Popular culture and popular will have a role to play in this process, but only after sufficient education and only after their more passionate elements have been diverted and diffused. Popular anger and uneducated public sentiments are more likely to lead to hasty and irrational judgments.

Like populists, progressives believe that governments must be freed of corrupting influences. But these corrupting influences are described quite differently: They include narrowness of vision, ignorance, and parochial self-interest. Government must be freed of corruption so that it can wisely debate what is truly in the public interest. Progressivism is less concerned than populism about centralization and concentration of power. It recognizes that some problems require centralized authority and that some enterprises benefit from economies of scale.³¹ Progressivism also has a significantly different attitude towards expertise: Far from being something to be distrusted, it is something to be particularly prized. Expertise is necessary to arrive at sound policy judgments; conversely, its lack often leads ordinary citizens to misunderstand the issues and make choices that are not in the public interest. Because of its respect for expertise, progressivism has always been quite comfortable with elite discourse, and progressivism is the natural home for reformers who are members of political, academic, and social elites.

Populism and progressivism may also be distinguished by their definitions of democratic culture, and by their views about the relationship between

31. Hence, one version of progressivism—identified with Theodore Roosevelt—argued that government should not oppose trusts simply because they were large and powerful but should accept large business organizations as a natural outcome of the evolution of capitalism. The state should therefore distinguish between “good” trusts, which should be preserved, and “bad” trusts, which should be regulated and punished. HOFSTADTER, *supra* note 26, at 246–51.

The example of health care legislation might serve to further distinguish populist and progressive approaches. From a populist standpoint, universal health care is a means of allowing families to have more control over their lives. It is a way of allowing them to live their lives with some measure of dignity, and not to be at the peril either of unscrupulous insurance companies out to make a buck or penny-pinching government bureaucrats. The bureaucracies of a centralized national health plan are at most a necessary evil to be avoided where possible at all costs.

From the standpoint of progressivism, universal health care is the government’s duty towards its citizens. It is something that is necessary because health is a public good, and because individuals will make insufficient investments in health care due to budgetary constraints and insufficient information. Their choices in this regard, although due to insufficient income and information, may not be in their best interests.

popular culture and democratic culture. One can see the debate between populism and progressivism as a debate over what a truly "democratic" culture is. For progressives, democratic culture is a culture in which the progressive ideal of democracy can flourish. It is a culture in which people engage in rational deliberation about important public issues, and in which each person has the opportunity and the obligation to discuss such matters through rational dialogue. However, precisely because popular culture is never like this, and because an enormous amount of discourse in society does not correspond to this model, democratic culture is an ideal which is opposed to popular culture and from which popular culture is always seen as a fall. At best, popular culture is a distraction from the business of political life; it is something people turn to when they are not otherwise occupied with the business of democratic deliberation.

By contrast, populism sees a less radical division between democratic culture and popular culture. Democratic culture *is* the culture through which ordinary citizens express themselves, and it is by no means restricted to discussions of politics. Democratic culture is "democratic" in the sense that everyone gets to participate in it. In so doing, it ranges over the political, the economic, and the social aspects of life; this conception of democratic culture is consistent with the populist notion that economic as well as political structures of power should be made more democratic.³² Thus, populism tends to merge democratic culture and popular culture, while progressivism tends to separate the two. For populists, popular culture is neither a debilitated version of democratic culture nor a mere diversion from the sober processes of deliberation imagined by progressivism. It is not a sideshow or distraction from democratic culture but the main event. Moreover, populism accepts, as progressivism does not, that popular culture—which is also democratic culture—is by nature unkempt and unruly, occasionally raucous and even vulgar. It is by turns both eloquent and mawkish, noble and embarrassing, wise and foolish, resistant to blandishments and gullible in the extreme. It is imperfect in precisely the same sense that democracy itself is imperfect.

It is important here to note the relationship between popular culture and the mass culture that is the product of economic and technological developments in the twentieth century. Much of mass culture involves programming, advertisements, architecture, and artwork produced by corporations and designed to sell products and make money. Many critiques of mass culture warn of the deleterious consequences of consumerism and mass consumption. The populist conception of democratic culture is not necessarily inconsistent with these insights. Populists can be highly critical of

32. See GOODWYN, *supra* note 24, at 294–96, 302–03; BRUCE PALMER, "MAN OVER MONEY": THE SOUTHERN POPULIST CRITIQUE OF AMERICAN CAPITALISM 31, 199–220 (1980); POLLACK, *supra* note 28, at 86, 113–21.

corporate attempts to manipulate people and sap their political energies. And populists are likely to be suspicious of elites not only in government, but also those in large media organizations.³³ But a populist view also emphasizes that ordinary people are not mere passive receptors of the messages offered in advertising, television programming, and other elements of contemporary mass culture. Such assumptions are just another way of denigrating the intelligence and abilities of ordinary people. People do not uncritically absorb and assimilate the images they see on the television screen—they process, discuss, and appropriate them.³⁴ People are active interpreters and rearrangers of what they find in mass culture.³⁵ They use the raw materials of mass culture to articulate and express their values. Through this process, they produce and reproduce popular culture.

Populism was supplanted by progressivism at the turn of the century, and as Lawrence Goodwyn has noted, the contemporary political position that we call liberalism is much more the heir of progressivism than of populism.³⁶ Indeed, nowadays people are likely to use the word “progressive” as a synonym (or a euphemism) for “liberal” or “left”; in this practice I myself have been as guilty as anyone else. Although aspects of populism still remain in liberal discourse, I think it is fair to say that progressivism is the more dominant sensibility. This is especially so in the academy, where most constitutional theorizing occurs.³⁷

One effect of the hegemony of progressivism in defining the character of liberal thought is that its populist possibilities have been more or less submerged. The enduring connections between liberalism and progressivism have made liberalism continually susceptible to populist attacks from the right: A good example is George Wallace’s assaults on the liberal media and “pointy headed” intellectuals.³⁸ The connections between liberalism and progressivism have also led to constant and persuasive claims that liberals are out of touch with and even hostile to the concerns of ordinary Americans. The contemporary Republican party has understood this lesson well. By discarding or disguising conservative elitism and offering a rightward spin on populist rhetoric, conservative Republicans have repeatedly trapped liberal Democrats

33. Suspicion of the press as just another out-of-touch elite is a familiar populist theme, as are attacks on the “liberal media” using right-wing populist rhetoric.

34. See W. RUSSELL NEUMAN ET AL., *COMMON KNOWLEDGE: NEWS AND THE CONSTRUCTION OF POLITICAL MEANING* 17–22, 60–77 (1992).

35. See JOHN FISKE, *UNDERSTANDING POPULAR CULTURE* (1989); JOHN B. THOMPSON, *IDEOLOGY AND MODERN CULTURE* 24–25, 105, 116, 318–319 (1990).

36. GOODWYN, *supra* note 24, at 269–70.

37. Cf. PARKER, *supra* note 23, at 66–67 & n.32 (arguing that antipopulist sentiment dominates contemporary constitutional law).

38. *THE MACMILLAN DICTIONARY OF POLITICAL QUOTATIONS* 376 (Lewis D. Eigen & Jonathan P. Siegal eds., 1990).

into a progressivist mode that continually pits them against the sensibilities of many ordinary citizens.³⁹

III. THE PECULIAR POSITION OF THE POPULIST THEORIST

There is an important and unacknowledged tension between populism and progressivism in constitutional theory, and constitutional theorists could learn a great deal from the populist sensibility.⁴⁰ This is particularly so because of the natural affinities between progressivism and academic life. Progressivism values the contributions of elites and experts, and academic discourse is a form of elite discourse. Despite their often egalitarian views, legal academics are socialized into a culture that privileges elite values.⁴¹ After all, like everyone else, academics hope to succeed in their chosen calling; and they tend to distinguish themselves by being smarter, by being more learned, and by possessing greater expertise. Thus, saying that legal academics have tendencies towards elitism is like saying that they have tendencies towards breathing oxygen. An encounter with populist values may help balance their natural proclivities.

Yet populism is hardly without its limitations. Indeed, both populism and progressivism have symmetrical failings, each of which is more easily recognized from the opposite perspective. History teaches us that populism has recurring pathologies; it is especially important to recognize and counteract them. These dangers are particularly obvious to academics and other intellectual elites: They include fascism, nativism, anti-intellectualism,

39. The Democratic party leadership's failure to profit from this lesson is testimony to the dominance of progressivism in the imagination of liberal political elites. An excellent study of the Republican strategy and its consequences is found in THOMAS B. EDSALL WITH MARY D. EDSALL, *CHAIN REACTION* (1991), which describes how pathological populist tendencies towards racism have been manipulated by the Republican party. A blueprint of how conservative Republicans might be attacked by an economic populist is offered in KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR* (1990). Indeed, one way of understanding some of the successes of the 1992 Clinton campaign and the subsequent failures of the Clinton Administration is to trace the ebb and flow of populist versus progressivist rhetoric and positions offered by this chameleon-like politician. Quite aside from his many other difficulties, Clinton has tended to succeed more when he is perceived as a committed economic populist who cares about ordinary people and less when he is perceived as a progressive, elitist, bureaucracy-loving policy wonk.

40. I am not alone in this conclusion. See PARKER, *supra* note 23. I also see elements of populism in Akhil Amar's work. See, e.g., Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1131-33 (1991) (discussing majoritarian focus of Bill of Rights). Two aspects of Amar's work are particularly worth noting. The first is Amar's emphasis on the jury as an institution of popular sovereignty. The second is his emphasis on textual argument. Of all the modalities of constitutional argument, textualism tends to emphasize the kinds of constitutional arguments that ordinary citizens can make and understand. In this respect, it is probably no accident that Hugo Black, the former Senator from Alabama, was also a proponent of textualism. Finally, James Gray Pope has even given a populist spin to civic republicanism, which at least in its recent revival has been more progressivist than populist. See James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287 (1990).

41. The conflict between elitism and egalitarianism in American law schools is well captured in JULIUS GETMAN, *IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION* 15-72 (1992).

persecution of unpopular minorities, exaltation of the mediocre, and romantic exaggeration of the wisdom and virtue of the masses.⁴² What is more difficult for many academics to recognize is that progressivism has its own distinctive dangers and defects. Unfortunately, these tend to be less visible from within a progressivist sensibility. They include elitism, paternalism, authoritarianism, naivete, excessive and misplaced respect for the "best and brightest," isolation from the concerns of ordinary people, an inflated sense of superiority over ordinary people, disdain for popular values, fear of popular rule, confusion of factual and moral expertise, and meritocratic hubris.

I have suggested that legal academics can learn something from populism and that they should fashion constitutional theories that are more sensitive to populist concerns. Yet the academic who advocates populism is still the member of an intellectual elite; she still writes in academic journals and speaks in the language of academic theory. Thus, a debate about the merits of populism versus progressivism is not a debate between progressivist intellectuals and academic representatives of "the people." It is a debate *among* intellectual elites within the legal academy about their proper relationship to popular culture and their appropriate understanding of attitudes and beliefs of ordinary citizens. Constitutional theorists may be able to offer a populist constitutional theory, but what they will inevitably produce is a populist constitutional *theory* clothed in the language of academic discourse and directed to other academics.

Thus, my argument about the lessons of populism is as much a point about the sociology of knowledge as it is about political theory. To give populism its due requires that academics realize that their social situation, their values, the kinds of work they perform, and the kinds of discourses they practice all

42. There is considerable controversy among historians over the degree to which American populism succumbed to nativism, racism, and anti-Semitism, and over the question of whether populism is an inherently intolerant political philosophy. See James Turner, *Understanding the Populists*, 67 J. AM. HIST. 354 (1980). Writing in the 1950's, Richard Hofstadter portrayed the populists as anti-intellectuals of limited imagination, seeing obvious parallels to McCarthyism. See HOFSTADTER, *supra* note 26, at 60-93. Nevertheless, Hofstadter's influential portrait has continually been subjected to criticism. Other historians have stressed that the populists were no more intolerant than establishment America and in many cases were more tolerant because of their own sense of marginalization. See, e.g., WALTER T.K. NUGENT, *THE TOLERANT POPULISTS: KANSAS POPULISM AND NATIVISM* (1963); NORMAN POLLACK, *THE POPULIST RESPONSE TO INDUSTRIAL AMERICA: MIDWESTERN POPULIST THOUGHT* (1962); C. VANN WOODWARD, *The Populist Heritage and the Intellectual*, in *THE BURDEN OF SOUTHERN HISTORY*, *supra* note 28, at 141. In these debates, distinctions between populists in the Midwest, West, and South become particularly salient. Many Southern populists, faced with attacks from commercial and political elites, often turned to race baiting, either as a political strategy to shore up their political base for reform, or out of disillusionment with the possibilities for democratic change in an America increasingly dominated by large concentrations of wealth and corporate power. The career of Tom Watson, who mutated from radical egalitarian to racist demagogue, is symbolic of the Faustian bargain of Southern populism. See C. VANN WOODWARD, *TOM WATSON: AGRARIAN REBEL* (1955).

Beneath the surface of debates over the dangers of populism lie more troubling questions about the assumed superior morality, tolerance, and political intelligence of political and academic elites. Identifying the tradition of populism with passion and intolerance often implies a contrasting identification of elite discourse with reason and lack of prejudice, an identification that may be more imagined than deserved.

tend to distance them from the lived experience and perspectives of most Americans. Many legal academics in particular lead lives of comparative privilege and high status. They are well compensated for relatively easy and enjoyable work, and that work focuses disproportionately on issues of public policy and matters of public concern. They inhabit a culture that places heavy emphasis on elite values and expertise, and they engage in a form of discourse that is often obscure and even irrelevant to the vast majority of people in this country.

If critical race theory and feminism have taught us anything, it is that one cannot begin to understand the situation of others until one also understands one's differences from them and how this difference affects one's ways of seeing the world. If we do not investigate the relationship between our social situation and our perspectives, we may confuse our conception of what is reasonable with Reason itself. If we do not see how our reason is both enabled and limited by our position, we may think our judgments positionless and universal. We may find the perspectives of those differently situated unreasonable, bizarre, and even dangerous, or we may not even recognize the possibility of another way of looking at things. What is true of race and gender is also true of professional training and social position. If legal academics are to learn something from populism, they must first try to understand the professional perspective from which they offer their judgments and the kinds of rhetoric they use to offer them.⁴³

For me, it is particularly telling that Richard Parker chooses to introduce his "Constitutional Populist Manifesto" through a close textual reading of a short story by Thomas Mann.⁴⁴ Parker offers this discussion with little recognition of the incongruity of this device. Yet the idea that the advantages of populism will be revealed to us by a Harvard Law professor discussing the structuralist oppositions at work in early twentieth-century German literature is emblematic of the peculiar position of the populist constitutional theorist.⁴⁵

A constitutional theorist who wants to incorporate populist insights must avoid two symmetrical errors. The first is engaging in an indulgent romanticism about the inherent wisdom and goodness of the people. Respecting and learning from the perspectives of ordinary citizens is not the

43. The argument I am making here is related to the critique of the objectivity of legal reasoning that appears in critical race theory and feminism, although I am not sure whether one should call the latter positions "populist." What all three share is the recognition that the exercise of reason is affected by the community one reasons within. Being an academic, and in particular being a legal or political theorist, is itself one way of being situated—it is constitutive of our thought rather than transparent to it. Immersion in academic culture does not merely allow us to see the world more clearly and correctly; it also colors and even distorts our perceptions of it. As we worry about the effects of race, gender, and sexual orientation in dividing academic thought, we must not forget that what all of us have in common—our status as academic intellectuals—also has its own ideological effects.

44. See PARKER, *supra* note 23, at 9–49.

45. And one might make a similar comment about my use of postmodernist philosophy and the sociology of knowledge to make these remarks about Parker.

same thing as uncritical acceptance. This is especially so since "ordinary citizens" are not an undifferentiated mass. They differ in their attitudes and concerns every bit as much as academics differ among themselves. The fantasy of the unadulterated goodness and wisdom of those who live beyond the ivory towers of academia is precisely that, a fantasy; the romance of "the people" and their mores is the sort of infatuation characteristic of someone who has not yet lived with the object of her affections on a daily basis.

The second error is the tendency to speak as a representative of "the people," rather than as a privileged academic who seeks to recognize the value of populism in her scholarship. Those who make this mistake will inevitably be faced with the rebuttal that they are not truly "of the people." In particular, such academics are highly vulnerable to accusations that the cars they drive, the books they read, the circles in which they travel, the houses and neighborhoods in which they live, and the schools to which they send their children are inappropriate for those who profess solidarity with the great unwashed. Hence their populist and egalitarian rhetoric shows them to be at best fuzzy-headed dreamers and at worst moral and political hypocrites.⁴⁶

The way to avoid the force of such criticisms is to avoid the causes that occasion them. A populist constitutional theory must begin not with an examination of the ordinary citizen but with the theorist herself: The constitutional theorist must consider how her own position as an academic distances her from the experiences and views to which she tries to give credence.⁴⁷ She must understand how she is the bearer of a distinctive subculture that colors and even distorts her views about what is most important in life. This is not a claim that constitutional theorists have nothing in common with ordinary people—a preposterous suggestion—but rather that there are some things that they do not have in common, and that these may be overlooked in the very process of theorizing.

The tension produced by the academic's position *qua* academic does not arise so urgently for progressives, because progressivism is a more natural position for intellectual elites. In comparison to the populist, the progressive academic feels less discontinuity between her beliefs and her social situation. Progressivism tends to emphasize and admire the sorts of things academics themselves tend to value—expertise, erudition, reasoned debate, and deliberation. Moreover, progressivism tends to identify these qualities with the very ideals of reasoned deliberation it exalts. The perspective of elites tends

46. For a routine example of the genre, see Brian Timmons, *That's No Okie, That's My Torts Professor*, WALL ST. J., Apr. 3, 1990, at A20 (*ad hominem* attack on Harvard Law School CLS professor for allegedly owning a Jaguar). Perhaps this form of rhetorical attack should be recognized as a special subcategory of arguments *ad automobilem*.

47. The analogous point in feminism and critical race theory is that in attempting to understand perspectives of minorities and women, whites and males must begin by coming to terms with the privileges of their whiteness and maleness. See, e.g., Elaine Showalter, *Critical Cross-Dressing: Male Feminists and the Woman of the Year*, in *MEN IN FEMINISM* 116, 126–27 (Alice Jardine & Paul Smith eds., 1987).

to merge with the perspective of the sort of informed, rational, deliberative person that progressivism sees as properly engaged in the ideal of democratic deliberation. As a result, progressivism tends to make the ideological effects of the academic's social situation invisible to herself. Yet the fact that progressives may not feel the tension of inconsistency experienced by their more populist colleagues does not mean that ideological effects are absent from their thought; it means only that these effects are more difficult for them to recognize.

IV. THE "MADISONIAN" SYSTEM AND CONTEMPORARY PROGRESSIVISM

In Sunstein's First Amendment theory we find an elegant and impressive example of constitutional progressivism, and in this Part I shall attempt to show its progressive roots. Sunstein's theory involves two important ideas. The first is a two-tier conception of the First Amendment, in which some speech is of higher constitutional value than others, and hence receives greater protection. The second idea is that political speech belongs in the highest tier.

Sunstein's first claim is unexceptional. Existing free speech doctrine already treats some kinds of speech with greater solicitude than other kinds; for example, novels receive greater protection than commercial speech. Moreover, there is no particular reason why there have to be only two tiers, and in fact, Sunstein really offers us three—conduct that is not even considered "speech," speech in the lower tier, and speech in the higher tier. It is unwise and in any case impossible to protect all communicative acts to the same degree. Like life on this Earth, the First Amendment is surely a vale of tiers.

