THE AFFIRMATION OF PRINCIPLE

THE PARTIAL CONSTITUTION by Cass R. Sunstein (Cambridge: Harvard University Press, 1993).

I. PRINCIPLES AND PREFERENCES

For at least a century now, American academic lawyers have been highlighting the dangers of judicial activism in a representative democracy. James Bradley Thayer was one of the first among their number to point to the counter-majoritarian implications of judicial review. If the discretion to review is left unchecked, he argued, there will exist nothing to prevent unelected federal judges from using the judicial forum to promote their own preferences and policies at the expense of those of Congress and the various state legislatures.[1] In an American context, the position adopted by Thayer is expressed most eloquently, and controversially, in Learned Hand's Holmes Lectures, delivered to the Harvard Law School during the late 1950s. Hand argued in those lectures that the United States Supreme Court is not invested with a *carte blanche* to review the actions of government officials. Rather, he claimed, it ought properly to intervene only in those cases where the language of the Constitution shows that such officials have overstepped their authority. Where the Court does assume the general power to review legislative and administrative action — particularly in those instances where it assesses the constitutionality of federal and state laws in relation to the broad strictures of the Fifth and Fourteenth Amendments — it assumes the undemocratic role of "a third legislative chamber."[2]

Hand's argument was considered to be controversial because it was read as an attempt to significantly curtail the power of judicial review — a power which, in the United States, was established as far back as the beginning of the nineteenth century in *Marbury* v. *Madison*.[3] In his own Holmes lectures, delivered in the year following Hand's, the Columbia law professor, Herbert Wechsler, argued that Article IV — the Supremacy Clause — of the United States Constitution makes judicial review a matter not of discretion but of duty.[4] That is, for Wechsler, the Supreme Court is not merely permitted but actually obliged to scrutinize official actions which appear to offend constitutional limitations. But Wechsler himself recognized that such an assertion simply highlighted the problem with which Hand had been concerned: namely, if the Supreme Court is considered to be under a duty to engage in judicial review, what safeguards exist to prevent it from becoming a third legislative chamber? Wechsler's answer is that the Court is not vested with a complete discretion to read policy preferences into the Constitution; rather, its constitutional interpretations are "to be

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1 See J.B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 Harv. L. Rev. 129.

2 L. Hand, *The Bill of Rights*, (Cambridge: Harvard University Press, 1958).

3 5 U.S. (1 Cranch) 137, 177 (1803). More generally, see S. Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990).

4 See H. Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 Harv. L. Rev. 1 at 6.

made and judged by standards that should govern the interpretive process generally."[5] These standards, he insists, must be "framed in neutral terms.... Only the maintenance and the improvement of such standards and, of course, their faithful application can ... protect the Court against the danger of the imputation of a bias favouring claims of one kind or another in the granting or denial of review."[6]

This thesis — the so-called "neutral principles" thesis — rests at the heart of Wechsler's jurisprudence of constitutional adjudication. Much has been written about this thesis, and particularly about the manner in which Wechsler defends it.[7] For Wechsler, the Supreme Court decisions of the 1940s and 1950s invalidating state imposed racial segregation[8] — and *Brown* v. *Board of Education*[9] in particular — illustrate by default the fundamental importance of principled constitutional adjudication. These decisions, Wechsler claimed, had "the best chance of making an enduring contribution to the quality of our society of any that I know in recent years."[10] Yet none of these decisions, he insisted, was genuinely principled.

Brown, Wechsler believed, was especially problematic. The problem rested not in the result, but in "the reasoning of the opinion."[11] The Supreme Court had based its decision to integrate public schools not on a principle, but on a particular point of view — that is, "on the ground that segregated schools are 'inherently unequal'" having "deleterious effects upon the colored children in implying their inferiority, effects which retard their education and mental development."[12] How would we ultimately judge *Brown*, Wechsler wondered, if this point of view turned out not to be supported by fact? That is, what if it transpired that the abolition of segregation in public schools served generally to exacerbate rather than ameliorate racial tensions? What if it led to black children in certain communities being humiliated and persecuted in integrated

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5 *Ibid.* at 9.

6 *Ibid.* at 9-10.

