

A THEORY IN SEARCH OF A COURT, AND ITSELF: JUDICIAL MINIMALISM AT THE SUPREME COURT BAR

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INTRODUCTION

According to the prevailing wisdom in academic public law, constitutional theory is a field that seeks to articulate and evaluate abstract accounts of the nature of the United States Constitution. Theorists offer those accounts as guides to subsequent judicial construction of constitutional provisions.¹ As typically conceived, therefore, constitutional theory tends to proceed analytically from the general to the particular; its animating idea is that correct decisions in constitutional cases presuppose theoretical commitments to the methodological principles that should guide constitutional interpretation and the substantive values such interpretation should advance.²

In its enthusiasm for abstraction, constitutional theory has, at times, generated accounts of judicial behavior that are removed from the realities of judicial practice.³ Indeed, it may not be an overstatement to suggest that a basic disconnect exists between the turn to theory in legal academia and the actual practice of constitutional adjudication. At the Supreme Court bar, for example, the Justices — and thus the appellate advocates who appear before them — appear more interested in grappling with the law and facts of the case at hand than they are eager to articulate or apply grand theories about the “fundamental nature” of the Constitution.

A few academic commentators share the Court’s point of view and have sought to redirect the path of academic constitutional law. Robert Post, for example, notes that constitutional theory is associated with “certain political philosophies that aspire to systematic analysis based on first principles,” and he argues that constitutional theory should instead seek “to expose and clarify the principles immanent

1. See, e.g., Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 537 (1999) (“[B]y [constitutional theory,] I mean theories about the nature of the United States Constitution and how judges should interpret and apply it.”); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 1 (1998) (“Constitutional theory, as I shall use the term, is the effort to develop a generally accepted theory to guide the interpretation of the Constitution of the United States.”).

2. See generally Fallon, *supra* note 1 (identifying the criteria that should inform the individual’s selection of “a good constitutional theory” for subsequent application to constitutional questions). The title and subject of Professor Fallon’s article evidence the highly theoretical bent of contemporary constitutional theorists.

3. The exploits of Hercules, for example, are well known. See RONALD DWORKIN, *LAW’S EMPIRE* 239-412 (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105-130 (1977).

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within the practice of constitutional adjudication.”⁴ Constitutional theory, he suggests, ought to be “always, so to speak, within our tradition and our history; it [ought to be] parasitic on the very practice it seeks to explain.”⁵ On this conception of the field’s role, constitutional theory should endeavor to articulate, order, and assess the broader principles latent in the Supreme Court’s decisions, and it should do so through relatively inductive analyses — accounts in which real constitutional cases and legal doctrines play a prominent role in formulating the theory itself.

If constitutional theory is to turn back to the context in which constitutional controversies are resolved — to the extant practice of constitutional adjudication — the field must be able to account for a basic descriptive reality. The Supreme Court, it would seem uncontroversial to suggest, assumes different postures in different cases. Sometimes, as in the historic example of *Brown v. Board of Education*,⁶ the Justices step up and forcefully expound the fundamental law regardless of how polarizing an issue may be. At other times, as in the controversial case of *Naim v. Naim*,⁷ the Court steps back, its voice inaudible; the Justices make the pragmatic judgment that the time is not right for the Court’s intervention, even despite the obvious importance and unconstitutionality of the state action at issue. On most occasions, the Justices do speak, and they adjust the volume of their pronouncements depending upon a multitude of considerations; their opinions fall somewhere along the decisional spectrum bounded by *Brown* and *Naim*.⁸

Viewed within this legal landscape, the position advanced by one distinguished constitutional theorist is striking. Cass R. Sunstein of the University of Chicago agrees that the field has taken an untoward turn to theory:

Observers, including academic observers, tend to think that the Supreme Court should have some kind of “theory.” But as a general rule, those involved in constitutional law tend to be cautious about theoretical claims. For this reason, much of academic work in constitutional law has been out of touch with the actual process of constitutional interpretation,

4. Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CAL. L. REV. 429, 429 (1998).

5. *Id.*; see also Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CAL. L. REV. 593 (1999) (rejecting the suggestion that judges and constitutional scholars should “choose” constitutional theories that they then use to resolve concrete disputes, and arguing instead that theories of constitutional interpretation emerge from context-sensitive judgments regarding particular cases).

6. 347 U.S. 483 (1954).

7. 350 U.S. 985 (1956) (refusing to hear a challenge to Virginia’s antimiscegenation statute).

8. For further discussion of *Brown* and *Naim*, see *infra* notes 270-271, 283, 287-290 and accompanying text.

especially in the last two decades. The judicial mind naturally gravitates away from abstractions and toward close encounters with particular cases. Even in constitutional law, judges tend to use abstractions only to the extent necessary to resolve a controversy.⁹

Professor Sunstein agrees, therefore, that constitutional theory should play close attention to the Justices' actual behavior in deciding cases.

At the same time, however, Professor Sunstein appears to let his own theory — minimalism — unduly color his understanding of what the Court has actually decided. An occasional qualification notwithstanding, he fails to register that the Rehnquist Court has tended to alter its role depending on the circumstances. Instead, Professor Sunstein maintains that the current Court does not resolve controversial cases broadly and deeply based on a comprehensive vision of the Constitution or area of law in question. Rather, he has argued in academic writing and in the *New York Times* that most of the current Justices are “minimalists”¹⁰ in the time-honored tradition of Justice Felix Frankfurter¹¹ and his former law clerk, Professor Alexander Bickel.¹² Minimalists “say no more than necessary,” Professor Sunstein urges, “resolv[ing] the largest issues of the day . . . as narrowly as possible,” and requiring “[a]bove all . . . procedures that are lawful, proper and fair.”¹³

In an earlier book that sets out his theory of judicial minimalism, Professor Sunstein describes the practice this way:

A minimalist court settles the case before it, but it leaves many things undecided. It is alert to the existence of reasonable disagreement in a

9. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* xi (1999) [hereinafter SUNSTEIN, *ONE CASE AT A TIME*].

10. *Id.* at 9 (stating that Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer “embrace minimalism — usually, not always — for reasons connected with their conception of the role of the Supreme Court in American government”); Cass R. Sunstein, Op-Ed, *The Smallest Court in the Land*, N.Y. TIMES, July 4, 2004, § 4 (Week in Review), at 9 [hereinafter Sunstein, *The Smallest Court*]. In the preface to his book, Professor Sunstein describes Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer as minimalists. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 9, at xiii. Most likely, the discrepancy between the assertion in the preface and on page 9 is inadvertent, so that Professor Sunstein believes six of the nine current Justices are minimalists.

11. According to Professor Sunstein:

[Minimalism's] credo was set out by Justice Felix Frankfurter some 60 years ago, in a case involving three men who were detained for 14 hours and questioned over two days before confessing to the murder of a federal officer. In reversing their conviction because they were deprived of their rights to be brought before judicial authorities, Justice Frankfurter wrote: “The history of liberty has largely been the history of the [sic] observance of procedural safeguards.”

Sunstein, *The Smallest Court*, *supra* note 10 (quoting *McNabb v. United States*, 318 U.S. 332, 347 (1943)).

12. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

13. Sunstein, *The Smallest Court*, *supra* note 10.

heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions. Alert to the problem of unanticipated consequences, it sees itself as part of a system of democratic deliberation; it attempts to promote the democratic ideals of participation, deliberation, and responsiveness. It allows continued space for democratic reflection from Congress and the states. It wants to accommodate new judgments about facts and values. To the extent that it can, it seeks to provide rulings that can attract support from people with diverse theoretical commitments.¹⁴

Professor Sunstein further explains that “the practice of minimalism involves two principal features, narrowness and shallowness.”¹⁵ Along the dimension of breadth, minimalist Justices endeavor to decide the specific case before them rather than lay down broad rules that effectively decide a host of distinct, future cases. Along the dimension of depth, minimalists try to avoid unnecessary theoretical ascents, thereby enabling people who diverge on questions of basic principle to come together and agree on judicial resolutions in particular cases.¹⁶

Professor Sunstein’s theory of judicial minimalism has both descriptive and prescriptive components. He contends that “[t]he current Supreme Court embraces minimalism,”¹⁷ and he regards this state of affairs as providing cause for celebration. For example, Professor Sunstein devotes roughly half of *One Case at a Time* to demonstrating — and approving — the Rehnquist Court’s commitment to minimalism in navigating the legal controversies over physician-assisted suicide, affirmative action, discrimination on the basis of sexual orientation, same-sex education, and the First Amendment and new communications technologies.¹⁸ Moreover, he asserts approvingly that the Court’s October 2003 Term exemplifies his theory of judicial minimalism. He maintains that “minimalism emerged triumphant” and “was the defining theme of the court’s most eagerly anticipated cases” that Term.¹⁹ Moving from purported description to prescription, he further submits that, “with its insistent focus on procedural safeguards, minimalism has real attractions, perhaps above all in a period in which judges are forced to reconcile the demands of national security with the commitment to liberty.”²⁰ Professor Sunstein portrays his descriptive and prescriptive claims as

14. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 9, at ix-x.

15. *Id.* at 10.

16. *Id.* at 10-11.

17. *Id.* at xi.

18. *Id.* at 75-205.

19. Sunstein, *The Smallest Court*, *supra* note 10.

20. *Id.*

complementary, each prefaced on the existence of a relatively clear definition of minimalism that is capable of uncontroversial application.²¹

Those appearances, this Article submits, are illusory. The analysis that follows demonstrates a deep tension between Professor Sunstein's aspiration that minimalism serve as an empirically testable (and therefore descriptively accurate) account of the Supreme Court's work, and his ambition that minimalism provide a convincing normative theory of judicial review.²² I begin by inquiring whether judicial minimalism accurately describes many of the most important decisions from the October 2003 Term. In order to investigate that question, however, I must give minimalism an operational definition that is empirically falsifiable. Part I derives, from among the possibilities evident in Professor Sunstein's descriptions, a definition focusing on the narrowness and shallowness of judicial decisions. This is the only version of minimalism that does not incorporate criteria so vague and contestable as to render the theory nonfalsifiable and thus empirically useless. Part II demonstrates that, so understood, the theory cannot account for many of the Court's most significant rulings from the October 2003 Term. Part III shows that the version of judicial minimalism most susceptible to empirical testing has little attraction as a normative account of how the Court should resolve constitutional controversies.

A brief conclusion summarizes the results of the Article's empirical and normative analyses, as well as identifies some rehabilitative options potentially left open to judicial minimalism going forward. One alternative is to articulate and attempt to test more modest descriptive claims about the Supreme Court's decisionmaking. Another is to abandon minimalism's claim to serve as a comprehensive approach to judicial review, and instead to embrace a contextually justified apprehension of the valuable lessons of prudence that historically have animated constitutional theories evoking the work of Alexander Bickel. Those powerful themes are present in Professor Sunstein's work.

21. Lest I be suspected of having set up a straw man, it is important to underscore that Professor Sunstein offers judicial minimalism as a descriptive and normative account of the Supreme Court's exercise of judicial review. He does not present minimalism merely as a general juridical value, virtue, or lesson such as "gradualism," "judicial restraint," or "prudence."

22. Most of the analysis that follows focuses on the Supreme Court because that is where Professor Sunstein directs his theory of judicial minimalism. For discussion of his theory's implications for lower courts, see *infra* Section III.A and accompanying text. I do not mean to suggest that constitutional theory should concentrate its attention almost exclusively on the Supreme Court.

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I. OPERATIONALIZING MINIMALISM

A. *What is Minimalism?*

One cannot evaluate Professor Sunstein's claim that a majority of the current Justices are "minimalists"²³ without first understanding with precision what he means when he uses that term. Nor can one assess minimalism's value as an approach to constitutional adjudication without clearly comprehending what minimalism is. A purportedly empirical theory's usefulness is severely limited if its definitional criteria are so inconsistently conceived or radically indeterminate that the theory is not falsifiable. This point may seem obvious, but "[f]amiliarity breeds inattention,"²⁴ and Professor Sunstein is, in fact, notoriously ambiguous about what he means by "minimalism." His theory is conceptually unstable.

At some points in Professor Sunstein's exposition, minimalism appears to be a theory of the Supreme Court's institutional position. He writes that "the denial of certiorari can be analyzed as a form of minimalism."²⁵ "Perhaps," he suggests, "the Court wants to receive more information, is so divided that it could not resolve the case in any event, or is attuned to strategic considerations stemming from the likelihood of adverse public reactions. For all these reasons, it may be prudent to wait."²⁶ At other points, however, Professor Sunstein presents minimalism as a theory of judicial decisionmaking (that is, how the Justices should draft opinions).²⁷ As noted above,²⁸ he writes that "the practice of minimalism involves two principal features, narrowness and shallowness."²⁹

The theory of the Court's institutional position is most closely associated with the scholarship of Alexander Bickel, who focused on the Court's role in deciding or not deciding cases.³⁰ Expressed as an

23. See *supra* note 10 and accompanying text.

24. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980).

25. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 9, at 39.

26. *Id.*

27. Slippage in the definition of minimalism is apparent throughout *One Case at a Time*. Compare, e.g., SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 9, at 39 (observing that "the denial of certiorari can be analyzed as a form of minimalism"), with, e.g., *id.* at 54 ("If the Court may deny certiorari partly in order to take account of considerations of this kind, surely it can use minimalism for the same purpose.").

28. See *supra* text accompanying notes 15-16.

29. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 9, at 10.

30. Professor Bickel viewed himself as negotiating, on the Court's behalf, the same tension between principle and pragmatism that President Lincoln's struggle with the issue of slavery has come to symbolize. BICKEL, *supra* note 12, at 65-72 (discussing the "Lincolnian Tension"). Professor Bickel presented the passive virtues not only to make judicial review safe for majoritarianism, but also as a shield to preserve the Court's finite institutional

institutional account, minimalism appears to be a generalization of the Bickelian theory of the passive virtues, addressing not only the question “when” the Court should decide certain controversial issues, but also the question “how.” Indeed, Professor Sunstein writes that “[i]nsofar as the minimalist judge seeks to promote democratic goals while recognizing social pluralism, the minimalist project is easily linked with the idea of ‘passive virtues,’ as discussed by Alexander Bickel.”³¹

This spacious account of judicial minimalism evidences the instability of Professor Sunstein’s conception of the theory. Including certiorari denials in the definition of minimalism creates an anomaly, which could be called the paradox of certiorari: almost any Supreme Court decision cannot be minimalist in simple virtue of the fact that the Court granted certiorari rather than denying it.³² Professor Sunstein certainly does not mean to compel that conclusion, for then his entire discussion of the benefits of narrowness and shallowness would be beside the point. But logically, his advocacy of narrow and shallow decisions presupposes a different definition of minimalism than does his endorsement of the passive virtues.

Insofar as minimalism is conceived as a theory of the Court’s institutional position, moreover, a disconnect exists between Professor Sunstein’s aggressive descriptive claim that the Court is minimalist and the means he employs to validate the assertion. Specifically, he largely ignores the Court’s certiorari practice, instead concentrating almost all his attention on about one percent of the Court’s docket — namely, the eighty or ninety (out of 8,000) cases each Term in which the Justices grant certiorari.³³ His discussion of certiorari denials and the Court’s certiorari practice more generally, canvassed immediately above, consumes only a few pages of *One Case at a Time*.

Professor Sunstein’s approach raises basic questions about minimalism’s coherence as an account of the Court’s work. What sense does it make to discuss whether the Justices are minimalists without considering the overwhelming majority of instances in which

capital in the face of intense political and moral disagreements in American society. *Id.* at 111-98.

31. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 9, at 39. *See also id.* at 267, n. 5.

32. The Court can choose to deny certiorari *almost* always. Congress still places a few categories of cases within the Court’s mandatory appellate jurisdiction — for example, the campaign finance cases from the October 2003 Term. *See infra* text accompanying notes 101-112.

33. In a typical Term these days, about 8,000 certiorari petitions are filed and around one percent of them are granted. In the October 2003 Term, for example, 1,722 paid cases and 6,092 *in forma pauperis* cases were docketed, for a total of 7,814. Only ninety-one cases, some of which were consolidated, were argued, submitted, and decided. *See* Clerk’s Office, Supreme Court of the United States, Statistical Sheet No. 28 (June 30, 2004) (on file with author).

