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A COMMENT ON CASS SUNSTEIN'S EQUALITY

*Emily Sherwin**

*(with annotations by Larry Alexander**)*

In an article entitled *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)*,¹ Professor Cass Sunstein has proposed that judges should give up the search for neutral principles in favor of a truer form of equal protection, in which law is partial to historically disadvantaged groups. This line of argument is not new—it is a major theme in contemporary legal writing—but Sunstein has stated it with particular clarity. My purpose in this paper is to examine Sunstein's approach to constitutional law to see where it leads and what sort of government it entails.

Sunstein begins by arguing that it is false to conceive equal protection of law as an evenhanded application of neutral principles. Seemingly neutral principles work from a "baseline" of social advantages ("wealth, opportunities, preferences and natural endowments"), which are unevenly distributed among the different groups that make up society.² Law not only accepts this baseline, but also shapes and perpetuates it.³

It follows, for Sunstein, that law should be partisan rather than neutral.⁴ Under the authority of the Equal Protection clause, courts should identify and rectify group disadvantages previously

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** Professor of Law, University of San Diego. The text of this paper was written by Emily Sherwin and most of the textual footnotes were written by Larry Alexander. The paper was conceived as a joint effort, but the female coauthor quickly asserted control over the text; the male coauthor, not wishing to confirm constitutionally unsound stereotypes, consented to be relegated to the footnotes. His contributions are indicated with his initials in brackets.

Kevin Cole, Gail Heriot, Herbert Lazerow, Maimon Schwarzschild, Steven Walt, Don Winslow, Chris Wonnell and Fred Zacharias made helpful comments on the paper (but should not be blamed for its content).

1. Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion and Surrogacy)*, 92 Colum. L. Rev. 1 (1992).

2. *Id.* at 1-2, 5-13.

3. See *id.* at 9.

4. See *id.* at 15-18, 48.

tolerated (and therefore condoned) by law.⁵ Equal protection of law means rooting out “constitutionally unacceptable stereotypes” imbedded in the baseline of present society.⁶

Sunstein applies his ideas to three specific issues: pornography, abortion, and surrogate motherhood contracts. In each of these areas, Sunstein detects an inequality in “the sexual and reproductive status quo” that ought to be corrected in the interest of equality for women.⁷ He concludes that a right to abortion is good for women and should be recognized, while pornography and surrogacy are bad for women and should (perhaps) be banned.⁸

I accept Sunstein’s initial point, that law is not neutral in the sense that it is indifferent among possible distributions of wealth and advantage. Law protects a set of entitlements and a sphere of private choice that determine the economic and social positions of individuals.⁹ I agree, too, that the existing distribution of advantages is not equal, not fair according to any articulable standard of fairness, and not what we might fix on if we started from scratch. Nevertheless, there is much to be said for an ideal of law that applies impartially to existing social facts—if only in comparison with the partisan alternative Sunstein recommends.

In a footnote early in his article, Sunstein mentions several writers who have defended the accumulated wisdom of the existing social order.¹⁰ Among them he lists Edmund Burke (as if to say “some at the fringe might think this”). Now I am not ready to accept the complete political philosophy of Edmund Burke. But

5. I believe this is what Sunstein means when he suggests that a proper understanding of equal protection takes account of the “causes and effects of legal controls.” See *id.* at 49.

6. See, e.g., *id.* at 32.

7. *Id.* at 16, 17, 49.

8. See *id.* at 16-17, 26-27, 39-40, 47-48, 49-50. Sunstein takes a definite position on abortion, but is more equivocal with respect to pornography and surrogacy. See *id.* at 50. On these latter issues, he maintains that there are valid equal protection arguments in favor of regulation, but adds that the arguments from equality may be outweighed by other considerations. See *id.* at 26-27, 47-48, 49-50.

9. On neutrality, see, e.g., Larry Alexander and Paul Horton, *Whom Does the Constitution Command?: A Conceptual Analysis with Practical Considerations* 74-79 (Greenwood Press, 1988).