7 See, for example, L.H. Pollack, "Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler" (1959) 108 U. Pa. L. Rev. 1; A. Mueller & M.L. Schwartz, "The Principle of Neutral Principles" (1960) 7 UCLA L. Rev. 571; A.S. Miller & R.F. Howell, "The Myth of Neutrality in Constitutional Adjudication" (1960) 27 U. Chi. L. Rev. 661; C.E. Clark, "A Plea for the Unprincipled Decision" (1963) 49 Va. L. Rev. 660; B.F. Wright, "The Supreme Court Cannot be Neutral" (1962) 40 Tex. L. Rev. 599; M. Shapiro, "The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles" (1963) 31 Geo. Wash. L. Rev. 587; M.P. Golding, "Principled Decision Making and the Supreme Court" (1963) 63 Colum. L. Rev. 35; J.G. Deutsch, "Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science" (1968) 20 Stan. L. Rev. 169; D.A.J. Richards, "Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication" (1977) 11 Ga. L. Rev. 1069; K. Greenawalt, "The Enduring Significance of Neutral Principles" (1978) 78 Colum. L. Rev. 982; M.V. Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983) 96 Harv. L. Rev. 781; G. Peller, "Neutral Principles in the 1950s" (1988) 21 U. Mich. J.L. Ref. 561.

8 See, for example, *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

9 347 U.S. 483 (1954) [hereinafter *Brown*].

10 Wechsler, *supra* note 4 at 27.

11 *Ibid.* at 32.

12 *Ibid.* at 32.

classrooms and playgrounds? What, indeed, if black schoolchildren and their parents actually expressed a preference for segregated schools? What if they felt that segregation guaranteed them a greater "sense of security"?[13] By implicitly raising such questions, Wechsler was not attempting to justify segregation. Rather, he was warning against the dangers of adopting expedient, consequentialist arguments in order to justify particular legal outcomes. The fact of the matter is, he recognized, that when a court adopts a particular policy on an issue such as segregation, the consequences of implementing that policy — even when it is one which would command widespread public support — will not necessarily be desirable. An anti-segregationist policy may serve, certainly in the short run, actually to aggravate racial tensions. That is why, Wechsler believed, constitutional adjudication must entail more than merely decision according to policy. Indeed, he concluded, that is why the Supreme Court must embark on a quest to develop principles of "adequate neutrality and generality"[14] for the purposes of constitutional interpretation.

There are two different ways in which Wechsler's argument might be said to be fundamentally important. First, it is important in so far as it reinforces one of the basic lessons of modern American jurisprudence: namely, that there are no guarantees that particular legal initiatives will satisfy the objectives which inspired their implementation. Regulatory theory in the Chicago neoclassical tradition teaches this lesson in an especially stark fashion. It is a simple matter of fact, Chicagoans have argued, that regulatory strategies often achieve quite the opposite of what they were intended to achieve: rent regulation is likely to lead to a decrease in the supply of private sector rented accommodation, thereby proving disadvantageous rather than beneficial to tenants;[15] minimum wage legislation invariably places extra financial burdens on employers, thereby forcing them either to cut their workforce or into liquidation.[16] Wechsler teaches a similar, if rather more subtle lesson with regard to constitutional adjudication. If the Supreme Court resolves constitutional dilemmas on the basis of policy, he claims, it ought not to be surprised if it finds that the effect of implementing particular policies turns out to be markedly different from what the Court had expected or intended. Just as there can be no guarantee from the outset that legislation will operate as it is supposed to, it is similarly impossible to guarantee that political adjudication will further the particular policy, or policies, on which it is founded.

The second lesson to be drawn from Wechsler's argument relates to his appeal to principle. The Supreme Court, Wechsler claims, ought to have decided *Brown* on the basis of a neutral principle, and yet he confesses to being uncertain as to what that

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[13] *Ibid.* at 33.

[14] *Ibid.* at 15.

[15] For the classic study in this context see M. Friedman & G.J. Stigler, *Roofs or Ceilings? The Current Housing Problem* (Irvington-on-Hudson, New York: Foundation for Economic Education, 1946).

[16] For an elaboration of this example and others, see G.J. Stigler, *The Citizen and the State: Essays in Regulation* (Chicago: University of Chicago Press, 1975).

