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The Quest for the Common Good: Neutrality and Deliberative Democracy in Sunstein's Conception of American Constitutionalism

Robert Justin Lipkin

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I. INTRODUCTION

In the beginning there was the state. And the state knew what was Just and Good. Theocratic states held dominion over heretics, infidels, and apostates, while in feudal states the King and his men reigned over the weak and the poor. In these times the state was the protector of partiality and the bastion of bias. Then came the liberal revolution which flooded the Western World, washing away the partisan state. In its place liberalism trumpeted the ideal of neutrality, an ideal setting the ground rules of government and permitting private actors to live the good life as they see it. According to the ideal of neutrality, the state should enforce the formal virtues of justice, constitutionalism, and the rule of law, but it must stay out of the good life business. The liberal state insists on leaving the conception of the good to the private world of individuals and their voluntary associations.

Since governmental neutrality is the hallmark of liberalism,[1] the state must embrace a dichotomy between the public and private spheres of human interaction. The state may regulate the public domain in pursuit of the common good, but it must not exacerbate a social con-

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1. *See generally* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); RONALD DWORKIN, A MATTER OF PRINCIPLE 195 (1985); CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY 42-55 (1987); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 33, 271-73 (1974); JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971); JOHN RAWLS, POLITICAL LIBERALISM 191-94 (1993). *But see* Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity and Authority*, 142 U. PA. L. REV. 549, 550 (1993) (arguing that "the status of neutrality as a defining characteristic of liberalism is quite contestable—even among liberals").

flict by favoring one private actor over another. The realm of the private must be, for the most part, beyond the government's reach.[2] This liberal insight presumes that people are better rational calculators, individually and collectively, when left to their own devices independently of the control of the state. If liberalism values autonomy and privacy so overwhelmingly, why then should it endorse government at all? Classical liberals answer that the minimal state is superior to anarchy—understood as the law-free interactions of individuals and private voluntary associations—because the minimal state protects individuals from harm and allows them to flourish, while anarchy pits all against all.

Contemporary liberalism extends the scope of the minimal state beyond this harm principle to include paternalism and governmental regulation of the common good. Nevertheless, even according to contemporary liberalism, the government, though deeply involved in economic and social life, should not formally embrace a particular conception of the good life and impose it on the populace. Instead, contemporary liberalism insists that there exists a line dividing the public and private spheres of human existence beyond which the state must not cross. Thus, even in contemporary American society, where government is a ubiquitous presence, it remains a liberal article of faith not to take sides.

What does it mean for the state to act impartially or neutrally? The standard response is that the state acts impartially when it refrains from entering the private sphere, or when it enters the private sphere only in exceptional circumstances and for limited reasons. A liberal government is a government of limited powers designed to protect people from violence and harm so that they may flourish in their private lives. The private sphere provides a baseline according to which governmental decisions can be evaluated in order to determine whether the government is adhering to the requirement of neutrality. If two parties are engaged in a conflict, the government's role is to remain neutral, per-

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2. In order to protect and enhance autonomy, the *raison d'etre* of liberal political theory is the harm principle which proscribes conduct that adversely affects others, such as criminal and tortious behavior. Classical liberal theory restricts the government's reach to the harm principle. Contemporary liberalism, on the contrary, in addition to protecting citizens from harm, also embraces legislation based on paternalism and the welfare of the individual and the community. Though these two forms of liberalism differ drastically in contemporary political controversies, their dispute centers around *what* limitations should be placed on government, not whether to limit government in the first place. For an instructive discussion of the harm principle, see generally JOEL FEINBERG, HARM TO OTHERS (1984).

mitting the combatants to settle the conflict by employing the resources of the private sector. If the government supports one party over the other it becomes partisan and thus violates the requirements of neutrality and the rule of law. The liberal ideal of neutrality requires that the government respect the private arena by supporting the status quo expression of it.

Cass R. Sunstein is committed to the ideal of neutrality.[3] In his book *The Partial Constitution*, however, Sunstein attempts to delineate and justify an alternative conception of governmental neutrality, one that does not valorize the status quo.[4] Sunstein's model rejects the premise that neutrality is preserved by maintaining the status quo distribution of rights and benefits guaranteed by American common law. Instead, Sunstein advocates subjecting all manifestations of governmental regulation—including the common law and intentional governmental inaction—to a process of deliberative democracy which will ensure neutrality.

Sunstein believes that neutrality is "the most basic organizing principle of American constitutional law . . . requir[ing] the government to be impartial."[5] This liberal vision is embedded in the Constitution, according to which the government should not single out particular people or groups for special treatment.[6] Neutrality is the primary obligation of the liberal state.[7] American constitutional law is replete with examples of neutral government action. However, trouble brews here over the proper understanding of the principle of neutrality as it functions in American constitutional law. The most familiar conception of neutrality, "status quo neutrality," is inimical to constitutional concerns over impartiality. Thus, according to Sunstein, liberals must provide a different conception of neutrality or abandon the liberal vision of constitutionalism.

According to the principle of status quo neutrality, a governmental

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

4. Just what is Sunstein's preferred conception of neutrality? For the answer to this question we must await the book's conclusion where Sunstein embraces several forms of neutrality such as consistency, including internal consistency, reflective equilibrium, and reasoning by analogy. *See also* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993). Additional forms of neutrality include public regarding reasons, the impersonality of some decision makers, and suitable baselines for choice. SUNSTEIN, *supra* note 3, at 351-53. But, what are the relations between and among these alternative conceptions of neutrality? Sunstein should provide some overview of how these different kinds of neutrality are related.

5. SUNSTEIN, *supra* note 3, at 2.

6. *Id.*

7. *Id.*

decision is neutral when it respects the status quo by refraining from interfering with existing distributions of rights and benefits. Since the common law expresses and defends existing distributions, status quo neutrality demands respect for the common law. In contrast, when the government intrudes upon existing distributions of rights and benefits, it is no longer neutral, but instead takes the side of one private actor over another. Liberal theory considers such partisan intervention by the government to be constitutionally suspect.[8]

Sunstein rejects status quo neutrality because, in his view, the common law is just another regulatory system. There is nothing neutral about letting the common law play out its themes. Restraining government from "intruding" into the common law makes an affirmative choice in favor of a particular regulatory scheme. Instead, American constitutionalism requires the status quo to be the object of deliberative democratic examination and justification. Rather than endorsing common law values and proscribing governmental regulations, we must realize that either is a choice of *regulatory* values. Sunstein exhorts us to drop the flawed notion of neutrality which considers a governmental act neutral only when it permits the common law regulatory scheme to prevail.

Status quo neutrality is generally a mistake and often produces injustice.[9] The problem is that status quo neutrality embodies yesterday's legal rules distributing rights and benefits in a partisan manner. These rules permit some people to own and drive cars, but not others. They permit police departments to discriminate against people with beards, but not against African Americans or women. Status quo laws permit killing fetuses under twelve weeks old, but not infants. These same laws permit heterosexuals, but not homosexuals, to marry. Status quo neutrality, according to Sunstein, maintains that there exists a prelegal "given"—a realm of experience existing naturally and independently of social organization. Liberal constitutionalism maintains that government should not take sides when private actors within this prele-

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8. According to Sunstein, status quo neutrality

> defines neutrality by taking, as a given and as the baseline for decisions, the status quo, or what various people and groups now have: existing distributions of property, income, legal entitlements, wealth, so-called natural assets, and preferences. A departure from the status quo signals partisanship; respect for the status quo signals neutrality. [Moreover,] the very categories of government "action" and "inaction" are given their content by the status quo.

Id. at 3.

9. *Id.* at 4.

gal domain oppose one another. Denying that this domain is a legal "given" forces one to reject the status quo as a baseline for justifying legal rules.[10]

If the status quo could be independently justified, according to Sunstein, we could reasonably use it as the baseline for government action.[11] However, the status quo is often controversial, sometimes unjust, and occasionally pernicious. Thus, "[t]he status quo might well be a target of law, and not taken as an inevitable or natural precondition for law."[12] Sunstein's quest is to devise a conception of neutrality without embracing the myth of the legal given. Once formulated, Sunstein's conception of neutrality would enable liberals to continue the liberal revolution by revising current constitutional law.

Sunstein's concern with rejecting status quo neutrality does not derive from an obsessive attraction to constitutional change. What drives Sunstein is his conviction that an essential goal of American constitutionalism is the creation of a deliberative democracy. In his view:

> The basic problem with status quo neutrality is that it shuts off, at the wrong stage, the American system of deliberative democracy. It refuses to subject existing legal practice to democratic scrutiny. It does not see legal practice as legal at all. It refuses to treat current distributions, or ownership rights, as a subject or object of deliberation.[13]

Thus, status quo neutrality arbitrarily withdraws from critical scrutiny large areas of social practice. These practices must first themselves be justified; therefore, they cannot be used as the baseline justification. However, Sunstein does not denigrate neutrality per se. Instead, Sunstein tries to show that "a number of conceptions of neutrality are indispensable parts of our legal system."[14]

This Essay argues that Sunstein's conception of deliberative democracy is both over- and under-inclusive. On one hand, deliberative democracy, as Sunstein understands it, is over-inclusive from the perspective of the constitutional conservative who argues against regulatory

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10. Sunstein's argument against the myth of the legal given derives from the work of scholars associated with legal realism and critical legal studies and still many mainstream legal theorists accept some version of this myth.

11. SUNSTEIN, *supra* note 3, at 6.

12. *Id.*

13. *Id.*

14. *Id.* at 10.

systems such as those brought about by the New Deal. On the other hand, deliberative democracy is under-inclusive from the perspective of the progressive democrat who inveighs against governmental constraints that prevent democracy from extending into the social and economic arenas of contemporary America.[15]

The constitutional conservative argues that Sunstein's deliberative democracy is not a form of neutrality at all, but instead is an unjustifiably partisan attempt to permit big government to enter into the private, economic, and social spheres of human life. In contrast, the progressive democrat insists that democratic dialogue must be pervasive if it is to exist at all.

Sunstein's limited conception of democracy, according to the progressive democrat, precludes the realization of complete democratic participation in American life. In order to achieve the latter, we must democratize the workplace, the corporation, the school, the hospital and so forth. Sunstein's commitment to property as a necessary condition of freedom and equality overlooks the ways that property perpetuates domination. Finally, the progressive democrat argues that extirpating domination is the primary political value that explains American history from Plymouth Rock to the Constitutional Convention, and it is as well the conceptual and moral driving force behind later American constitutional transformation.[16]

Although *The Partial Constitution* falls short of delineating a comprehensive framework of government neutrality, it is replete with astute constitutional analysis, sophisticated political philosophy, and flashes of insight into the human condition. Sunstein's conception of deliberative democracy should prompt any serious constitutional theorist to continue the search for the soul of America's Constitution.

II. DELIBERATIVE DEMOCRACY AND STATUS QUO NEUTRALITY

The centerpiece of Sunstein's constitutionalism is the ideal of deliberative democracy as the basis for governmental decisions. Deliberative democracy—giving public reasons in pursuit of the common

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15. Sunstein's liberalism incorporates some conservative values and some values of the progressive democrat, but he never grapples with the question of whether such a liberalism is coherent. Nor does he show why the more coherent positions of the conservative and progressive democrat are less attractive than liberalism. For an illuminating discussion of Sunstein's problem, see Mark Tushnet, *The Bricoleur at the Center*, 60 U. CHIC. L. REV. 1071 (1993) (book review).

16. I say "primary" to forestall the obvious and plausible objection that no single value will provide a comprehensive explanation of the American experience.

good—eschews self-interest and the protection of *merely* private rights.[17] Deliberative democracy, according to Sunstein, explains constitutional transformation: it explains the Revolution, the Founding, as well as other critical constitutional moments.[18]

Thus, deliberative democracy is Sunstein's formula for governmental impartiality and neutrality.[19] Deliberative democracy integrates liberalism's concern for independence, autonomy, and privacy with a republican concern for creating a civic language through which democratic deliberation can occur. This civic language requires impartial government decision making whereby lawmakers appeal to the common good for their justification as opposed to "self-interest, or power, or whim."[20] Governmental neutrality results when decisionmaking is impartial.

Status quo neutrality, for Sunstein, is inimical to the civic language of argument, reason, and justification. Since status quo neutrality "takes existing practices as given, and does not require government to bring reasons forward on their behalf,"[21] it cuts short deliberative democracy. Status quo neutrality fails the test of impartiality because existing practices and distributions are treated as "a kind of inexorable brute fact."[22] In Sunstein's view, the Framers invoked the impartiality principle to deal with the legacy of monarchy and self-interested representation by government officials. They hoped that through a neutral civic

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17. Three additional commitments of liberal republicanism follow from the ideal of political deliberation: citizenship, political agreement, and equality. SUNSTEIN, *supra* note 3, at 133-41. The role of the courts, therefore, is to "guarantee the preconditions for democracy by limiting the power of majorities to eliminate these preconditions." *Id.* at 142. For an interesting criticism of the adequacy of Sunstein's conception of deliberative democracy, see James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 241-79 (1993). *See also* Cass R. Sunstein, *Response: Liberal Constitutionalism and Liberal Justice*, 72 TEX. L. REV. 305 (1993) (responding to Fleming).

18. Sunstein insists that

> the principle of political deliberation . . . is part and parcel of the original Madisonian conception of politics. It resonates in our governmental institutions, including national representation, checks and balances, federalism, and judicial review. It is connected with the American belief that disagreement and heterogeneity are creative forces, indispensable to a well-functioning republic.

Sunstein, *supra* note 3, at 135.

19. According to Sunstein, risk management and an anti-caste principle drive deliberative democracy. In Sunstein's view, risk management is preferable to compensatory justice, and an anticaste principle is preferable to the standard conception of equal protection which treats similarly situated people the same. *Id.* at 334-46.

