## CASS R. SUNSTEIN, A REPUBLIC OF REASONS

THE PARTIAL CONSTITUTION 18–34, 38–39 (1993).

### MONARCHY, SELF-INTEREST, FACTIONS

The framers of the American Constitution sought to create a system of government that would simultaneously counteract three related dangers: the legacy of monarchy; self-interested representation by government officials; and the power of faction, or "majority tyranny." The impartiality principle was part of the attempt to respond to all these problems.

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The impartiality principle is conspicuously connected with the desire, traceable to the early period of the founding, to limit the potential arbitrariness of the king and indeed of everything entailed by the institutions of monarchy. The Constitution should be understood against the backdrop set by prerevolutionary America, which had been pervaded by monarchial characteristics, including well-entrenched patterns of deference and hierarchy. In the prerevolutionary period, many of these patterns were attributed to nature itself. These included not merely the institution of slavery but also existing family structures, relations between employers and employees, occupational categories, education, the crucial concept of the gentleman, and of course the structures of government. Indeed, those very structures were thought to be modeled on the family and to grow out of the same natural sources.

A large element in the American Revolution consisted of a radical rebellion against the monarchical legacy. The rebellion operated with special force against the traditional belief in a "natural order of things." Thus the Americans insisted, in direct opposition to their English inheritance, that "culture" was "man-made." In America, social outcomes had to be justified not by reference to nature or to traditional practices, but instead on the basis of reasons.

The American framers were alert not only to the legacy of monarchy, but also to the general risk that public officials would act on behalf of their own self-interest rather than the interests of the public as a whole. Actual corruption in government was the most dramatic illustration of this danger. But self-interested representation could be found in many places in which officials seek to aggrandize their own powers and interests at the expense of the people as a whole. The responsibility of the public official was to put personal interest entirely to one side. The impartiality principle, requiring public officials to invoke public-regarding reasons on behalf of their actions, was a check on self-interested representation.

Finally, the framers sought to limit the power of self-interested private groups, or "factions," over governmental processes. For Madison, this was

the greatest risk in America: "[I]n our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents."[3] Hence majority rule was, for the framers, a highly ambiguous good. On their view, even an insistent majority should not have its way, if power was the only thing to be invoked on its behalf.

It is relevant here that the framers operated in the light of their experiences under the Articles of Confederation. Under the Articles, powerful private groups appeared to dominate state and local government, obtaining measures that favored them but no one else, and that could be explained only by reference of private self-interest. The new Constitution was intended to limit this risk.

Above all, the American Constitution was designed to create a deliberative democracy. Under that system, public representatives were to be ultimately accountable to the people; but they would also be able to engage in a form of deliberation without domination through the influence of factions. A law based solely on the self-interest of private groups is the core violation of the deliberative ideal.

The minimal condition of deliberative democracy is a requirement of reasons for governmental action. We may thus understand the American Constitution as having established, for the first time, a republic of reasons. A republic of this sort is opposed equally to outcomes grounded on self-interest and to those based solely on "nature" or authority. Where the monarchical system saw government as an outgrowth of a given or natural order, the founding generation regarded it as "merely a legal man-made contrivance having little if any natural relationship to the family or to society."[5]

## FOUNDING INSTITUTIONS

The general commitment to deliberative democracy, and the belief in a republic of reasons, echo throughout the founding period. In *The Federalist* No. 10—James Madison's most outstanding contribution to political thought—the system of national representation is defended as a mechanism with which to "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." On this

[3]Madison to Jefferson, Oct. 17, 1788, in 11 J. Madison, *The Papers of James Madison* 298 (R. Rutland & C. Hobson eds. 1977).

[5]Gordon Wood, *The Radicalism of the American Republic* 167 (1992).

view, national officials, selected from a broad territory, would be uniquely positioned to operate above the fray of private interests.