principle ought to have been.[17] Given the manner in which he develops his argument, the formulation of an appropriate principle to justify the decision in *Brown* seems not especially important; for Wechsler's primary concern is not to identify a specific principle but to explain, in very general terms, why it is that the Supreme Court ought to concern itself with the formulation of principles. Although Wechsler does not articulate his position unequivocally, the essence of his argument seems to be that those who see no need for neutral principles of constitutional adjudication in effect subscribe to what we might call a jurisprudence for good times. The point is a simple one: unprincipled, political adjudication may seem unproblematic when the politics of the judiciary is generally considered to be laudable. But what is one to do when the politics of the judiciary changes for the worse? According to Wechsler, many of the great early-twentieth century Supreme Court dissents — Holmes in *Lochner* v. *New York*[18] is the classic example — were powerful precisely because they demonstrated the inability of the Court to "present an adequate analysis, in terms of neutral principles, to support the value choices it decreed."[19] Indeed, *Lochner* itself — one of various late-nineteenth and early-twentieth century cases in which the Supreme Court used the Fourteenth Amendment of the Constitution to sanctify *laissez-faire* and curb legislative intervention into private economic arrangements[20] — is commonly considered to be a classic, if not the classic, example of politically motivated constitutional adjudication. While not everyone finds fault with *Lochner*,[21] the case is more often than not held up as an example of undesirable political adjudication.[22] *Lochner*, so the argument goes, epitomizes the dangers of unprincipled judicial activism. The implication behind Wechsler's argument, however, is that the same could be said of *Brown*. As with *Lochner*, in *Brown* we find the Supreme Court using the Fourteenth Amendment in order to validate as law a particular preference. In *Lochner*, the Court had demonstrated a preference for *laissez-faire* as opposed to economic interventionism; in *Brown*, it exhibited a preference for racial integration as opposed to segregation. Both decisions were political. The fact that one decision is generally considered to be better or more welcome than the other is not, in Wechsler's view, particularly relevant. For where an unelected, politically appointed federal judiciary decides cases on the basis of preferences, there always exists the likelihood that those preferences will change with shifts in the political balance of the courts. By producing decisions such as that reached in *Brown* — indeed, by demonstrating a basic commitment to broadening the scope of the rights which attach to American citizenship — the Warren Court appeared to be pursuing a desirable political agenda. Wechsler's point, however, was that there was

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17 *Supra* note 4 at 34: "Given a situation where the state must practically choose between denying the association of those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school—segregation cases."

18 198 U.S. 45 (1905) [hereinafter *Lochner*].

19 *Supra* note 4 at 24.

20 For other classic examples, see *Allgeyer* v. *Louisiana*, 156 U.S. 578 (1897); *Adair* v. *United States*, 208 U.S. 161 (1908); *Coppage* v. *Kansas*, 236 U.S. 1 (1915).

21 R.A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, (Cambridge: Harvard University Press, 1985) at 128, 272-282.

22 See generally C.R. Sunstein, "Lochner's *Legacy*" (1987) 87 Colum. L. Rev. 873.

no reason to believe that the outlook of the Court would always remain fixed. *Lochner* was proof in itself that judicial activism may serve bad as well as good ends, and that political adjudication is likely only to be appealing when the general political outlook of the judiciary commands widespread respect.[23]

Wechsler, then, was concerned not with providing concrete examples of neutral principles, but with demonstrating the importance of such principles for the purpose of constitutional adjudication. Such principles are important, he believed, because they will ensure that the Supreme Court steers away from inconsistency and hypocrisy. They will ensure that the Court is a servant of reason and neutrality rather than a slave to political pressure. This argument — that judicial decision making is an apolitical activity only when judges endeavour genuinely to discover and elaborate non-preferential adjudicative principles — surfaces over and over again throughout the history of twentieth-century American jurisprudence.[24] It is an argument which is to be found, in one form or another, in the writings of, *inter alios*, Cardozo,[25] Pound,[26] Dickinson,[27] Fuller,[28] Hart and Sacks,[29] Bickel,[30] and Dworkin.[31] At the heart of the argument rests the belief that principles somehow make judges accountable for the decisions which they reach. To decide a case according to principle is not merely to determine a result, but to produce a reason for that result — a reason which may then be subjected to further principled scrutiny, either by courts or by legal commentators. This argument has recently been developed in a philosophical context by Robert Nozick. "A person may seek principles," Nozick observes, "not only to test his own judgment or give it more support but also to convince others or to increase their conviction. To do this he cannot simply announce his preference for a position; he must produce reasons convincing to others."[32] Principles thus have what Nozick calls "an interpersonal function":[33] that is, it is by resorting to principles that we both convince and make ourselves accountable to others. This is precisely Wechsler's argument regarding constitutional adjudication: the accountability and the persuasiveness of judges in this context depends upon their willingness and ability to articulate and promote neutral

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23 For further elaboration of this point, see Neil Duxbury, "The Theory and History of American Law and Politics" (1993) 13 Oxford J. of Legal Stud. 249 at 249-252.

