The Bricoleur at the Center

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Claude Lévi-Strauss introduced the intellectual community to the *bricoleur*, "adept at performing a large number of diverse tasks . . . [by] mak[ing] do with ‘whatever is at hand,’ that is to say with a set of tools and materials which is . . . heterogeneous because what it contains bears no relation to the current project, or indeed to any particular project, but is the contingent result of all the occasions there have been to renew or enrich the stock."[1] Lévi-Strauss contrasts the *bricoleur* with the engineer, who "questions the universe, while the ‘bricoleur’ addresses himself to a collection of oddments left over from human endeavors."[2] Opposing the rationalistic thrust of modernist social thought, Lévi-Strauss offered the *bricoleur* as the model intellectual hero of contemporary social thought. Attempts to construct grand theories of social life had failed, in Lévi-Strauss’s view; what true intellectuals could do was creatively select and thereby transform "whatever is at hand" in the service of their projects.

In this Review I argue that *The Partial Constitution* is best understood as *bricolage* of a high order.[3] To identify a work as *bricolage*, particularly a work of legal analysis, the critic must de-

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2 Id at 19.

3 Readers will evaluate for themselves whether this Review has been affected by the fact that Sunstein and I are two of four co-authors of a casebook on constitutional law. I also note that I am acknowledged for having read the manuscript of *The Partial Constitution* (p vi).
termine the author’s “project,” describe what the author selects from the intellectual materials at hand, and show how the author creatively transforms those materials. In his project, Cass Sunstein articulates a certain form of legal centrism; he relies on ideas prominent in contemporary legal discourse (as a *bricoleur* must)—republicanism, pragmatism, feminism, law and economics, neo-Aristotelianism (p 187)—and he creatively transforms them through an interesting set of rhetorical devices. By treating *The Partial Constitution*, as important a work of constitutional scholarship as has appeared in recent years, as *bricolage*, I hope to reveal some difficulties that anyone attempting to articulate a constitutional program for the liberal center must face. In the process, I hope to suggest that the project may be impossible; if a scholar as talented as Sunstein has not overcome those difficulties, probably no one can.

I take Sunstein’s summary of his conclusions as an indication of the project:

I will claim that a certain form of objectivity in law is a salutary ideal, and that there are good reasons for judicial restraint in the area of social reform. I will also contend that the Constitution neither forbids nor requires affirmative action; that government restrictions on pornography and campaign expenditures do not offend the First Amendment; that government has very substantial discretion to fund, or not to fund, artistic projects; that the 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; that our present educational system violates the Constitution, and that the President and Congress are under a constitutional duty to remedy the situation; that there 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 that the Constitution does not create a judicially enforceable right to welfare or other forms of subsistence (p 8).

How does this define Sunstein’s project? Consider where it locates him in contemporary constitutional discourse. *Judicial restraint*: His position is compatible with the present Court’s view of
the judicial role in cases involving "economic and social welfare"; it is somewhat to the right of the prevailing view in the legal academy, which is more receptive to some degree of judicial activism in these areas. Affirmative action: The present Supreme Court believes that the Constitution restricts the range of permissible affirmative action; the prevailing view in the legal academy is Sunstein's, that affirmative action is generally permissible, although there is some support for the view that affirmative action is sometimes constitutionally required. Pornography: The present Supreme Court probably believes that significant restrictions on pornography violate the First Amendment; the legal academy is divided between traditional civil libertarians who agree with the Supreme Court, and an increasing number of scholars who agree with the position Sunstein takes. Campaign finance: The present Supreme Court believes that many of the most important restrictions on campaign finance violate the First Amendment; the legal academy overwhelmingly disagrees, as does Sunstein. Arts financing: The present Supreme Court has not indicated its view on this question; most legal scholars who have written on the question agree that the government has substantial discretion in the area, though they may disagree on locating the point where an abuse of discretion arises. Abortion: The present Supreme Court believes that the Constitution protects the right to have an abortion, and it has moved in the direction of resting that right on equality arguments; the legal academy finds both privacy and equality arguments compelling. Abortion financing: The present Supreme Court believes that the Constitution does not require the government to finance any abortions; the prevailing view in the legal academy,

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4 See, for example, Dandridge v Williams, 397 US 471, 485 (1970); see also FCC v Beach Communications, Inc., 113 S Ct 2096, 2101 (1993).
5 Supporting this assertion in detail would require a "content analysis" of numerous law review articles. I rely instead on an appeal to readers' sense of the state of things in the legal academy today.
7 See American Booksellers Ass'n v Hudnut, 475 US 1001 (1986). I am not convinced that the present Supreme Court would treat the issue as summarily as it did in 1986.
8 Many of the former are older white males, and the changing demographic composition of the legal academy affects where the center lies on this issue.
9 Sunstein's formulation acknowledges that "the line between the key two categories is an elusive one" (p 311). He would allow restrictions based on conventional views of what constitutes art "if they are limited in time and space" (p 312).
11 Harris v McRae, 448 US 297, 316 (1980).
going beyond Sunstein's position, is that the government has a
duty to finance all or nearly all abortions for women who cannot
otherwise afford to pay. Education: The present Supreme Court
has expressed no view on whether the political branches have a
constitutional duty to reform the educational system, although it
has indicated sympathy for reform efforts;\footnote{San Antonio Independent School Dist. v Rodriguez, 411 US 1, 58-59 (1973).} many in the legal
academy believe that the courts should enforce such a duty. Access
to the media: The present Supreme Court probably believes that
the government can create a right of access to the electronic me-
dia;\footnote{Red Lion Broadcasting Co. v FCC, 395 US 367 (1969); PruneYard
Shopping Center v Robins, 447 US 74 (1980).} so do most legal academics. Welfare: The present Supreme
Court takes the position Sunstein does;\footnote{Bowen v Gilliard, 483 US 587, 596 (1987).} many in the legal acad-
emy would find some welfare rights to be enforceable by the
courts.

Overall, then, Sunstein's positions are somewhat to the left of
the present Supreme Court, and very slightly to the right of the
center of today's legal academy.\footnote{I believe that Charles Derber accurately describes Sunstein's positions as "the commu-
mitarianism of the professional middle class." Charles Derber, Coming Glued: Communitarianism to the Rescue, Tikkun 27-28 (July/Aug 1993).} I will therefore describe them as
centrists. Centrism comes in many forms. The centrism of some
people is a package of positions, some to the left, others to the
right, and still others in the middle, but a package that seems over-
all in the middle. Sunstein's centrism, in contrast, is almost sys-
tematic, in that on virtually every issue he discusses, Sunstein
places himself between a right-wing position and a left-wing one.

In calling Sunstein's project centrist, I mean to direct atten-
tion to an important change in the concerns of the legal academy.
Historically, the project of the left has focused importantly on the
reduction in severe disparities in material well-being.\footnote{The left has been concerned in part with equality as such, but even more, I believe, because leftists have believed that severe differences in levels of material well-being are likely to have bad effects. Those substantially better off are likely to have unacceptable influence on shaping public policy and other aspects of public life. Severe differences in material well-being are likely to produce troubling effects on the psychological well-being of both the better-off and the worse-off. Finally, leftists have feared that material advantages are likely to produce public policies that might create not just severe material inequality, but actual impoverishment of the worst-off. For an empirical study suggesting that justice requires a minimum floor on incomes but no ceiling on wealth, see Norman Frohlich and Joe A. Oppenheimer, Choosing Justice: An Experimental Approach to Ethical Theory (California, 1992). Frohlich and Oppenheimer do not discuss whether the floor might be set at a level that, in real economies, imposes a ceiling on wealth, or whether the non-economic con-}
contrast, appears to be rather uninterested in that goal, not merely because courts are not well-equipped to help society attain it, but because he is at the least unsure that society ought to try to reduce severe inequality in the first place. Sunstein's position here does indeed reflect the concerns of the contemporary left in the legal academy. I think it useful, even so, to insist that a traditionally "left" position must be more egalitarian than Sunstein's, and so conclude that Sunstein's project is the defense of the center with weapons provided by the right and the left.

In discussing *The Partial Constitution*, I will adopt what Lévi-Strauss calls the engineer's approach as a diagnostic tool, even though that approach is incompatible with the *bricoleur*'s. Before pursuing the diagnostic task in detail, I offer an overview of what it shows.

An engineer's approach to a centrist project suggests the difficulty that centrists have in explaining why advocates of views on either side go too far. Centrists frequently accept the premises of those on either side, and usually do not deny that, according to the engineer's logic, the premises *could* be pushed as far as extremists want. They then adopt strategies to cut off the premises' logical implications. In the prior generation, they used the language of balancing. That metaphor, though, suggests that legal analysis is a form of engineering. A more modern sensibility must defend centrism differently. Here the *bricoleur*'s techniques of selection and transformation are crucial. Seeing Sunstein as a *bricoleur*, we would note that he selects general approaches to analysis, such as republicanism and feminism, and transforms them in several ways.

First, the structure of many of Sunstein's arguments is, "Those on either side have made some valid points, but they take the logic of their positions 'too far.'" Employing this structure polishes the sharp edges of more radical criticisms. On some issues, such as pornography, campaign finance, and affirmative action, this may help restrain a drift in the direction of the Supreme Court's position; on other issues, such as welfare rights, it firms up the Court's position.

sequences of large disparities in wealth might render the "floor but no ceiling" standard unjust.

18 Sunstein does defend a principle of "freedom from desperate conditions" (p 138, emphasis omitted). Little of what ensues in the book, however, deals with the implications of that principle for legislative decision; the most sustained discussion is probably two paragraphs on achieving educational equality (p 140), and even that is presented as an implication of a different principle, "the obligations of government to provide roughly equal educational opportunity" (id). For a more extended discussion, see Section II.
Second, Sunstein adopts a rhetoric of centrism. For example, Sunstein often relies on the following trope: "To say X—the reasonable premises of people on either side of the center—is hardly to say Y—the unreasonable conclusions they draw." All the work is done here by the "hardly." Turning the engineers' approach against them, Sunstein typically defends his use of the word by formulating Y as the most extreme possible implication of X.

Even more important in Sunstein's rhetoric of centrism is his self-confidence. One characteristic trope here is the list of things government or the courts "should" do, prefaced or followed by the acknowledgment that a full defense of those recommendations would require a far more detailed analysis and empirical basis than Sunstein can provide in this book. The trope, though, assures us that, had we but world enough and time, Sunstein certainly could give us that analysis, buttressed, of course, by mounds of empirical data.

Finally, Sunstein opposes the engineer's approach by offering his analytic conclusions as simple descriptions of how things are. In this way he naturalizes his judgments about the Constitution in the course of an argument against treating the Constitution as in any sense natural.

If the rhetoric of centrism works, of course, who am I to challenge it? Or, perhaps better, how am I to challenge it? A critic can only show how Sunstein situates himself in the center, taking Sunstein's rhetoric as the device by which a legal bricoleur goes about his project, and using the engineer's approach to locate places where Sunstein does not pursue arguments to the conclusions the engineer might draw. As I argue in my conclusion, this strategy, which examines Sunstein's arguments from the outside, may be critical only in a restricted sense, but bricolage and, more generally, modern intellectual life may allow us only such a restricted sense.

To start, though, I present an outline of Sunstein's overall argument.

I. THE ARGUMENT

The Partial Constitution develops two themes, then applies them to a series of problems in constitutional law. First, "[i]n
American constitutional law, government must always have a reason for what it does,” and “[t]he required reason must count as a public-regarding one” (p 17). Second, much contemporary constitutional law erroneously adopts what Sunstein calls “status quo neutrality,” according to which “[a] departure from the status quo signals partisanship [while] respect for the status quo signals neutrality” (p 3). Because neutrality is impossible (and status quo neutrality therefore an illusion), every government action is partisan, and partisan interventions must be defended by public-regarding reasons.

