

William & Mary Law Review

Volume 35 (1993-1994)
Issue 4 Symposium: *The Revision of Article 2 of
the Uniform Commercial Code*

Article 13

May 1994

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John O. McGinnis, *The Partial Republican*, 35 Wm. & Mary L. Rev. 1751 (1994),
<https://scholarship.law.wm.edu/wmlr/vol35/iss4/13>

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BOOK REVIEW

THE PARTIAL REPUBLICAN

THE PARTIAL CONSTITUTION, by Cass R. Sunstein.*
Harvard University Press, 1993. Pp. 414. \$35.00

JOHN O. MCGINNIS**

Professor Sunstein is the foremost exponent of civic republicanism and *The Partial Constitution*¹ is his summa. Therefore, the book is signally important because civic republicanism has become a rallying cry for a platoon of leading law professors engaged in constitutional law and indeed public law generally.² Unfortunately, however, if Sunstein's book is fairly representative of the movement, civic republicanism is unlikely to last. His is a constitutional jurisprudence that appears to exhaust the entire spectrum of error—historical, scientific, and philosophical—that may derange a legal theory.

Professor Sunstein's substantive theory is that the Constitution's overarching objective is to create "a republic of reasons": a regime where citizens will collectively deliberate on all social practices and discard those not justified by reasons.³ Like many

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1. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

2. In the last nine years, the term "civic republican" or its cognate has been used in 258 articles collected in LEXIS. For a discussion of the reasons that civic republicanism is popular in the current legal academy, see *infra* notes 153-62 and accompanying text.

3. SUNSTEIN, *supra* note 1, at 17.

civic republicans, his constitutional theory appears to have both a historical component (such a deliberative regime was the explicit or implicit essence of constitutional philosophy at the nation's founding) and a social theory component (only social practices founded on reasons as distinguished from practices founded simply on the interests of social groups or what Sunstein terms "naked preferences"⁴ are just). Both components are deeply and variously flawed.

The greatest virtue of *The Partial Constitution* is its admirably simple, straightforward, and coherent structure. Sunstein argues that the essence of the historical Constitution was to establish a deliberative democracy in which citizens could reason together to transform society into a more just social order.⁵ He rejects the idea that the Constitution's central purpose was to protect natural rights. Indeed, according to Sunstein, rights are not natural but entirely products of law.⁶ Thus, a jurisprudence designed to protect natural rights pretends to employ neutral principles but actually is biased by an interest in protecting the status quo. He labels this incorrect approach to constitutional interpretation "status quo neutrality."⁷

Sunstein next offers a brief history of Supreme Court jurisprudence in which an interpretation of the Constitution that promotes a deliberative democracy of social transformation has competed with interpretations that are biased by the objective of protecting "status quo neutrality."⁸ According to Sunstein, the latter are exemplified by such cases as *Plessy v. Ferguson*⁹ and *Lochner v. New York*.¹⁰ *Plessy* mistakenly affirmed the dominant customs of segregation as natural; *Lochner* mistakenly affirmed common law property rights as the natural template of

4. *Id.* at 25-27.

5. *Id.* at 20-21.

6. *Id.* at 3-4. For further discussion of this point, see *infra* notes 70-75 and accompanying text.

7. *Id.*

8. *Id.* at 40-68.

9. 163 U.S. 537 (1986).

10. 198 U.S. 45 (1905).

society. Such bias has tended to make judicial interpretation of the Constitution "partial," hence one sense of the book's title.¹¹

Sunstein recognizes that an emphasis on the Constitution's socially transformative potential has required revisions in the separation of powers and federalism, because structures facilitating intragovernmental conflict may inhibit social change.¹² For Sunstein, however, these structural principles seem less important because the Constitution's pervasive requirement that collective deliberation be reasoned itself operates as a substantial restraint on government action motivated by improper interests. Indeed, such is his respect for the reason of the deliberative process that he would rely more on the political branches than the judiciary to work out the substantive principles of the constitutional order.¹³ Hence, because of the importance of executive and legislative interpretation, judicial interpretation of the Constitution is inevitably "partial" in a second sense.¹⁴

The remainder of the book is mostly devoted to using this general theory to transform specific areas of constitutional law, such as the First Amendment and abortion.¹⁵ Sunstein's discussion of the First Amendment is of particular importance to his general theory, because it addresses the problem of assuring the wide dispersion of information necessary to collective decisionmaking—a central issue for any theory that views deliberative democracy as the heart of the Constitution. If reason is to be the principal check on government tyranny, it will be essential that citizens be well informed. Therefore, it is entirely consonant with the premises of civic republicanism for Sunstein to construct his First Amendment jurisprudence with the objective of providing the citizen with diverse and relevant public policy information.

Unfortunately, the deliberative regime of social transformation that Sunstein discovers at the heart of the Framers' Constitution is constructed from historical distortions and exaggerations, suggesting that bad history is the homage Sunstein pays

11. SUNSTEIN, *supra* note 1, at v.

12. *Id.* 60-61.

13. *Id.* at 123-61.

14. *Id.* at vi.

15. *Id.* at 197-290.

to originalism.¹⁶ In particular, he is not persuasive in suggesting that "republicanism" explains the fundamental commitments and purposes of the Constitution better than natural rights or pluralist political theories. The first part of this Essay will demonstrate that, to the contrary, republican theory as embraced by the Framers was consistent with the view embodied in the Constitution that the protection of natural rights is the primary, if not the sole, object of government and that mechanisms of pluralism are the best way of maximizing that protection. Indeed, the normative core of republicanism was that the State should be ruled for the common good rather than for the ruler's good. This republican tenet comported with the natural rights understanding of the Constitution because the common good was widely understood to be coterminous with the protection of natural rights.

Republicanism at the time of the Founding was a theory about the structure of government as well as about its purpose: in Europe it had stressed that the regime must be structured to ventilate conflicting interests such as monarchical, aristocratic, and democratic elements of society in order to achieve lasting political stability. When transplanted into a new world of multiple and diffuse interests this distinctive republican sociology of regimes naturally gave rise to pluralism as well as to institutional mechanisms of internal governmental conflict such as separation of powers and federalism. These mechanisms helped insure against the danger that federal government would degenerate into an engine for the destruction of the natural rights it was established to protect. Thus, correctly understood, republican theory at the time of the Framers does not stand in opposition to natural rights and pluralist theories of the Constitution but instead is a bridge connecting them.

16. Sunstein rejects originalism, despite acknowledging the importance of text and history. *Id.* at 119-22. Running throughout the book is an underlying claim about the interpretative methodology of the Constitution: we cannot understand the Constitution without an interpretative theory and the interpretative theory we apply is a matter of political choice. *See id.* at 101-02. Although I believe his interpretative theory also to be in error, I do not address it in this Essay. For an attack of Sunstein's interpretive theory, see Gregory E. Maggs, *Yet Still Partial to It*, 103 YALE L.J. 1627 (1994) (book review).

Once it is clear that Sunstein's deliberative regime of social transformation can find no refuge in the historical Constitution, the second part of this Essay will demonstrate that his own constitutional jurisprudence wholly lacks the political realism of real republicanism. Having rejected the natural rights baseline of the Constitution, Sunstein gives government a far larger scope of social control while simultaneously largely rejecting the republican mechanisms for constraining government and the social forces poised to capture it. Therefore, he has left himself an important question for any republican: What will restrain a democracy with the power to reorder every practice of society?

Sunstein's notion that reason can provide this restraint faces very substantial barriers in the nature of man and the nature of the world.¹⁷ First, collective decisionmaking is unlikely to produce choices based on reasoned deliberation, because the citizens who have the most concentrated interest in a subject matter will have a disproportionate influence over that subject precisely because they can gain the most from a favorable collective decision. Indeed, as Sunstein's own discussion of the First Amendment reveals, the ideal of republican dialogue itself is largely unrealistic because citizens without a very substantial interest in a subject will fail to seek information on the matter, given

17. Although Sunstein recognizes that nature may inhibit specific projects of social reform, *see* SUNSTEIN, *supra* note 1, at 69, he never seems to realize that nature offers substantial barriers to his entire mechanism of reform. Indeed, it is striking that nowhere in his theory does he offer his view of human nature.

Although my concept of the nature of man will become clear as this Essay unfolds, a brief definition can be sketched here. Man's nature has been shaped by biology: millions of years have stamped him as a competitor for resources against other species and his kind. *See generally* CARL N. DEGLER, *IN SEARCH OF HUMAN NATURE: THE DECLINE AND REVIVAL OF DARWINISM IN AMERICAN SOCIAL THOUGHT* (1991) (discussing the growing importance of biologically based views of human nature). Man's intelligence and thus his ability to reason has evolved as an instrument for obtaining resources: for this reason the science of economics is based on premises broadly consistent with man's biological nature. *See* GARY S. BECKER, *Altruism, Egoism and Genetic Fitness: Economics and Sociobiology*, 14 J. ECON. LIT. 14 (1976) (noting that both sociobiology and economics "rely on competition, allocation and limited resources" as well as efficient adaptation to the environment). While altruism is possible when there are mutual gains to be obtained from cooperation, *see* ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984), society must be built with the recognition of the fundamentally self-interested nature of man. Human nature will reflect itself in the public as well as the private sphere.

both the small chance that even a well-informed vote or voice will affect the collective decision of millions of others and the relatively small effect a collective decision will likely have on the happiness of the citizen. Moreover, cognitive limits to collective decisionmaking also exist: some of the intricacies of complex collective choices are often beyond the comprehension of many citizens because of limitations imposed by their training or ability.

Sunstein's image of collective decisionmaking resembles that which would emerge from a continual Platonic dialogue between relatively unselfish and very knowledgeable participants engaged in a tireless search for the truth. In the real world, such decisionmaking, when bereft of a natural rights framework and strong internal checks and balances, is more like a drama by Beckett where the interested dominate the ignorant for the first act only to reverse roles in the second act, the net result being that both groups are worse off than when the action began. To be sure, deliberative democracy performs important but limited functions in a modern republic: it assures that the rulers will not be able to ignore the interests of the ruled and it promotes political stability. The notion, however, that civil society--the social order created by the exercise of individual rights--should be subject to continuous reformation through reasoned political discourse was an ideal not only rejected by the Framers, but is ultimately unachievable in the real world, at least in a large republic with a universal franchise.¹⁸

18. Sunstein seems enamored of classical republicanism. See SUNSTEIN, *supra* note 1, at 21. It is true that in some classical republics the ideal was for men to realize themselves in the political rather than private realm. See THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 147 (Rex Warner trans., Penquin Books 1972) (quoting Pericles to the effect that a man who has no interest in politics has no business being a citizen of Athens). The difficulty with setting political philosophy back two thousand years, however, is twofold. First, the republicanism of the period of the framing of the Constitution derived from Machiavelli rather than classical theorists. Indeed, *The Federalist* harshly criticizes the republics of ancient Greece:

It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy.

The third section of this Essay will focus on the conceptual problems inherent in Sunstein's project. Although Sunstein proclaims that requiring a decision to be justified by reasons makes a huge difference to collective decisionmaking, he never shows how this can be the case. Indeed, it is far from clear that Sunstein's distinction between practices founded on reasons and those founded on interests has any utility in separating out unconstitutional from constitutional social practices, because interests and reasons are parallel categories available as explanations for any action.¹⁹ The reasons one person offers for his actions inevitably can be explained by others as a product of his interests. If reason and interest can be viewed as parallel categories, a republican would suspect that the ruler, whether in the judiciary, the legislature, or the executive, generally will determine that decisions favoring his interest or the interest of his supporters are reasoned.

I. THE ACTUAL COMMITMENTS OF THE HISTORICAL CONSTITUTION

Professor Sunstein invokes the historical Constitution to support his notion that the essential purpose of a democratic republic is to empower a government to reform or even transform society through collective reasoning.²⁰ To that end, Sunstein

THE FEDERALIST NO. 8, at 71 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Second, modern social science, using analytical tools and empirical evidence not available to the ancients, casts doubt on the efficacy and coherence of collective decisionmaking. See, e.g., DENNIS C. MUELLER, PUBLIC CHOICE II 406 (1989) (discussing modern theorems that "raise fundamental questions about the possibility of establishing collective choice procedures satisfying minimally appealing normative properties"). See also *infra* notes 133-43 and accompanying text.

