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# Unmasking Judicial Extremism

Carl W. Tobias
*University of Richmond*, ctobias@richmond.edu

# BOOK REVIEW

## UNMASKING JUDICIAL EXTREMISM

RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA. By Cass R. Sunstein, NEW YORK, N.Y.: BASIC BOOKS. 2005. 252 pp. $16.95.

*Reviewed by Carl Tobias* *

### INTRODUCTION

Professor Cass Sunstein has long been an incisive and provocative legal scholar. Students of constitutional law, the modern administrative state, and contemporary political science—as well as numerous other fields ranging from cost-benefit analysis to punitive damages—eagerly anticipate the release of his work. Sunstein's monograph, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America*, continues this tradition. He exquisitely timed the book as attention recently focused on two Supreme Court vacancies after a protracted hiatus.[1] Rarely have the Justices been so divided over major substantive and interpretive questions, and rarely has such ferment permeated constitutional law. Indeed, Professor Laurence Tribe peremptorily announced that he was discontinuing work on the renowned treatise, *American Constitutional Law*, because the scholar could not organize and rationalize the divergent areas.[2]

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 Williams Professor, University of Richmond School of Law. I wish to thank Paul Catanese, Scott Jones, and Peggy Sanner for valuable suggestions; Tammy Longest for processing this piece; and Russell Williams for generous, continuing support. Errors that remain are mine.

1. *See* Linda Greenhouse, *Chief Justice Rehnquist Dies at 80*, N.Y. TIMES, Sept. 4, 2005, § 1, at 1.

2. *See* Letter from Laurence Tribe, Carl M. Loeb Univ. Professor, Harvard Univ., to

These ideas make the publication of *Radicals in Robes* timely and warrant the volume's review. This piece undertakes that effort. Part I descriptively assesses the monograph. Part II scrutinizes the myriad valuable insights Sunstein contributes to readers' appreciation of modern constitutional law and the Supreme Court. The review concludes by offering a few suggestions.

## I. DESCRIPTIVE ANALYSIS

The introduction, "The Constitution in Exile," analyzes how certain judges, scholars, and politicians contend that, because America has a written Constitution, jurists who faithfully read the document must "'illuminate the meaning of the text as the Framers understood it.'"[3] Some believe the Justices abandoned the text in the 1930s by finding that the Commerce Clause is a broad delegation, which Congress used to grant agencies wide discretion.[4] The Court also ostensibly "blinked away" core Bill of Rights provisions—namely the "Takings Clause"—and fashioned rights, such as privacy, not mentioned in the document.[5] Those observers urge greater textual fidelity by emphasizing the original meaning and, thus, restoration of the "real" Constitution, the document in exile.[6] Sunstein finds very troubling that numerous "judges—radicals in robes, fundamentalists on the bench"—attempt to transform the Constitution, basically reinstituting the much earlier version, or perhaps converting it to the more extreme views of the Republican Party.[7]

Sunstein explains that court appointments necessarily mean that the Constitution's interpretation will change over time. Republicans have favored judges who would alter Warren Court jurisprudence, making the former center the left and the prior far right the center, while eliminating what had been the left. Illustrative is Justice John Paul Stevens, whose views have essentially remained unchanged, even as the Court's gravity center has

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Stephen G. Breyer, Assoc. Justice, Supreme Court of the United States (Apr. 29, 2005), *in* Laurence Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 292 (Spring 2005).

3. CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 4 (2005) (quoting Douglas H. Ginsburg, Chief Judge, U.S. Court of Appeals for the D.C. Circuit, Remarks at the University of Chicago Law School).

4. *Id.*

5. *Id.* at 5.

6. *Id.* at 6.

