IT DOESN'T MATTER WHAT "INTERPRETATION" IS

HOW TO INTERPRET THE CONSTITUTION? By Cass Sunstein.* Princeton, NJ: Princeton University Press. 2023. Pp. IX + 195. $22.95 (hardcover).

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Cass Sunstein's illuminating new book, *How to Interpret the Constitution?*, is both an introduction to theories of constitutional interpretation in the U.S. and an argument on interpretive choice. Sunstein explains that the book has two goals: first, to provide an introduction—a "guide to the perplexed"—on debates of interpretation and to clarify the "nature of legitimate disagreement" (p. 7); and second, the book seeks "to ask and answer a single question: How should we choose a theory of constitutional interpretation?" (p. 8). For Sunstein, we are necessarily confronted with this choice: there is no single theory of interpretation that is required by the Constitution, or that derives from "some abstract idea like 'legitimacy,'" or that is required by the very idea of "interpretation" (p. 8). This last point is of great concern to Sunstein. He is keen to establish that "there is nothing that interpretation 'just is'" (p. 61) (the title of his seminal paper on the subject[2]). Not everything counts as interpretation (p. 62), but the idea of interpretation is broad enough to encompass the different theories of constitutional interpretation usually discussed in the U.S. If one needs a theory to interpret the Constitution, and if the theories on offer are incompatible with each other, then one needs to choose. The idea

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2. *See* Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 193 CONST. COMM. 193 (2015).

that no single theory of interpretation is "mandatory" (p. 61)[3] is important for Sunstein. If all mainstream theories represent legitimate options, then those tasked with interpreting the Constitution have a choice.

How is that choice to be made? The answer that Sunstein gives is that "[j]udges (and others) should choose the theory that would make the American constitutional order better rather than worse" (p. 8). On this view, interpretive choice is practical: it is ruled by normative criteria rather than by an inquiry into the nature of interpretation (subject to an important caveat that I address in Part V). In elaborating, defending, and ultimately choosing a theory, agents will—on Sunstein's account—seek "a kind of 'reflective equilibrium'" (p. 9),[4] one "in which their judgments, at multiple levels of generality, are brought into alignment with one another" (p. 102).

At the center of Sunstein's argument is, then, the idea of interpretive choice: the choice of a theory or method of interpretation.[5] The mere suggestion that there is interpretive

3. This idea is repeated several times in the book (pp. 64, 65, 73, 127–128). The claim is prominent in earlier work. *See* Sunstein, *supra* note 2, at 193 ("The problem with this view is that in the legal context, there is nothing that interpretation 'just is.' Among the reasonable alternatives, no approach to constitutional interpretation is mandatory.").

4. The notion is drawn from Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE 17–19 (1971); *see also* John Rawls, *Outline of a Decision Procedure for Ethics*, *in* JOHN RAWLS: COLLECTED PAPERS 1–19 (Samuel Freeman ed., 1999). For its use in constitutional debates, see RICHARD H. FALLON JR., LAW AND LEGITIMACY IN THE SUPREME COURT 142–54 (2018).

5. Sunstein generally refers to interpretive choice as a choice between "theories" of interpretation. I am uneasy about this terminology. I prefer the word "method," which is more consistent with the practical nature of interpretive choice, as explained in Part V. The word "theory" suggests something like a general, developed and unified explanation of such things as what interpretation is and how it should be done. Theories of interpretation may entail a method of interpretation, though a method of interpretation does not necessarily follow from a theory. By a "method" of interpretation, I mean a way of interpreting—a guide for *action* as to how one is to interpret. In a theory of interpretation, the method of interpretation is the prescriptive part, the part that says "this is how one should interpret: do A, B, C." But a method of interpretation does not necessarily derive from a theory. It could be an approach that practitioners have found useful in engaging with a legal source, but that has not been theorized yet. All interpreters need a method of interpretation: if they have to interpret, they necessarily need to choose how to go about doing that. They either need to choose one of the methods on offer or come up with one of their own and choose that one. But they do not need to have a "theory" of interpretation, just as many scientists have a method to work in their field, without necessarily having a "theory" of science. Perhaps by "theory" Sunstein means a method. But his survey of theories of interpretation in chapter 1 refers to theories proper: originalism, Dworkin's interpretivism, etc. In any case, I think that for Sunstein, "theory" certainly includes "methods."

choice in law is controversial.[6] If there is a choice, then this seems to entail discretion: whoever gets to choose will have discretion over pursuing any of the alternatives for choice. This has raised concerns as to whether Sunstein's views entail excessive discretion for judges and other decision-makers.[7] Thus, a central issue in the debate is that of constraints on interpretive choice.

Here I will focus on the problem of constraints and suggest that the concerns of the critics are misplaced. If there is a defect in Sunstein's argument, this is not leaving interpretive choice unconstrained, but constraining it excessively. First, in Part I, I briefly survey Sunstein's presentation of the different theories of interpretation.[8] The rest of the review addresses the more substantive argument of the book. In Part II, I suggest that Sunstein's argument can be understood as defending four theses, the most important of which are that there is nothing that interpretation "just is," and that one should choose a theory of interpretation based on normative reasons. In Part III, I argue

It may be worth clarifying that by talking of the choice of "a" method I do not mean to rule out eclecticism of any kind. My definition of method above is formal enough to include an approach that entails a combination of approaches, including the *ad hoc* decision-making suggested by Fallon, and the joint work of different modalities of argument proposed by Philip Bobbitt in the U.S. context (the approach of many courts and judges around the world). *See* Richard H. Fallon, *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982). The key point is that for anyone interpreting for a practical purpose (as a judge does in deciding a case), any approach as to how to interpret (be it one purely distilled from a theory or one that is a combination of approaches, or anything else) will be an alternative for choice, one among all the other possible ways of engaging with the meaning of a text, and which, to actually inform interpretation, must be chosen by an interpreter. I think all of this is consistent with Sunstein's insistence on choice.

In what follows, when reproducing Sunstein's views, since he speaks of "theory," I will use his terminology, though I take it to refer primarily to the prescriptive part of a theory, viz., the method.

6. See Richard Ekins, *Interpretive Choice in Statutory Interpretation*, 59 AM. J. JURIS. 1, 1–6 (2014).

7. See *infra* text accompanying notes 34–36. The concern is understandable. Legalism (not a pejorative term, merely descriptive of the ideas animating a practice centered around rule-following and about moral relationships determined by rules) abhors discretion. *See* JUDITH N. SHKLAR, LEGALISM (1964). For the tension between discretion and the rule of law, see Timothy Endicott, *The Impossibility of the Rule of Law*, 19 OXFORD J. LEGAL STUD. 1 (1999); Juan B. Etcheverry, *Rule of Law and Judicial Discretion: Their Compatibility and Reciprocal Limitation*, 104 ARCHIVES PHIL. L. & SOC. PHIL. 121 (2018).

