

Dru Stevenson
Associate Professor of Law
South Texas College of Law
1303 San Jacinto Street
Houston, Texas 77002

**May My Enemies Move Slowly: An Essay Reviewing
Radicals in Robes by Cass Sunstein
Basic Books, 2005; 281 pp.**

ABSTRACT: This essay reviews and critiques Cass Sunstein's new book entitled *Radicals in Robes*. After a discussion of Sunstein's (somewhat misleading) rhetorical nomenclature, this essay argues that Sunstein's proposed "minimalist" methodology in constitutional jurisprudence is beneficial, but not for the reasons Sunstein suggests. Sunstein alternatively justifies judicial restraint or incrementalism on epistemological self-doubt (cautiousness being an outgrowth of uncertainty) and his fear that accomplishments by Progressives in the last century will be undone by conservative judges in the present. Constitutional incrementalism is more convincingly justified on classical economic grounds. While affirming Sunstein's overall thesis, this essay offers an alternative rationale for the same approach, one that might be more plausible to those who do not already agree with Sunstein's political views.

“It is some time in the future. You are reading a weekly magazine, which explores how the Constitution has recently changed as a result of decisions of the Supreme Court.”¹ So begins Cass Sunstein’s new book *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America*.²

Suppose one were to continue the quote above like this: “After Democrats regained control of the Senate and White House in the 2008 elections, vacancies on the federal judiciary, including the Supreme Court,

¹ CASS SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 1 (2005).

² It seems that *Radicals in Robes* has already prompted two new books by other authors in reaction. See, e.g., RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006) AND RONALD DWORKIN, *JUSTICE IN ROBES* (2006). Richard Epstein and Ronald Dworkin are both critics of Sunstein (from different ends of the spectrum, though). Epstein’s book nowhere mentions Sunstein himself, or *Radicals in Robes*, but the back cover of the dust jacket on Epstein’s book sports the following quote (attributed to Charles Fried from Harvard University) in large print:

Just as we are being berated by his Chicago colleague Cass Sunstein for not completing FDR’s social-democratic revolution by embracing a New Deal for speech and constitutionalizing welfare rights, here come Richard Epstein inviting us to wonder whether the New Deal enterprise and the Progressive movement that preceded it were not all a dreadful mistake.”

Given that Sunstein’s book opens with a warning about conservatives who want to undo the New Deal, it seems to be a repartee when a new book appears soon thereafter defiantly asserting that we should do just that. Moreover, Epstein’s preface alludes to his opponents who “are quite happy to place anyone opposed to their ideals in the ‘Constitution-in-Exile’ movement” (see EPSTEIN, this note, at ix), which is exactly what Sunstein does in the Introduction to his book (SUNSTEIN, *supra* note 1, at 3-5), and in approximately fifteen other places throughout his volume (see *id.* at 25-26, 31, 37, 43, 49, 54-55, 75, 76, 131, 199, 205, 221, 238, 243, 249), Epstein’s reference seems, therefore, to be to *Radicals in Robes*, although Sunstein never mentions Epstein by name in his book.

Dworkin’s book also does not acknowledge *Radicals in Robes* in any of the footnotes or the index, but the title itself, *Justice in Robes*, seems to be a parody of Sunstein’s title – especially since Dworkin spend a fair amount of time criticizing Sunstein by name for being a short-sighted, amoral pragmatist who is afraid of taking a stronger stand for moral values like justice and equality in jurisprudence. See DWORKIN, *JUSTICE IN ROBES*, at 66-73. Almost all of Dworkin’s citations to Sunstein’s writings are to a much earlier book by Sunstein, *Legal Reasoning and Political Conflict* (1996), which introduced some of the nascent ideas developed in *Radicals in Robes*.

have likewise drawn left-wing progressives as replacements for the retiring Reagan-era appointees.” If you were a conservative, you might respond to this new-found political disenfranchisement by proposing a new rule: these judges should do nothing drastic. Change as little as possible. The goal, naturally, would be to have one’s opponents move slowly. This is what Sunstein wants as well, but as his subtitle indicates, the future is now; he wants to cabin the right-wing judges who are filling important judicial slots around the country.

This is predictable for politics, of course, but Sunstein takes pains early in the book to deny that his agenda is partisan, insisting instead that it is a neutral methodology for deciding court cases.³ Nevertheless, the book opens and closes with explicit attacks on the Republican agenda for the judiciary, and the excessively obvious overlap between the Republican Party platform and the decision patterns of originalist judges (whom Sunstein disparagingly calls “fundamentalists” throughout the book). Overall, the book reads somewhat like a plea for mercy or leniency by the politically vanquished.

That being said, Sunstein’s gradualist approach is right, but not for the reasons Sunstein says. Judges should take baby steps, he says, because

³ SUNSTEIN, *supra* note 1., at 28-29.

it shows more intellectual humility.⁴ He quotes Judge Learned Hand for the point that “the spirit of liberty is that spirit which is not too sure that it is right.”⁵ Such modesty is a good thing when it reflects genuine tolerance of alternative (and even opposing) viewpoints; but it can also be indistinguishable from intellectual agnosticism, or even straightforward ambivalence: near the end of the book, Sunstein says languidly that his camp is “comfortable”⁶ with the Supreme Court’s decision in *Lopez*; their views are “broadly compatible with the Court’s current approach to campaign finance reform,”⁷ they feel that neutral school voucher programs are “probably fine,”⁸ and are “puzzled” by distinctions between commercial speech, like product advertisements, and expressive speech, like political campaigning.⁹ They “resist any ambitious agenda for the Takings Clause,”¹⁰ preferring a piecemeal approach instead. His predilection for piecemeal jurisprudence smacks of 1960’s-style “situational ethics,” but here it applies to grand constitutional questions.

⁴ *Id.* at 34-36.

⁵ *Id.* at 35, citing LEARNED HAND, *THE SPIRIT OF LIBERTY* 190 (1953).

⁶ SUNSTEIN, *supra* note 1, at 239 (sounding rather ambivalent).

⁷ *Id.* at 232 (sounding vaguely acquiescent).

⁸ *Id.* at 227.

⁹ *Id.* at 230 (sounding legally agnostic).

¹⁰ *Id.* at 235 (espousing intentional halfheartedness).

Unsurprisingly, he spends most of the book worrying about whether the results in any case would offend his political sensibilities.¹¹

There are, however, perfectly good free-market arguments for judicial incrementalism and governmental gradualism in general, even in the wake of previous bad decisions. Sunstein's proposed methodology would be more palatable to the people he needs to win over – instead of the “amen chorus” of moderate liberals – if he could pitch judicial gradualism as something that fits squarely within the original intent of the Framers, as well as classical economic thought. This essay attempts to do just that. The real brilliance of the American Constitution, I argue, is its tendency to foster steady economic development and general prosperity by creating an inherently gradualist government, including the judiciary.¹² The mechanism for this achievement is the remarkable balance between governmental inertia and the possibility for change and progress. Our Constitution takes advantage of the tedious inefficiency of a government with checks and balances (and competing state and federal systems) to

¹¹ *Radicals in Robes* overall seems to be a restatement and further development of ideas that Sunstein introduced in earlier books, especially his classic *One Case At a Time* (1999) and *Legal Reasoning and Political Conflict* (1996).

¹² The argument presented herein departs from the standard free-market issues like freedom of contract and private property rights that Richard Epstein emphasizes throughout his new book, *How Progressives Rewrote the Constitution* (see EPSTEIN, *supra* note 2). Epstein focus primarily on these two specifically-delineated rights rather than the overall effects that the Separation of Powers has on the development of the free market, although he recognizes an implied “police power” in the structure of the Constitution. *See id.* at 16-17.

limit any changes to incremental, measured steps. This comports with the growing body of economic literature about the link between gradualism in governmental self-improvement and the overall prosperity of a society. Sunstein is absolutely right that courts should move one step at a time, but the reasons he offers are flaccid and confusing. There are much better reasons for following his program.

This review essay proceeds with a critical discussion (Part I) of Sunstein's innovative and self-conscious nomenclature, a noteworthy feature permeating his text. Part II presents the case for judicial gradualism from a historical and free-market perspective; this is the longest section and the heart of this essay. The next section, Part III, explores the nondelegation doctrine, both from Sunstein's point of view (his references to it in *Radicals in Robes* seem to indicate a significant departure from his earlier writings), and from the perspective advocated in this article – that government radicalism is bad for the economy. Similarly, Part IV addresses the controversial issue of gun control from these two parallel perspectives. Part V offers a brief summary and conclusion.

PART I: THE NAME GAME

Cass Sunstein is one of the most well-known legal writers of our time, and for good reason: he is prolific, writes on a wide variety of relevant topics, and is clearly well-informed on many subjects. He thinks and writes clearly, even brilliantly, and makes complicated legal doctrines accessible to his readers. I strongly recommend his book, as I would all his other books.

Before defending Sunstein's ultimate thesis, however, I must object to his protracted misuse of certain terminology in this particular volume. The craft of rhetoric sometimes requires that we group our opponents together and name them, usually uncharitably, and that we choose an appropriate moniker for our own position as well. Such rhetorical nomenclature can be valuable when it brings clarity, delineating the dividing lines between sets of ideas or opposing perspectives.

Sunstein chooses some novel nomenclature, and his generates confusion instead of clarity. He begins by saying that there are four main approaches to constitutional interpretation: perfectionism, majoritarianism, fundamentalism, and minimalism.¹³ By "perfectionism,"¹⁴ he seems to mean what everyone else calls "liberal judicial activism" or "progressive judicial activism" (or maybe aggressive

¹³ See SUNSTEIN, *supra* note 1, at the Preface, pp. xii-xiv.

¹⁴ *Id.* at 31-41.

civil libertarianism).¹⁵ Basically, he is identifying the type of judgecraft exemplified by Earl Warren and Thurgood Marshall. “Majoritarianism” is a type of judicial self-restraint and deference to the legislature, perhaps represented by Oliver Wendell Holmes.¹⁶ Sunstein says neither of these views have proponents on the Supreme Court today; they are artifacts of history that were partly rights and partly wrong, but right enough to be respectable and legitimate, Sunstein feels.

Even here the nomenclature introduces normative values mixed with supposedly descriptive terms. “Perfectionist” is not the most common term legal writers use for the Warren Court era, not do many of the other academic writers whom Sunstein includes in this group use that name for themselves.¹⁷ “Liberal activists” would have been fairly neutral, a term that writers on both sides of the issues seem to accept. It certainly would have been more informative about what these people believed and did. Why insist on renaming them all “perfectionists?”¹⁸ The term

¹⁵ *Id.*, see also *id.* at 50-51, 57-58, 245-50.