In their aspirations for deliberative government, the framers modernized the classical republican belief in civic virtue. The antifederalists, critics of the proposed Constitution, had invoked traditional republican ideas in order to challenge the Madisonian belief that a large territory was compatible with true republicanism. In the antifederalist view, a genuine republic required civic virtue, or commitment to the public good. Civic virtue, they insisted, could flourish only in small communities united by similar interests and by a large degree of homogeneity.

The framers fully accepted the goal; but they firmly rejected the prescription. For the framers, as for those in the classical tradition, virtue was indispensable; and the framers continued to understand virtue as a commitment to the general good rather than to self-interest or the interest of private factions. Thus Hamilton urged that the "aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust."[7] But for the framers, a large republic would be more, rather than less, likely to serve republican aspirations. It would do so precisely because in a large republic, national representatives would be in an unusually good position to engage in the deliberative tasks of government. A small republic, as history had shown, would be buffeted about by the play of factions. In a large republic, the various factions would offset each other.

In recent years, there has been an extraordinary revival of interest in republican thought. The revival is directed above all against two groups: people who think that the Constitution is designed only to protect a set of identified "private rights," and people who treat the document as an effort to provide the rules for interest-group struggles among selfish private groups.

The framers' aspirations were far broader. They attempted to carry forward the classical republican belief in virtue—a word that appears throughout the period—but to do so in a way that responded realistically, not romantically, to likely difficulties in the real world of political life. They continued to insist on the possibility of a virtuous politics. They tried to make a government that would create such a politics without indulging unrealistic assumptions about human nature. We might understand the Constitution as a complex set of precommitment strategies, through which the citizenry creates institutional arrangements to protect against political

[7] *The Federalist* No. 63.

self-interest, factionalism, failures in representation, myopia, and other predictable problems in democratic governance.

The commitment to these ideas explains many of the founding institutions. It helps explain why, in the original system, the Senate and the President were to be chosen by deliberative representatives rather than directly elected by the people. It helps with the mystery of the Electoral College, which was, at the inception, to be a deliberative body, one that would discuss who ought to be President, rather than simply register votes. It helps explain why the framers favored long terms of service and large election districts. All these ideas about government structure were designed to accomplish the same goals, that is, to promote deliberation and to limit the risk that public officials would be mouthpieces for constituent interests. It was in this vein that Madison attacked Congress in 1787 as "advocates for the respective interests of their constituents" and complained of "the County representatives, the members of which are everywhere observed to lose sight of the aggregate interests of the Community, and even to sacrifice them to the interests or prejudices of their respective constituents."[10] The new Constitution was designed to reduce this risk. The framers designed a system in which representatives would have the time and temperament to engage in a form of collective reasoning.

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The basic institutions of the resulting Constitution were intended to encourage and to profit from deliberation, thus understood. The system of checks and balances—the cornerstone of the system—was designed to encourage discussion among different governmental entities. So too with the requirement of bicameralism, which would bring different perspectives to bear on lawmaking. The same goals accounted for the notion that laws should be presented to the President for his signature or veto; this mechanism would provide an additional perspective. The federal system would ensure a supplemental form of dialogue, here between states and the national government.

Judicial review was intended to create a further check. Its basic purpose was to protect the considered judgments of the people, as represented in the extraordinary law of the Constitution, against the ill-considered or short-term considerations introduced by the people's mere agents in the course of enacting ordinary law. As we will see, many of the original individual rights can be understood as part of the idea of deliberative democracy. Indeed, the goals of protecting rights and of promoting deliberation were understood to march hand in hand. The special status of property rights was

[10]Letter to Jefferson, Oct. 3, 1785, reprinted in 8 *The Papers of James Madison* 374 (Robert Rutland & William Rachal eds. 1975); Remarks on Mr. Jefferson's Draft of a Constitution, in *The Mind of the Founder* 35 (Marvin Meyers rev. ed. 1981).

an effort to ensure against precipitous, short-sighted, or ill-considered intrusions into the private sphere. Deliberative government and limited government were, in the framers' view, one and the same.