7. *Id.* at 6–7.

shifted.[8] Sunstein concedes that the Justices have rejected some extreme modifications, as judges generally follow precedent, yet warns that a few doctrinaire appointments could prompt more radical change, voicing special concern about the "close fit between [extremists'] own political commitments and the Constitution itself."[9]

Part One, "The Great Divide," has two chapters.[10] The first defines and explores relevant interpretive schools. One school is the "fundamentalism" described above.[11] Because its proponents appreciate that constitutional doctrine now reflects other perspectives, they seek large-scale alterations through broad, clear rules.[12] The second school is "minimalism," which treats constitutional law as a "series of incompletely theorized agreements" whereby judges accept a particular view on doctrines, such as equality, without subscribing to its deepest foundations.[13] Minimalists concomitantly respect precedent because it vitiates the need to answer the most basic questions presented by new issues and fosters stability, though they prefer narrow disposition and resolving one case at a time.[14] Thus, minimalism comprises a method *and* a restraint while it is neither a program nor a mandate for specific results.[15] Sunstein asserts that modern constitutional disputes are best understood vis-à-vis the split between this idea and fundamentalism which, for instance, dominates the most critical debates within the High Court and Senate judicial confirmation fights.[16]

Other views do exist. "Perfectionism" holds that judges should make the Constitution as good as possible by interpreting its capacious, general phrasing so as to cast the document's "ideals in the best possible light."[17] For example, when precedent leaves gaps or ambiguities, jurists should attempt to improve the law. Justices William Brennan and William Douglas, who lack succes-

8. *See* Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, § 6, at 50.
9. SUNSTEIN, *supra* note 3, at 19.
10. *Id.* at 23–78.
11. *See id.* at 25.
12. *See id.* at 26–27.
13. *Id.* at 28.
14. *See id.* at 28–29.
15. *Id.* at 29.
16. *Id.* at 30.
17. *Id.* at 32.

sors on the present Court, are illustrative.[18] The fourth approach, "non-partisan restraint" or "majoritarianism," champions deference to the elected branches—unless their actions clearly violate the Constitution—because judges are fallible and a powerful judiciary could injure democracy.[19] Sunstein finds that no sitting Justice is a committed majoritarian.[20]

"Each position is vulnerable to coalitions of the other three," but minimalism and fundamentalism now dominate constitutional thought.[21] Sunstein emphasizes the latter in chapter two. "History's Dead Hand" shows how fundamentalists endorse "originalist" interpretations and assesses ways that the fundamentalists' approach could threaten democracy and jeopardize Americans' rights by freezing the Constitution as of 1787.[22]

The second part, "Great Divisions," canvasses quite a few important modern constitutional issues, such as affirmative action, national security, privacy, and separation of powers.[23] Sunstein demonstrates how applying the theories of construction yields particular results in specific doctrinal areas. For instance, he considers fundamentalism overbroad and retrogressive while asserting that minimalism takes a rather incremental and progressive approach.[24]

## II. CONTRIBUTIONS

Sunstein offers numerous cogent insights. Most significant, he descriptively analyzes four main interpretive schools and how they resolve constitutional disputes today while explaining why minimalism is preferable and fundamentalism is incorrect and even dangerous. Considerable previous research has assessed individual cases, doctrinal modifications, and emerging trends; however, *Radicals in Robes* is one of the best new treatments. Sunstein painstakingly documents relevant historical phenomena, evaluates and imposes a salutary conceptual framework on

18. *Id.*
19. *See id.* at 48–50.
20. *Id.* at 50.
21. *Id.* at 50–51.
22. *See id.* at 53–78.
23. *See id.* at 81–252.
24. *See id.* at 108–09 (discussing the difference between the minimalists' and the fundamentalists' approaches to the Court's decision in *Roe v. Wade*).

major opinions, identifies crucial jurisprudential and political linkages, and astutely elucidates how the whole is often more than the sum of its parts.

The remarkable detail and clarity with which Sunstein explores the four dominant positions are instructive. Sunstein reviews the approaches' backgrounds and philosophical foundations, their contemporary relevance, and the schools' benefits and disadvantages. The writer shows that majoritarianism and perfectionism are distinguished historical views with little representation on the current bench. Now, minimalism enjoys substantial public and judicial support while fundamentalism is ascendant—a juxtaposition which prompts their comparison. Sunstein advocates minimalism, contending that it respects the elected branches through allowance for democratic self-government and recognizes judges' limited role by favoring incremental court decisions and opposing expansive judicial power.