¹⁶ See *id.* at 44-51, 73, 77, and 251. The line between “majoritarianism” and all the other approaches is rather blurry, because adherent of each of the other viewpoints typically claim they are more in line with the will of the American people. Also, as Sunstein repeatedly admits, representatives like Oliver Wendell Holmes at times seem to fit in other categories, depending on the case and the issue.

¹⁷ The main exception seems to be Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981), although Monaghan never claims that anyone else describes themselves this way.

¹⁸ See SUNSTEIN, *supra* note 1, at 31-36, 50-51, 54, 57-58, 60, 67, 77, 222, 245-48.

implies good ness taken a bit too far, well-intentioned aspirations that went beyond what is realistic. Sunstein is not merely categorizing for us a diverse assortment of writers and judges; he is characterizing them, telling us how to esteem them. His odd choice of terms seems intended to honor and preserve their legacy as the Good Guys Who Just Couldn't Stop, as if to shield their memory from mud-slinging by modern conservatives. Similarly, the great "majoritarians" of history did not call themselves that. They thought they were "realists," "self-restrained," or simply democratic. Sunstein, however, wants to make them sound good, but not as desirable as modern "minimalists" (although he is hard pressed to find cases they would decide differently). The name harkens back to a simpler era, when "democracy" was closer to its plebiscite ancestors, before the complexities of twenty-first century governance took over. The name also makes them sound a bit irrelevant, because Supreme Court that simply defers to the legislature seems rather superfluous.

The Name Game takes a more audacious turn, however, when Sunstein sets his sights on his real target: the "fundamentalists." It appears from reading the book that there are only three such judges alive today – Justice Scalia, Justice Thomas, and Judge Ginsberg of the D.C.

Circuit – but Sunstein suggests that fundamentalists are legion, even if the rest of them do not have names or anything in print that he can cite.

Sunstein overreaches here. Not one of the “fundamentalists” he mentions or quotes would ever use the name for themselves; they always use more informative and descriptive terms like “originalists,” “textualists,” or “strict constructionists.”¹⁹ Apparently none of these terms are pejorative enough for Sunstein, however, and he decides instead to use a religious term for them, one that his moderate-liberal fans will associate with backwardness, intolerance, bigotry, and pushiness.²⁰

¹⁹ See, e.g., Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. (1971). It is not uncommon to see economics literature categorizing certain economists as “fundamentalists,” but this is again a specialized term of art for that industry, not an analogy to religious fundamentalists, *contra* Sunstein. I have found one other commentator using “fundamentalist” to refer to “federalists” in the environmental arena: Claire L. Huene, *Fundamentalist Federalism: The Lack of a Rational Basis in United States V. Morrison*, 9 WASH. U. J. L. & POL’Y 353 (2002).

Sunstein may have borrowed the analogy and expanded it (without acknowledging the source) from some earlier commentators, whose use of it was less rhetorical or pejorative. See, e.g., VINCENT CRAPANZANO, *SERVING THE WORD: LITERALISM IN AMERICA FROM THE PULPIT TO THE BENCH* 324-26 (2000) (descriptively comparing biblical fundamentalists with legal textualists); Thurman Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617, 646-47 (1932) (using the term – devoid of religious associations – to describe anti-Realists); it was also used, merely in passing, in the conclusion of Larry Kramer’s *Supreme Court 2000 Term Foreword: We The Court*, 115 HARV. L. REV. 4, 169 (2000). None of these sources, however, strain the term as Sunstein does. I cannot find any sources where judges or academicians describe *themselves* as legal “fundamentalists.”

²⁰ Sunstein does the same thing in two recent articles on national security, where he dubs his ideological opponents “national security fundamentalists,” even though their religious views are unknown and irrelevant to the issues he discusses. See Cass Sunstein, *Monkey Wrench*, 2005 LEGAL AFFAIRS 36 (2005); Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WSH. L. REV. 693 (2005).

Even the folks who call themselves “fundamentalists” would be offended. Christian Fundamentalists²¹ would generally not consider Scalia or Thomas to be real Christians at all, because both are Roman Catholics. Fundamentalists adopted the term for themselves early in the twentieth century to distinguish their churches from mainline denominations that seemed to be discarding essential tenets of Christianity²² (like belief in the deity of Christ or the virgin birth) – that is,

²¹ “Fundamentalism” can also apply to non-Christian religious devotees, of course, like Islamic Fundamentalists, at least in the American media. I focus my discussion here on Christian Fundamentalism, partly due to my greater familiarity with the movement’s own literature, but also because the Christian groups overtly adopted the name for themselves, while it is less clear that “Islamic Fundamentalist” is a self-ascription; the secular media seems to have applied the term to radical Muslims, starting with Khomeini’s rise to power in Iran, whether they liked it or not (I have not found any sources where Muslims use this term for themselves).

²² The definitive exposition of the Fundamentalist position, from the standpoint of members in the movement is J. I. Packer, “FUNDAMENTALISM” AND THE WORD OF GOD (1958), affirming the description I set forth here – that Fundamentalism has always meant adherence to a set of essential tenets or propositional truths, as opposed to a hermeneutical approach.. Packer explains the origin of the term:

The name developed out of the habit of referring to the central redemptive doctrines which Liberalism rejected as “the fundamentals.” This usage dates back to at least 1909. In that year there appeared the first of twelve miscellany volumes devoted to the exposition and defense of evangelical Christianity, entitled *The Fundamentals*. Through the generosity of two wealthy Californians, the ser was sent here to “every pastor, evangelist, missionary, theology student, Sunday School superintendent, YMCA and YWCA secretary in the English-speaking world, as far as those addresses could be obtained” – over three million copies were eventually circulated . . . The series contained positive biblical expositions of the controverted “fundamentals” – the inspiration and authority of Scripture, the deity, virgin birth, supernatural miracles, atoning death, physical resurrection and personal return of Jesus Christ, the reality of sin, salvation by faith through spiritual regeneration, the power of prayer and the duty of evangelism . . .

This use of “the fundamentals” as a conservative slogan was echoed in the Deliverance which the General Assembly of the Northern Presbyterian Church issued in 1910, while *The Fundamentals* were in the process of publication. This specified five items as “the fundamentals of faith and evangelical Christianity”: the inspiration and infallibility of Scripture, the deity

the “fundamental” doctrines of the faith.²³ Hijacking the name these religious devotees selected for themselves is not just a cheap shot at some radical judges; it is misleading to the reader (given the complete lack of connection between any real Fundamentalists and the judges in question), and unnecessarily injurious to an isolated religious group. The only instance I have seen of such blatant name theft is when political crackpot Lyndon LaRouche named his party the National Democrats in the 1980’s to create confusion at the ballot and steal votes for his disciple-candidates.²⁴

of Christ, His virgin birth and miracles, His penal death for our sins, and his physical resurrection and personal return. From that time on, it seems to have become habitual for American Evangelicals to refer to shoe articles as “the fundamentals” simply. The General Assembly’s list was adopted, with minor variations and additions, as the doctrinal platform of later “fundamentalist” organizations, of which the first was the still surviving World Christian Fundamentals Association, formed in 1919.

Id. at 28-29.

²³ See MILLARD J. ERICKSON, *CHRISTIAN THEOLOGY* 1142 (1983):

[F]undamentalism began historically with a series of Bible conferences attended by people who shared a set of distinctive beliefs terms “fundamentals of the faith.” Many participants discovered that they had more in common theologically and spiritually with some Christians bearing different denominational labels than they did with some members of their own denomination.

²⁴ See Robin Toner, *Democrats Scrutinize LaRouche Bloc*, *New York Times* March 30, 1986, Section 1; Part 1, Page 22; Kevin Klose, *LaRouche Followers Gained in Black Wards; Analysis of Illinois Primary Upset Shows Ballots Were Cast Against Regular Democrats*, *THE WASHINGTON POST* March 30, 1986, at A3; John Dillin, *Lyndon LaRouche has got America's attention now!* *CHRISTIAN SCIENCE MONITOR* March 27, 1986 at 1. For discussion of this event in the academic literature, see Angela P. Harris, *Vultures in Eagles' Clothing: Conspiracy and Racial Fantasy in Populist Legal Thought*, 10 *MICH. J. L. & RACE* 269, 322 n. 195 (2005); Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 *HARV. J. ON LEGIS.* 167, 208 (1991); Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 *MICH. L. REV.* 1703, 1739 n. 109 (1988); Francine Miller, *Fairness in the Election Arena: Congressional Regulation of Federal Ballot Access*, 32 *N.Y.L.SCH. L. REV.* 903 (1987); Karl D.

Sunstein is usually very well-informed when he writes, but here he seems to betray a lack of familiarity with popular religion: “Religious fundamentalism usually represents an effort to restore the literal meaning of a sacred text. For fundamentalists, it is illegitimate to understand the words of those texts in a way that departs from the original meaning or that allows changes over time.”²⁵

Wrong. Most Fundamentalists take the Scriptures very literally, but make little or no attempt to determine the original meaning of the words themselves.²⁶ They take the text at face value and apply it, as they understand it, quite rigorously and consistently (unfashionably so). It is the more liberal/modernist schools of theology that strain to discover original meaning using interpretive tools like the historical-critical method, form criticism, structural criticism, evolutionary approaches to

Cooper, Note, Are State-Imposed Political Party Primaries Constitutional? The Constitutional Ramifications of the 1986 Illinois LaRouche Primary Victories, 4 J.L. & POL. 343, 373 (1987); see also Entry, Lyndon LaRouche, available online at http://en.wikipedia.org/wiki/Lyndon_LaRouche.

²⁵ SUNSTEIN, *supra* note 1, at xiv.

²⁶ See, e.g., ERICKSON, *supra* note 23 at 251:

[T]his has also been the position of American fundamentalism of the twentieth century. Those who hold this position see an objective quality in the Bible that automatically brings one into contact with God; a virtually sacramental view of the Bible can result. The Bible as a revelation and an inspired preservation of that revelation is also regarded as having an intrinsic efficacy. A mere presentation of the Bible or exposure to the Bible is per se of value, for the words of the Bible have power in themselves.

ancient grammar, and anthropology of religion.²⁷ Fundamentalists have a hermeneutic that might be analogous to strict textualism (Scalia’s approach to statutory construction, not a subject of Sunstein’s book),²⁸ but they are largely unconcerned about what the Apostle Paul was thinking when he wrote his Epistles, or what Jeremiah’s original audience would have thought he meant.²⁹ The Scriptural words did not come from the writer, but from God Himself, with the writer functioning more as a scribe. Sunstein mischaracterizes the people who proudly call themselves

²⁷ See generally Ernest R. Sandeen, *Origins of Fundamentalism*, in RELIGION IN AMERICAN HISTORY 415-27 (John M. Mulder & John F. Wilson, eds. 1978)

²⁸ Hermeneutics, however, are “only part of the Fundamentalist enterprise,” as seen below:

To a large extent, the difference between fundamentalism and liberalism is a difference in world-view. The conservative operates with a definite supernaturalism – God resides outside the world and intervenes periodically within the natural processes through miracles. The conservative sees reality as occupying more than one level. The liberal, on the other hand, tends to have a single-story view of reality.

