THE PARTIAL CONSTITUTION

WE the People of the States of New-Hampſhire, Maſſachuſetts, Rhode-Iſland and Providence Plantations, Connecticut, New-York, New-Jerſey, Pennſylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and eſtabliſh the following Conſtitution for the Government of Ourſelves and our Poſterity.

ARTICLE I.

The ſtile of this Government ſhall be, "The United States of America."

II.

The Government ſhall conſiſt of ſupreme legiſlative, executive and judicial powers.

III.

The legiſlative power ſhall be veſted in a Congreſs, to conſiſt of two ſeparate and diſtinct bodies of men, a Houſe of Repreſentatives, and a Senate; [redacted]. The Legiſlature ſhall meet on the firſt Monday in December [redacted].

Sect. 1. The Members of the Houſe of Repreſentatives ſhall be choſen every ſecond year, by the people of the ſeveral States comprehended within this Union. The qualifications of the electors ſhall be the ſame, from time to time, as thoſe of the electors in the ſeveral States, of the moſt numerous branch of their own legiſlatures.

Sect. 2. Every Member of the Houſe of Repreſentatives ſhall be of the age of twenty-five years at leaſt; ſhall have been a citizen [redacted] the United States for at leaſt [redacted] years before his election; and ſhall be, at the time of his election, [redacted] of the State in which he ſhall be choſen.

Sect. 3. The Houſe of Repreſentatives ſhall, at its firſt formation, and until the number of citizens and inhabitants ſhall be taken in the manner herein after deſcribed, conſiſt of ſixty-five Members, of whom three ſhall be choſen in New-Hampſhire, eight in Maſſachuſetts, one in Rhode-Iſland and Providence Plantations, five in Connecticut, ſix in New-York, four in New-Jerſey, eight in Pennſylvania, one in Delaware, ſix in Maryland, ten in Virginia, five in North-Carolina, five in South-Carolina, and three in Georgia.

Sect. 4. As the proportions of numbers in the different States will alter from time to time; as ſome of the States may hereafter be divided; as others may be enlarged by addition of territory; as two or more States may be united; as new States will be erected within the limits of the United States, the Legiſlature ſhall, in each of theſe caſes, regulate the number of repreſentatives by the number of inhabitants, according to the [redacted] rate of one for every forty thouſand.

Sect. 5. All bills for raiſing or appropriating money, and for fixing the ſalaries of the officers of government, ſhall originate in the Houſe of Repreſentatives, and ſhall not be altered or amended by the Senate. No money ſhall be drawn from the public Treaſury, but in purſuance of appropriations that ſhall originate in the Houſe of Repreſentatives.

Sect. 6. The Houſe of Repreſentatives ſhall have the ſole power of impeachment. It ſhall chooſe its Speaker and other officers.

Sect. 7. Vacancies in the Houſe of Repreſentatives ſhall be ſupplied by writs of election from the executive authority of the State, in the repreſentation from which they ſhall happen.

V.

CASS R. SUNSTEIN

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Preface

Americans revere their Constitution. The four cornerstones of the system—checks and balances, federalism, individual rights, judicial review—are admired and emulated throughout the world. In periods of crisis, the constitutional system has helped America to avert tyranny, chaos, and oppression. In calmer times, the document has worked against less catastrophic but still serious difficulties. We should understand the framers' overriding goal as the creation of a deliberative democracy. In this system, public officials would be accountable to the people, but also in a position to avoid interest-group power, and thus to deliberate broadly about the public interest. More than two hundred years later, it is safe to report that this goal has often been realized. There is much to celebrate.

As it is currently interpreted, however, the American Constitution is partial. As so interpreted, it is partial, first, in the sense that it is biased. (I speak of current judicial interpretations of the Constitution, not of the text of the Constitution. For reasons that will be set out in detail, I do not believe that the Constitution itself is biased or that it must be interpreted in a biased way.) In contemporary constitutional law, the status quo—what people currently have—is often treated as the neutral and just foundation for decision. Departures from the status quo signal partisanship; respect for the status quo signals neutrality. When the status quo is neither neutral nor just, reasoning of this kind produces injustice. Sometimes the injustice is produced in the name of the Constitution. This is unnecessary and unfortunate.