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minimalism could potentially be employed simply by declining to consider cases — that is, through denials of certiorari? Similarly, in cases in which the Court grants certiorari, it is not obvious why the purposes of judicial minimalism are implicated in discussions of the narrowness and shallowness of a given decision but not in the antecedent question whether (or how) the Court should have granted certiorari in the first place.³⁴ In other words, Professor Sunstein's concentration on the Justices' written opinions ignores a crucial dimension of the Supreme Court's activity, one that should inform debates about the existence of judicial minimalism insofar as the theory is proffered as a descriptively accurate account of the Court's institutional position.

If one conceives judicial minimalism not as a theory of the Court's institutional position, but instead as an account of judicial decisionmaking once certiorari has been granted, the theory's instability endures. Sometimes, minimalism is presented as a theory of opinion writing that promotes narrow and shallow decisions, rulings from which certain goods are supposed to flow — namely, minimization of decision and error costs, enhanced democratic deliberation, overlapping consensus, and avoidance of deep theorizing.³⁵ At other times, however, minimalism seems to be a substantive theory of decisionmaking, one in which minimizing costs in the tradition of law and economics (broadly conceived),³⁶ implementing the virtues of democratic self-governance in the manner of modern republican theory,³⁷ and achieving overlapping consensus following the inspiration of John Rawls³⁸ constitute the decisionmaking criteria themselves.³⁹ And on still other occasions,

34. See, e.g., *infra* notes 181-182 and accompanying text (observing that the Supreme Court sometimes rewrites the questions presented as articulated by the parties or chooses to review only certain questions presented).

35. See *infra* Part III (analyzing the various substantive conceptions noted in the text). To be clear, conceiving minimalism as promoting narrow and shallow decisions does not entail viewing the attributes of narrowness and shallowness as goods in themselves; rather, those criteria for decisionmaking constitute means to the end of promoting various other goods, such as democratic deliberation. On any of its conceptions, minimalism is about values, not craft-related questions that are pursued for their own sake.

36. SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 46 (“Note that we can find such notions useful without thinking that it is necessary or helpful to understand the idea of ‘costs’ in a fully economic manner, as if the various consequences of decisions can be monetized, or aligned along a single metric.”).

37. See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

38. See generally JOHN RAWLS, POLITICAL LIBERALISM (1993). See *infra* Section III.C for a discussion of Professor Sunstein's use of Rawlsian political philosophy.

39. See, e.g., *supra* text accompanying notes 13-14 (capturing Professor Sunstein's vacillations between different conceptions of minimalism).

minimalism appears to be a substantive theory of rights, one that stresses the importance of strong procedural protections.⁴⁰

These are all different accounts of minimalism, and how they relate to one another theoretically is not clear in Professor Sunstein's work. He seems to shift from one to another without explanation, and the resulting blurriness generates confusion about what the theory of judicial minimalism is.⁴¹ For example, it would seem uncontroversial that decisions best promoting and protecting democratic deliberation, such as *New York Times v. Sullivan*,⁴² need not be either narrow or shallow. The same can be said of decisions that protect judicial procedural rights, such as *Hamdi v. Rumsfeld*.⁴³ Indeed, both types of decisions are at war with the notion of minimalism as a theory of judicial modesty and reservation because in any particular circumstance they can counsel dramatic results. So where exactly does minimalism put its chips? The answer is unclear, because Professor Sunstein situates the normative prong of his theory ambiguously between a theory of decisionmaking and a substantive theory of rights. And the situation is made analytically muddier because more than one theory of decisionmaking appears to be in play.

All these interpretations of judicial minimalism are interesting, and it is worth pausing to consider what one would have to believe jurisprudentially to think any of them made sense. Implicitly, minimalism rejects a hard-edged formalism in which there exists one "right" answer to a legal question, and it also denies the existence of a regime characterized by such radical divergence that practitioners cannot agree on what counts as the minimalist interpretation of a case. Instead, judicial minimalism presupposes the existence of a relatively stable community of meaning, one that, by and large, can come to a rough consensus on which way of deciding a case is the minimalist option.⁴⁴

40. See, e.g., *supra* note 11.

41. See, e.g., *supra* text accompanying note 13 (switching from a focus on narrow and shallow decisions to an emphasis on procedural safeguards).

42. 376 U.S. 254 (1964) (holding that freedom of speech and press bars a civil libel judgment for criticism of the official conduct of public officials, unless the plaintiff shows malice by clear and convincing evidence).

43. 124 S. Ct. 2633 (2004) (holding in part that due process requires the government to give a citizen held in the United States as an enemy combatant a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker). For a detailed discussion of *Hamdi*, see *infra* notes 166-169, 208-222, 282-290 and accompanying text.

44. For work clarifying the idea of communities of shared meaning in law, see, for example, ROBERT H. BORK, *THE TEMPTING OF AMERICA* 139-60 (1990) and Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 186-94 (1986-87). For relevant philosophical background, see generally 1 JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* (T. McCarthy trans., 1984), and

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Are these jurisprudential assumptions credible? On some level and to some extent, they are. For example, no one in the speech community of contemporary constitutional lawyers would suggest that a narrower option reasonably available to the Supreme Court in a given case would be to limit its holding to individuals with the same hair color as the prevailing party. We can all agree that hair color is completely irrelevant. Of course, that example concerns only the narrowness/shallowness conception of minimalism, and even on that interpretation of the theory, it would seem to leave plenty of room for intense disagreement about the minimalist disposition of a case.

The notion of a stable community of meaning seems incredible with respect to the other interpretations of judicial minimalism that are on the table. A Bickelian understanding — call it “prudentialism” — is impossible to test because the Court almost never explains why at least six Justices voted to deny certiorari.⁴⁵ More importantly, even if explanations were offered, the question whether a given certiorari denial was prudentialist would itself be endlessly debatable. Reasonable people inevitably will disagree about whether the Court should acquire “more information” before intervening, whether the country is ready for a particular decision, and whether a legal question is of such urgency and moment that the Court should decide it regardless of “strategic considerations stemming from the likelihood of adverse public reactions.”⁴⁶

Similarly, viewing democratic deliberation, overlapping consensus, etc., as the criteria for decisionmaking renders effectively impossible the formation of a consensus on the minimalist interpretation of a case. Reasonable people inevitably will disagree about what sorts of judicial decisions are required to promote those goals. The point here is not that minimalism cannot be falsified as a technical matter, but rather that the theory no longer has an operational definition that can actually be tested. Such a conception of minimalism, in other words, is not empirical but normative, because the question of what will serve various substantive values is always normatively contestable. Democracy promotion, for example, is often in the eye of the beholder. The same reasonable yet irreconcilable disagreement endures when minimalism is conceived as a substantive theory of rights.

We are left, therefore, with the view of minimalism that identifies the narrowness and shallowness of an opinion as the criteria for

LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 1958).

45. The affirmative votes of four Justices are required for the Court to grant a petition for a writ of certiorari.

46. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 9, at 39.

decision. Professor Sunstein stresses this approach, writing that “the practice of minimalism involves two principal features, narrowness and shallowness.”⁴⁷ While this conception has its problems, they are probably not as intractable as those associated with the other interpretations of minimalism canvassed above.⁴⁸ That is because there likely exists greater agreement within the speech community of contemporary constitutional lawyers regarding what constitutes the narrowest and shallowest resolution of a case than there is regarding which decision is most conducive to democratic deliberation, overlapping consensus, etc. Regardless of whether an analysis of breadth and depth is ultimately credible, in other words, it seems less incredible than the alternatives, and it may be the best we can do in a post-Realist world.

Insofar as minimalism can be given an operational definition that is capable of disconfirmation, Professor Sunstein’s descriptive claim that the Supreme Court embraces judicial minimalism provides an interesting empirical proposition. In the following test of his assertion, I investigate an account of minimalism that focuses on judicial opinion writing and that enables minimalism to be both a normative and empirical theory. In the next section, I give operational meaning to minimalism by defining it as a theory of judicial decisionmaking that promotes narrow and shallow opinions because of various goods that are alleged to flow from such rulings.⁴⁹

47. *Id.* at 10.

48. There is truth — but also overstatement — in Jeffrey Rosen’s assertion that “[w]hether a decision is characterized as narrow or shallow, or deep or broad, seems entirely in the eye of the beholder. . . . The indeterminacy of Sunstein’s categories calls their broader utility into question.” Jeffrey R. Rosen, *The Age of Mixed Results*, *NEW REPUBLIC*, June 28, 1999, at 43-44. Among modern practitioners, moreover, there likely exists less agreement regarding whether a case was decided “narrowly” than there is concerning whether it was decided “as narrowly as reasonably possible.” The question whether a holding is narrow is inescapably relative. By contrast, the question whether a case was decided as narrowly as reasonably possible invites a more tractable debate over the reasonableness of further narrowing.

49. I do not mean to suggest that empirical falsifiability is a necessary condition of a satisfactory constitutional theory. On the contrary, there is a central place for normative legal theory that is not falsifiable. Indeed, much constitutional jurisprudence involves training one’s attention on important precedents and gleaning the lessons of principle and prudence they offer. Positivists in the social sciences take exception to such an approach because it does not permit prediction and its lessons are not falsifiable. But that does not mean nonfalsifiable normative theory is not valuable, even necessary, given the nature of the enterprise of understanding the practice of constitutional adjudication. This Article focuses in part on the issue of empirical verification because Professor Sunstein makes aggressive descriptive claims.

B. *A (Relatively) Falsifiable Definition of Minimalism*

In *One Case at a Time*, Professor Sunstein defines the phrase “decisional minimalism,” which he uses interchangeably with the words “judicial minimalism” and “minimalism,” as “the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided.”⁵⁰ Minimalists “say no more than necessary,” Professor Sunstein has reiterated, “resolv[ing] the largest issues of the day . . . as narrowly as possible,” and requiring “[a]bove all . . . procedures that are lawful, proper and fair.”⁵¹ Practitioners of judicial minimalism, he submits, decide the case before them, but they resolve the action as narrowly and shallowly as possible.

According to this operational definition, therefore, minimalism is not conceived merely as leaving questions undecided. If that were the definition, then every case would be minimalist in the trivial sense that reflects the nature of appellate litigation: some issues are presented and others are not. In other words, it is not helpful to suggest that a Supreme Court decision is minimalist if it leaves questions unanswered because all cases leave some questions open. Nor does it appear useful to submit that a decision is minimalist if it is decided on jurisdictional grounds rather than on the merits. Jurisdictional rulings can be very broad in both their scope and impact.⁵² Finally, it seems a deviation from the operational definition of minimalism to identify a holding as minimalist just because the Court decides the only question before it, leaving other issues unresolved. In that circumstance, it would be not only misleading, but also incorrect, to say that the Court resolved the case “as narrowly as possible.” With only one question before the Court, it could just as readily be said that the Justices disposed of the matter as broadly as possible.⁵³

Rather, to be minimalist according to the operational definition, a decision must have two components: it must (a) result from the (apparently) intentional choice by a majority of the Justices (b) to decide a case on the narrowest and shallowest grounds reasonably open to them, even though broader and deeper rationale(s) were reasonably available. To say the same thing a slightly different way, a

50. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 9, at 3-4.

51. Sunstein, *The Smallest Court*, *supra* note 10.

52. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that a plaintiff in a civil rights action who had been subjected to a chokehold by the police after a routine traffic stop lacked standing to seek injunctive relief that would have forbidden future use of chokeholds because he could not show he was likely to be subjected to them again).

53. It also would be inaccurate to describe as minimalist a decision whose limited scope is attributable to the lack of a majority opinion. In that scenario, the opinion’s narrowness and shallowness seem more a function of necessity than choice. In any event, a fractured Court is not what Professor Sunstein has in mind in describing and defending minimalism. If it were, he would have underscored that point in *One Case at a Time*.

decision is minimalist if and only if at least five Justices had reasonably available a broader and deeper result, but consciously (as best one can tell) decided the case as narrowly and shallowly as reasonably possible.⁵⁴ It follows from this definition that a decision cannot be minimalist if no broader and deeper options were reasonably available to the Court. And when broader and deeper options were reasonably available, a decision still is not minimalist if narrower and shallower alternatives were reasonably available as well.⁵⁵ If no broader and deeper option was reasonably open to the Court, therefore, Professor Sunstein cannot establish that a given decision is minimalist. If narrower and shallower alternatives were reasonably available to the Justices, moreover, it can be affirmatively shown that a decision is not minimalist.⁵⁶

To be clear, these demanding requirements are not the proximate result of an uncharitable reading of Professor Sunstein's work. On the contrary, they are logical entailments of Professor Sunstein's own aggressive and provocative submissions that the Rehnquist Court is minimalist and minimalists decide cases *as narrowly and shallowly as possible*.⁵⁷ One key question this inquiry will investigate is the extent

54. It would be possible to define minimalism without requiring that it entail a conscious choice — that is, the practice could be defined as rendering the narrowest and shallowest decision possible when broader and deeper alternatives are available. Minimalism would then be a way of categorizing opinions. But that approach does not accurately reflect Professor Sunstein's argument. He is focusing on minimalism as an option that courts do and should make. This understanding reflects minimalism as a conscious choice.

55. The repeated references to reasonableness in the text seek to exclude exercises in further narrowing that most, if not all, members of the speech community of contemporary constitutional lawyers would regard as unavailable — for example, limiting the holding of a case to persons with the hair color of the prevailing party.

56. It might be profitable to examine more deeply the adequacy of this definition of judicial minimalism. For example, the attribute of shallowness may not be as important as that of narrowness in properly conceiving minimalism; the issue of shallowness may have more to do with the extent of one's agreement with a court's reasoning than with the optimal level of theoretical depth. Indeed, Professor Sunstein may have implicitly, if unwittingly, acknowledged that narrowness is more important than shallowness in identifying minimalist decisionmaking. He sometimes drops shallowness as a criterion in his description of minimalism. See *supra* text accompanying note 13. Moreover, he types Chief Justice Rehnquist as more nonminimalist than minimalist, see SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at xiii, yet the Chief Justice's opinions are characteristically shallow in the sense that their underlying rationales are not readily available. See, e.g., *Locke v. Davey*, 124 S. Ct. 1307 (2004); *infra* notes 126-134 and accompanying text (discussing *Locke v. Davey*); see also *infra* note 162 and accompanying text (identifying another instance in which the Chief Justice provides no explanation for a nonobvious conclusion). In any event, the interesting question of narrowness versus shallowness is beyond the scope of this inquiry. I am content to stick with what I perceive to be the most operational understanding of minimalism in Professor Sunstein's work, and to investigate the phenomenon's positive and normative power.

57. See, e.g., text accompanying note 13; see also SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 3-4 ("Let us describe the phenomenon of saying *no more than necessary* to justify an outcome, and leaving *as much as possible* undecided, as 'decisional minimalism.'") (emphases added).

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to which Professor Sunstein has seriously overclaimed. Even if he has, however, it is worth underscoring that a respectable minimalism of relative narrowness and shallowness, both empirically and normatively, may still be possible. I will return to that issue in the Conclusion of this Article.

Note one implication of the notion of deciding a case as narrowly and shallowly as reasonably possible. The minimalist inquiry takes as it finds them the Court's dispositions of cases — that is, the majority's decision whether to affirm or reverse the judgment of the court below. Minimalism addresses only how those decisions are crafted in terms of narrowness and shallowness. A distinct way of proceeding would be to direct the Justices to begin with the goal of narrowness and shallowness and then to choose dispositions that are the least broad and deep. Although it is possible to read Professor Sunstein both ways, the operational definition reflects the former understanding because it is doubtful Professor Sunstein means to require the Justices not to act on their considered constitutional judgments about who should win and who should lose a given case. In the empirical analysis that follows, therefore, it is no argument against minimalism that the dissent's approach was narrower and shallower than the majority's.

Another dimension of the operational definition of minimalism is worth underscoring from the start: the reasons motivating a decision are not relevant in assessing whether a decision is minimalist. Reasons for action, therefore, will not play a prominent role in the following empirical analysis of Rehnquist Court decisionmaking. What matters to the operational view of minimalism is the degree of narrowness and shallowness that the Justices chose relative to the available alternatives, not the question why the Court decided a case in a particular way. The reason could be that the Justices, like Professor Sunstein, care about deliberative democracy and negotiating deep moral disagreements. But the reason could also be the need to count to five and form a Court. Without some story to the effect that ideological and methodological differences within the Court faithfully reflect the moral and cultural diversity across American society as a whole, compromising on principle to get along with one's colleagues would seem to have little to do with the democratic values minimalism seeks to promote.

