BOOK REVIEW

THE PARTIAL CONSTITUTION OR THE SUNSTEIN CONSTITUTION?

THE PARTIAL CONSTITUTION. *By Cass R. Sunstein.* Cambridge, Massachusetts: Harvard University Press. 1993. Pp. vi, 414.

*Reviewed by David B. Rivkin, Jr.**

Cass Sunstein's *Partial Constitution* is an ambitious book.[1] In a single volume, Professor Sunstein attempts to develop a coherent political theory, emphasizing deliberation and promotion of virtue,[2] and a rather novel constitutional analysis[3] in an effort to provide a comprehensive paradigm for resolving all recent major legal controversies in constitutional law. Sunstein's overview examines such diverse issues as abortion, surrogacy, flag burning, pornography, and government funding of art, police activities and education. Unfortunately, although his political theory is on point in critiquing the state of the American body politic and makes a credible case for the virtues of genuine, reasoned deliberation in the political process, Professor Sunstein fails to explain how his approach would actually function or even how it would solve the problems he identifies.

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1. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993).

2. He denounces an interest-group pluralism paradigm where policies are shaped through political bargaining among diverse interest groups and argues in favor of a "deliberative democracy," which features reasoned dialogue and adoption of governmental policies designed to promote broad societal interests. Indeed, Sustein's emphasis on the promotion of virtue sounds similar to such conservative exponents of the politics of virtue as William Bennett and James Wilson. *See* WILLIAM BENNETT, THE BOOK OF VIRTUES (1993); JAMES Q. WILSON, THE MORAL SENSE (1993). The only critical difference being that, for Sunstein, the main actor instilling virtue is the national government; whereas, for Messrs. Bennett and Wilson, promotion of virtue is primarily the task of the civil society and its institutions, e.g., the family, civic associations, churches, etc.

3. Sunstein argues that the Constitution, in addition to promoting deliberative democracy, requires, above all, governmental neutrality in all decisions and policies. Moreover, because he views all existing societal and economic arrangements as the products of past governmental decisions, Sunstein argues that the government cannot condone existing "partial"/unjust arrangements, any more than it can create new ones.

Moreover, Sunstein's political philosophy loses much of its intellectual appeal when transformed into a set of constitutional imperatives. Elevated to the status of a constitutional requirement, deliberative democracy regrettably becomes a prescription for an all-powerful national government, with particularly vast new responsibilities being assigned to the federal judiciary.

Sunstein's evident disdain for democratic outcomes is also troubling; he argues, for example, that current public preferences are just the product of past governmental decisions and thus ought not to be given much weight. In general, Sunstein's approach would supplant democracy entirely rather than subject it to the few well-delineated exemptions envisioned by the Framers. There is, of course, a vast gulf between delineating, as the Framers did, a few explicit exemptions from democratic outcomes and being prepared, as Sunstein apparently is, to displace them altogether.

Furthermore, while Sunstein's theorizing about such concepts as government impartiality—a principle he views as the overarching imperative underlying any sound statecraft—and status quo neutrality—an allegedly flawed concept which improperly equates governmental neutrality with the preservation of existing unjust political, economic, and social outcomes—is intellectually quite fascinating, neither the text, political philosophy, nor history of the Constitution support his analysis. Ironically, Sunstein's theory—*e.g.*, his approach to constitutional interpretation which is infused with moral values but divorced from the text of the Constitution and his claim that all governmental policies must be subjected to a heightened level of judicial scrutiny—resembles, in several key respects, the writings of such civil libertarians as Professor Stephen Macedo. However, unlike Macedo, who at least evidences the virtue of being *consistent* in advocating the preservation of individual liberty in all areas, whether social, economic or political, Professor Sunstein is disappointingly selective in his approach. He will readily trample upon individual liberty, if necessary, to overturn what he considers to be unjust or inequitable social, economic or political arrangements.

Part II of his book, titled "Applications," is sketchy in its analysis, but predictable in its outcomes.[4] Indeed, it is curious that after reconceptualizing our entire constitutional framework and

4. SUNSTEIN, *supra* note 1, at 195-348.

tradition, Professor Sustein still managed to return home to a rather familiar set of "politically correct" conclusions.

One particular example well illustrates this point. In dealing with such contentious issues as pornography, abortion and surrogacy, Sunstein describes what he terms the two most common schools of thought in this area—the privacy-based school and the public morality school.[5] Instead of advocating one school over the other, Sunstein selectively borrows from both to reach his desired result without explaining why he rejects the remaining part of each school. In the process, he criticizes the familiar and oft-criticized privacy-based justification for the *Roe* decision, relying instead on the combination of equal-protection arguments and his own blend of anti-status-quo baseline rhetoric.

Thus, under Sustein's Constitution, the government cannot impair women's access to abortion, but it can ban almost any form of pornography and it can regulate, and even proscribe, surrogacy. While credible arguments can be advanced to support any one of these propositions, defending them all simultaneously requires exceptional mental agility. Although all of Sunstein's arguments bearing on these issues are clever, this reviewer is especially impressed, albeit not persuaded, by the formidable mental gymnastics he displays to dispose of the argument that, if the equal protection clause provides the basis for barring the government from regulating abortion, how does one balance the equal protection interests of mothers with those of their fetuses.[6] The clear impression generated by these paradigms is one of an author who first decided the positions he wanted to advocate and then used his talents to come up with whatever arguments were needed to sustain them.

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5. *See* SUNSTEIN, *supra* note 1, at 257.

6. *See id.* at 280-84. Elegant rhetoric notwithstanding, Sunstein's peculiar equal protection analysis is inferior to the standard substantive due process approach of *Griswold* and *Roe.* Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 959 (1973). The only obvious advantage of Sunstein's approach is that it enables him to defend a "good" version of substantive due process (protection of personal privacy) while rejecting a "bad" one (protection of individual property interests)—a dilemma that heretofore has vexed proponents of the standard due process approach. Not surprisingly, Sunstein's unique equal protection analysis supports a politically-correct version of privacy, which absolutely protects abortion, while allowing for state control of politically suspect privacy interests, such as those associated with surrogacy or pornography.

I. "A REPUBLIC OF REASONS"?

Professor Sunstein's disquiet and evident concern about the present state of the American body politic are neither misplaced, nor unique. Indeed, a great many scholars and commentators point out that there are systemic flaws in the overall functioning of our political system and its individual components, and that it has substantially deviated from the system of governance that the Republic's Founders expected.[7] Sunstein's explanations of what went awry,[8] and his prescriptions for setting things right, however, are far from persuasive. In his view, the basic fault lies with interest group pluralism, which came to dominate American political life and the resulting displacement of what Sunstein considers to be a far superior paradigm—"deliberative democracy," featuring reasoned dialogue among virtuous citizens, with the emphasis on communitarian values, rather than selfish individualism.[9]

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7. Tocqueville's prediction about the rise of the centralized bureaucratic "nanny" state has largely come true; this is, of course, contrary to the constitutional regime of limited powers and federalism. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer ed. & George Lawrence trans., 1969); *see also* RAOUL BERGER, FEDERALISM (1987) (arguing that the centralized American government of the 20th Century is contrary to the Founders' design of limited government and federalism); ROBERT BORK, TEMPTING OF AMERICA (1989) (demonstrating that the politicization of the judicial confirmation process has weakened the legitimacy of the judiciary and the democratic legislative process); JAMES BOVARD, LOST RIGHTS (1994) (describing the diminution of traditional liberties caused by the growth of the federal government); THE IMPERIAL CONGRESS (Gordon S. Jones & John A. Marini eds., 1988) (arguing that the Constitution's restrictions of the national legislature have all but disappeared leaving us with a pseudo-parliamentary system with none of that system's advantages).

