BOOK REVIEW

DOES IT TAKE A THEORY? ORIGINALISM, ACTIVE LIBERTY, AND MINIMALISM

James E. Ryan*

ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION
By Stephen Breyer. New York City: Knopf, 2005.

RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA
By Cass R. Sunstein. Cambridge: Basic Books, 2005.

INTRODUCTION

For the last fifteen years or so, Justice Antonin Scalia and his sympathizers within and outside the academy have dominated discussion and debate over how best to interpret the Constitution.[1] Their preferred methodology,

* William L. Matheson and Robert M. Morgenthau Distinguished Professor, University of Virginia School of Law. Thanks to Risa Goluboff, John Harrison, John

"originalism," shorn for the moment of complications, essentially requires courts to follow the original meaning of constitutional text.[2] Courts should accordingly determine how the provisions were understood at the time they were ratified, and that understanding should guide decisions.[3] The justification for this approach appears, at first glance, as simple and sensible as the methodology itself: applying the text as originally understood is the only method by which courts can claim to be applying the law, rather than the individual preferences of those sitting as judges.[4]

Most champions of originalism, though not all, currently reside on the right side of the political spectrum, and thus originalism has become inextricably associated with politically conservative judges and commentators.[5] The claim that originalism is the only "lawful" way to interpret and apply the Constitution, moreover, readily translates into the ubiquitous accusation from the right that nonoriginalists tend to be unprincipled and activist, happy to enshrine their personal views into the Constitution.[6] This charge is repeated in various forms in the political arena by those who claim that only conservative judges can be trusted to follow the law and refrain from legislating from the bench.[7]

It is impossible to measure the precise influence of Justice Scalia and his fellow travelers on the debate regarding constitutional interpretation. But there can be no doubt that they have had a significant impact within and outside the academy, as both judges and law professors alike have devoted increased attention over the last decade to enactment history and the theory of originalism. Until recently, the left has played a relatively small role in this debate, which has made it all the more difficult to combat the suggestion that

Jeffries, Doug Kendall, Liz Magill, Caleb Nelson, Scott Shapiro, Alan Trammell, Ted White, and the participants at our annual faculty retreat at the University of Virginia Law School for helpful comments and conversations.

1. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613-17 (1999) (detailing the prevalence and influence of originalism); Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587, 1592 n.14 (1997) (observing that "the turn to originalism seems so general that citation is almost beside the point").

2. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37-47, 129-49 (1997) [hereinafter SCALIA, MATTER OF INTERPRETATION]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) [hereinafter Scalia, *Originalism*].

3. SCALIA, MATTER OF INTERPRETATION, *supra* note 2, at 38.

4. *See, e.g.*, Scalia, *Originalism*, *supra* note 2, at 854-55.

5. *See* Martin S. Flaherty, *The Better Angels of Self-Government*, 71 FORDHAM L. REV. 1773, 1774 (2003).

6. *See, e.g.*, SCALIA, MATTER OF INTERPRETATION, *supra* note 2, at 39 (summarizing the nonoriginalist approach as "[i]f it is good, it is so").

7. For a characteristically flamboyant example, see Ann Coulter, *Actually, 'Judicial Activism' Means 'E=MC2,'* Sept. 14, 2005, http://www.townhall.com/opinion/columns/anncoulter/2005/09/14/155430.html.

nonoriginalists are lawless.[8] The left has nipped at the heels of originalism, by pointing out that originalists like Justices Scalia and Thomas do not always practice what they preach.[9] But a compelling and popular alternative theory has yet to emerge from the academy or from sitting judges as a serious competitor to originalism. As Adele Stan recently observed, "[l]iberals have done virtually nothing to explain the Constitution to regular people in terms they understand."[10]

Two recent books, by Justice Stephen Breyer[11] and Professor Cass Sunstein,[12] attempt to fill this void. Indeed, those in the popular media have characterized both as responses to Justice Scalia and originalism.[13] Both are unusual books, though for different reasons. Although sitting Justices have occasionally written books,[14] it is exceedingly rare for a Justice to write a book about his or her approach to interpreting the Constitution and statutes. The only other recent example is Justice Scalia's *A Matter of Interpretation*,[15] which roughly sketches the theory to which Breyer (like Sunstein) is in some sense responding. For this reason alone, Justice Breyer's book demands attention. Law professors, by contrast, often write books, but not so often like the one Professor Sunstein has written, which is clearly designed to reach a popular audience. In fact, both books seem self-consciously designed to influence a public debate that until now has been fairly lopsided.

The two books have similar structures. In *Active Liberty*, Justice Breyer begins by describing his general approach to the Constitution. This approach is informed by what he sees as the two overarching goals of our democratic

8. *See, e.g.*, Emily Bazelon, *Take That, Nino*: *Breyer Dukes It Out with Scalia*, SLATE, Sept. 12, 2005, http://www.slate.com/id/2125479.

9. *See, e.g.*, Jack M. Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, SLATE, Aug. 29, 2005, http://www.slate.com/id/2125226.

10. Adele M. Stan, *Unfounded Fodder*, AM. PROSPECT ONLINE, Aug. 17, 2005, http://www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleId=10145.

11. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

12. CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005).

13. *See, e.g.*, Bazelon, *supra* note 8; Adam Cohen, *Justice Breyer Proposes a New Path for the Post-Rehnquist Court*, N.Y. TIMES, Sept. 26, 2005, at A1.

14. *See, e.g.*, SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE (Craig Joyce ed., 2003); SANDRA DAY O'CONNOR & H. ALAN DAY, LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST (2002); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998); WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004); WILLIAM H. REHNQUIST, THE SUPREME COURT (rev. ed. 2001).

15. SCALIA, MATTER OF INTERPRETATION, *supra* note 2. Justice Scalia spends the bulk of his lead essay in this book, which is adapted from a lecture, on statutory interpretation. His section on constitutional interpretation is relatively brief, but his views on constitutional interpretation are fleshed out in his response to commentators at the end of the book. *See id.* at 129-49 (responding to comments by Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, and Ronald Dworkin).

Constitution: to protect "negative liberty," meaning freedom from government constraint, and to protect "active liberty," meaning the ability to participate in governance.[16] Although he acknowledges the importance of the former, he emphasizes the latter, and argues that reference to this overarching purpose, along with attention to the practical consequences of government decisions, can help guide courts to the proper outcome in concrete cases.[17] Justice Breyer disclaims that his approach is an actual theory of how to interpret the Constitution, calling it instead a "theme" that "can affect" interpretation or a matter of "perspective[] and emphasis."[18] He proceeds in the second part of the book to illustrate his approach through discussion of numerous concrete cases involving a range of issues.[19] He concludes by contrasting his approach to originalism, which he defines as relying on "the Framers' original expectations, narrowly conceived,"[20] and he spends the final part of the book highlighting the relative weaknesses of (this form of) originalism.[21]

Like *Active Liberty*, *Radicals in Robes* also begins by setting out Professor Sunstein's preferred approach to deciding constitutional cases, though it does so in large part by explaining what the approach is not. One need not wait until the end of this book to read a critique of originalism, which Sunstein renames—cleverly or cheaply, depending on one's perspective—"fundamentalism."[22] In Sunstein's view, the main debate in constitutional law is between fundamentalists, who espouse originalism, and those he calls "minimalists," who do not espouse much of anything.[23] What minimalists do, which Professor Sunstein admires and advocates, is go slowly. They take small steps, decide one case at a time, refrain from announcing grand principles, and exercise caution and humility.[24]

Like Justice Breyer's active liberty approach, "minimalism" is not a theory of interpretation: it is "a method and a constraint," not a "program," and "does not dictate particular results."[25] Minimalists might lean to the left or the right; they might even have originalist tendencies.[26] But they don't lean hard in one direction or embrace overarching theories. After identifying an assortment of shortcomings that plague fundamentalism and extolling the virtues of minimalism, Professor Sunstein spends the second half of his book illustrating the contrast between these approaches by examining a series of hot-button

16. BREYER, *supra* note 11, at 3-34.
17. *Id.*
18. *Id.* at 6-7.
19. *Id.* at 37-111.
20. *Id.* at 116.
21. *Id.* at 115-32.
22. SUNSTEIN, *supra* note 12, at 22.
23. *Id.* at xii-xiii, 23-51.
24. *Id*. at xii-xiii, 27-30.
25. *Id.* at 29.
26. *Id.* at 29-30.

issues, from a right of privacy to the right to bear arms.[27]

There is much to admire in both books. Both are engaging and at times quite provocative. Justice Breyer's book is candid and smart. He offers no pat answers or simplified formula for deciding cases, which is to his credit and speaks well of his intellectual honesty. And it is simply intriguing to read a Justice's own account of his approach to constitutional cases, even if the view offered remains a bit cloudy. Professor Sunstein's book, in turn, is quite effective in poking holes in "fundamentalism" and in highlighting the numerous instances where "fundamentalists" like Justices Scalia and Thomas seem to deviate from their avowed methodology. For those who have been waiting for a public response from the left, these books are a sight for sore eyes, if for no other reason than they constitute an attempt to push back at the level of ideas.[28]

And yet the books fall a bit flat, at least in the eyes of this (sympathetic) reader. The basic problem is suggested by the title of this Review: neither Justice Breyer nor Professor Sunstein offers and justifies a theory of constitutional interpretation. Justice Breyer comes closer than Professor Sunstein. But in my view, neither *Active Liberty* nor *Radicals in Robes* explains and justifies, in terms plain enough to influence public debate, how judges ought to decide cases. In their haste to distance themselves from originalism, moreover, both Justice Breyer and Professor Sunstein seem to distance themselves from the text of the Constitution. These seem to me fatal missteps in their efforts to persuade a general audience to reject originalism and embrace an alternative.

In addition, both books only partially succeed in their critiques of originalism. Breyer and Sunstein focus on one form of originalism, which entails looking to the narrowly conceived expectations of the Framers. While this may indeed be the way originalism is occasionally practiced by Scalia and others, it is not the only version of originalism conceivable. Nor is it necessarily the one most faithful to the text of the Constitution, which, at the end of the day, is the point of originalism. What is ironic about both books is that each contains seeds of an alternative, originalist-oriented approach. But neither Breyer nor Sunstein explores whether that alternative might be superior both to the originalism they criticize and the approaches they advocate. Indeed, absent a compelling alternative theory, one wonders if Breyer and Sunstein should have sought to mend rather than end originalism.

This Review proceeds in three Parts. Part I describes more fully the contours of the debate over originalism and the contribution that *Active Liberty*

27. *Id.* at 81-241.

28. This phrase is borrowed from Professor Sunstein's review of Justice Breyer's book. Cass R. Sunstein, *The Philosopher-Justice*, NEW REPUBLIC, Sept. 19, 2005, at 29 ("[L]iberalism is finally, at the level of ideas, pushing back."). The same could be said about Sunstein's book.

and *Radicals in Robes* make to this debate. In particular, it assesses the criticisms that Breyer and Sunstein make against originalism and self-styled originalists. Part II turns to the constitutional approaches advocated by Justice Breyer and Professor Sunstein, respectively, and examines the strengths and weaknesses of those approaches. Part III explores the larger questions regarding interpretive theory raised by these books.

