BOOK REVIEW ESSAYS

RADICALS IN TWEED JACKETS: WHY EXTREME LEFT-WING LAW PROFESSORS ARE WRONG FOR AMERICA

RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA. By Cass R. Sunstein. New York: Basic Books, 2005. Pp. 281. $26.00.

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This Review Essay assesses Cass Sunstein's new book Radicals in Robes. *After summarizing the book, this Review Essay considers the merits of Sunstein's minimalism, why Sunstein favors it, and the depth of his commitment to it. Then the Review Essay considers whether the meaning of words ought to turn on the consequences of that meaning, as Sunstein implicitly argues. Documents and utterances mean things without regard to what someone else might or might not do with the documents or utterances. When it comes to discerning meaning, the consequences do not matter. Finally, the Review Essay explains that originalism provides no argument (indeed can provide no argument) for following a document's meaning. Originalism is merely a means of making sense of text. The reasons for treating some documents as law (as opposed to others) have absolutely nothing to do with originalism as a theory of interpretation. Indeed, these reasons have nothing to do with interpretation at all. Whether we treat a particular text as binding upon us is a question of morality and politics.*

* Herzog Research Professor of Law, University of San Diego School of Law. Thanks to Larry Alexander, Mike Ramsey, Mike Rappaport, and Steve Smith for comments. Thanks to Scott Mason for research assistance. The title of this Review Essay should be understood as a lighthearted jab at Professor Sunstein's over-the-top book title and not a claim that Professor Sunstein is wrong for America. Readers should also be aware that Professor Sunstein has a response to this Review Essay in the same issue of the Columbia Law Review. See Cass R. Sunstein, Of Butterflies and Snakes, 106 Colum. L. Rev. 2234 (2006).

INTRODUCTION

When Cass Sunstein speaks, people listen. He has a well-earned credibility that leads people to respect his scholarship. This enables him to flit between topics as diverse as the unitary executive,[1] risk perception,[2] and why groups go to extremes.[3] And, he can say something worthy of note about each of these subjects, making his work compulsory reading for the legal academy.

Professor Sunstein's most recent contribution of required reading is the not-so-subtly titled *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America.* Sunstein argues that judges devoted to "fundamentalism"—by which he means originalism[4]—are wreaking extreme changes in American law, one broadly reasoned opinion at a time (pp. 13, 15, 17). If the "Radicals in Robes" have their way, American governments could racially discriminate, could curb political dissent, and could not meaning-

1. See generally Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1 (1994) (denying that Constitution originally created unitary executive, but nonetheless arguing for strongly unitary executive branch).

2. See generally Cass Sunstein, Precautions Against What? The Availability Heuristic and Cross-Cultural Risk Perception, 57 Ala. L. Rev. 75 (2005) (discussing conceptual claim about futility of precautionary measures and psychological hypothesis regarding public perception and bias toward perceived risks).

3. See generally Cass R. Sunstein, Deliberative Trouble? Why Groups Go to Extremes, 110 Yale L.J. 71 (2000) (discussing group polarization and its effects on deliberations process and democratic organizations).

4. Sunstein never explains why he creates new labels for originalism and its followers. He intimates that some originalists treat the Constitution "as if it were inspired directly by God," and hence he suggests that there is some affinity between religious fundamentalists and originalists (p. xiv). This will come as a surprise to devout originalists who likely doubt that God much cares about the electoral college. This will also come as a surprise to all those originalists who incline to atheism or agnosticism. Randy Barnett, Richard Epstein, Mike Rappaport, and others probably did not know that they had so much in common with Pat Robertson. One suspects that Sunstein links religious fundamentalism to originalism because he wishes to saddle his originalist adversaries with extraneous baggage. For purposes of this Review Essay, I will follow the conventional, nonreligious term, "originalism."

fully regulate property (pp. 2, 19, 65). Indeed, one of the book's most prominent features is its repeated warning that originalist readings of the Constitution will spawn a parade of horribles (pp. 18–19, 63–65).[5]

Setting aside for a moment his sometimes strained criticisms of originalism, Sunstein does have interesting things to say, as one would expect. First, Sunstein gives us a useful vocabulary for describing competing approaches to constitutional law (more on this later) (pp. xii–xiii, 25, 31, 44). Second, he reminds us why so many on the left abhor originalism: They dislike it not so much because it is an improper or silly means of making sense of text. Rather, they abhor it because they believe it generates dreadful results when it comes to the Federal Constitution (pp. 1–3, 6–7, 15–17, 63–65).

Sunstein has three principal goals. First, he describes four competing approaches to the Constitution: originalism, perfectionism, majoritarianism, and minimalism (pp. xi–xiii). Second, he hopes "to explain what is wrong with [originalism]" (p. xiii). As suggested earlier, what is wrong with originalism is that it permits the government to enact all sorts of nefarious laws while simultaneously barring all sorts of useful ones (pp. 63–65). Third, he wishes to make the case for minimalism, an approach that "recognizes the limited role of the federal judiciary and makes a large space for democratic self-government" (p. xv).

After Part I briefly describes the book, Part II considers the merits of minimalism, why Sunstein favors it, and the depth of his commitment to it. Part II argues that Sunstein's embrace of minimalism is rather minimal. Sunstein is a consequentialist when it comes to determining what the Constitution means. And he is quite open about his willingness to adopt and abandon theories of meaning. If the foremost champion of minimalism admits that he may abandon it under the right circumstances, minimalism will have little appeal. Part II also explores some tensions between minimalism and consequentialism.

Part III of this Review Essay considers whether the meaning of words ought to turn on the consequences of that meaning, as Sunstein implicitly argues. Part III maintains that documents and utterances mean things without regard to what someone else might or might not do with the documents or utterances. When it comes to meaning, the consequences do not matter. Additionally, Part III explains that originalism provides no argument (indeed can provide no argument) for following a document's meaning. Originalism is merely a means of making sense of text. The reasons for treating some document as law have absolutely nothing to do with originalism as a theory of interpretation. Indeed,

5. The target audience for Sunstein's book is unclear. It clearly is accessible to a lay audience. But it also speaks to the legal academy, anticipating arguments likely to be raised from that quarter. Obviously, Sunstein is not trying to convince originalists, or else he would be using honey rather than vinegar. Perhaps he sees himself targeting those not yet firmly attached to any approach and those on the left who hitherto embraced the idea that the courts should be at the vanguard of social change.

these reasons have nothing to do with interpretation at all. Whether we regard a certain text as binding upon us is a question of morality and politics.

I. THE MAJOR CONTENDERS

The heavies in Sunstein's book are the originalists. The introduction decries them as activists "trying to transform the Constitution" (p. 6). The originalists and their allies are "disciplined," "single-minded," and, above all else, "radical" and "extremists" (pp. 9, 10, 13, 17, 19, 26).[6] Later, Sunstein neutrally describes originalists as people who suppose "that the Constitution should be read to fit with the original understanding of the founding generation. The central constitutional questions thus become historical ones" (p. 26). The originalist project is to make radical changes in judicial doctrine so that it reflects the original understanding (p. 26). In a psychological turn, Sunstein claims that originalists "tend to feel angry and embattled" that current doctrine does not reflect their views (p. 26). Of the two originalists on the Court, Sunstein argues that Justice Thomas is an extreme originalist, while Justice Scalia is a "'faint-hearted originalist'" who takes precedent more seriously (p. 76). If originalists are irate, fanatical, and extreme, as Sunstein claims, is there any wonder why they are wrong for America?

The angels are the minimalists. They "dislike ambitious theories" and "do not want to do much more than is necessary to resolve cases" (p. 27). They "do not want to take sides in large-scale social controversies," preferring instead to "favor shallow rulings" that "seek to avoid taking stands on the biggest and most contested questions of constitutional law" (p. 27). Minimalists are happy to "reach *incompletely theorized agreements* in which the most fundamental questions are left undecided" (p. 28). This agreement not to agree on every last jot and tittle allows minimalists to have a "large measure of mutual respect" for others (p. 28). Minimalists celebrate precedent because it "promotes stability" and "makes it unnecessary . . . to fight over . . . fundamental questions whenever a new problem arises" (p. 28). The key factor is that minimalists prefer nudges to earthquakes—they do not want seismic legal shifts (p. 30). Sunstein counts Justice Ginsburg and former Justice O'Connor as minimalists (pp. 29–30).

Though contemporary constitutional disputes "are best understood" as a contest between minimalism and originalism, Sunstein argues that two other theories have enduring influence: perfectionism and majoritarianism (pp. 30–32, 44–45). Perfectionists, typified by Justices William Brennan and Thurgood Marshall, seek to make the Constitution "as good

6. To be fair to Sunstein, he is not uniformly critical of fundamentalists. He does say that "[i]t is not at all pleasant to challenge, as wrong, dangerous, radical, and occasionally hypocritical, the many people of honor and good faith who have come to embrace fundamentalism" (p. xv).

as it can be" by interpreting the Constitution in a manner that leads to a great and just Constitution (p. 32). Perfectionists can be found on the right as well, says Sunstein. Conservative perfectionists read the Equal Protection Clause as barring affirmative action (p. 32). Though perfectionists dominate the law schools, they have few adherents on the bench (p. 33). This makes perfectionism, for now at least, a spent force (p. 33).

The majoritarian camp favors majorities. Majoritarians grant the "benefit of every doubt to [the political] branches of government" and want the courts "to uphold the actions of those branches unless they clearly violate the Constitution" (p. 44). The most famous academic exponent of this view was James Bradley Thayer, who counseled that judges are fallible and that an overweening judiciary would tend to cause elected officials to slough off their constitutional responsibilities to the judiciary (pp. 45–46). Sunstein argues that Justice Holmes's jurisprudence reflected a majoritarianism (pp. 47–48). But there are no majoritarians on the Court today (p. 45), and if majoritarianism were adopted wholesale, it, like originalism, would require major revisions in judicial doctrine (pp. 49–50).

How should people choose amongst these contenders? Although he never says as much, Sunstein clearly believes that we ought to be consequentialists. That is to say, we should choose an interpretive theory by examining what would happen if we treated as law an interpretive theory's understandings of the Constitution. Hence he notes that originalists must argue that originalist judges "will really improve the system as a whole" and that if originalism "produces a far worse system of constitutional law, [then] that must count as a strong point against it" (pp. 41, 72). After all "[w]hy should we adopt an approach that turns constitutional law into a far inferior version of what it is today?" (p. 72). He also says that "[a]ny approach to interpretation . . . [that] would produce intolerable results . . . is hard to defend" (pp. 72–73).

On this score, originalism suffers because, Sunstein repeatedly tells us, originalism leads to terrible results. If we followed the Constitution's original meaning, states would bar contraception and establish official churches (pp. 1–2, 65). Modest gun control would be unconstitutional (p. 3), the Bill of Rights might only apply to the federal government (p. 64), and the federal government could discriminate on the basis of race and sex (p. 63). Of course, there would also be no right to privacy (p. 65).

Majoritarianism and perfectionism have their own failings, claims Sunstein. The former would permit all sorts of legislation currently regarded as unconstitutional. Wherever the Constitution was less than clear, majorities would prevail (p. 49). Hence majoritarian judges would eliminate the right to abortion and would permit governmental discrimination on the basis of race and sex (p. 49). For Sunstein, majoritarianism is "simply too radical" (p. 50).