Telling are Sunstein's criticisms of fundamentalism that would freeze the Constitution as it was when it was ratified, as jurists must construe the document in accordance with original intent. This, Sunstein contends, would eviscerate Americans' democracy and rights by undermining political-branch authority and many of the freedoms that citizens now enjoy. Sunstein describes how the idea fosters horizontal accretion in courts of power formerly held by the elected branches, shifts authority's prior vertical balance to the states away from the federal government, and constricts legislation that safeguards Americans' rights. For example, the author denigrates the recent judicial narrowing of Congress's "power to enforce, by appropriate legislation,"[25] the Fourteenth Amendment and shows that treating the Justices, rather than lawmakers, as propriety's arbiters is an invention based on miscomprehension of Section 5 of the Fourteenth Amendment, which simultaneously undercuts legislative authority to protect citizens and expands judicial power.[26]

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25. U.S. CONST. amend. XIV, § 5.

26. *See* SUNSTEIN, *supra* note 3, at 240–41; *see also* Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 630 (1999) (holding that the patent laws that "abrogated the States sovereign immunity from claims of patent infringement" could "not be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment"); City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (holding that Congress exceeded its power when it enacted the Religious Freedom Restoration Act of 1993).

Sunstein disparages the Justices' similar restriction of congressional authority to pass laws under the Commerce Clause and shows that making the Justices, not Congress, judges of "effects" on commerce is basically a fiction premised on the clause's misapprehension, which undermines legislative power—especially to safeguard the public—and increases judicial authority.[27] Both the Section 5 and Commerce Clause interpretations, which suggest that evidentiary records underlie statutes' passage and imply that the Court's decisional methods are better than lawmaking procedures,[28] have no constitutional underpinning. Sunstein criticizes the Justices' analogous determination that federal authority cannot support particular legislation because it commandeers states under the Tenth Amendment or invades their sovereignty under the Eleventh.[29] He also shows that the ways certain Justices read Section 5 and the Commerce Clause, as well as invoke the Tenth and Eleventh Amendments, epitomize how fundamentalists betray the commitment to originalism when historical evidence yields undesirable results or even ignore the applicable history, suggesting that they favor partisan ideology, not law.[30]

Sunstein's clarification of the rhetoric which suffuses much discourse about the Constitution and the Justices is similarly efficacious. For instance, Sunstein finds woefully insufficient the description of constitutional battles as fights between liberal and conservative ideology, even while showing how much the Court has drifted rightward, using Justices, namely William Rehnquist and John Paul Stevens, as foils, and the Court's gravity shift, which eliminated the left. He also suggests the inherent deficiencies of employing "judicial activism," observing that this phenomenon is frequently manifested on the spectrum's conservative as well as its liberal end.[31]

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27. *See* SUNSTEIN, *supra* note 3, at 240–41.

28. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

29. *See* SUNSTEIN, *supra* note 3, at 235–41. As to the Tenth Amendment, see Printz v. United States, 521 U.S. 898, 935–36 (1997) (O'Connor, J., concurring), and New York v. United States, 505 U.S. 144, 149 (1992). As to the Eleventh Amendment, see *Fla. Prepaid*, 527 U.S. at 634–35, and Alden v. Maine, 527 U.S. 706, 712–13 (1999).

30. "Too much of the time, fundamentalists read the Constitution not to fit the original understanding but the views of the extreme wing of [the] Republican Party." SUNSTEIN, *supra* note 3, at 244.

31. *See id.* at 41–44.

Sunstein's astute critique should also reach a wide audience. Despite the complexity intrinsic to the theoretical, political, and constitutional questions evaluated—as well as the obscure nature of the judicial decisions and interpretative approaches reviewed—his clear, thorough explication and informal, often colloquial, style will facilitate this work's broad dissemination. Attorneys and law students will easily comprehend the volume, but a multitude of readers without legal training should find the book accessible and instructive.

Sunstein's incisive perspectives have greater force because their exponent is a legal scholar who certain observers might assume would favor perfectionism. He trenchantly criticizes this view and fundamentalism in essence for analogous reasons, namely that both sacrifice practicality to absolutism. Sunstein espouses minimalism because the approach respects federal elected-branch prerogatives, contemplates a narrow judicial role, and favors incremental change.