I have said that the framers' belief in deliberative democracy drew from traditional republican thought, and that it departed from the tradition in the insistence that a large republic would be better than a small one. It departed even more dramatically in its striking and novel rejection of the traditional republican idea that heterogeneity and difference were destructive to the deliberative process. For the framers, heterogeneity was beneficial, indeed indispensable; discussion must take place among people who were different. It was on this score that the framers responded to the antifederalist insistence that homogeneity was necessary to a republic.

Drawing on the classical tradition, the antifederalist "Brutus," complaining of the theory behind the proposed nationalist Constitution, wrote, "In a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving against those of the other."[16] Hamilton, by contrast, thought that heterogeneity, as part of the deliberative process, could be a creative and productive force. Thus he suggested that the "differences of opinion, and the jarrings of parties in [the legislative] department * * * often promote deliberation * * *."[17] As the framers saw it, the exchange of reasons in the public sphere was a condition for this process.

## IMPARTIALITY, THE REPUBLIC OF REASONS, AND INTEREST-GROUP PLURALISM

Read against this background, the principle of impartiality requires government to provide reasons that can be intelligible to different people operating from different premises. The requirement might be understood in this respect as a check on government by fiat, helping to bar authoritarianism generally. Drawing from our founding aspirations, we might even define authoritarian systems as all those that justify government outcomes by reference to power or will rather than by reference to reasons. At the heart of the liberal tradition and its opposition to authoritarianism lies a requirement of justification by reference to public-regarding explanations that are intelligible to all citizens. The principle of impartiality is the concrete manifestation of this commitment in American constitutional law.

Described in this way, the impartiality requirement might seem trivial and therefore uncontroversial. But the requirement turns out to be in severe tension with one of the most influential approaches to both modern government and American constitutionalism: interest-group pluralism.

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[16] 2 *The Complete Antifederalist* 369 (Herbert Storing ed. 1980).

[17] *The Federalist* No. 70.

There are many different forms of pluralism, but the unifying pluralist claim is that laws should be understood not as a product of deliberation, but on the contrary as a kind of commodity, subject to the usual forces of supply and demand. Various groups in society compete for loyalty and support from the citizenry. Once groups are organized and aligned, they exert pressure on political representatives, also self-interested, who respond to the pressures thus imposed. This process of aggregating and trading off interests ultimately produces law, or political equilibrium.

Whether pluralist ideas accurately describe current American politics is a subject of much dispute. There can be little doubt that the American framers were not pluralists. Some people also think that contemporary real-world government outcomes actually reflect reasons and justifications, and that those outcomes diverge from legislative and constituent self-interest (unless the concept of self-interest is understood so broadly as to be trivialized—as in the idea that altruism reflects self-interest, because altruists are interested in altruism). As we will see, interest-group pluralism is not an attractive political ideal. But if interest-group pluralism does describe contemporary politics, a requirement of impartiality, understood as a call for public-regarding justifications for government outcomes, is inconsistent with the very nature of government. It imposes on politics a requirement that simply cannot be met.

In the discussion to follow, I explore the relationship between the principle of impartiality and contemporary constitutional law. I show the extraordinary persistence of the principle across many generations and many constitutional provisions. I do not defend the requirement here; my purpose is descriptive. I claim only that the antiauthoritarian impulse, understood as a requirement of reasons, lies at the heart of American constitutional law.

## THE BAN ON NAKED PREFERENCES

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. I will call this underlying evil—a violation of the impartiality requirement—a *naked preference.*

The commerce clause, for example, allows one state to discriminate against commerce from another state only if that discrimination is a means of promoting some goal unrelated to helping self-interested insiders. The privileges and immunities clause prohibits a state from preferring its citizens over outsiders, unless the preference is supported by reasons

independent of protecting the insiders. The equal protection clause permits laws treating two classes of people differently only if there is a good connection between the distinctions and legitimate public purposes. The due process clause requires all government action to be justified by reference to some public purpose. The contract clause allows government to break or modify a contract only if the action is intended to promote a general public goal and does not reflect mere interest-group power. The eminent domain clause protects private property against self-interested private groups, both by demanding that a "public use" be shown to justify a taking of private property and by distinguishing between permissible exercises of the government power and prohibited takings.