The effects of perfectionism are impossible to gauge in the abstract because the perfectionist methodology can lead to vastly different results depending upon who is doing the perfecting. A Justice Richard Epstein would craft a different takings doctrine than a Justice William Brennan. So rather than gauging the net benefits (or costs) of perfectionism as a theory, one would have to examine different perfectionist readings of the Constitution and assess them separately. Sunstein is content to say that perfectionism places too much confidence in the moral sensibilities of judges (pp. 35–36).

Several factors favor minimalism. First, Sunstein clearly believes that minimalism leads to good results. As he explains in the heart of his book—chapters 3–9—minimalism allows us to preserve some of the benefits of decades of undemocratic perfectionism without having to continue that undesirable experiment. In this way, minimalism preserves the right to privacy, the ability to engage in some affirmative action, and the federal government's ability to regulate pollution, among other things. Second, Sunstein supplies several generic reasons to favor minimalism: It favors stability, regards grand theories as suspicious, respects disagreements, leaves a space for democratic decisionmaking, and reflects a humility often lacking in the academy and on the bench (pp. 27–29). Minimalists have their own views about the just society, but they do not impose their views on everybody else (pp. 27–29).

Notwithstanding Sunstein's unstinting praise of minimalism, he is not wedded to it. In fact, he states, "[w]e cannot say, once and for all time, that [originalism] is inferior to minimalism" (p. 34), and "we could imagine times and places in which [originalism] would be the best approach of all" (p. 61). Indeed, he praises what he calls the perfectionist jurisprudence of Chief Justice John Marshall. Marshall consistently sought to expand federal power, and history has judged him kindly, says Sunstein (pp. 34–35). Hence, even though minimalism works best now, Sunstein clearly does not believe that it is the superior choice in all circumstances and conditions.

II. Appraising Minimalism

The aim here is to describe and assess minimalism. This Part begins by suggesting that minimalism does not offer a theory of interpretation so much as it offers a theory of judicial decisionmaking that privileges the doctrinal status quo. Next, it discusses some limits of minimalism as a theory of decisionmaking. After this discussion, it explores the tension between Sunstein's commitment to minimalism and his first-order commitment to consequentialism. Finally, this Part ends with a critique of Sunstein's evaluation of the costs and benefits of minimalism and originalism and with comments on why minimalism may have only minimal appeal.

A. *Minimalism as a Theory of Judicial Decisionmaking That Privileges the Doctrinal Status Quo*

The law is fraught with battles over interpretive theory. Is minimalism a new entrant into the fray? No. Properly understood, minimalism is not a theory of interpretation at all, at least not as most people understand "interpretation." Most people regard interpretation as the attempt to discern the meaning of some communication, and minimalism has nothing to say about what something means. One can see that most clearly by thinking of minimalism in nonjuridical contexts. What would it mean to read a recipe for masala dosa "minimally?" How would the minimalist find meaning in diaries? How would a minimalist read a book defending minimalism and attacking originalism? Minimalism has no answers to such questions.

Is minimalism instead a more specialized theory of constitutional interpretation? Once again, the answer is no. The Constitution's text plays a decidedly peripheral role in minimalism. To be sure, Sunstein would say that judges should look to the text when deciding cases. But in the absence of any claim about how to read constitutional text, this guidance amounts to little. What does "due process" or "executive power" mean? Minimalism does not begin to tell us whether the answer is to be found in modern dictionaries, English legal history books, or the minds of minimalist judges. On many of the most contentious legal issues of the day—abortion, affirmative action, and the separation of church and state—minimalism treats the Constitution's text as irrelevant. Since constitutional interpretation is, in large part, about deciding how to make sense of words, it would seem that minimalism is far too minimal, at least when it comes to its pretensions, as a theory of interpretation.

To understand what kind of theory minimalism actually is, one must keep in mind what clearly matters most to the minimalist—stability and a desire for small steps. Does the Constitution protect the right to abortion? For the minimalist judge, it does not much matter what the text says—we have precedent on this point, and we should be wary of making wrenching changes in the doctrinal status quo.

Minimalism is properly regarded as a theory of decisionmaking particularly addressed to courts—judges ought to decide new cases as prior cases were decided. If courts have not previously decided the precise question before them, judges should identify principles emerging from similar cases and apply them to the new issue. If judges want to move the law in one direction, they should make minimal movements in doctrine, i.e., write narrow opinions.

As the discussion above suggests, minimalism is a backwards-looking theory. New cases are to be decided as prior cases were resolved. Although Sunstein criticizes originalism's dead hand problem and its obsession with history, his brand of minimalism ironically has the same features. While originalists tend to privilege the views of the Founders, Sunstein's minimalism—because it is precedent focused—tends to privi-

lege the views of the Warren and Burger Courts. Rather than discerning what the Constitution meant 200 years ago, we must discern what Justice Blackmun meant in *Roe v. Wade*[7] and what Justice Douglas meant in *Griswold v. Connecticut*[8]—Justices who, like the Founders, have passed away.[9] In a way that Sunstein does not seem to appreciate, for minimalism no less than originalism, many of the central questions are "historical ones" (p. 26).

At its heart, Sunstein's minimalism is a defense of the doctrinal status quo. Cynics might say that the minimalist defense of current doctrine is the best that liberals currently can hope to achieve. On this view, minimalism is a rear-guard action designed to fend off the supposed conservative trajectory of the law—call it the legal academy's version of the Brezhnev doctrine. Liberals who embrace minimalism understand that leftist perfectionism is a spent force, at least given current political alignments. There are no more Brennans and Marshalls who can make it to the Court. But liberal decisions must not be reversed, just as Chairman Brezhnev would not allow the gains the Soviets made in Eastern Europe to be overturned. Although Sunstein continually denounces originalism for being a legal theory that does nothing more than justify Republican policies of deregulation, anti-affirmative action, and anti-environmental regulation (p. 217), he does not understand that minimalism will seem to many as nothing more than a Democratic argument for preserving abortion and big government on demand. His critique of originalism thus becomes a potent indictment of minimalism: "If judges' opinions consistently fit with a partisan political agenda, we have reason to doubt whether they are interpreting the Constitution with anything like neutrality" (pp. 217–18).

The less cynical might regard minimalism as a welcome admission that the perfectionist impulses of the Warren and Burger Courts were mistakes. Sunstein, to his credit, identifies all sorts of mistakes from these Courts (pp. 19, 119). But his denunciations of these decisions—and the judicial arrogance that he claims underlay them—have a ring of hollowness. For these mistakes, it seems, ought to be frozen in amber, or at least thawed out over an excruciatingly slow period of time. And if judges eventually do overturn these decisions, Sunstein will likely abandon minimalism. As discussed later, Sunstein finds minimalism worth defending only when the decisions being preserved lead to good results. When one considers Sunstein's consequentialist defense of minimalism and his willingness to discard minimalism if it leads to bad consequences, it seems

7. 410 U.S. 113 (1973).

8. 381 U.S. 479 (1965).

9. Indeed, Sunstein has a special place in his heart for the pre-Rehnquist era. The discerning reader will note that while most of the precedents that Sunstein says we must preserve were written by judges long dead (pp. 108–09, 236, 239), the cases he is most critical of are from the Rehnquist era—written by Justices who are, for the most part, still alive (pp. 15–16, 245).

clear that Sunstein fancies the results of '50s, '60s, and '70s leftist perfectionism even as he criticizes those decisions. He has found a way of denouncing his cake while eating it too.

B. *Limitations of Minimalism*

As a theory of judicial decisionmaking, minimalism does not tell you what to do so much as how to do it. It counsels cautious, tentative steps, just as a baby might take when it is unsure of how to step. To be avoided are broad decisions, "[e]arthquakes," as Sunstein calls them (pp. 25–27). But small steps can be taken in any number of directions. Minimalism does not even begin to tell us what direction we ought to take. For that reason, conservatives and liberals can embrace minimalism—it does not deny them their gratification, it just delays it.

Sunstein offers only glimpses of applied minimalism, making it hard to discern how narrowly he would have judges write their opinions. Minimalism clearly is not meant to generate exceedingly narrow opinions—such as a judicial pronouncement that some opinion only applies to the named parties or only applies for a few years. This would weaken the system of precedent that is at the heart of minimalism.

The few times that Sunstein offers alternative minimalist holdings of famous cases, however, the suggested rationales leave much to be desired. Consider his discussions of *Griswold v. Connecticut* (pp. 83–84)[10] and *Lawrence v. Texas* (pp. 92–96).[11] In both cases, Sunstein would have had minimalist judges strike down the relevant laws on the grounds that they had fallen into desuetude (pp. 97–99). Not having executed the laws for so many years, the state could not revive these essentially moribund laws and enforce them in a sporadic, arbitrary, and discriminatory manner (pp. 97–99). Prosecutions in these cases "violated the rule of law because [they] lacked the kind of generality and predictability on which the rule of law depends" (p. 98). Laws lapse, says Sunstein, "when their enforcement has already become exceedingly rare because the principle behind them has become hopelessly out of step with people's convictions" (p. 97). He maintains that this rationale is "more plausible as a matter of constitutional text, and more democratic" (p. 98).

Yet anyone who wishes to protect the right to contraception and the right to engage in homosexual relations has to find Sunstein's rationale hopelessly inadequate. If all that is needed to prohibit abortion or homosexual conduct is a pattern of enforcement, many states may be willing to vigorously enforce their laws prohibiting these practices. Connecticut could start to vigorously enforce the contraception bar and obviate Sunstein's desuetude rationale. Texas might do the same with respect to its "homosexual conduct" statute. The desuetude rationale also raises the possibility that contraception and sodomy laws will be unconstitutional in

10. 381 U.S. 479.
11. 539 U.S. 558 (2003).

Connecticut because Connecticut does not enforce them, but constitutional in the Bible Belt because those states vigorously prosecute violators of those laws.[12] Sunstein's desuetude rationale is a rule about enforcement and does nothing to protect privacy.

Ironically, Sunstein's desuetude rationale also has rather large unintended consequences. He hopes to provide a more narrow rationale for *Griswold* and *Lawrence*. But in fact, his desuetude rationale cuts across all areas of law. There is no principled way of cabining it to sexual privacy. Desuetude, if consistently applied, will lead to laws being struck in all areas of state and federal law because there are many laws—environmental, securities, criminal, civil—that are rarely enforced.[13] Far from being some narrow means of striking down laws related to sexual privacy, Sunstein has inadvertently advanced a radical engine for striking down all manner of laws. This approach is maximalism, not minimalism.

