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The Constitution of Reasons

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THE PARTIAL CONSTITUTION. By *Cass R. Sunstein.* Cambridge: Harvard University Press. 1993. Pp. vi, 414. Cloth, $35.

Cass Sunstein's book, *The Partial Constitution,*[1] brings together a number of his constitutional law essays from the last ten years. During that time, Sunstein has argued, powerfully, for the unconstitutionality of regulatory constraints on access to abortion;[2] for the constitutionality of and the need for regulation of violent pornography;[3] for the constitutionality of limits on both campaign spending and congressional control over public broadcasting;[4] for the deep consistency, conventional wisdom to the contrary notwithstanding, of the Court's repudiation of *Lochner* in 1937 with its 1974 decision in *Roe v. Wade;*[5] for the view that we should accord far less deference than we do to presently held preferences and presently conceived "interests" in our public or collective decisionmaking;[6] and for the view that at the heart of our constitutional traditions lies a commitment to deliberative democracy which, if sufficiently attended, could generate many more specific constitutional entailments, including but not limited to those put forth above.[7] This book re-presents, and by so doing strengthens, these arguments and a good number of others as well. Sunstein's now-familiar arguments on all of these topics are detailed, nuanced, often unconventional, and sometimes courageous. They are also — and for the most part to their credit — of an entirely conventional form, put forward in lawyerly cadences and straightforward propositions, beginning with general — but he thinks widely accepted — premises about the nature of our political life and proceeding through readings of the constitutional text and history toward specific conclusions about present constitutional conundrums. This book is well worth reading and

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1. Cass R. Sunstein is the Karl N. Llewellyn Professor of Jurisprudence, University of Chicago.

2. *See* Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy),* 92 COLUM. L. REV. 1 (1992).

3. *See id.*

4. *See* Cass R. Sunstein, *Free Speech Now,* 59 U. CHI. L. REV. 255 (1992).

5. *See* Cass R. Sunstein, *Lochner's Legacy,* 87 COLUM. L. REV. 873 (1987) (discussing Roe v. Wade, 410 U.S. 113 (1973), and Lochner v. New York, 198 U.S. 45 (1905)).

6. *See* Cass R. Sunstein, *Preferences and Politics,* 20 PHIL. & PUB. AFF. 3 (1991); Cass R. Sunstein, *Naked Preferences and the Constitution,* 84 COLUM. L. REV. 1689 (1984).

7. *See* Cass R. Sunstein, *Beyond the Republican Revival,* 97 YALE L.J. 1539 (1988).

rereading if for no other reason than to get a sense of the power of traditional legal arguments when put to often quite nontraditional political ends.

Others have already produced a tremendous amount of secondary commentary on virtually all of these Sunsteinian arguments, and I am not going to catalogue or add to it here, in part for the familiar reason that I agree with many of his positions and I see no reason simply to add my assent. I want to comment instead on what I see as the additional task Sunstein has set out for himself in this book — a task which may be of greater significance than the correctness of any of the particular constitutional arguments the book elaborates. What Sunstein has tried to do in this book is to weave his arguments on particular issues into a coherent whole, largely by identifying and then developing the common philosophical premises of the various positions he has taken over the last ten years. He then argues that the conception of the Constitution that emerges from a careful elaboration of those premises is both truer to our history and more just than the competing visions of the Constitution that both constitutional theorists and the Court have developed in the modern, post-New Deal era.

Importantly, though, Sunstein does not simply present "his" interpretation of the Constitution as one possible interpretation among any number. Rather, his starting premises, he clearly believes, are *correct* and widely held to be so. If that assumption is right, and if we share with him a commitment to rational forms of argument, then the Constitution he envisions is not just "his" interpretation; instead, it is in an important sense "our" Constitution. It follows that the conclusions he reaches on substantive constitutional positions, including some he calls "surprising," should command general assent. I think this larger, overarching project is not in the end successful, but I also think it is a tremendously worthy endeavor. It is a project full of promise and hope: the Constitution here envisioned is a just Constitution which could indeed service the ends of justice in contemporary life. Consequently, when the project fails, the failures are tremendously disappointing, and the reasons for those failures important.

In this review, I will first describe the deep structure of Sunstein's Constitution by outlining what I take to be the major premises elaborated in his book and then criticizing sequentially each of the premises I take to be the basic building blocks of Sunstein's "partial Constitution." All of Sunstein's basic premises, I think, are more problematic than Sunstein believes them to be. By identifying the problems I hope to suggest that the flaws, although deep, are curable, and that whether or not that is the case, the constitutional goals Sunstein puts forward in this book are goals we should applaud.

I. THE SUNSTEINIAN CONSTITUTION

At least five philosophical premises — four substantive and one methodological — unify the various arguments that compose the core of this book. The first substantive premise regards the nature of the state, hence the nature and scope of *state action*, and ultimately, therefore, the reach of the Constitution. Sunstein takes it as given that the Constitution addresses only state, not private, action. It therefore becomes imperative to know what does or does not constitute *state action* and what sorts of phenomena are accordingly within the reach of constitutional restraints. To answer that question, we need to know what is meant by the common notion of the *state*. As we all readily recognize, the state consists in part of legislatures and administrative agencies, and state action accordingly consists unproblematically of at least the decisions of those bodies. Central to virtually all of Sunstein's constitutional arguments, however, is the more contentious point that the state also consists of the seamless web of rules, standards, distinctions, and judgments that collectively constitute the common law (pp. 51-57, 74-75, 124, 159).

Echoing Holmes and the realists, Sunstein repeatedly points out that this definition is simply a matter of brute "fact," and even of obvious brute fact (pp. 51, 40-67), but he finds it nevertheless to be a fact of tremendous consequence, and a fact often ignored. Once we recognize that the state consists of the common law of property, contract, and tort, as well as the enactments of legislatures, the much treasured distinctions — treasured, that is, by some conventional liberals, many conservatives, and all libertarians — between public and private law (p. 159), between action and inaction (pp. 71-75), between partisan and neutral (pp. 75-80), between state and individual (pp. 90-91), and between positive and negative rights (pp. 69-71) virtually disappear. Private markets, to take an important example, do not exemplify, constitute, or participate in a private sphere of life unpolluted by state intervention: rather, the existence of a market is *itself* entirely a creation of the state, and more particularly a creation of the state common law of tort, contract, and property. Without contract and property law — and hence without the state — markets would not exist (p. 50). For similar sorts of reasons, when a legislature fails to act — fails to protect a citizen against violence, discrimination, or pollution — we cannot sensibly describe that as mere "inaction" in the face of a prelegal status quo and hence outside the reach of constitutional norms. Rather, the status quo the legislature failed to change is itself a product of legally created — hence state-created — rights and obligations (pp. 71-75).

That the purportedly private market and the purportedly prelegal status quo, appearances to the contrary notwithstanding, are actually products of state action is a brute fact that, if fully understood, renders

utterly fallacious a good bit of contemporary as well as pre-New Deal constitutional law, in addition to a great deal of contemporary libertarian rhetoric about the virtues of private markets as contrasted with the silliness, corruption, ineptitude, or incompetence of state intervenors. The state, Sunstein reminds us forcefully, is always already present in these supposedly private markets, no less than the state was present in the racially segregated private culture of the *Plessy*-era South (pp. 42-45). In fact, there is no meaningful realm of purely private life, if by *private life* we mean life untouched by state action, so we ought to quit thinking in terms of false dichotomies that assume the existence of unicorns. There is no private world of private action that exists apart from the mechanisms of the state, Sunstein strongly suggests (pp. 159-61). There is private action, to be sure, and such private action is indeed not the target of the Constitution (pp. 159-61). But that private action is invariably and inevitably facilitated by, structured by, permitted by, *made possible* by — no less than constrained by — the actions of states. Those actions, Sunstein insists, should without question be regarded, although they often are not, as the proper target of the Constitution (pp. 159-61).

Second, Sunstein argues, a great deal of contemporary constitutional law and contemporary constitutional argument rests on the flawed assumption that the requirement of "government neutrality" properly found in the Constitution mandates that the government take a deferential attitude toward the status quo, whenever that status quo is a product of either nature, market choices, or prelegal social structures (pp. v-vi, 1-14, 68-92). In other words, it is widely believed that the Constitution requires governmental neutrality, and what that neutrality requires in turn is that the government not "take sides" in social, natural, or market struggles. Sunstein endorses the premise but vigorously protests the inference. It is entirely correct, Sunstein insists — indeed, it is one of the major themes of his book — that government should live up to an ideal of neutrality, if by neutrality we mean that legislation must be backed by public-regarding *reasons* (p. 17). However, it does not follow from that premise that government should be neutral toward things as they are, a claim that Sunstein calls, as a shorthand, "status quo neutrality" (pp. 68-92). Rather, the Constitution — for the most part — requires and should require precisely the opposite. The central point of the Constitution, for Sunstein, is that government should be most decidedly neutral, which in turn requires *questioning,* not a deferential stance toward, "things as they are" (pp. 4-7, 123-61, 347-54).

