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Of Gnarled Pegs and Round Holes: Sunstein's Civic Republicanism and the American Constitution: A Review Essay of the Partial Constitution. by Cass R. Sunstein.

Robert W. Bennett

Review Essay

OF GNARLED PEGS AND ROUND HOLES: SUNSTEIN'S CIVIC REPUBLICANISM AND THE AMERICAN CONSTITUTION

The Partial Constitution. By Cass R. Sunstein.[1] Cambridge, MA: Harvard University Press. 1993. Pp. vi, 414. Cloth, $35.00; paper, $16.95.

Robert W. Bennett[2]

The Partial Constitution is Cass Sunstein's attempt to pull together the elements of a civic republican vision for American constitutionalism in the late twentieth century. Civic republicanism refers to a set of beliefs about government and its citizens, traceable to ancient Rome, and associated especially with the anti-federalist position in the debates surrounding ratification of the United States Constitution. In its revolutionary American form, this republicanism:

> meant . . . more than eliminating a king and instituting an elective system of government; it meant setting forth moral and social goals as well. Republics required a particular sort of independent, egalitarian, and virtuous people . . . who scorned luxury and superfluous private expenditure, who possessed sufficient property to be free from patronage and dependency on others, and who were willing to sacrifice many of their selfish interests for the res publica, the good of the whole community.[3]

In Sunstein's contemporary rendition, two notions move to center stage. The first is "the general commitment to delibera-

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1. Karl N. Llewellyn Professor of Jurisprudence, The University of Chicago.

2. Dean and Professor of Law, Northwestern University School of Law. I received helpful comments on a draft of this essay from my colleagues Gary Lawson, Tom Merrill, Michael Perry, Daniel Polsby, and Stephen Presser. I am grateful to them, as I am to Joseph Miller for able research assistance.

3. Gordon S. Wood, *Republicanism* in Leonard W. Levy, ed., *Encyclopedia of the American Constitution* 448, 449 (Supp. I, Macmillan, 1992).

tive democracy," which Sunstein says is at the heart of his approach to constitutional interpretation. The second is "status quo neutrality." Sunstein explains that neutrality is essential for the rule of law, and hence for constitutional law, but that it is impermissible to adopt the status quo as the baseline for judging neutrality, so that deviations from it are taken to be non-neutral, and hence suspect or infirm. Instead in a deliberative democracy, baselines for judgment must be forged by reason, with no favored position whatsoever for the status quo.

The book has a number of interesting and provocative discussions. It contains, for instance, a nice argument that law is a pervasive influence in the formation of individual preferences, so that we cannot simply assume that there is some prelegal set of preferences that makes up the raw material with which the law is to cope. (166-70) And it collects some interesting material as part of its argument that people display a different preference set when they are acting as decisionmakers in the public realm than in the private. (179) Many of the most interesting parts of the book are about baselines—for judging when the state has acted, when speech has been regulated, when some activity has been penalized and when it has been rewarded.

Unfortunately, the book lacks definition and coherence. Sunstein uses key terms with little precision; in particular, he never pins down what it takes to be a legitimating "reason." And neither of the book's central organizing themes—status quo neutrality and deliberative democracy—seems in the end to tie much together. Sunstein uses status quo neutrality to mean a lot of different things, and his commitment to his stated disapproval of a status quo standard of neutrality is belied by many of his specific discussions. His discussion of deliberative democracy leaves many unanswered questions about how that deliberative democracy would serve its supposed ends. Both the concepts seem to be mostly rhetorical devices deployed to unify a series of disparate positions on constitutional matters. Sunstein has earlier exhibited a passion for systematizing constitutional law beyond the comfort level,[4] and *The Partial Constitution* is in that pattern.

4. In one of his early articles pursuing what he characterized as "civil republicanism," for instance, Sunstein found a prohibition of something he called "naked preferences" to underlie much if not all of constitutional law. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984). I expressed doubt about that early attempt at constitutional systematization in Robert W. Bennett, *Reflections on the Role of Motivation Under the Equal Protection Clause*, 79 Nw. U. L. Rev. 1009 (1985). The "naked preferences" idea appears in *The Partial Constitution* as well, but in a relatively subdued role. (25-27).

In Parts I and II of this essay I describe and discuss Sunstein's notions of status quo neutrality and deliberative democracy. In Part III I sketch an alternative constitutional agenda for the contemporary United States, one that might be called "neo-Madisonian." Sunstein labors hard to enlist the Madison of the Federalist papers in the cause of civic republicanism, but the attempt falls flat. In Part III I suggest that a commonly discussed series of reforms that Sunstein entirely ignores, while surely bringing their own costs, would be a good deal more in the spirit of Madison's approach than are those to be found in *The Partial Constitution.*

I

Sunstein defines "status quo neutrality" as "taking . . . as the baseline for decision . . . what various people and groups now have: existing distributions of property, income, legal entitlements, wealth, so-called natural assets, and preferences." (3) Under this conception of neutrality "[a] departure from the status quo signals partisanship; respect for the status quo signals neutrality." (3) To Sunstein this is unacceptable. Rather the law must be fashioned by bringing reason to bear on all questions of entitlement. And the reason must be "public-regarding . . . . Government cannot appeal to private interest alone." (17)

The role that Sunstein assigns to "reason" is seemingly unrelenting. "[G]overnment must always have a reason for what it does." (17) Even "[t]he status quo . . . may be accepted only on the basis of the reasons that can be brought forward on its behalf." (135) These reasons must "independently" justify the status quo. (6) This means, of course, that government must have reasons, and be prepared to advance them, not only for action it takes, but for leaving things as they are.

Sunstein finds traces of this refusal to defer to the status quo in the intellectual climate of our constitutional founding, but he thinks it became embedded in our constitutional tradition in the New Deal. "[T]he outstanding conceptual break" of the New Deal, he tells us, was the appreciation "that ownership rights and the status quo were products of government," (57) that common law "ownership rights, and everything that accompanied them, had been created by the legal system" (51) and could be undone by it.

Sunstein is clear, however, that this New Deal project has been realized only partially. He analyzes myriad contemporary constitutional problems in terms of the failure to resist the allure

of the status quo baseline. Thus, on the guarantee of free speech, he says that we cannot simply accept the existing regime of property rights in media as non-regulation and hence constitutionally unobjectionable. "In a regime of property rights, there is no such thing as no regulation of speech . . . ." (206) Instead "protection of property rights [in media] . . . must always be assessed pragmatically in terms of its effects on speech." (206) In the same vein, he lets his imagination run free in discussing a constitutional taking: "a state might be thought to 'take private property' if it . . . uses law to disable the unpropertied from obtaining things."[5] (128)

In many of his most telling discussions, Sunstein uses the concept of the status quo to refer, as in these examples, to entitlements associated with holdings of property at common law. The definition quoted earlier, however, is a good deal broader ("existing distributions of . . . preferences [among 'various people and groups']"), and Sunstein does make use of the leeway provided by the broad definition. Thus he criticizes the majority opinion in *R.A.V. v. St. Paul*[6] as grounded in status quo neutrality for failure to appreciate that racial hate speech is distinctly stigmatizing, that it produces a hurt that is not simply like any other. (251) And he argues for a reconceptualization of many issues specially affecting women in our society by urging a willingness to look beyond "the sexual and reproductive status quo" that is "sometimes . . . a locus of inequality." (260) This includes urging that the First Amendment be conceptualized in a way that would allow at least some regulation of pornography because of the harm that it does to women. His discussion of this last point illustrates how easily he manipulates the concept of "status quo neutrality."

