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Cass R. Sunstein

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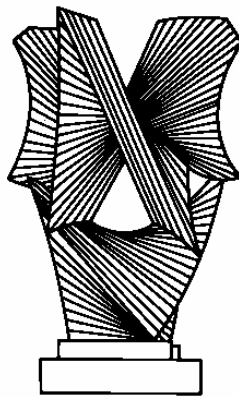
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# CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 135



## OF SNAKES AND BUTTERFLIES: A REPLY

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## Of Snakes and Butterflies: A Reply

Cass R. Sunstein \*

### Abstract

*This brief essay, a reply to a forthcoming essay by Radicals in Robes by Saikrishna Prakash in the Columbia Law Review, makes two points. The first is that the abstract idea of interpretation cannot support originalism or indeed any judgment about the competing (reasonable) approaches to the Constitution. Any such judgment must be defended on pragmatic grounds, which means that it must be attentive to consequences. The second point is that the consequentialist judgments that support minimalism also suggest that there are times and places in which minimalism is rightly abandoned. For example, broad rulings may well be justified when predictability calls for it; and the Supreme Court was right to refuse minimalism in the late 1930s. While minimalism is generally the proper approach to “frontiers” issue in constitutional law, its own pragmatic foundations suggest that constitutional law should not be insistently or dogmatically minimalist.*

### I. Audiences

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

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

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religious institutions; to give the President broad, unilateral authority to fight to war on terror; and to contain no right of reproductive choice or sexual liberty. *Radicals in Robes* was partly designed to show that for all the talk of “strict construction,” and for all the insistence on distinguishing between law and politics, we are in the midst of a period in which some prominent conservatives<sup>1</sup> are attempting to use judicial power for their own political ends. Of course judges usually act in good faith. But it is nonetheless true that references to history, and to the views of the framers and ratifiers, are sometimes a fraud and a façade.

At the same time, *Radicals in Robes* tries to make two points that (the author hoped) might have academic interest as well. The first is that throughout American history, many of our debates about constitutional interpretation have involved conflicts among four identifiable groups: originalists,<sup>2</sup> perfectionists,<sup>3</sup> minimalists, and majoritarians.<sup>4</sup> The second is that any approach to constitutional interpretation has to be defended by reference to its consequences.<sup>5</sup> The Constitution does not set out the

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<sup>1</sup> It is not entirely comfortable, in a law review article or in a book about constitutional law, to make references to “conservatives” and “liberals,” or to use words like “right-wing” and “left-wing.” One reason is that terms of this kind threaten to stop thought for conservatives and liberals alike. (People sometimes ask, not what they think on particular questions, but what their group thinks about those questions – and in particular what the opposing group thinks on such questions. The views of the groups, once identified, can crowd out and close off their own thought.) Another reason is that the views of sensible people cannot possibly line up consistently with the stereotypical judgments of either “conservatives” or “liberals” or “the right” or “the left.” Why on earth should anyone follow the stereotypes with respect such diverse questions as affirmative action, *Roe v. Wade*, same-sex marriage, the minimum wage, the Iraq War, capital punishment, and climate change – to name a very small subset of salient questions in law and politics?

Nonetheless, *Radicals in Robes* does use politically charged language, and not only in its title. The reason is that the Supreme Court, and methods of constitutional interpretation, have been politicized by conservatives and liberals alike, and it is hard to write a book for a general audience without discussing some of the underlying political views and dynamics. Prakash says that I am “not trying to convince the right,” but in fact I meant to speak to people with widely varying political views; I do not believe that reflective “conservatives” should endorse originalism, just as I do not believe that reflective “liberals” should endorse perfectionism.

<sup>2</sup> In *Radicals in Robes*, I use the term “fundamentalism” for “originalism,” on the ground that the former term seems to me at once more accessible and illuminating for a general audience; originalists want to go back to what they see as fundamentals, and in any case there is a clear link between the originalist method and certain claims about how to interpret religious texts. I did not intend “fundamentalism” to be a pejorative in any way. But some originalists, including Prakash, object to that term, and in deference to their objection I am happy to speak of “originalism” instead.

<sup>3</sup> For an illuminating recent defense (with a good title!), see Ronald Dworkin, *Justice In Robes* (2006).

<sup>4</sup> For a valuable recent defense, see Adrian Vermeule, *Judging Under Uncertainty* (2006).