Must all minimalist opinions have such unintended consequences? Of course not. But perhaps there is some wisdom in a court specifying multiple, independent rationales for a claim, even though the resulting decision makes more law. *Marbury v. Madison* did as much with respect to the constitutionality of judicial review.[14] And perhaps there are good reasons for judges to write broad opinions when it is the broad rationale that really motivates their decisions. One cannot object, in principle, to the idea that sometimes courts should adopt narrow opinions. But by the same token, perhaps we should be more humble when faced with an entrenched practice of occasionally writing broad opinions when expansiveness better serves a court's purposes.[15]

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12. Perhaps Sunstein would say that if states overcame his desuetude concerns, the Court ought to then throw up another roadblock to the constitutionality of such laws in order to promote the right to privacy. But then his minimalism does nothing more than waste everybody's time. If the Court announcing the desuetude rationale knows that there is another insuperable objection to the constitutionality of the Connecticut or Texas laws, why should the Court raise the more "narrow" objection without also raising the more general objection, thus clarifying that there are numerous reasons making it impossible for a state to have a particular law?

13. Sometimes laws are rarely enforced because of a prosecutorial policy to concentrate limited resources elsewhere. Other times laws are not "enforced" because there are no lawbreakers. And still other times they are not enforced because while there may be plenty of lawbreakers, there is little or no evidence of the violations. Sunstein never distinguishes between these three situations of nonenforcement.

14. See 5 U.S. (1 Cranch) 137, 173–80 (1803) (finding it unconstitutional for court to issue writ of mandamus in question for reasons including Constitution's text and intent of legislature).

15. The Court often grants a writ of certiorari precisely because it hopes to, once and for all, resolve some contentious question. Issuing a narrow opinion in this scenario may only continue the confusion and nonuniformity plaguing the lower federal courts. Sometimes there are rather good reasons for broad opinions that leave little wiggle room for interpretation.

C. *Sunstein's Surprisingly Minimal Embrace of Minimalism*

Sunstein has commitments to certain jurisprudential results (e.g., the right to privacy) and a commitment to minimalism. We have just seen that these commitments can conflict. When that happens, which allegiance takes precedence? His preference for good results prevails. "We cannot say, once and for all time, that [originalism] is inferior to minimalism, or vice-versa. Nor can we rule out perfectionism" (p. 34). Indeed, Sunstein goes out of his way to say that he could imagine situations when originalism or perfectionism would be the best theory (pp. 61–62, 246). For the contemporary United States, however, "minimalism is best and . . . both [originalism] and perfectionism are dangerous" (p. 35).

To borrow from Justice Scalia, Sunstein is an exceptionally faint-hearted minimalist.[16] Clearly he does not regard minimalism as some transcendent constitutional theory, to be applied forever and in all circumstances and climes (pp. 34–35). The failure to make any such claim makes good sense given his general distaste for grand theories (p. 27). But his focus on results renders irrelevant many of his nonconsequentialist arguments in favor of minimalism. Clearly there is a part of Sunstein that sees wisdom in small steps, humility, and incompletely theorized agreements—the supposed nuts and bolts of minimalism. He writes about each of these things in glowing terms as if they are almost unalloyed good things. But he clearly does not regard these factors as overwhelming his first-order preference for good consequences.

An example makes this clear: Suppose that the originalists win all the battles for twenty years and make radical changes in the law. Would a jurist who shared Sunstein's policy preferences and consequentialist approach to constitutional law be wedded to the idea that she should make only minor doctrinal changes? Of course not. In a world where the originalists ruled the roost, the Sunsteinian jurist would be a liberal perfectionist at least until she restored the status quo ante. If faced with a horrific doctrinal status quo, minimalism has got to go. What of humility and a respect for deeply felt moral disagreements? Those must be tossed out the window because in our hypothetical, there is a terribly unappealing status quo. Humility and small steps, it seems, only take you so far.

Up to a point, Sunstein's mode of argument makes good consequentialist sense. Someone hoping to persuade others may use arguments and principles that may move the audience even if one does not hold deep commitments to those arguments and principles. Hence, Sunstein argues for humility, respect for moral disagreements, and caution. But his use of such arguments leaves the disquieting sense that many of these arguments are really beside the point, at least as Sunstein conceives the point.

16. Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 862 (1989).

D. *The Consequentialist Trapped in a Minimalist Straitjacket*

When the chips are down, Sunstein the consequentialist takes primacy over Sunstein the minimalist. In another way, however, Sunstein the consequentialist seems a prisoner to Sunstein the minimalist. If the results are all that really matter, why not pick and choose amongst multiple interpretive theories? Sunstein adopts the conventional approach in constitutional decisionmaking—select a methodology and apply it relentlessly. Many adopt this approach because they wish to avoid the "results-oriented" tag. The ideal originalist applies original meaning whether or not she favors the resulting outcomes. The faithful majoritarian does the same.

But the consequential minimalist is free from the misguided desire to avoid a results-oriented jurisprudence. Indeed, the consequential minimalist chose minimalism precisely because all she cared about were the results. As Sunstein says, it is hard to defend an approach that "would produce intolerable results" (p. 73). But if results are all that matters, why should anyone be a consistent minimalist in 2006? If we may abandon minimalism in 2010 and reembrace it in 2020, why not be fickle minimalists right now? To achieve the best results, perhaps consequential minimalists really ought to be perfectionists about legislative power, originalists about executive power, and majoritarians when it comes to privacy rights. There is no reason why dyed-in-the-wool consequentialists should be slavish minimalists, even for the short run.[17]

Sunstein's failure to embrace the cafeteria approach to constitutional theory—a sprinkling of originalism, a healthy portion of perfectionism, and a tasting of majoritarianism—means that not only is he a faint-hearted minimalist, but he also seems a faint-hearted consequentialist.[18] To paraphrase Sunstein, it is hard to defend a small-minded consistency when a more eclectic approach yields far superior results (pp. 72–73).

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17. At first blush, this fickle approach may seem unprincipled. But this sense would merely reflect lingering traces of a prior (and ill-considered) distaste for a results-oriented jurisprudence. If results are what really matter, as Sunstein believes, we must adopt the best results.

18. Maybe the devoted minimalist can make a rule-utilitarian argument for a consistent minimalism. Perhaps it is too difficult to decide which theory leads to the best results in particular situations. Hence it might be better to decide which theory leads to the best results most often and consistently apply it. This argument suffers from two flaws. First, the consequentialist who chooses minimalism must gauge the results of all theories before deciding which one (or ones) to adopt. In that process, the consequentialist will have identified the benefits flowing from each theory and will then be in a position to pick and choose. Second, the consequentialist who chooses minimalism must periodically reevaluate the relative merits of minimalism and other theories, making it impossible to truly stick to a rule of minimalism. As a result, the Sunsteinian consequentialist who admits that minimalism will not always maximize benefits cannot sensibly cling to rule utilitarianism as a reason to be a minimalist in the short term.

E. *A Proper Consequentialist Evaluation of Originalism and Minimalism*

Sunstein tells us repeatedly that minimalism yields good results and that originalism yields the opposite. But his evaluation of both leaves much to be desired. Consider his treatment of minimalism. He begins his book by describing the supposed radical nature of the Rehnquist Court's jurisprudence. The First Amendment has been used to "invalidate many forms of campaign finance legislation" (p. 15). The Court has "reinvigorated the commerce clause as a serious limitation on congressional power," throwing a "large number of federal laws" into constitutional doubt (p. 16). Making these claims and many others fits with the "Radicals in Robes" thesis.

But when Sunstein discusses the merits of minimalism, these radical possibilities disappear. If Sunstein has accurately described the faults of the Rehnquist Court, these faults are also the flaws of minimalism and its embrace of existing doctrine. Minimalism has to cope with the consequences of that Court's supposed radicalism. Minimalism, as applied to today, yields restraints on federal power and threatens campaign finance legislation. Minimalism, no less than originalism, prevents Congress from allowing citizens to sue to enforce environmental laws; it sharply limits congressional authority to enforce the Fourteenth Amendment; and it throws affirmative action programs into serious doubt. But he never makes these admissions. More generally, he never tallies all the bad jurisprudence (from his perspective) that minimalism safeguards. This failure to say anything about minimalism's many warts suggests that the book has stacked the deck in favor of minimalism.

Sunstein's treatment of originalism is one-sided as well. First, he always finds a way to ascribe the worst results to originalism. Sometimes, Sunstein saddles originalists with results that they do not believe follow from originalism. He does this on the grounds that originalist judges are often bad or insincere originalists (pp. 133–34, 138). Hence, even though originalist judges have argued that neither the federal nor the state governments may use race in governmental decisionmaking except in the rarest circumstances (p. 132),[19] Sunstein says that originalism, properly understood, actually permits the federal and state governments to racially discriminate (p. 2).[20] Originalists are thus stuck with rampant state-sponsored racial discrimination.

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19. See Richmond v. J.A. Croson, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (noting that "only a social emergency rising to the level of imminent danger can justify" use of race).

20. What Sunstein fails to understand is that some originalists actually believe that the Constitution requires the courts to show some respect for precedent. These originalist judges do not have to (and indeed cannot) start from the beginning on every issue that comes before their court. Scalia clearly respects precedent; and Justice Thomas, however much more willing he is to overturn precedent than Scalia, respects it as well. Hence even if originalist judges think the Constitution does not forbid all forms of racial

Yet, at other times, he is all too willing to ascribe to originalism results that he claims are wrong on originalist grounds. Consider his treatment of the takings doctrine. Sunstein claims that originalists are wrong to read the Takings Clause as requiring compensation for regulations that harm property values (pp. 232–35). Yet, he has no problem ascribing to originalism the negatives associated with greatly constraining the government's ability to regulate property (pp. 19, 232–35). He does this because he clearly regards an expansive reading of the Takings Clause as a negative. Hence, sometimes Sunstein corrects the failings of originalists in order to burden them with poor consequences that they reject, and other times he is happy for them to stew in their poor originalism because it better makes his case that originalism yields bad results.[21]

Second, in criticizing originalism Sunstein emphasizes improbable possibilities rather than plausible outcomes. In particular, he repeatedly focuses on what could happen if courts followed the Constitution's original meaning. According to Sunstein, originalism permits the federal government to discriminate on the basis of race and punish political dissent, and allows state governments to establish churches and discriminate on the basis of sex (pp. 63–65, 223–28).

But this belief is surely silly. What ought to matter to consequentialists is what likely *would happen* under an originalist Constitution. If a consequentialist wanted to gauge the expected value of a particular constitution, she would take the magnitude (positive or negative) of all the possible laws that might be passed (and laws that could not be passed) and discount them by their individual probabilities. Most of Sunstein's horribles simply would not transpire if this country followed the original Constitution. There is no groundswell for racial segregation being held back by virtuous courts. Likewise, there is no likelihood that the states will reestablish churches. Hence, even if some originalist readings of the Constitution actually permitted the legislation Sunstein decries, these remote possibilities should count for very little in deciding whether the original Constitution ought to be rejected.

Surprisingly, Sunstein turns out to be a poor practitioner of consequentialism. He obsesses about low probability events and lets that drive his condemnation of originalism. Sunstein's "the-sky-would-fall" claims about originalism are highly ironic. He has written persuasively about how it is irrational to place too much weight on low-level risks.[22] Yet, his

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discrimination, they may feel constrained by precedents that constrain the government's use of racial considerations in decisionmaking.

