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ESSAY

EXPOSING SUNSTEIN'S NAKED PREFERENCES

STEPHEN M. FELDMAN*

I. INTRODUCTION

In *Naked Preferences and the Constitution*¹ and subsequent articles,² Professor Cass R. Sunstein argues that the Constitution requires legislatures to pursue public values or common goods. From this republican political theory, Sunstein argues for a theory of judicial review: when the Supreme Court reviews the constitutionality of a legislative act, the Court should ensure that the act does not reflect a mere "naked preference," but rather reflects some public value or common good. This essay questions the coherence of the concept of naked preferences by arguing that preferences are socially constructed not only through the political process as Sunstein suggests, but also through the judicial process. A preference is never naked. Even if one were able to peel off each layer of clothing and peek underneath, nothing would be there; a preference simply cannot exist without its socially constructed clothing.

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1. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) [hereinafter *Naked Preferences*].

2. Sunstein subsequently applies and elaborates his theory, first fully introduced and developed in *Naked Preferences*, *supra* note 1; in Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, *Interest Groups*]; Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986) [hereinafter Sunstein, *Legal Interference*]; in Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987) [hereinafter Sunstein, *Lochner's Legacy*]; Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988), [hereinafter Sunstein, *Republican Revival*]. Sunstein introduced the foundations for his approach in Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127. Bruce Ackerman and Frank Michelman have developed similar approaches. See, e.g., Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 740-46 (1985) (the Court must define substantive values as well as policing the political process); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1030 (1984) (judicial review meant to ensure that "normal politics" does not subvert constitutional values of the people); Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) [hereinafter Michelman, *Self-Government*]; Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (republicanism is a political form that can reconcile self-government and government by law) [hereinafter Michelman, *Law's Republic*].

Part II of this essay describes Sunstein's theory of naked preferences and relates it to its historical roots, the theories of Alexander Bickel and John Hart Ely.³ Part III criticizes the concept of naked preferences as a basis for judicial review, and then discusses Sunstein's reluctance to accept fully the insight that all preferences are social constructs.⁴ Part IV suggests how this insight may turn us towards a reconstructed vision of constitutional law. By combining Sunstein's theory with Bickel's theory—pushed in a postmodern direction—constitutional adjudication is recognized as a deliberative process or practice in which the Court participates with others in the construction and reconstruction of values, culture, and community. The Court's task is interpretive, requiring it simultaneously to search for and to create meaning.⁵

II. SUNSTEIN'S THEORY OF NAKED PREFERENCES

Sunstein's theory of naked preferences can be understood as a combination of Alexander Bickel's early theory of judicial review⁶ and John Hart Ely's theory of representation-reinforcement.⁷ According to Bickel's theory, the Court injects principles or enduring values into government. The legislative process, in Bickel's view, is a wide-open pluralist system, a clash of interests open to everyone and controlled by shifting majorities; legislative actions generally reflect the most expedient means for solving problems and attaining goals.⁸ The institutional role of the Court therefore stands distinct from that of the legislature. The legislative role is to allow the free play of democracy, whereas the judicial role is to inject principles into government. Without the Court, our government largely would lack enduring values.⁹

3. See *infra* text accompanying notes 6-28.

4. See *infra* text accompanying notes 29-75.

5. See *infra* text accompanying notes 76-100.

6. A. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986) [hereinafter A. BICKEL, *LEAST DANGEROUS BRANCH*] (1st edition published in 1962). Compare *id.* at 49-59 (Supreme Court should develop and enforce neutral principles) with A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 99, 165 (1978 ed.) [hereinafter A. BICKEL, *IDEA OF PROGRESS*] (1st edition published in 1970) (questions the possibility of finding neutral principles). See generally Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971) (criticizing Bickel's transition).

7. J. ELY, *DEMOCRACY AND DISTRUST* 73-104 (1980).

8. A. BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 6, at 24-25, 225-26; see A. BICKEL, *IDEA OF PROGRESS*, *supra* note 6, at 37 & n.*.

9. Bickel wrote:

Our point of departure, like Mr. Wechsler's, has been that judicial review is the principled process of enunciating and applying certain enduring values of our society. These values must, of course, have general significance and even-handed application. When values conflict—as they often will—the Court must proclaim one as overriding, or find an accommodation among them. The result is a principle, or a new value, if you will, or an amalgam of values, or a compromise of values; it must in any event also have general significance and

Ely's representation-reinforcement theory of judicial review rejects Bickel's vision of the judicial role as shaping and enforcing substantive principles. Ely argues instead that all substantive value decisions must be made through the democratic process.¹⁰ Although generally agreeing with Bickel's pluralist model of politics as a clash of interests, Ely insists that sometimes the democratic process is neither open to everyone nor controlled by freely shifting majorities. The Court's role, therefore, is to police the democratic process. The Court, in other words, does not seek to inject principles or enduring values into government. Instead, the Court clears the channels of political change and helps ensure the representation of minorities, who traditionally are not represented in our democratic process. Thus, for example, the Court will overturn a legislative action infected with discriminatory intent—a defect in the democratic process—but the Court will not overturn an action merely because it has discriminatory effects.¹¹

Sunstein's theory of naked preferences retains Ely's vision of the Court as policing the democratic process, but reintroduces Bickel's emphasis on principles. Sunstein, however, does not argue, as Bickel does, that the Court should define and enforce substantive values. Instead, Sunstein envisions a *legislative* process that injects principle into government; the Court polices legislative actions to ensure that they are principled and not the result of mere naked preferences.¹²

Hence, Sunstein's theory of judicial review is based on a distinct political theory, which he explicitly contrasts with the competing theory of pluralism. Pluralism views the political process as a clash of self-interested individuals and groups, all seeking no more than their own satisfaction through the exercise of raw political power. Legislators simply respond to the private interests of their constituents, and if such a thing

even-handed application. For, again, the root idea is that the process is justified only if it injects into representative government something that is not already there; and that is principle, standards of action that derive their worth from a long view of society's spiritual as well as material needs and that command adherence whether or not the immediate outcome is expedient or agreeable. It follows, and I take it Mr. Wechsler suggests, that once the Court has arrived at a principle, it must apply that principle without compromise. Therefore, the Court should not rest judgment on a "principle" which may be incapable of uniform application.

A. BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 6, at 58 (citing Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959)).

10. See J. ELY, *supra* note 7, at 43-104.

11. *Id.* at 73-179; see, e.g., *Washington v. Davis*, 426 U.S. 229, 232, 239 (1976) (written test for District of Columbia police force had discriminatory impact upon African-American applicants, yet was held constitutional because of failure to allege and prove intentional discrimination).