<sup>5</sup> This claim can also be found in Stephen Breyer, *Active Liberty* (2005) and Vermeule, *supra* note; and I believe that with some qualification, it is implicit in Dworkin, *supra* note. There are interesting relationships between Dworkin’s conception of law as integrity – which I characterize as a form of perfection – and minimalism. In my view, any conception of constitutional interpretation must, in the end, be perfectionist, in the sense that it attempts to make best sense out of our practices. Originalists, minimalists, and majoritarians can be understood as perfectionists too – but second-order ones, skeptical about the idea that judges should deploy moral and political ideals of their own. Originalists, for example, seek to deprive judges of the authority to deploy those ideals, often on the ground that judicial judgments are unreliable and in any event a disservice to self-government. Majoritarians are similarly skeptical of the view that judges have some special access to moral and political truth. See Vermeule, *supra* note. But a serious problem, for both originalists and majoritarians, is that their approaches are inconsistent with so

instructions for its own interpretation. A theory of interpretation has to be defended, rather than asserted, and the defense must speak candidly in terms of the system of constitutional law that it will yield. Consider the illuminating suggestion by Randy Barnett, a committed originalist: “Given a sufficiently good constitutional text, originalists maintain that better results will be reached overall if government officials—including judges—must stick to the original meaning rather than empowering them to trump that meaning with one that they prefer.”<sup>6</sup> In my view, Barnett is entirely right to suggest that if originalism is to be defended, it is on the ground that it will produce “better results . . . overall.”

Of course consequences can be evaluated in different ways, and hence we should expect diverse people to disagree about which consequences are good. If originalism permits racial segregation, is it unacceptable for that reason? How strongly, if at all, does it account against originalism if originalists must allow affirmative action programs, or refuse to recognize a right of privacy? And in evaluating consequences, we must certainly ask whether an approach to interpretation would unleash judges to do whatever they wish. To say the least, self-government is important, and part of the appeal of majoritarianism, originalism, and minimalism is that all three approaches attempt to cabin the power and the discretion of the Supreme Court. Perfectionism has a serious problem on this count; and hence minimalists have a serious problem with (for example) the reasoning in *Roe v. Wade*.

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

## **II. A Theory of Interpretation Must Be Defended, Not Asserted**

Prakash insists that in deciding on the meaning of a text, we should not think about consequences at all. He acknowledges that we might refuse to accept a text, after we have uncovered its true meaning. But there is a large difference between picking policies (for, say, environmental protection) and deciding on how to understand the Constitution’s terms. Originalists believe “that to discern the meaning of words, we ask what it would mean to those who penned or uttered those words.” Prakash offers what he calls a “simple case” for the originalist approach, which is that “it tracks common

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much of established law – and hence do not “fit” our practices. Minimalists, who also attempt to discipline judicial power, can make better claims along the dimension of fit. The relationship between integrity and consequentialism is this: In deciding what makes best sense out of the existing legal materials, consequentialists insist that consequences matter. As noted in text, a normative account is of course needed to evaluate consequences.

<sup>6</sup> Available at [http://legalaffairs.org/webexclusive/debateclub\\_cie0505.msp](http://legalaffairs.org/webexclusive/debateclub_cie0505.msp).

conceptions.” Originalism is not a political choice, any more than it is a political choice to be originalist when reading law reviews articles or *People Magazine*. When we ask about the meaning of words uttered by friends and acquaintances, we are likely to be originalists; we ask what they meant. Why isn’t the same true for constitutional law?

Prakash means to ask a rhetorical question. But (a rhetorical question) has he? Let put to one side two problems that originalists must overcome: (a) the possibility that the framers and ratifiers meant to offer a general principle whose meaning is not frozen over time; and (b) the difficulties in construing the constitutional text in circumstances that the framers and ratifiers could not possibly anticipate.<sup>7</sup> Even if we disregard these two problems, debates over constitutional interpretation cannot possibly be resolved by stipulating what interpretation “is,” or by pointing to “common conceptions.” What is needed is an argument, not a stipulation. And if “common conceptions” are to be followed, it is because good reasons can be marshaled on their behalf. To marshal good reasons, we will have to speak of consequences.

In fact judgments about interpretation are *always* consequentialist; pragmatic<sup>8</sup> arguments, of one or another sort, cannot be avoided. Suppose that a friend says, “let’s meet in the usual place for lunch today.” Of course I would ask about the specific, intended meaning – not about the most popular (“usual”) place in the area, and not about my own judgments about what place is, or ought to be, usual. But the reason for this kind of everyday originalism is not adequately captured by a stipulation about what meaning “is”; the reason lies in the *point*, or reason, or purpose, of this particular communication. When my friend and I are deciding where to meet for lunch, it makes no sense for me to do anything other than to attempt to discern his specific, intended meaning. (If I don’t do that, we won’t meet!) In contexts in which we ask about specific, intended meanings, and do that without much thinking, it is because consequentialist or pragmatic arguments so require. But sometimes an inquiry into authorial intentions cannot be justified in this way.