Sunstein's second claim, however, is analytically distinct from the first. Merely because we will protect some types of speech more than others does not guarantee what goes into the various categories. Our answer to this question depends on our view of the purposes behind the First Amendment. Sunstein sees the value of democratic deliberation as central, and hence he places political speech at its core. Nevertheless, if one believed that autonomy, truth seeking, cultural development, and democracy were equally important values, one might have a different allocation of core and periphery.

Sunstein believes that his theory best fits existing doctrine, and "receives firm support from history."⁴⁸ He calls his approach to free speech a "Madisonian" theory to highlight its connections to the political philosophy of the Framers. This conception holds, among other things, that "[l]iberal rights are pervasively democratic," and that "[o]ne of their prime functions is to furnish the preconditions for democratic deliberation."⁴⁹ In Sunstein's view, what is most characteristic of the "Madisonian" approach is "its skepticism

48. SUNSTEIN, *supra* note 1, at 132.

49. *Id.* at 248.

about external or transcendental foundations; its fear of institutional bias and partiality . . . and perhaps above all in its association of truth in politics with what emerges from a well-functioning political process."⁵⁰

These positions are certainly characteristic of contemporary neopragmatism and civic republicanism, but it is quite unclear that they can be traced to Madison or to the Founding Fathers generally. In fact, Sunstein's "Madisonian" theory of the First Amendment is about as Madisonian as Madison, Wisconsin: It is a tribute to a great man and his achievements, but bears only a limited connection to his actual views. Madison surely believed in democracy—of a restricted sort—and he also believed in free speech as a means to guarantee democracy. However, his theory of free speech seems to have been based in significant part on an analogy to property rights.⁵¹ Madison was more likely to believe that the state existed to protect individual rights or natural rights than that such rights existed to serve the just interests of the state.⁵² Nor is there much indication that as a philosopher of truth Madison was a closet neopragmatist. If Sunstein's theory shares anything with Madison, it is not his commitment to democracy but his antidemocratic tendencies; like any good Federalist, Sunstein recognizes the need to restrain popular will by filtering popular sentiment through the more dispassionate expertise of elected representatives.⁵³

As in his more general constitutional theory of civic republicanism, Sunstein's use of history is a respectful gesture towards original intention, a selective discovery of his own theoretical preoccupations in the materials of the past, made necessary because he is a constitutional lawyer and that is what lawyers do. Sunstein is often quite open about this; although he sometimes uses original understandings to support particular arguments, he does not believe that constitutional interpreters should be limited by the original understandings of the First Amendment.⁵⁴ Hence, we must consider his use of the term "Madisonian" a necessary obeisance to the rhetorical requirements of constitutional theory, for nowhere in the book does Sunstein suggest that he would find a particular result desirable but that it is, unfortunately, prohibited by the original understanding of the Framers or the views of James Madison.

50. *Id.*

51. See, e.g., James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, reprinted in THE MIND OF THE FOUNDER 243 (Marvin Meyers ed., 1973) (asserting that every "man has a property in his opinions and the free communication of them").

52. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990); John O. McGinnis, *The Partial Republican*, 35 WM. & MARY L. REV. 1751 (1994) (reviewing CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993)). It is not necessary to go so far as these authors and claim that Madison's theory of free speech was centrally or exclusively concerned with these matters. It is enough merely to note that there are very significant aspects of his thought that are unaccounted for in Sunstein's use of history.

53. See, for example, his criticisms of electronic populism in Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995).

54. SUNSTEIN, *supra* note 1, at 132.

We will better understand the nature of Sunstein's theory of free speech if we look elsewhere for family resemblances. Indeed, in his continual emphasis on the need for society to shape private preferences to serve public and democratic ends, Sunstein seems much closer to John Dewey than to James Madison.⁵⁵ It is of course no great shame to offer a theory influenced by one of America's greatest philosophers and surely its greatest philosopher of education. Of course, unlike James Madison, John Dewey was not one of the Founding Fathers nor the author of the words contained in the First Amendment. But this should detain us only if we had hoped to gain some undeserved measure of political authority from the invocation of Madison's name.

Dewey emphasized the need to educate the citizenry to prepare them for democracy and participation in democratic institutions.⁵⁶ He believed in a social interest that transcended the interests of any particular individual and to which individuals had to conform.⁵⁷ Because Dewey saw no fundamental opposition between individual and society, and because he argued that individuals were created by the society in which they lived, he viewed individualism and individual rights as social constructs that served (and should serve) the larger interests of society as a whole.⁵⁸ Finally, Dewey argued that political truth is the result of a process rather than a matter of correspondence.⁵⁹ Not unsurprisingly, all of these appear as themes in Sunstein's constitutional theory.⁶⁰ In his emphasis on the social construction of preferences, in his insistence on the educative functions of politics, and in his optimism that a common good can be derived from public deliberation about the great issues of the day, Sunstein sounds remarkably Deweyite, if not Dewey-eyed.

We will also better understand the nature of Sunstein's theory once we recognize that it is the latest in a long line of process-based theories of the First Amendment. Although Alexander Meiklejohn is mentioned only twice in this book,⁶¹ it is no accident that Sunstein replicates most of his positions, and that, like Meiklejohn, Sunstein is largely disappointed with the

55. This comparison is well made by Rabban, *supra* note 28, at 154-55.

56. See, e.g., JOHN DEWEY, *DEMOCRACY AND EDUCATION* 260-61 (MacMillan 1966) (1916); John Dewey, *Ethical Principles Underlying Education*, in *THIRD YEARBOOK OF THE NATIONAL HERBERT SOCIETY* 7 (1897), reprinted in *5 EARLY WORKS OF JOHN DEWEY* 54, 59-60 (1972); John Dewey, *My Pedagogic Creed*, *SCHOOL J.*, Jan. 1897, at 77-80, reprinted in *5 EARLY WORKS OF JOHN DEWEY*, *supra*, at 93.

57. See, e.g., JOHN DEWEY & JAMES H. TUFTS, *ETHICS* 303-04, 482-83 (1913). This view underlies his equation of the moral and the social. See DEWEY, *DEMOCRACY AND EDUCATION*, *supra* note 56, at 358-59.

58. DEWEY & TUFTS, *ETHICS*, *supra* note 57; DEWEY, *DEMOCRACY AND EDUCATION*, *supra* note 56, at 305, 359-60.

59. See DEWEY, *DEMOCRACY AND EDUCATION*, *supra* note 56, at 338-45.

60. See generally SUNSTEIN, *supra* note 1, at 19, 91, 241-50; CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

61. SUNSTEIN, *supra* note 1, at 38, 122.

performance of the mass media and popular culture in promoting democratic values.⁶² Moreover, as if condemned by a family curse to repeat the sins of his ancestors, Sunstein manages to replicate most of the theoretical difficulties inherent in Meiklejohn's views. To use Robert Post's apt expression, process-based theorists like Meiklejohn and Sunstein are managers of public discourse—they hope to use law to ensure the right mix of statements and positions.⁶³ The point, as Meiklejohn put it, "is not that everyone shall speak, but that everything worth saying shall be said."⁶⁴ Decisions about what is "worth saying"—for example, what mix of positions constitutes sufficient diversity—naturally fall to those designing and enforcing the regulatory system. Hence free speech policy becomes an exercise in managerial expertise, which at its best produces lively debate in the service of democracy, and at its worst is a form of political flower arrangement that crushes the life out of the unruly and unkempt carnival of public discourse. Such an approach is rooted in the progressivist vision that emerges in the early twentieth century. It is a desire for good government in the public interest produced with the assistance of scientific expertise and the leadership of intellectual elites.⁶⁵

Once we recognize the origins of this theory of free speech, we find that it bears the theoretical physiognomy of its ancestors like a distinctive family nose. As the contemporary equivalent of Deweyan progressivism and the heir to Meiklejohnian managerialism, it shares with them the following characteristic features:

- (1) A view of individual rights as serving the goals of democracy and democratic deliberation;
- (2) A notion of the "public interest" that rises above the petty interests of individuals;
- (3) An ideal of deliberation and dialogue that is considerably more managed and stylized than anything that occurs in the real world;
- (4) A distrust of popular culture for failing to live up to this ideal; and
- (5) A sense that—perhaps for reasons of unjust social structure and regulatory failure—the masses are not doing their part in

62. MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 4, at 86–88; SUNSTEIN, *supra* note 1, at 58–67. Meiklejohn also anticipates Sunstein's criticisms of Holmes' individualism and skepticism about the existence of a public interest. MEIKLEJOHN, *supra*, at 60–62.

63. Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

64. MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 4, at 26.

65. Meiklejohn's relationship to progressivism is obscured by the fact that he writes in the middle of the 20th century. Yet he was born in 1872, which would have made him 40 years old at the time of the 1912 election. His major work, *FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT*, reprinted in MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 4, becomes all the more remarkable when we realize that it was written at the age of 76; incredibly, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 [hereinafter Meiklejohn, *The First Amendment*], his last important essay, was written when Meiklejohn was almost 90.

furthering democratic ideals and hence steps must be taken to educate them to ensure that they engage in democratic deliberation in the appropriate way.

In short, implicit in the progressivist diagnosis and the progressivist framing of issues is a nascent distrust and critique of popular culture coupled with a call for the state to remedy or at least counteract its deficiencies. For if individuals are socially constructed by the communities in which they live—or (in Sunstein's preferred language) popular preferences are endogenous to politics—better politics is the solution to bad culture. In the contemporary language of civic republicanism this goes by the name of "instilling civic virtue," and in the language of contemporary communitarianism it goes by the name of "restoring personal responsibility." So conceived, such theories will almost always pose themselves against existing preferences of the masses and existing popular culture. They will usually find themselves opposing some form of populism, and hence they will usually be accused of some form of elitism. As I shall discuss later on, Sunstein's theory is no exception to this rule.⁶⁶ First, however, we must try to understand why a Meiklejohnian solution to the theory of free speech leads to characteristically Meiklejohnian problems.

V. SON OF MEIKLEJOHN

From a purely doctrinal perspective, the great difficulty with the Meiklejohn view has always been explaining why nonpolitical expression like art, music, and literature should receive the highest level of protection. Meiklejohn himself at first denied that these forms of expression were specially protected, but later changed his mind.⁶⁷ Of course, the problem of mapping received understandings about what should be constitutionally protected is endemic to any monistic theory of free speech; it extends as well to theories like Sunstein's that recognize a plurality of constitutional values but permit only one to determine what falls within the core of constitutional protection.⁶⁸ Although Sunstein justifies his "Madisonian" conception on the grounds that it maps received understandings better than other theories,⁶⁹ this is surely not the case. It does much worse than theories that recognize multiple and equal values for the simple reason that our received understandings are usually the result of considerations that are plural and eclectic.

66. See *infra* parts VIII & IX.

67. Compare MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 4, at 39–40 with Meiklejohn, *The First Amendment*, *supra* note 65, at 262.

68. Compare SUNSTEIN, *supra* note 1, at 122 (emphasizing that political deliberation is the primary value) with *id.* at 129–30 (allowing for plural subsidiary values) and *id.* at 144–48 (rejecting theory of equal plural values).

69. *Id.* at 152.

Faced with the task of explaining the observed motions of the planets while insisting that planets moved only around the Earth and only in perfect circles, the ancient astronomer Ptolemy and his followers hit upon the idea of epicycles, little circles within circles that the planets traversed on their way around the center of the universe.⁷⁰ Similarly, one can correct the deficiencies of the Meiklejohnian view with epicycles of a different sort, but, as in Ptolemy's case, the results are not particularly convincing except to those already committed to the theory. Thus, Meiklejohn eventually claimed that art and literature were protected because they were necessary for people to vote and engage in democratic deliberation.⁷¹ This seems somewhat far-fetched, for it is hardly necessary that everyone read novels, watch ballet, or listen to music for democracy to succeed. Moreover, it is not clear that all dance, music, and literature are equally helpful in this task.

Sunstein attempts to solve Meiklejohn's problem through an expansive definition of "political speech." He defines political speech as speech that is "both intended and received as a contribution to public deliberation about some issue."⁷² Public deliberation in turn is defined broadly to include any discussion of "social norms" as well as changes in law or government.⁷³ Moreover, although Sunstein requires that both speaker and receiver must understand that the speech is political in his sense, he does not press this point too hard. It is enough if "a few" understand it as such.⁷⁴ It is not even necessary that the artist herself understand or intend her work to be "political," at least in the ordinary sense of that word.⁷⁵

If these criteria are defined broadly enough, much art, literature, and even some music and dance will be included. This is, of course, Sunstein's goal, for he wants to map our received understandings concerning the kinds of expression that enjoy maximal protection. On the other hand, he does not want to define his categories too broadly. After all, commercials often comment on the human condition and social norms in order to sell products. As Sunstein notes, "it is plausible to think that almost all speech is political in the sense that it relates in some way to the existing social and political structure."⁷⁶ Nevertheless, he concludes that even "if some people understand the speech in question to be political, it cannot follow that the speech qualifies as such for constitutional purposes, without treating almost all speech as political and

70. THOMAS S. KUHN, *THE COPERNICAN REVOLUTION* 71-74 (1957).

71. Meiklejohn, *The First Amendment*, *supra* note 65, at 263. ("I believe, as a teacher, that the people do need novels and dramas and paintings and poems, 'because they will be called upon to vote.'"). Meiklejohn would surely have agreed that art is also necessary to engage in political participation and political debate (as in his famous example of the town meeting), so his use of the word "vote" must be understood in an extended, metaphorical sense.

72. SUNSTEIN, *supra* note 1, at 130 (emphasis omitted).

73. *Id.* at 130-31.

74. *Id.* at 131.

75. *Id.*

76. *Id.* at 132.

thereby destroying the whole point of the two-tier system."⁷⁷ Unfortunately, this does not so much resolve the difficulty as restate it.

Indeed, the breadth of Sunstein's definition threatens to undermine the reasons he gives for the central role of political speech. Here it is useful to contrast Meiklejohn's and Sunstein's approaches. As we have seen, Meiklejohn argued that art and literature deserved protection because citizens needed them in order to vote and discuss politics. His concern is tightly linked to the actual processes of self-governance, and that is precisely why his claims about the importance of Beethoven and Bo Diddley to debates about tariff regulation seem strained. Sunstein, on the other hand, believes that art and literature help individuals deliberate about social norms generally, whether or not they have anything to do with government action or inaction. He avoids Meiklejohn's problem by not requiring a direct and significant relationship between protected speech and government processes. Nevertheless, he justifies special protection of political speech on the grounds of government's greater incentives for self-interested action. When government regulates political speech it "is most likely to be biased or to be acting on the basis of illegitimate, venal, or partial considerations."⁷⁸ Moreover, "[g]overnment is rightly distrusted when it is regulating speech that might harm its own interests; and when the speech at issue is political, its own interests are almost always at stake."⁷⁹

One can surely question this premise. If we are looking for the situations in which governments are the most venal, biased, and partial, it might well be in the budgetary process when they hand out tax deductions, pork-barrel projects, and other government entitlements. However, even if we grant Sunstein's premise that greater dangers of venality and self-dealing are reasons for the special protection of political speech, it is hardly clear that Dostoevsky or Dolly Parton deserves this additional protection. Indeed, Sunstein says as much: He acknowledges the "worry that moralistic people or religious groups will attempt to use the arm of the state in order to censor speech that threatens their particular, partial conception of the good."⁸⁰ Nevertheless, "these kinds of threats, though real, do not distinguish regulation of speech from regulation of anything else; hence they provide us with no special reason to be suspicious of government regulation of speech."⁸¹ In other words, the distrust/self-dealing rationale argues for a much *narrower* definition of specially protected political speech than Sunstein himself provides. Sunstein argues that "[i]f courts are not especially suspicious of government regulation generally, they should not be especially suspicious of government regulation of nonpolitical

77. *Id.*

78. *Id.* at 134.

79. *Id.* (footnote omitted).

80. *Id.* at 135.

81. *Id.*

speech.”⁸² However, this is also true of much of the speech that Sunstein defines as “political”—for it includes any speech that has something to say about social norms.

Even so, Sunstein is not about to deny constitutional protection to art, music, and literature, for he has epicycles ready to hand. Government may also not regulate speech in the second tier because it disagrees with the message or because the message gives offense.⁸³ Nevertheless, as Sunstein notes, offense is a “complex and underanalyzed category,”⁸⁴ and his theory begs the interesting question whether objections to pornography and racist speech fall into this category. Sunstein suggests that “[i]t is at least plausible to think that the victim of a racial epithet suffers something other than mere offense.”⁸⁵ This requires him to introduce further epicycles on the theme of what is merely offensive and what is otherwise regulable, on what is offensive but also political, and on what is both offensive and political but can nevertheless be relegated to certain times and locations.⁸⁶ Through sufficient bobbing and weaving in the various chapters of this book, Sunstein is able to achieve his goal, which is that “a Madisonian approach would not require major changes in current law.”⁸⁷

Yet the problem has never been that a process-based theorist like Sunstein could not add enough competing considerations to his theory to map existing doctrinal results. The problem is rather the artificiality of the means used. Once again it is interesting to compare Meiklejohn and Sunstein in this respect. What makes Meiklejohn’s solution problematic is not that one cannot claim that art, music, and literature help produce a citizenry better prepared for democratic deliberation. It is rather that we think this a highly idiosyncratic and impoverished perspective on the value of art, music, and literature. Similarly, Sunstein claims that art, music, and literature gain maximal protection not for their positive attributes but because they are likely to be the targets of opportunistic politicians and blue-nosed civil servants. For Meiklejohn, art is protected because it serves politics; for Sunstein art is protected because it is continually threatened by politicians. In both cases, the constitutional value of art is a reflection of its relation to politics—either as its aid or its enemy, either as its servant or its victim, either as an instrument of its realization or as its familiar and recurrent prey.

82. *Id.*

83. *Id.* at 155.

84. *Id.* at 155–56.

85. *Id.*

86. *Id.* at 156–65.

87. *Id.* at 159. A major exception is that libels against public figures that do not involve matters of public concern would not be subject to the actual malice rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964). SUNSTEIN, *supra* note 1, at 159–62. Here again Sunstein applies a narrow conception of the idea of what is “political” that is in serious tension with the broader articulation elsewhere in the book. See text accompanying notes 74–79.

The difficulty is that the reasons why we value something are often as important as the fact that we value it. If I praise the Mona Lisa because it makes a good doorstep, I surely value it, but my valuation has a certain inherent bias. If the Mona Lisa is splashed with paint or even disfigured, it still makes a perfectly good doorstep, and so my decisions about how best to protect it will be affected accordingly. Moreover, our reasons for valuing something have more subtle ideological effects. For example, they determine the central and peripheral cases of the category. To return to the previous example, the central case of valuable art is the big, bulky (but not too bulky) item that keeps my door in place. By contrast, a blues number by Muddy Waters hardly seems worth much fuss. It is a peripheral example of a category that fails to exemplify the reasons for the category's value.

Sunstein emphasizes, quite correctly, that the reasons why we value something constitutionally are not necessarily the same reasons why we value it generally.⁸⁸ But this begs the question whether they should be different in any particular case. Even if institutional considerations require that the reasons for constitutional protection of art and literature differ in some respects from the reasons we believe that these things are valuable to us, it by no means follows that constitutional reasons must be limited to the protection of the political process. If a process-protection rationale severely distorts the reasons why we think art, music, and literature are valuable, this is a good reason for a less monistic theory of free speech justification.