8. In what follows, most of the time I will simply refer to "theories of interpretation" rather than to "theories of constitutional interpretation," though I mean the same thing by the two terms.

that the question of constraint is central, both to Sunstein's argument and to its rivals. On the one hand, Sunstein is keen to loosen the constraints on interpretive choice, to allow for interpretive choice. On his account, the idea of interpretation constrains interpretive choice, but this is a loose constraint, one which does not rule out any of the main theories of constitutional interpretation. Sunstein's critics, as I explain in Part IV, argue that his theses on interpretation entail great discretion for judges: the idea of interpretation is less capacious than what Sunstein believes, and thus imposes narrower constraints. For both sides, though, the idea of interpretation constrains interpretive choice.

I disagree. In Part IV, I argue that Sunstein's main theses do not entail greater judicial discretion. The problem is—I suggest in Part V—the opposite. Sunstein's argument is oddly restrained. It does not completely follow through on the idea that interpretive choice is a practical choice. The book makes a lucid and timely contribution in presenting the debate over theories of constitutional interpretation as one concerning interpretive choice. But it is unclear why, for Sunstein, interpretive choice is constrained by the limits of the idea of interpretation. Instead, we should embrace the practical (or "normative"—here I will use these words interchangeably) character of interpretive choice, which entails that the idea of interpretation poses no constraints whatsoever to (what for convenience we call) "interpretive" choice. It does not matter what interpretation is. So, unlike the critics, I agree with the overall direction of Sunstein's illuminating argument, it's just that I would favor a less compromising version of it.[9] Part VI concludes.

9. In this review I focus on two of the four theses in Sunstein's book (I explain them in Part II): that there is nothing that interpretation "just is" and that interpretive choice is normative. A further claim by Sunstein (thesis 3 below) is that the relevant normative criterion for interpretive choice is what "would make the American constitutional order better rather than worse" (p. 8). *See infra* notes 22–25 and the accompanying text. This criterion captures much of what is relevant in interpretive choice, but it seems to me to be unduly restrictive, since not all relevant outcome-related reasons are about "what makes the constitutional order better" (unless one interprets that criterion so broadly that one deprives it of any meaning), and it is unclear that it captures process-related reasons. On the distinction between outcome and process-related reasons, and the dangers of focusing exclusively on outcomes, see Lawrence B. Solum, *Outcome Reasons and Process Reasons in Normative Constitutional Theory*, 172 U. PA. L. REV. 913 (2024). Note also that with regard to both outcome and process-related reasons, there will be a separate question as to the capacity of a method of interpretation to succeed in realizing them (despite its aspirations) under specific circumstances. This latter question is empirical, but very important in practical reasoning on interpretive choice. *See* Adrian Vermeule, *Interpretive*

AN INTRODUCTION TO THEORIES OF INTERPRETATION

American debates on constitutional interpretation are remarkably sophisticated—perhaps byzantine. An American judge can self-identify as an "originalist," and that wouldn't be enough: is this judge an intentionalist originalist, an original public meaning originalist, a living originalism originalist, or something else? The U.S. is distinctive in the relevance of theories of interpretation to constitutional debates[10] and in the political significance of these theories ("originalism" being largely associated with the American Right[11] and more flexible methods—Dworkin's interpretivism, living constitutionalism, and common law constitutionalism—with the American Left[12]).[13] The last feature has undoubtedly helped make constitutional interpretation a matter of discussion outside academia. For example, then-candidate Donald Trump vowed to appoint

Choice, 75 N.Y.U. L. Rev. 74 (2000); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006).

10. Thus, Jackson and Greene explain that "[i]nterpretive theory as a subject assumes a larger role in some jurisdictions than in others. It has been a preoccupation of American legal scholarship for at least two generations," contrasting this with Canada, Australia, France, and Germany. Vicki C. Jackson and Jamal Greene, *Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?*, *in* COMPARATIVE CONSTITUTIONAL LAW 600 (Rosalind Dixon and Tom Ginsburg eds., 2011).

11. Sunstein remarks that "in its modern form, originalism was born as a political movement, not only as a legal movement; it was a self-conscious response from the right to a set of Supreme Court decisions that pleased the left" (p. 28). *See also* Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J. L. PUB. POL'Y 29, 30 (2011); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 680–81(2009). The story is told in greater detail in Jack Goldsmith, *The Conservatives and The Court*, 1 LIBERTIES J. (2023).

12. *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 568–69 (2006) ("the idea of living constitutionalism . . . has been at the core of progressive constitutional thought since the 1970's.").

13. Common good constitutionalism has upset this neat dichotomy. *See* Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037 [https://perma.cc/ X82X-4TNP] ("It is now possible to imagine a substantive moral constitutionalism that, although not enslaved to the original meaning of the Constitution, is also liberated from . . . the relentless expansion of individualistic autonomy."); *id.* ("Common-good constitutionalism is methodologically Dworkinian, but advocates a very different set of substantive moral commitments and priorities from Dworkin's, which were of a conventionally left-liberal bent."); *see also* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

originalists judges[14] and made good on that promise.[15] His very public commitment to replace Justice Scalia with an originalist and the appointment of Justice Neil Gorsuch—of impeccable originalist credentials[16]—generated a discussion around originalism in both Congress[17] and public opinion.[18]

But, of course, originalism (and its many variants) is not the only game in town. There are several other theories. All but the expert will struggle to keep up with the many theories of interpretation on offer, and yet the topic is of great relevance for anyone concerned with public affairs. A quick revision of a constitutional law textbook, the news, or Sunstein's book, for that matter, would furnish plenty of examples of the momentous political decisions that hinge on questions of constitutional interpretation in the U.S. (pp. 55, 78, 151).[19] This has not changed with the current Court (pp. 6–7).[20]

14. Donald Trump, Speech at Republican Nat'l Convention (July 22, 2016) ("We are also going to appoint justices to the United States Supreme Court who will uphold our laws and our Constitution. The replacement of . . . Justice Scalia will be a person of similar views and judicial philosophies. Very important.").

15. ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM, at x (2022) ("Donald Trump appointed more than a quarter of all federal court judges now on the bench . . . a great many of whom are Federalist Society members and embrace originalism.").