I. ORIGINALISM AND ORIGINALISTS

A. *Justice Scalia's Originalism*

Justice Scalia did not invent originalism, nor has he provided the most thorough explication and defense of the theory.[29] But he is its most well-known advocate today. He has also provided an ample description and defense of his theory of originalism in a short book and a law review essay.[30] When Professor Sunstein and Justice Breyer argue against originalism, they are essentially arguing against Justice Scalia. It thus makes sense to start with Justice Scalia's originalism and to take some care in trying to understand it. As we shall see, the temptation to engage in caricature is sometimes difficult for participants in this debate to resist.

Justice Scalia's basic idea is that courts can and should rely on the original meaning of the constitutional text in order to decide the outcome in at least some constitutional cases.[31] The idea is more complicated than it seems at first glance, which becomes apparent when describing what Scalia's originalism *does not* entail. Scalia is not interested in the intentions of the Framers who wrote the provisions, just as he is not interested in the intentions of those who draft statutes.[32] Discerning the intent of groups is difficult if not incoherent, and even if discoverable, intentions should not trump the meaning of the actual language used.[33] At bottom, then, Scalia claims to be interested primarily in the meaning of the text itself, as opposed to what those who drafted the text intended or hoped it would accomplish.

To determine this meaning, Scalia suggests that we look to the practices and interpretations of the Founding generation(s), implying that what counts

29. For more thorough and sophisticated treatments, see KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

30. SCALIA, MATTER OF INTERPRETATION, *supra* note 2; Scalia, *Originalism*, *supra* note 2.

31. The caveat is that Justice Scalia also believes in stare decisis. *See* SCALIA, MATTER OF INTERPRETATION, *supra* note 2, at 139-40; *infra* notes 50-53 and accompanying text.

32. SCALIA, MATTER OF INTERPRETATION, *supra* note 2, at 38 ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

33. *Id.* at 16-36.

most are the practices and understandings of those reasonably educated men who were around when the relevant provisions were adopted.[34] At the same time, however, Scalia acknowledges—as he must—that there can be a difference between meaning and expectations.[35] The Founding generations may have expected particular results to follow from constitutional language. But these expectations may or may not be consistent with the actual and proper meaning of the text.[36] They might be the result of misinterpretations of language or time-bound prejudices and beliefs that obscure the proper application of the text. Moreover, the language used in many constitutional provisions establishes general principles that are enduring but nonetheless invite different applications in different contexts. The Founders themselves would have recognized, as we should, that their specific expectations did not settle the meaning of these general principles enshrined in the text.[37]

Consider a statutory example that illustrates the basic point. Title VII prohibits discrimination "because of . . . sex" in the terms or conditions of employment.[38] It seems fair to say that those who voted for the law and those who were initially subject to it expected that the law barred discrimination by men against women. Perhaps some thought it could bar discrimination going the other way. But it seems highly unlikely that many, if any, expected that it barred "sex" discrimination by one man against another. Yet in *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court, in an opinion by Justice Scalia, held that this form of discrimination was barred by the text of the statute.[39] Although he recognized that male-on-male discrimination was obviously not the primary concern of legislators (which puts the point mildly), this did not matter. "[I]t is ultimately the provisions of our laws," Justice Scalia wrote, "rather than the principal concerns of our legislators by which we are governed."[40] Precisely the same could be said when trying to interpret and apply the Constitution. When considering whether the Equal Protection Clause prohibits sex discrimination, for example, it should not be enough for a principled originalist simply to point to the fact that the ratifiers were primarily

34. *Id.* at 38, 135-36; Scalia, *Originalism*, *supra* note 2, at 856-63.

35. *See* SCALIA, MATTER OF INTERPRETATION, *supra* note 2, at 144-49 (responding to Professor Ronald Dworkin); Scalia, *Originalism*, *supra* note 2, at 861-62 (acknowledging the possibility that constitutional text may not always be fixed by the specific expectations of the Framers).

36. *See* Ronald Dworkin, *Comment*, *in* SCALIA, MATTER OF INTERPRETATION, *supra* note 2, at 115-27 (explaining the difference between "semantic" originalism and "expectation" originalism).

37. As Professor Nelson explains, "members of the founding generation certainly expected some of the Constitution's rules to have different *applications* in different contexts. . . . In drafting rules for inclusion in the Constitution, the framers deliberately sought to use language that was general enough to accommodate relevant future changes." Nelson, *supra* note 29, at 543-44 (emphasis added).

38. 42 U.S.C. § 2000e-2(a)(1) (2006).

39. 523 U.S. 75, 79 (1998).

40. *Id.*

concerned about the treatment of freed slaves.[41]

Thus, the practices and beliefs of the Founding generations can provide some evidence of the original meaning of the text, but they cannot conclusively establish that meaning.[42] This point is crucial but often elided by Scalia, who seems determined to transform often abstract provisions in the text into a fairly specific list of rights and rules derived from the practices and understandings of the ratifiers.[43] The point is also usually missed by Sunstein and Breyer, both of whom equate original meaning with the original understanding or expectations of the ratifiers and simply call the entire enterprise originalism (or fundamentalism).[44] As we will see, Sunstein effectively criticizes "originalism" for its focus on the ratifiers' expectations and understandings,[45] but it is important to recognize that he is criticizing only one possible approach to originalism and one that Scalia may practice but not always preach.

Scalia defends originalism on several grounds, but his chief defense boils down to the idea that it is the only legitimate way to justify judicial review. The constitutional text that was actually ratified is the only legitimate source of constitutional law, so the argument goes, and therefore the only way judges can legitimately rely on the Constitution to negate legislation or executive acts is to rely on the original meaning of that text.[46] There are complicated questions regarding the democratic legitimacy of the Constitution, given that "We" obviously did not consent to it, and the amendment process is sufficiently burdensome that it is wrong to infer consent from a failure to amend. That said, presumably few would disagree with the following: judicial review is only plausibly legitimate insofar as courts can claim to be applying the Constitution (in however attenuated a fashion) or past precedent when striking down legislation. Even if there is some question about the legitimacy of the

41. Nor, presumably, would the fact that discrimination was practiced against women and thought constitutional be dispositive. It seems safe to suppose that sex discrimination by men against men may have been practiced in the 1960s and 1970s and thought legal, but this possibility did not preclude the interpretation of Title VII in *Oncale*.

42. *Cf.* Nelson, *supra* note 29, at 545-46 (acknowledging the possibility that "some provisions of the Constitution incorporated principles that do not themselves vary in any way, but whose proper application members of the founding generation did not fully understand").

43. *See* SCALIA, MATTER OF INTERPRETATION, *supra* note 2, at 135, 147; Scalia, *Originalism*, *supra* note 2, at 861-62. Justice Scalia actually seems a bit conflicted on this score. He rejects as a caricature of originalism the argument that it is hidebound and produces a closed list of rights and rules, pointing out that originalists are willing to apply the text to "new laws, and to new phenomena, that did not exist at the time." SCALIA, MATTER OF INTERPRETATION, *supra* note 2, at 140-41, 145. At the same time, however, he finds it preposterous to suppose that acts that "were perfectly constitutional in 1791 . . . might be unconstitutional today." *Id.* at 141.

44. *See* BREYER, *supra* note 11, at 116; SUNSTEIN, *supra* note 12, at 63.

45. *See infra* notes 91-99 and accompanying text.

46. Scalia, *Originalism*, *supra* note 2, at 854; *see, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA 2 (1989); Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL'Y 479, 486 (1996).

Constitution, it hardly follows that a judge acts legitimately by striking down legislation with no reference to the Constitution or prior cases and for whatever reason she fancies.[47] From this starting point, one need not travel far to recognize the basic appeal of originalism: to the extent originalism entails discerning and applying the meaning of the constitutional text, it is the methodology most consistent with the rule of law.[48]

It is equally easy from this vantage point to identify a major problem with nonoriginalist approaches, which all suffer from a similar inability to answer the following question: If the original meaning of the Constitution is not to be the guide, what is? As Scalia observed in his 1989 essay, it is impossible to "discern any emerging consensus among the nonoriginalists" regarding the appropriate interpretive methodology.[49] This remains true today. By their internal disagreement and their very diversity, nonoriginalists unwittingly bolster the originalists' assertion that nonoriginalists are simply making it up as they go along.

Last but not least, Justice Scalia—much more so than Justice Thomas—is willing to dilute his originalism with a healthy dollop of stare decisis. He acknowledges that stare decisis is "not part of" his originalist philosophy but is instead a "pragmatic exception to it."[50] Nonetheless, it is an exception he is willing to allow in order to make originalism work. As he puts it, the demand that originalists alone "forswear stare decisis is essentially a demand that they alone render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable prescription for judicial governance."[51] Allowing exceptions to originalism, of course, creates the opportunity for judicial willfulness, which is what originalism is supposed to control. Justice Scalia both acknowledges this risk and tries to defend against it by relying on "consistent rules" that govern his use of stare decisis.[52] According to those "rules," Justice Scalia will rely on precedent when necessary to promote stability and protect expectations. He will not rely on precedent when the precedent itself promotes uncertainty or is "insusceptible of principled application."[53]

47. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 3-14 (1980).

48. *See* SUNSTEIN, *supra* note 12, at 54-59. *See generally* Richard H. Fallon, Jr., *How To Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 551 (1999) ("In defending their theories against rivals, text-based theorists typically rely perhaps most heavily on an ideal of the rule of law.").

49. Scalia, *Originalism*, *supra* note 2, at 855.

50. SCALIA, MATTER OF INTERPRETATION, *supra* note 2, at 140 (emphasis omitted).

51. *Id.* at 139.

52. *Id.* at 140.

53. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 993 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); Walton v. Arizona, 479 U.S. 639, 672-73 (1990) (Scalia, J., concurring in part and concurring in the judgment).

B. *False Fundamentalists*

There are some obvious difficulties with Scalia's originalism as a theory, which both Professor Sunstein and Justice Breyer address. Before turning to those difficulties, however, it is worth considering a question that only Professor Sunstein raises: To what extent do so-called "originalists" or "fundamentalists" actually follow their avowed methodology? The question may at first seem like a cheap shot—a game of "gotcha" designed to expose inconsistencies that undoubtedly plague all jurists, not just self-proclaimed originalists. Putting aside the fact that some originalists like Scalia invite this line of inquiry by their unrelenting attacks on nonoriginalists as unprincipled,[54] the question is actually an important one. It not only sheds light on the sincerity of some originalists, but also on the degree to which we can trust their use of history. If it turns out, for example, that Justice Scalia only relies on originalism when it plausibly supports a politically conservative outcome, we have reason to be skeptical when he *does* rely on history, because he has already demonstrated a disposition to be results oriented. Looking more broadly, it might make us skeptical about the entire enterprise of originalism as currently practiced if it turns out that its advocates rely on history only when it plausibly supports politically conservative results.

