

Yet Still Partial to It

The Partial Constitution. By Cass R. Sunstein.* Cambridge: Harvard University Press, 1993. Pp. vi, 414. \$35.00.

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The Supreme Court has wrapped itself in a great deal of controversy during the latter half of this century by forcing change on people who have not wanted it. Its decisions have altered police practices, eliminated prayer from public institutions, curtailed the death penalty, ordered busing of children to new schools, and struck down longstanding laws on a variety of subjects ranging from flag burning, to loitering, to abortion. This history would suggest to many observers that the Court has no particular fondness for the status quo and, indeed, that the Court is quite willing to use its docket to rework society.

Professor Cass Sunstein does not share this view. In his new book, *The Partial Constitution*,¹ Sunstein faults the Court not for imposing change on an unreceptive nation, but instead for making the status quo a "baseline" for judging the constitutionality of action or inaction by the government.² In Sunstein's view, the Supreme Court tends to uphold laws that leave existing distributions of wealth and opportunity alone, while treating laws that alter them as constitutionally suspect.³

Sunstein believes that the Court favors the status quo because it thinks that the status quo is neutral. According to Sunstein, however, this view is wrong. In *The Partial Constitution*, Sunstein strives to explain that the status quo usually is not neutral because it is rarely determined solely by natural forces. Sunstein asserts that a myriad of background laws, such as the common law

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1. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) [hereinafter *THE PARTIAL CONSTITUTION*]. For other reviews of *The Partial Constitution*, see Sanford Levinson, *Unnatural Law*, *NEW REPUBLIC*, July 19 & 26, 1993, at 40; John O. McGinnis, *The Partial Republican*, 35 *WM. & MARY L. REV.* (forthcoming 1994); Paul Reidinger, *By and for the People*, *A.B.A. J.*, Aug. 1993, at 96; Mark Tushnet, *The Bricoleur at the Center*, 60 *U. CHI. L. REV.* 1071 (1993); Book Note, *The Partial Partial Constitution*, 107 *HARV. L. REV.* 493 (1993). Sunstein published another book last year entitled CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

2. *THE PARTIAL CONSTITUTION*, *supra* note 1, at 3.

3. *Id.*

of property and contracts, have helped to shape the distribution of resources in America over the centuries.⁴ As a result, the status quo may lack fairness and legitimacy if the background laws that have shaped it lack legitimacy.⁵

What troubles Sunstein most is the possibility that, by interpreting the Constitution to prefer the status quo over change, the Court's opinions favor those who currently enjoy benefits under the law, and disfavor those who do not. Favoring existing distributions, in other words, may make the Constitution "partial" to some and not to others. Sunstein asserts that the Court should cease preferring the status quo over change when it interprets the Constitution. He maintains that, properly interpreted, the Constitution generally empowers the government to alter legal interests so long as it acts in a manner consistent with what he calls "deliberative democracy."⁶

Sunstein clearly has thought long about his arguments,⁷ and he presents them in a logically organized and impressively detailed manner. Yet, the claim that the Supreme Court has taken an excessively conservative approach to change does not accord with a casual observation of the Court's cases, which appear to be constantly reshaping various facets of American life. *The Partial Constitution's* thesis suggests, moreover, that the Constitution mandates even greater departures from the status quo than those which the Court already has ordered. Sunstein contends that Congress has a constitutional duty to undertake various redistributive projects, such as funding abortion in certain cases.⁸ He also argues that current anti-obscenity laws may violate the First Amendment, except to the extent that they prohibit depiction of violence against women.⁹

Although Sunstein says much that is convincing, the central argument in *The Partial Constitution* has several problems. Sunstein does not prove that it is possible to generalize about whether the Constitution requires, permits, or forbids using the status quo as a baseline for decisionmaking. He does not show and probably cannot show that the Constitution embraces deliberative democracy or any other abstract principles in a consistent manner. Finally, he does not demonstrate that the Court actually has given the status quo the sanctity that Sunstein alleges.

4. *Id.* at 6.

5. *Id.*

6. *Id.*

7. Sunstein notes in the preface, *id.* at vi, that he based *The Partial Constitution* on the following articles and essays that he previously has written: *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992); *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992); *The Limits of Compensatory Justice*, in NOMOS XXXIII: COMPENSATORY JUSTICE (John W. Chapman ed., 1991); *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205 (1991) (book review); *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990); *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3 (1990); *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

8. See THE PARTIAL CONSTITUTION, *supra* note 1, at 315-17.

9. See *id.* at 269-70.

These problems, though significant, do not undermine the aim of his book, which is to relax inhibitions against political actions altering the status quo. Ironically, Sunstein's project is more likely to be undermined by his argument backfiring than by any holes in that argument. In other words, insistence that governmental action accord with Sunstein's vision of deliberative democracy might inhibit more change than it would foster.

I. SUMMARY

Although any short summary of *The Partial Constitution* has to leave out a great deal of detail,¹⁰ Sunstein's argument does not defy a brief outline. *The Partial Constitution* is split into two parts. The first examines a variety of questions that arise when the government attempts to change the status quo. The second applies the ideas developed in the first part to a host of currently controversial constitutional issues.

A. *Status Quo Neutrality and Constitutional Interpretation*

In discussing the government's obligations with respect to the status quo, Sunstein addresses three topics: (1) the "impartiality principle" in constitutional law, (2) the "status quo neutrality" conception of impartiality, and (3) the proper manner of interpreting the Constitution. Although these ideas may sound rather abstract, Sunstein lays them out in straightforward terms.

1. *The Impartiality Principle*

Sunstein claims that the Constitution generally requires the government to treat citizens impartially, meaning that it may not distribute "resources to one person or group rather than to another on the sole ground that those benefited [by the distribution] have exercised political power in order to obtain government assistance."¹¹ In other words, no group—men, women, Christians, or others—should have special benefits merely because its members have managed to elect sympathetic representatives into office.

Where does this "impartiality principle" come from? Sunstein finds support for it in the history and text of the Constitution. He reports that a common idea "echoed" throughout the founding period that the United States should be a "republic of reasons" and a "deliberative democracy,"¹² rather than a nation

10. Sunstein has packed the book with discussions of many interesting issues. Moreover, where other authors might give one or two examples to support their points, Sunstein rarely settles for less than a half dozen, as he takes the reader through lists of constitutional provisions, Supreme Court cases, and hypothetical questions. To appreciate the book fully, one really must read it in its entirety.

11. *THE PARTIAL CONSTITUTION*, *supra* note 1, at 39.