12. See *Naked Preferences*, *supra* note 1, at 1692-93 & n.26 (rejects Ely because principles or values are important in constitutional decision making).

as a public interest exists, then it is constituted merely by the aggregation of private interests.¹³

Sunstein's political theory—a form of republicanism—rejects this pluralist vision of the political process. His theory is premised instead upon the existence of public values or common goods that are beyond the mere aggregation of private interests. The political process is “one of collective self-determination.”¹⁴ Legislators deliberate and discuss an issue until they together reach a solution that reflects public values. Sunstein defines public value tautologically as “any justification for government action that goes beyond the exercise of raw political power.”¹⁵ Thus, the legislature should not distribute resources or opportunities in response to raw political power, or in other words, legislative actions should not result from mere naked preferences.¹⁶ Sunstein writes:

When a naked preference is at work, one group or person is treated differently from another solely because of a raw exercise of political power; no broader or more general justification exists. For example, state *A* may treat its own citizens better than those of state *B*—say, by requiring people from state *B* to pay for the use of the local parks—simply because its own citizens have the political power and want better treatment.¹⁷

Sunstein derives his theory of judicial review from this republican political theory.¹⁸ The institutional role of the Court is to insure that legislative actions do not result from mere naked preferences and instead that they instead reflect public values. Sunstein characterizes this requirement as a minimal but nonetheless significant constraint on the legislative process. If no more than a naked preference justifies or motivates a legislative action, then the Court must hold the action unconstitutional, but if a public value justifies or motivates the legislative action, then the

13. *Naked Preferences*, *supra* note 1, at 1693-95.

14. *Id.* at 1694.

15. *Id.*

16. *Id.* at 1689, 1693; see Sunstein, *Interest Groups*, *supra* note 2, at 31-32, 58.

17. *Naked Preferences*, *supra* note 1, at 1693. Ronald Dworkin endorses a similar vision of politics. See R. DWORKIN, *LAW'S EMPIRE* 173-75, 211 (1986). Sunstein has articulated four principles of what he calls “liberal republicanism”: deliberation in politics, equality of political actors, universalism, and citizenship. See Sunstein, *Republican Revival*, *supra* note 2, at 1541, 1548-58. For a criticism of the so-called republican revival, see Fallon, *What Is Republicanism, and Is It Worth Reviving?*, 102 *HARV. L. REV.* 1695, 1727-30 (1989).

18. Sunstein traces the historical roots of his political theory to what he calls civil or Madisonian republicanism. See *Naked Preferences*, *supra* note 1, at 1690-91. In a subsequent article, he elaborates Madisonian republicanism as a synthesis of classical republicanism and pluralism. See Sunstein, *Interest Groups*, *supra* note 2, 33-48.

Court must find it constitutional.¹⁹ Consequently, as with Ely's process-based theory, Sunstein's theory suggests that the *effects* of a legislative action are not subject to judicial inquiry—except insofar as they evidence improper legislative motives or, in Sunstein's words, naked preferences.²⁰

Sunstein illustrates the application of his theory in the context of the equal protection clause.²¹ Under equal protection doctrine, if a statute discriminates on its face against a racial minority, then the Court reviews the law under a strict scrutiny standard.²² This high level of judicial inquiry is justified, according to Sunstein, because the facial discrimination of the law provides strong evidence that the law reflects the raw political power of whites, not the pursuit of some public value.²³ Strict scrutiny is also appropriate if a plaintiff alleges and proves that a facially neutral law resulted from racially discriminatory intent—that is, the law reflects a naked preference rather than a public value.²⁴ Yet, even in instances that lack clear evidence of improper legislative motive, the Court still requires at least a rational basis for any law.²⁵ This highly deferential rationality standard provides, according to Sunstein, a clear example of the prohibition against naked preferences: no law can be justified by raw political power. The legislative act satisfies the rational basis test only if it can be justified by some public value, a minimal requirement that may be easily satisfied, but a requirement nonetheless.²⁶

19. In some contexts, this minimal requirement is supplemented by additional and sometimes more controversial constitutional constraints upon legislative action. See *Naked Preferences*, *supra* note 1, at 1698-1704.

20. See *id.* at 1690, 1714; *supra* text accompanying note 11. Michelman adds that the Court should police the political process by assuring that the community is open to presently excluded voices, thus encouraging an on-going and vigorous dialogue on public values. See Michelman, *Law's Republic*, *supra* note 2, at 1524-37.

21. U.S. CONST. amend. XIV, § 1; See *Naked Preferences*, *supra* note 1, at 1710-17. Besides the equal protection clause, Sunstein further illustrates the application of his theory in the context of five additional constitutional provisions: the commerce, privileges and immunities, due process, contract, and eminent domain clauses. See *id.* at 1704-27.

22. Under the strict scrutiny standard, such a law can be justified only if it is necessary to achieve a compelling governmental purpose. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11, 12 (1967) (an anti-miscegenation law was unconstitutional under the strict scrutiny standard).

23. See *Naked Preferences*, *supra* note 1, at 1710-11. Sunstein characterized this prohibition of racial discrimination as the "strong version" of his theory of naked preferences. *Id.* at 1712.

24. See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982) (African-American plaintiffs alleged and proved that an at-large voting scheme was intended to dilute their voting strength); *Washington v. Davis*, 426 U.S. 229 (1976) (written test for the District of Columbia police force had a discriminatory impact upon African-American applicants, yet was held constitutional because of failure to allege and prove intentional discrimination).

25. Under the rational basis test, a law can only be justified if it is rationally related to a legitimate governmental interest. See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 491 (1955) (law preventing opticians from fitting or duplicating lenses without prescription from an optometrist or ophthalmologist survived rational basis review).

26. See *Naked Preferences*, *supra* note 1, at 1713-14.

For example, in the case of *Williamson v. Lee Optical, Inc.*,²⁷ the Court held that a law preventing opticians from fitting or duplicating lenses without a prescription from an optometrist or ophthalmologist survived a rational basis review under the equal protection clause. Sunstein argues that the Court's decision was based on the finding that the legislative action was motivated by a public value—protecting consumers—not merely by a naked preference—transferring wealth from opticians to optometrists and ophthalmologists. Since a public value, not merely a naked preference, motivated enactment of the law, the Court found the law constitutional.²⁸

III. EXPOSING SUNSTEIN'S NAKED PREFERENCES

Sunstein conceives of naked preferences as "preexisting private interests,"²⁹ exogenous to social influences and autonomously chosen by individuals.³⁰ These naked preferences provide Sunstein with Archimedean points³¹ for his constitutional theory because they allow him to inflate substantive value judgments with an air of neutrality and objectivity. For example, Sunstein argues that some values are "truly" public values,³² *Lochner v. New York*³³ was "wrongly" decided,³⁴ and some private preference structures have "defects."³⁵ More important, these preexisting naked preferences also allow Sunstein similarly to inflate judicial review. Sunstein argues that the Court decides constitutional issues by answering the following question: "Was the legislative action the result of naked preferences or public values?" Naked preferences simply exist and thus provide, according to Sunstein's theory, neutral and objective Archimedean points for the Court's decisions.³⁶ Public values are socially constructed through a deliberative process, as Sunstein argues,³⁷ but private preferences are not socially constructed: they

27. 348 U.S. 483 (1955).