This point is not new. See Cass R. Sunstein, *Lochner’s Legacy*, 87 Colum. L. Rev. 873 (1987). Further, as Sunstein himself recognizes, the point is analytical, and has no normative force of its own. See Sunstein, 92 Colum. L. Rev. at 12 n.40 (cited in note 1). To point out that there is no neutral baseline of entitlements and that all entitlements are backed by state action does not make the case for or against any particular baseline, whether as a matter of equal protection or as a matter of freedom of speech. On baselines and freedom of speech, compare Sunstein, 92 Colum. L. Rev. at 10-11 (baseline distribution of wealth affects distribution of speech) with Lawrence Alexander and Paul Horton, *The Impossibility of a Free Speech Principle*, 78 Nw. U. L. Rev. 1319, 1344, 1348 (1983) (same). [L.A.]

10. Sunstein, 92 Colum. L. Rev. at 3-4 n.8 (cited in note 1).

Burke said some wise things, which Sunstein might consider as he prepares to remake society.

Commenting on the social reformers of his own time (those who urged England to follow France in revolution), Burke said:

These professors . . . [f]inding their schemes of politics not adapted to the state of the world in which they live, . . . come to think lightly of all public principle; and are ready, on their part, to abandon for a very trivial interest what they find of very trivial value.¹¹

I will return to Burke, but first let me spell out the type of reform that Sunstein seems to have in mind.

At first glance, one might think that Sunstein is objecting to the very idea of a baseline—that is, to the fact that law works from a baseline of social and economic advantages. Once this baseline is revealed, law cannot claim to be neutral, or to treat its subjects equally.

But on more careful inspection, I do not think Sunstein is objecting to the existence of a baseline; his quarrel is with the present baseline. Indeed, no system claiming to be a system of law could operate apart from a baseline of advantages and disadvantages. The point of law is to establish a social order, to fix the rules of the game, to secure the goods of the world to individuals by some other means than force. The moment there is law, there is a baseline, and in the absence of a baseline, there is anarchy. And it would be an error to think that Sunstein is advocating anarchy. In fact, he is advocating a very definite—and very strict—social order.

Sunstein's point, then, is not to do away with baselines, but to move us from the present unjust distribution of advantages to a new, true, unbiased baseline.¹² Sunstein proposes to revise the baseline by tracing and eradicating the "causes and effects of legal controls" in present society.¹³ The first step is to examine the history of asserted legal inequalities, in order to determine whether supposedly neutral laws have reinforced disadvantages in the underlying social baseline.¹⁴ If so, lawmakers should act to rectify those disadvantages by overriding tainted entitlements and preferences.

11. Edmund Burke, *Reflections on the Revolution in France* 155 (1790; reprinted by Penguin Books, 1976) ("*Reflections*").

12. See Sunstein, 92 *Colum. L. Rev.* at 52 (suggesting that "decisions made in accordance with the appropriate baseline" would embody a proper form of neutrality) (cited in note 1).

13. *Id.* at 49.

14. See *id.* at 13-18, 49. Sunstein states, for example, that "the sexual and reproductive status quo is sometimes a locus of unjustified inequality, and the law should protect against that inequality." *Id.* at 49.

Sunstein's reference to cause and effect suggests that he is advancing a "neutral" principle of his own. At least, he is attempting to locate his baseline by objective methods. He will study history, discover the legal "causes and effects" of inequality, and act to establish a correct baseline.

But is his inquiry really an objective one that can yield a truer baseline? To anyone familiar with tort law, the word "cause" will stand out immediately as a red flag. Any event or condition has multiple causes,¹⁵ and identifying one of them as the responsible cause is inevitably a normative process.

Any remaining semblance of objectivity disappears when one considers that the thing caused, in his formula, is inequality. Before Sunstein can trace out the causes of inequality, he must decide who is now unequal and how unequal they are.¹⁶ If the issue were simply one of wealth distribution, identifying inequalities would be a relatively straightforward task.¹⁷ But Sunstein is concerned with the distribution of *social* advantages—with matters such as status and role. Moreover, he is concerned not only with equality among individuals, but also (and more emphatically) with equality among groups. In his own terminology, he is concerned with problems of *caste*.¹⁸ In a society such as ours, the boundaries of castes, as well as their relative rank, are surely controversial questions.¹⁹

Thus it turns out that Sunstein's baseline is not something he

15. If someone left embers burning in a campfire, and an extraordinary gust of wind blew them into a distant patch of brush, where lay a gasoline can carelessly forgotten by someone else, and a forest fire followed, what caused the fire? See Hart and Honoré, *Causation and Responsibility*, in H.L.A. Hart and Tony Honoré, *Causation in the Law* ch. 3, 62-83 (Clarendon Press, 2d ed. 1985). For an example of the difficulty of working out a natural understanding of causation, see Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151, 160-89 (1973).