12. *Id.* at 20.

governed by "the self-interest of private groups."¹³ The framers, Sunstein asserts, wanted participants in government to persuade their opponents through logical reasoning, rather than merely to outvote them. He notes, for example, that James Madison said that he wanted to create a government that would consist of men "whose wisdom [will] discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."¹⁴ Sunstein has found similar quotations from Thomas Jefferson,¹⁵ Roger Sherman,¹⁶ and Alexander Hamilton.¹⁷

The Constitution, according to Sunstein, embodies the impartiality principle, in greater and lesser degrees, in a variety of places. For example, the Privileges and Immunities Clause of Article IV and the so-called dormant Commerce Clause prohibit protectionism or, as Sunstein puts it, "measures that citizens of one state enact in order to benefit themselves at the expense of out-of-staters."¹⁸ Sunstein sees the Equal Protection and Due Process Clauses as general expressions of the same idea, in that they forbid the government from benefiting or discriminating against any group without providing justifications.¹⁹ The Eminent Domain Clause, he observes, likewise allows the government to take property only for public use, and not for the private use of others.²⁰ The Contract Clause, Sunstein notes, affords further protection against government partiality by preventing those in power from undoing agreements if they later become disadvantageous to one side.²¹

2. *Status Quo Neutrality—A Misconception of Impartiality*

Sunstein argues that although the Court has recognized the requirement of impartiality, it often misconceives the meaning of impartiality. According to Sunstein, the Court has taken the position that the government acts neutrally or impartially when it does not interfere with existing distributions of rights and opportunities. Sunstein labels this conception of impartiality, which he considers misguided, "status quo neutrality."²²

Sunstein does not believe that status quo neutrality necessarily satisfies the impartiality requirement. Distributions of resources rarely stem from wholly

13. *Id.*

14. THE FEDERALIST NO. 10, at 134 (James Madison) (Benjamin F. Wright ed., 1961), quoted in THE PARTIAL CONSTITUTION, *supra* note 1, at 20.

15. See THE PARTIAL CONSTITUTION, *supra* note 1, at 22 (condemning decision to conduct the Constitutional Convention in secret).

16. See *id.* (opposing proposal giving citizens a right to "instruct" their representative on how to vote because it would impede deliberation).

17. See *id.* at 24 (arguing that differences of opinion would help, rather than hinder, the functioning of a republic).

18. *Id.* at 32.

19. See *id.* at 33-34.

20. See *id.* at 37.

21. See *id.* at 35.

22. *Id.* at 3-6.

natural forces; instead, some background law—such as the common law—usually determines who has what in our society. In Sunstein's words, "[r]espect for existing distributions is neutral only if existing distributions are themselves neutral."²³ He asserts that, when the status quo favors one group over another, and thus lacks impartiality, a court should not use the status quo as a baseline for assessing whether governmental action or inaction has violated the impartiality principle.

Sunstein illustrates this idea with a host of Supreme Court decisions. One of his examples is *Lochner v. New York*, in which the Court struck down a state law limiting the number of hours bakers could work each week.²⁴ Reading between the lines of the opinion, Sunstein interprets the case to say that the law violated the impartiality principle because it "transfer[red] resources from employers to employees" and thus favored one group over another.²⁵ He faults this reasoning because it takes "existing distributions as the starting point for analysis."²⁶ Sunstein feels that the Court should have recognized that there were background rules—in particular, the common law—under which the bakers and their employers operated before the legislature enacted the maximum-hour legislation, and thus realized that the status quo was not necessarily neutral.²⁷ Sunstein laments that other cases from the same period also equated status quo neutrality with impartiality.²⁸

A more recent example is *Rust v. Sullivan*,²⁹ in which Sunstein says the Court "upheld a regulation forbidding clinics [receiving certain federal funds] from giving advice about abortion."³⁰ Sunstein criticizes the decision for its failure to recognize that conditions on federal funding may violate the First Amendment. He explains:

23. *Id.* at 6.

24. 198 U.S. 45 (1905).

25. THE PARTIAL CONSTITUTION, *supra* note 1, at 47. See *infra* pp. 1643-45 for a differing view of the *Lochner* Court's rationale.

26. THE PARTIAL CONSTITUTION, *supra* note 1, at 48.

27. See *id.*

28. Sunstein discusses *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Muller v. Oregon*, 208 U.S. 412 (1908), at length. In *Plessy*, the Court upheld racial segregation, rejecting the argument that segregation favored one race over the other by stamping "the colored race with a badge of inferiority." 163 U.S. at 551. The Court said that if the "colored race" experienced feelings of inferiority, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.* Sunstein faults this analysis for failing to recognize that the "colored race" would not have chosen to interpret segregation as implying a "badge of inferiority" in the absence of the segregation laws. THE PARTIAL CONSTITUTION, *supra* note 1, at 44. Blacks felt inferior precisely because of those background legal rules. See *id.*

The *Muller* case upheld a maximum-hour law that applied only to women. According to Sunstein, the Court ruled that the state action at issue was neutral because "the difference between the sexes" justified the legislation. *Id.* at 62 (citing 208 U.S. at 419). Again, Sunstein contends, the Court failed to recognize that the status quo was not natural, but was in part the creation of law: "The Court treated the differences between men and women as 'inherent' when in fact some of these differences were a creation of social customs, and indeed of the legal system itself." THE PARTIAL CONSTITUTION, *supra* note 1, at 62.

29. 111 S. Ct. 1759 (1991).

30. THE PARTIAL CONSTITUTION, *supra* note 1, at 86. For the author's differing view of the facts of the *Rust* case, see *infra* pp. 1645-46.

On the Court's approach, the recipient [of the funds] is the person in the prerogative status quo. Even if that person is pressured by a selective funding decision, she has no basis for complaint unless she is worse off than she was before the program was enacted. This is a conspicuous use of the status quo as the basis for assessing whether government has violated its obligation of neutrality.³¹

Sunstein claims that the Court recently has made similar mistakes in others areas of the law.³²

Despite these examples, Sunstein does not believe that the Court always gets it wrong. The New Deal, in his view, changed America's way of thinking about the status quo, causing many to realize that we live in a constructed world that the government can change. Sunstein cites *Shelley v. Kraemer*³³ as the best example of this view. In that case, the Supreme Court held that state courts could not enforce covenants that restricted the use of real property on the basis of race.³⁴ The Court found it insufficient that the common law long had allowed such covenants. In the Court's opinion, as Sunstein interprets it, "common law principles no longer seemed merely to facilitate private desires or to be natural, but instead emerged as a conscious social choice."³⁵ The Court, in other words, rejected status quo neutrality and inquired into the justness of existing distributions. Sunstein describes other cases which he believes embody similar conclusions.³⁶

3. *How To Interpret the Constitution*

After this introduction to the ideas of impartiality and status quo neutrality, Sunstein devotes the next three chapters of his book to the question of how to

31. THE PARTIAL CONSTITUTION, *supra* note 1, at 87; *see also id.* at 229-30, 310.

32. Sunstein characteristically does not limit himself to a few examples, but instead discusses status quo neutrality in the context of state action, affirmative action, de jure/de facto distinctions, sex discrimination, definitions of liberty and property, campaign finance regulation, unconstitutional conditions, review of agency inaction, standing, and takings. *See id.* at 68-92.