28. See *Naked Preferences*, *supra* note 1, at 1713.

29. *Id.*

30. Sunstein, *Interest Groups*, *supra* note 2; Sunstein, *Legal Interference*, *supra* note 2; see *Naked Preferences*, *supra* note 1.

31. See generally R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 8, 18 (1983) (argues that the search for an Archimedean point to ground objectivity upon has dominated western philosophy since the time of Descartes).

32. *Naked Preferences*, *supra* note 1, at 1731.

33. 198 U.S. 45 (1905).

34. Sunstein, *Interest Groups*, *supra* note 2, at 51; see also Sunstein, *Lochner's Legacy*, *supra* note 2, at 912.

35. Sunstein, *Legal Interference*, *supra* note 2, at 1131; see also *id.* at 1136 (some preferences are "nonautonomous," which suggests that some are autonomous); *id.* at 1150 (some preferences are the product of "distortion," which suggests that some are undistorted).

36. See Sunstein, *Lochner's Legacy*, *supra* note 2, at 906.

37. See *supra* text accompanying notes 12-17.

are “preexisting” and identifiable as such by the Court. When the Court reviews a legislative action, it searches for a preexisting private preference, and if it spots one, it plants a red flag and declares the legislative act unconstitutional.

The problem is that naked preferences simply do not exist: they are social constructs, defined in part by the Court in its practice of constitutional adjudication. Indeed, all values, perceptions, and expressions are social constructs; they are created and exist through social relations and culture, including language.³⁸

In Kuhnian terminology, we all experience and perceive reality through various paradigms—world views—and those paradigms consist of structures that are socially constructed or created.³⁹ Within any culture and community, the paradigms and their constituent structures antedate and thus preexist each person’s birth; the society already exists before any particular person joins it. Consequently, the societal paradigms are, in a sense, given to each individual as he or she is born into, matures, and is socialized within a community. As a person develops, the preexisting and given societal paradigms and structures shape the person’s world and limit his or her imagination of alternative worlds.⁴⁰

38. See P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 34-46 (1967). The notion that values, perceptions, and expressions are social constructs is founded on the insight that humans are social beings. For the classic treatments of this insight, see Marx, *On the Jewish Question*, in *THE MARX-ENGELS READER* 42-46 (R. Tucker 2d ed. 1978); M. WEBER, *ECONOMY AND SOCIETY* (G. Roth & C. Wittich eds. 1978). Berger and Luckmann argue that even apparently organic functions are socially constructed: “[S]ocial reality determines not only activity and consciousness but, to a considerable degree, organismic functioning. Thus such intrinsically biological functions as orgasm and digestion are socially structured.” P. BERGER & T. LUCKMANN, *supra*, at 182.

39. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10-13 (2d ed. 1970). Kuhn argues that science operates within paradigms. *Id.* at 23-31. Most periods of scientific research are characterized by “normal science,” when the scientific community accepts one paradigm and explores questions within that dominant framework. Experimental data that is inconsistent with the accepted paradigm is ignored or obscured so as not to disrupt the world view of the community. At certain moments of crisis, however, a revolution occurs in the scientific community: the old paradigm is replaced by a new one, which accounts for much of the previously inconsistent data. The scientific community then resumes “normal science,” but now it is operating in a new paradigmatic framework.

40. Berger and Luckmann argue that when children develop and are socialized within particular social institutions, the social institutions have the quality of objectivity because they have “a reality that confronts the individual as an external and coercive fact.” P. BERGER & T. LUCKMANN, *supra* note 38, at 58; see *id.* at 131. Kuhn’s example of the “black four of hearts experiment” starkly illustrates the power of a paradigm. In that experiment, subjects were asked to identify playing cards from what appeared to be an ordinary deck. The deck, however, was not ordinary: it contained anomalous cards such as the black four of hearts. Because of their paradigmatic expectations, though, the subjects consistently failed to recognize the anomalous cards for what they “really” were. See T. KUHN, *supra* note 39, at 62-65, 112-13. John Elster’s argument that people adapt their preferences to what they see as possible also supports the argument that all values and perceptions

For example, a child learns through various social interactions the definition of being a police officer. An officer wears a certain type of uniform, carries a gun, drives a special car, and performs certain tasks. These characteristics of being a police officer shape the child's conception of the role of officers in the community. If the child wishes to become a police officer one day, she will have to fit within this given role because to imagine an officer existing in a different manner may be difficult if not impossible. In short, the paradigmatic structures of being a police officer shape and limit the child's world.⁴¹

Yet all paradigmatic structures are social constructs that arise and exist only through localized instances of acting and communicating: They are human artifacts. That is, various practices—including constitutional adjudication—constantly constitute and reconstitute the culture and community. Without those human practices, the socially constructed paradigms would not exist.⁴² To return to the example of a po-

are socially limited, although Elster does not push his argument to this conclusion. See J. ELSTER, *SOUR GRAPES* (1983).

41. Berger and Luckmann offer an example of the social definition of hunting.

There will be, say, a vocabulary designating the various modes of hunting, the weapons to be employed, the animals that serve as prey, and so on. There will further be a collection of recipes that must be learned if one is to hunt correctly. This knowledge serves as a channeling, controlling force in itself, an indispensable ingredient of the institutionalization of this area of conduct. As the institution of hunting is crystallized and persists in time, the same body of knowledge serves as an objective (and, incidentally, empirically verifiable) description of it. A whole segment of the social world is objectified by this knowledge. There will be an objective "science" of hunting, corresponding to the objective reality of the hunting economy

[T]he same body of knowledge is transmitted to the next generation. It is learned as objective truth in the course of socialization and thus internalized as subjective reality. This reality in turn has power to shape the individual. It will produce a specific type of person, namely the hunter, whose identity and biography as a hunter have meaning only in a universe constituted by the aforementioned body of knowledge as a whole

P. BERGER & T. LUCKMANN, *supra* note 38, at 66-67 (emphasis in original).

Generalizing, Berger and Luckmann add:

An institutional world, then, is experienced as an objective reality. It has a history that antedates the individual's birth and is not accessible to his biographical recollection. It was there before he was born, and it will be there after his death. This history itself, as the tradition of the existing institutions, has the character of objectivity. The individual's biography is apprehended as an episode located within the objective history of the society. The institutions, as historical and objective facticities, confront the individual as undeniable facts. The institutions are *there*, external to him, persistent in their reality, whether he likes it or not. He cannot wish them away. They resist his attempts to change or evade them. They have coercive power over him, both in themselves, by the sheer force of their facticity, and through the control mechanisms that are usually attached to the most important of them.

Id. at 60. Paradigmatic structures nonetheless are contingent and do change. See H. GADAMER, *TRUTH AND METHOD* (1975); T. KUHN, *supra* note 39.

