VOLUME XXIII, NUMBER 4, FALL 2023

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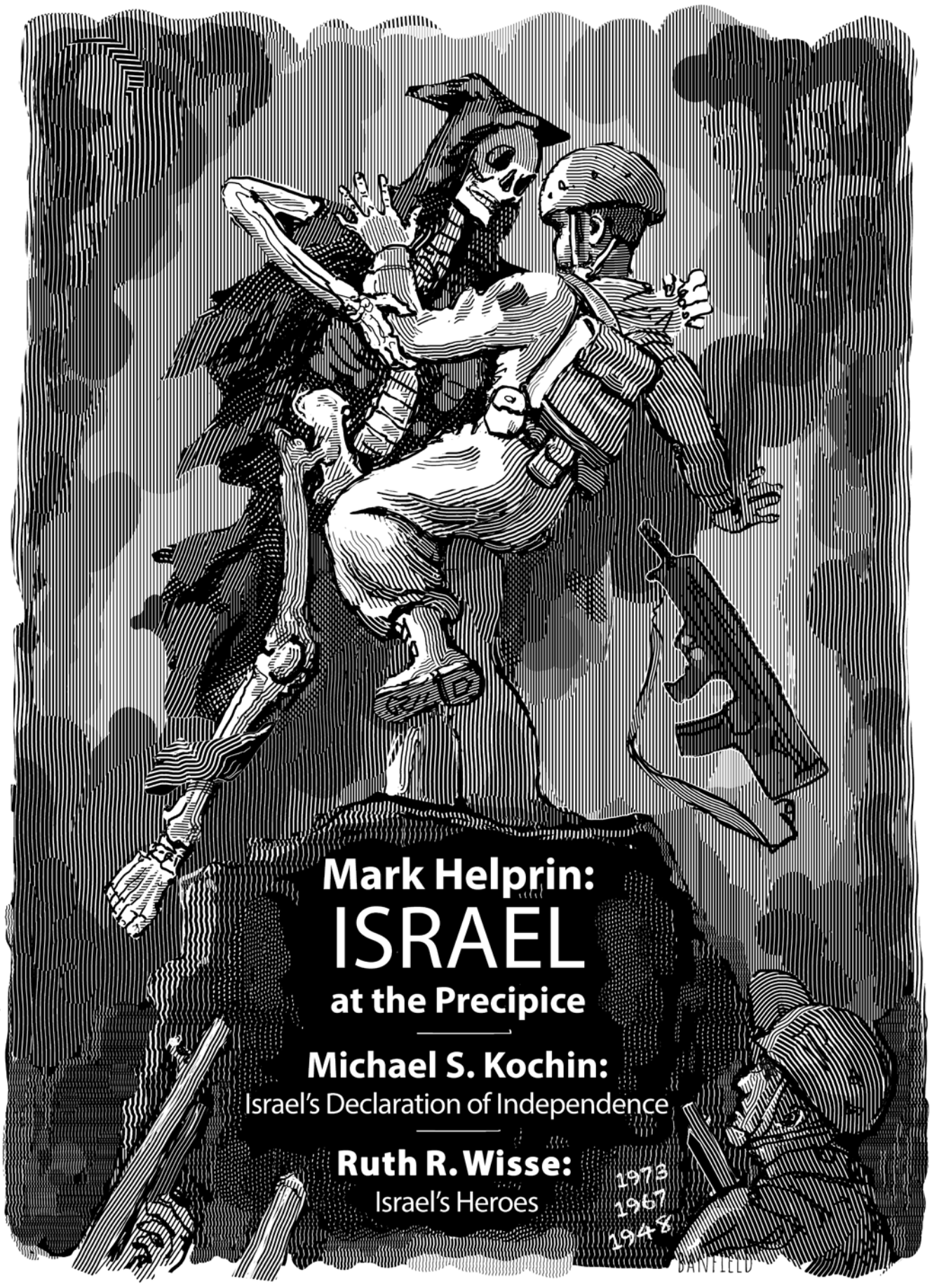