Sunstein finds several sources for the requirement of public-regarding reasons. Federalist No. 1 opened by saying that Americans had to decide “the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.” As Sunstein puts it, “social outcomes had to be justified not by reference to nature or to traditional practices, but instead on the basis of reasons” (p 19). The framers also desired to avoid both self-interested action by public officials and the domination of government by factions, that is, by groups seeking only to advance their private interests. The new government, they believed, ought to act only when it had public-regarding reasons for doing so. Further, the framers structured the new government to encourage deliberation about public-regarding goals. The Senate’s long terms, the electoral college, and other institutions “were designed . . . to promote deliberation and to limit the risk that public officials would be mouthpieces for constituent interests” (pp 21-22).

Finally, the courts have vindicated the framers’ concern for deliberation about the public good by interpreting the Constitution to ban naked preferences, “the distribution of resources or opportunities to one group rather than to another solely on the ground that those favored have exercised the raw political power to obtain what they want” (p 25). This prohibition “underlies a wide range of constitutional provisions” (p 26). The courts have sometimes used a “weak version” of this prohibition (pp 28-29), most notably...
in review of legislation for mere rationality, which “simply means that public measures must be a minimally reasonable effort to promote some public value” (p 29). They have also imposed “a more robust set of constraints” (p 30), such as heightened scrutiny and a theory of impermissible goals for government action. Surveying the cases, Sunstein says that they “show the wide range of settings in which constitutional doctrines adopt a concept of impartiality that rejects pluralist conceptions of politics” (p 37).

One version of impartiality is status quo neutrality. Sunstein’s chapter on “The Revolution of 1937” shows that the Supreme Court before 1937 employed status quo neutrality in several important areas. He argues that *Plessy v Ferguson*, *Lochner v New York*, and *Muller v Oregon*, which are, he asserts, “rarely studied together” (p 41), all “took existing practice as the baseline for deciding issues of neutrality and partisanship . . . by assuming that existing practice was prepolitical and natural” (id). The Revolution of 1937 rejected that conception of neutrality. Nonetheless, “despite its apparent rejection in the 1930s, the same conception plays an enormous role in current constitutional law” (p 40). Chapter Three surveys “constitutional law that relies on status quo neutrality” (p 68). When courts assert that the Constitution protects negative but not positive rights, when they invoke the state action doctrine as a barrier to imposition of constitutional norms on private behavior, when they reject affirmative action and resist finding discrimination based on differential impact, when they restrict legislatures’ abilities to regulate campaign expenditures, when they are reluctant to review administrative agency inaction as they do agency action—they adhere to the fundamental precepts of status quo neutrality. Sunstein concludes that “[m]uch of modern constitutional law is based on status quo neutrality” (p 68).22

22 Because Sunstein ultimately rejects the broad Burkean proposition that adherence to tradition is a public-regarding reason in his sense (pp 130-31), this conclusion is in some tension with his earlier assertion that much of modern constitutional law adopts the requirement that government act only when it has public-regarding reasons. Presumably, though, there might be disjoint sets of “much modern constitutional law” of similar size.

There is a conceptual difference between respecting the status quo as such, and treating “respect the status quo” as a placeholder for a number of public-regarding reasons such as stability and, importantly, concerns about the limited efficacy and legitimacy of judicial intervention. There may not be much practical difference, however. So, when Sunstein examines the consequences of abandoning status quo neutrality (pp 155-56), he argues that courts should not recognize a constitutional right to welfare because “there is a real risk that a right would harm the very people whom courts are trying to protect” (p 155); that courts should not invalidate laws on the sole ground that they have discriminatory effects because “the social consequences would be enormous . . . [and] serious strains would be imposed on the judiciary, particularly in the remedial process” (id); that the current regime of limited
Two chapters on constitutional interpretation follow. The first argues, against originalists like former judge Robert Bork, that a sensible political theory of democracy allows us to require public-regarding reasons for government action. Sunstein argues that originalists revert to original intention because they fear that nothing else can stop judges and legislators from acting on their subjective preferences. Originalism, for Sunstein, is a form of “[I]egal authoritarianism,” which “sees laws . . . as deals among self-interested actors[,] is usually skeptical of all efforts to reason about social and economic problems[, and] disparages such efforts as a mere mask for self-interest or as incapable of resolving social and political disputes” (pp 108-09). Sunstein then turns his attention to those who stress indeterminacy and to conventionalists like Stanley Fish, arguing that there truly are public-regarding reasons, which are something other than “exercises of will, or subjective opinions, or even power and whim” (p 95). Like originalism, both indeterminacy and conventionalism can support status quo neutrality, because that form of neutrality is “often rooted in a fear that it is necessary to ensure that decisions will not be chaotic and unordered . . . [and t]o abandon the baseline of the status quo is to enter the abyss of no baselines at all or to require people to create baselines in a way that gives free rein to the prejudices of those in authority” (p 117).

Sunstein’s alternative is to develop a set of interpretive principles, consistent with the Constitution’s text, structure, and history, that must be openly defended on substantive grounds, as promoting the welfare of “the human beings who live within” the constitutional system (p 116). These principles “should be derived from the general commitment to deliberative democracy” (p 123). Baselines should be generated from an inquiry into “the effects of different systems on the lives of human beings who are affected by law and politics” (p 126), not from an examination of the status quo distribution of rights and goods. Sunstein points out that sometimes people attempt to justify status quo neutrality on “plausible” grounds (p 127). They argue that “changes in the status quo will be futile or more likely counterproductive” (p 127); that at least some important constitutional provisions, like the Takings Clause, are “rooted in existing distributions” (p 128); that “a system that respects current distributions will create far more

review in cases of economic and social legislation is justified (p 156); and that “the Court’s current approach to the takings and contracts clauses” is justified (id). This covers a large territory.
stability than a system that does not” (p 129); or, in Burkan fashion, that the status quo embodies the accumulated wisdom of society, which is far more likely to promote the human good than the rationalistic interventions of activists purporting to offer public-recurring reasons for government action (p 130). Sunstein concedes that each of these substantive arguments has some merit, but argues that none establishes the broader proposition that status quo neutrality in all domains is the best we can do.

Having rejected status quo neutrality as a general proposition, Sunstein elaborates on what the commitment to deliberative democracy requires. First, it focuses on political deliberation and “prizes citizenship,” that is, “widespread participation by the citizenry” in political action (p 135). This means that “people [must] have a large degree of security and independence from the state” (p 136). This justifies constitutional protection of private property, which “creates a sphere of autonomy into which the state may not enter” (id). Finally, the commitment to deliberative democracy requires equality, barring “large disparities in the political influence held by different social groups” (p 137). To ensure this, the Constitution should be interpreted to guarantee “freedom from desperate conditions” (p 138, emphasis omitted), though, as with many constitutional provisions, the enforcement of this guarantee is best left to legislatures. It should also be interpreted to oppose caste systems, and to create “rough equality of opportunity,” so that “the life prospects of a child born to one family in one part of the country should not be radically different from those of another child born to another family elsewhere” (p 139, emphasis omitted).

Sunstein then specifies the interpretive principles more precisely. Along lines similar to those defended by John Hart Ely, Sunstein says that courts should be particularly “aggressive” in protecting “rights that are central to the democratic process” and “groups or interests that are unlikely to receive a fair hearing in the legislative process” (pp 142-43). But, he continues, courts should be sensitive to their own “institutional limits” (p 145). “Reliance on the courts . . . might divert energy and resources from

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23 Sunstein’s formulation is: “Like the right to private property, [the Fourth Amendment] immunizes the citizen from governmental discretion and control. It creates a sphere of autonomy into which the state may not enter” (p 136). The invocation of the Fourth Amendment here is slightly off base. Strictly speaking, the Fourth Amendment establishes that there is no sphere of autonomy into which the state may not enter. The Warrant Clause of the Fourth Amendment means that, with a warrant supported by probable cause, the state may search anywhere and seize anything. For a discussion, see Fisher v United States, 425 US 391, 400 (1976).
politics, and the eventual judicial decision may foreclose a political outcome” (id). Further, courts “are often surprisingly ineffective in bringing about social change” (p 146), and the “narrowing focus of adjudication” makes it difficult for judges “to understand the complex, often unpredictable effects of legal intervention” (pp 147-48). These principles lead Sunstein to endorse a rather general posture of judicial deference to legislatures: courts should be inclined to uphold legislation whether it disrupts existing distributions or not. “In short: The status quo should generally be subject to democracy” (id). Courts should uphold campaign finance laws and affirmative action programs. They should not create a constitutional right to welfare or find race or gender discrimination merely on the basis of differential impact. Much of this sounds like the “weak version” of the requirement of public-regarding reasons Sunstein described in Chapter One, and indeed Sunstein suggests only that the courts should “enforce the rationality requirement somewhat more stringently” than they have (pp 158-59).

Chapter Six discusses the role of preferences in deliberation. Sunstein argues that, particularly in a deliberative democracy, government need not—and actually cannot—act only on the basis of what people want, because what people want is at least sometimes decisively shaped by the status quo. Therefore, if the status quo has no distinctive normative weight, neither should the preferences shaped by the status quo: “Social rules and practices cannot be justified by practices that they have produced” (p 172). Here Sunstein relies on social-psychological studies revealing an endowment effect (pp 167-68). The studies show that people value the things they have more than they value the same things if they do not have them. More generally, the endowment effect means that people might reject changes that would make them better off. Preferences shaped by the status quo need not reflect even what people subjectively value most. This has “large consequences,” because “much of governmental behavior will be a product of endowment effects” (p 170). Sunstein then catalogues “cases in which considerations of autonomy and welfare justify government action that subjective welfarism would condemn” (p 179): efforts to advance aspirations rather than present preferences, efforts predicated on unjust background conditions, “intrapersonal collective action problems” (p 191) of which addiction is an example. According to Sunstein, a political system that allows government to override present preferences can be justified because “it creates a kind of energy and independence of mind that are important human
goods,” or “as embodying a mild form of liberal perfectionism” (p 186).

The five chapters of Part Two apply this general framework to particular problems. Chapters Seven and Eight deal with free speech. Most of Chapter Seven deals with public regulation of broadcasting. Sunstein points out that much First Amendment theory, sometimes deployed to challenge such regulation, rests on several premises: the idea “that the government is the enemy of freedom of speech,” the understanding that the First Amendment “embod[ies] a commitment to a certain form of neutrality,” a refusal to distinguish between political and nonpolitical speech, and a concern that “any restrictions on speech, once permitted, have a sinister and nearly inevitable tendency to expand” (pp 199-200). Sunstein “calls for a New Deal for speech [which] would apply much of the reasoning of the New Deal attack on the common law” to First Amendment questions (p 202).

Some regulations, he argues, should be seen not as restrictions on speech but as efforts to promote it. Rejecting status quo neutrality shows that the fairness doctrine and similar regulatory efforts are not distinctive government intrusions on broadcaster autonomy because the rules of property law, which are themselves forms of government action, produce the power broadcasters have. As a result, the only question is whether the rules—fairness doctrine, property law, or whatever—have valid “purposes and effects” (p 205). This analysis shows that, although threats to speech come from government, sometimes they come from the private sphere, “made possible only by legal entitlements that enable some people but not others to speak and to be heard” (p 212). Sunstein then applies this analysis to defend the fairness doctrine and “public provision of high-quality programming for children [and] . . . provision of free media time to candidates” (p 221). Campaign financing laws are, he says, in principle justified, although in practice they “might well turn out to be incumbent protection measures” (p 224). Rights of access to the media and to shopping centers ought to be encouraged, and the public forum doctrine should be developed with an eye to the practical reality of how public areas are used today (pp 224-26).