Professor Sunstein mostly targets Justices Scalia and Thomas, and he effectively demonstrates that both occasionally deviate from originalism. His primary example is affirmative action, which both Scalia and Thomas adamantly oppose, regardless of whether the program is sponsored by state or federal governments.[55] The problem, of course, is that there is little support in either the text or history of the Constitution for the position that Scalia and Thomas endorse; if anything, the practices of the Reconstruction Congress suggest that the Equal Protection Clause was originally understood to permit race-based affirmative action programs.[56] To make matters worse, Scalia and Thomas have no claim to judicial restraint in these cases, as they are *striking down* rather than upholding legislation. To make matters worse still, neither Justice Scalia nor Justice Thomas has said a word about the original meaning of the relevant constitutional text.[57] The obvious question is why. The conclusion Sunstein wishes his readers to draw is that Justices Scalia and Thomas are willing to dispense with originalism where that methodology prevents them from reaching the politically conservative results they want to reach.

In Sunstein's view, the gaps between theory and practice do not end with affirmative action. Takings law is another good example. The Takings Clause requires the government to pay compensation when it "take[s]" private property

54. *See, e.g.*, SCALIA, MATTER OF INTERPRETATION, *supra* note 2, at 38-39.

55. SUNSTEIN, *supra* note 12, at 133-42.

56. *Id.*

57. *Id.* at 133-34.

for public use.[58] A recurring question is whether the Clause requires compensation when environmental regulations diminish the value of property but leave the property in the hands of private owners. Conservatives who believe property rights are imperiled by modern governments would love to see the compensation requirement extend to burdensome and costly regulations.[59] Justices Scalia and Thomas support an expansion of the Takings Clause, so as to require compensation for at least some costly regulations.[60] This position is hard to square with the original meaning of the Clause, which seems to require compensation only when the government actually "takes" the property in question. Neither Scalia nor Thomas, however, has said much at all about the original meaning of the Takings Clause.[61]

And on it goes. Justice Thomas supports broad presidential authority to detain terrorist suspects, but never explains how this authority is rooted in the original meaning of the constitutional text.[62] Justice Thomas also supports, and Justice Scalia is sympathetic with, granting the same protection to commercial speech as is currently made available to political speech, despite a good deal of evidence to suggest that commercial advertising was understood to fall outside of the First Amendment's ambit altogether.[63] Last, Justice Thomas embraces a revival of the nondelegation doctrine, despite, Sunstein argues, a lack of historical or textual support for that doctrine.[64]

Sunstein refrains from seriously criticizing Scalia's occasional reliance on stare decisis,[65] which might seem odd at first glance. After all, this offers a pretty major opportunity to be a "false fundamentalist," which in turn creates an opportunity for Scalia's critics to hoist him by his own petard. Indeed, the "rules" that supposedly discipline Scalia's reliance on stare decisis are hardly hard and fast. Takings law again provides a good illustration. In explaining his embrace of regulatory takings, Scalia acknowledged that history was not on his side but explained that stare decisis supported the regulatory takings doctrine and stated that the text *could* be read to encompass such takings.[66] However, the case that created the regulatory takings doctrine, *Pennsylvania Coal v. Mahon*,[67] was not actually a takings case but a due process case.[68] Moreover,

58. U.S. CONST. amend. V.

59. *See, e.g.*, Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509 (1998).

60. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe, 535 U.S. 302 (2002) (Thomas, J., dissenting, joined by Scalia, J.); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

61. Justice Scalia has said a little. *See infra* note 66 and accompanying text.

62. SUNSTEIN, *supra* note 12, at 156-66.

63. *Id.* at 229-30.

64. *Id.* at 199-210.

65. *Id.* at 76-77.

66. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 n.15 (1992).

67. 260 U.S. 393 (1922).

68. Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon,

Mahon created a standard—it's a taking if the regulation "goes too far"[69]—that hardly seems susceptible "of principled application,"[70] making it all the more curious that Scalia decided to favor precedent over original understanding.

Sunstein does point out that adulterating originalism with stare decisis "leaves a lot of vagueness" and makes it difficult for "faint-hearted fundamentalists" like Scalia to "show that their approach promotes their goal of binding judges through clear rules."[71] But his touch here is relatively light, and he contrasts Scalia favorably with Justice Thomas, who (according to Scalia) "doesn't believe in stare decisis, period."[72] Sunstein's reticence to hit harder on this point is best explained by his commitment to minimalism. Minimalists seem to favor stare decisis over originalism and don't seem to value theoretical consistency. This makes it hard to fault Justice Scalia for occasionally abandoning originalism in favor of precedent, even if the reliance on precedent seems result-driven.

This still leaves plenty of material for Sunstein. Indeed, in Sunstein's view, Scalia and Thomas are emblematic of fundamentalists who harbor not a principled but a political agenda. The claim is an exaggerated one, both generally and with regard to Scalia and Thomas, but it is not necessarily false. To begin, fundamentalists do not self-identify as such. Some advocates may push a radically conservative agenda under the banner of originalism, regardless of the match between that agenda and the original meaning of the Constitution. But it does not follow, of course, that all who subscribe to originalism are equally radical or politically motivated. Similarly, with regard to Justices Scalia and Thomas, they certainly veer occasionally from originalism, and there does seem to be a coincidence between their abandonment of original meaning and their arrival at a politically conservative result. But the issue is more complicated, because both Scalia and Thomas have endorsed politically liberal results that seem dictated by originalism[73] and because Scalia has indicated that he will sometimes follow precedent rather than original meaning.

That said, Sunstein is surely right to encourage his readers to raise an eyebrow or two at the contemporary correspondence between so-called originalists and those who are politically conservative. As he observes, it would be odd if the original meaning of the Constitution—which, after all, is not

106 YALE L.J. 613, 666-70 (1996).

69. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

70. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 599 (Scalia, J., dissenting).

71. SUNSTEIN, *supra* note 12, at 77.

72. *Id.* at 76 (quoting Scalia).

73. In *Texas v. Johnson*, 491 U.S. 397 (1989), for example, Justice Scalia joined Justice Brennan's majority opinion, which held that the First Amendment protects flag burning. Justice Thomas, in turn, disagreed with both Justice Scalia and Chief Justice Rehnquist in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 359 (1995), and concluded "freedom of speech, or of the press," as originally understood, protected anonymous political leafleting.

easily ascertained with regard to a host of important issues—happened to line up perfectly with the major planks of the Republican Party platform.[74] So why is it that so many conservative Republicans support originalism and so few liberal Democrats do? Doesn't this correspondence itself suggest that originalism, as currently practiced by conservative lawyers within and outside the Supreme Court, may often be just a smoke screen to justify politically conservative results that its advocates favor? Doesn't the fact that Scalia, Thomas, and others are willing to abandon originalism when it does not support a politically conservative outcome bolster that suggestion? These are the questions Sunstein wants his readers to ask themselves, and he is right to provoke this inquiry. There does indeed seem to be something fishy going on here, and Sunstein, though certainly not the first,[75] is right to say so.

But notice this criticism only gets Sunstein, or anyone else, a small part of the way toward debunking originalism. The fact that so-called originalists do not always follow their principles does not discredit originalism as a theory of interpretation. Sunstein wants to do this as well, and so does Justice Breyer.

C. *Originalism's Defects*

1. *Justice Breyer's view*

Breyer and Sunstein define originalists similarly, as those who look to the specific views of the Framers and ratifiers to determine constitutional meaning.[76] Sunstein is more careful than Breyer in drawing attention to the ratifiers rather than the Framers, but Breyer's critique does not turn on this difference. In Justice Breyer's view, originalism suffers from five defects: (1) the Founding generation(s) did not have a fixed view that courts should be originalist; (2) nonoriginalists are not necessarily subjective; (3) originalists have plenty of opportunities to be subjective in their reliance on history, and they can use that history to obscure what really motivated the decision; (4) originalism does not necessarily produce clear, workable legal rules and, even if it does, "the advantage of legal rules can be overstated"; and (5) originalism can produce "seriously harmful consequences" and "[m]uch of the harm at stake is a constitutional harm."[77]

The first point is interesting and may be right, though it is neither new nor dispositive.[78] The fact that the Founding generation may not have uniformly

74. SUNSTEIN, *supra* note 12, at 19.

75. *See, e.g.*, David M. Zlotnick, *Justice Scalia and His Critics*: *An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1413-17 (1999) (discussing articles criticizing Justice Scalia for not being faithful to his own methodology).

76. BREYER, *supra* note 11, at 116; SUNSTEIN, *supra* note 12, at 63.

77. BREYER, *supra* note 11, at 115-32.

78. *See, e.g.*, LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 331-32 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98

endorsed originalism is far from fatal to the theory. To see why, imagine that the Founders did endorse it. Would this be enough to establish originalism as the method contemporary courts should use? Of course not. To rely on original expectations or understandings about interpretation to justify using original understanding as a methodology would be hopelessly circular.[79] To justify originalism, one must point to an independent reason that supports its use—that is, one must identify beneficial consequences, as Justice Breyer himself suggests.[80] (And thus he, too, recognizes that his criticism is not dispositive.) If uniform support is not sufficient to justify originalism, then mixed support—while perhaps a slight embarrassment to originalists—is not sufficient to condemn it.[81]

Justice Breyer's second and third points are important but essentially cancel each other out. It is a relief to see Justice Breyer striking back at the claim—made over and again by Justice Scalia and conservative politicians—that anyone who is not an originalist must be in favor of unprincipled decisionmaking. For too long, Justice Scalia has been allowed to paint a caricature of nonoriginalists as jurists who are dying to impose their personal preferences on an unwitting nation. It is about time that one of his colleagues called him on it. Justice Breyer is correct that nonoriginalists can strive to be restrained and consistent. (Indeed, one might think that Justice Scalia would acknowledge as much, given that he himself occasionally acts as a nonoriginalist when following past precedent.) Justice Breyer is also correct that originalists have plenty of opportunity to be willful and to hide their willfulness by saying, essentially, "the ratifiers made me do it." At the same time, however, these points do not necessarily establish the primacy of nonoriginalism over originalism. The most that Justice Breyer can honestly claim—and, again, his book is admirably forthright—is that both nonoriginalists and originalists have means of restraining themselves and opportunities to do mischief.

Justice Breyer's fourth point is that originalism doesn't lead to clear rules and even if it does, clear rules aren't always so great. This point seems to cancel *itself* out, at least insofar as it does not offer a way to distinguish originalism from other interpretive methodologies, except perhaps one (not identified) that consistently produces clear rules. One is ultimately left wondering whether and when, if ever, clear rules might be useful.

This leaves the fifth point, namely that originalism leads to "seriously

HARV. L. REV. 885 (1985). *See generally* Nelson, *supra* note 29, at 523-53.

79. Nelson, *supra* note 29, at 547-48.

80. BREYER, *supra* note 11, at 118.

81. *Cf.* WHITTINGTON, *supra* note 29, at 15, 181 (arguing that originalism, to be a legitimate theory of interpretation, need not have been supported by the Founders); Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627, 1629 (1997) ("The role of history in constitutional interpretation is necessarily a theoretical question.").

harmful consequences."[82] It is a point made by Professor Sunstein as well, in much more vivid and graphic detail, so let's turn to his book.