24 See N. Duxbury, "Faith in Reason: The Process Tradition in American Jurisprudence" (1993) 15 Cardozo L. Rev. 601.

25 See B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921).

26 See R. Pound, "Roscoe Pound" in Julius Rosenthal Foundation, ed., *My Philosophy of Law: Credos of Sixteen American Scholars* (Boston: Boston Law Book Co., 1941) 249 at 257.; R. Pound "Survey of the Conference Problems" (1940) 14 U. Cin. L. Rev. 324 at 330.

27 See J. Dickinson, "The Law Behind Law: II" (1929) 29 Colum. L. Rev. 285 at 296.

28 See L.L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353 at 369.

29 *See* H.M. Hart, Jr. & A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambrige: Harvard University Press, 1958) at 159-161, 177-178.

30 *See* A.M. Bickel, "The Supreme Court, 1960 Term — Foreword: The Passive Virtues" (1961) 75 Harv. L. Rev. 40 at 77.

31 See R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) at 217.

32 R. Nozick, *The Nature of Rationality* (Princeton: Princeton University Press, 1993) at 6.

33 *Ibid.* at 9.

principles. Very simply — indeed, to use Nozick's words — "[p]rinciples constitute a form of binding."[34]

II. WHY PRINCIPLE?

Principles will only constitute a form of binding, of course, so long as one accepts them as such. But what if one lacks faith in principle? What if one believes that principles are incapable of distinguishing adjudication from politics? There are plenty of American lawyers who believe precisely this. A significant proportion of that literature which goes under the banner of critical legal studies[35] is devoted to the proposition that principled adjudication is, of necessity, indeterminate.[36] What this means is that the principles to which judges might resort in the process of adjudication inevitably tug against one another, that there can never be a truly neutral principle or a principle which might generate a right answer, because principles exist in competition rather than in isolation. Judges are forced to choose among competing principles (the choice which a judge may face between arguing on principled grounds for freedom of speech or for the protection of privacy is the classic illustration in this context) and such choices are necessarily issues of individual preference rather than principle. The choice of which principle to promote, in other words, cannot itself be a matter of principle.

A further problem with the neutral principles thesis concerns what we might call its normative status. That is, even if it were possible to formulate truly neutral principles of constitutional adjudication, and even if one were to accept the argument that the Supreme Court ought to develop and apply such principles when engaging in this type of adjudication, the simple fact is that this is not what the Court does. However one might wish it were otherwise, the Supreme Court is not a forum of principle. For all that Wechsler believed that the Court ought to be in the business of developing non-preferential principles of constitutional adjudication, it was, and is, not.

This observation takes us to the heart of this essay. There has been a tendency for commentators to criticize Wechsler by taking issue with his position on *Brown*. Wechsler's assertion that *Brown* is an unprincipled decision, certain of these commentators have argued, is really an assertion that it was a bad decision, which in itself may be interpreted as an argument against racial integration.[37] There is certainly a good deal of naiveté to be discerned in Wechsler's position on segregation. This is especially clear from his claim that blacks and whites suffer equally from the effects

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34 *Ibid.* at 10.

35 The lower case here is deliberate, following M. Tushnet, "Critical Legal Studies: A Political History" (1991) 100 Yale L.J. 1515 at 1515-23 (arguing that critical legal studies is a political location rather than an intellectual movement in the American law schools).

36 For but a handful of examples, see M.J. Horwitz, "The Jurisprudence of *Brown* and the Dilemmas of Liberalism" (1979) Harv. C.R.-C.L. L. Rev. 599; R.D. Parker, "The Past of Constitutional Theory — And Its Future" (1981) 42 Ohio St. L.J. 223; J.W. Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 Yale L.J. 1; G. Peller, "The Metaphysics of American Law" (1985) 73 Cal. L. Rev. 1151.

