

## WAS ANN COULTER RIGHT? SOME REALISM ABOUT “MINIMALISM”

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### INTRODUCTION

Ever since the Warren Court rewrote much of the Bill of Rights and the Fourteenth Amendment, there has been a debate within legal academia about the legitimacy of this judicial law making.<sup>1</sup> Very little popular attention was paid, at least in the last several decades, to this problem. More recently, however, the issue of the legitimacy of judicial law making has begun to enter the realm of partisan popular debate. This is due to the fact that Republicans controlled the White House for six years and a majority in the Senate for almost all of that time, that they have announced, as it were, a program of picking judges committed to adjudication rather than legislation, and finally, that the Democrats have, just as vigorously, resisted Republican efforts. Cass Sunstein, a professor at the University of Chicago Law School,<sup>2</sup> and now a visiting professor at Harvard Law School,<sup>3</sup> has written a provocative book purporting to be a popular, yet scholarly critique of the sort of judges President George W. Bush has announced that he would like to appoint. Is Sunstein’s effort an objective undertaking, or is it partisan politics with a thin academic veneer? If Sunstein’s work (and that of others on the Left in the

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1. Compare, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997) (critical of Warren Court efforts), with, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 88 (1980) (defending the Warren Court efforts insofar as they were “representation-reinforcing,” that is, contributing to the participation of all in the political process and rejecting the strict interpretation advocated by Chief Justice Warren Burger and others).

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3. John H. Watson, Jr., Visiting Professor of Law, Harvard Law School.

academy) is something more (or less) than it appears to be, can the work of an unabashedly partisan popular commentator help us to figure out what is happening in constitutional jurisprudence? In what follows, I will first review Ann Coulter's critique of "liberalism," and then I will proceed to suggest that Coulter's criticism might well be applied to Sunstein's approach to constitutional interpretation, insofar as it seems more politically partisan than objectively valid. I will conclude by suggesting that the "radicals" whom Sunstein excoriates are actually those most faithful to our constitutional tradition.

### I. ANN COULTER ON LIBERALS VS. CONSERVATIVES

Ann Coulter is one of the most delightfully provocative pundits currently pontificating. She has gored more than the usual number of sacred oxen and is joyously unafraid to speak her mind in a political climate that—at least in the case of what is now called the mainstream media—is not kind to iconoclastic conservatives. Coulter is most infamous, perhaps, for her suggestion that the way to defeat what President George W. Bush now calls "Islamic fascists"<sup>4</sup> and what others call "Islamofascism"<sup>5</sup> is for the United States to "kill their leaders and convert them to Christianity,"<sup>6</sup> and for her observation that some ostensibly grieving 9/11 widows actually seemed to be taking too much joy at the deaths of their husbands.<sup>7</sup> Coulter nevertheless has an extraordinary ability to unmask hypocrisy. In particular, she took aim at liberals in her 2002 book *Slander*<sup>8</sup> and suggested that their principal means of operation was to vilify conservatives rather than seriously advancing arguments to rebut conservative positions on social issues. As she put it:

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4. President George W. Bush, The President's News Conference, 42 WEEKLY COMP. PRES. DOC. 1125, 1131 (June 14, 2006).

5. Editorial, *It's Fascism*, WASH. TIMES, Aug. 12, 2006, at A12.

6. See Jim Ritter, *Muslims See a Growing Media Bias*, CHI. SUN-TIMES, Sept. 4, 2006, at 3 ("After Sept. 11, columnist Ann Coulter wrote, 'We should invade their countries, kill their leaders and convert them to Christianity.'") (quoting Ann Coulter, *This Is War: We Should Invade Their Countries*, NATIONAL REVIEW ONLINE, Sept. 13, 2001, <http://www.nationalreview.com/coulter/coulter.shtml>).

7. See ANN COULTER, GODLESS: THE CHURCH OF LIBERALISM 103, 112 (2006) (calling the 9/11 widows "Witches of East Brunswick" and "harpies" who enjoy their husbands' deaths and are "reveling in their status as celebrities and stalked by grief-arazzis").

8. ANN COULTER, SLANDER: LIBERAL LIES ABOUT THE AMERICAN RIGHT (2002).

Liberals dispute slight reductions in the marginal tax rates as if they are trying to prevent Charles Manson from slaughtering baby seals. Progress cannot be made on serious issues because one side is making arguments and the other side is throwing eggs.... Prevarication and denigration are the hallmarks of liberal argument. Logic is not their *métier*. Blind religious faith is.

The liberal catechism includes a hatred of Christians, guns, the profit motive, and political speech and an infatuation with abortion, the environment, and... "affirmative action"[]. Heresy on any of these subjects is, well, heresy. The most crazed religious fanatic argues in more calm and reasoned tones than liberals responding to statistics on concealed-carry permits.<sup>9</sup>

Or, again:

The spirit of the First Amendment has been effectively repealed for conservative speech by a censorious, accusatory mob. Truth cannot prevail because whole categories of thought are deemed thought crimes.

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In May 2001, former Clinton strategists James Carville and Paul Begala released a "Battle Plan for the Democrats" on the op-ed page of the *New York Times*. Their central piece of advice was for Democrats to start calling President George Bush names. "First," they said, liberals must "call a radical a radical." Other proposals included calling Bush dangerous and uncompassionate: "Mr. Bush's agenda is neither compassionate nor conservative; it's radical and it's dangerous and the Democrats should say so."

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Instead of actual debate about ideas and issues with real consequences, the country is trapped in a political discourse that increasingly resembles professional wrestling. The "Compassionate Conservative" takes on the "Republicans Balancing the Budget on the Backs of the Poor." The impossibility of having any sort of

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9. *Id.* at 2.

productive dialogue about civic affairs has become an immovable reality.<sup>10</sup>

Some of this is a bit over the top, but, adding it all up, a sharp and succinct point is still being made. In short, the Left refuses to debate the Right and instead unleashes hate speech in order to demagogue voters.

In this Article, I argue that Coulter's criticism might also be leveled against at least some of the criticism of conservative jurisprudence prevailing in legal academia. My particular target for this exercise is Professor Sunstein's recent book, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America*.<sup>11</sup> As I will explain below, Sunstein does engage in some thoughtful jurisprudential analysis, but the thrust of his book, as the title suggests, is that United States Supreme Court Justices Clarence Thomas and Antonin Scalia, and others like them on the lower courts, represent a threat to the American republic. This, to Sunstein, justifies calling these justices "radicals" and consigning them to the "extreme right wing." In reality, Justice Thomas, Justice Scalia, and others like them are merely engaged in what we might describe as traditionally conservative jurisprudence. Coulter's words, aimed at a former Democratic presidential candidate, might have some application to Sunstein:

Striking an especially high note in the 2000 presidential campaign, Vice President Al Gore aggressively implied that Bush's Supreme Court nominees would bring back slavery. Not only that, but Justices Antonin Scalia and Clarence Thomas were already hard at work on the Republicans' pro-slavery initiative. In numerous campaign speeches, Gore said Bush's pledge to appoint "strict constructionists" to the Court—such as Scalia and Thomas—reminded him of "the strictly constructionist meaning that was applied when the Constitution was written and how some people were considered three-fifths of a human being." If you were one of

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10. *Id.* at 4, 6, 8 (quoting James Carville & Paul Begala, Op-Ed., *A Battle Plan for the Democrats*, N.Y. TIMES, May 27, 2001, § 4, at 9).

11. CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005) [hereinafter SUNSTEIN, *RADICALS IN ROBES*].

the swing voters waiting to see which of the candidates supported slavery, at least Gore had cleared up the confusion.<sup>12</sup>

Gore got it wrong, as Coulter explains: "At the risk of seeming overly legalistic, Bush, Scalia, and Thomas do not subscribe to a legal philosophy that would bring back slavery. 'Strict constructionism' means only that judges should interpret laws rather than write them. It has nothing to do with slavery."<sup>13</sup> Sunstein's suggestion that Republican judicial nominees are "radicals" or "extreme right wingers," if not quite as fanciful as accusing them of advocating repeal of the Thirteenth Amendment, is still misleading and quite possibly is equally devoid of substance.

## II. SUNSTEIN AND ME

I came across Sunstein's book at a local Barnes and Noble, and, as academics are wont to do, since I write in the same area as he does, I turned to the index to see if I figured into Sunstein's argument. I noticed two entries for my name<sup>14</sup> and then looked them up in the text. Both instances referred to the same quote.<sup>15</sup> In one, the quote was used in italics to headline a chapter,<sup>16</sup> and in the other it was buried in the text of a different chapter.<sup>17</sup> The quote came from an article I had written about Justice Thomas for a short-lived but daring magazine, *Legal Affairs*,<sup>18</sup> which, possibly quixotically, sought to bring the work of legal scholars to a popular audience. Since most of these scholars were liberals, *Legal Affairs* was particularly kind in offering me, a conservative, a forum, since the magazine sought to achieve some sort of ideological balance. My article—really a book

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12. COULTER, *supra* note 8, at 9.

13. *Id.*

14. *See* SUNSTEIN, RADICALS IN ROBES, *supra* note 11, at 278.

15. The quote is: "For us, and for Clarence Thomas, it's more important to get it right than to maintain continuity." Stephen B. Presser, *Touting Thomas: The Truth About America's Most Maligned Justice*, LEGAL AFFAIRS, Jan.–Feb. 2005, at 68, 69 [hereinafter Presser, *Touting Thomas*].

16. *See* SUNSTEIN, RADICALS IN ROBES, *supra* note 11, at 217.

17. *See id.* at 76–77.

18. Presser, *Touting Thomas*, *supra* note 15, at 68. *Legal Affairs* published issues six times per year from March 2002 until March 2006. LEGAL AFFAIRS, About Us, <http://legalaffairs.org/aboutus/index.msp> (last visited Feb. 15, 2006). It was "the first general interest magazine about law . . . with the goal of stirring a challenging, vibrant conversation." *Id.*

review of a recent biography of Justice Thomas<sup>19</sup>—sought to explain why he was one of George Bush’s two favorite justices, much like another *Legal Affairs* piece I had written and that ended up as the cover story<sup>20</sup> (the cover provocatively consisting of a depiction of a possible Bush court made up entirely of clones of Justices Thomas and Scalia).

Because a Court of Justices Scalia and Thomas clones is apparently just what Sunstein fears, it is not surprising that he read my *Legal Affairs* article on Justice Thomas. He picked up on a point I had tried to make in the *Legal Affairs* piece, which was the difference between the jurisprudence of Justice Thomas and that of Justice Scalia. Justice Scalia had explained to Justice Thomas’s biographer that he felt bound by prior precedents of the Court in interpreting constitutional provisions, but that Justice Thomas did not feel so constrained and was more interested in arriving at the constitutional interpretation that was most consistent with the original understanding.<sup>21</sup> Identifying myself with Justice Thomas’s jurisprudence and that of some other conservative academics, particularly Gary Lawson of Boston University School of Law—who, like Justice Thomas, has argued that, unlike the common law, constitutional adjudication should not involve the assumption that stare decisis is the binding rule<sup>22</sup>—I had written that “[f]or us, and for Clarence Thomas, it’s more important to get it right than to maintain continuity.”<sup>23</sup> Taking the quote a bit out

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19. KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* (2004).

20. Stephen B. Presser, *The Scalias Court: Bush Understands That Justices Should Interpret Laws and Protect Our Liberties the Way the Founders Intended*, *LEGAL AFFAIRS*, Sept.–Oct. 2004, at 26.

21. Presser, *Touting Thomas*, *supra* note 15, at 68–69.

22. *Compare* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 19 (2004) (Thomas, J., concurring) (writing that the Establishment Clause should not be incorporated and thus should not apply to the states via the Fourteenth Amendment), *and* Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (“I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”), *and* Scott D. Gerber, “My Rookie Years Are Over”: Clarence Thomas After Ten Years, 10 AM. U.J. GENDER SOC. POL’Y & L. 343, 345 (2002) (“Justice Thomas seems even more willing now than he was during his acclimation period to say that well-established precedents and/or entire areas of the law should be rethought.”) *with* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23 (1994) (suggesting that the Supreme Court should never choose precedent over actual constitutional meaning), *and* Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007) (reiterating that the Court should rely on constitutional meaning over precedent but allowing for a narrow exception).

23. Presser, *Touting Thomas*, *supra* note 15, at 69.

of context, at least insofar as it was used as a chapter heading,<sup>24</sup> Sunstein took my reference to "us," that is, to Justice Thomas and a few conservative academics, to refer to a purported group of judges Sunstein calls "fundamentalists"—judges who, Sunstein believes, are comparable to religious fundamentalists in their zeal to overturn prior precedents.<sup>25</sup> This likening of conservative judges to the Taliban or Jerry Falwell is, of course, just the sort of name calling against which Coulter quite properly rails.