2. *Professor Sunstein's objections*

On three separate occasions in the first third of his book, Sunstein produces overlapping lists of the consequences that would attend the Court's embrace of originalism/fundamentalism: states could ban the sale of contraceptives; one could bid farewell to portions of the Clean Air Act and other health and safety laws; states could establish official churches; even modest gun control laws would be invalid; the federal government could discriminate on the basis of race; state and federal governments could segregate on the basis of race; there would be no right of privacy; states could sterilize criminals; and speech in general might be less protected, while commercial speech would be protected to the same extent as political speech.[83]

It's a scary list, no doubt. Before assessing the relationship between this list and reality, it's important to try to understand why Sunstein and Breyer emphasize consequences so much. In Sunstein's view, any theory of interpretation has to be defended and justified based on its consequences. If a particular approach "would produce intolerable results," he argues, "it is hard to defend."[84] Breyer seems to endorse the same position.[85]

It is hard to know what to make of these claims. On the one hand, it seems right that theories of interpretation must be defended based on the consequences that would follow from their adoption. Indeed, unless there are deontological reasons to support one theory over another (and it's hard to think of any), arguing from consequences is the only option. Originalists, for example, assert that their approach promotes the rule of law, which is a consequentialist argument.

On the other hand, Sunstein and Breyer seem to be suggesting that one should pick a theory of interpretation that will result in good policies—period. Sunstein is unabashed in suggesting that "fundamentalism" should be rejected because it would lead to results that are bad as a matter of policy.[86] Justice Breyer, by contrast, seems to fudge the point by asserting that the harmful results from originalism are "constitutional" harms.[87] This assertion, however, rests on the dubious proposition that following the literal text of the Constitution may be "inconsistent with the most fundamental original intention of the Framers themselves," which was to create a government that both

82. BREYER, *supra* note 11, at 129.

83. SUNSTEIN, *supra* note 12, at 1-3, 18-19, 63-65.

84. *Id.* at 73.

85. BREYER, *supra* note 11, at 129-32 (arguing against a literal interpretation of the Constitution because it would produce serious harm).

86. SUNSTEIN, *supra* note 12, at 71-73.

87. BREYER, *supra* note 11, at 131.

protects civil liberties and allows citizens to govern themselves effectively.[88] If following the text can lead to "constitutional harm," however, it becomes difficult to understand whether there is much difference between a constitutional harm and a bad policy result. All of which points back in Professor Sunstein's direction and suggests that Justice Breyer would reject originalism because it might produce bad policies.

If this is indeed one of their arguments against originalism, it is both overblown and potentially self-defeating. It is overblown insofar as it ignores the role of stare decisis. Sunstein is guiltier on this score, as his parade of horribles assumes that originalist judges are willing to overturn precedent in order to achieve their more perfect vision of the Constitution. Yet as he acknowledges, most judges, including Justice Scalia, believe in stare decisis.[89] So it is hard to agree that the sky would necessarily fall if the Supreme Court became more originalist in orientation while at the same time maintaining a healthy respect for stare decisis. What is more, it is hard to see how Sunstein's own approach—or *any* single coherent approach to the Constitution, for that matter—would necessarily lead to all or even most of the results that Sunstein now wants to preserve. It seems unfair to imagine originalism without stare decisis and catalogue the awful results, without engaging in a similar thought experiment in which minimalism is the approach and there are no precedents to preserve or build from.

The argument also seems to play right into the hands of originalists. The inference one draws from this criticism of originalism is that courts should, above all, "interpret" the Constitution in a way that leads to good policies, regardless of whether the result is connected to the language of the Constitution. If that is indeed what Sunstein and Breyer are advocating, they are in a relatively weak position to rebut the charge that nonoriginalists are essentially in favor of winging it.[90] On the other hand, if this is not what Sunstein and Breyer are advocating, this particular criticism of originalism loses much of its force, because all theories that command something other than "make good policy" might lead to some results we don't like as a matter of policy. Perhaps all they mean to suggest is that originalism should be rejected because it will lead to really bad policy results, whereas other theories might lead to only some bad results. This empirical conjecture, however, does not seem like an especially reliable way to choose interpretive theories.

88. *Id.* at 131-32.

89. SUNSTEIN, *supra* note 12, at 17-19, 77.

90. *Cf.* ELY, *supra* note 47, at 3-9 (arguing that constitutional adjudication that relies on notions found neither in the Constitution nor in the judgment of political branches "seems especially vulnerable to a charge of inconsistency with democratic theory"); Fallon, *supra* note 48, at 572-79 (arguing that constitutional theories should be judged instrumentally, in terms of their consequences for the rule of law, participatory democracy, and the protection of substantive rights but emphasizing that the choice of a theory should not be "crassly opportunistic").

In addition to arguing that originalism would lead to bad results, Professor Sunstein asserts that originalism itself may be self-defeating and incoherent.[91] The claims are related, and the argument goes something like this: If originalism simply requires imagining how members of the Founding generation would answer constitutional questions, we can imagine getting answers to at least some of the questions. For example, we could be fairly confident that if we asked reasonably educated people in the 1870s whether the Equal Protection Clause banned sex discrimination, we can imagine that they would say no. But there are two problems with this approach.

The first is that it may be improper and inaccurate to construct the originalism thought experiment by posing specific questions to ratifiers. As Sunstein puts it, if we want to get at the actual meaning of the text, we would want to ask the relevant ratifiers whether they meant to set out a general principle or freeze current expectations or legal rules.[92] Using the Equal Protection Clause as an example, rather than ask whether they think sex discrimination is banned by the Clause, we would want to ask the ratifiers if they meant to set out a general principle that prevents the denial of equal protection, a principle that might lead to different results over time, as new social understandings about the role of men and women in society emerge.[93]

The second point is that it is silly to try to imagine how ratifiers would feel about situations or technologies that they never encountered or imagined. Sunstein uses the common example of wiretaps, which weren't available when the Fourth Amendment was ratified. It's an odd exercise, to say the least, to ask whether the ratifiers would think that a technology they never imagined violated the Fourth Amendment's prohibition on unreasonable searches and seizures. The straightforward question and answer would lead to the conclusion that the ratifiers didn't understand the Fourth Amendment to ban wiretaps. But that is obviously unsatisfying. To get anywhere on this question, you would have to contemplate first telling the ratifiers about the new technology. But once you do this, can you really be talking about the ratifiers' understanding anymore?[94]

The problem is not limited to new inventions or technologies. It also extends to new social situations, institutions, and understandings. Consider school desegregation. If one asked the ratifiers of the Equal Protection Clause whether they believed it outlawed school segregation, it seems pretty clear that their answer would be no. But how trustworthy is that answer, given that public schools barely existed when the provision was ratified and given that social attitudes toward African-Americans were marked by ignorance and great prejudice? To get an accurate answer to the question in 1954, wouldn't we have

91. SUNSTEIN, *supra* note 12, at 65-71.
92. *Id.* at 66.
93. *Id.*
94. *Id.* at 68-69.

to tell the ratifiers about the importance of public schooling and the changed attitudes toward African-Americans and then ask, "Okay, now that you are aware of these changes, do you think the provision you ratified in 1869 prohibits school desegregation in 1954?"[95]

The two problems are related, insofar as both point to the gap between expectations and meaning, discussed earlier. A principled commitment to original meaning must acknowledge the possibility that the expectations of Founding generations about the application of general principles does not necessarily freeze for all time the scope or future application of those principles.[96] This does not mean, as Sunstein suggests,[97] that the principles themselves would change. Rather, it means that the same general principles might lead to different results under different circumstances.[98]

Sunstein is exactly right that originalism becomes a largely meaningless if not silly enterprise if it entails an imaginary conversation with ratifiers, where the ratifiers are asked to play the role of judge in a contemporary dispute. He is also right to notice that (at least some) originalists have very little to say about this, and instead want us simply to assume that originalism provides a relatively closed list of specific answers regarding the rights protected or powers granted by various constitutional provisions. That list might get expanded when new technologies emerge, so wiretaps are covered. It might also get expanded, though very rarely, when some social understandings change, so originalists can say *Brown* was correctly decided. But usually, the list remains what it was in either the late 1700s or late 1800s. Indeed, Justice Scalia has suggested as much, but his justification is pretty weak: he argues that even the general provisions in the Bill of Rights, which seem to establish abstract principles that might lead to different results over time, must be interpreted to establish a fairly concrete list of rights because the general provisions are placed among more specific ones.[99]

95. *Id.* at 69-70.

96. *See, e.g.*, Dworkin, *supra* note 36, at 115-27; Nelson, *supra* note 29, at 543-47.

97. SUNSTEIN, *supra* note 12, at 66-68.

98. *See* Nelson, *supra* note 29, at 546-47.

99. SCALIA, MATTER OF INTERPRETATION, *supra* note 2, at 135, 147. Justice Scalia also argues that if the Founders really meant to establish abstract principles, whose specific content would be supplied over time, they would not have left that task to judges. *See id*. at 136. Professor Sunstein makes a similar point when criticizing perfectionists. SUNSTEIN, *supra* note 12, at 67. This argument, which focuses on original intent rather than original meaning, is arguably anachronistic because it assumes that the Founders expected courts to take an aggressive and plenary role in enforcing rights guaranteed by the Constitution. If that assumption is not correct (and there is a large literature questioning it), then the argument loses its force, because it becomes possible to imagine that the Founders *did* intend to establish broad, general principles but did not expect courts to do much more than police blatant and clear violations of the Constitution. Following this line of thought, one might be led to advocate judicial restraint *not* because the rights guaranteed by the Constitution are but a meager and fixed list, but because the judiciary is not the correct institution to enforce the full panoply of protections in the Constitution. *Cf.* Lawrence Gene Sager, *Fair Measure: The*

Of the criticisms of originalism made by Breyer and Sunstein, these points are the most persuasive. Any version of originalism that relies exclusively on the practices of the ratifiers or tries to imagine their answers to precise constitutional questions is difficult if not impossible to reconcile with the more open-ended provisions of the Constitution. These provisions, like the Equal Protection, Privileges or Immunities, Due Process, Cruel and Unusual Punishment, Free Speech, and Necessary and Proper Clauses, all seem to establish general principles that may indeed result in different applications over time. The tension in Scalia's approach to originalism is that he wants to remain true to the constitutional text *and* he wants that text to be very specific. But it is not always easy to reconcile these twin desires, and to transform general provisions into a more or less fixed list of specific rules is to gloss the original meaning of the text. This, in turn, runs contrary to the central point of the originalist project, which is to elucidate, not change, the meaning of the text.

That said, Sunstein seems to miss the point that his criticisms apply only to one version of originalism—the version in which the ratifiers matter more than the text. But this is not and need not be the only originalist approach. Scalia himself seems conflicted on this score, and for good reason: elevating the ratifiers' expectations over the text *ought not* to be the approach if originalism means being faithful to the text. Thus, at the end of the day, Sunstein has both discredited one form of originalism while pointing the way toward another. Before exploring that alternative version of originalism, which I take up in Part III, let's take a look at the approaches advocated by Breyer and Sunstein.

II. ACTIVE LIBERTY AND MINIMALISM

In "Originalism: The Lesser Evil," Justice Scalia criticizes nonoriginalists for doing little more than pointing out some flaws in originalism. Just as you can't beat somebody with nobody in politics, he says, you can't beat one theory with no theory.[100] Justice Breyer and Professor Sunstein certainly succeed in pointing out some flaws in one form of originalism. But the real test is whether they have something more attractive to offer in its place.