37 On this point, see Duxbury, *supra* note 24 at 675-76.

of segregation;[38] as it is also from his belief that a decision to abolish segregation which is justified by reference to a neutral principle is likely to command the respect of all those affected by it.[39] But it is not Wechsler's argument that an unprincipled decision is somehow a wrong decision (nor, by extension, is it necessarily the case that a principled decision is a right decision).[40] Indeed, as we have seen, Wechsler welcomed the cases outlawing racial segregation. His argument, rather, is that an unprincipled decision is, of necessity, an insufficiently reasoned decision; and it is precisely because of this insufficiency that any such decision is unlikely either to persuade or to bind those whom it affects.[41]

The fundamental problem with Wechsler's neutral principles thesis, I would argue, rests not in his response to *Brown*, but in his response to Learned Hand. Wechsler, we have seen, responds to Hand's reservations over the exercise of judicial review by asserting that the likelihood of the Supreme Court evolving into a third legislative chamber is diminished owing to the fact that constitutional adjudication is subject to neutral standards of interpretation. In other words, since the Court is expected to adjudicate constitutional issues on the basis of neutral principles as opposed to particular preferences, there is little need to fear that it might adopt the role of a legislative organ. From where, however, does this expectation derive? That is, why might it be reasonable to suppose that the Supreme Court will consider itself bound to seek out and articulate neutral principles when engaging in constitutional adjudication? Given that Wechsler himself was remarkably hesitant when it came to the matter of identifying a neutral principle which might apply to the issue of segregation — given, still more importantly, that the Warren Court seemed in general to be little concerned with the elaboration of principles — it seems distinctly odd that he should have expected the Court to consider itself under a duty to adjudicate constitutional issues in a neutral, principled fashion. Wechsler, it appears, conjures up this duty out of nothing. Thus, it is that his neutral principles thesis raises a monumental question: *viz.*, what is the source of this expectation that constitutional controversies be adjudicated by reference to neutral principles? It is certainly clear from Wechsler's argument why he should think that the Supreme Court *ought to* strive to develop such principles. It is by

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38 *Supra* note 4 at 34 where Wechsler claims that the black lawyer, Charles Houston, "did not suffer more than I" when they were prevented from dining together in certain restaurants in the District of Columbia. For further critical analysis of this claim, see C.R. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1993) at 76-77 [hereinafter *The Partial Constitution*].

39 *Ibid.* at 26.

40 See H. Wechsler, "The Nature of Judicial Reasoning" in S. Hook, ed., *Law and Philosophy: A Symposium* (New York: New York University Press, 1964) 290 at 299.

> I have never thought the principle of neutral principles offers a court a guide to exercising its authority, in the sense of a formula that indicates how cases ought to be decided ... That an adjudication be supported or at least supportable in general and neutral terms is no more than a negative requirement. A decision is not sound unless it satisfies this minimal criterion. If it does, but only if it does, the other and harder questions of its rightness and its wisdom must be faced.

41 It is worth noting in this context that ten years after *Brown* was decided, little more than one percent of black children in the South attended desegregated schools. Not until 1964, after the involvement of Congress and the executive branch, did widespread desegregation begin to occur. See *The Partial Constitution*, *supra* note 38 at 146.

developing neutral principles of constitutional adjudication, he claims, that the Court ensures its commitment to restraint, that it resists the temptation "to function as a naked power organ."[42] But it is not at all clear why he should have believed that the Court may be *expected* to develop such principles. In short, the question of from where this expectation derives is left unanswered.

III. BEYOND WECHSLER

Let us summarize the thrust of this article thus far. The debate in American constitutional jurisprudence over the viability of principled decision making has tended to focus on the questions of whether it is in fact possible to formulate genuinely neutral principles of constitutional law and whether the Supreme Court ought indeed to endeavour to elaborate and apply such principles in the process of constitutional adjudication. My argument is that the neutral principles thesis raises, and leaves unanswered, an even more basic question, a question which American constitutional law theorists have tended to overlook: namely, irrespective of whether or not we consider genuinely principled constitutional adjudication to be either possible or desirable, why might the Supreme Court ever be expected to engage in such adjudication?

That this question has been left unanswered by American constitutional law theorists does not necessarily mean that it is unanswerable. Indeed, the work of one contemporary American constitutional law scholar can be seen, if only implicitly, to represent a response to this question. Cass Sunstein's *The Partial Constitution* might be said to be neither a new nor a novel book. Much of its content is drawn from essays which Sunstein has written and had published over the past decade, and he himself admits that the central thesis of the book not only "played a central and explicit role in Franklin Roosevelt's New Deal" but may be traced back to "the founding generation and the period following the Civil War."[43] The book nevertheless represents, I believe, a unique attempt to explain why the Supreme Court might be expected to engage in principled constitutional adjudication.

