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RADICALS IN ROBES

Why Extreme
Right-Wing Courts
Are Wrong
for America

CASS R.
SUNSTEIN

Author of *The Second Bill of Rights*

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Right-Wing Courts Are
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Cass R. Sunstein

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Praise for Radicals in Robes

“Sunstein pulls no punches.”

Chicago Daily Law Bulletin

“In an angry age too easily seduced by partisan aggressiveness and simple-minded slogans, Cass R. Sunstein, one of our country’s finest legal scholars, argues for a constitutional law based on common sense, patience, modesty, and restraint. These are virtues we need now more than ever.”

Jack M. Balkin, Knight Professor of
Constitutional Law and the First Amendment,
Yale Law School, author of *The Laws of Change*

“Not entirely the partisan screed that you’d expect . . . enlightening and . . . fascinating.”

Kirkus Reviews

“This book clarifies the stakes in current struggles over the role of courts in American democracy. For all those seeking a path between the extremes of old judicial liberalism and the new ‘fundamentalist’ counterrevolution, Cass R. Sunstein offers one here, and he does so with the energy, clarity, and scholarly commitment for which he has become so widely known.”

Rick Pildes, Sudler Family Professor of
Constitutional Law, NYU School of Law

“In his new book, *Radicals in Robes*, Cass R. Sunstein, of the University of Chicago, offers a helpful taxonomy for identifying the various strands of constitutional philosophy in the court and the country today.”

The Chronicle of Higher Education

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"*Radicals in Robes* explains why it is important to prevent the right-wing takeover of the federal judiciary. Cass Sunstein embeds his argument within a more general theory of judicial 'minimalism' that would limit the further politicization of judicial appointments. It is an important argument, and he presents it well."

Sanford Levinson, author of *Wrestling with Diversity*

"All in all . . . this manifesto, directed against all sorts of extremists, is a fine one."

St. Louis Post-Dispatch

"One of the nation's leading scholars of constitutional law offers an astute and opinionated overview of what matters in today's controversies about federal judges. Your blood pressure may go up as you read this book, but afterwards you'll understand more about what's at stake."

Mark Tushnet, author of *A Court Divided*

"This timely book builds a convincing case that extreme right-wing courts are wrong for America. Cass Sunstein, a professor at the University of Chicago Law School, pulls away the veil of rhetoric from dangerous and radical movements and issues a strong and passionate warning about what some extremists really intend for our judicial system."

Tucson Citizen

RADICALS IN ROBES

ALSO BY CASS R. SUNSTEIN

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For David A. Strauss

*The spirit of liberty is that spirit which is
not too sure that it is right.*

Learned Hand

The dead have no rights.

Thomas Jefferson

Preface

EVERY DAY OF EVERY YEAR, we Americans are freer because of our Constitution. If we're allowed to say what we like, worship as we choose, proceed without fear of the police, and even govern ourselves, we owe a large debt to our founding document. But our freedom is more fragile than it appears. The meaning of the Constitution is often disputed, and the disputes are often settled by the Supreme Court of the United States. The rights of Americans depend on what the Court says, and the Court doesn't always say what it said before.

It is customary to describe battles over the Constitution as pitting "liberals" against "conservatives," but this description is hopelessly inadequate. While ideology matters, different judges follow radically different approaches to constitutional law, and these approaches go well beyond ideology. My first goal in this book is to describe the four approaches that have long dominated constitutional debates, and to show how these approaches apply to the constitutional questions that trouble us today.

Two of them are minority positions, claiming distinguished historical pedigrees but few supporters on the current federal courts. I will argue for a third, which continues to have strong representation on the judiciary and in the nation as a whole. The fourth, which is ascendant, threatens both our democracy and our rights.

The first position is favored by many American liberals. We may call it *perfectionism*. Perfectionists want to make the Constitution the best that it can be. They follow the document's text, but they are entirely willing to understand that text in a way that reflects their own deepest beliefs about freedom of speech, equal protection of the laws, the power of the President, and other fundamental questions. Perfectionism played a major role in the liberal decisions of the Supreme Court under Chief Justice Earl Warren—the court that, among many other things, banned racial segregation in America; required a rule of one person, one vote; prohibited compulsory school prayer; and provided broad protection to political dissent. Many American liberals are willing to ask the Supreme Court to recognize or create new rights of many different kinds. When liberal perfectionists are committed, in principle, to a right, they often want the Supreme Court to say that that right is part of the Constitution.