16. Peter Westen points out that there are at least seven possible interpretations of "equality before the law." Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse*, 74-79 (Princeton U. Press, 1990). It may mean that legal classifications (whatever their content) must be applied consistently; or that no person shall be classified in a way that leaves him or her outside the reach or protection of law; or that all are entitled to a fair judicial hearing; or that laws must not be applied retroactively; or that courts should be open to all without regard to ability to pay; or that the law must not make arbitrary classifications; or that the law must not distinguish among people on any basis. *Id.* at 76-77.

17. Even in the context of wealth, the meaning of equality is contestable. For example, equality can plausibly be understood as either numerical equivalence or distribution in proportion to some criterion of merit. See *id.* at 52-57 (on Aristotle and proportional equality).

18. Sunstein, 92 Colum. L. Rev. at 15 n.56 (cited in note 1).

19. Sunstein has chosen to focus on a particular group, women. But he never answers the fundamental question why we should care how certain biological or vaguely sociological groups, such as women, are faring as groups. What gives these groups moral significance? How do a black mother on welfare, a wealthy Palm Beach matron, a moderately successful woman lawyer, and a middle class housewife constitute a group whose group prospects are morally significant? Why don't we care about groups such as the unskilled, or the poorly

can arrive at neutrally, empirically, or uncontroversially. The "causes and effects of legal controls" are only a feint, and his analysis is entirely prescriptive. Stripped of the language of cause and effect, Sunstein's argument must be that we should reject a baseline shaped by past history and social evolution in favor of a baseline that enacts Sunstein's view of correct social order.

The contours of Sunstein's program are rather obscure. We know what he requires in three specific areas (pornography, abortion, and surrogacy). Otherwise, he describes his program as "anti-caste" and grounded in "equality," but the only guide he gives us to interpreting those terms is the unhelpful notion of cause and effect.

But suppose Sunstein has a social vision. Perhaps he has worked out a conception of the minimum dignity and welfare to which all individuals are entitled. Or (more in keeping with the notion of caste), he may have a conception of the minimum dignity and welfare that must not be denied to any identifiable group.²⁰

If Sunstein is going to do away with the present baseline and reenact it according to some such ideal, he faces a serious problem of central planning. Laws must be partial (he says). But in designing partial laws, just what do we give to whom in order to achieve the right end result?²¹ In economic affairs, central designs have not

paid? Why abstract this one commonality (female) from every difference and deem it morally significant?

Sunstein refers obliquely to "politically vulnerable" groups (Sunstein, 92 *Colum. L. Rev.* at 41 (cited in note 1)); but political vulnerability does not explain his aggregation of women. If anything, the groups he is concerned with are those that have managed to draw political attention to themselves as groups. [L.A.]

20. It is not enough to say that in a society dominated by "white male" values, we must improve the relative positions of others. To argue effectively against a set of values that results in a certain pattern of power, reward, and adulation, one must argue that another set of values—which favors a different group of people—is *better*. Thus Sunstein must show that laws redesigned to favor groups such as women, racial minorities, or the disabled will be superior to current laws in terms of what people want (or should want?). For example, we might improve the relative position of the learning disabled by returning to a primitive agricultural society. But the standard of living would be dismal, and the absolute position of all people (including the disabled) would be lowered. [L.A.]

Sunstein hints at something like an (oxymoronic) unconscious conspiracy among white males to preserve the current values that favor them. We see these interests as neutral and natural when they are not, and this (he suggests) serves the interests of white males. But many white males do poorly by prevailing standards, and many females and non-whites do well. It seems more plausible, then, that the prevailing values seem neutral and natural—that they are invisible—not because they favor white males, but because they produce what most of us want. [L.A.]