Two important consequences follow. First, once we see that this *is* the core meaning of the Constitution, we will also see that much of what we have come to believe is *un*constitutional — such as regulations of pornography (pp. 261-70), limits on campaign spending (pp. 223-24), prohibitions on some forms of hate speech (pp. 245-53), or

broadcasting (pp. 213-33) — may in fact be not only constitutionally permissible but in some ways constitutionally obligatory. Rather than being inappropriate intrusions into the prelegal, natural, or simply given status quo, as they might on first blush appear to be, these state actions are better seen as legislated corrections of a status quo that is itself state created and manifestly unjust. Because the Constitution in a sense demands of us an ever-vigilant stance toward the possibility that the status quo is unjust, these correctives should be constitutionally applauded, not constitutionally suspect. It is this argument, and the handful of conclusions to which it leads regarding the meaning and scope of the First Amendment, that Sunstein has provocatively labeled a "New Deal" for speech (pp. 197-231).

The second implication is simply the other side of the coin: we will also see that much of what we had thought to be *constitutional* is in fact unconstitutional. Any number of bits and pieces of the common law of trespass, contract, and property — when viewed, as they should be, as state action, and when scrutinized, as they should be, for conformity or nonconformity with the mandates of justice — may be revealed as unconstitutional, particularly if they are themselves nothing more than encrusted codifications of an unjust status quo. Laws permitting private owners of public spaces, such as shopping centers, or of television licenses or of newspapers to use their property in a way that effectively shuts down means for public debate and dialogue, for example, even if facially neutral, should accordingly be examined against a demanding constitutional test: If the laws burden deliberation and stem from background entitlements that are themselves unjust, they may be properly subject to constitutional challenge (pp. 224-26).

These two inferences obviously point in opposite directions. The first suggests a more modest, less intrusive Constitution — the First Amendment does not reach as much legislation regulating speech as commonly believed, just as, analogously, the Contract, Takings, and Due Process Clauses do not reach as much legislation regulating economic behavior as commonly believed during the *Lochner* era. The second suggests a more ambitious constitutional role — once the common law, as well as conventional sorts of state action, is regarded as the proper target of the Constitution, a great deal of private conduct once thought beyond the reach of the Constitution becomes a lens that might magnify the constitutional infirmities of the common law. There is clearly no inconsistency, however, between these two inferences. Both inferences — the lesser intrusiveness of the First Amendment against legislation regulating speech, and the greater role of other clauses, notably the Equal Protection Clause, when used as swords against the common law — are sensibly drawn from the same premise. The central point is simply that the Constitution exists and should exist to prod us toward a *reexamination,* not a reaffirmation, of

extant entitlements and distributions. This obviously suggests both a judicial deference toward legislative efforts to correct for present injustices, which is the Sunsteinian reading of the central message of *West Coast Hotel,*[8] *and* a constitutionally inspired critical attack on extant injustice, sometimes emanating from the judiciary but more frequently and more appropriately from the legislature.

Third, Sunstein argues, we should engage deliberative democracy as well as constitutional argument in the tribunal of *reason* (pp. 17-39). Only *reasons,* Sunstein insists — not appeals to authority, not appeals to nature, not "naked preferences," not self-interest, and above all else not unadorned grasps for power — should guide collective choice. We should not understand democracy as a forum in which competing interests vie for votes, dollars, or influence (pp. 24-27). Rather, democracy requires above all else that collective decisions be justified by *public-regarding* reasons (pp. 17-24). It is not enough that a law command the consent of a majority of the governed, or that a compromise command the begrudging consent of warring factions, or that a bill accurately reflect the victor in a contested battle for legislative power. Law generally, and every law in particular, should be and constitutionally must be *in the interest of the community,* and arguments for or against a proposed legal reform must be grounded in nothing but reasoned appeals to the interest of the community. Factional interests, preferences, power, authority, and nature all fail to justify decisions made by some that will affect all. Only reasons can justify such collective decisions.

The fourth Sunsteinian premise is a principle of justice. Sunstein puts forward in this book an elaboration of suggestions he has made elsewhere regarding a particular conception of the meaning of equality, and hence of the Equal Protection Clause.[9] The equality to which we are as a people committed, Sunstein insists, at least since the Reconstruction era — the equality that accordingly finds expression in the Fourteenth Amendment — is the equality embodied in what he calls in shorthand an "anticaste principle" (pp. 338-45). The anticaste principle requires neither substantive egalitarianism, as argued by the Left, nor a bare formal equality, as argued by the Right, but something quite different from both. What the Fourteenth Amendment demands of states, and what equality demands of society, is that they not turn a morally irrelevant characteristic into the basis for systemic disadvantage (p. 339). Thus, to take the obvious example, the state cannot systematically disadvantage blacks on the basis of the morally irrelevant characteristic of race. Affirmative action, however, raises no constitutional problem — proponents of affirmative action, believes

8. Pp. 45-51 (discussing West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)).

9. *See* Cass R. Sunstein, *The Limits of Compensatory Justice, in* NOMOS XXXIII: COMPENSATORY JUSTICE 281, 303-07 (John W. Chapman ed., 1991).

Sunstein, do not intend systematically to disadvantage whites on the basis of their race. (pp. 343-45). In the same way, prohibitions on access to abortion violate the anticaste principle because they have the effect of subjecting women to systemic disadvantage solely on the basis of a morally irrelevant characteristic — the ability to carry a fetus (pp. 272-85). Thus *Roe,* Sunstein argues, follows in direct lineage, not from the discredited substantive due process reasoning of the *Lochner* era, but rather from the equal protection jurisprudential underpinnings of *Brown.*[10] Both decisions preclude the state from participating in the creation or maintenance of a two-tier system of citizenship.

These are powerful premises, and they collectively form the skeleton of a Constitution that is markedly different from that projected by the major liberal theorists of the 1960s and 1970s, the critical scholars of the 1970s and 1980s, and the major conservative theorists of the 1980s and 1990s. Let me mention just a few of the prominent differences. The Sunsteinian Constitution, unlike that of both the liberals and the conservatives, is largely aimed at legislatures and citizens rather than judges; Sunstein cleanly separates institutional imperatives that constrain judges from constitutional mandates, leaving room to argue for a large number of constitutionally obligatory measures that only legislatures, rather than courts, could institute. Second, the Sunsteinian Constitution, although not directed against private action, is often, perhaps routinely, *triggered* by private action, again unlike the Constitution propounded by both liberal and conservative theorists. The private actions facilitated by the common law, although not the target, are what generate the challenges to the constitutionality of those background common law norms. Third, the Sunsteinian Constitution is considerably more activist than that promoted by liberals in some areas, but considerably more modest in others. This is simply because the central target of the Constitution is not the occasionally unjust legislative act but *an unjust status quo.* This target may in turn be reflected in a piece of unconstitutional legislation, as envisioned by the paradigm liberal Constitution, *or* in *either* an unjust common law or a state's unjust reticence to use its powers to correct an unjust social reality. Consequently, Sunstein would be willing to exert constitutional pressure when liberals often would not — for example, to invalidate some property law when it is used in a way that frustrates public debate and dialogue — but less likely to see constitutional violations when liberals often do — whenever a legislature is acting against an unjust status quo and the liberals' finding of unconstitutionality is premised explicitly or implicitly on an assumption that the prelegal status quo is natural or private and therefore just, as with pornography legislation. Fourth — and this may be the key insight of this book —

10. Pp. 260, 270-85 (comparing Roe v. Wade, 410 U.S. 113 (1973), with Brown v. Board of Educ., 347 U.S. 483 (1954)).

in clear contrast to the Constitution propounded by modern conservatives, the Sunsteinian Constitution demands an almost relentless reexamination, not a preservation, of extant institutions, traditions, and distributions. In fact, what the Constitution *is,* Sunstein insists, is a precommitment strategy toward precisely that reexamination.