Sunstein contrasts the prevailing approach to regulation of pornography with that for obscenity:

> Obscenity law, insofar as it is tied to community standards, is . . . deemed neutral . . . . Antipornography legislation is

5. Sunstein does not advocate this position, but his dismissal of it comes in noticeably milder terms than his later rejection of a First Amendment theory turning the protection of the Amendment on whether the speech in question involves "rational thought." He dismisses that theory because it would produce "major anomalies" and "jarring" results. (238) I make note of this not because I think Sunstein has any sympathy for a constitutional right to steal, but because it provides an example, of which I will note many more, of how variable is the "reason" that seems to suffice for Sunstein. It is also an example, of which there will also be more, of seeming implicit respect for the status quo. For one thing that likely makes a result "anomalous" or "jarring" is that we are unaccustomed to it.

6. 505 U. S. — (1992).

> deemed impermissibly partisan because the prohibited class of speech is defined by less widely accepted ideas about equality between men and women—more precisely, by reference to a belief that equality does not always exist even in the private realm, that sexual violence by men against women is a greater problem than sexual violence by women against men, and that the sexual status quo is an ingredient in gender inequality. (269)

Embedded here are factual assertions that three beliefs are held at least more widely than the contrary beliefs: a) that equality between the sexes always exists in the private realm; b) that sexual violence by women against men is at least as much a problem as sexual violence by men against women; and c) that the sexual status quo is not an ingredient in gender inequality. Now I doubt that many people believe any of these three things, especially a) and b).[7] I should be amazed if more than a handful of adults in the country believe b). More to the point, if these beliefs are taken to be part of some "status quo" that is illegitimately being used to define "neutrality," it seems a trivial use of the status quo concept, far removed from common law property entitlement. If all Sunstein means by "status quo neutrality" is a position or belief held by some people (more "widely accepted") with whom he is in the process of disagreeing, then it hardly carries the encompassing and portentous significance that he ascribes to it when he speaks of the "conceptual break" of the New Deal.

If instead we confine the notion of "status quo neutrality" to the concern with common law property, we find that Sunstein's bark is more fearsome than his bite. As we have seen, he speculates that the prohibition of theft might be unconstitutional, but he is really quite mild in the positions he actively advocates. Being untethered by common law property entitlement undoubtedly leaves him feeling more comfortable in advocating such things as rights of access to mass media (221-23) and to privately owned shopping centers (208) for those wanting to have their say. But both those positions have previously been advocated by

7. I am not quite sure what c) is supposed to mean, or what it might be thought to add to a). At other points in the same discussion, Sunstein refers to "the sexual and reproductive status quo" (260) and to the "reproductive status quo." (267). If these various phrases are meant to be equivalent, then c) may refer to a belief that the physical, and perhaps psychological, burdens on women caused by human reproduction should not be seen as handicaps causing any worrisome "inequality." I have no idea how to judge whether this idea is more or less widely held.

courts and commentators who had not thrown common law property notions overboard.[8]

Sunstein is actually quite eloquent in a defense of the institution of private property. Thus in discussing the takings clause, he says:

> To remove the clause from its moorings in existing distributions would . . . repudiate a huge amount of long-standing law. Judges should hesitate before doing that. [T]he notion that a constitutional provision should protect existing holdings of property from governmental disruption seems . . . fully justified. That notion protects an important form of stability for individuals and for the system at large. It also creates and safeguards expectations that in turn help promote economic planning, investment, and prosperity. Perhaps most fundamentally, it is a way of ensuring a degree of independence from the whim of the state, which is a precondition for the practice of citizenship. A system in which private property is open to freewheeling public readjustment may well subject all citizens to open-ended state power. This form of insecurity introduces a kind of serfdom that is debilitating to democracy itself. (128-29).

Given this defense, it is hard to know just what to make of Sunstein's professed disdain for the "status quo" in property entitlement. To be sure, if reason is to govern, and is taken to be independent of tradition, habit, precedent, and the like, and is further assumed to give unique answers to the questions it addresses, it shouldn't matter if one takes private property or some common pool as the starting point. In either event, the end point dictated by reason would presumably be the same. The conditions, as we shall continue to see, are hardly self-evident. In any event, Sunstein's defense of property seems to be a defense of end points, and if that is so it is unclear what he means when he insists that every time the government takes an action that affects property, or fails to do so, it must have a justification based on "reason."

In one sense, an answer may be transparent. The book is full of proposals in which property interests are compromised to

8. On the shopping center issue see, e.g., *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff'd* 447 U. S. 74 (1980); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 Nw. U. L. Rev. 1137, 1207-08 (1983); Gilbert T. Perlman, Comment, *The Public Forum from* Marsh *to* Lloyd, 24 Am. U. L. Rev. 159 (1974) (passim). On the media access question, see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 (1969); Roscoe L. Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 Hastings L.J. 659 (1975).

some social goal. Many of those proposals are by now governmental commonplaces, like welfare programs, broadcasting access rights, limitations on sexual surrogacy arrangements, and public access to some privately owned areas for the distribution of information. Sunstein's disdain for common law property may be part of a felt necessity to provide a capacious theoretical tent where common law property and its frequent qualifications in our society can dwell comfortably together.

If that is the motivating sentiment, however, there is no effective way to know what legitimately goes inside the tent and what goes outside. Sunstein's talisman of "reason" certainly provides none. On free speech and property, for instance, Sunstein says the following:

> 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. Less frequently, the use of property rules to foreclose efforts to speak might represent impermissible restrictions on speech. To know whether this is so, it is necessary to assess the effects of such rules in terms of their consequences for speech. In any case both reform efforts and the status quo must be judged by their consequences, not by question-begging characterizations of 'threats from government.' (207-08)

The problem is that this discussion, with its emphasis on the "consequences" for speech of some proposed regulation, is pegged at an entirely different level of generality than is the earlier quoted defense of private property. Are the "consequences" to be judged regulatory measure by regulatory measure? At one point Sunstein suggests just that: "The legal question frequently involves the weight, *in the particular case*, of the interests in stability and protection of expectations." (103) (emphasis added) But then what is to assure that the totality of the infringements on property from all the regulatory measures will not undermine the "expectations that in turn help promote economic planning, investment, and prosperity"? And what mechanism is there for concluding that the accumulation of regulation will leave that "degree of independence from the whim of the state, which is a precondition for the practice of citizenship"? Conversely, if the "consequences" for speech are to be judged on the basis of a totality of regulation, the problems of judgments are unending and insuperable, as each new proposal is subjected to "reason" to

determine if it, in combination with everything already existing, promotes enough speech to make it worth the cost in dispiriting the sturdy citizen property holder. And if the answer is "no," presumably "reason" would have to be applied when each new infringement on property is proposed to determine what of all that exists then must go. The best one could hope for under those circumstances would be constant instability of expectations that the protection of property was meant to avoid.[9]

It is clear to me that the overwhelming assumption in contemporary American culture is that of private property, subject to reasonable forms of public regulation, and that no conceptual break of the New Deal made much of a dent in that assumption. Sunstein's own analyses occasionally help solidify this impression, just as they belie his assertions to the contrary. For examples, let us look briefly at Sunstein's discussion of two largely unrelated problems: the First Amendment status of regulation of the broadcast media, especially to provide public "access" of various sorts (221-22), and the long-muddled problem in constitutional law of the distinction between "rights" and "privileges," and the attempt of government to condition the exercise of the one or the other. (298-300)