ERICKSON, *supra* note 23, at 304.

It is also worth noting that “textualism” is not necessarily the same thing as “literalism,” as the former could consider the context in which the word occurs, and the latter could focus only on lexicographical meaning, independent of sentence context.

²⁹ The seminal work on Fundamentalism, at least within the movement (arguably its manifesto, in fact), is J. I. Packer’s early work entitled “FUNDAMENTALISM” AND THE WORD OF GOD (1958). His section on “The Interpretation of Scripture” (pp. 101-14) explains that his espoused literalism starts with a nod toward the idea of an original writer and audience, but quickly moves to an emphasis on the direct accessibility of the text to modern readers, the rule for letting Scripture interpret itself, and the need for the Holy Spirit to tell the reader the meaning; originalism is not central to the hermeneutic at all, and is ultimately rather inconsistent with it. See also JAMES T. DRAPER, JR., AUTHORITY: THE CRITICAL ISSUE FOR SOUTHERN BAPTISTS 45-79 (1984) (echoing the same points).

See also, the discussion in SYNDEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 772-74 (1972). For examples of the approach at originalism that Fundamentalists reject (contrary to what Sunstein says), see generally E. P. SANDERS, PAUL, THE LAW, AND THE JEWISH PEOPLE (1983); LLOYD GASTON, PAUL AND THE TORAH (1987).

Fundamentalists, and uses the term for judges they would consider unbelievers.

Sunstein tries to backpedal a bit and adds, “I do not mean to say anything about religious fundamentalism,”³⁰ but proceeds to misuse the term until the last page of the book. He ends this same paragraph saying that “fundamentalists” will “make Americans much less free than they are now.”³¹ This is exactly what most of his audience thinks about religious Fundamentalists who vie for political power, because the Religious Right constantly complains that our society has become too permissive, licentious, and immoral. Sunstein’s real targets (the three judges mentioned above) would rightly feel slandered, because their platform is not that Americans are too free, but that we labor under a burden of Byzantine federal bureaucracy, undemocratic infringement on local self-governance, and endless entitlements that undermine our merit-based systems of education and job placement.³²

Continuing with the religious motif, Sunstein calls his sect the “minimalists,” suggesting a thoughtful, Zen-like jurisprudence, something

³⁰ SUNSTEIN, *supra* note 1, at xiv.

³¹ *Id.*

³² These issues, in fact, are the ones for which Sunstein takes them to task throughout the rest of the book. His point in the Preface seems to be that their misguided views would *inadvertently* make America less free, despite the good intentions of constitutional originalists – nowhere does he suggest that this set of radical judges are excessively Puritanical. The real Christian Fundamentalists, however, are unabashedly anti-libertine.

both harmless and enlightened. “Minimalist” conjures up images of jurists who are disciplined, contemplative sojourners, carefully preserving the harmony of their environment. It is legitimate, of course, for a person to adopt a name for oneself or one’s own ideas. Even so, not all self-appellations are equally helpful or benign. “Incrementalist” would have been more descriptive and informative (I shall use it hereafter), unless one is troubled by the slight semantic suggestion with “going in a certain direction.” Perhaps Sunstein wants judges to move in haphazard directions, or maybe he wants his camp to be inclusive of as many people as possible, even those with opposite ideas of where the courts should be moving.³³ “Minimalism,” though, is laden with unrelated religious and aesthetic connotations.³⁴

Categorizing Supreme Court Justices on their interpretive methods is fine (albeit unoriginal³⁵), but Sunstein’s Name Game is beneath a person of his intellectual caliber and self-ascribed cautious temperament.³⁶ Instead of using religious terms (even “Perfectionist” really comes of the

³³ For example, Sunstein explains inclusively, “[T]he minimalist camp is large and diverse. We can even imagine minimalists with fundamentalist leanings.” *Id.* at 30.

³⁴ “Minimalism” could also have the unpleasant double meaning of doing next-to-nothing, i.e., “shirking.”

³⁵ See, e.g., R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121 (1994) (offering a different foursome for constitutional interpretation: natural law, formalist, Holmesian, and instrumentalist).

³⁶ See *id.* at 30 (“Minimalists are cautious by nature...”).

theological traditions of John Wesley),³⁷ he could have used something – anything – more secular, neutral, and descriptive. If he had used the terms only in passing this would be a mere quibble on my part, certainly not warranting a documentary defense of Fundamentalists; but he insists on using these terms, especially “fundamentalist,” as a sustained quasi-religious metaphor from beginning to end.

PART II. THE RIGHT THING FOR THE WRONG REASON

A. Wrong Reason

Apart from his misnomers, Sunstein’s proposal is correct: judges should confine themselves to small steps, and the Constitution itself warrants this approach. Sunstein’s purported reasons, however, are not as strong as they could be. Besides the obvious hint in his title that today’s radical judges are bad *because* they are conservative, he offers two main justifications for his approach. First, judges can never be sure if they are absolutely right, he says, so it is more prudent to avoid hasty or moves

³⁷ See generally JOHN WESLEY, A PLAIN ACCOUNT OF CHRISTIAN PERFECTION (1777); Melvin Deiter, *The Wesleyan Perspective*, in FIVE VIEWS ON SANCTIFICATION 9-46 (Melvin Deiter, ed. 1987); ALHSTROM, *supra* note 27, at 327-27; ERICKSON, *supra* note 21, at 971-74. There were earlier sects in church history who were perfectionists as well – like the Hesychasts in the medieval Eastern Orthodox Church and the Jansenists in counter-Reformation Europe, but Wesley was the first to take the notion mainstream through his Methodist Church, especially in the United States in the early nineteenth century.

or big steps.³⁸ He notes a few cases where sweeping moves to the left have backfired (most notably *Roe v. Wade*),³⁹ fueling the right-wing political triumph (and hence, judicial appointments) he now laments.⁴⁰

Second, the only real alternative to his position of minimalism, he suggests, is the agitated, retrograde “fundamentalism” (a.k.a. originalism) he so deplors, which will produce alarmingly bad results if left unchecked.⁴¹ Both justifications are inherently philosophical, even if superficial. The first seems to be an epistemological point about the fallibility of human judgment, the unknowable nature of complete truth. The second point is essentially consequentialist or utilitarian, that is, the result would be bad, the end of America as we know it. Like most

³⁸ SUNSTEIN, *supra* note 1, at 35.

³⁹ *Id.* at 106 (“Minimalists are greatly embarrassed by *Roe*, and rightly so. This was the Court’s first encounter with the abortion question, and the Court badly overreached, deciding many issues unnecessarily.”).

⁴⁰ *Id.* at 105. This is one of the more interesting passages in the book:

Roe is a crucial decision for women’s groups, many of whose members have long seen the ruling as central to women’s equality. But from the standpoint of equality, the Court’s decision has been a mixed blessing. The decision in *Roe* almost certainly contributed to the defeat [of] the Equal Rights Amendment. It also helped to demobilize the women’s movement and at the same time to activate the strongest opponents of that movement. . . . Democrats have made preservation of *Roe* a central issue in presidential elections, and many Republican leaders have made it clear that they would like the Court to overrule the decision. But if *Roe* were overruled, Democrats would almost certainly be helped and Republicans would almost certainly be hurt. Everyone knows that if abortion really becomes an active issue again – if abortion might actually be a crime – then countless Americans will vote for pro-choice candidates. A judicial decision to overrule *Roe* would immediately create a major crisis for the Republican Party. Some red states would undoubtedly turn blue or at least purple.

Id.

⁴¹ *See id.* at 1-3.

teleological arguments, however, it walks on stilts of deontological assertions and assumptions: that it would simply be *bad* to have more guns on the streets, *bad* to have no affirmative action, *bad* to have restrictions on the sale of contraceptives (a strikingly improbable scenario, but one he fears anyway), and *bad* to have a state like Utah somehow endorse the Mormon Church⁴² more than it already does. Perhaps each of these claims is correct; maybe all these things would be *bad*. They are still value judgments nonetheless, entangled with utilitarian, results-oriented arguments. Sunstein's arguments for hesitant decisionmaking are, in the end, philosophical.

Hesitancy can signal different things. An unwillingness to take big steps (or leaps of faith) can reflect fear, laziness, apathy, agnosticism, modesty, or even conscientiousness; the motivations are not always clear, and sometimes mixed. In public policy, for example, the line between agnosticism and simple ambivalence is gray. After Sunstein goes to great length to criticize the "perfectionist" judges for their drastic measures, he suggests that sometimes judges simply have to take drastic measures to do the right thing. An underlying moral universe props up his arguments

⁴² *Id.* at 2.

for minimalism; but if morality is our real basis, then drastic measures should not scare us.⁴³

In other words, the problem with type of “minimalism” is that it can easily function as a cloak for judicial cowardice.⁴⁴ The judge may simply be afraid to do the right thing, or afraid to admit his real reason for doing it. The fact is that some legal questions are unavoidably controversial, and they are often controversial because they confront us with a problem in our traditional rules. If a situation arises where doing the right thing would contravene our time-honored traditions, this does not really introduce a question about the right thing to do, nor is there any question that this will make many people upset. That is the nature of a controversial question.

It is insulting to both sides in such situations to mask or justify a significant change as merely technical. This is what Sunstein seems to advocate in these dilemmas. For example, suppose the Supreme Court

⁴³ Ronald Dworkin’s main criticism of Sunstein’s ideas is that Sunstein claims to be avoiding morals as a basis for judicial decision, insisting on incompletely theorized holdings and pragmatic baby steps, while at the same time making many moral assumptions along the way. See Dworkin, *JUSTICE IN ROBES*, *supra* note 2, at 66-73. Dworkin, however, wants Sunstein to be *more* moralistic, to be willing to do whatever is the “right thing” in a given case, regardless of how drastic it may be.