A. *Justice Breyer's Active Liberty*

Justice Breyer begins by indicating that, in a sense, he's not really going to try to compete with originalism because he is not interested in articulating a unifying theory of constitutional interpretation.[101] In his view, all judges use the same tools to interpret statutes and the Constitution: they look to language, original understanding, traditional uses of the relevant language in law,

Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212 (1978).

100. Scalia, *Originalism*, *supra* note 2, at 855.

101. BREYER, *supra* note 11, at 6-7.

precedent, the purposes or values embodied in the relevant provision, and the consequences of different outcomes.[102] Judges differ only in terms of which sources they emphasize.[103] Justice Breyer thinks it proper to emphasize purposes and consequences, but he does not forswear reliance on text, original understanding, or precedent.

Justice Breyer is skeptical of general theories of interpretation because he does not believe any single theory will capture the true meaning of the Constitution or the intent of its Framers.[104] In his view, the basic problem with interpreting the Constitution is that some of its provisions are open-ended and do not provide clear directions for rules of action, and one cannot easily ascertain a precisely defined purpose behind the provisions.[105] This presents judges with a dilemma: they must avoid being "willful" and pouring into these clauses their individual views, but they must also avoid being "wooden" and resting too much on interpretive formulas that ignore the nature of the text and the complexity of actual cases.[106] The way out of that dilemma is not a hard and fast theory of interpretation but an attitude: "an attitude that hesitates to rely upon any single theory or grand view of law, of interpretation, or of the Constitution. It champions the need to search for purposes; it calls for restraint, asking judges to 'speak humbly as the voice of the law.'"[107]

Justice Breyer's own search for purposes has led him to "a certain view of the original Constitution's primary objective. That view sees the Constitution as furthering active liberty, as creating a form of government in which all citizens share the government's authority, participating in the creation of public policy."[108] Faintly echoing John Hart Ely, Justice Breyer believes that reference to this purpose, along with attention to the practical consequences of judicial decisions, can lead the Court to better results. He thus argues that Justices "should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts."[109] Focusing on that nature, he contends, "will yield better law—law that helps a community of individuals democratically find practical solutions to important contemporary social problems."[110] Justice Breyer then illustrates his approach by explaining his views on a range of issues, including campaign finance reform, commercial

102. *Id.* at 7-8.

103. *Id.* at 8.

104. *Id.* at 7.

105. *Id.* at 18-19.

106. *Id.*

107. *Id.* at 19 (ellipsis omitted).

108. *Id.* at 33.

109. *Id.* at 5. Justice Breyer devotes a chapter to his theory of statutory interpretation, in which he contrasts his approach, which considers statutory purpose and congressional intent, with the textualism advocated by Justice Scalia and others. I mostly leave issues of statutory interpretation to one side in this Review. *Id.* at 85-101.

110. *Id.* at 6.

advertising, federalism, Fourth Amendment privacy issues, affirmative action, statutory interpretation, and deference to agency interpretations of statutes.[111]

Two of these illustrations, regarding campaign finance and affirmative action, nicely highlight the strengths and weaknesses of the book. With regard to campaign finance reform, the basic question is the extent to which Congress can limit campaign contributions without running afoul of the First Amendment guarantee of free speech. Justice Breyer begins by observing that neither text nor history is much help here. The Constitution protects "freedom of speech" but does not define "speech" or indicate whether campaign contributions count as such. The history is sparse and thus not very helpful. Concepts like "money is speech" or "money is not speech" are also not a huge help.[112]

Breyer then suggests that "we remove our blinders" and "understand the First Amendment as seeking in significant part to protect active liberty," meaning "'participatory self-government.'"[113] In doing so, we will come to "understand the First Amendment as seeking primarily to encourage the exchange of information and ideas necessary for citizens themselves to shape that public opinion which is the final source of government in a democratic state."[114] Of course, Breyer recognizes that the Amendment also protects the individual from government restrictions on speech. Constitutional interests thus lie on both sides of campaign finance laws: those with money who wish to "speak" through campaign contributions have a constitutional interest that weighs against restrictions, while those with less money but a will to participate in the process have a constitutional interest that weighs in favor of restrictions. It follows that an approach that seeks to balance those interests by permitting reasonable regulations may make the most sense practically. It may also be truest to the two purposes—one participatory, the other libertarian—behind the free speech protection.[115] Reference to these purposes might not offer an easy answer, Breyer acknowledges, but it can provide some traction for approaching hard questions and might "help the Court arrive at answers faithful to the Constitution, its language, and its parts, read together as a consistent whole."[116]

Breyer's approach here, as elsewhere, is candid, in admitting the indeterminacy of traditional legal sources. It is reasonable, in recognizing that there are strong arguments on both sides. And it is sensible, in suggesting that the purposes behind the First Amendment might help frame the issues at stake.

At the same time, Breyer's discussion of purposes spotlights some weaknesses in his approach. To begin, the source of Breyer's "participatory" purpose, which he believes helps drive the Free Speech Clause, is not clear. On

111. *Id.* at 39-109.
112. *Id.* at 43-47 (discussing all of these points).
113. *Id.* at 46.
114. *Id.* at 47 (internal quotation omitted).
115. *Id.* at 48-49.
116. *Id.* at 50.

the one hand, it seems like the source is the First Amendment itself, and the purpose he assigns to it is the familiar one of protecting political speech as a means of enhancing participation and protecting against governmental abuse. If that is so, however, it is not clear what work his broad theme of active liberty is actually doing. True, a specific purpose derived from the language and history of the Free Speech Clause might be consistent with the theme of active liberty, but one could remove active liberty from the equation and the result would be the same.

On the other hand, if the participatory purpose is imposed on the First Amendment, it is not entirely clear what justifies the imposition. It is one thing to suggest, as Breyer does, that some general reference to active liberty might help inform decisionmaking. It seems quite another to look for ways to explain every provision in the Constitution in those terms. To begin, some provisions are going to be quite difficult to explain in terms of "active liberty." (Think of the Eighth Amendment.) More generally, why resort to general, abstract purposes if it is possible to discern the purpose or principle embodied by the relevant provision?[117] Do general purposes override the more specific ones? Why?

Consider Justice Breyer's explanation of his dissent in the voucher case. Breyer concluded that voucher programs are inconsistent with a key purpose of the Establishment Clause, which is to prevent religious strife.[118] He makes no reference here to the larger purpose of promoting participatory government, and his silence is instructive. One *could* connect the prevention of religious strife to the more general goal of fostering political participation, but it's a little tenuous and, more to the point, what is the point? In short, it's not clear what work the concept of "active liberty" does in the voucher case or elsewhere, nor is it entirely clear what work it should do.

Similar questions are raised by Justice Breyer's explanation of *Grutter v. Bollinger*,[119] the University of Michigan Law School affirmative action case. The Court concluded that diversity in higher education is a compelling interest which, if narrowly tailored, can justify an affirmative action program in admissions. Justice Breyer first acknowledges the familiar contrasting views of the Equal Protection Clause. Some believe it embraces a colorblind principle, while others believe it enshrines an antisubjugation principle—though Breyer

117. When interpreting statutes, for example, it would be odd if reference to "active liberty" or the broad goal of democratic self-governance helped solve many questions of meaning and scope. And indeed, when interpreting statutes, Justice Breyer looks to the specific purposes behind the relevant statutes or statutory provisions. *Id.* at 85-101. It is not clear why Justice Breyer would then think that reference to the abstract goal of active liberty can or should do much work in interpreting constitutional provisions, unless he believes that each of the provisions is explained solely or primarily in terms of that goal, which seems unlikely.

118. *Id.* at 120-21.

119. 539 U.S. 306 (2003).

does not call it this.[120] He argues that the latter, more "narrowly purposive" view of the Clause won out in the *Grutter* decision, and he supports that victory.[121] Drawing heavily on Justice O'Connor's opinion in *Grutter*, he explains how the approval of affirmative action enhances democratic participation. Excluding minorities from elite law schools, Justice Breyer argues, might hinder democratic participation by making those shut out feel like "the nation and its governmental processes are *theirs*, not *ours*."[122]

This seems tenuous on two levels. First, thinking of the Equal Protection Clause as furthering the general purpose of enhancing democratic participation may be somewhat helpful, but again it's not clear how much work this approach can or should do. Second, suppose we accept that the Equal Protection Clause ought to be interpreted so as to enhance participatory democracy, as opposed to furthering other, more specific purposes. It is still far from clear that approving affirmative action programs at elite law schools is necessary or useful to achieve that broad and abstract goal. Perhaps affirmative action programs alienate more white students and citizens than they help African-Americans. (We don't know.) If consequences matter, wouldn't Justice Breyer have to consider the possibility that, on balance, affirmative action programs might actually hinder participatory democracy? To be sure, affirmative action is not necessarily inconsistent with the goal of participatory democracy, and judicial restraint would seem to counsel the result reached in *Grutter*. But it is nonetheless difficult to conclude that reference to active liberty ineluctably leads to approving an affirmative action plan in university admissions.

This might seem overly picky, given that Justice Breyer himself admits that his approach might not lead to concrete answers. But it points to a larger problem with Justice Breyer's approach, namely that it seems incurably indeterminate. By this I *do not* mean that it is difficult to tell how concrete cases should come out under Breyer's approach. I mean that we are not entirely sure what Breyer is looking for, other than reasonable solutions to difficult problems. Justice Breyer will consider democratic purposes and consequences, this much we know. But he also seems willing to consider more specific purposes, as well as text, history, structure, and precedent. Will democratic purposes and consequences ever override these other sources? Do they trump text or clear understandings? Precedent? Or do they just fill in gaps and nudge him in one direction or the other? Consequences matter to Justice Breyer, but what sort of consequences, exactly? Justice Breyer, for example, would have struck down the voucher program because of its *potential* consequence of

120. BREYER, *supra* note 11, at 77-78.

121. *Id.* at 77.

122. *Id.* at 83; *see also id.* at 82 (calling Justice O'Connor's opinion "an appeal to principles of solidarity, to principles of *fraternity*, to principles of *active liberty*").

creating religious strife.[123] Judge Richard Posner, by contrast, who is also deeply interested in consequences, would allow the voucher experiment to continue because *we don't yet know* what the consequences are; if they are bad, there will be time to shut down the experiment.[124] Who is right? How do you tell?

Judging is surely more art than science, but there is something a little frustrating, if not disconcerting, about the inability or unwillingness of most jurists to tell us much about how they decide cases. Is it impossible even to identify the priority given different sources? Is it impossible for judges to say, for example, that they look first to the plain language of the text, followed by precedent, followed by tradition or practical consequences or consideration of the overarching purposes of our democratic Constitution? Perhaps this would not be especially constraining, or provide much transparency, but it might be a start.

Chief Justice Roberts used a baseball analogy in his confirmation hearings, comparing judges to umpires calling balls and strikes.[125] But this isn't right. If baseball umpires were like most Supreme Court Justices, they would be able to decide who wins a baseball game by considering a number of "sources," including runs, hits, errors, strikes, balls, double plays, and steals. Umpires would throw all of these sources into the mix and not feel obliged from one game to the next to consider any of them in the same order or to assign them the same weight. This would undoubtedly increase the power of umpires but likely diminish the integrity of the game. To be clear, I am not arguing that Supreme Court Justices can or should act just like umpires, or that umpires should act more like Supreme Court Justices (though the latter would be a humorous, short-lived experiment). I am simply suggesting that an accurate contrast between the two highlights what is sometimes frustrating about Supreme Court decisionmaking.