In its current interpretation, the Constitution is partial, second, in the sense that it serves as part of what should be a whole. The largest problem here is that people tend to identify the meanings and workings of the Constitution with the decisions of the Supreme Court. In fact the Constitution was originally intended for the nation in general. The President and members of Congress are also sworn to uphold the Constitution. State officials and ordinary citizens also have obligations to the founding

document. The Constitution does not mean only what the judges say it means. On the contrary, the Constitution has often served as a catalyst for broad public deliberation about its general terms and aspirations. Its meaning to Congress, the President, state government, and citizens in general has been more important than its meaning within the narrow confines of the Supreme Court building.

It is now critical to revive this broader understanding of the role of the Constitution. That understanding was an inextricable part of the original commitment to deliberative democracy. It is far from anachronistic today. Public deliberation about the meaning of the Constitution should in turn be freed from a principle of neutrality based on the status quo. The status quo, like everything else, should be subject both to deliberation and to democracy. These, at any rate, are the principal themes of this book.

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In this book I have drawn upon nearly ten years' work on the general subject of neutrality in constitutional law. Some of this work has been published elsewhere, though in significantly different form. I am grateful for permission to reprint portions of the following: "Naked Preferences and the Constitution," 84 *Columbia Law Review* (1984); "Lochner's Legacy," 87 *Columbia Law Review* 873 (1987); "Preferences and Politics," 20 *Philosophy & Public Affairs* 3 (1990); "Neutrality in Constitutional Law," 92 *Columbia Law Review* 1 (1992); "Free Speech Now," 59 *University of Chicago Law Review* 255 (1992); "What Judge Bork Should Have Said," 23 *Connecticut Law Review* 205 (1991); "Why the Unconstitutional Conditions Doctrine Is an Anachronism," 70 *Boston University Law Review* 593 (1990); "The Limits of Compensatory Justice," *NOMOS XXXIII: Compensatory Justice* (John W. Chapman ed., New York University Press 1991).

"[O]pinions were so various and at first so crude that it was necessary they should be long debated before any uniform system of opinion could be formed. Meantime the minds of the members were changing, and much was to be gained by a yielding and accommodating spirit. . . . [N]o man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument."

—James Madison in *The Records of the Federal Convention of 1787* (1911)

"If the artificial is not better than the natural, to what end are all the arts of life? To dig, to plough, to build, to wear clothes, are direct infringements on the injunction to follow nature. . . . All praise of Civilization, or Art, or Contrivance, is so much dispraise of Nature; an admission of imperfection, which it is man's business, and merit, to be always endeavoring to correct or mitigate. . . . In sober truth, nearly all the things which men are hanged or imprisoned for doing to one another, are nature's every day performances. . . . [I]t remains true that nearly every respectable attribute of humanity is the result not of instinct, but of a victory of instinct; and that there is hardly anything valuable in the natural man except capacities—a whole world of possibilities, all of them dependent upon eminently artificial discipline for being realized. . . . [T]he duty of man is the same in respect to his own nature as in respect to the nature of all other things, namely not to follow but to amend it. . . . Conformity to nature, has no connection whatever with right and wrong. . . . That a thing is unnatural, in any precise meaning which can be attached to the word, is no argument for its being blamable."

—John Stuart Mill, *Nature* (1874)

"[B]e the evils what they may, the experiment is not yet played out. The United States are not yet made; they are not a finished fact to be categorically assessed."

—John Dewey, *The Public and Its Problems* (1927)

Contents

Introduction

In the last generation, the terms of American constitutional law were set by the Warren Court and its successor in the first few years under Chief Justice Burger. An aggressive Supreme Court, acting on the basis of new ideas about civil rights and civil liberties, tried to bring about significant social change in the name of the Constitution. The Court invalidated segregation in the schools and elsewhere; created new protections for criminal defendants; imposed a rule of one person–one vote on state elections; recognized broad rights of freedom of speech, including not merely political discussion but commercial advertising, advocacy of crime, sexually explicit materials, and libel as well; removed prayer from the public schools; recognized a right of privacy, including the right to choose abortion; and created something like a flat rule against race discrimination, a strong presumption against sex discrimination, and barriers to discrimination on the basis of alienage and legitimacy.