⁴⁴ In fairness to Sunstein, he acknowledges this point: “If you have no doubt that your own theory is right, as fundamentalists and perfectionists tend to, then minimalism will seem a dodge or even a form of cowardice.” SUNSTEIN, *supra* note 1, at 37. Unfortunately, he moves on in his description of the opposing view, without offering a clear answer to this objection – besides the epistemological assumption that we can never be sure if we are correct.

effectively overturns *Roe*- but under the pretence that it is merely addressing technicalities. For pro-choice advocates, this would be adding insult to injury – serving up a devastating result and then insisting that nothing changed except some labels. Their pro-life counterparts would also feel cheated, because the Court ignored the fact that abortion is a fundamentally moral issue – and the Court created a precedent for treating divisive moral questions as procedural matters. Abortion is not a matter of mechanical legal rules. Indeed, stuffing a grand social controversy into a box of tiny technicalities simply invites the other side to search for a better test case to get the result they want, the result that seems right to them. Judicial cowardice masked as minimalism can prolong the agony, as in *Dred Scott* and *Plessy*.

It is true that doing the right thing in a controversial case can produce problems later on, given the natural tendency for exceptions to swallow the rule. When the right result is in conflict with the traditional rules, it does not mean that those rules were all wrong all along.⁴⁵ It means only that the rule was imperfect or incompletely developed, as all rules are. Later judges can address this problem by showing the same fortitude, and doing the right thing again if the previous change has run

⁴⁵ This seems to be one of Dworkin's points in *Justice in Robes*, or at list an implication of his discussion of pragmatism. See DWORKIN, *supra* note 2, at 66-73.

its course or gone too far. The value of incrementalism is not just that undoing a small mistake is easier than undoing a big one; gutsy judges can do either. Either minimalism or activism can actually be self-perpetuating. Courageous jurisprudence requires judges to overhaul everything a few decades later; tinkering with technicalities invites tinkering again and again, reducing the law to something as banal as resetting a thermostat.

I am not saying that drastic, ideologically-driven decisions are desirable. The point is that epistemological self-doubt and the prospect of major goof-ups cannot in themselves warrant judicial restraint. Self-doubt will only restrain us until a case arises where we have strong feelings about the principles involved – a situation where those nagging doubts dissipate because we feel passionately. Scary results, on the other hand, could be corrected or ameliorated by the next judge, or even the other branches of government.

B. The Right Reason

Incrementalism is desirable because it creates systematic stability, which in turn fosters economic growth – more investment and more productivity. An impressive and growing body scientific literature

suggests that gradualism in governance is better for a country.⁴⁶ This is more than the tired truism that “people can plan their activities accordingly if the rules are predictable” – an adage that Scalia himself uses to justify *his* approach, because it would eventually produce pure rigidity in our legal system (he compares the Constitution to stone, in fact). In fact, most of us do not plan any of our activities around the Constitution. Few of us worry ahead of time about using our *Miranda* rights, or worry about the nondelegation doctrine, think about how best to discriminate against other races, or foresee the upcoming need for an abortion. Almost none of the rights and freedoms Sunstein says are at stake are things that a responsible person needs to plan around.

The real concern is the risk of shocks to the system, and this is the best reason for incremental rulemaking. The possibility of sudden, radical

⁴⁶ See, e.g., Matthew C. Stephenson, *Legislative Allocation Of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006) (demonstrating that Congress delegates more discretion to the courts when they want more stability over time, and are less concerned about inter-issue consistency); S. Nuri Erbas, *Primer on Reforms in a Second-Best Ambiguous Environment: A Case for Gradualism*, (March 2002), IMF WORKING PAPER NO. 02/50 AVAILABLE AT SSRN: <http://ssrn.com/abstract=879451>; Marcello Basili, *Knightian Uncertainty in Financial Markets: An Assessment*, (February 2000), UNIVERSITY OF SIENA, DEPARTMENT OF ECONOMICS, WP NO. 281. AVAILABLE AT SSRN: <http://ssrn.com/abstract=237279>; Claire A. Hill, *How Investors React to Political Risk*, 8 DUKE J. COMP. & INT’L. L. 283, 297-309 (1998) (discussing investor skittishness in response to any signs of political turmoil); S. Nuri Erbas, *Ambiguity, Transparency, and Institutional Strength*, (July 2004). IMF Working Paper No. WP/04/115 Available at SSRN: <http://ssrn.com/abstract=878939>; Matthias Busse and Carsten Hefeker, *Political Risk, Institutions and Foreign Direct Investment*, (April 2005). HWWA Discussion Paper No. 315. Available at SSRN: <http://ssrn.com/abstract=704283>; Campbell R. Harvey, *Country Risk Components, the Cost of Capital, and Returns in Emerging Markets*, Available at SSRN: <http://ssrn.com/abstract=620710>.

moves by any governmental branch introduces genuine uncertainty into many facets of society.⁴⁷ People are averse to uncertainty, even more than they are averse to risk.⁴⁸ They will steer their resources away from it when possible. Where uncertainty prevails, it stifles investment⁴⁹ and generates unnecessary losses.⁵⁰ Most people will not invest money, time or labor where there is uncertainty looming; and those who *do* invest under these circumstances usually lose. Uncertainty is different than risk; we are compensated for taking risks through simple interest on our investment, and we can insure against known, calculable risks as much as we like. Pioneer economist Frank Knight famously demonstrated that the premium investors expect in risky ventures is not really profit, but a combination of compensation for opportunity costs and the likelihood of losses.⁵¹ Uncertainty occasionally yields windfall profits for the

⁴⁷ See generally Paul Slovic, *Perceived Risk, Trust, and Democracy*, reprinted in THE PERCEPTION OF RISK 316-326 (Paul Slovic, ed. 2000).

⁴⁸ See, e.g., Paolo Ghirardato and Massimo Marinacci, *Risk, Ambiguity, and the Separation of Utility and Beliefs*" (February 2001). CALTECH SOCIAL SCIENCE, WORKING PAPER NO. 1085, Available at SSRN: <http://ssrn.com/abstract=260578>.

⁴⁹ See Takao Asano, "Portfolio Inertia under Ambiguity" (June 2004). ISER DISCUSSION PAPER NO. 609. AVAILABLE AT SSRN: <http://ssrn.com/abstract=562561>.

⁵⁰ See, e.g., Jürgen Eichberger, David Kelsey, and Burkhard Schipper, "Ambiguity and Social Interaction" (November 21, 2005). Available at SSRN: <http://ssrn.com/abstract=464242>

⁵¹ See generally FRANK KNIGHT, RISK, UNCERTAINTY, AND PROFIT (1927). To summarize, risk involves multiple possible outcomes of a scenario, where the odds of each outcome are fairly clear and quantified. An example would be a bet (or lottery or raffle) where the chances of winning are one in fifty; or, for that matter, the *Reader's Digest* Sweepstakes, which typically has odds on the order of one in two hundred million. Uncertainty, in contrast, involves either unknown or unknowable possible outcomes. Knightian uncertainty may involve a finite set of reasonable possibilities where it is impossible to ascertain beforehand which is more likely, or

extraordinarily lucky investor (Knight showed that these are the only “true” profits in any meaningful sense of the term),⁵² but these occasional bonanzas are not enough to offset the aggregate losses of the less fortunate, who are much greater in number.⁵³

Daniel Ellsberg further developed the distinction between risk and uncertainty renaming uncertainty “ambiguity” in his writings), showing that individuals act “as though the worst were somewhat more likely than his best estimates of likelihood,” which would “indicate he distorted his best estimates of likelihood, in the direction of increased emphasis on the

how much more likely. Of course, uncertainty *could* refer to an infinite range of outcomes or possibilities as well. See also Johan Deprez, *Risk, Uncertainty, and Nonergodicity in the Determination of Investment-Backed Expectations: A Post Keynesian Alternative to Posnerian Doctrine in the Analysis of Regulatory Takings*, 34 LOY. L.A. L. REV. 1221, 1237-46 (2001); Claire A. Hill, *How Investors React to Political Risk*, 8 DUKE J. COMP. & INT’L. L. 283, 297-309 (1998) (discussing investor skittishness in response to any signs of political turmoil); See generally John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Sanctions*, 70 VA. L. REV. 965 (1984) (arguing generally that uncertainty overdeters and underdeters the wrong people respectively); Louis Kaplow, *Optimal Deterrence, Uninformed Individuals, and Acquiring Information about Whether Acts are Subject to Sanctions*, 6 J. L. ECON. & ORG. 93 (1990).

⁵² Laypersons typically use “profits” to refer to “net revenue,” that is, the leftover money after a business has paid all its bills. Frank Knight’s argument (throughout his entire book, really) is that much or all of this net revenue is simply direct compensation for the entrepreneur’s opportunity costs, compensation for the manager’s talent and expertise, interest (accounting for the future discounted value of the original investment, and perhaps compensation for actuarial risk. All of these are actually costs that should be included in the other accounts payable that form the difference between gross revenue and net revenue. This implies, of course, that most businesses are not terribly “profitable” at all, but are simply repaying the initial investment.

⁵³ I am indebted to Professor Henry Smith at the Yale Law School for first drawing my attention to Frank Knight and the implications of the distinction between risk and uncertainty in his article *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L. J. 1, 32 n. 122 (2000) (with Thomas W. Merrill); Smith has discussed additional applications of the distinction in subsequent articles, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1724 (2004) and *Governing the Tele-Commons*, 22 YALE J. REG. 289, 303-04 (2005).

less favorable outcomes and to a degree depending on his best estimate.”⁵⁴ Ellsberg conducted famous experiments in which subject faced two urns, M and N, which each contained on hundred red or black balls. Subjects were informed that Urn M contained exactly half red and half black balls; the other contained an unknown proportion of each. Bets were placed on the subject’s ability to draw a black ball from either urn; subject showed a strong preference for Urn M, for which they knew the likelihood of winning (fifty percent); this presented a contradiction to the classic ractor model of economic thought, because the subjects had no rational basis for such a consistent preference—uncertainty was just as likely to favor them, especially when compared to a fifty-fifty chance, as it was to disfavor them. This pattern of human decision-making has been verified in innumerable subsequent experiments and came to be known as Ellsberg’s Paradox. Uncertainty can take the form of straightforward ambiguity—the individual knows the set of possible outcomes, but cannot ascertain the relative likelihood of one as opposed to another. Alternatively, uncertainty can take the form of the individual’s recognition that there are unknown or hitherto unimagined possible outcomes of a situation, an awareness of one’s own ignorance. This latter

⁵⁴ Daniel Ellsberg, *Risk, Ambiguity and the Savage Axioms*, 75 Q. J. ECON. 643 (1961).

type of uncertainty would not apply to Ellsberg's experiment, of course, because the subjects knew that they would either draw a black ball or a red one; there was no chance of drawing yellow or blue.

Applying uncertainty principles to legal settings can implicate either type. Individuals will sometimes face discreet possible outcomes, such as winning or losing a case, but may have unquantifiable odds for either outcome (as when the case is based on a novel but compelling argument, or where both parties have very poor evidence for their side). Jurisdiction and venue questions, such as whether one's criminal case will be prosecuted in state court or federal court, also provide finite sets of options but (sometimes) uncertain probabilities of one outcome actually occurring. Other situations confront us with unknown possible outcomes—the amount of punitive damages in a newer type of mass tort claim, for example, or the types of torts for which we may become victims.