One virtue of originalism is that at least we know what originalists are looking for—the original meaning of the text. To be sure, sometimes originalists may confuse the ratifiers' expectations with the actual meaning of the text. And things become more opaque when originalism is combined with stare decisis. But that combination seems almost pellucid in contrast to an approach that identifies four or five potential sources of decisionmaking and offers no indication of their relative priority or weight. Whether and how this contrast matters in the public debate about constitutional interpretation is taken up in Part III. First, however, we should take a look at Professor Sunstein's approach.

123. *Id.* at 120-22.

124. Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 90-92 (2005).

125. *See Quotation of the Day*, N.Y. TIMES, Sept. 13, 2005, at A2 ("And I will remember that it's my job to call balls and strikes, and not to pitch or bat.") (quoting then-Judge Roberts).

B. *Minimalism*

Professor Sunstein has for some time advocated an approach to constitutional adjudication that he describes as minimalism.[126] But *Radicals in Robes* is his most animated and pointed presentation, insofar as he portrays minimalism as one participant in a monumental clash with fundamentalism, with nothing less than the health of our country at stake. He is targeting a popular audience, so the hyperbole and occasional scare tactics (e.g., the multiple listings of the disastrous consequences of fundamentalism) may be understandable, but perhaps best left to one side. Professor Sunstein is a serious, prolific, and deservedly eminent scholar, and this book recapitulates and refines some serious ideas.

As Professor Sunstein sees the constitutional landscape, there are four competing approaches to interpretation: (1) perfectionism; (2) majoritarianism; (3) fundamentalism; and (4) minimalism.[127] Perfectionists, according to Sunstein, follow the text of the Constitution but try to put the text in its best light, which means they interpret the text "in a way that reflects their own deepest beliefs."[128] Sunstein cites Warren Court decisions as the best examples of perfectionism, with Brennan and Marshall as some prominent practitioners.[129] Majoritarians are committed primarily to restraint and will not overturn legislation unless it plainly violates the Constitution.[130] Thayer and Holmes are Sunstein's examples here.[131] Although perfectionists and majoritarians have been on the Court in the past, Sunstein argues that at the moment no Justice is either a perfectionist or a majoritarian.[132]

This leaves fundamentalists and minimalists, who are both represented on the current Court and are wrestling over the Constitution. As already suggested, the term "fundamentalism" is sometimes used to denote a methodology (originalism) and sometimes to denote a political program.[133] As a methodology, fundamentalism entails following what the ratifiers expected the relevant constitutional provisions to accomplish.[134] As a political program, fundamentalism entails following the ratifiers' wishes except when doing so would interfere with the achievement of a radically conservative agenda.[135] Because of the term's dual usages, it is sometimes hard to keep straight just

126. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME (1999); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

127. SUNSTEIN, *supra* note 12, at xi-xv, 23-51.

128. *Id.* at xii.

129. *Id.* at 32.

130. *Id.* at 44-50.

131. *Id.*

132. *Id.* at 33, 45.

133. *Id.* at xiii-xiv (using "fundamentalism" in both senses).

134. *Id.* at 26-27.

135. *Id*. at xiv, 78.

who is and who is not a fundamentalist, a task that becomes even more difficult with the occasional use of terms like "false" fundamentalists (who occasionally betray originalism)[136] and "faint-hearted" fundamentalists (who believe in stare decisis).[137] Nonetheless, Sunstein wants to oppose fundamentalism in all its guises for the reasons described earlier: it would lead to bad results (very bad when you include false fundamentalists, less bad when you include faint-hearted fundamentalists), and it is either incoherent, self-defeating, or both.

Sunstein prefers minimalism. Minimalists do not subscribe to any particular theory of interpretation and do not want to do any more than decide one case at a time.[138] They want to "avoid taking stands on the biggest and most contested questions of constitutional law,"[139] and instead believe that more modest answers can be achieved through "incompletely theorized agreements."[140] These agreements leave fundamental questions undecided and consist of a consensus forged around reasonable outcomes that can "attract support from people holding many different theoretical positions."[141] Minimalists don't believe the Constitution is "frozen in the past," but they are also "nervous" about judicial review and wary of those who want to create new rights and liberties that lack a foundation in "our traditions and practices."[142] Minimalists may be conservative or liberal, and minimalism itself "does not dictate particular results."[143] Above all, minimalists believe in "narrow, incremental decisions" that "resolve the problem at hand without also resolving a series of other problems that might have relevant differences."[144] According to Sunstein, Justice Frankfurter was a minimalist,[145] as are both Justices O'Connor and Ginsburg.[146]

Sunstein's categories provide a helpful rough cut regarding interpretive approaches, but they get a little blurry on close inspection. There is some overlap among them, for example, and some individuals straddle the different categories. Majoritarians, for instance, believe primarily in judicial restraint, but some minimalists believe in this as well.[147] Where one ends and the other begins is sometimes hard to tell. Perfectionists believe in the primacy of the text, as do at least some fundamentalists. Sunstein labels as fundamentalists those who follow originalism and occasionally deviate from it; when they

136. *See, e.g.*, *id.* at 133-37.
137. *Id.* at 76-77.
138. *Id.* at 27.
139. *Id.*
140. *Id.* at 27-28 (emphasis omitted).
141. *Id.* at 28.
142. *Id.* at xiii.
143. *Id.* at 29.
144. *Id.*
145. *Id.* at 165.
146. *Id.* at 29-30.
147. *Id.* at 50.

deviate from originalism, they are apparently acting as perfectionists.[148] I suppose the same could be said of minimalists who are motivated by judicial restraint to uphold a law; they might be acting as majoritarians rather than minimalists.

Similarly, it is hard to tell sometimes which decisions fall in which category. *Brown*, for example, is considered on page 36 as an example of an ambitious ruling from the perfectionist Warren Court. But on page 129 Sunstein suggests it might be a minimalist ruling, given that it was preceded by a number of cases that chipped away at *Plessy*. Then on page 247 it is again cited as a cautionary tale for perfectionists, while on page 248 Sunstein notes that because *Brown* "was the culmination of a long line of cases," it "can be defended on minimalist grounds." Two pages later Sunstein appears certain that "[t]he ban on racial segregation" was the product of minimalist rulings—including, presumably, *Brown* itself.[149]

In addition, Sunstein is not always fair when explaining why we ought to reject all three alternatives to minimalism. I've already explained how he stacks the deck against fundamentalists by usually assuming that none of them would respect stare decisis, despite acknowledging that Justice Scalia does.[150] He makes the same move against majoritarians, who he claims would eliminate the right to choose abortion, the right to privacy, and the prohibition against sex discrimination, while allowing the federal government to discriminate on the basis of race and permitting state and federal governments to ban commercial advertising, sexually explicit speech, and "possibly even blasphemy."[151] Sunstein fails to consider that majoritarians might respect stare decisis. He also implicitly assumes that majoritarians would follow the original understanding of the ratifiers, which explains why they would allow sex discrimination and might allow governments to ban commercial advertising and blasphemy. But why would majoritarians have to subscribe to this form of originalism?

Similarly, Sunstein at first suggests that perfectionists take the text seriously, though they recognize, unlike some originalists, that the text often speaks in broad principles that cannot be reduced to a laundry list of specific protections, powers, or rights.[152] But Sunstein then assumes that perfectionists essentially want to enshrine their own preferred list of individual rights and liberties.[153] Is it not possible to imagine a principled perfectionist? And what are minimalists doing, other than enshrining their personal visions of reasonableness into the Constitution, except at a slower, more moderate pace?

148. *Id.* at 32-34.

149. *Id.* at 36, 129, 247, 248, 250; *see also id.* at 64 ("If *Brown v. Board of Education* is right, it is either because perfectionism deserves to have its day(s), or because minimalism justified the Court's decision.").

150. *See supra* note 19 and accompanying text.

151. SUNSTEIN, *supra* note 12, at 49-50.

152. *Id.* at 66-68.

153. *Id.* at xii.

Sunstein also seems inconsistent when rejecting the notion that perfectionism is preferable to minimalism because it has led to better results than minimalism would have produced.[154] Sunstein first suggests that minimalism is responsible, "[t]o a greater extent than we appreciate," for the protection of "our most basic rights."[155] This doesn't tell us much, but the next line of defense reveals perhaps too much. Suppose perfectionists can show that their approach produced a number of great decisions that no other approach would produce, Sunstein asks. "The principled minimalist responds: So what? If the Court had not acted, the democratic process might have done so instead."[156] The alert reader responds: Come again? Recall that Sunstein argues that we must judge interpretive methodologies based on the results they produce. Indeed, his biggest criticism of fundamentalism and majoritarianism is that they would lead to terrible consequences—many of which, it bears observing, could be avoided by "the democratic process" Sunstein would rely upon to correct the deficiencies of minimalism. Yet when faced with the argument that perfectionism produces better results than minimalism, results become a largely irrelevant criterion for judging methodologies. Why?

Putting aside Sunstein's categories and his treatment of non-minimalists, the big question, again, is whether minimalism itself is an attractive approach to deciding cases. Minimalism is sensible and commendable at one level. Its program of judicial restraint, modesty, and moderation are difficult to quarrel with, and its suggestion that judges decide only the case before them is inherently attractive. Moreover, the notion that judges should try to find consensus and avoid conflicts over large questions wherever possible seems wise. And some of Professor Sunstein's examples, such as relying on *desuetude* to strike down rarely enforced antisodomy laws rather than creating a new and potentially expansive right to sexual liberty, are intriguing and attractive.[157]

Nonetheless, minimalism suffers from two serious and related flaws. The first is that important questions cannot be eternally finessed and avoided. The second is that minimalism doesn't tell you how those questions—or any others, really—should be answered as a matter of constitutional law. It tells you how judges should write opinions, suggesting that they should try to reach some agreement on some narrow grounds. But it is quite silent as to the substance of that agreement. At one point, Sunstein seems to flirt with the notion that the Supreme Court should act like a common law court and build slowly on precedent.[158] The dedication of the book to Sunstein's colleague, David Strauss—who has ably advocated this position[159]—is perhaps a nod in the

154. *Id.* at 249-50.

155. *Id.* at 250.

156. *Id.*

157. *See id.* at 97-99.

158. *Id.* at 28-29.

159. David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

same direction. But Sunstein never says as much, and he also suggests that there can be minimalists with originalist leanings, which would seem to negate the possibility that minimalists are simply Straussians.[160]

A few examples illustrate the twin flaws of minimalism. In discussing abortion, Sunstein admits that "[m]inimalists are greatly embarrassed by *Roe*, and rightly so."[161] He acknowledges that the Court "badly overreached" and that the decision was not based in precedent or constitutional text.[162] He argues that the Court instead should have proceeded slowly. Rather than create a full-blown right to abortion, the Court first should have established that women must be allowed to obtain an abortion in cases of rape or when childbirth would endanger their health.[163] This makes some good sense, and Sunstein is probably correct that such rulings would have contributed to a dialogue about abortion rather than dictating a "solution." (One wonders, though, whether this is ultimately a minimalist or majoritarian approach, to use Sunstein's categories.)