16. *See* John O. McGinnis, *Gorsuch Nomination: Potentially the Best News for Originalism Since 1987*, L. & LIB'Y (Feb. 5, 2017); Robert P. George, *Ignore the Attacks on Neil Gorsuch. He's an Intellectual Giant-and a Good Man*, WASH. POST (Feb. 1, 2017, 7:50 AM), https://www.washingtonpost.com/posteverything/wp/2017/02/01/ignore-the-attacks-on-neil-gorsuch-hesan-intellectual-giant-and-a-good-man [https://perma.cc/2CHU-K8DR] ("Gorsuch, like Scalia . . . is a textualist and an originalist.").

17. Including presentations on originalism at the Senate by prominent scholars of interpretation. *See Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*, Committee on the Judiciary United States Senate, 115th Cong. 447–48 (2017) (statement of Lawrence B. Solum).

18. *See* Austin Sarat, *What Gorsuch's originalism puts at risk*, CNN OPINION, (March 20, 2017), https://www.cnn.com/2017/03/20/opinions/the-problem-with-gorsuch-originalism-sarat-opinion/index.html; Aaron Blake, *Neil Gorsuch, Antonin Scalia and originalism, explained*, WASH. POST (Feb. 1, 2017); Ed Pilkington, *Neil Gorsuch's constitutional philosophy explained*, GUARDIAN (Feb. 2, 2017).

19. Perhaps this view is too legalistic (or naïve). From the point of view of the legal reasoning expressed in a decision, the outcome seems to depend on how the Constitution is interpreted. Of course, this does not rule out the skeptical view that judges reach the decision through means different from legal reasoning as expressed in the decision. Here, I do not take any position on this. At the very least, interpretation matters greatly in U.S. Constitutional law as a way of justifying a decision. I am grateful to Felipe Jiménez for raising this point.

20. *See*, *e.g.*, Dobbs v. Jackson Women's Health Org. 142 S. Ct. 2228 (2022); Bostock

Sunstein's book is timely. It offers a concise account of the different theories of constitutional interpretation and their respective differences. Here, Sunstein's strengths as a writer pay off. His prose is clear and agile, the style is warm, and the analysis is fair. The exposition is not purely academic. It conveys the political associations of theories of constitutional interpretation and what is at stake in choosing one or the other: the theories may seem abstract and scholarly, but they are part of American power politics. Sunstein is candid about his preferences, but he is also fair in portraying the alternatives.[21] This is an excellent introduction to debates on constitutional interpretation.

FOUR THESES ON INTERPRETIVE CHOICE

For a specialized audience, the more interesting part of the book will be its argument in favor of a particular theory of interpretive choice in chapters 2 to 6. The question that Sunstein wants to answer here is the following: given all these different theories, "[h]ow should we choose a theory of constitutional interpretation?" (p. 8). It may be useful to think of Sunstein's work as defending four theses:

1. The "nothing that interpretation 'just is'" thesis: The idea of "interpretation" is broad enough to encompass the different methods proposed by the theories of constitutional interpretation often discussed in U.S. constitutional debates. The idea of interpretation does not rule out any of these methods and theories, and it is certainly not the case that it rules out all but one of them.
2. The "normative choice thesis." In choosing a theory of interpretation, only normative reasons are pertinent. The idea of interpretation does not provide reasons for choosing a theory of constitutional interpretation (but, on Sunstein's rendition of the thesis, it does constrain choice to those methods or theories that count as methods or theories of interpretation, see Part III).
3. The "constitutional order" thesis: Interpretive choice should be based on a specific set of normative reasons, viz., reasons regarding what "would make the American constitutional

v. Clayton County, Georgia 140 S. Ct. 1731 (2020); Janus v. AFSCME, 138 S. Ct. 2448 (2018); Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

21. Or so it seems to me. *But see* John O. McGinnis, *Unmooring the Constitution*, L. & LIB'Y (Oct. 26, 2023).

order better rather than worse." (p. 8)

4. The "reflective equilibrium" thesis: In determining what theory would be most capable of making "the American constitutional order better rather than worse," one should arrive at a reflective equilibrium between theory and considered judgments.

I should clarify that in this book thesis 3 is more prominent than in Sunstein's previous work. In fact, in some places thesis 2 has been quietly displaced by thesis 3.[22] Does this reflect a change? I don't think so. In earlier work, theses 2 and 3 were both present.[23] Thesis 2 is presupposed by thesis 3. Indeed, thesis 3 is a specification of thesis 2: it specifies which normative reasons matter for interpretive choice—but interpretive choice still depends on normative reasons.[24] It is useful to distinguish between theses 2 and 3, though, because one can hold thesis 2 without holding thesis 3 (or thesis 4, for that matter). For example, one could think that "what makes the constitutional order better" is not the only or even the most important normative consideration at stake in interpretive choice, thus rejecting thesis 3 (but not necessarily thesis 2);[25] or one could believe that in

22. Thus, in earlier work Sunstein argued that "[a]mong the reasonable alternatives, no approach to constitutional interpretation is mandatory. Any approach must be defended on normative grounds—not asserted as part of what interpretation requires by its nature." Sunstein, *supra* note 2, at 193. In this book, he introduces an almost identical phrase, but more specific at the end: "[a]mong 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." (p. 91).

23. *See* Sunstein, *supra* note 2, at 194 (referring to normative reasons generally), 207 (referring to what would make the constitutional order better).

24. Thesis 2 is also entailed by other remarks in the book. E.g.: "consider the view that judges should decide, as a matter of principle, whether current practices do deny people 'equal protection of the laws,' or violate 'the freedom of speech,' rather than ask about the original meaning of those words. Whether that view is right or wrong is a normative question. It cannot be settled by an understanding of how communication through language works" (pp. 87–88); "In some sense, originalism does indeed stand or fall on whether it 'produces outcomes that fit one's normative priors'" (p. 73).

25. One could think of stronger or weaker versions of thesis 3 with regard to its force and application. As to force, at its strongest, thesis 3 claims that the *only* relevant reasons for interpretive choice are those related to whether adopting a method of interpretation would make the constitutional order better. A weaker but still strong version of thesis 3 would claim that those reasons are the most important ones for interpretive choice. ("Important" here is purposefully vague. It could mean "always very weighty" or "overriding most opposing reasons," etc.) A weak version would claim that such a fact is a relevant reason for interpretive choice—while being agnostic as to whether this is the only relevant reason or whether this reason is important in some sense. As to its application, at its strongest, thesis 3 would claim that the fact that adopting a theory or method of interpretation makes the constitutional order better is *always* a (decisive, important, good,

determining which method of interpretation "makes the constitutional order better" one does not need to arrive at a "reflective equilibrium," because, for example, considered judgements do not matter, thus rejecting thesis 4 (but not necessarily thesis 2 or thesis 3).