The prohibition of naked preferences therefore underlies a wide range of constitutional provisions. The prohibition is connected with the original idea that government must be responsive to something other than private pressure, and with the associated notion that politics is not the reconciling of given interests but instead the product of some form of deliberation about the public good. As it operates in current constitutional law, the prohibition of naked preferences—like Madison's approach to the problem of factionalism—focuses on the motivations of legislators, not of their constituents. The prohibition therefore embodies a particular conception of representation. Under that conception, the task of legislators is not to respond to private pressure but instead to select values through deliberation and debate.

The notion that governmental action must be grounded in something other than political power is of course at odds with pluralism. Naked preferences are common fare in the pluralist conception; interest-group politics invites them. The prohibition of naked preferences stands as a repudiation of theories claiming that the judicial role is only to police the processes of representation to ensure that all affected interest groups may participate. In this respect, the prohibition of naked preferences reflects a distinctly substantive value and cannot easily be captured in procedural terms. Above all, it presupposes that constitutional courts will serve as critics of the pluralist vision, not as adherents striving only to "clear the channels" for political struggle.[23] And if a judicial role seems odd here, we should recall that the founding generation itself regarded courts as an important repository for representation and preservation of republican virtue, standing above the play of interests.

### THE BASIC FRAMEWORK

We might distinguish between two bases for treating one group or person differently from another. The first is a naked preference. For

[23]On this question, the influential treatment in John Hart Ely, *Democracy and Distrust* (1980), is untrue to the original constitutional structure or to current law.

example, state A may treat its own citizens better than those of state B—say, by requiring people of state B to pay for the use of the public parks in state A—simply because its own citizens have the political power and want better treatment. Or a city may treat blacks worse than whites—say, by denying them necessary police and fire protection—because whites have the power to restrict government benefits to themselves. In these examples, the political process is a mechanism by which self-interested individuals or groups seek to obtain wealth or opportunities at the expense of others. The task of the legislator is to respond to the pressures imposed by those interests.

Contrast with this a political process in which outcomes are justified by reference not to raw political power, but to some public value that they can be said to serve. For the moment we can define a public value extremely broadly, as any justification for government action that goes beyond the exercise of raw political power. (I describe later how the Constitution limits permissible public values.) For example, a state may relieve a group of people from a contractual obligation because the contract called for an act—say, the sale of heroin—that violated a public policy. Or state A may treat its own citizens better than those of state B—say, by limiting welfare payments to its own citizens—because it wants to restrict social spending to those who in the past have made, or in the future might make, a contribution to state revenues. In these examples, the role of the representative is to deliberate rather than to respond mechanically to constituent pressures. If an individual or group is to be treated differently from others, it must be for a reason that can be stated in public-regarding terms.

These competing portraits of the political process are of course caricatures of a complex reality. It is rare that government action is based purely on raw political power. Losers in the political process may have lost for a very good reason that has little to do with the power of their adversaries. Belief that an action will promote at least some conception of the public good almost always plays at least some role in government decisions. Sometimes people motivated to vote for certain legislation cannot easily disentangle the private and public factors that underlie the decision.

It is also rare for government action to be based on a disembodied effort to discern and implement public values, entirely apart from considerations of private pressure. Representatives are almost always aware of the fact that their vote will have electoral consequences. What emerges is therefore a continuum of government decisions, ranging from those that are motivated primarily by interest-group pressures to those in which such pressures play a very minor role. In any particular case, it may well be difficult to see which of these is dominant. But the occasional or even frequent difficulty should not be taken to obscure the existence of a real distinction. There 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.