Sunstein advocates extensive broadcast regulation, finding no insuperable First Amendment obstacle. His rationale initially seems grounded in his disdain for status quo neutrality. Recall his comment that "there is no such thing as no regulation of speech." (206) He examines various maladies of broadcasting and advocates experimentation with a variety of regulatory measures to address those ills. Throughout the discussion, however, he remains largely silent about regulation of the print media. He does say that "mild regulatory efforts should be upheld" if the government seeks to "promote quality and diversity in the newspapers," (225) but that stands in stark contrast to his vigorous advocacy of broadcast access. Indeed, he feels obliged to bolster the case for "mild regulatory efforts" for newspapers by noting "the fact that many newspapers operate as de facto monopolies." (225)

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9. The only other justification that occurred to me for Sunstein's defense of private property in the midst of a discourse that casts doubt on it at every turn was that the defense might be solely for purposes of interpreting the Takings Clause. His discussion does draw explicitly on both the words and the history of the clause. But that would not make much sense either, since the defense he gives depends so centrally upon the psychology it generates in property holders. That psychology can hardly be generated with separate compartments for separate constitutional provisions.

The contrast here in Sunstein's approach reflects longstanding differences in the regulatory climates for the print and broadcast media in the United States, with the latter taken to be subject to a great deal of regulation, because they are merely "licensed" to use the public airwaves.[10] If one were applying unadorned "reason" to the problem of media regulation without regard to the "status quo," the disparity of regulatory climates would be an obvious target. Many commentators have found the distinction unprincipled, whether they have advocated that the broadcast regulatory regime be extended to print media, or that the print private property regime be applied to broadcasters.[11] Sunstein's failure to address the anomaly seems explicable only on the basis of some respect he accords to the prevailing regulatory assumptions, to the status quo. The regulatory regime from which, relatively speaking, he keeps his distance—the print media—is the one characterized by the private property regimen that he especially insists must always be open to public revision in the light of reason.

Sunstein's fidelity to existing assumptions as the basis of entitlement also comes through in his discussion of the distinction between rights and privileges. It has long been assumed that government could not encroach on "rights" by imposing conditions on their exercise that would be unconstitutional if imposed as outright requirements. Suppose, for instance, that my common law property right in beachfront real estate gives me exclusive access to the beach extending out from the property. And suppose also that the government is constitutionally foreclosed from forbidding that I speak publicly in criticism of it. The government is then foreclosed from conditioning my access to the beach on my refraining from the public criticism.

The problem arises when the condition is imposed not on exercise of a "right" but on receipt of a "privilege." Thus if the government starts a welfare program, it is usually assumed that I have no "right" to the welfare, only a "privilege."[12] Now suppose the government seeks to condition my receipt of the welfare

10. Cable systems complicate the picture somewhat and may even now be creating pressure for some larger accommodation, but the complications are not really relevant for the present discussion.

11. See Benno C. Schmidt, Jr., *Freedom of the Press vs. Public Access* 241-45 (Praeger, 1976); William W. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C.L. Rev. 539, 544 (1978); L.A. Powe, Jr., *"Or of the [Broadcast] Press"*, 55 Tex. L. Rev. 39 (1976); see also Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967).

12. Sunstein might accord a "right" to welfare. He argues for a "freedom from desperate conditions" as an important element in a deliberative democracy. (138)

on my silence. Over the years there has been a fair amount said in cases and constitutional literature that would seem to allow this condition, or any other, on my receipt of a mere "privilege."[13]

Sunstein objects to any doctrine that would allow such conditions on receipt of something called a "privilege." His reason is that the distinction between "rights" and "privileges" dissolves once status quo neutrality is abandoned:

> In a crucial sense, all constitutional cases are unconstitutional conditions cases. . . . There is no fundamental or metaphysical difference between the unconstitutional conditions case (welfare benefits will be eliminated for those who criticize the government) and the ordinary constitutional case (people who criticize the government must pay a fine). The sharp distinction between ordinary cases and unconstitutional conditions cases depends on status quo neutrality. (293)

With this analytical framework, Sunstein applies his "reason" to the solution of a variety of the problems that the right/privilege puzzle suggests. In doing so he draws "on a complex range of considerations." (304) Included among them seems to be the distinction between "rights" and "privileges," the very distinction that abandonment of status quo neutrality was supposed to have allowed us to escape.

Thus in discussing *Lyng v. International Union,*[14] in which the Supreme Court upheld a provision of the food stamp program that withheld benefits from strikers, Sunstein offers this tentative justification for the decision:

> A plausible argument for this outcome would start with the proposition that even if the government cannot forbid strikes through criminal punishment, it may limit scarce resources to people who are genuinely in need. Perhaps the government may legitimately conclude that strikers are not in need in the same sense as other unemployed people. (305)

Perhaps a distinction could be drawn between the use of criminal penalties and of mere material inducements, such as welfare benefits, but this passage avoids the interesting question of what

13. The classic exposition is that of Oliver Wendell Holmes in *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517-18 (Mass. 1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman . . . . The servant . . . takes the employment on the terms which are offered him."). For a modern example in the welfare arena, see *Wyman v. James*, 400 U.S. 309, 324 (1971) (the plaintiff "has the 'right' to refuse the home visit, but a consequence in the form of cessation of aid . . . flows from that refusal.").

14. 485 U.S. 360 (1988).

would happen if the government didn't deny welfare benefits to strikers, but rather assessed a "civil fine." The one is no less scarce than the other, nor less appropriate because strikers are assumed "not in need in the same sense as other unemployed people." They would appear to differ only to the hidebound among us who think of denying welfare as withholding something that is a public resource and a civil fine as the confiscation of a private resource.

This should not describe Sunstein. As we have just seen, he instructs us that "[t]here is no fundamental or metaphysical difference between . . . [the case where] welfare benefits will be eliminated for those who criticize the government . . . and . . . [where] people who criticize the government must pay a fine . . . ." Despite this, in the end he expresses some continuing affinity for "a core and unavoidable insight of current law" in its treatment of funding, licensing, and employment cases as according greater leeway to the government to deny or withhold. (305) It is hard to see what that core insight is other than some close kin to the status quo as represented by common law property.[15]

I thus conclude that in the final analysis Sunstein, like the rest of us, is under the spell of common law notions of property, and probably of other aspects of the status quo. In all likelihood, Sunstein's characterization of welfare resources as "scarce" is a recognition that they are the government's to dispense in a way that the strikers' property is not. Toward the beginning of *The Partial Constitution* Sunstein comments that a status quo measure of neutrality is widely held "so much so that it operates reflexively rather than self-consciously." (4) This is the reason, he insists, that "it accounts for so many understandings about the meaning of the Constitution." (4) In the end, I fear that the

15. In principle I do not have much difficulty in finding that the government cannot condition welfare on relinquishment of (at least many) constitutional rights. When the government establishes a welfare program, *it* has defined those benefits as important, and it is this fact that forecloses the condition. For this reason the case is quite unlike a claim of "right" to welfare benefits, where there is no existing program. The latter claim should be rejected on the ground that individuals do not have a claim on public resources akin to the claim they have on their own resources. To be sure, once a welfare program is established, there will be legitimate conditions on entitlement—need, dependency, age, and the like. To make the judgment that some condition is unconstitutional, it will be necessary in part to judge whether that condition is "like" or "unlike" the legitimate conditions. The exercise of judgment cannot be avoided, but at least that judgment can take as a given the legislature's acceptance of the general obligation. Herein, I think, lies some of the contemporary attraction of the Equal Protection Clause as a vehicle for substantive review of legislation. It focuses attention on a decision the state has already made as the starting point for judicial analysis. I discussed this point at greater length in Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. Pa. L. Rev. 445, 489-91 (1984).

book proves this point fully as much by example as it does by argumentation.