19. Of course, the Constitution does expressly preclude some social practices that certain interests may favor, but Sunstein offers no new mechanism except an appeal to reason to discover which practices or which interests these are.

20. While Sunstein disclaims any adherence to originalism, see *supra* note 16, it is in his interest to suggest that his theory is compatible with the Framers' essential thinking. See *infra* notes 159-61 and accompanying text. He has attempted to root previous interpretations of the Constitution in historical understanding with similar success. Compare David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992) with John O. McGinnis, *The President, the Constitution and the Confirmation Process*, 71 TEX. L. REV. 633 (1993).

argues that the Constitution's core commitment was to "deliberative democracy."²¹ He contends that the Constitution was not "designed only to protect a set of identified 'private rights' . . . [or] to provide rules for interest-group struggles among selfish private groups."²² To the contrary, according to Sunstein, the legacy of the American Revolution was a rebellion against the "the natural order of things"—a celebration of the notion that the political order is man-made and thus subject to continual revisions according to reason.²³ For Sunstein, the ongoing potential for social transformation is the essence of the republican thinking that animates the Constitution.

A. *Natural Rights and Property Rights*

This Section will explain why theories of natural rights, pluralism, and republicanism that Sunstein contrasts were not in fundamental tension at the framing of the Constitution, but, to the contrary, formed a fairly coherent whole in the political philosophy of the day. A discussion of natural rights is the proper starting point, because despite Sunstein's claims, overwhelming evidence demonstrates that both the proponents and opponents of the Constitution agreed that the protection of natural rights was the central purpose and limit of government. Indeed, many Framers, including Madison (whom Sunstein appears to regard as the patron saint of civic republicanism), agreed on the even narrower proposition that the primary object of government was the protection of property, although most Framers' understanding of property was more capacious than Sunstein's.²⁴ In the

21. SUNSTEIN, *supra*, note 1, at 19-20; see also *id.* at 60 (discussing "original commitment to deliberative democracy").

22. *Id.* at 21. Of course, to demonstrate that the Constitution's core commitment is to deliberative democracy, it is not enough to show that the document was not designed *only* to protect natural rights or sustain a pluralistic society. Sunstein, however, does not even succeed in showing that deliberative democracy was other than an instrument for the protection of natural rights.

23. *Id.* at 19. One difficulty with Sunstein's reliance on the American Revolution as a key to a proper understanding of the Constitution is that the Constitution emerged not directly from the Revolutionary period but from the critical period during which renewed consideration was given to the importance of natural rights, particularly those of property. See *infra* notes 79-80 and accompanying text.

24. The importance of property rights to the Constitution has been recently recov-

Federalist Papers, Madison states baldly that "[t]he protection of these faculties [the different and unequal faculties for acquiring property] is the first object of government."²⁵ Gouverneur Morris, the Framer who, after Madison, spoke most often at the Convention, also held the view that property "was the main object of society."²⁶

ered by Jennifer Nedelsky. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990). I am pleased to acknowledge the usefulness of her work in preparing this Essay. Nevertheless, as will become clear from my discussion, I have three reservations about Professor Nedelsky's treatment. First, she does not sufficiently emphasize that to many of the Framers, rights that we today understand as civil rights such as free speech were not different in kind from property rights. Second, although in some moods Madison may have had Malthusian tendencies, generally the view of the Framers was that the exercise of rights would lead to greater prosperity for all. Finally, respect for property rights and the spirit of commerce to which they were allied was not confined to the Federalists; it was so widely shared by Federalists and Antifederalists alike that it must be considered part of the common political grammar of America at the time of the Founding.

25. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961). It is striking, to say the least, that Sunstein relies on *Federalist No. 10* to argue that the Constitution's core commitment is to deliberative democracy, but fails to acknowledge that within *Federalist No. 10* Madison views the protection of property rights as the essential objective of government and structures democratic representation to better meet that objective.

26. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533 (Max Farrand ed., 2d ed. 1937). Gouverneur Morris also stated that the state of nature "was only renounced for the sake of property which could only be secured by the restraints of regular Government." *Id.* At the Convention, Mr. Rutledge agreed with Gouverneur Morris that "[p]roperty was certainly the principal object of Society." *Id.* at 534; see also *Vanhorne v. Dorrance*, 28 F. Cas. 1012, 1015 (C.C.D. Pa. 1795) (No. 16,857) (Patterson, J.) ("The preservation of property then is a primary object of the social compact . . ."); Letter from the House of Representatives of Massachusetts to Denny de Berdt (Jan. 12, 1768), reprinted in 1 THE WRITINGS OF SAMUEL ADAMS 134, 138 (Harry A. Cushing ed., 1904) ("The security of right and property, is the great end of government. Surely, then, such measures as tend to render right and property precarious, tend to destroy both property and government; for these must stand and fall together.").

The idea that protection of property is the motivating force of men entering into society dates back at least to Locke: "The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government is the Preservation of their Property." JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 368-69 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690). Locke's use of the word "property," was meant to convey more than just ownership of realty or chattel; he wrote that he called "Lives, Liberty and Estates . . . by the general Name, Property." *Id.* at 368; see also ADAM SMITH, *AN INQUIRY INTO THE WEALTH OF NATIONS* 670 (Edwin Cannan ed., Modern Library 1937) (1776) ("The acquisition of valuable and extensive property, therefore, necessarily requires the establishment of civil gov-

At times Sunstein concedes that certain provisions of the Constitution, such as the Contracts Clause and the Takings Clause of the Fifth Amendment, suggest that certain property rights were a baseline not to be disturbed.²⁷ Nevertheless, he fails to recognize the pervasiveness of rights in general, and property rights in particular, in the Framers' justification of the Constitution. Madison, for instance, did not view freedom of speech as merely an instrument of democratic deliberation, but essentially as a species of *property* right.²⁸ In defending freedom of speech, Madison stated that man "has a property in his opinions and the free communication of them,"²⁹ in defending free exercise of religion he declares that man "has a property . . . in his religious opinions;"³⁰ and more generally that man "has an equal property in the free use of his faculties and free choice of the objects on which to employ them."³¹ For Madison, "[g]overnment is instituted to protect property of every sort," including the speech production rights protected by the First Amendment.³² Madison's emphasis on property rights is hard to square with a government of social transformation empowered to redistribute property according to the reasons of the day. There is no evidence that Madison or other Framers sought to protect property from depredations of those with less facility for acquiring it so that it could be then parcelled out by the politicians of a deliberative democracy.

Moreover, the rights to be protected by the government were generally understood as natural, not simply as social conventions.³³ The exercise of these rights, in turn, was understood to

ernment. Where there is no property, or at least none that exceeds the value of two or three days labour, civil government is not so necessary.").

27. SUNSTEIN, *supra* note 1, at 91-92.

28. See James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266-68 (Robert A. Rutland et al. eds., 1983). Madison's view of the nature of the First Amendment suggests that it is not "strange," as Sunstein asserts, SUNSTEIN, *supra* note 1, at 199, for the First Amendment vigorously to protect commercial speech as well as political speech. Commercial speech is no less one's property than political speech.

29. James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON, *supra* note 28, at 266.

30. *Id.*

31. *Id.*

32. *Id.*

33. Many of the state constitutions from the time of the Revolution expressly ac-

create civil society. Property rights to material goods create prosperity and indeed are what has enabled society to progress to civilization.³⁴ Property rights in opinions (called the freedom of speech) lead to the discovery of truth, as false ideas are refuted and replaced.³⁵ Property rights in conscience (called the free exercise of religion) lead to enlightened morals and beliefs.³⁶

knowledge that property rights are natural and inalienable. See, e.g., MASS. CONST. OF 1780 art. I, *reprinted in* 3 FRANCIS N. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1888, 1889 (1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS] ("All men are born free and equal, and have certain natural, essential, and unalienable rights, among which may be reckoned the right . . . of acquiring, possessing and protecting property . . ."); PA. CONST. OF 1776 art. I, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3081, 3082 ("That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are acquiring, possessing and protecting property . . ."); see also James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON, *supra* note 28, at 266 ("In its larger and juster meaning, [property] embraces every thing to which man may attach a value and have a right; and which leaves every one else the like advantage.").

34. See, e.g., James Madison, Note to His Speech on the Right of Suffrage, Documentary History 5:440-49 ("In civilized communities, property . . . is an essential object of the laws, which encourage[s] industry by securing the enjoyment of its fruits."); Gouverneur Morris, *Political Enquiries 1776: An Essay by Gouverneur Morris*, *reprinted in* Willi P. Adams, *The Spirit of Commerce Requires That Property Be Sacred*: Gouverneur Morris and the American Revolution, 21 AMERIKASTUDIEN 327, 331 (1976). ("The most rapid advances in the State of Society are produced by Commerce . . . [Commerce] requires not only the perfect Security of Property but perfect good faith . . . It requires also that every Citizen have the Right freely to use his Property.").

35. See, e.g., JAMES MADISON, ADDRESS OF THE GENERAL ASSEMBLY TO THE PEOPLE OF THE COMMONWEALTH OF VIRGINIA (1799), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 332, 337 (Gillard Hunt ed., 1906) ("By subjecting the truth of opinion to the regulation, fine, and imprisonment, to be inflicted by those who are of a different opinion, the free range of the human mind is injuriously restrained."); JAMES MADISON, REPORT ON THE RESOLUTIONS (1799-1800), *reprinted in* 6 THE WRITINGS OF JAMES MADISON, *supra*, at 341, 389 ("[T]o the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression . . .").

36. Thomas Jefferson believed that the free exercise of religion led to truth.

Reason and free enquiry are the only effectual agents against error. Give a loose to them, they will support the true religion, by bringing every false one to their tribunal, to the test of their investigation. They are the natural enemies of error and of error only. Had not the Roman government permitted free enquiry, Christianity could never been introduced.

Thus the beneficial social fabric of prosperity, truth, and morals—the common good of civil society—is the consequence of an order created by prepolitical rights and not the result of collective deliberations. Accordingly, the Framers' general understanding is in sharp contrast to that of Sunstein, who collapses civil society into political society and the natural social order created through the exercise of natural rights into one created by government.³⁷

To be sure, the Framers understood that government was necessary to give greater security to the fruits obtained by the exercise of rights. The social contract establishing government was struck for the purpose of providing that security.³⁸ Thus,

THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 157-61 (William Peden ed., 1955) (1787).

St. George Tucker warned against allowing the balance to tip in favor of religious establishments.

But what I wish most to urge is the tendency of religious establishments to impede the improvement of the world. They are boundaries prescribed by human folly to human investigation; and enclosures, which intercept the light, and confine the exertions of reason. Let any one imagine to himself what effects similar establishments would have in philosophy, navigation, metaphysics, medicine, or mathematics.

ST. GEORGE TUCKER, 2 BLACKSTONE'S COMMENTARIES app. at 8 (Augustus M. Kelley ed., 1969) (1803).

Madison wrote against the adoption of a bill to provide for Christian teachers: "Instead of Levelling as far as possible, every obstacle to the victorious progress of Truth, the Bill [establishing in Virginia a provision for Christian teachers] with an ignoble and unchristian timidity would circumscribe it with a wall of defence against the encroachments of error." James Madison, To the Honorable the General Assembly of the Commonwealth of Virginia, A Memorial and Remonstrance (ca. June 20, 1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 298, 303 (Robert A. Rutland & William M.E. Rachal eds., 1973).

37. For discussion of Sunstein's arguments for conflating natural order and the order created by government, see *infra* notes 65-75 and accompanying text.

38. See *supra* notes 24-26 and accompanying text; see also Civics [David Ramsay], Letter to the Columbian Herald (Charleston, S.C.), Feb. 4, 1788, *reprinted in* 2 THE DEBATE ON THE CONSTITUTION 147, 147-48 (Bernard Bailyn ed., 1993) ("These relinquishments of natural rights, are not real sacrifices: each person, county or state, gains more than it loses, for it only gives up a right of injuring others, and obtains in return aid and strength to secure itself in the peaceable enjoyment of all remaining rights."); James Wilson, Opening Address of the Pennsylvania Ratifying Convention (Nov. 24, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra*, at 791, 797 ("On the other hand, in entering into the social compact, though the individual parts with a portion of his natural rights, yet it is evident that he gains more by the limitation of his own,—so that in truth, the aggregate of liberty

the central issue for the science of government was how to create a governmental structure that would simultaneously facilitate the enforcement of these natural rights and yet be restrained from becoming the very instrument of their impairment. As we shall see, aspects of republican theory played an important role at the Founding precisely because they suggested ways of protecting natural rights from the dangers posed by government.