33. 334 U.S. 1 (1948).

34. *See id.* at 4, 23.

35. THE PARTIAL CONSTITUTION, *supra* note 1, at 56.

36. Sunstein cites three sex discrimination cases as examples: *Califano v. Goldfarb*, 430 U.S. 199 (1977), *Craig v. Boren*, 429 U.S. 190 (1976), and *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). In each of these cases, states had enacted laws that reflected—at least roughly—typical differences between men and women in our society. The statute in *Goldfarb* assumed that husbands financially supported their wives, but wives did not financially support their husbands. The statute in *Craig* rested on the idea that young men who drank posed more of threat to themselves and society than young women who did so. The statute in *Hogan* presumed that women, but not men, wanted to become nurses.

The Court invalidated the laws in all of these cases, even though they may to some extent have accorded with actual differences between men and women. Sunstein favors this result because "the differences, even if 'real,' are at least to some degree creations of society: products of cultural forces, including the legal system, that have given effect to and perpetuated differences between the sexes, or turned these differences into social disadvantages." THE PARTIAL CONSTITUTION, *supra* note 1, at 80 (footnote omitted). The Court, in Sunstein's view, thus properly concluded that, when the status quo fails the impartiality test, laws perpetuating the status quo also do not satisfy it.

interpret the Constitution. Sunstein directs his argument not just to the courts, but also to the other branches of the government and "the citizenry at large."³⁷ He first sets out to refute originalism, the theory that the Constitution means what the framers and ratifiers originally understood it to mean. In making his argument against originalism, he concentrates almost exclusively on Judge Robert H. Bork's exposition of the theory in his best selling book, *The Tempting of America*.³⁸ Sunstein explains that he focuses on Bork's book "not because it is eccentric, but . . . because it states a certain widely held view of constitutional neutrality."³⁹

Sunstein agrees with Judge Bork that judges have not followed the original understanding of the Constitution.⁴⁰ Yet, he believes that Bork has failed to supply adequate reasons for the conclusion that the Court has a duty to do so. As Sunstein puts it, "the position set out in *The Tempting of America* is not so much defended as proclaimed."⁴¹ He asserts that Bork did not want to defend originalism because any defense of the theory "would have to be rooted in moral and political judgments" and would undermine Bork's claim that judges must avoid such judgments by using originalism to interpret the Constitution.⁴² Sunstein explains that "no text has meaning apart from the principles held by those who interpret it, and those principles cannot be found in the text itself."⁴³ According to Sunstein, many possible interpretive principles exist, including originalism, but "their selection must be justified in moral and political terms; we cannot defend a system of interpretation in law without mounting a substantive defense."⁴⁴

37. THE PARTIAL CONSTITUTION, *supra* note 1, at 10. Sunstein explains that courts have limitations that other institutions do not, and he thus considers it a mistake to focus exclusively on courts when discussing the Constitution. *See id.* at 145-53.

38. ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990).

39. THE PARTIAL CONSTITUTION, *supra* note 1, at 95.

40. Sunstein states, "It is surprising but true that many of the principles of constitutional liberty most prized by Americans were created, not by the founders, but by the Supreme Court during this century." *Id.* at 97.

41. *Id.* at 103. As Sunstein portrays it, Judge Bork makes only three half-hearted attempts to defend originalism, each of which is unconvincing. First, Bork asserts that the choice to follow the original understanding "was made long ago by those who designed and enacted the Constitution." *Id.* at 99 (quoting BORK, *supra* note 38, at 177). Sunstein finds this statement circular and unpersuasive. He responds that Bork is saying merely "that the original understanding is binding because the original understanding was that the original understanding is binding." THE PARTIAL CONSTITUTION, *supra* note 1, at 99. Second, Bork argues that the Court must follow the original understanding because the people never authorized it to do otherwise. *Id.* at 99-100 (citing BORK, *supra* note 38, at 201). Sunstein responds that "a tight connection with a specific previous decision of the polity is neither a necessary nor a sufficient condition for legitimacy." THE PARTIAL CONSTITUTION, *supra* note 1, at 100. According to Sunstein, whether the Supreme Court's decisions deserve respect depends on whether "some amalgam of substantive political reasons" justify obedience to them. *Id.* Third, Bork believes that abandoning the original understanding would require judges to make "moral choices" not subject to a rational defense. *Id.* at 100-01 (citing BORK, *supra* note 38, at 258-59). Sunstein finds this argument unpersuasive because "Bork's own approach . . . relies on [a] political and moral decision[]"—the very decision to follow the original understanding. THE PARTIAL CONSTITUTION, *supra* note 1, at 101.

42. THE PARTIAL CONSTITUTION, *supra* note 1, at 103.

43. *Id.* at 101.

44. *Id.* at 102.

On similar, although not identical grounds, Sunstein rejects several other constitutional theories, including those of Professors Laurence Tribe, John Hart Ely, and Ronald Dworkin.⁴⁵ He then turns to the affirmative task of identifying what he thinks should control the meaning of the Constitution. Sunstein says, in particular, that “[w]e should develop interpretive principles” for understanding the Constitution “from the goal of assuring the successful operation of a deliberative democracy.”⁴⁶ Sunstein does not attempt to “offer a full elaboration and defense”⁴⁷ of this theory in *The Partial Constitution*, but he does outline the form that the defense might take:

This goal [of deliberative democracy] can be traced to the earliest days of the American republic. It has been broadened and deepened by important developments since the founding. The governing ideal of deliberative democracy has a close connection with constitutional aspirations as they have been understood at the important periods in our history. An effort to build interpretive principles from this ideal therefore has the advantage of continuity with the Constitution’s structure and history. The ideal also has considerable independent appeal.⁴⁸

Sunstein breaks down the principles of deliberative democracy into various ingredients, which include commitments to “deliberation, citizenship, agreement as a regulative ideal, and political equality.”⁴⁹ According to Sunstein, courts should decide whether governmental action violates the Constitution in light of these factors, rather than by reference to the status quo.⁵⁰

It is somewhat difficult to summarize what the principles of deliberative democracy mandate in practical terms. Sunstein appears to present two competing visions, one more restrictive than the other. At times, he seems to say that the principles require the government to have an articulable public-minded explanation that consistently and comprehensively justifies its acts. Sunstein asserts, for example, that “the principle of impartiality,” properly understood, “requires government to provide reasons [for its acts] that can be

45. See *id.* at 104-13.

46. *Id.* at 133.