24 This argument recalls the classic discussion in Thomas Emerson, The System of Freedom of Expression 627-73 (Random House, 1970) (chapter on “Affirmative Promotion of Freedom of Expression”). Some of Sunstein’s conclusions differ from Emerson’s, and he writes with an additional twenty years of evidence and new forms of such promotion, but the main lines of Sunstein’s analysis are not significantly different from Emerson’s.
The core of Chapter Eight defends the Court's distinction between high-value political speech and lower-value non-political speech. The distinction, Sunstein contends, is based on "The Primacy of Political Deliberation" in the constitutional scheme (p 232). He defines political speech as that which is "intended and received as a contribution to public deliberation about some issue" (p 236, emphasis omitted). This, though, should be "broadly understood," so that the category would encompass "all art and literature that have the characteristics of social commentary, which is to say most art and literature" (p 240). Sunstein then applies his analysis to the issue of hate-speech regulation, which he finds constitutionally defensible in principle, although again he acknowledges that specific codes might be badly drafted (p 244).

Next, Sunstein examines regulation of pornography, abortion, and surrogacy. He begins by arguing that "[l]egal treatment of these issues is pervaded by the now familiar conception of neutrality" (p 257). Opposing sides in the debates share the view that sexual drives are natural; one side typically argues that "the government should not repress or interfere with" those drives, while the other argues that "[g]overnment should act to ensure that sexuality and reproduction, in their best, current, or natural forms, are not polluted, altered, or debased through artificial external influences" (id). Against these positions, Sunstein invokes the anticaste principle, in the form of a ban on turning women's sexuality and reproductive functions "into something for the use and control of others" (p 258, emphasis omitted). Pornography does so, and the government can invoke the anticaste principle to restrict its distribution. Restrictive abortion laws also put women's sexuality under the control of others, and are therefore barred by the anticaste principle. Finally, surrogacy arrangements are questionable because "a world in which female sexual and reproductive services were freely traded on markets would legitimate and reinforce a pervasive form of inequality—one that sees the social role of women as that of breeders" (p 288).

The New Deal transformation of government and of constitutional theory have made the problem of conditional funding (or "unconstitutional conditions") particularly pressing and puzzling.

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25 I merely note that some (perhaps many) artists would question the claim that most art and literature is social commentary: There is a sense in which a Rembrandt self-portrait or the music of John Cage is social commentary, but in that sense almost anything is social commentary. In particular, pornographic movies, which Sunstein generally excludes from the category (p 241), are almost certainly social commentaries in that sense.
Sunstein argues that the doctrine of unconstitutional conditions should simply be abandoned, to be replaced by a direct inquiry, in particular contexts, into “whether the government has constitutionally sufficient justifications for affecting constitutionally protected interests” (p 292). Sunstein shows how unconstitutional conditions are a problem only within a framework that accepts status quo baselines. He rejects the Holmesian position that government can impose whatever conditions it wants on its expenditures. Holmes understood that status quo baselines were unavailable, but wrongly concluded that no baselines at all existed. For reasons that by this point are familiar, Sunstein also rejects the common distinction between government subsidies and government penalties: The distinction requires a baseline, typically set, in status quo neutrality fashion, by “the ordinary or perhaps desirable state of affairs” (p 299).

Sunstein agrees that some of the intuitions that lie beneath the unconstitutional conditions doctrine deserve respect, but he insists that they should be dealt with in particular contexts, not by developing an overarching doctrine applicable to all areas in which the government spends its money. There are, however, some guiding principles. First, the analysis must distinguish between constitutional provisions conferring rights to government neutrality and those permitting the government to “offer justifications that allow it to be selective in funding” (p 304). For example, the First Amendment creates a right to neutrality among competing points of view, but, according to Sunstein, the constitutional right of family autonomy underlying the protected right to send children to private schools does not create a right to neutrality. Accordingly, the government has no obligation to pay the costs of sending children to such schools. Second, suppose a majority has moral or conscientious objections to the use of taxpayer (that is, their) money in certain ways. Sunstein says that “for the most part, moral objections ought to play no role” (p 306). Often such objections can be “translated into some other reason” sufficient to justify selectivity where neutrality is not required, and when the government must be neutral, moral objections are inadequate (id). Again Sunstein concludes the discussion with some applications: Subsidies to pub-

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28 Pursuing Sunstein’s program, one might set a baseline by examining the government’s justifications, and then apply the subsidy/penalty distinction. Although the distinction would then be coherent, it would be unnecessary: All the analytic work would be done in examining the government’s justifications, from which it would necessarily follow that some condition was either a penalty or a subsidy.
lic schools but not religious ones are permissible because the Establishment Clause gives the government a reason to refuse the subsidy; government has broad discretion in funding art projects, though it may not across-the-board “deny funding to art that offends conventional morality” (p 312) because the First Amendment “is designed precisely to protect views that do not reflect conventional morality” (p 313) and the government must fund abortions resulting from rape or incest because the anticaste principle prevents the government from “requiring poor women to be breeders” (p 317).

The final chapter of The Partial Constitution discusses how principles of compensatory justice, clearly predicated on notions of protecting status quo distributions, pervasively and often unwisely limit government responses to social problems. The Supreme Court’s reluctance to encourage small-claim class actions, for example, rests on concerns that those who deserve compensation will not get it, leading the Court to require personal and expensive notice to all class members, and that those who do not deserve compensation will get paid, leading the courts to be suspicious of fluid class recovery and similar devices that distribute “recoveries” to people who may not have been injured in the first place. Similar concerns underlie the courts’ reluctance to acknowledge probabilistic harms; they strongly prefer to find that a defendant’s action caused a discrete and classical harm, and are uncomfortable awarding relief when the defendant’s action simply increased the risk that harm would occur. As Sunstein points out, the same reluctance characterizes the Supreme Court’s approach to standing. The courts are clearly more comfortable with discrimination cases involving discrete and classical harms than they are with cases involving long-term effects and affirmative action, again because the connection between compensation and relief is clearer in the first type of case.

Rejecting compensatory justice as the sole ground for judicial action, Sunstein recommends a series of responses to probabilistic torts and regulatory failure. He also would replace compensatory principles in discrimination cases with his anticaste principle, but he cautions that “[a]n anticaste principle is simply beyond the capacities of the judiciary, which lacks the necessary tools” (p 340) to ensure that economic castes in particular do not arise. Legislatures, however, should focus on the caste-like dimensions of race discrimination, such as “lack of opportunities for education, training, and employment,” and courts should uphold affirmative action pro-
grams without requiring a "backward-looking," compensatory justification (p 344).

*The Partial Constitution* is powerfully and persuasively argued. Although I have some quibbles about some points along the way,\textsuperscript{27} and one serious reservation,\textsuperscript{28} the main lines of the argument are compelling. Given that view of the argument, I confine the ensuing discussion to the way in which *The Partial Constitution* places itself in the center of the political spectrum.

II. THE GAPS AND AMBIGUITIES IN SUNSTEIN'S PROJECT

In cautioning against "a major judicial role in social reform" (p 145), Sunstein offers a short formula: "the judiciary's lack of a democratic pedigree, lack of fact-finding powers, and limited remedial authority" (p 223).\textsuperscript{29} When he approves of judicial intervention, however, those cautions disappear. Noting this gap is one form of the engineer's criticism of Sunstein's project.

Before considering three examples, I must flesh out the short formula. First, for Sunstein, "[r]eliance on the courts may impair democratic channels for seeking changes, and in two ways. It might

\textsuperscript{27} In particular, Sunstein sometimes asserts a legal position that strikes me as a little odd, though not obviously wrong. On reflection, the legal position can be straightened out, but when it is it may not support Sunstein's broader claims as strongly as he suggests. For example, Sunstein argues that contemporary "First Amendment law contains several categories of speech that are subject to ban or regulation even though they are non-neutral . . . [including] labor law, where courts have held that government may ban employers from speaking unfavorably about the effects of unionization in the period before a union election if the unfavorable statements might be interpreted as a threat. Regulation of such speech is unquestionably non-neutral, since employer speech favorable to unionization is not proscribed" (p 268, emphasis added, footnote deleted). The last clause is not quite wrong, but it is not quite right either. When might an employer want to speak in favor of unionization? Not when the only ballot issue is "Union X or No Union," because the employer who favors unionization could have negotiated with Union X without insisting on an election. And, when the ballot issue is "Union X or Union Y or No Union," the employer must be careful not to favor either Union X or Union Y, lest the employer be found to have dominated the favored union. See 29 USC § 158(a)(2) (1988). If contemporary labor law is non-neutral, it is so in quite a weak sense. I believe this example is insufficient to provide much support for Sunstein's general argument. (It bears noting, too, that contemporary labor law is clearly neutral, in Sunstein's sense, in barring unions from speech that threatens reprisal for voting against the union or promises benefit for merely voting in favor of the union.) As this example shows, straightening out the arguments can be quite time-consuming, and I refrain from doing so more than occasionally.

\textsuperscript{28} I am not persuaded that contemporary constitutional law, as articulated by the Supreme Court, is as deeply committed to status quo neutrality as Sunstein believes. In many areas, as Sunstein shows, the Court accepts weak public-regarding reasons as justifications for departing from the status quo; in other areas, the Court may use "status quo neutrality" as a proxy for reasons Sunstein would accept. See text accompanying note 20.

\textsuperscript{29} For variants, see pp 224, 259, 329, 340, 341, 345.
divert energy and resources from politics, and the eventual judicial
decision may foreclose a political outcome” (p 145). These observa-
tions are unfortunately undifferentiated. They apply every time
the courts invalidate legislation. Sunstein’s examples suggest two
limitations. The courts’ lack of democratic pedigree might matter
less if they can connect their action to fundamental democratic
principles, involving “rights that are central to the democratic pro-
cess” (p 142) or “groups or interests that are unlikely to receive a
fair hearing in the legislative process” (p 143). Second, the lack of
pedigree might matter more on issues where we need “creative, im-
aginative, and long-term solutions” so that “[i]ndividual values can
more easily be reflected in outcomes that are beneficial to diverse
groups and interests” (p 145). Again unfortunately, sometimes
these limitations conflict, as on the abortion issue.

Second, judicial reform may be ineffective. The desegregation
example is the most notorious. As Sunstein notes, less than two
percent of Southern black children attended integrated schools ten
years after Brown v Board of Education (p 146). Sunstein also re-
lies on Gerald Rosenberg’s The Hollow Hope: Can Courts Bring
About Social Change? to argue that even Roe v Wade was “inef-
fective,” in the sense that it may have contributed rather little to
the increase in abortions performed after 1973 (p 147). Finally,
and connected to ineffectiveness, courts lack the tools to examine
complex social issues, develop the relevant facts, and “understand
the complex, often unpredictable effects of legal intervention” (p
148).

One general observation about these institutional concerns
must be made at the outset. Sunstein argues that “large conse-
quences follow” from recognition of the endowment effect (p 170).
In particular, “much of governmental behavior will be a product of
endowment effects” (id). Among that behavior might well be the
institutional incapacities Sunstein finds in courts. Because “preferences are often shifting and endogenous rather than fixed and ex-
genous . . . a function of current information, consumption pat-
terns, legal rules, and social pressures most generally” (p 174),
Sunstein’s own assertions about institutional capacity need to be

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20 As Sunstein acknowledges (p 143), this sounds a lot like John Hart Ely. John Hart
22 This appears to be Sunstein’s criterion of effectiveness: “The decision in Roe v. Wade
may be another illustration of the Court’s limits . . . It is undoubtedly true that the deci-
sion increased women’s access to safe abortions. Surprisingly, however, it did not dramati-
cally increase the actual number and rate of abortions” (p 147).
questioned. The courts' limitations, such as they are, may be as adaptive as anything else—as much the product of the background social conditions as preferences for particular laws. And, of course, "[s]ocial rules and practices cannot be justified by practices that they have produced" (p 172). If we apply the ideas behind the endowment effect to Sunstein's endorsement of judicial restraint, we may well find his claims normatively unsupported.