## III. SUGGESTIONS

Despite Sunstein's many insightful contributions, I can posit several constructive ideas. Elaborating a few notions would improve appreciation of present constitutional disputes and the Supreme Court. For example, knowing that fundamentalism may at once erode American democracy and citizens' rights is valuable. Equally useful would be more consideration of how it affects horizontal power distribution given each administration's tendency to claim greater authority, particularly vis-à-vis Congress. It may also be beneficial to identify the vertical effects of such power distribution. National power's devolution to the states—a central fundamentalist tenet—may be anachronistic, and even dangerous, during a time of international crises, especially considering the upheaval fostered by world terrorism. Detailing the horizontal and vertical impacts may correspondingly elucidate modern American debates, such as the preferable governmental branch and level for treating complex societal issues, namely crime, natural disasters, and the tensions between national security and civil liberty. All this information would help policymakers and citizens decide whether increasing judicial power at the expense of

the other branches and states' authority vis-à-vis the federal government advantages the country as matters of structure, power, and citizen rights and, if not, how to alter those trends.

Sunstein also might have explained precisely how minimalism applies to specific past, current, and future issues. One general illustration is the Court's privacy decisions, which trace their modern lineage to *Griswold v. Connecticut*.[32] Particular examples are the questions of reproductive freedom that involve *Roe v. Wade*[33] and its progeny; gay rights as implicated by *Lawrence v. Texas*;[34] and equal protection, critical to the Court's decisions in *Brown v. Board of Education*,[35] *Grutter v. Bollinger*,[36] and *Baker v. Carr*,[37] which involves reapportionment, the "thickest thicket."[38] Minimalism could place greater trust in elected officials than history warrants, as the desegregation and reapportionment cases show. Modern constitutional theory and law, evidenced by footnote four in *Carolene Products* and numerous precedents, concomitantly hold that an integral judicial function is protecting minority rights from majoritarian tyranny.[39]

These concerns do not detract from Sunstein's valuable contributions. However, he might have reviewed a few areas explicitly or with increased specificity, derived additional lessons from fundamentalism's rise, and offered more suggestions for rectifying or ameliorating the present circumstances. It would be helpful to have additional views from an expert observer who has so meticulously scrutinized constitutional interpretation, the Supreme Court, separation of powers, federalism, and politics. For instance, Sunstein might have assessed the effects of campaign finance regimes, legislative reapportionment schemes, and incumbency's power on the phenomena he analyzes, as well as how the unelected judiciary, the least democratic branch, has ironically become the greatest moderating force in the national arena.

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32. 381 U.S. 479 (1965).

33. 410 U.S. 113 (1973), *overruled in part by* Gonzales v. Carhart, 550 U.S. 124 (2007), *and* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

34. 539 U.S. 558 (2003).

35. 347 U.S. 483 (1954).

36. 539 U.S. 306 (2003).

37. 369 U.S. 186 (1962).

38. *See* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987).

39. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

Thus, *Radicals in Robes* may be profitably compared with new works by other students of constitutional interpretation and the High Court, namely Justice Stephen Breyer's *Active Liberty*,[40] Professor Jeffrey Rosen's *The Most Democratic Branch*,[41] Professor Mark Tushnet's *A Court Divided: The Rehnquist Court*,[42] and ABC Supreme Court Correspondent Jan Crawford Greenburg's *Supreme Conflict*.[43] These ideas are particularly salient when controversial and powerfully held views about the best ways to interpret the Constitution, protect citizens' rights, appoint judges, distribute governmental authority, and correspondingly preserve horizontal and vertical structural integrity suffuse modern debate.

## CONCLUSION

*Radicals in Robes* substantially advances understanding of modern constitutional interpretation and the Supreme Court, particularly by showing how fundamentalism's ascension might undermine democracy and citizen rights. Sunstein illuminates this jurisprudential approach's revitalization, its deleterious impacts, and a salutary response in the form of a preferable theory—minimalism. That concept accords the elected branches greater respect while it better protects citizens' rights and limits judicial power.

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

41. JEFFERY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006).

42. MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW (2005).

43. JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007).