20. *Id.* at 17.

21. *Id.*

22. *Id.*

discourse the bias of both monarchy and factionalism could be extirpated.

As a result, the Constitution "was designed to create a deliberative democracy."[23] In such a republican form of government, the people have ultimate power but speak through their representatives who "engage in a form of deliberation without domination through the influence of factions."[24] In this picture, legislative action "based solely on the self-interest of private groups is the core violation of the deliberative ideal."[25] This Madisonian ideal regards the deliberation of national representatives as the vehicle through which civic virtue is expressed in pursuing the common good. Understood in this fashion, the structure of the American government and its insistence upon checks and balances is designed to effect a conversation from which the common good derives.[26] According to Sunstein, "[d]eliberative government and limited government [are], in the framers' view, one and the same."[27]

Impartiality, then, requires that governmental policy be justified by "public-regarding explanations that are intelligible to all citizens," even those citizens "operating from different premises."[28] No special-interest-group justification is allowed. Consequently, interest-group pluralism, according to Sunstein, was not originally a part of American constitutionalism.[29] Sunstein asserts that "the antiauthoritarian impulse, understood as a requirement of reasons, lies at the heart of American constitutional law."[30] Antiauthoritarianism rejects "naked preferences" as a source of law.[31] Instead, the Constitution generally requires governmental acts to be effective means to public values. The raw power of an interest group, even after fair and open competition, is an insufficient justification for governmental action.[32] Consequently, the judicial

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23. *Id.* at 19-20.

24. *Id.* at 20.

25. *Id.*

26. Dialogue and conversation have been recently resurrected in legal and moral theory. *See generally* Robert Justin Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 TUL. L. REV. 69 (1991).

27. SUNSTEIN, *supra* note 3, at 23.

28. *Id.* at 24.

29. John Hart Ely's representation-reinforcing theory as expressed in DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) would be deficient in this regard.

30. SUNSTEIN, *supra* note 3, at 25.

31. A "naked preference" permits "the distribution of resources or opportunities to one group rather than to another solely on the ground that those favored have exercised the raw political power to obtain what they want." *Id.* at 25.

32. The problem of distinguishing between power and deliberation arises in this context. What does it mean to say that a particular law is based on self-interest, while another is based

role must be more than merely policing the process of representative government, as John Hart Ely's theory maintains.[33] The courts must evaluate the reasons behind legislative and executive acts in order to determine whether government process reflects a genuine system of reflection and justification.

Although Sunstein's conception of Madisonian democracy is a compelling account of American constitutionalism, his argument would have been more persuasive had he appealed to the principle of anti-domination. The principle of anti-domination embraces the idea that people should be free of self-interested forces that relish hierarchy and deference. These oppressive forces can take the form of distorted political processes, invidious social conventions, and even the politicization of the natural order. Anti-domination rejects monarchy as a legitimate form of constitutional government; it also rejects the use of the political system for personal advantage. Most importantly, the anti-domination principle is a constraint on majoritarian rule, insisting that such rule is illegitimate when it takes the "naked preferences" of the majority as sufficient justification for law.

It is this anti-domination principle, and not simply deliberative democracy, that is at the heart of the American Revolution and the story of American constitutionalism. To be sure, the Framers created a "republic of reasons" insisting that deliberation and democracy were central constitutional values. However, these were instrumental values, not intrinsic ones.[34] The reason that the Revolution "consisted of a

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on civic virtue? Even if we can conceptually distinguish between power and deliberation, how do we apply this distinction to practice? It is almost always possible to construct a public justification for legislation motivated by the most sordid motives. Moreover, insisting upon public justifications often breeds duplicity. Sunstein's framework requires a more comprehensive and persuasive definition of "public value." Is such a value a constitutional value? Is it instead a value which benefits everyone? Do there exist public values capable of resolving the great constitutional controversies of today? Is it a value that most people would embrace? Sunstein's excursion through means-ends rationality and his republican conception of constitutionalism along with his rejection of naked preferences fail to address these issues.

33. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

34. I do not endorse an absolute distinction between instrumental and intrinsic values. Often, instrumental values are conceptually related to intrinsic values, and certainly this is true of the relation between anti-domination and democracy. The Framers could not conceive of creating a polity having anti-domination as its central value without establishing a democracy to create and preserve it. However, it is the anti-domination principle, not democratic deliberation, that was the core value of the American revolutionary and constitutional experience. Further, this is a core aspirational and critical value. It explains what was good about the American experience, while simultaneously providing a critical standard for explaining the great American failures, for example, our treatment of the original American people, slavery, sexism and so forth. These

radical rebellion against the monarchial legacy"[35] was the Founders' rejection of domination in political life. This fundamental constitutional value drove the early American revolutionaries and constitutionalists toward deliberative democracy because they were convinced that the only way to resist domination was to participate in creating law by and for themselves.

Political participation and deliberation should focus on the good of the polity, not the adoration of the Crown, nor the good of self-interested representatives, nor even the good of an unmodified majority will. If not, the people will be dominated by either the one or the many. Therefore, instituting a deliberative democracy appealed to the Framers' perspective because deliberative democracy was inextricably linked to anti-domination, an underlying and motivating substantive value behind American constitutionalism. The metaphor of a "republic of reasons" fails to capture this substantive value because a republic of reasons in itself does not reveal *substantive* reasons that are uniquely American. Any principle or policy is justifiable if one can amass more reasons in its favor than in favor of the alternatives. What good is a republic of reasons if the republic has an inegalitarian foundation, or if the reasons permit tyranny? The Framers had little faith in purely formal or procedural safeguards for the sake of process alone. Instead, they desired to extirpate political domination. To that end it was necessary to eliminate monarchy, politically corrupt representation, and the notion that a majority had the right to rule simply because it was the majority.[36] For this reason, Sunstein's celebration of a republic of reasons falls short because it fails to capture the Framers' partisan ideal of a republic opposed to political domination.

A. *The Role of Common Law Neutrality in Constitutional Adjudication*

Deliberative democracy and status quo neutrality are strategies of political justification. Both strategies dictate the role of the government in a wide range of circumstances. In order to identify and contrast deliberative democracy and status quo neutrality, Sunstein concentrates on three key cases which "help define our understandings about when

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were failures precisely because they violated the anti-domination principle.

35. SUNSTEIN, *supra* note 3, at 19.

36. *Cf.* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

government is even present."[37] The United States Supreme Court in *Plessy v. Ferguson*,[38] *Lochner v. New York*,[39] and *Muller v. Oregon*[40] "took existing practice as the baseline for deciding issues of neutrality and partisanship."[41] In *Plessy*, the Court held that social intercourse between blacks and whites was immune from judicial action. In *Lochner*, the Court held that, barring exceptional circumstances, the economic arena was off limits to governmental regulation. In short, both cases insist that the government stay out of private America.

The Court assumed in *Plessy* and *Lochner*, Sunstein argues, that existing social and economic practice were law-free, and thus government intrusion into this practice was partisan. Believing that the government should just let the law-free realm play out its own themes, the Court constitutionalized this law-free realm by placing it beyond the government's reach. In *Muller*, the Court upheld legislation restricting the hours women could work. At first glance, *Muller* appears different from *Plessy* and *Lochner*. Sunstein insists, however, that this appearance is misleading. According to Sunstein, the Court in *Muller*, in upholding the paternalistic law, constitutionalized the differences between men and women because it regarded these differences as natural and prepolitical. All three cases are based on the core idea that existing practice—whether economic or social—must be taken as given and as law-free. In contrast, Sunstein notes that the New Deal revolution rejected the notion that neutrality referred to the status quo, and that government regulation of the status quo must be partisan. Instead, the New Deal insisted "that current rights of ownership, and other rights, were a product of law."[42] Consequently, there is no neutral baseline free from political, legal, and governmental intrusion. Everything is political from the ground up.

Sunstein rightly insists, of course, that the distinction between governmental regulation and the common law does not correspond to the distinction between law and neutrality. Thus, the common law is not a law-free, neutral framework for evaluating governmental intervention. Sunstein writes:

> [The] government—through minimum wage laws or the com-

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37. SUNSTEIN, *supra* note 3, at 41.
38. 163 U.S. 537 (1896).
39. 198 U.S. 45 (1905).
40. 208 U.S. 412 (1908).
41. SUNSTEIN, *supra* note 3, at 41.
42. *Id.*

> mon law system—is making a choice and is doing so through law. The law created property and contract rights, and the law imposed various limits on these rights. Market wages and market hours were in this sense a creation of law, not of nature, and not of laissez-faire. The common law could not be regarded as a natural or unchosen baseline. Instead its principles amounted to a controversial regulatory system that created and did not simply reflect the social order.[43]

The problem here is that Sunstein fails to appreciate fully the reason for using the common law as a baseline in the first place.[44] The reason that such theorists as Edmund Burke or Thomas Cooley, for instance, use the common law as a justificatory framework is not because the common law is neutral, nonnormative or prepolitical; nor is it because the common law is produced unintentionally, or is beyond human choice. Instead, common law theorists select the common law as a justificatory framework because of the *kind* of choices involved in common law adjudication. Sunstein's confusion here is between the common law as a complex normative system resulting from a myriad of independent or quasi-independent choices in law, finance, and government, and the common law as a singular normative *statute*, or a sweeping judicial decision.[45] Sunstein is certainly right that the common law is determined by normative political choices, but that does not entail that the common law as a body of law was chosen in the way a com-

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43. *Id.* at 50.

44. Sunstein's characterization of status quo neutrality offers bad reasons in defense of common law rationality when better reasons exist. If the Court regards governmental inaction as constitutional, and governmental action as intrusive, it is not because the Court believes that inaction is neutral while action is non-neutral. Instead, the reason for the Court's endorsement of inaction is precisely because governmental—usually *federal* governmental—action intrudes on the non-neutral, highly normative area of the common law, an area thought to deserve constitutional protection.

45. Consider Cooley's words:

> Preserving their common law, the people of America have also very wisely in the framework of their political institutions preserved whatever of value had been worked out for them in the struggles and vicissitudes of ancestral history, and have shown a prudent conservatism in accepting changes which would substitute for actual benefits as opposed to merely theoretical improvements. Their maxims of liberty are embodied in their constitutions as a protecting armor, and to this protector may aptly be applied the saying that "only link by link is made the coat of mail." Under the hammer and by painful and patient riveting it grows, till it is complete for protection; and in like manner have grown and been perfected our bills of rights until they justly attract the admiration of mankind as the perfect work of centuries.

Thomas M. Cooley, *The Uncertainty of the Law*, 22 AM. L. REV. 366 (1888).

prehensive statute is chosen, or in the manner an activist judge decides a case. No one believes the common law to be devoid of normative elements, but constitutional conservatives contend that these elements arise in a unique manner demonstrating their superiority to statutory solutions or to sweeping judicial solutions to perennial economic and social problems.

For common law judges and lawyers, "[e]volution, not revolution; slow and unconscious adaptation, not self-conscious institutional engineering, seemed the proper path of human development."[46] This view of the common law rests on a deep mistrust of global reform legislation like that of the New Deal, or judicial solutions such as those made by the Warren Court, in favor of pragmatic, incremental decisions designed with specific kinds of problems in mind. According to this view, "[t]he common lawyer . . . is deeply suspicious of comprehensive efforts at institutional redesign."[47] In practice, "these abstract projects are meaningless without the exercise of practical wisdom by practical men and women steeped in the evolving mores of social life."[48] The common law judge insists that "[a] thoughtful judicial decision will not be full of so-called theories of fairness or equality or democracy. It will be accompanied by a sober enumeration of the particular factors that particular decisions bring into play."[49] Common law "field workers"—judges and lawyers—confront actual legal, economic, and social conflicts that demand resolution. These field workers are the prime movers of this system of law in contradistinction to legislators or activist judges, who force the facts of the conflict into grand theories of constitutional government.

The common law, according to this view, is certainly normative and

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46. Bruce A. Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5, 6 (1991). Ackerman continues:

> From this perspective, the slow and half-conscious methods of the common law seemed more deeply rooted in the life of the community than the efforts by Enlightenment Founders or Reconstruction Republicans to usher in brave new worlds of constitutional meaning . . . . [T]he Founders and Reconstructers were far too optimistic about the role of self-conscious constitutional construction in history; that deeper changes occurred through evolutionary process by which an organic community adapted to imperfectly understood imperatives of growth and development. The challenge was not to understand the intention of the Framers of the original Constitution and its amendments, but to grasp the ways in which these original understandings were transformed by deeper organic imperatives.

Id.

47. *Id.* at 9.

48. *Id.*

49. *Id.*

political, but it is *not* revolutionary or utopian.[50] Nor is the common law external to the practices it regulates, as are federal legislation and revolutionary judicial decisions. The state obviously engages in legal choices either by acting or not acting,[51] but what matters is the *kind* or *source* of the choice and not merely that it *is* a choice. Governmental action is on firm ground when it supports the common law because the common law is committed to what works. The common law is derived from, but not identical to, customary solutions to actual legal, economic, and social problems. These solutions are crafted in the field as opposed to the detached vantage point of the legislative chamber or the gilded chambers of an activist judicial legislator.[52] The common law is based on an experimental workshop consisting of customs, prior common law decisions, social mores, and so forth.[53] Customary law is certainly not neutral, so the argument goes, but it is well-confirmed and therefore an appropriate baseline for testing legal decisions.[54]

Returning to *Lochner,* Sunstein first objects to the Court's assumption that the common law's market-ordering is the appropriate baseline

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50. The common law opposes revolution and utopian reform. It does not, however, oppose its own brand of *internal* reform, the process through which the law works itself pure. The common law embraces internal reform because judges confront actual conflicts, the resolution of which refines and perfects the law. Common law judges, therefore, have an advantage over legislators and activist judges removed from the field of conflict.