21. It may be possible to arrive at a conception of distributive justice by a method such as John Rawls has described. See John Rawls, *A Theory of Justice* 11-22 (Belknap Press, 1971) ("the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association"). But Rawls himself admitted that his theory is designed to test the "basic structure of society," see *id.* at 7-11, rather than to resolve specific disputes such as the legality of abortion or pornography.

been successful—recent history suggests that the market does a better job of generating, collating and applying information than a central authority.²² Sunstein's project is the far greater one of social central planning, which lacks even the common denominator of currency. As Burke reminded the revolutionists:

The science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught *á priori*. Nor is it a short experience that can instruct us in that practical science; because the real effects of moral causes are not always immediate . . . [V]ery plausible schemes, with very pleasing commencements, have often shameful and lamentable conclusions. . . . The science of government being . . . a matter which requires experience, and even more experience than any person can gain in his whole life, . . . it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes.²³

The best evidence of the difficulty of designing a new social order is Sunstein's own endeavor to improve (or correct) the status of women, through changes in laws relating to pornography, abortion, and surrogacy. In the area of pornography, he finds that material depicting violent acts against women encourages a form of violence that disproportionately affects women, and that it fosters a "degrading and dehumanizing" view of women.²⁴ Thus the principle of equal protection supports a ban on pornography.²⁵ In the area of abortion, he finds that restrictions on abortion result in

22. See Christopher T. Wonnell, *The Abstract Character of Contract Law*, 22 Conn. L. Rev. 437, 456-57 (1990).

23. Burke, *Reflections* at 152 (cited in note 11).

24. Sunstein, 92 Colum. L. Rev. at 20-26 (cited in note 1). In the course of his discussion of pornography, Sunstein cites but mischaracterizes a previous article by one of the authors of this paper. See *id.* at 22 n.88, referring to Larry Alexander, *Legal Theory: Low Value Speech*, 83 Nw. U. L. Rev. 547, 551-54 (1989). The point made in that article was that the government cannot claim that it is justified in regulating pornography because of the political content of its message (that is, its implicit comment on the status and worth of women) and at the same time maintain that pornography does not qualify as high value, political speech. If the message received is political (as Sunstein suggests it is), the speaker's intent is irrelevant. If, on the other hand, no such political message is received, the political value of the speech is diminished, but so is the government's justification for banning it. [L.A.]

Sunstein also avoids dealing with the problem that bad images of women—images conducive to violence and inequality—are conveyed by a substantial body of material generally acknowledged as literature or art. [L.A.]

25. *Id.* at 26-27.

"bodily cooptation"²⁶ of women in support of fetuses, and perpetuate a stereotypical association of women with childbearing.²⁷ Laws restricting abortion prescribe "different roles for men and women . . . that are part of second-class citizenship for women."²⁸ It follows that such laws are constitutionally unsound.²⁹ In the area of surrogate motherhood, Sunstein finds that if we uphold surrogacy arrangements "the reproductive capacities of one class of people are turned, by law, into something for the use of others."³⁰ Moreover, the "social legitimation" of surrogacy would confirm a historically subservient role for women.³¹ Therefore surrogacy contracts, too, are constitutionally suspect.³²

In resolving these issues, Sunstein is prepared to override or discount a particular woman's decision (such as the decision to enter into a surrogate motherhood contract, or the decision to risk pregnancy) in the interest of dignity and equality for women.³³ As he puts it, his understanding of liberty "does not entail respect for all 'choices,' viewed acontextually and made pursuant to existing distributions of wealth and entitlements."³⁴

But hasn't Sunstein overlooked something? Doesn't the legal validity of women's choices (identified particularly as *women's* choices) have something to do with the view the world takes of women? Is it not "degrading and dehumanizing" to say women do not

26. *Id.* at 31-32, 42.

27. *Id.* at 31-44.

28. *Id.* at 36.

29. *Id.* at 32, 39, 40, 43-44.

30. *Id.* at 45.

31. *Id.* at 46. Virtually any restriction on freedom could be justified in this way, by arguing that the activity in question affects social attitudes about those who engage in it. [L.A.]

32. *Id.* at 47-48.

33. See *id.* at 45 (acknowledging that regulation of surrogacy contracts would override voluntary agreements), 41 (suggesting that a woman who voluntarily engages in sex should not be considered to assume risk of pregnancy).