The views of the Antifederalists in fact demonstrate the extent of the consensus on the primacy of natural rights at the time of the Founding. They agreed in great measure with the Framers' views on the purpose and limit of government, while bitterly disputing the idea that the Constitution realized those purposes and limits.³⁹ For instance, the Antifederalists were generally even more emphatic than the Federalists that people had natural rights, including property rights, the freedom of speech, and the right of religious conscience.⁴⁰ Like the Federal-

is more in society, than it is in a state of nature."). The importance of social contract theory dates back to Locke and Blackstone.

For the principal aim of Society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature Hence it follows, that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals.

WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 124 (9th ed., Garland Publishing, Inc. 1978).

For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have Property*, without which they must be suppos'd to lose that by entering into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own.

See LOCKE, *supra* note 26, at 378.

39. 1 THE COMPLETE ANTI-FEDERALIST 53 (Herbert J. Storing ed., 1981) ("The Federalists and Antifederalists agreed that government is properly directed to the pursuit of limited ends, namely the security of individual rights; and there was very limited debate about limited government in this fundamental sense"); see also Agrippa [James Winthrop], Letter to the Massachusetts Gazette (Jan. 11, 15, 18, 1788), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 38, at 762, 762 ("It is universally agreed, that the object of every just government is to render the people happy, by securing their persons and possessions from wrong.").

40. See, e.g., Brutus, N.Y.J., Jan. 17, 1788, *reprinted in*, 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 39, at 408.

The design of civil government is to protect the rights and promote the happiness of the people.

ists, they believed that the exercise of these rights created a social tapestry of prosperity and enlightenment and many were even more optimistic than the Federalists that the spirit of commerce would unite those engaged in business.⁴¹ They also generally agreed that the purpose of government was to provide greater security for these rights. In their view, the social compact was justified in curtailing rights only insofar as it provided greater security for the rights that remained.⁴² Indeed, one

For this end, rulers are invested with powers. But we cannot from hence justly infer that these powers should be unlimited. There are certain rights which mankind possess, over which government ought not to have any control, because it is not necessary they should, in order to attain the end of its institution.

Id.; see also The Federal Farmer, Letter to the Editor, COUNTRY J. (Poughkeepsie, N.Y.), Oct. 9, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 39, at 231 ("There are certain unalienable and fundamental rights, which in forming the social compact, ought to be explicitly ascertained and fixed—a free and enlightened people, in forming this compact, will not resign all their rights to those who govern, and they will fix limits to their legislators and rulers . . .").

41. See, e.g., John DeWitt, *To the Free Citizens of the Commonwealth of Massachusetts*, AM. HERALD (Boston), ca. Dec. 1787, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 39, at 34, 35.

The chief blessings of society, like individuals, are fond of association, and have a mutual dependence upon each other. They form links of one chain, and are all actuated by the same cause. Where freedom prevails, industry and science there also prevail. Industry produces wealth, and science preserves freedom in purity.

Id.; Agrippa, *To the People*, MASS. GAZETTE, Nov. 23, 1787, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 39, at 71.

[T]he spirit of commerce is the great bond of union among citizens. This furnishes employment for their activity, supplies their mutual wants, defends the rights of property, and producing reciprocal dependencies, renders the whole system harmonious and energetic. Our great object therefore ought to be to encourage this spirit. If we examine the present state of the world we shall find that most of the business is done in the freest states, and that industry decreases in proportion to the rigor of government.

Id.

42. See, e.g., Cato, *The Citizens of the State of New-York*, N.Y.J., reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 39, at 110 ("[T]he great question then, that arises on this new political principle, is, whether it will answer the ends for which it is said to be offered to you, and for which all men engage in political society, to wit, the mutual preservation of their lives, liberties, and estates."); Philadelphensis, INDEPENDENT GAZETTEER (Philadelphia), reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 39, at 110.

Antifederalist offered a principle that may represent the best summary of the philosophical consensus of the time on the justice of governmental structures: "They ought to construct [government] in such a manner as to procure the best possible security for their rights;—in doing this they ought to give up no greater share than what is understood to be absolutely necessary"⁴³ The Antifederalists thus agreed that the essential purpose of government was to conserve natural (i.e., prepolitical) rights. The *common* grammar of government at the time of the Framers was essentially the opposite of Sunstein's notion of a government empowered to transform civil society.⁴⁴

Finally, the text of the Constitution and the Bill of Rights themselves explicitly evidence the natural rights foundation of the Framers' thought. Within the original unamended document, the Contracts Clause⁴⁵ is the most direct marker of the natural rights conception: State governments, whether representative or not, are disabled from interfering with contracts.⁴⁶ Thus, the Contracts Clause also presupposes a view that contractual rights are part of a preexisting civil fabric that government is obliged to protect rather than disturb. Although Sunstein acknowledges

The only thing in which a government should be efficient, is to protect the *liberties, lives, and property* of the people governed, from foreign and domestic violence. This, and this only is, what every government should do effectually. For any government to do more than this, is impossible, and every one that falls short of it is defective.

Id.

43. *To the Free People of Virginia*, VA. INDEPENDENT CHRON., Feb. 20, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 39, at 176; see also William Penn, *To the Citizens of the United States*, INDEPENDENT GAZETTEER (Philadelphia), Jan. 2, 1788, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 39, at 170 ("[T]he best government is that which secures to the citizens the greatest share of their natural rights").

44. Yet another demonstration that many of the Federalists wanted no part of deliberative democracy of social transformation was their hostility to the theories of Jean Jacques Rousseau. See PAUL M. SPURLIN, ROUSSEAU IN AMERICA 1760-1809, at 44, 61 (1969) (quoting John Adams as stating that Rousseau's ideas on property were full of "wild ravings" and Noah Webster as stating that Rousseau's ideas were "chimerical" and not founded in "experience").

45. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Law impairing the Obligation on Contracts").

46. Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 528-29 (1987).

that the Fifth Amendment contains such a natural rights marker in its prohibition on the taking of private property for public use without just compensation,⁴⁷ such markers in the Bill of Rights as a whole, however, are pervasive.⁴⁸ While it may be possible to conceive of freedom of speech as being protected because it was instrumental to deliberative democracy rather than as a natural right, we have already seen that this was not the understanding of Madison and the predominant political philosophy of the time.⁴⁹ In any event, the religious freedom enshrined in the Free Exercise Clause⁵⁰ cannot easily be understood as merely instrumental to deliberation, but was instead protected because it was a natural right.⁵¹

Moreover, the Fourth Amendment by asserting "[t]he right of the people to be secure in their persons, houses, papers, and effects,"⁵² also indicates that there is a rights baseline for civil society.⁵³ The criminal law enforcement authority of the government poses in concrete form the general dilemma of assuring that government increase rather than decrease the security of rights. Properly used, the criminal law enforcement authority can facilitate the exercise of private rights; arbitrarily used, it can threaten the private sphere that is the wellspring of civil society. Therefore, the reasonableness standard of the Fourth Amendment attempts to maximize the security of rights by minimizing the sum of private and governmental deprivations of liberty and property.⁵⁴ The Fourth Amendment thus neatly encap-

47. SUNSTEIN, *supra* note 1, at 128.

48. See *infra* notes 49-54 and accompanying text for examples.

49. See *supra* text accompanying note 29.

50. U.S. CONST. amend. I.

51. As was discussed earlier, free exercise was understood by the Founders as a natural right. See *supra* note 30 and accompanying text.

52. U.S. CONST. amend. IV.

53. See, e.g., The Federal Farmer, Letter to the Editor, COUNTRY J. (Poughkeepsie, N.Y.), Oct. 12, 1787 (letter to the editor), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 39, at 249. ("There are other essential rights, which we have justly understood to be the rights of freemen; as freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men's papers, property, and persons.").

54. See Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 793 (1994) ("In assessing the 'reasonableness' of any Fourth Amendment intrusion, we should consider whether an incremental government intrusion will be more

ulates the underlying political philosophy of the Constitution as a whole.

While Sunstein never directly confronts evidence that the objective of the Constitution was to protect the exercise of natural rights, he does attempt to discredit the centrality of the natural rights with a variety of less direct arguments. First, he suggests that the Framers' revolutionary dissatisfaction with the status quo suggests a general rejection of any natural order, presumably including the civil order immanent in the exercise of natural rights.⁵⁵ In the late eighteenth century there was, however, no inconsistency in being simultaneously a revolutionary and a believer in natural rights. In his discussion of the rights of property cited above, Madison is also eloquent about the injustice of current laws—the status quo—

where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called. What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favour his neighbour who manufactures woolen cloth; where the manufacturer and wearer of woolen cloth are again forbidden the economical use of buttons of that material, in favor of the manufacturer of buttons of other materials!⁵⁶

than offset by a likely diminution of private violence.”)

Of course, this discussion does not exhaust the list of natural right markers in the historical Constitution. Professors Lawson and Granger have recently suggested that the word “proper” in the Necessary and Proper Clause requires that all executive legislation “conform to the traditional principles of individual rights.” See Gary Larson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 329 (1993). In any event, the Ninth Amendment speaks of rights “retained by the people,” even if these rights are defined residually from the powers delegated to the federal government. See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1221 (1990).

55. See SUNSTEIN, *supra* note 1, at 19.

56. James Madison, *Property*, THE NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON, *supra* note 28, at 266, 267.

Madison's conception of rights was egalitarian and revolutionary in this limited sense: each person had God-given natural rights to exercise. The regime, therefore, was unjust insofar as it restricted those rights by giving special status to aristocrats or monopolists.⁵⁷ Thus, Madison's dissatisfaction with a status quo that rested on such artificial restrictions actually flowed from his embrace of natural rights as the baseline for assessing the justice and proper functioning of government.⁵⁸

Second, Sunstein argues that Madison's philosophy was egalitarian in another sense, suggesting that it would justify an individual's constitutional right to basic services to be funded by taxing the resources of others.⁵⁹ Sunstein relies principally on a quotation from Madison, written in the same year as his disquisition on property discussed above. Madison wished to combat parties and factions:

1. By establishing a political equality among all. 2. By withholding *unnecessary* opportunities from a few, to increase the inequality of property, by an immoderate, and especially an unmerited, accumulation of riches. 3. By the silent operation 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.⁶⁰

57. In colonial times, aristocrats and monopolists were frequently one and the same as a result of the royal power to grant monopolies. For a discussion of the colonists' anger against royal attempts at creating artificial class distinctions, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 83-90 (1969).

58. Sunstein's attempt to discredit the view that the Constitution presupposes a natural baseline by suggesting that *Plessy v. Ferguson*, 163 U.S. 537 (1896), rested on such a baseline, derives from his conflation of natural rights and social norms. SUNSTEIN, *supra* note 1, at 42-45. It may be true that the majority in *Plessy* relied on social norms that relegated blacks to an inferior social position, but such reliance would be wholly unjustified on a natural rights baseline. Because the natural rights baseline implied a hostility to social regulation that served to deprive citizens of the equal exercise of their rights, a natural rights baseline would be incompatible with government enforced segregation.

59. SUNSTEIN, *supra* note 1, at 138. The constitutional principle Sunstein believes that Madison shares is "a belief in *freedom from desperate conditions*. No one should be deprived of adequate police protection, food, shelter or medical care." *Id.* Sunstein's use of the word "deprive" glosses over a central question of political philosophy: Is someone deprived of medical care simply because no one is willing to provide it to him on terms he would like?