The fifth major premise of this book is methodological: in contrast to that of the critical legal studies (CLS) scholars, the Sunsteinian Constitution is relatively determinate. Sunstein's commitment to the determinacy of the Constitution, furthermore, is stunningly revealed in the tone, style, and rhetoric of this book, as much as by its substantive argument. Sunstein does argue explicitly, in the chapters devoted to issues of interpretation, for the determinacy that has now become a staple of anti-CLS argument: that constitutional law is not a matter of politics; that determinate answers to constitutional questions are possible; that there are right and wrong answers to constitutional questions; and that history gives some but not complete guidance for the familiar list of reasons (pp. 93-122). All of this will strike some readers as comfortingly familiar — it is the same stance that virtually all of the important non-CLS constitutional theorists of the past thirty years have taken, regardless of their substantive positions — and will strike others for that very reason as simply quaint.

Far more revealing than the explicit case it makes for determinacy, I think, is the *tone* of this book. Sunstein is absolutely sure, not to put too fine a point on it, that he is *right.* This confidence carries him through not only discussion of his philosophical premises but further through his arguments about the constitutionality of pornography legislation, the unconstitutionality of prohibitions on abortion, and so on. When he is not sure of his conclusions, he is careful to say so. His occasional tentativeness, though, comes not from any insecurity on his part but rather from the lack of decisive evidence. For the most part, Sunstein argues on the clear assumption that the conclusions he reaches about our modern constitutional debates follow logically from the handful of political and moral premises summarized above about the nature of the state, the essential historical and textual meaning of the Constitution, the noncontroversial content of substantive principles of justice, and, above all else, the primacy of reason in collective and constitutional judgment.

The implication of the rhetoric of certainty is manifestly clear on every page of this book. The rhetoric suggests that reason should guide us toward consensus on both political and constitutional issues. Thus, if we accept these tremendously attractive philosophical premises about the requirements of justice — accept what sound like incontrovertible claims about the nature of the state, agree with the plausibility of his account of the core meaning of the Constitution, and above all else accept his insistence that public decisions be reasoned — then, if we are being intellectually honest, we should *all,* whether we

are prochoice or prolife, agree with his endorsement of the outcome in *Roe;* whether we are libertarian or communitarian, we should agree with his analysis of the constitutionality of congressional control of broadcasting; whether we are enthusiastic or skeptical of the liberatory powers of private speech and private culture generally, we will see the constitutionality of attempts to regulate pornography; whether we are committed to or repelled by race-conscious attempts to eradicate the legacy of slavery, we will concur that affirmative action is constitutionally permitted. The deep claim of this book, in other words, which it tries to exemplify as well as to put forward, is simply that reasoned discussion of precisely the sort in the book itself is what will lead to agreement. Sunstein explicitly argues that *reason* — not tradition, not nature, not authority, not past state decisions — is what should guide collective choice (pp. 17-20). He tries to exemplify the closely related point that reason — not passion, emotion, sentiment, or politics — should guide individual as well as collective thought and will guide it toward agreement.

I hope that the brief discussion above captures the central arguments and spirit of this powerful book. Let me state unequivocally that this is good constitutional writing. Much of this book is convincing; all of it is well argued. Each of the premises on which these arguments rest, however, has problems. In the remainder of this review, I will comment very briefly on some of the problems posed by each of the first four major premises outlined above. In the conclusion I will comment briefly and impressionistically on what I take to be the implicit methodological theme, exemplified as well as argued in Sunstein's writing: that this is a republic of reasons and that what that means is that our moral, political, and constitutional deliberation must be, above all else, *reasoned.* I do not think it is possible, nor do I think it desirable, to equate moral — and hence political, legal, or constitutional — argument with the exercise of reason. The shortcomings of this masterful book by an accomplished constitutional scholar quite vividly illustrate why.

II. A Critical Assessment

A. *The Ever-present State*

As noted above in Part I, at the heart of the Sunsteinian Constitution is the insight — borrowed lock, stock, and barrel from the legal realists — that "the state" is pretty much everywhere (pp. 68-75). According to Sunstein, when a private homeowner covenants not to sell his home to a black buyer, it is by virtue of the common law of contract and property that he is able to do so (pp. 56-57). The homeowner's promise may be private — indeed it is — but the mechanisms by which that promise is enforceable, and hence meaningful, are state mechanisms, and the norms to be enforced are the familiar state-gen-

erated norms of property and contract law. When the owner of a shopping center excludes political speech from the premises, the decision to do so is a private one, but the threat of forcible removal is made possible only by virtue of the state, its law of trespass, and its mechanisms for delegating and enforcing those norms (p. 160). Every private action, every private entitlement, every private act of exclusion is facilitated by the state. That facilitation is action — it is action of the state — and hence is properly subject to constitutional scrutiny. If it violates a constitutional norm — which, of course, it may not — it should be struck down. Sunstein's analysis thus retains the "state-action" doctrine, but it diminishes the doctrine's force significantly. The Constitution is indeed directed only at the actions of the state, but the state is acting in virtually every private transaction one can conceivably imagine.

Sunstein draws two inferences from this premise, one that suggests a less intrusive Constitution and one that suggests a more intrusive Constitution. The first inference is that, contrary to the claims of some right-wing libertarian constitutional theorists, when a legislature acts to redistribute existing property rights, that legislature is not intruding into a private sphere because the existing property rights are themselves a function of state action (pp. 51-62). Accordingly, we should not regard that legislative intrusion *itself* as an impermissible invasion of the private sphere and therefore unconstitutional under the Takings, Contract, or Due Process Clauses of the Constitution. It may, of course, be unconstitutional for some other reason. But the argument for its unconstitutionality cannot possibly draw any rhetorical or legal strength from the fallacious claim that the state has invaded a private realm of private conduct and that, by virtue of that fact, the invasion is somehow impermissible.

Sunstein's second inference is that those pieces of common law that facilitate private action may themselves be constitutionally suspect if they violate a constitutional prohibition — if, for example, they render deliberative democracy impossible (pp. 197-256) or they violate the Fourteenth Amendment's embrace of the anticaste principle (pp. 338-46). Thus, the law of defamation may violate the First Amendment — indeed, the Court so held in *New York Times v. Sullivan.*[11] The exercise of property rights created by the common law may violate the First Amendment as well (pp. 206-13). Contract law and property law combined may violate the Fourteenth Amendment, under certain circumstances. Sunstein's conclusion, then, is that we should regard such bits and pieces of the common law as fair game for constitutional scrutiny, and, if they are constitutionally offensive, we should strike them down.

The suggestion is appealing, and the motivation for it clear

11. *See* pp. 203-10 (discussing New York Times v. Sullivan, 376 U.S. 254 (1964)).

enough. Sunstein wants to retain the state-action doctrine — he declares repeatedly his enthusiastic endorsement of it (pp. 159-61, 204-05) — but, at the same time, he wants to bring within the ambit of constitutional scrutiny the multiple ways in which the less visible actions of the state are complicit in a huge array of injuries, which on first blush *appear to be* inflicted by private actors in the private sphere. To put it bluntly, there is indeed a state-action doctrine — the Constitution addresses only state, not private action — but the requirement that there be state action is almost always met. Again, the state is in some sense always already present. The real issue for Sunstein is substantive: whether or not the state action in question — which may be only the state's willingness to enforce a trespass cause of action or to enforce an executory contract — violates the Constitution. It may not, but then again, it just might.

There is much to be said for this reorientation of the state-action requirement, but there are also problems, of which I want to mention two. The first is at once practical, legal, and strategic. The sorts of background common law rules Sunstein has in mind — the law of trespass, primarily, but also of contract and property more generally conceived — are almost always unobjectionable and neutral when looked at outside the context of unjust and hugely disproportionate amassments of private power. It is not clear, in light of that fact, what the relative gain of the Sunsteinian approach is over a more radical approach that argues more directly that the grotesquely disproportionate distribution of private power is precisely the trigger of the Constitution. For instance, it is by virtue of the private law of property that I am entitled to keep bigots, misogynists, and Seventh Day Adventists out of my house, and I assume that the law of property does not for that reason violate the First Amendment. When the shopping center owner invokes the same property right, however, the First Amendment may well be implicated. Surely the constitutional problem, then, is the shopping center's amassment of private power and the impact of that power on public debate. It seems artificial in the extreme to say that the constitutional problem in the latter case is the state's law of trespass, *when applied* to shopping center owners, but that seems to be precisely the analysis Sunstein advocates.