The most fundamental are the first two theses. They set out the main features of Sunstein's approach to debates on interpretation, as consisting of *choosing* a theory of interpretation from an available set, rather than, say, deriving it from the idea of interpretation. The last two theses concern implementation of the first two. Thesis 3 specifies the kind of normative reasons (per thesis 2) that are pertinent for this choice (assuming there is such a choice, per thesis 1); thesis 4 explains how one arrives at, and justifies, a particular application of thesis 3 in concrete circumstances. Hence, I focus here on the first two theses.[26]

CONSTRAINTS ON INTERPRETIVE CHOICE

The first thesis is strategic for Sunstein because, on his presentation, it is what allows for interpretive choice. Sunstein emphasizes that the nature or idea of interpretation does not settle which approach to interpretation one should adopt. There is a need for choice. As Sunstein says, "[t]he idea of interpretation is capacious, and a range of approaches fit within it. 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" (p. 91). There are a number of similar assertions in the book where Sunstein emphasizes that the idea of interpretation is broad enough to allow for a range of different theories of constitutional interpretation, suggesting that there is something at stake in this finding: that if the idea of interpretation were not broad enough to include them, those theories would not be live alternatives for interpretive choice.[27]

etc.) reason for interpretive choice; a weaker but still strong version would claim that it is *typically* such a reason; and a weak version would claim only that it *can be* a reason for interpretative choice. Sunstein does not clarify this, but his presentation of thesis 3 suggests that he adopts the strongest version along the two dimensions of strength and application, or at least a strong version, and in the text above I assume that this is the case. I do not think thesis 3 is correct on its strongest version, but I will not address this here. *See supra* note 9.

26. *See supra* note 9.

27. For example, Sunstein says that that "many judges" embrace original public

Sunstein's main foils are those who think that only one approach to interpretation is valid, and within this group, those who "insist that the very idea of interpretation requires judges to adopt their own preferred method of construing the founding document." (p. 61).[28] On this view, there would be no interpretive choice based on normative criteria, as the very idea of interpretation would sanction only one theory of interpretation. For Sunstein, a range of authors—from originalists to proponents of moral readings—follow this approach.[29] Indeed, a merit of

meaning originalism "which cannot be *ruled out of bounds by the very idea of interpretation*" (p. 68, emphasis added); that "[r]easonable people can and do understand interpretation in different ways. Radically different approaches can fairly count as interpretive. Which approach is best?" (p. 84); that "[d]ifferent answers to [what the requirement of "fit" means] are admissible *within the general concept of interpretation*." (p. 82, emphasis added); and that "[i]f some intelligent originalists call for attention to intentions, and other intelligent originalists call for attention to the public meaning, it would seem unlikely that the abstract idea of interpretation, standing by itself, requires one rather than the other" (p. 67).

28. Sunstein also discusses views that challenge interpretive choice on grounds different than the "very idea of interpretation," viz., those that argue that the law requires adopting a particular interpretive theory and those that hold that only one theory is correct based on a single normative consideration (e.g., legitimacy) (p. 8). Whatever the merits of the latter two grounds for rejecting interpretive choice, they are of a different nature than the first. The first relies on a conceptual claim, the latter two on a normative one, and hence could be in principle compatible with Sunstein's theses 1 and 2 (*see infra* Part IV).

29. Sunstein says that "many people believe" that he is wrong in claiming that "there is nothing that interpretation 'just is'" (p. 61), and that the view that interpretation corresponds to only one theory "is especially pervasive among originalists, though some version of it can be found among nonoriginalists as well" (p. 61). He attributes this view to original intention originalists broadly (p. 62), and to several authors, such as Walter Benn Michaels (p. 27), Justice Scalia (pp. 67–71) (though Scalia's argument, as presented by Sunstein, seems normative to me), Randy Barnett and Evan Bernick (pp. 72–73), Lawrence Solum (p. 86), and Ronald Dworkin (pp. 83–84). *See also* DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY 19–20, 178–84 (2020) (criticizing Sunstein's argument and claiming that "the concept of interpretation has had fixed boundaries for centuries").

As in previous work, Sunstein cautions that some originalists do provide normative reasons for their arguments (p. 67), citing as example of this Lawrence B. Solum, *The Constraint Principle* (2018) (manuscript at 81), available at https://ssrn.com/abstract=2940215, at p. 91 n. 8; Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464 (2014); John O. McGinnis & Michael B. Rappaport, ORIGINALISM AND THE GOOD CONSTITUTION (2013) (p. 91 n. 1). To this important caveat, one should add that sometimes normative reasons are not presented explicitly as such in works on interpretation. For example, intentionalism is said to entail that interpretation necessarily searches for original intent. *See* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 47 (2009). Yet Larry Alexander's illuminating hypothetical concerning "telepathic law" seems to me to convey that our intuitions are not only that interpretation entails the search for intentions or that his preferred method of interpretation better serves legislative supremacy (non-normative), but also that realizing legislative supremacy is the overriding

Sunstein's argument is to bring attention to this common element in several theories of interpretation, and to give explicit articulation to it. One needs to be aware of it before one can challenge it.

And Sunstein indeed challenges it. As seen above, Sunstein defends the view (thesis 1) that the idea of interpretation is capacious enough to encompass many theories of interpretation. It is not boundless, though. While the idea of interpretation cannot determine interpretive choice, it does impose constraints on it. Let's pause over this constraining role of the idea of interpretation. Sunstein says:

> "It is true that some imaginable practices cannot count as interpretation at all. The text matters. If judges do not show fidelity to authoritative texts, they cannot claim to be interpreting them. . . . Without transgressing the legitimate boundaries of interpretation, judges can show fidelity to a text in a variety of ways. Within those boundaries, the choice among possible approaches depends on a claim about what makes our constitutional system best" (p. 62).

That the idea of interpretation poses constraints on interpretive choice "does not, by itself, immediately rule out any of the established approaches" (p. 62): the idea of interpretation is broad enough to encompass the theories of interpretation discussed in U.S. debates. It would seem to follow that the idea of interpretation makes no practical difference, given the options actually on offer. But this is contingent. On Sunstein's theory, the idea of interpretation constrains the set of alternatives for choice: interpretive choice is a choice that occurs "within those boundaries," i.e., between the "legitimate boundaries of [the idea of] interpretation" (p. 62).

Sunstein's account can therefore be characterized as a "two-step" view of interpretive choice. In step one, the question is whether purported theories of interpretation are really such. For each purported theory of interpretation, one should determine whether it "count[s] as interpretation within permissible understandings of the term" (p. 81).[30] This is a conceptual question. Sunstein believes that the idea of interpretation is broad

consideration in judicial decision-making (normative). Larry Alexander, *Telepathic Law*, 27 CONST. COMM. 139 (2010).

