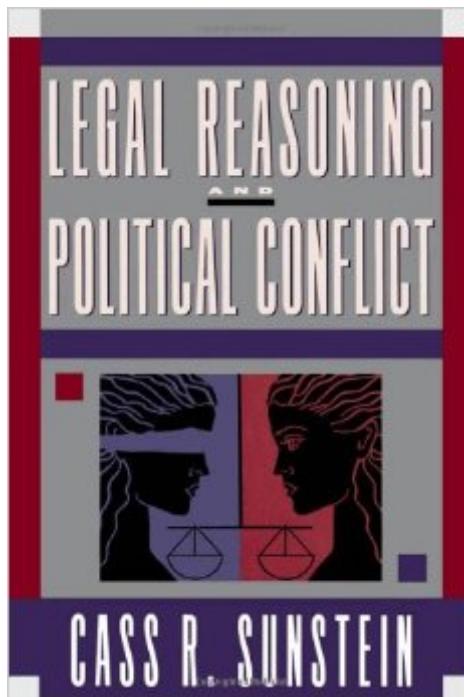


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# Legal Reasoning And Political Conflict



## Synopsis

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

the Constitution or the spell cast by the revolutionary Warren Court, Cass Sunstein writes with grace and power, offering a striking and original vision of the role of the law in a diverse society. In his flexible, practical approach to legal reasoning, he moves the debate over fundamental values and principles out of the courts and back to its rightful place in a democratic state: the legislatures elected by the people.

## **Book Information**

Paperback: 240 pages

Publisher: Oxford University Press (February 26, 1998)

Language: English

ISBN-10: 0195118049

ISBN-13: 978-0195118049

Product Dimensions: 6.1 x 0.8 x 9.2 inches

Shipping Weight: 15 ounces (View shipping rates and policies)

Average Customer Review: 4.3 out of 5 starsÂ  See all reviewsÂ (3 customer reviews)

Best Sellers Rank: #616,724 in Books (See Top 100 in Books) #76 inÂ Books > Law > Law Practice > Research #205 inÂ Books > Law > Philosophy #367 inÂ Books > Law > Legal Theory & Systems > Jurisprudence

## **Customer Reviews**

Legal Reasoning, Writing, and Other Lawyering SkillsAn Introduction to Legal Reasoning (Phoenix Books in Law)This book articulates some of the limits on analogical reasoning and also explains the basis of this type of reasoning. Likewise it explains why the basis of such reasoning may well change over time.

Dr. Sunstein is one of the stellar legal minds of our time, right up there with "D" for "Dershowitz". His book is a brilliant treatise on this complex subject. He did not always agree with my point of view, for example he advocates a slower strategy than I would have liked on gay rights issues. That is to say, he agrees with the concept of gay rights, but believes in a gradual approach for achieving them. I mention this to show that, even though I disagree with him, I'm still giving the book 5-stars. Professor Sunstein has obviously worked through his arguments and provoked me to think about these issues in a new and rigorous fashion. This book is a must reading for anyone interested in law, politics and their convergence.

Sunstein's look at America's political process does have some innovative ideas for how to fix some of the problems that he perceives. In this book, he furthers his idea of judicial minimalism, the idea of the least active court. This book is probably only for polished legal scholars.

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