47. *Id.* at 134.

48. *Id.* at 133-34.

49. *Id.* at 141.

50. *Id.* at 123, 141. Before arguing for principles of interpretation based on deliberative democracy, Sunstein very briefly discusses substantive reasons for preserving the status quo, including arguments (1) that change in the status quo usually will produce unexpected consequences, making matters worse than before; (2) that frequent reexaminations of existing distributions of property undermine stability and settled expectations; and (3) that we should have respect for the status quo and existing practices because they often reflect centuries of experience and the common thought of millions of people. *Id.* at 127-31. Sunstein recognizes that all of these arguments have some force, but finds none of them strong enough to form general interpretive principles.

intelligible to different people operating from different premises.”⁵¹ In other places, however, he appears to relax this higher standard and suggest that the principles of deliberative democracy merely require the government to engage in “deliberation that has some autonomy from private pressures.”⁵² In other words, the government only needs to avoid the influence of “naked preferences” of private groups.⁵³

B. *Application of Sunstein’s Theory to Current Issues*

In the second part of *The Partial Constitution*, Sunstein applies his theory to a great variety of contemporary issues. He reaches the following principal conclusions:

- [T]he Constitution neither forbids nor requires affirmative action; . . .
- [G]overnment restrictions on pornography and campaign expenditures do not offend the First Amendment; . . .
- [The] government has very substantial discretion to fund, or not fund, artistic projects; . . .
- [T]he equal protection clause (if not the right to privacy) protects women’s right to have an abortion, and indeed compels governmental funding of that right in cases of rape and incest; . . .
- [O]ur present educational system violates the Constitution, and . . . the President and Congress are under a constitutional duty to remedy the situation; . . .
- [T]here is no constitutional problem if government creates a right of private access to the media or otherwise imposes obligations of diversity and public affairs programming on broadcasters; and . . .
- [T]he Constitution does not create a judicially enforceable right to welfare or other forms of subsistence.⁵⁴

Sunstein’s arguments on these points, made over the course of several hundred pages, also defy concise summary. A few examples, though, illustrate his ideas.

For instance, Sunstein discusses at length whether the government has the power to regulate sexually explicit materials.⁵⁵ He explains that court decisions presently do not allow the government to ban materials that depict violence against women unless those materials are obscene. Sunstein notes that courts have rejected the antiviolence form of restriction, which has been the

51. *Id.* at 24.

52. *Id.* at 38.

53. *Id.* at 25, 38.

54. *Id.* at 8 (format altered).

55. *See id.* at 261-70.

basis for several recent local ordinances, because it establishes an "approved" view of "how the sexes may relate to each other" in violation of the neutrality principle as embodied in the First Amendment.⁵⁶

Sunstein rejects the law's distinction between obscenity and violent pornography because he believes that the distinction impermissibly rests upon status quo neutrality:

Obscenity law, insofar as it is tied to community standards, is . . . deemed neutral, but only because the class of prohibited speech is defined by reference to existing social values. Antipornography legislation [specifically aimed at the depiction of violence against women] is deemed impermissibly partisan because the prohibited class of speech is defined by less widely accepted ideas . . . [such as the idea] that sexual violence by men against women is a greater problem than sexual violence by women against men⁵⁷

Sunstein thinks that the principles of deliberative democracy dictate that courts stay out of this sort of debate, notwithstanding the First Amendment. In his view, "[s]o long as any emerging [antipornography] law has the requisite clarity and narrow scope, the appropriate forum for deliberation is the democratic process, not the judiciary."⁵⁸

The question of whether Congress must fund abortions for indigent women in cases of rape or incest provides another good example of the application of Sunstein's theory. He asserts that, under present law, Congress does not have a duty to pay for abortion because the Supreme Court views a failure to fund as inaction by the government, rather than action, and thus considers it presumptively neutral and constitutional.

Sunstein criticizes the Court's understanding of the issue as being "based on the indefensible conception of neutrality that we have encountered throughout this book."⁵⁹ He explains that neither "biology" nor "poverty" justify the result that poor women cannot have abortions when they become pregnant.⁶⁰ Instead, the decision not to fund abortions "is a legal and a social one."⁶¹ Congress, after all, could fund abortions if it wished. Sunstein explains more fully that "the failure to fund is not inaction at all. It represents a conscious social choice, one that conscripts women in the cause of incubation. It does not simply let 'nature' take its course."⁶² Sunstein

56. *Id.* at 268 (quoting *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986)).

57. THE PARTIAL CONSTITUTION, *supra* note 1, at 269. Sunstein does not discuss the apparent similarity between his argument here and the reasoning that he condemns in *Muller v. Oregon*. See *supra* note 28.

58. THE PARTIAL CONSTITUTION, *supra* note 1, at 270.

59. *Id.* at 317.

60. *Id.*

61. *Id.*

62. *Id.*

concludes that, at least in certain instances, the Constitution may require Congress to fund abortion.⁶³

After completing his discussion of these and numerous comparable issues, Sunstein concludes *The Partial Constitution* with a thoughtful essay about the roles of the various branches of government in interpreting the Constitution.⁶⁴ He recognizes that courts have institutional limitations that prevent them from forcing the rest of government to act in all instances in which the Constitution might require action.⁶⁵ Sunstein, therefore, makes clear that he is addressing his argument as much to the legislative and executive branches of government as to the courts.⁶⁶

II. ORIGINALISM

Sunstein deserves praise for devoting a significant portion of his book to originalism. Far from lying "outside the mainstream,"⁶⁷ the theory in fact represents a view shared by a great many lawyers and judges in this country. Even if the Supreme Court does not always decide constitutional cases on the basis of what the framers and ratifiers thought, their views play a consistently prominent role in constitutional litigation.⁶⁸ As a result, no work in constitutional law that seeks to persuade a broad audience can afford to ignore originalism. Although Sunstein disagrees with the theory, his generally respectful analysis of Judge Bork's exposition of the theory accrues to his credit.

Sunstein's argument nevertheless has three principal weaknesses. First, Sunstein fails to explain fully the position that originalists would take on the issue of status quo neutrality and thus leaves unclear why originalism poses a problem for the thesis of his book. Second, Sunstein offers a somewhat incomplete assessment of the justifications for originalism because he focuses nearly exclusively on the argument presented in Robert Bork's *The Tempting of America*. Third, Sunstein does not make clear exactly what sort of defense of originalism would satisfy him.