As stated in the introduction of this essay, the real brilliance of our Constitution is how it encourages economic development and general prosperity; the great democracy experiment would have failed if the nation had languished indefinitely in Third-World type poverty. The Constitution gave us a perfectly inefficient government that allows for just the right amount of change or progress – without destabilizing the entire

system. It confines the government to baby steps. The advantage of baby steps is not only that they are easy to backtrack (one of Sunstein's core premises), but that they are very steady and stable.

The Framers (as evidenced in the Federalist Papers)⁵⁵ wanted a permanent tension between the states and the national government, and between the three branches of government on each level (or more, if we count bicameral legislatures as two). The multi-tiered, multi-directional logjam that would inevitably result was thought to forestall factions from seizing control while the rest of us went about our business, and then wreaking havoc with the country.⁵⁶

⁵⁵ Other examples are cited below, but James Madison observes that aversion to uncertainty - even by the dominant, powerful majority in a society - is what leads people to submit to a government in the first place. *See, e.g.*, THE FEDERALIST NO. 51 (JAMES MADISON) (“ . . . even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as much as themselves. . .”).

⁵⁶ *See, e.g.*, THE FEDERALIST NO. 10 (JAMES MADISON). It is interesting how Madison lists “instability” first on the list of problems with factions, before injustice or self-interest, and the idea is prominent throughout:

The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity for this dangerous vice: [The] *instability*, injustice, and confusion introduced into public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious defamations. [Complaints] are everywhere heard from our most considerate and virtuous citizens equally friends of public and private faith, and of public and personal liberty, that our governments are too *unstable*, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority . . . [The] distresses under which we labor [must] be chiefly, if not wholly, effects of the *unsteadiness* and injustice with which a factious spirit has tainted our public administrations. (Emphasis added).

Factions can be ideological, but they can also be ethnic, regional, or aligned around some common interest (economic, religious, etc.).⁵⁷ The more modern term is “interest group,” but “interest group” carries an inherent recognition of the obstacles our government presents to getting one’s way; “factions” at the time of the Framers could be more ambitious. Why are factions wrong? We might say they are inherently undemocratic, putting the interests of a few over the good of the many.⁵⁸ Indeed, unrepresentative, non-majoritarian governments can be tyrannical. Yet they are not necessarily so. “Benevolent autocrat” is not an oxymoron – Plato conceived of a benign philosopher-king, and ancient Israel awaited an all-powerful, all-wise Messiah.⁵⁹ Certainly dissidents in Hitler’s Germany constituted a faction, but one we all wish had seized power. Admittedly, good factions seem less likely to seek absolute power than bad ones. Even so, benevolent factions – enlightened technocrats, if you will – are conceivable.

⁵⁷ *Id.* Madison lists the “latent causes of factions” in this order: ideological zeal over religious views and political views; sentimental attachment or loyalty to individual leaders – either excessively ambitious people or celebrities; and then (Madison calls this one “the most common and durable source of factions”) economic self-interest (property distribution, creditor-debtor rights, etc.).

⁵⁸ Madison makes this point, but only after mentioning how factions destabilize society. *Id.*

⁵⁹ Madison’s point about this in *The Federalist* was that enlightened statesmen are theoretically possible, but an endless succession of enlightened rulers is not. *See id.*

In fact, there are two inherent problems in factions, which would be mutually exclusive except that they occur sequentially, not simultaneously. The first is that factions – regardless of whether they are malevolent – are inherently drastic. They care enough to fight for control of the government, or to force things in the direction they want. Factions form over all sorts of causes and shared goals, but they all tend to upset the applecart. Exacerbating the tendency for factions to be drastic is the tendency of group members to reinforce each other's point of view to the point where a type of tunnel vision sets in.⁶⁰ This myopic perspective leads to even more imbalanced decisions. In any case, a government whose structure makes it susceptible to quick action and sweeping change will inevitably be characterized by both before long. Drastic change introduces pervasive uncertainty, even if the changes themselves were good – nobody knows what may come next. This uncertainty, as mentioned above, has a chilling effect on all economic activity. Not all shocks are morally bad, but the looming possibility of an unknown number and variety of shocks is bad for economic development. The ongoing potential for shocks – persistent uncertainty on a large scale – is the problem. It paralyzes a society and sends the economy into a coma.

⁶⁰ Sunstein himself talks about this problem, but only in regard to the conservative judges with whom he disagrees.

The second problem inherent in factions illustrates the other side of our Constitution's elegance, the possibility of incremental reform. Factions inherently have an entrenchment effect. Once power is consolidated in the hands of a few who like to wield it (for better or worse), the system is restructured to resist further change, including incremental slippage. Without a full-scale revolution, dislodging a faction – or changing anything at all – becomes nearly impossible.⁶¹ The faction orchestrates a deadlock in the system so no progress can occur. This is problematic, because some change and adaptation over time is necessary, for economic growth and sustained development. There is an optimal level of government inertia, beyond which the system ossifies, becoming too rigid.

Scalia, as Sunstein rightly points out, wants a Constitution “set in stone,” a bright-line rule of law. He says that then people will be able to plan accordingly, and he is exactly right – but therein lies a problem. When rules and government activity becomes too predictable and rigid, people eventually find ways around all the rules, discovering every

⁶¹ James Madison asserts that the drastic measures necessary to prevent or unseat a faction are even worse than the problem of having a faction itself, it is “worse than the disease,” because it simply perpetuates an escalating cycle of turbulence. *THE FEDERALIST NO. 10 (JAMES MADISON)*.

possible loophole.⁶² The problem of loopholes makes laws less relevant and enables the wealthier, more established interests to exploit the rules in their favor,⁶³ because the wealthy have more ex ante information about the laws. The result of excessive rigidity in our legal system would be monopoly rents in commerce, monopolization of political power, and even monopolization in religion and education.⁶⁴ As stated before, we do

⁶² Highly specific terms create loopholes, which are most likely to be known by insiders in a regulated industry or community (although this only sometimes pertains to criminal law). Complexity and specificity in regulatory terms, therefore, are indications of “agency capture” by the regulated community itself. For an excellent discussion of the problem of loopholes, See Michael F. Ferguson and Stephen R. Peters, *But I Know It When I See It: An Economic Analysis of Vague Rules*, unpublished manuscript available at http://papers.ssrn.com/paper.taf?abstract_id=218968 at 5 (“[I]f regulators are ‘captured’ by industry, then regulations will tend to be less vague and, consequently, overly strict. These more specific (and strict) regulations effectively provide industry insiders with a roadmap that enables them to uncover and exploit loopholes, and insulates them from outside competition.”). They conclude their article with a helpful example:

An amusing illustration of the tradeoff between specificity and loophole creation appears in George Orwell’s *Animal Farm*. When the animals take over the farm from its human owners they paint some very general rules (the “seven commandments”) on a barn wall including, “No animal shall sleep in a bed,” “No animal shall drink alcohol,” and “No animal shall kill any other animal.” As time passes the pigs on the farm take control and amend the rules to permit activities they wish to pursue. Loopholes are created in each case by making the rules more detailed and precise. The three noted above become, “No animal shall sleep in a bed *with sheets*,” “No animal shall drink alcohol *to excess*,” and, “No animal shall kill any other animal *without cause*.”

Id. at 24.

⁶³ Too much certainty leads to erosion of the rule of law as people are able to find loopholes to circumvent the literal terms of the law; this loophole problem leads to additional injustice because it is inherently anti-redistributive; those who can afford ex ante legal counsel escape liability while still pursuing the socially harmful activities, while the poor bear the costs of the legal sanction regime. See Ferguson & Peters, *id.* at 25 (discussing the wealth-favoring loophole issue, but not focusing on the injustice of the increased inequality)

⁶⁴ For example, many municipalities now threaten legal action against religious groups that meet in homes for services or Bible studies, usually citing zoning ordinances for legal authority. Enforcement involves nearly unfettered prosecutorial discretion, of course. A local chapter of the NRA, Girl Scouts, Tupperware parties, Hell’s Angel’s meetings, or Klansmen could meet freely (not implying any connection between these examples), while the city zeroes in on a

not want so much change that potential shocks always loom before us.

Yet neither do we want the monopolization of every aspect of society that results from excessive rigidity in government. The perfect system would

small religious group. Of course, some rules affect everyone – fire codes, noise-nuisance rules, etc. – but the restrictions in some of these cases target religion.

Constitutional issues aside, religious home groups present interesting practical issues. Churches (I'm going to switch to this term for shorthand, but I mean to include any type of religious group) are different than Scouts or the local NRA: they sing, they grow, they like to meet more and more frequently as more people come, and they attract families. Families come in family cars (lots of minivans), which they park up and down the street; in contrast, parents often drop their little Scouts off for their meetings and pick them up afterward. (Let's forget about the motorcycle club for a minute). Successful church groups present problems that are worse in the short term (more people, more cars, more singing, and more members recruiting others, which leads to more people, more singing, etc.), but the trouble is relatively short-lived, because they outgrow their family room and need to rent a public place. Less successful groups continue home meetings longer, but are more likely to fit all the cars in their driveway and bother the neighbors less. Thus the problems usually wash out – either the group grows and moves into a more conventional church building, or dwindles and presents no concerns for outsiders. It is understandable that local officials have initial concerns about the cars parked on the street, but it is a feature of American religious freedom – there's not a good way around it. This feature of American religious freedom – basically, religious innovation starting from the home to avoid prohibitive startup costs – parallels the other types of freedom for innovation in our society. While new commercial ventures are sometimes spawned by the R&D branches of existing corporate conglomerates, the kid-in-his-garage-inventing-Apple-computers is the stuff of urban legends, and inspirational testimonial to capitalism and freedom. Some of the best things in America came from someone's home.

The current system, however, tips the scales a little bit away from religious freedom or innovation. Property tax exemptions, for example, mostly benefit churches with elaborate buildings and prime real estate. These tend to be older, wealthier, institutionalized churches (with occasional bizarre exceptions, of course) or churches whose priority is to invest their donor's offerings in luxurious digs. The legal scheme favoring grandiose church buildings creates an entrenchment effect, a type of entry barrier for newer churches who must rent their space. Rent will be high enough to cover the landlord's property taxes. Though small and strapped for cash, they are taxed indirectly for their meeting place; entrenched wealthy churches are not. This is a shame, because often the priorities of newer churches are to bring valuable services to the community, and to preach a message that challenges us instead of indulging our complacency. Similarly, immigrant churches are often newer and smaller, and unable to get a building (though some do). Groups with new, valuable insights, or updated ways of presenting their beliefs, often have the same plight. This is not, however, a call for the abolition of religious tax exemptions. Taxing church properties would be politically infeasible and would have a chilling effect on religion generally; it's probably better not to touch it. Removing the exemptions would also have the perverse effect of forcing more churches to have shabby or even marginally unsafe facilities (or to crowd into homes even more often and for longer terms), and this would be a net social loss for many communities. On the other hand, an irony of the current system is a chilling effect on some new churches that may have valuable things to offer.

allow for incremental change, progress that involves significant transaction costs and delay, but allows for some change nonetheless.