#### A. *Sunstein's Contribution*

Sunstein's labeling conservatives as "fundamentalists"<sup>26</sup> strikes me as a bit too facile, but I do not mean to suggest that Sunstein's analysis is completely without merit. Some of his fellow liberals, writing in blurbs on the back cover of the book, suggest that Sunstein is "[o]ne of the nation's leading scholars of constitutional law,"<sup>27</sup> that he is "one of our country's finest legal scholars,"<sup>28</sup> that his argument "explains why it is important to prevent the right-wing takeover of the federal judiciary,"<sup>29</sup> that he "clarifies the stakes in current struggles over the role of courts in American democracy," and that he "does so with the energy, clarity, and scholarly commitment for

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24. To be fair to Sunstein, while the use of the quote in *Radicals in Robes* seems to refer generally to "fundamentalists," the subject of the chapter, see SUNSTEIN, RADICALS IN ROBES, *supra* note 11, at 217, he appears to recognize that what I said ought to apply only to a smaller, "radical" subset of fundamentalists, which includes merely "a number of constitutional scholars [who] have recently argued that in constitutional law, the idea of stare decisis has no place." *Id.* at 76. He calls the views of these people "extreme," and explains that "[i]n [his] view, faint-hearted fundamentalism is the only plausible form of fundamentalism." *Id.* at 77.

25. *Id.* at xiii ("As a constitutional creed, fundamentalism bears an obvious resemblance to religious fundamentalism.") (presumably referring to persons such as Jerry Falwell); see also *id.* at xiv ("'Strict construction' of the Constitution finds a parallel in literal interpretation of the Koran or the Bible.") (presumably mentioning fundamentalism as a reference to the Taliban or others who believe in Sharia, or Islamic law).

26. See, e.g., *id.* at xiii–xiv.

27. Mark Tushnet, then Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center; now William Nelson Cromwell Professor of Law, Harvard Law School.

28. Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment, Yale Law School.

29. Sanford Levinson, W. St. John Garwood and W. St. John Garwood, Jr., Centennial Chair in Law, University of Texas School of Law; Professor of Government, University of Texas.

which he has become so widely known."<sup>30</sup> Chosen blurbs for one's books do not come from one's critics, and while I think there are major difficulties with Sunstein's analysis, of a kind that Coulter correctly flags, he certainly gets some things right and does offer, especially for non-lawyers, a classification scheme that is helpful for understanding the last half century of constitutional law.<sup>31</sup>

For example, I think Sunstein correctly finds fault with the assumption by some conservative judges that the Second Amendment was designed to give an individual a right to the ownership of firearms of a kind that might forbid governmental prohibition of gun owning.<sup>32</sup> It is more likely, as Sunstein explains, that the Second Amendment's language—that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed"<sup>33</sup>—is concerned with a collective responsibility of the American people to maintain militias, such as state and local armed forces, or the National Guard, for their collective defense.<sup>34</sup> Further, Sunstein is probably on firm ground when he rejects the opinion of some conservatives that the Fourteenth Amendment was designed to give us a "color-blind" Constitution, and also when he argues that the original understanding of the Fourteenth Amendment permitted governmental measures favoring formerly disenfranchised blacks over the race that had formerly held them in bondage.<sup>35</sup> Some important, recent scholarship has confirmed that this sort of discrimination on the basis of race was practiced by Congress shortly after the passage of the Fourteenth Amendment.<sup>36</sup>

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30. Richard Pildes, Sudler Family Professor of Constitutional Law, New York University School of Law.

31. For Sunstein's classification scheme, see, for example, SUNSTEIN, *RADICALS IN ROBES*, *supra* note 11, at xi–xiii, 23–51.

32. *Id.* at 217–23.

33. U.S. CONST. amend. II.

34. See SUNSTEIN, *RADICALS IN ROBES*, *supra* note 11, at 219; see also SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* at x–xi (2006) (exploring the original understanding of the Second Amendment and indicating that it is less about individual or collective rights and more about civic rights and obligations).

35. SUNSTEIN, *RADICALS IN ROBES*, *supra* note 11, at 131–50.

36. Sunstein indicates that "[t]he best discussion, from which [he] borrow[s] here," is Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985). SUNSTEIN, *RADICALS IN ROBES*, *supra* note 11, at 259 n.5. My favorite article making this point is Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998).

Thus, the original understanding of the Fourteenth Amendment might be construed to support affirmative action programs, such as, for example, the kind practiced by the University of Michigan Law School and upheld by the U.S. Supreme Court in *Grutter v. Bollinger*.<sup>37</sup> By spotlighting some of the inconsistencies among those jurists—such as Justices Scalia and Thomas, who claim to adhere to a philosophy that requires following the “original understanding” of constitutional provisions<sup>38</sup>—Sunstein may actually be contributing to a more consistent jurisprudence of “originalism.”<sup>39</sup> Sadly, however, Sunstein seeks no such end. Rather, he aims to disparage “originalism” itself.

### B. *Sunstein’s Four Categories of Constitutional Jurisprudence*

Sunstein’s disparagement of “originalism” is not limited to his ridicule of the notion that it is more important to reach the right result in constitutional adjudication than to maintain continuity with the past. It is also evident in his creation of a four-part division for constitutional jurisprudence, with only one part warranting his approval.

Sunstein describes one of these four jurisprudential strands as “perfectionism.” Constitutional “perfectionists,” as Sunstein describes them, believe that it is the job of the justices to extend and “perfect” principles such as a right to privacy, individual liberty, or equality—which purportedly are inherent in the document—and to apply them to situations that were not contemplated by the Framers and perhaps even in ways that the Framers might not have approved.<sup>40</sup> “Perfectionism” is thus inconsistent with “originalism” and, indeed, is the liberal theory of a “Living Constitution” against which

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37. 539 U.S. 306 (2003).

38. See SUNSTEIN, *RADICALS IN ROBES*, *supra* note 11, at 25–26. It is clear that Sunstein believes that Justice Scalia, Justice Thomas, and those who believe in a “Constitution in Exile,” *id.*, such as Chief Judge Douglas H. Ginsburg of the United States Court of Appeals for the District of Columbia Circuit, *id.* at 54 (pointing to Judge Ginsburg and indicating that “[f]undamentalists endorse an ‘originalist’ approach to constitutional interpretation”), fall into this category. Sunstein refers to them as “fundamentalists.” *Id.* at 26.

39. Perhaps some clarification of terms might be of use here. “Originalists” are judges or scholars who believe that it is appropriate to interpret the Constitution according to the meaning it would have had to those who ratified it. This seems to be Sunstein’s understanding of the term “originalism.” *Id.* at 26.

40. For Sunstein’s description and critique of “perfectionism,” see *id.* at xii, 31–41.

“originalists,” such as former Chief Justice William H. Rehnquist, have battled.<sup>41</sup> Leading “perfectionists,” according to Sunstein, include such justices as William O. Douglas, William J. Brennan, Thurgood Marshall, and, above all, Earl Warren.<sup>42</sup> These justices were willing, in effect, to rewrite the Bill of Rights and the Fourteenth Amendment to promote the policies they favored. Sunstein also argues that Chief Justice John Marshall was a “perfectionist,”<sup>43</sup> although I think Justice Marshall’s understanding of the document actually may not have been that far from what the Framers intended. And so the truth is that Justice Marshall was more of an “originalist” than a “perfectionist.”<sup>44</sup> Sunstein appears to reject “perfectionism” as a preferred constitutional methodology,<sup>45</sup> although nowhere does he explicitly repudiate any of the purportedly dubious achievements of the “perfectionists.”