To take another example not so fully raked over in cases and commentaries but of perhaps greater import: there seems to be solid evidence to support the claim that private racism and sexism permeate private markets for rentals and sales of cars.[12] Women and blacks pay more for cars than do white men. Surely this ongoing practice violates the Fourteenth Amendment's anticaste principle: it is hard to imagine a clearer example of a social practice that turns a morally irrelevant

12. *See* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

distinction into a systemic disadvantage. Surely contract and property law facilitate this private action; the state is implicated in the same way as it is implicated in the shopping center owner's apparent denial of important First Amendment guarantees of public discourse. It seems perverse, however, to characterize the *root problem* in this situation as a problem that adheres in contract and property law. The root problem here is private racism and sexism, pure and simple. There is indeed a hard question as to whether we can or should reconceptualize the Constitution's Fourteenth Amendment to bring the problems of private racism or sexism into its ambit of concerns — I think we can, and I have elaborated the argument elsewhere.[13] Maybe my argument is wrong, and the Constitution simply cannot be sensibly read as having anything to do with private conduct of this sort. But I am not sure it is going to be very helpful to bring this kind of problem within the scope of the Fourteenth Amendment by recharacterizing it as a problem of state mendacity, stemming from the state's authorship of contract and property law, rather than as individual, societal, and cultural misconduct.

The second and larger problem, which the strategic issue above really only reflects, is philosophical. Sunstein's insistence on the permeation of private life with state action comes close to being a denial of the very *existence* of private culture. There are a number of ways to put this point. Perhaps the most direct is to suggest a point of *metaphorical* contrast between Sunstein and traditional liberal and communitarian social theorists. Liberal theorists, almost by definition, conceive of the individual as prior to society in some sense; communitarians, in contrast, conceive of the community as prior to the individual in some sense. Sunstein, notably, and in contrast to both, seems to conceive of the *state* as prior to *both individual and community.* For Sunstein, the state really is everywhere, always and already. It was in the cultural segregation of the pre-*Brown* south (pp. 42-45). It was in the pre-New Deal contractual relationships between employers and nonunionized, exploited, overworked, and underpaid workers (pp. 45-54). It is in the homeowner's decision to oust the Seventh Day Adventist from the doorstep (p. 209). It is in the seller's decision to sell to whites only (pp. 56-57), and it is in the pornographer's decision to depict violent sexuality (pp. 261-70). The state is operating, whether we see it or not, anywhere and everywhere. It is prior to individual and community alike. It is not constitutive of both, but, rather, it constitutes both.

This is a deep distinction, in some ways too deep to be visible, and I am afraid that its invisibility skews Sunstein's understanding of his adversaries. Surely when libertarians and liberals speak of the prop-

13. Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment,* 94 W. VA. L. REV. 111 (1991).

erty rights of individuals as being naturally "theirs," and in that sense prior to the state, they are speaking metaphorically. Sunstein writes as though this were not the case, and, to that degree, I fear he is attacking a strawperson. All of us, surely including libertarians, know that my property is mine by virtue of laws created by states. What the libertarian means by insisting on their naturalness is that the state is enforcing something that, given the nature of human beings, the individual should have dominion over. The property is "naturally" the individual's in the sense only that the individual is naturally such that his property — in this or that — *should be* recognized. The claim of naturalness, in other words, is a relatively easily translated normative claim based on what people are like. No one thinks property rights are *literally* prelegal.

Sunstein simply does not come to grips with this interpretation of the libertarian's claim, and the reason he does not, I think, is that he is taken by an equally powerful and equally blinding metaphor: the metaphorical creation by the prior state of all individuals, as opposed to the metaphorical creation, beloved by libertarians, of states by prior individuals. For Sunstein, it is impossible to conceive of individual private action unadorned or unaffected by the state, purely and simply, because it is impossible to conceive of individuals independent of the state. It is, consequently, impossible to conceive of what individual "nature" would be like, prior to or independent of the state. This is a powerful metaphor, with powerful consequences for constitutional analysis, particularly for a Constitution with a state-action requirement at its heart. But it is nevertheless an unfortunate one.

It is an unfortunate metaphor primarily because its description of our natures is simply wrong. There are indeed private individuals, private acts and actors. There are, in other words, *private cultures,* and the most profound implication from that fact is that we cannot accurately describe our individual and communitarian nature as fully constituted by the state. I do not mean by this claim that there exist private cultures that are unaffected by law — *of course* these do not exist. There are, however, "private cultures" in this different and important sense: there are associations of persons that are *private* — in that they consist of individuals coming together with the very conscious aim and desire to *divorce* their community from the influences and requirements of the state — and that are *cultural* — in that they come together in order to *exert* an influence, through the media of ritual, tradition, language, and any number of other forces, over the identity and self-understanding of their members.

These private cultures are everywhere. Let me name just a few to give a flavor of the phenomenon I want to highlight. College fraternities, for example, are profoundly cultural and emphatically private. For that matter, the entire sports culture is private and cultural in the sense mentioned above: it exerts a tremendous influence on the iden-

tity of participants, and it is private; it is exclusionary and nondemocratic toward nonparticipants. Not everyone can play. In the marketplace, which *of course* is facilitated by state law, a private culture of toy manufacturers and toy consumers has generated a separate cultural realm in which sex-role stereotyping — of dolls, toy cosmetics, and toy soldiers — runs rampant; step into a Toys-R-Us and you will see the tremendous power of private culture to perpetuate sex-role stereotyping. To take a historical example, the city of Buffalo, New York apparently harbored during the 1930s and 1940s a thriving bar subculture of working-class lesbians, sharply divided into butch and fem.[14] The Amish of Ohio and Pennsylvania and the Mormon communities in Utah and Nevada have developed sharply delineated private cultures. There is, to take an example closer to one of Sunstein's central concerns, a private subculture of contemporary sexual radicals, whose members get as much sustenance from their sexual radicalism as Cass Sunstein gets from the U.S. Constitution. That subculture produces a large number of publications, all of which are profoundly threatened by antipornography legislation of the sort Sunstein has gone to considerable lengths to defend. There are private schools that generate their own culture, and parents who educate their children at home. There still exist some communes that date from the "countercultural" movements in the 1960s, the privacy and culture of which have been made tremendously resilient over the past thirty years. Obviously, one could go on and on.

Again, I am not claiming that these groups are not in some way facilitated by permissive state action; of course they are. It is, though, an almost ludicrous misdescription of their natures to describe them as the end product of state action — the state action is the tail wagging the dog. These groups exemplify a human impulse to *resist* the state — in many cases, to resist precisely the participatory democratic dialogue Sunstein and other civic republicans so clearly cherish. The denial that they exist — and more specifically, the denial that they exist as essentially private cultures — has, I think, at least two pernicious side effects.

First, it leads to a sort of inattentiveness to the occasional virtues, but more often the deathly vices, of these private cultures. These communities, or cultures, all exist, almost by definition, to foster a self-identity that stands in contrast to the state-created, participating citizen at the heart of the Sunsteinian democratic soul. Those identities might have virtues worth attending to; they might open up different possibilities for exemplary lives, in ways familiar to any Mill devotee — and Sunstein is surely one. However, they also may and often do foster identities that are profoundly destructive. The sports culture is

14. ELIZABETH L. KENNEDY & MADELINE D. DAVIS, BOOTS OF LEATHER, SLIPPERS OF GOLD (1993).

violent, misogynistic, and competitive; the Amish and Mormon communities are both depressingly authoritarian and thoroughly racist and sexist; private schooling is antidemocratic in the very sphere — education — in which democratic ideals seem to matter most; the countercultural communes, even the nonauthoritarian ones of which there are precious few, cut off individual education and development in ways that seem unconscionable. When we deny the distinctiveness of these private cultures and the quite separate identities to which they give rise by seeing them as simply further flowerings of an ever-creative, albeit sometimes invisible, "state," we have in effect sanitized as well as homogenized social life, and by doing so we preclude an important area of critical inquiry.

Second, by denying in effect the privateness of these private cultures, we have denied — or cut off — the possible relevance of the Constitution to the quite distinctive identities these communities generate. Again, I am most emphatically *not* saying that, for Sunstein, these private cultures are beyond the reach of the Constitution because they are private. Rather, for Sunstein, all of the private cultures listed above may raise constitutional problems, but, if they do, they do so *because of the underlying common law of tort, contract, or property* that facilitates or permits their existence. What is *denied* by this argument is the quite different possibility that the cultures *themselves* and the identities they generate might by virtue of their private nature give rise to problems of a constitutional dimension. The systematic denial to Mormon women and girls of positions of power in the church and of access to education might, for example, constitute a denial of the equal protection of the law, not because of any problem with contract or tort, but because of the gross inequalities built into the Mormon religion. The analogy here is to slavery itself: the *identity* created by the slave society — of course facilitated by law, but centrally a product of that private society of master and slave — is an unconstitutional identity, an unconstitutional relationship, an unconstitutional "society" under both the Thirteenth and Fourteenth Amendments. If the analogy is sound, then in the case of the Amish or Mormon culture, as in the case of slave culture, it is because of their *distinctiveness* — their distinctive authoritarian and sexist and racist structures — that constitutional concerns are triggered. Whether the denial of equal protection to women within the Mormon community is sufficiently serious to outweigh the group's right to an autonomous existence is, to my mind, the underlying constitutional and moral problem that the existence of groups of this sort raises. However we resolve that question, we should be clear, I think, that what is being proposed is the possible unconstitutionality of a private culture's actions by virtue of the distinguishing features of that culture. It is that possibility that Sunstein's analysis forecloses, and I think unfortunately so.