But surely the question the Court actually decided in *Roe*—whether women have a right to choose an abortion at least in the first trimester—could not have been dodged forever, and Sunstein does not say how the Court should ultimately have ruled when confronted with that question.[164] Indeed, other than relying on the inherent reasonableness of permitting abortions in cases of rape or medical necessity, he does not explain why absolute bans on abortion violate the Constitution rather than make for bad public policy. Nor does he explain his one-sentence suggestion that bans on "partial birth" abortions might be constitutional.[165] In short, when Sunstein says things like, now that we have *Roe*, "[m]inimalists are willing to agree that the Constitution permits reasonable restrictions on the right to choose abortion,"[166] one is left to wonder: Why, exactly? On what basis can minimalists say much of anything about what "the Constitution" permits or prohibits?

The discussion of gay marriage raises similar questions. Sunstein argues that federal courts should not be in the business of recognizing a right to gay marriage, largely for institutional and strategic reasons.[167] Gay marriage is being debated in legislatures around the country, and it is a divisive social and moral issue. Sunstein believes that legislatures should have time to consider

160. SUNSTEIN, *supra* note 12, at 30.

161. *Id.* at 106.

162. *Id.*

163. *Id.* at 107.

164. *Cf.* SCALIA, MATTER OF INTERPRETATION, *supra* note 2, at 137 (agreeing that "candor and humility" are admirable virtues, "[b]ut they are of little use to the judge who must determine whether and whither the Constitution has wandered, and who is not permitted to render a candid and humble judgment of 'Undecided'").

165. SUNSTEIN, *supra* note 12, at 108.

166. *Id.*

167. *Id.* at 126-29.

solutions, and he sees it as a benefit that there might be a diverse range of possible accommodations, from various forms of civil unions to ordinary marriage.[168] Sunstein is also worried about the backlash that can attend court decisions that press for too much too quickly, as happened in response to the decision by the Massachusetts Supreme Court recognizing a right to gay marriage.[169]

In Sunstein's view, courts should take "exceedingly small steps in this controversial domain" and should strike down only "the most indefensible laws" affecting homosexuals.[170] The central questions should be left for "democratic arenas," with courts acting, at most, as "catalysts."[171] This is sensible advice, but it is not clear what difference there is between minimalism and majoritarianism on this specific issue; presumably, majoritarians would also agree that courts should leave the question of gay marriage to "democratic arenas." Nor is it clear what would make a law regarding gay marriage "indefensible" to minimalists. Finally, if and when the gay marriage issue is presented squarely to a federal court, perhaps after a period of percolation in state legislatures, it is not at all clear what minimalists believe courts should do as a matter of constitutional law.

Implicit in the abortion and gay marriage discussions is a meliorist perspective that sees courts as nudging legislatures ever so gently along a path of moderately progressive politics, never having to do more than tell them when they have really strayed from that path. Gently corrected, legislatures will not simply return to the point from which they strayed but will travel further down the path, eliminating the need for additional court involvement. It is not clear whether courts in this role need bother with the Constitution per se; it seems instead that they should act as juries assigned the task of assessing whether legislation is reasonable and striking down legislative provisions that are clearly unjust, oppressive, or just plain loopy.

Indeed, as the book proceeds, the equation of the Constitution with what seems reasonable and moderate becomes almost automatic. By the last chapter, on "Guns, God, and More," minimalists have become a sort of judicial Goldilocks, rejecting extreme positions on the left and right and always going for the "just right" compromise. Gun control and the Second Amendment? Modest gun restrictions are fine.[172] Voucher programs? If neutral between religious and nonreligious institutions, "probably fine."[173] Campaign finance restrictions? Reasonable ones are fine.[174] Congress's power to enforce the Equal Protection Clause? Minimalists "would be inclined to give Congress the

168. *Id.* at 127.
169. *Id.* at 128.
170. *Id.* at 127.
171. *Id.* at 127-29.
172. *Id.* at 222-23.
173. *Id.* at 227.
174. *Id.* at 232.

benefit of reasonable doubt."[175]

I happen to like all of the results Sunstein favors, as a matter of policy. But to don the tentative perspective of a minimalist, I am not too sure the Constitution requires or supports these results, and minimalism doesn't offer much help on this point. Sunstein's book is written for a popular audience, and he covers a great deal of ground. It is unreasonable to expect him to explain, in detail that would be excruciating to most, the basis for all of his conclusions. But the accumulation of these examples and the increasing rapidity with which they are employed leave a definite impression: minimalists support reasonable public policies, and they favor the Court acting in as gingerly a fashion as possible to foster those policies. This is an attractive position, assuming you are not an ideologue and are ready to give up on the idea that the Constitution has much to say about these various disputes. The question is whether the public, or anyone else, is ready to take that step—or ought to be.

III. DOES IT TAKE A THEORY?

One is left to wonder, after reading these books (if not before), whether a general and truly meaningful theory of interpretation might be impossible to articulate if one remains intellectually honest. One could regard *Active Liberty* and *Radicals in Robes* not as failing in their attempts to articulate a theory, but as admissions that general theories of interpretation will all fall short when it comes to actually deciding cases—as a variation, in other words, of Holmes's famous remark that "[g]eneral propositions do not decide concrete cases."[176] Perhaps only by ignoring the complexities of actual cases and the inevitable clash of contesting principles they occasion, and by fudging about the guidance offered by general theories, could one claim that a general theory of interpretation is truly useful in deciding cases.[177]

Perhaps the most that can be said is precisely what Justice Breyer says in *Active Liberty*: all judges look to essentially the same sources, namely text, history, structure, precedent, and tradition. Beyond that, actual outcomes in close cases will be a matter of emphasis and perspective.[178] What judges ought to do, in this situation, is what Justice Breyer and Professor Sunstein essentially advise: pay attention to consequences and seek to render decisions that make our system of government work better.

At the same time, however, Justice Scalia seems correct that it takes a

175. *Id.* at 240.

176. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

177. Surely Justice Scalia is guilty of some fudging, as he admittedly supplements his theory of originalism with respect for stare decisis. This inevitably complicates his theory if it does not render it hopelessly opaque, leaving his audience of practitioners and academics wondering just when precedent trumps original understanding. *See supra* notes 65-75 and accompanying text.

178. *See supra* notes 102-07 and accompanying text.

theory to beat a theory. Justice Breyer's book, no less than Professor Sunstein's, will likely be assessed not solely or even primarily in terms of whether it offers a helpful, insider's message to judges who recognize that theories do not decide cases. Both books do this quite well, offering advice to judges that, in the abstract, is sensible and wise. But given that the authors are writing against Scalia's originalism, they will likely be judged in terms of whether they succeed in offering an attractive alternative at the level of interpretive theory. By this I mean a reasonably specific basis for deciding cases that is explained and justified. I do *not* mean they need an algorithm, which will spit out answers to a broad array of concrete cases. No theory of interpretation accomplishes this; originalism certainly does not. But at the very least, to succeed at this level, a theory ought to provide a rough sense of the sources that judges will rely upon and the priority or weight they will give to those sources. It should also explain why relying on those sources to strike down legislation is a legitimate exercise of judicial power.

From this perspective, Sunstein's minimalism does not seem especially promising. The basic notion that judges should be cautious and restrained may be a useful and popular side constraint on any theory of interpretation. But it is not itself a theory; it does not help explain or justify why judges should decide concrete cases in one way or another. Indeed, there is no real reason why originalist judges could not also be considered minimalists, provided that they also respect precedent. With little explanation as to *how* or *why* judges should rule in particular cases, when constitutional issues cannot be dodged, it is hard to see how minimalism competes with originalism at the level of interpretive theory.

Justice Breyer comes closer to articulating a theory of interpretation. But his approach seems quite abstract and at times only loosely connected to the text of the Constitution. This is apparent, among other places, in the inherent tension in Justice Breyer's frequent insistence that judges pay attention to "consequences." Justice Breyer emphasizes that judges are to assess whether the consequences of the law or policy under consideration are consistent with the relevant constitutional purposes.[179] But under this formulation, consequences do not do much independent work in the analysis. All theories of interpretation help frame a concrete question, such as: Does this law violate free speech, according to my theory of interpretation of what free speech protects? To answer that question, one has to look at the consequences of the law.

One has the sense, however, that consequences matter more than this for Justice Breyer.[180] Perhaps what he means by paying attention to consequences is that judges should avoid making bad policy. This implication is rendered more plausible when one recognizes that Justice Breyer's overarching theme of

179. BREYER, *supra* note 11, at 120.

180. *See id*. at 115-16.

promoting active liberty is quite capacious, as the discussion of affirmative action illustrates. If Justice Breyer is assessing "consequences" in terms of whether laws promote or hinder active liberty, there may not be much difference between bad policies and unconstitutional laws. Seen in this light, Justice Breyer's approach may not be much different from Professor Sunstein's. Trying to make good policy may be a worthwhile project for federal judges, but it remains essentially unjustified in Justice Breyer's book.[181]

What is particularly unfortunate about the approaches advocated by both Sunstein and Breyer is that they seem to downplay the importance of constitutional text. I cannot know, of course, but I suspect this may be the consequence of feeling the need to distance oneself from originalism; it seems to end up forcing Sunstein and Breyer to distance themselves from the text. Sunstein's criticisms of originalism, and his insistence that it would necessarily lead to horrible results, thus at times seems like an argument that judges should not feel bound by the text of the Constitution. Similarly, in arguing against the harms that arise from "literalist" interpretations of constitutional text, Justice Breyer also seems to suggest that judges should ignore the text when it would preclude reaching sensible results. I say this is unfortunate because any approach that seems to give license to judges to ignore the text seems destined to flop in the public sphere, for the simple reason that it seems to bolster, rather than refute, the caricature of nonoriginalists as lawless.

This is not the place to offer a full-blown theory of judicial review, but I can say this: it seems worth contemplating whether Justice Scalia and originalists are right about the simple point that "doing law" means being faithful to the original meaning of the constitutional text, at least where stare decisis does not pull in a different direction. The text is not perfect, and it is often indeterminate. There is some undeniable tension between a commitment to democracy and subservience to a text that no one alive played a role in formulating or ratifying. But that tension is surely not resolved, indeed it is heightened, by theories that downplay or essentially ignore the text.[182] The tension might be resolved by a thoroughgoing commitment to majoritarianism and the Thayer-Holmes approach of only striking down laws that plainly violate a clear command of the Constitution. But this possibility, however attractive, seems quite implausible today given the inability of most Justices to stay their hands.

Paying attention to the original meaning of the text does not necessarily require an imaginary séance to ask ratifiers how they would have answered

181. *Cf.* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1302 (1995) ("If the Constitution is law, and if we are trying to interpret that law, then the claim that a particular governmental practice, domestic or international, is efficacious, is consistent with democratic theory, and is in some popular or moral sense 'legitimate' just doesn't cut much ice when the question before us is whether that practice is constitutional.").