If we constitutionally value art as the servant or victim of politics, we risk skewing our estimation of it. It becomes art not for art's sake, but for policy's.⁸⁹ It is art as seen through the eyes of a policy wonk. It is art either in the service of politics, or as the favorite target of politics. From this perspective, the central case of artistic expression becomes not George Gershwin's *Rhapsody in Blue*, but George Carlin's "seven dirty words" monologue.⁹⁰

We often associate arguments that art has nonpolitical worth with the elite values of high culture. Yet there is more to art than elite art, and there is more to culture than high culture. The critique of Meiklejohn's political instrumentalism must be more than a defense of the aesthetic values of elites

88. As Sunstein puts it, "constitutional value" is not the same as "social value." SUNSTEIN, *supra* note 1, at 153.

89. Sunstein himself does little to assuage one's fears on this score. Stressing the value of high culture to democratic deliberation, he notes that Dickens' *Bleak House* "contains a great deal of comment on the fate of poor people under conditions of industrial profit-seeking." *Id.* He then adds, with apparent seriousness, that Joyce's *Ulysses* "deals with the role of religion in society," *id.*, a claim that is surely true but which rather tends to demonstrate the limitations of the argument. At some point, of course, it becomes difficult to draw the line between earnestness and parody. Thus, in like fashion we might think of Camus' *The Plague* as an anguished cry for universal health care coverage, Shakespeare's *King Lear* as an attack on term limits, and Euripides' *Medea* as a comment on the breakdown of the Ancient Greek family.

90. A work of art that now lives on—in ironic symbolism—as a mere appendix to a judicial opinion. See *FCC v. Pacifica Found.*, 439 U.S. 883 (1978) (appendix to Court's opinion).

against the philistinism of politics. Attacking the two-tier system in the name of high culture co-opts the critique of Meiklejohn; it becomes an argument for one set of elite values against another. Moreover, it is a co-optation with its own ideological effects. First, it produces a tendency to justify the protection of popular culture in terms of the aesthetic values of high culture. It leads to the claim that we must defend the right to broadcast *Married With Children* so that we can preserve the right to display Robert Mapplethorpe's photography. Yet when popular and elite standards diverge (as they often do), such arguments become increasingly strained. Second, and more important, this very kind of argument demeans the values and modes of popular culture, because it views popular values merely as corrupted approximations of elite values, worthy only to the extent that they imperfectly reflect a purer aesthetic.

Understood in its broadest terms, the critique of political instrumentalism is not simply a claim of art for art's sake. Rather it is an argument about the kind of culture we live in and the importance of respecting its expressive values whether or not they converge with elite preoccupations. A theory of free speech is also a theory of democratic culture, and from a populist perspective, democratic culture *is* popular culture. America has become a democracy not merely because it has adopted more democratic forms of governance, but because its culture and its social norms have become more democratic and popular. Such a culture is more than a servant of some ideal of democratic deliberation. But it is also more than a poor reflection of elite culture, valued merely because of its debauched relationship to it. The First Amendment does not protect mass culture for the sake of avant-gardism and high art; rather it protects the latter because they are part of a larger phenomenon—the carnival of public discourse and popular culture that arises in a democratized society. The First Amendment is about Spielberg as much as Bergman, about the Jackson Five as much as Jackson Pollock, about Rambo as much as Rimbaud. Meiklejohn and his intellectual progeny have always shared this dual failing: Defending art in the name of politics and all art in the name of high art, they inevitably neglect the cultural and condescend towards the popular.

VI. THE TWO-TIER SYSTEM AND PROGRESSIVE REFORM

The most important difficulty with Sunstein's two-tier system, however, is that it is in serious tension with his egalitarian, good-government agenda. At first glance, the two seem to mesh quite nicely. Placing speech on matters of public concern in the upper tier appears to safeguard the processes of democratic deliberation. Placing everything else in the lower tier allows him to regulate commercial advertising and sexually explicit speech in the interests of promoting democratic seriousness and gender equality.

The problem is that the two areas Sunstein most wishes to reform are campaign finance and broadcast policy. He wants to permit legislatures and

administrative agencies to regulate these areas in the public interest, and he wants courts to exercise greater judicial restraint in passing on the constitutionality of such regulations. However, part of what he wants to regulate in broadcast policy, and all of what he wants to regulate in the area of campaign finance, is political speech—the speech that is at the very core of his theoretical framework and that calls for the highest level of judicial protection.

Here Sunstein's arguments for the two-tier system come back to haunt him. He distinguishes nonpolitical expression (including nonpolitical art and literature) from political speech on the grounds that the dangers of self-dealing by politicians are greatest in the case of speech about public affairs. But if this is so, it suggests that reform of campaign finance and broadcast policy should be viewed not with greater judicial restraint, but with the strictest of scrutiny. Sunstein himself recognizes that campaign finance reform may serve as a device for the protection of incumbency.⁹¹ Moreover, as Scot Powe has shown convincingly, FCC regulation of the broadcast media over the past century has involved continual favoritism towards political allies and continual hostility towards political opponents or those thought to be politically embarrassing.⁹² Sunstein's worries about self-dealing in the area of political speech, it would seem, are abundantly justified. If so, his assumption that governments aided by appropriate expertise can be trusted to develop policies that are in the public interest must be viewed with more than a grain of salt.

The problem is that Sunstein wants two things at the same time: He seeks judicial restraint in situations where legislatures and administrative agencies engage in reform-minded attempts to promote serious and balanced discussion of public issues—for it is the appropriately managed conduct of core political activity that makes democracy function properly under his theoretical system. On the other hand, his defense of political speech as standing at the core of First Amendment protection is premised on the very real concern that the dangers and consequences of self-interested dealing by the political branches are most serious precisely when such speech is the subject of regulation.

This dilemma reveals the essentially schizophrenic nature of the book: The two-tier system so elaborately developed in the second half of the book does nothing for Sunstein when applied to the first half's discussion of campaign finance, and indeed is a positive hindrance. This may explain why the two-tier system is not fully introduced until Chapter Five, when questions of campaign finance and broadcast policy are safely out of the way.⁹³

91. SUNSTEIN, *supra* note 1, at 99.

92. LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 108–61 (1987); see also KRATTENMAKER & POWE, *supra* note 8, at 103–74.

93. Note that one cannot escape this dilemma by invoking the realist point that campaign finance and broadcast policy reforms are no more regulations of speech than the status quo. The realist critique (which I describe in more detail shortly) does not hold that regulations of speech are not regulations; it argues that speech is continually undergoing regulation by the state, even in situations where we least expect it. One

The only way out of the dilemma is to argue that regulations of political speech should be treated with greater deference because and to the extent that they promote rather than debilitate democratic values. In Meiklejohn's language, such regulations may be restrictions on the liberty to speak, but not of the freedom of speech.⁹⁴ However, this answer does not escape the dilemma but simply embraces one of its two horns. It shows that Sunstein's theory, at bottom, is a theory of *reduced* judicial scrutiny in the regulation of political speech—an ironic result for a Meiklejohnian theory. In practical terms, he must abandon the argument for greater distrust of government regulation in the areas of campaign finance and broadcast regulation.

The reason is simple. In the abstract, one can say that distrust is unnecessary when the government improves democracy and promotes democratic deliberation. But in practical terms, courts must still pass on challenges to reform efforts that claim to have these goals. The long-term consequences of such reforms will rarely be clear on their face. Even where there is relative certainty, there will be many disputes about what kinds of results are better or worse for democracy (including disputes about what "democracy" really requires). Moreover, different interest groups often have very different visions of what effective campaign finance reform would look like. For example, in the bills placed before Congress at the end of the 1994 session, the Democrat-sponsored bills looked markedly different and regulated different things than the Republican-sponsored bills.⁹⁵

Because legislatures will usually insist that they are acting to promote democracy, courts must face the question of the appropriate level of scrutiny. The question is what degree of confidence should be reposed in the product that emerges from the legislative process—whether from a Congress dominated by incumbent Democrats or one (as after the 1994 elections) dominated by incumbent Republicans.

Ultimately, if we wish legislatures to reform the political process and courts to uphold these reforms, we must be prepared to accept and even advocate greater judicial restraint in these cases. This means that courts must allow a number of different regimes to pass constitutional muster, even if some of them do not in fact promote democratic goals in the long run. The only way to avoid this result would be for the judiciary to arrogate for itself the task of drafting the perfect legislation, from which no deviations would be held

still has to justify the regulations in place, whether they are due to legislative and administrative action or to common law rules of property, tort, and contract.

94. MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 4, at 21.

95. As one observer has noted, because Republicans generally have access to wealthy individual donors, they want no limit on what candidates can raise and spend but are willing to abolish or limit political action committees; Democrats, in contrast, generally want to restrict the total amount spent and oppose abolishing or limiting political action committees unless they are nationally prominent. See David E. Rosenbaum, *The 1994 Campaign; Campaign Finance: G.O.P. Filibuster Defeats Campaign Finance Curbs*, N.Y. TIMES, Oct. 1, 1994, at A1.

constitutional. This, however, is a task for which courts are no better suited than legislatures, and that is no more likely to result in a healthier political process.

Sunstein is not ultimately wrong, I think, in advocating greater judicial restraint in review of campaign finance regulations (I shall have more to say about broadcast policy in the next section). Once we move from a strictly libertarian conception of free speech and adopt a more regulatory model of the political process (as both Sunstein and I do), the boundaries that determine permissible limitations on financing of political campaigns necessarily become fuzzier. Constitutionality begins to turn not so much on simple on/off rules (for example, *Buckley v. Valeo*'s infamous distinction between limitations on contributions and expenditures⁹⁶), but becomes a matter of reasonable legislative judgment within certain boundaries.

Nevertheless, I think that support for such legislation requires a necessary qualification, which I am not sure is consistent with Sunstein's generally progressivist model of free speech but is rather more populist in flavor. In my view, any constitutional system of campaign finance reform must be combined with term limits. Because the temptations towards incumbent protection legislation are so great, any campaign finance reform that an existing Congress legislates must be accompanied by guarantees of continual rotations in office. From a progressivist standpoint, term limits are problematic because they debilitate the expertise of legislative bodies; experienced legislators must leave after fixed periods of time and there is a corresponding loss of institutional memory. Term limits regularly place the government in the hands of neophytes rather than experienced and knowledgeable policymakers. A progressivist might support term limits for familiar "good government" reasons of preventing corruption, but even here it would be unclear whether such a prophylactic measure was the most appropriate means to this end. From a populist perspective, however, term limits are not merely a remedy for corruption. They also serve as an important symbol that the government, no matter how noble its asserted motives, does not always act in the best interests of its citizens, and that individuals who are long in power naturally tend to lose touch with their constituents and abuse their privileges.

Like campaign finance reform, term limits pose First Amendment problems (in addition to problems under the Qualifications Clause). It might seem strange to think that the problems of the former regulation of speech could be solved by even greater regulation; perhaps the best analogy is to the theory of "second best" in economics.⁹⁷ The greatest practical difficulty is that our system of constitutional adjudication makes it difficult for courts to pass on a

96. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

97. Indeed, Fred Schauer has suggested that the entire structure of First Amendment law can be thought of this way. See Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989).

unified system of electoral regulation that would include both features. Nevertheless, from a populist perspective, it seems entirely plausible that the constitutionality of one must depend in part on the presence of the other.

VII. A NEW DEAL FOR SPEECH AND THE MANAGEMENT OF PREFERENCES

Apart from the two-tier system, Sunstein's other basic conceptual move is an attack on uncomplicated notions of government neutrality towards speech. Sunstein's analysis here is quite similar to arguments I have previously offered,⁹⁸ and for obvious reasons, I think it is quite convincing. What I have called a "Legal Realist" approach to the First Amendment he calls a "New Deal" for free speech.⁹⁹ The relationship between these titles is apt, for realism was an intellectual tool in the promotion of the New Deal agenda. However, as I shall argue, Sunstein goes well beyond the realist point that government is responsible for unjust distributions of communicative power. He argues that government is also responsible for the public's tastes in broadcast programming; hence the government has the duty to shape private preferences to promote the ideals of democratic deliberation. This additional claim gives his argument a distinctly progressivist spin.

The basic insight of the realist analysis is simple: Government is always involved in the regulation of speech, even and especially through its common law rules of property, tort, and contract. These rules affect the ownership and distribution of communicative technology; they also affect the economic power of people who might wish to purchase the right to use them. Effective communication is always a function of the existing social and technological structure. In our age, this increasingly requires access to media of mass communication, which in turn is tied to rights of private property. At the same time, because the right to speak is tied to property rights, the rules of contract, property, and tort give private individuals power to withhold the right to use communicative technologies from each other or to impose economic or other social sanctions on the exercise of speech. For example, property owners can invoke the right of trespass to keep away protesters, advertisers can withdraw financial support from broadcasters whose programs they dislike, networks can refuse to sell air time to organizations they do not wish to associate with, and political activists can organize economic boycotts of organizations with disagreeable views. A system of private rights simultaneously puts in place a

98. See Balkin, *Some Realism About Pluralism*, *supra* note 20.

99. SUNSTEIN, *supra* note 1, at 28–38. Chapters Two and Three offer a revised version of his discussion in *THE PARTIAL CONSTITUTION*, which in turn derives from a 1992 article, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992), which introduces the terminology of a New Deal for free speech. The importance of the New Deal and the rejection of pre-New Deal understandings are recurring themes in Sunstein's work. See, e.g., Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

system of rights to free speech based on property ownership and a system of private censorship based on the exercise of these rights.¹⁰⁰

As long as the practical ability to communicate with others is effectively tied to inequalities in the ownership of property, we cannot say that a purely formal right to speak is identical with a substantive liberty or with equal opportunity to speak. The government may not defend the current allocation of contract, property, and tort rights merely on the grounds that its system of private property is neutral as between speakers and does not interfere with speech. Under a different regime of rules, different individuals would have greater economic power and hence different substantive abilities to speak and to deter others from speaking. Put in Sunstein's favored terminology, there is no natural baseline for the distribution of these rights and therefore no natural distribution of rights and powers to purchase and use communicative technology.¹⁰¹ Because the government is always regulating speech in one way or another, the distribution of rights that affect speech is a matter of public policy, and the government is responsible if its distribution has the effect of inhibiting speech or disserving valuable goals like democratic deliberation.¹⁰²

This analysis softens the distinctions between positive and negative liberties, between government intervention and government inaction, and between public and private power. For example, we can think of certain features of free speech law—for example, the existence of public fora—either as constitutionally mandated rights of speaker access to government property or as government subsidies of speech. Similarly, we can view constitutional restrictions on libel judgments as redistributive decisions to subsidize speakers at the expense of the persons whose reputations they besmirch and whose reputational capital they lessen.¹⁰³

Nevertheless, the point of this conceptual exercise is not to abolish the distinctions between concepts like public and private power. The goal rather is to understand these boundaries as more flexible. Indeed, we may even think of public and private as conclusory terms that help us describe the kinds of regulatory schemes that best further interests like human liberty, cultural development, the pursuit of truth, and democratic self-government. It is tempting to rush to the conclusion that in a post-New Deal world we will no longer have use for concepts like government neutrality. Yet it is a fool's

100. See Balkin, *Some Realism About Pluralism*, *supra* note 20, at 411; J.M. Balkin, *The American System of Censorship and Free Expression*, in *PATTERNS OF CENSORSHIP AROUND THE WORLD* 155 (Ilán Peleg ed., 1993).

101. SUNSTEIN, *supra* note 1, at 34–46; Balkin, *Some Realism About Pluralism*, *supra* note 20, at 409–14. The language of baselines is a recurrent trope in Sunstein's work. For the best example, see Sunstein, *Lochner's Legacy*, *supra* note 99.

102. SUNSTEIN, *supra* note 1, at 177–79; Balkin, *Some Realism About Pluralism*, *supra* note 20, at 413–14.

103. SUNSTEIN, *supra* note 1, at 47; Balkin, *Some Realism About Pluralism*, *supra* note 20, at 403–04.

errand to think that we can abandon the distinction between public and private, between positive and negative liberty, or between government action and inaction. Whenever we attempt to cast these distinctions aside, they simply return in other forms. They are what I have called in other contexts “nested oppositions”; conceptual opposites whose intellectual coherence depends in an uncanny way on the existence of their opposite numbers.¹⁰⁴

At bottom, the legal realist analysis is a form of conceptual liberation. It allows us to think about free speech policies differently and helps us remove certain intellectual blinders. Yet by itself it has no necessary political consequences. One might accept this analysis and still conclude that, all things considered, it is best to retain the present system or even move to a more libertarian one because this furthers the goals of free speech as well as any, despite its obvious defects.¹⁰⁵ In Sunstein’s case (as in mine) the point of this reconceptualization is to reconcile our commitment to free speech with our commitment to egalitarianism. It is designed to show that more egalitarian policies towards free speech are compatible with the free speech tradition. The major difference between us concerns the kind of egalitarianism each of us hopes to further. For Sunstein, equality serves the goal of promoting a healthy system of democratic deliberation. For me the goal is to ensure equality of opportunity for self-expression and equality of access to the political process.¹⁰⁶

In offering this reconceptualization, both Sunstein and I owe an intellectual debt to an unlikely pair—Owen Fiss and the Critical Legal Studies movement. In two important essays in the 1980’s, Fiss emphasized the importance of the state as a positive force in constructing a democratic system of free expression and criticized the conflation of freedom of speech with the existing regime of property rights.¹⁰⁷ Critical Legal Studies scholars, in turn, refurbished the

104. See J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990).

105. In that case, however, the choice does not rest on spurious notions of government neutrality or inaction, but on a sober consideration of the administrative limits of government’s ability to shape the distribution of economic and communicative power. Note that when we take these administrative limitations into account, something like the concept of neutrality reemerges. If the government cannot effectively produce any system of free speech rights (because it would be administratively impractical or would be enormously expensive) the government’s responsibility for not achieving such systems is lessened to that extent. Because ought implies can, governments cannot be held responsible for failure to produce systems they cannot realistically create. However, this is not quite the same thing as an equation of government inaction with government neutrality. When the government cannot achieve particular goals through regulation, it should choose instead among the best of the realistically available alternatives, and it is still responsible for this choice.

106. These contrasting visions correspond very roughly to progressive and populist defenses of First Amendment egalitarianism. From a progressive standpoint, First Amendment egalitarianism is informed by the goals of managerialism; equality promotes the creation of a desirable form of and climate for public deliberation. From a populist standpoint, First Amendment egalitarianism is driven by an aspiration for equality of opportunity; it is motivated by a desire for “the little guy” to be free from concentrations of government and corporate power. It is important to stress that these goals do not necessarily conflict in many contexts; that is one reason why I find much of what Sunstein has to say appealing.

107. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987). Nor should we forget the earlier contributions of Jerome

realist critique of the distinction between public and private power, and attacked the neutrality of baselines established by the common law.¹⁰⁸ Although my intellectual debt to CLS is clear, its influence on Sunstein's constitutional theory may be less obvious but is no less significant. Both *The Partial Constitution* and the present book would have been impossible without the critique of neutrality promulgated by figures like Morton Horwitz and Duncan Kennedy in the 1970's.¹⁰⁹ It is of course Sunstein's particular genius that he has been able to adapt insights from many different sources, including CLS and feminism, and synthesize them together into a more or less coherent vision of constitutional law and regulatory policy. Such a gift may be viewed from the perspective of the left and the right as domestication,¹¹⁰ "mere" bricolage,¹¹¹ or conceptual confusion.¹¹² Yet these weaknesses (if they are such) are also strengths, for by cobbling together disparate sources, Sunstein has been able to fuse different theoretical perspectives into the service of an enlightened political centrism and in a language that is distinctively his own.

Sunstein's New Deal for speech goes beyond the realist critique, however, in its views about the scope and extent of government responsibility. Sunstein hopes to use the critique of government neutrality to justify his civic republican view that government both can and should instill civic virtue and attention to public issues in its citizens. This leads him to two controversial positions: First, he believes the realist critique shows that law is responsible for the lack of quality in public discourse in the United States and the programming preferences of the public. Second, he believes that legal regulation of the mass media can foster public-spiritedness and the goals of democratic deliberation.