Accordingly, the presence of a minimalist opinion provides no indication that the Justices share the theory's democratic project. I emphasize this point for a reason. In stating that “[t]he current Supreme Court embraces minimalism,”⁵⁸ Professor Sunstein appears to suggest not only that the Justices render the narrowest and shallowest decisions reasonably possible, but also that they are

58. SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at xi.

motivated by minimalist substantive values.⁵⁹ That motivational assertion is largely nonfalsifiable. The Court does not reveal its internal deliberations, nor is a minimalist motivation evident on the face of most opinions. Only years from the time a decision comes down, when the private papers of then-current Justices are made public, may scholars and other Court watchers have any chance of learning as a general matter whether the Justices who joined minimalist opinions were motivated by minimalism.⁶⁰

One final point about the operational conception of minimalism is worth stressing before turning to the cases. One cannot determine whether a judicial decision is minimalist by assessing its real-world effects. While minimalist opinions may tend to have less impact than nonminimalist decisions as a general matter, that need not always be the case. Narrow and shallow decisions can have huge impacts, and broad and deep decisions can cause relatively modest effects. *Baker v. Carr* held only that malapportionment challenges are justiciable, but the legal and social consequences were enormous.⁶¹ And the Court's more recent anticommandeering decisions were relatively broad and deep, but the effects of that principle have been quite modest.⁶² The narrowness/shalowness inquiry is analytically distinct from an investigation of social consequences.

II. THE REHNQUIST COURT'S RECENT RECORD

With the operational definition of minimalism in hand, it is now possible to evaluate Professor Sunstein's provocative descriptive claim that the current Court embraces his theory. In this regard, one important issue to consider is the consistency between his definition of minimalism and the decisions he identifies as minimalist. Another significant question, with which I begin, is the optimal sample size from which to draw general conclusions about the jurisprudential nature of this Court's work.

59. *See id.* at 9 (asserting that Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer "have chosen to be minimalist *for reasons* that are, broadly speaking, of the sort I will be discussing here" (emphasis added)).

60. The Justices' academic writings and public addresses might provide general evidence of a minimalist judicial philosophy. To my knowledge, however, none of them has expressed a minimalist motivation in such settings.

61. 369 U.S. 186 (1962).

62. *See* *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress may not "commandeer" local sheriffs by requiring them to perform background checks on would-be handgun purchasers); *New York v. United States*, 505 U.S. 144 (1992) (holding that a federal statute requiring states either to regulate radioactive waste or to take title to the waste constitutes unconstitutional compulsion and commandeering of the states' governmental capacity).

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In considering the descriptive accuracy of Professor Sunstein's claim that the Rehnquist Court embraces minimalism, a methodological question that immediately arises is how best to proceed. If one takes as the proper time frame a roughly twenty-year period, the sheer number of decisions involved renders detailed analysis difficult to conduct. Moreover, one runs the risk of being selective in choosing which cases to analyze. It appears likely that a number of decisions from the past two decades are minimalist, and that a number are not.

In light of those difficulties, one appropriate way to assess a theorist's descriptive thesis is to focus on a sufficiently short time period such that the evaluative problem is rendered both analytically tractable and susceptible to evenhanded analysis. Regarding Professor Sunstein's theory in particular, it seems appropriate to examine closely the constitutional cases from the Court's October 2003 Term because he himself has implied that the Justices' work during that year validates his theory.⁶³ Below I analyze the decisions he discusses from that Term after first applying the operational definition of minimalism to several significant holdings he overlooks.⁶⁴

A. *Decisions Overlooked*

1. *Blakely and Crawford*

Professor Sunstein makes no mention of the Court's jaw-dropping holding in *Blakely v. Washington*.⁶⁵ Although overshadowed by more high-profile cases, *Blakely* may end up being the year's most momentous decision in terms of concrete human consequences. The Court there struck down a state sentencing-guidelines regime on grounds that jeopardized the constitutionality of numerous other state sentencing systems and led to the partial invalidation — and fundamental reshaping — of the United States Sentencing

63. Sunstein, *The Smallest Court*, *supra* note 10.

64. To be clear, I focus on the constitutional cases from the October 2003 Term, including those that were not ultimately decided on constitutional grounds. I do not analyze the several cases in which the Court decided important questions of federal statutory interpretation. Nor do I discuss most of the criminal procedure decisions. Those regrettable omissions were necessary to keep this Article's length manageable. For a more comprehensive overview of the term, see *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 248, 248-496 (2004) [hereinafter *Leading Cases*].

65. 124 S. Ct. 2531 (2004); *see, e.g.*, Stephanos Bibas, *Blakely's Federal Aftermath*, 16 FED. SENTENCING REP. 333, 333 (2004) ("The media are sometimes slow to recognize landmark Supreme Court decisions. Even Professor Cass Sunstein praised the current Justices as 'minimalists' who hew to judicial restraint, overlooking the Court's most earth-shaking decision last Term."). Justice Breyer relied on Professor Bibas's work in his *Blakely* dissent. *See Blakely*, 124 S. Ct. at 2553, 2556-57 (Breyer, J., dissenting) (citing Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1100-01 (2001)).

Guidelines.⁶⁶ Specifically, the Court in *Blakely* held that petitioner Ralph Howard Blakely's sentence violated his Sixth Amendment right to trial by jury because not every fact supporting the sentence was admitted by him or found by a jury.⁶⁷ Using a common practice, the judge ratcheted up Blakely's sentence from 53 months to 90 months after finding that he had acted with "deliberate cruelty," a statutory ground for departing upward from the standard sentencing range.⁶⁸

The result was that two decades of sentencing reform and tens of thousands of criminal sentences were put in jeopardy, which is why lawyers and judges around the country scrambled to understand the decision's breadth and to choose a sensible response. Justice O'Connor, who does not often exaggerate for rhetorical effect, wrote in dissent that "the practical consequences of today's decision may be disastrous."⁶⁹ The Courts of Appeals for the Seventh and Ninth Circuits struck down the Federal Sentencing Guidelines in light of *Blakely*,⁷⁰ and the Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits reaffirmed the Guidelines' validity.⁷¹ With the situation in the lower courts still very much in flux,⁷² the Supreme Court, at the urgent request of then-Acting Solicitor General Paul D. Clement during the

66. See *United States v. Booker*, 125 S. Ct. 738 (2005) (holding that the Sixth Amendment as interpreted in *Blakely* applies to the Federal Sentencing Guidelines and that the Sentencing Reform Act of 1984 must be modified so as to render the Guidelines effectively advisory, requiring a sentencing court to consider Guidelines ranges but permitting it to tailor the sentence in view of other statutory concerns).

67. *Blakely*, 124 S. Ct. at 2536-43.

68. *Id.* at 2535.

69. *Id.* at 2544.

70. *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), cert. granted, No. 04-104 (Aug. 2, 2004); *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004).

71. *United States v. Warren*, 120 Fed. Appx. 257 (10th Cir. 2005); *United States v. Mincey*, 380 F.3d 102 (2d Cir. 2004) (per curiam); *United States v. Hammoud*, 378 F.3d 426 (4th Cir. 2004) (en banc); *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004); *United States v. Koch*, 383 F.3d 436 (6th Cir. 2004) (en banc); *United States v. Reese*, 382 F.3d 1308 (11th Cir. 2004).

72. Legal blogs on the Internet reported the judicial action blow by blow. See, e.g., Howard J. Bashman, *How Appealing*, at <http://legalaffairs.org/howappealing> (visited throughout Summer 2004); Douglas A. Berman, *Sentencing Law and Policy*, at <http://sentencing.typepad.com>. Dahlia Lithwick, in her inimitable way, observed:

For the first time in recent memory, the wheels of justice are turning faster than the news cycle. The fallout from the term's sleeper case, *Blakely v. Washington*, grows more dramatic by the hour. And the best image I can conjure to describe the situation involves all the federal court judges in America racing around with plastic bags, trying madly to dispose of the Supreme Court's droppings.

Dahlia Lithwick, *No-Good Lazy Justices: After the Supreme Court's sentencing case, the sky is falling. Hooray!*, SLATE, July 15, 2004, at <http://slate.msn.com/id/2103909>. I had to revise the paragraph in the text describing the developments in the circuits several times, as each new decision rendered the previous day's summary out of date.

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Court's Summer 2004 recess,⁷³ granted certiorari in two cases to resolve the circuit split and restore uniformity to federal criminal sentencing law.⁷⁴ The Court heard oral argument on Monday, October 4, the first day of the new Term, in a very rare afternoon session.⁷⁵

Booker and *Fanfan* came down on January 12, 2005. In an unusual decision, the Court issued two separate majority opinions. The first concluded that the current approach to applying the Sentencing Guidelines was unconstitutional, and the second prescribed the remedy for this constitutional problem. Justice Stevens, joined by Justices Scalia, Souter, Thomas, and Ginsburg, held that *Blakely* applies to the Sentencing Guidelines. Justice Stevens stressed that the Guidelines compelled the judge to impose a sentence greater than that which would be based on the jury's verdict; he concluded that this requirement conflicts with *Blakely's* holding that any factor (other than the fact of a prior conviction) leading to a sentence greater than that which would be imposed based on the jury's verdict must be proven to the jury beyond a reasonable doubt.⁷⁶ Regarding the appropriate remedy for the constitutional violation, however, Justice Breyer wrote for the Court, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg.⁷⁷ Justice Breyer concluded that the proper remedy, in light of the congressional intent underlying the Sentencing Reform Act, was to make the Guidelines advisory rather than mandatory — that the Guidelines' mandatory nature rendered them unconstitutional.⁷⁸ He concluded that federal courts of appeals should review sentences to determine whether they are reasonable.⁷⁹

Because *Blakely* triggered this extraordinary series of events, the notion that it was a minimalist decision may seem counterintuitive.

73. U.S. Dep't of Justice, Office of the Solicitor General, October Term 2004 Briefs Petitions and Replies, at <http://www.usdoj.gov/osg/briefs/2004/2pet/7pet/2004-0104.pet.aa.html>, <http://www.usdoj.gov/osg/briefs/2004/2pet/7pet/2004-0105.pet.aa.html> (last visited August 3, 2004).

74. *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, 125 S. Ct. 11 (2004); *Fanfan v. United States*, No. 03-47, 2004 WL 1723114 (D. Me. Jun 28, 2004), *cert. granted before judgment*, 125 S. Ct. 11 (2004).

75. Supreme Court of the United States, Argument Calendar: October Term 2004, at http://www.supremecourtus.gov/oral_arguments/argument_calendars/monthlyargumentcaloctober2004.pdf (last visited Aug. 3, 2004).

76. *United States v. Booker*, 125 S. Ct. 738, 748-52 (2005).

77. In other words, Justice Ginsburg joined the four dissenters to Justice Stevens' opinion — the dissenters in *Blakely* — on the issue of the appropriate remedy.

78. *Booker*, 125 S. Ct. at 757-69. Justice Breyer expressly disagreed with the dissent's view that the jury should find the requisite facts for greater sentences under the Guidelines. Justice Breyer perceived no basis for the Court's interjecting the jury into the sentencing system created by Congress under the Sentencing Reform Act. *Id.*

79. *Id.* at 765-67.

Yet it is worth recalling that minimalist decisions may have a significant real-world impact.⁸⁰ It might be technically accurate, therefore, to describe the Court's ruling in *Blakely* as minimalist.⁸¹ A defender of judicial minimalism who turned her attention to *Blakely* might suggest that the decision represents minimalism par excellence. After all, the Court expressly declined to decide the validity of the Federal Guidelines,⁸² instead choosing to proceed "one case at a time."⁸³

Such a defender of minimalism, however, cannot rely on the Federal Guidelines question left open in *Blakely* to show that broader and deeper options were reasonably available to the Court. The Justices could not have decided *Blakely* more broadly and deeply for the simple reason that the constitutionality of the Guidelines was not before the Court. The cold, hard reality of judicial review is that the Justices can — in the sense of raw power to act — say whatever they want. But that cannot be the criterion for determining whether a decision is minimalist if one wants to avoid the trivial conclusion that every judicial decision lacks breadth in this sense. Rather, the relevant question is whether the Court reasonably could have decided the Guidelines issue in *Blakely*. I do not see how it could have.⁸⁴

80. See *supra* text accompanying notes 61-62.

81. Indeed, looking back now in the wake of *Blakely* and *Booker*, Jeffrey Rosen was prescient in his assessment of *One Case at a Time*:

If the Supreme Court were the only court in the nation, it might be able to embrace a highly personalized, "the law is what we say it is" jurisprudence, without worrying about giving very clear reasons for why it is doing so, and without tipping its hand about how it is likely to decide similar cases in the future. In the American system, however, the Supreme Court sits at the top of a pyramid of inferior federal courts, all of which are bound to apply its decisions uniformly throughout the nation. And lower courts, when faced with a narrow, shallow Supreme Court decision of the kind that Sunstein praises, may literally be at a loss about what the opinion means. This is more likely to promote chaos than reasoned deliberation.

Rosen, *supra* note 48, at 45.

82. Justice Scalia authored this terse, poker-faced statement for the Court: "The Federal Guidelines are not before us, and we express no opinion on them." *Blakely v. Washington*, 124 S. Ct. 2531, 2538 n.9 (2004). Justice Scalia declined to engage Justice Breyer's strong disagreement with the Court's approach:

Ordinarily, this Court simply waits for cases to arise in which it can answer such questions. But this case affects tens of thousands of criminal prosecutions, including federal prosecutions. Federal prosecutors will proceed with those prosecutions subject to the risk that all defendants in those cases will have to be sentenced, perhaps tried, anew. Given this consequence and the need for certainty, I would not proceed further piecemeal; rather, I would call for further argument on the ramifications of the concerns I have raised. But that is not the Court's view.

Id. at 2562 (Breyer, J., dissenting).

83. Lithwick, for example, praised the *Blakely* decision because the Court "did precisely what everyone keeps asking courts to do and showed impressive restraint." Lithwick, *supra* note 72.

84. This is not to suggest that the Court had no alternative but to proceed in the way it did. The Court could have granted certiorari in *Blakely* along with one of the many petitions

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The Court, moreover, reasonably could have resolved *Blakely* more narrowly and shallowly than it did. The part of the opinion that has received the most attention is Justice Scalia's explanation of why the maximum sentence Blakely could have received was 53 months, not 90:

Our precedents make clear . . . that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. . . . Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).⁸⁵

In order to resolve the case, the Court did not need to distinguish between judicial and jury fact findings at such a general level of abstraction. Instead, the Justices could have rendered a more factbound decision, that is, one limited to judicial findings similar to that of "deliberate cruelty" at issue in the case. Indeed, in light of the demanding *mens rea* requirement implicit in the word "deliberate," the particular factual determination at issue in *Blakely* was indicative of a separate crime. The Court could have held only that the State's scheme was unconstitutional as far as such facts are concerned.

The intuition behind the Court's broad holdings in *Apprendi v. New Jersey*⁸⁶ and *Blakely* appears to be that it is unconstitutional to convict someone of one crime and then to sentence him to a different, more serious crime.⁸⁷ Justice Scalia is right that it can be difficult to

seeking to challenge the Federal Guidelines that routinely are pending before the Court; the Justices then could have considered both questions together. Alternatively, the Court could have delayed ruling in *Blakely* and granted certiorari in a Federal Guidelines case once the implications of the Court's holding in *Blakely* had become clearer to the Justices. The Court also could have followed Justice Breyer's advice. *See supra* note 82.

85. *Blakely*, 124 S. Ct. at 2537-38 (2004) (citations and footnote omitted).

86. 530 U.S. 466, 490 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

87. I credit Erwin Chemerinsky with having articulated that intuitive understanding of *Apprendi* and *Blakely*'s essential meaning.

sort out the point at which the “tail” begins to “wag” the “dog.”⁸⁸ But he cannot reasonably deny that some cases are easier than others in this regard. Nor can he establish that the Court was somehow required to decide all such cases arising under Washington law at once.

The minimalist approach I suggest above, it could be argued, might have required the Court to make distinctions without an ultimately persuasive difference after several more cases were litigated at the Supreme Court. But is not that result what narrowness and shallowness are sometimes all about? Moreover, it would not have been the first time that the Court distinguished different kinds of facts in this complicated, changing area of the law.⁸⁹ The Court’s decision in *Blakely* is not a shining moment for minimalism.