42. Berger and Luckmann write: "Reality is socially defined. But the definitions are always embodied, that is, concrete individuals and groups of individuals serve as definers of reality." P. BERGER & T. LUCKMANN, *supra* note 38, at 116 (emphasis in original). See generally R. BERNSTEIN, *supra* note 31; Rabinow & Sullivan, *The Interpretive Turn: Emergence of an Approach*, in *INTERPRETIVE SOCIAL SCIENCE—A READER 1* (P. Rabinow & W. Sullivan eds. 1979). Richard

lice officer,⁴³ without a multitude of existing human practices, the currently accepted definition of being an officer would differ. The definition is socially contingent; indeed, police officers do not exist at all in some societies.⁴⁴

Consequently, in constitutional adjudication, the question whether a legislative action is based on either a naked preference or a public value does not have a neutral, objective, and preexisting answer. Instead, the Court, as well as the rest of the culture and community, constantly is defining and redefining the meanings of naked and public preferences. And because naked preferences are not preexisting—exogenous to social influences and autonomously chosen by individuals—Sunstein's theory of judicial review, lacking the support of its foundation, shudders, groans, and ultimately collapses.

For example, in the context of equal protection, when the Court found in *Williamson v. Lee Optical, Inc.*⁴⁵ that the law preventing opticians from fitting or duplicating lenses without a prescription was based on the public value of protecting consumers and not on the naked preference of transferring wealth from opticians to optometrists and ophthalmologists,⁴⁶ the Court's decision did not rest firmly on a neutral and objective foundation. It is not self-evident that this law did not arise solely from a desire to transfer wealth. And more important, it also is not self-evident that a desire to transfer wealth from opticians to optometrists and ophthalmologists is a preexisting naked preference while the protection of consumers is a public value. To the contrary, the Court shapes our meaning of naked preferences and public values as it decides the case: only *after* the Court's decision does it become clear that protecting consumers with such a law is a public value, not a naked preference.

Moreover, the Court can shape the definitions of naked preferences and public values so that the transfer of wealth can also be a public value,

Bernstein writes: "[P]rejudgments and prejudices have a threefold temporal character: they are handed down to us through tradition; they are constitutive of what we are now (and are in the process of becoming); and they are anticipatory—always open to future testing and transformation." R. BERNSTEIN, *supra* note 31, at 140-41.

43. See *supra* text accompanying notes 40-41.

44. For example, in his study of the criminal law in eighteenth-century England, Douglas Hay notes that a regular police force did not exist. Hay adds:

In place of police, however, propertied Englishmen had a fat and swelling sheaf of laws which threatened thieves with death. The most recent account suggests that the number of capital statutes grew from about 50 to over 200 between the years 1688 and 1820. Almost all of them concerned offenses against property.

Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE 18 (1975). Hay argues, however, that few people were actually executed for crimes against property.

45. 348 U.S. 483 (1955).

46. See *supra* text accompanying notes 27-28.

not a naked preference. This possibility shows most prominently in the jurisprudence of substantive due process. In *Lochner v. New York*,⁴⁷ the Court, according to Sunstein, effectively found that a law restricting the hours of employees in bakeries stemmed from a naked preference. The New York law, according to this reasoning, merely transferred wealth from employers to employees and thus was unconstitutional under the due process clause.⁴⁸ But as Sunstein acknowledges, from 1937 onward, the Court viewed similar laws that transferred wealth as efforts to pursue public values, not naked preferences.⁴⁹ The Court thus had helped to transform such a wealth transfer from a naked preference into a public value, at least under the due process clause.

An inconsistency between Sunstein's discussions of equal protection and *Williamson*, on the one hand, and due process and *Lochner*, on the other hand, reflects his unwillingness to accept that the Court itself helps to define and redefine what constitutes a naked preference and what constitutes a public value. According to Sunstein's discussion of *Williamson*, a law that merely transfers wealth is unconstitutional under the equal protection clause because it is grounded on a naked preference. Yet, according to Sunstein's discussion of *Lochner* and post-*Lochner* cases, a similar transfer of wealth can be constitutional under the due process clause because it is grounded on a public value. Thus, Sunstein's analysis suggests that during the same historical period, wealth transfers may simultaneously reflect naked preferences and public values. If, however, Sunstein's characterization of naked preferences were correct—if naked preferences were exogenous to social influences and identifiable as such by the Court—then such an inconsistency could not exist. If a wealth transfer were a naked preference in Sunstein's sense of the word, then it must always be a naked preference. According to Sunstein's scheme, a wealth transfer cannot be judicially or socially redefined to be a public value.

This analysis shows that naked preferences as well as public values are social and judicial constructs. Constitutional adjudication is as much a deliberative process or practice as is legislative action. The entire community, including the Court, constantly constructs and reconstructs our culture (and community), including the meanings of naked preferences and public values.⁵⁰ Thus, as discussed above,⁵¹ the transfer of wealth is

47. 198 U.S. 45 (1905).

48. U.S. CONST. amend. XIV, § 1; see *Naked Preferences*, *supra* note 1, at 1717 "[T]he *Lochner* Court regarded redistribution . . . as an essentially private taking."

49. See *Naked Preferences*, *supra* note 1, at 1717-18; see, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 385 (1937) (upholds as constitutional a state law establishing minimum wage for women, despite claim that it undermines freedom of contract).

50. See *supra* note 42.

not necessarily either a public value or a naked preference, exogenous to culture and community, which somehow arises directly from the depths of self-interested individuals. Moreover, since the legislature alone cannot construct our culture and community, the legislature cannot determine independently whether a wealth transfer will be a public or private value. The Court must contribute to the definition or meaning of a wealth transfer through its decisions, although the Court cannot do anything it wishes and cannot impose its mere personal preferences. Instead, the Court's practice of constitutional adjudication interacts with the rest of the community. For instance, political pressure from the New Deal strongly influenced the Court to reject *Lochner*; yet that rejection itself helped fuel the explosion of the administrative state.⁵²

The strange thing about Sunstein's theory is that he apparently recognizes the basic point that naked preferences and public values are social and judicial constructs, yet he refuses to accept its most significant implications. Sunstein's recognition is evident when he states that the "selection of public values is made by the judiciary,"⁵³ "the existing social order should not be regarded as natural but as the product of public choices,"⁵⁴ and "legal rules . . . are part of a system that constitutes, and does not simply reflect, the social order."⁵⁵ Indeed, in an effort to bolster his political theory of pursuing public values, Sunstein devotes an entire article to cataloguing the many factors that may contribute to the "distortion" of "private" preferences.⁵⁶ Of course, most of the factors that he believes distort the private preferences are social influences. One possible implication of this argument, although denied by Sunstein, is that

51. See *supra* text accompanying notes 45-49.

52. Franklin Roosevelt's landslide victory in the 1936 presidential election together with his court-packing plan of 1937 probably influenced the Court to reverse its position supporting *Lochner* and liberty to contract, which was inconsistent with much of FDR's New Deal legislation. See Leuchtenberg, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 673; Leuchtenberg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347; Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1253-62 (1986). Once *Lochner* was swept away, Congress was free to expand federal power and the federal administrative state to still unknown boundaries. Compare *National League of Cities v. Usery*, 426 U.S. 833 (1976) (only case after Court's change of position in 1937 in which Court held that Congress had exceeded its power under commerce clause; Court reasoned that Congress had intruded into state's area of traditional governmental functioning by applying minimum-wage and overtime provisions of Fair Labor Standards Act to the state) with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overrules *National League of Cities* and rejects its limitation on congressional power). See generally B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984) (discussing the effects of the New Deal on the development of American law).