B. *Status Quo Neutrality*

Sunstein's second philosophical premise is that, while governmental neutrality is an unqualified good, governmental neutrality *toward the status quo* is *almost* always — but not always — a mistake. Sunstein sometimes calls this phenomenon "status quo neutrality" (pp. 3-7), and he states repeatedly throughout the book, and at length in his introduction and conclusion, that status quo neutrality is his central target: it has — almost — no legitimate place in government processes (pp. 3-7, 347-54). True neutrality — the good kind — requires not complacent acquiescence in the status quo but a critical attitude toward it. According to Sunstein, we are a republic of reasons, and what such a republic must do is justify its actions. Acquiescence in the status quo is one such action. It does not justify itself. The evenhandedness in simply "keeping things as they are" is only apparent, not real; just as the blatantly redistributive legislative act takes from *A* to give to *B,* so the state that stays its hand actively perpetuates the preexisting distributions enjoyed by *A* and *B,* distributions which are themselves, importantly, a product of state action.

As a constitutional matter, the position of status quo neutrality is a bit more complex. There are, Sunstein concedes, a number of constitutional phrases that both seem to, and in fact do, mandate acquiescence in the status quo: the Takings Clause and the Contracts Clause rather strongly suggest that to some degree we are supposed to hold existing property entitlements inviolable (pp. 91-92, 156). At the other extreme, a few constitutional principles seem to mandate an aggressive, critical stance toward the status quo: the Fourteenth Amendment's Equal Protection Clause is the clearest example (pp. 154, 156-58). Generally, though, the Constitution consists of substantive principles that do not in any simple way counsel for or against the status quo. Sunstein's prescription for political deliberation vis-à-vis the Constitution, then, runs something like this: typically, the Constitution permits, but does not mandate or preclude, a critical stance toward the status quo. In those vast areas of public deliberation, then, political morality dictates what we should do: we should correct the status quo through legislation when we find it to be unjust. Importantly, the Constitution for the most part does not preclude us from so doing. In some areas of life, however, we have a constitutional as well as moral and political obligation to adopt such a critical stance: the areas of life touched on by the Fourteenth Amendment are the clearest cases. In other areas of life, too, we have a constitutional mandate to *refrain* from doing what we should otherwise do: when such a reexamination would so interfere with existing property entitlements that it would violate the Contract, Takings, or Substantive Due Process Clause. Conflicts between those areas where status quo neutrality is mandated and those in which status quo neutrality is made the explicit

target of constitutional analysis give rise, unsurprisingly, to the hard cases of constitutional law. When there is no such conflict, however — and there is no such conflict in far more cases than is typically argued by both libertarians and liberals — the cases are easy and should be resolved in favor of the constitutionality of redistributive, corrective legislation.

There are two problems in Sunstein's analysis, one that stems from a progressive perspective and another from a conservative one. The first problem is that, for all the attention Sunstein gives to the problem of status quo neutrality, both in the law and in politics, he is in the end surprisingly ambivalent toward it. Status quo neutrality is only *sometimes* morally unacceptable to Sunstein. It turns out to be fully acceptable to Sunstein when the security of market capitalism demands it (pp. 128-29, 341-42). When the workings of markets occasion the injustice of the status quo, the importance of maintaining those markets in effect trumps whatever justice-based concerns might have prompted a critical attack. Although we should *generally* be critical of and not biased toward the status quo, precisely the opposite presumption arises in Sunstein's analysis when the status quo consists of inequalities of wealth — even quite large inequalities of wealth — occasioned by market capitalism. Sunstein suggests that both the Constitution and political morality require not just complacency toward but approval of those inequalities (pp. 341-42).

The confusion resulting from this analysis has at its heart a glaring inconsistency, which is, to Sunstein's credit, frequently, even obsessively, *noted* — like the elephant in the china closet, one must somehow attend to it — but is never adequately resolved. Status quo neutrality is bad — but not always bad. It is bad, in short, *unless* the security of markets demands it. Then it is good. We should always be critical of existing distributions — *unless* those existing distributions are a product of markets, in which case, sometimes, we should not be so critical (pp. 128-29). We should be vigilantly on our guard against injustices caused by the day-to-day invisible actions of states, including the relatively invisible operations of the common law, *unless* such vigilance will raise doubts about distributions of wealth, in which case the overriding liberatory virtues of markets and market behavior might — but might not — outweigh the injustices those markets could effectuate (pp. 128-29, 137-38, 341-42). The result is unprincipled in the extreme. Nowhere does Sunstein put forward anything more than empty slogans exalting the liberatory virtues of markets in defense of this deference to market capitalism. Nowhere does he defend this profoundly biased stance in favor of the market-generated status quo in a book overwhelmingly devoted to a critical attack on the very attitude of bias that the book's own stance toward market inequalities exemplifies.

The effect of Sunstein's highly qualified attack on the status quo, of

course, is to blunt the impact of what is otherwise a strikingly radical suggestion — to wit, that we must justify the status quo. Surely, to many minds, the most strikingly unjust aspect of the modern status quo is the profound inequalities of wealth to which market economies, particularly over the past fifteen years, have led. Surely the most compelling, interesting, innovative, and, indeed, *hopeful* implication one might want to draw from an account of the Constitution — an account that puts *at its core* an expansive understanding of the state-action requirement and then couples that reading with a moral and political philosophical insistence that the status quo be justified — is that the grotesque maldistributions of this country's wealth are constitutionally suspect. It is surely one of the great disappointments of this book that Sunstein reaches precisely the opposite conclusion. Even given his expansive understanding of state action, even given the book's core thesis that status quo neutrality is usually intolerable, the conclusion reached, with only the slightest equivocation and hand wringing, is that not only are even extreme maldistributions of wealth constitutionally permitted but they should apparently be constitutionally protected (pp. 128-29). Inequalities between the sexes, between the races, between the handicapped and the able bodied, are all a part of a status quo that likely leads to impermissible castes, and that is constitutionally fatal. Inequalities of wealth, however, are beyond the reach of the Constitution and, in a sense, even beyond the reach of moral inquiry. They are a product of market capitalism, itself conducive to liberty, productivity, and a healthy respect for differences. According to Sunstein, those inequalities — that aspect of the status quo — are to be applauded, not scrutinized.[15]

15. Before exploring the second problem with Sunstein's account of status quo neutrality, I want to take a detour and discuss briefly why Sunstein permits — indeed insists upon — this qualification of his basic thesis. Why insist on an exception to the general attack on status quo neutrality, the magnitude of which might well swamp the principle? I think there are two possible answers, one that I endorse, and a second that follows from now-standard forms of critical argumentation — put forward by the critical legal studies movement — that is now widely held both in and out of CLS but that I think is flawed. Sunstein's book provides a striking example of where CLS analysis fails and why we might profitably consider alternatives.

The first explanation for the Sunsteinian contradiction — and the one that I think is basically right — is simply that Sunstein is a lawyer first and a social visionary second. He wants to put forward a vision of what this society ought to look like and be, but he also wants to put forward a positive, plausible account of the meaning of the Constitution. The glaring inconsistency — vigorously attack status quo neutrality, but preserve hands-off market capitalism — at the heart of the *prescriptive* or moral dimension of Sunstein's book is first and foremost *in the Constitution.* If the Constitution is itself contradictory in this way, then, to whatever extent the Constitution guides and restricts our political options, our political vision will be contradictory as well. For Sunstein — *as is typically true for constitutional theorists* — the Constitution does indeed both guide and restrict moral vision.

On this account, in other words, the contradiction in Sunstein's political vision is a function of our contradictory Constitution. What Sunstein has done — which is not uncommon among constitutional theorists — is define his normative vision by reference to the best read he can give of the Constitution's meaning. Like the liberal constitutional theorists of the 1960s and 1970s, Sunstein is unfailingly respectful toward and uncritical of the Constitution. If the Constitution demands complacency toward market capitalism but a vigilant critical stance toward all other

The second problem with Sunstein's denunciation of status quo

institutions and traditions of modern life that constitute in some form the "status quo" we inherit, then so be it — that contradiction must be somehow desirable as well as constitutionally mandatory. Moral vision will be tailored accordingly.