According to Sunstein, a second constitutional theory, “majoritarianism,” is the notion that justices should hesitate to strike down the work of state or federal legislative majorities as unconstitutional unless there is a very clear violation of the Constitution.<sup>46</sup> This was a theory that once had considerable sway in the academy—especially as expressed by the great constitutional

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41. See, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

42. SUNSTEIN, RADICALS IN ROBES, *supra* note 11, at 32.

43. *Id.* at 34–35.

44. See, e.g., R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT (2001). To quote from a very insightful review of Newmyer’s very insightful book:

Marshall was a conservative, who valued property and individualism and believed in the original intent of the Framers. Although Marshall declared in *McCulloch* that the Constitution needed “to be adapted to the various crises of human affairs,” Newmyer dismisses the notion of portraying the chief justice as the father of “modern constitutional relativism.” “It is the historical reality of intent, more even than his unique concept of nationalism or his concept of balanced federalism,” Newmyer argues, “that locates Marshall in his own age and distinguishes his jurisprudence from ours.”

Timothy S. Huebner, *R. Kent Newmyer and the Heroic Age of Judicial Biography?*, H-LAW, Mar. 2002, <http://www.h-net.org/reviews/showrev.cgi?path=64131020447313> (book review) (quoting Newmyer, *supra* at 480). As Huebner’s remarks suggest, Sunstein may be in error about the nature of Marshall’s jurisprudence. In Sunstein’s terms, Marshall may be more of a “fundamentalist” than a “perfectionist.”

45. SUNSTEIN, RADICALS IN ROBES, *supra* note 11, at 35 (“But I have many doubts about the Warren Court. And for the contemporary United States, I believe, and I shall attempt to show, that minimalism is best and that both fundamentalism and perfectionism are dangerous.”).

46. *Id.* at xii–xiii, 44–50.

scholar James Bradley Thayer<sup>47</sup>—and once had great proponents on the Court, such as Justice Oliver Wendell Holmes, Jr., and the second Justice John Marshall Harlan. This theory—which is probably also reasonably and accurately described by the term “judicial restraint”—has few, if any, adherents on the Court today, according to Sunstein,<sup>48</sup> who seems to suggest merit in the notion but stops short of embracing it.

A third theory, and the one most strongly condemned by Sunstein, is what he labels constitutional “fundamentalism.” This is the theory that the Constitution should only be interpreted in a manner consistent with the original understanding of those who ratified it. Thus, for “fundamentalists,” the meaning of the document is fixed in time and not subject to expansion or alteration by those interpreting it. “Fundamentalism” thus completely rejects “perfectionism,” while “fundamentalists” argue for a jurisprudence that is faithful to the aims of the Constitution’s Framers as understood at the time of the ratification of the Constitution or its amendments.<sup>49</sup> Leading “fundamentalists” are Justices Scalia and Thomas,<sup>50</sup> and Sunstein finds the essence of “fundamentalism” in my statement that “[f]or us, and for Clarence Thomas, it is more important to get it right than to maintain continuity.”<sup>51</sup> While at one point Sunstein appears to come close to endorsing a weak or “faint-hearted” version of “fundamentalism,”<sup>52</sup> he chooses the term “fundamentalist” because he wishes to disparage strong constitutional “fundamentalism” as suffering from the same kind of mindless zealotry as those religious fundamentalists who would insist on a rigid reading of the Koran or the Bible according to its original, literal understanding.<sup>53</sup> This is a nice rhetorical trope, but in tarring Justices Scalia and Thomas (to say nothing of me) with this brush, Sunstein manages to obscure the subtleties in “originalist” thought<sup>54</sup> and to engage in the kind of

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47. See generally Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993).

48. See SUNSTEIN, *RADICALS IN ROBES*, *supra* note 11, at 50 (“But as I have emphasized, majoritarianism has no defenders on the federal bench.”).

49. See *id.* at xiii–xiv, 25–30, 53–78.

50. *Id.* at 26.

51. *Id.* at 76–77, 217.

52. *Id.* at 77.

53. *Id.* at xiv.

54. For one of the most subtle treatments of “originalism,” arguing that it is the most viable theory of constitutional interpretation, see KEITH E. WHITTINGTON, *CONSTITUTIONAL*

activity Coulter condemned. To lump Justices Scalia and Thomas in with Osama bin Laden or Jerry Falwell, as Sunstein appears to do, is not the move of an entirely objective analyst.

Sunstein himself adheres to a fourth theory, which he labels “minimalism.”<sup>55</sup> One might as well call this “Goldilocksism” because a “minimalist” believes that the Constitution can and should be made more progressive, but just not too much. The “perfectionists” went too far; the “fundamentalists” are not willing to go far enough; but “minimalists” can get it just right. As Sunstein puts it, “[t]heir distinguishing feature is that they believe in narrow, incremental decisions, not broad rulings that the nation may later have cause to regret.”<sup>56</sup> Two of the most important “minimalists” in recent history are Justice Anthony Kennedy and retired Justice Sandra Day O’Connor, who are or were, respectively, the justices widely regarded as “swing” votes with the most influence in determining the outcome in major cases. Thus, what Justice O’Connor did with affirmative action and what Justice Kennedy did with consensual homosexual conduct are regarded as acts of “minimalists.”<sup>57</sup> Perhaps Sunstein regards “minimalism” as some sort of noble Aristotelian mean, but “minimalism,” as practiced by Justice Kennedy and Justice O’Connor, seems, at least in these instances, to look a little too similar to what Coulter describes as “liberalism.” Thus, if “minimalism” does not condone completely arbitrary behavior on the part of the Court, then it at least results in reinforcing the academy’s predominantly liberal view of constitutional law.

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INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999). For Justice Scalia’s version of “originalism,” usually now described as “textualism,” see, for example, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997). For my argument for “originalism,” see, for example, STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED (1994) [hereinafter PRESSER, RECAPTURING THE CONSTITUTION].

55. SUNSTEIN, RADICALS IN ROBES, *supra* note 11, at xii, 27–31.

56. *Id.* at xiii.

57. *Id.* at 92–99 (arguing that Justice Kennedy’s opinion on consensual homosexual acts in *Lawrence v. Texas*, 539 U.S. 558 (2003), can be read as a “minimalist” decision); *id.* at 31 (suggesting that Justice Kennedy is a “minimalist”); *id.* at 146–50 (reading as “minimalist” Justice O’Connor’s opinion upholding “affirmative action” in *Grutter v. Bollinger*, 539 U.S. 306 (2003)); *id.* at 29–30 (labeling Justice O’Connor as a “minimalist”).