60. James Madison, *Parties*, NAT'L GAZETTE, reprinted in 14 THE PAPERS OF JAMES

The first sentence suggests only that Madison believes in political equality. The second sentence simply reiterates Madison's opposition to artificial distinctions such as grants of monopoly which give unmerited wealth. In the third sentence, by his allusion to the silent operation of laws, Madison is referring to taxation of large estates, as Sunstein himself understands.⁶¹ This passage thus does not evidence Madison's embrace of positive constitutional rights to other citizens' resources but instead merely shows his interest in avoiding, as he had said in his earlier discussion on property, the "excessive taxes [that] grind the faces of the poor."⁶² Indeed, Madison contrasts two kinds of "spur[s] to labor": excessive taxation of the poor and "keenness and competitions of want."⁶³ The former he condemns and the latter he at least tolerates. These are hardly the words of a man who believes that the Constitution gives citizens positive claims to the resources produced in society.

Moreover, Madison here discusses taxation in the context of reducing factionalism which he had previously identified in *Federalist No. 10* as the major threat to property rights. Thus, the third sentence in Madison's quotation is best read as justifying taxation insofar as it generally will strengthen the security of natural rights by reducing faction. Taxation of great concentrations of wealth can be tactically justified as a means of providing the maximum security of rights in a world where perfect security is not possible.⁶⁴

Third, as another counter to the natural rights baseline, Sunstein argues that the Framers' emphasis on creating representative institutions like the electoral college and legislatures that were independent of direct instruction by the people show

MADISON, *supra* note 28, at 197-98.

61. See SUNSTEIN, *supra* note 1, at 138-39 (discussing Jefferson's and Madison's view that tax exemption for the poor would mitigate the inequality of property). Sunstein notes that Jefferson had written to Madison about taxation in terms of the "silent operation of the laws." *Id.*

62. James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON *supra* note 28, at 266, 267.

63. *Id.*

64. For a discussion of the Framers' pessimism about perfecting the security of rights, see *infra* text accompanying notes 99-104.

that deliberative democracy, rather than the protection of natural rights or the ventilation of interests, is at the heart of the Constitution. He argues that individual rights were protected because they promote deliberative democracy, not because they are natural. Indeed, Sunstein states that "[d]eliberative government and limited government were . . . one and the same."⁶⁵

As we have already seen, both the major proponents and opponents of the Constitution overwhelmingly believed that the primary objective of government structures was to protect natural rights.⁶⁶ Sunstein provides little or no evidence that individual rights were seen merely as a *means* to promoting the deliberative democracy as the ultimate social end. Once it is conceded that the Constitution was designed to protect natural rights, its attempt to facilitate deliberation as much as possible is readily understandable. Insofar as government institutions can deliberate free from the hurly-burly of short-term political pressures they are more likely to perceive clearly the civil society created by the exercise of natural rights that government is established to secure. Nevertheless, even the mechanisms of government deliberation to which Sunstein points reiterate the Framers' recognition that interest, both personal and institutional, rather than disinterested deliberation, are likely to dominate daily politics.⁶⁷ The electoral college was preferred as a method of selection of the President to selection by the legislature, because of the Framers' understanding of the danger that the legislature would be racked by faction and cabal.⁶⁸ One of the central purposes of bicameralism, like the separation of powers

65. SUNSTEIN, *supra* note 1, at 23.

66. See *supra* notes 23-54 and accompanying text.

67. The mechanisms demonstrate the centrality of the civil society to the Framers' designs. For instance, the electoral college was designed in part to filter out local politicians in favor of "continental" characters—men who had gained reputation in civil society. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 26, at 29 (remarks of Gouverneur Morris). For a discussion of the theory behind the electoral structures of the Constitution, see David J. Katz, *Grand Jury Charges Delivered by Supreme Court Justices Riding Circuit During the 1790s*, 14 CARDOZO L. REV. 1045, 1064 (1993).

68. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 744, at 531 (photo. reprint, Carolina Academic Press 1987) (1833) (stating that one objective of the electoral college was intended to "lessen the dangers of cabal, intrigue, and corruption" to which the Congress could otherwise gravitate).

generally, was to make use of the natural rivalry of institutions so that one house would check the other.⁶⁹ Thus, while Sunstein is correct that the Framers thought highly of deliberation, he fails to show that they thought that deliberation was either the object of just government or the principal guarantor of good government.

Fourth, Sunstein suggests that the Framers' attachment to natural rights was simply a conceptual mistake, because the rights depend on the government for enforcement.⁷⁰ Of course, even if Sunstein were correct that the Framers were conceptually mistaken, he would not have shown that this mistake does not animate the actual Constitution. In any event, it is Sunstein rather than the Framers who is confused. Sunstein's blithe assertion that "[e]conomic value does not predate law; it is created by law"⁷¹ is in large measure false. Whatever the realists may have thought, more recent social science demonstrates that men naturally create nongovernmental and decentralized mechanisms for enforcement and so sustain valuable exchanges even without formal rules backed by the State. For instance, within the system of positive contractual law, market forces themselves play an important role in assuring contract performance.⁷² Moreover, even when the State refuses to enforce property rights or encumbers such enforcement with burdensome regulations, informal mechanisms of social order spring up to serve the need for protecting exchange value. This is the conclusion, for in-

69. See 1 JAMES WILSON, *THE WORKS OF JAMES WILSON* 415 (Robert G. McCloskey ed., 1967) (arguing that "mutual watchfulness and mutual control between the two houses, will redound to the honour of each, and to the security and advantage of the state").

70. See SUNSTEIN, *supra* note 1, at 52 (setting forth Robert Hale's view that legal rights embody government intrusion in the economy).

71. *Id.* at 51. Sunstein also declares that "[m]arkets are made possible only by government regulation, in the form of the law of tort, contract and property." *Id.* at 5.

72. See, e.g., Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981) (examining the value of repeat sales to consumers as a means of enforcing private contracts); Stewart MacAulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (discussing the informal ways with which businessmen facilitate contractual compliance).

stance, of De Soto's recent work on the informal economies of Latin America.⁷³

If the value created by individuals can be separated conceptually and factually from the action of the State, natural rights theory remains coherent in the face of Sunstein's attack, because natural rights theory, at least in the Framers' hands, was a normative claim about who had the right to economic values created. Of course, the Framers understood that government action may be essential to securing rights. Indeed, providing greater security for property was a central, if not the central, purpose of government.⁷⁴ Nevertheless, for the Framers, only natural rights provide a measuring rod for determining the justice of state intervention; just government better protects what could be produced in the absence of government.⁷⁵ Sunstein does not provide a refutation of the natural rights justification for the State. Indeed, Sunstein notably fails to ground his theory of the Constitution in a justification for government at all. If he were to offer his own and different justification for the State, he would only succeed in showing how distinct his political philosophy is from that of the Framers.

Moreover, modern social science's confirmation that value as a matter of fact can be created by informal social order vindicates the notion of a civil order conceptually distinct from politics. It also shows that a government that ignores the interests of man-

73. See HERANANDO DE SOTO, *THE OTHER PATH* (June Abbott trans., 1989); see also Marci A. Hamilton, *The Moment of Constitutional Opportunity*, 14 CARDOZO L. REV. 937, 939 (1993) (criticizing Sunstein's proposals for substantive constitutional provisions in emerging Eastern European democracies for their failure to reflect De Soto's insights); Arthur J. Jacobson, *Law's Other Path*, 103 YALE L.J. (forthcoming 1994). For a discussion of economic order in the absence of law, see generally JACK HIRSHLIEFER, *ECONOMIC BEHAVIOUR IN ADVERSITY* (1987). Hirshliefer observes that

[i]nteraction via market exchange under the rules of the game . . . called *political economy* is only a part, often a small part, of the economic picture. Not only plants and animals, but human beings as well, interact economically to a very large degree under *natural economy* rather than political economy, without benefit of law or property or contract.

Id. at 191.

74. See *supra* notes 24-44 and accompanying text.

75. For instance, Madison criticized artificial status distinctions such as monopolies on natural rights grounds that such monopolies prevented citizens from exercising their natural right to make and sell goods. See *supra* notes 55-58 and accompanying text.

kind in property and exchange does so at its own peril. In fact, the lesson of much of this century is that no matter how strong is the concrete laid down against beneficial economic activity, sooner or later the wild grass of an informal order of property will break through. As shown below, because real republican theory intensely concerned itself with the stability of the republic, humanity's immutable and powerful impulse to create property offers yet another reason for protecting property rights in a republic.

B. Republicanism and the Constitution

Sunstein's invocation of republicanism does little to discredit the natural rights baseline of the Constitution, because the core of republicanism at the time of the Framing was simply that a republic should be designed for the good of the public rather than for the good of the ruler. As no less a republican than Thomas Paine stated, "[t]he word *republic* . . . means the *public good*, or the good of the whole, in contradistinction to the despotic form, which makes the good of the sovereign, or of one man, the only object of the government."⁷⁶ Thus, insofar as those of the founding generation identified the common good with the protection of natural rights, there was little tension between republican and natural rights political theories.⁷⁷ Indeed, this conception of natural rights as the public good can be understood as the logical fulfillment of republicanism because it enshrines in the justification for government itself the requirement that government serves merely as the instrument for protecting the rights that inhere in each citizen. The just ruler cannot rule in his own interest or the interest of the few because

76. WOOD, *supra* note 57, at 55-56 (quoting Thomas Paine). As Gordon Wood suggests, the notion of republicanism was consistent in whig political philosophy with the notion of limited government. *See id.*

77. *See, e.g.,* Brutus, *To the Citizens of the State of New York*, N.Y.J., Nov. 1, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 39, at 372, 373 ("To surrender [natural rights] would counteract the very end of government, to wit, the common good."). For a discussion of the manner in which both the Federalists and the Antifederalists viewed the exercise of natural rights as creating the common good, see *supra* notes 34-41 and accompanying text.

the just government's sole objective is to protect the rights that inhere equally in all.⁷⁸

The identification of the public good with the protection of natural rights, particularly property rights, was reemphasized during the period after the Revolution and before the framing of the Constitution, when attacks on property rights by debtors and others demonstrated that overthrowing the crown was not enough to ensure that government would be guided by correct political ideals. Indeed, James Madison believed that such attacks were a principal motivation for the Constitutional Convention, arguing that it was "the necessity, of providing more effectually for the security of private rights, and the steady dispensation of Justice. Interferences with these were evils which had more perhaps than any thing else, produced this convention."⁷⁹ In trying to correct these evils, Madison understood himself to be saving the republican form of government by designing a government that would better secure rights not only from the defalcations and oppression of those who were formally invested with office but of the factions who supported the office holders.⁸⁰

Indeed, republicanism at the time of the Founding was not only consonant with natural rights but it also holds the key to understanding why the Framers believed that a measure of pluralism was necessary to secure these rights. A common tenet of the science of government in republican thought was that tyrannical governments were inherently unstable because of their tendency to provoke revolution and dissolve into governments of

78. Another way of understanding this point is to view natural rights as a culmination of Machiavellian republicanism. Machiavelli saw that a constitutional structure that provided governing opportunities for competing princes would likely serve those governed better than a structure dominated by a single hierarchical institution like the Church. A society founded on natural rights restrained the rulers to an even greater extent by further decentralizing power through the creation of a market system: every man is a potential prince.

79. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 26, at 134. Nedelsky provides an excellent discussion of this point. See NEDELSKY, *supra* note 24, at 23-24.

80. Madison feared that the republican form of government would disintegrate if such attacks on property were allowed to continue. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 26, at 134.

extreme democratic tendencies.⁸¹ Modern republican theory, such as Machiavelli's, asserted that without a mixture the government of a single principle would repress the forces of other principles until its repression led to revolution and the institution of a government of an opposing principle.⁸² Then the cycle of repression and revolution would begin again.⁸³ The way to prevent this perpetual cycle of construction and destruction was to internalize the conflict of the republic's principal elements—such as the monarchical, aristocratic, and democratic elements—in the institutions of the government.⁸⁴ Conflict of a quotidian and controlled variety would serve a cathartic function, releasing tensions that otherwise would accumulate and destroy the republic.⁸⁵ The conflict would force the contending parties to renew consideration of the republic's original principles, which however good and noble at the republic's founding are liable to corruption over time.⁸⁶

This view was supported not only by theory but by the Framers' experience: the American Revolution itself appeared a consequence of the corruption and tyranny of the Parliament and the resulting alienation of those ruled by Parliament.⁸⁷ It was natural, therefore, that the Framers should give consideration to adapting the ideas of dynamic republican theorists who saw that the stability of the Republic could best be preserved by perpetual conflict between its internal governing elements.⁸⁸ At

81. WOOD, *supra* note 57, at 19.

82. NICCOLO MACHIAVELLI, *THE DISCOURSES* bk. 1, ch. 3, at 104-11 (Bernard R. Crick ed., 1970).

83. *Id.*

84. Machiavelli's republicanism was concerned with "the institutional structuring, the channeling and balancing, of this unleashed and selfish competition. In a healthy society, unquenchable strife—between rich and poor, priests and warriors, diverse great families and individuals—maintains a veritable dynamo of acquisitive growth." THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* 63 (1988).