The second possible explanation for the contradictory attitude toward market capitalism at the heart of Sunstein's book is that, entirely aside from constitutional mandates, Sunstein himself just happens to be uncritical of capitalism but highly critical of all of our other social institutions and the injustices to which they give rise, and that combination of views has skewed his reading of the Constitution. His privately held politics, in other words, are driving his interpretation of the Constitution, rather than, as postulated above, the clear mandate of the Constitution determining his political and moral commitments. On this explanation, the Constitution does not contain any clause that demands that an exception the size of a mountain be carved into the general requirement that we critically assess the status quo, so that maldistributions of wealth go untouched. Indeed, quite the contrary. It is easy enough — or at least it is not impossible — to read the Takings, Contract, and Due Process Clauses as protective not of existing property rights but of what "property rights" might be thought of as symbolically encoding: a general right to a healthy standard of living. Any halfway decent constitutional lawyer should be able to construct the argument. On this account — loosely, the account put forward by the critical legal studies movement — it is the preexisting politics of the theorist or interpreter of the Constitution, and not the Constitution itself, that contains the fundamental contradiction. The Constitution is not internally contradictory. Its meaning is too indeterminate to be either contradictory or consistent. It means what one pours into it, and, if Sunstein finds a general mandate of justification that is qualified by complacency toward markets, it is because he has chosen to put it there — both the general mandate and the qualification. Mark Tushnet, one of the most prominent advocates of the indeterminate Constitution, has written a review of Sunstein's book arguing this point. *See* Mark Tushnet, *The Bricoleur at the Center,* 60 U. CHI. L. REV. 1071, 1114-15 (1993) (reviewing *The Partial Constitution*).

This second explanation follows directly from the central CLS claim that the Constitution itself is indeterminate. The most important implication of that claim is that it is *always* the interpreter, not the document, who is responsible for any inconsistencies and for any political judgments one might choose to locate in a legal or constitutional — or for that matter any other — text. I have written elsewhere why I think this widely held view is wrong. *See* Robin West, *Constitutional Skepticism,* 72 B.U. L. REV. 765, 788-90 (1992). Let me just note here that we might profitably examine what I have put forward above as the first of these two explanations in a bit more detail — to wit, the possibility that inconsistencies in the moral or political views of constitutional theorists might have their genesis in a contradictory Constitution, rather than in the preconstitutional contradictory views of the theorist. *Id.* at 774-80. In this case, in other words, we should not rule out the possibility that Sunstein has in effect reported correctly — the Constitution really does contain both a general prohibition against status quo neutrality and a specific insistence on just that neutrality toward inequalities generated by markets. If the contradiction is in the Constitution, rather than in Sunstein's politics, we should know it. Our present Constitution might be just as contradictory in its stance toward market-generated poverty as the original Constitution was in its stance toward slavery. If so, then it contains just as serious a flaw. Obsessive attention paid to the alternative explanatory account — that contradiction in an interpretation of a document is invariably a function of the interpreter's contradictory politics because the document itself has no determinate meaning, contradictory or otherwise — may be simply distracting us from a more critical, and urgently needed, appraisal of the moral and conceptual failings of the Constitution itself.

Generally, what I want to urge is that, the claims of the critical scholars notwithstanding, it may be that a flawed and contradictory Constitution has rendered inconsistent and compromised the moral vision of some of our most influential, as well as most constitutionally influenced, social theoreticians — *rather than the other way around.* The ability of constitutional theorists — and to a lesser extent the rest of us — to see clearly that to which this society should aspire may be stunted and compromised, not inspired, by what the Constitution has to teach if the Constitution is itself stunted and compromised and if we insist on couching our social aspirations in the language of the Constitution. In other words, when we put forth claims as to what this society ought to look like and simultaneously put forth claims as to what the Constitution requires, and simultaneously claim that they are one and the same — that what we ought to be is precisely what the Constitution claims we must be — the result may be not just a disingenuous reading of the Constitution to fit our preexisting political aspirations — although it may of course be that —

neutrality comes from the other end of the political spectrum. The tone and content of this book illustrate precisely what it is about the rationalist enlightenment sensibility that drove Edmund Burke to his masterful denunciation of the Age of Reason,[16] and well exemplify precisely those qualities about reform-minded liberalism that drive Burke's contemporary followers to fits of distraction.[17] Must we *really* justify the status quo every minute of our waking lives? This will be a busy government indeed. Should we allow this house to continue standing or this tree to continue growing? Do we not have to weigh their value against alternative uses for the land upon which they sit? Can we really justify public subsidies to the arts, in light of *today's* needs? What about tomorrow's needs? Should we not collectively and rationally, rather than individually and whimsically, decide the best allocation of the considerable resources represented by private fortunes, handed down in violation of every conceivable scheme of justice from one wealthy ingrate to the next, generation after undeserving generation? Perhaps, today, interest in stability and the diversity and liberty that "markets" allow to flourish might justify the continuing existence of my house, the tree outside, subsidies for the arts, or inheritance entitlements, but, then again, they might not — and there is no justification whatsoever for cutting off the inquiry. There is more than a little hubris and a great deal of bureaucratic confidence smuggled into the innocent-sounding claim that the status quo, no less than departures from it, stands in constant need of justification.

C. *The Republic of Reason*

The third philosophical premise behind the Sunsteinian Constitution is that reason and deliberation — not power, nature, preferences, or interests — are at the heart of democracy as conceived by the U.S. Constitution (pp. 1-14, 17-39). Indeed, Sunstein tells us, this understanding of democracy constitutes the uniquely American contribution to the world's shared understanding of the nature of sovereignty (pp. 18-24). We are, by constitutional mandate, a republic of reasons. Only reasons can justify political actions. Nature does not justify social practice or legal mandate (pp. 18-19); nor do preferences (pp. 162-94), interests (pp. 24-25), or power (pp. 18-20). According to Sunstein, while the Constitution may be equivocal concerning the value of status quo neutrality, it is absolutely unequivocal in its advocacy of

but rather, more disturbingly, a stunted vision of what we ought to be — stunted in order to fit the compromises, inconsistencies, and morally fatal qualifications of a profoundly flawed and seriously "partial" constitution. Constitutional theorists are peculiarly vulnerable to precisely this form of moral compromise.

16. *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Thomas H. D. Mahoney ed., 1976) (1790).

17. *See* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944); Anthony T. Kronman, *Precedent and Tradition,* 99 YALE L.J. 1029 (1990).

reason. The primacy of reason is the common thread that ties together the revolutionaries' overthrow of the English monarchy (pp. 18-19), the constitutionalists' simultaneous embrace of both civic republicanism and factional pluralism (pp. 20-22), the Reconstructionists' repudiation of slavery and constitutive institutions (p. 136), and the New Deal crafters' reconstitution of the very meaning of natural entitlements (pp. 51-61). In all of these cases — in all of these constitutional moments — the Constitution came to reflect a disapproval of nonrational or irrational forms of political authority — whether based on monarchical status, interest group, racial category, or economic class. Again, the shared lesson is simply that only reason — not bloodline, race, class, power, interest, or preferences — can justify the exercise of power.

There are two problems in Sunstein's analysis. One is the same problem noted in a different context above[18] — if Sunstein is serious about this commitment to reason and deliberation, it is not clear why he is so willing to tolerate — even applaud — the profoundly irrational hierarchic relationships of entitlement and disenfranchisement generated by gross inequalities of wealth. Second, the entire argument has an odd and paradoxical ring to it: Sunstein is using an authoritative text and an authoritative tradition to argue for an antiauthoritarian form of government. Thus, it is as though he is saying, "You cannot rely on mere *authority* to justify your actions because authority says you cannot." His own reverential stance toward the Constitution, in other words, mirrors *almost precisely* the reverential attitude toward monarchy that he insists the constitutionalists as well as the revolutionaries so adamantly opposed. The antiauthoritarianism, the rationalism, the spirit of enlightenment, the ever-critical stance toward authority, power, interests, factions, nature, and all else but reason, which he finds implicit and explicit in the text of the Constitution, undermine, more than anything else possibly could, the case for treating that Constitution, along with its mandate of antiauthoritarianism, as authority for anything. If the Constitution tells us not to take authority seriously, then why should we take the Constitution seriously, as well as its mandate of antiauthoritarianism?