C. *Sunstein's Problems with "Fundamentalism"*

Sunstein's embrace of "minimalism" and his rejection of "fundamentalism" appear to occur because of his adherence to particular political views. Sunstein, the champion of "minimalism," makes clear that he prefers it to "fundamentalism" because the "fundamentalists," following their interpretive strategy of following the original understanding of the Framers and ratifiers, would significantly alter constitutional law in a manner that would permit things that Sunstein simply declares are unacceptable.<sup>58</sup> These include, for example, abolishing the "right to privacy,"<sup>59</sup> first discovered in penumbras and emanations of the Constitution in *Griswold v. Connecticut*—where the Court struck down prohibitions on the sale of contraceptives to married adults<sup>60</sup>—and then extended in *Roe v. Wade* to include a constitutional right to terminate pregnancies.<sup>61</sup> "Fundamentalists" finding no explicit "right to privacy" in the Constitution might overturn both decisions. If "fundamentalists" were in charge of the Court, expansive readings of the federal government's power to regulate commerce could end, and this might mean that the Clean Air Act, the Clean Water Act, the Federal Communications Commission, and the Occupational Safety and Health Administration might all be found to lack a constitutional basis.<sup>62</sup>

Because "fundamentalists" might not interpret the Equal Protection Clause of the Fourteenth Amendment as broadly as would "minimalists," the federal government might be able to use racial profiling in the war on terror, or states might be permitted to discriminate on the basis of sex (say to operate single-sex military academies) or even race.<sup>63</sup> Sunstein appears to hint darkly that there could be racial discrimination of a kind that was practiced under

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58. See, e.g., *id.* at xiv ("[F]undamentalism can be shown to be destructive and pernicious. Fundamentalism would make Americans much less free than they now are. It would constrict the right to free speech. It would eliminate the right of privacy. It might well allow states to establish official religions. It would do much more.").

59. *Id.*

60. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

61. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

62. SUNSTEIN, *RADICALS IN ROBES*, *supra* note 11, *passim*.

63. See, e.g., *id.* at 2.

*Plessy v. Ferguson*,<sup>64</sup> but given that “fundamentalists” appear, as Sunstein concedes, to believe in a “color-blind” Constitution, this seems, even if the “fundamentalists” were in charge, very unlikely.<sup>65</sup> Because “fundamentalists” would interpret the First Amendment’s Establishment Clause according to its original understanding in 1791 as a federalism measure that applied only to the federal government—to keep it from overturning the three then-existing state establishments of religion and the various religious restrictions on the franchise or holding of office that existed in at least eleven of the thirteen original states<sup>66</sup>—this might mean that states could establish official churches, which, for example, could be done by the Mormons in Utah.<sup>67</sup>

Given the “fundamentalist” view of expanded executive power, Sunstein warns that a “fundamentalist” Court might give the President the power to detain suspected terrorists, or those who are alleged to have assisted them, without warrants or other judicial supervision.<sup>68</sup> Warming up to his topic, Sunstein predicts that civil rights laws might be found unconstitutional by “fundamentalists” because of their narrow conception of the interstate commerce power of Congress;<sup>69</sup> gun control laws might all be found unconstitutional because of the Second Amendment;<sup>70</sup> and, all campaign finance reform legislation might be thrown out because of a “fundamentalist” view that such legislation prevents political speech protected by the First Amendment.<sup>71</sup> Affirmative action might be forbidden because of the “fundamentalist” belief in a “color-blind” Constitution.<sup>72</sup> Finally, Sunstein rails against the possibility that because of the “fundamentalists’” strong belief in the primacy of private property

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64. 163 U.S. 537 (1896) (upholding segregated passenger railroad cars on the principle of “separate but equal”), *overruled by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

65. See SUNSTEIN, *RADICALS IN ROBES*, *supra* note 11, at 132 (“Fundamentalists follow a simple principle: color-blindness. In their view, the Equal Protection Clause means that the government may not take account of race, period.”).

66. See, e.g., Stephen B. Presser, *Some Realism About Atheism: Responses to The Godless Constitution*, 1 TEX. REV. L. & POL. 87, 112 (1997) (book review).

67. SUNSTEIN, *RADICALS IN ROBES*, *supra* note 11, at 2.

68. *Id.*

69. *Id.* passim.

70. *Id.* passim.

71. *Id.* passim.

72. *Id.* at 132.

rights, these rights might be expanded to result in a requirement of compensation for more regulatory takings.<sup>73</sup>

### III. WHERE SUNSTEIN GETS IT WRONG

Sunstein believes that for "fundamentalists" to manage to accomplish what he believes to be their substantive goals would be to "threaten[] both our democracy and our rights."<sup>74</sup> Curiously, however, Sunstein does not always appear to understand that a majority of the American people might well favor at least some of the results that "fundamentalists" might seek to achieve, and that the conception of "our rights" favored by "perfectionists," or "minimalists," if not really anchored in the Constitution, might not only *not* be the choice of the American people, but might have been undemocratically imposed on them by a "perfectionist" or "minimalist" Court.<sup>75</sup> It is not at all clear that "fundamentalists" are any less democratic than "minimalists" or "perfectionists," and insofar as "fundamentalists" are faithful to the original understanding of the Constitution, they certainly have a claim to be close to the group that Sunstein calls "majoritarians." Could it actually be that "minimalism," for Sunstein, is simply a way of justifying his set of particular political preferences, a set that might not be embraced by the American people?

Indeed, while Sunstein suggests that no jurisprudential theory should be based on approval of a particular political party, it does appear that the only political party he condemns is the Republican Party. "We live in an era," writes Sunstein, "in which some prominent politicians are demanding that the courts interpret the Constitution as if it conformed to positions of Republican party leaders—and threatening federal judges with reprisal if they refuse to

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73. *Id.* passim.

74. *Id.* at xi.

75. To be somewhat more fair to Sunstein, I should say that at some points in his book he does, at least, acknowledge that there is some value to what "fundamentalists" advocate. For example, he states: "It is not possible to demonstrate, in the abstract, the superiority of one or another approach to constitutional interpretation." *Id.* at 34. And: "[F]undamentalism can claim the virtues associated with the rule of law." *Id.* at 40. He also suggests that the "fundamentalists'" arguments against the "perfectionists'" "Living Constitution" are "appealing." *Id.* at 59. He also concedes that there are times and places when "fundamentalism" "would be the best approach of all," *id.* at 61, but that our society is not at such a time or a place, *see id.* at 72–73.

do exactly as politicians want.”<sup>76</sup> Sunstein names no names here, and I do not know of any politician who, on all issues, has demanded that judges make the positions of “Republican party leaders” the lodestar of constitutional interpretation. I have had the pleasure of testifying before congressional committee hearings on occasion and I have to confess that I have been called by Republicans. On two occasions when Sunstein and I both testified, Sunstein had been called as a witness by Democrats.<sup>77</sup>

### A. *Sunstein, Schumer, and Judicial Ideology*

There were reports in June 2001 that Sunstein, along with Harvard Professor Laurence Tribe and Marcia Greenberger of the National Women’s Law Center, were the architects of the strategy employed by Senate Democrats (during the brief period that they controlled the Senate that year) to hold hearings on “judicial ideology,” and to maintain that it was important to have a “balance” of judicial ideologies on the bench.<sup>78</sup> This was a strategy designed to limit

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76. *Id.* at xiv.