None of this is to deny that there is a real problem of baselines in constitutional law, nor that ambivalence about the status quo is an important element of that problem. Sunstein has generalized the point, but recognition of the baseline problem is longstanding. Any number of scholars have urged, in particular, that a state action requirement fatally suffers from a baseline problem. They note that the state through its laws requires, forbids, or tolerates everything, and hence that "state action" is always present unless perchance there is some comfortable measure of the necessary state involvement.[16] Any such baseline has proved elusive, leading many of those scholars to urge that a state action requirement serves no independent purpose.

What I do mean to deny is that Sunstein has advanced the inquiry by insisting on "reason" as somehow substituting for the status quo baseline. It is necessary to specify what counts as a permissible reason with a lot more clarity than Sunstein has provided before one will have placed any real restraint on what can be done in its name, or, for that matter, to have excluded the embrace of accustomed ways of approaching problems embedded in the status quo.

Almost twenty years ago, Hans Linde cautioned that "[i]t is a realistic postulate that laws do not get enacted for no reason at all . . . ."[17] Linde elaborated as follows:

> a policy often results from the accommodation of competing and mutually inconsistent values, or because it simply intends to favor one interest at the expense of another, or because it represents only a judgment of the justice or equities in the immediate issue without intending to accomplish any further aim.[18]

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16. See, e.g., Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. Cal. L. Rev. 208 (1957); Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 Const. Comm. 361 (1993). I expected to find Sunstein embracing this position. Since he asserts that the "status quo" is entitled to no presumption in its favor, it would seem to follow that state tolerance of what is, is all the "action" that is required. For that reason I was puzzled to find him insisting that a state "actor" must be *actively* involved. In the end, there is little difference between the implications of Sunstein's approach and that of the state action skeptics, since Sunstein insists that the state actor can be a judge, or other enforcement official, so that he would find the necessary state involvement whenever there is any attempt to enforce private prerogatives through public processes.

17. Hans A. Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 197, 212 (1976).

18. Id.

For Sunstein the problematic category is where legislation favors "one interest at the expense of another," but Sunstein's error is in (sometimes) seeming to assume that this can never supply a "reason." Quintessential New Deal programs like social security, farm support, and child labor laws are described comfortably in such terms. This is not to say that one must approve or disapprove all such favoritism, but only that the difference lies in the realm of values, and not of "reason" in any other sense.

I would also deny that the status quo is unattractive as a presumptive baseline. Reasons come in lots of shapes and sizes, and it is not at all obvious why respect for the status quo should not qualify as one. The status quo has lots to be said for it, much of which Sunstein has said.

His defense of property captures part of it. I'll paraphrase: To deny the status quo presumptive respect "would . . . [risk repudiating] a huge amount [of what we take for granted, and which provides] . . . . an important form of stability for individuals and for the system at large." Respect for the status quo "creates and safeguards expectations" that foster secure and tranquil lives, as well as "planning" and "investment." And it ensures privately defined reference points, giving "a degree of independence from the whim of the state."[19]

But there is more. Respect for the status quo also makes possible reform that is constructive rather than destructive. There is a Burkean strain in American political thought that views the status quo as embodying the accumulated wisdom of the ages.[20] Sunstein notes and rejects this view (or, perhaps more precisely, dismisses it as a half truth, and then ignores the non-dismissed half) (130-31), but Burke's insight is real, and there is no reason why it cannot be accepted in degrees. If existing practices were too repugnant, they would not have lasted, at least in a society that holds open avenues for change. What has survived thus comes with some assurance that its costs have

19. Sunstein also generalizes the point in an interesting discussion of what he calls "endowment effects," (166-73) the creation of expectations by existing distributions and entitlement. He acknowledges that "the psychological effects of existing endowments" supports a "partial defense" of "status quo neutrality," (171) but that point then goes the way of so many others in his insistence that unrelenting reason can accord no preference to the status quo.

20. See Burke, *Speech on Reform of Representation in the House of Commons*, in James Burke ed., *The Speeches of the Right Honorable Edmund Burke* 405, 408 (1865) ("*Speeches*"). Hayek made the point even more explicitly. See F.A. Hayek, *The Errors of Constructivism*, in *New Studies in Philosophy, Politics, Economics and the History of Ideas* 3, 10 (U. of Chicago Press, 1978) ("*Errors*"). Incidentally, each insisted that he nonetheless welcomed reforms. See Burke, *Speech on Economical Reform*, in *Speeches*, at 170; Hayek, *Errors* at 18-19.

been tolerable. That might well suffice to allow the status quo to form the presumptive base from which a society can then reason about what to change.

Consider, for instance, the rule that custody of a child resides with its natural parents, absent renunciation, abuse or some severe inability to bear the responsibility.[21] In all likelihood, this rule responds to extraordinarily powerful human emotions. These are evidenced by contemporary social movements and laws that would often accede to parental prerogatives, even in the face of substantial evidence of unfitness, or of strong indications that the well-being of the child would be better served by different custody arrangements. If we undertook a lot of research, we might accumulate data that would justify the usual rule by some utilitarian or other calculus of the interests of children and parents, and of social cohesion. But it seems quite unlikely that we now have anything approaching data to support such a conclusion. Should that mean that we welcome the application of unadorned Sunsteinian "reason" to solve the question of where custody of children should normally reside? I doubt that Sunstein would think so. He would doubtless urge that "reason" shows change here to be a bad idea. But it will have missed the mark unless that "reason" draws on the fact that these arrangements have been accepted in our society for a very long time—that they come with the kind of approval that only long-standing survival can provide. That is respect for the status quo, and it is a reason, at least in the loose sense that Sunstein uses the term.

Such respect need not be absolute. If weighty considerations counsel change, respect for the status quo should not stand in the way. But without that respect, our reasoning has no anchor, no place to return, when, as will so often be the case, reason does not muster resolve. Reasoning without that anchor in an uncharted sea of reasons would, later or more likely sooner, give reform a bad name.

II

In a deliberative democracy as Sunstein depicts it, "public officials would be accountable to the people, but also in a posi-

21. See, e.g., Homer H. Clark, Jr., *The Law of Domestic Relations in the United States*, § 19.6, at 821-22 (West, 2d. ed 1988); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). For a powerful argument that the presumption might appropriately be loosened a bit, see Elizabeth Bartholet, *Family Bonds: Adoption and the Politics of Parenting* (Houghton Mifflin, 1993).

tion to avoid interest-group power and thus to deliberate broadly about the public interest." (v) In this system, "political outcomes . . . are to be produced by an extended process of deliberation and discussion, in which new information and new perspectives are brought to bear." (134) The process is to be characterized by "widespread participation by the citizenry," (135) but it does not consist of summing up voter preferences in some fashion, "precisely because preferences have [themselves] been created by legal rules." (11)

The participants in this process must have "a large degree of security and independence from the state." (136) It is on this basis, as we have seen, that the institution of private property receives much of its justification. But this does not require inviolable private property rights, and indeed a redistributive tax system may be required, because in addition to property rights, "the assault on dependency implies . . . social programs designed to ensure that no one is dependent." (136) Thus there must be "freedom from desperate conditions," and "rough equality of opportunity." (138-39)