63. See *infra* note 112.

64. See *id.* at 319-46.

65. See *id.* at 320.

66. See *id.* at 346.

67. Several members of the Senate Judiciary Committee declared that they voted against confirming Judge Bork's nomination to the Supreme Court because his views were "outside the mainstream." See, e.g., Steven V. Roberts, *9-5 Panel Vote Against Bork Sends Nomination to Senate Amid Predictions of Defeat*, N.Y. TIMES, Oct. 7, 1987, at A1 (quoting Senator DeConcini); John Hanrahan, *Washington News*, UPI, Oct. 6, 1987, available in LEXIS, Nexis Library, Archive File (quoting Senator Kennedy); cf. *Reagan Rebukes Bork Foes*, CHI. TRIB., Sept. 26, 1987, at 1 (quoting President Reagan as saying that Bork's opponents were outside the mainstream).

68. References to the framers of the Constitution, for example, have appeared in dozens of Supreme Court opinions and hundreds of briefs filed in the Court during the past decade.

A. *The Threat of Originalism*

Why does Sunstein need to refute originalism? He does not spell out a reason explicitly in *The Partial Constitution*, and the answer may differ from what one first expects. Originalism does not threaten Sunstein's thesis by validating the status quo neutrality conception of impartiality. Instead, originalism makes Sunstein's arguments against status quo neutrality irrelevant.

An originalist makes decisions of constitutionality according to the original understanding of the Constitution. Sunstein's argument that the status quo neutrality principle overlooks background law and fails to comport with the "commitment to deliberative democracy," even if correct, cannot influence an originalist's interpretation of the Constitution. These considerations might play a role in devising future constitutions, but they cannot change the original understanding of the Constitution we already have.

Discovering exactly what the framers and ratifiers thought about the relevance of the status quo to particular subjects would require exhaustive research. There was certainly a mixture of views. The framers probably would not have objected to respecting the status quo in certain contexts. For example, as Sunstein himself recognizes, certain constitutional provisions, such as the Takings and Contracts Clauses, appear to rest on the premise that the government should not disrupt existing distributions of resources, even if those distributions depend on background rules of property and contract law.⁶⁹

The framers and ratifiers, however, may not have understood other provisions of the Constitution to require status quo neutrality. The Equal Protection Clause is a good example. All legislation creates categories and affects some people differently from others.⁷⁰ Moreover, all new legislation changes the status quo. An act that increases property tax rates, for example, will not leave everyone as well off as they were before and may fall harder on homeowners than renters, or vice versa. Although the new law might radically alter the status quo, it surely would not violate the Equal Protection Clause, as originally understood, for that reason alone. An originalist must accept status quo neutrality as a valid constitutional argument to the extent that the framers and ratifiers of the Constitution and its amendments understood it to be a valid argument, but no further.

B. *Incompleteness*

Sunstein, as noted, attempts to counter the threat of originalism by taking on *The Tempting of America*. Sunstein makes many valid observations about

69. See *THE PARTIAL CONSTITUTION*, *supra* note 1, at 153 ("[T]he takings and contracts clauses cannot easily be read to create a constitutional baseline other than that of the status quo.").

70. See generally Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

the book. Bork does not address at any length the need for interpretive principles and he eschews discussion of the kinds of moral and political issues that Sunstein finds relevant. Bork thus has little to say about the kinds of questions that Sunstein considers crucial to determining what the Constitution means. Sunstein's criticism of *The Tempting of America*, nevertheless, has two significant shortcomings.

First, Sunstein largely repeats charges already leveled against Bork's book, but he does not respond to arguments made in Bork's defense. Immediately after Judge Bork wrote *The Tempting of America*, a number of reviewers criticized it on precisely the grounds that Sunstein sets forth in *The Partial Constitution*. Judge Richard Posner and Professors Ronald Dworkin and Bruce Ackerman, for example, each faulted Bork for failing to recognize that a reader may interpret any text in a variety of ways and for failing to justify the originalist method.⁷¹

Since the publications of these and other reviews, however, several authors have written powerful responses in support of *The Tempting of America*. Professor Lino Graglia, for example, questioned whether it makes sense to require justificatory reasons for originalism of the kind that Sunstein demands.⁷² Raoul Berger, moreover, has supplied a variety of historical arguments in favor of Bork's position.⁷³ If Sunstein has replies to these responses, he should have included them in his book rather than simply reiterating criticism that by now has become familiar.

Second, even if Sunstein could show that Bork had not supplied a complete defense of originalism in *The Tempting of America*, that would not prove that the theory has no defense. Although Sunstein briefly responds to an essay by Judge Frank Easterbrook,⁷⁴ he does not touch upon the arguments of many others who have written in defense of originalism.⁷⁵ Practical considerations surely limited how much Sunstein could say about the topic, but this omission is troubling nonetheless.

71. See, e.g., Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419, 1421 (1990); Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 668 (1990); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1368 (1990). Even Sunstein has made the same arguments in a previous review. See Sunstein, *What Judge Bork Should Have Said*, *supra* note 7, at 205 ("Because [*The Tempting of America*] relies on [originalist] principles without defending or even recognizing them, it provides no basis for its own approach.").

72. See Lino A. Graglia, "Interpreting" the Constitution: Posner on Bork, 44 STAN. L. REV. 1019 (1992).

73. See Raoul Berger, *Activist Censures of Robert Bork*, 85 NW. U. L. REV. 993 (1991).

74. See THE PARTIAL CONSTITUTION, *supra* note 1, at 99-100 (citing Frank Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992)).

75. There are several collections of arguments in support of interpreting the Constitution as originally understood. See, e.g., INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Rakove ed., 1990); U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK (1987); see also LESLIE F. GOLDSTEIN, IN DEFENSE OF TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY (1991).

C. Interpretation or Legitimacy

Perhaps Sunstein did not say more about the arguments for originalism because he felt that originalists bore the burden of proof on the issue and had not yet made a convincing case. That possibility, though, raises the question of what Sunstein thinks that originalists must show. A careful reading of *The Partial Constitution* suggests that he has an unusual standard.

Sunstein apparently would ask that originalists not only justify their method of interpreting the Constitution, but also that they prove that the Constitution, enacted into law in 1789, has continuing legitimacy. Sunstein, indeed, criticizes Bork and Easterbrook for failing to recognize that the Constitution and judicial decisions made in its name cannot be "justified simply because [they] follow from a judgment made by the people—especially when the relevant people died long ago, and indeed excluded large segments of the polity (including all blacks and all women)."⁷⁶ Sunstein explains that "[a] prior agreement of that sort does not provide a moral justification for obedience. Ultimately obedience is justified, if it is, for some amalgam of substantive political reasons By itself, however, the fact that there was agreement on the document many generations ago is insufficient for legitimacy."⁷⁷ In this passage, Sunstein seems to be calling for Bork and other originalists to demonstrate that the Constitution—as opposed to something else—empowers and restrains the government.