77. The first of these two hearings was held in the fall of 1998 before the Subcommittee on the Constitution of the House Judiciary Committee and related to the history and meaning of the Constitution’s impeachment clauses. *Background and History of Impeachment: Hearings Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 1 (1998). Our testimony was later reprinted in annotated versions in the *George Washington Law Review*. See Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 GEO. WASH. L. REV. 666 (1999); Cass R. Sunstein, *Impeachment and Stability*, 67 GEO. WASH. L. REV. 699 (1999). The second hearing concerned judicial ideology and was chaired by Democratic Senator Charles Schumer in 2001. *Judicial Nomination and Confirmation Process: Hearings Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 107th Cong. 1 (2001) [hereinafter *Hearings*].

78. *E.g.*, Byron York, *Back to Bork?: A New Strategy of Demanding Nominees’ Views on Judicial Issues Ensures That the Next Supreme Court Nomination Battle Will Be Ugly*, THE ATLANTIC MONTHLY, Mar. 2003, at 30, 30–35. York writes:

Schumer invited three prominent liberal lawyers—Laurence Tribe, of Harvard Law School; Cass Sunstein, of the University of Chicago; and Marcia Greenberger, of the National Women’s Law Center—to testify at the hearing. (Two months earlier the same three had appeared at a Democratic retreat and reportedly urged lawmakers to take an aggressive stance against Bush’s judicial nominees.) Only a more assertive and openly ideological Judiciary Committee, they told the subcommittee, could stop the White House from packing the courts with doctrinaire conservatives. Democrats simply had to be tougher on Bush nominees.

*Id.*; see also *Hearings*, *supra* note 77, at 3, 4 (statement of Sen. Schumer, Chairman, Senate Subcomm. on Administrative Oversight and the Courts, of the Senate Comm. on the Judiciary) (mentioning Tribe and Sunstein by name).

President Bush's discretion to make selections of judges, prompted, apparently, by his making it clear that his two favorite justices were Scalia and Thomas—the two "fundamentalist" justices Sunstein most frequently singles out for criticism. Witnesses called by the Democrats, such as Sunstein, Tribe, and Greenberger, sought to make the case that there were at least two "ideologies" manifested by judges: one was "originalism," (what Sunstein now calls "fundamentalism"); and the other, apparently, was the view that there is a "Living Constitution," which is amenable to change by judges to meet the particular needs of the times (a view Sunstein now calls "perfectionism"). Democratic witnesses urged the subcommittee to consider that it would be a disaster to have an ideologically-dominated bench—apparently implying that it was the duty of the President to "balance" the ideologies on the bench and the duty of senators to oppose the President's nominees if that "balance" were not maintained.

This, then, was the justification for the Democratic filibuster of many of President Bush's nominees to the lower federal courts. Republican witnesses before the Senate subcommittee took the position that there was no such thing as "judicial ideology"; that while there was, perhaps, some difference over "judicial philosophy," the only proper role for judges was to decide cases according to the then-existing law; and, that it was the job of judges not to formulate new rules of constitutional, or any other, law, but simply to interpret the Constitution in an objective manner and in accordance with the original understanding of that document.<sup>79</sup>

Indeed, the senator who called the hearings, Charles Schumer (D-N.Y.), who presumably was advised by Sunstein, Tribe, and Greenberger,<sup>80</sup> took the position that any nominee had the burden of proving to the satisfaction of the Senate that he or she was a fit candidate and would not shift the balance of ideologies on the bench to which he or she was to be appointed.<sup>81</sup> Republican witnesses disputed this "burden of proof" argument and suggested that such a position undermined the President's Article II appointment power because there was at least

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79. See, e.g., Stephen B. Presser, *Should Ideology of Judicial Nominees Matter?: Is the Senate's Current Reconsideration of the Confirmation Process Justified?*, 6 TEX. REV. L. & POL. 245, 247–48 (2001) [hereinafter Presser, *Should Ideology of Judicial Nominees Matter?*].

80. See *supra* note 78.

81. See *Hearings*, *supra* note 77, at 3, 113 (statements of Sen. Schumer on June 26, 2001, and Sept. 4, 2001, respectively).

some authority in *The Federalist No. 76* that the job of the Senate was not to police “judicial ideologies,” but simply to determine whether a nominee was technically competent and of good moral character, rather than, say, an unqualified crony or relative of the President.<sup>82</sup> The arguments about “burden of proof” and a “balance” of judicial ideologies were new ones, and they seemed to have been advanced simply to undercut the strategy of a Republican President to appoint to the bench those jurists whose judicial philosophy was in accordance with the original understanding of the Constitution and with the idea that judges should interpret, not make, the law.

### B. *Is Sunstein a Political Partisan?*

There is no denying that a certain amount of judicial law making is probably inevitable, and while most of the legal academy, like Sunstein, scoffs at the notion that there is such a thing as an objective approach to deciding cases,<sup>83</sup> it is still clear that the notion that ours is a government of laws, not men—that is, the idea of the rule of law—presupposes that there are objectively correct answers to questions of constitutional interpretation. The only approach to judging that seems to follow from these ideals is that of “originalism.”<sup>84</sup> One cannot help but wonder whether Sunstein, both in advising Senate Democrats and in excoriating “fundamentalism,” is actually advancing a partisan agenda at the expense of the rule of law. Virtually all of the preferred positions on constitutional law that Sunstein claims “perfectionists” advocate are those embraced by Democrats and rejected by Republicans.

In any event, there does seem to be a tendency in Sunstein’s analysis to equate his opinions with the point of view that ought to be adopted by all right-thinking persons. For example, he comments

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82. Presser, *Should Ideology of Judicial Nominees Matter?*, *supra* note 79, at 253.

83. See, for example, SUNSTEIN, *RADICALS IN ROBES*, *supra* note 11, at 23, where Sunstein observes that both President Bush and Senator John Kerry (D-Mass.), the 2004 Democratic presidential nominee, indicated that they favored judges who would interpret the Constitution “according to the law.” Sunstein indicates that “[t]his claim is at once correct and ludicrously unhelpful, in a way a sham.” *Id.* This is, of course, a bit like saying something is at the same time completely correct and completely incorrect. But it certainly indicates that Sunstein—and I would guess most of the legal academy—does not find the idea of the rule of law a particularly meaningful or useful concept.