85. MACHIAVELLI, *supra* note 82, bk. 1, ch. 4, at 113 ("That Discord between the Plebs and the Senate of Rome made this Republic both Free and Powerful.").

86. *Id.* bk. 3, ch. 1, at 386-87. Thus, pluralist institutions through the creation of internal conflict may actually promote consideration of a republic's distinctive virtues.

87. J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT* 508 (1975).

88. For a discussion of Machiavelli's pervasive influence on subsequent republican theorists, see PANGLE, *supra* note 84, at 52-54, 62-67. Hamilton, the author of the *Federalist* numbers outlining the utility of competition between the federal government and its state counterparts, like Machiavelli, understood "love of fame" as the

the founding of the American Republic, the concern over containing conflict among fixed and rigid social elements was not as acute as in Machiavelli's time.⁸⁹ Nevertheless, managing the more diffuse interests of the republic's citizens was seen as essentially the same problem as assuring political stability.⁹⁰

"ruling passion of the Noblest Minds." THE FEDERALIST NO. 71, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Because of his understanding of the passions of rulers, Hamilton naturally was concerned to establish institutions that would channel these passions into a healthy competition for the public interest. See PANGLE, *supra* note 84, at 110 (suggesting that Hamilton aimed to protect against rulers' passions through the institutional system itself, rather than through the moral quality of its leaders); see also GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT (1970) (arguing that Hamilton's favorable view of politicians' aspirations to greediness set him apart from his colleagues).

89. WOOD, *supra* note 57, at 604 (stating that Americans had "divest[ed] the various parts of the government of their social constituents," such as aristocracy and monarchy). Moreover, the British constitutional system predicated on a mixed government of social classes had failed the colonists and fallen into disrepute. Madison bitterly objected to creating "*artificial distinctions*, by establishing *kings*, and *nobles*, and *plebeians*" in order to create checks and balances. See James Madison, *Parties*, NAT'L GAZETTE, reprinted in 14 THE PAPERS OF JAMES MADISON, *supra* note 28, at 197-98.

90. It is beyond the scope of this Essay to assess the degree to which the Framers thought that virtue could play a role in government. Madison does speak at times as if there were a public interest that comprised more than the aggregate of individual interests. For Madison, however, the calculation of the course of men's interests was fundamental in shaping all aspects of his defense of the constitutional design, from the reliance on large republics to the separation of powers. See *infra* notes 91-92 and accompanying text. Other Federalists openly scoffed at the ability of virtue to play a role in the science of government. See Noah Webster, *A Citizen of America* (Oct. 17, 1787), reprinted in THE DEBATE ON THE CONSTITUTION, *supra* note 38, at 129, 158 ("*Virtue*, patriotism, or love of country, never was and never will be, till mens' [sic] natures are changed, a fixed, permanent principle and support of government . . ."); see also Americanus [John Stevens, Jr.], Letter to the New York Daily Advertiser (Dec. 12, 1787), reprinted in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 38, at 487. Stevens wrote:

Can any man, who has a tolerable acquaintance of human nature, imagine that men would so eagerly engage in public affairs, from whence they can hope to derive no personal emolument, merely from the impulse of so exalted, so pure, so disinterested a passion as patriotism, or political virtue? No! it is ambition that constitutes the very life and soul of Republican Government. As fear and attachment insure obedience to Government so does ambition set its wheels in motion.

Id. at 490.

Even if some kind of public virtue had a role to play, such virtue may well have been conceived largely as a respect for others' exercise of natural rights. The point here, however, is not to resolve the nature and scope of virtue in its relation

Thus, the Constitution's pluralist mechanisms can be understood as the working out of old world republican theory in a new world. Because the new world was possessed of a greater diffusion and a greater variety of interests than the old world, mechanisms for assuring stability had to address this diffusion and variety. Thus, the first mechanism of pluralism was the creation of a large republic that helped assure against the entrenched control of any single interest. The larger republic would in fact contain a sufficient number of factions so that shifting coalitions of diffuse interests would struggle for control, thus ventilating conflict.⁹¹ Pluralism thus recaptures in a more fluid social order the catharsis that old world republicanism created by facilitating the conflict among the democratic, aristocratic, and monarchical elements in society.

A second mechanism for republican catharsis was the encouragement of conflict through the separation of powers and federalism. The separation of powers, of course, facilitates conflict by pitting ambition against ambition. Moreover, the tension between the state and federal government, with their distinct but overlapping responsibilities, also helps to ensure that no faction will entirely control the instruments of governmental power.⁹² The social release provided by internal conflict of distinct social elements in the Machiavellian republic gave way in a less rigidly stratified society to political clashes between different avatars of

to government in the minds of the Framers, but simply to show that the republican theory that was part of the common grammar at the time of the Framing put man's self-interest at the center of the science of government, and thus naturally led to pluralism.

91. THE FEDERALIST NO. 10, *supra* note 25, at 82-84.

92. This aspect of the separation of powers theory is manifest in THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("Ambition must be made to counteract ambition."). The same kind of approach also animates the discussion of federalism. Indeed, Hamilton's approach to federalism is of a piece with his psychology of the ruling class—a psychology that owes much to Machiavelli's dynamic republicanism. See *supra* notes 82-86 and accompanying text. It is not surprising, therefore, that he views federalism as another mechanism to harness these passions in the service of the republic. For Hamilton, both federal and state governments will be "depositories" of the "strength of the community" and the struggles that can be expected will bear similarities to those of the aristocracy against the national monarch. See THE FEDERALIST NO. 17, at 120-22 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

a single body politic.⁹³ Republican theory thus naturally led to the Constitution's establishment of government as a mobile whose intricate motions perpetually attempt to displace factions as quickly as they are propelled into power by the political life of the nation.

The structures of separation of powers and federalism that this republican-pluralist understanding placed at the heart of the Constitution are notable problems for Sunstein's deliberative regime of social transformation. In creating a separation of powers system in which the legislature, executive, and judiciary were all conceived of as having conflicting institutional ambitions, the Framers consciously made government less efficient in order to protect liberties. State governments retained governmental powers in part so that their exercise of these powers would serve as a counterweight even when the federal government was united.⁹⁴ These structures make sense if the purpose of government is essentially to perfect the enforcement of natural rights that sustain a civil society. The social blueprint has already been laid down and government is simply to be engaged in the details—important details to be sure—of construction. As Sunstein himself makes clear, however, these structures make substantially less sense if government is responsible for constructing society from scratch, because the branches have been designed to quarrel over the social initiatives. According to Sunstein, the New Deal “carr[ied] forward and deepen[ed] the original commitment to deliberative democracy.”⁹⁵ Yet, a paragraph later, Sunstein admits that in deepening this commitment the New Deal substantially revised federalism and the separation of powers.⁹⁶ Local self-governance under federalism “often served as an obstacle to necessary social change; too often it was

93. If institutions such as state and federal government are more liable to control by different factions, conflict between the institutions will tend to ensure the political participation of the different factions in the political life of the republic. I explore this thesis in my forthcoming article, *Toward a Strict Doctrine of Preemption and a Machiavellian Constitution* (1994) (unpublished manuscript, on file with the author).

94. THE FEDERALIST NO. 17, *supra* note 92, at 120-22.

95. SUNSTEIN, *supra* note 1, at 60.

96. *Id.*

vulnerable to powerful private groups.”⁹⁷ Separation of powers as originally conceived was also suspect, because “[a]ggressive government initiatives could not easily be generated within a system in which the different branches of government worked against one another.”⁹⁸ It is surprising that Sunstein did not consider whether a view of the Constitution that required the total restructuring of the cornerstones of separation of powers and federalism actually reflected the document’s foundational commitments.

It also follows from republican theory that the government cannot protect all rights perfectly and directly because a regime of sufficient unity and power to accomplish this objective would ultimately threaten natural rights because of its potential for tyranny and instability. This realism was also reinforced by the predominant religious sensibility at the time of the Founding.⁹⁹ Even though security of rights is the objective of government, in a fallen world perfection in security is not possible: “If men were angels, no government would be necessary.”¹⁰⁰ Thus, although the rights given by the Constitution and written law generally reflect natural rights, they do not exactly embody them, because it was understood that to be enforced under political government the guarantees of liberty had to be clear, and, thus, more narrowly defined.¹⁰¹ Government was a blunt instrument: even as it secured rights it made them somewhat less full and refined.¹⁰²

Moreover, republican realism also suggests why the Constitution relies largely on indirect methods of securing rights, such as

97. *Id.*

98. *Id.* at 61.

99. The Framers’ religious understanding of the fallen nature of man, as well as their republicanism, made them more pessimistic about what was achievable under social contract theory than are contemporary social contract theorists, such as Richard Epstein or Robert Nozick, who seem to believe in the possibility of perfecting the security for rights. For reference to the influence of Calvinism on the Framing, see RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* 3 (1951).

100. *THE FEDERALIST* NO. 51, *supra* note 92, at 322.

101. This aspect of social theory at the time of the founding is well described in Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907, 937-44 (1993).

102. *Id.*

that provided by placing responsibility for certain matters closely related to property, in larger but nevertheless representative government.¹⁰³ Schooled in the republican tradition, the Framers could readily understand that too great a reliance on direct judicial enforcement of natural rights rather than indirect but representative enforcement would give rise to a cycle of tyranny and instability, ultimately rendering government a less, not more, effective guarantor of rights.¹⁰⁴

This account of the relation between republicanism, pluralism, and natural rights does a far better job than Sunstein's theory of republicanism in explaining the Constitution and the Bill of Rights. It is also fatal to Sunstein's attempt to suggest that a

103. For instance, the federal government is given the authority to regulate commerce, U.S. CONST. art. I, § 8, cl. 3, and mint money, U.S. CONST. art. I, § 8, cl. 5. These matters are placed in control of a representative government at the federal level, not because deliberation at the federal level is inherently desirable or a good in itself, but because matters affecting commercial activity are best regulated in a large representative republic, which is less subject to the tyranny of particular factions. See THE FEDERALIST NO. 10, *supra* note 25, at 83.

Other provisions of the Constitution also reflect the understanding that rights may be best guaranteed indirectly through representative government acting through positive law. For instance, the Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, cl. 1, addresses the problem of providing for the rights of out-of-state citizens who were at particular risk of being deprived of their rights when in another state where they were not represented in the legislature. Privileges and immunities are protected because they reflect, however imperfectly, natural rights, see *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230), but the way the Constitution protects against the serious risk that out-of-state citizens may be denied natural rights is indirect: states are required to give the same bundle of rights to out-of-state citizens as to their own citizens who are represented in government. John Harrison recently has demonstrated that the Fourteenth Amendment's Privileges or Immunities Clause similarly protects against the danger that states would deny natural rights to minorities. The Fourteenth Amendment requires that the civil rights that a state gives to its majority citizens through its positive law be also extended to its minority citizens. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

104. Thus, under this view, *Lochner v. New York*, 198 U.S. 45 (1905), was decided properly because it was the task of Congress rather than the judiciary to protect property rights other than vested rights protected by the Contract Clause and the Fifth Amendment.

In any event, the relation between pluralism, natural rights, and republicanism outlined here is in tension with the notion that the Constitution incorporates as a matter of law the straightforward enforcement of all or even most natural rights. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (arguing for substantial judicial enforcement of natural rights).

deliberative democracy empowered to transform civil society is consistent with, let alone captures the essence of, the political philosophy behind the founding of the republic. The Constitution was constructed on the understanding that rights were emphatically natural. These rights, modeled on the paradigm of property rights, were entirely negative liberties; they gave no one a claim on the resources of others. Most fundamentally, they were the presuppositions of government rather than mere objects of its deliberation.