51. SUNSTEIN, *supra* note 3, at 54.

52. Consider Cooley once again:

> "With customs we do well," says the proverb, "but statutes may undo us;" and our laws we do not forget are still for the most part customary. The power to legislate, the people of America have discovered, unless carefully restrained and limited, is quite likely to prove a "power to frame mischief by a law;" . . . .

Cooley, *supra* note 43, at 367.

53. In this view, the common law is pragmatic, anti-theoretical, and non-ideological. Should the common law fail to exhibit these qualities, it must be reformed.

54. Sunstein intimates that segregation as a social, political, and legal policy was "a conscious social choice." SUNSTEIN, *supra* note 3, at 56. There is no doubt American apartheid used both common law and statutory law to *enforce* segregation. But it does not necessarily follow that we collectively *chose* to provide the *conditions* for racism, let alone that law is the exclusive *source* of segregation. More importantly, even if the *original* source of racism or segregation is the public domain of law and culture, it does not follow that subsequent generations experience these attitudes as public rather than private, especially when we virtually imbibe them with our mother's milk.

What Sunstein fails to notice is that so-called status quo neutrality is not an issue about neutrality at all. Rather it is an issue of political and legal change. How should such change occur? What are the dangers of revolutionary or utopian change? Should we respect the spirit of the past? What are the virtues of bold new attempts to meet the future? For a discussion of constitutional change see Robert Justin Lipkin, *The Anatomy of Constitutional Revolutions*, 68 NEB. L. REV. 701 (1989).

for constitutional adjudication. Second, the *Lochner* Court regarded consideration of the plight of the disadvantaged to be insufficiently public or general to be neutral.[55] Third, "the court took as natural and inviolate a system that was legally constructed and that did not have a strong claim as a matter of justice."[56] Accordingly, the problem with *Lochner* is not "a commitment to free markets or an opposition to 'government' but something altogether different: the use, in *Lochner* itself, of the status quo as the baseline from which to distinguish partisanship and neutrality, or government action and inaction."[57] Sunstein continues:

> Rejecting that view, the New Deal period deepened the original constitutional commitment to deliberative democracy, seeing the status quo, like everything else, as subject to deliberation and to democracy. And if the defect in *Lochner* is understood in this way, we can link the case with *Plessy* and *Muller* as well. In all three cases, the Supreme Court took as natural and prepolitical systems that in fact were created by law and controversial or indefensible from the standpoint of justice.[58]

The problem with this argument is that it fails to distinguish between using the status quo as a baseline for constitutional adjudication and insisting that the status quo is natural or prepolitical. The constitutional conservative believes that the status quo can be used as a baseline precisely because it is not natural or prepolitical, but rather because it is based on the collective wisdom of the common law courts and the rules of the marketplace. In fact, the constitutional conservative believes that the status quo is created by a diverse group of agents making a myriad of legal, economic, and social decisions, at times individually, and at times in concert with others. The constitutional conservative embraces the status quo precisely because it contains the results of yesterday's "common law deliberation," an essential element in the ultimate constitutional value of deliberative democracy.[59] Sunstein is

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55. SUNSTEIN, *supra* note 3, at 61.

56. *Id.* It might have been useful had Sunstein explicitly defined such terms as "baseline," "partisan," and "neutral."

57. *Id.* at 66.

58. *Id.* at 66-67.

59. Indeed, Sunstein himself recognizes the common law "to be a set of collective choices." *Id.* at 294. No doubt these collective choices are not identical with democratic deliberation in Sunstein's sense. Nevertheless, common law judges function collectively like a democratic deliberative body. Common law judges invoke public, in this case legal, reasons in support of their

correct, of course, in pointing out that the common law is political and in some cases clearly unjust, but this is different from saying its justificatory force stems from its being a neutral or a pre-political given. Rather, the constitutional conservative embraces the status quo because it is the obvious starting place for constitutional adjudication, and because she distrusts grand judicial theorizing and sweeping legislative initiatives as the appropriate method for correcting injustice.[60]

In this regard, it would have been remarkable if the *Lochner* Court did not begin its analysis with the common law's market ordering. Where else could the Court have begun? Moreover, it would be surprising if the Court had not been committed to the correctness of the common law. The *Lochner* Court was committed to the common law rights of property and contract as nonnatural, defeasible rights developed through the intricate evolution of the common law.[61] A legislature in exceptional circumstances can overturn these rights for health and safety reasons, but the state in this case did not demonstrate the need for such legislative intrusion. In order to overturn these rights, the legislature must simply make a stronger case than it did in *Lochner*. No doubt this judgment is controversial. Indeed, Justice Harlan's dissent dispels any doubt that the legislation in *Lochner* could be construed as a health or safety law, but this has nothing to do with the propriety of using the common law as a baseline. How else could one proceed? Beginning with the common law does not preclude quickly rejecting it if empirical or other evidence suggests that it is flawed. Consequently, constitutional analysis is a non-starter, according to this argument, if it fails to begin with the common law.

Behind the notion of status quo neutrality lurks a contest between the common law and statutory law, and between incremental pragmatic change and grand theoretical or revolutionary change. Sunstein's dis-

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decisions. They expect challenge from, and consensus with, their judicial colleagues—as well as their fellow citizens. Thus, common law judges are, for the most part, equal members of a judicial deliberative body.

60. Two slightly different common law views should be distinguished here. A strong proponent of the common law might argue that injustice should be reformed only through the common law. A weaker version might hold that in cases where the common law is *clearly* unjust, legislation is permissible in reforming it.

61. The decision in *Lochner* can be redescribed to satisfy Sunstein's concerns. Indeed, one could rephrase the Court's opinion to say that a law favoring bakers is a naked preference. It cannot be generated through deliberative democracy. Thus, the Court in *Lochner* was policing the process of deliberative democracy. Indeed, as Sunstein intimates, *Lochner* stands for the proposition that no sufficiently public reasons can be given for the law. As such, Sunstein should approve the type of argument, if not its application, in *Lochner*.

cussion about "defining liberty and property" reveals this. Those prizing common law benefits view statutory benefits, according to Sunstein, "as a form of 'intervention'—the same understanding as that of the *Lochner* Court. An alternative approach would have been to select liberty and property interests by reference to some criteria independent of the common law, or at least not determined by common law categories."[62] What can such categories be?

B. *Status Quo Neutrality, Anti-domination, and Deliberative Democracy*

The issue here is between the common law and statutory law, between incrementalism and rationalism in law, not between nature and nurture. Common law theorists need not insist that the common law is more natural than statutory law, or that it is nonpolitical or nonlegal. Rather, these theorists can reply to Sunstein in his own terms. The common law is superior to statutory law because it embodies the results of yesterday's deliberative democracy—of yesterday's pragmatic solutions to concrete legal, economic, and social problems. Sunstein is right that "[t]he failure to grant substantive protection to statutory benefits derives from a sharp distinction between common law interests and other benefits."[63] That is precisely right, but that has little to do with statutory benefits being "normally or naturally owned by recipients."[64] Instead, the conservative theorist takes the common law's insight derived from conversation and interaction among diverse common law field workers more seriously than does Sunstein. According to common law conservatism, this conversation and interaction represent the common law's pursuit of the common good. Curiously, if we understand the common law as the result of a form of deliberative democracy between and among common law judges, then it is a mystery why Sunstein himself does not accept the value behind status quo neutrality. This value is not neutrality or naturalness. Instead, Sunstein should embrace status quo neutrality because the common law represents a baseline created by yesterday's deliberative democracy. In fact, conservative constitutionalists value the common law because it represents the fruit of an elaborate dialogue between judges and market actors, resulting in decisions that are created in the field and withstand the test of different generations.

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62. SUNSTEIN, *supra* note 3, at 83.
63. *Id.*
64. *Id.*

Constitutional conservativism conceives of a person as someone submerged by her situatedness. Such a person develops her values and aspirations as a result of the historical community into which she is born. Continuous reflection and scrutiny of these values is discouraged because such pursuits distort the process of social change. In this view, social change must occur obliquely; it must be in place, so to speak, before it is recognized, and therefore always must present itself as a *fait accompli*.[65] Such a theory of social change descriptively distorts actual social practices, and it normatively vitiates the creative potential behind reform and social engineering.

The real problem with constitutional conservatism is not that it wrongly contends that the common law is neutral, prepolitical, or nonnormative. Rather, constitutional conservatism fails because it is actually both antidemocratic and antithetical to enlarging and deepening our conception of liberty and creative change. As Bruce Ackerman explains, "[i]t is more obviously inconsistent with democratic principle and less robust in its liberty-protective tendencies . . . ."[66] Yet, why should the common law, a pragmatic procedure for concrete change, become encrusted and resistant to change? This is the paradox conservative constitutionalism must resolve.

The First Amendment, according to Sunstein, also suffers from status quo neutrality. In particular, Sunstein argues that the Court's decision in *Buckley v. Valeo*[67] is based on status quo neutrality:

> The existing distribution of wealth is seen as a given, and failure to act—defined as reliance on markets—is treated as no decision at all. Neutrality *is* inaction, reflected in a refusal to intervene in markets or to alter the existing distribution of wealth. This is so despite the fact that markets are conspicuously a regulatory system, and reliance on markets for elections is a regulatory choice. *Buckley*, like *Lochner*, grew out of an understanding that for constitutional purposes, the existing

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65. On the other hand, the progressive democrat believes that her historical situatedness is obviously the starting point of constitutional change. Indeed, the language of one's birth and maturation is necessarily the language with which one begins to contemplate social change. One is not restricted to this language, however. Indeed, in those truly remarkable American constitutional and social transformations, the language of change overcomes the birth language and is not translatable into that language.

66. Ackerman, *supra* note 46, at 25. Ackerman also contends that common law constitutionalism is incompatible with the bureaucratic state. *Id.* at 26-29.

67. 424 U.S. 1 (1976).

distribution of wealth must be taken as simply "there."[68]

Sunstein is right; markets are regulatory systems, but contemporary conservatism chooses to rely upon markets for elections, not because markets are just "there," but rather because the regulatory choice of markets for elections is one that grew out of the common law, yesterday's deliberative democracy. More accurately, markets and the common law have a shared origin and *modus operandi*. Markets and the common law rely on a process of decentralized agents, collaborating in incrementally creating laws and social practices that are tested, verified, and reformed in the field. Conservatives need not argue that there is anything natural or prelegal about markets for elections, just that they work better than alternative regulatory systems.

Although Sunstein boldly asserts that "[m]uch of modern constitutional law is based on status quo neutrality,"[69] he fails to recognize that the meaning of "status quo neutrality" is far from pellucid. In fact, much of the plausibility of Sunstein's argument depends on multiple ambiguities in this term. Sunstein uses the term "status quo neutrality" in the following ways. A governmental decision is based on status quo neutrality when it is justified in terms of or begins analysis with (1) the common law, (2) voluntary exchanges between and among individuals,[70] (3) human or physical nature, (4) natural law, (5) nonpolitical, nonlegal, or more generally, non-normative considerations,[71] (6) governmental inaction, or (7) what is right or desirable. These concepts do not necessarily mean the same thing; some of these senses of "status quo neutrality" are even incompatible with others. For example, a person might regard the common law, but not human nature, as the sole justificatory mechanism of law. Further, if a decision derives from natural law it is normative and political, but its justification is not a function of the common law. The constitutional conservative's position is generally one that appeals to the common law or voluntary exchanges between and among individuals.[72] Sunstein needs to state just what

68. SUNSTEIN, *supra* note 3, at 85.

69. *Id.* at 68.

70. For example, Sunstein states: "Actually the FCC's attack asserts, without a full look at the real-world consequences of different regulatory strategies, that the [fairness] doctrine involves governmental interference with an otherwise purely *law-free* and *voluntary* private sphere." *Id.* at 214 (emphasis added).

71. *Id.*

72. American constitutionalism limits the powers of the federal government in order to protect the state and local common law from federal intrusion. According to this view, since the English common law existed prior to the formation of the United States, it can be used as a

his conception of status quo neutrality ultimately means.

One particularly interesting defense of status quo neutrality, one that Sunstein explicitly rejects, is found in the Burkean defense of common law. Here it is obvious that status quo neutrality has little to do with neutrality in the sense of a nonlegal baseline. Sunstein describes the Burkean defense of status quo neutrality as:

> [T]he status quo and existing practice have a kind of rich complexity and wisdom that no critic is in a position to appreciate. Current practices have developed through the work of millions of people over . . . hundreds of years. They therefore profit from a collective intelligence that will transcend what any single mind, or particular set of minds, can hope to produce . . . .
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> . . .
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> [R]eformers might overlook something of value in existing practices. We should be humble about reform proposals developed by few people or over short periods; current practices have more to offer than at first appears.[73]

Sunstein rejects this argument, contending instead that "[s]ometimes existing practices are the result not of a rich rationality, but instead of such things as sheer chance; economic, physical, and social power; injustice; and the arbitrary sequence of events."[74] Sunstein is no doubt correct that such practices as slavery, segregation, sexual inequality, and oppression of gays and lesbians are practices that have been protected by both common sense and the common law. That is irrelevant, however, to whether both common sense and the common law should be the starting point of constitutional evaluation. Of course, the starting point is not necessarily dispositive, but we should understand the deep rooted

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benchmark of neutrality regarding governmental conduct. In other words, Sunstein's argument against the common law can be regarded as begging the question against conservative constitutionalists who believe that the Constitution was not meant to replace the common law, but to preserve it. After all, the Constitution could have abolished common law categories explicitly, but it did not, and indeed, it was seen as protecting these categories.

Neutrality enforces the status quo whatever its content. If the common law permitted radical, global change, then the Constitution would protect such change. Had the content of the common law been different, for example, if it did not protect private property, contract and individual liberty, status quo neutrality would not protect capitalism. Instead, neutrality might protect private collective choices against individualist reform. In these circumstances, a law permitting a farmer to keep her profits would be seen as non-neutral.