A. Anti-Pornography Legislation

Sunstein offers "a quite straightforward argument for regulating at least some narrowly defined class of pornographic materials" (p 264), that is, "violent pornography" (p 266). Such materials "are far from the core of constitutional concern" (p 264). Sunstein argues that free speech principles should be most readily enforced when the government attempts to regulate political speech, which he defines as speech "both intended and received as a contribution to public deliberation about some issue" (p 236, emphasis omitted). Pornographic materials do not involve discussion of public affairs. And, though they may have political effects, they rarely are either intended or received as the right kind of contribution (p 241).

When the government regulates materials outside the core of constitutional concern, it need only identify genuine harms the speech might cause, although it may not act simply to "repress a message" (p 242). Sunstein identifies three harms pornography causes. First, "[m]any women, usually very young, are coerced into pornography" (p 265). Because sorting out cases of coercion from cases of voluntary participation is likely to be difficult, "we must accept . . . overly broad" regulation (p 266) that targets all pornography. Second, "there is a causal connection between pornography and violence against women" (id). Sunstein acknowledges controversy about "the extent of the effect," but treats this as a question of "degree" (id). In cases of such empirical disagreement, the courts' limited fact-finding capacity should incline them to uphold anti-pornography regulations.33 Third, "pornography reflects and promotes attitudes toward women that are degrading and dehumanizing" (p 266).

Summarizing his argument, Sunstein calls it "a quite conventional argument for regulation of violent pornography" (id), and

33 "So long as any emerging law has the requisite clarity and narrow scope, the appropriate forum for deliberation is the democratic process, not the judiciary" (p 270).
the restriction to “pornography containing violence” recurs (p 270). I find this restriction striking, for nothing significant in Sunstein’s argument turns on the linkage of sex with violence. How would he have us analyze a ban on hard-core pornography, the material available in neighborhood video rental stores?  

Non-violent hard-core pornography too is far from the political core of the free speech principle. What of the harms? I should think it clear that a legislature could reasonably think that hard-core pornography promoted “attitudes toward women that are degrading and dehumanizing.” And, coercion is coercion, whether accompanied by grotesque abuse or not. Or, to put it another way, a woman who is coerced into appearing in hard-core non-violent pornography is raped no less than one who is beaten on screen. Certainly a court, with its limited fact-finding capacities, would find it difficult to disagree with a legislative determination that pre-filming coercion occurs often enough to justify a ban. The proof difficulties Sunstein offers to justify overly broad regulation of violent pornography are equally real here. This leaves the question of whether there is a causal connection between non-violent hard-core pornography and violence against women. But, invoking Sunstein’s strictures about judicial restraint, I would think that courts have a limited capacity to determine the fact of the matter here, in the face of a contrary legislative determination.  

Why does Sunstein defend the constitutionality of a ban on violent pornography only, rather than pornography generally? Perhaps a defender might respond that prohibiting hard-core but non-

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34 This material depicts penile erection, penile penetration of the mouth, vagina, or anus, and ejaculation. For confirmation that this is indeed what the Supreme Court before 1972 thought was hard-core pornography, see Huffman v United States, 470 F2d 386, 393-94 n 9, 398-401 (DC Cir 1971) (analyzing the materials in cases where the Supreme Court had either vacated or refused to vacate findings of obscenity).  

35 Perhaps all hard-core pornography is violent. Then we ought to consider the rhetorical implications of Sunstein’s use of the term violent, which he links to the words “abused and mistreated, often in grotesque ways” (p 265). If the category of non-violent hard-core pornography is empty, Sunstein offers what rhetoricians call a persuasive definition of violence. The Supreme Court of Canada has explicitly distinguished between “the portrayal of sex coupled with violence [which] will almost always constitute the undue exploitation of sex” and “explicit sex which is degrading or dehumanizing . . . [which] may be undue if the risk of harm is substantial.” Regina v Butler, 134 NR 81, 117 (Can 1992).  

36 One would not have to stretch the concepts to call depictions of ejaculation on a woman’s face “degrading and dehumanizing.” Perhaps, however, this could fairly be called violent without severely distorting the ordinary use of that word.  

37 The courts’ relative lack of democratic legitimacy might be another reason for upholding regulation of non-violent hard-core pornography, because, on Sunstein’s definitions, such pornography is not connected to a right “central to the democratic process” (p 142).
violent pornography raises more difficult issues than prohibiting violent pornography. Exactly how the issues are more difficult, within Sunstein’s framework, is quite unclear. More important, I think, is that Sunstein’s presentation aligns him with a moderate version of anti-pornography legislation; the arguments he develops, an engineer would say, would support a structure of more extensive regulation of pornography than contemporary liberal centrist could accept.  

B. Abortion

Much of The Partial Constitution cautions against judicial action overturning legislation on constitutional grounds. Indeed, Sunstein provides a detailed defense of such action only once, arguing not only for a judicially protected right to abortion but to a judicially enforced entitlement to funding for abortions in cases of rape and incest. Were it not for the centrism of Sunstein’s project, the example would be striking.

Sunstein bases his argument on equal protection principles. Restrictive abortion laws, he writes, “turn women’s reproductive capacities into something for the use and control of others” (p 272). Courts can invalidate them without “tak[ing] a position on the status of the fetus” and without “disparag[ing] the good-faith moral convictions of those who believe that fetuses are vulnerable creatures deserving respect and concern” (id). According to Sunstein, the argument “is supported by four different points” which “derive force from their cumulative effect” (p 273). First, restrictive abortion laws are a form of gender discrimination because they are, in all constitutionally relevant respects, “explicitly addressed to women” (id). Second, they are selective. In no other arguably similar situation, such as may occur when a person needs an organ transplant or even a blood transfusion, does the government require people to “devote[ ]” their bodies “to the protection of another” (p 274). Third, this selective imposition “is a product of


39 Sunstein provides an effective response to the use of a male-only draft as a counterexample. The male-only draft is “part of a system of sex role stereotyping characterized by a sharp, in part legally produced, split between the domestic and public spheres . . . . In this light, legal restrictions on abortion and a male-only draft serve similar functions” (p 276).
constitutionally unacceptable stereotypes about the proper role of women in society" (p 277). This, Sunstein writes, "is of course an empirical claim; but it is one with ample support" (id). Finally, "in the real world, the consequence of a restriction on abortion is not to save as many fetal lives as one would think or hope, but instead to force women to seek dangerous abortions" (p 278). This too is an empirical argument, relying on "contested" figures, but, Sunstein concludes, "even if the number and rate of abortions have significantly increased as a result of Roe, at least it seems clear that the principal effect of the decision was not to increase fetal deaths, but instead to produce a shift from dangerous to safe abortions" (id).40

Sunstein's argument is reasonably persuasive on its own terms.41 The difficulty arises when one thinks about applying Sunstein's argument against judicial activism here. Consider his concern that courts lack resources to develop and evaluate facts about complex social processes. Two of Sunstein's subarguments rest on empirical judgments as to which the evidence is, in Sunstein's term, contested. His concern about judicial restraint seemingly would imply that courts ought not rely on these subarguments. Of course, it is difficult to evaluate the overall argument when no single subargument alone is sufficient but all four together are cumulative. Perhaps the idea is that courts can do a "good enough" job on the empirical questions: "Ample" though not conclusive support would be sufficient. Then, however, one might have to reconsider Sunstein's dismissal of judicial invalidation in other situations where the empirical evidence is surely not conclusive but might be "ample."

The other part of the short formula about judicial restraint, relative lack of democratic legitimacy, is also implicated. Sunstein's equal protection argument does connect the abortion issue to questions of adequate representation. We are then left with the proposition that judicial invalidation on constitutional grounds obstructs the emergence of compromise. In the abortion context,

40 Sunstein responds to the counterargument that "pregnancy is a voluntary state" by pointing out that the counterargument is not available when pregnancy results from rape or incest, and that "the fact that individualized proof of rape or incest is so difficult even in criminal cases reveals that it is extraordinarily hard to make pleading and proof of rape or incest a predicate for abortion" (p 281). He concludes that "overprotection is necessary to allow those abortions that are constitutionally safeguarded" (id).

41 As Sunstein notes (p 396 n 21), "[a]n argument of the [same] general sort" was made by Judith Jarvis Thompson, A Defense of Abortion, 1 Phil & Pub Aff 47 (1971), and Donald H. Regan, Rewriting Roe v. Wade, 77 Mich L Rev 1569 (1979).
Sunstein notes, *Roe* "severely undermined the women's movement" (p 147).

In a footnote, Sunstein discusses Mary Ann Glendon's "important and persuasive" argument that the United States has made abortion a part of an unattractive child-care policy, in contrast with "the far more attractive European approach," which provides more "social supports" for mothers and children and restricts access to abortion (p 397 n 30). Sunstein says that "[u]nder current conditions [ ] Glendon's arguments should not be taken as a reason to reject an abortion right built on principles of sex equality" (id).

This is remarkable. For an important element in Glendon's argument is that the constitutionalization of the abortion issue in the United States in fact was important in blocking the development of a more sensible, more European-like family and child-care policy. The abortion issue, that is, illustrates precisely what Sunstein finds problematic about judicial invalidation: its interference with the development of sensible compromises.

Perhaps Sunstein means to suggest that compromise was blocked because the Court rested *Roe* on questionable privacy grounds rather than on more defensible equal protection grounds. As a preface to his presentation of the sex discrimination argument, Sunstein points out that "the competing views on abortion seem to have reached stalemate, with no possibility of developing criteria for mediating between them that might be acceptable to both sides" (p 272). The sex discrimination argument, it seems, offers that possibility.

For reasons that Sunstein's treatment of abortion funding suggests, this strikes me as quite implausible. In constructing his argu-

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42 For a more elaborate presentation, though one foreshadowed in the work Sunstein cites, see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, 1991).

43 See also p 283 ("In *Roe* itself there was no mention of equality . . . "). As a criticism of *Roe*, this is ahistorical. When *Roe* was first argued, and therefore when the litigation against abortion took shape, the Court's precedents strongly supported the choice of a "privacy" rationale. In contrast, the Court did not invalidate a statute on sex discrimination grounds until 1971. See *Reed v Reed*, 404 US 71 (1971). Indeed, in the term *Roe* was decided, only four justices agreed that statutes that facially discriminated on the basis of sex must be subjected to "close judicial scrutiny." See *Frontiero v Richardson*, 411 US 677, 682 (1973). A Court that had just embarked on constitutional examination of sex discrimination could not be expected to develop the sophisticated discrimination argument Sunstein presents twenty years later. For a criticism of the argument that the defense of the right to choose should be placed exclusively on equality grounds, see Jean L. Cohen, *Redescribing Privacy: Identity, Difference, and the Abortion Controversy*, 3 Colum J Gender & L 43 (1992).
ment for funding abortions in cases of rape and incest, Sunstein argues that "moral objections" on the part of some taxpayers to funding "ought to play no role" (p 306). Perhaps one might believe that reformulating the abortion right in equality terms would mute controversy because the reformulated right would take no position on the moral status of the fetus, and so might be thought to be respectful of the moral objections some people have to abortion. But, if those objections were ruled out of bounds when funding decisions were involved, surely the controversy would reignite.

C. Poverty

Treating restrictive abortion laws as sex discrimination is an illustration of Sunstein's broader anticaste principle, that "differences that are irrelevant from the moral point of view ought not without good reason to be turned, by social and legal structures, into social disadvantages [particularly] if the disadvantage is systemic [—that is, it] operates along standard and predictable lines in multiple important spheres of life, and applies in realms that relate to basic participation as a citizen in a democracy. These realms include education, freedom from private and public violence, wealth, political representation, and political influence" (p 339). Sunstein's formulation leads rather directly to the question:

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44 It is worth noting that ruling out moral objections is in some tension with Sunstein's advocacy of a "mild . . . liberal perfectionism" (p 188). What he construes as moral objections are, from another point of view, the visions of the good life for human beings that constitute perfectionism. If the anticaste principle outweighs the perfectionist elements of the views held by those who advocate restrictive abortion laws or denial of public funding for abortions, it would seem that Sunstein's commitment to liberalism overcomes his commitment to perfectionism, at least in this context. Yet, he does not explain why perfectionism should prevail in other contexts but not this one. In this connection it would have been interesting to have Sunstein's views on Reynolds v United States, 98 US 145 (1879), and Employment Division, Department of Human Resources v Smith, 494 US 872 (1990). Reynolds might be taken to suppress religious practice incidental to a moderate liberal perfectionist program of ensuring the equal civil status of women through eliminating bigamy (a controversial characterization of the issue in Reynolds). Smith might be taken to suppress religious practice incidental to a moderate liberal perfectionist program of ensuring the citizenry's capacity for rational deliberative participation in public affairs, a capacity impaired by use of psychotropic drugs.