34. *Id.* at 17. The endogeneity of preferences (relative to a set of entitlements) is a frequent theme in Sunstein's writing. See, e.g., Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. Chi. L. Rev. 1129 (1986). But its implications are unclear. If the entitlements to which preferences are endogenous are morally correct, then the preferences should be respected. If the entitlements are not morally correct, then it is the entitlements that should be changed, and if the preferences are truly endogenous, they will change with them. Either way, one must attack or defend the entitlements, rather than the preferences. [L.A.]

Perhaps, then, the question is whether entitlements can be justified by reference to existing preferences. The argument of endogeneity suggests that they cannot; but this leads to further problems. If all preferences are endogenous, one cannot simply argue against respecting a particular set of preferences. Instead, one must either reject all reliance on preferences—which suggests a very strong paternalism, stronger perhaps than even Sunstein would endorse; or one must argue about true, authentic-self preferences, which suggests pretty much the same thing. [L.A.]

understand their own interests? To me, Sunstein's version of dignity and equality is an odd and dangerous one, for it suggests that women are not fully autonomous beings—that they are so disabled by a history of discrimination that they require the assistance of Sunstein in ordering their lives.³⁵ But then I am just a woman, probably awash in false consciousness (or as Sunstein might say, endogenous preferences). Burke said of the reformers of his time:

You will smile here at the consistency of those democratists, who, when they are not on their guard, treat the humbler part of the community with the greatest contempt, whilst, at the same time, they pretend to make them the depositories of all power.³⁶

If it appears that Sunstein has arrived at his conclusions by a full and fair review of the evidence, then perhaps I should abide by his results and wait for my status to improve. But I cannot give him much credit for scientific method. He cites empirical data, but the data are curiously one-sided. Overall, his tone is one of advocacy rather than impartial review of facts.

In fact, it seems at times that Sunstein's enthusiasm for his enterprise has got the better of his common sense. For example, is it really fair to assume (as Sunstein does at a crucial point in his discussion of abortion) that "an abortion is seen as a killing rather than a failure to allow conscription only because of the perceived naturalness of the role of women as child-bearers"?³⁷ One might just as

35. One troubling aspect of the argument from endogeneity is that it assumes that Sunstein himself has somehow escaped the corrupting influence of existing distributions of advantages (or that he can penetrate it by sheer force of intellect). Otherwise, how could we accept any conclusion he draws about the preferences of others?

36. Burke, *Reflections* at 146 (cited in note 11).

37. Sunstein, 92 Colum. L. Rev. at 35 (cited in note 1). Sunstein is not alone in this thought. See Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 360 (1992): "Rather, one has to ask, in what ways might assumptions about the proper roles of men and women have moved the state to engage in fetal life-saving by compelling pregnancy?" How else would the state go about fetal life-saving? [L.A.]

In fact, the entire argument that abortion is an issue of equal protection for women is implausible. Sunstein objects that current Supreme Court doctrine takes the "physical capacities of men" as its baseline, and so does not recognize abortion restrictions as a form of discrimination. It is true, of course, that men and women differ in their capacity to become pregnant, and it is true that the manner in which the law responds to that difference is a matter of choice. But it is a distraction to focus on the fact that lawmakers have a choice rather than on the justifiability of the choice they make. In the end, until technology makes ex utero gestation possible, if the fetus is morally and legally protectable, initial bodily care by women is the only eligible choice. [L.A.]

Sunstein also argues that sex-specific legislation is "sex discrimination" (at least when it affects the vulnerable group, women). See Sunstein, 92 Colum. L. Rev. at 32-37 (cited in note 1). But the debate over whether laws relating to pregnancy are "sex discrimination" or only discrimination between "persons who become pregnant" and those who do not is a red herring. Whether a law is or is not sex discrimination depends on (1) whether it was motivated

well argue that abortion should not be allowed because a right to abort pregnancies confirms a traditional view of women as fickle and unable to manage their affairs. Or, similarly, one might argue that surrogacy contracts should be allowed in order to counteract the negative effects of past laws denying contractual capacity to married women.

Another example is Sunstein's assessment of a *New Republic* article entitled *Big Boobs: Ed Meese and His Pornography Commission*. Sunstein explains that the magazine "sought, in this way, to ridicule the authors of the Report by depicting them as parts of the female anatomy. . . . [Thus it] inadvertently confirmed some of the antipornography movement's arguments about the relationships among sexuality, pornography, and inequality."³⁸ Others might have interpreted the same title as a play on words—a joke. But then modern legal scholarship is not much inclined to levity.