All this amounted to a constitutional revolution. For defenders and critics of the Supreme Court, the debate, in the last generation, centered on these cases. That debate sparked a broad discussion of the role of the judiciary in social reform and of the Court's approach to constitutional interpretation in general.

The Emerging Constitutional Controversy

The discussion generated by the Warren Court and its successor is over. The terms of the earlier debates are increasingly anachronistic.

A new debate, with new terms and alliances, is emerging. Its contours remain indistinct. But it raises a new set of questions, very general in character, about the relationship between liberty and equality; the principle of free speech; the whole notion of judicial restraint; the role of property rights and freedom of contract; the connection between constitutional law and democratic deliberation; the nature of a well-functioning constitutional democracy. The new debate raises some more particular questions as well, about the power of our government to grant dollars, licenses, or jobs on "conditions" that might be thought to invade constitutional rights; about the meaning of freedom of speech in new areas involving advanced technologies, campaign finance regulation, government efforts to ensure quality and diversity on the airwaves, hate speech, and pornography; about legal treatment of reproductive rights, including abortion and surrogacy arrangements. The legacy of the Warren Court—the positions laid out by its defenders and detractors—is increasingly unhelpful to the resolution of these questions.

Above all, perhaps, the emerging alignments test the meaning of what we might well understand as the most basic organizing principle of American constitutional law. That principle requires the government to be impartial. Under the American Constitution, government should not single out particular people, or particular groups, for special treatment. Neutrality is its first obligation.

Ideas of this kind play a large role in political discussion. They help shape our views about what government may properly do. Some version of them can be found in nearly every political speech and party platform. Criticisms of governments not only in America but all over the world—in Russia and England, South Africa and Israel, Romania and Iraq, El Salvador and Peru—echo these ideas.

Such ideas also help account for much of American constitutional law. Many provisions of the Constitution are understood to require neutrality and prohibit partisanship. If the government takes property, discriminates between people, interferes with a contract, or abridges liberty, it must show that its decision reflects some effort to protect the public good rather than mere favoritism. The basic principle is extraordinarily widespread. It unites a striking range of seemingly disparate constitutional guarantees. It can even be seen as the heart of antiauthoritarianism, or as (what may be the same thing) the core of the impulse toward the rule of law.

Indeed, the most important contemporary disputes about the mean-

ing of the Constitution reflect disagreement about the meaning of this principle. The power of government over private property; the status of affirmative action for blacks and women; the duty of the government to provide food, or housing, or protection against criminal violence; the relationship between government and the arts; the relationship between government and religion; the legal treatment of the handicapped; the distinction between "negative" and "positive" rights; governmental power to spend taxpayer money as it sees fit; the problems of pornography and abortion; government efforts to regulate campaign finance and access to the media—all these debates, and many more, are organized around competing views of the constitutional prohibition on partisanship and the constitutional obligation of neutrality.

Status Quo Neutrality

In discussing current problems in American constitutionalism, I will deal above all with that prohibition and that obligation. One of my principal goals is to identify and challenge an extremely pervasive understanding of the neutrality requirement. That understanding plays an important role in political debate. It also accounts for both reasoning and results in many areas of constitutional law.

In brief, the understanding that I mean to challenge defines neutrality by taking, as a given and as the baseline for decision, the status quo, or what various people and groups now have: existing distributions of property, income, legal entitlements, wealth, so-called natural assets, and preferences. A departure from the status quo signals partisanship; respect for the status quo signals neutrality. When government does not interfere with existing distributions, it is adhering to the neutrality requirement, and it rarely needs to justify its decision at all. When it disrupts existing arrangements, it is behaving partially, and is thus subject to constitutional doubt. Current rights of ownership are not seen as a product of law at all.

Even more than this, the very categories of government "action" and "inaction" are given their content by the status quo. Courts answer the question whether government has acted by reference to existing practices and existing distributions. Decisions that upset those practices and distributions are treated as "action." Decisions that do not are perceived to stay close to nature and thus to amount to no action at all. In constitutional law, then, we should understand the

prevailing conception of neutrality to be one that treats as legally uncontroversial any decision to respect existing distributions, and as legally suspect any decision to disrupt them.