45 On this view, treating the abortion right as an issue of equality would respect the position of those who believe abortion to be murder by framing the question relevant to their concerns as, may both men and women be allowed to commit murder?

46 I note as well that Sunstein's strictures against determining when rape or incest has occurred, which lead him to support an admittedly overbroad protection of all abortions (see p 281), seem equally applicable in the funding context, which would lead to the conclusion that the government is obliged to fund all abortions.
Should poverty itself be treated as a form of caste subject to the ant caste principle?

Sunstein addresses that question only indirectly. He places poverty within the framework of a market society, which, he rightly says, "quite frequently translate[s]" morally irrelevant differences "into social disadvantages" (p 341). One of his examples is the person who "happened to produce a commodity that many people like" (id), compared to whom factory workers are socially disadvantaged. Perhaps one might wonder whether this particular arbitrary difference actually has a systematic effect on government allocations: By the time someone produces a popular commodity, his or her need for education, for example, is likely to have passed, and it is unclear that the distributor of "The Club" really has greater political representation or influence than a nurse. Yet, although there might be some examples where arbitrary differences ought not affect government allocations, still it might be that markets in general properly allow other arbitrary differences to do so.4

Even so, it seems undeniable—the evidence seems "ample"—that poor people in the United States constitute a caste subject to systemic disadvantage.48 To be born poor is to have severely restricted life chances, to run substantially greater risks of private and public violence, to have narrow educational options, and the like. It is one thing to say that in a market economy people who have a morally arbitrary lack of "willingness to work hard" (id) will receive fewer rewards than those who happen to make a product that people arbitrarily like a lot. It is another to say that in a market economy the children of less motivated people will receive fewer resources than the children of lucky ones, that, as Sunstein puts it, "the recognition of such factors is inseparable from the operation of a market economy" (id). It is inseparable from the operation of certain systems of parental rights, of course, but one would need a rather complex argument to connect those systems of parental rights to the market economy. Recall, as well, Sunstein's

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4 Perhaps Sunstein should be taken to mean that people who are systematically disadvantaged are unlikely to "happen[ ] to produce a commodity that many people like" (p 341). His stress on luck as morally irrelevant is in tension with that interpretation.

48 For some statistics, see William Julius Wilson, The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy 174-77 (Chicago, 1987) (concluding that "despite [some] optimistic findings . . . there is still a firm basis for accepting the notion that a ghetto underclass has emerged and embodies the problems of long-term poverty and welfare dependency"); William W. Goldsmith and Edward J. Blakely, Separate Societies: Poverty and Inequality in U.S. Cities 52-54 (Temple, 1992) (noting that "[c]hildren are also highly over-represented among the persistently poor of all races"); Spencer Rich, Poverty Is Blamed For 9-Point Deficit in 5-Year-Olds' IQs, Wash Post A3 (March 27, 1993).
formulation of the equal opportunity principle: “the life prospects of a child born to one family in one part of the country should not be radically different from those of another child born to another family elsewhere” (p 139).49

The anticaste principle thus might lead one to support programs like extremely high inheritance tax rates (coupled, obviously, with restrictions on transfers during the parents’ lives), food stamps, and health care and housing vouchers. Early in the book Sunstein identifies a relevant “narrow conception of equality,” according to which “[n]o one should be deprived of adequate police protection, food, shelter, or medical care” (p 138). When he discusses the anticaste principle, though, his concern about judicial restraint leads him to suggest that judicial enforcement of such rights might constitute “major intrusions on markets,” which might “produce more unemployment, greater poverty, higher prices for food and other basic necessities” (pp 341-42).50

Sunstein has available a fall-back position. Although he explicitly confines his anticaste principle to “the castelike features of the status quo with respect to race, sex, and disability” (p 342), it might be extended without real strain to include poverty. The reason is that, for Sunstein, the “legal assault” (id) on caste is most appropriately conducted by legislatures, not courts: “An anticaste principle is simply beyond the capacities of the judiciary, which lacks the necessary tools” (p 340). Throughout the book, Sunstein emphasizes that many of his constitutional principles are “under-enforced,” in that, though they are constitutional principles, they are to be enforced primarily through legislative action. The anticaste principle, applied to poverty, might be such an under-enforced principle. Even so, I would think that legislatures ought to be cautious in adopting programs that might “produce more unemployment, greater poverty,” and the like.

I have two additional observations about the concept of under-enforced principles. First, it is unclear why the problems of judicial enforcement of an anticaste principle to require food stamps or housing vouchers are more severe than the problems of judicial en-

49 The implicit geographic comparison here does no work; nowhere else does Sunstein discuss geographic differences.

50 Sunstein appears to believe that such programs may “bar use of [f]actors [such as] intelligence, production of socially valued goods, and so forth” in allocating wealth (p 342). Bar here is too strong. The problem with health care vouchers and the like is that they have bad effects on the work incentives of people who receive them. In this sense they diminish the role of intelligence and other such factors as the basis for allocating wealth, but they do not preclude their use.
forcement of the same principle to require funding abortions in cases of rape and incest (which might, after all, be called a program of judicially mandated abortion vouchers). Just as abortion vouchers can be used only in facilities regulated to assure that abortions are performed effectively, so too courts might require that housing or food vouchers be used only in appropriately regulated facilities. If "[a] decision to require expenditures on school busing might . . . divert resources from an area with an equal or greater claim to public resources—including medical and welfare programs for the poor" (p 148), a decision to require expenditures on food stamps or public housing seems immune from that objection, while a decision to require expenditures on abortions in cases of rape and incest seems subject to a modified version of the objection, taking into account the fact that abortion is a medical procedure.

Judges might well find it difficult "to understand the complex, often unpredictable effects of legal intervention" (id). This cautions against judicially mandated voucher programs—as much against abortion vouchers as against education or housing vouchers. Although abortion vouchers and food stamps do not differ because courts face enforcement problems with a food stamp requirement, they differ for other reasons, for example, because one might be concerned that people would change their behavior—would not work as hard—were they assured of minimum subsistence guarantees, but no one could reasonably be concerned that women would change their behavior—be more vulnerable to rape or incest—if they knew that funding for abortions was available under those circumstances. Perhaps more dramatically, one might think that the availability of funding for abortions in cases of rape or incest would increase not the incidence of pregnancy due to rape or incest, but the incidence of claims that pregnancy resulted from rape

51 I suspect that we do not think of abortion funding as entailing use of regulated facilities only because we have become accustomed to the nearly invisible licensing system for doctors and medical facilities. Of course, as Sunstein shows, that is irrelevant: Licensing is a form of regulation, subject to all the usual problems associated with regulation.

52 Perhaps the sense of the difference is that abortion funding addresses a discrete and well-defined subset of the problems associated with poverty, and that courts can manage such narrow interventions. Anti-choice advocates would not think the problem narrow, and in any event surely an ingenious judge could come up with similarly discrete and well-defined subsets in other contexts; providing vaccines for children might be a candidate, for example. Of course there would be difficulties associated with such a program, but the question here is whether the difficulties would be more severe than those associated with abortion funding for rape and incest. It does not seem to me that Sunstein's analysis shows that they are.
or incest. If "the fact that individualized proof of rape or incest is so difficult even in criminal cases [means] that it is extraordinarily hard to make pleading and proof of rape or incest a predicate for abortion" (p 281), it seems equally difficult to do so as a predicate for abortion funding.

The second observation about the idea of underenforced principles is that Sunstein fails to specify what, other than judicial non-enforcement, follows from the fact that a constitutional principle is underenforced. Perhaps courts ought to be particularly generous in interpreting statutes enacted to advance such principles, although exactly how such generosity would differ from the ordinary approach a court ought to take to interpreting a statute needs to be spelled out. Perhaps citizens ought to reward more enthusiastically, through re-election or public acclaim, those representatives who devote particular attention to legislative programs that advance constitutional principles. Or, perhaps legislators ought to feel a moral duty to enact such programs.

Sunstein seems to exclude two other possibilities. First, legislation advancing underenforced norms might prevail over mere policy objections. Because the legislature in adopting the laws at issue would have addressed the policy objections, however, the question for the courts is simply a matter of statutory interpretation: Did the legislature actually intend to override this particular policy objection? Sunstein’s analysis of affirmative action suggests this difficulty. For him, "the Constitution neither forbids nor requires affirmative action" (p 8). But, "[a]s a matter of law, affirmative action for both race and gender is relatively easy" (p 156). Affirmative action programs "have been adopted by democratic bodies," and are "designed to overcome the castelike status of blacks" (id), which brings them into the domain of the constitutionally mandated anticaste principle. In addition, "consequentialist concerns cannot be said to count powerfully against affirmative action and may even argue in favor of validation. In the face of uncertainty, courts should defer to the legislature" (p 157). But, "affirmative action does not appear an impermissible taking of any real entitlement held by whites and men" (p 343). The conflict between affirmative action programs and the interests of whites and men, therefore, appears to be a conflict between an underenforced constitutional norm and a mere policy concern. In such a conflict, which could be restated as a conflict between two policies, legislative preference should prevail; saying that one policy advances a constitutional norm does not add anything to the analysis.
Another possibility is that underenforced constitutional principles serve as especially good reasons for legislative action. One parenthetical comment suggests that Sunstein rules this out. Sunstein writes, “I do not claim that as a matter of policy, affirmative action programs are preferable to those that are not race- or gender-conscious” (p 343). Then, however, it would seem either that affirmative action programs are merely ordinary legislation, unconnected to constitutional principle, or that underenforced constitutional principles do not provide especially good reasons for legislative action.

Sunstein’s attraction to the idea that some constitutional principles are underenforced derives, I think, from the centrism of his bricolage. The idea allows him to avoid the engineer’s criticism, that his commitments have more far-reaching implications than he recognizes, when those implications push outside the bounds of the center. The concept allows Sunstein to identify some attractive norms with the Constitution, while confining their scope by describing them as underenforced. Underenforced norms are precisely those whose implications would go “too far” beyond the center.

III. THE RHETORIC OF CENTRISM

The preceding Section examined how Sunstein’s specific recommendations place him in the center. This Section shows how Sunstein’s rhetoric places him there as well. His general rhetorical strategy is to describe and reject positions to the right and to the left, thereby leaving the center as the only viable alternative. This strategy participates in the engineer’s enterprise, though, and it may fail if Sunstein does not describe accurately every position outside the center, and if his reasons for rejecting the positions he does describe apply to those positions alone.

A. Creating the Center by Rejecting the Extremes

1. Originalism and conventionalism.

Chapter Four, on methods of constitutional interpretation, provides a critique of the right, in the form of Robert Bork’s originalism, and the left, in the form of conventionalism and indeterminacy claims. The criticism of Bork is by now familiar: Bork defends originalism as the only interpretive method that avoids the necessity of making controversial and ultimately indefensible value choices, but that defense of originalism—or indeed any
other—"requires a moral or political theory—in terms of, say, a theory of democracy" (p 101).