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A Publication of the Claremont Institute
PRICE: $9.95
IN CANADA: $14.95

Book Review by Randy E. Barnett

# Originalism and Its Discontents

*How to Interpret the Constitution*, by Cass R. Sunstein.
Princeton University Press, 208 pages, $22.95


On June 26, 1987, Justice Lewis Powell resigned his seat on the Supreme Court. Five days later President Ronald Reagan nominated former Yale Law professor and D.C. Circuit Court of Appeals judge Robert Bork to take his place. Within 45 minutes of the nomination, in a nationally televised speech from the Senate floor, Massachusetts Democrat Ted Kennedy declared:

> Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the Government, and the doors of the Federal courts would be shut on the fingers of millions of citizens.

Four months later, the Senate Judiciary Committee convened 12 days of hearings. Much of the Democrats' focus was on Bork's commitment to originalism and the outcomes they said would result from employing a consistently originalist methodology. Based on these alleged results, many both inside and outside the Senate claimed that Bork would turn back the clock on civil rights.

Bork's nomination was rejected by a vote of 58-42. Six Republicans joined the Democrats to vote against him. For the next three decades, no Supreme Court nominee identified as an "originalist"—not Anthony Kennedy, nor David Souter, nor John Roberts, nor Samuel Alito. Even Clarence Thomas didn't identify as an originalist at the time of his nomination. His confirmation hearings focused instead on his expressed sympathy for "natural law." His commitment to originalism would come later.

Some 30 years after the failed nomination of Bork, President Donald Trump nominated Circuit Judge Neil Gorsuch to assume the seat vacated by the death of Justice Antonin Scalia. Hearings occupied four days. Just over two months after his nomination, Gorsuch was confirmed by a vote of 54-45, with two Democrats joining all 52 Republicans.

Unlike previous nominees, Gorsuch expressly endorsed originalism as the proper method of constitutional interpretation. Indeed, he had been chosen by the White House largely *because* he had publicly endorsed originalism. Senate Democrats sought to make an issue of his commitment. Yet this time both the result and the popular discourse were different. Despite harsh questioning by Senate Democrats, there was no public outcry about Gorsuch's originalism, no litany of the civil rights that would be rolled back were he to be confirmed.

What happened over that 30-year period to account for this difference in the tenor and outcome of the debate? Why did the criticisms of originalism aimed at Bork get such traction while the critics who questioned Judge Gorsuch repeatedly spun their wheels?

Part of the difference, surely, was that the Senate was now controlled by Republicans. But that does not explain why all previous Republican nominees in the 30-year interim declined to adopt the label "originalist." A bigger part of the difference was that in the 30 years between Bork and Gorsuch a small handful of legal academics—a *very* small handful—developed the *theory* of originalism. Because of them, the intellectual terrain had greatly shifted from 1987 to 2017.

With Gorsuch's elevation to the Supreme Court, the efforts of these scholars bore fruit. After Gorsuch was confirmed, both Brett Kavanaugh and Amy Coney Barrett self-identified as "originalists." To a significant degree, so too did Justice Ketanji Brown Jackson, without using the label. Justice Jackson's testimony led some on both the left and right to claim that originalism had become so amorphous as to be meaningless. But in this they were mistaken. Even an insincere commitment to the original meaning of the Constitution is the homage that vice plays to virtue.

Nothing exemplifies the mainstreaming of originalism more than the latest book by Cass Sunstein, the prolific and highly regarded Robert Walmsley University Professor at Harvard Law School. In *How to Interpret the Constitution*, Sunstein treats originalism as an entirely respectable—though erroneous—method of interpretation. Unlike purely political partisans, he demonstrates a knowledge of the nuances of modern originalist theory.

Because Sunstein repeatedly criticizes originalism, the extent of his concessions may not be obvious to casual readers. To illustrate, I must string together some disparate quotations: "The text matters. If judges do not show fidelity to authoritative texts, they cannot claim to be interpreting them." "To read the Constitution, we need to know the English language. But to understand what the Constitution means, an understanding of the English language is not nearly enough." "Many people insist that the text of the Constitution must be interpreted in a way that is consistent with the original semantic meaning of its words. Semantic originalism insists that in deciding on the meaning of words, we have to ask a question about history: What did the word mean, simply as a matter of the English language, at the time of ratification?" "If the semantic meaning of words shifts over time, it is fair to say that what is binding is the original semantic meaning, not some new semantic meaning. Almost everyone almost always accepts semantic originalism."