I do not mean simply to introduce a brain teaser. It seems to me there are two different ways one might approach a constitution — the very idea of a constitution — and still hold fast to the rationalist ideals of the Enlightenment, and both are riddled with problems. One is to regard the Constitution as a definitive statement of substantive ideals, proven to be worthy of respect over time, and to defer to the authority of the Constitution accordingly. One then has a *reason,* grounded in reason, for taking constitutional authority seriously, importantly including its substantive commands and not just its antiauthoritarian

18. *See supra* note 15 and accompanying text.

core. The second is to regard the Constitution as a definitive rejection of irrational authority — a sort of imperfect and at times clumsily worded commitment to the ideal of reasoned authority. Then one has a *reason,* grounded in both reason and the authority of the Constitution, for not taking the substantive commands of the Constitution too seriously — after all, the most central message is its antiauthoritarianism, not its substantive mandates. Both of these routes, I think, are problematic in obvious ways, but what is even more problematic, perhaps even impossible, is to hold open both of these possibilities simultaneously. That, though, is precisely what Sunstein has tried to do. What results from that attempt is an oddly unjustified deference to constitutional authority — the oddity of which is underscored, rather than ameliorated, by Sunstein's insistence that the authoritative command of that document is profoundly antiauthoritarian.

D. *The Anticaste Principle*

The fourth and final substantive premise of Sunstein's constitutionalism is a conception of equality, and hence of equal protection: What the Fourteenth Amendment dictates is that government not turn a morally insignificant characteristic, such as race or sex, into the basis of systemic disadvantage (pp. 338-45). On the basis of the anticaste principle, Sunstein argues for a number of positions pertaining to the Fourteenth Amendment, ranging from the permissibility of affirmative action (pp. 77-79, 149-50, 156-57, 331-32) to the unconstitutionality of constraints on abortion (pp. 270-85). Again, I do not intend to reiterate those particular arguments in this review. Instead I want to note two problematic features of the anticaste principle itself.

The first tracks the central problem of this book, which I have already noted:[19] Sunstein's refusal to think through the implications of his anticaste principle for impoverished people (pp. 341-42). Surely there can be no clearer "systemic disadvantage" than poverty, no more irrelevant characteristic than the economic well being of the family into which one is born, and consequently no greater injustice than the creation and maintenance of a permanent underclass. If so, then it is the greatest violation of the Constitution of our day. Yet Sunstein assures the reader again and again that he does not intend his anticaste principle to extend this far, for the flatly stated reason that to do so would unduly compromise the liberatory virtues of markets (pp. 341-42).

Again, it is simply, tremendously disappointing that there is in the end no detailed discussion of the support for this position. An anticaste principle seems like a promising bridge between the clear intent of the drafters of the Fourteenth Amendment and the lives of relative servitude endured by members of the permanent underclass. If one

19. *See supra* note 15 and accompanying text.

can sustain the claim that a resistance to caste is the principle behind the words of the Fourteenth Amendment, then there is a compelling argument indeed for the proposition that there are constitutional limitations, emanating from the Equal Protection Clause of the Fourteenth Amendment, to the gross disparities of wealth characteristic of modern American life. It is extremely unfortunate, as well as simply revealing of the state of our current politics, that this book does not make that argument.

The second problem is related: The anticaste principle is simply too demanding if taken too literally, and, consequently, because it truly cannot be taken literally, its application is unpredictable and arbitrary — it is invoked when a conclusion reached on some other grounds demands a neutral-sounding justification. There are two reasons for this indeterminacy: first, there are no differences between people that are "morally irrelevant" in the abstract; second, and even more clearly, there is no noncontroversial content one can possibly give to the notion of "systemic disadvantage." To take the latter, most obvious point first, it is not clear, as Sunstein seems to think it is, when someone is systematically disadvantaged by a condition or what the consequence of that disadvantage should be. For example, it is certainly not clear to me that whites are not "systematically disadvantaged" by affirmative action. It is even less clear that, if they are, that systematic disadvantage is unjust or unconstitutional. Surely one could plausibly argue that whites are indeed systematically disadvantaged by affirmative action, but that such a disadvantage, given the context, is simply not unjust. Difficult issues, and affirmative action is one, are not resolved by invocation of slogans.

Further, there is no abstract category easily labeled "morally irrelevant differences." Differences are only relevant or irrelevant to some particular decision made in the context of some particular ongoing relationship. Thus, distinctions which would most assuredly be morally irrelevant to distributions made by government are precisely the distinctions upon which we rely, as private citizens, every day. We systemically prefer our family members to nonmembers, members of our community to distant strangers, and even citizens to noncitizens, and these practices seem not only morally unobjectionable but in some ways morally compelled. Morality seems, if anything, to be more a function of these relationships, all of which in some way involve individuals thrown together because of some morally "irrelevant" history into a relationship that converts that irrelevancy into the very foundation of moral obligation. The morality that guides our practice, whatever may be the state of our theory, seems far more closely connected to these relationships than to any categorical imperative of neutrality.

Obviously, what may be "morally relevant" to a decision made by a private individual might be quite different from what is or is not

morally relevant to a government decision; that an individual parent might be permissibly "biased" toward her children on the basis of the irrelevant characteristic of a genetic or adoptive connection should not count against the moral impropriety of a legislator being so inclined. It might be acceptable for me as a parent to prefer my own children to my neighbor's, but not for me to do so when acting as a legislator; the distinction between my children and other children, from the legislative perspective, is indeed in some sense morally irrelevant. However, if "morally irrelevant distinction" simply *means* a distinction upon which government should not rely, then the anticaste principle turns out to be completely empty; all it states is that government should not turn those differences which government should not use into the bases for systemic disadvantage. This is not going to be a very helpful principle.

The problem, though, might be not with the "anticaste" principle, but rather, more broadly, with the idea of invoking a principle of any sort to resolve hard moral and constitutional questions. To sustain the claim that Jim Crow segregation is wrong but affirmative action is good, or that constraints on abortion are bad and that reproductive rights are good, we need more than a slogan. After forty years of formulating, reformulating, and rejecting principles with which to resolve issues of racial justice, it is becoming harder and harder to see precisely what any of these principles — whether the principle of colorblindness, or anticaste, or antisubordination, or antidiscrimination — are doing, beyond providing fancy rhetorical garb for slogans. If the past four decades of arguing over which principles should be invoked, and how, to resolve hard cases of racial justice have taught us anything at all, it surely is that principles — particularly when shed of context — simply do not decide hard cases.

E. *Conclusion: The Role of Reason*

By way of conclusion I want to comment briefly, critically, and entirely impressionistically on what I have suggested above is the implicit methodological claim of this book: to wit, that through the exercise of reason — rather than passion, emotion, or of course force — we will reach consensus on divisive moral issues. I think that is wrong — reason alone will not lead us to consensus — but that is not the point I want to urge here. All I want to note is that Sunstein's apparent embrace of this conviction — that reasoned deliberation is the method of moral inquiry — for all its nobility, hampers the presentation of arguments in this book. Simply put, this book lays stake to reason but lacks heart, and, given his thesis, this matters. Sunstein wants us to reorient our thinking about the Constitution in an extremely fundamental way; he wants us to view it as a mandate to *challenge* rather than to conserve the status quo. What he has not done is show us why

we should. He does tell us we should change the status quo when and where it is unjust. But he does not *demonstrate* the injustice.

Let me put the point a slightly different way. It is hard to squelch the feeling, as one reads through the awesome array of arguments presented in this book, that something central has been left out of each and every one; the moral *case* for the various positions for which Sunstein marshals his legal arguments is somehow missing. The arguments for regulating pornography, for deregulating abortion, for controlling campaign financing, for regulating some hate speech, for regulating surrogacy contracts, for weak protection of welfare rights, and all the rest of it, are often intellectually convincing. When I read through this book, however, I could not shake the feeling that I simply did not have a clue why Sunstein chose *this* particular collection of positions to defend. Is it really the case that Sunstein supports legal abortion — which he fervently does — *because* he believes that its legal prohibition would be unconstitutional? Frankly, that is rather bloodless. Alternatively, one would hope, Sunstein opposes the criminalization or recriminalization of abortion because he thinks women must have this right in order to lead decent lives, and, given our current legal status, one way to ensure that they will is to deploy constitutional authority against attempts to control them. If this latter account is right, nothing in this book tells you *why* women need the right, and that is the sense in which the case is simply missing. Suggestions are made — the most important one being that criminalizing abortion is wrong because such regulations have the effect of turning women's reproductive capacities into a tool for the use of others (pp. 270-85). Because these regulations do so, they violate the anticaste principle. Because they violate the anticaste principle, they violate the Equal Protection Clause and are accordingly unconstitutional. But, if we take this argument at face value, the reason it is even *noteworthy* that regulations on abortion have the pernicious effect they have on women's lives is that this fact is a necessary step in the argument for their unconstitutionality. The focus, the goal line, and, one fears, the passion is for constitutional purity, rather than for women's lives. Heaven forbid we should have bad constitutional law on the books, and a decision overruling *Roe v. Wade* would indeed be bad law. Again, to be blunt, that looks more like constitutional fetishism than like feminism.