As discussed above in Part I, there exists an important distinction between deciding questions narrowly and shallowly, and leaving issues undecided. Blockbuster decisions such as *Blakely*, by virtue of their very breadth or depth, change the law significantly and thus necessarily create — as opposed to leave open — serious questions where none previously existed.⁹⁰ It is incorrect, therefore, to equate unanswered questions with minimalism or to assume that the existence of unanswered questions reflects the practice of minimalism. Thus, not only would it be counterintuitive to describe the Court’s decision in *Blakely* as minimalist, but attempting to support that assertion would also require twisting the only available operational definition of minimalism.⁹¹

88. See *Blakely*, 124 S. Ct. at 2542 n.13 (“To be sure, Justice Breyer and the other dissenters would forbid those increases of sentence that violate the constitutional principle that tail shall not wag dog. The source of this principle is entirely unclear. Its precise effect, if precise effect it has, is presumably to require that the ratio of sentencing-factor add-on to basic criminal sentence be no greater than the ratio of caudal vertebrae to body in the breed of canine with the longest tail. Or perhaps no greater than the average such ratio for all breeds. Or perhaps the median. Regrettably, *Apprendi* has prevented full development of this line of jurisprudence.”).

89. See *Apprendi*, 530 U.S. at 490 (declining to overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), in excluding “the fact of a prior conviction” from the coverage of its holding).

90. As Part I also mentioned, the Justices may leave questions unanswered because a majority cannot agree on a rationale to support the judgment, as in the political gerrymandering case decided during the October 2003 Term. See *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004) (affirming without majority opinion the judgment of a three-judge district court dismissing a political gerrymandering claim).

91. It might be tempting to add that the overwhelming majority of commentators with relevant expertise believed, even before *Booker* came down, that the Federal Guidelines could not plausibly be distinguished from the Washington scheme invalidated by the Court in *Blakely*. See, e.g., Lithwick, *supra* note 72 (“The problem, of course, is that most scholars agree that the most logical inference one can draw from *Blakely v. Washington* is that significant portions of the federal guidelines are unconstitutional, too.”). In *Blakely*, the Solicitor General almost appeared to concede as much (reading between the lines) in his *amicus* brief in support of the State. Justice Scalia, writing for the Court, characterized the Government’s position this way: “The United States, as *amicus curiae*, urges us to affirm. It notes differences between Washington’s sentencing regime and the Federal Sentencing

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Professor Sunstein also omits discussion of another historic decision from the October 2003 Term, *Crawford v. Washington*.⁹² *Crawford* is not the work of a minimalist Court. The Justices there changed the law of evidence in every criminal court in the United States regarding the Sixth Amendment's requirement of confrontation with respect to testimonial hearsay,⁹³ overruling a twenty-four-year-old precedent, *Ohio v. Roberts*.⁹⁴ The Court in *Crawford* held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."⁹⁵

Chief Justice Rehnquist, joined by Justice O'Connor, "dissent[ed] from the Court's decision to overrule [*Roberts*]."⁹⁶ His dissent rejects a minimalist interpretation of the majority opinion:

[T]he Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent. Its decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.⁹⁷

According to the Chief Justice,⁹⁸ reversal of the state supreme court's judgment was amply supported by that tribunal's contravention of the holding of *Idaho v. Wright*, a case in which the Court concluded that an out-of-court statement was not admissible simply because its truthfulness was corroborated by other evidence at trial.⁹⁹ In the Chief

Guidelines but questions whether those differences are constitutionally significant." *Blakely*, 124 S. Ct. at 2538 n.9. Justice O'Connor expressed a similar understanding of the Government's view in her dissent: "The structure of the Federal Guidelines . . . does not, as the Government half-heartedly suggests, provide any grounds for distinction." *Id.* at 2549 (O'Connor, J., dissenting). Accordingly, the *Blakely* decision lends itself to the charge of disingenuousness. "The writing is on the wall," a cynic might have contended just after *Blakely* was decided, "and certain courts of appeals already have gotten the message." On this view, "one case at a time" really meant "it's only a matter of time." Warranted or not, the disingenuousness critique is not relevant here because it concerns motivational issues that do not appropriately affect the question whether a given decision is minimalist. See *supra* Part I.

92. 124 S. Ct. 1354 (2004).

93. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST., amend. VI.

94. 448 U.S. 56, 66 (1980) (holding that the Confrontation Clause does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability,'" a test met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness").

95. *Crawford*, 124 S. Ct. at 1374.

96. *Crawford*, 124 S. Ct. at 1374 (Rehnquist, C.J., concurring in judgment).

97. *Id.* (Rehnquist, C.J., concurring in judgment) (emphasis added).

98. *Id.* at 1378 (Rehnquist, C.J., concurring in judgment).

99. 497 U.S. 805, 820-24 (1990).

Justice's view, the testimonial hearsay at issue in Crawford's case had been admitted based on that previously rejected rationale.¹⁰⁰

A defender of the claim that the Court's decision in *Crawford* is minimalist might observe that the Justices left open questions concerning which kinds of statements qualify as testimonial, including whether dying declarations or excited utterances qualify. But as Part I and the above discussion of *Blakely* make clear, asserting that the Court left questions unanswered does not demonstrate the presence of minimalism. The Court in *Crawford* could have resolved the case narrowly based on precedent; instead, it rendered a remarkably broad decision.

2. McConnell and Sabri

Because so many statutory provisions were challenged in the historic campaign finance decision from the October 2003 Term, *McConnell v. FEC*,¹⁰¹ a comprehensive analysis of the Court's three separate majority opinions would be inappropriate in this setting. Instead, I will highlight general evidence of breadth and depth in the expansive reasoning and language of the Court's lead opinion.

McConnell involved eleven actions challenging the constitutionality of numerous statutory provisions set forth in the five titles of the Bipartisan Campaign Reform Act of 2002 ("BCRA").¹⁰² The Court decisively upheld almost all of BCRA's most important provisions, including Title I's regulation of the use of "soft money" by political parties, officeholders, and candidates, and Title II's prohibition of corporate and labor-union use of general treasury funds for communications that are intended to, or have the effect of, influencing the outcome of federal elections.¹⁰³ Commentators debate the soundness of the Court's reasoning, and they dispute whether the reform effort that culminated in BCRA's enactment can make a difference in view of the inevitability of effective evasions. I am aware of no one on either side of those disputes, however, who views the Court as having shaped its numerous holdings as narrowly and shallowly as reasonably possible.

Nor is it apparent what broader and deeper options existed that the Justices deliberately chose to forego in favor of a minimalist path.

100. See also *Leading Cases*, *supra* note 64, at 322 ("[I]f the Court were truly concerned with avoiding questions it need not reach, it could have simply resolved the entire case with 'a citation to *Idaho v. Wright*,' as Chief Justice Rehnquist suggested.") (quoting 124 S. Ct. at 1378 (Rehnquist, C.J., concurring in judgment)).

101. 540 U.S. 93 (2003).

102. Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.).

103. *McConnell*, 540 U.S. at 223-24.

The Court emphatically and enthusiastically upheld BCRA's most important provisions. Indeed, "[e]ven academics who support the result in *McConnell* complain that the Court did not apply sufficiently demanding scrutiny and was overly deferential to Congress in judging whether BCRA was properly tailored to preventing the corruption or appearance of corruption claimed to justify the law."¹⁰⁴ One commentator, for example, observes that "[t]he Court not only upheld BCRA against constitutional challenge; it lavished it and prior congressional regulatory efforts with effusive praise as furthering the needs of a well-functioning democracy."¹⁰⁵ In one instance among several, the Court's lead opinion introduced BCRA as "the most recent federal enactment designed to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions."¹⁰⁶

In sustaining BCRA's core provisions, moreover, the Court displayed an expansive understanding of political "corruption." Specifically, the Court conceived corruption broadly to include contributions that may purchase special access to political influence.¹⁰⁷ "By focusing on special access," one commentator notes, "the Court shifted from *Buckley*'s emphasis on the possible effects of money on actual policymaking to its effects on the opportunity to influence policymaking or gain special access," a move that "will make it easier for courts to uphold contribution caps in various forms."¹⁰⁸ Of course, not all those "various forms" were before the Court in *McConnell*; the breadth of the Court's conception of corruption thus evidences the decision's nonminimalist nature. The Court, moreover, even intimated that BCRA was justified as a "governmental effort to advance participation in self-government itself."¹⁰⁹ That is an extraordinarily broad and deep rationale for validating congressional campaign-finance regulations like BCRA.

104. Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 134 (2004) (citing Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31 (2004)). "[I]n their embrace of legislative deference," Professor Hasen writes, the Justices "have abdicated their responsibility to carefully balance competing constitutional concerns and to police legislatively enacted campaign finance regulations for self-interest." Hasen, *supra*, at 60.

105. Hasen, *supra* note 104, at 59 (quoting *McConnell*, 540 U.S. at 115-18, 206 n.88).

106. *McConnell*, 540 U.S. at 115 (internal quotation marks omitted).

107. *Id.* at 150-51, 156, 174-75 (emphasizing Congress's interest in limiting special access).

108. Pildes, *supra* note 104, at 151-52.

109. *Id.* at 149 ("Reflecting the present-day democratic disaffection . . . , the Court cast campaign finance regulation as a response to the 'cynical assumption that large donors call the tune' and the 'dispiriting' consequences of that assumption for public participation in elections and self-government.") (quoting *McConnell*, 540 U.S. at 143-44, 153).

In addition, the majority virtually invited further congressional legislation aimed at eliminating corruption, thereby suggesting that the Court's holdings were quite broad and deep:

Many years ago we observed that “[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection.” *Burroughs v. United States*, 290 U.S. [534,] 545 [(1934)]. We abide by that conviction in considering Congress’s most recent effort to confine the ill effects of aggregated wealth on our political system. We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day.¹¹⁰

Concerns for another day they may be, but on this day the Court was almost encouraging Congress to continue combating the corrosive effects of money on the political system. A minimalist Court would not have been so supportive of Congress’s concerns. By definition, an invitation to further legislation does not reflect a minimalist approach to adjudicating constitutional cases — that is, such encouragement does not exemplify “the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided.”¹¹¹

In sum, the Court articulated a robust conception of corruption in *McConnell*, one moving it practically to congratulate Congress for its work and to invite further legislative action. Because “[l]ower courts showing fidelity to *McConnell* will have a difficult time striking down most campaign finance regulation,”¹¹² and because of the reasons for that difficulty canvassed above, the decision is not fairly viewed as minimalist.

*Sabri v. United States*¹¹³ does not warrant extended discussion in this setting because the majority opinion’s unqualified endorsement of broad federal spending power is manifestly nonminimalist. At issue in the case was the constitutionality of a federal criminal law, 18 U.S.C. § 666(a)(2), which prohibits bribing state and local officials of entities that receive at least \$10,000 in federal funds. The petitioner, a real estate developer, was arrested and indicted under the statute after offering bribes to a city councilman in the hopes of obtaining, among other things, city regulatory approvals.¹¹⁴

110. *McConnell*, 540 U.S. at 223-24.

111. SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 3-4.

112. *Hasen*, *supra* note 104, at 72.

113. 124 S. Ct. 1941 (2004).

114. *Id.* at 1944.

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The Court could have sustained the statute on any number of relatively narrow grounds. Because of the widely recognized possibility that Congress could use the spending power to circumvent the federalism-based limits imposed by the Court on the commerce power,¹¹⁵ one option was to hold only that § 666(a)(2) falls within Congress' authority under the Spending and Necessary and Proper Clauses because bribery inherently implicates commercial activity.¹¹⁶ Another possibility was to limit the holding to bribery of officials in a position to impact how federal funds are spent.¹¹⁷ Alternatively, the Court could have upheld the statute under its existing Commerce Clause jurisprudence.¹¹⁸ Like the congressional regulation of local "loan sharking" activities upheld in *Perez v. United States*,¹¹⁹ bribery of public officials has a substantial effect on interstate commerce when considered in the aggregate.¹²⁰ The commercial nature of bribery also brings § 666(a)(2) within the commerce power under *United States v. Lopez*¹²¹ and *United States v. Morrison*.¹²²

Instead of choosing any of those available paths, the Court underscored the breadth of federal power to legislate pursuant to the spending and necessary and proper hooks, holding that Congress may enact criminal statutes as long as their general prohibitions have some rational connection to protecting the purposes of federal funding.¹²³ Stressing that "[m]oney is fungible"¹²⁴ and that the statute addresses bribery problems at the source "by rational means"¹²⁵ is not the work

115. See, e.g., Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 460 (2003) (noting the "many commentators" who "have proposed that Congress should respond to the Rehnquist Court's states' rights decisions by using the spending power to circumvent those limitations on congressional power").

116. *Leading Cases*, *supra* note 64, at 382-83 (noting the narrower option proposed in the text while articulating *Sabri's* breathtaking implications for the values animating the Court's federalism jurisprudence).

117. *Id.* (rejecting the proposal in the text as a plausible interpretation of the Court's opinion).

118. Justice Thomas relied on the commerce power to uphold the statute. He took exception to "the scope the Court gives to the Necessary and Proper Clause as applied to Congress' authority to spend." 124 S. Ct. at 1949 (Thomas, J., concurring in judgment).

119. 402 U.S. 146 (1971).

120. *Id.* at 151-55.

121. 514 U.S. 549, 561 (1995) (stressing that the criminal statute at issue "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms").

122. 529 U.S. 598, 610 (2000) (emphasizing "the role that the economic nature of the regulated activity plays in our Commerce Clause analysis").

123. *Sabri*, 124 S. Ct. at 1946-47.

124. *Id.* at 1946.

125. *Id.*

of a Court concerned to approve narrowly a particular use of the spending power — let alone approve it as narrowly as reasonably possible. Under the Court's reasoning, any official of any entity receiving any amount of federal funds can be brought within the scope of federal criminal laws.

3. Davey and Lane

In fairness, it should be pointed out that the Court may have rendered a couple of minimalist decisions in important cases during the October 2003 Term. In *Locke v. Davey*,¹²⁶ the Justices considered Washington State's Promise Scholarship Program, which had been created to help academically gifted students pay for college. The state constitution prohibits students from using a Promise Scholarship to pursue a devotional theology degree. Respondent Joshua Davey was awarded such a scholarship and chose pastoral ministries, a devotional theology degree, as one of his majors. Upon learning he could not use his scholarship to pursue that degree, Davey sued under 42 U.S.C. § 1983. The state-mandated scholarship denial, he argued, violated the First Amendment's Free Exercise Clause by discriminating against religion because excluding religious alternatives was not required by the federal Establishment Clause.¹²⁷

By a vote of seven to two, the Court rejected Davey's free exercise challenge, upholding Washington's decision to exclude students who pursue a devotional theology degree from its otherwise-inclusive scholarship aid program. Writing for the majority, the Chief Justice arguably limited the Court's holding to contexts where taxpayer funding is used to train religious leaders:

The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program as currently operated by the State of Washington.¹²⁸

The Court could have gone further by rejecting broadly the notion that the Free Exercise Clause prohibits excluding religious alternatives (and only religious alternatives) from state funding programs that the Establishment Clause allows. That was the breathtaking implication of

126. 124 S. Ct. 1307 (2004).

127. Under controlling Supreme Court precedent, Washington was not compelled by the federal Establishment Clause to exclude devotional degrees from its otherwise inclusive aid program because the independent and private choices of scholarship recipients sever the connection between government funding and religious training. *See, e.g.,* *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986).

128. *Davey*, 124 S. Ct. at 1315.

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respondent Joshua Davey's argument and Justice Scalia's dissent.¹²⁹ According to such reasoning, for example, the inclusion of sectarian private schools (along with secular private schools) in the voucher program at issue in *Zelman v. Simmons-Harris*¹³⁰ became constitutionally required under the Free Exercise Clause once the Court held that such inclusion is constitutionally permissible under the Establishment Clause.

On the other hand, the Chief Justice's opinion for the Court in *Davey* is ambiguous; it is reasonably read expansively as having rejected the broader rationale just identified:

These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. Yet we have long said that "there is room for play in the joints" between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.

This case involves that "play in the joints" described above.¹³¹

Like the majority opinion, Justice Scalia's dissent suggests that more was being decided in *Davey* than the use of public funds to train future religious leaders:

When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.