If Sunstein truly holds this position, he is going too far. In writing about how judges should interpret the Constitution, Judge Bork and others certainly do not have to explain what makes the Constitution law. That may be an interesting and important question, but it is not a question of interpretive principles or a question that judges who already have sworn to uphold the Constitution must decide.

III. DELIBERATIVE DEMOCRACY AND A REPUBLIC OF REASONS

Sunstein decided not to supply a complete defense of his theory that the nation's commitment to deliberative democracy—government in which reason rather than naked power prevails—should provide principles for interpreting the Constitution.⁷⁸ He certainly deserves no criticism for this decision. *The Partial Constitution* undertakes enough ambitious tasks for a single volume.

76. *THE PARTIAL CONSTITUTION*, *supra* note 1, at 100.

77. *Id.* Sunstein ultimately suggests that a variety of factors may justify obedience to the Constitution, including its largely democratic pedigree and the possibly chaotic consequences of abandoning it. *Id.* Given Sunstein's open-ended conception of constitutional interpretation, however, what he means by obedience certainly differs from what an originalist would mean.

78. *Id.* at 134 ("I will not be attempting to offer a full elaboration and defense of deliberative democracy or to measure it against the many alternative sources of interpretive principles. To undertake such tasks, it would be necessary to set out a complete theory of what government should do.").

Yet if Sunstein chooses to present a more complete defense in a later work, he will have his hands full, and not just with the arguments of the originalists.

Antisthenes the Cynic, a defender of the philosophy of nominalism, once had an argument with Plato about whether it was possible to discern the nature of a horse. He complained to Plato, who he thought was looking at the matter too abstractly, that "A horse I can see, but horseness I cannot see."⁷⁹ Sunstein will encounter the same kind of objection in trying to prove that our republic has the abstract feature of "deliberative democracy."⁸⁰

Our Constitution, despite its virtues, lacks consistency. Some provisions of the document no doubt serve to promote deliberation and curtail majority power. The Speech or Debate Clause is one excellent example.⁸¹ The provisions that break up factions by staggering terms of office and dividing representatives geographically provide other illustrations.⁸²

The Constitution, however, includes many other provisions that do not require decisions based on the rational debate one might expect in a "republic of reasons." For example, the President has the power to veto bills for good reason, bad reason, or no reason at all.⁸³ Congress, in turn, has the power to overrule the President's veto not when it can devise better arguments than the President, but whenever it can muster a two-thirds majority to override the veto.⁸⁴

Indeed, the Constitution contains striking examples of decisions not made by reasoning. The three-fifths compromise is one.⁸⁵ Logic certainly did not dictate that slaves should count as only sixty percent of a person for census purposes. The rule makes no sense by itself; it came about only as a compromise between factions lacking the power to obtain exactly what they each wanted.⁸⁶ The provision preventing Congress from regulating the

79. 8 SIMPLICIUS, COMMENTARIA IN ARISTOTELEM 208 (Charles L. Kalbfleisch ed., 1907).

80. See *supra* notes 46-53 and accompanying text.

81. U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.").

82. See *id.* art. I, § 3, cl. 2 (staggered terms for Senators); *id.* art. I, § 2, cl. 3 (geographical distribution of House seats).

83. See *id.* art. I, § 7, cl. 3.

84. See *id.* To some extent, these powers promote deliberative democracy structurally by creating some checks on power.

85. See *id.* art. 1, § 2, cl. 3.

86. Representatives from the Southern states wanted to count slaves as whole persons so that their states would have more Representatives in Congress. They argued, without a trace of irony, that slaves were equivalent to workers in the North. Representatives from the Northern states did not want to count slaves at all, arguing that they were property and that other property, such as cattle, did not count for census purposes. Neither argument carried the day. Instead, the competing factions compromised on counting slaves as three-fifths of a person. Madison and at least one other participant in the Constitutional Convention describe these debates and the compromise in their notes. See H.R. Doc. No. 398, 69th Cong., 1st Sess. 354-55, 764 (1927) (reprinting Madison's journal from July 11, 1787, and notes taken by Hon. Robert Yates on June 11, 1787). For a rather weak rationalization of the three-fifths compromise, see THE FEDERALIST No. 54 (Alexander Hamilton or James Madison).

importation of slaves until 1808 (rather than, say, 1798 or 1818) provides another example of an unreasoned compromise.⁸⁷

As these counterexamples demonstrate, any attempt to say that the Constitution creates a "republic of reasons" based on "principles of deliberative democracy" is an overgeneralization. They also suggest that searching for abstract principles to govern all constitutional issues involves great risks. Sunstein might see "deliberative democracy" in various places in the Constitution. Others, however, may look at the three-fifths compromise and 1808 slave trade provision and see arbitrariness and tolerance of evil. Surely the latter ideas, although clearly embodied in the Constitution, should not influence all constitutional debate.

This criticism should not come as a surprise to Sunstein, because he clearly understands the problem of overgeneralization. For example, even though he insists that the Constitution generally does not require status quo neutrality, he admits that some provisions—like the Takings Clause—do embody that principle.⁸⁸ In other words, in some instances, Sunstein is willing to accept the fact that the Constitution is a rather mixed bag. It is thus odd that Sunstein did not recognize that deliberative democracy probably does not supply the only principles for interpreting the Constitution.

What is an alternative? Originalism supplies one answer. The idea is not to look for "horseness" in the Constitution—that is, abstract general principles about the nature of our republic. They may or may not exist. Originalists would say, simply, that the Constitution promotes deliberative democracy through the provisions that were originally understood to do so, but not elsewhere.

IV. STATUS QUO NEUTRALITY IN THE COURTS

Regardless of whether the Constitution embodies a general and consistent commitment to deliberative democracy, Sunstein makes a valid and important point in his discussion of the "status quo neutrality" conception of impartiality. When considering the constitutionality of a statute that changes existing distributions, courts should not forget that natural forces alone did not create the status quo. Instead, courts should recognize the contribution of background law, especially the common law, and judge the new law not by itself, but in the context of the existing law.

If Sunstein were limiting his book to this point, he would be on solid ground. He goes further though, contending that the Supreme Court regularly has used status quo neutrality reasoning to reach its decisions. This view should strike most casual observers of the Court as odd, given all of the

87. See U.S. CONST. art. 1, § 9, cl. 1.

88. See THE PARTIAL CONSTITUTION, *supra* note 1, at 153-55.

sweeping changes the Court has wrought in society. A significant weakness of *The Partial Constitution* is that some of the most prominent cases that Sunstein cites as examples do not support his conclusion. Sunstein may be condemning a practice that does not occur as often as he suggests.