21. The same can be said of Sunstein's treatment of the originalist approach to the nondelegation doctrine. He says that originalists are wrong in concluding that the Constitution forbids delegations of legislative power (pp. 204–07). But he still lists the disruptions to the administrative state that would result from the reinvigoration of the nondelegation doctrine as a failing of originalism (p. 1).

22. See generally Cass Sunstein, Risk and Reason (2002) (advocating cost-benefit analysis to ensure government does not attempt to eliminate trivial risks).

analysis of originalism suffers from this exact flaw. The worst-case scenarios drive the analysis with no attention paid to the likelihood of these scenarios coming to pass.

If we applied the same faulty methodology to minimalism (i.e., what laws the government could enact under minimalism), it is easy enough to draw a different parade of horribles. The federal government could control all productive resources in the name of fairness and not pay a dime so long as it did not take possession of these resources. The states could be barred from regulating prostitution and drug use under an ever expanding right to privacy. Evaluating the consequences of a constitutional vision based on doomsday scenarios is no way for a consequentialist to run a railroad.

F. *The Minimal Appeal of Minimalism*

Sunstein's brand of minimalism offers a rather small banner to rally scholars and citizens: Use arguments about humility and a respect for moral disagreements as tools to preserve the status quo. But if we move away from the status quo, even over the course of decades, we ought to abandon minimalism, says Sunstein. It would no longer produce good results (at least given Sunstein's current preferences). Sunstein's minimalism is a hard sell precisely because its principal champion seems ready to abandon it after a series of originalist or majoritarian opinions.[23]

What about minimalism's supposed sense of humility? As should be clear by now, minimalism does not live up to its billing. Minimalism is not a theory for the humble. Taking only small steps away from doctrinal status quo seems a mark of humility. But the reason for the small steps has to do with a sense that the doctrinal status quo is rather good. This opinion is not humble. It is as confident (or as arrogant) as any of its competitors. Sunsteinian minimalists believe in the goodness of the status quo and then privilege it. Similarly, one can imagine an originalist saying the following: As a matter of humility, we ought to make only minor movements away from the original Constitution. This statement is humble in one sense, arrogant in another.[24]

Similar points apply to Sunstein's boast that minimalism "recognizes the limited role of the federal judiciary and makes a large space for democratic self-government" (p. xv) and his criticism of the so-called activism of originalist judges (pp. 43, 133). The boast better fits majoritarianism,

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23. Of course, not all minimalists need be fickle. There may be those minimalists who believe that judges ought to be wary of making major doctrinal changes whatever the doctrinal status quo. Whether it is Roe v. Wade, 410 U.S. 113 (1973), Lochner v. New York, 198 U.S. 45 (1905), or Dred Scott v. Sandford, 60 U.S. 393 (1856), such minimalists will be steadfast in their advocacy for minimalism.

24. Put another way, Sunstein offers no reason why we ought to be humble when it comes to the work of one set of dead males—Justices Warren, Blackmun, Brennan, and Marshall—as opposed to being humble to the handicraft of a different set of dead, white males—Founders Madison, Hamilton, Wilson, and Washington.

which truly enshrines a limited judicial role and creates a much larger space for democracy. Minimalism, on the other hand, enshrines rather large affronts to democracy, like *Roe*, and safeguards all manner of squishy, multifactor tests that make it possible for courts to pretty much do whatever they want, all in the guise of enforcing the Constitution.

Sunstein's related criticisms of activist originalist judges are odd because whether laws are struck down is a feature of at least two different factors: the content of laws passed and the theory of constitutional decisionmaking. I very much doubt Sunstein's claim that the Rehnquist Court has held more statutes unconstitutional than any other Supreme Court in history (p. 245). But even if that were true, there could be no necessary normative implications. We would have to know if modern legislatures were more likely to pass unconstitutional statutes in order to ascertain whether the judges had good cause for striking down legislation. If so, the judiciary's "judicial activism" ought to be lauded rather than condemned. In like manner, a Sunsteinian judge might strike down hundreds of statutes on the grounds that they were inconsistent with precedent. Such a judge would be activist in the sense that she struck down lots of legislation as unconstitutional. But I hardly doubt that Sunstein would be put off by this activism. Even majoritarianism will lead to lots of judicial activism when legislators and executives repeatedly violate a constitution's clear dictates. Tallying up the number of statutes that the Supreme Court strikes down tells us very little.

Finally, what about minimalism's capacity to work around fundamental moral differences? Does not the minimalist avoid posing contested answers to deep moral questions? She does not, at least no more than an originalist. The minimalist avoids deep moral questions by citing precedent: Do not blame me for abortion on demand—blame *Roe v. Wade*. But the originalist can say the same: Do not blame me because there is no right to privacy—blame Madison, Hamilton, and Wilson. This blame shifting can be no more persuasive for the minimalist than it is for the originalist. The person who really cherishes the right to privacy will not much care about the reasons for its demise. She will despise the idea that there is no right to privacy and blame the originalist. The same will be true for pro-lifers—they are not likely to be swayed by the minimalist claim that even though *Roe* will remain standing, the minimalist herself takes no position on hotly disputed questions like abortion.[25] The choice to follow precedent as opposed to the original Constitution or the post-New Deal Constitution will inevitability result in some blame or credit.

25. Of course, Sunsteinian minimalists carry an extra burden here. Such minimalists cannot hope to convince people who do not like abortion on demand that they chose minimalism based on neutral principles and not results-oriented ones. Those who dislike some feature of minimalism are not going to accept the argument that minimalism abjures moral disagreements because the very reason for selecting it (according to Sunstein) is that it produces morally superior results.

Though Sunstein's minimalism is a theory justified by the good results it generates, it is insufficiently results-oriented in some respects, while too results-oriented in others. It is insufficiently results-oriented in that it asks consequentialists to be steadfast minimalists in the short term even at the cost of bad results. Why should the consequentialist sacrifice utility at the altar of a false humility? The clear-eyed consequentialist who loathes *Bowers v. Hardwick*[26] or *Roe v. Wade* will not refrain from overruling those cases, especially since she knows that Sunsteinian minimalists may abandon minimalism wholesale some years down the road.

Sunstein's minimalism is too results-oriented in that its obsession with results contains the seeds of its own eventual obsolescence. If our constitutional history—with its many twists and turns—has taught us anything, it has taught us that what is doctrine today will not be doctrine tomorrow. When the doctrine changes, consequentialist minimalists can be expected to shed their minimalist clothes like a snake sheds it skin. No one blames the snake for its shedding, and no one ought to blame the Sunsteinian minimalist when she inevitably abandons minimalism. Consequentialists cannot help but shed minimalism at some point because that is what a consequentialist focused on results simply must do.

III. CONSEQUENTIALISM, ORIGINALISM, AND MEANING

A frequent argument voiced against originalism is that if judges actually adhered to the Constitution's original meaning, unacceptably bad results would follow. The argument has the following structure: Outcomes A–Z are absolutely terrible; originalism, as applied to the Constitution, yields results A–Z; therefore, we ought to reject originalism because it generates horrendous results. Having rejected originalism, we can thankfully conclude that the Constitution neither generates results A–Z nor "means" all sorts of awful things. This argument is the chief theme of *Radicals in Robes* (pp. xi–xv).

This Part considers the relationship between consequentialism, originalism, and meaning. It first argues that the meaning of a document does not turn on whether the document is consequential or insignificant. The original Constitution means the same thing regardless of whether we treat it as supreme law or not. Second, this Part makes the simple case for originalism, relying upon a surprising quarter for support. Sunstein himself endorses originalism. Third, this Part argues that originalism, properly understood, has absolutely nothing to do with whether we ought to accept the Constitution as law. Originalism supplies no argument for accepting the Constitution any more than it provides an argument for rejecting the Constitution of the Southern Confederacy. This Part concludes by considering Sunstein's argument for why we ought to follow the Constitution.

26. 478 U.S. 186 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003).

A. *Why Consequences Are Not Relevant to Discerning What Something Means*

Does it make any sense to choose a theory of interpretation based on the results a particular document would generate if the theory were taken as true? For example, should a person select among originalism, minimalism, and perfectionism based on the outcomes that each technique might generate? With all due respect to Professor Sunstein, the idea that one should choose a theory of interpretation based on the results that the theory would generate is mistaken. It is wide of the mark because it conflates two separate things: meaning and acceptance. What a document means is independent of our subsequent embrace (or rejection) of that document.[27]

To see why this is so, we need to focus on inconsequential documents. Take a letter written by one friend to another about having lunch in 1986. Everyone understands that this letter has meaning even though absolutely nothing turns on that meaning. Or take a document that was once quite consequential—the Articles of Confederation. It no longer matters what its Article III meant when it talked about a "firm league of friendship."[28] Nonetheless, this phrase has a meaning even though precious little follows from it. Most of our lives are spent interpreting words that have little to no consequences (perhaps the reader will regard this Review Essay as a conspicuous example). Despite their insiguificance, we have little trouble identifying meaning in them.

If it is possible to generate a meaning when a document has no effects (and experience proves in spades that it is), why does the process of identifying meaning become more complicated when the document's meaning has real-world effects? It does not. If we have identified some method of finding meaning in inconsequential documents, we can apply the same method to finding meaning in consequential documents. The results of an interpretation just do not matter when deciphering what a document means.

Hence *Mein Kampf*[29] means terrible things whether it is a document of historical interest or a document that provides a blueprint for a government agenda. It does not mean less terrible things or, amazingly, even beneficial things should it be removed from the ash heap of history and treated as law. It means the same thing, no matter what we choose to

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27. See Gary Lawson, On Reading Recipes . . . and Constitutions, 85 Geo. L.J. 1823, 1834 (1997) (noting that one should distinguish between interpretation and evaluation).

28. The relevant passage reads:

> The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

Articles of Confederation art. III.

29. Adolf Hitler, Mein Kampf (John Chamberlain et al. eds. & trans., Reynal & Hitchcock 1939) (1925).

do with it. Likewise, the famous claim that "all men are created equal" does not acquire a still better meaning merely because many of us choose to make it an animating principle of our society.[30] Conversely, a regrettable decision to reject that claim would not make that phrase mean something less salutary.

More prosaic examples also indicate that one should not be consequentialist when it comes to determining meaning. If I tell my child Gayathri that she should "absolutely never leave our house without my prior permission," the meaning of that instruction does not change should Gayathri find herself inside a burning house. This is so even though we would all agree that it would be a horrible mistake for Gayathri to seek my permission prior to exiting the burning house. The instruction means something, no matter how inadvisable or silly it might be as applied to unforeseen or changed circumstances.

Likewise, the meaning of the Constitution does not turn upon a consequentialist appraisal of all possible meanings.[31] We do not line up all possible readings, assess their benefits and costs, and then choose the meaning with the highest net benefits. Discerning constitutional meaning is not the constitutional counterpart of the Office of Management and Budget regulatory review process whereby interpreters select a meaning that maximizes net benefits. To use consequentialism as a tool to discern meaning would be akin to using a hammer on a screw. The hammer has its place, but like consequentialism, it is not some all-purpose tool that can cut, glue, and puncture.