The same can be said of most — though not quite all — of the arguments in this book. Tellingly, Sunstein begins his argument for the constitutionality of regulating pornography with only a cursory account of the harms pornography visits upon women (pp. 265-66). He then moves on to what is the heart of the discussion — that opponents of these regulations base their opposition on a false belief in the naturalness of the status quo (pp. 261-70). The discussion does not satisfy, in part because it is not at all clear that opponents of anti-

pornography regulations have the quaint and silly set of beliefs he attributes to them,[20] but more fundamentally, I think, because he has not carried the burden he surely must: to show the reader why pornography is hurtful. What we are left with is a shell of an argument, ready for use by anyone willing to supply the core. The shell of the argument does not ultimately convince. In fact, it does not come close.

Cass Sunstein is a committed feminist, and a committed humanist, and a fervent democrat. He cares deeply about women's lives. That is why he cares about pornography. He also cares about children, and that is why he cares about the junk on television that passes for children's programming. He is also a democrat who cares about the quality of our public life, and that is why he cares about limits on campaign spending. What is odd is that you would never know any of this from his writing. The tone of the writing instead suggests a scholar who cares deeply about the Constitution and who happens to think that a number of modern arguments currently being advocated by feminists that would happen to benefit women — and some arguments by television critics and would-be regulators on behalf of regulations that would happen to benefit children, and some arguments by democrats regarding campaign spending that would happen to improve the quality of public life — are probably, as a constitutional matter, quite right. The commitment to the Constitution, in other words, is primary. That it aligns with some feminist or democratic politics — or that it would incidentally benefit women, children, or democracy — is quite incidental.

I think that the tone does not fit the man and the cause of the ill fit is an excessive commitment to rationalism. Reason alone will wrinkle out inconsistencies in our convictions, and the critical use of reason will expose inconsistencies in the views of others. But reason will not account for, or in the end meaningfully challenge, our rock-bottom moral beliefs, and Sunstein is simply wrong to think otherwise. The exercise of reason, and the pursuit of rational deliberation which is its behavioral and political counterpart, will not lead us to agreement. Reason will supply the shell but never the core of moral arguments, and hence of constitutional arguments as well, if we insist on incorporating our moral commitments into our constitutional interpretations.

The core of our moral beliefs is constituted, not by reason, but by our experiences and by our empathic sense of the experiences of

20. Thus, Sunstein asserts that the anticensorship position "[i]n some of its incarnations . . . has relatively straightforward neo-Freudian roots. It rests on the perceived naturalness of sexual drives, and it emphasizes the need to liberate those drives from the constraining arm of the state. . . . The link between [the traditional antiobscenity and anticensorship] positions lies in their shared reliance on a private sphere of sexuality, taken as natural and in any case as neutral and just" (pp. 262-63). Sunstein does not provide any support for this atribution of neo-Freudian naturalism to opponents of censorship. I am not at all sure who he means to include in this description.

others. This is a hard truth to acknowledge. It inescapably implies that reason alone is not going to compel agreement. All of the sentences in Sunstein's book that label an argument right or wrong would be in need of serious revision. Most critically, the certainty with which he writes that rational readers who accept his premises will move steadily along with him to his conclusions would fall away. We have had different experiences. We see the world differently. These facts must be addressed and acknowledged, and, if we are really aiming for genuine consensus, the experiential gaps must be bridged. Sunstein does not even attempt it.

Let me try to illustrate the problem I want to highlight with an example. Sunstein is firmly committed to women's reproductive freedom. The question is why. Again, what he says on this score is not exactly enlightening. He does say, of course, that abortion restrictions turn women's reproductive lives into a tool for the use of others (pp. 272-73), but, again, he makes that assertion in the course of presenting an argument for their unconstitutionality, not as an explanation of why they are a bad thing. I have never been sure — and after reading this book I am still not sure — why Cass Sunstein is so fervently prochoice.

I do know why I am, and it most assuredly has nothing to do with reason or principle. I saw a picture many years ago, and again more recently, and I was vividly reminded of it while reading Sunstein's book. I am not sure where I first saw it, but the picture has been reprinted in the most recent edition of *Our Bodies, Ourselves.*[21] The picture is a black and white photograph of a naked woman crouched down on a tile floor. She is alone, except for the photographer. The picture is shot from the rear. Her head is resting cheek-down on the floor. She is young, and one might first think, or hope, for only a second, that she is sleeping. But — the eye is drawn down, and there is a pool of blood under her. The blood suggests, and the caption confirms, that she is dead.

This picture has haunted me for years. I never knew anyone who died of an illegal abortion. But, when I saw that picture, I was filled with sadness and then with an overpowering feeling of identity. What a terrible, lonely, torturous, painful, fearful, and unutterably sad way to die. It is, to my mind, indistinguishable from torture. It could so easily, so very very easily, have been me, have been anyone and everyone that I knew. Partly because I so readily recall the impact of this picture, I teach the well-known brief, authored by the National Abortion Rights Action League (NARAL), and colloquially known as the "Voices Brief,"[22] every year in a feminist legal theory seminar and in a

21. BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, THE NEW OUR BODIES, OURSELVES 372 (2d ed. 1992).

22. Brief of Amici Curiae National Abortion Rights Action League et al., Thornburgh v.

law and literature seminar as well. In the Voices Brief, now routinely submitted by NARAL as an amicus brief in all major abortion cases, the NARAL lawyers put together a document consisting primarily of women's stories of abortion — legal and illegal — and of their reasons for having one and its effect on their lives. Some of those stories, like the picture described above, are quite harrowing. Every year at least one student, usually a man, tells me that the brief changed his mind on abortion. It seems to me that the picture from *Our Bodies, Ourselves,* like the NARAL brief, does something that Sunstein's book simply does not even attempt: it *shows* — illustrates — the terrible consequences of rolling back *Roe v. Wade.* Obviously, one does not have to have *been there* to understand what those consequences might be. However, one must indeed somehow be shown those consequences. The consequence that matters is that, in a world of illegal abortion, some of us, but only some of us, live out a regime of terror, torture, and unnecessary death. This is not a hard point to grasp. But, to be grasped, it must be shown. Principles and reason do not make the case.

My point is simply that moral convictions are changed experientially or empathically, not through argument. Given a moral conviction that the criminal prohibition of abortion would be a terrible wrong, any number of constitutional arguments suggest themselves. One might argue, for example, that no one should suffer a torturous death at a young age at the hands of criminal entrepreneurs. We should be protected — we should be "equally protected" — against this form of butchery. If the way to achieve that protection is through legalization of abortion, then so be it. The alternative is that women — women you know — will surely die, and, when and if they do, the state would most assuredly have failed to provide them equal protection of the law.

In a cataloging of facts intended to show that, contrary to the claims of prolife advocates, criminalizing abortion will not reduce fetal death at all but will only increase maternal death — the legality or illegality of abortion affects only the safety, not the frequency, of abortions — Sunstein notes that during the heyday of criminalization five to ten thousand women a year died of illegal abortions (p. 278). Five to ten thousand — *dead.* It was when I read that paragraph that I recalled the woman in the picture. If the Constitution is the recordation of the ideal ways in which we aim to constitute ourselves, then that fact alone — five to ten thousand dead — is surely of constitutional significance.

By taking Sunstein to task for not providing the experiential and emotional "core" of his moral arguments, I am not advocating illogic

American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379), *reprinted in* 9 WOMEN'S RTS. L. REP. 3 (1986).

or irrationality. What I am seeking to highlight is that injustice must be *shown,* not asserted. Sunstein clearly believes, and strongly, that the status quo — the way things are — is in need of justification. He clearly believes that the status quo is rife with injustice. If he *did not* think that, then surely he would not have gone to the immense trouble to craft a constitutional vision designed to highlight that fact. What he has not shown, however, is the injustice. What of the world has he seen that leads him to the conclusion that we must challenge the world we have inherited? His deeply held belief that we must indeed change our unjust world is a moral conviction that matters. If he wants us to reorient our view of the Constitution because of it, he has to move us to the point where we share it. Reason alone simply will not move us — but experience, empathy, and reflection might.

This is a strong book. Cass Sunstein has convincingly shown that we could reorient our thinking about the Constitution without doing undue violence to our basic institutions or to our constitutional history. But if he had done more — if he had tried to show us why we *should* reorient our thinking, if he had made even a nod in that direction — an already strong case for radical constitutional change might have been a more compelling one.