53. *Naked Preferences*, *supra* note 1, at 1702.

54. *Id.* at 1729.

55. Sunstein, *Legal Interference*, *supra* note 2, at 1135-36.

56. *Id.* at 1129. Sunstein relies heavily on Jon Elster's *SOUR GRAPES*. see J. ELSTER, *supra* note 40.

undistorted private preferences—preferences exogenous to social influence—do not exist at all.

Ultimately, Sunstein refuses to take the final step to acknowledge fully that naked preferences, as well as public values, are not exogenous to culture and community but are instead social constructs.⁵⁷ Sunstein fears that if he takes this step, he will fall over the edge into a bottomless abyss. He writes:

Lurking beneath the surface . . . is a serious risk: the recognition that desires are social constructs, or are distorted by various factors, may tend to undermine the notion of autonomy altogether. If the ideas of endogenous preferences and cognitive distortions are carried sufficiently far, it may be impossible to describe a truly autonomous preference. No desire is unaffected by social forces. If the notion of autonomy is abandoned, the realm of permissible legal interferences may become limitless—hardly a comforting prospect.⁵⁸

Hence, Sunstein closes his eyes, grits his teeth, and resists the strength and significance of his own insight. If he surrenders and steps into the abyss, he fears the end of rational decision making in constitutional adjudication. He writes: “This position offers obscure guidance for constitutional courts; it counsels a general rejection both of neutrality and of baselines, but at least in some forms, it offers no alternative position from which to decide cases.”⁵⁹

Sunstein’s discussion of the eminent domain clause⁶⁰ illustrates his fear of free-floating and unbounded constitutional adjudication.⁶¹ A key issue under this clause is the distinction between a “taking,” which requires just compensation, and a “regulation,” which requires no compensation. This distinction turns on the premise that a taking involves a governmental transfer of an individual’s private property to the public, while a regulation does not involve such a transfer. With a regulation, in other words, the government does not interfere with the ownership of private property, which theoretically is natural and exogenous to governmental and social influences.⁶² The Court addressed this distinction in *Miller v. Schoene*.⁶³ Virginia had passed a law that forced owners of red

57. At one point, Sunstein appears to acknowledge this point fully when he writes: “Politics cannot . . . be reduced to the aggregation of private interests. Such interests are not preexisting. They are themselves a product of the political process . . .” *Naked Preferences*, *supra* note 1, at 1694-95; accord Sunstein, *Republican Revival*, *supra* note 2, at 1549 (“individual preferences should not be taken as exogenous to politics”). Nonetheless, Sunstein clearly is unwilling to maintain this recognition and pursue its ramifications for constitutional law.

58. Sunstein, *Legal Interference*, *supra* note 2, at 1170.

59. Sunstein, *Lochner’s Legacy*, *supra* note 2, at 905.

60. U.S. CONST. amend. V.

61. See *Naked Preferences*, *supra* note 1, at 1723-27.

62. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

63. 276 U.S. 272 (1928).

cedar trees to cut their trees to protect nearby apple orchards from cedar rust disease. In holding that the law was a regulation and not a taking, the Court stated:

[T]he state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked.⁶⁴

As Sunstein acknowledges, this statement of the Court undermines the premise for distinguishing takings from regulations. The Court suggests that regardless of what the government did—whether it passed the law or did not pass the law—it effectively was choosing who would own property. Private property is not natural and exogenous to governmental and social influences, rather it is a governmental and social construct. Consequently, the Court admits in a subsequent case that “quite simply, [it] has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government.”⁶⁵ As Sunstein suggests, the law of eminent domain is in “disarray.”⁶⁶ The Court itself has fallen into the bottomless abyss, at least with regard to this one constitutional clause, and coherent constitutional theory and adjudication is impossible within the current rhetorical framework.

Sunstein resists this fall to impending disaster by refusing to acknowledge that naked preferences, as well as public values, are social constructs. In his view, he maintains the Archimedean point that saves constitutional law. But closing his eyes and pushing against the strength of his own insights has not made those insights magically disappear. The challenge for constitutional theorists today is to accept this insight—that private and public values are social constructs—and to develop a new vision of constitutional law and theory around it.

Sunstein instead attempts to relegate this insight to the lawyer’s toolbox—no more than another tool for constructing legal arguments.⁶⁷ The toolbox already contains the classical rhetorical tools (constitutional text, framers’ intent, and stare decisis⁶⁸), and the post-realist tools (policy

64. *Id.* at 279.

65. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

66. *Naked Preferences*, *supra* note 1, at 1726.

67. The idea for this metaphor originated with my professor in Contract Law, Jon Jacobson, who referred to promissory estoppel in contracts as a tool in the lawyer’s toolbox.

68. See Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); see, e.g., *United States v. Butler*, 297 U.S. 1 (1936) (Court should do no more than look to the language of the Constitution and intent of the Framers when determining the constitutionality of legislation); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (in developing the

argument, balancing test, and constitutional theory⁶⁹), and now Sunstein adds a postmodern tool—private and public values are social constructs. We use this tool, for example, to argue that *Lochner* was wrong: the Court mistakenly believed that both the common law and the market status quo were natural and exogenous to governmental and social influences, but, as Sunstein informs us, they actually were social constructs.⁷⁰ When we finish using the tool to criticize the case, though, we merely return it to the toolbox to use another day.

The recognition that both private and public values are social constructs, however, cannot be relegated to the toolbox for occasional use. For just as Sunstein fears, this recognition undermines constitutional jurisprudence as we have known it. Sunstein and traditional constitutional law rest on the bedrock concept that either we have some Archimedean point on which to ground constitutional objectivity, or we have unconstrained subjectivity. Apparently for Sunstein, no other possibilities exist. He is trapped in the Cartesian either/or:⁷¹ either we have knowledge that is objective and certain, or we have no knowledge at all. And constitutional knowledge can be objective and certain only if it is based on some readily identifiable object that is exogenous to society. That readily identifiable object, for Sunstein, is the naked preference: an unadulterated value arising directly from the depths of individual self-interest and independent of social influences. Without the naked preference—the readily identifiable object—constitutional knowledge is impossible, and constitutional adjudication is no more than free-floating and unprincipled arbitrariness.

doctrine of judicial review, Chief Justice Marshall constructed arguments based largely on the language of the constitutional text and the structure of our constitutional government). See generally Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (identifying five types of arguments that are typically used in constitutional adjudication).

69. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 842-49 (1935) (courts should avoid justifying decisions by relying on legal fictions such as location of a corporation or status of a labor union as a person; courts should instead focus on likely actual consequences of its various possible decisions, choosing decision that will, on balance, lead to best result for society); Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1252-54 (1931) (arguing that should look to policy concerns). See generally Fallon, *supra* note 68, at 1189 (identifies five types of arguments that are typically used in constitutional adjudication).

70. See Sunstein, *Lochner's Legacy*, *supra* note 2; *Naked Preferences*, *supra* note 1, at 1717-18.

71. Descartes radically transformed western thought by focusing on a thinking subject in a mechanistic external world. The Cartesian separation of the subject from the objects of the external world leads to the Cartesian either/or: either perception and knowledge are rooted in the subject—and are thus relativistic and subjective—or perception and knowledge are rooted in the mechanistic external world—and are thus certain and objective. For further discussion of the Cartesian either/or, see R. BERNSTEIN, *supra* note 31, at 1-7.

The overarching challenge for current constitutional theory is to move beyond the either/or, to overcome the fear of the maelstrom of social and cultural subjectivity.⁷² Knowledge must be viewed as the understanding of a practice that is defined by the given, though contingent, structures of its paradigms. This understanding is not purely subjective or relative: paradigmatic structures are real. That is, even though these structures are socially constructed, they nonetheless exist as they shape and limit human experience and perception.⁷³ But since the structures exist only through human action and communication—through human practices—knowledge is no more objective and certain than it is subjective and relative.⁷⁴ In other words, to move beyond the either/or, we must accept that knowledge can exist without being objective and certain.⁷⁵ Constitutional knowledge thus is possible without grounding in preexisting and exogenous private values. The task, therefore, for the modern constitutional theorist is to recognize that naked preferences are socially constructed, acknowledge that this insight undermines traditional constitutional jurisprudence, and consequently reconstruct our vision of constitutional theory and adjudication.

IV. TOWARDS A RECONSTRUCTED CONSTITUTIONAL LAW

The historical roots of Sunstein's theory provide a source for the possible reconstruction of constitutional law. As discussed previously, Sunstein's theory of judicial review can be understood as a combination of Alexander Bickel's early theory of judicial review and of John Hart Ely's theory of representation-reinforcement.⁷⁶ Bickel argued that the Court injects principles or enduring values into the governmental process, while Ely argued that the Court only polices the political process. Sunstein combines the two theories and argues that the Court polices the

72. James Boyd White writes:

[I]n our actual lives we show that we know how to read and speak, to live with language, texts, and each other, and to do so with considerable confidence. But to do this we must accept the conditions on which we live. When we discover that we have in this world no earth or rock to stand or walk upon but only shifting sea and sky and wind, the mature response is not to lament the loss of fixity but to learn to sail.

J. WHITE, WHEN WORDS LOSE THEIR MEANING 278 (1984); see R. BERNSTEIN, *supra* note 31; Rabinow & Sullivan, *supra* note 42; R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 45-61 (1979); cf. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1105-09 (1981) (fundamental rights controversy of constitutional law is essentially contradictory because of inherent tension within Madisonian democracy between individual rights and majority rule).

73. See *supra* notes 38-41 and accompanying text.

74. See *supra* notes 42-44 and accompanying text.

75. See P. BERGER & T. LUCKMANN, *supra* note 38, at 87; R. RORTY, *supra* note 72, at 170-81, 315-19.

76. See *supra* text accompanying notes 6-12.

legislative process, but in so doing, it insures that the legislative process pursues public values and not naked preferences.

A more appealing description of judicial review, however, arises from a combination of Sunstein's theory with an aspect of Bickel's theory that Sunstein rejected. Sunstein's vision of the political process—deliberative democracy creating or constructing public values—is compelling; however his vision of judicial review is partially but significantly flawed. Although the Court should, as Sunstein suggests, police the political process, naked preferences are not exogenous to social influence or readily identifiable by the Court. Bickel's point that the Court itself injects values into government must be reintroduced in constitutional theory.⁷⁷ Supplementing Bickel's theory with the postmodern insight that private and public values are social constructs turns us towards a reconstructed vision of constitutional adjudication: The Court participates in the deliberative process of constructing and reconstructing the values of the society, and moreover, the Court participates in the process of defining and redefining those values as either private or public.⁷⁸

This alternative vision of constitutional adjudication, it should be noted, is not colored by pure subjectivism; the Court is not merely enforcing its own personal values or preferences. The Court is but one participant in an ever-continuing process of constructing and reconstructing values, culture, and community. The other participants in the process and the values already given to the Court always limit its vision and understanding of the past, present, and future. Culture and community limit and constrain all participants, including the Court, even though all participants constantly construct and reconstruct culture and community.⁷⁹ In particular, certain contingent paradigmatic structures consti-

77. *See supra* text accompanying notes 6-9. Since I am suggesting that Sunstein's notion of policing the political process is appropriate and since Ely's representation-reinforcement theory is the historical foundation for that aspect of Sunstein's theory, I am effectively incorporating Ely's theory into my suggested alternative approach to judicial review. Thus, the Court should police the political process to clear the channels of political change and to insure the representation of minorities, *see supra* text accompanying notes 10-11, although as both Sunstein and I argue, the Court must do much more.

78. *Cf. Fiss, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (Courts, as well as other societal institutions and individuals, should have a voice in giving specific meaning to the ambiguous values embodied in the Constitution,); Michelman, *Self-Government*, *supra* note 2, at 75 (justices are the "oracles" of the law); Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006 (1987) (the Court must maintain a boundary between public and private spheres).

79. Rabinow and Sullivan write:

The interpretive turn refocuses attention on the concrete varieties of cultural meaning, in their particularity and complex texture, but without falling into the traps of historicism or cultural relativism in their classical forms. For the human sciences both the object of investigation—the web of language, symbol, and institutions that constitutes signification—and the tools by which investigation is carried out share inescapably the same perva-

tute the practice of constitutional adjudication and thus constrain the Court's possibilities when deciding constitutional issues. For example, under current constitutional practice the Court usually articulates reasons for its decisions,⁸⁰ and those reasons supposedly reflect values that are presently and generally perceived to be public values. Thus, the Court cannot decide a case by stating: "The defendant wins because this result personally profits five of the justices." But the Court can state: "The defendant wins because this result increases political equality throughout society." The recognition that the current paradigmatic structures of constitutional adjudication constrain the Court does not, however, undermine the conclusion that the Court's opinions themselves reconstitute societal values, whether public or private.⁸¹

How might this alternative vision of judicial review work in the context of equal protection? Consider the case of Warren McCleskey. Mc-

sive context that is the human world. All this by no means to exalt "subjective" awareness over a presumed detached scientific objectivity, in the manner of nineteenth-century Romanticism. Quite the contrary, the interpretive approach denies and overcomes the almost de rigueur opposition of subjectivity and objectivity.