The inadequacies in Bork's presentation of originalism, however, hardly demonstrate that originalism could not be based on an acceptable democratic theory, a point Sunstein concedes (p 103). For Sunstein, Bork's work deserves attention "because it states a certain widely held view of constitutional neutrality in such stark form" (p 95). The starkness of Bork's position suggests, though, that it might have flaws that a more subtle originalist thinker could avoid. To reject originalism as an interpretive method, one would first have to construct the best democratic defense of originalism and would then have to show the inadequacies of that defense. But Sunstein merely sets up an opponent on the right to critique, on the way to proclaiming the merits of the center.

The process of creating an opponent outside the center is even more apparent in Sunstein's critique of conventionalism and indeterminacy. In discussing Bork, Sunstein at least has quotations available to show that someone holds the views he criticizes. In contrast, his three-page treatment of the left contains not a single quotation from a conventionalist or indeterminist.

For Sunstein, "[c]onventionalists see the meaning of words as a function of the interpretive principles held by those in positions of authority . . . The conventions that determine meaning inevitably grip and constrain interpretation. They are not subject to anything like substantive or reasoned defense" (p 114). For indeterminists, textual meaning is "indeterminate, undecidable, or irreducibly 'political' and 'subjective'. . . . In the face of conflicting perspectives, often operating across such divides as race, class, and gender, the imposition of one meaning rather than another is a product of arbitrariness, or power, or whim" (id). Both conventionalists and indeterminists "stress the incapacity of interpreters to mediate, through discussion and argument, the different views about which principles ought to be invoked in considering the meaning of the Constitution" (p 115).

Sunstein agrees with these groups that "there is no external perspective, that interpretive principles are inevitable, and that legal meaning cannot be grounded without language or culture" (id). But, he continues, "this does not mean that all argument is manipulation or that good reasons cannot be offered on behalf of one view rather than another. . . . it does not follow that the process of reason-giving is a charade or that we are left simply with whatever people now happen to think" (id). He offers as an alternative a brief description of a "debate" over originalism focusing on Brown. 
His description concludes: "Perhaps [originalists] would emphasize the dangers of judicial discretion that come from abandoning the original understanding; and then we would enter into a discussion of what sorts of interpretive strategies will create a better constitutional system for the human beings who live within it. This is not a question of physics or mathematics, but it is hardly something on which reason has nothing to offer" (p 116).

What Sunstein concedes to conventionalism and indeterminacy with one hand, he takes back with the other, by offering a characterization of them as "stark" as Bork's version of originalism. A conventionalist would agree, at the first stage of the argument, that "good reasons can[ ] be offered on behalf of one view rather than another," but would go on to say that a more precise formulation would be that "what are taken to be good reasons" are offered. Then, through a historical and sociological analysis, the conventionalist would show that what count as good reasons in today's United States would have been dismissed out of hand earlier, or elsewhere. Some conventionalists would conclude that Sunstein's effort to connect interpretation to moral or political theory is simply misguided; others would conclude that the historical contingency of the category "what counts as a good reason" demonstrates that legal systems like ours, which purport to connect interpretation to democratic legitimacy, do not have the legitimacy they claim.

There are responses to these versions of conventionalism, of course, as there are responses to political theories that attempt to justify originalism. The most plausible responses would likely insist on a rather large context in which conventional judgments are stabilized; for John Rawls, for example, the relevant context is "Western society since the seventeenth century." The larger the

53 Note that Sunstein begins here to sketch the political theory that might justify originalism, but, because he has dismissed Bork's originalism, and therefore originalism itself, a few pages earlier, he does not address the merits of this theory. All he says is, "[i]ndeed we now have a wealth of questions, involving facts and values, with which to grapple" (p 116). Somehow I doubt that a serious originalist would think that Sunstein, with this discussion, had chased the position from the field.


55 One reader of a draft of this Review suggested that what follows in the text commits the error I criticize Sunstein for, in creating a "good conventionalist" to respond to Sunstein, without showing that any particular conventionalist holds those views. For present purposes, though, I am a conventionalist, and (I believe) a good one, so the analysis in the text can be attributed to a real conventionalist.
context, however, the less it matters that there is no external perspective. In any event, saying that conventionalism, in its best form, means that “the process of reason-giving is a charade,” is not a plausible response to those conventionalists who analyze what counts at particular times and places as good reasons.

Acknowledging that “there is no external perspective” (p 115), Sunstein seems nonetheless to take one. His “good reasons” might be transcendentally good, in which case he is committed to an external perspective. Or, they might be the reasons that seem good from the perspective of the center, in which case he has not addressed conventionalism’s claims. He argues as though the perspective from the center was not a perspective at all, which I suppose is the most important point one could make about Sunstein’s presentation. Sunstein says that Bork’s position is “not so much defended as proclaimed” (p 103). I believe that the same could be said of Sunstein’s rejection of conventionalism and indeterminacy. Yet only engineers defend; bricoleurs proclaim. What is a fair criticism of Bork is only an observation about Sunstein.

2. Sexual conservatives, libertines, and civil liberties.

The rhetorical strategy of rejecting the extremes recurs throughout The Partial Constitution. Another example arises at the conclusion of Sunstein’s argument about pornography. The exposition leading up to the example will at first seem to introduce a quite different point, to which I will return, but the exposition is essential to connecting the rhetorical moves Sunstein makes.

As we have seen, Sunstein treats the regulation of pornography as raising questions of sex discrimination. He begins his discussion by describing two positions, which he says “have captured the current constitutional landscape” (p 261). The first position is that obscenity is excluded from the category of speech protected by the First Amendment. This position, he writes, is “sometimes associated with the idea that sexuality is private or sacred” (p 262), because obscenity makes public that which should be private. The other position is that obscenity and pornography are “speech, not sex” (id). Sunstein connects this position to a “neo-Freudian[ism]” that “rests on the perceived naturalness of sexual drives, and [ ] emphasizes the need to liberate those drives from the constraining arm of the state” (id). Although Sunstein con-

If the context is as large as “all people at all times,” the sense in which the perspective is external is obscure.
cedes that the position that treats obscenity as speech might “in-vok[e] the need to respect divergent conceptions of the good,” he insists that both positions treat sexuality as “natural” (pp 262-63).

What is peculiar about this construction is that Sunstein conflates a civil libertarian view of obscenity as speech with a libertine one. Those who think that obscenity and pornography should be treated as speech rather than sex need not—indeed, often do not—provide an affirmative defense of obscenity or pornography as a positive social good, an expression of one of the “divergent conceptions of the good” that a liberal society ought to respect. The more common civil libertarian position is that authorizing government officials—assistant prosecutors, municipal judges, and the like—to determine that a particular item of published material is pornographic runs too great a risk that material that is not pornographic will be suppressed. Sunstein says that the antipornography position “has the advantage of concentrating on real-world harms” (p 267), but, because he contends that the opposition to antipornography campaigns rests on the libertine defense of pornography, he overlooks the real-world concerns about enforcement that motivate large parts of the civil libertarian position. So, he writes, “it is an exceedingly strange artifact of current legal thinking that an attack on material featuring sex and violence against women should be believed simultaneously to endanger art relating to homosexuality” (p 270). He concludes his discussion with this sentence: “As a matter of principle, the argument for restrictions on pornography containing violence against women does not require restrictions on all sexually explicit speech” (id, emphasis added).

Surely he is right about the conceptual point, but that is not what civil libertarians worry about; opponents of antipornography regulations rarely argue that if a city suppresses violent pornography it can be criticized for acting inconsistently if it fails to suppress all sexually explicit speech, or art relating to homosexuality. Their concern is that, in the real world, the odds are too high that officials enforcing antipornography regulations will selectively turn their attention to art relating to homosexuality, or to other material that, even on Sunstein’s presentation, ought not be suppressed. Sunstein passes this concern by observing only that it may not be “easy to design regulation with sufficient clarity and narrowness,” and that “it is those questions that we should be addressing” (id). As suggested by the earlier discussion of the difficulties Sunstein should have in distinguishing between violent pornography and
hard-core pornography suggests, these difficulties among the ones civil libertarians do address.\textsuperscript{57}

B. Theory-Driven Self-Assurance

In constructing the libertine position, Sunstein uses another rhetorical strategy. The driving theme of \textit{The Partial Constitution} is that an inadequate conception of status quo neutrality pervades contemporary constitutional law. Status quo neutrality treats socially constructed arrangements as natural. It helps the overall argument to show that naturalist arguments crop up everywhere, and on both sides of the conventional treatment of the problems Sunstein addresses. So, for example, opponents of obscenity believe "in the naturalness of sexual drives" and that obscenity "depicts sexuality in a debased and unnatural way," while libertine defenders of obscenity, in their neo-Freudianism, equally treat sexual drives as natural, and "emphasize[ ] the need to liberate those drives from the constraining arm of the state" (pp 263, 262). By placing naturalism on both sides, Sunstein places himself in the center.

This has two notable consequences. First, as in the presentation of the pornography argument, it often gives a reader the strong impression that Sunstein is striving too hard to identify the status quo naturalism that, he argues, is on both sides of the center. The argument seems driven by the overarching theory more than by the data to be assembled from the arguments actually made by those on opposing sides or by the actual state of contemporary law. Second, the intractability of the material when turned to Sunstein's purposes leads to analytic distortions and inconsistencies. These too are engineer's criticisms.

1. Theory-driven arguments.

The theory-driven character of Sunstein's arguments comes out in several ways. Often Sunstein describes an argument and says that "something like this" is what people contend. So, for ex-

\textsuperscript{57} Of course there are responses to the civil libertarian concerns. In particular, in a world without a state action doctrine, see Section III.B.1.b, the relevant question is whether the damage inflicted by government officials through the suppression of art relating to homosexuality and the like is greater than the damage inflicted by non-government actors by the materials government officials will in fact suppress. Opinions will differ on this; my view is that officials are likely to suppress rather little pornography and rather more art relating to homosexuality and the like, resulting in a loss of liberty for some not offset by significant gains in liberty for women.
ample, he writes that “[i]deas of this general sort”—that some democratic aspirations existed apart from private preferences—“took . . . shape during the founding period” (p 163).\(^5\) It turns out, of course, that it is much easier for Sunstein to show that those arguments rest on naturalist premises, or that they are inconsistent with his non-naturalism, than to show how the arguments others have made rest on such premises or are consistent with his position.

a) Naturalizing segregation and gender discrimination. Probably the most dramatic theory-driven argument is Sunstein’s attempt to show that *Plessy*, *Lochner*, and *Muller* rest on the same premise, taking “existing practice as the baseline” (p 41). This clearly is true of *Lochner*; it is, indeed, the now-standard interpretation of the case. It is less clearly true of *Plessy*. The difficulty is that the Louisiana legislature *required* segregation where it had not occurred before; it was, in that sense, changing rather than ratifying the market-based status quo.

According to Sunstein, *Plessy* “treats the social sphere—and the established usages, customs, and traditions of the people—as if they were free from, independent of, and immune to law” (p 43). This claim depends on a controversial characterization of the “customs” of the people. It is true if the relevant custom is a widespread though not universal practice of segregation. It is not, however, if the relevant custom is the widespread though not universal commitment of decisions to market processes. If the custom is the latter, why did the legislature have to require segregation on privately-owned and operated trains? In a market society, those who desired segregated facilities for themselves should be able to purchase them at a high enough price; those who desired a society in which no one could use integrated facilities needed the force of the state to overcome collective action problems that would arise if they tried to buy from railroads their legal right to operate integrated facilities. Segregation by law, then, is not “part of a voluntary and law-free ‘social’ sphere” (p 44); it effectuates choices made elsewhere. The segregation statute, that is, can be understood as an attempt to intervene in the social sphere, to alter the usages and customs that emerge from the market; in intervening, the legislature rejected the social sphere’s immunity to law. Indeed, the Court distinguished between civil rights, which were pro-

\(^5\) See also p 384 n 9 (“Something of this general sort is suggested in” several cited works.).
tected by the Constitution, and social rights, which were not, precisely to allow the legislature to intervene in the sphere of social rights.