Sunstein overstates the degree to which these concessions are shared by other non-originalists. Especially with respect to the more abstract parts of the Constitution, many law professors insist that, under the rubric of "interpreting" the Constitution, courts are empowered to supply entirely new meanings to suit their own sensibilities. But that's what makes Sunstein's concessions so noteworthy. He avoids embracing originalism by claiming that the "semantic meaning" of the text is too abstract or "thin" to provide much guidance on the constitutional issues *about which we argue*. "[S]emantic originalism does not have a lot of 'bite,'" he writes. "It leaves almost everything open." How so?

"The line between originalism and other approaches starts to dissolve," Sunstein contends,

> A theory of interpretation flexible enough to get all the results you want cannot actually assure you of getting any of the results you want.

"because interpretation of abstractions—what counts as 'equal protection' or 'the freedom of speech'—squarely invites the exercise of discretion on the part of the judges." The bare semantic meaning of such phrases as "unreasonable searches and seizures," "due process of law," "the equal protection of the laws," and "cruel and unusual punishment" is too open-ended to constrain constitutional interpreters. Something non-originalist is required.

But originalists have a ready response to this. The meaning communicated to others by our use of words is not limited to their bare semantic meaning. It is shaped by the *context* of the word's utterance. In context, we know that the right to bear "arms" declared in the Second Amendment refers to weapons, not the limbs to which our hands are attached. Likewise, the words "domestic violence" in Article IV refer to riots, not spousal abuse. Sunstein would agree with these examples, while insisting that other, vaguer terms leave considerable discretion to today's constitutional actors. For this reason, almost every non-originalist is, in practice, what Sunstein calls a "semantic originalist." For "semantic originalists," he writes, "the word 'equal' cannot mean a contemporary sugar substitute (even though there is one, 'Equal'). But if we are semantic originalists, the word 'equal' may or may not forbid discrimination on the basis of sex, even if it was not originally understood to forbid discrimination on the basis of sex."

Given that language communicates information beyond its bare semantic meaning, non-originalists need to explain why we are bound by the *semantic* meaning of the text but not by its *contextual* meaning. Since 1987, research into almost every contested constitutional clause has revealed that the terms that progressive non-originalists like Sunstein—or conservative critics of originalism like Sunstein's Harvard colleague Adrian Vermeule—claim to be abstract, open-ended, "majestic generalities" are far more concrete than is commonly assumed. My own book with Evan Bernick, *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit* (2021), is one among several works to give a more concrete and constraining meaning to the terms "privileges or immunities of citizens," "due process of law," and "the equal protection of the laws." In *context*, these phrases are not nearly so open-ended as Sunstein contends.

Take Sunstein's example of the word "equal" in the 14th Amendment and how it would apply to women. "Equal" does not appear alone, but in the phrase "equal protection of the laws." Research shows that this phrase did not guarantee equality generally, but equality in government *enforcement* of its laws. And there is no reason to doubt that this equality of enforcement protected women as well as men.

The original meaning of "due process of law" protected any "person" from deprivations of life, liberty, or property without a judicial proceeding to ensure such deprivations were not arbitrary. In 1868, women were clearly considered to be "persons," and the constitutional bar on arbitrary laws therefore protected women as well as men. In 1868, however, the laws of coverture, which subordinated the legal rights of married women to their husbands, were thought to be reasonable—that is, not arbitrary—given what were thought to be actual differences between men and women. The same went for women practicing law.

When applying the original meaning of "due process of law" today, the original meaning of the text does not bind us to accept 19th-century beliefs about these empirical differences between men and women if they were factually inaccurate. We are entitled to

conclude based on our understanding of these differences that barring married women from practicing law or entering contracts just as their husbands can is arbitrary—that is, not warranted by the facts. And the judiciary may conclude the same when, as part of the "due process of law," it vets laws for arbitrary deprivations of life, liberty, or property.