That is precisely what the State of Washington has done here. It has created a generally available public benefit, whose receipt is conditioned only on academic performance, income, and attendance at an accredited school. It has then carved out a solitary course of study for exclusion: theology.¹³²

In an attempt to preempt any overreading of the Court's opinion, however, Justice Scalia underscored that "[t]oday's holding is limited to training the clergy." Yet even he conceded that "its logic is readily extendible, and there are plenty of directions to go."¹³³ The very lack of a clear distinction in the *Davey* decision between the holding and logical implications in dicta favors a nonminimalist interpretation. A narrower option would have been to "sa[y] no more than necessary to justify [the] outcome, and leav[e] as much as possible undecided."¹³⁴

129. *Id.* at 1315-20 (Scalia, J., dissenting). Justice Thomas joined Justice Scalia's dissent.

130. 536 U.S. 639 (2002).

131. *Davey*, 124 S. Ct. at 1311 (citations omitted).

132. *Id.* at 1316 (Scalia, J., dissenting).

133. *Id.* at 1320 (Scalia, J., dissenting).

134. SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 3-4. Despite expressing some uncertainty about the scope of the holding in *Davey*, Professor Douglas Laycock has

The Court's decision in *Tennessee v. Lane*¹³⁵ constitutes a more certain instance of minimalism. The plaintiffs-respondents were paraplegics who filed an action for damages and equitable relief, alleging that the State of Tennessee and several of its counties had denied them physical access to the State's courts in violation of Title II of the Americans with Disabilities Act of 1990 ("ADA").¹³⁶ Among other things, Title II provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity."¹³⁷ The legal question before the Court was Title II's validity under Section 5 of the Fourteenth Amendment. The Court held that Title II constitutes a valid exercise of Congress' Section 5 power to enforce Section 1's substantive guarantees, but limited its holding to the class of cases implicating the fundamental right of access to the courts — the factual context at issue in the case.

The Justices could have issued several broader holdings. The Court could have concluded that Title II may never be used by private litigants to sue states for money damages, as it had held in *University of Alabama v. Garrett* regarding Title I of the ADA,¹³⁸ and as the State of Tennessee had urged in *Lane*.¹³⁹ Or the Court could have concluded that states may always be sued for money damages by private parties under Title II, as the Solicitor General had argued in *Lane*.¹⁴⁰ Instead, the Court in *Lane* held only that states may be sued by citizens for money damages when the fundamental constitutional right of access to the courts is implicated.

convincingly advanced a nonminimalist interpretation of the Court's decision. See Douglas Laycock, *The Supreme Court, 2003 Term—Comment: Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 161 (2004) ("*Davey* also poses important questions about the boundaries of its holding. As written, it applies only to funding the training of clergy, but it may well be extended to all funding decisions . . ."); *id.* at 171 ("*Davey* held that when the state elects to fund a category of private-sector programs, it may facially discriminate against religious programs within the category."); *id.* at 173 ("The terse opinion implies more than it states."); *id.* at 185 ("But *Davey* is likely to lead to a more general principle that all religious programs and institutions can be excluded from funding programs.").

135. 124 S. Ct. 1978 (2004).

136. 42 U.S.C. §§ 12131-12165 (2000).

137. 42 U.S.C. § 12132.

138. 531 U.S. 356 (2001) (holding that Title I of the ADA, which prohibits employment discrimination against the disabled, was not validly enacted under Section 5 of the Fourteenth Amendment, and thus that the Eleventh Amendment bars private money-damages actions for violations of Title I).

139. See generally Brief of Petitioner, *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (No. 02-1667).

140. See generally Brief for the United States, *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (No. 02-1667).

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It is not readily apparent from this disposition how the Court reasonably could have decided the case more narrowly and shallowly — the Court’s congruence-and-proportionality jurisprudence from *City of Boerne v. Flores*¹⁴¹ onward precludes a wholly case- or fact-specific analysis. The outcome in *Lane*, moreover, appears to reflect a conscious choice because all the Justices knew from the briefing that broader options were on the table. The theory of judicial minimalism, therefore, accounts for at least one significant decision rendered by the Supreme Court during the October 2003 Term.

B. *Decisions Analyzed Improperly*

1. *Not Reaching the Merits: Newdow and Padilla*

Other cases from the past Term might appear to some commentators to reveal “a restrained judicial role,”¹⁴² but evidence of an affinity for minimalism is less apparent upon close examination. It is true, as Professor Sunstein underscores,¹⁴³ that the Court “refused to reach the merits” in two important cases. That fact by itself, however, does not evidence minimalist decisionmaking. Rather, answering the minimalism question requires one to determine whether the Court consciously chose the narrowest and shallowest option when broader and deeper alternatives were reasonably available. Judged against this criterion, the Court’s decision in the Pledge of Allegiance case appears minimalist, but its ruling in the case of Jose Padilla is not.

In *Elk Grove Unified School District v. Newdow*,¹⁴⁴ the Court held that respondent Michael Newdow could not challenge the inclusion of the words “under God” in recitations of the Pledge of Allegiance at his daughter’s public elementary school. The Court so concluded based on a novel, “prudential” — that is, not constitutionally required — standing theory. Specifically, Justice Stevens wrote these words for the Court:

In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff’s claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand

141. 521 U.S. 507 (1997) (articulating the congruence-and-proportionality requirement in holding that Congress had exceeded its Section 5 authority when it enacted the Religious Freedom Restoration Act of 1993). Specifically, the Court held that, for a federal statute to be valid under Section 5, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *Id.* at 508.

142. Sunstein, *The Smallest Court*, *supra* note 10.

143. *Id.*

144. 124 S. Ct. 2301 (2004).

rather than reach out to resolve a weighty question of federal constitutional law. . . . We conclude that, having been deprived under California law of the right to sue as next friend, *Newdow* lacks prudential standing to bring this suit in federal court.¹⁴⁵

Chief Justice Rehnquist countered that “the Court may have succeeded in confining this novel principle almost narrowly enough to be, like the proverbial excursion ticket — good for this day only”¹⁴⁶ Like the Chief Justice, Justice O’Connor would have reached the merits and affirmed the constitutionality of public-school Pledge-recitation policies that include the words “under God.”¹⁴⁷

Professor Sunstein sees a Court that “invoked procedural principles” and “attend[ed] carefully to limits on its own authority . . . when fundamental issues are at stake.”¹⁴⁸ Perhaps. But as the discussion in Part I makes clear, Professor Sunstein’s submission regarding *Newdow* is really a prudentialist point, not a minimalist one. In any event, the Chief Justice’s persuasive criticism that the Court was fashioning a prudential standing rule essentially “for this day only,” — a charge the majority did not seriously dispute — as well as the broader political context,¹⁴⁹ suggests that the Court’s opinion will have the generative force of a rock. It is therefore not clear how the Court’s reasoning reasonably could have been any narrower and shallower. Moreover, the Court could have issued a much broader ruling by not crafting a novel prudential standing rule and instead deciding the merits of *Newdow*’s challenge to public-school Pledge-recitation policies. Accordingly, the decision in *Newdow* does seem minimalist.¹⁵⁰

145. *Id.* at 2312.

146. *Id.* at 2316 (Rehnquist, C.J., concurring in judgment).

147. *Id.* at 2321-27 (O’Connor, J., concurring in judgment).

148. Sunstein, *The Smallest Court*, *supra* note 10.

149. See Laycock, *supra* note 134, at 224 (“No matter how the Court defines a de minimis exception, it would be hard to fit the Pledge of Allegiance within it. In *Newdow*, it may have been politically impossible to affirm and legally impossible to reverse.”); *id.* at 245-46 (“A decision to invalidate the Pledge would have galvanized supporters of government-sponsored religious observances and quite possibly provoked a constitutional amendment.”).

150. Recall, however, that a minimalist decision does not indicate a minimalist motivation. Several commentators have sided with the Chief Justice, suggesting that the Court created limits on its own authority in order to have its cake and eat it too: the Ninth Circuit’s decision striking down the local school district’s Pledge-recitation policy is no longer law, yet the Supreme Court did not have to say what the law is, potentially setting off a political firestorm during an election year. The charge of disingenuousness looms again. See, e.g., Stuart Taylor Jr., *Our Imperial, Unjudicial, Disingenuous, Indispensable Court*, NATIONAL JOURNAL, July 17, 2004, at 2215 (“In short, none of the nine consistently practices judicial restraint. And when the justices do invoke that ideal, it is often an exercise in disingenuousness. Take the 5-3 decision on June 14, which ducked the merits of the case in which a federal appeals court in California had ruled that ‘under God’ must be dropped when the Pledge of Allegiance is recited in schools. . . . The case presented a dilemma for

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Before concluding that jurisdictional rulings necessarily evidence the presence of judicial minimalism, however, one should consider the case of Jose Padilla.¹⁵¹ Padilla is the American citizen who was apprehended by federal agents in Chicago's O'Hare International Airport upon arrival from Pakistan. He was transported to New York on a material-witness warrant issued by the United States District Court for the Southern District of New York in connection with its grand-jury investigation into the September 11th terrorist attacks. He was then detained as an alleged "enemy combatant" in the Consolidated Naval Brig in Charleston, South Carolina by order of President Bush.¹⁵² Seeking to challenge his indefinite detention, Padilla filed a petition for writ of habeas corpus in the New York federal court against Secretary of Defense Rumsfeld. As Professor Sunstein stresses, the Court, through the Chief Justice, did not decide the merits of the controversy, "insist[ing]" instead "on procedural

the four liberals and Kennedy. A decision striking out 'under God' would have provoked an election-year firestorm, perhaps even a constitutional amendment.").

Perhaps tellingly, the Court did not heed one of its traditional policies of restraint — deference to the federal courts of appeals regarding the interpretation of state law — to support its holding that Newdow lacked prudential standing to sue. *See, e.g.*, *Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988); *Bishop v. Wood*, 426 U.S. 341, 346-47 (1976). The Ninth Circuit reasoned that, because noncustodial parents have a state-law right to expose their children to their beliefs and values, Newdow was injured since state law "surely does not permit official state indoctrination of an impressionable child on a daily basis with an official view of religion contrary to the express wishes of *either* a custodial or noncustodial parent." *Newdow v. United States Congress*, 313 F.3d 500, 504-05 (9th Cir. 2002). The Court disagreed:

The California cases [on which the Ninth Circuit relied in holding that Newdow had standing] simply do not stand for the proposition that Newdow has a right to dictate to others what they may and may not say to his child respecting religion. . . . The cases speak not at all to the problem of a parent seeking to reach outside the private parent-child sphere to restrain the acts of a third party.

Newdow, 124 S. Ct. at 2311-12 (referencing *In re Mentry*, 142 Cal. App. 3d 260, 268 (1983) (reversing restraining order against noncustodial father forbidding him from engaging children in religious activities other than those approved by custodial mother); *Murga v. Peterson*, 103 Cal. App. 3d 498, 504-05 (1980) (refusing to restrain noncustodial parent wishing to expose his children to his religious views)). The Court's understanding of California law was reasonable, but then so was the view of the court of appeals. At the very least, the Ninth Circuit's understanding was not so unreasonable as to be unworthy of deference. As the Chief Justice argued, "[r]espondent does not seek to tell just anyone what he or she may say to his daughter, and he does not seek to vindicate solely her rights." *Newdow*, 124 S. Ct. at 2316 (Rehnquist, C.J., concurring in judgment). Rather, he observed, "respondent wishes to enjoin the School District from endorsing a form of religion inconsistent with his own views because he has a right to expose his daughter to those views without the State's placing its imprimatur on a particular religion." *Id.* at 2315.

151. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

152. *See* Brief for Petitioner, app. D at 5a, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027) (reproducing the Presidential Order of June 9, 2002 directing the Secretary of Defense to detain Padilla).

constraints” and holding that Padilla had sued the wrong person in the wrong court.¹⁵³

Yet as Justice Stevens persuasively argued in dissent, those “procedural constraints” were not genuine constraints at all; rather, they were of the Court’s own choosing. The Court’s doctrine is riddled with exceptions to the immediate custodian “rule”:¹⁵⁴

Although the Court purports to be enforcing a “bright-line rule” governing district courts’ jurisdiction, an examination of its opinion reveals that the line is far from bright. Faced with a series of precedents emphasizing the writ’s “scope and flexibility,” the Court is forced to acknowledge the numerous exceptions we have made to the immediate custodian rule. The rule does not apply, the Court admits, when physical custody is not at issue, or when American citizens are confined overseas, or when the petitioner has been transferred after filing, or when the custodian is “present” in the district through his agents’ conduct. In recognizing exception upon exception and corollaries to corollaries, the Court itself persuasively demonstrates that the rule is not ironclad. It is, instead, a workable general rule that frequently gives way outside the context of “core challenges” to Executive confinement.

In the Court’s view, respondent’s detention falls within the category of “core challenges” because it is “not unique in any way that would provide arguable basis for a departure from the immediate custodian rule.” It is, however, disingenuous at best to classify respondent’s petition with run-of-the-mill collateral attacks on federal criminal convictions. On the contrary, this case is singular not only because it calls into question decisions made by the Secretary himself, but also because those decisions have created a unique and unprecedented threat to the freedom of every American citizen.¹⁵⁵

Justice Stevens also might have stressed — and not merely hinted at¹⁵⁶ — the risk of forum shopping by the Executive Branch.¹⁵⁷ It is doubtful that the Government’s detention of alleged enemy

153. In particular, the Court held that Melanie A. Marr, the commander of the South Carolina Naval Brig, is the only proper respondent to Padilla’s petition because she, not Secretary Rumsfeld, is Padilla’s custodian. *Padilla*, 124 S. Ct. at 2717-22. The Court further concluded that the Southern District of New York did not have personal jurisdiction over Commander Marr. *Id.* at 2722-25.

154. The general rule in habeas law is that the proper respondent to a habeas petition filed by a detainee who challenges the legality of his confinement is the prisoner’s immediate custodian — that is, the warden of the facility in which the detainee is being held. *See, e.g., Padilla*, 124 S. Ct. at 2731 (Stevens, J., dissenting) (“All Members of this Court agree that the immediate custodian rule should control in the ordinary case and that habeas petitioners should not be permitted to engage in forum shopping.”).

155. *Id.* at 2732-33 (Stevens, J., dissenting) (citations omitted).

156. *Id.* at 2734-35 (Stevens, J., dissenting).

157. *Leading Cases*, *supra* note 64, at 416 (noting that in the “context [of] executive detention,” the “habeas jurisdiction default rules” upon which the *Padilla* majority relied “empower limitless executive forum shopping”).

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combatants within the Fourth Circuit is coincidental. That federal court of appeals is widely regarded as among the most conservative and pro-Government in the nation.¹⁵⁸

In appearing to accept the Justices' rhetoric of restraint uncritically in both *Newdow* and *Padilla*, the theory of minimalism risks giving the impression that it is strikingly idealistic, even naïve. But such an impression would be false: In his book on minimalism, Professor Sunstein is a realist in assessing justiciability doctrine: "It may be tempting to see these principles [of justiciability] as firm, rule-bound law, allowing no room for discretionary judgments. But realistically speaking, justiciability doctrines are used prudentially and strategically" ¹⁵⁹

By disposing of *Padilla* on the procedural ground it chose, moreover, the Court laid down a broad rule with inevitable implications for an important question of federal law that currently divides several federal courts of appeals: whether the Attorney General is a proper respondent to a habeas petition filed by an alien detained pending deportation.¹⁶⁰ That issue matters because, among other things, "there are indications that the district courts in areas where immigration detention centers are located have been flooded with detainee habeas petitions. This influx may seriously threaten some district courts' ability to consider petitions in a reasonably prompt manner."¹⁶¹ Chief Justice Rehnquist dropped a footnote

158. See, e.g., Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES, Mar. 9, 2003, § 6 (Magazine), at 38 (detailing the court's strong conservatism). There may be reason to question Sontag's objectivity in view of how unfavorably she portrays the Fourth Circuit's decisionmaking. I do not think it is controversial, however, to characterize that court as among the most conservative federal courts of appeals in the nation as a relative matter, just as it would not be controversial to characterize the Ninth Circuit as among the most liberal.

159. SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 39-40. Compare *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam) ("None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront."), with Cass Sunstein, *What We'll Remember in 2050*, CHRONICLE OF HIGHER EDUCATION, Jan. 5, 2001, at B15-16, reprinted in *BUSH v. GORE: THE COURT CASES AND THE COMMENTARY* 339-40 (E.J. Dionne Jr. & William Kristol eds., 2001) (predicting that "millions of Americans [will come to] believ[e] that the court . . . acted in an unacceptably partisan manner, and not as a court of law at all," and that the Court's decision will be remembered in hindsight as "illegitimate, undemocratic, and unprincipled").