II. THE NATURAL DEFECTS OF SUNSTEIN'S CONSTITUTION

The political philosophy behind Sunstein's constitution differs from the Framers' Constitution in two essential respects. First, as discussed above, Sunstein's interpretation rejects a natural rights baseline; second, whereas the Framers relied essentially on private and institutional interest as a constraint on government, Sunstein places confidence in the ability of deliberative reasoning to restrain government.

This Section will suggest that both aspects of Sunstein's constitution would have unfortunate consequences. The abandonment of the natural rights baseline of the Constitution transforms the Constitution from a document that preserves an order immanent in civil society to one that authorizes its constant disruption by government. Its reliance on reason as the principal constraint on government risks tyranny because reason is almost infinitely manipulable in the political world.

These consequences are manifest in the context of the First Amendment—a jurisprudence that Sunstein seeks to revise ostensibly to encourage the dispersion of public policy information and thus facilitate the process of reasoning in a deliberative democracy. Vitiating the state action doctrine, he permits intrusive government regulation of information production by private actors. Moreover, Sunstein's own discussion of the public policy information consumed in a democracy inadvertently reveals the inherent weakness of reason as a constraint on government: citizens by and large simply lack incentives to acquire much of the information necessary for reasoned collective decisionmaking. Nothing in Sunstein's First Amendment reforms will change

this basic fact, because this weakness inheres in the nature of man and collective decisionmaking.

A. Sunstein's First Amendment as a Matrix for Government Regulation

The consequences of Sunstein's rejection of the natural rights baseline of the Constitution is nowhere more dramatic than in his dissolution of the state action doctrine.¹⁰⁵ The natural rights baseline provides a clear standard for determining state action: the State's enforcement of a contract is not state action because the State is perfecting a natural right. On the other hand, the State's enactment of legislation that regulates a citizen's ability to contract is state action because it is interfering with a natural right. Only the latter kind of government action needs to be restrained by the Constitution, because they potentially interfere with natural rights. Sunstein, however, sees no essential difference between the State's enforcing natural rights and interfering with them: both enforcement and interference can equally be understood as state action.¹⁰⁶ He thus believes that the state action doctrine has in the past reflected what he views as "status quo neutrality"—the wrong-headed notion that some practices are rooted in the exercise of prepolitical rights and beyond the reach of the deliberative regime of social transformation envisaged by the Constitution.¹⁰⁷ Accordingly, for Sunstein, the question of state action ultimately is inseparable from the issue of the merits of the constitutional question at issue because a private actor's deployment of property on any substantial scale depends on the protections of the State and thus may be ultimately attributed to the State.¹⁰⁸ Although Sunstein certainly suggests that some private action should be beyond the reach of constitutional scrutiny,¹⁰⁹ the

105. SUNSTEIN, *supra* note 1, at 71-75.

106. *Id.* at 74.

107. *Id.* at 72.

108. Sunstein suggests at one point that he does not "argue that the state action requirement should be abandoned" but a few sentences later says that any issue of state action should be resolved on the "merits" and "constitutional principles." *Id.* at 75. He thus fails to understand the state action doctrine as an independent limitation on the ability of the government to disturb private ordering.

109. *Id.* at 72. He conspicuously fails to offer a test for deciding what constitutes

scope of private action immune from constitutional attack will be decided on a case-by-case basis without any cross-cutting barrier such as that represented by a state action doctrine embedded in the Constitution's natural rights baseline.

Sunstein's rejection of state action as an independent limitation on the Constitution's scope represents a huge transfer of power from individuals to the State: the doctrine assures that provisions such as the Bill of Rights remain what they were intended to be—a restraint on *governmental* interference with liberties rooted in natural rights. In the absence of a clear distinction between governmental and private action, such prohibitions become unmoored and in fact, as we shall see, may actually be converted into justifications for interfering with such liberties.

Sunstein's First Amendment jurisprudence is a prime example of the manner in which his dissolution of the state action doctrine would radically change the operation of the polity.¹¹⁰ For instance, Sunstein argues that because the government gives broadcasters the right to air material by license, their decisions to exclude material offensive to a potential class of viewers may violate the First Amendment.¹¹¹ Thus, in Sunstein's view, the First Amendment may actually mandate government intervention to assure that broadcasters provide diverse material.¹¹² Sunstein also seems to suggest that the attempt of a newspaper to exclude certain points of view from its pages may also be regulated under the First Amendment.¹¹³ Certainly, Sunstein's understanding that all rights are created by the State makes it easy to extend constitutional scrutiny from licensed broadcasters to the unlicensed print media.¹¹⁴ While broadcasters are depen-

state action and what does not.

110. He entitles his chapter on the First Amendment "Speech in the Welfare State: A New Deal for Speech," thus implying that his reforms will redistribute speech rights in the manner the New Deal redistributed material property rights. *See id.* at 197.

111. *Id.* at 214, 222-23.

112. *Id.* at 210-11.

113. *Id.* at 212. In his recent book, *Democracy and the Problem of Free Speech*, Sunstein has suggested that some regulations (for instance, a right of reply regime) can be applied to newspapers. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 113 (1993).

114. For a discussion of Sunstein's views on this point, see *supra* notes 70-75 and

dent on licenses, newspapers are also dependent on a whole nexus of state-enforced laws: if a newspaper publishes an article that it wants to publish rather than my article, it can do so because it owns the processes necessary to publish it and the State prevents me from appropriating these processes by laws prohibiting conversion and trespass.¹¹⁵ Viewing the editorial decisions of broadcasters or newspapers as state action, however, means they become subject to public oversight. In Sunstein's hands, the First Amendment, which is a charter for liberty from government, becomes a matrix for government regulation.

The notion that the First Amendment permits or indeed mandates the government to be a roving commission to regulate speech in order to promote speech has something of an Orwellian ring to it. Sunstein avoids confronting the danger that this view would lead to the pervasive regulation of speech only by failing to follow the logic of his own argument. For instance, Sunstein suggests that a private college's decision to expel students for racist speech would be its own and not subject to constitutional scrutiny.¹¹⁶ Despite his acknowledgment that trespass law, which would be used to enforce the expulsion, represents state action under his constitution, he contends that its operation is content-neutral (because it can be invoked equally to enforce the expulsion of students for other reasons) and thus would not be subject to searching First Amendment scrutiny.¹¹⁷ Sunstein's attempt to tame the wild consequences of his dilution of the state action doctrine in the First Amendment context, however, is inconsistent with the premises of that rejection.

accompanying text.

115. In *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), the Supreme Court justified more intrusive regulation of the broadcast medium than of newspapers, but that decision rested on the scarcity in the broadcasting spectrum. Sunstein, however, does not simply rely on the scarcity rationale, because that rationale is no longer factually viable. See President Reagan's Veto of the Fairness in Broadcasting Act of 1987, 23 WEEKLY COMP. PRES. DOC. 715 (1987) (noting the erosion of the factual underpinnings of the *Red Lion* decision). With the rise of cable television, an enormous number of programming outlets have been made available. Indeed, there are more cable channels available in most cities than there are newspapers.

116. SUNSTEIN, *supra* note 1, at 205.

117. *Id.*

On Sunstein's own logic, the decision to expel students because of their speech also must be evaluated under the First Amendment. The private college's decisionmaking process rests on state laws that establish the university as a corporation as well as other laws that protect the physical safety of the persons engaged in and the premises used in the decisionmaking. Without a clear distinction between state action and private action, the decision to expel the students for racist speech may thus also be attributed to the State. Sunstein might argue that those laws authorizing and protecting the university are content-neutral in the sense that they also would authorize or protect decisions to expel students for other kinds of speech, but such an appeal to the generality of the authorization or protection provided by these laws is unavailing without a clear distinction between private and public action. Certainly the Supreme Court would not be deterred from applying strict scrutiny to a public university's decision to expel students for racist speech, even if the university were also authorized to expel students for expressing religious views.¹¹⁸

In any event, Sunstein's assertion of the content neutrality of trespass laws does not much reduce the dangers his First Amendment regime poses for previously unregulated discourse, because even content-neutral governmental behavior is substantially regulated by the First Amendment. For instance, content-neutral rules are still subject to some kind of balancing tests: "regulatory choices aimed at harms not caused by ideas or information as such are acceptable so long as they do not *unduly* constrict the flow of information and ideas."¹¹⁹ Indeed, just a few pages after Sunstein's celebration of the content neutrality of trespass laws, he suggests that the Court nevertheless should consider whether the First Amendment requires a shopping center to suspend its use of such laws to evict protesters, because there may have been no other effective outlet for protest.¹²⁰ Thus, even on Sunstein's own terms, his Constitution

118. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (discussing the constitutionality of content-based restrictions).

119. LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 791 (1988) (footnote omitted).

120. SUNSTEIN, *supra* note 1, at 208.

gives the government enormously greater scope to regulate the speech and association of citizens—sometimes even in the *name* of the First Amendment.

B. Civic Republicanism and Civic Ignorance

A republic restrained by reason requires wide dispersion of public policy information and the avowed purpose of Sunstein's restructuring of First Amendment law is to produce information conducive to democratic deliberation.¹²¹ Sunstein's First Amendment discussion, however, signally undermines the allure of civic republicanism, because it begins by unleashing government on a most basic constitutional freedom ostensibly to promote the power of reason but ends by showing why reason is inevitably a relatively powerless restraint on government. Unfortunately, not only would many of his reforms frustrate rather than facilitate the dispersion of information, but an analysis of the real dilemmas inherent in the dispersion of public policy information shows that collective decisionmaking has natural defects that no restructuring of the First Amendment can correct.

Consider Sunstein's concerns about television news that in some measure motivate his interest in regulating that medium. As evidence that the television networks are not producing sufficient deliberative information, Sunstein notes that the television networks are giving presidential candidates on average less air time to present their views on public issues, the average sound bite having fallen from 42.3 seconds in 1968 to 9.8 seconds in 1988.¹²² He believes that competitive commercial pressures among the networks are largely responsible for this reduction.¹²³ The reasons for this reduction, however, are far more complex. Other televised media have arisen to compete with the networks and some, such as CNN and C-Span, have the capacity to carry events live.¹²⁴ This leads the networks to respond by

121. *Id.* at 198.

122. *Id.* at 216.

123. *Id.*

124. For a discussion of how the networks have lost their monopoly in delivering the news, see TOM ROSENSTIEL, *STRANGE BEDFELLOWS: HOW TELEVISION AND THE*

providing new information in the form of analysis to the candidate's presentation, thus adding to the information available. Second, the substitution of analysis for presentation can be readily understood as a substantive viewpoint choice of the networks premised on the notion that politicians are at least in some measure rational vote seekers more interested in winning than in promoting any particular public position.¹²⁵ Thus, analyzing the possibly strategic reasons behind a politician's adoption of a public policy issue adds distinctive information for a viewer, providing him with, among other things, a basis to discount in some measure the likelihood the politician will pursue the policy once in office should the political landscape shift.¹²⁶ Moreover, the network news is not the only potential forum for candidates' presentations: the 1992 campaign demonstrated that when the necessity for the candidates to reach the people directly in greater numbers than generally watch CNN and C-Span arose, the candidates were able to take advantage of talk shows to get their messages across.¹²⁷ In response to changes in technology the market is giving more information about the candidates rather than less.

This more complex understanding of the networks' behavior and politicians' reaction to it illustrates the danger of government regulation that would try to modify it. Regulation of the proportion of time devoted to candidates' presentations on networks likely would retard the process of information producing change, because networks would be discouraged from offering

PRESIDENTIAL CANDIDATES CHANGED AMERICAN POLITICS 64 (1992) (describing the rising influence of the popular culture media on the 1992 campaign).

125. The networks are now beginning to reflect the new model of political behavior constructed by public choice theorists. See DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 19, 23-24 (1991) (discussing the public choice model of politicians). If academic theories have explanatory power, it is not surprising that they will over time be diffused into the popular culture.

126. Similarly, the emphasis on the horse race aspect of campaigns which Sunstein appears to deplore, see SUNSTEIN, *supra* note 1, at 216, has a relevance beyond satisfying the public's curiosity, insofar as candidates' positions and tactics are shaped by their standing in the polls.