182. *Cf.* ELY, *supra* note 47, at 3-9.

specific questions of constitutional law. Nor must it mean converting open-ended text into a specific and relatively closed list of rights and powers. It *could* mean, at least in part, trying to understand the principles and purposes behind the often open-ended language of the Constitution and trying to determine how those general purposes and principles play out in modern circumstances. If one were to do this, it might be possible to construct an alternative theory of interpretation that is actually more faithful to the text than the originalism occasionally practiced by Justice Scalia and his conservative followers.[183]

Perhaps because of the contemporary connection between originalism and conservative judges and politicians, those on the left—including Professor Sunstein—seem convinced that a reliance on original understanding would inevitably lead to disastrously conservative, if not antediluvian, results. But as Professor Sunstein also reminds us, somewhat paradoxically, it would be odd indeed if it turned out that the original meaning of the text, properly construed, just happened to mirror the major planks of the Republican Party platform. Works by Akhil Amar and others, moreover, raise the prospect that a turn to history would bolster, not weaken, the progressive's cause.[184] This is not to say that those on the left (or the right) should choose a constitutional theory primarily because it supports their preferred outcomes, but only that the left may have less to fear from text and history than conventional wisdom—and Sunstein's and Breyer's books—suggest.

The ultimate irony of these books is that each contains the seeds of an originalist-oriented approach, but both authors seem determined to distance themselves from originalism rather than to embrace at least some aspects of it. *Active Liberty*, for example, advocates interpreting the document in light of its overarching goal of fostering democratic participation.[185] What is this *but* a form of originalism, albeit at a higher level of generality than the originalism espoused by Justice Scalia?

183. Some have already described such an approach. *See, e.g.*, Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); *see also* James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1336-38 (1997) (criticizing Lessig and other "broad" originalists and arguing in favor of Dworkin's moral reading of the Constitution). I am not endorsing Lessig's approach or any other at this point; I am simply suggesting that this starting position seems more promising and persuasive than theories that do not begin with the text.

184. *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005); Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985); *see also* Akhil Reed Amar, *Rethinking Originalism*, SLATE, Sept. 21, 2005, http://www.slate.com/id/2126880 (arguing that "there are many reasons to question the idea that modern liberals should abandon constitutional history rather than claim it as their own").

185. *See supra* notes 108-10 and accompanying text.

An originalist-oriented approach of the sort I've described is also apparent in Justice Breyer's discussion of the Establishment Clause and the Court's recent cases regarding public displays of the Ten Commandments.[186] Justice Breyer begins his approach by identifying a key purpose of the Establishment Clause, which is to prevent social conflict due to religious divisiveness. He then explains how he relied on this purpose to decide that one of the displays, given its context, could remain, while the other should be removed.[187] This methodological approach is essentially originalist, insofar as Breyer is seeking to distill a principle from the language and history of the text and to apply that principle to modern circumstances.[188] The opportunity missed by Justice Breyer, in my view, is to acknowledge that this sort of approach—looking to the principles that animate the Constitution and its particular provisions—is indeed originalist, and to explain why this version of originalism is most faithful to the open-ended nature of the textual provisions that often form the basis for constitutional litigation.

Radicals in Robes points in a similar direction at times, describing a form of originalism (although calling it perfectionism) that looks to the general principles that animate constitutional provisions.[189] As Sunstein points out, operating at this higher level of generality is actually more faithful to the constitutional text than searching for proof regarding the specific expectations of Framers and ratifiers.[190] Although apparently sympathetic, Professor Sunstein stops short of endorsing this approach, because he believes it inevitably leaves judges too much discretion and will be accompanied by broad and deep rulings.[191] But there is no reason why such an approach could not be accompanied by judicial restraint, which is as much an attitude that cuts across any and all interpretive theories as it is anything else.

What is worth considering, ultimately, is whether those on the left might be more persuasive and influential in the debate over constitutional interpretation if they acknowledged that the original meaning of the text is indeed the correct starting point for deciding cases. Obviously, the text will not always provide determinate answers to concrete cases; often, at best, it will produce a range of possible outcomes.[192] Any full-blown theory of interpretation must also take into account the role that precedent does and should play in decisionmaking—an issue on which Breyer and Sunstein, like Scalia before them, are

186. BREYER, *supra* note 11, at 122-24.

187. *Id.*

188. *See id.* at 124 (arguing that "my opinions sought to identify a critical value underlying the Religion Clauses" and then "consider[] how that value applied in modern-day America").

189. SUNSTEIN, *supra* note 12, at 66-67.

190. *Id.*

191. *Id.* at 245-51.

192. This point, in itself, would be a useful response to the "originalists" who purport to find a slew of specific answers in the Founders' practices and understandings.

frustratingly brief. But text and history are solid and legitimate starting points, and those on the left might do well to acknowledge as much and join debate with those on the right about what that text and history require or permit.

CONCLUSION

It might be useful to end by clarifying what is not at stake. It must be right that most American citizens know and care almost nothing about interpretive methodology. Presumably, they care about results. I certainly do not mean to suggest otherwise or to imply that there is a swirling national debate, akin to discussions over who should be the next American Idol, about how best to interpret the Constitution.

That said, there is undoubtedly a much smaller but influential segment of the public that at least pretends to care about methodology. Columnists like George Will, Charles Krauthammer, and Dahlia Lithwick write about it; articles about methods of interpretation appear in major newspapers and magazines, from the *New York Times* to the *Washington Times*, and from the *American Prospect* to the *National Review*.[193] Law professors certainly argue about it among themselves and with their students. They also write op-eds about the issue[194] and testify before Congress about it.[195] Members of Congress also engage in debates over methodology when considering whether to confirm judges.[196]

193. *See* Robert H. Bork, *The Uphill Fight*, NAT'L REV., Aug. 29, 2005, at 32; Stanley Fish, *Intentional Neglect*, N.Y. TIMES, July 19, 2005, at A21; Charles Krauthammer, *From Thomas, Original Views*, WASH. POST, June 10, 2005, at A23; Dahlia Lithwick, *The Dangling Conversation: The One-Sided "Debate" About Judges*, SLATE, Nov. 4, 2005, http://www.slate.com/id/2129374; John O'Sullivan, *Judicial Activism Encounter*, WASH. TIMES, Oct. 26, 2005, at A17; Cass R. Sunstein, *The Right and the Law: The Right-Wing Assault*, AM. PROSPECT, Mar. 1, 2003, at A2; Edward Whelan, Brown *and Originalism: There's More than One Way To Get It Right*, NAT'L REV. ONLINE, May 11, 2005, http://www.nationalreview.com/comment/whelan200505110758.asp; George F. Will, *Some Questions for the Nominee*, WASH. POST, Sept. 8, 2005, at A29.

194. *See, e.g.*, Randy E. Barnett, *Advice for the Senate: Ask the Nominee To Interpret Some Key Constitutional Clauses*, RECORDER (San Francisco), July 29, 2005, at 5; Jeffrey Rosen, *Senators Should Focus on Roberts' Vision*, CHI. SUN-TIMES, July 22, 2005, at 59.

195. For example, Professors Viet D. Dinh, Nicholas Q. Rosenkranz, and Sarah Cleveland testified before the House Judiciary Committee's Subcommittee on the Constitution regarding reference to foreign law by United States courts interpreting our Constitution. *See House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing on H.R. 97 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 7-11, 28-42 (2005). Professors Vicki Jackson and Michael Ramsey testified at a similar hearing in 2004. *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. 568 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 14-28 (2004).

196. *See, e.g.*, Judges and Our Constitution, 109 CONG. REC. H8135 (daily ed. Sept. 20, 2005); Constitutional Guidelines for Supreme Court Decisions, 109 CONG. REC. H3105 (daily ed. May 10, 2005); Judicial Nominations, 109 CONG. REC. S3962 (daily ed. Apr. 20,

In this smaller and rarefied world, there is a debate about methodology. Whether it is always informed or rarely so, always sincere or rarely so, it is a debate, and I think it is fair to say that the debate matters. Clearly, Justices Breyer and Scalia, along with Professor Sunstein and plenty of other academics, believe that the debate matters. It may only indirectly trickle down to influence who is nominated to become a judge and whether that nomination is successful. Or its influence might only come through law students who eventually go on to become judges or participate in the process of confirming them. Regardless of its precise course of influence, we can be reasonably confident that the debate is sufficiently important that the right response to the question of interpretive methodology is not "Who cares?"

Active Liberty and *Radicals in Robes* contribute to this debate, and each offers valuable insights and sensible advice. Both books also raise important and serious questions about originalism. For reasons I have explained, however, I do not think either provides a persuasive alternative to originalism, because neither fully explains and successfully justifies how judges should decide cases. Justice Breyer comes closer than Professor Sunstein, but he nonetheless leaves a great deal unexplained and unjustified.

Perhaps I expect too much and have imposed an impossible burden. Perhaps constitutional text tells us virtually nothing about how a number of important, concrete cases should be decided. To suggest, as I have, that theories of interpretation should nonetheless be tied to the text could be seen, from this perspective, as advocating intellectual dishonesty. Indeed, one might say that the whole problem with Scalia's originalism is that he is disingenuous in suggesting that it offers real guidance in actual cases, rather than a convenient justification for results reached by other means. A more forthright approach would come clean on the indeterminacy of the text and proceed to explain why the alternative—perhaps minimalism, perhaps some reliance on broad purposes like enhancing active liberty—is justified. Seen most sympathetically, one might read both *Active Liberty* and *Radicals in Robes* as trying to do just that.

Notice that even this approach, however, would tacitly accept that the text ought to control when it is relatively clear. To fully succeed, moreover, it would have to explain why some textual provisions are hopelessly indeterminate and why a particular non-textualist approach (or non-interpretivist approach, to use an old phrase) is justified when construing those provisions. This is one way to understand Ely's project in *Democracy and Distrust*, which offers a theory for interpreting not all constitutional provisions but only those that are open-ended.[197] Even on this more sympathetic account, however, I think it fair to say that *Active Liberty* and *Radicals in Robes* are not

2005) (statement of Sen. Durbin); Sen. Orrin Hatch, *Roberts Will Interpret Laws, Not Make Them*, DESERET MORNING NEWS (Salt Lake City), Sept. 12, 2005, at A8.

197. *See* ELY, *supra* note 47, at 1-41; *see also* G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 567-70, 576-77 (2002) (discussing Ely's rejection of literal or "clause-bound" interpretivism as hopeless).

entirely successful. Neither author spends much time explaining whether his approach applies to all textual provisions or only to indeterminate ones, nor does either author spend much time demonstrating that particular provisions are truly indeterminate. Indeed, to the extent Professor Sunstein wants to argue that originalism would certainly lead to disastrous consequences,[198] he gives the impression that the original meaning of the text is actually quite clear. So, too, does Justice Breyer, in suggesting that following the literal meaning of the text would produce serious harms.[199]

At the end of the day, I imagine those on the right (and some on the left) will read these two books and charge that they do not offer a completely successful rebuttal to originalism, because neither offers a persuasive and coherent alternative. Perhaps I am wrong, but that charge seems right.

198. *See supra* note 83 and accompanying text.

199. *See supra* note 87 and accompanying text.