The deliberation is to lead to agreement, but the process is not horse trading. Sunstein is at pains to distinguish civic republicanism from interest-group pluralism, where politics is seen as a succession of accommodations among interest groups. One of Sunstein's objections to interest-group pluralism seems to be its detachment from substantive values. "[R]epublicans[, on the other hand,] . . . believe that there are frequently correct answers to political controversy." (137) Apparently this does not, or does not necessarily, mean that the answers are substantively better than others that might be given, because the "[a]nswers are understood to be correct through *the only possible criterion*, that is, agreement among equal citizens." (137) (emphasis added)

There is an awkwardness in this talk of a procedural criterion for determining those "frequently correct answers to political controversy," an awkwardness that is reinforced by the book's devotion to so many substantive prescriptions for constitutional law. Many of these prescriptions could, I suppose, be seen as suggestive only, demonstrations of the kinds of reasoning in which a republican political process might engage, without any intention to suggest that the resolutions somehow ought to dominate contrary agreements that might be reached "among equal citizens." But there is one particular respect in which Sunstein's devotion to republican processes is tested, and found half-hearted.

In a sense, the question of the role of democratic politics in the United States is the mirror image of the question of the role of courts. Sunstein devotes explicit attention to the role of courts, understandably since such questions have dominated recent constitutional debates in both the political and scholarly realms. Sunstein indicates repeatedly that "[t]he role of courts in . . . [the] process will be limited," (140, see also, e.g., 9, 11), because of a variety of "institutional limitations" under which they labor. The most basic of these is that judicial activism is inconsistent with the democracy part of deliberative democracy.

In Sunstein's telling, however, this leads not only to limits but to an important role for the courts.

> [T]he case for an aggressive role for courts is especially strong in [only] two classes of cases. The first involves rights that are central to the democratic process and whose abridgement is therefore unlikely to call up a political remedy. . . . [Thus] our interpretive principles ought to be especially attuned to harmful effects on the system of free expression and on political participation and representation.
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> The second category involves groups or interests that are unlikely to receive a fair hearing in the legislative process . . . [because of] pervasive prejudice or hostility . . . . Courts should give close scrutiny to governmental decisions that became possible only because certain groups face excessive barriers to exercising political influence. (142-43)

This "representation reinforcement" rationale for judicial review[22] is, by now, standard fare among constitutional theorists. For Sunstein's purposes, the first category may be largely (if not entirely) unexceptionable, but that is not true of the second, where "groups or interests" that have fair and equal access to the franchise (and to media of communications) nonetheless "are unlikely to receive a fair hearing in the legislative process." Sunstein gives no hint of why as a "civic republican" he should find "an aggressive role for courts" congenial in such cases, and the answer is far from obvious.

It is by now well understood that the best available evidence on which to base such judgments will usually be the *substance* of the decisions affecting those groups.[23] This means, of course,

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22. The best known contemporary exposition of the notion is found in John Hart Ely, *Democracy and Distrust* (Harv. U. Press, 1980).

23. See, e.g., Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063, 1072-77 (1980). I say "usually" because there may be occasions when one could uncover evidence of discussions among legislators showing

that the courts will judge the fairness of those decisions, obviously using a standard for review other than "agreement among equal citizens," which was supposed to be the only acceptable criterion for the correctness of a political decision. The rationale for their doing so, I suppose, is that a political decision in such circumstances could not have been informed by full and effective participation of those treated unfairly. But that observation only serves to locate us on a vicious circle, not to solve the problem of how to get off it.

I would have thought that the "civic republican" answer to the dilemma was fairly clear, and contrary to Sunstein's. First, it is not obvious why unelected courts should be thought to be some decent substitute for fairly constituted legislatures if "the only possible criterion" of correctness truly is "agreement among equal citizens." Imperfectly constituted legislatures seem a closer substitute, particularly given the assumption, for which Sunstein argues, that individuals even in our present imperfect world are able to cast aside personal interests when they enter the realm of public decisionmaking. (179-83) Even now representative bodies make decisions for nonmembers all the time, not only for all the nonlegislator citizens, but for members of unrepresented groups—for noncitizens, for children, for prisoners, for the disengaged, for all those groups that have not succeeded in placing members in the representative assemblies. Neither Sunstein nor any other commentator of whom I am aware suggests doing away with most of these elements of unrepresentativeness. It is unclear why Sunstein might trust legislatures with decisions for some or all of those groups but not for the others he seems to have in mind.

Second, and more important, substantive review in this second category of cases is on a collision course with Sunstein's general insistence on judicial restraint lest the processes of deliberative democracy be diminished. For if the best way to judge whether a group has been treated fairly in the political process is to review the substantive fairness of some action challenged by that group, then the two tend to become equivalent. In the name of assuring a fair legislative hearing, the courts will be called upon to review all manner of measures for substantive fairness. The prospect should be chilling to a civic republican,

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their conscious disdain for the interests of some group, or some other direct and useable evidence of "pervasive prejudice" that does not take the form of unfair legislation or other unfair government action. But such instances will be rare.

and Sunstein provides no explanation of why he not only tolerates but encourages it.

One suspects that the answer lies in some results that he seeks to justify. Whether this is so or not, Sunstein's discussion of the constitutional status of abortion provides an instructive example of the problematic nature of trying to justify active judicial review from civic republican premises.

Sunstein criticizes the opinion in *Roe v. Wade* for grounding the interest of pregnant women in access to abortion in substantive due process. Instead he urges that the rubric of equal protection more comfortably accommodates abortion rights. He adopts Judith Jarvis Thomson's argument that a prohibition of abortion leaves pregnant women required to devote their bodies to the sustenance of another in a way that others are not required to do.[24] (272-74) He suggests the hypothetical case of a father of a child who requires a kidney transplant to save its life where the father could be the donor without risk to himself. Sunstein suggests, almost surely correctly, that the father would not legally be required to donate the organ. The example is thus telling evidence that the prohibition on abortion treats women unequally and disadvantageously.

There are difficulties with the argument, and Sunstein discusses a good many of them. Of particular note is that men have been drafted for service in the armed forces, and especially for combat roles, while women have not traditionally been subject to the draft. Sunstein notes that this might be thought to be a "plausible counterexample." (276) In the end, however, he concludes not only that the example is not suggestive of equal treatment of men and women, but that it actually supports the claim of unequal treatment:

> legal requirements that only men be drafted are part of a system of sex role stereotyping characterized by a sharp, in part legally produced split between the domestic and public spheres—with women occupying the domestic and men occupying the public. In this light, legal restrictions on abortion and a male-only draft serve similar functions. Restrictions on abortion [remain] . . . an element in the legal creation of a domestic sphere in which women occupy their traditional role . . . . (276)

Satisfied that he has dealt with this and other arguments, Sunstein concludes that restrictions on abortion can only be under-

24. See Judith Jarvis Thomson, *A Defense of Abortion*, 1 Phil. & Pub. Aff. 47 (1971).

stood as a product of a "discriminatory purpose . . . ultimately at work." (275)