Sunstein's embrace of a results-oriented jurisprudence appears to be a means of working around the original Constitution's less desirable features. This is a trait that consequential minimalism shares with perfectionism. But these attempts have a distinct air of wishful thinking to them. There will always be documents containing instructions, and these instructions often will be quite bad. Putting on rose-colored glasses and making these instructions the best that they can be is a whimsical exercise, not interpretation. Because the number of possible meanings is unbounded, we can always interpret away the seemingly bad consequences of some document. The only limit is our imagination.

But suppose for a moment that the above claims are all wrong. If we are to judge the meaning of a document by the results that the document would generate—e.g., whether it is accepted as law or not—we get some really interesting results. For instance, if Sunstein's results-oriented theory is correct, then the Articles of Confederation meant something when

30. The Declaration of Independence para. 2 (U.S. 1776).

31. But is there not a choice about what something means on the margin? If we are in doubt, should we not choose the "best reading," however one defines best? If whatever tools we use to discern meaning fail to make a choice amongst options, then we will have to break the tie with some external factor—God's will, utility, or the flip of a coin. But this is light years away from the broader claim that the meaning of a document is always up for grabs and to be determined by what yields the best outcomes.

they were law, but means something entirely different today. Or take a more familiar example: the Eighteenth Amendment. Sunstein's theory would suppose that the Eighteenth Amendment meant something from 1919 to 1933, but meant something different from 1933 until today. If the results matter in deciding meaning, the Twenty-First Amendment not only repealed the Eighteenth, it also changed the Eighteenth Amendment's meaning going forward.

Moreover, if consequentialism matters in discerning meaning, we may have to apply different interpretive techniques to different legal documents. Perhaps the Americans with Disabilities Act[32] should be interpreted using perfectionism because that would generate the best results, while the Electoral Count Act[33] should be interpreted employing majoritarianism (assuming that is possible). Maybe contracts and wills should be interpreted using originalism. And, as suggested earlier, we may need to make frequent consequentialist-based interpretive switches within a particular Act. Imagine applying originalism to Title II of the Civil Rights Act,[34] but minimalism to Title IV and perfectionism to Title VI of the same Act.

B. *The Simple Case for Originalism as a Theory of Interpretation*

Originalism maintains that to discern the meaning of words, we ask what they meant to those who penned or uttered those words.[35] Originalism does not deny that seeking original meaning will often involve difficult decisions, including what to do when a word or phrase has multiple possible meanings.[36] But originalists believe that these difficult decisions plague interpretation of all documents and utterances, no matter how consequential or minor those documents and utterances might be.[37]

Originalists suppose that when lawmakers purport to enact some text into law, they are not just enacting the marks on the page.[38] They also are necessarily enacting meanings, for if they were not, their marks would

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32. 42 U.S.C. §§ 12101–12213 (2000).

33. 3 U.S.C. §§ 5–6, 15–18 (2000).

34. 42 U.S.C. §§ 2000a–2000h.

35. Of course there are differences amongst originalists. Some originalists eschew trying to discern what words would have meant to their author and instead seek a generic, public meaning. Sometimes the internecine squabbles amongst originalists are more fierce than their quarrels against others outside the fold.

36. See generally Larry Alexander & Saikrishna Prakash, "Is That English You Are Speaking?" Why Intention Free Interpretation Is an Impossibility, 41 San Diego L. Rev. 967 (2004) (discussing difficulties with original-meaning approach and admitting difficulties of original-intention approach).

37. See Saikrishna B. Prakash, Unoriginalism's Law Without Meaning, 15 Const. Comment. 535–36 (1998) [hereinafter Prakash, Unoriginalism's Law] (reviewing Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996)) (discussing how Bork and Scalia regard originalist inquiry as difficult one).

38. See Saikrishna B. Prakash, Overcoming the Constitution, 91 Geo. L.J. 407, 434 (2003) (reviewing Richard H. Fallon, Jr., Implementing the Constitution (2001)).

be no more consequential than the documents generated by monkeys on typewriters.[39] Lawmaking must involve something more than a wholesale delegation of meaning to posterity; otherwise lawmaking would serve no purpose.[40] Lawmakers do not labor over text believing that others may understand it however they wish.[41] Lawmakers are smart enough to know that posterity does not need to be told that it is free to do as it wishes.[42]

The positively magnetic pull of originalism is that it tracks common conceptions about interpretation. As Sunstein says in a surprising and welcome admission, originalism tracks "ordinary thinking about interpretation. If your best friend asks you to do something, you're likely to try to understand the original meaning of his words; you won't select the interpretation that you deem best" (p. 57).

But if that is true for a conversation with Sunstein's friend, and it is true for books on interpretation (such as *Radicals in Robes*), why is it untrue for the Constitution or a city ordinance? Why isn't the meaning of these documents to be determined by their original meaning as well? Other than referring to the negative consequences of originalist readings of the Constitution and to some widely admitted difficulties in discerning original meanings, Sunstein never tells us why we ought to reject originalism. The former negative consequences, as we shall see, are reasons for rejecting the original Constitution and not a reason to reject originalism. The latter difficulties with identifying original meaning, as noted earlier, plague interpretation of all manner of documents. These difficulties just come with the territory.

At one point, Sunstein says that the use of originalism is a "political choice" that must be defended (p. 72). Admittedly, as discussed below, those who prefer the original Constitution to other contenders must defend that choice. But originalists are not making a political choice when they use originalism to decide what things mean (including the original Constitution) any more than Sunstein makes a political choice when he uses originalism to understand his friend's words. If Sunstein is right that the choice of interpretive technique is a political choice, then making sense of *People* magazine involves hitherto obscured political choices.

Imagine the perverse consequences of applying consequentialism to determine the meaning of *Radicals in Robes*. The consequentialist who favors originalism as a constitutional theory of interpretation would be led to read Sunstein's book as favoring originalism because that approach

39. See Prakash, Unoriginalism's Law, supra note 37, at 529, 540 ("Text, divorced from meanings, would be mere gibberish.").

40. See id. at 542 (stating that giving future generations power to dramatically reinterpret meanings of words in statutes "would make lawmaking an utter waste of time").

41. See id. ("Lawmakers do not gather in solemn proceedings and enact a statute using carefully chosen words, but then contemplate that the statute will float away untethered to any particular meanings.").

42. See id. at 543 ("Indeed, a constitution methodically designed to establish nothing durable begs the question of why anyone would bother. Future generations do not need permission to do what is expedient.").

yields the best constitutional results.[43] For the sake of consistency, originalists ought to refrain from making the devilish argument that in advocating for consequentialism as a means of determining meaning, Sunstein hoists himself by his own petard because he makes it possible for an interpreter to read his book as *endorsing* originalism. However much Sunstein might bash originalism, it is far better for originalists to take the high road and make sense of a book denouncing originalism through the originalist lens. That is, after all, how Sunstein wants us to make sense of his book.

More importantly, it is also how Sunstein wishes the Supreme Court's precedents to be understood. How are current judges and Justices to make sense of all the precedents that Sunstein wishes to preserve? Surprisingly, Sunstein never tells us. He certainly would not apply consequentialism to determine the meanings of those precedents. Consequentialism permits all sorts of mischief—*Roe*, in the hands of a consequentialist pro-lifer, will be read as something *upholding* the constitutionality of statutes barring abortions. Sunstein surely envisions that originalism would be used to interpret these precedents, to make sense of these precedents as they would have made sense to those who wrote and approved them. Sunstein's implicit endorsement of originalism when it comes to understanding the precedents he favors is not a political choice. We need not fear that his implicit embrace of originalism furthers a hidden political agenda. Originalism is just the way he, and we, make sense of words, including precedents from the Warren and Burger Courts.

C. *The Misconceived Relationship Between Originalism and the Constitution*

Originalists think that interpretational methodology ought to be uniform. They think that all sorts of documents and utterances are to be interpreted by reference to their original meaning. Originalism, properly understood, is just a claim about how to find meaning.

But some originalists claim much, much more for originalism. Originalism, some originalists say, furthers the rule of law, limits judicial

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43. This "interpretation" seems bizarre. Rightfully so. But once one maintains that the meaning of something is to be equated with its best possible meaning, and once one realizes that there are infinite possible meanings, then one will select the meaning that creates the best consequences. If the Constitution permits states to freely impair the obligations of contracts, notwithstanding the Contracts Clause, merely because that produces the best results for society, then the meaning of Sunstein's book likewise must be determined by examining the consequences of various possible readings. For originalists, the best meaning of Sunstein's book is that it extols originalism rather than criticizes it.

At this point, Sunstein might respond that surely any claim of meaning has to come to grips with the words he actually used in his book and their intended or conventional meanings, or both. But if Sunstein believes minimalism is the correct means of deciding constitutional meaning irrespective of all those Supreme Court opinions that are totally insensitive to textual constraints, then he will be hard pressed to argue that the text somehow constrains what meaning a consequentialist can find in his book. Under a Precedentialist Constitution, the Constitution's text often plays no role at all.

discretion, and ensures predictability.[44] Despite the fact that some of originalism's most famous proponents speak of originalism as conducive to these goals,[45] nothing could be further from the truth. Properly understood, originalism does not stack the deck in favor of any substantive preference. Originalism applied to the fiats of a dictator furthers the rule of man and not the rule of law. Originalism as applied to a constitution that delegates questions of morality to judges will enshrine krytocracy, not curb it. Originalism applied to a mercurial, chameleon-like constitution makes predictability impossible. Saying that originalism furthers democracy and political legitimacy is like saying translation furthers peace and prosperity. There can be no necessary connection.

Even if originalism does not stack the deck in favor of certain favored constitutional features, does originalism somehow compel us to accept the original Constitution? Of course not. There are innumerable documents that we could choose to accept as law, all of which have original meanings. The Articles of Confederation have an original meaning, as did the old Soviet Constitution. But no one in America accepts either as law. Once we identify the original meaning of some document, absolutely nothing necessarily follows from that meaning.

Sunstein is right that originalists, like everyone else, must make arguments for why some constitution is worth accepting as law and why other pretenders, such as the Constitution of the Confederacy, are not. That is where arguments about democracy, rule of law, popular sovereignty, and their counterparts—outdated rules and a failure to provide useful constitutional guidance—must be made. But these points are points in favor of or against the original Constitution. They have nothing to do with originalism.

Who is to blame for the common conflation of originalism with the original Constitution? Originalism's opponents deserve some blame. They are mistaken when they say that originalism yields bad results when the underlying original Constitution and the decision to accept it as law should be held responsible. If the original Constitution permits the segregation of public schools, so much the worse for the original Constitution and its proponents. But this is no failing of originalism as a theory of interpretation.

Yet the bulk of the blame for the common conflation more properly lies with originalists.[46] Originalists who should know better sometimes speak of originalism as yielding all manner of benefits when those features ought to be attributed to the original Constitution. Arguments for originalism ought to be made wholly independent of the original Constitution's features. And arguments for why the original Constitution

44. See Robert H. Bork, The Tempting of America: The Political Seduction of the Law 145, 153, 318, 351–52 (1990); Scalia, supra note 16, at 863–64.

45. See supra note 44.

46. See supra note 44.

should be regarded as fundamental law ought to be made wholly independent of originalism.