The realist critique of neutrality—at least in the form I have offered it—holds merely that different regulatory regimes will have different consequences on the distribution of income and power. Therefore the government must be held responsible for the distribution of economic power and the relative access to communicative technology that goes with it. Sunstein takes this point one step further. He argues that different regimes will produce

Barron and Thomas Emerson. See Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795 (1981).

108. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960* (1992); Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1091 (1993) (reviewing HORWITZ, *supra*); Duncan Kennedy, *The Stages in the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

109. Indeed, the critique of neutrality gives *The Partial Constitution* its title, for Sunstein's claim is that we have a Constitution not only partial in its coverage but also partial in the sense of its lack of neutrality.

110. Jeanne L. Schroeder, *The Taming of the Shrew: The Liberal Attempt To Mainstream Radical Feminist Theory*, 5 YALE J.L. & FEMINISM 123, 125 (1992).

111. Mark Tushnet, *The Bricoleur at the Center*, 60 U. CHI. L. REV. 1071, 1071 (1993) (book review).

112. See William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991).

not only different economic holdings, but also different *preferences*, and in particular preferences for information about politics and for what Sunstein calls “high-quality” programming.¹¹³

To a certain extent this is surely true. Because different regimes will produce different distributional consequences, they will surely result in changes in *revealed* preferences—that is, preferences as judged by what people do in markets. If the legal regime makes me poorer, I may not buy that new Lexus, but will settle instead for a used Corolla. It is not clear, however, that I wouldn’t still prefer the Lexus if I had the money. Different regimes create different options for individuals, and hence change the ways in which they can exercise their wills. In addition, by changing holdings, we also change the relative quantity of various goods and services produced in the market, and this will also have an effect on revealed preferences.

Finally, large changes in distributions of property over several generations might produce marked changes in preferences because of the relationship between tastes and socioeconomic class. If a person is raised in a rich household, her preferences may be different than if she were raised in poverty. Thus, if we want people to grow up liking ballet, we could increase the chances of this by making their grandparents very wealthy.

Sunstein, however, is not making these relatively modest claims about law’s effects on preference formation. For he believes that tastes as well as options are significantly affected by the choice of legal regimes. In particular he believes that law is largely responsible for the low quality of public discourse in the United States and for people’s failure to expose themselves to the issues of the day. It is an article of civic republican faith that preferences are endogenous to politics; hence, Sunstein argues, if people fail to watch sufficient amounts of high-quality programming or expose themselves to public issues, this is due to some form of regulatory failure.

Surveying the quality of public discourse in the United States, Sunstein finds little to admire.¹¹⁴ The airwaves are full of “scandals, sensationalized anecdotes, and gossip,”¹¹⁵ and the broadcast media “deals rarely with serious issues and then almost never in depth.”¹¹⁶ Yet, Sunstein argues, “if anything like this is true, it is, I believe, the law—not nature, not ‘freedom,’ and not ‘private decisions’—that is responsible.”¹¹⁷

Sunstein argues that “[i]t is the law that creates the system operated by the broadcasting . . . [and] print media.”¹¹⁸ Hence it is the law that gives rise to

113. SUNSTEIN, *supra* note 1, at 90. The important ambiguity in Sunstein’s use of this expression is explored in the discussion of Sunstein’s critique of popular culture at *infra* text accompanying notes 154–68.

114. SUNSTEIN, *supra* note 1, at 23.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

the choices individuals make, which, in turn, feed back and reinforce the kinds of programming that the media offer. If law caused the problem in the first place, Sunstein assumes, it can surely remedy it. Accordingly, Sunstein holds that "there is no good basis for supposing that current tastes and habits are rigidly fixed."¹¹⁹ Indeed, he contends, "[t]here is reason to believe that viewing habits, like many other customs and cultural practices, are extremely vulnerable to large-scale shifts on the basis of relatively mild government interventions."¹²⁰

What would explain law's ability to produce these large-scale shifts? One possibility suggested by Sunstein is that viewer tastes are due to fads. Thus, "[s]ometimes the practice of many people is dependent on what other people do. Once some people change their practices, a wide range of others change as well."¹²¹ For example, if a few people start watching *Frasier* rather than *Roseanne*, this signals to others that perhaps there is something worth watching on the other channel, and hence a snowball effect occurs making *Frasier* the current darling of television audiences. This is a useful model to account for certain types of cultural fads, but it is unclear that it can explain mass preferences for *Roseanne* versus *The MacNeil/Lehrer NewsHour*. Once we consider the choice between sitcoms and public-affairs programming, it is by no means clear that mass preferences for what Sunstein considers low-quality programming or mere entertainment are due to fads. Rather, they seem to be longer-term phenomena that are comparatively resistant to changes in fashion. Sitcoms come and sitcoms go among the most popular programs on television, and still *The MacNeil/Lehrer NewsHour* is nowhere to be found.¹²²

Another possibility is that tastes for mass entertainment reflect what Jon Elster calls "adaptive preferences."¹²³ Building on Leon Festinger's theory of cognitive dissonance and Paul Veyne's historical sociology, Elster argues that people sometimes form preferences for what they can reasonably expect to have given the limitations of their situation and reasonably feasible alternatives.¹²⁴ Changes in taste reduce cognitive dissonance because people then do not have to want what they cannot have, nor do they have to find intolerable circumstances they cannot escape.¹²⁵ This theory would suggest that people now prefer low-quality programming because they have given up

119. *Id.* at 90.

120. *Id.*

121. *Id.*

122. By contrast, *60 Minutes*, with its combination of aggressive investigative journalism leavened by sentimental human interest stories, was for many years one of the highest-rated programs on television, and has spawned many (for some, too many) imitators.

123. JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 110 (1983) [hereinafter *ELSTER, SOUR GRAPES*]; JON ELSTER, *POLITICAL PSYCHOLOGY* 54 (1993).

124. ELSTER, *POLITICAL PSYCHOLOGY*, *supra* note 123, at 110-11, 115-16; LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957); PAUL VEYNE, *BREAD AND CIRCUSES* (Brian Pearce trans., Penguin Press 1990) (1976).

125. ELSTER, *POLITICAL PSYCHOLOGY*, *supra* note 123, at 54.

hoping for higher-quality material. Thus, law might create large-scale shifts in viewer preferences by providing high-quality alternatives to existing programming.

So stated, it should be obvious that the theory of adaptive preferences is particularly ill-suited to explain why people continue to watch sitcoms or *The Price Is Right* when they could be watching C-SPAN or *MacNeil/Lehrer*. Adaptive preferences occur when people are denied alternatives and limited in their choices. However, one need not engage in dissonance reduction strategies to avoid being disappointed in one's desire for public-affairs programming. One can see *The MacNeil/Lehrer NewsHour* every Monday through Friday. This is to say nothing of the considerable amount of public-affairs programming presently available on television, in addition to historical documentaries, science programs, and "high culture" entertainment like theater, opera, and ballet.¹²⁶ To be sure, some of this programming is on cable television, but this would mean at most that we would see adaptive preferences for "trash television" only among those members of the public who cannot afford cable. Moreover, much of this programming is on public television, which is available to the vast majority of Americans.¹²⁷ If Americans are not watching public-affairs programming, it is not because no such programming is available.¹²⁸

There is an important intuition behind the adaptive preferences claim, but it does not suggest that modest changes in broadcast policy will do the trick. One might argue that people prefer entertainment to public-affairs programming because they work hard all day earning a living and have limited leisure time, or because they have been reduced to grinding poverty and need entertainment as a form of escape. If so, we might change their preferences for public-affairs programming by giving people higher incomes and more satisfying lives. Sunstein suggests that public-affairs programming and public television in general seem to be viewed disproportionately by more affluent and educated viewers,¹²⁹ and it is often said that public television subsidizes the rich at the expense of the poor and the more educated at the expense of the less educated.¹³⁰ However, this suggests that we might change the public's tastes for such programming by eliminating poverty and reforming our decaying educational system. These reforms would be much more costly than simply requiring different broadcast fare, and they would probably do more good as well. On the other hand, it is unlikely that modest changes in

126. For example, on most basic cable systems one can currently watch, in addition to local and national news, PBS and C-SPAN1 and 2, CNN and *CNN Headline News*, Court TV, the Discovery Channel, the Learning Channel, Arts & Entertainment, and Bravo.

127. KRATTENMAKER & POWE, *supra* note 8, at 302, 314.

128. *Id.* at 82-83, 298-300.

129. SUNSTEIN, *supra* note 1, at 91.

130. *But cf.* KRATTENMAKER & POWE, *supra* note 8, at 313-14 (citing studies that indicate that well-educated people watch basically what everyone else watches).

broadcast policy would have much effect because they do not address the deeper economic and social problems that poor and working people face.

What is most puzzling about Sunstein's arguments about the malleability of preferences is that they seem belied by his diagnosis of their causes. He acknowledges that people's preferences may be due to their economic and educational status, and yet he advocates creating large-scale shifts in these preferences through FCC regulation rather than welfare and educational policy. Law may have a role in creating the economic and social conditions that lead to current viewing tastes, but it does not follow that these preferences are easily manipulated by changing broadcast policy as opposed to changing the underlying social and economic structure. Indeed, one is tempted to borrow a line from Elster and Festinger and suggest that Sunstein's views on preference shaping are themselves an example of cognitive dissonance reduction, in this case, wishful thinking. As Elster explains, sometimes people believe things because they prefer a world in which they are true to one in which they are false.¹³¹

Although Sunstein's views about the mutability of viewer preferences seem unpersuasive, his more central point is that the legal system should regulate the media to promote democratic deliberation and viewer interest in public affairs. According to Sunstein, broadcast policy, like other free speech policies, should be tailored to serve the goal of promoting deliberative democracy. In particular, Sunstein attacks the idea that viewer choice, or what he calls "consumer sovereignty," should control. Thus, there is some irony in Sunstein's invocation of the statement in *Red Lion Broadcasting Co. v. FCC* that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."¹³² For Sunstein, this apparently refers not to the actual preferences of viewers, but rather to an idealized conception of what their preferences as citizens should be under appropriate conditions.

Sunstein is particularly concerned that existing broadcast fare lacks sufficient diversity and sufficient attention to public affairs. He is of course aware of the natural rejoinder that the amount of diversity and public discussion has never been higher, given the rise of cable television, CNN, C-SPAN, Court TV, and talk radio. Sunstein responds that only half of U.S. households are currently wired for cable, and "[e]ven worse, the households and the children that are probably most in need of high-quality programming are least able to afford it."¹³³ Yet the obvious response to this problem would be for the government to subsidize cable television in every American home, and then simply allow viewers (and parents supervising children) to choose what they want to watch.

131. ELSTER, *SOUR GRAPES*, *supra* note 123, at 148-49.

132. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

133. SUNSTEIN, *supra* note 1, at 68.

However, Sunstein finds this capitulation to existing choices and preferences particularly troubling. He argues that information about public affairs is a public good, and hence that "[f]reedom of choice will therefore fail to capture the important external and systemic benefits of learning about public issues."¹³⁴ People will simply not watch enough C-SPAN even if we give it to them for free (or at greatly reduced cost) as long as they are subjected to the enticements of *Roseanne* or MTV.

Of course, the existence of public goods is usually a justification for government regulation, and for forcing people to make choices they would not otherwise make. For example, in the environmental area we issue regulatory mandates to people to take precautions we would not expect them to take of their own accord. If we really believe that exposure to public affairs is a public good every bit as important as a clean environment, should we not consider forcing viewers to read newspapers or watch "high-quality" programming in order to ensure the "external and systemic benefits of learning about public issues"?¹³⁵ In some contexts, the idea is not all that far-fetched. We do require children to attend school until the age of sixteen. We attempt, sometimes with only limited success, to ensure that the general population is literate and able to participate in public affairs as well as able to earn a living in the contemporary marketplace. The question Sunstein's analysis raises is whether further mandates should be issued to fully grown adults who, for one reason or another, have an insufficiently well-developed taste for discussions of serious public issues.

Sunstein quite naturally and properly recoils from the claim that we should force people to watch public-affairs programs.¹³⁶ However, neither does he want to accept the principle of "consumer sovereignty" in television watching. Indeed, allowing the public to watch what it wants gauged by its revealed viewing preferences is the opposite of sovereignty for him. While he concedes that "[p]eople's consumption patterns in television-watching do suggest a more favorable attitude toward existing practices"¹³⁷ than he finds desirable, these revealed preferences cannot be regarded as more authentic or true than the preferences people have as democratic citizens.¹³⁸ Sunstein argues that "private broadcasting selections are a product of preferences that are partly a result of the existing broadcasting system and not entirely independent of it."¹³⁹ So one cannot without circularity assume that existing preferences justify the current system of broadcasting.¹⁴⁰

134. *Id.* at 69.

135. *Id.*

136. *Id.* at 70.

137. *Id.* at 73.

138. *Id.*

139. *Id.* at 73-74.

140. *Id.* at 74.

These arguments shed further light on why Sunstein is uncomfortable with autonomy-based accounts of the free speech principle. Because individual preferences are the result of the existing legal system, what people choose to say, read, watch, or listen to may simply be the result of the system in which they live.¹⁴¹ Their choices both as speakers and listeners may be due to poverty, insufficient education, or lack of education, and hence need not be fully respected.¹⁴² By contrast, he argues, when the people act as citizens through their democratic representatives, they engage in democratic sovereignty that is superior to consumer sovereignty and deserves greater deference: "People might well choose to view a silly situation comedy at night, while also enthusiastically supporting a requirement of media attention to public affairs."¹⁴³ If so, "[t]heir support of that requirement," Sunstein argues, "operating through democratic channels, could reflect a reasoned judgment about what they value for the polity of which they are a part, not a consumption choice about what they want for their private enjoyment. That judgment should be respected."¹⁴⁴

Sunstein's separation of consumer choice from democratic choice seems puzzling. First, the same individuals whose cognitive abilities Sunstein has criticized as consumers are suddenly praised for their perspicacity as citizens. If poverty, insufficient information, and lack of education cause people to choose badly in their choice of programs, don't they also affect their judgments as citizens about what legislation to support? If so, why should these judgments be any more entitled to respect? Conversely, if their political judgments are entitled to respect, why do we need to second-guess their choices about what to watch or listen to?

This conceptual difficulty is yet another version of the problem we saw earlier in the discussion of Sunstein's two-tier system: Sunstein distrusts the current system of democratic deliberation, thinking it undermines democracy and badly needs reform; yet he trusts the same system to produce legislation in the public interest, and holds that its judgments in this regard "should be respected." Yet one can apply Sunstein's argument about the circularity of respect for consumer sovereignty to his optimistic assessment of political sovereignty: We can also say that political judgments about broadcast reform "are a product of preferences that are partly a result of the existing broadcasting system and not entirely independent of it."¹⁴⁵ If the existing political process produces legislative reforms, these cannot without circularity be considered to be the result of democratic sovereignty because what appears

141. *Id.* at 137, 143-44.

142. *Id.* at 143-44.

143. *Id.* at 73.

144. *Id.*

145. *Id.* at 73-74.

to be the people's *political* choice may simply have been due to defects in the process and lack of information and education among the citizenry.

Second, Sunstein fudges the point that regulatory choices will be made not by citizens themselves, but by their elected representatives. In fact, they will most likely be made by government bureaucrats with no direct accountability to the people. Of course, this suggests how one might reconcile his relative disrespect for the public as consumers and his relative respect for the public as citizens. This difference in attitude reflects the difference between individual choices and choices filtered through a representative system aided by regulatory expertise. Yet it is precisely at this point that a potential distinction between progressive and populist orientations emerges. From a progressive standpoint, the substitution of representative judgment for individual judgment is highly desirable; once the people's representatives have decided that some form of broadcast regulation is appropriate, they can pass the question along to regulatory experts who can fashion the best means of promoting democratic goals. From a populist standpoint, this substitution is considerably more troublesome and even suspicious. The idea that government bureaucrats will select what people should or should not watch under the name of serving their interests seems like a net loss of sovereignty rather than a net gain.

By the time Sunstein has finished his critique of consumer sovereignty, he seems poised to call for highly interventionist mandates to improve the quality of broadcast programming and ensure that the unwashed masses watch these programs. But in fact he does nothing of the sort. The reforms he proposes are comparatively modest and, for the most part, eminently sensible. First, Sunstein argues that we should devote more money to public broadcasting, especially children's programming.¹⁴⁶ Second, the FCC and other government agencies might publicly fund or produce more "high-quality" programming¹⁴⁷ along the lines of the BBC. Third, Congress might relax the antitrust laws so that broadcasters could develop codes of conduct designed to lessen advertising pressures that affect programming.¹⁴⁸ Fourth, the government might place a tax on advertising revenues to fund public broadcasting or publicly subsidized programming.¹⁴⁹ (Another related possibility would be to charge license fees from broadcasters for the same purpose.¹⁵⁰) Finally, Sunstein suggests that the government might guarantee free air time to political candidates, either by directly purchasing it, or by making such provision a condition of a broadcast license.¹⁵¹

146. *Id.* at 84.

147. *Id.* at 88.

148. *Id.* at 86.

149. *Id.*

150. See Henry Geller, *Mass Communications Policy: Where We Are and Where We Should Be Going*, in *DEMOCRACY AND THE MASS MEDIA* 290, 308-09 (Judith Lichtenberg ed., 1990).

151. SUNSTEIN, *supra* note 1, at 85.

Although these reforms are for the most part plausible suggestions, it is unclear that they will have anything more than a modest effect in promoting democratic deliberation. People will still be free to watch MTV rather than "high-quality" programming. Nor is there any indication that these suggestions will produce large-scale shifts in viewer preferences. Better children's television may have salutary effects on democratic deliberation, but that is only in the long run. Free air time to political candidates is an excellent way of reducing the inherent disparities between wealthier and poorer candidates, for television advertising often eats up increasingly large portions of modern campaigns.¹⁵² Yet Sunstein does not advocate restricting the purchase of political advertising, and he gives us no reason to assume that negative campaigning and attack ads will not continue.

VIII. THE CRITIQUE OF MASS CULTURE

What is most interesting about Sunstein's reforms, in fact, is not so much their specific content as the striking contrast between their relative modesty and the strong distrust of consumer choice and viewer preferences expressed in this book. Sunstein's theoretical bark is much worse than his practical bite. One reason for this discrepancy is that Sunstein is not only a gifted theoretician but also a person of impeccably sound judgment. He is temperamentally (one might even say constitutionally) incapable of being unreasonable for very long. He is therefore unwilling to carry any of the principles he espouses to their logical, if potentially absurd, conclusions. Moreover, the fact that he is unwilling to do this should be understood less as a sign of his lack of consistency than of pragmatic good sense triumphing over academic excess.

Nevertheless, Sunstein's saber rattling against the evils of consumer sovereignty reveals something much deeper and, I think, more important about his general views concerning the First Amendment. It reveals the cultural underside of his "Madisonian" conception. Sunstein's attack on consumer sovereignty reflects his distrust of and disappointment with American mass culture and the popular tastes reflected in that culture. Underlying Sunstein's discussion of broadcast policy is a division between high and low culture—with the former seen as essential to the repair of the system of democratic deliberation and the latter identified with mass culture and particularly with the culture of television.

This pejorative view of mass culture is implicit in Sunstein's repeated call for more "high-quality" programming,¹⁵³ a term that is importantly and

152. See, e.g., Glenn F. Bunting & Dwight Morris, *Huffington Outspends Feinstein 3 to 1 on Television Ads*, L.A. TIMES, Nov. 2, 1994, at A3 (discussing importance of television expenditures in 1994 California Senate campaign, the most expensive Senate race in American history).