The second position is *majoritarianism*. Majoritarians want to reduce the role of the Supreme Court in American government by allowing the democratic process to work its will. Unless the Constitution has been plainly violated, majoritarians believe that the courts should defer to the judgments of elected representatives. This commitment to bipartisan restraint would both permit affirmative action programs and allow states to forbid same-sex sodomy. Oliver Wendell Holmes, perhaps the greatest figure in the history of American law, was a majoritarian, and majoritarianism has recently attracted significant support among lawyers and law professors. Remarkably, however, it is hard to find a consistent majoritarian on today's Supreme Court.

The third position is *minimalism*. Minimalists are skeptical about general theories of interpretation; they want to proceed one

step at a time. They are willing to nudge the law in one or another direction, but they refuse to promote a broad agenda, and they are skeptical of “movement judges” of any kind. They insist that the Constitution is not frozen in the past. But they are nervous about the exercise of judicial power, and they disagree with those who want the Supreme Court to elaborate new rights and liberties lacking a clear foundation in our traditions and practices. Minimalists may be either conservative or liberal. Their distinguishing feature is that they believe in narrow, incremental decisions, not broad rulings that the nation may later have cause to regret. Justice Felix Frankfurter was a distinguished minimalist. In recent years, Justice Sandra Day O’Connor has been the Court’s leading minimalist, and I argue for minimalism in this book.

The fourth position is *fundamentalism*. Fundamentalists believe that the Constitution must be interpreted according to the “original understanding.” In their view, the founding document must be interpreted to mean exactly what it meant at the time it was ratified. If the Constitution did not originally ban the federal government from discriminating on the basis of race, then the federal government is permitted to discriminate on that basis. If the Constitution did not originally permit Congress to forbid child labor, then Congress cannot forbid child labor. If the Constitution did not originally give broad protection to political dissent, then courts cannot give broad protection to political dissent.

My second goal in this book is to explain what is wrong with the fundamentalist position.

As a constitutional creed, fundamentalism bears an obvious resemblance to religious fundamentalism. 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. “Strict construction” of the Constitution finds a parallel in literal interpretation of the Koran or the Bible. Some fundamentalists seem to approach the Constitution as if it were inspired directly by God. But since my topic is law, not religion, I do not mean to say anything about religious fundamentalism. It is in constitutional law that fundamentalism can be shown to be destructive and pernicious. Fundamentalism would make Americans much less free than they now are. It would constrict the right to free speech. It would eliminate the right of privacy. It might well allow states to establish official religions. It would do much more.

Fundamentalists often assert that theirs is the only legitimate approach to the Constitution. This is arrogant and wrong. Fundamentalists like to accuse their critics of bad faith. But some prominent fundamentalists have not hesitated to betray their commitment to the original understanding when the historical evidence points to results they dislike. Their willingness to do so suggests that some of the time, they are speaking for a partisan ideology rather than for law.

In extreme cases, the role of ideology is transparent—as in the disgraceful attack on an independent judiciary during the 2005 effort to ask federal judges to reinsert the feeding tube of Terri Schiavo, a brain-damaged woman in Florida. We live in an era in which some prominent politicians are demanding that the courts interpret the Constitution as if it conformed to positions of Republican party leaders—and threatening federal judges with reprisal if they refuse to do exactly as politicians want.

Their efforts should be rejected. My plea, in the end, is for minimalism—an approach to the Constitution that refuses to

freeze the document in the eighteenth century, but that firmly recognizes the limited role of the federal judiciary and makes a large space for democratic self-government.

It is not at all pleasant to challenge, as wrong, dangerous, radical, and occasionally hypocritical, the many people of honor and good faith who have come to embrace fundamentalism. Fundamentalists are right to seek to cabin judicial power, and their democratic commitments are a good starting point for constitutional law. But I hope to show that the most appealing goals of fundamentalism can be accomplished in much better ways—and that many of fundamentalism's goals are not appealing at all.

RADICALS IN
ROBES

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INTRODUCTION

The Constitution in Exile

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.

- *States can ban the purchase and sale of contraceptives. The Court has ruled that the Constitution contains no right of privacy. Having overturned Roe v. Wade and allowed states to criminalize abortions, the Court now concludes that the Constitution does not protect any right to sexual or reproductive freedom. In some states, doctors are subject to criminal punishment for performing abortions. In other states, those who use contraceptives or engage in certain heterosexual and homosexual acts are subject to fines or jail sentences.*
- *Key provisions of the Clean Air Act, the Federal Communications Act, and the Occupational Safety and Health Act are unconstitutional. Using a long-dead idea from the early twentieth century, the Supreme Court has ruled that Congress must narrowly confine the power of regulators. Many regulations, controlling air pollution, safety at work, and sexually explicit material on the airwaves, are invalid.*