127. See ROSENSTIEL, *supra* note 124, at 143, 170, 260. Using forums devoted to entertainment to present the candidates has the advantage of drawing in those viewers who rationally choose to consume entertainment rather than public policy information. See *infra* note 140.

their commentary and candidates from seeking other outlets. It is surprising that in an age where the medium is recognized as at least part of the message,¹²⁸ Sunstein also fails to understand that a network's decision to reduce the politician's presentation time as opposed to analysis conveys a viewpoint about politics. Sunstein probably disagrees with such a jaundiced view of politicians and their motives (how can men or women on the make be expected to sustain a republic of reasons?), but that should make us all the more suspicious about his complaints about the content of television news.

Sunstein acknowledges that his concern about the broadcasting market may seem a little bizarre in light of the "quality and diversity" of views available from the many broadcast outlets accessible besides the networks such as CNN and C-Span, but responds by contending that because information has many of the characteristics of a public good, too little will be produced without government regulation.¹²⁹ His justification for regulating the media in order to produce more plentiful and more diverse public policy information, even in the face of its apparent abundance, is deeply inadequate. First, it is doubtful that in a modern welfare state, where the State redistributes rents and where politicians wield enormous power over citizens' lives, that there are insufficient incentives to make any public policy argument that would advance the possibility of taking power.¹³⁰ On the other hand, if the information that the market fails to produce is defined not merely as information about public policy, but as information about public policy that citizens need, there will be intractable problems in determining what information is

128. MARSHALL McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 7 (1964).

129. SUNSTEIN, *supra* note 1, at 219. As I point out below, this response is something of a non sequitur. The real problem is not production of information but consumption: citizens make a rational choice to decline to consider the ample information that is produced. *See infra* text accompanying note 139.

130. *See* Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 22 (1986) (suggesting that public policy information will be produced as an instrument of gaining power). Thus, we should expect that much public policy information will be produced in the same ample amounts as advertising. Indeed, this conclusion is consistent with Sunstein's own observation about the quality and diversity of views. *See supra* note 129 and accompanying text.

necessary for the citizen. Even where consumer and market goods are at issue, a regulator must struggle to determine the information for which the rational consumer would be willing to pay, assuming a perfect market in information.¹³¹ If the product at issue is a health plan for the entire nation rather than a light bulb, how even unbiased regulators would create a more perfect market is entirely unclear; they would have no principled basis to decide what information citizens need.¹³² Thus, Sunstein in his emphasis on the "market" failure problem of producing public policy information unwittingly underscores yet another important disadvantage of collective decisionmaking compared to the decentralized decisionmaking of the markets.¹³³

Even in the absence of the conceptual difficulties with a regulatory regime designed to increase the diversity and quality of views, any real republican understands the central problem of implementing the idea in a political world: the rulers have a natural interest in suppressing and manipulating speech to their own advantage.¹³⁴ That Sunstein's proposed regimes are purportedly designed to increase diversity is no answer. A message can be weakened by being forced to appear with other messages on the topic; a right of reply can deter some messages from being disseminated at all by raising the costs of producing the original message. Indeed, any diversity regime inevitably entan-

131. For a discussion of the argument that regulation can induce a better market in information for simple goods, see Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 665 (1977).

132. See David A. Strauss, *Persuasion, Autonomy and Freedom of Expression*, 91 COLUM. L. REV. 334, 370 (1991) (doubting that it is possible to know what political information a citizen would want made available without knowing his preferences).

133. I am indebted to Stewart Sterk and Paul Shupack for discussion of this point. Other principal problems of collective decisionmaking, already well outlined in the public choice literature, are (1) strategic behavior by which citizens rationally fail to state their true preferences, creating barriers to allocative efficiency, and (2) rent seeking in which various factions of citizens rationally use the government to expropriate others' wealth, creating productive inefficiencies. See MUELLER, *supra* note 18, at 37-43, 229-47.

134. Professor Farber, who appears to agree with Sunstein that public policy information has many of the characteristics of a public good, stresses that for that very reason rulers may face little resistance in suppressing public policy information. See Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 564 (1991).

gles the government in making decisions about the content of what will be broadcast.¹³⁵ For instance, to determine whether a view has been insufficiently represented, the State will have to make fine distinctions. Does the view of a traditional conservative require the response of a libertarian as well as a liberal? What about a socialist? Other views will raise questions of whether they are within the compass of the politically thinkable. Does Sunstein believe that analysts who advocate summary punishment as the answer to urban crime and disorder should get time equal to those who propose more traditional solutions?¹³⁶ If the State chooses limited diversity it will become the arbiter of the mainstream; if it prefers unlimited diversity, the State will subsidize and celebrate every lunatic and extremist with a distinctive politic.

Thus, aside from the problems of subtle and not so subtle censorship inherent in the reform proposals Sunstein would have us consider,¹³⁷ little imagination is needed to understand that a regime required to determine the kind of views to be broadcast may lead to social instability as well, as taboos are either reinforced or broken by an official, central decisionmaker. Another of the advantages of freedom of speech in the Framers' Constitution is that, like other property rights, it facilitates social stability through the dispersion of power. The First Amendment permits the social consensus necessary to any soci-

135. The push for "diversity" in the academic world has operated as "at least in part a cover for a political power grab by the left." Steven C. Bahls, *Political Correctness and the American Law School*, 69 WASH. U. L.Q. 1041, 1055 n.59 (1991) (quoting Professor Alan Dershowitz). Professor Dershowitz is also quoted as asking: "How many politically correct students are demanding in the name of diversity an increase in the number of evangelical Christians, National Rifle Association members and Right to Life advocates?" *Id.* Given that those on the left are predominant in law schools, see *infra* note 153 and accompanying text, this is an instructive example of the way a diversity regime will be manipulated by those who have control of bureaucratic power.

136. Such an advocate might be a latter day disciple of Joseph De Maistre who saw the executioner as central to social order. See Joseph De Maistre, IV OEUVRES COMPLETES DE J. DE MAISTRE 33 ("Et cependant toute grandeur, toute puissance, toute repose sur l'exécuteur: il est l'horreur et le lien de l'association humaine. Ôtez du monde cet agent incompréhensible; dans l'instant même l'ordre fait place au chaos, les trônes s'abîment et la société disparaît.")

137. SUNSTEIN, *supra* note 1, at 222 (listing possible First Amendment reforms).

ety (but particularly a democracy) to be arrived at organically through the decisions of hundreds of mediating institutions such as press and universities and therefore to evolve slowly to conform to additions in knowledge and changes in sentiment, thus minimizing social disturbance. One of the many defects of a scheme of government enforced diversity is that government would set the contours of the consensus, resulting in a more brittle framework less amenable to steady transformation and more susceptible to violent dissolutions and reconstitutions of the social fabric of shared ideas.¹³⁸

Finally, and most troubling of all, Sunstein's own discussion of the First Amendment reveals a natural defect of civic republicanism: it is the nature of man and not some correctable failure in the market for public policy information that inhibits reasoned collective decisionmaking among citizens of the republic. Although Sunstein is concerned that citizens do not obtain sufficient public policy information, C-Span already provides a very wide range of views (including the debates in the House and the Senate and discussions spanning the spectrum of public policy institutes from the Cato Institute to the Institute for Policy Studies) in amounts that would permit the concerned citizen to spend his entire day consuming public policy information. Of course, a relatively small percentage of the millions who have access to these programs watch, but this shows that the basic problem is *consumption*, not production: few citizens use the vast amount of information that is already available at low or no monetary cost to them. Citizens have projects other than democratic deliberation and, given the choice, few spend a large amount of time considering social policy.¹³⁹ Sunstein never gives any evidence that citizens have ever behaved differently, at least in a nontotalitarian society.

138. The advantages of informal consensus to social stability is one of the many answers to Sunstein's rhetorical question: Why should the Constitution bar a "Madisonian experiment" to obtain a greater quality and diversity of views? *See id.* at 220.

139. *See* Daniel E. Troy, *Talking Points*, 97 COMMENTARY 63, 64 (1994) (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993)) ("PBS, let alone the various public-affairs cable channels, are already ignored by millions.").

Indeed, a citizen's decision to limit his intake of public policy information is a completely *rational* choice for two separate but reinforcing reasons. First, in collective decisionmaking it is very unlikely that any decision of an individual citizen made on the basis of such information will make a difference to the outcome of a decision that depends on the views of thousands or millions of others.¹⁴⁰ Second, at least in a nontotalitarian society, a citizen's private choices will affect the course of his life far more than collective decisions and he therefore rationally will spend far more time attempting to refine his private choices.¹⁴¹

Moreover, even apart from citizens' rational ignorance, many citizens can be expected to suffer from cognitive ignorance of many issues of public policy.¹⁴² First, for reasons discussed above, they lack incentives to train themselves to understand information involved in complex public policy debates. Second, some may lack the intellectual ability to understand all the intricacies of such debates thus empowering demagogues and

140. Indeed, while Sunstein objects to the information-to-entertainment ratio of much local news, see SUNSTEIN, *supra* note 1, at 215-16, a regime with this ratio may impart information to more citizens than would a regime that produced only pure public policy information, because it recognizes that most people follow news for its entertainment value. See POSNER, *supra* note 130, at 23 (suggesting that television news is packaged as entertainment rather than information because the public attaches little value to political information). The real way Sunstein could get more exposure for public policy information is to abolish professional sports, drama, cinema, and music, because then citizens would have fewer alternatives to listening to politicians, public policy analysts, and law professors.

141. In a society with an all-powerful government, it might be more rational for a citizen to devote a greater expenditure of time to public policy debates, not in the interest of influencing them, but in the interest of predicting their outcome and changing his position or behavior to temper their potentially devastating effect on his well being. For instance, citizens in Maoist China were well advised to follow the latest thoughts of Chairman Mao. Thus, to be fair, if Sunstein were successful in creating a government with a vast scope for social transformation, he might succeed in getting citizens to pay more attention.

142. This assumes that public policy discourse has at least some factual or deductive element as well as an emotional or ideological component. For instance, it assumes that the effects of the minimum wage on unemployment figures are relevant to a public policy debate about the wisdom of the minimum wage. This assumption seems to be descriptively true of contemporary public policy debates: while it would be, of course, logically possible to favor a certain level for the minimum wage, regardless of the number who were unemployed by its implementation, very few, if any, policy makers publicly take that position.

dissemblers who will arise to exploit this ignorance.¹⁴³ Sunstein, like most civic republicans, never even addresses the issue of the natural limits to republican discourse in a large republic with a universal franchise.

III. REASONS AND INTERESTS IN SUNSTEIN'S PHILOSOPHY

Thus, Sunstein's own discussion of information dispersion should make us doubt his central claim that "[t]here is all the difference in the world between a system in which representatives try to offer some justification for their decisions, and a system in which political power is the only thing that is at work."¹⁴⁴ Given the nature of man and the nature of collective decisionmaking, few citizens will listen to much public reasoning and even fewer will fully understand all of it. Indeed, Sunstein's general silence concerning the capacity of reasoned argument to make such an enormous difference is the most surprising aspect of a jurisprudence that celebrates the place of reason in a republic. This is a serious defect, not only because of the natural constraints on collective decisionmaking discussed above, but because of common sense observation of the political scene. Members of the House and Senate always provide reasons for their actions on the floor and in press releases, and yet social scien-

143. The distribution of cognitive abilities will constrain collective decisionmaking taken on the basis of complex public policy arguments. Psychologists estimate that professionals, such as physicians or engineers, must possess a minimum I.Q. of 114 in order to be successful, thus the professions are accessible to only about 13% or 14% of the population. See DANIEL SELIGMAN, *A QUESTION OF INTELLIGENCE* 143 (1992); see also *Intelligence Among University Scientists*, *NATURE*, Feb. 4, 1967, at 441 (suggesting the existence of a threshold of intelligence necessary to be a scientist; an I.Q. of 112 appeared to be the threshold for social scientists). If we assume that most serious public policy arguments are as complex as the arguments evaluated in professional schools, some citizens may have trouble digesting some aspects of these arguments.