The conflation between originalism and the original Constitution can perhaps be explained by the fact that seemingly all originalists favor the original Constitution and often speak of the latter as the only possible constitutional contender. Hence to be an "originalist" in today's lingo is to favor originalism as an interpretational methodology *and* to favor the idea that the original Constitution is fundamental law. But of course, there are an infinite number of choices of fundamental law. One could be an originalist who favors the Marshall Court's Constitution of broad federal power or the New Deal Court's even more generous reading of federal power. Or one might favor the Precedentialist Constitution that derives from the Supreme Court's current doctrine. These later constitutional possibilities can be understood through the lens of originalism, with the relevant opinions of the Supreme Court serving as constitutional text—much like court cases and statutes help form the text of Britain's "unwritten" constitution.

It would be helpful if some originalists rejected the original Constitution, even while admitting that originalism is the method of discerning its meaning. Likewise it would be useful if some nonoriginalists had a change of heart and admitted that originalism was the means of discerning meaning. Of course, they could go on to reject the original Constitution as antiquated and the product of dead, white males. Then we might get past the confusing and mistaken practice of equating originalism with the features of the original Constitution.

As we have seen, the argument for originalism is most emphatically not an argument for treating the original Constitution as law; it is an argument about how to decide what something means. Originalists who favor the original Constitution must explain why we should pledge allegiance to the original Constitution rather than the Articles of Confederation, the maxims of Lao Tzu, or what we might call Sunstein's Precedentialist Constitution.

Here is where consequentialism comes into play. For most, if not all, people, the consequences of a constitutional contender are a crucial factor in deciding whether to accept that constitution as law. People will tend to favor constitutions they regard as superior, and the consequences will be vital in deciding whether to favor one constitution over another. The choice will depend, as it must, on the meanings of various possible constitutional contenders. But as we have seen, no constitution's or law's meaning will actually depend upon whether we choose to treat it as law.

If originalists have sometimes acted as if merely knowing the Constitution's meaning is sufficient reason to follow it, they have conflated what something means with whether we ought to be bound by it. This is perhaps a generic problem with constitutional scholarship. People share a vague sense that they are (or should be) bound to the Constitution. Scholars often exploit this sense by assuming fidelity to some par-

ticular conception of the Constitution and then arguing about what that fidelity entails. But this mode of decisionmaking puts the cart before the horse. We ought to decide what competing constitutions mean and then decide which one to embrace.

D. *Why Follow the Constitution?*

Sunstein does not suffer from this failing. More than most, he realizes that arguments must be made for any constitutional contender. Yet given his consequentialist methodology, his argument for treating the "Constitution" as binding is rather curious.

> The Constitution is binding because it is good to take it as binding. It is good to take it as binding because it is an exceedingly good constitution, all things considered, and because many bad things, including relative chaos, would ensue if we abandoned it. We're much better off with it than without it (p. 74).

But why is it an "exceedingly good constitution, all things considered" (p. 74)? It is a good constitution because of Sunstein's application of his consequentialist methodology, a methodology that points to minimalism as the approach that currently generates the best results. After all, if the Constitution actually meant what originalists take it to mean, it would not be an "exceedingly good constitution" (p. 74). It would instead be a bad constitution—perhaps an exceedingly bad one.

What Sunstein does not appreciate is that his consequentialist search for the best results guarantees that *all potential constitutions generate good results.* No matter how silly, retrograde, or radical a potential constitution might appear, Sunstein's interpretive methodology promises good results because we must choose the interpretive method that yields the best results. Because there are innumerable possible interpretations, we will always find one that generates good results.[47] This has the odd consequence of making all potential constitutions good and therefore binding. It would seem that all potential constitutions are binding because they are all "exceedingly good" after we engage in the consequentialist search for the method that generates the best results.

Why does Sunstein feel the need to speak well of the Constitution? He understands that many of his arguments against the original Constitution seem as if they are arguments against the Constitution itself (p. 74). Hence he wants to assure readers that he is not opposed to "the Constitution." But of course he is clearly *against* the Constitution of 1789 and *for* the Precedentialist Constitution of the '60s, '70s, and '80s. There is no reason to obscure this preference behind some generic support for

47. Once again, Sunstein might object that constitutions have texts, and we cannot ignore them in deciding what they mean. But this objection is not available to Sunstein given his preference for a Precedentialist Constitution where the text often plays no role. No matter how bad a constitution seems, someone can claim it means something else quite good. The committed consequentialist may then point to the good results generated from the "good reading" to justify adoption of those readings.

"the Constitution" (p. 74).[48] Rather than saying the "Constitution . . . is an exceedingly good constitution," what he ought to say is that the Precedentialist Constitution is an exceedingly good constitution (p. 74). Rather than say he is against originalism, he ought to say that he opposes the original Constitution and favors originalism as applied to the Precedentialist Constitution.

CONCLUSION

Professor Sunstein's book has given us a useful vocabulary for describing different approaches to constitutional law. It also highlights why so many dislike originalism, namely the results that supposedly flow from originalism as applied to the original Constitution. Yet these results supply reasons to dislike or reject the original Constitution. They are not reasons for disparaging originalism. Sunstein's denunciations of originalism are misplaced in a book that ultimately will be read and understood through the originalist lens.

Sunstein's treatment of minimalism and his ultimate consequentialist justification for it are awkward. Rather than uneasily favoring both, it would have been better had Sunstein made a choice between minimalism and consequentialism. He might then have defended minimalism without regard to the consequences. Indeed, many of his reasons for minimalism have nothing to do with the consequences minimalism generates.

Or Sunstein might have made an unequivocal case for the results of the Warren and Burger Courts, without regard to minimalism. He might have written in his book, "These Warren and Burger opinions generate good policy, and that is why I favor them. The constitutional vision emanating from these opinions—this Precedentialist Constitution—is the one I defend and cherish." Then he would not be in the awkward position of being a fair-weather friend to minimalism because he would have fully embraced a results-oriented jurisprudence.

Instead of making a choice between the two, Sunstein tries to embrace both. The result is an unsatisfying argument. We ought to be minimalists so long as there are precedents that we like and that are worth preserving. When there are too few such precedents and many more that we dislike, we ought to abandon minimalism.

For many on the left, minimalism and its respect for precedent is the flavor of the month. One striking feature of the recent confirmation hearings for the new Justices is the extent to which senators discovered a

48. Sunstein seems to understand this when he discusses the possibility of many constitutions (p. 7). But he never returns to the point to say why he favors one constitution, the Precedentialist Constitution, and opposes the others—the original, the Marshallian, the New Deal, etc.

newfound respect for precedent.[49] The idea of a living constitution,[50] so much in vogue a decade or two ago, has given way to the idea of celebrating a Precedentialist Constitution fossilized in 1980 (who knew that we lived through an era of constitutional apotheosis!). But this love affair with precedent will only last so long as the senators and their allies in the academy see enough precedents worth preserving. When enough undesirable precedents accumulate, we will no doubt hear that minimalism is a theory that pays too much respect to the dead or the doddering and too little attention to the needs of the present.

Knowing that the consequential minimalist will eventually abandon minimalism, the rest of us can be forgiven for not paying too much attention to the consequentialist's fleeting embrace of minimalism. The passionate but ultimately fickle pangs of puppy love are something we indulge. We need not celebrate these passing fancies.

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49. See Dana Milbank, The Issue Senators Dare Not Speak by Name, washingtonpost.com, Sept. 13, 2005, at http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301127_pf.html (on file with the *Columbia Law Review*) (mentioning how often stare decisis was discussed in John Roberts's nomination hearing); Walter Shapiro, The Gang That Couldn't Question Straight, Salon, Jan. 11, 2006, at http://www.salon.com/news/feature/2006/01/11/alito_confirmation_hearings/ (on file with the *Columbia Law Review*) (mentioning how often precedent was discussed in Samuel Alito's nomination hearing).

50. See, e.g., Thurgood Marshall, The Constitution: A Living Document, 30 How. L.J. 915, 915–16, 919–20 (1987) (lauding "evolving nature of the Constitution" as process over two centuries that has corrected defects in original Constitution).

OF SNAKES AND BUTTERFLIES: A REPLY

*Cass R. Sunstein**

The abstract idea of interpretation cannot support originalism or indeed any judgment about the competing (reasonable) approaches to the Constitution. Any such judgment must be defended on pragmatic grounds, which means that it must be attentive to consequences. In addition, the consequentialist judgments that support minimalism suggest that there are times and places in which minimalism is rightly abandoned. For example, broad rulings may well be justified when predictability calls for it; and the Supreme Court was right to refuse to accept minimalism in the late 1930s. While minimalism is generally the proper approach to "frontiers" issues in constitutional law, its own pragmatic foundations suggest that constitutional law should not be insistently or dogmatically minimalist.

I. AUDIENCES

Such trouble over the title! The original proposal was called *The War for the Constitution*—but the debate about constitutional interpretation just isn't a war. At one point, I favored *Visions of the Constitution*, but my publisher vetoed that idea—too boring. The final draft was called *Fundamentally Wrong*. Vigorous, to be sure, but also obscure, and offering, without charge, a snappy two-word ending for unkind reviewers. At the last moment, my publisher proposed *Radicals in Robes: Why Right-Wing Courts Are Wrong for America*. I accepted the proposal on the ground that with respect to titles, publishers tend to know best. But I did insist that the word "extreme" be added before "right-wing"—with the thought that while right-wing courts might not be so bad, extreme right-wing courts are definitely wrong for America. On reflection, the addition probably didn't help. Oh well.[1]

Radicals in Robes was written for a general audience, and its original motivation was simple—to challenge the ludicrous but apparently widespread view that while liberals want to "change" the Constitution, conservatives want to "follow" it. In the last decade and more, some (of course very far from all) conservative judges have been reading the Constitution in a way that lines up uncomfortably well with their own political views: to invalidate affirmative action programs, campaign finance laws, and restrictions on gun control; to strike down certain laws protecting the environment and forbidding discrimination on the basis of disability and age; to protect commercial advertising; to permit discrimination on the basis of sex and sexual orientation; to allow government to provide financial

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1. I'd vote again for *Visions of the Constitution*, but tragically, the statute of limitations has passed.

and other assistance to religious institutions; to give the President broad, unilateral authority to fight the war on terror; and to contain no right of reproductive choice or sexual liberty. No one doubts that some of these readings of the Constitution are reasonable. But *Radicals in Robes* was partly designed to show that, for all the talk of "strict construction," and for all the insistence on distinguishing between law and politics, we are in the midst of a period in which some prominent conservatives[2] are attempting to use judicial power for their own political ends. To be sure, judges almost always act in good faith. But it is nonetheless true that references to history, and to the views of the Framers and ratifiers, are sometimes a fraud and a façade.