73. SUNSTEIN, *supra* note 3, at 130.

74. *Id.*

origins of social practices, even evil ones, before we are in a position to comprehensively and persuasively argue for their abandonment.[75]

Contrary to both Sunstein and the Burkean defender of the common law, the issue should not be drawn in the stark terms of either accepting the common law entirely or starting from scratch. Starting from scratch is impossible and therefore is not a reasonable option. Nor should we valorize the common law so as to preclude change. What we should do is begin with the common law, then identify constitutional crises, and try to resolve such crises by appealing to general principles and values in the common law and the wider culture.[76] If we cannot resolve a crisis in this manner, we must then shift to a more imaginative interpretation of our predicament in order to construct a viable resolution of the crisis.[77] This process of creative constitutionalism requires reconstructing or recombining values from different historical epochs in order to resolve a contemporary crisis in a novel manner. These imaginative reinterpretations will always meet resistance, but it is just those circumstances—when resistance is overcome—that mark the great transformations in American constitutional law.[78]

The New Deal was such an interpretation, and it extended a com-

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75. Robert Justin Lipkin, *Pragmatism—The Unfinished Revolution: Doctrinaire and Reflective Pragmatism in Rorty's Social Thought*, 67 TUL. L. REV. 1561 (1993).

76. The egregious failures of the common law, such as slavery and segregation, were resolvable by appealing to what we already knew. No independent knowledge of human society was required to show us that slavery and Jim Crow segregation were wrong. Instead, all we needed was to appeal to the aspirations for freedom and equality already embedded in the common law. White males desired liberty and equality, but could offer no compelling moral reasons why Native Americans, African-Americans and women did not deserve the same.

77. Sunstein contends that because the existing distributions are made possible by law they are not neutral nor should they be the baseline for constitutional analysis. However, "neutrality" might mean prelegal or it might mean derived from the common law and yet nonpartisan with regard to *this* dispute. Moreover, a baseline might be dispositive regarding a particular issue or it might be the starting point for constitutionally analyzing that issue. Sunstein is right to reject existing distributions as dispositive of an issue, but it certainly must be the starting point for constitutional analysis. This last point is merely a consequence of anti-foundationalism in constitutional adjudication. Only if an independent standard existed from which to evaluate constitutional issues would it make sense to suggest that we can *begin* constitutional analysis with anything but existing distributions. If foundationalism is dead, so too is the view that the status quo need not be the starting point of intellectual inquiry. Indeed, just what is the alternative to starting with existing distributions? This does not entail, however, a *formal* presumption in favor of existing distributions.

78. *See generally* BRUCE A. ACKERMAN, WE THE PEOPLE (1991); *see also* Robert Justin Lipkin, *Can American Constitutional Law Be Postmodern?*, 42 BUFF. L. REV. 317, 344-76 (forthcoming 1994) (critically examining Ackerman's theory of constitutional dualism).

mitment to the politics of deliberation "through its insistence that the status quo and existing ownership rights could no longer be reflexively accepted or be thought to be part of nature."[79] Instead, the status quo, like every other frame of reference, must be subjected to critical scrutiny:

> The status quo, too, may be accepted only on the basis of the reasons that can be brought forward on its behalf. In this respect, the New Dealers subjected the status quo to a version of the impartiality principle, on the antiauthoritarian ground that the distribution of social benefits and social burdens must always be defended by reference to reasons. There is a strong continuity between the republican attack on monarchy and the New Deal challenge to status quo neutrality.[80]

Sunstein presents this principle of impartiality as the foundation of deliberative democracy. The commitments of citizenship, consensus, and equality follow "[f]rom the belief in political deliberation."[81] This is a curious result. Sunstein seems to argue that citizenship, consensus, and equality are valuable *only* because they follow from the conception of political deliberation. Surely, this places the cart before the horse. Political deliberation is intrinsically less compelling than these other commitments. In fact, political deliberation is valuable because it helps further these intrinsically superior values.

Aside from its instrumental value, political deliberation is necessary since "[a] goal of politics is thus to reflect on and sometimes to change existing preferences, not simply to implement them. Preferences are not static; they are subject to conversation and debate. People must justify social outcomes by reference to reasons."[82] Without specifying a substantive value to drive deliberation, the appeal to *reasons* is anemic. If political decisions need only reasons—without specifying the form, content, and constraints on such reasons—then anything is permissible. Reasons, public reasons, are available for almost any actual controversial position.[83] More importantly, why should the foundation of liberal

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79. SUNSTEIN, *supra* note 3, at 135.

80. *Id.*

81. *Id.*

82. *Id.*

83. The problem with reason is that understood abstractly and generally, it is likely to be uncontroversial but unlikely to yield determinate outcomes. Understood concretely and in context, reason will yield determinate outcomes but only at the expense of being characterized in controversial terms. Either possibility renders reason seriously defective.

republicanism center on *reasons per se*? Surely, there must be more fundamental values which make political deliberation attractive. Indeed, the very values Sunstein contends are derivative—citizenship, consensus, and equality—are each alone, and certainly collectively, values which political deliberation serves.

This is not just an academic point. Rather, it demonstrates the need for some unifying substantive value to drive deliberation, especially if it is to have the wide application Sunstein intends. Citizenship, consensus, and equality explain the value of deliberation, but they in turn need some *unifying* substantive value to explain their importance. Contrary to Sunstein, anti-domination is that overriding substantive value that explains the value of citizenship, consensus, and equality, and ultimately explains the value of deliberative democracy. We value deliberative democracy primarily because it enables us to achieve the substantive right against domination consistent with a similar right for others.[84] Our admiration of this process of decision making would quickly dissipate if we became convinced that anti-domination, or some similar substantive value, were rendered no more likely by its operation.

Similarly, Sunstein tries to justify diversity and freedom "in part because of their salutary effects on public deliberation."[85] Again this places the cart before the horse. Public deliberation is valuable in part because it promotes diversity and freedom, or in my terms, anti-domination. However, it is anti-domination that drives the process of public deliberation. Should it turn out that "public deliberation" was anathema to anti-domination, Sunstein would apparently be committed to public deliberation anyway.[86] In contrast, it is my view that should public deliberation permanently cease promoting anti-domination, its value becomes problematic.

Sunstein fails to appreciate that in the American democratic experience political deliberation is valuable because it helps combat domination. Consequently, judicial review is permissible, according to Sunstein, when it protects "rights that are central to the democratic process and whose abridgement is therefore unlikely to call up a political remedy,"

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84. This is a reciprocal relation. Deliberative democracy can produce anti-domination, and the conditions of anti-domination may be necessary to preserve deliberative democracy.

85. SUNSTEIN, *supra* note 3, at 173.

86. It might be conceptually impossible to describe this counter-example. The only way we could know that public deliberation was detrimental to diversity and freedom would be to deliberate on the effects of deliberation, but then, it is deliberation that shows the harmful effects of deliberation.

and when it protects "groups or interests that are unlikely to receive a fair hearing in the legislative process."[87] This point ultimately leads Sunstein to devise a conception of judicial restraint. He writes:

> [A]n insistence on the democratic character of American constitutionalism provides the right source of interpretive principles. In most cases that view would lead to judicial caution. In others it would lead to a more aggressive role. In all cases it would provide a helpful orientation.
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> If interpretive principles are generally to grow out of democratic commitments, it follows that a judicial role in social reform will frequently be unjustified. We might even be able to generate a set of criticisms of an aggressive role for the judiciary in the name of the Constitution. These criticisms will help in the development of interpretive principles.[88]

Two points are relevant here. First, the best interpretation of the "American experience" is the anti-domination principle. Arguably, this principle explains the reasons for coming to America, rebelling from British control, creating a Constitution and a Bill of Rights, fighting a Civil War, Reconstruction, the New Deal, the Civil Rights movement, the privacy movement, the revolution in criminal procedure, and the reinvigoration of the modern First Amendment.[89] The anti-domination principle, with the appropriate qualifications, can be understood as the touchstone of American constitutional and political life.[90] Consequently, the anti-domination principle does not seek to rid American constitutionalism of a dynamic and healthy process of judicial review. When Sunstein writes that "[w]e have seen that the belief in deliberative politics has been central to American constitutionalism since its inception,"[91] my response is that this commitment to deliberative politics has value, for the American experience, only in serving the anti-

87. SUNSTEIN, *supra* note 3, at 142-43.

88. *Id.* at 144-45.

89. The anti-domination principle also explains feminist and critical race theory arguments against pornography and hate speech as well as the gay and lesbian rights movement.

90. By "appropriate qualifications" I mean the disparity between our best interpretation of the anti-domination principle and its imperfect implementation in American history. After all, our political and constitutional experience is predicated on mistreatment and domination of Native Americans, African-Americans, and women. Nevertheless, if there is good in the American experience, it derives from our commitment, albeit imperfect, to anti-domination. In fact, I believe that anti-domination and domination explain the good and the bad in American constitutional history. Few people, however, would explicitly endorse domination as a worthy American value.

91. SUNSTEIN, *supra* note 3, at 146.

domination aspirations of the American people. Consequently, if an expansive role for judicial review contributes to anti-domination, it is justified by virtue of this contribution.

Status quo neutrality arises again when we attempt to discover the relationship between governmental decisions and the aspirations, preferences, and desires of the populace. According to status quo neutrality, the "government takes citizens' desires as they are and does not seek to evaluate or to change them. It is impartial among them. Both government action and government partisanship are . . . defined as rejection, by the state, of existing preferences. Inaction and neutrality are . . . defined as respect for those preferences."[92] Sunstein rejects this view, contending "that the use of such preferences is unsupportable by principles of neutrality, autonomy, or welfare—the very ideas that are said to justify it."[93]

Sunstein's discussion of this issue is central to the question of whether status quo neutrality is desirable or possible. Sunstein's point here is that government cannot be neutral with respect to preferences because "the initial allocation shapes preferences" and "no legal system can operate without initial allocation."[94] According to Sunstein, no neutral, acontextual "preference" or perspective exists from which the government can evaluate the preferences of the citizenry. Whether government acts or refrains from acting, it helps to create preferences and thus, whatever its posture, government cannot be neutral. Sunstein rejects the suggestion that the government might just allow people to do what they want. For example, government might permit railroads to pollute the air without liability. This will not work, according to Sunstein, because "[a] decision to permit railroads to emit pollutants is a grant, by law, of a legal entitlement; it allocates the relevant right to the railroads."[95]

Although this point is basically correct, one wishes Sunstein had considered libertarian or quasi-libertarian objections. For example, suppose the government simply prevented people from physically injuring one another, but permitted social and economic confrontations. In this scenario, railroads could pollute, but environmentalists could organize campaigns, including civil disobedience, against railroad pollution. In these circumstances, the government simply makes sure that no one gets

92. *Id.* at 162.
93. *Id.* at 163.
94. *Id.* at 168.
95. *Id.* at 169.

hurt physically. Whoever prevails in the social and economic marketplaces prevails—period. In this way, the government is impartial between railroad polluters and environmentalists. It is not at all clear that this libertarian example can be described intelligibly, or if it can, that it represents a desirable form of government. Sunstein would have done us a service, however, to take this example more seriously, and to show why it does not support the contention that the government can act neutrally.

Since Sunstein does not offer a general account of the legitimacy of taking existing distributions as the baseline for constitutional analysis, his arguments for doing so appear arbitrary. He simply asserts, for instance, that property and contract must refer to the status quo baseline. Why should this be so? We might need to begin our analysis with property and contract, but why must we end with them as well? Or even if we must start out *and* end up with property and contract, why should that entail that we must start out and end up with the *same* conception of property and contract? For example, a society that understands ownership, at least in part, as the "new property" can apply constitutional provisions to statutory entitlements.[96] A society that incorporates a progressive conception of individual property and contract might apply the Constitution to that baseline.[97] Additionally, Sunstein overlooks the fact that choosing a particular baseline does not foreclose very different conclusions based on that choice. One chooses a baseline under a certain description, that is, one makes an interpretive choice of baselines, and this generally precludes one uniquely right conclusion flowing from a given baseline. Consequently, Sunstein needs to elaborate on the logic of baselines for his argument to be successful.

Once Sunstein acknowledges that what he calls status quo neutrality has nothing to do with neutrality and everything to do with the deliberative democracy of the common law, his argument becomes vulnerable to objections from the progressive democrat. Sunstein would no doubt reject the notion that the common law contains a deliberative democratic element. The progressive democrat insists, however, that deliberative democracy fails to provide a rich enough conception of democracy. The progressive democrat wants to replace governmental "deliberative demo-

96. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

97. A progressive conception of property might privatize personal property such as homes, clothing, cars, tools, books, and so forth. It might, on the other hand, subject the distribution and operation of other forms of property, such as factories, corporations and investments to some form of deliberative democracy.

cratic" institutions with institutions encouraging participatory democracy over a range of political and social contexts. Progressive democracy means the opportunity for democratic input in critically important American institutions such as the school, the workplace, the hospital, the corporation, and so forth. Progressive democracy enables the citizen to *live* democracy daily in her interactions with fellow citizens. Sunstein's arguments against status quo neutrality fail to satisfy either the constitutional conservative or the progressive democrat. This failure reoccurs in Sunstein's discussion of free speech.

III. RETHINKING THE RIGHT TO FREE SPEECH

A. *A New Deal for Speech*

The crusade against status quo neutrality is crystallized in Sunstein's call for a "New Deal for Speech."[98] Both the strength and weakness of his position against taking the common law as a baseline is revealed here. The concept of a New Deal for speech rejects the notion that a private, neutral domain of speech exists in which government, barring an extraordinary justification, should not intrude. Sunstein points out that in a capitalist society speech is regulated either by the government or the common law of property, contract, or tort. The central question is not whether to regulate speech, but rather which regulatory system to adopt.