Finally, in 1868 women were certainly thought to be among the "citizens of the United States." Discrimination by states against women with respect to the privileges or immunities of U.S. citizens was therefore barred by the Privileges or Immunities Clause. At the same time, voting was not thought to be a privilege of citizenship. It later became one for all citizens, regardless of race or sex, who have reached the age of 18, by the original meaning of the 15th, 19th, and 26th Amendments. Thus, non-originalists are wrong to assert that the original meaning of the 14th Amendment did not protect the rights of women.

Sunstein claims that there is nothing that "just is" per se without interpretation. But this assertion is in tension with his concession that semantic meaning of a text is constraining. Recall his affirmation that "if judges do not show fidelity to authoritative texts, they cannot claim to be interpreting them." Here he is referring to the "semantic" meaning of the texts. But this concession should apply as well to contextual meaning. If the historical context surrounding the use of these phrases renders their public meaning more specific and constraining than their purely semantic meaning, then that "just is" their meaning. In sum, Sunstein's concession to semantic meaning must extend to the original meaning that was communicated to the public by these phrases when they were adopted. His stated position should be tweaked to read: "If judges do not show fidelity to" the meaning *actually communicated* by "authoritative texts, they cannot claim to be interpreting them."

Modern originalists concede that context will not render all the terms in the Constitution as determinate as the number of senators to which each state is entitled. It is undeniable that, even limited by context, some provisions of the Constitution are more abstract—and less rule-like—than others. Fidelity to "the letter" of the Constitution therefore requires *more* than just adherence to its original meaning. Applying that meaning to particular cases and controversies also requires a decision-maker to be *faithful* to its spirit, by which I mean the original ends, objects, functions, purposes of the text, or the problems at which the text was aimed—as opposed to the interpreter's ends or purposes. Adhering to the spirit when applying the letter of the text is as old as the Constitution itself.

Sunstein makes another, more interesting—and valid—argument: whatever theory of constitutional interpretation one favors must be normatively justified. "Among the reasonable alternatives," he writes, "no approach to constitutional interpretation is required or self-justifying. Any approach must be defended on some ground—not asserted as part of what interpretation requires by its nature." He continues: "Among the reasonable alternatives, any particular approach to the Constitution must be defended on the ground that it makes the relevant constitutional order better rather than worse." He is not wrong about this.

Indeed, the title of Sunstein's book is inapt. He does not defend his own view of "how to interpret the Constitution." A more accurate title for it would have been *How to Decide How to Interpret the Constitution*. This is what the book is really about, and it is a serious question deserving of serious consideration. Sunstein's proposed answer—employing reflective equilibrium—

has promise. When making moral judgments we usually begin with provisionally "fixed points"—as he puts it—of reference, and then try to bring our actions into alignment with as many of these fixed points as we can, sometimes altering our fixed points in the process of establishing an equilibrium. But what should be our provisional fixed points? Do they include the results of particular cases and, if so, which ones?

In making his case, Sunstein pits two statements of mine against each other. In the first, which he quotes with approval, I wrote: "Given a sufficiently good constitutional text, originalists maintain that better results will be reached overall if government officials—including judges—must stick to the original meaning rather than empowering them to trump that meaning with one that they prefer." Sunstein thinks that the case I make for originalism "is unconvincing" but credits me "for identifying the territory on which reasonable argument can occur." To this statement he opposes Evan Bernick's and my claim that "we do not start with normative priors," and that to identify the law "we need an interpretive method in which we are confident." What matters, we continued, are the "theoretical arguments in favor of originalism, not whether originalism produces outcomes that fit one's normative priors."