A. *Bakers*

Sunstein makes *Lochner v. New York*⁸⁹ a centerpiece of his argument. He asserts that the Court in *Lochner* struck down a state law limiting the number of hours that bakers could work because it thought that the statute served a redistributive purpose, and thus violated status quo neutrality. This analysis seems rather strained. As Sunstein himself admits, the Court never said that the statute served a redistributive purpose and never said anything about the status quo neutrality conception of impartiality.⁹⁰ Sunstein merely reads that rationale into the Court's decision. It is more helpful to look at what the case actually said.

Justice Peckham wrote the opinion of the Court in *Lochner*. He sought to demonstrate the unconstitutionality of the statute in three steps. First, Peckham asserted that as a general rule, a state cannot regulate contracts. To support this proposition, he noted the Court's previous holding in *Allgeyer v. Louisiana*⁹¹ that "[t]he general right to make a contract in relation to [one's] business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."⁹² Second, Peckham asserted that as an exception to the general rule, a state could restrict the right to make a contract in the exercise of its police powers. Various precedents established that these powers included protecting the health and safety of workers and wards of the state.⁹³ Third, Peckham asserted that the statute at issue did not fit into this police power exception. He reasoned that restricting the working hours of bakers did not really protect their health or safety.⁹⁴ Peckham thus concluded that the *Allgeyer* decision controlled the case and that the statute was unconstitutional.

Of these three steps, the first—in which Peckham asserted that the Fourteenth Amendment generally prohibits states from regulating contracts—was the most important. Peckham's citation of *Allgeyer* for that proposition was undoubtedly correct, for he happened to have written the opinion of the Court in *Allgeyer* as well as in *Lochner*. The key issue then is where the Court in *Allgeyer* found the rule that the freedom to make a contract

89. 198 U.S. 45 (1905).

90. See THE PARTIAL CONSTITUTION, *supra* note 1, at 47.

91. 165 U.S. 578 (1897).

92. 198 U.S. at 53.

93. See *id.* at 53-55.

94. See *id.* at 55-64.

is a "liberty" protected from regulation by the Fourteenth Amendment. Here is what Justice Peckham said in *Allgeyer*:

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.⁹⁵

Where did this definition of "liberty" come from? Unfortunately, Justice Peckham did not say. Following this long declaration, he provided no citation. Apparently, Peckham just made it up.

Justice Holmes, in his famous dissent in *Lochner*, rejected the understanding of liberty expressed in *Allgeyer*. He maintained that citizens traditionally have not had a freedom to make unregulated contracts. Holmes cited longstanding restrictions, such as "Sunday laws and usury laws," as examples.⁹⁶ Emphasizing the need to look at existing practices, Holmes wrote:

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.⁹⁷

Holmes—if anyone—was arguing for a decision based on the status quo. He thought that the New York statute was constitutional simply because it was a "traditional" kind of law.

Lochner strongly cuts against Sunstein's thesis in two ways. First, it shows that the Court does not always base its decisions on status quo neutrality. Justice Peckham and the other members of the majority did not rely on the status quo as a reason to invalidate the statute; to them the status quo was irrelevant. Moreover, they rejected the position that Holmes took in dissent, even though he did rely on the status quo.

95. 165 U.S. at 589.

96. 198 U.S. at 75.

97. *Id.* at 76. After reciting this quotation in his book, Judge Bork commented: "So Holmes . . . merely disagreed with Peckham and the majority about which principles were fundamental. Nor did he explain why a free people could not decide to change or abandon principles supported by tradition but not by the Constitution." BORK, *supra* note 38, at 45-46.

Second, and perhaps more seriously, the case shows how easy it is to read the status quo rationale into a case that does not explicitly contain that rationale. The legal status quo often has several dimensions. For example, while the statute in *Lochner* altered the status quo by placing new restrictions on bakeries, it respected the status quo in the sense that it was not a novel type of regulation. As a result, no matter how *Lochner* had been decided, Sunstein could have characterized it as a decision biased in favor of the status quo.

Despite these problems, Sunstein stands on solid ground when he says that the Court erred in *Lochner*. The case should have come out the way Holmes said that it should, but for a different reason. The Court decided *Allgeyer* and *Lochner* incorrectly because it invented the freedom of contract out of thin air, not because it cared too much or too little about the status quo.

B. *Pregnancy Counselors*

Another of Sunstein's prominent examples, *Rust v. Sullivan*,⁹⁸ also does not support his thesis that the Court regularly decides cases on grounds of status quo neutrality. That case involved what Sunstein and the popular media commonly, though inappropriately, refer to as the "gag rule."⁹⁹ As noted above, Sunstein says that the Court "upheld a regulation forbidding clinics [that received federal funds] from giving advice about abortion"¹⁰⁰ on grounds that the restriction did not leave anyone "worse off than she was before the program was enacted."¹⁰¹ Sunstein inaccurately characterizes the facts and holding of the case: *Rust v. Sullivan* did not in fact involve a regulation categorically forbidding clinics from giving abortion advice; and the Court made clear that such a restriction would not be upheld merely because it left the persons whom it affected no worse off.

The actual facts of the case are revealing. In 1970, Congress enacted Title X, a law providing federal funding for family planning services. The statute stated that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."¹⁰² In 1988, the Secretary of Health and Human Services promulgated a regulation under the statute providing that "[a] title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning."¹⁰³ Several Title X grantees—recipients of the federal money—challenged the regulation on the ground that it "condition[ed] the receipt of a benefit, Title X funding, on the

98. 111 S. Ct. 1759 (1991).

99. THE PARTIAL CONSTITUTION, *supra* note 1, at 310.

100. *Id.* at 86.

101. *Id.*

102. 42 U.S.C. § 300a-6 (1988).

103. 42 C.F.R. § 59.8(a)(1) (1992).

relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling.”¹⁰⁴

In an opinion written by Chief Justice Rehnquist, the Court rejected this argument, not because the government had the power to condition the receipt of Title X benefits on the relinquishment of free speech rights, but because the government had not done so. The Court’s opinion says so in unmistakably clear terms:

The Secretary’s regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X grantee and a Title X project. . . . The regulations govern the scope of the Title X project’s activities, and leave the grantee unfettered in its other activities. The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.¹⁰⁵

In other words, contrary to what Sunstein suggests, the grantees could advocate abortion even if they accepted the federal money.¹⁰⁶

Immediately following this passage, the Court reaffirmed the validity of what it called its “unconstitutional conditions” cases. The Court explained that it previously had found First Amendment violations in “situations in which the government ha[d] placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.”¹⁰⁷ *Rust v. Sullivan*, however, simply did not present that issue. In sum, *Rust v. Sullivan* does not show that the Court relies on the status quo conception of neutrality. The Court did not use the status quo as an argument for its holding and, in dicta, suggested that it would not accept status quo reasoning if the facts were what Sunstein asserts.