Rabinow & Sullivan, *supra* note 42, at 4-5; see Hoy, *Interpreting the Law: Hermeneutical and Post-structuralist Perspectives*, 58 S. CAL. L. REV. 135, 152 (1985) ("Since [a] text comes to be only in an act of understanding, the distinction between the way it is 'in itself' before being read and the way it appears in an interpretation is a false reification of the process of understanding."); Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987) (argues for a conception of law based on a new epistemology that rejects the dichotomy between a transcendental objectivism and a relativistic subjectivism); *supra* notes 38-48 and accompanying text.

The complex interaction between culture and human action and expression plunges us into the hermeneutic circle. At the level of reading a written text, the hermeneutic circle focuses on the interaction between the whole text and its constituent parts. A whole text cannot be understood unless one first understands its constituent parts, yet those constituent parts cannot be understood unless one first understands how those parts fit within the whole. Richard Palmer writes: "[I]n order to read, it is necessary to understand in advance what will be said, and yet this understanding must come from the reading." R. PALMER, *HERMENEUTICS* 16 (1969). This hermeneutic circle maintains its hold upon us when we seek to understand text-analogues—any meaningful human actions. Thus, the cultural anthropologist, Clifford Geertz, writes: "Hopping back and forth between the whole conceived through the parts which actualize it and the parts conceived through the whole which motivates them, we seek to turn them, by a sort of intellectual perpetual motion, into explications of one another." Geertz, *From the Native's Point of View: On the Nature of Anthropological Understanding*, in *INTERPRETIVE SOCIAL SCIENCE—A READER* 239 (P. Rabinow & W. Sullivan eds. 1979). See R. BERNSTEIN, *supra* note 31, at 131-39; R. RORTY, *supra* note 72, at 318-19; Rabinow & Sullivan, *supra* note 42, at 6-7.

80. This structure of constitutional adjudication was initially focused upon by the "legal process" scholars of the 1950's. See, e.g., H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tentative ed. 1958).

81. Indeed, the effects of a Court opinion ripple throughout society. For example, the Court's articulation in its opinions of reasons that reflect values that are perceived to be public is likely to increase the actual pursuit of those perceived public values. See J. ELSTER, *supra* note 40, at 36. Furthermore, the Court's opinions not only reconstitute societal values, but also reconstitute the practice of constitutional adjudication. That is, each time the Court decides a constitutional case, the opinion contributes to the evolving paradigmatic structures of constitutional practice.

Cleskey had been convicted of murder in a Georgia state court and sentenced to death. He petitioned for habeas corpus, alleging that the Georgia capital sentencing statute was racially discriminatory and thus violated the equal protection clause. McCleskey presented striking statistical evidence that strongly suggested that the two most important facts leading to his death sentence were *his* race—African-American—and his *victim's* race—white. In the Supreme Court's opinion in *McCleskey v. Kemp*,⁸² the Court summarized this evidence: "[T]he death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims."⁸³ Despite this evidence, the Court held that McCleskey had failed to prove intentional discrimination; the Court therefore applied only rational basis review and held the law constitutional.⁸⁴ Translating this result into Sunstein's language, the Court found that McCleskey had failed to prove the law reflected a mere naked preference; instead, the law reflected a public value, and the Court thus upheld it.

Under the proposed alternative approach to constitutional adjudication, the Court's analysis in *McCleskey* did not go far enough. As Sunstein argues, the Court should police the political process, and in so doing the Court should assure that the legislature deliberated in the pursuit of public values. But the Court must recognize that it too deliberates and defines public and private values. The Court cannot merely search for and readily identify a preexisting and exogenous naked preference because no such preference exists. All preferences, whether naked or public, are social and judicial constructs. Thus, in *McCleskey* the Court should have focused more clearly on its own role in interpreting social events and defining acceptable values. In doing so, the Court should have considered the potential meanings that alternative decisions would have within our culture and community. For instance, the Court in *McCleskey* could have stated that any law with such a clearly discriminatory effect cannot reflect the common good—it must reflect a naked preference. Our community, through the Court, can refuse to define itself as able to accept that such a discriminatory law could fulfill any public value: the conclusion is that a law with sharply discriminatory effects reflects unacceptable values (or naked preferences) and no more.

82. 481 U.S. 279 (1987).

83. *Id.* at 286; *see id.* at 319 (Brennan, J., dissenting).

84. *Id.* at 297-299. The Court also rejected claims that the capital sentencing scheme was administered in a racially discriminatory manner, *id.* at 289-98, and that it violated the prohibition against cruel and unusual punishment, *id.* at 298-319; *see also* U.S. CONST. amend. VIII.

If the Court had reached this conclusion by following the alternative approach—by self-consciously interpreting and defining values—it would have communicated a different (more egalitarian?) message or meaning to the legal and broader social communities than the one the Court communicated implicitly by its actual decision. And although the Court need not necessarily reach this particular conclusion—I am not claiming this conclusion is objective and neutral—the Court is, as discussed above, constrained in its vision and possible conclusions because it decides constitutional issues within the contingent structures of accepted constitutional practices.⁸⁵ To use an extreme example, the legal and broader communities would not accept, and the Court would not envision, a judicial finding that death sentences should be determined by the flip of a coin.⁸⁶ Nonetheless, the Court cannot avoid its role in the community by claiming that it merely polices the legislative process for preexisting and identifiable naked preferences: the Court's decision contributes to the definition of what preferences are acceptable and unacceptable. The Court, in other words, necessarily constitutes and reconstitutes values, culture, and community.⁸⁷

*Plessy v. Ferguson*⁸⁸ and *Brown v. Board of Education*⁸⁹ starkly illustrate the significance of the Court's role in the community within the context of equal protection doctrine. In *Plessy*, decided in 1896, the Court upheld a Louisiana statute that required railroad companies to provide separate but equal accommodations for African-American and

85. See *supra* notes 79-81 and accompanying text.

86. Ronald Dworkin writes: "Every community has paradigms of law, propositions that in practice cannot be challenged without suggesting either corruption or ignorance." R. DWORKIN, *supra* note 17, at 88; see *id.* at 228-38. My approach partly corresponds with the approach that Dworkin takes to judicial decision making in *Law's Empire*. R. DWORKIN, *supra* note 17. Insofar as Dworkin argues that we should take an interpretive approach to all judicial decision making, including constitutional adjudication, I agree with him. I also agree that this insight ultimately must be supplemented by a particular interpretive theory. I do not, however, agree that Dworkin's interpretive theory of "law as integrity" is necessarily the best interpretive theory. The presentation of an alternative interpretive theory is beyond the scope of this essay. For one possible approach, see Habermas, *The Hermeneutic Claim to Universality*, in J. BLEICHER, *CONTEMPORARY HERMENEUTICS* 181-211 (1980) (philosophical hermeneutics or interpretivism must be supplemented with a meta-hermeneutics in which truth is based on consensus in an ideal speech situation).