I stand behind both positions. Originalism can be summarized in a single sentence: The meaning of the Constitution should remain the same until it is properly changed (by amendment). This sentence can be unpacked as containing two distinct propositions. First is the claim that the meaning of the written constitution was "fixed" at the time it was enacted. This is an empirical claim about how language works. If it is to be contested, it must be by denying its factual accuracy. As I have shown, Sunstein concedes this empirical claim with respect to bare semantic content, but I maintain that it extends as well to the original meaning that was communicated to the public in context. So, as a purely descriptive matter, the meaning—that is, the communicative content—of the U.S. Constitution "just is" its original meaning, every bit as much as the meaning of the Confederate Constitution "just is" its original meaning.

But this claim alone does not constitute "originalism." Embedded in the above definition is a second claim: the meaning that was fixed in the text of the U.S. Constitution *should* constrain constitutional actors—including judges and legislators—today. This is a normative claim about how constitutional actors *ought* to act. Sunstein's belief that our choice of interpretive methodologies must be normatively justified is both valid and important. But this is not news to originalists. Since 1987, originalist scholars have developed several normative arguments on its behalf.

To appreciate why the fixed meaning of the text ought to be followed, it is good to start with the proposition that the Constitution is not a law that governs us. Rather, the Constitution is the law that governs *those who govern us*. Those who are to be governed by the Constitution can no more change the law that governs them without going through the amendment process described in Article V than "we the people" can change speed limits without going through the legislative process by which speed limits are set.

There are other, more elaborate, normative arguments on behalf of adhering to the meaning that was fixed by the Constitution's text at the time of its original ratification and later ratifications of amendments. Given space constraints, I will merely summarize them:

- *The Consent of the Governed*. The "democratic legitimacy" of the Constitution is based on the will of the people, which can only mean the will of the majority. This collective conception of popular sovereignty is probably the most commonly voiced normative reason for being constrained by the original meaning of the text. We ought to follow the Constitution that the people have authoritatively adopted. I am not myself persuaded that majoritarian will can bind the minority in this way. But this normative claim remains popular among conservatives.
- *To Secure These Rights*. In *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People* (2016), I defend what I call our "Republican Constitution," which is based on an individualist conception of popular sovereignty: We the People, each and every one. According to this view, a principal purpose or function of a written constitution is stated in the Declaration of Independence: "To secure these rights." Which rights? The preexisting natural rights to "life, liberty, and the pursuit of happiness"—all of which are unquestionably individual rights. To the extent the *substance* of what the Constitution communicates—its original meaning—creates a governing system that is sufficiently protective of these rights, it is *legitimate* and therefore ought to be followed. To be sure, this entails some inquiry into whether the result of following original meaning is sufficiently rights-protecting. But before we can assess whether the substance of the Constitution is "good enough," we first need to identify the fixed meaning of the text.

Though these two conceptions of popular sovereignty may be mutually inconsistent with each other, each of them is consistent with several more normative arguments for originalism:

- *The Rule of Law*. Originalism provides a transparent basis for constitutional decision-making. The public meaning of the constitutional text is accessible to all. There may be some difficult questions that turn on technical meanings, but the public can identify these meanings by reading scholarly writings and published judicial opinions. Originalism is also evenhanded: it requires that the fixed original meaning of the constitutional text be applied in all cases by all judges, irrespective of their political ideologies and moral beliefs.
- *Judicial Role and the Separation of Powers*. The legitimate role of judges is law application, not lawmaking. Judges have the authority to apply preexisting law to cases and controversies, but they are not authorized to amend the Constitution. The Constitution vests the judicial power in the Supreme Court and such inferior courts as Congress establishes. The legislative (lawmaking) power is vested in Congress.
- *The Consent of the Governors*. Although I believe the consent of the *governed* is largely a fiction, the same is not true of those who gain power under the Constitution. Each and every person who receives powers pursuant to the Constitution must first expressly consent to be bound. This is real consent, and it is unanimous. Before assuming office, every officeholder must take an oath to uphold the meaning that is fixed in the text of "this Constitution," the written one. Every judge—indeed, every federal and state representative

or officer—is bound by the original meaning of the Constitution because every one of them consented to be so bound.