For the moment this description must remain unhappily abstract. The real argument lies in the details, where we will find many surprises. The surprises take the form of the courts' constant use of the status quo—to mark out the boundaries between neutrality and partisanship, or inaction and action—in cases in which something other than the status quo seems, at first, to be at work. Indeed, we will find that status quo neutrality lies at the heart of some of the most important legal principles involving free speech, use of government funds, property rights, and equality.

To be sure, few people actually proclaim that they take the status quo as the baseline for distinguishing between partisanship and neutrality. Most lawyers and judges would be extremely puzzled by any such proposition. But this conception of neutrality is in fact widely held, so much so that it operates reflexively rather than self-consciously. It is largely because of its reflexive character that it accounts for so many understandings about the meaning of the Constitution. And although my focus is on courts and the Constitution, the discussion bears on treatment of important issues outside the courtroom.

Status Quo Neutrality as a Mistake

I want not only to identify this understanding of neutrality, but also to argue that in many areas it is a mistake, and one that produces serious injustice. Most narrowly: Status quo neutrality disregards the fact that existing rights, and hence the status quo, are in an important sense a product of law. It is a matter of simple fact that people own things only because the law permits them to do so. Without law, no one can "own" anything, at least not in the sense that we understand the notion of ownership. Status quo neutrality is a mistake precisely to the extent that it overlooks the fact that our rights, including our rights of ownership, are creations of law. Often important constitutional decisions do indeed overlook this fact.

The point is especially important if our rights are seen, as they should be, to include the many entitlements that the law confers.[1] These entitlements are not easily visible as legal creations. We tend to take them for granted. But they are nonetheless a product of legal rules. The law allows people not merely to own land, or newspapers,

or cars, but also to act within a legally specified territory: to go certain places, to hire and fire certain people, to control their bodies, to enter into agreements, to say things, to allow certain people (and not others) access to their property, to do certain things with what they own. Without legal protection, no such rights would be secure.

The state always stands ready to defend our rights of free action and free mobility (very broadly defined) against invasions by private people as well as government. We need the law of trespass, for example, to prevent people from coming onto or taking our land. We need the law of contract to protect our rights to enter into (or to refuse to enter into) agreements. We need the law of tort to allow us to engage in a protected sphere of action, accompanied by legal safeguards when we do as we are permitted, and insulated from liability for such offenses or harms as the law allows us to impose on others. And the state eliminates people's right to "self-help"—use of their own coercive powers—when they are unhappy with some outcome, like a discharge from a job, or an eviction from a home.

I offer all this as a simple description of our legal and social world. It is of course possible to argue that some rights are "natural" or a product of the correct theory of justice. But if we are trying to describe why we are allowed to do what we do, or why our world looks the way it does, it is important to understand the pivotal and omnipresent role of legal rules.

In general, it is surely good—for reasons of liberty and prosperity—that the law gives people these various entitlements. But it is not so good, indeed it may turn out to be very damaging, if we forget that these entitlements have been conferred by law in the first place. In thinking about the meaning of the Constitution, we often do forget that fact. We act as if the relevant entitlements come from nature, and are not a legal product at all.

To take a familiar and important example: Many people think that they oppose government regulation, or that we have all learned that government regulation "fails." But no one really thinks this. Markets are made possible only by government regulation, in the form of the law of tort, contract, and property. Such law is, among other things, coercive, in the sense that it stops people from doing what they want to do. For example, the law of property stops some people from getting food or shelter; the law of contract prevents some people from keeping their jobs. It is perfectly possible to think that markets are a desirable system of human ordering. But it is not possible to think that

markets are not a product of law, or that they represent something called "laissez-faire."

More broadly: A decision to use the status quo as the baseline would be entirely acceptable if the status quo could be independently justified. In many contexts, however, the status quo should be highly controversial as a matter of both principle and law. Respect for existing distributions is neutral only if existing distributions are themselves neutral.

When the status quo—between, say, rich and poor, or blacks and whites, or women and men—is itself a product of law and far from just, a decision to take it as the baseline for assessing neutrality is unjustifiable. The status quo might well be a target of law, and not taken as an inevitable or natural precondition for law. It is the law (to take an extremely important current example) that confers rights of exclusive ownership on the broadcasting media. Let us suppose that the resulting system of free expression offers little discussion of public issues and little diversity of view, and produces instead sensationalist anecdotes, attention to "horse race" issues rather than substance, and watered-down versions of conventional morality rather than a wide range of positions. If this is so, the entire problem is created by law. We do not have to complain about "private power" in order to see that the system of broadcasting is a creature of legal rules, and that these legal rules, like all others, should be assessed for conformity to the Constitution.