153. SUNSTEIN, *supra* note 1, at 82, 84–85, 88–91.

systematically ambiguous. It appears to refer both to programs that deal with public issues and programs that appeal to the norms of "high culture"—for example, "serious" drama (as opposed to made-for-TV movies) and BBC-style documentaries.¹⁵⁴ Conversely, what it most decidedly does not refer to are the hallmarks of television mass culture—situation comedies, tabloid journalism, *Beverly Hills 90210*, MTV—in short, all that is generally referred to as "trash television," regardless of its high technical quality or considerable production cost.

The systematic conflation of public-affairs programming with programming appealing to the mores of "high culture" under the rubric of "high-quality" programming is central to the cultural mindset of this book. Sunstein's conception of "high-quality" is naturally opposed to the existing tastes and preferences of the masses. This is clear in Sunstein's dismissal of current viewer preferences as due to limited opportunities and lack of education.¹⁵⁵ Moreover, as Sunstein points out, it is not accidental that "high-quality" programming is disproportionately watched by the well educated.¹⁵⁶

Finally, and most important, Sunstein's conception involves an opposition between high culture and low culture in which the virtues of democratic deliberation are associated with the former and opposed to the latter. The mass audience, seduced by the temptations of the culture of television, is diverted away from high cultural "public-affairs programming" necessary to the health of democracy. Thus, we see the following set of conceptual oppositions: High-quality programming is to low-quality programming as democratic deliberation is to consumer sovereignty, as high culture is to popular culture, and as enlightened preferences are to popular preferences. Sunstein's worry about the decline of public discourse parallels his worry about the rise of mass culture; unchecked and uncontrolled, mass culture may become the enemy of democratic deliberation and "Madisonian" values.

Nevertheless, it would be completely wrong to conclude from this that Sunstein is intolerant of popular culture. Indeed, precisely the opposite is true. Sunstein views popular culture precisely as an object of toleration, as a thing that must be tolerated even though it is of relatively little political value, endured even though it distracts people from the business of government. It is precisely this attitude of toleration that allows him to view popular culture as peripheral to democratic culture rather than central to it, as a vulgar sideshow rather than the main event, as an intermittent nuisance that occasionally interferes with the processes of democratic deliberation but that is generally irrelevant to it. Popular culture is something people turn to when they are not engaged in serious discussions about public issues. It is a diversion from

154. It also refers to programming that provides appropriate educational values for children. See *id.* at 84–85.

155. *Id.* at 19–21.

156. *Id.* at 91.

democratic deliberation, and dangerous precisely because it is so diverting. At the same time, because popular culture occasionally does interfere with democratic deliberation, it must be opposed and counteracted, shaped and managed in order to produce the conditions for true democracy.

Sunstein's dissatisfaction with popular preferences and his distrust of popular culture lead naturally to the charge that he is elitist.¹⁵⁷ But this revelation should hardly seem shocking or surprising once we recognize Sunstein as the intellectual heir of good-government progressivism. The pre-World War I progressives were elitists too; they were sure in their convictions that expertise could improve the processes of government and that rational discussion would lead to an enlightened consensus that would promote social progress in the interests of all.¹⁵⁸ Their faith in elite judgment distinguished them from the previous generation of populist reformers.

There are in fact deep and abiding connections between progressivism and elitism. Progressivism sets for itself the tasks of setting the government's house in order and improving the culture of democracy. It views itself as working in the interest of a public good discernable through educated and enlightened reason. As such, progressivism is the natural home for intellectual elites, who (like everyone else) tend to measure the world by their own standards. Conversely (and unsurprisingly), intellectual elites are valued doubly by progressivism: first because they possess the necessary information and expertise to formulate wise public policy, but second because they are viewed by other progressives as the best educated and most committed to the values of rational inquiry and deliberation. Thus, progressivism inevitably recasts the norms of democratic deliberation in the image of elite values and elite preoccupations, and inevitably judges the quality of popular participation by elite standards of education and taste. Popular culture, with its shallowness, rudeness, and lack of intellectual seriousness, is almost always seen as a fall away from these standards. Hence bettering or counteracting that cultural deficit in the interests of democracy inevitably becomes part of the progressive agenda.

Conversely, because progressivism places such faith in the formation of consensus through good-faith cooperation and rational inquiry, it has difficulty acknowledging that some problems—in particular problems of race, nationality, and class—"may be rooted in values and interests whose differences cannot rationally be bridged even with the best of intentions."¹⁵⁹ When such consensus fails to form, or when it forms contrary to elite understandings, progressivism naturally tends to identify the causes as parochial self-interest and uneducated passion. As a result, progressivism is always destined to see

157. *Id.* at 90–92 (discussing charges of elitism).

158. Rabban, *supra* note 28, at 11–14.

159. *Id.* at 14.

itself as the perpetual victim of ingratitude for all of its pains by a populace that continually fails to recognize progressivism's reasoned efforts on its behalf.

From this standpoint, civic republicanism is merely the latest episode in the progressive crusade to improve American democracy in the face of the woeful political culture the American public has created. Scot Powe has remarked that Sunstein's broadcasting policy demonstrates that he does not want better programming, but "better people."¹⁶⁰ Sunstein, I think, would not necessarily disagree. The whole point of the "Madisonian" system is to improve democracy not by kowtowing to popular preferences but by opposing and reshaping them. Sunstein's political theory is unabashedly perfectionist, both for the political regime and for the people who live in it. If perfecting democracy requires people to match their viewing habits to those better educated, then this is the appropriate model for them to aspire to. If Woodrow Wilson hoped to make the world safe for democracy, Sunstein hopes to make the American citizenry safe for democracy as well.

For these reasons, the bare accusation that Sunstein is elitist does not further the discussion very much. Sunstein is hardly unaware that he will be accused of elitism. The real question is whether, in his words, he is being "unacceptably elitist."¹⁶¹ Moreover, he offers what I think is an entirely logical response to such criticisms: It is perfectly justifiable to be an elitist if your values really are the better ones. And Sunstein has no doubt that the preferences of the affluent and well educated are objectively better: If such people will "disproportionately enjoy high-quality broadcasting," it is "precisely because they have been educated to do so."¹⁶² "[H]igh-quality education," Sunstein argues, "is not something to be disparaged. It has a point."¹⁶³ Moreover, people who lack these better preferences need to be educated so that they will come to have them; the mass media should be part of a comprehensive system of public education designed to serve these ends.¹⁶⁴ Sunstein concludes that "[m]any people who are not college graduates should benefit a great deal from" high-quality broadcasting.¹⁶⁵ "Indeed, they may receive disproportionately high benefits."¹⁶⁶

160. Conversation with Scot Powe, Professor of Law and Government, University of Texas, in Austin, Tex. (Dec. 15, 1993).

161. SUNSTEIN, *supra* note 1, at 91.

162. *Id.*

163. *Id.*

164. *Id.* After this suggestion, Sunstein adds the perfunctory disclaimer that "there is nothing elitist about that." *Id.* But of course, the idea that the masses should be educated to conform to the preferences of elites because they are better preferences is the very essence of elitism. The question is whether it is unacceptably or improperly elitist to educate people so that they have better preferences, and Sunstein's answer to that question is clear.

165. *Id.*

166. *Id.*

Moreover, it will do no good to respond to these claims by trotting out familiar assertions about the subjectivity of all values and preferences. Sunstein is quite prepared to defend the view that some preferences are better than others. The only question is which ones really are better. But of course, that is precisely the sort of discussion he would like to invite. He wants us to ask ourselves what values citizens should have and whether it is not the duty of the state to instill those values so as to make better citizens. I think he is right to ask these questions.

IX. THE PROBLEM OF IDEOLOGICAL CRITICISM

The deeper difficulties in Sunstein's position can only be addressed once we recognize that Sunstein's critique of mass culture and viewer preferences is really a form of ideological critique. Sunstein claims that citizens' values and preferences are distorted. This distortion is due either to lack of information, heuristic biases caused by social position, attempts to reduce cognitive dissonance, or mistaken conceptions of true interest.¹⁶⁷ These claims are quite consistent with a familiar conception of ideology—distortions in beliefs or preferences that cause individuals to act contrary to their interests.¹⁶⁸

This conception of ideology turns crucially on the notion of beliefs and actions that deviate from an objective interest—for example, the class interest of an oppressed group such as the urban proletariat. This objective interest exists apart from the private and subjective interests of members of the oppressed group. Indeed, short-term and parochial interests of individual members of the proletariat may cause them to fail to recognize their common interest as class members. Therefore, in some versions of Marxist theory, it is necessary for a revolutionary vanguard to instill the appropriate revolutionary consciousness in the members of the class.¹⁶⁹ Sunstein's civic republicanism also assumes that citizens have an objective interest—an interest in democratic deliberation and democratic government—that exists apart from their private

167. Jon Elster's work makes clear the connections between traditional conceptions of ideology and claims about the distortion of preferences. In fact, Elster argues that one can explain most ideological phenomena through social psychological mechanisms that distort either beliefs or preferences. See JON ELSTER, *MAKING SENSE OF MARX* 18–22, 465–68, 476–93 (1985); ELSTER, *SOUR GRAPES*, *supra* note 123, at 141–66.

168. See MICHÉLE BARRETT, *THE POLITICS OF TRUTH: FROM MARX TO FOUCAULT* 4 (1991) (identifying classical conception of ideology as mystification that serves interests of some class). Beliefs can serve the interests of one's own class, or they can serve the interests of another class. The notion that one's beliefs are serving interests contrary to one's own is often summed up in the illusive term "false consciousness," a term, interestingly, that Marx himself never used. *Id.* at 5.

169. See, e.g., Vladimir I. Lenin, *What Is To Be Done?*, in *LENIN ANTHOLOGY* 50 (Robert C. Tucker ed., 1975).

interests as citizens, and it is the duty of government and law to instill them with appropriate preferences so that they will pursue this objective interest.¹⁷⁰

All ideological analysis involves an analyst who offers a critique and an analysand who is the object of criticism. Here Sunstein plays the role of the analyst critiquing the preferences of ordinary citizens. The basic problem for all ideological analysis is that it is reflexive: The analyst identifies defects in the analysand's thought due to her interest and social position, yet the analyst herself is also subject to cognitive deficiencies and cognitive biases due to her own interest and social position.¹⁷¹ These defects and biases may color her understandings about whether and to what degree the analysand's thought is inadequate or distorted. Hence, the position of the analyst and analysand is symmetrical, or to put it another way, every analyst can be an analysand to someone else.

Successful ideological analysis must also put the analyst's own ways of thinking into question. This requirement follows because we must assume that the thought of all human beings is partly adequate and partly inadequate to the understanding of social conditions, and that each person's way of looking at the world partly grasps what is just even if it partly furthers injustice. No person has a complete monopoly on truth, but none has a complete monopoly on falsehood either. If so, the analyst may not explain all disagreements between herself and the analysand as due solely to the analysand's defective beliefs, preferences, and structures of thought. She must consider the possibility that her own analysis of the situation is due to the limitations and partiality inherent in her own thought.

To this end, the analyst must consider what truths might be contained in the analysand's way of looking at the world. She need not accept the analysand's perspective completely and uncritically, but she must entertain the possibility that the truth is partly, even if only slightly, on the analysand's side and that the analysand has something to teach her about social conditions generally, or, at the very least, the social conditions that the analysand faces. If the analyst does not do this, she cannot tell whether her pejorative judgment about the analysand's thought is due to limitations in the analysand's thought or to limitations in her own.¹⁷²

170. The common public interest in democratic deliberation, in turn, allows them to pursue and define their common interests as citizens. One should distinguish the public interest in democratic deliberation from the specific content of what kinds of policies are in the public interest. The latter are not defined prior to deliberation in Sunstein's system, but grow out of the process of democratic deliberation.

171. This problem, first clearly identified by Karl Mannheim, leads to the predicament called "Mannheim's Paradox": Ideological analysis is always produced by a subject who in turn is subject to the same ideological scrutiny she performs on others. KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 76-77 (Louis Wirth & Edward Shils trans., new ed. 1991) (1936). The phrase "Mannheim's Paradox" was coined by Clifford Geertz. See CLIFFORD GEERTZ, *Ideology as a Cultural System*, in *THE INTERPRETATION OF CULTURES* 193, 194 (1973).

172. We might compare this requirement of ideological analysis to the requirement of understanding a text we disagree with. As Gadamer points out, if we do not attempt to understand a text's claims to truth,

Through the process of understanding why the analysand thinks as she does, the analyst can begin to see (albeit always to a limited extent) how her own situation affects her understanding of social conditions and questions of justice. Thus, the analyst must use the analysand's thought as a partial check upon her own.¹⁷³ There is no guarantee that this process will be foolproof, and it contains many risks of its own.¹⁷⁴ Nevertheless, it is a more mature form of analysis than a unidirectional model that does not inquire into the analyst's status and locates all distortion in the thought of the analysand. The unidirectional approach assumes that if we disagree with an Other it is because we have something to teach her; it does not consider the possibility that the Other may also have something to teach us.

The deeper problem with Sunstein's critique of popular preferences and mass culture is not that it is elitist, but that it is unidirectional. It locates the source of difference in the mind of the Other, and it explains this discrepancy in terms of cognitive defects, narrow self-interest, and vulgar self-gratification. In so doing, it fails to consider the possibility that the progressive academic might possess a limited vision, a narrowness of mind, or a parochial sensibility. The unidirectional approach allows defects and passions to be projected from the mind of the analyst onto the hapless object of her objections.

Because Sunstein's critique of consumer sovereignty is, at bottom, a form of ideological analysis, he too must take on the burden of self-reflexive inquiry. He must consider what features of his own situation—as a legal and political theorist who earns a living writing and teaching about constitutional law and public policy issues in a university setting—potentially skew his understanding. He must try to use popular culture as a partial check on his own position.¹⁷⁵

A nonreflexive approach to ideology sees ordinary citizens as suffering from a pathology, a defect that needs to be cured through the analyst's expertise. The relationship between the academic and the citizenry is that of a wise doctor diagnosing a sick patient. By contrast, a reflexive approach understands the relationship between the analyst and analysand as a *disagreement* about what is good, a disagreement that may be due to

we will not know whether we disagree with it because the text lacks coherence or because we have not really understood it. HANS-GEORG GADAMER, *TRUTH AND METHOD* 261–63 (Garrett Barden & John Cumming trans., Crossroad Paperback 1982) (2d ed. 1965).

173. More generally, we must rely on other people for help in ideological analysis. Sometimes this help comes in the form of disagreement with and criticism from others.

174. On some of these risks, see Balkin, *supra* note 22, at 159–66.

175. Since I am also engaged in ideological critique, the same injunction applies to me as well. Sunstein and I share a considerable amount in common in terms of background and current social position—for example, we are both white, middle-class, straight, Jewish law professors who attended Harvard Law School in the late 1970's and currently teach at elite institutions. Of course, this does not excuse me from the attempt to see why Sunstein's defense of elite values has some merit. Nevertheless, precisely because of the similarity in our backgrounds, he does not have to try very hard to convince me.

misunderstandings and ideological blinders on both sides. The first sees the analysand as an object of rectification, while the second sees the analysand as a subject engaged in a virtual dialogue with the analyst, who demands that the analyst try to see things from her point of view. The first is an attempt merely to bring enlightenment to others; the second is an attempt to bring enlightenment to one's self.

Unfortunately, Sunstein attempts to sidestep these issues by asserting that "Madisonian goals are not mere preferences."¹⁷⁶ Because they are not mere preferences, they are not subject to attack as merely Sunstein's personal desires for a good society. Nor can they be said to be the result of lack of education and cognitive deficiency. But this resolves the matter too quickly. Sunstein is surely right that a demand for justice or democracy is not a mere preference. Yet it does not follow that an analyst's concrete articulation of what justice or democracy requires is beyond ideological scrutiny. Our view of what these ideals require in particular cases may be due in part to the limitations and situation of our own thought. Hence, even if all persons express fealty to justice or democratic self-government, our own particular interpretation of what justice and democracy require may be partly the result of our own situation and interests. Although justice and democracy are not "mere preferences," we cannot avoid ideological scrutiny of our interpretations of these norms by claiming that they are democracy and justice simpliciter.

I think, in fact, that there are important connections between the kind of ideological analysis I advocate here and the ideals of dialogue normally venerated in dialogic and deliberative political theories. What these theories honor in theory, the reflexive approach tries to honor in practice. Thus, my criticism of Sunstein is not that he is wrong to value deliberation and dialogue, but that he does not do sufficient justice to his own dialogic commitments. In his encounter with popular culture, he should not be in the position of a policy expert dictating to the masses the content of their appropriate preferences. Rather, he, and I, and all constitutional theorists, should be engaged with popular will and popular culture, open to the possibility that the varied perspectives of ordinary citizens might influence our views just as we hope to influence theirs.

X. POLITICO-CENTRISM VERSUS POPULIST ALTERNATION

In particular, an encounter with popular culture might tend to counteract the tendency, common to certain academics, politicians, and even a few self-styled revolutionaries, to overstress the importance of politics to the life of ordinary citizens. We might even coin a new word to describe this phenomenon: Let us call it politico-centrism. If ethnocentrism is the world seen

176. SUNSTEIN, *supra* note 1, at 91.

through the eyes of a cultural chauvinist, politico-centrism is the world seen through the eyes of a political junkie.

What makes it difficult to understand politico-centrism as an ideological position—especially for teachers of law and political theory—is that politics, broadly defined, *is* central to the human condition, for we do and must live in a world with other people. Politico-centrism merely fails to grasp that specific articulations of the value and importance of politics are parochial, and leave out significant portions of the complicated world of human activity and human values. Politico-centrism is like the famous cartoon depiction of the New Yorker's view of the world, where the cosmos appears to shrink drastically west of the Hudson River; it resembles the confusion of the genuine importance of New York with the particular importance given to it by the New Yorker.

It is hardly surprising that persons who deal with law and politics every day might come to believe that public affairs have or should have a disproportionate importance to every person's thoughts and activities. The lifestyles of legal and political theorists in the academy are particularly suited to produce this sort of judgment. Academics have comparatively large amounts of leisure time (which I define as time they need not devote to the minimum requirements of their jobs). Moreover, they tend to spend the time they do have thinking, writing, and discussing books and ideas, many of which include public issues.

Most ordinary citizens, by contrast, do not have the same leisure to pursue in depth the relative benefits of managed care versus single-payer health plans. They may be interested in politics, but they are also interested in eking out a living wage and taking care of their children. For example, viewed from the perspective of the many American women who work outside the home and yet still have primary responsibility for childcare, devotion to public affairs must take a back seat to the harsher realities of life. For them a "Madisonian" system, which insists that all citizens devote "broad and deep attention to public issues,"¹⁷⁷ must seem the sort of pipe dream invented by people who do not have to work for a living.¹⁷⁸

Unfortunately, Sunstein gives little more than lip service to these concerns. "No political regime," he explains, "can or should insist that citizens be

177. *Id.* at 20–21.

178. In its classical conception, civic republicanism also demanded considerable devotion to political affairs from the class of citizens who were heads of households. Yet these citizens possessed leisure time precisely because they were supported by an army of women, servants, and artisans. See Hendrik Hartog, *Imposing Constitutional Traditions*, 29 WM. & MARY L. REV. 75 (1987); Linda R. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1668–71 (1988). Sunstein offers us a kinder, gentler, civic republicanism that retains its public spiritedness while jettisoning its inegalitarian features. Yet the question remains whether this political theory can be divorced from the political economy that originally supported it. In terms of access to leisure time, the similarities between the otherwise dissimilar classical head of household and the contemporary academic are particularly striking and may tend to explain academic belief in the feasibility of the republican conception of civic duty.

thinking about politics all, most, or even much of the time; people have many other things to do.”¹⁷⁹ Yet he continues by suggesting that lack of interest is often a result of cognitive defect and ideological delusion.¹⁸⁰ Sunstein well recognizes that people’s socioeconomic status and situation in life may contribute to what he regards as insufficient concern with current policy debates. However, he does not view their situation as producing a perspective with its own claims to validity, but rather as the source of cognitive disability and false belief. “We know enough,” Sunstein explains, “to know that lack of interest is often a result of inadequate education, perceived powerlessness, unsatisfactory alternatives, or a belief that things cannot really be changed.”¹⁸¹ Even so, one must also inquire into the status of “We” who knows these things about the great unwashed.