160. Compare *Robledo-Gonzales v. Ashcroft*, 342 F.3d 667 (7th Cir. 2003) (Attorney General is not proper respondent), *Roman v. Ashcroft*, 340 F.3d 314 (6th Cir. 2003) (same), *Vasquez v. Reno*, 233 F.3d 688 (1st Cir. 2000) (same), and *Yi v. Maugans*, 24 F.3d 500 (3d Cir. 1994) (same), with *Armentero v. INS*, 340 F.3d 1058 (9th Cir. 2003) (Attorney General is proper respondent). Cf. *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998) (discussing the issue at length but not deciding the question).

161. *Armentero*, 340 F.3d at 1069.

stating — without explanation — that the Court was not deciding the circuit split.¹⁶² But the Court's reasoning, which focuses on the location of the detainee's immediate physical custodian, appears squarely applicable in the INS setting. The Chief Justice reasoned as follows:

In accord with the statutory language and *Wales*' immediate custodian rule, longstanding practice confirms that in habeas challenges to present physical confinement — “core challenges” — the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official. No exceptions to this rule, either recognized or proposed [by Justice Kennedy in his concurring opinion], apply here.¹⁶³

None of the exceptions discussed by the majority or Justice Kennedy — that is, a court-martial convict detained outside the territorial jurisdiction of any district court, nonphysical custody, dual custody, removal of the petitioner from a district's territory after a petition has been filed, or certain kinds of unfair behavior by the Government¹⁶⁴ — appears to apply in the INS context.¹⁶⁵

To generate direct implications for a question of such moment in an extraordinary, nonimmigration case and in the absence of much briefing on the probable consequences is aggressive. The Court's chosen path is all the more aggressive because the outcome in *Hamdi v. Rumsfeld*,¹⁶⁶ the case involving an American citizen also detained in the South Carolina brig after his capture in Afghanistan, affects mightily — if not ultimately determines — the upshot of federal-court review of Padilla's contentions.¹⁶⁷ Indeed, it is not difficult to count five votes for the proposition that Padilla's detention is

162. *Padilla*, 124 S. Ct. at 2718 n.8 (“In *Ahrens v. Clark*, 335 U.S. 188 (1948), we left open the question whether the Attorney General is a proper respondent to a habeas petition filed by an alien detained pending deportation. *Id.* [] at 189. . . . Because the issue is not before us today, we again decline to resolve it.”) (parallel citations omitted).

163. *Id.* at 2718 (referencing *Wales v. Whitney*, 114 U.S. 564, 574 (1885)) (citations and footnote omitted).

164. *Id.* at 2718 n.9, 2721-24; *id.* at 2729 (Kennedy, J., concurring).

165. That said, it would be most welcome if the Court somehow were to prove this concern unfounded or if Congress were to address the problem by relieving some of the pressure on the affected district-court dockets.

166. 124 S. Ct. 2633 (2004).

167. Padilla's attorney, Donna Newman, refiled the habeas petition in South Carolina District Court. Petition for Writ of Habeas Corpus, *Padilla v. Hanft*, No. Civ. A. 2:04-2221-26A (D.S.C. July 2, 2004). On February 28, 2005, U.S. District Judge Henry F. Floyd held that the President has no authority to detain Padilla as an enemy combatant, and he ordered the Government either to charge Padilla with a crime or to release him within forty-five days. *See Padilla v. Hanft*, No. Civ. A. 2:04-2221-26A, 2005 WL 465691, at *13 (D.S.C. Feb. 28, 2005). The Government is currently appealing Judge Floyd's decision to the Fourth Circuit.

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unconstitutional: the four *Padilla* dissenters plus Justice Scalia.¹⁶⁸ In his dissent in *Hamdi*, which was joined by Justice Stevens, Justice Scalia provides a historical analysis whose conclusion is sweeping:

Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the decision below.¹⁶⁹

The same reasoning applies with (at least) equal force to *Padilla* given that the Government seized him on American soil, as opposed to in a theater of military operations abroad.

In other words, the Court in *Padilla* had a narrower option. The Justices could have decided the merits, which had already in effect been decided in *Hamdi*, thereby avoiding a broad ruling on an unsettled procedural question with seemingly mammoth implications. But, it could be objected, how could the Court have reached the merits without deciding the threshold immediate-custodian question one way or the other? Justice Stevens explained how the Justices could have resolved that issue in a more factbound and narrow fashion:

More narrowly, we agree that if jurisdiction was proper when the petition was filed, it cannot be defeated by a later transfer of the prisoner to another district. . . .

It is reasonable to assume that if the Government had given [Donna] Newman, who was then representing respondent in an adversary proceeding, notice of its intent to ask the District Court to vacate the outstanding material witness warrant and transfer custody to the Department of Defense, Newman would have filed the habeas petition then and there, rather than waiting two days. Under that scenario, respondent's immediate custodian would then have been physically

168. In *Padilla*, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, concluded that Congress had not authorized *Padilla*'s detention: "Consistent with the judgment of the Court of Appeals, I believe that the Non-Detention Act, 18 U.S.C. § 4001(a), prohibits — and the Authorization for Use of Military Force Joint Resolution, 115 Stat. 224, adopted on September 18, 2001, does not authorize — the protracted, incommunicado detention of American citizens arrested in the United States." 124 S. Ct. at 2735, n.8 (Stevens, J., dissenting).

169. *Hamdi*, 124 S. Ct. at 2660-61 (referencing the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)). For detailed discussion of *Hamdi*, see *infra* notes 208-222, 282-290 and accompanying text.

present in the Southern District of New York carrying out orders of the Secretary of Defense. Surely at that time Secretary Rumsfeld, rather than the lesser official who placed the handcuffs on petitioner, would have been the proper person to name as a respondent to that petition.

The difference between that scenario and the secret transfer that actually occurred should not affect our decision, for we should not permit the Government to obtain a tactical advantage as a consequence of an *ex parte* proceeding. The departure from the time-honored practice of giving one's adversary fair notice of an intent to present an important motion to the court justifies treating the habeas application as the functional equivalent of one filed two days earlier.¹⁷⁰

Despite initial appearances, therefore, *Padilla* is not a poster child for minimalism by virtue of its disposition on jurisdictional grounds.

On the other hand, it could forcefully be argued that I just cheated in applying the operational definition of minimalism. I have shown that the approach of the *Padilla* dissenters was narrower than that of the majority. I have not demonstrated how the *Padilla* majority could have decided the case the same way — reversing the judgment of the Second Circuit — on a narrower ground. The point of the above analysis, however, was not to change (or forget) the rules of the minimalist inquiry, but to refute the claim that jurisdictional rulings are necessarily narrower and shallower than decisions on the merits.

Applying minimalism's operational definition to *Padilla*, it appears that a narrower option was reasonably available to the majority. Rather than deciding the controversial immediate-custodian question, the Court could have taken issue with the Second Circuit's holding that the district court had personal jurisdiction over Secretary Rumsfeld under New York's long-arm statute.¹⁷¹ As that court noted, the state's statute had never been applied in an analogous setting,¹⁷² and surely the New York legislature had never contemplated its application to the facts of *Padilla*. Granted, the Court's typical practice is to defer to federal courts of appeals on questions of state law, but that did not stop the majority from showing no such deference in *Newdow*.¹⁷³ Moreover, to the extent one insists on the rightness of the lower courts' interpretation of New York's long-arm statute, it appears that the "operational" definition of minimalism is more subject to dispute than we might at first imagine because its criteria require making substantive and contestable judgments on the merits of legal questions.

170. *Padilla*, 124 S. Ct. at 2731-32 (Stevens, J., dissenting) (citations and footnote omitted).

171. See *Padilla v. Rumsfeld*, 352 F.3d 695, 708-710 (2d Cir. 2003) (analyzing the applicability of the state's long-arm statute), *rev'd*, 124 S. Ct. 2711 (2004).

172. *Id.* at 710.

173. See *supra* note 150.

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It is noteworthy that four of the five members of the majority in the minimalist Pledge decision — Justices Stevens, Souter, Ginsburg, and Breyer — dissented in *Padilla*. Likewise, the Chief Justice and Justices O'Connor and Thomas, who were in the majority in *Padilla*, would have upheld the constitutionality of Pledge recitations in public schools. Only Justice Kennedy was in the majority in both cases. (Justice Scalia recused himself in the Pledge case after publicly criticizing the Ninth Circuit's decision.¹⁷⁴) With eight out of nine Justices on opposite sides of what Professor Sunstein sees as minimalist holdings, the question arises whether the theory of judicial minimalism provides a persuasive account of the Court's decisionmaking in both those cases. At a minimum, minimalists bear the burden of offering a more complex, counterintuitive account, one that explains how minimalism emerges from shifting coalitions of Justices, some of whom are committed to a nonminimalist jurisprudence much of the time.

2. *Reaching the Merits: Rasul, Ashcroft v. ACLU, and Cheney*

Still other important decisions from the October 2003 Term reveal the limits of minimalism as an organizing framework for understanding the Court's work. Professor Sunstein submits that the Justices decided the Guantanamo Bay, child online pornography, and energy task force cases "in the narrowest possible fashion."¹⁷⁵ Most of those opinions reveal a different picture.

The Court, according to Professor Sunstein, evidenced minimalism in *Rasul v. Bush*¹⁷⁶ by holding only that federal courts have authority to entertain habeas petitions filed by aliens held at Guantanamo Bay.¹⁷⁷ Specifically, he stresses that "the court pointedly declined to specify the nature of the hearing — to say, for example, whether foreigners have a right to a lawyer."¹⁷⁸ He fails to register, however, that the threshold question of judicial power to entertain the petitions was the sole issue before the Justices when the case was decided. Here is the first sentence of Justice Stevens' opinion for the Court:

These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in

174. See 124 S. Ct. at 2304 (noting Justice Scalia's recusal); Laycock, *supra* note 134, at 159, n.19 (documenting the series of events culminating in Justice Scalia's recusal).

175. Sunstein, *The Smallest Court*, *supra* note 10.

176. 124 S. Ct. 2686 (2004).

177. Sunstein, *The Smallest Court*, *supra* note 10.

178. *Id.*

connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.¹⁷⁹

To return to a recurring theme, not deciding questions not presented is not evidence of minimalism.

On the other hand, there would seem to be no reason why evidence informing the minimalist inquiry should be limited to the merits stage as opposed to the certiorari stage, even if Professor Sunstein devotes almost all his attention to the former.¹⁸⁰ Nor must evidence of minimalism be confined to the text of published opinions. When granting certiorari, the Court sometimes rewrites the questions presented as articulated by the parties or chooses to review only certain questions presented.¹⁸¹ *Rasul* is a good example of an instance in which the Court chose not to address a question of substantive rights that was presented at the certiorari stage. The Justices' decision to proceed in such a fashion evidences narrowness.¹⁸²

Yet the Court reasonably could have resolved the threshold jurisdictional question in *Rasul* more narrowly. Specifically, the majority could have followed Justice Kennedy's lead,¹⁸³ making clear that its holding was limited to detainees held at Guantanamo Bay in

179. *Rasul*, 124 S. Ct. at 2690.

180. See *supra* text accompanying notes 33-34.

181. See, e.g., Docket for *Rasul v. Bush*, No. 03-334, at <http://www.supremecourtus.gov/docket/03-334.htm> (last visited April 1, 2005) ("Petition GRANTED limited to the following Question . . ."); Docket for *Elk Grove Unified Sch. Dist. v. Newdow*, No. 02-1624, at <http://www.supremecourtus.gov/docket/02-1624.htm> (last visited April 1, 2005) ("Petition GRANTED limited to the following Questions . . .").

Most of the time, moreover, the Justices have a variety of vehicles from which to choose at the certiorari stage. Those vehicles present different facts and therefore somewhat different legal questions for resolution. The Court typically makes decisions among those vehicles, albeit in a manner not accessible to public scrutiny. In choosing, the Justices could adopt a minimalist approach by choosing a fact pattern with narrower and shallower legal implications.

182. See Petition for Writ of Certiorari at i-ii, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334) [hereinafter *Rasul* petition] (two of three questions presented directed at the merits). Specifically, the first question presented raised the issue of subject matter jurisdiction under *Johnson v. Eisentrager*, 339 U.S. 763 (1950), see *infra* note 186, and the second and third (somewhat redundantly) asserted due process claims. For example, this was the third question presented in the petition:

Does the Due Process [C]lause of the Fifth Amendment permit the United States to detain foreign nationals indefinitely, in solitary confinement, without charges and without recourse to any legal process, so long as they are held outside the "ultimate sovereignty" of the United States, even when they are held in territory over which the United States has exclusive jurisdiction and control?

Rasul petition at i-ii. For a discussion of the substantial confusion generated by the Supreme Court's refusal to address the merits in *Rasul*, see *infra* Section III.A.

183. See *Rasul*, 124 S. Ct. at 2701 (Kennedy, J., concurring in judgment) ("In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal-court jurisdiction is permitted in these cases. This approach would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States, and remains true to the reasoning of *Eisentrager*.").

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view of the area's essentially unique legal status and the detainees' indefinite detention.¹⁸⁴ Instead, the broad and somewhat ambiguous reasoning in the majority opinion caused Justice Scalia, in dissent, to exclaim with some justification that "the Court boldly extends the scope of the habeas statute to the four corners of the earth,"¹⁸⁵ and also to contend that the majority had implicitly overruled controlling precedent.¹⁸⁶ *Rasul* is no instance of minimalism.

Turning next to *Ashcroft v. ACLU*,¹⁸⁷ Professor Sunstein asserts that "[t]he court followed a remarkably similar path in its inconclusive decision involving the Child Online Protection Act [(“COPA”)], which criminalizes the commercial posting of sexually explicit material that is ‘harmful to minors’” where the commercial entities posting the material do not verify that each online visitor is at least 18 years old.¹⁸⁸ “The court upheld a lower court’s temporary injunction against the act,” he notes, “but only on the narrow ground that less restrictive methods, like filtering software, might protect children more effectively than a criminal ban.”¹⁸⁹ He further observes that the Court “[p]ostpon[ed] a final resolution” and instead “asked for a full trial, offering the government an opportunity to prove its claim that the act is the only realistic method of achieving Congress’s goal.”¹⁹⁰ Justice

184. The United States occupies a naval base at Guantanamo Bay under a lease and treaty recognizing Cuba's ultimate sovereignty, but giving the United States “complete jurisdiction and control” for so long as it does not abandon the leased areas. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418; *see also Rasul*, 124 S. Ct. at 2690-91 (discussing this legal arrangement).

185. *Rasul*, 124 S. Ct. at 2706; *see also* Jeffrey Rosen, *Divide and Rule*, NEW REPUBLIC, July 26, 2004, at 11, 11 (“Cass R. Sunstein . . . praised the Court for deciding the Guantanamo Bay case in the ‘narrowest possible fashion,’ while Justice Antonin Scalia criticized the Court for indulging in ‘judicial adventurism of the worst sort.’”).

186. *See Rasul*, 124 S. Ct. 2701 (Scalia, J., dissenting) (“The Court today holds that the habeas statute, 28 U.S.C. § 2241, extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts. This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied”) (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)). *Eisentrager* concerned German nationals who were confined in the custody of the United States Army in Germany following their conviction by a military commission of having engaged in military activity against the United States in China after Germany's surrender. The Court held that they had no right to file a petition for a writ of habeas corpus to test the legality of their detention. Before *Rasul* came down, many jurists had thought the Guantanamo detainees were similarly situated — that is, aliens detained outside the territorial jurisdiction of any federal court. In *Rasul* itself, District Judge Colleen Kollar-Kotelly had dismissed the action for lack of jurisdiction, 215 F. Supp. 2d 55 (D.D.C. 2002), and the D.C. Circuit had affirmed, 321 F.3d 1134 (D.C. Cir. 2003).

187. 124 S. Ct. 2783 (2004).

188. Sunstein, *The Smallest Court*, *supra* note 10 (quoting COPA, 47 U.S.C. § 231 (2000)).

189. *Id.*

190. *Id.* In evaluating COPA, the Court applied strict scrutiny to nonobscene sexual speech for the second time in recent years. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000). That is a significant change in First Amendment law, and one with

Breyer, by contrast, joined by the Chief Justice and Justice O'Connor, would have had the Court construe the statute's coverage narrowly to uphold it, rather than block Congress' attempt to limit children's widespread access to pornography on the World Wide Web.¹⁹¹

Professor Sunstein is correct that the Court's empirical focus on less restrictive alternatives is narrower and shallower than other paths the Justices might have taken. He also would have been right to suggest that a minimalist approach seems commendable in light of changes in computer technology (and thus in the facts on the ground in the case) since the litigation's inception.¹⁹² The majority's chosen course, nonetheless, was not the minimalist option.