Sunstein's argument here is a powerful one and it is skillfully presented, but it is far from overwhelming. Perhaps the male-only draft, and the use of men but not women for combat, is part of a larger invidious treatment of women, but Sunstein has oversimplified the argument at several points. Fathers would not be required to donate the organ, but neither would mothers. And there is ample evidence that the burdens and benefits of service in the armed forces have recently been borne and enjoyed by members of racial minorities,[25] groups that Sunstein and most others have viewed as politically disadvantaged. Perhaps there is some way to understand the motivation behind the now-defunct draft as somehow invidiously to exclude women from a privileged public sphere, while the motive behind the present form of the armed services is to project traditionally disadvantaged groups into that same public sphere, but I have trouble wrapping my mind around such a combination. The male-only draft may be a perfectly good example of an institution that could not survive the application of "reason" to its evaluation, but in context it supplies only the most ambiguous of evidence of a "purpose [to disadvantage women] . . . ultimately at work."[26]

Abortion remains an issue on which our society is deeply divided, and on which political compromise is stymied. This is so for reasons that surely have much to do with the role of women in our society in all its complexity, but that also draw on myriad religious, moral and political considerations. For an old-fash-

25. See generally, Martin Binkin, et al., *Blacks and the Military* (Brookings, 1982). By 1992, blacks made up six percent of the generals in the army, a number that must compare favorably, for instance, with the officer corps of virtually any big business concern in the United States. See Charles Moskos, *From Citizens' Army to Social Laboratory*, Wilson Q., Winter 1993, at 83, 88.

26. My own view is that abortion rights are best left right in the due process orbit where Justice Blackmun situated them. The Equal Protection Clause is most appropriately used to bring into relief a comparison between the treatment of two groups, where the treatment of one is taken to be established as legitimate or illegitimate. See note 15 supra. But, as Sunstein himself notes, "nothing is quite like pregnancy. . . . If fetuses are to survive, it must be a result of impositions on women. Selectivity is foreordained by the brute facts of human physiology." (275, 281) In such an environment, comparison with some different treatment of men is bound to be unenlightening.

Other wise voices besides Sunstein's have urged the equal protection route, see, e.g., Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1198-1200 (1992), but I remain doubtful. Besides the conceptual difficulties discussed in the text, an equal protection approach may represent a tactical mistake for advocates of abortion rights, for it focuses on women as the disadvantaged group just as more women—many of whom may not favor abortion rights—are attaining political power. Over time, the political disadvantagement prop for the equal protection rationale might just collapse.

ioned constitutionalist like myself, the political impenetrability provides at least the starting point of an argument that judicial review of the question is appropriate.[27] But for a civic republican, the very complexity of the issue should make it quintessentially appropriate for political forums where a wealth of "new information and new perspectives" can be brought to bear.

My concern about Sunstein's vision of a deliberative democracy runs deeper than questions about the depth of his devotion to it, for in its name he advocates positions that seem oblivious to questions of how public policy actually is made. The phrase "deliberative democracy" is rife with ambiguity on such questions, and Sunstein has done almost nothing to help us cut through the ambiguities.

The beauty of the classical republican vision was that it suggested simultaneous solution of two of mankind's deepest dilemmas, how to have virtuous individuals and responsible government. The republican citizen exemplified virtue in participation in governance, precisely because acting in this public capacity he chose responsibly rather than selfishly. But this simultaneous solution of the two problems depended upon their interaction, and the modern day has largely separated them. In the contemporary United States, save for the act of voting, very few individuals do—or could hope to—take active part in governance at all, let alone at the national level, where many of the most important decisions are made. Sunstein's mechanism is thoroughly anachronistic. We live in an age of division of labor, and there is simply no way that we can turn either the clock or the geography back to a setting where governance can be by agreement among equal citizens.

Of course, Sunstein cannot literally mean that agreement of all citizens is necessary, but it is not at all clear what he does mean. To make a real stab at tying the strands of republicanism around the unwieldy modern day, it seems important to get a handle on the connection between citizen input into public decisions and the legislative output.

Sunstein has a great deal to say about input at the citizen level. His emphasis, as I have said, is on citizen ability to contribute to a political dialogue. It is in pursuit largely of that goal that he would mold the First Amendment's protection of speech. There are also times when he seems to focus on the legislative deliberations, and after all that is where the public policy deci-

27. See Robert W. Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 Nw. U. L. Rev. 978, 992-99 (1981).

sions on which the book focuses so much attention are finally made. (27) Thus in trying to make out the case that the Framers had a deliberative democracy in mind from the outset, he points to the fact that the constitutional convention was closed "from public view." (22) But Sunstein has almost nothing to say about the way in which non-legislator inputs contribute to the outputs. His apparent approval of the closing of the constitutional convention is only suggestive of how complex those connections might be thought to be.

Consider Sunstein's advocacy of rights of access to the broadcast media. He rehearses contemporary maladies of broadcasting and concludes that citizen involvement through access rights can only enrich the mix. This might well be responsive to an individual sense of alienation from the political process, and in this sense could give those who gain the access a sense of political involvement and hence individual fulfillment.[28] But that is a very different thing from contributing to a higher quality of public decisionmaking.

There is at least a plausible argument that access rights detract from the dialogue in which public decisions are forged. For rights of access likely tend to weaken the media that are required to provide those rights. Those media must relinquish space or time to satisfy the rights, and this provides them with incentives to say and do less that will trigger the access rights. Sunstein, for instance, seems to favor reinvigoration of the "fairness doctrine," (223) under which broadcasters who carry material on controversial issues of public importance must provide "balance" on those issues. The clear incentive is to avoid such programming. And if broadcasters overcome those incentives, they lose a degree of control over the substance of what gets said. They are thus diminished both editorially and economically, and that makes *them* less effective contributors to informed public decisionmaking.

Whether this is a good or bad thing in terms of contributions to eventual legislative deliberations depends, in part at least, on whether media in general make more effective contributions to those deliberations than do the individuals to whom the reforms

28. At one point Sunstein considers the possibility that the First Amendment free speech guarantee might be aimed at protecting "the development of individual capacities." He rejects this view in favor of protection of political speech in support of deliberative democracy. The latter, he says, holds "out the best promise for organizing our considered judgments about the range of cases likely to raise hard First Amendment questions." (239) Entirely unattended is the possibility that the First Amendment might be aimed at—and have to be understood as compromising among—a multiplicity of values.

Sunstein advances would afford access they would not otherwise have achieved. Sunstein insists that the "consequences" of one approach to speech or another are what really count, but he seems not to have in mind consequences like these that should really matter if one's concern is with contribution to eventual outcomes.

There is another problem with Sunstein's prescription for citizen input, besides questions about their comparative ability to make a substantive contribution. It is not obvious that more citizen access to media yields better understanding even of their content. More here may not be better. The last decade has seen an incredible proliferation of the means, and correspondingly the amount, of both public and private communication,[29] but each of us has a limited capacity to listen and to absorb. After that communications to us can get in the way of one another. They impart more and more noise and less and less information.[30]

While Sunstein notes the proliferation of media, he also seems oblivious to these implications. He suggests (though far from explicitly) that the republican approach to speech (he calls it the "Madisonian ideal" (213)) is to obtain the maximum amount of it, and the maximum amount of audience for each utterance (with some unspecified credit thrown in for "diversity"). Thus more than once he says that people are "prevented from speaking" or are not speaking "freely" if they don't have access to places or media where they can increase the size of their audience. (207, 215)

The apparent assumption behind Sunstein's positions is that all inputs have equal capacity for contributing to outputs, at least if appropriately amplified. But it is hard to imagine that he could believe any such thing.[31] Obviously public opinion influences legislative behavior, even between elections. And appearances

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29. This is most obviously true in the case of public and private electronic media, but it is also the case, for instance, that the number of magazine titles in the United States has nearly doubled over the last decade. See New York Times, Dec. 6, 1993 at C6.