87. For a critical view of the prospects for African-Americans of a civic republican approach to politics, see Bell & Bansal, *The Republican Revival and Racial Politics*, 97 *YALE L.J.* 1609 (1988). More generally, danger exists whenever white scholars write about constitutional rights and minorities: loud voices of "imperial scholars" may drown out the voices of minorities, and necessary societal change may occur too slowly. Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 *U. PA. L. REV.* 561 (1984). On the other hand, at least one feminist scholar has tied the rebirth of civil republicanism to the feminist voice in jurisprudence. Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *VA. L. REV.* 543 (1986).

88. 163 U.S. 537 (1896).

89. 347 U.S. 483 (1954).

white passengers. The Court stated that the separation of African-Americans and whites was a "public good":⁹⁰ in Sunstein's terminology, the Court found that forced legal separation was a public value, not a naked preference. Justice Harlan's dissent, however, rejected this finding.⁹¹ In so doing, Justice Harlan emphasized the meaning of the Court's decision for society:

The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the [Reconstruction] amendments of the Constitution. . . . What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.⁹²

The history of the plight of African-Americans in American society unfortunately has proven the prescience of Justice Harlan. Professor Derrick Bell writes that after *Plessy* "blacks encountered even more difficulty in obtaining from the lower courts relief from serious racial inequities."⁹³ Focusing on education, Bell documents the injustices legitimized and engendered by *Plessy*:

[L]itigation could not bring equality for blacks under the easily evaded "separate but equal" standard, in a society whose attitude toward the education of blacks ranged from apathy to outright hostility. In 1915, South Carolina was spending an average of \$23.76 on the education of each white child and \$2.91 on that of each black child. As late as 1931, six Southern states (Alabama, Arkansas, Florida, Georgia, and North and South Carolina) spent less than one-third as much for black children as for whites, and ten years later this figure had risen to only 44 percent. At the time of the 1954 decision in *Brown v. Board of Education*, the South as a whole was spending on the average \$165 a year for a white pupil, and \$115 for a black.⁹⁴

Obviously, the rule of *Plessy* enervated the equal protection clause, which remained largely ineffective until the Court finally decided in 1954 *Brown v. Board of Education* in 1954.⁹⁵ *Brown* held, of course, that

90. *Plessy*, 163 U.S. at 550.

91. *Id.* at 552-64 (Harlan, J., dissenting).

92. *Id.* at 560 (Harlan, J., dissenting).

93. D. BELL, *RACE, RACISM AND AMERICAN LAW* 373 (2d ed. 1980); see *id.* at 29-38, 83-91, 364-74.

94. *Id.* at 373.

95. 347 U.S. 483 (1954).

"[s]eparate educational facilities are inherently unequal,"⁹⁶ or in Sunstein's words, the separation of African-Americans and whites is not a public value, but rather it is a naked preference of whites. The meaning of *Brown* has been as significant to modern society as the meaning of *Plessy* had been earlier: the illegality of state laws mandating racial apartheid is now undisputed.⁹⁷

Justice Harlan's dissent in *Plessy* and the transition from *Plessy* to *Brown* underscore the two distinctive aspects of the recommended alternative approach to constitutional adjudication. First, the question whether a particular value is a naked preference or a public good does not have a preexisting and self-evident answer. Public and private values are social constructs emerging from social relations and actions that are interpreted by the Court. Second, the Court itself, through the practice of constitutional adjudication, contributes to the definition of values and their characterization as public goods or naked preferences: the Court creates meaning and values through its interpretations. The significance of *Plessy* reverberated throughout American society for more than sixty years, just as the significance of the meaning of *Brown* still manifests itself today.⁹⁸ Thus the Court's constitutional decisions are part of the dialectic of social change.

Although *Plessy* and *Brown* are extreme examples because they held unusually important significance for American society, all constitutional decisions have some significance for some part of society. I do not mean to suggest that the Court alone shapes society, or even that the Court is the primary force for social change. To the contrary, the Court's decisions usually reflect values and perceptions that a large segment of the

96. *Id.* at 495.

97. See D. BELL, *supra* note 93, at 377-97; Michelman, *Law's Republic*, *supra* note 2, at 1523-24. Robert L. Carter writes:

Brown v. Board of Education fathered a social upheaval the extent and consequences of which cannot even now be measured with certainty. It marks a divide in American life. The holding that the segregation of blacks in the nation's public schools is a denial of the Constitution's command implies that all racial segregation in American public life is invalid—that all racial discrimination sponsored, supported, or encouraged by government is unconstitutional. As a result of this seminal decision, blacks had the right to use the main, not the separate, waiting room; to choose any seat in the bus; to relax in the public parks on the same terms as any other member of the community. This and more became their birthright under the Constitution.

Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 246 (1968); accord J. WILKINSON, FROM BROWN TO BAKKE 6 (1979). I do not mean to suggest that *Brown* has successfully eliminated segregation and racism in America; this is far from the truth. As Robert L. Carter suggested, racial discrimination is illegal in public life, but the same is not true in private life. See D. BELL, *supra* note 93, at 397-457; Carter, *supra*, at 243-46; Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

98. See *supra* notes 93, 97 and accompanying text.

society already has accepted at least partially.⁹⁹ Nonetheless, *Plessy* and *Brown* illustrate that the Court is a powerful institution within society, strongly influencing the values that much of the community either accepts as worthy or rejects as unworthy. The Court's practice of constitutional adjudication is a conversation with the rest of society that requires the Court simultaneously to search for and to create meaning. That the Court sometimes generates heated debates, such as in the current battle over abortion and *Roe v. Wade*,¹⁰⁰ only underscores its significant role in constituting and reconstituting values, culture, and community.

V. CONCLUSION

Professor Sunstein argues that the legislative process should be characterized by a deliberative pursuit of public values. The Court therefore, according to Sunstein's theory of judicial review, should police the political process, ensuring that legislative actions arise from actual public values, not from naked preferences. Naked preferences are preexisting private interests, exogenous to social influences and autonomously chosen by individuals. The problem with Sunstein's theory is that preferences are never naked: they are always socially constructed.

This recognition turns us towards a reconstructed vision of constitutional law. The Court and others, including the legislatures, are participants in a continuing conversation, deliberating and constructing and reconstructing values, culture, and community. Consequently, in judicial review, the Court should police the legislative process, and that legislative process should be a deliberative discussion that defines and redefines values. But the Court must do more. It also must construct and reconstruct values, culture, and community, thereby contributing to the conversation as it simultaneously monitors the contributions of others.

99. See D. BELL, *supra* note 93, at 92-93, 374-81; Carter, *supra* note 97, at 237-38.

100. 410 U.S. 113 (1973); see, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (argues that recognizing a woman's right to choose whether to have an abortion is an unjustified substantive value choice by the Court).