30. Sunstein says this here in relation to a particular theory (moral readings). For similar statements with regard to other theories, see *supra* note 27.

enough to allow for different alternatives (p. 91), though it may rule some out. It sets, in Sunstein's words quoted above, "boundaries" on interpretive choice. Step one is about setting those conceptual boundaries and determining what is inside them.

Step two is about choosing a theory of interpretation from those that are "within those boundaries" (p. 62). In step two, one chooses a theory or method of interpretation based not on conceptual considerations on what interpretation is, but on normative reasons—particularly on what would make the constitutional order better.

While in practice step one may not constrain much, the idea of constraint plays an important role in Sunstein's framing of interpretive choice and, more generally, in his exposition of his theory. He opposes the view that the idea of interpretation is so narrow that it only allows for a single theory of interpretation. Sunstein's thesis 1 expands these constraints: now several approaches fall within the "legitimate boundaries" of the idea of interpretation, and interpreters have a choice. The approach to interpretive choice is expressed in terms of constraints: under rival views, the constraints are too tight, but under Sunstein's view, they are far looser. They are loose enough so as to allow for interpretive choice, and, in practice, for all relevant theories to be live alternatives. Nevertheless, there are constraints. On Sunstein's view, the idea of interpretation does pose constraints, and the interpreter needs to choose from the set of alternatives allowed by those constraints.

Other authors have emphasized the relevance of normative reasons for interpretive choice,[31] but Sunstein's argument is probably the most comprehensive. It is probably the most discussed and developed, as it has been the object of several writings throughout the years.[32] From the beginning, his argument

31. *See*, *e.g.*, Richard H. Fallon, Jr., *The Meaning of Legal Meaning*, 82 U. CHI. L. REV. 1235 (2015); Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, *in* BETWEEN AUTHORITY AND INTERPRETATION 323 (2009); Fallon, *supra* note 5; MARK GREENBERG, *Legal Interpretation* (2021), *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed.), https://plato.stanford.edu/entries/legal-interpretation; Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 133–41 (2020).

32. *See* Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, *in* A CONSTITUTION OF MANY MINDS (2009); Sunstein, *supra* note 2; Cass R. Sunstein, *Formalism in Constitutional Theory*, 32 CONST. COMM. 27 (2017); Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671 (2018). Those works focus on the first three theses. The last thesis was anticipated in Cass. R. Sunstein, *'Fixed Points' in Constitutional*

stirred criticism.[33] Much of the criticism is about constraints. Some critics believe that Sunstein's proposals for interpretive choice allow judges too much discretion. Sunstein addresses some of these objections in this book. It is useful to look at this more closely.

THE PROBLEM OF CONSTRAINT

Many believe that Sunstein's views entail great judicial discretion. Thus, William Baude and Stephen Sachs take Sunstein's argument to entail that "judges are and should be largely unbound when choosing among" different meanings of a legal instrument.[34] Richard Ekins attributes to Sunstein the view "that judges are simply free to choose whichever theory of constitutional meaning will better secure outcomes they prefer, including their own empowerment."[35] Donald Drakeman criticizes Sunstein for the same reason: Sunstein's approach would allow judges to choose "any plausible approach that gets the outcome right."[36]

At times it seems that Sunstein's answer to this challenge is to bite the bullet. He admits that his "central argument means that judges (and others) have a degree of freedom: They get to choose their own theory of interpretation" (p. 62). Sunstein argues for "the inevitability of choice"—the title of chapter 2 of the book. In that chapter he claims that neither the idea of interpretation, nor the law, nor a single value (e.g., legitimacy) fully determines interpretive choice. If this entails too much freedom for judges, as critics believe, then such freedom is unavoidable. Resistance is futile.

But in discussing Baude and Sachs' claim that originalism is

Theory, HARV. PUB. L. WORKING PAPER No. 22–23 (2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123343; Cass R. Sunstein, *Experiments of Living Constitutionalism: A Manifesto*, 3 LIBERTIES (2023); and Cass Sunstein, *How to Choose a Theory of Constitutional Interpretation*, BALKINIZATION (Jan. 12, 2023), https://balkin.blogspot.com/2023/01/how-to-choose-theory-of-constitutional.html, and is fully developed for the first time in the book.

33. Richard Ekins, *Objects of Interpretation*, 32 CONST. COMM. 1 (2017).

34. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1096–97 (2017).

35. Ekins, *supra* note 33, at 16; *see also id.* at 14.

36. Donald Drakeman, *Consequentialism and the Limits of Interpretation: Do the Ends Justify the Meanings?*, 9 JURISPRUDENCE 1, 16 (2017); *see also id.* at 1–3, 14.

part of U.S. constitutional law,[37] Sunstein seems to admit that the law could determine or at least be relevant to interpretive choice[38]—it is just that he thinks that Baude and Sachs are wrong "in arguing that our system is originalist" (p. 68). Is this compatible with the idea that "judges have a degree of freedom" in interpretive choice? It is, if one believes, as Sunstein does, that Baude and Sachs are wrong and that even if there is a law of interpretation, the law does not prescribe a single method of interpretation. The law may impose some constraints on interpretative choice, but this would be compatible with "a degree of freedom" for judges in choosing a theory or method of interpretation. But if Sunstein accepts the possibility that the law can constrain interpretive choice, then it would seem that everything depends on a factual legal claim: if Baude and Sachs are right, and "originalism" is indeed "our law," then there wouldn't be such "degree of freedom." By legal decree, interpretation would "just be" something (originalism), and there would be no interpretive choice. All of Sunstein's theses would fail. Hence, Sunstein's efforts in refuting Baude and Sachs' factual claim and arguing that U.S. constitutional law does not adopt a single theory of interpretation.

The problem runs even deeper if we move from the factual to the normative. If it is accepted that the law could constrain and even determine interpretative choice (whether U.S. constitutional law actually does so or not),[39] then in an important sense interpretive choice for those subject to the law —crucially, judges—is avoidable, contrary to what Sunstein suggests. The question is whether there are good reasons to restrict the interpretive choices of, say, judges, and, if there are (as Sunstein's

37. *See* Baude & Sachs, *supra* note 34, at 1135 ("This way of looking at interpretation is particularly compatible with certain forms of originalism"); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019) ("As it turns out, the particular rules of our legal system happen to endorse a form of originalism."); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015).

38. I hesitate, though, because Sunstein is not at his most assertive here. He says: "In my view, Baude and Sachs are right to draw attention to the law of interpretation, understood as the legal rules that judges have endorsed about how to interpret the Constitution" (p. 78).