The basic problem with status quo neutrality is that it shuts off, at the wrong stage, the American system of deliberative democracy. It refuses to subject existing legal practice to democratic scrutiny. It does not see legal practice as legal at all. It refuses to treat current distributions, or ownership rights, as a subject or object of deliberation.

In fact my challenge to the prevailing conception of neutrality is far from novel to American law and government. Some such challenge can be found in both the founding generation and the period following the Civil War, and it played a central and explicit role in Franklin Roosevelt's New Deal. For the New Dealers, the status quo was a product of law and frequently unjust; they thought it was a mistake to see the New Deal programs as "government intervention" into an otherwise voluntary and law-free private sphere. In this respect, the New Deal deepened and strengthened the original constitutional commitment to deliberative democracy. The New Dealers saw the status quo as no longer immune from that commitment. I attempt here to

recover this aspect of the New Deal, to trace its profound effects on the legal and political culture, and to bring it to bear on current controversies.

Nor is my challenge to status quo neutrality novel to the study of American law. The legal realists, most prominently Robert Hale and Morris Cohen, paved the way for the New Deal reformation. Along with the American pragmatists, especially John Dewey, the realists insisted that existing distributions were a product of law and that these distributions should be evaluated in terms of their human consequences. (See Chapter 2.) More recently, Bruce Ackerman has emphasized the foundational importance of the New Deal to American constitutionalism; Ackerman has also identified the New Dealers' insistence that the law inevitably created the so-called "private sphere." Laurence Tribe has similarly stressed the New Deal attack on status quo neutrality, and he has shown in detail how pre–New Deal assumptions play a prominent role in many areas of contemporary constitutional thought. Others have worked on closely related ideas.[2]

The views presented here will depart in important respects from those of the realists, Ackerman, Tribe, and others.[3] But I will be trying to build on their insights, making them part of a general inquiry into the issue of neutrality in constitutional law.

Interpreting the Constitution

My subject is not only the substance of constitutional law but also the problem of constitutional interpretation. With respect to that problem, a distinctive conception of neutrality also turns out to be widespread. On that conception, the decision about constitutional meaning is at least to some extent a mechanical process, one of discerning the commands of a superior—the people who ratified the Constitution.

This process, it is often thought, does not authorize interpreters to use their own values, commitments, or principles. Neutrality in interpretation consists precisely in the abandonment of the interpreter's own views. Some people think that this abdication of personal responsibility—in favor of a principle of obedience to others—reflects the distinctive morality of law.

This conception of neutrality contains an important truth. Judges do owe a duty of fidelity to the founding document. The Constitution

(like other legal texts) cannot reasonably be said to mean whatever the judges think that it should mean. Moreover, any sensible system of interpretation must attempt both to limit the discretion of the interpreters and to constrain the power of judges over democratic processes.

As I have described it, however, this conception of neutrality in interpretation is implausible. It is built on a conceptual mistake; it aspires to a form of neutrality that is literally impossible. The meaning of any text, including the Constitution, is inevitably and always a function of interpretive principles, and these are inevitably and always a product of substantive commitments. The problem with the prevailing conception of interpretive neutrality is that it denies the role of interpretive principles in giving meaning to texts, and thus hides the inevitability of judicial reliance on substantive commitments.

There is simply no such thing as preinterpretive meaning, or meaning without resort to interpretive principles. Personal responsibility, in this particular sense, should not be denied—which is not at all, however, to say that legal thought is "subjective," or that law is simply politics.

Although I spend considerable space in identifying and challenging these ideas about neutrality in law, my claims here will not be solely negative. Indeed, I will be arguing for a large number of general propositions and for particular resolutions of current legal disputes. I will claim that a certain form of objectivity in law is a salutary ideal, and that there are good reasons for judicial restraint in the area of social reform. I will also contend that the Constitution neither forbids nor requires affirmative action; that government restrictions on pornography and campaign expenditures do not offend the First Amendment; that government has very substantial discretion to fund, or not to fund, artistic projects; that the equal protection clause (if not the right to privacy) protects women's right to have an abortion, and indeed compels governmental funding of that right in cases of rape and incest; that our present educational system violates the Constitution, and that the President and Congress are under a constitutional duty to remedy the situation; that there is no constitutional problem if government creates a right of private access to the media or otherwise imposes obligations of diversity and public affairs programming on broadcasters; and that the Constitution does not create a judicially enforceable right to welfare or other forms of subsistence. My argument will bear as well on the foundations of regulatory law, above all in the context of environmental protection.