Consider one of Prakash’s own examples: judicial interpretation of the precedents of the Supreme Court. Prakash thinks that I “surely envision[] that originalism would be used.” But I envision no such thing, and in fact the example cuts hard against his claim about “common conceptions.” No one follows originalism in interpreting the Court’s own precedents. No one thinks that the Court must ask, in interpreting (say) *Roe v. Wade* or *Brown v. Bd. Of Educ.* or *McCulloch v. Maryland*: What was the specific, original

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<sup>7</sup> See *Radicals in Robes*, supra note, at XX-YY. Throughout this Reply, I assume that originalism is a coherent enterprise that can overcome these objections.

<sup>8</sup> I am understanding pragmatic arguments to be consequentialist ones, as in the standard pragmatic view. See Williams James, *What Pragmatism Means*, in *Pragmatism* 43, 45 (1907): “The pragmatic method is primarily a method of settling metaphysical disputes that otherwise might be interminable. Is the world one or many? – fated or free? – material or spiritual? – here are notions either of which may or may not hold good of the world; and disputes over such notions are unending. The pragmatic method in such cases is to try to interpret each notion by tracing its respective practical consequences. What difference would it practically make to any one if this notion rather than that notion were true?” I believe that Prakash’s argument is pre-pragmatic, in the sense that it refuses to trace the “respective practical consequences” of one or another view of interpretation, and acts as if hard questions can be solved at the level of concepts or definitions. But an effort to establish this point would take me beyond the boundaries of this Reply.

meaning intended by Justice Blackmun or Chief Justice Warren or Chief Justice Marshall, or by those who signed the Court's opinion? When the Court interprets its own precedents, it is hardly originalist; it attempts to make best sense out of the prior decisions, in a way that has nothing to do with specific authorial intentions.

Of course a theory of interpretation, to qualify as such, must attend to the text that is being construed; otherwise it is not a theory of interpretation at all. But constitutional interpretation is, or at least might be, very different from communication between friends – in the sense that specific, intended meanings are, or might be, controlling in the latter context but not in the former. The (inescapable) question is whether consequentialist arguments justify our adoption of a theory of interpretation that requires adherence to the original understanding of the founding document. That question must be answered with an argument, not a stipulation. The idea of authorial intentions is attractive in many contexts, but it is not compelled by the very idea of interpretation, and indeed many prominent originalists recognize the point<sup>9</sup> – and reject authorial intentions in favor of the original public meaning.<sup>10</sup>

There is no a priori reason to reject originalism.<sup>11</sup> We could easily imagine a society in which originalism would have a strong consequentialist defense. In such a society, the original understanding would lead to an excellent system of rights and institutions; departures from the original understanding would untether judges, who would compromise democratic self-government and produce an inferior system of rights and institutions; and the original understanding, if followed, would permit the democratic process to correct inadequate understandings of rights and institutions over time. In such a society, what could possibly be wrong with originalism? Many originalists believe that our own society is not unrecognizably different from this one.<sup>12</sup> If they are right, originalism might be justifiable on consequential grounds. But I do not think that they are right. Originalism fails for that reason. The broader point is that originalism is inescapably a political choice, and it has to be evaluated as such.

Prakash does not care about the consequences of originalism, so apparently it does not matter to him, for purposes of selecting an approach to constitutional interpretation, if originalism, properly understood, would permit race and sex discrimination by the national government; eliminate the right to privacy; allow racial segregation at the state level; permit states to establish their own religions; require abolition of the administrative state; or for that matter doom most Americans to short and miserable lives. Nonetheless, Prakash does think it relevant to say that I ascribe “unlikely

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<sup>9</sup> See Barnett, *supra* note.

<sup>10</sup> See Antonin Scalia, *A Matter of Interpretation* (1997).

<sup>11</sup> I am bracketing some historical and conceptual questions. See note *supra*.

<sup>12</sup> See Akhil Amar, *Rethinking Originalism*, *Slate* (2005), available at <http://www.slate.com/id/2126680/>. Of course Amar does not contend that the Constitution, as originally understood, is perfect, but he attempts to rebut the consequentialist argument against originalism. If Amar were correct on the consequences of originalism, the argument against originalism would be significantly weakened. Interestingly, Antonin Scalia, *A Matter of Interpretation* (1997), and Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U Cin L Rev* 849 (1989) have strong consequentialist features; Scalia does not contend that originalism is right because it is what interpretation is.

possibilities” to originalism and that my account of its consequences is “silly.” His reason is that the consequences that I trace “simply would not transpire if this country followed the original Constitution.” For example, there “is no groundswell for racial segregation,” and “there is no likelihood that the states will reestablish churches.”