This seems to be the system our Constitution gave us. It is, and always has been in America, very difficult for the government to get anything done and very difficult for anyone to get the government to act.⁶⁵ The branches pull against each other, and the municipal, state, and federal counterparts keep one another in check. This is very frustrating when we want something done quickly (like immediate relief after a natural disaster), but very comforting when it comes time to invest money, save money, or even earn money. It has always been a very good bet in America that five years hence things would be mostly the same. It is extraordinarily unlikely that the United States will become an Afghanistan or Cameroon within a decade. Citizens in Cameroon, unfortunately, get little payoff from investing anything, nor reward for saving up, and little compensation for working harder or smarter. There is no incentive to do anything.

⁶⁵ James Liebman and Brandon Garrett offer an interesting discussion of this idea – albeit in passing – in a recent article where they show that James Madison’s view of “equal protection” was really “entirely negative: freedom from instability and conflict.” James S. Liebman and Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 875 (2004). See also Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L. J. 1, 109-111 (1999).

C. Reason and Rights

Admittedly, it is a bit audacious to claim that the beauty of our Constitution is the inefficient, almost-inert government it created. The long-standing tradition is to extol instead the rights and freedoms the Constitution supposedly bestows.

We could, however, conceive of a much smaller Constitution that actually restricted the government even more, if the whole point was making the government leave everyone alone. Certainly we could be a little more free, and it is undeniable that we could have more guaranteed rights (other countries have lengthy lists of rights and entitlements our Constitution omits).

The problem here is that Constitutional writers, like Sunstein, are locked into the idea that rights flow out of our human dignity or some other metaphysical ideal. At least for the sake of argument, for now let us discuss rights simply as roadblocks to government action, regardless of whether the action would be good or bad.⁶⁶ Rights are road blocks,

⁶⁶ I recognize that some commentators distinguish between civil “liberties” and civil “rights,” but this seems to be a technical usage for the purpose of discussing whether the Constitution promises positive entitlements from the government, as opposed to promising the government will leave people alone. *See, e.g.* John C. Howell, *Competing Visions Of Equality*, 32 S.U. L. REV. 197, 201 (2005) (“Civil rights, in contrast with civil liberties which are limitations on government action, specify what the government must do to ensure equal protection and freedom from discrimination.”). From this semantic perspective, I am using “rights” the way Howell uses “civil liberties,” but I think my usage is more commonplace. I should also clarify that

dilatory and obstructionist instruments that slow the rate of change.⁶⁷ In this sense, even the Bill of Rights encourages government inefficiency and inertia, which in turn creates optimal conditions for prosperity and growth.

Even when we discuss rights in the conventional way, as necessary corollaries of human dignity, it is not clear that this notion applies with the same force to individually articulated rights as much as it does to the more abstract notion that some rights ought to exist and have state protection. If we think of rights in general as encumbrances on government action, then the exact list of rights may not matter as much as how many rights are on the protected list, and how general or elastic they are. For example, a narrower right of free speech (like they have in Germany) might be offset by a more expansive or absolute right of a free press (which is not the same thing), or a more elastic, inclusive right of

I am sidestepping the classic debate between “private rights theory” and “public rights theory,” because my analysis is more of a positivist perspective. For a good explanation of the private-public right terminology – which I am distinguishing from the argument here – see Gregory P. Magarian, *The First Amendment, The Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 110 (2004).

⁶⁷ See Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 12 (1988) (“Constitutional rights can be conceived as ‘power-constraints’ that regulate the exercise of power by Congress and the executive branch”). Barnett argues that the Supreme Court, in fact, treats rights in the manner I am describing when the government action in question relates to an enumerated power, but he discusses are other rights that some commentators call “rights-powers.” *Id.* at 12-13. The difference seems semantic; it is possible to think of rights, at least in theory, not as something we have ex ante that should be immune to government infringement, but rather as the void left when the government is shut out of some area of our lives.

free association. If the overall quantum of our freedom depends on how much we shackle the government, then which rights we have may matter *less* than how many.

Of course, the semantics of a delineated right make a difference. “Due process” – an incredibly vague phrase, requiring so many *ex ante* conclusions that it approaches a tautology – is certainly a bigger impediment to hasty government action than, say, the right to refuse quartering soldiers in one’s home during peacetime. Perhaps we could imagine assigning weighted values to different rights, depending solely on how obstructionist they are to government intervention.⁶⁸ We could give the Third Amendment, say, a “2,” and give the Fourteenth Amendment a “9,” and the Presentment Clause a “4.” Then we could think about an algorithm – or even a simply sum – for how much resistance value we have from the Constitution overall. The overall resistance quotient would matter much more than its individual components in creating a free society, as long as we end up with the same number. We could substitute some rights for others, as long as we are

⁶⁸ Sunstein does the opposite, I feel, putting the availability of over-the-counter contraceptives on the same level as unspecified provisions of the Clean Air Act and OSHA; the need for modest gun-control regulations on the same level as his fear that individual states will establish official churches that they subsidize; and racial discrimination on the same level as the Endangered Species Act. SUNSTEIN, *supra* note 1, at 1-3.

careful not to substitute rights with differing resistance values. Forfeiting the Fourteenth Amendment, for example, would require some number of smaller-valued rights to make up for it. The point is that such exchanges are possible, and the Framers (and subsequent Supreme Court decisions) engaged in just this type of trading to preserve a rough equilibrium.

Rights are roadblocks to governmental action, just like the checks and balances provided by the three branches, and the fifty regional version of the same regime. The roadblocks are good, not because government is bad, but because uncertainty is bad. The government is in the unique position of being either the great stabilizer or the ultimate destabilizer of society. Rights are simply an accessory in the government-inertia program of the Constitution.

Turning now to Sunstein's book, it is clear that he is exactly right about judges. Radical moves by the judiciary are horrible, something we should avoid. Our quality of life depends on systemic stability and minimal uncertainty – not perfect stability, but a high degree of it. The concern is not so much that Scalia and Thomas will convince the other ten justices to make a singularly bad decision, trampling on something we hold dear. The concern is living with loose cannons in high places, period.

Incrementalism is the warp and woof of the Constitutional scheme, and we need judges who understand that and act accordingly.

Undoubtedly this free-market-based incrementalism view of “rights” – essentially a negative view – will bother those who feel passionate about certain rights or issues.⁶⁹ We all (including this author) have deeply-held views about some things, like abortion, and we would feel triumphant (and perhaps would gloat a bit) if things went our way, once and for all, on this point. Even so we do not want Supreme Court Justices who are doing to fix overnight everything that is wrong with America. Even if they *could* do this, it would be bad for the economy. We cannot afford the prospect of repeated, unforeseeable shocks to the system.

Abortion bring sup another issue, one which Sunstein does not discuss:⁷⁰ the possibility of the single-issue radical judge. Sunstein’s dreaded “radicals” have a comprehensive agenda, which is what makes them so dangerous, such loose cannons. Compared to these “big picture”

⁶⁹ On the other hand, this negative view of rights seems to be the working paradigm of the American Civil Liberties Union, a group devoted to rights. “[T]he ACLU seeks to enforce limitations on government action --negative rights. The government may not interfere with our freedom of speech or the freedom of the press and so forth. The ACLU has not championed the affirmative entitlements. . .” Nadine Strossen, *What Constitutes Full Protection of Fundamental Freedoms?* 15 HARV. J. L. & PUB. POL’Y 43, 45 (1992).

⁷⁰ Instead, Sunstein treats abortion as a single-issue constraint for liberals in thinking about blocking Supreme Court appointments by Republican presidents, and merely one of many issues important to conservatives. *Id.* at 104.

ideologues, a single-issue combatant seems rather harmless. Consider the example of a judicial nominee whose sole purpose in life is to overturn *Roe v. Wade* (not unlike single-issue anti-war politicians in the Viet Nam era). Our confirmation hearings for judges now focus too much on screening out single-issue activists, and not enough on screening out the next Earl Warren or Clarence Thomas. The “abortion” judge may be dead wrong on that issue (depending on one’s perspective), but a single predictable change in our system is not as fearsome as annual sweeping changes in an unknown number of areas. Swinging the wrong way on a single issue creates a confined problem, which we can work to undo, or work around. This harkens back to the earlier discussion of the problem with a moral or deontological justification for “minimalism” – single, isolated mistakes are not the problem, because the next generation of courageous judges will correct them (albeit always to the consternation of some in the academy). The problem is not the one bad case, but the jack-in-the-box judge, whose timing and direction one never can know.

III. THE NONDELEGATION DOCTRINE

Sunstein devotes a chapter of his book (Chapter Eight)⁷¹ to attacking the nondelegation doctrine (the idea that the Constitution limits how much the government – especially the Legislature – can delegate its power to other agents), and calls it a “long-dead idea from the early twentieth century” on the first page of the book.⁷² This treatment was quite surprising for three reasons. First, Sunstein himself published an article⁷³ in the recent past extolling the “nondelegation cannons” enshrined under other names in numerous rules and procedures – like the *Chevron* doctrine, which mandates judicial deference to administrative agency interpretations of ambiguous statutes.⁷⁴ He opened that article with the following assertion: “Reports of the death of the nondelegation doctrine have been greatly exaggerated. Rather than having been abandoned, the doctrine has merely been renamed and relocated. Its current home consists of a set of nondelegation canons, which forbid executive agencies from making certain decisions on their own.”⁷⁵ It was surprising, therefore, to see him call the nondelegation doctrine a “long

⁷¹ SUNSTEIN, *supra* note 1, at 199-216.

⁷² *Id.* at 1.

⁷³ See Cass Sunstein, *Nondelegation Cannons*, 67 U. CHI. LAW REV. 315 (2000).

⁷⁴ *Id.* at 329-30.

⁷⁵ *Id.* at 315. It appears Sunstein recycled the material from this article on pp 211-15 of *Radicals in Robes*, except in a watered down version emphasizing the need for judicial inaction.

dead idea from the early twentieth century” on the opening page of his new book.