39. Though it is not evident that this should be accepted. A skeptic, for example, could claim that the question of how to determine the meaning of law—the question that calls for a method of interpretation—will apply to a law of interpretation. *See* Marc Greenberg, *What Makes a Method of Legal Interpretation Correct*, 130 HARV. L. REV. FORUM 105, 109 (2017). I am grateful to Felipe Jiménez for this observation.

critics seem to believe), then this is what should be done. No "degree of freedom" for judges, and no allowing them to choose "their own theory of interpretation." Resistance is not futile.

I think that the debate took a wrong turn. Sunstein's theses are not in peril, not even if Baude and Sachs are right and interpretive choice can be constrained by law. And this is so for the same reason that the concern of Sunstein's critics with judicial discretion has always missed its mark.

The reason why the concern of the critics has always missed its mark is the following. The critique fails to distinguish between two different questions: first, what are the relevant reasons bearing on interpretive choice? And second, should specific interpreters—particularly, judges—be somehow constrained in making that choice? The answer to each question is independent from the answer to the other. On the one hand, even if the idea of interpretation properly understood included only one of the theories or methods of interpretation (say, some version of originalism), that philosophical truth would be compatible with the legal truth that judges, here and now, are unconstrained by positive law in how they approach legal texts, and, therefore, there is no legal requirement that they should follow only that theory or method of interpretation in engaging with legal sources. It would also be compatible with the practical truth that in this particular society it would be best not to impose legal constraints on how judges engage with legal sources (say, because there is no practical way to enforce these constraints, or because of fear that they will be abused, harming judicial independence). On the other hand, interpretation may be a more capacious idea and interpretive choice be fully normative per Sunstein's theses 1 and 2, and yet judges could still be legally obliged by positive law to follow a specific approach. This fact would not deny theses 1 and 2. Of course, if such an authoritative determination exists, this would raise the separate question of whether such determination is reasonable or not (perhaps the authority got things wrong![40]) and what follows from that (positive law provides a reason for action, but not necessarily a decisive one).

Interpretive choice is not peculiar in this regard. What I said in the previous paragraph relies on a distinction that applies to all

40. As Sachs says, "the law doesn't have to reflect good philosophy any more than good policy." Sachs, *supra* note 37, at 819.

sorts of practical choices: the distinction between what reasons bear on a choice and how a particular agent should engage with those reasons. Sometimes it would be most reasonable for an agent not to consider all the relevant reasons bearing on a given choice, but this does not entail that the reasons that the agent is not considering are not relevant. Authority is a well-known instance of this.[41] For example, the reasons that matter for choosing food for my three-year-old daughter are related to nutrition, health, environmental impact, fair trade, cost, etc. Those are reasons bearing on everyone's choices regarding what to eat, including my daughter. But my daughter should not consider any of those reasons. She should choose what to eat based only on a single reason: what her parents and teachers tell her to eat. She has most reasons to make this choice based only on what her parents and teachers tell her to eat, rather than to assess by herself whether different kinds of foods are healthy, nutritious, sustainable, fair trade, etc. From this latter fact—that authority should be the overriding consideration for my daughter in choosing food (for now)—it does not follow that the *only* relevant reason bearing on the choice of what my daughter will eat is authority. This is why I could exercise this authority *badly*, if, for example, I chose for her to eat only fries. The reason why authority would be badly exercised here is because the act of authority is not responsive to the underlying reasons bearing on the choice of what to eat. There are two points worth underscoring for the purposes of my argument. First, the fact that a particular agent should not engage with all the reasons bearing on a choice situation does not entail that those reasons do not exist or are irrelevant.[42] Second, precisely because those reasons are not irrelevant, it is frequently useful to know them. This is the case of authority, where we are often interested in evaluating whether the authority made a reasonable decision.[43]

Sunstein's thesis is an argument about the reasons bearing on

41. This is consistent with Raz's insight that authority is both preemptive of other reasons, and dependent on them. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 46–47 (1986).

42. For a similar claim, in the context of private law theory, *see* Felipe Jiménez, *Two Questions for Private Law Theory*, 12 JURISPRUDENCE 391, 407–08 (2021).

43. Of course, distinction does not mean isolation. The reasons bearing on a choice should impact deliberation as to how one should engage with those reasons when faced with that choice. In my example, part of the reason for my daughter to defer to authority is that the reasons bearing on choosing food are too difficult to understand for a three-year-old.

interpretive choice. Such a theory entails neither judicial discretion nor judicial limitations. Though pertinent for deliberation on what each judge should ultimately choose to do, it does not exclude the possibility that there be second-order reasons on how first-order reasons relevant for interpretive choice should be considered by a particular agent—for example, a set of judges in a specific jurisdiction. For this reason, Sunstein's theses are compatible with an inferior court being bound by the interpretive choice made by a superior court, and, more generally, by the existence of a "law of interpretation" of the kind suggested by Baude and Sachs.

Another way to make this point is to draw attention to a distinction between three kinds of claims: a) a claim about a concept (interpretation), and two practical claims: b) a claim about the reasons that bear on a particular choice situation; and c) a claim about the specific way in which specific actors (you, me, judges, etc.) should engage with the relevant reasons in a particular context (here and now, in deciding cases of such and such type in such and such country, etc.), including which constraints exist or it would be reasonable for others to impose on that actor's choice. Sunstein's theses entail claims of types a) and b); the critics' concern with discretion is with a claim of type c).

Confusion between these different claims has plagued the debate. Critics took Sunstein's theses about normative reasons pertinent to interpretive choice as entailing a factual or normative claim about legal constraints on judges in the U.S. Sunstein's reply is at the same level: U.S. law does not impose the constraints on judges that some think. This is a legitimate point—and one worth making—but the more fundamental point is that even if Baude and Sachs and others are right in thinking that U.S. law legally constrains or determines interpretive choice, this does not challenge Sunstein's main theses. Interpretive choice can be fully normative, and the decisive practical criterion for it could be "what makes the relevant constitutional order better rather than worse," and this would not rule out that it be constrained by a "law of interpretation," if there are good reasons for this to be so. But maybe there are no such reasons for a "law of interpretation" prescribing judges to adopt a single method of interpretation. Sunstein's four theses do not entail an answer to this, and, for the same reason, they should be compatible with any view as to whether originalism or any other approach to interpretation is

part of U.S. law.