30. My colleague Gary Lawson points out that this problem may run much deeper. In comments on a draft of this review, Gary said: "If the goal of republicanism is to turn the country into a gigantic town meeting, with every aspect of public and private life (there is, according to Sunstein, no difference) up for grabs in the political marketplace, no individual can possibly be informed as to every issue, or even most issues. This is a prescription for interest group warfare of the worst kind, as people concentrate on those aspects of the political process in which they have a comparative advantage." Gary insists that the point is not original with him.

31. See David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. Chi. L. Rev. 466, 473 (1983) ("[I]t is widely accepted among scholars—though to my knowledge it has never been scientifically demonstrated—that not all pages of words are of equal intellectual value.")

in mass media, including those achieved through any access rights, can affect legislative deliberations directly, or indirectly by affecting public opinion. But communications vary in their intelligence, imagination, and in the research and learning that inform them, and these matters are relevant to the capacity of these communications to contribute to legislative outcomes. Without attending to these matters, one cannot say whether more citizen access to public media and public forums will add or detract from the stock of useful contributions to the dialogue about public issues.

It is true that I have here diverged from the procedural test for public policy decisions that Sunstein announces—agreement among equal citizens. As indicated, he cannot be serious about that test, but if that really were the touchstone of legitimacy, it would be unthinkable that the persuasiveness and hence the substance of what is said would be irrelevant in achieving that agreement. It is Sunstein, after all, who tells us that his ideal is a "republic of reason." (10) And as long as substance matters in the deliberative process, it will not do simply to assume that a proliferation of even amplified talk about public policy will improve the decisions that are made in its name.

Without any persuasive answer to whether the moves Sunstein suggests would contribute to the *effective* discussion of public issues, I recur to the argument of Section I, above. While our First Amendment jurisprudence is far from a coherent whole, it has largely resisted the kind of encroachments on the prerogatives of (at least) print media that Sunstein's approach would encourage. My own sense is that deliberations about public policy suffer from lots of problems, but a dearth of imaginative and constructive suggestions for change is not one of them. Until the status quo in media rights is shown more clearly to be "broke," I wouldn't try to fix it, and certainly not in the name of deliberative democracy.

III

The recent interest in republicanism undoubtedly comes in reaction to law and economics and to the extension of its *homo economicus* to the realm of politics in what is called "social choice theory." The "rational" actor of economic and of social choice theory is guided by self-interest. Much of the attempt to tease implications for constitutionalism from social choice theory proceeds from a vision of the citizen that stresses the role of self-interested behavior. Such behavior takes political form through

the deployment of what James Madison called "factions" and we today call "pressure groups" or "interest groups" or, most ominously, "special interests." In a perhaps extreme but not uncommon form, social choice theorists employ a model of government that includes no public-regarding motivation at all. It is this version with which Sunstein sets out to do battle. He insists that such single-minded self-interest in the political realm is inaccurate on a descriptive level and impermissible as a normative matter.

Containing the mischief of faction was, of course, a central concern of Madison. His Tenth Federalist is devoted to the advantages that a "well-constructed union" would have because of its "tendency to break and control the violence of faction."[32] There is obviously a major embarrassment for republican constitutionalism here, since the civic republican antifederalists lost, and it is a Madisonian Constitution that contemporary republicans like Sunstein are attempting to steer. Sunstein relieves the embarrassment by finding civic republican themes in the writings of Madison, Hamilton, and other federalists. That Madison and other federalists shared some views with antifederalists cannot be doubted. Whatever may be said of modern social choice theorists, for example, Madison clearly thought that public-regarding behavior was possible by those in authority, and that deliberation among the public-spirited was a good thing.

But Sunstein considerably overstates his case when he finds the encouragement of public spirited deliberation at the heart of the Madisonian system. Here is what Sunstein says:

> The basic institutions of the . . . Constitution were intended to encourage and to profit from deliberation . . . . The system of checks and balances—the cornerstone of the system—was designed to encourage discussion among different governmental entities. So too with the requirement of bicameralism, which would bring different perspectives to bear on lawmaking. The same goals accounted for the notion that laws should be presented to the President for his signature or veto; this mechanism would provide an additional perspective. The federal system would ensure a supplemental form of dialogue . . . .
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> Judicial review was intended to create a further check. Its basic purpose was to protect the considered judgments of the people, as represented in the extraordinary law of the Constitution, against the ill-considered or short-term considerations

32. *Federalist No.* 10 (James Madison).

> introduced by the people's mere agents in the course of enacting ordinary law. (23)

The typical account of all the Madisonian mechanisms that Sunstein mentions is that they were adopted as hurdles to get in the way of faction-inspired legislation, not as mechanisms for deliberation.[33] It is well known that Madison advocated a large republic as a means of proliferating factions, the better to combat factional power. With more and individually less powerful factions, and multiple units of government through which they might operate, Madison thought factions would check one another, and thus accomplish less mischief. Thus the very mechanisms of governance that Sunstein depicts as designed to facilitate deliberation, Madison advocated instead as obstacles to decision. It is true that Madison thought that legislation in the public interest would emerge from the process, but the focus of his concern was to filter out undesirable, not to promote desirable, legislation. The reasons for this are fairly clear. When "a small number of citizens . . . assemble and administer the government in person," Madison warned, "there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual." And even in representative assemblies:

> It is vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate inter-

33. Sunstein disavows the intention "to provide anything like an exhaustive historical account." (18). Rather he is in search of "a usable past." (18). The problem is that Madison's vision for government is so different from Sunstein's that the historical evidence for a past Sunstein can use is hard to come by. Thus he quotes Hamilton (twice) as saying in Federalist 70 that " 'differences of opinion, and the jarrings of parties in [the legislative] department . . . often promote deliberation. . . .' " (24, 253) Hamilton does say that, but the subject of Federalist 70 is the executive. Hamilton makes an extended and impassioned case for a single rather than a plural executive, on the ground that only a single executive can bring the necessary energy for the effective execution of the law. That obviously suggested the question of how the plural legislature could be effective. To that question, Hamilton gave a complex answer, including that "in the legislature, promptitude of decision is oftener an evil than a benefit." He acknowledged that the plurality of the legislature "may sometimes obstruct salutary plans," and he praised it as serving "to check excesses in the majority." Sandwiched among these points is that it might also "promote deliberation and circumspection." "Deliberation" here might well have been meant to be synonymous with "circumspection," meaning something like "caution." But even if it was meant in Sunstein's apparent sense—something like "reasoned discussion"—in context the mention of deliberation, by Hamilton, not Madison, seems pretty insignificant.

> est which one party will find in disregarding the rights of another or the good of the whole.[34]

Madison and Sunstein also differ in the mechanisms by which they believe that public-regarding legislation may win out over factional legislation. Madison mentions two mechanisms, the larger constituencies from which legislators will be chosen in the larger republic, making it more likely that "enlightened statesmen" will be found; and the "limitation of the term of appointments,"[35] by which he seems to have meant the necessity for periodic approval by the voters. For Sunstein, on the other hand, the answer seems to lie basically in the application of reason once democratic deliberation takes place.

Sunstein acknowledges that the republican vision of participatory democracy is romantic, in part because self-interested politics is a pervasive part of the process. (21, 27-28) He asserts, and I am inclined to grant that he is right, that there is also an important public-regarding element in most political decisions.[36] (27-28) He is surely also right when he says that "sometimes people motivated to vote for certain legislation cannot easily disentangle the private and public factors that underlie the decision." (28) Having acknowledged this, however, he proceeds as if the glass is half full, but not simultaneously half empty.