The second reason that this was surprising was that the nondelegation doctrine is one point that has pitted his three named foes – Scalia, Ginsberg, and Thomas – against each other, rather acrimoniously in fact. In *American Trucking*,⁷⁶ Scalia verbally spanked the D.C. Circuit – i.e., Judge Ginsberg – for using the nondelegation doctrine to invalidate EPA regulations. It is true that Scalia formally pronounced the doctrine alive and well in this case (contrary to Sunstein and his colleagues at the University of Chicago have written), but he insisted that it is a narrow rule, a last resort, and that it restricts the power of judges as much as legislators or agencies. One would have thought that Sunstein might like something that so divided his opponents.

The third reason that Sunstein’s disavowal is surprising is that it is a quintessentially “minimalist” or incrementalist device. Properly understood, the doctrine keeps power in the hands of the turgid government and out of the hands of delegates who could go do something quick and drastic – especially private individuals. This was, in fact, the occasion for the doctrine’s explicit use in the few cases where the Court

⁷⁶ 531 U.S. 457 (2001).

employed it: an individual agent had received too much unfettered discretion and power to really mess things up, or even to act out of private vested interests. As such, the nondelegation doctrine is at the core of the Constitution, or better yet, embodies everything I have been saying: it prevents quick, drastic use of government power that would shock the system. Even the existence of agents with such power and discretion poses a threat of uncertainty, and is therefore undesirable.

In this sense, the nondelegation doctrine never lapsed or languished, but rather operated under the rubric of the due process clause. There is no “Nondelegation Clause” in the Constitution, so naturally courts would cite an existing passage – like the Fourteenth Amendment – when deciding a case that limits the power of private actors. It also makes sense that courts never used it against administrative agencies *per se*, because bureaucracies pose none of the threats that the nondelegation doctrine really contemplates. Bureaucracies are nearly as inert and inefficient as the rest of the government, if not more so. Meanwhile, the invalidations by courts of private actor delegations have continued to this day.

One example *Texas Boll Weevil Eradication Foundation v. Lewellyn*.⁷⁷

This case invalidated a state statute that gave a private board of cotton-growers sweeping police powers to eradicate crop pests (boll weevils).⁷⁸ Local farm owners comprised the board, using their power against competitors in the area, forcing them to raze their fields to stop dubious outbreaks of the pestilence. The Texas Supreme Court found this delegation to a private group to be much more troubling than delegations to administrative agencies:

[P]rivate delegations clearly raise even more troubling constitutional issues than their public counterparts. On a practical basis, the private delegate may have a personal or pecuniary interest which is inconsistent with or repugnant to the public interest to be served. More fundamentally, the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government. Thus, we believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts.⁷⁹

The problem of unchecked self-interest (and conflicts of interest) on the part of the private parties presents the crux of the legal problem. The

⁷⁷ *Tex. Boll Weevil Eradication Found., Inc. v. Lewellyn*, 952 S.W.2d 454 (Tex. 1997). The decision reviews some of the leading articles and treatises on the nondelegation doctrine in recent times, and its eight-part test is essentially an amalgamation of what it found in the academic scholarship in this area.

⁷⁸ *Id.* at 460-61.

⁷⁹ *Id.* at 469.

United States Supreme Court has occasionally reviewed cases where state judges were given a financial interest in the outcome of the cases they decided, whether directly or indirectly, and has always held that such a situation violates the Due Process Clause.⁸⁰ For example, in *Tumey v. Ohio*,⁸¹ the Court overturned a criminal conviction because the judge had a direct pecuniary interest in the fine exacted. Similarly, in *Ward v. Village of Monroeville*,⁸² the Court found it unconstitutional – on due process grounds, naturally – to have a local adjudicator whose compensation scheme could affect the way cases were decided. In *Bennett v. Cottingham*,⁸³ an adjudicator's compensation consisted of the traffic fines he imposed - and this was deemed unconstitutional. A more nuanced example is *Brown v. Vance*,⁸⁴ considering a scheme in which judges received a flat fee per case they heard, and creditors could select the judge hearing their case. This created an incentive for a judge to give favorable

⁸⁰ Interestingly, James Madison alludes to the very problem I discuss here in *The Federalist* when he talks about factions as destabilizing elements in society:

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?

THE FEDERALIST NO. 10 (James Madison).

⁸¹ 273 U.S. 510 (1927).

⁸² 409 U.S. 57 (1972).

⁸³ 290 F. Supp. 759 (N.D. Ala. 1968), aff'd, 393 U.S. 317 (1969) (mem.).

⁸⁴ 637 F.2d 272 (5th Cir. 1981).

rulings to creditors, so that creditors would file more frequently in courts of judges who tended to favor plaintiffs, which increased the judge's "business" or income. The result was the same – an unconstitutional delegation of power to an individual that violated the due process clause.

Another example is Judge Posner's *Club Misty* decision,⁸⁵ which involved involving a Chicago ordinance that allowed a neighborhood referendum to control the granting or revocation of liquor licenses. Voters could bypass the political process and simply control the actions of the liquor commission via referendum fiat.⁸⁶ The court saw a significant distinction between delegations of rule-making power, which affect a general class, and delegations of adjudicative power, which determine the rights of an individual. Mere delegation of rule-making power is more likely to survive judicial scrutiny: the legislature can empower voters to act legislatively, as in a normal public referendum, provided that the

⁸⁵ *Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir. 2000). "Club Misty" was the name of a local watering hole whose clientele was unsavory to area residents. A local business competitor organized area residents, and together they brought about the revocation of the establishment's liquor license. The unusual delegation mechanism differed from the standard public hearings held by zoning and planning boards before issuing liquor licenses. Local boards typically retain the power to make an independent decision, while in this case the neighborhood residents had the power to actually bind the board's decision.

⁸⁶ *Id.* 208 F.3d at 615. For an almost identical set of facts in a state supreme court case, see *Du Pont v. Liquor Control Commission*, 71 A.2d 84, 85 (Conn. 1949) ("since no standard whatever is prescribed to guide, limit, or control the reactions of those comprising the fifty-one percent [of the voters], a decision by them based upon whim, fancy, prejudice, caprice or other ill-founded motive would suffice under the ordinance."). *Club Misty* involved a statutory scheme enabling local residents to terminate another's liquor license through a process of circulating petitions and forcing a public referendum, while *Du Pont* involved the liquor commission acquiescing to whatever suspicious scheme a local municipality used to attack liquor proprietors.

action "is on the legislative side of the legislative/judicial divide."⁸⁷ On the other hand, delegating judicial-type decision-making to private parties is "what the Due Process Clause prohibits."⁸⁸ In another example, *General Electric Co. v. New York Department of Labor* ("GE"),⁸⁹ the Second Circuit invalidated New York's "prevailing wage" law under the nondelegation doctrine, because it permitted private parties to control government actions toward others. The court observed that "this would clearly establish an unconstitutional delegation of authority under the statute as applied."⁹⁰

⁸⁷*Club Misty*, 208 F.3d at 622. Posner's distinction between "legislative" and "adjudicative" activities tracks the distinction made by the Administrative Procedures Act for agency actions, but here the distinction is applied to the types of activities being delegated to private parties. See 5 U.S.C. § 558 (2002).

⁸⁸*Club Misty*, 208 F.3d at 622.

⁸⁹ 936 F.2d 1448 (2nd Cir. 1991). The statute at issue required the Department of Labor to establish fair wages for government contracts based on a review of private-sector contracts for the same type of work. The electricians' union, however, drafted its private contracts to delineate two categories of "work," one with wage rates double that of the other. The second, higher category was crafted in a way so that it would always serve as the reference for the Department of Labor in setting rates for government contracts, ensuring high wages (double) for those jobs. The first category would actually be the controlling feature for the private contract, enabling the contractor to be competitive in the private market while reserving future above-market prices for forthcoming government jobs. General Electric (GE), via a subsidiary, was under contract with the State of New York for service and repair of railroad electrical transformers. GE paid its unionized workers the hourly wage normally paid in the private sector. Union workers, however, were used to receiving double the usual market price when working under government contracts. The New York Department of Labor then commenced proceedings to impose substantial fines on GE for failing to pay the "prevailing wage" for this type of work.

⁹⁰*Id.* at 1459. See also *Osius v. St. Clair Shores*, 75 N.W.2d 25 (Mich. 1956) (striking down statute that allowed public hearings on zoning applications to control outcome); *Revne v. Trade Comm'n*, 192 P.2d 563 (Utah 1948); *Union Trust Co. v. Simmons*, 211 P.2d 190 (Utah 1949). Even Noam Chomsky has expressed doubt about the delegation of power inherent in privatization schemes, and the ability of regulations or standards to rein in the self-interest of corporate contractors once privatization has taken place: "There will, of course, be regulations.... But there are so many ways around regulations, especially if you're rich and powerful and have a

Private-party delegations, whether in the form of government outsourcing or decisionmaking (privatization⁹¹) or referendum-style ordinances, allow parties to take the power and run with it. Even though it is possible that the parties would act in an altruistic or noble manner, the uncertainty that results is a real hazard. Sunstein is right to be somewhat dismissive of Judge Ginsberg's desire to use the doctrine to dismantle any administrative agency he dislikes. The reason to dismiss such silliness, however, is not that the nondelegation doctrine is old or out of fashion, or even because he it is wrong to dislike the EPA, but because bureaucracies pose little threat of shocks; in fact, bureaucracies do more to reduce uncertainty (because of their comprehensive regulatory frameworks) than any another governmental entity.

IV. GUNS?

Sunstein's discussion of the right to bear arms is informative and insightful (one of the better sections of the book), particularly when he

lot of lawyers. That's not a big problem. It's just like there are regulations around worker safety." NOAM CHOMSKY & DAVID BARSAMIAN, PROPAGANDA AND THE PUBLIC MIND 103 (2001)

⁹¹ In two earlier articles, I addressed the connection between privatization of government services and the nondelegation doctrine at more length: *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83 (2003), and *Privatized Welfare and the Nondelegation Doctrine*, 35 CLEARINGHOUSE REV. 546 (2002). Subsequently, Gillian Metzger offered a superior treatment of the subject in *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

surveys the likely original intent and historical understanding of the Second Amendment.⁹² As explained above, we can conceive of rights simply as roadblocks to government activity, not necessarily emanations of natural law (except in the abstract concept that people need some freedom and latitude of movement in order to feel dignity). I am not attached to the right to bear arms for its own sake – I believe guns are from the Devil, actually – but rather for the sake of having some right in the Number Two slot of Amendments. It contributes to the Constitution’s overall resistance quotient of impeding governmental action for citizens to have weapons; it means the government must come armed with bigger weapons if it intends to apprehend someone. Perhaps some other, unrelated right could make a similar contribution (have a similar resistance value), in which case gun rights would be superfluous.