84. See WHITTINGTON, *supra* note 54, at 3, 218; PRESSER, *RECAPTURING THE CONSTITUTION*, *supra* note 54.

that "[b]y 1970, everyone agreed that the Constitution prohibited racial segregation, safeguarded the right to vote, banned official prayers in the public schools, and offered broad protection not only to political dissent but also to speech of all kinds."<sup>85</sup> This may have been the view of many Americans, and particularly the mainstream view of the Democratic Party, but it is hardly true, for example, that all Americans believed that it was correct to interpret the Constitution to ban prayer in the public schools, or that the enhanced protection of political dissent and some other forms of speech had won universal favor. Perhaps, however, in 1970 these views might have been nearly universally held in the legal academy. Sunstein's remark recalls that of the liberal New York writer who could not believe that Richard Nixon had been reelected President in 1972 because no one she knew had voted for him.<sup>86</sup>

Sunstein is not alone as a man of the academic Left, fighting to keep the Republicans from advancing the kind of jurisprudence practiced by Justices Scalia and Thomas. The control of both the executive and the legislative branches by the Republicans has led to an assault from the Left on the institution of judicial review itself. Mark Tushnet, one of the most prolific and brilliant Left-leaning scholars, has actually proposed ending the practice or, at least, ending the deference to judicial interpretation of the Constitution.<sup>87</sup> Larry Kramer, now the Dean of Stanford Law School and another distinguished scholar displaying great historical knowledge, has argued, in a manner similar to that of Tushnet, that it has been our tradition not only for the judiciary to engage in constitutional exegesis, but that it has also been a task of the American people themselves, and that the judiciary's current monopoly on the

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85. SUNSTEIN, *RADICALS IN ROBES*, *supra* note 11, at 8.

86. The statement is generally attributed to *New York Times* film critic Pauline Kael. Israel Shenker, *2 Critics Here Focus on Films as Language Conference Opens*, N.Y. TIMES, Dec. 28, 1972, at 33; BERNARD GOLDBERG, *BIAS: A CBS INSIDER EXPOSES HOW THE MEDIA DISTORT THE NEWS* 24 (2004). Some have said the quote is apocryphal. *See, e.g.*, Dan Wiese, *Nobody Likes the Retro Chevy HHR Except Just About Everyone Who Sees It*, ST. LOUIS POST-DISPATCH, Sept. 4, 2005, <http://www.stltoday.com/stltoday/autos/columnists.nsf/danwiese/story/84C35F4113D932C98625706E00743CB8?OpenDocument>.

87. *See, e.g.*, MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, at x (1999). Tushnet's views in this regard are noted by Sunstein in *SUNSTEIN, RADICALS IN ROBES*, *supra* note 11, at 49.

enterprise should cease.<sup>88</sup> Tushnet and Kramer surely have a point that others besides the courts have engaged in constitutional construction,<sup>89</sup> but it is still striking that the attack on the courts from the Left was not heard as audibly when the Warren, Burger, or Rehnquist Courts were moving jurisprudence in the direction the Left seemed to favor.

Sunstein's "fundamentalists"—or, if you like, the members of the Republican Party who favor judges such as Justices Scalia and Thomas, judges more or less committed to interpreting the Constitution as it was understood by its Framers and ratifiers, and judges committed to the notion that the judicial task is one of interpretation, not policy making—claim to be objective advocates of the rule of law. These "fundamentalists" argue that it is the Left that is playing partisan politics with the Constitution. Sunstein, of course, claims that it is the "fundamentalists" who are the partisans and he regards the dramatic changes to constitutional interpretation brought about by the Warren and Burger Courts as an unqualified good. This view coincides with that of the Democratic Party generally.

With this kind of fundamental disagreement, it is natural to ask whether one can objectively approach constitutional law or whether it is just a matter of partisan politics. The Republicans, after all, opposed some nominees of President Clinton to the bench, and, as Sunstein reminds us, some of these nominees were never even given committee hearings.<sup>90</sup>

So while Republicans complained quite loudly that Democrats filibustered several of President Bush's nominees to the lower federal courts, Democrats may have viewed this simply as tit-for-tat. And yet, if it is true that one political party stands for the rule of law and another party stands for rule by judges, then maybe there *is* a

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88. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7–8 (2004). Kramer's views are reported by Sunstein in *SUNSTEIN, RADICALS IN ROBES*, *supra* note 11, at 49.

89. And those on the Left are not the only ones who have stressed that others than the judges ought to be engaged in constitutional construction. Sunstein reports that Robert Bork, a well-known conservative whose nomination to the Supreme Court by President Reagan was famously defeated—Sunstein calls him "a vigorous critic of the Warren Court"—has "argued for steps that would make it possible for Congress to 'overrule' Supreme Court decisions." *SUNSTEIN, RADICALS IN ROBES*, *supra* note 11, at 49. For another non-Leftist view that "constitutional construction" by other branches of government has been the norm in America, see, for example, KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 2–3 (1999).

90. *SUNSTEIN, RADICALS IN ROBES*, *supra* note 11, at 13–14.

disagreement here beyond partisan politics, since the rule of law is, after all, the basis of American republican government itself.<sup>91</sup>

One can build an argument that meets the red-face test that when Republicans opposed Democratic nominees ostensibly committed to making policy through the judiciary—"perfectionists" in Sunstein's terminology—they were defending the rule of law and not simply being partisan. Such an argument is less than persuasive to those, like Sunstein, who believe that the Constitution is in need of improvement by pragmatically-minded "minimalist" judges prepared to incrementally nudge it along. Or perhaps what they are up to is simply preserving the situation created by the "perfectionist" judges such as those on the Warren and Burger Courts who radically altered constitutional meaning.

But surely there is still something to be said for allowing any constitutional change to be made by the people themselves, rather than the judges, much as Kramer suggests<sup>92</sup> (although perhaps for different reasons than Kramer might advocate). There are times when one side has the better argument; and if the rule of law is good and judge-made law is bad (as we all seem to agree, even if only on a rhetorical level<sup>93</sup>), then for Sunstein to arrive at a "minimalist" compromise between the two is still, to a certain extent, choosing wrong over right. Perhaps this is unduly simplistic, but even some political concepts need not be complicated, and perhaps "minimalism" simply masks a departure from the rule of law.