For all this, though, Sunstein's point is basically right. The rhetoric of Plessy did naturalize segregation by taking it, rather than the market, as the relevant custom. Yet, of course, treating the market as the relevant custom, and finding segregation by law unconstitutional, would similarly naturalize a social construction. Thus, as Sunstein argues, the question of segregation's constitutionality cannot be determined by reference to custom or tradition.

The argument gets more strained when Sunstein takes up Muller, which upheld a maximum-hours law that applied only to women. The statute, according to the Court, was justified because of the differences between the sexes. Again, according to Sunstein, this endorses status quo neutrality because 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" (p 62). But, again, the legislature was altering the status quo; the apparently inherent differences between men and women were not sufficient to lead market forces to impose a maximum-hours restriction on women's work.

Perhaps the underlying argument is that the legislatures were responding to an unfortunate fact of human nature, that some people—those willing to employ women on the same terms as men, for example—disregarded women's true natures, and had to be disciplined by law.59 This argument suggests that the legislatures were acting in a perfectionist manner: employers' preferences had adapted to the pressures created by the market, and the legislatures were attempting to offset those adaptive preferences. Here again Sunstein's liberalism overcomes his perfectionism. Or, alternatively, perhaps the argument establishes that the Court believed there to be a number of natural orders, with the "natural" gender and race hierarchies having priority over the natural market order in cases of conflict.

If status quo neutrality means that courts treat departures from the status quo as particularly troublesome, neither Plessy nor Muller illustrates status-quo neutrality in operation. In an important way, in both Plessy and Muller the status quo was desirably neutral; before the legislatures acted, African-Americans and whites, men and women, were treated the same. To attack those

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59 As in the analysis of Plessy, this treats the statute as the solution to a collective action problem.
decisions, a critique of status-quo neutrality is irrelevant. What matters is the anticaste principle. Here Sunstein succumbs to the temptations of engineering, attempting to unify disparate arguments rather than presenting them as *bricolage*.

b) The *state action doctrine*. A similar difficulty characterizes Sunstein's treatment of the *state action doctrine*. Here, he correctly says, status quo neutrality has "played the crucial role" (p 72). This explains why "governmental repeal of a trespass law or refusal to enforce a contract counts as state action—whereas a repeal of an antidiscrimination law, enforcement of a trespass law, and enforcement of a contract probably does not" (id). Under the state action doctrine, "existing distributions and the common law provide the benchmark from which to measure intervention" (p 75).

Sunstein's stance toward the state action doctrine is difficult to discern, in part because of his focus on the issue of status quo neutrality. Consider government enforcement of a trespass law. I fail to understand why such enforcement is probably not state action (although, of course, it might be constitutionally permissible state action). Later, in discussing free expression, Sunstein writes: "A private university, expelling students for (say) racist speech, is not a state actor. The trespass law, which helps the expulsion to be effective, is indeed state action" (p 205). But, he correctly says, the trespass law is constitutional because it is content-neutral. That is to say, enforcing a trespass law is constitutional state action.

That view leads Sunstein to conclude correctly that "common law rules are themselves subject to constitutional objection" (p 76). Perhaps Sunstein means that many people would unreflectively think that enforcing a trespass law was probably not state action, or that under contemporary state action doctrine it probably is not. As to the latter, the assertion must be examined in more particular contexts when someone might ask whether enforcing a trespass law was state action. Consider a suit against a police officer for using excessive force in the course of enforcing a trespass law; I doubt that the officer could defend on the ground that "enforcing a trespass law" is not state action. Or, suppose a homeowner allows everyone but African-American children to cut across his lawn on the way to school. Were I the lawyer for African-American children arrested on the homeowner's request for trespass, I would argue that the homeowner had allowed school-children to create something like an easement in the short cut, and that, on direct analogy to *Shelley v Kraemer*, 334 US 1 (1948), the courts cannot use their general trespass law to enforce a discriminatory easement. That argument might not prevail, but it is, I believe, substantial enough to show that it cannot be said without more argument than Sunstein provides that under contemporary state action doctrine enforcing a trespass law is probably not state action. For a discussion of when enforcing a trespass law is state action under current doctrine, see *Lavoie v Bigwood*, 457 F2d 7 (1st Cir 1972).
When a private person or corporation exercises lawful power to exclude another from some resource, such as a home or a shopping center, the common law rules conferring that power must be examined to see if they conform to constitutional requirements. As Sunstein puts it, "[t]he conferral of [a] right is an exercise of state power" (p 208), and of course all exercises of state power are subject to constitutional requirements.

From this it would seem to follow that, in a post-New Deal world, there should not be—because there cannot coherently be—a state action doctrine. Sunstein appears to resist that conclusion, "reconceiv[ing]" (p 159) but not rejecting the doctrine in terms as clear as his rejection of the unconstitutional conditions doctrine. For him, "the state action doctrine calls for an inquiry into whether the state action at issue in the relevant case violates the pertinent provision of the Constitution" (pp 159-60). So, for example, does a facially-neutral trespass law conferring power on a shopping mall owner to exclude political protestors from the mall violate the First Amendment? Does a facially-neutral rule requiring courts to enforce all restrictive covenants violate the anticaste principle when applied to a racially restrictive covenant? These questions, Sunstein says, are "not always [ ] easy" to answer, but they are "the right one[s]." They are "question[s] about the meaning of the Constitution, not about state action" (p 160).

Sunstein's analysis is unobjectionable.61 The only difficulty is that this "reformation" (p 161) of the state action doctrine eliminates it as a doctrine. The state action doctrine operates, in contemporary constitutional law, as a "trans-substantive" rule.62 Consider Jackson v Metropolitan Edison Co.63 as an example. The Court there held that the actions of a regulated public utility were not state action, so the utility could ignore the constitutional norms of fair process when it terminated service to a customer. As Justice Marshall pointed out in dissent, in finding that the utility was not engaged in state action, the Court implied that the utility could terminate service to racial minorities without constitutional liability: if the utility is not a state actor when it adopts its termination procedures, it is not a state actor when it decides who to terminate. The state action doctrine, that is, identifies a domain

61 For an earlier, more opaque statement of the point, see Laurence Tribe, Constitutional Choices 255-57 (Harvard, 1985).
within which whatever the private actor does is free from constitutional scrutiny.

Consider how Sunstein's reformed doctrine would operate. In *Jackson* itself, the court would ask, "Does the state law conferring unbridled discretion on the utility to design termination procedures violate the constitutional requirement that the government act only after following fair procedures?" The answer is almost certainly no. In the race discrimination example, the question would be, "Does the state law conferring unbridled discretion on the utility to select who to terminate violate the anticaste principle?" Even though the state law is facially neutral, and even though Sunstein cautions against invalidating statutes merely because of their disparate racial impact, the answer to that question might well be yes. Sunstein's approach thus eliminates the trans-substantive element that distinguishes the state action doctrine from other discrete, substantive doctrines about procedure, equality, or free expression.

Sunstein's ambivalence about whether to retain a state action doctrine is connected to his defense of the market as "a source of important human goods, including individual freedom, economic prosperity, and respect for different conceptions of the good" (p 341). But, because "[m]arkets [ ] reward qualities that are irrelevant from a moral point of view" (id), replacing a trans-substantive state action doctrine with a collection of discrete substantive rules threatens the market's immunity from moral scrutiny. With respect to every morally questionable action taken within the market's domain, one would have to ask, "Does the legal rule conferring power to take that action comport with the restrictions placed on legal rules by the anticaste principle, free expression principles, fair procedure principles, and the like?" In this way, every private action becomes subject, indirectly but no less intrusively, to constitutional scrutiny.

2. Minor peculiarities and the rhetoric of the center.

Going through the pages of *The Partial Constitution*, a reader is likely to notice some minor peculiarities. I offer a brief and incomplete catalogue here, not to carp at Sunstein's arguments but to show how the peculiarities reveal the depth of his commitment to the center.

(a) On page 70, we find, "[t]he takings clause protects private property, and in so doing it protects against repeals, partial or total, of the trespass laws." On page 73, Sunstein discusses
PruneYard Shopping Center v. Robins, where the Court rejected a challenge under the Takings Clause to a state law decision requiring a shopping mall operator to make its facility available to picketers. Sunstein calls the state decision a "partial abrogation of the state law of trespass," and says that "a fair reading of the opinion is that some large-scale abstractions of state trespass law would amount to an unconstitutional taking." Perhaps Sunstein just failed to include in his first formulation the qualification he placed in the second.

(b) Sunstein is hesitant to recommend an aggressive judicial stance "when courts are asked to attack status quo neutrality on their own," as occurs when they are asked to invalidate statutes with differential racial or gender impacts (p 151). Later he points out that when the courts require discriminatory intent and reject differential impact, they rely on notions of compensatory justice, which he thinks inappropriate. When he recommends supplementation of compensatory justice, he again writes that a differential impact standard "[p]robably . . . should be set out by legislatures rather than by courts, because of the superior democratic pedigree and fact-finding competence of the former" (p 345). Sunstein does recommend "[s]erious judicial scrutiny of content-neutral restrictions" of expression because they "can, in view of an unjust status quo, have severe adverse effects on some forms of speech" (p 227). Are the fact-finding difficulties less severe here than in cases of differential racial or gender impact? Or the courts' relative lack of democratic pedigree? Recall, in particular, that we can make the most sense of Sunstein's concern about democratic pedigree by saying that it has less force in domains connected to democratic deliberation, which include "rights central to the democratic process" like free speech and, notably, "groups or interests that are unlikely to receive a fair hearing in the legislative process" (pp 142-43). On what basis, then, does Sunstein distinguish between his endorsement of a judicially enforced differential-impact standard for free speech but not for race and sex discrimination?

Sunstein also contends that "[a] test that excludes more blacks than whites . . . should be invalidated unless shown to be substantially related to an important state interest" (p 345). What "invalidated" means here is obscure. If a legislature set the standard, one would think that it ought not adopt the test in the first place. Sunstein may have in mind a hierarchical relation, with the legislature adopting the standard and courts applying it to tests adopted by administrative agencies or subordinate legislatures. Then, however, it would help to have an explanation of how the courts' fact-finding capacity is improved when they act pursuant to a legislative standard compared to a constitutional one.
Sunstein urges expanded rights of access to the media, to shopping centers, and to public forums. In discussing media access, he suggests that "creation of such a right would call for an unusually intrusive judicial role . . . [and] might also strain judicial competence in light of the courts' limited fact-finding and policymaking capacities" (p 224). For shopping malls "state legislatures and state courts should be encouraged" to create greater access; for public forums "Congress, state legislatures, and state courts" should decide whether "government has sufficiently strong and neutral reasons for foreclosing access to the property" (pp 225-26). The presence of state courts in these recommendations is odd, for Sunstein nowhere discusses whether or to what degree state courts differ from federal courts in their fact-finding and policymaking capacities.

In developing his interpretive principles, Sunstein urges that constitutional provisions be read "in light of one another" (p 120). So, for example, "one ought not to read the equal protection clause in a way that would do fundamental damage to the explicit protection of private property and freedom of contract. A socialist system would indeed be unconstitutional" (id). The conclusion does not follow. Indeed, one might say exactly the opposite: The Takings Clause on its face licenses "a socialist system." For it says that governments may take private property as long as they compensate. Congress could therefore create socialism by taking and compensating, and then taxing at progressive rates the income resulting from use of the compensation. The only argument against such a course would be that redistribution is not a "public purpose." Sunstein explicitly says that "unless we are to return to Lochner, redistributive . . . programs are no longer constitutionally out-of-bounds" (p 298). Perhaps Sunstein meant that courts ought not interpret the Equal Protection Clause to require socialism.66

Sunstein defines egalitarianism as "an effort to ensure against large disparities in wealth and resources," and says that "[e]galitarianism, as a political creed, is foreign to liberal republicanism as it has been understood in American public law" (p 138). He urges instead a principle of freedom from desperate conditions,

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66 For another example of Sunstein's concern that he not be taken to endorse socialism, see page 59 (after commending the New Deal's willingness to experiment with changes in status quo distributions, Sunstein writes, "[t]he New Dealers were hardly socialists"). As Sunstein understands it, socialism means "freewheeling public readjustment" of private property relations (p 129).
saying that “this form of freedom . . . was enthusiastically en-
dorsed by both Jefferson and Madison” (id). He then quotes Jef-
ferson—“I am conscious that an equal division of property is im-
practicable. But the consequences of this enormous inequality
producing so much misery to the bulk of mankind, legislatures
cannot invest too many devices for subdividing property”—and
Madison—we can fight the “evil of parties” by “the silent opera-
tion of laws, which, without violating the rights of property, reduce
extreme wealth towards a state of mediocrity, and raise extreme
indigence towards a state of comfort” (pp 138-39). In their concern
to eliminate “enormous inequality” and “reduce extreme wealth,”
Jefferson and Madison appear to be egalitarians under Sunstein’s
definition.