The pre-New Deal conception of free speech insists that the only threat to free speech comes from governmental regulation. In fact, according to this conception, "an effort to regulate speech is defined as an attempt, by government to interfere with communicative processes, taking the status quo—the common law, property rights, wealth, and so on—as a given."[99] Sunstein proposes to apply the reasoning of the New Deal attack on the common law to current questions of First Amendment law.[100] This New Deal for speech parallels the purposes of the New Deal for economic activities.[101] In both contexts, status quo neutrality maintains that intervention comes only from the government. Existing practice is defined as the baseline for constitutional analysis. Whatever happens in these contexts occurs as a result of voluntary exchanges and interactions among private actors. Paying a person a

98. SUNSTEIN, *supra* note 3, at 197-231.
99. *Id.* at 199.
100. *Id.* at 202.
101. *Id.*

non-living wage is neutral because the government does not dictate that wage. Similarly, individual students may or may not decide to engage in hate speech on campus. What is constitutionally unacceptable is for the government to either compel or prohibit minimum wages or hate speech.

Calling for a New Deal for speech, like the New Deal itself, involves taking the common law as the object of rational scrutiny. Rational scrutiny requires us to state the purposes of a *system* of speech or a *system* of economic activity. The purpose of a system of speech is to promote free speech, just as the purpose of a system of economic activity is to promote economic well-being. Consequently, we must not divide the world into two categories: the common law of free speech and governmental regulation of speech. Promoting or inhibiting speech can be accomplished in either sphere. The common law of property can prohibit free speech, as in the case of broadcasters monopolizing air time to the exclusion of powerless individuals. In turn, the government can promote free speech when it prevents a powerful group from physically intimidating a speaker in a public park. Rather than dividing the world into two mutually exclusive spheres of private freedom and public control, regulations—private or public, common law or governmental—should be evaluated in terms of whether they promote free speech values.

Sunstein insists that before judging government regulation of free speech as potentially unconstitutional, we should ascertain the purposes behind the regulation. After all, non-governmental regulation of free speech is still regulation. Free speech is regulated by the common law of property, contracts, and torts. For Sunstein, "legal rules that are designed to promote freedom of speech and that interfere with other legal rules—those of the common law—should not be invalidated if their purposes and effects are constitutionally valid."[102] The pre-New Deal conception maintains "that the common law simply implements existing rights or private desires and does not amount to 'intervention' or 'action' at all."[103] By contrast, Sunstein claims that in a capitalist system, speech is always regulated and that the proper question is "what forms of regulation best serve the purposes of the free speech guarantee."[104] Perhaps Sunstein's point is stated best as follows:

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102. *Id.* at 205.
103. *Id.* at 206.
104. *Id.* Sunstein does not explain why this is the appropriate question.

> [The] grant of power—sometimes through the common law, sometimes through statute—is usually taken not to be a grant of power at all, but instead to be purely "private." Thus the exclusion of people and views from the airwaves is immunized from constitutional constraint, on the theory that the act of exclusion is purely private; thus rights of access to the media are thought to involve governmental intervention into the private sphere; so too with attempted limits on campaign expenditures.[105]

The point here is that if the government must *permit* or *forbid*, then nothing neutral remains. However, Sunstein overlooks a crucial difference in these two modalities. When the government forbids an activity, that ends the question of whether the forbidden practice, for example, speech, will legally occur. Forbidding is direct and final intervention. When the government merely *permits* action, however, it does not *require* it. An additional act must occur for the action to take place. Consequently, when the private sector "regulates," it does so only after competing private interests vie with one another for the opportunity to regulate. Once the government *permits* an activity, it has nothing more to do with the causal occurrence of that activity or its common law regulation.[106] In short, the government is then neutral with respect to the occurrence of that activity, and with respect to prospective private regulators. Even if we agree that the private sector regulates, there is still nonetheless an important distinction in the different *types* of regulation. This distinction can be explicated in terms of the comparative freedom of the private sphere as well as its decentralized planning and decision making. Private regulation, so the argument goes, if pernicious, can be corrected through the marketplace—in contrast to the iron heel of the government.

Of course, Sunstein would reply that when government grants speech rights to large private actors, it is the same thing as forbidding others from having an opportunity to speak. That, however, is false. Smaller actors in a capitalist system at least from time to time acquire the capacity to rival the large institutional actors. Consider the recent success of *USA Today* and the *Cable News Network*. Sunstein does not seem to address the issue of those really left out: the poor, minorities, women, homosexuals, the disabled, and so forth.

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105. *Id.* at 207.

106. From the progressive democrat's perspective, of course, this is little consolation for the individual who is excluded or exploited by the common law agent.

This last issue is illuminated by the progressive democrat's criticism of Sunstein's approach. According to the progressive democrat, Sunstein never really questions the system of property that becomes, in his eyes, the silent regulating system. Rather than allowing the government to intervene to regulate the silent regulators, Sunstein never considers abandoning the silent regulatory system or at least radically modifying it. For example, the progressive democrat urges stringent limits on licenses for broadcasting in order to increase diversity and to permit a larger number of points of view to have access to the air. Indeed, we can imagine a system in which a revolving fund of public monies alternates between and among "indigent" investors. For instance, public assistance could be provided for potential broadcasters who cannot afford a license or who do not have the capital to begin broadcasting. The progressive democrat insists that distribution of licenses be based on inclusion and diversity. Property should be only one factor in deciding this issue, in contrast to our present system in which property is dispositive.

A further difficulty with Sunstein's New Deal for speech is that it fails to express a coherent political philosophy.[107] Neither conservative nor progressive theorists can accept his view nor does it represent a principled alternative. Consider Sunstein's words:

> Some regulatory efforts, superimposed on current regulation through current property rules, may promote free speech, whereas the property rules may undermine it. Such efforts might not be "abridgements" of freedom of speech; they might increase free speech. To know whether this is so, it is necessary to understand their purposes and consequences.[108]

For the conservative, this observation risks creating a system of free expression sanctioned only by Big Brother. The view that government regulations can "promote" free speech, while common law rules "abridge" free speech, turns First Amendment jurisprudence on its head in the eyes of the conservative. Who is to decide when regulations promote free speech? How can governmental officials decide this issue without risking tyranny? Is it not better to permit the common law with its diverse decisionmakers to deal with these questions?

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107. Sunstein's liberal political theory is an unstructured hybrid of conservative and progressive elements. The conservative element is the commitment to autonomy and private property, while the progressive element is a commitment to equality and social welfare.

108. SUNSTEIN, *supra* note 3, at 207.

The progressive democrat is no happier than the constitutional conservative with Sunstein's New Deal for speech. Since the progressive democrat believes that law and culture are already skewed in favor of the status quo, she wants to resist those wider cultural forces that cause and reenforce this distortion.[109] In other words, American culture will inevitably lean toward the status quo and the common law even if we decide to self-consciously scrutinize both. The progressive democrat seeks a systematic procedure for counteracting this tendency. If the purpose of a system of free speech is promoting free speech, then this itself can prompt a switch toward greater democratization. Not only does free speech ultimately require opening up markets in speech to the poor and excluded, but it also requires the eradication of poverty and exclusion so that free speech is not perpetually dependent upon governmental largesse.[110] In short, the progressive democrat believes that no emancipatory conception of free speech is possible *without modifying the domination of private power.*

Sunstein argues that "[t]he major problem is not that private power is an obstacle to free speech; even if it is, private power is not regulated by the First Amendment. Nor would it be accurate to say that employer power was the central concern for the New Dealers."[111] According to Sunstein, "[t]he real problems are that public authority creates legal rules that restrict speech; that new exercises of public authority can counter existing restrictions; and that any restrictions, even those of the common law of property, must be assessed under constitutional principles precisely because they are restrictions."[112] Since the common law governs nearly every aspect of life and since the common law is a creation of public authority, then for all practical purposes, the traditional conception of private and public as well as the state action requirement are jettisoned or are retained in name only.

The *PruneYard Shopping Center v. Robins*[113] case illustrates this

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109. Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 CARDOZO L. REV. 865 (1993).

110. From the progressive democrat's perspective, we must reconsider our faith in property and markets, or put differently, we must integrate the concept of democracy with that of property and markets. We must experiment with official and unofficial regulations of the market in free speech. For the progressive democrat this has revolutionary consequences, including the extirpation of the debilitating poverty that exists in America today. It further requires democratizing both the economic and social arenas.

111. SUNSTEIN, *supra* note 3, at 208. Does not the concept of a New Deal for property and speech involve a redefinition of the notions of "private" and "public"?

112. *Id.*

113. 447 U.S. 74 (1980).

deficiency in Sunstein's argument. According to Sunstein,

> [t]he owners of the shopping center are able to exclude the protestors only because government has conferred on them a legal right to do so. The conferral of that right is an exercise of state power. It is this action that restricts the speech of the protestors. Surely it is a real question whether the grant of the exclusionary power violates the First Amendment, at least in circumstances in which it eliminates the only real way of making a political protest visible to members of the community.[114]

Here the government has conveyed the right—a permission—to an independent actor to exclude *or* not to exclude. If a governmental grant of power is tantamount to the government deciding to act, then despite his protestations to the contrary, Sunstein is eliminating or radically restricting the state action requirement. In other words, Sunstein's argument is potentially more radical than he acknowledges, and he should explain why a reconception of the state action requirement is *not* a consequence of his position. Similarly, Sunstein says "that a right of exclusive ownership in a television network is governmentally conferred; the exclusion of the would-be speakers is backed up, or made possible, by the law of . . . civil and criminal trespass. It is thus a product of a governmental decision."[115] This conclusion is interesting only if the government's *role* in the exclusion triggers constitutional scrutiny. If so, the traditional conception of state action has been abandoned. Notice that the terms "backed up," "made possible," or "a product of a governmental decision" are all ambiguous. Is Sunstein saying that we must view the private sphere as a regulatory system because it is *backed up*, *made possible*, or *a product of* the chief regulatory system, the government?[116] To do so is to conflate the statement "The government permits X" with "The government requires X," and that is simply a logical mistake.

Sunstein's point may be *political*, not logical. Given that government grants exclusive powers to private actors, and excluded actors

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114. SUNSTEIN, *supra* note 3, at 208.

115. *Id.* at 209.

116. Similarly, Sunstein asserts "that much of the private power over others is in fact delegated by the state, and that all of it is 'sanctioned' in the sense of being permitted." *Id.* at 224. These remarks are puzzling because they appear to get rid of the state action requirement, and because they do not recognize that "private power," sanctioned in this way by the state, is an obstacle to the reforms that Sunstein endorses.

have no recourse other than the unrealistic task of becoming rich and powerful themselves, the practical effect of the governmental action is the private actors' exclusion. Here the progressive democrat would insist on taking this argument to its logical conclusion: if the government permits market capitalism and market capitalism impoverishes the poor, then the government impoverishes the poor. Consequently, government must actively include the poor into the common law system, and that means modifying the common law of property, contract, and tort along egalitarian lines.

From the progressive democrat's perspective, a major problem with Sunstein's approach is his unabashed support of capitalism. Sunstein insists that "it is generally good to have a system in which government creates ownership rights or markets in speech, just as it is usually good to create rights of ownership, and markets, in property."[117] How, on Sunstein's own premises, can this be true? If the common law of property involves a regulatory system, one that is not democratically chosen, how can deliberative democracy endorse the common law? A deliberative democrat like Sunstein should instead endorse democratizing the common law. In fact, why does Sunstein's commitment to democracy not lead to a system of economic democracy?[118] Indeed, why does Sunstein's argument not entail a more radical or progressive form of *democratic* capitalism? Sunstein fails to appreciate that in a market-based system such as ours, the economically disenfranchised suffer a great debilitating harm. Indeed, from the progressive democrat's perspective, the poor and excluded seem always to remain poor and excluded, though the names and faces may change.

Sunstein's New Deal for speech is also inconsistent with conservative constitutional jurisprudence. According to Sunstein's view, we must ask whether ownership rights in speech are consistent with the First Amendment or whether governmental grants of exclusive ownership of speech rights violate the First Amendment.[119] Sunstein's view invites

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117. *Id.* at 208-09.

118. I do not say this disparagingly. I endorse such a program, but Sunstein does not. Why does he not take the next logical step?

119. His exact words are:

> A system in which only certain views are expressed or made available to most of the public is a creation of law. The constitutional question is whether reforms eliminating exclusive ownership rights—or, more precisely, eliminating an element of such rights by conditioning the original grant—are consistent with the First Amendment, or whether the government grant of exclusive ownership rights violates the First Amendment. We cannot answer such questions merely by saying that ownership rights are

centralized decision making when such decisions are best left to the market. Despite the market being a creation of law, it is decentralized and permits the promotion of liberty in a way centralized planning does not.

Sunstein claims that when an unpopular view has no access to the networks, it is the civil and criminal law that prohibit it.[120] However, the government does not do the excluding; the network does. Should those promoting the unpopular view buy the network, the government is no more responsible for endorsing the unpopular view or for excluding the conventional view than before the sale. The issue is whether the government can be neutral when it enforces acts of exclusion by private parties. Answering this question would seem to require an examination of the disparities of wealth and power in our society, but Sunstein does not pursue this path. Once pursued, however, it becomes evident that revisions in our economic institutions will be required for the success of his New Deal in free speech. Although Sunstein shrinks from this conclusion, the error of appealing to status quo neutrality cannot be rectified simply by recognizing that the status quo has legal and political content. The New Deal did not eliminate poverty, starvation, poor health care, and unsafe working conditions because it never addressed the underlying causes of these problems. So too, a New Deal for free speech will not work without eliminating the great disparities of wealth. This requires, however, extending the role of democracy beyond the political to the social and economic spheres as well.[121]

Sunstein's conception of a Madisonian democracy permits a "democratic decision to experiment with new methods for achieving . . . Madisonian goals."[122] Consequently, legislatures can regulate the com-

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> governmental. We need to know the purposes and effects of the grant. That question cannot be answered a priori or in the abstract. We need to know a lot of details.