8. One of the fundamental political and social problems we face today is the abandonment of the collective good in favor of the feeding frenzy of entitlements and pork-barrel politics. Cultural, ethnic, racial and geographical fissures in American society proliferate, threatening to undo the unique American "melting pot." Ironically, the New Deal, Professor Sunstein's favorite, dealt one of the biggest blows to deliberative democracy's goal of nurturing common good by ushering in an era of big national government and the corresponding administrative state machinery that was designed to dispense the federal largesse. Whatever virtues the New Deal policies may have had, they certainly intensified the tempo and depth of interest group rivalries, with each group of voters clamoring to receive as big a slice of government benefits as possible.

Even more fundamentally, it is at least an open question whether the interest group pluralism of today, which Sunstein properly decries, is an inescapable result of the evolution of the "interest group" approach, or whether a more reasonable and more deliberative version of it is feasible even without subscribing to Sunstein's constitutional imperative of deliberation. Unfortunately, Professor Sunstein never squarely resolves this issue.

9. Professor Sunstein also argues that "current legal doctrines reject interest-group pluralism as a constitutional creed." *Id.* at 38. I am, however, aware of no court cases or even mainstream legal theories which reject interest-group pluralism in *toto*, as distinct from specific policy outcomes of the functioning of interest-group politics.

Debates about the political and constitutional philosophy of the Framers are perennial favorites of American scholars and practitioners alike. Thus, Professor Sunstein treads on well-worn ground. After two centuries, historians and political theorists still are wrestling with the Founding's meaning and historical development of the Constitution, producing in the process two principal schools of thought.

One school embraces a "republican" vision of American society, and posits that "classical republicanism" largely structured eighteenth-century American thought and helped underwrite the Constitution. According to the historian Bernard Bailyn,[10] this interpretation of the American experience was shaped by the "Country" opposition[11] in England, traceable to such influential theorists as Bolingbroke, Sidney and Harrington, who, in turn, were influenced by such venerable writers as Machiavelli, Plutarch, Aristotle and Xenophon. J. G. A. Pocock, in his seminal work, *The Machiavellian Moment*, ascribed to classical republicanism the leading role in animating the Framers and argued that "neoclassical politics provided both the ethos of the elites and the rhetoric of the upwardly mobile, and accounts for the singular cultural and intellectual homogeneity of the Founding Fathers and their generation."[12]

Sunstein correctly notes that the core of classical republican thought is the concept of "civic virtue," which requires the sacrifice of the individual interest for the benefit of the body politic.[13] Thus, to Plato and Aristotle, the purpose of the state was to promote justice through law—law reflecting not merely a majoritarian will, but rather embodying a moral obligation to be obeyed. Sunstein also accurately observes that, in the classical republican tradition, "civic virtue," was largely equated with delib-

10. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1992). *See also* RICHARD M. GUMMERE, THE AMERICAN COLONIAL MIND AND THE CLASSICAL TRADITION (1963).

11. While the "Country" ideology is a complex and multifaceted one, in essence, its late 18th Century version featured deep skepticism of the alleged corrupting influence on the parliament of the English Court. "From this [premise] there arose two of the most recurrent if never-satisfied demands in the "Country" political program: that for the exclusion of officeholders or 'placemen' from the House of Commons, and that for short, i.e., frequently elected, parliaments . . . on the grounds that to send members regularly back to their constituents for reelection was the best means of ensuring that they did not become dependents of the Court." J. G. A. POCOCK, THE MACHIAVELLIAN MOMENT 407 (1975).

12. *Id.* at 507; *see also* J. G. A. Pocock, VIRTUE, COMMERCE, AND HISTORY (1985).

13. *See generally*, GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992).

eration and participation of the citizenry in politics. Ironically, if one assumes, as does Sunstein, that the sole purpose of government is to promote the good public life by instilling virtue and morality, which are given specific content through the enlightened and deliberative political process, one should also argue that, once sufficient deliberation has been secured, it is proper and fitting for a republican government to effectuate the will of the majority.

In general, Sunstein's description of the Framers' goals—"[f]or the framers, as for those in the classical tradition, virtue was indispensable; and the framers continued to understand virtue as a commitment to the general good rather than to self-interest or the interest of private factions"[14]—is correct, albeit incomplete and therefore defective.[15]

Sunstein's analysis virtually ignores the other primary school of thought which, while not rejecting the classical republican roots of the Framers, emphasizes that the Constitution and indeed the entire American Revolutionary period were shaped by the writings of John Locke, and by the advocates of the rights-centered philosophy of eighteenth-century America.[16] Thomas Pangle, for example, argues that Lockeanism was the root of the "moral vision" of the Framers.[17] The adherents of this school contend that the Founders perceived individual self-interest as both the motivating force and the curse of politics, and that the Founders believed government ought to be an arbiter among conflicting interests and normative values, with its role limited to protecting the rights of individuals against tyranny, whether of the few or the many.[18] Unfortunately, Professor Sunstein completely ig-

14. SUNSTEIN, *supra* note 1, at 20-21.

15. Sunstein appears to misconstrue not just the role of the republican tradition in the Founding, but also the nature of that tradition itself. Pocock describes the Framers' republicanism as the "Atlantic republican tradition," blending the republicanism of the ancients with the West European republican experiences. *See generally* POCOCK, *supra* note 11. By contrast, Sunstein's republicanism seems to be of a distinctly communitarian variety, similar to the views of German social-democrats of the 20th century, who emphasized primarily not political participation, but rather the need to ensure, through enlightened government policies, fair and just distributions of goods and services to all citizens. Sunstein's "welfare state," whatever its theoretical merits—and much of the world is now repudiating this model of government—is a far cry from classical republicanism.

16. *See, e.g.*, THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM (1988).

17. *See id.*

18. The primary reason for the Framers' concern with having a government that protects liberty without threatening it was their profound skepticism about human nature. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1972). Indeed, while the Framers were political idealists, hoping over time to instill virtue among the citizenry, they were also constitutional realists. The Constitution certainly reflects the lat-

nores this important aspect of the Framers' political theory. In fact, he seems to argue that the Framers were motivated entirely by, and sought to effectuate only the goals of, classical republicanism.[19]

Having propounded a highly idiosyncratic view of the political theory of the Framers, Professor Sunstein proceeds to analyze what he considers to be the specific core principles embodied in the Constitution. Again, however, neither the Constitution's text nor the history of the Founding support Sunstein's account of these principles.

Admittedly, Professor Sunstein's proffered objectives are modest. He concedes, for example, that he does "not intend to provide anything like an exhaustive historical account [of the Founding]."[20] However, although a definitive historical exegesis of the Constitution might not be required, Sustein's argument that the Framers sought to effectuate the "impartiality principle" above all else needs more support than he provides.[21] Sunstein also overemphasizes the Framers' desire "to limit the power of self-interested private groups, or factions, over governmental

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ter view, assuming that human beings, though occasionally noble, are mostly self-centered and selfish creatures.

19. Two other recent reviews of Sunstein's book also take issue with Sunstein's selective and misleading account of the Founders' views. *See* John O. McGinnis, *The Partial Republican*, 35 WM. & MARY L. REV. 1751 (book review); Robert Delahunty, *From Ancient Liberty to the Welfare State*, 1994 issue of *Public Interest Law Review* (forthcoming November 1994). Delahunty, for example, points out that "[a]mong the Framers, Alexander Hamilton was probably the most vigorous in criticizing the ancient model of liberty. Hamilton argued that the virtues that the ancient polities instilled in their citizens reflected the highly militarized character of such regimes, and that those virtues would not be adapted to a society based on commerce, such as the United States." Delahunty, *supra* at 1, n.2. To be sure, Sunstein's alleged main champion of republican values is Madison. Still, Professor Sunstein should have both acknowledged that some Framers specifically rejected classical republicanism and then explained why, in his view, they did not prevail on this issue. To ignore these critics erroneously implies that classical republicanism had no foes among the Framers.