Similarly, Sunstein acknowledges that “[b]usy people cannot be expected or required to devote all or most of their time to public issues.”¹⁸² (Presumably the slackers have no such excuse.) “One of the advantages of a representative system—not to mention one with a large bureaucracy—is that it allows the citizenry to devote its attention to subjects other than politics.”¹⁸³ But the very way of framing the issue begs the question. It implies that people might be *allowed* to divert attention from their primary concern—which is politics—to secondary concerns (like raising children) and the pursuit of mere preferences (like eating). It does not sufficiently engage with the possibility that politics might simply and justifiably play only a very small part in many people’s lives.

Indeed, a subject largely left undiscussed in the book is exactly how much effort people *would* have to make for Sunstein’s vision of democracy to be realized. Sunstein insists that “it is hardly unrealistic to assess a system of free expression by examining whether it generates broad and deep attention to public issues, and whether it brings about public exposure to an appropriate diversity of view. These are not utopian goals.”¹⁸⁴ But of course that is precisely the question—is “deep attention” to public issues by all citizens a utopian goal and can government “bring[] about” their “exposure to an appropriate diversity of view” in ways that do not violate their liberties or are not unduly paternalistic? The discrepancy between the ideal and the real is a recurring problem for Sunstein’s project because he seems to want a very high degree of public involvement and familiarity with current affairs without forcing anyone to watch or read anything against her will.

179. SUNSTEIN, *supra* note 1, at 21.

180. *Id.*

181. *Id.*

182. *Id.* at 22.

183. *Id.*

184. *Id.*

Complicated issues like health care or trade policy may demand considerable information and attention to detail to be discussed intelligently and effectively. This poses a considerable difficulty. If Sunstein really wants the vast majority of adult Americans to be well acquainted with the available policy options and the relevant pros and cons, he will better approach an ideal of democratic deliberation, but his theory looks increasingly unrealistic, and his goals, in his own words, "utopian." On the other hand, if all he is saying is that people should know in a rough sort of way the kinds of issues currently before the Congress, such a goal might be attainable, but under Sunstein's own criteria it hardly constitutes a well-functioning democratic system.

One escapes this dilemma if one sees the legislature and not the people as the true arena of democratic deliberation. The legislature would do the sort of in-depth analysis necessary to choose wise policy, while the citizenry would simply point in a very broad way the direction they wished to travel. Some of Sunstein's prior work suggests this division of labor, and it is consistent with his Madisonian predilection for limited democracy, as opposed to limited government.¹⁸⁵ Yet Sunstein makes clear in this book that he expects the citizenry as well as the legislature to be well informed. After all, if citizens are not engaged in informed democratic deliberation, they will tend to send the wrong signals and elect the wrong individuals to the legislature.

Sunstein is surely not wrong to hope that the citizenry can become better informed about public issues; government can and should take steps to give ordinary people better opportunities to learn about public affairs and become involved in public life. Many of Sunstein's suggested reforms (as opposed to his rhetoric) should be unobjectionable from a populist standpoint. Yet populism also demands recognition that citizens may have good reasons to neglect politics. This inattention may reflect the comparative urgency of the demands of everyday life, or a belief that government adequately albeit imperfectly serves their interests. However, it may also reflect the growing judgment that government is the seat of corruption, privilege, cronyism, and injustice. At some point, this indignation will surface in popular political action, and when it occurs, it must be given its due. From a populist perspective, an alternation between periods of relative inattention and episodes of popular uprising is not a pathological but a normal feature of democratic life. It symbolizes the people's simultaneous recognition that they ultimately rule and that their government is usually in the hands of people who systematically forget this fact. The model of populist democracy is not prolonged dialogue but periodic revolution.¹⁸⁶

185. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

186. One can find this idea in the words of the Declaration of Independence itself: "Governments are instituted . . . [to secure the people's right to life, liberty, and the pursuit of happiness, and] whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government" THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

This alternation between inattention and outrage looks quite different and very disturbing from the perspective of progressivism. Citizen activism is supposed to be continuous and sustained rather than concentrated in brief moments of outrage, just as sustained rational deliberation is to be preferred to sporadic outbursts and expostulations. Some progressives may seek revolutionary changes in society, but in its preference for sustained democratic deliberation, progressivism is decidedly antirevolutionary.

Faced with recurrent political apathy, progressivism has traditionally decried civic sloth and preached the gospel of public participation. Yet precisely at those moments when the citizenry is most eager and engaged, progressives are rarely pleased with the results. An energized populace is, unfortunately, empowered by popular sentiment and popular passion. Progressivism tends to be suspicious of such energy, thinking it usually badly informed and misdirected by clever manipulation.¹⁸⁷ Thus progressivism finds itself continually hoping for an active citizenry, but perpetually in fear that it will get what it wishes for.

We have seen this schizophrenia before. It is the simultaneous trust of the democratic process in the abstract coupled with a distrust of the same process when goaded and controlled by ordinary citizens. Populism's vision of normal politics is progressivism's nightmare—a citizenry that sporadically takes power into its own hands without adequate preparation and sufficient education in proper values. Yet from populism's standpoint the progressive dream is hardly heavenly—for it is premised on disdain and disrespect for popular will and civic energy. It is a participation with only idealized participants, a democratic culture without a demos.

XI. CONCLUSION

Populism, like politics, makes strange bedfellows. I have argued that the importance of populism rests not only in its distinctive conception of democracy, but in its lessons about the social construction of judgments—the sort of critique often associated with postmodern philosophy. It may seem strange to connect populism and postmodernism, that most arcane of academic

There is an interesting analogy between this conception of populism as involving a sort of "punctuated equilibrium" and Bruce Ackerman's idea of a division between normal politics and constitutional politics. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 133–40, 230–65 (1991). The comparison is not exact, for these moments of popular uprising are not all moments of constitutional change. Rather, many (if not most) of them occur during what Ackerman would call "normal politics." Nor can all of these uprisings be classified as "failed constitutional moments." Nevertheless, Ackerman's theory recognizes, as mine does, the importance of the interaction between popular and elite discourse in American democracy. Recently Ackerman has come to emphasize this uncertain and intermittent relationship as a key mechanism in his theory of "dualist democracy." See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

187. PARKER, *supra* note 23, at 82–93 (discussing distrust of popular energy by legal academy and other intellectual elites).

perspectives. But this incongruity is more apparent than real. A populist constitutionalism demands that academics become more self-conscious about their status as members of a subculture whose elite values tend to shape and occasionally distort their perspectives. It asks that they become more aware about the culturally bound nature of the activity called constitutional theory. It entreats them to consider the possible value in popular culture. Finally, it requires them to acknowledge that distinctions between a more valuable high culture and a less valuable low culture have become increasingly problematic in our age. All of these are familiar postmodernist themes.¹⁸⁸ The fact that I might turn to postmodernism to articulate them is simply further evidence of the particular place from which I stand and the particular cultural tools available to me given this position.

Constitutional theorists have something to learn from populism, even if at the end of the day they must cast a skeptical eye on its excesses. Yet this encounter may help theorists recognize the excesses of positions that seem most natural to them. Just as critical race theory and feminism ask whites and males to recognize and surrender their privileges as whites and males, so too populism asks elites to recognize and surrender their privileges as members of these distinctive subcultures. In particular, populism requires professors of constitutional law to forgo their privileges as academics. For those of us who are trained to respect the meritocratic values of the academy, this may be no small task, and our resistance to it should not be underestimated. In any case, the goal of a populist constitutionalism is neither anti-intellectualism nor academic self-loathing. It is rather a richer and fuller understanding of the self and its place in the larger political community. All critical theory seeks enlightenment, and enlightenment, like charity, begins at home, with an examination of the self and its precommitments. Through this process all of us may hope to understand better what our commitment to democracy—rule by the people—truly means.

188. On postmodern views of culture, see STEVEN CONNOR, *POSTMODERNIST CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY* (1989). The Sheryl Crow song that begins this essay is symbolic of the merger of high and low culture. Crow based the lyrics of her song on a poem by Bennington College Professor Wyn Cooper, taken from a book of poetry that originally sold less than 500 copies. Crow added a chorus and then set the piece to music, transforming a work of "high culture" into an object of popular consumption. Ajay Sagal, *The Poet and the Rock Star*, L.A. TIMES, Dec. 4, 1994, Magazine Section, at 39.

Casting the Spell:

The New Haven School of International Law

Jurisprudence for a Free Society: Studies in Law, Science, and Policy. By Harold D. Lasswell* and Myres S. McDougal.** New Haven, Conn.: New Haven Press/Martinus Nijhoff Publishers, 1992. Pp. xl, 1588. \$594.00.

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In what must be a virtually unsurpassed record of forbearance, Professors Myres McDougal and Harold Lasswell polished and perfected the huge manuscript that was to become *Jurisprudence for a Free Society* for several decades after it was ready for publication in virtually its present form. Such perfectionism exhibited and confirmed a deep commitment by the authors to the most precise possible formulation of their jurisprudential position. It also represented great confidence that their influence would be exerted in a literal and comprehensive fashion, that readers would be guided quite specifically in their thinking about law through a study of this text. Only time will tell whether this preoccupation with precision that delayed publication more than thirty years was warranted.

McDougal and Lasswell locate their endeavor in an evolutionary process of thinking about law, repudiating naturalism because of its supraempirical claims of validation, and positivism because of its formalistic reliance on logical derivations of legal decisions from abstract doctrines.¹ They perceive American legal realism as an antecedent to their work, admirable for its critical focus on the interplay between rules and social process in the enunciation of law in authoritative form, especially through the operations of appellate courts.² Indeed, the McDougal and Lasswell undertaking can be regarded as converting the core insight of legal realism into a comprehensive framework of inquiry, including the provision of a normative rudder—the eight constituent values of a free society dedicated to the promotion of human dignity—by

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1. See 1 HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY* 212–17, 220–23, 231–35, 236–42 (1992) [hereinafter *JURISPRUDENCE*].

2. 1 *id.* at 249–67.

which to assess the relative merits of opposing lines of argument and analyses of factual circumstances.³

McDougal and Lasswell thus offer a jurisprudence that breaks radically from the positivism of John Austin and Hans Kelsen, viewing law not as the command of the sovereign⁴ or—in the more contemporary formulation of H.L.A. Hart—as the product of some rational “rule of recognition,”⁵ but rather as the end result of an authoritative decision-making process.⁶ For scholars and policymakers, McDougal and Lasswell’s configurative jurisprudence offers the promise of a rigorous approach to decision, as well as one embedded in social context. By following the steps set forth, McDougal and Lasswell argue that a scientifically grounded answer to any given policy problem may be reached that is likely to promote the common interest in achieving a world order founded on fundamental principles of human dignity.⁷

As part of this endeavor, McDougal and Lasswell emphasize the distinction between “the observational standpoints of the scholar and decision maker,” with respect to “enlightenment, as well as . . . decision.”⁸ The stress on this distinction is explained primarily by a presumed difference in orientation. The scholar is thought to be preoccupied with aggregating the knowledge relevant to reaching the most informed decision, while the decision maker is conditioned by the dimension of power. As McDougal and Lasswell put it, the decision maker—unlike the scholar—is constrained by “the making of effective choices in conformity with demanded public order.”⁹ Without such a distinction, it becomes impossible for the scholar to do that part of her job that involves “appraising the rationality” of legal events “in terms of community interest of either claims or decision.”¹⁰

The other side of this search for a better jurisprudence is to ground it in policy science properly conceived: in essence, empirical knowledge analyzed by reference to purposive outcome. McDougal and Lasswell express their outlook as follows: “Science is sometimes said to be ‘value free’; and yet the most obvious fact about policy is that it is value oriented, since policy is only intelligible when it is seen as a deliberate search for the maximization of valued goals.”¹¹

3. This framework is the work of the entire two volumes, but its nature is usefully summarized at several points. *See, e.g.*, 1 *id.* at xxi–xxvii; 2 *id.* at 725–58.

4. *See* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 11 (Weidenfeld & Nicolson 1954) (1832); HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 30–31 (Anders Wedberg trans., Legal Classics Library 1990) (1945).

5. H.L.A. HART, *THE CONCEPT OF LAW* 97 (1961).

6. 1 *JURISPRUDENCE*, *supra* note 1, at 24–25.

7. 1 *id.* at 34–36.

8. 1 *id.* at 17, 18–24.

9. 1 *id.* at 18.

10. *Id.*

11. 1 *id.* at 16.

Another take on the McDougal and Lasswell enterprise is that its aims are primarily pedagogical rather than policy-oriented. Their preoccupation with legal education is expressed by both their dedication "To Our Students," and their first published effort *Legal Education and Public Policy: Professional Training in the Public Interest*, reprinted as an Appendix to their jurisprudence.¹² There is no question that the approach they advocate is more contextual, interdisciplinary, processive, systematic, and visionary than the standard emphases on legal reasoning and fact/law analysis characteristic of the way law mainly was (and is) being taught in American law schools. In some sense, McDougal and Lasswell conceive of legal education less in terms of vocational training and more as a means of producing enlightened citizens capable of understanding the issues of the day as a struggle to realize the values of human dignity. Thus, they seek through their jurisprudence a dynamic of political engagement needed to achieve and sustain a free society.

Despite the huge delay in publication, this mammoth work remains "unfinished." Harold Lasswell, who died in 1978, had evidently planned to expand and document substantially the chapters for which he took primary responsibility.¹³ These constitute the bulk of the second volume. And more surprisingly, despite a long prepublication process that included numerous reconsiderations of how to formulate this or that dimension of the overall orientation, the work as published has a dated quality arising partly from the authors' failure to refer in the text or footnotes to the major scholarly work or historical developments of the last twenty-five years. It poses a question for reader and reviewer. Why was this mystifying preoccupation with exactitude, which was responsible for the long deferral of publication, coupled with an unwillingness to look up from the manuscript to take account of what others were writing during these years and of what was going on in the world?

My own explanation would be that the core of this remarkable jurisprudential enterprise was conceptual, pedagogical, professional, and scientific, with reference being made to other scholarly work either for polemical purposes (to orient critical arguments)¹⁴ or as a matter of academic decorum (to exhibit a reassuring and professionally proper awareness of other, related work).¹⁵ The documentation, aside from cross-referencing other work

12. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943), reprinted in 2 JURISPRUDENCE, *supra* note 1, at 1265.

13. See 1 JURISPRUDENCE, *supra* note 1, at xxiii.

14. This comment applies generally to the reliance on academic sources throughout this work, and indeed in most of the vast corpus of McDougal's scholarly output. McDougal and Lasswell use some antecedent writing critically to situate their own enterprise, see 1 *id.* at 3-9 nn.1-17, but in the remainder of the text other scholarly work plays virtually no role in the exposition of their theory and its application.

15. For an example of their reference to an assortment of scholarly work without any serious treatment of the positions taken, see 1 *id.* at 177-81. In many footnotes, diverse, even antagonistic, works by a range of authors are simply listed. See, e.g., 1 *id.* at 181 nn.49-52.

proceeding from a kindred, and generally collaborative, viewpoint,¹⁶ adds very little to the essentials of the approach. Updating would have added, at most, little more than an aura of contemporaneity. Similarly with the evolving global setting. Aside from the crucial, and historically (and ethically) appropriate, distinction between democratic and totalitarian public order systems,¹⁷ the authors were not really concerned about depicting empirical levels of reality at a given historical juncture.

Theirs was a remarkable collaboration, noteworthy for its coherence of vision and pedagogical impact. But I shall argue that the jurisprudence is conceptually troubled, and unlikely to survive once the charismatic spell cast by its progenitors has passed.

I. COLLABORATIVE SCHOLARSHIP

It is highly unusual to find distinguished scholars with independent reputations collaborating on works of conceptual magnitude.¹⁸ It is unique to find a work of this sort prefaced by short essays by each author on his sense of his partner in collaboration, a self-consciousness that acknowledges just how special this jointness of endeavor really is. Lasswell begins his essay, entitled "Lasswell on Collaboration with McDougal," with a characteristically engaging remark: "Professor McDougal and I have been able to work together for over thirty years in what must establish a record of sorts for an interdisciplinary team whose members are not shackled together by the love, hate, and duty bonds of matrimony."¹⁹ My own experience with collaborative scholarship has been somewhat opposite, creating some of the bonds, for better and worse, of a mini-marriage. But Lasswell is all business: "The essential point in our collaboration is common purpose and shared expectation about what is to be

16. See, e.g., 2 *id.* at 725–45 nn.1–10.

17. This distinction is powerfully developed and relied upon in Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959), reprinted in MYRES S. McDOUGAL ET AL., STUDIES IN WORLD PUBLIC ORDER 3 (1960) [hereinafter McDOUGAL ET AL., STUDIES].

18. The only important exception in international legal studies is the treatise on international law of Lassa Oppenheim and Hersch Lauterpacht, but even here the collaboration was less a joint scholarly undertaking than Lauterpacht taking over the work of editing later editions of Oppenheim's original treatise. See LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE (H. Lauterpacht ed., 8th ed. 1955); see also W. Michael Reisman, *Lassa Oppenheim's Nine Lives*, 19 YALE J. INT'L L. 255, 268–70 (1994) (describing evolution of treatise). Although prodigious, the effort was essentially doctrinal and informational, given that the treatise's positivist jurisprudential frame was taken as fixed. For another major collaboration, see MORTON A. KAPLAN & NICHOLAS DEB. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW (1961).

19. 1 JURISPRUDENCE, *supra* note 1, at xxxv. He concludes his comments in the same vein:

In some collaboration the partners keep together by multiplying side-activities. They cultivate big game fishing, yachting, karate, or opera. McDougal and I have been so absorbed in the central tasks the re-enforcements have been superfluous. Our collaboration has required no care and feeding after hours. How long will our collaboration last? As long as we do.

1 *id.* at xxxvii. And so it did! But, perhaps, a little more care and feeding would have made the process even more satisfying, or at least so it seems to me.

done. . . . The aim is to show how a comprehensive approach to the role of knowledge in society generates a jurisprudence that furthers self-appraisal and innovation in systems of public and civic order."²⁰

Lasswell also tells us about the interplay of the collaborators' interests and orientations, including his preference for working papers in contrast to McDougal's inclination to rely on exhaustive outlines and critiques of preliminary drafts as a way of producing by stages a manuscript. Lasswell also takes note of McDougal's "furious tenacity" and his deployment of an "intellectual bulldozer" to remove from the path of inquiry "traditional modes of thought."²¹ And Lasswell celebrates difference, perhaps most tellingly in terms of intellectual style: "McDougal loves verbal combat, especially in the frame of a prescriptive system and an appellate court. So far as I am concerned, most combat is boring and time-wasting. My preference is for inquiry into factual causes and consequences."²²

Lasswell's inquiring mind was always pushing back the frontiers of knowledge in relation to the social sciences. He recognized early in his career the implications for knowledge of psychoanalysis and psychological self-scrutiny,²³ of modern communications and the manipulation of information as a dimension of power,²⁴ and of the relevance of polling and sampling techniques to politics in large, contemporary democracies.²⁵ Such social science perspectives, when filtered through McDougal's more focused preoccupation with law (conceived as the processes of authoritative decision making), give credence to McDougal and Lasswell's joint claim to provide a comprehensive framework for inquiry into the interface between law and policy.