This is by no means the primary objective of the book. Indeed, Sunstein warns against overemphasizing the role of adjudication within the American constitutional framework. "[T]he notion that the Constitution is directed to judges," he observes, "was dramatically fueled by our experience under the Warren Court."[44] In fact, "the Constitution is aimed at everyone, not simply the judges."[45] Even in so far as Sunstein is concerned specifically with the Constitution in the Supreme Court, he is not drawn principally to the question of why the Court might ever be expected to engage in principled adjudication. My point, however, is that, as we unravel his argument, we find this question answered.

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42 *Supra* note 4 at 12.
43 *Supra* note 38 at 6.
44 *Ibid.* at 9.
45 *Ibid.*

The basic premise of American constitutional law, Sunstein observes, is that government must be impartial. "Under the American Constitution, government must not single out particular people, or particular groups, for special treatment."[46] The first obligation of government, in other words, is impartiality or neutrality. If government is to be impartial, it must be committed to providing "reasons that can be intelligible to different people operating from different premises."[47] But what if government demonstrates an abandonment of impartiality? Sunstein's answer to this question provides an initial insight into why the Supreme Court may be expected to be preoccupied with developing neutral principles of constitutional adjudication:

> Judicial interpretation of many of the most important clauses of the Constitution reveals a remarkably common theme. Although the clauses have different historical roots and were originally directed at different problems, they appear to be united by a concern with a single underlying evil: the distribution of resources or opportunities to one group rather than to another solely on the ground that those favored have exercised the raw political power to obtain what they want.[48]

In other words, the Constitution itself — or certainly judicial interpretation of its major clauses — is underscored by a general commitment to neutrality. When government promotes particular preferences, therefore, it is likely to be adjudged as offending the basic principle of constitutional impartiality.

But what is meant, in this context, by neutrality? According to Sunstein, modern efforts at constitutional interpretation are characterized by a tendency to equate neutrality with the status quo. "In contemporary constitutional law, the status quo — what people currently have — is often treated as the neutral and just foundation for decision. Departures from the status quo signal partisanship; respect for the status quo signals neutrality."[49] Yet the status quo may in fact be neither neutral nor just. Where this is the case, the endeavour to promote neutrality in the process of constitutional interpretation may produce injustice. We ought, therefore, to be suspicious of what Sunstein terms status quo neutrality. "A decision to use the status quo as the baseline [for constitutional deliberation] would be entirely acceptable," he asserts, "if the status quo could be independently justified."[50] However, "[s]tatus quo neutrality disregards the fact that existing rights, and hence the status quo, are in an important sense a product of law."[51] That is, the existing distribution of entitlements within any society is legally rather than neutrally conferred. "It is a matter of simple fact that people own things only because the law permits them to do so."[52]

It is a mistake, therefore, to use status quo neutrality as a baseline for constitutional interpretation. Yet the mistake, Sunstein asserts, is one which both law professors and judges have committed all too frequently. Wechsler's critique of *Brown*, for example,

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46 *Ibid.* at 2.
47 *Ibid.* at 24.
48 *Ibid.* at 25.
49 *Ibid.* at v.
50 *Ibid.* at 6.
51 *Ibid.* at 4.
52 *Ibid.*

is rooted in this mistake. "For Wechsler, the existing distribution of opportunities and resources is simply 'there'; neutrality lies in (what is seen as) inaction. Neutrality is threatened when the Court 'takes sides' by preferring those who are disadvantaged."[53] The same mistake lies at the heart of the Supreme Court's decision in *Lochner* v. *New York*. In *Lochner*, Sunstein argues, the Court considered freedom of contract to be a phenomenon of nature rather than a legal construct. The existing distribution of entitlements within the marketplace was therefore assumed by the Court to be neutral.[54] Yet the fact of the matter is — and this is precisely what the majority of the *Lochner* Court failed to appreciate — that the law creates and imposes limitations on property and contract rights. Thus it is that Sunstein concludes, apropos of *Lochner*, that:

> [m]arket wages and market hours were ... a creation of law, not of nature, and not of laissez-faire. The common law could not be regarded as a natural or unchosen baseline. Instead, its principles amounted to a controversial regulatory system that created and did not simply reflect the social order.[55]

Sunstein's basic message, then, is that reliance on neutrality — when neutrality is understood in terms of the status quo — is likely to prevent rather than to foster impartiality in the process of constitutional interpretation. While the Constitution is underscored by a commitment to neutrality, those engaged in constitutional interpretation have failed to appreciate what neutrality means. So does this mean that the quest for neutrality in constitutional interpretation ought to be abandoned? Sunstein insists not: "[t]he Constitution (like other legal texts) cannot reasonably be said to mean whatever the judges think that it should mean."[56] For "[c]onstitutional interpretation inevitably requires us to use principles external to the Constitution."[57] Although "the meaning of any text, including the Constitution, is inevitably and always a function of interpretive principles," and although these principles themselves "are inevitably and always a product of substantive commitments,"[58] this does not mean "that judges should feel free to choose whatever principles they prefer,"[59] or "that we are in chaos,

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53 *Ibid.* at 76.