Several considerations, including the case's procedural posture and the corresponding abuse-of-discretion standard of review, support the Court's decision, but they do not suggest that the Justices can fairly lay claim to the mantle of minimalism. Because the only issue before the Court was whether to uphold or overturn the preliminary injunction, the decision was not minimalist just because the Justices decided only that question. As Professor Sunstein relates,¹⁹³ the Court emphasized respondents' submission that blocking and filtering software is less restrictive than the statutory scheme Congress had enacted; in the Court's view, the Government had not shown it would be likely to disprove that contention at trial.¹⁹⁴

That, however, is not all the Court said:

Filters also may well be more effective than COPA. First, a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America. The District Court noted in its factfindings that one witness estimated that 40% of harmful-to-minors content comes from overseas. COPA does not prevent minors from having access to those foreign harmful materials. That alone makes it possible that filtering software might be more effective in serving Congress' goals. Effectiveness is likely to diminish even further if COPA is upheld, because the providers of the materials that would be covered by the statute simply can move their operations overseas. It is not an answer to say that COPA reaches some amount of materials that are harmful to minors; the question is whether it would reach more of them

which Justice Scalia registered his strong disagreement. *See Ashcroft v. ACLU*, 124 S. Ct. at 2797 (Scalia, J., dissenting).

191. *Ashcroft v. ACLU*, 124 S. Ct. at 2797-806 (Breyer, J., dissenting).

192. *See id.* at 2787 (noting that "the factual record does not reflect current technological reality"); *see also* SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 174 ("I urge that a form of minimalism makes particular sense for the new communications technologies, including the Internet. The most important reason is that the relevant facts are in flux and changing very rapidly, and the consequences of current developments are hard to foresee.").

193. *See* Sunstein, *The Smallest Court*, *supra* note 10.

194. *Ashcroft v. ACLU*, 124 S. Ct. at 2790-95.

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than less restrictive alternatives. In addition, the District Court found that verification systems may be subject to evasion and circumvention, for example by minors who have their own credit cards. Finally, filters also may be more effective because they can be applied to all forms of Internet communication, including e-mail, not just communications available via the World Wide Web.

That filtering software may well be more effective than COPA is confirmed by the findings of the Commission on Child Online Protection, a blue-ribbon commission created by Congress in COPA itself. Congress directed the Commission to evaluate the relative merits of different means of restricting minors' ability to gain access to harmful materials on the Internet. It unambiguously found that filters are more effective than age-verification requirements. Thus, not only has the Government failed to carry its burden of showing the District Court that the proposed alternative is less effective, but also a Government Commission appointed to consider the question has concluded just the opposite. That finding supports our conclusion that the District Court did not abuse its discretion in enjoining the statute.¹⁹⁵

A minimalist Court — that is, one concerned to decide the case before it as narrowly and shallowly as reasonably possible — would not have made it so clear to the courts below that it favors filtering software. After all, filters need not be more effective to support the district court's entry of a preliminary injunction; equal effectiveness is sufficient. Judges tend not to like being reversed on appeal, and the judges who do the reversing know this very well. After learning that five Justices favor filtering software, the lower courts in *Ashcroft v. ACLU* probably will find it difficult to avoid putting a thumb (or two) on the scale in favor of filters during and after trial on remand. "The Court's opinion leaves Congress and interested persons asking whether *any* regulation of nonobscene Internet materials can pass muster. . . . [T]he Court seemed to be telling Congress that, because filters already exist, Congress cannot regulate indecent communication on the Internet."¹⁹⁶

195. *Id.* at 2792-93 (citations omitted).

196. *Leading Cases*, *supra* note 64, at 354, 361. The situation in *Ashcroft v. ACLU* illustrates the point developed in Part I that using democratic deliberation as the decisionmaking criterion renders minimalism nonfalsifiable because the question whether a decision is minimalist becomes endlessly debatable. That case creates a genuinely difficult problem for any Justice who wants to use his or her vote to advance democratic deliberation in the presence of social disagreement. On the one hand, the outdated factual record caused by rapidly changing computer technologies suggests that democratic deliberation might be enhanced most effectively by deciding less rather than more. On the other hand, the appearance of stringing Congress along and extending the agony yet again by prolonging the inevitable may be difficult to avoid once the Court sends the case back down again for further proceedings. Indeed, from the standpoint of facilitating democratic deliberation and responsiveness to the Court's decisions, Justice Breyer makes a powerful case in his dissent that his approach is most efficacious. Specifically, he directs this rhetorical question at the majority opinion's author, Justice Kennedy, who also dissented in *Blakely*:

Finally, in *Cheney v. United States District Court for the District of Columbia*,¹⁹⁷ Judicial Watch and the Sierra Club sued, among others, Vice President Cheney, seeking disclosure of the members of his energy-policy task force. The task force had been established to give advice and make energy-policy recommendations to President Bush. The complaint alleged that nonfederal employees and private lobbyists regularly attended and fully participated in the task force's nonpublic meetings. The two public-interest groups urged that such participation triggered the procedural and disclosure requirements of the Federal Advisory Committee Act ("FACA"), which apply where not all participants are "full-time, or permanent part-time, [federal]

[W]hat has happened to the "constructive discourse between our courts and our legislatures" that "is an integral and admirable part of the constitutional design"? [*Blakely v. Washington*, 124 S. Ct. 2531, 2550 (2004) (Kennedy, J., dissenting)]. After eight years of legislative effort, two statutes, and three Supreme Court cases the Court sends this case back to the District Court for further proceedings. What proceedings? I have found no offer by either party to present more relevant evidence. What remains to be litigated? I know the Court says that the parties may "introduce further evidence" as to the "relative restrictiveness and effectiveness of alternatives to the statute." But I do not understand what that new evidence might consist of.

Moreover, Congress passed the current statute "[i]n response to the Court's decision in *Reno*" striking down an earlier statutory effort to deal with the same problem. Congress read *Reno* with care. It dedicated itself to the task of drafting a statute that would meet each and every criticism of the predecessor statute that this Court set forth in *Reno*. It incorporated language from the Court's precedents, particularly the *Miller* standard, virtually verbatim. . . . What else was Congress supposed to do?

. . . [S]ome Members of the Court . . . have taken the view that the First Amendment simply does not permit Congress to legislate in this area. Others believe that the Amendment does not permit Congress to legislate in certain ways, *for example*, through the imposition of criminal penalties for obscenity. There are strong constitutional arguments favoring these views. But the Court itself does not adopt those views. Instead, it finds that the Government has not proved the nonexistence of "less restrictive alternatives." That finding, if appropriate here, is universally appropriate. And if universally appropriate, it denies to Congress, in practice, the legislative leeway that the Court's language seem to promise. If this statute does not pass the Court's "less restrictive alternative" test, what does? If nothing does, then the Court should say so clearly.

Ashcroft v. ACLU, 124 S. Ct. at 2804-05 (Breyer, J., dissenting) (citations omitted). Justices motivated by minimalism in *Ashcroft v. ACLU* risk suffering a self-inflicted wound. As Justice Breyer fears, it is possible Congress and concerned citizens will view the Court as having transformed interbranch dialogue and democratic deliberation into an exercise in futility. Democratic actors can become fatigued.

Yet it could be argued in response to Justice Breyer that what COPA accomplished was less anything that could fairly be called democratic deliberation than it was simply an effort by Congress to go as far legislatively as it could go along the child-protective lines it favored subject to the unavoidable constraint of satisfying the Court. Such a congressional reaction to Supreme Court decisionmaking constitutes neither deliberation nor "constructive discourse" in any strong sense, *id.* at 2804 (Breyer, J., dissenting), and it certainly is not the sort of rational reflection that Professor Sunstein champions.

This example demonstrates a key point: Figuring out whether and how to be a minimalist can require a complicated calculus that often will prove uncertain and controversial. Likewise, commentators who endeavor to confirm or disconfirm the presence of democracy-promoting decisionmaking criteria in judicial opinions face an almost impossible empirical task.

197. 124 S. Ct. 2576 (2004).

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officers or employees.”¹⁹⁸ Among other things, the district court entered orders allowing the plaintiffs to conduct limited discovery to ascertain the energy task force’s structure and membership.

The Vice President requested that the district court halt proceedings on separation of powers grounds. Professor Sunstein observes that “the [Supreme Court] again proceeded cautiously” by rejecting that argument, but “requir[ing] the lower courts to take account of the vice president’s need for confidentiality.”¹⁹⁹ The D.C. Circuit, the Supreme Court essentially held, had wrongly concluded that the Government’s ability to protect its rights by asserting executive privilege in the district court stripped the appellate court of mandamus authority. At the same time, however, the Court did not order the court of appeals to issue mandamus against the district court, instead leaving it to the appellate court to address the parties’ arguments and other matters bearing on the question whether mandamus should issue. In short, the Court concluded only that lower courts entertaining mandamus petitions involving the President or Vice President must consider separation of powers concerns even absent assertion of executive privilege.²⁰⁰

Professor Sunstein is correct that the Court “proceeded cautiously.” The Court’s display of caution seems well explained by several legal and factual considerations. These include: the extraordinary nature of the mandamus remedy;²⁰¹ the sensitive separation of powers concerns surrounding the prospect of judicial interference with the President’s access to confidential policy advice;²⁰² a disagreement among the Justices on the question whether the Vice President argued merely for less discovery or for no discovery in the District Court;²⁰³ and the significant overlap between the information

198. *Cheney*, 124 S. Ct. at 2583. Specifically, the complaint alleged that the Vice President and other defendants did not qualify for the disclosure exemption in § 3(2)(C)(i) of the statute, which excludes from the statute’s open-meeting and disclosure requirements “any committee . . . composed wholly of full-time, or permanent part-time, [federal] officers or employees.” Federal Advisory Committee Act, 5 U.S.C. app. § 3(2)(C)(i) (2000).

199. Sunstein, *The Smallest Court*, *supra* note 10.

200. *Cheney*, 124 S. Ct. at 2586-93.

201. *See, e.g., Ex parte Fahey*, 332 U.S. 258, 259-60 (1947) (holding that mandamus is a “drastic and extraordinary” remedy “reserved for really extraordinary causes”).

202. *See Cheney*, 124 S. Ct. at 2582 (noting that enforcement of the discovery orders “might interfere with” the Vice President and other senior executive-branch officials “in the discharge of their duties and impinge upon the President’s constitutional prerogatives”).

203. *See id.* at 2595-601 (Ginsburg, J., dissenting). Justice Ginsburg argued that the Court’s reasoning did not justify its judgment. The remand order, she noted, was premised on the possibility that the District Court ordered *excessive* discovery, but the Government, in her view, had been resisting *any* discovery. *See id.* To the extent she is correct, *Cheney* may, at least in part, evidence what Professor Sunstein calls “subminimalism.” SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 10 (suggesting that “subminimalism” can be “understood

discovery would produce and the ultimate relief sought by the plaintiffs.²⁰⁴ It does not follow, however, that the Court's display of caution necessarily evidences minimalism. The question, as far as minimalism is concerned, is not whether the Justices were cautious, but whether the Court consciously chose to decide the case as narrowly and shallowly as possible when broader and deeper options were reasonably available.

According to those criteria, the *Cheney* decision does seem well described as minimalist. The Court did not resolve the question whether mandamus should issue when it could have, and reasonably narrower and shallower options do not appear to have been available. Rather than accede to the government's request that the Court invoke constitutional separation of powers principles fundamentally to rework the executive branch's obligations in the litigation process, the Justices sent the case back to the Court of Appeals.²⁰⁵

Yet, another aspect of the *Cheney* decision reveals a nonminimalist tendency. At the end of his opinion for the Court, Justice Kennedy authored these words:

Other matters bearing on whether the writ of mandamus should issue should also be addressed, in the first instance, by the Court of Appeals after considering any additional briefs and arguments as it deems appropriate. We note only that all courts should be mindful of the burdens imposed on the Executive Branch in any future proceedings. Special considerations applicable to the President and the Vice President suggest that the courts should be sensitive to requests by the Government for interlocutory appeals to reexamine, for example, whether the statute embodies the *de facto* membership doctrine.²⁰⁶

The Court here is saying more than it must along the dimension of breadth in order to decide the case. Specifically, the Justices are reiterating their skepticism, voiced by some members of the Court at oral argument, that the D.C. Circuit's "de facto membership doctrine" even exists.²⁰⁷ That signal to the court of appeals to reassess its own precedent is not the handiwork of jurists who consciously choose to write as narrowly and shallowly as reasonably possible.

as decisions that are conclusory and opaque, and offer little in the way of justification or guidance for the future"); *see also id.* at 15-16 (further discussing subminimalism).

204. *See Cheney*, 124 S. Ct. at 2593-94 (Stevens, J., concurring) (stressing the point set forth in the text).

205. *Accord, Leading Cases, supra* note 64, at 257 & n.3 (2004) (interpreting *Cheney* to be "a model of judicial minimalism" and citing *One Case at a Time*).

206. *Cheney*, 124 S. Ct. at 2593.

207. According to the D.C. Circuit's de facto membership doctrine, the regular participation of nongovernment officials renders them de facto members of a government committee, such that the committee may not benefit from the statutory exemption under section 3(2) of FACA. *See Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993); *supra* note 198.

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3. *Stepping Up*: Hamdi

Professor Sunstein acknowledges that *Hamdi* is the Court's "most expansive ruling."²⁰⁸ He nonetheless applauds its "strong minimalist features"²⁰⁹ — specifically, the failure of a majority of the Justices to announce that detained enemy combatants always have a right to counsel, the Court's decision to leave open the question whether a military tribunal could try Americans, and the Justices' decision not to engage the Bush administration's aggressive claims regarding the scope of the President's inherent Article II powers as Commander in Chief.²¹⁰ As Professor Sunstein appears to concede, however, descriptive minimalism can rely only modestly on *Hamdi*: the decision's nonminimalist features render it a historic triumph for civil liberties in wartime.

In her plurality opinion announcing the judgment of the Court, Justice O'Connor hardly "sa[id] no more than necessary" to decide the case.²¹¹ On the contrary, she emphatically rejected the executive branch's assertions of breathtaking presidential power. "We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law,"²¹² she wrote, underscoring that "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."²¹³ Through those words, with which most of her colleagues agreed, it is almost as if Justice O'Connor is rejecting the premise of *Korematsu* on behalf of the Court and vowing never to

208. Sunstein, *The Smallest Court*, *supra* note 10.

209. *Id.*

210. *Id.* Moreover, the four Justices who joined Justice O'Connor's plurality opinion announcing the judgment of the Court decided the question whether Congress had authorized Hamdi's detention as narrowly as reasonably possible. Specifically, the plurality assumed without deciding that: (1) congressional authorization of Hamdi's detention was constitutionally required; and (2) the Non-Detention Act (NDA), 18 U. S. C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress," applied to Hamdi's detention. 124 S. Ct. at 2639-40. The plurality then concluded that the Authorization for Use of Military Force ("AUMF"), *see supra* notes 168-169, enacted one week after the terrorist attacks of September 11, 2001, satisfied the NDA's requirement of an "Act of Congress." 124 S. Ct. at 2640-43. The AUMF authorized the President to "use all necessary and appropriate force against those . . . he determines planned, authorized, committed, or aided the terrorist attacks." Justices Souter and Ginsburg, by contrast, would have considered each of the above three questions and decided all of them against the executive branch. 124 S. Ct. at 2652-59 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in judgment).

211. SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 3-4.

212. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2647 (2004).

213. *Id.* at 2648.

make the same mistake again.²¹⁴ “We therefore hold,” she wrote, “that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”²¹⁵ “In so holding,” Justice O’Connor continued:

we necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. *Youngstown Sheet & Tube [Co. v. Sawyer]*, 343 U.S. [579.] 587 [(1952)]. Whatever power the United

214. See *Korematsu v. United States*, 323 U.S. 214 (1944) (affirming petitioner’s conviction for remaining in a part of a designated “military area” from which persons of Japanese ancestry had been ordered excluded). Justice Jackson wrote these chilling words in dissent:

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as “the tendency of a principle to expand itself to the limit of its logic.” A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court’s opinion in this case.