Prakash is right to say that if originalism were followed, states are unlikely to respond by segregating schools by race or by establishing their own churches. But Prakash understates the contemporary importance of the constitutional doctrines that are now in place. Without the current ban on racial discrimination, we would surely see much more in the way of racial discrimination. Without the current application of the Establishment Clause to the states, we would surely see, at some times and places, forms of government favoritism toward religion, and forms of religious struggle in state legislatures, that would make the United States a quite different nation from what it now is. In any case my goal is to trace the potential consequences of originalism for constitutional law, a point of independent interest; and on that point Prakash offers no rejoinder at all.

### **III. What Minimalism Isn't**

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

I think that Prakash is generally right here, and that the conscientious minimalist ought to welcome most of these claims. Prakash is right to say that minimalism does not specify the small steps that judges ought to take. It is possible to imagine liberal minimalists and conservative minimalists; majoritarian minimalists and originalist minimalists; “active liberty” minimalists<sup>13</sup> and “negative liberty” minimalists. Prakash is also right to press hard on the relationship between consequentialism and minimalism. With good reason, he argues that consequentialism supplies the best defense of minimalism – and that when consequentialism argues against minimalism, we ought not to be minimalists.

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<sup>13</sup> This is a plausible characterization of Justice Breyer. See Breyer, *supra* note.



It is important to disaggregate two aspects of minimalism here. First, minimalists tend to like decisions that are narrow, in the sense that they do not want to cover issues not before the Court. Minimalists also prefer decisions that are shallow, in the sense that they avoid the largest theoretical controversies and can attract support from those with diverse perspectives on the most contentious questions. But sensible minimalists offer no theology or dogma. They freely admit that when predictability is important, narrowness can be a big mistake.<sup>14</sup> They agree that if the Court has enough experience to justify acceptance of a deep theory, it is entitled to do exactly that. No sensible person could embrace minimalism in all times and places, and hence Prakash's objections to minimalism, in some times and places, is entirely within the spirit of the most plausible claims on its behalf, which are pragmatic and qualified.

This point should not be read for more than it is worth; Prakash reads the argument for minimalism as more limited and less ambitious than it actually is. That argument is hardly restricted to the particular circumstances of the early twentieth century. Minimalism is grounded in an appreciation of the common law method and its appropriate place in constitutional law. In the hardest and most controversial cases, the Supreme Court should generally follow minimalism.<sup>15</sup> For this reason, there is good reason to doubt the analysis in *Roe v. Wade*, *Reynolds v. Simms*, and indeed a number of the ambitious decisions of the Warren Court. Minimalists are skeptical of broad rulings and theoretical ambition, whatever the political commitments that accompany them. On consequentialist grounds, the frontier cases in constitutional law – whatever their time and place – are strong candidates for minimalism.

But let us sharpen Prakash's challenge and suppose that in the next decades, the least attractive and most highly politicized form of originalism prevails, so that the Court moves the Constitution in directions that closely correspond to the views of the extreme wing of the Republican Party. (Of course such a movement is exceedingly unlikely; it's a thought experiment, not a prediction.) After the movement is complete, should we want new appointees to be minimalists – and merely to take small steps within the new framework that the Court has devised? In my view, this question is close to that faced by the Court in the late 1930s, when it had to choose among three possible courses for dealing with the doctrine that it had developed in the last decades: to build on it, in minimalist fashion; to chip away at it, also in minimalist fashion; or to repudiate it fairly rapidly. The Court chose the third path. Was it wrong to do so? I do not think so, especially because the decisions of the *Lochner* era erected a range of barriers -- with dubious constitutional roots on any sensible interpretive theory -- to the decisions of democratically elected officials, both state and federal.<sup>16</sup>

Of course any approach to interpretation, to qualify as such, must attempt to limit judges; its application should not vary between Monday and Tuesday. But an approach that makes sense in one nation may be senseless in another, and it is fine for courts to

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<sup>14</sup> See Cass R. Sunstein, *Problems With Minimalism*, 58 *Stan L Rev* 1899 (2006).

<sup>15</sup> On the exceptions, see *id.*; Cass R. Sunstein, *One Case At A Time* (1999).

<sup>16</sup> For discussion, see Cass R. Sunstein, *Burkean Minimalism*, *Mich L Rev* (forthcoming).

follow one approach in 1800 and quite another in 1954. If Prakash's objection to the contingency of minimalism seems convincing, consider the fact that no one complains when courts rule narrowly because they lack enough information to rule ambitiously.<sup>17</sup> Nor is it unusual to think that when a precedent is wrong, it should be limited rather than extended – and that when it is egregiously wrong, it must be overruled.

It is true that minimalists must, on some occasions, be prepared to leave their cocoons. But if an approach to constitutional law must be justified by reference to its consequences, this is no problem for minimalism. Snakes shed their skins,<sup>18</sup> but so, in their way, do butterflies.

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<sup>17</sup> See Breyer, *Active Liberty*, supra note (discussing privacy).

<sup>18</sup> See Prakash, supra, at

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