20. SUNSTEIN, *supra* note 1, at 18.

21. Likewise, Sunstein's claim that the Framers merely reacted to the "backdrop set by prerevolutionary America, which has been pervaded by monarchical characteristics, including well-entrenched patterns of deference and hierarchy," lacks solid support in the historical record. SUNSTEIN, *supra* note 1, at 18. Indeed, he seems to have reduced Gordon Wood's complex and nuanced account in the *Radicalism of the American Revolution* to a simple, and therefore misleading, proposition that the American War of Independence was mostly about rebelling against hierarchies and patrimonial authority, making the founding generation to be a late 18th century equivalent of the 1960s counterculture, scornful of all authority. *See* WOOD, *supra* note 13. Even a cursory review of the history of the Founding indicates that much more was at stake. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM (1985); WOOD, *supra* note 18.

processes."[22] The only evidence Sunstein provides is to opine that the American Founders

> were alert not only to the legacy of monarchy, but also to the general risk that public officials would act on behalf of their own self-interest, rather than the interests of the public as a whole. . . . The impartiality principle, requiring public officials to invoke public-regarding reasons on behalf of their actions, was a check on self-interested representation.[23]

In fact, according to Pocock, the Framers viewed

> [i]nterest and faction [as] the modes in which the decreasingly virtuous people discern and pursue their activities in politics; but in Madison's thought two consequences soon follow. In the first place, the checks, balances, and separations of powers, to be built into the federal structure, ensure as we have seen that interest does not corrupt, so that the full rhetoric of balance and stability can still be invoked in the praise of an edifice no longer founded in virtue . . . .[24]

Thus, far from viewing self-interest and factions as something that ought to be eradicated because of the threat they posed to virtue, the balancing of factions and the interplay of self-interest was supposed to promote virtue.

According to Sunstein, to achieve impartiality and prevent self-interest politics, the Framers crafted a Constitution designed to guarantee "deliberative democracy." Thus, he asserts that all of the familiar constitutional devices, *e.g.*, checks and balances available to the two political branches,[25] federalism, bicameralism, judicial review, *etc.*, were all really intended to ensure deliberation.

What is wrong with this account? The basic flaw is that Sunstein takes some elements of the Framers' complex constitutional

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22. SUNSTEIN, *supra* note 1, at 19.

23. *Id.*

24. POCOCK, *supra* note 8, at 522.

25. "The system of checks and balances—the cornerstone of the system—was designed to encourage discussion among different governmental entities." SUNSTEIN, *supra* note 1, at 23. This claim seems to ignore the fact that the system of checks and balances was primarily intended to limit the overall governmental power, at least at the federal level, by enabling one government department to counteract the ambitions of another political department. For a useful discussion of this issue, *see e.g.*, Lawrence Block and David Rivkin, *The Battle to Control the Conduct of Foreign Intelligence and Covert Operations: The Ultra-Whig Revolution Revisited*, 12 HARV. J.L. & PUB. POL'Y 303 (1989). *See also* RICHARD EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST (1984); SEPARATION OF POWERS—DOES IT STILL WORK? (Robert A. Goldwin & Art Kaufman eds., 1986). The key reason that the Framers designed this arrangement was their belief that the constitutional government's primary task was to protect the civil society—a requirement which implied that the government's role was far from being an activist one. The fact that the resulting arrangement *might* also provoke deliberation is clearly secondary.

philosophy[26] while abandoning many other, equally important, aspects. The Framers clearly believed that one of the specific problems that prompted the Revolution was unchecked authority, and the danger it posed to individual liberty. Thus, while we cannot poll the founding generation, given their shared acculturation and experiences, it seems entirely implausible to suggest that they would have countenanced the creation of an extremely powerful national government, no matter how deliberative its decisionmaking.[27]

Indeed, the best support for this proposition is that, following the Revolution, the Continental Congress crafted the Articles of Confederation, which featured a comparatively weak central government, with most of the attributes of sovereignty being lodged at the state level. Further, it strains credulity to argue that the key lesson that the Framers derived from their experiences under the Articles of Confederation was the need to ensure deliberation and to adjure self-interested politics—"[u]nder the Articles, powerful private groups appeared to dominate state and local government, obtaining measures that favored them but no one else, and that could be explained only by reference of private self-interest. The new Constitution was intended to limit this risk."[28] Although the Framers certainly were concerned about the efforts of debtors and other factions to obtain favorable legislation on the state level, the primary lesson they drew from the experience accumulated under the Confederation government was the need for a strong and energetic national government, albeit one of carefully limited powers.[29]

26. The Framers' political and constitutional theory, in addition to Atlantic republicanism and Lockeanism, was shaped by the writers of Scottish enlightenment (David Hume), English Whigs, and theories of Adam Smith and Isaac Newton. *See generally* POCOCK, *supra* note 11, at 506-522.

27. Given Sunstein's preoccupation with civic virtue, his insistence that a powerful government operating under the properly deliberative principles, is capable of promoting virtue is somewhat ironic. According to Pocock, in the Framers' political tradition, "[in] the authoritative literature of their culture . . . [there existed] a civic and patriotic ideal in which the personality was founded in property, perfected in citizenship but perpetually threatened by corruption; government figuring paradoxically as the principal source of corruption and operating through such means as patronage, faction, standing armies . . . ." POCOCK, *supra* note 11, at 507. Hence, it is difficult to imagine the Framers seriously expecting the federal government to function as a virtue promoting institution.

28. SUNSTEIN, *supra* note 1, at 19.

29. *See, e.g.*, FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL (1986) (arguing that trade and national defense were the primary reasons for the convocation of the Philadelphia convention and the primary fields in which the new national government was expected to function).

As for virtue, the Framers in general, and Madison in particular, undoubtedly believed it to be an important attribute of any viable republic. There is also no doubt that the Framers were keenly interested in promoting civic virtue among the citizenry.[30] One should not, however, confuse the Framers' political aspirations with their constitutional prescriptions.[31] Significantly, according to Pocock and Wood, the Framers had concluded that by the time of the Founding sufficient corruption had set in among the colonists, so as to rule out what Wood has termed "classical politics." Gordon Wood describes this realization by the Founders as the "end of classical politics."[32] Now, the citizen, instead of being animated by a shared conviction to advance the common good, is "conscious chiefly of his interest and takes part in government in order to press for its realization, making only an indirect contribution . . . *whereby government achieves a reconciliation of conflicts which is all the common good there is.*"[33]

Given this view of the government's role it is not surprising that, to the Framers, virtue was to be inculcated in the citizenry primarily through the efforts of the enlightened elites, chosen through the so-called filtration system. Here, the Framers believed that the large size of the United States would be of benefit, ensuring a large pool of talented and virtuous leaders who would compete against each other, with the most able eventually rising to the top.[34] There is little evidence to suggest that the Framers

30. Sunstein, for example, aptly points out that Madison expected the Bill of Rights to have a positive impact on "political deliberation" by having "educative effects on the citizenry at large." SUNSTEIN, *supra* note 1, at 9. *See* WOOD, *supra* note 18 (containing an excellent discussion of this view of "classical republican" virtue).

31. To be fair to Professor Sunstein, one must acknowledge his recognition of the differences between the Framers' political aspirations and constitutional prescriptions. *See* SUNSTEIN, *supra* note 1, at 21. The problem lies in his insistence that the Framers devised the Constitution largely to promote virtue. In my view, the Constitution's primary purpose was to limit the consequences of less than virtuous governance, by constraining *what* the federal government can do and *how* it can go about transacting its business.

32. WOOD, *supra* note 18, at 562, 606-15.

33. POCOCK, *supra* note 11, at 523 (emphasis added).

34. Sunstein himself cites the famous passage from *The Federalist No. 10,* where James Madison described the filtration system as a process to " 'refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.' " SUNSTEIN, *supra* note 1, at 20 (quoting THE FEDERALIST No. 10).