The dilemma here is that Madison's and Sunstein's visions for government are not congruent or even compatible, as Sunstein suggests, but opposed. Sunstein wants to facilitate deliberation and ultimately "public interest" decisionmaking, while Madison wanted to impede the process and produce less selfish legislating. The only one who suggests a mechanism by which we might have the one without the other is Sunstein, and that mechanism is "reason." But there is no warrant for thinking that Madison, whose exclusive focus was structural, would have been consoled by this appeal to man's better self. It was just such seduction that Madison erected his system to circumvent.

Still, it is not clear that the Madisonian system has accomplished its aims. No serious observer of contemporary American politics doubts that interest-group politics is thriving. I have no way to measure its extent or to know how much of it Madison would have found tolerable. I don't suppose that Madison

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34. Id.

35. *Federalist No.* 57 (James Madison).

36. See Arthur Maass, *Congress and the Common Good* 5, 18-19, 64-74 (Basic Books, 1983); Abner J. Mikva, *Foreword* 74 Va. L. Rev. 167 (1988) (Symposium on the Theory of Public Choice).

imagined that the structural devices he advanced would banish factional politics from the land. But it is not implausible to suppose that Madison would find the present level excessive. Nor is it hard to come up with an explanation of what went wrong—and it's not status quo neutrality, or insufficient public access to the mass media. What Madison could hardly have foreseen was the growth of the United States economy, with implications for how powerful the lure of interest-group politics would come to be—so powerful that it could surmount the obstacles put in its way. And if this is viewed as the problem, it would be compounded by Sunstein's treatment of status quo neutrality. For if existing property arrangements are no more insulated from majoritarian decisionmaking than a requirement that Sunsteinian reasons be given for invasion, then the society's resources would be even more readily accessible as interest-group spoils.

Now it would be perverse to depict the growth in the economy over the past two hundred years as something that has gone "wrong." A flourishing interest-group politics may simply be a price we pay for the combination we enjoy of prosperity and democracy. But if we set our sights on Madison's target, we will be led at least to consider a very different set of reforms than those Sunstein advances. To a great extent a contemporary Madisonian agenda would consist of items that have found their way into public discourse and politics. This is testament to the enduring appeal of Madison's diagnosis and to his structural approach to treatment.

For instance, a balanced budget amendment to the Constitution might rein in the appetites of interest groups. The requirement of a balanced budget would mean that expensive interest-group projects would naturally be opposed by the taxpaying public and indeed by other interest groups either seeking to avoid paying the costs or competing for the scarce resources. Similarly, term limitations for Congressmen and Senators might be an item on a neo-Madisonian agenda. There is an argument that term limitations would strengthen the hands of congressional staff members, and that interest groups could then work even more effectively through them. It is possible, however, that the class of professional politicians that the lack of term limits has allowed to proliferate and flourish tends to dampen the public-interest dialogue both at election time and in the legislative process.

Still another idea that might dampen interest-group politics is an executive line-item veto. This would, of course, strengthen the hand of the executive vis-á-vis the Congress, but that might

be a sensible move if one thought that the executive was less susceptible to interest-group pressures than the Congress. It has also been suggested that spiraling federal budget deficits may be caused by a proliferation of congressional committees with spending power, and the absence of any central body to bring discipline to the process.[37] A neo-Madisonian might try to bring structural change to the workings of the Congress as a way to address this part of the problem.[38] And finally, concern with interest group politics could lead to a call for reinvigorated judicial review rather than the withdrawal that Sunstein (at least sometimes) urges.[39] The judiciary is, after all, the branch most insulated from politics and hence from interest group pressures.

None of these suggestions comes without its costs. There is, for instance, respectable—perhaps even overwhelming—economic opinion that a balanced budget amendment would be a bad idea.[40] And there are powerful arguments—many of which Sunstein presents—that judicial review can stifle political processes and thus defer or scuttle solutions to problems with a greater chance to endure.[41] (145) But these measures do not for

37. John Cogan, *What Really Causes Those Budget Deficits*, Fortune, Oct. 18, 1993, at 116.

38. An intriguing way to facilitate public interest deliberations by legislators is suggested in John W. Ellwood and Eric M. Patashnik, *In Praise of Pork*, 110 Public Interest 19 (1993). One of the dilemmas of the "public-interest legislator" is that reelection is facilitated by responsiveness to interest groups. Even if it is assumed that much legislation can serve both public and private purposes simultaneously (as indeed is necessary if there is such a thing as public-interest legislation), the public-interest legislator may well have an incentive to vote for interest-group legislation that at least in the aggregate will be more costly than his sense of the public interest would tolerate in the absence of interest-group pressure. Ellwood and Patashnik argue for what might be called an "optimal" rather than a minimal (or zero) level of interest-group legislation that takes the form of costly benefits, or "pork." And, while they don't quite put it this way, the optimal level seems to be that amount necessary to sustain legislators politically, so that they can feel secure in advancing public-interest legislation. One particular suggestion they make is that legislation that builds constituent favors in automatically, like the indexing of social security benefits in 1972, is unfortunate, since it deprives legislators of repeated occasions to curry constituent goodwill at no greater overall cost.

This thesis strikes me, as it does the authors, as Madisonian, *id.* at 21, but it also suggests that the distinction between structural and nonstructural reform will not always be so clear. If legislators were to follow Ellwood and Patashnik's suggestion, they would have repeated occasions to do so, or not. The "reform" if adopted by means short of a constitutional amendment would become structural more by education and habit than by virtue of anything that could be "built" into the legislative processes.

39. See, e.g., Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29, 43 n.62 (1985).

40. See Susan Cornwell, *Economists Disagree on Balanced Budget Amendment*, Reuters, June 1, 1992, available in LEXIS, Nexis Library, Reuters file.

41. While I was writing this review Chicagoans were witness to an apparent example of this phenomenon, as political resolution of the latest financing controversy surrounding the Chicago public schools was deferred until the possibility of court resolution had

the most part even enter into Sunstein's discussion, because, in seeking to bring his own theories under Madison's attractive tent, he has ignored what Madison taught life was really like under there.

CONCLUSION

One of the strengths of *The Partial Constitution* is that it evidences sophistication about so much that is its undoing. Sunstein is intellectually very broadly gauged, and that makes many of his specific discussions engaging and informative. But the whole does not fit together, and that makes the book a disappointment.

There seem to be two reinforcing causes for the failure. First is that Sunstein advances a procedural remedy (deliberative democracy) when his ultimate concerns often seem to be deeply substantive. Ironically, this could be depicted as reaching out for a false neutrality, which is, of course, Sunstein's suggestion of where the rest of us have gone wrong. The second is his penchant for systematization. There is an initial allure to both of the central notions he deploys—deliberative democracy and status quo neutrality—because they seem at first blush to help capture and to order so many troubling pieces of the contemporary constitutional scene. As Sunstein deploys them, however, they dissolve into little more than slogans.

Theories do not, of course, have to capture all of reality to be useful or "valid." Sunstein's failing is in pretending that he has presented a full description of a problem and a coherent approach to its solution. He has done neither, though he has presented a good measure of interesting constitutional commentary along the way.

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passed. See Editorial, *So Close, So Far Apart on Schools*, Chicago Tribune, Nov. 4, 1993, at A30.