At the same time, *Radicals in Robes* tries to make two points that (the author hoped) might have academic interest as well. The first is that throughout American history, many of our debates about constitutional interpretation have involved conflicts among four identifiable groups: originalists,[3] perfectionists,[4] minimalists,[5] and

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2. It is not entirely comfortable, in a law review article or in a book about constitutional law, to make references to "conservatives" and "liberals," or to use words like "right wing" and "left wing." One reason is that terms of this kind threaten to stop thought for conservatives and liberals alike. (People sometimes ask not what they think on particular questions, but what their group thinks about those questions—and in particular, what the opposing group thinks on such questions. The views of the groups, once identified, can crowd out and close off their own thought.) Another reason is that the views of sensible people cannot possibly line up consistently with the stereotypical judgments of either "conservatives" or "liberals" or "the right" or "the left." Why on earth should anyone follow the stereotypes with respect to such diverse questions as affirmative action, abortion, same-sex marriage, the minimum wage, the Iraq War, capital punishment, and climate change—to name a very small subset of salient questions in law and politics?

Nonetheless, *Radicals in Robes* does use politically charged language, and not only in its title. The reason is that the Supreme Court, and methods of constitutional interpretation, have been politicized by conservatives and liberals alike, and it is hard to write a book for a general audience without discussing some of the underlying political views and dynamics. Prakash says that I am "not trying to convince originalists," but in fact I meant to speak to people with widely varying political views; I do not believe that reflective "conservatives" should endorse originalism, just as I do not believe that reflective "liberals" should endorse perfectionism. Saikrishna Prakash, Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America, 106 Colum. L. Rev. 2207, 2209 n.5 (2006) (book review).

3. In *Radicals in Robes*, I use the term "fundamentalism" for "originalism," on the ground that the former term seems to me at once more accessible and illuminating for a general audience; originalists want to go back to what they see as fundamentals, and in any case, there is a clear link between the originalist method and certain claims about how to interpret religious texts. I did not intend "fundamentalism" to be a pejorative in any way. But some originalists, including Prakash, object to that term, and in deference to their objection I am happy to speak of "originalism" instead.

4. For an illuminating recent defense of perfectionism (with a good title!), see generally Ronald Dworkin, Justice in Robes (2006) (defending view that judges' moral convictions bear on their judgments).

5. See Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court, at ix–xiv (1999) [hereinafter Sunstein, One Case] (describing minimalism as form

majoritarians.[6] The second is that any approach to constitutional interpretation has to be defended by reference to its consequences.[7] The Constitution does not set out the instructions for its own interpretation. A theory of interpretation has to be defended, rather than asserted, and the defense must speak candidly in terms of the system of constitutional law that it will yield. Consider the illuminating suggestion by Randy Barnett, a committed originalist: "Given a sufficiently good constitutional text, originalists maintain that better results will be reached overall if government officials—including judges—must stick to the original meaning rather than empowering them to trump that meaning with one that they prefer."[8] In my view, Barnett is entirely right to suggest that if originalism is to be defended, it is on the ground that it will produce "better results . . . overall."[9]

Of course, consequences can be evaluated in different ways, and hence we should expect diverse people to disagree about which consequences are good. If originalism permits racial segregation, is it unacceptable for that reason? How strongly, if at all, does it count against

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of judicial restraint that seeks to decide cases on narrow grounds and tends to promote democratic ideals).

6. For a valuable recent defense of majoritarianism, see generally Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation (2006) (offering form of legal interpretation based on attentiveness to institutional limitations of courts).

7. This claim can also be found in Stephen Breyer, Active Liberty 118–24, 129–32 (2005), and Vermeule, supra note 6, at 71–85. I also believe that with some qualification, it is implicit in Dworkin. See generally Dworkin, supra note 4. There are interesting relationships between Dworkin's conception of law as integrity—which I characterize as a form of perfection—and minimalism. In my view, any conception of constitutional interpretation must, in the end, be perfectionist, in the sense that it attempts to make best sense out of our practices. Originalists, minimalists, and majoritarians can be understood as perfectionists too—but second-order ones, skeptical about the idea that judges should deploy moral and political ideals of their own. Originalists, for example, seek to deprive judges of the authority to deploy those ideals, often on the ground that judicial judgments are unreliable and in any event a disservice to self-government. See, e.g., Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation 3, 41–47 (Amy Gutmann ed., 1997) [hereinafter Scalia, Interpretation] (offering skepticism about idea of "living constitution," on ground that political and moral judgments should not be made by judges). Majoritarians are similarly skeptical of the view that judges have some special access to moral and political truth. See, e.g., Vermeule, supra note 6, at 22, 29, 56–57. But a serious problem, for both originalists and majoritarians, is that their approaches are inconsistent with so much of established law—and hence do not "fit" our practices. Minimalists, who also attempt to discipline judicial power, can make better claims along the dimension of fit. The relationship between integrity and consequentialism is simply this: In deciding what makes hest sense out of the existing legal materials, consequentialists insist that consequences matter. As noted in text, a normative account is of course needed to evaluate consequences.

8. Randy Barnett & Cass Sunstein, Legal Affairs Debate Club, Constitution in Exile?, May 3, 2005, at http://legalaffairs.org/webexclusive/debateclub_cie0505.msp (on file with the *Columbia Law Review*).

9. Id.

originalism if originalists must allow affirmative action programs, or refuse to recognize a right of privacy? And in evaluating consequences, we must certainly ask whether an approach to interpretation would unleash judges to do whatever they wish. To say the least, self-government is important, and part of the appeal of majoritarianism, originalism, and minimalism is that all three approaches attempt to cabin the power and the discretion of the Supreme Court. Perfectionism has a serious problem on this count; and hence minimalists have serious problems with (for example) the reasoning in *Roe v. Wade*.[10]

I am grateful to Saikrishna Prakash for his illuminating, careful, and generous review. Prakash makes two principal arguments. The first and more straightforward is that originalism "is merely a means of making sense of text," and hence originalists need not provide, and do not provide, any argument on its behalf.[11] The second and more complex is that minimalism is not a theory of interpretation at all, but a kind of "passing fancy"—an approach that its own advocates will surely abandon when the time is right, just "like a snake sheds its skin."[12] For this reason, minimalism turns out to be unstable, even opportunistic. Let me begin in Part II with Prakash's claims on behalf of originalism, before I turn to his objections to minimalism in Part III.

II. A THEORY OF INTERPRETATION MUST BE DEFENDED, NOT ASSERTED

Prakash insists that in deciding on the meaning of a text, we should not think about consequences at all. He acknowledges that we might refuse to accept a text, after we have uncovered its true meaning. But there is a large difference between picking policies (for, say, environmental protection) and deciding on how to understand the Constitution's terms. Originalists believe "that to discern the meaning of words, we ask what they meant to those who penned or uttered those words."[13] Prakash offers what he calls a "Simple Case" for the originalist approach, which is that "it tracks common conceptions."[14] Originalism is not a political choice, any more than it is a political choice to be originalist when reading law review articles or *People* magazine. When we ask about the meaning of words uttered by friends and acquaintances, we are likely to be originalists—we ask what they meant. Why isn't the same true for constitutional law?

Prakash means to ask a rhetorical question. But (a rhetorical question) has he? Let us begin by putting to one side two problems that originalists must overcome: (a) the possibility that the Framers and ratifiers meant to offer a general principle whose meaning is not frozen

10. 410 U.S. 113, 152–65 (1973) (holding that constitutional right of privacy extends to right to choose abortion).

11. Prakash, supra note 2, at 2029.

12. Id. at 2223.

13. Id. at 2226.

14. Id. at 2226–27.

over time; and (b) the difficulties in construing the constitutional text in circumstances that the Framers and ratifiers could not possibly anticipate.[15] Even if we disregard these two problems, debates over constitutional interpretation cannot possibly be resolved by stipulating what interpretation "is," or by pointing to "common conceptions." What is needed is an argument, not a stipulation. And if "common conceptions" are to be followed, it is because good reasons can be marshaled on their behalf. To marshal good reasons, we will have to explore consequences.

In fact, judgments about interpretation are *always* consequentialist; pragmatic arguments,[16] of one sort or another, cannot be avoided. Suppose that a friend says, "let's meet in the usual place for lunch today." Of course I would ask about the specific, intended meaning—not about the most popular ("usual") place in the area, and not about my own judgments about what place is, or ought to be deemed, usual. But the reason for this kind of everyday originalism is not adequately captured by a stipulation about what meaning "is"; the reason lies in the *point*, or reason, or purpose, of this particular communication. When my friend and I are deciding where to meet for lunch, it makes no sense for me to do anything other than to attempt to discern his specific, intended meaning. (If I don't do that, we won't meet!) In contexts in which we ask about specific, intended meanings, and do so without much thinking, it is because consequentialist or pragmatic arguments so require. When someone is interpreting orders from a superior, a form of originalism is generally justified on the same grounds. But sometimes an inquiry into authorial intentions cannot be justified in this way.

Consider one of Prakash's own examples: judicial interpretation of the precedents of the Supreme Court. Prakash thinks that I "surely envision[ ] that originalism would be used."[17] But I envision no such thing, and, in fact, this example seems to me to cut hard against his claim about

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15. See Cass R. Sunstein, Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America 65–71 (2005). Throughout this Reply, I assume that originalism is a coherent enterprise that can overcome these objections.

16. I am understanding pragmatic arguments to be consequentialist ones, as in the standard view. As William James explains,

> The pragmatic method is primarily a method of settling metaphysical disputes that otherwise might be interminable. Is the world one or many?—fated or free?—material or spiritual?—here are notions either of which may or may not hold good of the world; and disputes over such notions are unending. The pragmatic method in such cases is to try to interpret each notion by tracing its respective practical consequences. What difference would it practically make to any one if this notion rather than that notion were true?

William James, What Pragmatism Means, *in* Pragmatism and Other Writings 24, 25 (Giles Gunn ed., Penguin Books 2000) (1907). I believe that Prakash's argument is prepragmatic, in the sense that it refuses to trace the "respective practical consequences" of one or another view of interpretation, and acts as if hard questions can be solved at the level of concepts or definitions. But an effort to establish this point would take me beyond the boundaries of this Reply.

17. Prakash, supra note 2, at 2228.

"common conceptions."[18] No one follows originalism in interpreting the Court's own precedents. No one thinks that the Court must ask, in interpreting (say) *Roe v. Wade*[19] or *Brown v. Board of Education*[20] or *McCulloch v. Maryland*:[21] What was the specific, original meaning intended by Justice Blackmun, or Chief Justice Warren, or Chief Justice Marshall, or by those who signed the Court's opinion?[22] When the Court interprets its own precedents, it is hardly originalist; it attempts to make the best sense out of prior decisions, in a way that has nothing to do with specific authorial intentions. Prakash is therefore wrong to suggest that interpretation simply "is" a search for authorial intentions.[23]

Of course, a theory of interpretation, to qualify as such, must attend to the text that is being construed; otherwise it is not a theory of interpretation at all. But constitutional interpretation is, or at least might be, very different from communication among friends—in the sense that specific, intended meanings are generally controlling in the latter context but not necessarily in the former. The (inescapable) question is whether consequentialist arguments justify our adoption of a theory of interpretation that requires adherence to the original understanding of the founding document. That question must be answered with an argument, not a stipulation. The idea of authorial intentions is attractive in many contexts, but it is not compelled by the very idea of interpretation. Indeed many prominent originalists recognize the point,[24] and reject authorial intentions in favor of the original public meaning.[25]

There is no a priori reason to reject originalism,[26] and reasonable people can disagree about how to evaluate consequences. It is, of course, not possible to evaluate consequences without a normative account of

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18. Id. at 2227.