IT DOES NOT MATTER WHAT INTERPRETATION IS

This takes us to another feature of Sunstein's argument. Sunstein is right that interpretive choice is ruled by normative criteria rather than by an idea of what interpretation is. Interpretive choice, just as every practical choice, is ruled by practical, normative considerations. In the context of the judicial role, choosing a method of interpretation is part of a set of judicial choices about how one is to go about deciding a case: a practical choice. Such choices should be shaped by considerations such as what is just, what am I obliged to do, what would most realize a specific good or value, etc. A judge owes nothing to the concept of interpretation. Neither do other interpreters of the Constitution, such as elected officials, administrative agents or, most importantly, the citizenry.[44]

But it seems that on Sunstein's view a judge does owe something to the concept of interpretation. Recall Sunstein's "two-step" view of interpretive choice explained above. On the "two-step" view, one should do two things when choosing a theory of interpretation. First, one should determine which methods of interpretation are truly such. Second, one should choose from among the remaining set of alternatives the theory or method of interpretation that best fulfils the relevant normative reasons (for Sunstein, what makes the constitutional order better, per thesis 3). Sunstein presents interpretive choice as a normative choice within constraints posed by the idea of interpretation. He says, for example, that a theory of interpretation "cannot be ruled out of bounds by the very idea of interpretation" (p. 68), and that another theory "certainly count[s] as interpretation within permissible understandings of the term" (p. 81), and that yet another theory is "not built into the very idea of interpretation" (p. 67). As seen above, this concedes that the idea of interpretation imposes constraints on interpretive choice, but it holds that those constraints are loose enough to allow for the different methods of interpretation on offer. For his

44. Sunstein's argument legitimately focuses on judges and, for this reason, I do the same here. But I do not think that a theory of interpretation should focus only on judges, and even less impose the strictures of the judicial role on the interpretation of other actors.

critics, this idea of interpretation leaves judges with too much discretion. The idea of interpretation is less capacious. What unites both sides of the debate is thinking that the idea of interpretation imposes constraints on interpretive choice.

But, does it? Recall Sunstein's "two-step" view. If only normative reasons are decisive in step two, this must be because interpretive choice is ultimately a normative enterprise. And if it is so, why would the concept of interpretation impose any constraints?

Take the following example. Judge A is faced with a choice between three alternative methods for constitutional interpretation: methods *X*, *Y*, and *Z*. Each method is supported by one normative reason in the form of a single value realized by each method. Method *X* realizes the value of substantive justice in the particular case. Method *Y* fulfills formal values associated with the rule of law, such as equality before the law and legal certainty. Method *Z* realizes the value of democracy.[45] Assume that the three values are relevant for interpretive choice (on Sunstein's account, they bear equally on whether a given approach "makes the relevant constitutional order better rather than worse" (p. 91)). Assume now that upon reflecting on the idea of "interpretation," *A* has come to the conclusion that while *X* and *Y* could be characterized as methods of interpretation, *Z* could not. *Z* is only a "so-called" method of interpretation. Would this change the alternatives available to *A* and the reasons *A* is to act for? Surely not. The reason for choosing *Z* is that it realizes the value of democracy; *Z* will realize that value whether it is a method of interpretation or only a "so-called" method of interpretation. To the extent that the value of democracy is relevant for interpretive choice, the choice that *A* faces and the reasons that bear on that choice are the same, regardless of whether *Z* is a method of interpretation or only a "so-called" method of interpretation. If *A*'s concept of interpretation were more capacious and included *Z*, the choice and the reasons bearing on that choice would be the same as they would be if it

45. Assume these are all distinctive values and are not conflated in the way they often are in political and legal discourse. *See* John Tasioulas, *The inflation of concepts*, AEON (Jan. 29, 2021); John Tasioulas, *The Rule of Law*, *in* THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 117–19 (2020); ISAIAH BERLIN, *Two Concepts of Liberty*, *in* LIBERTY 172 (Henry Hardy ed., 2d ed. 2002) ("Everything is what it is: liberty is liberty, not equality or fairness, or justice or culture, or human happiness or a quiet conscience").

was less capacious and excluded *Z*. It would be unreasonable for *A* to restrict deliberation to *X* and *Y*, and exclude *Z*, only because *Z* is a "so-called" method of interpretation. And it would be unreasonable for *A* not to choose *Z*, if this is the option that *A* has most reason to adopt (say, because the fact that *Z* promotes the value of democracy provides the strongest reason in this case), only because *Z* does not fall under what *A* believes is the true concept of interpretation.[46]

I hope this is intuitive. The underlying explanation is the following. Sunstein is concerned with a choice between the different methods of engaging with a legal source (the U.S. Constitution) entailed by the different theories of U.S. constitutional interpretation (explained in chapter 1 of the book). This is the set of alternatives. All these methods, whether they qualify as interpretation or not, are courses of action: the respective theories that adopt them suggest them as courses for action for a particular agent or type of agents—e.g., judges—who need to engage with some provision of the U.S. Constitution for legal (as opposed to purely aesthetic, ludic, or speculative) purposes—for example for deciding a case. This is a practical purpose. In this sense, the enterprise of choosing a theory or method of constitutional interpretation is a practical one. In assessing methods of constitutional interpretation, a judge who needs to decide a case applying the Constitution will be concerned with them as proposals for a course of action. The judge is, or should be, concerned with the course of action that would be most reasonable to adopt, rather than with, say, the clearest or most original exposition of a concept—as perhaps a participant in an academic seminar could be. In other words, the judge will be concerned with reasons for action. These reasons do not change according to whether one describes the alternatives as falling under the idea of interpretation or not,[47] as the hypothetical in the previous paragraph illustrates. At least in law and legal adjudication, this choice[48] is a practical choice, ruled by practical

46. *See* Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 181 (2008) at 181 ("Assuming that the content of the decisionmaking process is the same no matter what label we put on it, the fact that we say 'interpretation' as opposed to 'shmerpretation' will have no impact on constitutional decisions.").

47. There is nothing peculiar in the term or idea of "interpretation": the same would apply if we replace it by "law-application" or "adjudication" or some other broader concept or term.

48. I do not address here choices of a method of interpretation for other purposes,

reasons only.

So here is the point where I depart from the debate outlined above. Both sides agree that the idea of interpretation poses constraints on interpretive choice, and the debate is on the scope of the idea of interpretation: is it broader or narrower? My main point is that this debate does not have the significance that Sunstein and his critics attribute to it. It is not only that "there is nothing that interpretation 'just is'": it simply *doesn't matter* what interpretation is. Assume that the concept of interpretation was narrower than Sunstein thinks and excluded the proposal for interpretation that is best for, say, constitutional adjudication in the U.S. This would neither change the alternatives available for choice nor alter the reasons in favor and against any of them, as illustrated in my example above. It would only entail that the concept of interpretation is inadequate for thinking about the way that U.S. judges should engage with the Constitution.