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The equal protection clause, part of the Fourteenth Amendment, forbids a state to deny to any person "the equal protection of the laws." The clause is not concerned solely with the special case of discrimination between in-staters and out-of-staters. Its prohibition is far broader. Indeed, in many respects the clause may be understood as a generalization of the central concerns of the dormant commerce and privileges and immunities clauses, applying to all classifications their prohibition of naked preferences at the behest of in-staters. In this way, the basic requirement of impartiality is applied to everything.

*Disadvantaged groups, impermissible ends, and heightened scrutiny.* Discrimination against blacks, the central evil at which the clause was aimed, is the equal protection analogue of discrimination against out-of-staters under the commerce and privileges and immunities clauses. When a statute discriminates on its face against blacks, the Court applies a strong presumption of invalidity. One reason for heightened scrutiny is a belief that when a statute discriminates on its face against members of racial minority groups, a naked preference is almost certainly at work. Here a familiar idea—the relative political powerlessness of members of minority groups—helps to account for that belief. The central notion is that the ordinary avenues of political redress are much less likely to be available to minorities. The danger that such statutes will result from an exercise of (what is seen as) raw political power is correspondingly increased.

Current equal protection law also treats a number of government ends as impermissible. Notably, these prohibited ends involve a wide range of justifications that do not involve the exercise of raw political power in the ordinary sense. The point becomes clearest in cases involving classifications drawn on the basis of gender, alienage, and legitimacy. For example, when a statute provides that the spouses of male workers automatically qualify for social security benefits, but that spouses of female workers must show dependency, the classification hardly reflects an exercise of raw political power—narrowly understood—but instead embodies certain conceptions about the nature of female participation in the labor market. Invalidation of such statutes cannot be explained only on the basis of the minimal requirement that classifications rest on something other than raw power. Although the Court has not provided a clear rationale for its decisions here, the central ideas seem to be that the relevant groups are politically weak and that the traditional justifications for discrimination both reflect and perpetuate existing injustice.

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[T]here can be no question that current legal doctrines reject interest-group pluralism as a constitutional creed. They point instead to a conception of politics that demands a measure of deliberation from government representatives, deliberation that has some autonomy from private pressures. Many provisions of the Constitution are thus aimed at a single evil: the distribution of resources to one person or group rather than to another on the sole ground that those benefited have exercised political power in order to obtain government assistance.

To be sure, the prohibition rarely results in invalidation. But the cases are strikingly unanimous in their version of the prohibited end. In this way, the impartiality principle lies at the core of American constitutional law.

## JED RUBENFELD, OF CONSTITUTIONAL SELF-GOVERNMENT

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Is constitutional law democratic?

If democracy means government by the living will of the people, the answer seemingly has to be no. Why should we cavil at this answer? Constitutional law checks the excesses of popular rule; that was and is its point. Europeans, by and large, are content to say so; the entire ideology of "universal human rights," which is orthodoxy in the "international community" today, presents these rights, enforced by constitutional tribunals throughout the world, as a supra-national, supra-political imperative to which every nation, including democratic nations, must equally bend.

But Americans have never wanted to concede that their Constitution or its rights are anti-democratic. For over a hundred years, American constitutionalists have offered ever more ingenious theories reconciling constitutional law with the principle of government by the living will of the people. This is a prestigious, central line of American constitutional thought, linking such prominent figures as Tiedeman, Thayer, Holmes, Meiklejohn, Bickel and Ely.

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Majority rule is one way to operationalize the democratic imperative of governance by the present will of the governed. According to some, it is the best way; according to others, it is only a fair way. But whatever is said for it, the idea behind majority rule is clearly governance by present popular will or judgment.

Why is democracy understood—so frequently that it is often stated without argument or assumed without even being stated—as governance by the present will (or preferences, consent, judgment, values, etc.) of the people? The answer is that governance by the present will of the governed