According to Pocock, the Founding Generation believed that "democracy could discover the [natural] aristocracy by using its own modes of discernment . . . ." POCOCK, *supra* note 11, at 515. In essence, the Framers expected that the elite, driven by their somewhat selfish desire for fame, would simultaneously promote public welfare—a model quite resembling the 19th century Adam Smith's famous "invisible hand." *See generally,* DOUGLASS

expected the Constitution to *guarantee* virtue, or be used as a tool to promote it. Rather, they viewed the Constitution as a mechanism for controlling vice.

The most glaring omission in Sunstein's history, however, is his near total disregard of the Framers overarching emphasis on protecting individual liberty—a goal they sought to attain through the creation of a limited government[35] at the national level, replete with a system of checks and balances as well as various auxiliary precautions.[36] It is difficult to understand why a scholar of Sunstein's obvious accomplishments and intelligence never bothers to ask himself how his constitutional prescriptions of deliberation and neutrality can be achieved without creating an all-powerful government of Orwellian proportions. Thus, even an otherwise sympathetic review of his book in the *Harvard Law Review*, points out that

> [b]y relying on a descriptive rather than normative account to justify his theory and by failing to articulate more clearly his vision of decisionmaking in a deliberative system, Sunstein inadequately develops his conception of deliberative democracy, leaving it open to attacks posed by alternative models of governance based on interest-group pluralism.[37]

Indeed, I am not even sure whether, for example, the deliberative democracy model requires that courts be able to strike down an otherwise unobjectionable piece of legislation, if it can be shown that the principal legislative sponsors of that legislation were motivated by narrow, parochial, or partisan views.[38]

ADAIR, FAME AND THE FOUNDING FATHERS (1974) 75-141. *See also*, HARVEY C. MANSFIELD, TAMING OF THE PRINCE (1989).

35. Regrettably, Professor Sunstein seems to be completely disinterested in the subject of limited government. To be sure, he opines early on that "[d]eliberative government and limited government were, in the framers' view, one and the same." SUNSTEIN, *supra* note 1, at 23. This view is puzzling. First, there is no instance where any of the Framers argued that a requirement to deliberate was, by itself, sufficient insurance that a limited government would be established at the federal level. Second, the Framers' creation of structural limitations on governmental powers, *e.g.*, the "herein granted" language of Article I which indicated that Congress possessed only those powers that were specifically enumerated in the Constitution belies the claim that they believed deliberation alone was enough.

36. The discussion which follows draws heavily on Lawrence Block and David Rivkin, *The Bill of Rights and American Republicanism*, 51 POLICY REVIEW 68 (1990).

37. Book Note, *The Partial Partial Constitution*, 107 HARV. L. REV. 493 (1993).

38. The following passage from Sunstein strongly implies that he envisions the courts acting as the guardians of constitutionally-prescribed deliberation for the two political branches.

> Under that [Madisonian] conception, the task of legislators is not to respond to private pressure but instead to select values through deliberation and debate.... the prohibition of naked preferences reflects a distinctly substantive value and

For the Framers, the central dilemma of republican government was not the promotion of deliberation and neutrality. Rather, it was how to balance the liberty of the individual against the requirements of societal order and stability to produce what Justice Cardozo more recently described as a system of "ordered liberty."[39] Having studied their history carefully, the Founders concluded that classical republicanism failed precisely because ancient republics and democracies did not adequately balance the dual imperatives of liberty and order: self-government and personal security. Too much freedom usually caused the anarchy of the Athenian mob; too little invariably led to the tyranny of despotic Roman dictators and emperors.[40] As Alexander Hamilton stated in *Federalist No. 9,* with the aid of "great improvement[s]" in the development of the "science of government" that grew out of the Enlightenment, the Framers were able to build upon *both* the classical republican and Lockean principles of government to forge a new, American blend of republicanism—an American cure for the "Republican disease."[41] Thus, contrary to Sunstein's idiosyncratic account of the Founding, James Madison, and other Framers were Lockeans insofar as they viewed the primary end of government to the promotion of "justice," *defined as the protection of property and individual rights.*

In addition, they turned on its head the traditional republican notion, advanced by Montesquieu, that only a small homogeneous republic, featuring a sufficient moral consensus among the citizenry, could survive. Indeed, Madison argued that multiplication of regional, economic interests and political factions acted as a guarantor of freedom and justice.[42] The larger the Republic, the greater the number of factions that could be checked and balanced against each other to prevent the accumulation of power and, accordingly, tyranny. "Divide et impera" became the maxim of liberty, American style. This point is acknowledged by Professor Sunstein, who unfortunately views it as supporting his

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cannot easily be captured in procedural terms. Above all, it presupposes that constitutional courts will serve as critics of the pluralist vision, not as adherents striving only to "clear the channels" for political struggle. And if judicial role seems odd here, we should recall that the founding generation itself regarded courts as an important repository for representation and preservation of republican virtue, standing above the play of interests.

SUNSTEIN, *supra* note 1, at 26-27 (citations omitted).

39. *Palko v. Connecticut,* 302 U.S. 319 (1937).

40. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM 2-3 (1985).

41. THE FEDERALIST No. 9, at 72 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

42. *See* THE FEDERALIST No. 10 (James Madison).

proposition that virtue is synonymous with deliberation as a constitutional imperative.[43] The more historically accurate view is that the offsetting effects of numerous factions was yet another guarantee of a limited government at the national level.

The Framers' political philosophy had as its basis both the Humean notion that man is motivated by "ambition" (the aggrandizement of power and wealth) and the principle from Newtonian physics of the "counterpoise" (the balance achieved through opposing forces such as action and reaction). "Counterpoise" found its way into the Constitution as separation of powers and checks and balances, which were the means to counteract "ambition." In other words, to Madison:

> [G]overnment [is] the greatest of all reflections on human nature. If men were angels, no government would be necessary. If angels were to govern men, neither external or internal controls on government would be necessary. In framing a government that is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on government; but experience has taught mankind the necessity of auxiliary precautions.[44]

Significantly, Madison and the Framers' generation considered a republican form of government, operating through the consent of the people registered in periodic elections, to be the *primary* source of protection of fundamental rights. Thus, far from rejecting majoritarian democracy *in toto*, the Framers viewed it as the foundation of the American system of ordered liberty. However, they also believed that reliance upon elections and public opinion alone was insufficient, because, despite their hopes that virtue can be instilled among the citizenry, they could not be sufficiently certain of that outcome and a tyranny of the majority could be just as pernicious as a dictatorship by the one or the few. Thus, the Framers concluded that "auxiliary precautions" were necessary to prevent tyranny. Regrettably, Professor Sunstein ignores altogether the fact that most of the constitutional text was shaped by the perceived imperative of establishing these auxiliary precautions.

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43. *See* SUNSTEIN, *supra* note 1, at 20-24.

44. THE FEDERALIST No. 51, at 322 (James Madison)(Clinton Rossiter ed., 1961).

What are these auxiliary precautions that are embodied in the Constitution? They are the same constitutionally-prescribed devices which Professor Sunstein erroneously believes to be the indicia of deliberative democracy. They are first of all the framework of separation of powers, undergirded by the system of checks and balances, which divides power and prevents each branch of the federal government from amassing too much power for itself or from encroaching on the powers of the others. Two hundred years later, the constitutional system of checks and balances remains relatively well understood. Regrettably, however, another "auxiliary precaution," one that the Framers considered crucial, has been all but forgotten: the constitutional device of limiting the powers of the federal government to those that are specifically enumerated. It is here that Professor Sunstein's deliberative democracy paradigm poses special problems.