In the end, I can only think that Sunstein's efforts on behalf of my gender are ill-conceived and likely to do more harm than good. This is not to say that I disagree in all cases with his results. For example, I would be happy to see abortion established more securely as an individual right. But I deeply mistrust his methods. I have far more confidence in a legal system that works from the existing baseline, evolved over time through human interaction in an open society, than I would in a system given over to Sunstein for revision.

There is also a problem of enforcement. Sunstein admits (in fact, he insists) that the baseline of social and economic advantages he wishes to enact is not supported by present social consensus.³⁹ Nor does he envision a system in which individuals are free to choose which values to pursue.⁴⁰

Without the support of either consensus or rational self-interest, Sunstein must be prepared to take the measures necessary to bring unwilling subjects (me, for example) into compliance with his laws. Sanctions are a necessary part of any legal system, because no system can hope for the willing obedience of all its subjects in all cases.⁴¹ But the system will be more stable, and have less cause to

by bias or unwarranted stereotypes, or (2) perhaps, for those like Sunstein who find this material, whether it produces group inequality. In the latter case, why not just say that sex-specific legislation will hurt women as a group, whatever that means? One suspects that the term "sex-specific" functions to allow the latter form of such a claim to trade on the general antipathy toward the former one. [L.A.]

38. Sunstein, 92 Colum. L. Rev. at 25 n.98 (cited in note 1).

39. See, e.g., *id.* at 28-29.

40. See *id.* at 17. Sunstein's disregard for individual choice among values is particularly evident in his discussion of surrogacy contracts. See *id.* at 46-47.

41. This is true simply because law must (to some extent) take the form of general rules.

employ sanctions, if most of its subjects think the laws it enacts are sensible.⁴² To command voluntary respect, the law must appeal not only to a few academics who share an understanding of equality, but to the whole mass of people who live under it. This suggests that Sunstein's program might require somewhat more in the way of enforcement than we have become accustomed to in our present, non-ideal society.

Burke believed in the wisdom of the existing social baseline, and in "the science of jurisprudence, the pride of the human intellect, which, with all its defects, redundancies, and errors, is the collected reason of ages."⁴³ And he feared the destruction that can result from programs that seek to force radical change on an unwilling society:

Rage and phrenzy will pull down more in half an hour, than prudence, deliberation, and foresight can build up in a hundred years. The errors and defects of old establishments are visible and palpable. It calls for little ability to point them out; and where absolute power is given, it requires but a word wholly to abolish the vice and the establishment together.⁴⁴

At least in academic literature, rage and frenzy have received more attention lately than they are due. Our democratic order, in which individuals are equal in moral and political status if not in social advantage, is much more deserving of respect than the order Burke wished to defend. The fact is that we live in a prosperous, heterogenous society, under sound institutions that accommodate and protect a wide plurality of views. We have the machinery necessary for constructive social change through public debate.⁴⁵ We should trust in our institutions. We should support the right of speech. We should let matters like proper roles for women work themselves out—without the assistance of Sunstein's "partisan" laws.

Any general rule, no matter how wise and good, will at sometimes conflict with a rational assessment of right action in an individual case. See Larry Alexander, *The Gap*, 14 Harv. J. L. & Pub. Pol. 695 (1991); Larry Alexander, *Pursuing the Good—Indirectly*, 95 Ethics 315, 324-25 (1985); Frederick Schauer, *Rules and the Rule of Law*, 14 Harv. J. L. & Pub. Pol. 645, 693-94 (1991); Frederick Schauer, *The Rules of Jurisprudence: A Reply*, 14 Harv. J. L. & Pub. Pol. 839, 849-50 (1991).

42. See H.L.A. Hart, *The Concept of Law* 38-39, 55-56, 86-88 (Clarendon Press, 1961) (on the "internal" aspect of legal rules).

43. Burke, *Reflections* at 193 (cited in note 11).

44. *Id.* at 279-80.

45. For a thoughtful and persuasive defense of traditional First Amendment jurisprudence, with its emphasis on autonomy, see Robert Post, *Managing Deliberation: The Quandary of Democratic Dialogue* (forthcoming in *Ethics* 1993).