Sunstein, *supra* note 3, at 209.

120. Typically, this type of governmental action is insufficient to trigger constitutional scrutiny.

121. Sunstein is not oblivious to this problem. He writes:

> The most general problem is that neutrality is frequently thought to be exemplified in the use of economic markets to determine access to the media and thus an opportunity to be heard. This form of neutrality actually embodies a collective choice, captured in the use of the market and the creation of particular legal standards for its operation, that ensures that some will be unable to speak or to be heard at all, and at the same time that others will be permitted to dominate public communication.

Sunstein, *supra* note 3, at 213.

Sunstein is correct here. The revisions required to remedy this situation, however, are unavailable within the traditional framework of property and markets. Instead, this traditional framework must also incorporate the concept of democracy if we are to get the free speech question right.

122. *Id.* at 220. Democratization of American life might be impossible within the "Madison-

mon law of property concerning free speech to encourage diversity and quality in broadcasts. The problem here, for the conservative, is the danger in permitting the government to decide what "diversity" or "quality" means. According to Sunstein's conception of Madisonian democracy, "sovereignty entails respect not for private consumption choices, but for the considered judgments of a democratic polity."[123] Is there a distinction between these alleged alternatives, and if so, what is it, and how do we know when it applies?[124]

Sunstein rejects the conservative argument as well as its dependence on the distinction between content-based and content-neutral restrictions of speech. Indeed, Sunstein contends that this distinction "reproduces the framework of the *Lochner* era."[125] Sunstein writes:

> It takes the market status quo as natural and just insofar as it bears on speech. It sees partisanship in alteration of that status quo, and neutrality in government decisions that respect it. But there may be no neutrality in use of the market status quo when the available opportunities are heavily dependent on wealth, on the common law framework of entitlements, and on what sorts of outlets for speech are made available, and to whom. In other words, the very notions "content-neutral" and "content-based" seem to depend on taking the speech status quo

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ian" conception of democracy.

123. *Id.*

124. Will the entrenched interests permit greater equality in the economic marketplace as well as greater diversity and quality in free speech? An extension of equality in the marketplace as well as in free speech requires first acknowledging the need for greater democracy in economic and social institutions generally. Sunstein sometimes appears to embrace this view. Consider:

> *Buckley* reflects status quo neutrality, indeed . . . it should be seen as the modern-day analogue of *Lochner v. New York*; a decision to take the market status quo as prepolitical, and use of that decision to invalidate democratic efforts at reform. Reliance on markets is governmental neutrality; use of existing distributions for political expenditures marks out government inaction. But from what I have said thus far, it should be clear that elections based on those distributions are actually subject to a regulatory system, made possible and constituted through law. That law consists, first, in legal rules protecting the present distribution of wealth, and more fundamentally, in legal rules allowing candidates to buy speech through markets.

Id. at 223 (citation omitted). However, nothing in *Lochner* suggests that the status quo is neutral. Rather, the *Lochner* Court believed that the law should reflect and codify the true normative order. In addition, the Court believed that this order was market capitalism. Further, does Sunstein really believe that even the reform in *Buckley* would sufficiently democratize the election process in the United States? Without more sweeping change, monied interests would still dominate, and such domination is antithetical to democratization.

125. *Id.* at 227.

as if it were unobjectionable.[126]

The problem with the free speech status quo is its dependence upon the current distribution of wealth. Thus, the distinction between "content-based" and "content-neutral" restrictions will "have powerful harmful consequences for poorly financed causes."[127] The reason for this is that "[t]he marketplace of ideas is of course a function of existing law, including property law, which is responsible for the allocation of rights that can be turned into speech."[128] Consequently, "the creation of markets might, on some occasions and in some settings, itself amount to an abridgement of free speech."[129] This is a powerful conclusion.[130]

But again, Sunstein fails to appreciate that his argument can apply to other constitutional provisions with equal force and clarity. For example, the free exercise clause should apply to poorly financed religions more forcefully than wealthy ones. Poverty plays a role in the effects of most constitutional rights, for example, speech, religion, association, self-incrimination, criminal procedure, the death penalty, and so forth. As such, his argument should be extended as a general restriction on the status quo, because the status quo is skewed in favor of the wealthy. Thus, Sunstein's argument logically implies a more extensive redistribution of wealth.

B. *The Primacy of Political Deliberation*

Sunstein's conception of a New Deal for speech is bold and illuminating, if not entirely persuasive. It would not be surprising if Sunstein recognized the problems with the New Deal argument, since he follows it with an alternative program for speech. According to Sunstein's alternative program, we should distinguish two-tiers of the First Amendment. The first tier is political speech which deserves the highest degree of protection. Non-political speech falls on the second tier which "cannot be censored without a substantial showing of harm."[131] Sunstein's

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126. *Id.*
127. *Id.*
128. *Id.* at 228.
129. *Id.* at 256.
130. Therefore, it is all the more disappointing when Sunstein asserts that "[i]n general, however, the existence of an unjust status quo should probably not be a reason to allow regulation of the content of speech." *Id.* at 228.
131. *Id.* at 242.

reason for this bifurcation is that "any well-functioning system of free expression must ultimately distinguish among different kinds of speech by reference to their centrality to the First Amendment guarantee."[132] Sunstein defines speech as political "*when it is both intended and received as a contribution to public deliberation about some issue.*"[133]

This definition is vague and ambiguous. The definition is vague because its application to large areas of human communication is unclear and uncertain. It is ambiguous because it equally applies to areas that are clearly political and those that are clearly not political. Sunstein rules out pornographic films that are "in essence masturbatory aids."[134] What if the "masturbatory aid" is intended and received as a contribution to our public deliberation about sexually transmitted diseases such as AIDS? Why does that not satisfy Sunstein's definition of political speech? Indeed, some might argue that there always exists a redescription of a pornographic film, according to which it can be seen as "a contribution to public deliberation about some issue." Moreover, even if Sunstein's definition is sufficiently principled not to apply equally to almost any speech, you can be sure, if adopted by the Court, "pornographers" will surely incorporate "Sunsteinian" political content into their films. Consequently, it is dubious that Sunstein's definition of political speech, or any other plausible *definition* can survive critical scrutiny. If, in theory, such a conception does survive scrutiny, in practice it becomes otiose.

In addition to problems of defining political speech, explaining why nonpolitical speech deserves less constitutional protection can be problematic as well. Sunstein replies that this merely requires a difficult, though not prohibitive, task of line drawing. But this reply misses the point. The question is not that it is difficult to distinguish political speech from other forms of speech, but rather that given some form of speech *is* nonpolitical, why should it not receive the highest constitutional protection?[135] Talk of line drawing here is irrelevant.

Sunstein's definition of political speech is designed to present a univocal standard for deciding when speech requires the highest protection. This design has the advantage of contributing to predictability and stability in the law. It creates comprehensible categories for limiting

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132. *Id.* at 233.
133. *Id.* at 236.
134. *Id.* at 241.
135. Sunstein himself phrases the question as: "[I]s it so clear that speech that has nothing to do with politics is not entitled to First Amendment protection?" *Id.* at 239.

judicial discretion by obviating the necessity of continually evaluating and comparing different kinds of speech. Sunstein then jettisons these advantages, however, by stating that "the category of the political should be broadly understood."[136] Thus, almost everything can be intended and received as a contribution to political dialogue. Consequently, almost everything can trigger the highest protection. If I intend my offer to bribe a public official as a political statement and she receives it as such, can that possibly make it political speech? Of course, Sunstein might respond by distinguishing between subjective and objective interpretations of his definition. However, as in other cases, appealing to an objective, or reasonableness standard, is conclusory and merely covers up a systemic vagueness and ambiguity in the definition. It does not provide a reliable procedure for decision-making.[137]

Sunstein's proposals for free speech will satisfy neither the conservative nor the progressive.[138] In order for him to construct alternatives

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136. *Id.* at 240.

137. Sunstein's conception of free speech arises from his commitment to deliberative democracy. In fact, "the American constitutional system is emphatically not designed only to protect private interests and private rights." *Id.* at 253. Nor is it a referee for interest-group pluralism. Instead, this "system is to ensure discussion and debate among people who are differently situated, in a process though which reflection will encourage the emergence of general truths." *Id.* Perhaps this was true in the nineteenth century, when constitutional actors were under the influence of such modernist notions as foundationalism, objectivity, truth, and reason. However, it is difficult to see how this applies in a post-foundationalist climate such as ours. Conversations among disparate groups in this nation do not reveal modernist presuppositions, nor do they exhibit republican features.

Equally unpersuasive is Sunstein's claim that "[a] distinctive feature of American republicanism is hospitality toward heterogeneity . . . ." *Id.* Moreover, Sunstein's quotation from the antifederalist Brutus does not support his present claim. Brutus says "[i]n a republic, the manners, sentiments, and interests of the people should be similar." *Id.* Had he said dissimilar, or if similar is contrasted with the same, Brutus's observation would then support Sunstein's point. Brutus speaks of manners, sentiments, and interests, but what about skin color, ethnic background, language, religion, and so forth? Our present society is more than heterogeneous, it is fractionated and polarized. *See generally* Lipkin, *supra* note 26.

138. Sunstein intentionally walks a line between these perspectives. Consider:

> A healthy recognition that decentralized markets generally are indispensable to protect liberty—for both products and for speech—is not inconsistent with the basic claim [concerning regulating the common law where it unconstitutionally regulates speech]. Nor is that recognition inconsistent with the view that the creation of markets might, on some occasions and in some settings, itself amount to an abridgement of free speech.

Sunstein, *supra* note 3, at 256.

Perhaps these remarks can be interpreted as recommending abandoning the framework that views everything in terms of the trichotomy: conservative, liberal or progressive. For a discussion of this framework in legal theory see Robert Justin Lipkin, *Beyond Skepticism,*

to these perspectives, he must elaborate his conception of deliberative democracy in much greater detail. He must also show why a more radical or progressive "New Deal" for free speech is inappropriate, one that makes wealth a critical issue in deciding whether the common law or the government promotes or inhibits free speech. Finally, Sunstein must explain why only political speech deserves the highest constitutional protection, and how his definition of political speech is superior to alternatives.

IV. GENDER EQUALITY

Sunstein considers the Equal Protection Clause to be the appropriate provision for constitutionally analyzing pornography, abortion and surrogacy. Ultimately, he concludes that equal protection supports some restrictions on pornography and surrogacy,[139] and protects abortion most clearly, though not exclusively, in cases of rape or incest.[140] Sunstein's argument here suffers from the same difficulty that undermines his general approach. Sunstein has not demarcated a coherent alternative to conservatism or progressive democracy. Instead, his argument exhibits conservative elements, yet is too strong for the constitutional conservative; while it simultaneously exhibits progressive elements, yet is too weak for the progressive democrat.

A. *Pornography*

Sunstein insists that the harm caused by pornography is just as much a product of law as the harm caused by governmental regulation. Consequently, in choosing between common law regulation which permits pornography and governmental action forbidding it, our choice is between *two* regulatory systems, not one regulatory system and a non-regulatory *je ne sais quoi*. The conservative, however, can grant that

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Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory, 75 CORNELL L. REV. 811 (1990).

139. I omit discussing surrogacy because Sunstein asserts that "[i]f surrogacy is troubling, it is so for largely the same reason that makes abortion restrictions troubling, namely, legally turning the reproductive capacities of one class of people . . . into something for the use of others." SUNSTEIN, *supra* note 3, at 287. Sunstein's argument here is an equal protection argument, and my criticism of this argument in the section on abortion applies with suitable modification to surrogacy.

140. It is extremely difficult to understand why Sunstein shrinks from his equal protection argument by insisting that it applies most forcefully to rape and incest. Though controversial even in those circumstances, the abortion controversy centers around the permissibility of terminating a pregnancy for less compelling reasons.

the common law which permits pornography is non-neutral, and that it regulates behavior, and still resist Sunstein's conclusion. The conservative seeks to preserve the status quo by protecting free speech even when the speech is harmful, as in the case of pornography.[141] For the conservative, preserving autonomy against a slippery slope justifies choosing the common law regulatory system over the statutory or judicial regulatory system. If we start regulating speech because it is harmful, we erode the foundations of an entire system of free speech. Any instance of free speech can be harmful in the appropriate circumstances. If that is the reason for regulating speech, there is no limit to regulation. Consequently, according to the conservative, Sunstein's position is dangerously radical.

The progressive, on the other hand, will quickly point out that if "[t]he pornography industry operates as a conditioning factor for some men and women, a factor that has consequences for the existence of equality between men and women,"[142] then mainstream speech should also be subject to regulation. Mainstream magazines, such as *Cosmopolitan*, *Vogue*, *Sports Illustrated*, *Allure*, *Bazaar*, and *Shape*, portray women as sexual artifacts in order to promote sales. Television, movies, and advertising are equally culpable. Consequently, since these cultural icons arguably contribute greatly to women's subjugation, a greater regulation of speech is required.

Sunstein is certainly correct in insisting that "there is a close alliance between the effort to regulate violent pornography and the effort to reduce domestic violence."[143] Again this would involve a much more sweeping examination of the conventional ways men regard and treat women—ways having little to do with explicit sexuality and yet nonetheless contributing to women's subjugation.[144] This subjugation of women is expressed in the home, workplace, corporation, church, school, hospital, and every other social institution. Despite advance-

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141. *See, e.g.*, American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (holding that Indianapolis anti-pornography ordinance is unconstitutional), *aff'd*, 475 U.S. 1001 (1986).

142. SUNSTEIN, *supra* note 3, at 266.

143. *Id.* at 267.