It should be stressed that, for the Founding Generation, the device of limiting the federal government's powers, particularly in the domestic sphere, was preferred to the enumeration of citizens' rights against the government. To be sure, the Framers of the Constitution strongly espoused the Lockean concept of natural rights. Yet, most of the Framers also maintained that a bill of rights would be a mere "parchment barrier," a weak reed against the gale of tyranny.[45] They believed it was impossible to foresee every conceivable governmental encroachment on individual liberty and thus impossible to set up case-specific constitutional guarantees.

Accordingly, the Framers held that a framework of government, that could limit government power from the outset, would be a more effective bulwark against despotism than any elaborate set of procedural requirements that the government had to follow. Thus, the power of Congress, the branch of government that Madison and others of the Founding Generation recognized had the greatest tendency to aggrandize itself, was limited through the constitutional device of enumerated powers: Article I of the Constitution vests in the Congress only those powers "herein

45. Letter from James Madison to Thomas Jefferson (October 17, 1788) *quoted in* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 193 (1983). Although, within a year, Madison changed his position and drafted the Bill of Rights for consideration by the First Congress, this shift can be attributed to Madison's belief, shared by most of the leading Federalists, that an enactment of the Bill of Rights was necessary to secure the ratification of the Constitution. *See, e.g.*, CREATING THE BILL OF RIGHTS (Helen E. Veit et al. eds. 1991).

granted."[46] Here again, Sunstein's *Partial Constitution* is completely devoid of any recognition of the Framers' desire to create a federal government of enumerated powers.[47]

Yet another "auxiliary precaution" that seems to have eluded Sunstein is federalism. The Constitution divided governmental power not only horizontally (among three branches of the federal government), but also vertically (between the federal and state governments). While the legislative authority of the national government was contained within the sphere of enumerated powers, that of the States was not so constrained; state power was limited principally by the Supremacy Clause, under which the national government's exercise of its enumerated powers would "trump" conflicting exercises of state power.

In other words, the States were expected to play the traditional role of the classical republics—providing "good government" by acting through state legislatures, who reflected the evolving moral consensus of their communities. In fact, the States were to legislate exclusively in areas that implicated public morality (now termed the police power or welfare power). By contrast, the national legislature was intended to have exclusive jurisdiction only in the matters of the general interest and welfare of the United States[48] such as national defense and security, interstate and foreign commerce.

Indeed, Alexander Hamilton defined the role of the States in the American constitutional system to encompass "the ordinary administration of criminal and civil justice," making the States the "visible guardian of life and property."[49] For Hamilton, the States have the primary role in "regulating all those personal in-

46. U.S. CONST. art. I, § 1.

47. For example, Professor Sunstein's apparent conviction that the prescription of deliberation, replacing the alleged current style of naked power politics, would be effective in restraining governmental abuses is misplaced. Unlike the straightforward proscription of the federal government's legislative activities which are not directly tied to Article I's enumerated powers, what would prevent government officials from cloaking any policy decision in a language of deliberation and reason? Stated differently, how would the requirement of deliberation be effectively policed?

48. Professor Sunstein largely ignores this point as well. In his discourse on status quo neutrality, he overlooks the fact that, even if one were to accept his premise that all societal and economic arrangements are the creatures of law, the vast majority of them, *e.g.*, contract law, property law, and tort law, are created by the States, rather than the federal government. *See* SUNSTEIN, *supra* note 1, at 68-93. Hence, for the federal government to revise these state-created status quo baselines would effectively emasculate state legislatures, a result not desired by the Framers and one that would destroy the last remaining vestiges of federalism.

49. THE FEDERALIST No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

terests and familiar concerns to which the sensibility of individuals is more immediately awake . . .," while the federal government's concerns are termed to be more remote, "relating to more general interest."[50]

Similarly, to James Madison, whom Professor Sunstein justifiably venerates, the distinction between federal and state power is both quantitative and qualitative. Thus:

> [t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State.[51]

The entire Constitution, therefore, contrary to Professor Sunstein's depiction of it as essentially a deliberation-ensuring arrangement, is more properly seen as a giant Bill of Rights, in which liberty was preserved by making "ambition . . . counteract ambition,"[52] through separated powers and checks and balances, by limiting the sphere of federal law-making authority, and by allowing ultimate decision-making power to be exercised through the democratic process. This scheme was founded upon the practical realities of politics as envisioned by the Framers.[53] Consequently, for example, freedom of speech was protected by the Constitution in two distinct ways: (1) because Congress did not possess the authority in its enumerated powers to legislate in that area, unless the speech involved enough of a commercial component to be reachable under the Commerce Clause of Article I, and (2) through the judicial protection of the First Amendment.

In short, Professor Sunstein's emphasis on deliberation notwithstanding, in the American republican system created by our Constitution, the delicate balance between liberty and order is preserved in *four* distinct ways: first, through democratic gov-

50. *Id.*

51. THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

52. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

53. The later enacted Bill of Rights, on the other hand, was predicated upon the notion of fundamental rights—rights that were considered "unalienable" and so important that they were taken entirely outside of the political arena.

ernment, by putting into practice the concept that government may only operate through the consent of the governed; second, through the horizontal diffusion of power on the national level, undergirded by the system of functional separation of powers and checks and balances, which tends to prevent the accumulation of power while preserving stability and order in the body-politic; third, through the vertical diffusion of power between national and state governments, which tends to protect local traditions, mores and beliefs from federal encroachment; and finally, through the judicial enforcement of the Bill of Rights, which, as a matter of philosophical principle, takes the handling of certain fundamental rights out of the political arena.

II. SUNSTEIN'S CONSTITUTIONAL THEORY—FROM VIRTUE AND DELIBERATION TO IMPARTIALITY AND REJECTION OF STATUS QUO NEUTRALITY.

Aside from featuring an exotic view of the Founding, Professor Sunstein's approach to constitutional interpretation appears both labored and unpersuasive. For example, his starting proposition—"[c]onstitutional interpretation inevitably requires us to use principles external to the Constitution. There is no such thing as interpretation without interpretive principles, and these cannot be found in the Constitution"—is far from obvious.[54] Nevertheless, Professor Sunstein treats it as a self-evident truth, and uses it as a point of departure for the ensuing discussion. However, one can easily envision a legal document which, while not entirely free of ambiguity, contains enough clarity to be comprehensible, for most, if not all, legal controversies which arise and are expected to be resolved under this document. This is particularly true in the context of a shared knowledge about the linguistic, philosophical, legal, and historical circumstances in which it was drafted.

Of course, whether or not the Constitution fits the above description, has been a hotly contested subject. However, without retracing all of the complicated arguments involved, it is sufficient to point out that Sunstein's account of what he calls consti-

54. SUNSTEIN, *supra* note 1, at 93. Sunstein also observes that "the Constitution does not contain the instructions for its own interpretation (and if it did, we would need principles to make sense of the instructions)." *Id.* at 94. Elevated to this level of generality, Sunstein seems to argue that any finite amount of information, no matter how organized and structured, cannot possibly be comprehended without the aid of some external "key." This assertion would bring smiles to the faces of most mathematicians or linguists.

tutional "formalism" in general, and Judge Bork's contribution to it in particular, both distorts what he purports to critique,[55] and fails to explain why his approach is the preferred one.[56]

Indeed, after all of Sunstein's learned efforts are over, his overarching interpretive approach seems to be as follows: the specific tenets of constitutional text ought to be interpreted in light of what one considers to be the appropriate substantive constitutional principles embodied in the Constitution. This is not, however, so radical a proposition. Even Judge Bork would probably

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55. Professor Sunstein describes what he considers to be the practical consequences of Judge Bork's constitutional theory of "original understanding." *Id.* at 97. It is a parade of horribles, perhaps not surprising when emanating from some overzealous partisans in the heat of Bork's confirmation hearings, but simply inexcusable when repeated in a scholarly treatise. Moreover, it is surprising that a serious constitutional scholar would argue against "original meaning" jurisprudence simply because it allegedly produces undesirable public policy consequences. Even if one's facts were correct, and Sunstein's are not, this would represent the ultimate in result-oriented jurisprudence.