None of these peculiarities are significant in themselves. They
could be eliminated, or appropriate qualifications inserted, without
damaging Sunstein’s argument at all. The opposition to socialism,
of course, reflects Sunstein’s commitment to the center. The more
interesting question, though, is why Sunstein introduced these pe-
culiarities? I believe that Sunstein’s confidence that his answers
are right, that he is not offering an interpretation of the Constitu-
tion but the interpretation of the Constitution, leads him to natu-
ralize his judgments, whatever they happen to be. And, after all, to
note these inconsistencies is again to apply the engineer’s stan-
dards to the bricoleur’s work.

This also accounts for Sunstein’s repeated assertions that his
conclusions are surprising. Constitutional theory is notoriously
plagued by the inconvenient fact that authors’ conclusions about
what the Constitution requires, permits, or prohibits, track the au-
thors’ policy preferences: One does not imagine, for example, that
Michael McConnell thinks it perfectly dreadful that the Constitu-
tion unfortunately requires public funding of elementary and sec-
ondary education conducted in religiously affiliated schools, or that
Laurence Tribe thinks it awful that the Constitution unfortunately
protects the right of women to choose to have abortions. For most
theorists, it comes as no surprise that their interpretations of the
Constitution lead to policy conclusions they would otherwise come
to. As engineers, they set out to develop constitutional interpreta-
tions that cohere with their prior judgments. Sunstein is different.
As a bricoleur, he assembles arguments from the materials at
hand, with no expectation that they will do anything other than
contribute to the general project of articulating a liberal centrist
position. The precise substantive content of what the bricoleur
produces is indeed surprising, in the way a novel work of art can be surprising.

Sunstein regularly criticizes status-quo neutrality as naturalizing the social order, that is, for treating as a product of natural forces what must actually be understood as a product of social choice. Yet, Sunstein, too, naturalizes his judgments, treating as an incontestable fact of the matter what is the result of his own interpretation.

C. The Authoritarian Rhetoric of the Center

Sunstein criticizes originalism and conventionalism as "authoritarian," because they refuse to defend law "by reference to reasons" (p 107). *The Partial Constitution* illustrates the difficulties liberal centrists face when they try to give reasons for their positions. The confrontation between liberalism and postmodern conventionalism has demonstrated at least three things. First, reconstructing liberalism in the face of a sensibly restricted conventionalism is not easy. Even such a restricted conventionalism requires liberals to consider that what they once thought were transcendental "reasons" may be as partial as sectarian religious views. Second, a reconstructed liberalism will probably not agree that there is no external perspective, because something like such a perspective seems necessary to deal with the difficulties of social life in a wildly pluralist social world. Third, though, a reconstructed liberalism will be chastened about what can be seen from the external perspective. It is likely to find that a rather wide range of policies is compatible with the demands of liberalism.

*The Partial Constitution* is replete with assertions that reasons could be provided for the recommendations Sunstein makes, but the assertions are I.O.U.s that Sunstein rarely pays off. For example, after criticizing the way ideas about compensatory justice interfere with a sensible approach to managing risks, Sunstein gives readers a couple of pages of recommendations about how government "should" deal with risk (pp 336-38). Some are banal: "Government should also attempt to develop a system of priorities, putting its limited funds where they will do the most good" (p 336). Others are moderately revisionist: "Exposure to risk should itself be a liability-creating event" (p 338). All, however, are "not so much defended as proclaimed (p 103)."
I use Sunstein’s phrase about Robert Bork to suggest that his is a rhetoric of legal authoritarianism analogous to Bork’s. On a deeper level, Sunstein’s critique of conventionalism, his acceptance of the proposition that “there is no external perspective” (p 115), sits uneasily with the rather comprehensive set of policy recommendations he makes. This difficulty arises because Sunstein is also committed to a relatively standard centrist liberalism.

That a reconstructed liberalism is likely to be rather capacious poses the largest threat to the detailed set of recommendations in *The Partial Constitution*. I have little doubt that a reconstructed liberalism will continue to be committed to principles of free speech and sex equality described rather generally. It seems to me quite likely, though, that such a liberalism will find room for many specifications of those principles. Even in the circumstances of the contemporary United States, privately financed political campaigns might well be as compatible with liberalism as publicly financed ones, for example. A European policy about abortion and child-rearing might be as consistent with liberalism as the policy Sunstein recommends.

In contrast to what I believe will be the capaciousness of a reconstructed liberalism, Sunstein’s prescriptions close down options. What seems to him sensible policy becomes, through his rhetoric, what liberalism in the contemporary United States requires. Like many in the center, for example, Sunstein, though opposed to large-scale efforts to transfer wealth from the rich to the poor,

69 endorses the transfer of wealth from poor to rich that occurs through high-minded public broadcasting (pp 221-22).

67 As noted earlier, see notes 54-55, I regard myself as a conventionalist and indeterminist. Having been included in a group Sunstein calls authoritarian (p 107), I think it appropriate to suggest how he might also be so labelled. The exercise suggests, of course, that the term may not be analytically useful.

68 Because Sunstein is a critic of *Roe v Wade*, the issue for him should not be whether the result in *Roe* can be justified on other grounds, such as his anticaste principle, but what set of policies might now be adopted to put the United States on a course to a policy compatible with liberalism. Anti-choice feminists (who do exist) contend, against Sunstein’s assertions, that there are anti-choice policies that could now be adopted that would lead the United States to a more European policy. See, for example, Glendon, *Rights Talk* at 64-66 (cited in note 42).

69 His defense of the market is not merely that market-based systems are constitutional, but that they are affirmatively desirable even if they result in large inequalities in material well-being. See pp 228, 341-42.

70 I describe this as a transfer on the assumption that the tax system is not progressive enough to offset the fact that wealthy people consume more high-minded public broadcasting than less wealthy ones. The accuracy of the description of course depends both on the degree of progressivity and the size of the differential in consumption.
recommendation is prefaced by the statement that “we should be frankly experimental” (p 221), but in context, and coupled with Sunstein’s pervasive use of the word “should” in presenting policy recommendations, the import is clear: A decent liberal society roughly like ours ought to have subsidized high-minded public broadcasting.

I should stress that my point here is about Sunstein’s rhetoric, not about his analysis. Much of the analysis leads to the modest conclusion that courts should not interpret the Constitution to bar legislatures from experimenting with policies within the domain of reconstructed liberalism. They do not do so, of course, in the public broadcasting example, for only a handful of the most eccentric right-wing libertarians think public broadcasting unconstitutional. And, Sunstein says often enough that what the best policy would be for the contemporary United States will frequently depend on an assessment of facts that are not readily at hand. Yet, in the end, Sunstein leaves readers with little doubt about how, he believes, a sensible person would resolve the factual controversies. His discussion of the inadequacies of leaving broadcasting entirely to the market, for example, contains several pages presenting “[s]ome facts” (pp 215-17). I can imagine an analyst committed to narrative jurisprudence presenting those facts rather differently, treating the short-form political advertisement as a narrative that can be more effective in inducing serious consideration of public issues than a more extended, argumentative speech.

Although The Partial Constitution offers reasons for its conclusions, readers will have no doubt that they ought to treat those reasons as rationally compelling, a term that itself evokes the image of authoritarianism. Sunstein’s performance undermines his adherence to a program of offering reasons for others to consider and reject if they have reasons to do so.

Conclusion

The gaps, inconsistencies, and peculiarities I have identified are characteristic of how heterogeneous tools and materials are used in bricolage. As I have repeatedly indicated, they are what an engineer would say about bricolage. The bricoleur is constrained differently. Bricolage must “work,” too, but it works when the culture into which it is inserted finds it acceptable. In this sense

71 Similarly, though Sunstein says that some facts about abortion are “contested” (p 278), he does not provide the evidence that creates the contention.
bricolage might be seen as necessarily an activity of the center. Precisely because Sunstein is located at the center, that is, The Partial Constitution is a successful work.

Yet, in introducing the idea of bricolage, Lévi-Strauss pointed the way to a postmodernist understanding of argument, which would welcome bricolage at every point of the political spectrum. The engineer, according to this interpretation of Lévi-Strauss, stands for the project of Enlightenment rationality. But, according to some postmodernists, that project failed precisely because it treated social life as a form of engineering rather than as bricolage. Sunstein evokes this criticism of the all-encompassing Enlightenment project in concluding his discussion of conventionalism: “[t]his is not a question of physics or mathematics, but it is hardly something on which reason has nothing to offer” (p 116).

The bricoleur would not be disturbed in finding that reason has nothing to offer. That Sunstein cares about offering reasons again locates him in the center, because (from the perspective of the center) the postmodernist position that Sunstein selectively appropriates is unreasonable when pursued too far. For the bricoleur, in contrast, all there is in social life, and so all there is in law, is the creative selection and transformation of actions and ideas that happen to be rattling around as the contingent residues of what has gone before. The bricoleur invites us to take an aesthetic view of reason, not a rationalistic one.

How one taking such a view can also adopt a critical stance toward any intellectual production is notoriously puzzling. The greatest temptation is to apply direct political criteria: A person of the center will think The Partial Constitution a powerfully argued and persuasive work; a person on the right will think it peculiarly inconstant in its sporadic defense of judicial restraint; a person on the left will think it peculiarly inconstant in its sporadic defense of judicial activism. As Alexander Bickel pointed out when he was committed to the Enlightenment project, this reduces critical evaluation to “moral approval of the lines.” Worse, the postmodernist critique makes the word moral redundant.

Though it has its own difficulties, an alternative is to treat intellectual productions as performances, and to develop a language of critical appreciation. So, for example, one might say that the fundamental difficulties in The Partial Constitution arise from its rhetoric. Sunstein’s verbal constructions—the assertion that “to

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say X is hardly to say Y," or that his conclusions are "surprising"—make the work's political centrism too apparent. Sunstein might have done better to write that his conclusions were "obvious" and followed "straight-forwardly" from his description of the current Constitution.

One might also say that *The Partial Constitution* has a certain charm, arising from the way it selects and transforms ideas whose originators thought were destabilizing or radical (on the right or the left) and turns those ideas to the service of the center. For me, watching Sunstein at work is, on this view, something like watching *The Terminator*. The film is a modern classic. At its heart is the Terminator himself, a tragic hero who attempts to overcome all obstacles on the way to his goal but is destined to fail. So too, I believe, with any defense of legal centrism, even as skilled as Sunstein's. But, perhaps that means only that I remain too much an engineer, and that Sunstein the *bricoleur* is, as Lévi-Strauss believed, the hero of contemporary legal thought.

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72 See *The Terminator* (Orion, 1984). The Terminator is the hero, in my view, in large part because of the extratextual point that he is played by Arnold Schwarzenegger, who *must* be the hero of any film in which he appears. Arguably, however, the fact that a sequel was produced in which the Terminator was the unambiguous hero suggests that Schwarzenegger thought it necessary to straighten out his character's position.