144. Some men do not believe that women are sufficiently talented to perform such complex tasks as open heart surgery or flying a jet liner. Also, men often do not respond to women's issues, even women's medical issues, as they would their own. For example, it has recently been revealed that insufficient funding for breast cancer is causing the deaths of many women. Susan Ferraro, *The Anguished Politics of Breast Cancer*, N.Y. TIMES MAG., Sunday, Aug. 15, 1993, at 24. How would breast cancer research be funded were men susceptible to breast cancer at the same rate as women?

ments by the women's movement, sexual stereotypes still pervade most public institutions. If pornography is wrong because it contributes to sexual subjugation, other institutional practices should also receive tougher regulation.

B. *Abortion*

Next, Sunstein offers a now fashionable reconceptualization of the rationale for abortion rights. Rather than scrutinize abortion regulations according to the Due Process Clause of the Fourteenth Amendment, Sunstein suggests we invoke the Equal Protection Clause instead. One reason for this shift is the inadvisability of resting abortion rights "on a general or acontextual privacy right . . . ."[145] He writes:

> [T]he equality argument has a large advantage over the pro-choice position in that it does not rest on privacy, freely acknowledges and indeed insists on the strength of the interest in protecting fetal life, and stresses rather than disregards the facts that women alone become pregnant and that discrimination and coercion exist in the realm of reproduction . . . .
>
> The equality argument has advantages over the antiabortion position as well insofar as it stresses both the inadequacy of restrictions on abortion to protect life and the selectivity of the imposition on women. Indeed, it seems reasonable to conclude that an argument from sex discrimination is not merely a worthy competitor [to the privacy argument] but [is] on balance correct.[146]

The principle upon which Sunstein depends states that *women's sexuality and reproductive functions should not be used or controlled by others.*[147] In a nutshell, the argument is that since women are systematically discriminated against in our society, and since abortion regulations contain gender-based classifications, a strong argument can be made that these regulations are a form of sex discrimination.

In addition to the above reasons, the equality argument is superior to the privacy argument because it makes intelligible an otherwise unintelligible position, namely, rejecting *Lochner* and approving *Roe v.*

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145. SUNSTEIN, *supra* note 3, at 283.
146. *Id.*
147. *Id.* at 259.

Wade.[148] Since both cases are exercises in substantive due process, both should be upheld or overturned together. As an equal protection case, *Roe* is different from *Lochner*, not because there are different rights and interests involved,[149] but because *Roe* is concerned with sexual *equality* while *Lochner* is an exercise in substantive due process. Interestingly, under Sunstein's view, *Roe* is more like *Brown v. Board of Education*[150] than it is like *Lochner*.[151] Both *Roe* and *Brown* forbid making second-class citizens of people—women, in the former case, and African Americans in the latter. For Sunstein, the status quo concerning sexual and reproductive activities is already rife with inequality. In fact, "[l]egal and social control of women's sexual and reproductive capacities has been a principal historical source of sexual inequality."[152]

According to Sunstein, abortion regulations require using women's bodies for the purposes of others. Though Sunstein gives several formulations of the argument, he is most persuasive when he argues: "[The equality argument] asserts that under current conditions, the government cannot impose on women alone the obligation to protect fetuses by co-opting their bodies through law. A key point here is that in no context does the law intrude on men's bodies in any comparable way."[153]

It is difficult to understand how a law could impose this obligation on men. Sunstein does not take seriously enough the argument from incapacity. Such an argument does not appeal to biological facts as dispositive. Rather, it invokes the Kantian dictum that *ought implies can*. For men to be obligated not to have abortions, they must be capable of having abortions, which means they must be capable of bearing children. Since men are incapable of having abortions, it is physically impossible for the state to impose the same burden on them as on women. If only some people can fly, restrictions on flying are not

148. 410 U.S. 113 (1973).

149. The argument here is that the rights in *Roe* are more pervasive, more central to human personality than the rights in *Lochner*. Of course, it is important to specify why rights of intimacy are more *important* than economic rights. I believe an argument involving the importance of intimacy interests, and the depth to which they affect a person's self-conception, personality, and character can be offered and defended. Economic interests also affect one's self-conception, personality, and character, but they are not as pervasive or as deep, and therefore do not affect one's self-conception, personality, and character to the same extent.

150. 347 U.S. 483 (1954).

151. SUNSTEIN, *supra* note 3, at 260.

152. *Id.*

153. *Id.* at 272-73.

violations of equal protection because it burdens flyers but not non-flyers, not if there are good reasons to burden flyers in the first place.

Undoubtedly, Sunstein would insist that the incapacity of men to bear children is irrelevant to the equal protection argument. He would insist that no *comparable* intrusion on men's bodies is legally imposed. The difficulty here is conceiving of what comparable intrusions could mean in this case. Perhaps, a comparable intrusion would be to compel men to donate their blood or their organs. This might be similar but not comparable. What sacrifice could men endure that is comparable to a compelled pregnancy? Probably none. That, however, cannot win the argument. For if women and men are so dissimilarly situated concerning reproductive decisions, then it makes no sense to speak of comparable intrusions. Hence, the equal protection argument fails as a justification for abortion.

The equality argument might be reformulated to avoid this last conclusion. The point is not so much that only women can be pregnant. Rather, it is that reproduction is a critical aspect of a woman's life, and that her position in the broader economic and social world is critically affected by her reproductive decisions. Further, since our society is guilty of sexual inequality, the price a woman pays for a compelled pregnancy is not just the nine months of pregnancy. Rather, she suffers economically and socially throughout the course of her life. When we now add that men are never asked to make similar sacrifices, we must conclude that on equal protection grounds, regulating abortion contributes to women's subjugation and is fundamentally unfair.

Although I find an element of truth in this argument, its Achilles' heel is revealed when one contemplates the possibility (eventuality?) of women's complete equality to men.[154] Would no argument be available for overturning abortion restrictions then?[155] No doubt that in

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154. In other words, suppose the shoe was on the other foot. Suppose "in cases in which men's bodies *could* be conscripted to protect children, the state [*did*] impose . . . obligations." *Id.* at 282. If the reason against restricting abortion is inequality, suppose that inequality is rectified; would the abortion rights argument then be overcome?

155. One might argue that as long as there are restrictions on abortion, women cannot be completely equal to men. Though equal in all other ways, abortion regulations show that women do not ultimately control their own reproductive capacities, and therefore, gender inequality persists. I find this argument unpersuasive and question begging. Suppose in a egalitarian society, reflective women overwhelmingly support abortion regulations. How can one insist that gender inequality persists? I suppose one could argue such support is irrelevant to the injustice of compelling even *one* woman's pregnancy, but that just shows that the gender inequality argument is not at work here. Rather, what is wrong is compelling the pregnancy, irrespective of gender equality, and that is a due process argument.

present historical circumstances, abortion restrictions, like every other law and social practice affecting only women, are inextricably linked to women's subjugation. Consequently, there is no doubt that the equality argument is a powerful contextual argument. But is it the only argument, and what happens when contexts are transformed?

Appealing to the anti-domination principle shows both the strength and weakness of the equality argument. The equality argument is adequate because in present circumstances men surely dominate women systematically in the home, workplace, church, corporation, schools, hospitals, and so forth. As soon as we ask the question whether abortion restrictions would be constitutional in a world of gender equality, we see the limits of the equality argument.[156] Should not the equality argument drop out in circumstances of gender equality? If so, women do not have a right to abortion in such circumstances. However, if we believe that women have a right to abortion even in circumstances of gender equality, we must concede that equality cannot exhaust the considerations justifying abortion.

The anti-domination principle explains the force behind this argument. Legally compelling a person to use her body to complete a pregnancy is a form of domination, a form of power that government should not have. Here the anti-domination principle supports the traditional due process argument concerning privacy, liberty, and autonomy. Even if we grant the fetus' humanity, the state cannot have the authority to compel pregnancy legally. Since the state cannot now require organ donations or blood donations in order to save another's life, it cannot compel pregnancy to save the life of the fetus. This would be true even if women were completely equal to men. This argument is based on the intuition that the state is not justified in controlling my body no matter what it does to others. The equality argument cannot account for this intuition, and therefore, it is less effective than the due process argument in justifying abortion rights.

V. GOVERNMENT FUNDING AND UNCONSTITUTIONAL CONDITIONS

The issue of unconstitutional conditions arises when the government tries to prohibit indirectly what it cannot prohibit directly. In the post-New Deal state, this doctrine assumes critical importance. Since government largesse pervades almost every area of social life, the government

156. That such circumstances may never exist is irrelevant to the outcome of this argument. If we can plausibly construct an additional argument in idealized circumstances, then we can determine whether it plausibly applies to the present, concrete circumstances.

can constrain constitutional rights by conditioning its grants. Such control over constitutional rights occurs when the government withholds benefits if people engage in certain otherwise protected activities. If the government can "pressure people to do what it wants,"[157] then it can do through the back door—as a paternalistic institution—what it cannot do through the front door by simply prohibiting certain activities. The unconstitutional conditions doctrine arises because "modern government affects constitutional rights not only through criminal penalties but also through spending, licensing, and employment."[158]

Sunstein's discussion here is interesting and important, and is illustrated vividly by his treatment of the abortion funding cases.[159] The United States Supreme Court held in these cases that the Hyde Amendment[160] passed constitutional scrutiny because *Roe v. Wade* does not require the state to take any affirmative steps to assist women in exercising their right to abortion. Therefore, the Due Process Clause does not require the state to fund abortions. More specifically, the Court held that the state was under no duty to provide indigent women with medical benefits for abortions. Presumably, the Court's decision is based on the distinction between negative and positive rights. When a person has a negative right to do X, it means that the state may not prohibit doing X. When a person has a positive right to do X, it means that the state is under an affirmative duty to assist the person's doing X. A person generally has a negative right to free speech, a right that does not entail an affirmative duty on the state's part to assist or encourage her free speech activities. The right to an abortion means that the state may not criminalize abortion or otherwise directly prohibit abortion services. This does not mean that an individual has a positive right against the state to provide benefits for abortions in the case of indigent women.[161] It simply means that the state cannot stand in the way of a

157. Sunstein, *supra* note 3, at 291.

158. *Id.*

159. Harris v. McRae, 448 U.S. 297 (1980) and Maher v. Roe, 432 U.S. 464 (1977).

160. The Hyde Amendment limits federal abortion funding under Medicaid to cases in which the mother's life is threatened as well as in certain cases of rape and incest.

161. This distinction is itself problematic. Is providing police and fire protection, without which an abortion clinic could not adequately function, fulfilling a negative or positive right? What about providing electric power, water, or sanitation services? As Sunstein indicates, this distinction depends on first deciding on a baseline, or what I call a frame of reference. This frame of reference depends upon a political theory of the appropriate role of government and what rights—negative *and* positive—a citizen has against the government as well as against other people. Since the frame of reference depends upon the theory, it cannot be used to construct the theory in the first place. The frame of reference can be deployed as a baseline only after

woman who has the inclination and the means to have a legal abortion.

Sunstein criticizes this position for assuming the wrong baseline. If we appeal to the post-New Deal baseline, then we assume that the government is involved in the lives of the citizens in funding, licensing, and employment. In that case, the "failure to fund is not inaction at all. It represents a conscious social choice, one that conscripts women in the cause of incubation. It does not simply let 'nature' take its course."[162] According to this view, the question that must be asked is "whether the right at issue does or does not require neutrality."[163] Since abortion restrictions, at least in cases of incest or rape according to Sunstein, violate equal protection, the failure to fund is not merely the failure to provide a positive right. Instead, it violates a negative right; it is the government, in an activist state, that is preventing indigent women from having abortions. Consequently, funding childbirth and not abortions, in post-New Deal America, is a non-neutral governmental act that denies indigent women a fundamental *negative* right.

Conscientious objections to abortion, on the part of a sizable segment of the population in these circumstances, are not relevant to the question of whether the government is required to fund abortion. The government's "desire not to force taxpayers to pay for practices that a significant number consider to be abhorrent for reasons of conscience,"[164] cannot justify preventing abortions for indigent women. Were the right to abortion a privacy right, conscientious objections, according to Sunstein, "provide a sufficient justification for selectivity."[165] Although Sunstein's argument is analytically powerful, he makes his case, in my estimation, only by conceptualizing the case exclusively in terms of baselines and penalties.

Sunstein contends that the issue is whether "the Hyde Amendment operated as a 'mere' failure to fund or as a 'penalty' on the exercise of the constitutional right to have an abortion. To make that distinction work, it is necessary to establish a baseline against which the assessment will be measured."[166] He continues:

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you justify its use by appealing to a political theory.

162. SUNSTEIN, *supra* note 3, at 317.

163. *Id.* at 316.

164. *Id.*

165. *Id.* I am not at all sure why this conclusion follows. One could imagine a general proscription against the relevance of justifying governmental interference on the ground of conscientious objections. If not, interference is almost always justified, since conscientious objections exist to almost every constitutional right.

166. SUNSTEIN, *supra* note 3, at 86.

> We do not know whether something is a penalty unless we decide about the world that would exist "otherwise"—that is, without the relevant condition. In *Harris*, the Court concluded that the baseline is a world without the Medicaid program; as a result, the denial is a mere failure to fund. But if the post-New Deal baseline is a system in which poor citizens generally are reimbursed for medical services, the denial is really a penalty.[167]

It is not obvious why Sunstein conceptualizes this case in this manner. Sunstein's conclusions gain support for this formulation from the conventional view which insists that the issue of whether governmental action burdens a fundamental right is a threshold question for constitutional scrutiny. The question of what counts as a burden is difficult to answer, but surely, in this case, a failure to provide funding for indigents that conceptually and practically results in their inability to engage in the protected activity must be considered a burden.[168]

Notice that this does not involve a choice of baselines. The focus is instead on whether there exists a strong probability that the Hyde Amendment will result in the failure of some indigent women to receive a desired abortion. In the real world—where social altruism is severely limited—surely we can answer that question affirmatively. After all, that was the purpose of the amendment in the first place. This question applies to both pre-New Deal and post-New Deal situations, and therefore, is not essentially a question about baselines.