- *Originalism Is Our Law*. Some originalists claim that non-originalist decision making is contrary to the positive law as it now exists. Judges and officials explicitly say that the Constitution provides binding law. More importantly, it is rare for judicial decisions to explicitly claim that judges have a lawful power to override, modify, or nullify the Constitution. The existence of such a social norm is indicated by the fact that no one nominated to be a federal judge would be confirmed who forthrightly expressed the living constitutionalist position that judges are empowered to override, modify, or nullify the Constitution. In short, no one can be confirmed as a judge if they openly express the views held by most legal academics about the proper role of judges. (I am not yet persuaded that this claim is entirely true, but am open to it.)

Each of these normative arguments for being constrained by original meaning can be contested either as wrongheaded ends or on the ground that originalism does not serve them as well as its non-originalist rivals. To establish the latter, one would need a systematic comparison of originalism against each of its competitors. To his credit, Sunstein reports and critiques some of the competitors, but he never compares originalism with its rivals along each of these normative lines.

What matters most for Sunstein's principal claim, however, is that originalists have hardly denied the need to normatively defend originalism. In fact, they have offered manifold mutually reinforcing normative claims about why constitutional actors *ought* to adhere to the original meaning that was fixed in the text of the Constitution—even if doing so does not always lead to their desired results in particular cases.

Originalists don't criticize "result-oriented" interpretation because they think results don't matter. Constitutions are adopted and put in writing to achieve good ends and to avoid bad ones. Rather, we are responding to the claims by non-originalists that no theory of interpretation should constrain constitutional actors if it would "wrongly decide" some particular set of approved or "canonical" cases—what Sunstein calls "fixed points." For Sunstein, the moral sensibilities of individual constitutional actors—who are governed by *their* fixed points of preferred case outcomes—determine the "meaning" of the Constitution's text. Yet not everyone shares the same "fixed points" about particular cases, and these points have changed radically over time. This is a recipe for constitutional arbitrariness, if not chaos.

Whether we view a case as rightly or wrongly decided should be based on whether it is consistent with what the Constitution requires, permits, or prohibits. That's why we put constitutions in writing. Assuming we already know the correct outcome of all cases before interpreting the meaning of the text puts the interpretive cart before the horse. It assumes we already know what we need a constitution to tell us.

An infinitely flexible approach to constitutional interpretation might get the interpreter every outcome he or she desires. But under this approach, constitutional results flow entirely from the interpreter and not the object of interpretation. This is the epitome of a government of men and not laws. Moreover, an approach this flexible can also be used to get the completely opposite results that *other* interpreters desire. A theory of interpretation flexible enough to get all the results you want cannot actually assure you of getting any of the results you want.

On Sunstein's account, before his modern "fixed point" cases were decided, previously held fixed points justified the cases Sunstein is glad have been reversed. But on his "fixed points" approach to interpretation, those older cases like *Dred Scot v. Sandford* (1857), *Plessy v. Ferguson* (1898), or *Buck v. Bell* (1927) were rightly decided when they were decided—whatever their consistency with the original meaning of the Constitution. When seeking a moral reflective equilibrium, our "fixed points" do not have to be a list of canonical cases. They can also be the fixed points of constitutional *principles*, such as popular sovereignty (collective or individual), the rule of law, judicial role and separation of powers, the oath, or what the positive law requires. These fixed points might well explain *why Dred Scott*, *Plessy*, and *Buck v. Bell* were wrong the day they were decided.

Indeed, Sunstein's own formulation allows for this: "[I]n deciding how to interpret the Constitution, we have to think about what we are most firmly committed to, and about what we are least likely to be willing to give up. Without thoughts of that sort, we are at sea; we lack moorings. We cannot know what to think and why to think it." What originalists are most firmly committed to includes honoring constitutional principles over and above the results of particular cases.

*How to Interpret the Constitution* demonstrates why constitutional theory matters, and why the development of originalist constitutional theory and practice over the past 30 years has been so consequential. Originalists have forced non-originalist luminaries like Cass Sunstein to identify and defend their own approaches to interpreting the Constitution. On that field of intellectual battle, originalism has become the theory to beat. Even after this book, it remains the king of the hill.

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