McDougal's assessment of Lasswell is more sober, and extravagantly celebratory. McDougal praises Lasswell's achievement as the founder of what "is now widely known, as 'the policy sciences,'"²⁶ and his specification in empirical terms of the values decision makers should rely upon to identify preferred policies in all arenas in which they must act authoritatively. By

20. 1 *id.* at xxxv.

21. 1 *id.* at xxxvi.

22. *Id.*

23. See the path-breaking books HAROLD D. LASSWELL, *POWER AND PERSONALITY* (1948); HAROLD D. LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* (1930); see also HAROLD D. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (1935).

24. See HAROLD D. LASSWELL, *PROPAGANDA TECHNIQUE IN THE WORLD WAR* (1927); HAROLD D. LASSWELL, *The World Revolution of Our Time*, in *WORLD REVOLUTIONARY ELITES* 29 (Harold D. Lasswell & Daniel Lerner eds., 1965) [hereinafter Lasswell, *World Revolution*].

25. Lasswell first developed this line of thought in his early writings. See HAROLD D. LASSWELL, *THE ANALYSIS OF POLITICAL BEHAVIOR: AN EMPIRICAL APPROACH* 224-34 (1948). He argued that survey research was essential to understanding governmental operations and encouraging the development of democratic and responsible governments. He was also aware, however, of the danger posed by the development of "communications professionals." See HAROLD D. LASSWELL, *ON POLITICAL SOCIOLOGY* 267-78 (1977).

26. 1 *JURISPRUDENCE*, *supra* note 1, at xxx.

focusing on these values, decision makers are able to promote and develop in practice a "jurisprudence for a free society" (that is, a framework expressing an underlying commitment to "the basic values of human dignity").²⁷ McDougal also emphasizes Lasswell's insistence on applying a multidisciplinary array of perspectives, thereby aggregating knowledge being accumulated by specialists in all fields that appear constitutive of the behavioral domains subject to legal constraint and guidance.²⁸

This stress on the collaborative nexus seems warranted, reflecting its comparative rarity as well as the importance attached to its exposition by McDougal and Lasswell in their quite revealing cross-portraits of one another. It also bears on a paradoxical aspect of the resultant jurisprudence, and its distinctive web of influence. On one side is the penchant for Lasswellian taxonomies, long lists of complex items to be included in the comprehensive mapping of what a policy adviser or policymaker should consider and do.²⁹ On the other is the intensely personal McDougalian approach, with the sensitivity of a local politician to the way the world works.³⁰

In one crucial respect, the McDougal and Lasswell orientation is richer and more challenging than what appears in published form. Lasswell was very much an amateur, yet highly skilled, psychoanalyst, alert above all to what was concealed from conventional understanding in unconscious motivations and instinctual drives; McDougal learned from this, and built upon his own past in a rural northern Mississippi county where his father, a country doctor, allegedly could routinely deliver 50,000 votes on election day. It was McDougal's love of people and of helping his students gain access to power and vocational success that brought him the greatest visible satisfaction, and exhibited his "other" sense that power was mainly about human relations, wheeling and dealing, the reciprocal sense of getting things done for others and thereby engendering feelings of gratitude and loyalty.

II. CASTING THE SPELL: PROPAGATING THE IDEAS OF THE NEW HAVEN SCHOOL

Conjectures about the wider web of influence and impact may seem remote from a Book Review, but arguably not in relation to the McDougal and

27. See 2 *id.* at 737-41.

28. McDougal writes in his prefatory note on Lasswell:

A distinctive emphasis in Lasswell's orientation to problem-solving is grounded in the wisdom that every discipline can provide methods and insights which may be of use to those who can use and/or understand them. Hence, his injunction to become multidisciplinary, and no one heeded this advice better than Lasswell himself.

1 *id.* at xxxii.

29. See, e.g., 2 *id.* at 741-58 (providing clarification of values); 2 *id.* at 960-72 (offering recommended approach to study of judicial decisions).

30. McDougal does not express this highly emotional, personalized style in his written work, but it is a staple of his vivid oral performances and of his working style.

Lasswell jurisprudence. Their jurisprudence, its potency and its limitations, owe as much to personal style as to intellectual attributes. McDougal and Lasswell's jurisprudential publication—produced over a period of decades—was paralleled by a pedagogical process that sent forth influential students from the Yale Law School to all corners of the country and the world forever imprinted with the law, science, and policy approach.

Indeed, the McDougal and Lasswell framework has had more influence in Third World countries than any other American jurisprudential perspective—a surprising result given the founders' penchant for applying their theory in justification of U.S. foreign policy.³¹ This truth illustrates the power of the framework to structure decisions whatever the observational stance of the user. It is also a tribute to McDougal's extraordinary missionary gift as an engaged teacher. The scholars and practitioners influenced by the approach invariably are former students. I remember being dazzled as a student by Mac's seemingly limitless patience with foreign graduate students whose English intonation made their speech incomprehensible to me. Somehow, Mac listened carefully enough to create bonds that endured over great distances and for decades, giving individuals who were then anonymous students that experience of dignity in concrete personal encounter that the jurisprudence promised at the level of social and political intercourse.³²

What is more, unless one was actually in residence as a student or visiting scholar, the spell was not cast. The weight of impact depended on the existential experience of teacher, text, and pupil in the Yale Law School milieu. My view is that *A Jurisprudence for a Free Society* will not be widely read or relied upon, except by those who were directly exposed to the pedagogic spell cast by McDougal and Lasswell's special variant of enchantment. Why? The text on its own is too idiosyncratic and demanding to engage general readers, and requires excessive effort to achieve the practical purpose of promoting a useful and ethically attractive approach to the place of law in the policy process.

Can the disciples sustain the vision of the founders? It remains to be seen, but I doubt it. There is to be sure an Institute for the Policy Sciences based in New Haven, which brings the faithful together annually at their own expense for several days of stimulating discussion within the ambit of the McDougal and Lasswell jurisprudence, and is administratively directed by a gifted

31. Perhaps the most impressive scholarly assessment of McDougal and Lasswell's contribution by a Third World author is that of B.S. Chimni in a long discussion that mixes appreciation and criticism. B.S. CHIMNI, *INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES* 73–145 (1993). Chimni's book is one of the few that tries to assess the utility of alternative approaches for the study of international law and world order.

32. I omit reference to Lasswell here because he did not share this side of the teaching impact, to the best of my understanding.

interpreter, Andrew Willard, a scholar of independent importance.³³ As well, the Yale law faculty includes McDougal's semi-anointed successor, Michael Reisman, himself a remarkably dedicated, wide-ranging, and talented adherent, whose own scholarly achievement has achieved worldwide recognition and whose teaching commitment has built a loyal following.³⁴ Whether Willard and Reisman can do for the words of McDougal and Lasswell what Peter and Paul did for the message of Jesus is, of course, a tall order, and not one that appears to be their single-minded scholarly purpose.

Yet all is not lost even if the primary line of influence cannot perpetuate itself beyond the successor generation. The jurisprudence's astonishing range of scholarly applications is likely to provide the most resounding vindication of the heroic efforts made by McDougal and Lasswell throughout their long, productive careers.³⁵ On this secondary level of influence, writers on almost any topic of significance in international law can benefit from and are likely to keep consulting the McDougal treatment of broad subject-matter sectors. Scholars will find reference to the configurative approach useful both because it provides a rich appreciation of the nature of international law in relation to any substantive concern, and because a comprehensive exploration of the multi-dimensionality of contested behavior in light of expectations about the application of legal authority is likely to be useful in evaluating alternatives. Even here there are problems. The massiveness of the tomes on specific topics makes their revision a daunting task, and yet unless the unfolding world and its law enterprise is incorporated, the scholarly work, despite its theoretical merits, will soon appear superseded by time. Here, I think a conscious effort to stimulate, and if necessary subsidize, the processes of revision would be both intrinsically rewarding and the most promising way to keep the McDougal and Lasswell jurisprudential torch burning in the decades ahead.

What I have written in the prior paragraph could be read as implying that the configurative jurisprudence is superfluous, or worse, a kind of gigantic failure. Not at all. The jurisprudence is the culmination and keystone of many

33. See *INTERNATIONAL INCIDENTS* (W. Michael Reisman & Andrew R. Willard eds., 1988); Andrew R. Willard, *Incidents: An Essay in Method*, in *INTERNATIONAL INCIDENTS*, *supra*, at 25; see also W. Michael Reisman & Andrew R. Willard, *The World Community*, 21 U.C. DAVIS L. REV. 807 (1988).

34. Professor Reisman has been a prolific scholar, exerting influence on a wide range of topics relevant to international law. In addition to the work cited in the previous note, and to his collaborative work with McDougal, among Reisman's most significant contributions are W. MICHAEL REISMAN, *NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS* (1971) and W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION* (1992). In many respects, since Lasswell's death Reisman has been McDougal's most significant collaborator, especially on matters relating to the constitutive process of governance in international political life. The most important of this writing is collected in MYRES S. MCDUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS* (1981).

35. See 1 *JURISPRUDENCE*, *supra* note 1, at xxiv-xxvi nn. 1-5 (listing of principal works); see also Frederick S. Tipson, *Bibliography of Works by and Relating to Myres S. McDougal*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDUGAL* 579 (W. Michael Reisman & Burns H. Weston eds., 1976) [hereinafter *TOWARD WORLD ORDER AND HUMAN DIGNITY*].

disparate scholarly extensions and applications. Without it there would be something missing of a fundamental character, a cohering overall framework for analysis and prescription. Again, my conclusion is paradoxical. The jurisprudence is an extraordinary part of the overall achievement, yet it will not work by itself without the living presence of its two larger-than-life architects and charismatic disseminators.

III. A CRITIQUE OF THE JURISPRUDENCE³⁶

The great contribution of the McDougal and Lasswell jurisprudence is that it provides an orientation toward law in any context, a coherent way of thinking that is more systematic than alternatives, an approach that if followed, or even approximated, assures a comprehensive and intellectually responsible treatment of any complex problem or issue area. The impressive corpus of scholarship by McDougal and his many collaborators on specific topics confirms this claim, as well as its cautionary corollary: Don't expect to overcome discretion, bias, or interpretative perspective by adopting this (or any other) approach.³⁷ In fairness, McDougal and Lasswell acknowledge this limitation on their approach, at least in the abstract. They claim only that one must be as self-conscious as possible about one's observational perspective, and as systematic and complete in assessing policy choices as the current state of available knowledge allows.³⁸ On the matter of observational clarity, greater concreteness would have made their position both more insightful about the deformations of knowledge produced by the biases of power elites and more persuasive, by taking into account differences of gender, race, class, sexual orientation, and culture. There is in this vast work no discussion of feminist, gay and lesbian, indigenous peoples', or black "readings" of international law. This is a serious omission given the powerful critiques of hegemonic discourses of various sorts that emerged in the 1980's and 1990's.³⁹

36. Prior assessments of McDougal and Lasswell's jurisprudence include CHIMNI, *supra* note 31, at 73-145; JULIUS STONE, *VISIONS OF WORLD ORDER* 20-32 (1984); Oran R. Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, 66 AM. J. INT'L L. 60 (1972); Gerald Fitzmaurice, *Vae Victis or, Woe to the Negotiators!: Your Treaty or Our "Interpretation" of It?*, 65 AM. J. INT'L L. 358 (1971) (reviewing MYRES S. MCDUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967)). For my own earlier responses to McDougal and Lasswell, see RICHARD A. FALK, *LEGAL ORDER IN A VIOLENT WORLD* 80-96 (1968); Richard A. Falk, Book Review, 10 AM. J. COMP. L. 297 (1961).

37. What can be expected from a scholar or decision maker is to clarify her or his "observational framework." See 1 JURISPRUDENCE, *supra* note 1, at 17-19. It is a matter of acknowledgment of perspective, not its transcendence, although an appropriate "scientific" view of knowledge reduces to a minimum such distorting impacts. Impressively, McDougal and Lasswell assert the relevance of psychoanalysis to probe the domain of unconscious bias and manipulation. See 2 *id.* at 911-41.

38. See 1 *id.* at 23.

39. See, e.g., SPIKE PETERSON & ANNE S. RUNYAN, *GLOBAL GENDER ISSUES* (1993); J. ANN TICKNER, *GENDER IN INTERNATIONAL RELATIONS* (1992); Howard R. Berman, *Perspectives on American Indian Sovereignty and International Law, 1600 to 1776*, in *EXILED IN THE LAND OF THE FREE* 125-88 (Oran Lyons et al. eds., 1992); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J.

Moreover, it is not clear exactly what McDougal and Lasswell claim for their jurisprudential stance, whether the essential claim is one of sensitizing scholars and decision makers to the performance of their roles in a more efficient manner, or something more. This second, stronger claim would be that the jurisprudence could effect a series of outcomes or decisions that were more persuasively aligned with the realization of the values of human dignity than outcomes and decisions made impressionistically or on the basis of rival jurisprudential stances.⁴⁰ The weak goal of sensitizing students and policymakers seems attainable, provided the effort entailed is not so overwhelmingly complex as to render the process impracticable. It is not surprising that the larger goal, the adoption of the jurisprudential orientation as method as well as perspective, has been limited to the scholarly community (although arguably decision makers exposed to the approach might in practice apply law more responsively to the value demands at stake). Even among scholars, as noted earlier, the orbit of influence has been restricted to those who have directly assimilated the approach through a period of dedicated study within the charismatic pedagogical reach of McDougal.

The strength of the McDougal and Lasswell framework as a guide to thought therefore needs to be separated from the more problematic claim that with such a supposedly scientific purchase on knowledge it will be possible to march in time while advancing toward the posited goal of "a free society" embodying ever more fully the values of human dignity. The jurisprudence as set forth by McDougal and Lasswell is explicitly designed to help academic advisers and policymakers use law as a specialized instrument in a wide variety of social and political arenas for pursuing these normative goals.⁴¹ In my view, this part of the enterprise fails, and is doomed to failure by its inherent nature. This failure is expressed by the inability of honest, intelligent, morally sensitive, and politically moderate individuals steeped in the New Haven approach to agree in the domain of policy application. Reliance on the McDougal and Lasswell orientation tends, if anything, to accentuate policy divergences as opposed viewpoints each claim "scientific" grounding for their

INT'L L. 613 (1991); Lurence R. Helfer, *Lesbian and Gay Rights as Human Rights*, 32 VA. J. INT'L L. 157 (1991); Henry J. Richardson III, *The Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. 42 (1993); see also HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES chs. 8-14 (Abdullahi Ahmed An-Na'im ed., 1992).

40. It is integral to McDougal and Lasswell's project to promote a world order based on the values of human dignity and to avoid the challenges associated with either totalitarianism or with what they label "a Garrison-Prison World." See 2 JURISPRUDENCE, *supra* note 1, at 986-87. They express these wider ambitions most forcefully in Chapter 4. See 2 *id.* at 973-79. McDougal and Lasswell also express a conviction that a policymaker with authority can facilitate these ends by improving the intellectual foundations of the decision-making process along the lines they propose. See, e.g., 2 *id.* at 1131-33.

41. See, e.g., 1 *id.* at 203-326 (analyzing functions of legal policymakers); 1 *id.* at 1131-1262 (clarifying intellectual tasks to be performed by legal academics and policymakers).

positions.⁴² As the Chinese proverb goes, "Two persons in the same bed have different dreams."

Indeed, in other writing and speaking—especially that of McDougal—devoted to discussion of controversial policy issues (how to interpret the U.N. Charter in light of Soviet obstructionism; how to appraise the legality of hydrogen bomb tests in the Pacific; how to evaluate contested Cold War interventions in Vietnam or Nicaragua), the results, although elaborated in alleged relation to the jurisprudential frame, had an uncomfortable tendency to coincide with the outlook of the U.S. government and to seem more polemically driven than scientifically demonstrated.⁴³

Finding myself over the years in the odd position of adhering generally to the McDougal jurisprudential outlook, yet consistently in sharp disagreement on policy applications,⁴⁴ I tried on several occasions to convince my erstwhile mentor that he misunderstood, and hence misapplied, his own theory. Of course, such a tack involved hubris on my part, but Mac, with his exemplary loyalty to former students and his unfailing offstage humor, seemed, or at least so I imagined (perhaps vainly), almost to accept this effort to deny any claims of policy "truth" deriving from his framework of inquiry. In any event, whatever McDougal did or didn't believe, the effort to resolve policy controversy by scientific inquiry has not succeeded. Opposing lines of interpretation by individuals of comparable intelligence and virtue can reach utterly opposed policy conclusions on controversial matters even as they acknowledge their indebtedness to the McDougal and Lasswell jurisprudence.⁴⁵

42. Consider, for example, the debates on the Vietnam War by two "followers," John Norton Moore and myself, which appeared initially in the pages of *The Yale Law Journal*. See discussion and sources cited *infra* note 44.

43. Some of the most important early work along these lines was collected in MCDUGAL ET AL., *STUDIES*, *supra* note 17.

44. These disagreements often surfaced in oral encounters at professional occasions or in private conversation, and reached their peak of intensity during the decade of debate about the legality of U.S. participation in the Vietnam War. McDougal's views were never, as far as I know, developed systematically, although he generally affirmed the position supporting U.S. government claims developed by his student, John Norton Moore. See Myres S. McDougal, *Foreword* to JOHN NORTON MOORE, *LAW AND THE INDO-CHINA WAR* at vii, xi (1972); see also Myres S. McDougal, *Foreword* to ROGER H. HULL & JOHN C. NOVOGROD, *LAW AND VIETNAM* at vii-ix (1968). My own orientation was highly critical of U.S. official claims. See, e.g., 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 397-400 (Richard Falk ed., 1968).

The main issues in controversy between Professor Moore and myself were debated in a series of articles published in the pages of *The Yale Law Journal*. See Richard A. Falk, *International Law and the United States Role in the Viet Nam War*, 75 *YALE L.J.* 1122 (1966); John Norton Moore, *International Law and the United States Role in Viet Nam: A Reply*, 76 *YALE L.J.* 1051 (1967); Richard A. Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, 76 *YALE L.J.* 1095 (1967).

Another example of sharp policy disagreement concerned the U.S. Government's insistence on testing nuclear weapons on the high seas and in the atmosphere. See Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective*, 64 *YALE L.J.* 648 (1955), reprinted in MCDUGAL ET AL., *STUDIES*, *supra* note 17, at 770-72.

45. For instance, the published work of two prominent McDougal protégés, Michael Reisman and Burns Weston, diverges on many crucial issues of policy controversy. Compare W. Michael Reisman,

The jurisprudential enterprise embodies an Enlightenment confidence that science produces over time a stream of advances in knowledge, and the further conviction that if knowledge is properly put to the task of the realization of values, the results will lead inevitably to human betterment.⁴⁶ This unconditional confidence in the *normative* benefits of knowledge does give the McDougal and Lasswell jurisprudence a slightly old-fashioned tone. In this heady "postmodern" era there is widespread skepticism abroad about the generalizability of knowledge relevant to social issues, and a far greater degree of deference to a range of different readings. To posit a comprehensive framework of the McDougal and Lasswell variety is to suppress difference, and to suppose that rational value categories can achieve objective knowledge. True, McDougal and Lasswell recommend self-scrutiny in relation to observational standpoint, but they do so to minimize the intrusion of bias, whereas the postmodern position is that there is no way to transcend the particularities of perspective, and hence, what is called "bias."