104. 111 S. Ct. at 1763.

105. *Id.* at 1774.

106. Sunstein appears to have understood the actual facts of *Rust* because he quotes the Chief Justice as saying that *Rust* is not a case “in which the government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.” *THE PARTIAL CONSTITUTION*, *supra* note 1, at 86-87.

Yet, despite his inclusion of this quotation, Sunstein misdescribes the statute in each of the three portions of his book discussing the case. *See id.* at 86 (“a regulation forbidding clinics from giving advice about abortion”); *id.* at 229 (“regulations banning federally funded family planning services from engaging in counseling concerning, referrals for, and activities advocating abortion”); *id.* at 310 (“the so-called abortion gag rule, forbidding clinics receiving federal funds to provide abortion-related counseling”).

107. 111 S. Ct. at 1774.

C. Other Cases

Even if *Lochner* and *Rust* do not provide good examples for Sunstein, that does not mean that the Court never decides cases on the basis of status quo neutrality. The Court may do so; it decides more than a hundred cases a year and certainly does not give the best of reasons for all of them. Some of the many other cases that Sunstein cites in *The Partial Constitution* in fact may provide examples that can withstand close scrutiny. *Lochner* and *Rust*, however, suggest that he has overstated the extent to which the Supreme Court relies on the status quo neutrality conception of impartiality.

V. STATUS QUO NEUTRALITY OUTSIDE THE COURTS

The question now arises whether the problems suggested above really matter to Sunstein's argument. Would the Supreme Court's refusal to endorse the principles of deliberative democracy undermine what Sunstein seeks to accomplish? Does the actual number of times that the Supreme Court has relied on the status quo neutrality argument make a difference? Probably not. The foregoing criticisms, even if valid, should not trouble Sunstein very much.

Sunstein surely is not writing disinterestedly about the ability of the government to change the status quo. He wants actual change, perhaps even very extensive change, in existing legal arrangements. For this reason, he stresses throughout *The Partial Constitution* that he is addressing the book more to politicians than to members of the judiciary.¹⁰⁸ As Professor Sanford Levinson, an early and enthusiastic reviewer of the book, has put it: "*The Partial Constitution* is now, among other things, a memorandum to the White House about the way that 'new liberals' (in whose camp Sunstein would count himself) should respond to the unexpected opportunity [presented by President Clinton's election] to reshape American constitutional doctrine."¹⁰⁹

To achieve sweeping legal change, Sunstein needs to persuade participants in the executive and legislative branches of government that the Constitution does not prohibit redistribution as a general matter. He thus emphasizes that, at a minimum, the government usually may enact new laws that alter existing allocations. If members of Congress or the Administration go so far as to accept Sunstein's further thesis that they have a constitutional duty to pursue

108. See, e.g., THE PARTIAL CONSTITUTION, *supra* note 1, at 10 ("[M]any of the constitutional proposals set out here are intended not for the judges at all, but for others thinking about constitutional liberties in the modern state."). Sunstein does not say much explicitly about the practical political impact that he wants or expects his views to have. In several places in the book, however, he speaks very favorably of the general reorientation of government that took place during the New Deal. See *id.* at 6-7, 57-61. Perhaps he would favor a similarly broad reorientation of our present legal framework.

109. Levinson, *supra* note 1, at 40.

the principles of deliberative democracy to their logical conclusions, all the better.

The criticisms of Sunstein's book presented earlier in this Review do not stand in the way of these objectives. Arguing that the Supreme Court has acted too conservatively in the past, even if not wholly accurate, still serves a purpose. It strengthens the argument for more change now. In any event, a little deliberation here and there would not hurt the country, even if the Constitution does not require as much of it as Sunstein suggests.

Whether Sunstein's theories of deliberative democracy truly would facilitate the reworking of society that Sunstein wants, however, remains unclear. Sunstein does not think that the Constitution prohibits the government from altering the status quo, but he does set a high standard for new legislation. He insists, as noted, that "the principle of impartiality requires government to provide reasons [for its acts] that can be intelligible to different people operating from different premises."¹¹⁰

To the extent that he is serious about that standard,¹¹¹ Sunstein may be making it more difficult for government to act, for a simple reason: Factions often have to compromise, and compromises tend to produce somewhat arbitrary results. Consider, for example, the issue of abortion counseling. When Congress was considering the legislation involved in *Rust v. Sullivan*, it probably had to make a choice. Some members of Congress surely wanted to fund clinics that would provide information about all lawful forms of birth control, including abortion. Others surely did not want to fund clinics at all.

Each side could present reasons to the other that presumably would satisfy the test of impartiality. Neither side, after all, was singling out abortion counseling for special treatment.¹¹² Ultimately, however, Congress took a middle course—funding family planning, but denying money to abortion advocacy. Sunstein says that the compromise violates the impartiality principle. That conclusion, however, may prevent the government from doing anything. As the current administration has discovered as it tackles controversial topics like gays in the military, the budget, and health care reform, not much happens without compromise.

Perhaps the founders of this nation wanted the "republic of reasons" that Sunstein describes. Perhaps the framers even wanted to hold the government to Sunstein's impartiality test—even if that test often would prevent government action when disputing sides could compromise but not convince

110. THE PARTIAL CONSTITUTION, *supra* note 1, at 24.

111. See *supra* text accompanying notes 51-53.

112. Sunstein objects primarily to "selective funding" decisions, not policies of paying for everything or nothing. THE PARTIAL CONSTITUTION, *supra* note 1, at 317. By way of comparison, as noted, Sunstein argues that the government "must fund abortion in cases of rape or incest, at least if it is funding childbirth in such cases." *Id.* at 13.

each other.¹¹³ But is this what Sunstein wants from his envisioned “republic of reasons?” Ironically, by replacing “status quo neutrality” with his conception of impartiality, Sunstein might make it harder rather than easier to change existing law.¹¹⁴

113. Many of the Founders had quite conservative views when it came to the status quo. Even the Declaration of Independence—the most revolutionary of all official documents—prudently and incongruously cautions: “[A]ll experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

114. Sunstein seems to recognize this possibility early in the book. See THE PARTIAL CONSTITUTION, *supra* note 1, at 25 (“[I]f interest-group pluralism does describe contemporary politics, a requirement of impartiality, understood as a call for public-regarding justifications for government outcomes, is inconsistent with the very nature of government. It imposes on politics a requirement that simply cannot be met.”). Oddly, however, he says little more about it.