Thus, collective decisionmaking on many matters, far from being a vehicle in which all citizens can equally realize themselves, actually turns out to be a stratified caste system in which some citizens may participate substantially less than others. One of the advantages of a system of decentralized decisionmaking, such as the market, over collective decisionmaking, is that it evolves social arrangements that provide each citizen with decisionmaking authority over matters that he is well equipped to address.

144. SUNSTEIN, *supra* note 1, at 28.

tists nevertheless interpret their actions as exercises of pure political power which will aid them or their constituents.¹⁴⁵ Indeed, it is particularly difficult to distinguish sharply between acts based on reason and those rooted in naked preferences, if one believes, as Sunstein apparently does, that helping a particular class of society may offer sufficient reason to justify legislation.¹⁴⁶ In the welfare state, reasons and preferences turn out to be strikingly coterminous. A Senator from a Western state defending below market grazing fees for his constituents may offer the reason that his constituents otherwise would not get their fair share from the welfare state as well as suggest that such subsidies preserve a way of life important to the national heritage.¹⁴⁷ Yet his ability to offer these reasons hardly would seem to suggest that raw political power was not at work.¹⁴⁸

The difficulties in distinguishing reason from preference are not merely observational but also philosophical. Sunstein is unclear when he suggests that reasons make a world of difference. Does the fact that a man is offering reasons mean that he is not also acting out of interests? Since the Enlightenment, man has been an object of scientific explanation and the reasons he gives are also subject to analyses and dissection. Hume, for instance, explains mankind's reason in terms of his passions.¹⁴⁹ His natural successors are sociobiologists, economists and public choice political scientists who explain human behavior in terms of

145. See, e.g., ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957) (proposing a behavioral model for government based upon rational political behavior).

146. SUNSTEIN, *supra* note 1, at 34-35.

147. See 137 CONG. REC. S13,122 (daily ed. Sept. 17, 1991) (remarks of Sen. Garn) (asserting that higher grazing fees "are, in effect, an extermination order on our rural way of life"); 137 CONG. REC. H5700 (daily ed. July 23, 1991) (remarks of Rep. Marlenne) (observing that representatives from Oklahoma who suggest higher grazing fees are "playing in some very dangerous minefields" in light of subsidies for Oklahoma winter wheat).

148. Of course, to a pluralist this is not disturbing because the justice of a system is not measured by its ability to generate reasons for governmental action. Indeed, if reason were the principal measure of justice many communist systems would rate highly, because such governments employed ideologies for the purpose of comprehensively justifying all actions.

149. See, e.g., DAVID HUME, *AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS*, in *ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS* 169 (L.A. Selby-Bigge & P.H. Nidditch eds., 3d ed. 1975) (1877).

interests and biological imperatives. Indeed, the best-known alternative to the interest-based explanation of human behavior, Kantian moral philosophy, would not seem to offer Sunstein much solace because it understands reasons as providing a knowledge different in kind from natural science.¹⁵⁰ If reasoning operates in a realm of knowledge wholly distinct from that of empirical science, the reason-versus-preference distinction on which Sunstein relies so heavily is vacuous as a criterion of decision or restraint because every action can simultaneously be understood under the category of reason as well as interest.

Sunstein simply may be arguing that requiring a public declaration of reasons will fundamentally change the outputs of the system for the better by changing the constraints under which government actors act and thus the relevant constellation of interests, but he never offers a defense of even this modest claim. Strangely enough, he praises the legal realists who used the intuitions of Marx and Freud to suggest that the normative claims of property were rationalizations of interest, but he seems to ignore them in his celebration of reason.¹⁵¹ If the realists were correct to believe that because of rationalization and self-delusion reason was a weak or a nonexistent constraint on the judicial process—a process that, by its norms and tradition, puts reasoning at its core—can the requirement of deliberative rationality really substantially change the outputs of the political process?¹⁵²

150. See James Boyle, *The Politics of Reason*, 133 U. PA. L. REV. 685, 733 (1985) (viewing Kant as rejecting the explanatory system of Hume in favor of prioristic epistemologies on which knowledge can be constructed).

151. See LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960*, at 164 (1986) (arguing that Jerome Frank, the "father of legal realism" explained judicial decisionmaking in terms of Freudian categories); Steve Fuller, *Playing Without a Full Deck: Scientific Realism and the Cognitive Limits of Legal Theory*, 97 YALE L.J. 549, 557-58 n.19 (1988) (suggesting that legal realists used Marxist class analysis to show that legal activity was not "governed by regularities that are relatively autonomous from other aspects of social life").

152. It should be remembered that the legal process school, which was the most important response to the legal realists, stressed legal concepts such as *stare decisis* that provided the judicial process with a greater structure of deliberative rationality than the legislative process. See John O. McGinnis, *The 1991 Supreme Court Term: Review and Outlook*, 1993 PUB. INTEREST REV. 165, 166-67 (arguing that the legal process school views *stare decisis* as a "still point that distinguishes the deliberative

Thus, at the center of Sunstein's philosophy of the republic of reasons there is a void about the nature of reason. This is disturbing in a regime where reason is to be the principal restraint, because a republican naturally would believe that the rulers will tend to manipulate a concept as amorphous as reason in their own interest. Even well-intentioned rulers may rationalize as founded in reason actions that are in their own interest. Indeed, a republican naturally would be moved to consider whether, despite Sunstein's own obvious good will, his own proposals for social reform and indeed his whole constitutional philosophy can be understood as an attempt to advance his own interests and the interests of the class of which he is a member and which determines his professional status—the academic class generally, and more particularly, the class of liberal-left academics that predominate in contemporary law schools.¹⁵³

For instance, Sunstein's suggestion that government might engage in more regulation to ensure a greater diversity of views in the media would benefit this class, if their views would not be as well represented in the broadcast media as they would be under a regime of enforced diversity. There is substantial evidence that the country has been moving to the right and commentary on radio and television has moved to the right.¹⁵⁴ Un-

rationality of courts from the turbulent movements of the political world").

153. One of the many measures of how far to the left legal academia has moved is the huge disparity between those who opposed and those who supported the nomination of Robert Bork to the Supreme Court. Of the remarkable 34.3% of all law professors who expressed a view on the nomination, opponents outnumbered supporters approximately 18 to 1. See Roger B. Clegg & Mike DeBow, *A Post Socialist Reading List for Pre-Law Students*, POLICY REV., Winter 1994, at 76. While Bork lost by a margin of 58 to 42, the discrepancy between the percentage of Bork's supporters in the Senate to the percentage of supporters among those who had declared themselves in legal academia is still extraordinary: eight-to-one.

There is a substantial consensus among scholars of varying political views that the legal academy leans decidedly to the left side of the American political spectrum. See Stephen L. Carter, *Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice*, 69 TEX. L. REV. 759, 771 (1991) (arguing that the legal academy is to the left of the public); Robert W. Gordon, *Lawyers, Scholars and the "Middle Ground,"* 91 MICH. L. REV. 2075, 2107 (1993) (commenting that legal academics are "mostly pretty liberal"); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1381 (1990) (stating that "left-liberal academics" are predominant in American universities).

154. For discussion of the recent rise of conservative commentators in the mass

der a diversity or right of reply regime, the class of liberal university critics therefore might be expected to appear more often than they do now.

Indeed, the skeptical republican might suspect that the rising acceptance of government regulation of speech in the academic community, which Sunstein reflects, is best explained by understanding how such regulation will further the political interests that now dominate that community.¹⁵⁵ On this view, before the 1980's, both liberals and even those further to the left were generally united in favor of an absolutist approach to the First Amendment,¹⁵⁶ because the liberals and left believed in one way or another that objective truth emerging from social science was on their side and that so long as the government did not prevent its dissemination, it would eventually substantially advance the social transformation of society. A skeptical republican might believe that their faith that objective truth was on their side was shaken by the rise of disciplines more closely allied to natural science, from sociobiology to law and economics, which cast doubt on collectivist solutions generally, and specifically on the efficacy of government intervention to transform adaptive social practices.¹⁵⁷ A logical consequence of this loss of

media, see Ed Bark, *Commentators Twist the Dial to the Right*, DALLAS MORNING NEWS, July 4, 1993, at 1C.

155. For another example of the left's dissatisfaction with current First Amendment jurisprudence, see Morton J. Horowitz, *Foreword: The Constitution of Change: Legal Fundamentality with Fundamentalism*, 107 HARV. L. REV. 30, 109-16 (1993) (describing the "Lochnerization" of the First Amendment).

156. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383 (explaining the happy marriage between the First Amendment and the left in previous decades).

157. In general, the rise of natural as opposed to environmental explanations for social ordering currently poses the most substantial problem for liberal and left social thought. For a general discussion of the revival of biologically based explanations of human nature and society, see DEGLER, *supra* note 17, at 215-329. The consequences for the political thought of nature's renewed rise in the social sciences is a subject worthy of a separate essay. Here it is sufficient to note the problem that nature's ascendancy may pose for some advocates of a politics of social transformation. Such a politics is often premised on the notion that through collective social construction humankind can be changed from the being who has created the defective social order into a new man capable of achieving a social utopia or at least sustaining progress toward it. Such advocates of social transformation thus contrast humankind as constructed by progressive politics with the grasping and calculating

faith would be a renewed interest in regulation of speech so as to make certain that the thought of those on the left would continue to retain some share of the information market. Sunstein's First Amendment proposals would preserve this share at the level of public discourse, moving toward the cartelization we already see in academic discourse, particularly with the rise of new forms of narrative scholarship that self-consciously adopt the view that, because they are based on a unique perspective, they deserve a share of law review articles.¹⁵⁸

Looking beyond Sunstein's specific proposals, a skeptical republican might view his entire approach as advancing the political interest of the academic community of which he is part, because Sunstein packages ideas of important segments of that community in a manner that will maximize their power in the general body politic.¹⁵⁹ First, as discussed in Part I, Sunstein argues that the Constitution from the time of the Framing embodies a philosophy consistent with proposals for a greater role for collective, as opposed to individual, decisionmaking. Although most of his historical assertions are unsupportable, this gives the social philosophy predominant in the legal academy a patina of historical legitimacy that makes their proposals easier for the general body politic to accept. Second, as discussed in Part II, he incorporates familiar themes from radical scholarship such as the rejection of the private-public distinction,¹⁶⁰ but

individual—homo economicus—at the root of the unjust social order. Evolutionary biology, however, suggests that man's nature cannot be so easily altered by changing the context from economics to politics. A human being remains the same homo sapiens shaped by millions of years of evolution to be a competitor for status and resources, regardless of whether the human is acting in the private or public sphere. This raises questions about the prospects for fundamental social transformation through politics.

158. See Richard A. Epstein, *Legal Education and the Politics of Exclusion*, 45 STAN. L. REV. 1607 (1993) (looking at the struggle between competition and protectionism in the modern academic market).

159. My colleague Jeanne Schroeder has previously remarked upon Professor Sunstein's interest in bringing radical theories into the mainstream by tempering their radicalism. See Jeanne L. Schroeder, *Taming the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory*, 5 J.L. & FEMINISM 123, 124 (1992) (describing how Sunstein brings Catherine MacKinnon's theories into the mainstream and distorts them in the process).

160. The view espoused by critical legal studies is outlined in *Symposium on the Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

masks their radical consequences by softening their hard edges and refusing to follow them to their logical conclusion. Once again, this serves the purpose of converting a jurisprudence of the academic left that is irreconcilable in undiluted form with a market oriented and pluralist society like our own into a political program with greater possibility of influence.¹⁶¹

Revealing the interests behind normative claims of the rulers or those who would be rulers is part of the historic enterprise of republicanism. Indeed, Machiavelli's work can be understood as an attempt to dispel the myths and mist of piety behind which the medieval Church advanced its own interests at the expense of the public: that is precisely why he was attacked as an immoralist.¹⁶² The social structures of the Middle Ages have disappeared, but one can only expect that other institutions and groups will attempt to occupy a similar niche of social power by offering new myths, albeit in postmodern form. In this, if only in this, I agree with Sunstein: a real republican's work is never done.

161. This approach also has the advantage of pleasing more moderate liberals who again have a program of meliorist social reform to embrace.

162. For a discussion of Machiavelli's attacks on Christianity, see MARK HULLING, *CITIZEN MACHIAVELLI* 66-68 (1983).