The Constitution outside the Courts

I also suggest that there has been far too much emphasis, in the last generation, on the role of courts in the American constitutional system. This court-centeredness is a continuing problem for constitutional thought in the United States. It has helped to weaken the sense of responsibility of other officials and indeed ordinary citizens, and it has distracted attention from nonjudicial strategies. Rooted in the overwhelming symbol of *Marbury v. Madison,* which established judicial review, the notion that the Constitution is directed to judges was dramatically fueled by our experience under the Warren Court. But the Constitution is aimed at everyone, not simply the judges. Its broad phrases should play a role with legislators, executive officials, and ordinary citizens as well.

Nor is this understanding novel. It receives strong support from the original views of the founders, who were hardly obsessed with the judiciary. James Madison, the most important voice behind both the Constitution and the Bill of Rights, came to advocate the bill primarily because of its effects on political deliberation. In his crucial letter to Jefferson on October 17, 1788, Madison asked, "What use, then, it may be asked, can a bill of rights serve in popular Governments?" His first response was that the "political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the National sentiment, counteract the impulses of interest and passion."[4] Hence Madison hoped not for legal protection through courts, but for educative effects on the citizenry at large.

Madison's second response was that when oppression came from the government itself, "a bill of rights will be a good ground for an appeal to the sense of the community." Here as well, the judiciary was not the principal vehicle for constitutional protection. The Bill of Rights was to appeal more broadly to the "sense of the community." Three years later Madison wrote in the same vein: "In proportion as Government is influenced by opinion, must it be so by whatever influences opinion. This decides the question concerning a bill of rights, which acquires efficacy as time sanctifies and incorporates it with public sentiment."[5] The central point here is that "public sentiment," not only the Supreme Court, is to concern itself with constitutional protections.

Too little attention has been paid to the possible role of the Constitution outside the judiciary and in the democratic process.[6] For the

next generation, a shift to administrative and legislative bodies, and to democratic arenas generally, is necessary. Such a shift would amount to a recovery of the original constitutional goal of creating a deliberative democracy, one that would benefit from widespread discussion among representatives and the citizenry at large. Hence many of the constitutional proposals set out here are intended not for the judges at all, but for others thinking about constitutional liberties in the modern state.

I will claim more generally that despite the persistence of an inadequate conception of neutrality, the aspiration to neutrality is far from an outmoded or empty one. On the contrary, a number of conceptions of neutrality are indispensable parts of our legal system. To say that neutrality should not be founded in the status quo is hardly to say that there is no room for neutrality at all. Interpretation may rest on interpretive principles, but this does not mean that judges should feel free to choose whatever principles they prefer. One of my major goals is to say something about the nature of truth and objectivity in law, and to challenge the view that the failure of mechanical interpretation is a reason to give up on notions of neutrality altogether.

This book is organized into two parts. The first deals with general questions of both constitutional substance and constitutional method. The second applies the general conclusions to specific areas.

In Chapter 1, I describe the original aspiration to deliberative democracy, the American Constitution's distinctive conception of political life. I identify commonalities among many provisions of the Constitution, arguing that all of them are taken as embodying a general principle of neutrality, one that I describe as "impartiality." The impartiality principle requires reasons, or justifications, for the distribution of social benefits and burdens. The impartiality principle is part and parcel of one of the founders' creation of what we might think of as a republic of reasons.

In Chapter 2, I introduce the principle of status quo neutrality by exploring three of the most important Supreme Court cases decided in the late nineteenth and early twentieth centuries. I show how a controversial and indeed implausible conception of neutrality was thought to justify racial segregation, sex discrimination, and "laissez-faire" in the economy. This conception of neutrality was based on a status quo, then taken as prepolitical and just, that now seems conspicuously state-created and unjust. Most of all, I argue that very much the same conception of neutrality operated in all three areas.