An alternative analysis of the abortion funding cases suggests that the right to abortion funding derives from the fundamental rights branch of equal protection. As such, abortion funding is a negative equal protection right of privacy. Although the government has no *affirmative* duty to provide abortion funding, it must spend fairly. Consequently, the government must not disburse medical benefits in a way that burdens the fundamental right to privacy (abortion).[169] The fundamental rights branch of equal protection is a mechanism by which a *negative* right, in certain special circumstances, becomes an affirmative obligation

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167. *Id.*

168. The concept of a "burden" is used as a term of art, but, in my opinion, it has no clear meaning. As a term of art, it should function as a device for setting up the analysis, but in fact, it functions in a conclusory manner only after the result has been decided by some other means.

169. Nor can the government disburse medical benefits in a way that burdens free speech.

on the government's part to provide benefits it ordinarily would not be obligated to provide.

Though the government is under no affirmative obligation to provide medical benefits for reproductive activities, including childbirth, it cannot provide such benefits in a way that invidiously affects a fundamental right for some individuals but not others. It can, of course, affect everyone's right by not providing medical benefits for anyone. It cannot, however, invidiously discriminate against some people who wish to exercise their fundamental right to reproduction in an unpopular fashion. That is the essence of the fundamental rights branch of equal protection.[170]

The Court, in *Shapiro v. Thompson*,[171] enunciated the fundamental rights branch of the equal protection clause. In this case, the Court held that although a state may withhold welfare benefits from all of its residents, it may not withhold such benefits from newly arrived residents while simultaneously providing benefits for older residents. Since, on grounds of federalism, individuals have a fundamental right to interstate travel, a state withholding benefits from newly arrived individuals while granting them to older residents invidiously violates the newly arrived residents' fundamental right to interstate travel.

This result, it is important to realize, does not rest on abortion funding being a positive right.[172] The complaint in this case is not that the state fails to fulfill an affirmative obligation to provide welfare benefits to newly arrived indigent residents. The state has no affirmative due process obligation to provide welfare to anyone. If the state provides welfare to some residents, however, it cannot withhold it from

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170. For example, suppose the government decided to provide free radio time to political parties, and then decided to withhold time from Republicans. This would be violative of the negative right to equal protection concerning the exercise of the fundamental right to free speech. It is important to see that the decision not to fund the Republicans is not a violation of the First Amendment itself. The Constitution does not require the government to provide free radio time to anyone. If the government provides First Amendment benefits to some, it cannot make invidious distinctions based on viewpoint discrimination.

Similarly, Rust v. Sullivan, 500 U.S. 173 (1991), is a violation of the fundamental rights branch of equal protection twice over. The government need not provide medical advice to anyone, but if it does, it cannot discriminate on the basis of the content of that advice. In doing so the government violates the negative equal protection rights of privacy *and* free speech. Consequently, it does not matter which baseline is chosen; the same result obtains. In other words, this argument has nothing to do with expectations. Government grants generally cannot deny the negative equal protection right to exercise one's fundamental rights.

171. 394 U.S. 618 (1969).

172. If it were, the state could deny welfare benefits to new residents just as long as it did not bar them from entering the state.

others by burdening their fundamental right to interstate travel. Thus, the right here is the equal protection right of not being discriminated against in exercising one's fundamental right to interstate travel.[173]

It is difficult to see why this analysis does not apply *a fortiori* to abortion funding cases and perhaps even to unconstitutional conditions generally. No one has a positive right to medical benefits for reproductive activities, so no due process or liberty argument could presently prevail for funding either abortion or childbirth. If an indigent woman has a constitutional right to abortion, funding abortion is a negative right of equal protection. If the state provides funding for some reproductive activities, it cannot withhold funding from others in a way that implicates a fundamental right. The right here is the *equal protection* right of nondiscrimination in exercising one's fundamental right to reproductive services. The primary right in this analysis is the equal protection right of nondiscrimination; the derivative right triggering the fundamental rights branch of equal protection is the right to privacy. Notice that the right of equal protection for this fundamental right drops out just as soon as the state withholds funding from all indigent women, or from all indigent women seeking funds for reproductive activities.

That is why the argument that the right to abortion is *not* burdened by withholding medical benefits because no one has a positive right to abortion funding is completely irrelevant to this issue. All we need to know is whether the state distributes reproduction activities selectively, according to who seeks an abortion and who does not. If so the fundamental rights branch of equal protection takes over. The right violated is the negative equal protection right of nondiscrimination when exercising the fundamental right to abortion.[174] The equal protection right to nondiscrimination in receiving government benefits applies to both the right to interstate travel and the right to abortion. In fact, the right to abortion should apply more forcefully in the abortion funding cases, because the right there is directly implicated by the government's withholding funds; while in *Shapiro*, the fundamental right to interstate travel is only indirectly implicated.[175]

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173. The fact that a sizable portion of the population could have conscientious objections to newly arrived residents receiving welfare is irrelevant to whether the state violates the fundamental branch of the equal protection clause. *See supra* note 165.

174. Just how far this argument can go in the area of unconstitutional conditions is a question for further investigation and analysis.

175. Conscientious objections to abortion can have no greater power in this case than they do

The above argument for using the fundamental rights branch of the Equal Protection Clause to require funding for abortions is not simply based on the observation that it is "wrong and even cruel deliberately to put a judicially recognized constitutional right beyond the economic reach of every poor woman."[176] Providing criminal prohibitions against abortion puts the right beyond the reach of all women, but that in itself is not an argument against pre-*Roe* prohibitions. The argument from the fundamental rights branch of equal protection is that the state cannot fail to fund the reproductive decisions of women seeking abortions who are just as indigent as those seeking childbirth.[177] Since all indigent women have the fundamental right to make reproductive decisions for themselves, providing medical funding for one subclass of this larger group cannot pass constitutional muster because such a restriction invidiously discriminates against a woman's fundamental right to privacy.[178] We need only invoke the fundamental rights branch of the Equal Protection Clause and not mention baselines or penalties at all.[179]

VI. COMPENSATORY JUSTICE

American common law is predicated upon considerations of compensatory justice. The intuitive appeal of this conception is obvious. I harm you by stealing your car. Thus, you have a right to compensation. The status quo plays a critical role here. The sole purpose is to restore you to the way things were before my transgression. What if the status

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in *Shapiro*, since both are equal protection cases.

176. LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES 158 (1990).

177. It is not clear whether withholding funding for childbirth and abortion could pass constitutional scrutiny on the grounds of fiscal integrity. If the government funds other important medical needs, the fundamental rights branch of equal protection precludes using fiscal integrity as a legitimate reason for such discrimination. *But see* Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that California's insurance program, which excluded benefits for pregnancy, was constitutional since the state has a "legitimate interest in maintaining the self-supporting nature of its insurance program"). In my view of the fundamental rights branch of equal protection, this case was decided wrongly.

178. Sunstein's argument for abortion rights, at least in the context of rape and incest, should also justify abortion funding for indigent women on the grounds that discrimination against *poor* women is often more devastating to the woman's self-conception, personality, and character than discrimination against women generally.

179. We must resist the temptation to dismiss the fundamental rights branch of equal protection in abortion funding cases on the ground that abortion and childbirth are too dissimilar to permit equal protection analysis. Whatever their common sense differences, constitutionally, abortion and childbirth are instances of the same fundamental right to privacy, and, therefore, they are subject to analysis under the Equal Protection Clause.

quo itself is unjust? Should we not be concerned with justice more generally? If we were, restoring the status quo ante would not be the goal. Instead, we should be concerned with changing the status quo to meet the requirements of justice. Compensatory justice cannot take other conceptions of justice into account. One might observe that compensatory justice is a very narrow, primordial conception of justice.

Sunstein argues that the New Deal and the "rights revolution" four decades later "were self-conscious legal responses to the inadequacy of compensatory principles."[180] Yet he cites the extraordinary anomaly of American public law, namely, "the continued use of compensatory principles in defining the content and reach of the very initiatives that were created to displace them."[181] Sunstein's urges us to "undertake a large-scale shift in the role of law, a shift that has marked the twentieth century in general and will be increasingly important in the twenty-first. Legislatures and administrative agencies . . . should sometimes abandon compensatory principles, and courts should be receptive to the abandonment."[182]

In place of compensatory principles, government should embrace a principle of risk management and a principle opposed to caste. Sunstein's argument in this context is persuasive. As stated earlier, the central objection to Sunstein's theory is that it does not state a coherent alternative to either constitutional conservatism or progressive democracy. Instead, from the conservative's perspective, it does not adequately justify abandoning compensatory principles, while from the progressive democrat's perspective, abandoning these principles is not comprehensive enough.

The conservative believes that compensatory principles are at the heart of Anglo-American morality and law. According to Anglo-American common law, while individuals ought not to harm one another, they have only a minimal responsibility to help others out of jams, unless of course they are responsible for placing them there in the first place. When you harm someone, you should compensate her or make her whole. If you are free of fault, you should not have to "compensate" anyone. Fortuitous gifts should remain where they fall. Redistribution is generally wrong. Sunstein might be correct that this conception of justice is anathema to the modern regulatory state, but he does not sufficiently demonstrate why that fact should be dispositive. Moreover,

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180. SUNSTEIN, *supra* note 3, at 320.
181. *Id.* at 321.
182. *Id.*

even if he is correct, does that entail a complete abandonment of compensatory principles?

Sunstein insists that "[b]ecause the departures [from compensatory principles] are not radical, people who start from the compensatory tradition, broadly conceived, can often be led, without serious reluctance, to endorse risk management."[183] But this shift *is* radical from the conservative's perspective. Indeed, the conservative sees this shift as too radical. Only from the progressive democrat's perspective is the shift not radical. Too often Sunstein underestimates how great a departure his views are from conservative constitutionalism, and how modest they are from the perspective of progressive democracy.

The problem with Sunstein's abandonment of compensatory justice in favor of risk management, from the perspective of the progressive democrat, is that it assumes the validity of the modern administrative state. Instead, the progressive democrat wants to decrease bureaucracy by instituting a more general democratic, participatory program throughout American society. Rather than big government regulating the entire economic and social sphere, the progressive democrat wants participatory empowerment in all facets of the citizen's social life. A more democratic structure should exist in the workplace, the corporation, the school, the neighborhood, and the hospital. All constituents of an institution should be part of the decision making capacity of that institution. Let risk management be decided by the people who endure the risks, and who are ultimately forced to pay for them. True deliberative democracy means the full participation of the citizen in deciding the fate of institutions with which she is associated. Sunstein no doubt rejects this possibility because, among other reasons, it would modify the concept of markets. However, the democratization of markets might be the next great phase of advanced *democratic capitalism.*

When discussing the anticaste principle we soon discover that Sunstein does not *fully* appreciate its scope. The anticaste principle seeks to eliminate morally arbitrary qualities from being dispositive in political and social affairs. To say he does not fully appreciate the anticaste principle does not mean that he does not appreciate it at all. Consider his words:

> The anticaste principle . . . call[s] for significant restructuring of social practices. . . . [I]t is important to acknowledge that a wide range of differences among people are indeed morally

183. *Id.* at 343.

> arbitrary, in the sense that the difference does not by itself justify more resources or greater welfare. In a market economy, those morally irrelevant differences are . . . translated into social disadvantages. . . . Is someone really entitled to more money because he was born into a family that stressed education, because he has high intelligence, or because he happened to produce a commodity that many people like?
>
> Markets thus reward qualities that are irrelevant from a moral point of view.[184]

From the progressive democrat's perspective, this eloquently states the principle of anti-domination. Individuals should not be dominated by the social and legal use of morally irrelevant qualities. To the extent that a market economy makes morally arbitrary qualities relevant, it is defective and should be modified along democratic lines.

Sunstein is loathe to draw this conclusion for the reason that morally irrelevant qualities are inseparable from a market economy.[185] Sunstein reminds us that "a market economy is a source of important human goods, including individual freedom, economic prosperity, and a respect for different conceptions of the good."[186] This same market economy, however, has also failed miserably to alleviate the plight of the poor. Do not forget that American inner cities and some parts of rural America are sometimes described in terms used to describe third world countries. Additionally, economic prosperity comes inextricably linked to materialism and consumerism which often inhibit human development by impoverishing our emotional and spiritual lives. Moreover, materialism and consumerism inhibit rather than expand true diversity. Does my buying a Lexus, while you buy a Mercedes instead, prove the availability of different conceptions of the good? True diversity cannot be explained by the wide availability of economic commodities no matter how different the commodities.

In support of the anti-domination principle, the progressive democrat contends that the biggest culprit in translating morally arbitrary differences into social disadvantage is wealth classifications. From this perspective, wealth *is* morally irrelevant, and should not be the basis of distributing social goods. The progressive democrat need not suggest that markets be abandoned—whatever that could possibly mean in con-

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184. *Id.* at 341.
185. *Id.*
186. *Id.*

temporary society. Rather, the progressive democrat need only seek creative solutions to contemporary social and political problems that have wealth at the core. These solutions might require modifying the existing conception of a market. Such modifications are legitimate, however, since they are made in pursuit of the common good through the democratic expansion of American capitalism.

VII. CONCLUSION

Sunstein's deliberative democracy goes too far in regulating the common law for the constitutional conservative, while for the progressive democrat it does not go far enough in democratizing American social life. Moreover, because Sunstein's position includes an ad hoc combination of both these perspectives, it fails to express a coherent alternative of its own. Nevertheless, Sunstein's conception of deliberative democracy is illuminating and his analysis of particular cases is instructive. Perhaps liberal republicanism is a powerful enough concept to return to the battle field in a different guise.