19. 410 U.S. 113 (1973).

20. 347 U.S. 483 (1954).

21. 17 U.S. (4 Wheat.) 316 (1819).

22. The problems of eliciting the intentions of five or more signatories can be quite serious; how shall we characterize the intentions of the justices who signed *Brown* or *Roe*? These problems are simply a modest version of the problems, which are sometimes quite serious, of eliciting the intentions of the many Framers and ratifiers. Many originalists emphasize not intentions, but original public meaning. See, e.g., Scalia, Interpretation, supra note 7, at 38 (emphasizing original public meaning). In some circumstances, the original public meaning can be described without running into the problems raised by aggregating disparate intentions; there may be an agreed-upon public meaning, in a relevant period, with which judges can work. Certainly this is often the case in the context of statutory interpretation. But no one denies that sometimes there may not be a consensus on the public meaning of legal terms.

23. Prakash, supra note 2, at 2228.

24. See Barnett & Sunstein, supra note 8 (statement of Randy Barnett) (referring to contemporary prominence of original public meaning, as opposed to authorial intent, in originalist thought).

25. See Scalia, Interpretation, supra note 7, at 38 (emphasizing original public meaning).

26. I am bracketing some historical and conceptual questions. See supra note 15 and accompanying text.

some kind. We could easily imagine a society in which originalism would have a strong consequentialist defense. In such a society, the original understanding would lead to an excellent system of rights and institutions; departures from the original understanding would untether judges, who would compromise democratic self-government and produce an inferior system of rights and institutions; and the original understanding, if followed, would permit the democratic process to correct inadequate understandings of rights and institutions over time. In such a society, what could possibly be wrong with originalism? Many originalists believe that our own society is not unrecognizably different from this one.[27] If they are right, originalism might be justifiable on consequentialist grounds. But I do not think that they are right. In my view, originalism fails for that reason. The broader point is that originalism is inescapably a political choice, and it has to be evaluated as such.

Prakash does not care about the consequences of originalism, so apparently it does not even matter to him, for purposes of selecting an approach to constitutional interpretation, if originalism, properly understood, would permit race and sex discrimination by the national government; eliminate the right to privacy; allow racial segregation at the state level; permit states to establish their own religions; require abolition of the administrative state; or for that matter doom most Americans to short, desperate, and miserable lives. Nonetheless, Prakash does think it relevant to say that I ascribe "improbable possibilities"[28] to originalism and that my account of its consequences is "silly."[29] His reason is that the consequences that I trace "simply would not transpire if this country followed the original Constitution."[30] For example, there "is no groundswell for racial segregation," and "there is no likelihood that the states will reestablish churches."[31]

Prakash is right to say that if originalism were followed, states are not likely to respond by segregating schools by race or by establishing their own churches. But Prakash understates the contemporary importance of the constitutional doctrines that are now in place. Without the current ban on racial discrimination, we would surely see much more in the way

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27. See Akhil R. Amar, Rethinking Originalism, Slate, Sept. 21, 2005, at http://www.slate.com/id/2126680/ (on file with the *Columbia Law Review*). Of course Amar does not contend that the Constitution, as originally understood, is perfect, but he attempts to rebut the consequentialist argument against originalism. If Amar were correct on the consequences of originalism, the argument against originalism would be significantly weakened. Interestingly, Scalia, Interpretation, supra note 7, at 41–42, and Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 861–64 (1989), have strong consequentialist features; in neither of these essays does Scalia contend that originalism is right because it is what interpretation is.

28. Prakash, supra note 2, at 2220. It should be unnecessary to say that only some—hardly all!—of the possibilities just listed are a plausible reading of history.

29. Id.

30. Id.

31. Id.

of racial discrimination. Without the ban on sex discrimination, there would be much more sex discrimination. Without the current application of the Establishment Clause to the states, we would surely see, at some times and places, forms of government favoritism toward religion and forms of religious struggle in state legislatures that would transform the United States into a quite different nation. In any case, my goal is to trace the potential consequences of originalism for constitutional law, a point of independent interest. On that point Prakash offers no rejoinder at all.

III. WHAT MINIMALISM ISN'T

Prakash has a great deal to say about minimalism. He objects that small steps can go in many different directions, and that minimalism, in the abstract, is unable to identify the proper directions.[32] He contends that far from being a theory of interpretation, minimalism is merely an account of how courts should decide cases, one that "tends to privilege the views of the Warren and Burger Courts" and thus defends "the doctrinal status quo."[33] Most fundamentally, he objects that if consequentialism is really our guide, the appeal of minimalism is sharply limited. As Prakash contends, "perhaps consequential[ist] minimalists really ought to be perfectionists about legislative power, originalists about executive power, and majoritarians when it comes to privacy rights."[34] He argues that if originalists succeed in the next twenty years, and make radical changes in the law, "minimalism has got to go"—hoisted by its own consequentialist petard.[35] A consequentialist minimalist turns out to be fickle, Prakash says, because he would have to abandon his own method after a long period of originalism or majoritarianism.[36] In any case, Prakash thinks that minimalism is less humble than it appears to be. In the end it depends on a belief that "the doctrinal status quo is rather good"—a free-standing judgment that seems evaluative and not terribly modest.[37]

I think that Prakash is largely right here, and that the conscientious minimalist ought to welcome most of these claims. Prakash is correct to say that minimalism does not specify the small steps that judges ought to take. It is possible to imagine liberal minimalists and conservative minimalists; majoritarian minimalists and originalist minimalists; "active liberty" minimalists[38] and "negative liberty" minimalists.[39] Prakash is also

32. Id. at 2215.
33. Id. at 2213–14.
34. Id. at 2218.
35. Id. at 2217.
36. Id. at 2218.
37. Id. at 2221.
38. This is a plausible characterization of Justice Breyer's position. See Breyer, supra note 7, at 71–74 (emphasizing need for cautious decisions involving privacy and new technologies).
39. Note, however, that minimalists favor shallowness as well as narrowness, and to the extent that judges endorse a controversial foundation—such as one rooted in negative

right to press hard on the relationship between consequentialism and minimalism. With good reason, he argues that consequentialism supplies the best defense of minimalism—and that when consequentialism argues against minimalism, we ought not to be minimalists.

It is important to disaggregate two aspects of minimalism here. First, minimalists tend to favor decisions that are narrow, in the sense that they do not want to resolve issues not before the Court. Minimalists also prefer decisions that are shallow, in the sense that they avoid the largest theoretical controversies and can attract support from those with diverse perspectives on the most contentious questions. At the same time, sensible minimalists offer no theology or dogma. They freely admit that when predictability is important, narrowness can be a big mistake.[40] They agree that if the Court has enough experience to justify acceptance of a deep theory, it is entitled to do exactly that. No sensible person could embrace minimalism in all times and places. It follows that Prakash's objections to minimalism, in some times and places, are entirely within the spirit of the most plausible claims on its behalf, which are pragmatic and highly qualified.

This point should not be read for more than it is worth; Prakash reads the argument for minimalism as more limited, and less ambitious, than it actually is. That argument is hardly restricted to the particular circumstances of the early twenty-first century United States. Minimalism is grounded in an appreciation of the common law method and its appropriate place in constitutional law. In the hardest and most controversial cases, the Supreme Court should generally follow minimalism.[41] For this reason, there is good reason to doubt the analysis in *Roe v. Wade*,[42] *Reynolds v. Sims*,[43] and indeed several of the ambitious decisions of the Warren Court.[44] Minimalists start from a position of skepticism about broad rulings and theoretical ambition, whatever the political commitments that accompany them. On consequentialist grounds, the "frontiers" cases in constitutional law—whatever their time and place—are strong candidates for minimalism. Prakash therefore errs in suggesting that the argument for minimalism is limited to the current situation that faces the Supreme Court, or that those who endorse it do so because they endorse the rulings of the Warren and Burger Courts.[45]

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liberty—they are abandoning the minimalist skepticism about depth. I take up this point immediately below.

40. See Cass R. Sunstein, Problems with Minimalism, 58 Stan. L. Rev. 1899, 1909–10 (2006) [hereinafter Sunstein, Problems] (discussing problems with narrowness).

41. On the exceptions, see Sunstein, One Case, supra note 5, at 57–60 (discussing reasons why minimalism or maximalism might be desirable); Sunstein, Problems, supra note 40, at 1914–15 (discussing contexts for minimalism).

42. 410 U.S. 113 (1973).

43. 377 U.S. 533 (1964).

44. See, e.g., Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 157 (1970) (radically revising law of standing).

45. Prakash, supra note 2, at 2232–33.

But let us sharpen Prakash's challenge and suppose that in the next decades, the least attractive and most highly politicized form of originalism prevails, so that the Court moves the Constitution in directions that closely correspond to the views of the extreme wing of the Republican Party. (Of course, such a movement is exceedingly unlikely; it's a thought experiment, not a prediction.) After the movement is complete, should we want new appointees to be minimalists—and merely to take small steps within the new framework that the Court has devised? In my view, this question is close to that faced by the Court in the late 1930s, when it had to choose among three possible courses for dealing with the doctrine that it had developed in the last decades: to build on it in minimalist fashion; to chip away at it, also in minimalist fashion; or to repudiate it fairly rapidly. The Court chose the third path. Was it wrong to do so? I do not think so, especially because the rulings of the *Lochner* era erected a range of barriers—with dubious constitutional roots on any sensible interpretive theory—to the decisions of democratically elected officials, both state and federal.[46]

Of course any approach to interpretation, to qualify as such, must attempt to limit judges; its application should not vary between Monday and Tuesday. But an approach that makes sense in one nation may be senseless in another,[47] and it is fine for courts to follow one approach in 1800 and quite another in 1954 or 2000. If Prakash's objection to the contingency of minimalism seems convincing, note that certain forms of contingency are entirely familiar; no one complains if courts rule narrowly only when and because they lack enough information to rule ambitiously[48]—and when ample information is available, more ambition is acceptable. Nor is it unusual to think that when a precedent is wrong, it should be limited rather than extended, and that when it is egregiously wrong, it must be overruled.

It is true that minimalists must, on some occasions, be prepared to leave their cocoons. But if an approach to constitutional law must be justified by reference to its consequences, this is no problem for minimalism. Snakes shed their skins,[49] but so, in their way, do butterflies.

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46. For a discussion of this topic, see generally Cass R. Sunstein, Burkean Minimalism, 105 Mich. L. Rev. 353 (2006).

47. In Israel, for example, the recent role of the Supreme Court, involving more aggressiveness than minimalism, might well be justified. See Aharon Barak, Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 Harv. L. Rev. 16, 62–64, 99–100 (2002) (exploring fairly aggressive judicial role in context of terrorism prevention measures).

48. See Breyer, supra note 7, at 71–74 (citing privacy example, where "[a] broader constitutional rule" would be "particularly dangerous" and limit legislative options).

49. See Prakash, supra note 2, at 2223.

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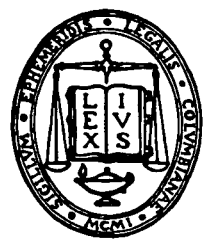

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