54 See *ibid.* at 48: "Thus it is that the *Lochner* Court relied on a conception of neutrality taking existing distributions as the starting point for analysis."

55 *Ibid.* at 50. As Sunstein himself recognizes (*ibid.* at 51-53), during the early part of this century the most careful and rigorous critic of *Lochner*-style neutrality was the Columbia law professor, Robert Lee Hale. The basic problem with *Lochner*, according to Hale, was that the majority of the Court believed that all citizens enjoy a natural equality of bargaining rights. Yet such rights do not exist *a priori*. Rather, they are legally conferred. The ability to benefit from such rights, moreover, will reflect distribution of wealth, so that those with greater wealth will be able to take greater advantage of legal rights (for example, the extent of my wealth will determine whether or not I am able to take advantage of my legal right to buy a luxury car). For Hale's principal attempt to develop the constitutional implications of this argument, see R.L. Hale, "Our Equivocal Constitutional Guaranties" (1939) 39 Colum. L. Rev. 563. More generally on Hale, see N. Duxbury, "Robert Hale and the Economy of Legal Force" (1990) 53 Mod. L. Rev. 421.

56 *Supra* note 38 at 7-8.

57 *Ibid.* at 93.

58 *Ibid.* at 8.

59 *Ibid.* at 10.

or an abyss, or that law is simply politics. Instead, it means only that the external principles must be identified and defended."[60]

The identification and defense of such principles entails, for Sunstein, a commitment to neutrality. Despite the inadequacy of the status quo conception of neutrality, he claims, "the aspiration to neutrality is far from an outmoded or empty one."[61] This takes us back to our discussion of Wechsler. We saw that Wechsler fails to explain why the Supreme Court might ever be expected to develop neutral principles of constitutional adjudication. Sunstein, we have seen, provides us with an explanation as to why the Court might be expected to be committed to neutrality when engaging in constitutional adjudication; but he has also demonstrated that the conception of neutrality which dominates constitutional discourse is not particularly satisfactory. Thus it is that his analysis leads us to a rather different question: namely, why might we ever expect constitutional interpretations to be based on any conception of neutrality other than the status quo conception? If, as Sunstein observes, "interpretive principles must be created by the judges"[62] — if, furthermore, "[t]here is ... no way for those interpreting the Constitution to avoid moral decisions"[63] — are we not forced to accept that constitutional interpretation must be open-ended? To phrase the question rather differently, why might we expect interpretations of the Constitution to be anything other than indeterminate?

Sunstein offers two interrelated answers to this question. His first answer is that if the Constitution really were indeterminate, it would be an irrelevance. That is, if the text of the Constitution could be taken to mean anything, there would be no reason to pay any attention to it. But of course, this is not the case. The Constitution is considered to be binding: "Any system of interpretation that disregards the constitutional text cannot deserve support."[64] This is not merely a theoretical proposition; rather, "[i]t depends on some substantive political arguments."[65] Fidelity to the text of the Constitution is required, for example, owing to the fact that, generally speaking and properly interpreted, the text prevents the exercise of arbitrary judicial power and promotes the pursuit of human liberty. It is a text, furthermore, which contains certain "substantive principles on which there is general agreement."[66] Sunstein takes the principle of free mobility to illustrate his point:

> For example, it seems correct to infer, from the federal structure of the Constitution, a general right to travel from one state to another. A denial of that right would be inconsistent with the Constitution's structural commitments to national supremacy and national citizenship. If there were no right to travel, these commitments would unravel; states could restrict citizens to state borders. Through reasoning of this general form, a good deal of constitutional interpretation can take place.[67]

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60 *Ibid.* at 93.
61 *Ibid.* at 10.
62 *Ibid.* at 94.
63 *Ibid.* at 101.
64 *Ibid.* at 119.
65 *Ibid.*
66 *Ibid.*
67 *Ibid.* at 119-20.

Accordingly, one might expect the Supreme Court to be concerned with the articulation of neutral principles of constitutional adjudication since, to a limited degree,[68] such principles are to be found in the Constitution itself.