Sunstein also takes issue with Frank Easterbrook's argument that "judicial review is justified, if at all, only because 'the people' specifically authorized it. Easterbrook claims that any defensible system of interpretation must follow from this insight." *Id.* at 100. By contrast, Sunstein endorses a much more result-oriented approach to the Constitution. In that regard, he opines that

> [u]ltimately obedience [to the Supreme Court's interpretation of the Constitution and, more broadly, to the Constitution itself] is justified, if it is, for some amalgam of substantive political reasons: our Constitution is on balance a good one; it has a democratic pedigree . . . the consequence of a decision to abandon the Constitution would be intolerable chaos . . . .

Id.

Interestingly, Sunstein's views on proper constitutional interpretation are nearly identical to those of Professor Stephen Macedo, a well-known libertarian scholar, who has a broad conception of what the Constitution was designed to accomplish. Macedo also argues that "the Constitution should not be read in terms of specific historical intentions, or as the expression of the will of some authoritative group, or as an acknowledgment of majority sovereignty. The Constitution is better read in terms of the aspirations set out in the preamble, as an attempt to, among other things, establish Justice . . . promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Prosperity." STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION 94-95 (1987). In contrast to Sunstein, Macedo's interpretative approach, while infused with moral values, does not postulate that these values can be only found outside of the Constitution. In any case, Sunstein is fundamentally wrong: whatever the imperfections of the original franchise which ratified the Constitution, it rests on a "theory of democracy" and, despite Sunstein's apparent derision, democracy is still preferable to all other alternatives.

56. Sunstein describes Bork and Easterbrook as the supporters of such allegedly flawed concepts as the legally binding character of the "original understanding" and eventually chastises them as the "legal authoritarians." SUNSTEIN, *supra* note 1, at 96-98. He also decries the views of the so-called "disappointed formalists," who, despite all of their other differences, believe that constitutional interpretation is basically a power trip by the interpreters, and hence, is essentially a political enterprise. *Id.* at 113-116. Sunstein also criticizes a number of otherwise divergent constitutional approaches espoused by Messrs. Bork, Ely, Tribe and Dorf, for failing to defend, in terms of substantive values, their approaches to constitutional interpretation, and resorting to a tired, old formalism. Not surprisingly, what is needed, in Sunstein's view, is to abandon blind adherence to a status quo baseline, and a more meritorious constitutional interpretative paradigm would readily present itself—apparently his own approach.

not find much fault with it; the only difference being that Judge Bork and Professor Sunstein subscribe to different fundamentals.[57]

Professor Sunstein's starting principle of deliberative democracy is supplemented by what he calls the neutrality obligation—"the most basic organizing principle of American constitutional law."[58] Stated differently, the relevant governmental decisionmakers are supposed both to deliberate and be scrupulously neutral.[59] Sunstein opines, for example, that numerous specific tenets of the Constitution, the Takings Clause, the Equal Protection Clause, the Contract Clause, *etc.*, are all designed to effectuate neutrality, and proscribe partisanship.[60]

A logical outgrowth of Sunstein's view of neutrality as a constitutionally-guaranteed imperative is his criticism of the allegedly flawed fixation, reflected in the existing political and constitutional theories, on the preservation of "status quo neutrality." In that regard, Sunstein challenges what he perceives to be an unjustified dichotomy in the way the courts scrutinize governmental action as opposed to inaction—"[w]hen government does not interfere with existing distributions, it is adhering to the neutrality requirement, and it rarely needs to justify its decision at all. When it disrupts existing arrangements, it is behaving partially,

57. Indeed, the claim that Judge Bork advocates a value-free approach to constitutional interpretation is simply false. What Bork criticizes is the resort by the judges to their own *personal morality*; he does not deny the fact that the Constitution itself embodies a set of moral principles. In particular, in Judge Bork's view, the Constitution embodies the morality of democracy: "[o]ne of the freedoms, the major freedom, of our kind of society is the freedom to choose to have a public morality." Robert H. Bork, *Tradition and Morality in Constitutional Law*, 1984 Francis Boyer Lectures on Public Policy, American Enterprise Institute at 9.

58. SUNSTEIN, *supra* note 1, at 2.

59. "Under the American Constitution, government should not single out particular people, or particular groups, for special treatment." *Id.*

60. *See id.* at 68-93. Here again, Professor Sunstein reads too much into the constitutional text. In general, these clauses are all designed to protect minorities by limiting what the majorities can do to them. Yet, although one can readily discern that the Constitution both proscribes and prescribes certain types of governmental conduct, *e.g.*, the taking of property without compensation, impairment of contracts, *etc.*, it seems farfetched to suggest that the Constitution requires impartiality in all things. Indeed, neutrality, depending on how it is defined, may not even be a good social/political principle, much less a constitutional obligation. There is no reason why government may not, or should not, openly tilt towards a given policy position, or a given set of voters, and governments do so routinely. They may, of course, pay a political price for it, but there is nothing constitutionally improper about partisanship. In fact, there are numerous instances in American history when the Federal Government promoted the interests of a particular set of Americans on a grand scale—examples would include the Jackson Administration (westerners), Reconstruction (northerners and the Republican faithful), and the New Deal, much beloved by Sunstein, (labor and the Democratic faithful).

and is thus subject to constitutional doubt."[61] In his view, this approach is all wrong. Stated differently, Professor Sunstein feels that both governmental action and failure to act ought to be scrutinized using the same test: impartiality.

He links the imperative of ensuring impartiality and the need to avoid fixation with the status quo by arguing that, because all law is a product of the government, the government can never really opt-out of any controversy.[62] Sunstein notes, for example, that "[m]arkets are made possible only by government regulation, in the form of the law of tort, contract, and property."[63] Likewise, "[w]hen the status quo—between, say rich and poor, or blacks and whites, or women and men—is itself a product of law and far from *just*, a decision to take it as the baseline for assessing neutrality is unjustifiable."[64]

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61. *Id.* at 3.

62. There are three distinct problems with Sunstein's claims. First, the Founding Generation clearly believed that there were certain inalienable rights, rights individuals possessed by virtue of being human. These "natural" rights are distinctly not a product of law, since they cannot be abridged or proscribed by the government. The most rhetorically powerful statement about such rights from the Founding Period is the Declaration of Independence. Second, Sunstein himself is curiously inconsistent in his treatment of this issue. If all rights are really a product of government-made law, his strong indignation about the *injustice* of various status quo baselines makes no sense. Indeed, any discussion of inequality, whether social, economic or political, is comprehensible only if there is an external yardstick for comparison regarding what is just and fair. Third, Sunstein ignores the key difference between the government setting a few basic rules—a constitutionally-proper governmental role—and the government redistributing goods and services, an approach that is both economically counterproductive and constitutionally suspect. Moreover, to the extent government-sponsored processes help shape law, the Federal Government is rarely the relevant lawgiver in establishing the original status quo baseline. Yet, Sunstein apparently sees nothing constitutionally improper in using the alleged constitutionally-guaranteed impartiality principle as a tool to let the Federal Government re-engineer all existing societal and economic arrangements. And, if federalism does not survive this policy prescription, so much the worse for federalism.

63. *Id.* at 5.