In cultural terms, the McDougal and Lasswell effort is thus situated in the modernist attempt to retain human access to unconditional truth by supplanting religion with science, in this instance social science.⁴⁷ Of course, McDougal and Lasswell (and their many followers) invoke science for the sake of "values," as derived from the experience of constitutional democracies in the non-socialist West.⁴⁸ To some extent, McDougal and Lasswell anticipate the end-of-history line taken by Francis Fukuyama through their insistence that there is one and only one general path that has the capacity to achieve a free society.⁴⁹

McDougal and Lasswell had an early and historically prophetic grasp on the fundamental ideological struggle of the last half-century, and they resolved

Deterrence and International Law, 4 N.Y.L. SCH. J. INT'L. & COMP. L. 339 (1983) (arguing that both expectations of politically relevant actors and control intention—evidenced by proliferation of nuclear weapons in decentralized system—indicate effective legality of nuclear armaments) with Burns H. Weston, *Nuclear Weapons and International Law: Prolegomenon to General Illegality*, 4 N.Y.L. SCH. J. INT'L. & COMP. L. 227 (1983) (arguing that nuclear weapons are incompatible with fundamental precepts of international law); see also TOWARD WORLD ORDER AND HUMAN DIGNITY, *supra* note 35 (illustrating wide range of views associated with McDougal and Lasswell's approach).

46. This epistemological confidence in the fruits of scientific inquiry is a pervasive attribute of McDougal and Lasswell's enterprise, briefly specified in the Preface. See 1 JURISPRUDENCE, *supra* note 1, at xxii–xxiii.

47. For an analysis of the complex transition to modernism, see generally STEPHEN TOULMIN, COSMOPOLIS: THE HIDDEN AGENDA OF MODERNITY (1990).

48. See 2 JURISPRUDENCE, *supra* note 1, at 725–41, 1017–31, 1131–54; see also MCDUGAL & REISMAN, *supra* note 34; MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980); LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 3–22 (1989).

49. See FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN at xi (1992). In fairness, McDougal and Lasswell give an isolated acknowledgment that it is at least theoretically possible for a socialist schema to be consistent with the values of human dignity, even if the empirical record fails to posit a single supportive instance. In the course of the chapters attributed primarily to Lasswell, they suggest that "[i]t is speculatively conceivable that socialist economies in advanced industrial societies and in big states can learn how to maintain high levels of economic progress by strategies other than maintaining high levels of terror." 2 JURISPRUDENCE, *supra* note 1, at 1147.

it in favor of the West in a manner that has been abundantly validated but that was by no means self-evident when initially articulated.⁵⁰ There is an element of *mea culpa* involved here; I tended to regard the ideological struggle as far less clear-cut while it was unfolding, seeing serious flaws in the value commitments of both systems.⁵¹ As well, my fear that the Cold War would generate a catastrophic World War III made me receptive to the project of constructing a world order based on coexistence that transcended the ideological divide while respecting a diversity of views within the antagonistic blocs.⁵² In retrospect, given the oppressiveness and ineptitude of the Soviet system, ruining everything and everyone it touched, I now regard the ideological partisanship of McDougal and Lasswell as far preferable to my posture of nonpartisan criticism and emphasis on war avoidance.⁵³ This clarity of commitment informs their jurisprudence at every stage, giving it both a historical relevance and rootedness, and an ahistorical validation of great significance—for the process of democratizing, realizing the values of a free society, is without end. Admitting this, which I gladly do, is not, however, an acquiescence in their claim that values and policy can be put on a scientific foundation in the sense of objective knowledge generative of “correct” policy choices.⁵⁴ There are two interrelated problems here. If scientific means objective, then it cannot be achieved in policy domains. If scientific is more adequately and contemporaneously understood as encompassing varying degrees of chaos, uncertainty, irreducible complexity, and indeterminacy, then McDougal and Lasswell’s invocation of science is misleading—for science in this sense does not generate determinate answers to policy problems.⁵⁵

50. See McDougal & Lasswell, *supra* note 17, at 1–6. Note especially their criticisms of false universalism of the sort posited in C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* (1958). McDougal & Lasswell, *supra* note 17, at 1 n.1, 2.

51. See, e.g., RICHARD FALK, *THE END OF WORLD ORDER* 3–23, 35–69, 89–101 (1983); RICHARD FALK, *THE PROMISE OF WORLD ORDER* 1–4 (1987).

52. See RICHARD A. FALK, *A STUDY OF FUTURE WORLDS* 150–59 (1975); RICHARD A. FALK, *THIS ENDANGERED PLANET* 309–12 (1971). Although this anxiety has not been validated, it is a matter of unresolved (and, likely, unresolvable) conjecture as to how great risks of general war were at various points of crisis in the Cold War; the “lessons” of the past are always overdrawn, as occurrences that might have happened, or almost happened, are essentially neglected in favor of what did happen.

53. Arguably, the excesses of both positions were avoided by the encounter between them, producing a desirable mutual muting that kept the focus on the stakes of struggle, but also on its risks.

54. McDougal, while right on the fundamental split between public order systems, may still be irresponsible with respect to the advocacy of given interventions in foreign societies; what would it mean to be irresponsible? In his jurisprudential terms, it would mean not clarifying the bias of the observer, failing to grasp the antecedent grounds of the conflict, inadequately assessing the prospects for success, or refusing to think through the implications of alternative lines of policy. The best example is probably McDougal’s support for the U.S. role in the Vietnam War. See *supra* note 44. Beyond this, the complexity of reality makes the resolution of choice opaque from the perspective of the rational, inquiring mind; otherwise, every split judicial decision would be an expression of mental incompetence or corruption.

55. The traditional image of scientific rationality is based on the discovery of “laws” that explain causation in a manner that excludes indeterminacy. The more recent image, while acknowledging the traditional emphasis on predictability, seeks to grasp the social and cognitive importance of degrees of unpredictability arising from unfathomable patterns of complexity and causation. For useful introductory accounts, see JAMES GLEICK, *CHAOS* (1987); STEPHEN H. KELLERT, *IN THE WAKE OF CHAOS* (1993); M.

The collaboration itself also introduced tensions into the jurisprudence. Lasswell's garrison-state hypothesis was one of his most famous conceptualizations: that world political trends were inducing a pervasive militarization of the governing process everywhere, including in the countries of the liberal West.⁵⁶ An outgrowth of Lasswell's work prior to his collaboration with McDougal, the garrison-state hypothesis is somewhat unconvincingly incorporated into the jurisprudence late in the second volume. This hypothesis is not easily reconciled with the ideological bipolarity of a world order that pits totalitarian versus free societies as the essential struggle of our time, a view that anchors the McDougal and Lasswell jurisprudence in the history of the Cold War era. This tension is obliquely addressed deep in the entrails of the McDougal and Lasswell opus, as one of two "constructs" presenting contrasting "images of a terminal state of man."⁵⁷ The other construct, labeled "Construct B. Toward a Universal Public Order of Human Dignity," is a scenario not present in Lasswell's earlier independent work that envisions cumulative progress being achieved in relation to the eight public order values.⁵⁸ While informing readers that they did not "intend to obtrude our estimates of the outcome into the presentation," McDougal and Lasswell went on to say that "we are not sanguine," while regarding neither result as "inevitable."⁵⁹

This fear of pervasive militarization was quite plausible given the persistence of Cold War tensions that imposed a readiness in the nuclear age to wage all-out strategic war at a moment's notice. Lasswell also believed that the techniques of manipulation and coercion available to the modern state would allow total control over territorial space, and that leaders, even in democratic societies, were being driven toward a garrison-prison ethos.⁶⁰ Of course, it is a great relief that this "construct" has not come to pass, although it is also the case that Construct B has not materialized, despite the spread of human rights and democratic values.

Two observations are relevant here. First, the garrison-state hypothesis is more systemic than is the other view of a rivalry between contending public

MITCHELL WALDROP, *COMPLEXITY: THE EMERGING SCIENCE AT THE EDGE OF ORDER AND CHAOS* (1992). For Ilya Prigogine's seminal reimagining of science, see ILYA PRIGOGINE & ISABELLE STENGERS, *ORDER OUT OF CHAOS* (1984). For a useful effort to adapt the understanding of international relations to these perspectives, see JAMES N. ROSENAU, *TURBULENCE IN WORLD POLITICS* 47-66 (1990).

56. See Lasswell, *World Revolution*, *supra* note 24, at 73-77.

57. See 2 *JURISPRUDENCE*, *supra* note 1, at 986. The garrison-state construct is labeled "Toward a Garrison-Prison World." 2 *id.* at 986-1017. Note that the use of the word "man" in this formulation is very anachronistic in relation to normative sensitivities of the 1990's. And this matter of semantic choice cannot be reduced to an issue of "political correctness." There has occurred, despite the "Reagan revolution" and now the "Contract with America," a societal shift in attitude toward gender that affects acceptable language use at this time. I stress this point partly for substantive reasons, but also to reinforce the contention that the jurisprudence as published has a dated quality attributable to its long period of gestation and refinement.

58. See 2 *id.* at 1017-31.

59. 2 *id.* at 986.

60. See 2 *id.* at 991-95.

order systems, but has turned out to be a false alarm. There is not now evident any trend toward an increase in state power vis-à-vis the citizenry. Second, the stress on the coercive capabilities of the state fails to take into account the impact of global market forces on the role and character of the state in the evolving world order. McDougal and Lasswell fail, along with most other work on global trends, to appreciate the vital restructuring impact of economic globalization and regionalization on the nature of the state, including its function in upholding territorial security.

McDougal and Lasswell are sensitive to the significance of power (effective control) considerations in determining legal outcomes, perhaps overly so.⁶¹ Every specialist in international law is confronted by the challenge of irrelevance, namely, that foreign policy is inherently discretionary, that law is either manipulated to rationalize policy or ignored by reference to national interests, and that the failure to realize this has been detrimental to the protection of national interests.⁶² One can read the enormous jurisprudential enterprise generated by the New Haven approach as a gigantic exercise of reassurance, an insistence that if properly understood international law is similar in its essence to other types of law and can guide decision by courts, government officials, and advisers in a manner that is beneficial (in preserving power and furthering values) both for those in authority and for members of the broader community. As expressed by McDougal in the preface, "[t]he jurisprudence for which we searched was one relevant, in its theories and intellectual procedures, for any community, including the global or earth-space community and all its component communities. A jurisprudence which stopped short with a single nation-state could scarcely be adequate in or for an interdependent world."⁶³

I would register two responses, while taking note of the grandiosity implicit in their transcultural claim to provide a jurisprudence that will fit equally well everywhere. Such an attempt has grown more difficult over time, as formerly colonial nations seek economic, cultural, and social autonomy, in

61. McDougal and Lasswell express this sensitivity both by associating law in its essence with effective control—that is, the capacity to translate claims of authority into behavior—and by classifying power as the first of their eight values that together constitute the basis of human dignity and provide the guidelines for the realization of a free democratic society. See 1 *id.* at 147–50, 399–404; 2 *id.* at 941–48; see also Myres S. McDougal, *Law and Power*, 46 AM. J. INT'L L. 102, 109–12 (1952).

62. For a classic statement of this claim, see GEORGE F. KENNAN, *AMERICAN DIPLOMACY 1900–1950*, at 95–100 (rev. ed. 1984). This challenge is often suppressed in more legalistic approaches to international law, but it is always lurking in the background, haunting the claim that governments should defer to international law in the implementation of foreign policy. I have discussed this theme in several settings. See RICHARD A. FALK, *A GLOBAL APPROACH TO NATIONAL POLICY* 29–40 (1975); Richard A. Falk, *Law, Lawyers, and the Conduct of American Foreign Relations*, 78 YALE L.J. 919 (1969). See generally LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 31–83 (1968); THE RELEVANCE OF INTERNATIONAL LAW (Karl W. Deutsch & Stanley Hoffmann eds., 1968); Dean Acheson, *The Arrogance of International Lawyers*, Remarks Before the Section of International and Comparative Law of the American Bar Association (Mar. 24, 1968), in 2 INT'L LAW. 591 (1968).

63. 1 JURISPRUDENCE, *supra* note 1, at xxii.

addition to political independence. We are only now beginning to realize the postcolonial assertiveness of non-Western societies, as well as the radical unevenness of perception and memory across space and through time that renders suspect all universalist thinking originating in the West.⁶⁴ First of all, the McDougal and Lasswell attempt to provide a universal jurisprudence is the most impressive effort ever made to achieve this result, although its impact outside of international law has been decidedly modest, and this despite Lasswell's eminence as a social scientist.⁶⁵ Second, the jurisprudence's universalist claims are irrelevant to its real achievements as a tool and framework for analysis, and are oblivious to the most serious shortcomings of its orientation for the purpose of assessing and enhancing policy choice with respect to the domain of international law.⁶⁶

By seeking to establish the political credentials of international law as helpful to governments dedicated to the promotion of human dignity, a goal that in practical application has meant defending the contested international initiatives of the U.S. government,⁶⁷ the McDougal and Lasswell approach has often been accused of conflating law with apology for state power.⁶⁸ Perhaps worse is their appeal to existing authority structures and power-wielders as if they were receptive to the promotion of the values of human dignity, ignoring the distorting effects of structures of exploitation, privilege,

64. One dimension of this assertiveness is the rise of inter-civilizational tensions, especially between Islam and the West. In this regard, see Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22; see also OLIVIER ROY, *THE FAILURE OF POLITICAL ISLAM* (1994); Thomas Kamm, *Rise of Islam in France Rattles the Populace and Stirs a Backlash*, WALL ST. J., Jan. 5, 1995, at A1, A6. On the less lethal challenge to Western-guided universalism, see Yoichi Funabashi, *The Asianization of Asia*, FOREIGN AFF., Nov.-Dec. 1993, at 75; Fareed Zakaria, *Culture Is Destiny: A Conversation with Lee Kuan Yew*, FOREIGN AFF., Mar.-Apr. 1994, at 109. The McDougal and Lasswell approach to cultural identity is, in contrast to that of the writers cited, to stress the potential for harmonization, provided only that public order systems are liberal democratic in character. See, e.g., 2 JURISPRUDENCE, *supra* note 1, at 787-803.

65. On the jurisprudence's modest impact outside of international law, see Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81, 85-88 (1991). On Lasswell's eminence as a social scientist, see McDougal's prefatory note "McDougal On Lasswell," and the references cited there. 1 JURISPRUDENCE, *supra* note 1, at xxix-xxxvii.

66. Rosalyn Higgins' adaptation is suggestive of one line of jurisprudential evolution that derives from the New Haven approach. See ROSALYN HIGGINS, *PROBLEMS AND PROCESS* (1994). Her formulation at the end of this fine book imparts its quasi-McDougalian orientation:

International law is a process, a system of authoritative decision-making. It is not just the neutral application of rules. . . . The problem exactly is that various, quite plausible, alternative prescriptions can be and have been argued for. The role of international law is to assist in choice between these various alternatives. . . . International law is a process for resolving problems. And it is a great and exciting adventure.

Id. at 267. At the same time, her substantive discussions are fairly conventional doctrinal expositions without any particular elaboration of the global setting or the policymaking framework.

67. This convergence is evident in the setting of policy application, perhaps most pronouncedly in relation to interventionary diplomacy during the Cold War era, but also on such matters as nuclear weapons tests on the high seas and the interpretation of the U.N. Charter to minimize the role of the Soviet veto. See sources cited *supra* note 44.

68. For critical analysis, see MARTTI KOSKENNIE, *FROM APOLOGY TO UTOPIA 173-78* (1989); Purvis, *supra* note 65, at 83-87; see also Philip Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 815-20 (1990).

and unevenness—although the policymakers and decision-making elites are beneficiaries of such structures, and are generally unaware of such disguised biases. The invocation of human dignity as the foundational criterion of legality covers up the failure to engage in social criticism of a more concrete variety, that brings into view factors of race, class, and gender. Somehow, the workings of the legal system are never tested by critical reflection upon ongoing struggles against a variety of oppressive circumstances and on behalf of those most vulnerable. The McDougal and Lasswell enterprise, for all its vastness, devotes no space to the cartography of suffering and victimization that occurs *within* the sort of public order system, based on the principles of liberal democracy, of which they approve.

IV. SUMMING UP

There is no doubt in my mind that immersion in the McDougal and Lasswell jurisprudence is beneficial from many standpoints: student, scholar, policymaker, and judge. It softens predispositional bias and fills in many of the gaps found in conventional wisdom. As such, it provides an invaluable pedagogic tool that has proven useful, even formative, for several generations of students who have attended the Yale Law School, and then moved on to a variety of careers.

Further, it is a prodigious intellectual achievement. The sheer magnitude of the scholarly endeavor is quite overwhelming. Only a seasoned weightlifter could carry the McDougal and Lasswell corpus. More deeply, the integrity of seeing the world clearly from a single vantage point provides a kind of moral certification of lifelong dedication to the pursuit of “truth.” Their sustained commitment, especially given the subject matter, stands in contrast to academic work that follows trends or headlines and adds up to nothing in the end. Whatever else, McDougal and Lasswell have established a clearly contoured presence in writings about law, especially international law.

Will the McDougal and Lasswell orientation provide the basis for future endeavors to construct a jurisprudence for free societies? I think here its role will be restricted. Their enterprise too fully embodies the modernist legacy of the Enlightenment, with its particular turn toward universal science and reason, a meta-narrative of society and humanity that implicitly and operationally situates the West at the center.⁶⁹ In this regard, the absence of critical

69. For varying strands of this postmodern critique of rationality and the ordered worldview of modernity, see DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 10–38 (1989); JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION* at xxiii–xxv (1984); JOHN MCGOWAN, *POSTMODERNISM AND ITS CRITICS* 14–16, 19–21 (1991); *see also* TOULMIN, *supra* note 47, at 192–98, 206–09 (arguing new phase of modernity will witness shift in importance from nation-state to sub-, trans-, and multinational levels); R.B.J. WALKER, *ONE WORLD/MANY WORLDS* 57–63 (1988) (postmodern approach to world order; arguing “critical social movements” must emerge to establish connections across time and space); CAROLYN MERCHANT, *THE DEATH OF NATURE* at xvi–xviii (1980)

perspectives reflecting the interests of excluded constituencies (women, non-Westerners, the poor, indigenous peoples) is a fatal flaw. A free society is most likely to emerge from the interplay of difference and sameness, a dialectic of sorts.⁷⁰ McDougal and Lasswell, despite their fabled openness to a diversity of perspectives and participants, cannot accommodate such radical questionings of the established order. Also, they do not help us achieve an identity as political actors or citizens based on the possibilities of the future (community, time), rather than the necessities of the present (territory, space).⁷¹ A jurisprudence of human dignity would have to include the training needed to reconceptualize citizenship, moving it by stages to encompass an imagined future (that is, a time dimension) as well as to infuse traditional territorial affiliations of citizenship (that is, a space dimension) with world order values.⁷²

(feminist and ecological critique of mythos and practice of rationalist science).

70. For a challenging formulation of difference as constitutive, see TRINH T. MINH-HA, *WOMAN, NATIVE, OTHER: WRITING POSTCOLONIALITY AND FEMINISM* (1989).

71. For some discussion along these lines, see generally RICHARD FALK, *EXPLORATIONS AT THE EDGE OF TIME: THE PROSPECTS FOR WORLD ORDER* (1992).

72. I have elaborated on this assertion in two recent published discussions. See Richard Falk, *Democratizing, Internationalizing, and Globalizing*, in *GLOBAL TRANSFORMATION* 475-502 (Yoshikazu Sakamoto ed., 1994); Richard Falk, *The Making of Global Citizenship*, in *THE CONDITION OF CITIZENSHIP* 127, 139-40 (Bart van Steenberg ed., 1994). Also relevant are various claims that to counter the detrimental impacts of global market forces it is necessary to protect territorial or social interests by adopting new tactics and strategies. Robert Reich has written in this vein, encouraging what he calls "positive economic nationalism" as a constructive reaction to the gravitational pulls of economic globalism. See ROBERT B. REICH, *THE WORK OF NATIONS* 301-15 (1991).