Perhaps what Sunstein and his critics presuppose is that, in engaging with the law, judges pretty much always have normative reasons to "interpret," as this is understood by one or more of the theories often discussed.[49] Yet this presupposition is about normative reasons. It is therefore not well expressed in terms of the concept of "interpretation" setting boundaries to what judges or other actors should do. If interpretive choice is all about reasons for action, then theories of interpretive choice should acknowledge that. Even if acknowledging the fully normative character of interpretive choice made no practical difference, there is value in understanding the reasons for which one should act, and for a theory to show this clearly. And I am not sure that it makes no practical difference. At the very least, full awareness of the normative nature of interpretive choice allows for better accountability. Judges and other such actors should decide based on normative reasons, and bear responsibility for their choices—there is no conceptual or linguistic truth that can relieve them from this burden.[50]

I would therefore suggest replacing thesis 1 ("there is nothing that interpretation 'just is'") with thesis 1': "it doesn't matter what

e.g., for explaining the nature of interpretation in a philosophy seminar; or for methodological purposes in interpreting data; etc.

49. I am grateful to Jordan de Campos-Rudinsky for raising this point.

50. Leaving aside the loose constraint posed by Sunstein's step 1, this is very much in line with Sunstein's argument (e.g., pp. 19 n. 5, 128).

interpretation is."[51] But I should clarify what is the scope of the latter. It means that it does not matter what interpretation is *for interpretive choice.* It does not mean that it never matters, for any purpose, what interpretation is. It may be useful to dwell on this a little, as some of the intuitive appeal of the two-step view may arise from the fact that, for purposes other than interpretive choice, it may matter what interpretation is.[52]

Think of description. I said that if the method of interpretation one has most reasons to choose in U.S. constitutional law is one that is not captured by the best account of interpretation, then this does not mean that one should not choose that method. It only means that perhaps one will not describe the method as one of interpretation proper, and therefore the concept of interpretation would be inadequate for thinking about U.S. constitutional law. But assume the opposite and more realistic scenario: that the idea of interpretation is apt for thinking about the way judges should engage with legal sources generally and with the Constitution in particular. After all, we use the term "interpretive choice" assuming that it refers to a choice of alternatives that can plausibly be described as interpretation, at least most of them or the more important ones. If the idea of interpretation is apt for thinking about, e.g., what judges should do in engaging with the Constitution when deciding a case, then it must be that two things are the case: a) the concept of interpretation captures one or more of the alternatives for action regarding how judges should engage with the Constitution in deciding cases, say, alternatives *X*–*Y*; and *b*) practical reason identifies at least one of those alternatives for action, say, alternative *X*, as the alternative that in regular circumstances judges should have most reasons to follow in this particular jurisdiction.

If this is the case, interpretation may be a useful concept to describe the best alternative for judicial action, and we may use it in prescription: "judges should interpret rather than do something else!" Under some circumstances, we may even have good

51. *See* Andrew Jordan, *Constitutional Anti-Theory* 107 Geo. L.J. 1515 (2019). Jordan's illuminating account of "constitutional decision-making" is paradigmatic of a resolutely normative view that is fully aware of doing away with conceptual restraints. A view of interpretive choice that does away with conceptual restrains does not need to adopt the additional steps, taken by Jordan, of rejecting a role for constitutional content or for abandoning focus on interpretation and interpretive choice.

52. I am grateful to Jeff Pojanowski for raising this point.

reasons to use a narrow concept of interpretation for the purposes of a specific practice (say, constitutional adjudication), one that includes only *X*, even if the concept of interpretation were actually broader. This would allow us to have a term to refer to the optimal choice in this particular context, and thus to communicate economically about it. This could promote at least three practically relevant aims: guiding action in desirable ways,[53] coordinating judicial action by making an alternative more salient,[54] and holding judges accountable if they fail to adopt the optimal interpretive choice (*X*). All this is contingent. It depends on two circumstances: that *X* is the best alternative, and that disciplining our use of "interpretation" (to refer only to *X*) is an apt means to promote judicial choice of *X*. If this were so, we would indeed have reasons within legal practice to use the concept of interpretation with discipline, including artificially restricting it only to *X*. We would also have reasons to object to looser uses of the concept which, in our practice, would hinder the attainment of some valuable aims.

So, under some circumstances and for some practical purposes, it may be reasonable to describe the optimal interpretive choice as "interpretation" and perhaps even to restrict that term to only one alternative for interpretive choice. But none of this should make us forget that what features in practical reasoning for interpretive choice, and what ultimately justifies the alternative chosen, is not the concept of interpretation. If the alternative that a judge has most reason to choose was not *X*, but rather some alternative not captured by our concept of interpretation, viz., *Z*, then the judge should choose *Z*, regardless of the fact that it is not captured by the concept of interpretation (which only captures alternatives *X*–*Y*). If *Z* is not captured by the concept of interpretation, then this is not a reason not to do *Z* (as Sunstein's two-step view would counsel), but only a reason to adjust our description of what should be done.

The key is to distinguish the practical enterprise of choosing how to go about engaging with some authoritative legal source in a particular setting (e.g., for a Justice of the U.S. Supreme Court

53. In a way analogous to the potential of doctrine to offer moral guidance. *See* FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING 162–81 (2017).

54. On the importance of coordinating judicial action, *see* Jeremy Waldron, *Lucky in Your Judge*, 9 THEORETICAL INQUIRIES L. 185, 191 (2008).

in a case that involves the Constitution), from the enterprise of describing that choice. In law, the latter enterprise is often of practical significance. We need to describe for some practical purpose (e.g., guiding action, coordination, holding authorities accountable for the decision, etc.). Both enterprises then are about the same thing (constitutional interpretation) and both are, in different ways, of practical significance. But this should not lead to confusing the two. Sunstein's book is about the first enterprise (the enterprise of interpretive choice in constitutional law), but the need for discipline in the use of a particular concept or term is only relevant for the second one. This need for discipline in the second enterprise does not impact the underlying reasons *for choosing a method of interpretation* in, say, constitutional adjudication. For the first enterprise, it really does not matter what interpretation is.[55]

CONCLUSION

Sunstein's book has two goals: to serve as an introduction to debates on constitutional interpretation, and to argue for a set of theses on how one should choose a theory of constitutional interpretation. Readers will welcome that Sunstein pursues these two goals in a single book. A discussion of interpretive choice benefits from a presentation of the alternatives. Sunstein does this clearly, fairly, and efficiently. But he does much more. Sunstein's book not only succeeds in presenting the debate clearly and fairly, but also situates it where it is most honest and fruitful. He presents the debate as it really is: a debate about a choice, one where the different methods of constitutional interpretation are not just that but, crucially, alternatives for action. Debates on interpretation would be better if they were more influenced by this illuminating and important book.

55. For a more developed version of the argument in this section, *see* Francisco J. Urbina, *Reasons for Interpretation*, 124 COLUM. L. REV. (2024) (forthcoming), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4722069.