64. *Id.* at 6 (emphasis added). As American political life evolved, the major dividing line in doctrinal and political debates became the tension between liberty and equality. In that regard, American Enterprise Institute's Christopher DeMuth notes that "[f]reedom is a cardinal virtue of the conservative, equality a cardinal virtue of the liberal." Christopher DeMuth, *The Tension between Freedom and Equality*, AEI Newsletter, February 1994 (on file with author). Yet, DeMuth argues, drawing on the work of the Nobel Prize winning economist, Robert Fogel, that, as a result of economic and technological progress, equality has been ushered in without unduly impeding liberty—

> twentieth-century America and Western Europe have been the scene of an egalitarian revolution without precedent in modern history. The distribution of real income and of other aspects of material welfare such as longevity, nutrition, and health has become vastly more equal, and government redistribution has had little to do with it.... The one government policy that Fogel identifies as having contributed substantially to the egalitarian revolution is free or subsidized education from primary school through college.

Id. at 4. Thus, while specific economic, social or environmental problems may well require some government involvement to resolve them, by and large, status quo distribu-

To support his claim that impartiality is a constitutional imperative, Professor Sunstein cites several constitutional provisions. In particular, Sunstein relies on the Commerce, Equal Protection and Due Process clauses, as well as the contract and eminent domain clauses. Yet, despite proffering intellectually elegant reasoning, Sunstein fails to prove his point. The contract and eminent domain clause, while suffering from regrettable judicial neglect in the post-*Lochner* era, have never imposed an impartiality obligation. By contrast, equal protection and due process are at least relevant. Yet, arguably, they prove the exact opposite of Sunstein's thesis—only specific types of government discrimination, implicating particular constitutionally protected rights or certain societal groups which lack an ability to hold their own in political battles, are singled out for special protection.[65] Otherwise, the government can be just about as partial as it wants.

Sunstein devotes an entire chapter, *Interpreting the Constitution: Substance,* to analyzing what he considers to be the problems associated with blind adherence to status quo neutrality.[66] He scrutinizes, and rejects, the views of such jurists as Oliver Wendell Holmes, Learned Hand and Felix Frankfurter, all of whom felt that "courts [ought] to abandon the field [of baseline revision] to politics."[67] From there, Sunstein attempts to flush out his concept of political deliberation, and how it relates to the imperatives of neutrality and the concomitant critical scrutiny of status quo baselines.

Overall, even if one were to accept Professor Sunstein's first proposition regarding the need for impartiality, his views on status quo neutrality go too far. There is a very significant difference between having the government prescribe a few basic rules of the game, and the government guaranteeing supposedly "impartial" outcomes. Moreover, Professor Sunstein seems to be unimpressed by the notion that there are good reasons for any society, having established an original baseline, to maintain that status

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tions are working reasonably well. Indeed, Professor Sunstein himself seems to acknowledge this point. SUNSTEIN, *supra* note 1, at 130-31.

65. *See generally,* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (arguing that the major function of judicial review is a representation-reinforcing one). Sunstein, of course, squarely disagrees with this proposition, noting that "[t]he prohibition of naked preferences stands as a repudiation of theories claiming that the judicial role is only to police the processes of representation to ensure that all affected interest groups may participate." SUNSTEIN, *supra* note 1, at 26 (citations omitted).

66. *Id.* at 123-62.

67. *Id.* at 124.

quo, at least in the absence of a compelling reason to the contrary.[68] Otherwise, what would ensue is a constant reordering of existing societal and economic arrangements—a permanent war of Hobbsean proportions.

Indeed, it does not matter what lofty sounding constitutional principles the Sunstein-envisioned government would have to follow, so long as that government is free to engage in a never ending game of social, economic, and political redistribution and reengineering. Not once does Sunstein ask the key question that has preoccupied political and constitutional scholars for centuries—who will guard the guardians? To be sure, Sunstein initially proclaims that he is not advocating any further judicial aggrandizement, the courts already have been too much an arbiter of constitutional issues.[69] This view is certainly to be commended.

However, soon thereafter, determined to debunk status quo neutrality, and to uphold the imperative of proscribing "naked preferences," he postulates the need for heightened judicial scrutiny of virtually all governmental decisions.[70] Thus, the end result of applying the Sunstein constitution is an all-powerful government, constantly reworking any societal, political, and economic arrangement it considers to be the result of either not enough deliberation or too much partiality, backstopped by an all-powerful judiciary, which subjects all government decisions to heightened level of scrutiny.

III. Applications—Old Wine in New Bottles.

Without meticulously describing every "application" of Sunstein's deliberation/neutrality paradigm, three observations are in order. First, perhaps the strongest part of Professor Sunstein's

68. Obviously, a number of key legal and societal baselines, *e.g.*, slavery, racial discrimination, *etc.*, were fundamentally wrong, even odious and thus, properly overturned by the American body politic. The presumption, however, should be that most existing social, economic and political baselines should not be casually disturbed, if for no other reason than to avoid prohibitive transactional costs.

69. *See id.* at 9.

70. *Id.* at 29. Specifically, Sunstein decries the wide-spread use of the so-called "rational basis" test by the courts, resulting in what he considers to be all too casual ratification of governmental decisions—"a 'weak version' of the prohibition of naked preferences." *Id.* at 28. The reason for his angst is that, when using the mere rationality nexus, almost any governmental decision, no matter how nakedly preferential, can be justified. Clearly, he seeks "active judicial policing of politics in the interest of deliberative democracy." *Id.* at 30. What Professor Sunstein fails to consider is that, if heightened scrutiny is applied in all cases, the entire federal government would be placed in judicial receivership.

book is his analysis of the New Deal and the judicial decisions that validated it. In fact, while it's obvious that Sunstein personally approves of New Deal jurisprudence and, hence, is no disinterested observer, his discussion of the *Lochner* era cases is nevertheless innovative, original and intellectually stimulating, particularly the way he tries to synthesize and reconcile such disparate decisions as *Plessy v. Ferguson*,[71] *Lochner v. New York*[72] and *Muller v. Oregon*.[73] It certainly provides a good background for arguing that a similar approach ought to be applied for dealing with the pressing constitutional controversies of today.

However, Sunstein's case law analysis, while intellectually elegant, is far from compelling. For example, the traditional interpretation of *Plessy*, that the Court erroneously concluded that racial discrimination involving public accommodations was sufficiently private, and thus, constitutionally permissible, still remains the most plausible one. The key flaw in the Court's reasoning, which Sunstein himself remarks on, is that it "was dealing with a compulsory segregation law. . . . It [the Court's view that law cannot modify private behavior] could make sense as a response to a compulsory integration law, or to an effort by a private person to compel integration when the races had segregated themselves voluntarily."[74] Likewise, *Plessy*'s verbiage regarding "natural affinities" and "voluntary consent" can be seen as reinforcing its faulty analysis regarding the essentially private nature of the racial segregation in issue, and not, as Sunstein alleges, indicative of the Court's infatuation with a status quo baseline.

As far as *Lochner* and *Adkins*[75] are concerned, the principle problem was the Court's constitutionally specious embrace of the substantive due process doctrine, which allowed it to overturn perfectly legitimate exercises of state police power. By contrast, Professor Sunstein alleges that "*Lochner* failed because it selected, as the baseline for constitutional analysis, a system that was state-created, hardly neutral, and in important respects unjust. This accounts above all for the New Deal reformation of legal rights."[76] Here again, the discussion of subsidies, which Sunstein

71. 163 U.S. 537 (1896).
72. 198 U.S. 45 (1905).
73. 208 U.S. 412 (1908).
74. SUNSTEIN, *supra* note 1, at 44.
75. Adkins v. Children's Hospital of D.C., 261 U.S. 525 (1923).
76. SUNSTEIN, *supra* note 1, at 57.

draws on to fit the cases into his procrustean bed of status quo neutrality, is clearly secondary. Stated differently, unless the Court embraced the flawed banner of substantive due process, all the discussion of subsidies and baselines would have been irrelevant. Ironically, the *West Coast Hotel*[77] decision—while again talking about subsidies—is an example of the Court using the rational basis scrutiny, which Sunstein so detests, to uphold a legislative determinate to set minimum wages for women.