Sunstein's second answer to the question as to why we might expect constitutional interpretation to be founded upon neutral principles revolves around his observation that "[a]bove all, the American Constitution was designed to create a deliberative democracy."[69] In general, he claims, "constitutional interpretation must rely on principles external to the constitutional text, and ... the commitment to deliberative democracy is a promising source of those principles."[70] Sunstein never explains in any detail what he means by deliberative democracy.[71] Possibly an American readership does not require such an explanation; or perhaps to do so would have necessitated a further book. In essence, it seems, a system founded upon deliberative democracy is one in which public officials, besides being accountable to the people, are "able to engage in a form of deliberation without domination through the influence of factions."[72] Sunstein himself admits that his objective is "only to set out the commitments of deliberative democracy; to suggest its plausibility, its historical roots, and its general appeal; and to see how it might bear on the development of interpretive principles in various areas of law."[73] While the Constitution may originally have been devised in order to promote deliberative democracy, the question facing constitutional theorists today is whether the ideals of such a democracy might be said to generate an expectation that constitutional interpretation be both principled and impartial.

Sunstein clearly believes that the ideals of deliberative democracy do generate such an expectation. Respect for status quo neutrality, he argues, must be subject to considerations of deliberative democracy.[74] When deliberative democracy comes to the fore in constitutional debate, certain issues are found to be unripe for constitutional adjudication.[75] Take the example of affirmative action: "When a legislature enacts an affirmative action program," Sunstein claims, "it does not operate against a baseline that is in any sense neutral or just. The current distribution of benefits and burdens along racial lines is partly a product of discrimination."[76] However, there is little doubt that

> [s]uch programs can stigmatize their purported beneficiaries, produce unfairness, and bring about a range of other social harms. Often or even usually, it may be best to have a race-neutral policy benefiting the disadvantaged, rather than reserving benefits to members of identified racial groups. But

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68 *Ibid.* at 120-21 (on the limited number of interpretive principles to be found within the Constitution itself).

69 *Ibid.* at 19-20.

70 *Ibid.* at 162.

71 *Ibid.* at 134 ("I will not be attempting to offer a full elaboration and defense of deliberative democracy or to measure it against the many alternative sources of interpretive principles.").

72 *Ibid.* at 20.

73 *Ibid.*

74 *Ibid.* at 149.

75 The concept of ripeness, as used in this context, was originated by Alexander Bickel. See Bickel, *supra* note 30 at 74.

76 *Supra* note 38 at 149-50.

> these are questions for the political process, not for courts. The courts should let this difficult issue be decided through democratic means.[77]

For the most part, Sunstein is concerned in *The Partial Constitution* with demonstrating that, if constitutional interpretation were distinguished, as it ought to be, by a commitment to deliberative democracy rather than to status quo neutrality, then American constitutional law would have an entirely different complexion than it currently does. A reinvigoration of deliberative democracy would force us to recognize, among other things, that, notwithstanding the language of the First Amendment, there exist principled grounds for regulating pornography;[78] that government, if it so wishes, has substantial discretion to fund artistic projects;[79] that the equal protection clause of the Fourteenth Amendment (if not the right to privacy) protects the right of women to seek abortions[80] (and indeed compels governmental funding of that right in cases of pregnancy owing to rape or incest);[81] and that the Constitution does not create a judicially enforceable right to welfare or other forms of subsistence.[82] A critical examination of such specific claims lies beyond the remit of this article. The objective of this article has been to suggest that the appeal to deliberative democracy offers an explanation as to why it may not be unreasonable to suggest that there exists an expectation that constitutional adjudication be framed in terms of neutral principles. Commitment to deliberative democracy, as Sunstein demonstrates, demands faith in the principle of constitutional impartiality — in the fundamental rights to free speech, equal protection of the law, due process, religious liberty, and the like.[83] It is a commitment which entails a respect for neutrality — neutrality defined not in terms of the status quo, but in terms of deliberation free from interest-group dominance. While this notion of commitment may seem idealistic, it lies at the centre of the American constitutional heritage. Better than anything else, it explains the quest — so peculiar to the American law schools — to discover and articulate neutral principles of constitutional adjudication.

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77 *Ibid.* at 150.
78 *See ibid.* at 261-70.
79 *See ibid.* at 292-93.
80 *See ibid.* at 270-85.
81 *See ibid.* at 315-18.
82 *See ibid.* at 155.
83 *See ibid.* at 347.