### C. *Should Judges Alter the Constitution?*

On the other hand, given that some conditions of modern life simply were not anticipated by the Framers or the ratifiers, is it not inevitable, as Sunstein recognizes, that someone will need to alter the meaning of the Constitution to fit these changed circumstances? Of course, this could be done by constitutional amendment, or by constitutional construction on the part of the legislature, the executive, or the people themselves, and it may not be necessary for judges or justices to do it. Sunstein seems to suggest that if we turn back the clock on constitutional jurisprudence and deprive judges of

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91. See, e.g., JOHN PHILLIP REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 7 (2004).

92. KRAMER, *supra* note 88, at 7–8.

93. See, e.g., SUNSTEIN, *RADICALS IN ROBES*, *supra* note 11, at 23.

the discretion, even minimally, to create new meaning, disaster will follow. Again, there is no reason to believe that legislation, amendment, or executive discretion cannot create some means of coping with societal change. Is that not the purpose of legislation and amendment, and perhaps of implied grants of executive discretion?

But supposing some judicial legerdemain is necessary, is it so clear that a “minimalist” committed to preserving the legal substance desired by Sunstein and other liberals is the right kind of judge to exercise it? There does seem to be in Sunstein’s “minimalism”—and in the work of some other theorists who believe that a creative role for the judiciary is inevitable—a desire for judges who, instead of being “fundamentalists” committed to the original understanding, would be Burkeans who would understand that abstract theories such as “originalism” may not yield appropriate answers to constitutional questions.<sup>94</sup> These theorists seem to believe that a pragmatism that takes one case at a time—the sort of pragmatism one can see in the work of Justices O’Connor or Kennedy and advocated not only by some on the Left but also on the Right by Judge Richard A. Posner of the Seventh Circuit Court of Appeals—would be better.<sup>95</sup> It is curious, however, that Sunstein excoriates Justices Scalia and Thomas when they depart from “originalism” to reach results that he personally does not favor—in cases involving the Second Amendment and affirmative action, for example<sup>96</sup>—and calls what may be their version of pragmatism, “partisanship.”<sup>97</sup> So the “fundamentalists” are doubly

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94. Sunstein appears to give a qualified endorsement to Edmund Burke, see SUNSTEIN, *RADICALS IN ROBES*, *supra* note 11, at 122–23, and I think it is fair to suggest that insofar as Sunstein’s “minimalism” eschews abstract theories, its essence could also be regarded as Burkean, insofar as Burke also was suspicious of abstract theories. ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 32 (1992) (quoting ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 19 (1975)). Burke appears to have perennial relevance as an expounder of the American Constitution, even though, of course, he never actually engaged in such exposition himself. For a brilliant discussion of various Burkean approaches to interpretation of the U.S. Constitution, see, for example, Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635 (2006).

95. For Judge Posner’s latest contribution in that vein, see RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006) (arguing for a pragmatic approach to issues of constitutional interpretation raised by the current war on terror (or, if you prefer, the war against the Jihadists)). See also CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) (setting forth Sunstein’s theory about “minimalism”).

96. SUNSTEIN, *RADICALS IN ROBES*, *supra* note 11, at 218–23 (Second Amendment); *id.* at 133–35 (affirmative action).

97. *Id.* at xiv.

damned; once for their theory and twice for when they depart from it, while others, like Justices O'Connor and Kennedy, are praised for their "minimalism," which seems to mean their flexibility.<sup>98</sup>

CONCLUSION: BURKE, BLACKSTONE, MONTESQUIEU,  
AND PROPER JUDICIAL PHILOSOPHY

Edmund Burke is a useful political philosopher for Americans to use for constitutional exegesis even though his work was really about the British constitution, which is much more flexible fundamental law. Still, for Burke, there were fixed notions on some constitutional matters, such as a firm belief that there needed to be restraints on arbitrary power and that there needed to be a role for tradition and restraint in the just administration of government. That is what prompted Burke's railings against the French Revolution, his criticism of the acts of King George III's government against the American colonists, and his leading the impeachment of Warren Hastings.<sup>99</sup> Justice Scalia's adherence to tradition and Justice Thomas's belief in transcendent natural law principles<sup>100</sup> seem, to me at least, to be more Burkean than the kind of pragmatic (arbitrary?) judicial discretion practiced by the "minimalist" justices Sunstein favors.

While it may be in vogue in the academy and some other quarters to criticize a simple belief in the rule of law and a judiciary that limits itself to adjudication rather than legislation or policy making, this belief

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Fundamentalists like to accuse their critics of bad faith. But some prominent fundamentalists have not hesitated to betray their commitment to the original understanding when the historical evidence points to results they dislike. Their willingness to do so suggests that some of the time, they are speaking for a partisan ideology rather than for law.

*Id.* Referring, *inter alia*, to many statutes that "fundamentalists" would eliminate and to their views on the Commerce Clause and the Takings Clause, Sunstein continues his criticism: "On these counts, the constitutional judgments of fundamentalists are eerily close to the political judgments of conservative politicians. . . . If judges' opinions consistently fit with a partisan political agenda, we have reason to doubt whether they are interpreting the Constitution with anything like neutrality." *Id.* at 217–18. He also writes that "too much of the time, fundamentalists offer an unmistakably partisan vision of the Constitution." *Id.* at 243.

98. See, e.g., *id.* at 29–30, 44, 245 (Justice O'Connor); *id.* at 31, 245 (Justice Kennedy).

99. On these views of Burke see, for example, CONOR CRUISE O'BRIEN, EDMUND BURKE (Jim McCue ed., abr. ed. 1997); C.B. MACPHERSON, BURKE (Keith Thomas ed., 1980). On Burke's relevance to American constitutional law, see, for example, Calabresi, *supra* note 94.

100. For more on Justice Scalia's adherence to "traditionalism" and Justice Thomas's "natural law" beliefs, see, for example, PRESSER, RECAPTURING THE CONSTITUTION, *supra* note 54.

remains at the foundation of our jurisprudence and is consistent with what Blackstone maintained during the late eighteenth century, right before our revolution, in which we fought the English for the rights of Englishmen.<sup>101</sup> It still remains true today. Blackstone believed that the law was:

a permanent rule, which . . . is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.<sup>102</sup>

To the same effect, Montesquieu, quoted by Hamilton in *The Federalist No. 78*, observed that “[n]or is there liberty if the power of judging is not separate from legislative power and from executive power.”<sup>103</sup> That is what Justices Scalia and Thomas believe, and it is the core understanding of those whom Sunstein disparages as “fundamentalists.”

If that is “fundamentalism,” maybe it is not so bad, and, aided by Ann Coulter, perhaps we can see that it does not deserve the excoriation Sunstein heaps upon it.

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101. See, e.g., REID, *supra* note 91, at 75.

102. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*69.

103. MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et. al eds. & trans., Cambridge Univ. Press 1989) (1749), *quoted in* THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (using a slightly different quotation, which is “there is no liberty, if the power of judging be not separated from the legislative and executive powers”).