In a chapter entitled *Status Quo Neutrality in Contemporary Law*,[78] Sunstein continues to analyze a plethora of modern Supreme Court cases dealing with such issues as the right to receive government assistance, indicia of state action, racial discrimination, affirmative action, sex discrimination, campaign finance regulation, unconstitutional conditions, standing, judicial review of agency action and inaction, *etc.* Throughout, he views as the key problem the Court's alleged blind embrace of status quo baselines, repeating again and again what Sunstein considers to be the pre-New Deal flaws of *Plessy* and *Lochner*.

I cannot prove definitively that Professor Sunstein is wrong. Indeed, his account is intellectually fascinating and not completely implausible. Yet, there are perfectly conventional explanations for all of the Court's decisions that are a lot more plausible than Sunstein's resynthesis. In fact, considering how the Supreme Court decides cases and builds a consensus for a majority/plurality decision, the notion that there is some overarching constitutional principle, that underlies virtually all of its decisions over the last several decades, is nothing short of miraculous.[79] From this legal realism perspective, it almost does not matter whether the principle involved is right or wrong, what is implausible is the Court's alleged consistency.

Second, his brilliant analysis of the constitutional history of the New Deal does not work particularly well when dealing with such issues as pornography, abortion, free speech, government funding of the arts, *etc.*[80] Arguably, the problem lies not in the lack of

77. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

78. SUNSTEIN, *supra* note 1, at 68-92.

79. *See, e.g.*, Lawrence Block, A New Look at Plurality Decision: Report to the Attorney General, Office of Legal Policy, Dept. of Justice, March 15, 1988 (on file with author).

80. To be sure, Professor Sunstein's efforts to reexamine these key controversies within the context of his constitutional paradigm are commendable and squarely fit within American political and constitutional traditions. As Thomas Pangle recently observed, such disparate events as the "contest between Federalists and Anti-Federalists, the Jeffersonian and then the Jacksonian revolution, the debates over the meaning of equality, liberty

effort by Sunstein—of that there is plenty—but in the fundamental distinctions between economic/commercial issues and social/political dilemmas that have proved so intractable.[81] This dichotomy is not particularly surprising. The federal government is vested with constitutional authority, subject to certain restrictions, to regulate commerce. This is emphatically not the case with most social and political issues. Here, it is not just the specific provisions of the Bill of Rights that are an obstacle; the single greatest bar is the limited nature of congressional powers, prescribed by the language of Article I.

Aside from these general problems, in no instance does Professor Sunstein's discussion of the constitutional quandaries of today reach an outcome that departs from some tenet of existing

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and union that reached so high a level in the utterances of Calhoun, Webster, Clay, Lincoln and Douglas, the unfinished argument over the political economy of a liberal democracy ushered in by the New Deal, Martin Luther King's appeal to Thomas Aquinas and natural law in the *Letter from a Birmingham Jail* . . . " all have at their core theoretical controversies over "what it means to be a patriotic [*i.e.*, Constitution-minded] American." PANGLE, *supra* note 16, at 278-79.

81. The notion that there is a disconnect between the Court's current jurisprudence on economic issues and social/political matters is embraced by both Professor Sunstein and Stephen Macedo. In that regard, Macedo's conception of limited government and his view that the Constitution proscribed many, rather than just a few, majoritarian impulses, leads him to advocate the overturning of the New Deal-era cases and the use of the same heightened scrutiny standards to review government's economic regulations as are those presently used in fundamental liberties/suspect classification cases. *See, e.g.*, STEPHEN MACEDO, LIBERAL VIRTUES (1988); STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION (1987).

In language strikingly reminiscent of Sunstein's musings, Macedo laments the use of rational basis review and describes with approval such cases as City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) and Plyler v. Doe, 457 U.S. 202 (1984), where the Court, despite the absence of the traditional fundamental rights being implicated, applied a heightened level of scrutiny and emphasized the need "to govern impartially." Macedo states that "[t]his duty to govern impartially or reasonably embodies the core values of constitutionalism: to have a government of laws rather than of men is to have government based on reasons that *all* ought to be able to accept." MACEDO, THE NEW RIGHT V. THE CONSTITUTION 65. Macedo proceeds to argue that

> legislators have a *pervasive* duty always to act on good reasons, to offer sound constitutional reasons for all restrictions on liberties. To exempt state legislators from the duty to justify restrictions on economic liberty or the privacy of disfavored groups is inconsistent with a conscientious desire to apply and enforce the Constitution's own values.

Id. at 81.

While Macedo's interpretation of the Constitution tilts too much toward liberty and destroys the delicate balance between liberty and order envisioned by the Framers, he is at least consistent in his approach—all governmental intrusions on individual liberty are suspect. For Sunstein, however, the shoe seems to be on another foot. While he also distrusts majoritarian impulses, or at least those not imbued with enough deliberation, his prescription is the antithesis of libertarianism—apply heightened scrutiny to almost all government policies which fail to effectuate "just" results and display healthy suspicion toward all existing social and political baselines, including private ones, similar to what the New Deal courts did in economic regulation cases.

"progressive" orthodoxy. This, by itself, does not definitively prove that Professor Sunstein's constitutional analysis is result-oriented. Given the novelty of his constitutional paradigm, however, the fact that he reaches the same conclusions as the more traditional liberal constitutional scholars creates such an inference.

Third, most of his analysis of the intermediate steps involved in applying his constitutional theory is extremely superficial. For example, Sunstein exhaustively describes what he calls the "New Deal for Speech"—two entire chapters are devoted to this subject.[82] Generally, Sunstein argues that, having accepted the propriety of governmental regulation of the economy dating back to the New Deal, and the lenient judicial scrutiny of such decisions, we should now do the same for the First Amendment. By itself, there is nothing inherently wrong with this argument. Indeed, the proposition that not all speech is created equal, and that purely political speech deserves more protection than speech that bears only a very remote connection with politics, is neither unique nor particularly debatable.[83] The problem, of course, lies with defining what political speech means.

Unfortunately, it is here that Sunstein is at his weakest. For example, as noted in the *Harvard Law Review* analysis of his book,

> [in discussing cross burning] he appears to have passed over the central components of his two-tiered test — the determination whether the speech is political or nonpolitical, and a showing of harm . . . . *Sunstein seems simply to have adopted from the outset a position opposed to cross-burning and then attempted to develop an argument in support of regulation.*[84]

The same problems pervade his discussion of governmental regulation of pornography, abortion, surrogacy, and the funding of speech, education and reproduction. Overall, one is left with an impression that Sunstein's approach to constitutional interpretation is not particularly useful in disposing of the constitutional dilemmas we face today. While he strongly criticizes existing jurisprudence and academic theories used in disposing of such contentious issues as, for example, balancing the right to free speech against other public policy imperatives, his own anal-

82. SUNSTEIN, *supra* note 1, at 197-231, 232-56.

83. Sunstein correctly points out that the courts have shied away from explicitly proclaiming that "nonpolitical speech occupies a lower tier [of constitutional protection]." *Id.* at 243.

84. Book Note, *supra* note 62, at 498 (emphasis added).

ysis is just as convoluted and open to criticism as those he proposes to replace.

The overall impression, at least of this reviewer, generated by reading *The Partial Constitution* is one of disappointment. Sunstein obviously has a keen intellect and produced many innovative insights about important constitutional issues. In the end, however, neither his constitutional history, political philosophy, his new interpretive paradigm, nor his specific suggestions for dealing with important constitutional issues make sense. They are internally flawed, inconsistent and not supported by available evidence. To be sure, Professor Sunstein is not alone in advocating radical constitutional surgery. Indeed, I would have approached this book review in a very different way if Professor Sunstein were to simply embrace the virtues of deliberative democracy and not try to wrap himself in the Madisonian mantle. However having chosen to do otherwise, Sunstein must be judged by the standards he sets for himself.