Sunstein, however, makes the rather arbitrary and vague assertion that some gun restrictions are fine.⁹³ He seems to be going with his gut here – how can we just decide to play halvesies with some right, but not others? If we are going to curb a constitutional right (like gun-toting), we need to make up for it by doubling some other right to maintain our level

⁹² SUNSTEIN, *supra* note 1, at 217-23.

⁹³ *Id.*

of government inertia. But allowing such trades to happen often is itself destabilizing, and should be avoided.

The entire issue of gun rights could disappear if we allowed public nuisance suits (or wrongful death actions) against gun manufacturers.⁹⁴ There is no constitutional right to manufacture guns (at least not in mass production) or to distribute them, or to market them.⁹⁵ We have only the right to “bear” them, i.e., possess and wield them.⁹⁶ Guns were not in

⁹⁴ See, e.g., *City of Cincinnati v. Beretta U.S.A. Corp.*, 758 N.E.2d 1136 (Ohio 2002); *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16 (Ill. Ct. App. 2002); *James v. Arms Technology, Inc.*, 2003 WL 942781 (N.J. Super. Ct. App. Div. Mar. 11, 2003).

Advocating in favor of tort actions against gun makers is certainly not popular with most commentators who emphasize free-market values. See, e.g., ROBERT LEVY, *SHAKEDOWN: HOW CORPORATIONS, GOVERNMENT, AND TRIAL LAWYERS ABUSE THE JUDICIAL PROCESS* 55-88 (2004). Levy does a wonderful job of documenting the history of such litigation and the leading cases and commentaries, so I will not duplicate his work here. Even so, Levy and writers of his persuasion seem to overlook 1) the problem with externalized costs from consumers using certain products, 2) the free-market forces that are allowed to work in liability insurance regimes to manage risk more efficiently, and 3) the superiority of using the case-by-case tort system instead of one-size-fits-all regulatory regimes, which are the only feasible alternative from a political standpoint. Levy is a Senior Fellow at the libertarian Cato Institute, but free market analysis plays little or no part in his discussion; instead it seems to elevate the Second Amendment to the level of a moral imperative.

⁹⁵ There are endless articles and books asserting that the Second Amendment applies to lawsuits against gun makers, but I have not found any that notice the distinction between a right to “bear” arms and the right to “mass produce” arms (much less a right to “flood the market with arms.” The constitutional discussions of the Second Amendment – Sunstein’s is typical in this regard – focus on the definition of “arms” (i.e., whether its includes a sawed-off shotgun, as in *United States v. Miller*, 307 U.S. 174 (1939)), the definition and syntactical placement of the term “militia,” etc. Yet the gun industry has not relied on the Second Amendment in this litigation, which is perhaps telling that they know it does not cover them. See William L. McCoskey, *The Right of the People to Keep and Bear Arms Shall Not Be Litigated Away: Constitutional Implications of Municipal Lawsuits Against the Gun Industry*, 77 IND. L.J. 873, 875 (2002) (“[D]efendant gun manufacturers have rarely asserted the Second Amendment as a defense against municipal claims”).

⁹⁶ Some argue, however, that there is not even a real constitutional right for personal gun ownership. See generally Patricia Foster, *Good Guns (And Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry From Civil Liability Is Unconstitutional*, 72 U. CINC. L. REV. 1739, 1741 (2004). Cass Sunstein makes a very

mass production or mass distribution in the time of the Framers; every gun was hand made by a gunsmith. The Constitution protects ownership and carrying, but says absolutely nothing about the commercial enterprise of making millions of guns (or ammo rounds) and marketing them in such a way as to inundate the nation in firearms. When courts (or legislatures) shield gun manufacturers from liability for the obviously foreseeable social costs of their products, it externalizes those costs onto third party victims. This state-sponsored externalization is effectively a subsidy of gun makers, allowing them to collect “rents” as a result of shifting these product costs onto unwilling third parties.

Using the tort system to regulate guns is better than command-and-control regulation by congress or administrative agencies.⁹⁷ Regulation of gun ownership and purchases may simply transgress the Constitution, as noted above (and in thousands of other writings), although regulation of the gun industry – never tried – would not. Litigation, however, would offer more stability to the system than command-and-control regulation in this area. As with every other type of tort liability, the manufacturer

convincing argument that such rights are not always absolute, but he does not give a convincing argument for why this should be the case.

⁹⁷ An example of wrongheaded gun control regulation is the Gun-Free School Zones Act of 1990, which Richard Epstein appropriately lambastes (on constitutional grounds other than the Second Amendment) in his discussion of Progressive malfeasance. See EPSTEIN, *supra* note 2, at 75.

would simply purchase liability insurance to cover any lost lawsuits and would pass the costs on to the customers. In this way – as in every liability insurance program – the costs would be spread across a broad customer base so that those who want guns would pay a marginal premium for the social cost of their activity. Otherwise, they are forcing others to subsidize their activity, just like non-smokers have to subsidize workers who choose to smoke.⁹⁸

Insurance companies would use sophisticated actuarial investigation (untainted by political rhetoric) to figure out which product designs, marketing schemes, and distribution systems result (statistically) in the most lawsuits or the highest verdicts. The Insurers have an inherent financial incentive to get the most accurate data and analysis possible. Insurers would then offer financial incentives to the manufacturers (lower premiums) to shift their production to guns used less often in homicides, to shift distribution systems away from the channels that generate the most gun violence.⁹⁹ Simply letting the free market work – through

⁹⁸ For an excellent discussion of the way insurance markets and tort liability work together to manage risks for society efficiently, see DAVID A. MOSS, *WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER* 275-316 (2002).

⁹⁹ There is, in fact, evidence that the gun makers have already begun to do this in response to the prospect of such liability; see Rachana Bhowmik, *Aiming For Accountability: How City Lawsuits Can Help Reform An Irresponsible Gun Industry*, 11 J. L. & POL'Y 67, 129-133 (2002). For an excellent discussion of the problem of a few “bad apples” in the industry being responsible for most of the guns used for violence, see generally Eric L. Kintner, *Bad Apples and*

liability and insurance – would do more to encourage gun safety than any regulations have done to date, without forbidding anyone from exercising their precious constitutional right.¹⁰⁰

Customers who insist on having extra-lethal weapons would have to pay for it. This would provide a financial incentive for most customers to stick with less dangerous firearms from more reputable providers. In addition, if gun deaths are as rare as the manufacturers claim, they should not have anything to fear from these lawsuits; they would be correspondingly rare. Litigation also introduces the jury as a buffer. Plaintiffs would have to convince the jury of the causal nexus between the manufacturer's activities and the victim's death. This would have to be done over the impressive counter-evidence the defendants would undoubtedly offer. Gun makers say their products are not dangerous unless used improperly by criminals.¹⁰¹ Perhaps the jury will agree.

Suppose, for example, that I kill a man with an empty Pepsi can – perhaps I twist and tear until I have a sharp edge for cutting, or crumple it into something that could choke a person. Suppose we let the victim's

Smoking Barrels: Private Actions for Public Nuisance Against the Gun Industry, 90 IOWA L. REV. 1163 (2005) (focusing on the remedy of public nuisance suits against these reprobate manufacturers). See also Foster, *supra* note 96, at 1740.

¹⁰⁰ David Moss offers an illuminating discussion of this paradox under the heading “The Unusual Appeal of Public Risk Management: Statism for Anti-Statists?” see MOSS, *supra* note 95, at 316-25.

¹⁰¹ For a forceful summary of such arguments, see LEVY, *supra* note 94, at 75-80.

family sue Pepsi for marketing a lethal weapon in the form of an aluminum can. The jury would probably say, “Imagine! He killed that fellow with a soda can! Who would have ever thought of that?!” Pepsi’s contribution to a homicide would be clearly unforeseeable, or seem incredibly unlikely, so the verdict would be in their favor.

Now suppose that gun maker can use the same argument with a jury. Perhaps the jury will say the same thing: “Imagine! He killed that fellow with a *gun*! Who would ever have thought *that* could happen?!” If successful, the gun maker has nothing to fear. The jury will hold that it was unforeseeable, unthinkable, that anyone would use a gun to kill somebody.

The point is that our robust insurance market does a better job of reducing risks and injuries – and gently regulating our behavior – than command-and-control regulations.¹⁰² The key is the tort system, and allowing the cases to go forward.¹⁰³ When judges dismiss novel claims,

¹⁰² See Bhowmik, *supra* note 99, at 129-33.

¹⁰³ My claims here are, admittedly, based on the general principles of insurance, liability, and the rational actor model in economics, rather than empirical studies. For a relatively even-handed discussion of the empirical studies in this area (or lack thereof), see Timothy D. Lytton, *Litigation To Make Public Health Policy: Theoretical and Empirical Challenges in Assessing Product Liability, Tobacco, and Gun Litigation*, J.L. MED. & ETHICS 556 (2004). Although Lytton expresses concern throughout his article with the constitutional question of whether courts should make policy decisions, it seems obvious to me that the case-by-case litigation method, with all its attendant evidentiary restrictions, jury ballots, and the checks and balances of the adversarial system, will mean more gradual management of public risks than command-and-control regulation by administrative agencies, which is clearly the inevitable alternative.

like lawsuits against gun companies, they prevent the insurance market from regulating this area naturally, and instead invite still clumsier interventionism from government agencies. Dismissal of novel actions under Fed Rule 12(b)6 can be just as radical and destabilizing as Sunstein's favorite "rights."¹⁰⁴ A better position for incrementalists on the gun issue is to keep the Second Amendment in full force (as an impediment to the government) and encourage the tort liability/insurance system to moderate gun usage based on actual facts and incidents.¹⁰⁵

V. CONCLUSION

Sunstein says the right thing for the wrong reasons. His rebuttals to originalism are well done and inform the debate on these points, but he could offer a better argument for incrementalism than merely attacking the main alternative approach. His incrementalist program does not have to stand as the last report after he has repudiated every other option. Instead, incrementalism can stand on its own as the necessary component of a system that encourages work, savings, and investment.

¹⁰⁴ Patricia Foster argues, in fact, that statutory bars on such lawsuits are themselves unconstitutional. *See generally* Foster, *supra*, note 96.

¹⁰⁵ For a similar argument, albeit with less of a free-market bent, *see* Elizabeth T. Crouse, *Arming the Gun Industry: A Critique of Proposed Legislation Shielding the Gun Industry from Liability*, 88 MINN. L. REV. 1346 (2004).

Unfortunately, most of Sunstein's book is spent on negating the views of three judges, and offering tenuous philosophical reasons for his "minimalism." In this sense, it makes a very small, modest contribution to the existing mountain of academic literature on originalism. Professors can be minimalists, too.