Id. at 245-46 (Jackson, J., dissenting) (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921)) (footnote omitted). It may be that some of Justice O’Connor’s inspired language in *Hamdi* was drafted within the long shadow cast by *Korematsu*. That decision, though never overruled, has been firmly rejected by the court of history. See, e.g., Neil S. Siegel, *A Prescription for Perilous Times*, 93 *GEORGETOWN L.J.* (forthcoming Summer 2005) (reviewing GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004)). Justice Souter’s opinion in *Hamdi* explicitly relied on *Korematsu*. His conclusion that Congress had not authorized Hamdi’s detention was based in part on his recognition that the Non-Detention Act, see *supra* note 210, was passed “for the purpose of avoiding another *Korematsu*.” 124 S. Ct. at 2653 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in judgment). For an examination of *Korematsu*’s possible impact on the Court’s decision in *Hamdi*, see Neil S. Siegel, *Korematsu’s Shadow* (unpublished manuscript on file with author).

215. *Hamdi*, 124 S. Ct. at 2648.

States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (it was “the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty”); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934) (“[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.”). Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions. See [*INS v.*] *St. Cyr*, 533 U.S. [289,] 301 [2001] (“At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest”). Thus . . . it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.²¹⁶

That the Justices could have said more — a fact of life at the Court — is insufficient to establish the presence of minimalism.

The decision in *Hamdi* is not minimalist in part because the plurality here is displaying greater analytical depth than it must to decide the case. Justice O’Connor’s opinion is grounded in a highly theorized — indeed, Madisonian²¹⁷ — conception of the separation of powers. Articulating grave concerns about the condensation of power in the executive branch was not necessary to decide the case; a reliance on precedent — for example, the decisions cited by Justice O’Connor in the quotation above — would have sufficed. Four other Justices, moreover, displayed similar levels of theorization.²¹⁸

216. *Id.* at 2650-51 (parallel citations omitted).

217. See, e.g., THE FEDERALIST NO. 51, at 262 (James Madison) (Garry Wills ed., 1982) (“But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.”).

218. See *Hamdi*, 124 S. Ct. at 2652-60 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in judgment) (concluding that congressional authorization was necessary to detain Hamdi based explicitly on a Madisonian understanding of human nature and the separation of powers, and determining that Hamdi’s detention was unlawful based on a lack of congressional authorization); *id.* at 2660-74 (Scalia, J., joined by Stevens, J., dissenting) (concluding based on an extensive historical analysis that Hamdi’s detention was unlawful absent suspension of the writ of habeas corpus). Justice Souter further stated:

For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the

Turning to the circumstances of Hamdi's detention, Justice O'Connor pulled no punches in assessing the Government's conduct to date: "Plainly, the 'process' Hamdi has received is not that to which he is entitled under the Due Process Clause."²¹⁹ And though the plurality did, among other things,²²⁰ decline to announce that detained enemy combatants always have a right to counsel, Justice O'Connor also wrote these words:

Since our grant of certiorari in this case, Hamdi has been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unquestionably has the right to access to counsel in connection with the proceedings on remand.²²¹

Because Hamdi was no longer being denied access to counsel, and because the Government could no longer plausibly maintain that it had an interest in again denying Hamdi access to counsel after allowing him to consult with an attorney several times, the Court was not required to address the extent of Hamdi's right to counsel on remand. Thus, the decision in *Hamdi* is not minimalist along the analytical dimension of breadth as well.

In sum, Justice O'Connor made clear that neither assertions of presidential power nor pleas for judicial restraint would succeed in removing the Court from the critical separation of powers dynamic "when individual liberties are at stake."²²² The outcome in *Hamdi* was not maximalist, but neither was it minimalist along the dimension of depth or breadth. Indeed, the Court there confronted much of what minimalism would have had the Justices avoid.

balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that 'the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other — that the private interest of every individual may be a sentinel over the public rights.' The Federalist No. 51, p. 349 (J. Cooke ed. 1961). Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.

Hamdi, 124 S. Ct. at 2655 (Souter, J., concurring in part, dissenting in part, and concurring in judgment); see also *supra* note 169 and accompanying text (quoting Justice Scalia's dissenting opinion).

219. *Hamdi*, 124 S. Ct. at 2651.

220. Justice O'Connor also wrote: "Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in [an enemy combatant] proceeding," *id.* at 2649; "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided," *id.*; and "[t]here remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal," *id.* at 2651.

221. *Id.* at 2652.

222. *Id.* at 2650.

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C. The Verdict

If judicial minimalism is supposed to have empirical relevance as a description of the way the Supreme Court actually decides cases, then the theory requires an operational definition that can be falsified — a definition, in other words, that is capable of relatively uncontroversial application. Part I identified the best such definition available, and this Part has applied the operational criterion to many of the most important decisions from the October 2003 Term. The upshot of the foregoing investigation does not bode well for minimalism's descriptive aspirations: the suggestion that judicial minimalism triumphed at the Supreme Court during the October 2003 Term is, with few exceptions, descriptively false.

Rather than consistently apply an operational definition of judicial minimalism, Professor Sunstein perceives evidence of minimalism where the Justices left questions undecided, resolved a case on jurisdictional grounds, decided only the question presented, or proceeded with caution. Professor Sunstein's theory of judicial minimalism, therefore, appears either to have no operational criterion, or to be false. The Justices did not consciously choose to resolve most of the cases discussed above as narrowly and shallowly as reasonably possible, even though broader and deeper rationales were reasonably available to them.²²³

Not even Justice O'Connor. In his review of *One Case at a Time*, Jeffrey Rosen chose the label "O'Connorism" to describe minimalist legal theory.²²⁴ "By embracing shallowness as a judicial virtue," he

223. It has been suggested to me that Professor Sunstein might find the outcome of this Article's empirical analysis unsurprising because there may be a certain disingenuousness to his assertion that most of the Justices are minimalists. Rather than really believing that to be the case, this argument runs, his descriptive claim is aspirational — that is, he means to persuade the current conservative Court and possibly the next one that it ought to be a minimalist decisionmaking institution. This argument might be regarded as a social variant of the Heisenberg Uncertainty Principle in physics; the suggestion is that Professor Sunstein hopes to change the Court's decisionmaking through the very act of observing its decisionmaking. *See, e.g.*, HEINZ R. PAGELS, *THE COSMIC CODE: QUANTUM PHYSICS AS THE LANGUAGE OF NATURE* 89-91 (1982) (discussing the impossibility of knowing the position and momentum of an electron simultaneously, because the act of observing its position changes its momentum). Lacking direct evidence to substantiate such a charge regarding Professor Sunstein's motivation, I do not think it appropriate to question his bona fides; this article certainly takes him at his word.

It may be worth noting, however, that the use of descriptive claims as vehicles for normative advocacy is rampant not only in legal academia, but also in legal practice and judicial decisionmaking. For example, when the top-side and bottom-side briefs — or majority opinions and dissents for that matter — seem to be discussing different cases in describing the holdings of the very same precedents, there is often more going on than a genuine disagreement regarding the meaning and binding force of past decisions. Given the normative power of the actual in both law and popular culture, convincing people that what ought to be already is would seem to be an effective rhetorical strategy.

224. Rosen, *supra* note 48, at 46.

wrote, “Sunstein is advocating a version of the personalized jurisprudence of Sandra Day O’Connor.”²²⁵ By likening minimalism to “O’Connorism,” Professor Rosen, among other things, effectively clipped the wings of Professor Sunstein’s aggressive descriptive claim that most of the current Justices embrace his theory.²²⁶

The foregoing analysis of decisions that came down during the October 2003 Term suggests that minimalism is indeed closer to “O’Connorism” than to an apt description of the Court’s work as a whole. During that year, the Court was not minimalist; instead, Justice O’Connor tended to be one of the most inclined towards narrow and shallow decisions among nine jurists with diverse ideological and methodological commitments. And though Justice O’Connor’s vote often proved critical, she sometimes was not in the majority in important cases. Emblematic examples include *Blakely*, *Crawford*, and *Ashcroft v. ACLU*.

But the story of the October 2003 Term is more complicated than that. The above investigation also suggests that not even Justice O’Connor is genuinely a judicial minimalist. In the October 2003 Term, the theory could not adequately account for much of her voting behavior. When she was in the majority in momentous cases, she often could not be fairly described as a minimalist. That is one jurisprudential lesson to be drawn from decisions such as *McConnell*, *Rasul*, *Padilla*, and *Hamdi*. In *Newdow*, moreover, she was neither in the majority nor a minimalist. Accordingly, it can prove difficult to make persuasive minimalist generalizations about the Justice most oriented towards narrow and shallow decisionmaking, let alone the entire Court. If the October 2003 Term is consistent with a larger picture, and I suspect it is, this Court does not tend to be a minimalist decisionmaking institution.²²⁷

225. *Id.*

226. See *supra* text accompanying note 17.

227. An adequate defense of that claim is beyond the scope of this inquiry. See *supra* Introduction to Part II. And while offering only a sampling of decisions as suggestive of the Court’s generally nonminimalist character runs the risk of selection bias, *id.*, it is nonetheless worth considering whether these controversial cases from the past ten years are fairly described as having been decided as narrowly and shallowly as reasonably possible: *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding constitutional the University of Michigan Law School’s affirmative action admissions program); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that an Ohio school voucher program, which included sectarian private schools, did not violate the Establishment Clause); *Ring v. Arizona*, 536 U.S. 584 (2002) (holding that the Sixth Amendment right to a jury trial in capital prosecutions is violated by an Arizona statute pursuant to which, following a jury adjudication of a defendant’s guilt of first-degree murder, the trial judge alone determines the presence or absence of the aggravating factors required by state law for imposition of the death penalty); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of any mentally retarded individual constitutes “cruel and unusual punishment” prohibited by the

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Academic theories of judicial behavior, including Professor Sunstein's contribution, at times perceive general truths when outcomes are highly contingent on the tendencies of particular Justices — proclivities admitting of important exceptions that may ultimately swallow the proffered general rule. If Justice O'Connor is succeeded shortly by more of a maximalist, the theory of judicial minimalism may join her in retirement.²²⁸ Even if she had stayed on the Court for several more years, the theory would have found itself struggling to explain the Justices' decisions if the October 2003 Term had turned out to be a harbinger of those to come.

III. NORMATIVE PROBLEMS

Part II demonstrated that minimalism does not provide a viable empirical account of recent Rehnquist Court decisionmaking. The question remains, however, whether there exists reason to adopt minimalism as a normative theory of judicial review. Can normative considerations be invoked to justify minimalism? This Part argues that the answer is no. Specifically, I show that the empirically testable version of minimalism does not serve the various substantive values rejected in Part I as an inadequate account of any version of minimalism that would be empirically testable — namely, cost

Eighth and Fourteenth Amendments); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that application of New Jersey's public accommodations law to require the Boy Scouts to admit homosexuals violated the Boy Scouts' First Amendment right of expressive association); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment authorized Congress to enact a provision of the Violence Against Women Act, 42 U.S.C. § 13981, providing a federal civil remedy for victims of gender-motivated violence); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress may not subject a state to any suit in state court without its consent); *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding that the Line Item Veto Act, 2 U.S.C. § 691 *et seq.*, violated the Presentment Clause); *Printz v. United States*, 521 U.S. 898 (1997) (relying on a Tenth Amendment anticommandeering rationale in holding unconstitutional certain interim provisions of the Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s), which required state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (articulating a novel congruence-and-proportionality requirement in holding that the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, exceeded Congress' enforcement powers under Section 5 of the Fourteenth Amendment); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congress may not use any Article I, Section 8 power to abrogate state sovereign immunity); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that all federal, as well as state and local, affirmative action programs are subject to strict scrutiny).

228. On July 1, 2005, Justice O'Connor informed President Bush of her "decision to retire from [her] position as an Associate Justice of the Supreme Court of the United States effective upon the nomination and confirmation of [her] successor." <http://www.supremecourtus.gov/publicinfo/press/oconnor070105.pdf>.

minimization, democracy promotion, and achieving overlapping consensus, thereby negotiating theoretical disagreements.

Professor Sunstein claims that judicial minimalism possesses a number of “attractive features.”²²⁹ He suggests that minimalism “is likely to reduce the burdens of judicial decision,” by which he means that minimalism makes it easier for jurists on a multimember court “who disagree on a great deal,” and who are short on both time and access to information, to get their work done.²³⁰ Professor Sunstein also asserts that “minimalism is likely to make judicial errors less frequent and (above all) less damaging,” because “[a] court that leaves things open will not foreclose options in a way that may do a great deal of harm,” especially in light of “unanticipated bad consequences.”²³¹ Further, and perhaps most critically, Professor Sunstein believes that judicial minimalism promotes democratic deliberation by leaving more questions to the democratic process:

There is a relationship between judicial minimalism and democratic deliberation. Of course minimalist rulings increase the space for further reflection and debate at the local, state, and national levels, simply because they do not foreclose subsequent decisions. And if the Court wants to promote more democracy and more deliberation, certain forms of minimalism will help it to do so.²³²

Relatedly, Professor Sunstein argues that minimalist jurists, by rendering shallow decisions, help a democratic society to negotiate the reasonable yet irreconcilable disagreements that are inevitable in a modern, pluralistic community.²³³ Finally, Professor Sunstein suggests that minimalism allows jurists to avoid the need for constitutional theory.²³⁴ Unlike originalists, for example, minimalists need not “take a position on some large-scale controversies about the legitimate role of the Supreme Court in the constitutional order.”²³⁵

In my judgment, Professor Sunstein fails to establish any of these claims. Moreover, I will argue that the Court’s principal role in our constitutional system — that is, guardian of the fundamental rights of individuals — often will be advanced most effectively through relatively broad and deep judicial decisionmaking, not through narrow and shallow opinions.

229. SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 4.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at ix-x, 50-51.

234. *Id.* at 8 (section entitled “Against Theories, against Rules”).

235. *Id.*

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A. Multiplying Decision and Error Costs: The Court as Guide

Despite his initial suggestion that minimalism “is likely to reduce the burdens of judicial decision,”²³⁶ Professor Sunstein later acknowledges that the answer to this empirical question is uncertain and complex:

A court that economizes on decision costs for itself may in the process ‘export’ decision costs to other people, including litigants and judges in subsequent cases who must give content to the law. Such costs may also be faced by those who are trying to plan their affairs and who must try to figure out what the law will ultimately be.²³⁷

Similarly, Professor Sunstein first asserts that “minimalism is likely to make judicial errors less frequent and (above all) less damaging.”²³⁸ Elsewhere in *One Case at a Time*, however, he is not so optimistic. He acknowledges that minimalism may not be “the best way to reduce total error costs,” particularly in situations where “lower courts and subsequent cases would generate an even higher rate of error.”²³⁹

Such a costly course of events seems difficult to avoid after decisions such as *Tennessee v. Lane*.²⁴⁰ The Justices there offered lower courts little guidance regarding how they should handle future cases in which private plaintiffs seek money damages from States for violations of Title II of the ADA. To begin with, the Court declined to clarify whether the fundamental-rights dimension of the case was critical to the holding. Assuming for the sake of argument it was, moreover, the Court did not specify how much of a nexus is required between a case’s factual setting and heightened judicial scrutiny under Section 1 of the Fourteenth Amendment before Congress may be held to have enacted valid Section 5 legislation in the many Title II contexts not covered by the Court’s decision.²⁴¹ In addition, the Court did not offer any guidance regarding how to identify the relevant “context” within which its novel and inappropriately labeled “as applied” Section 5 analysis should be conducted. Why was the implicated class of cases in *Lane* “access to courts,” as opposed to something narrower (such as physical access to court proceedings) or something broader (such as access to all government buildings and programs)? Judged against whatever the Supreme Court will hold in future decisions, it seems inevitable that a number of lower courts will decide (or already have

236. *Id.* at 4.

237. *Id.* at 48.

238. *Id.* at 4.

239. *Id.* at 49-50.

240. *See supra* notes 135-141 and accompanying text (discussing *Lane*).

241. Recall that Title II covers every one of a state’s public services, programs, and activities. *See supra* notes 136-137 and accompanying text.

decided) Title II-Section 5 cases incorrectly, either by holding an application of Title II in a particular setting valid or invalid under Section 5.²⁴²

Because the Justices did not answer the central analytical questions generated by the Court's resolution of the case, it seems perilous to offer much more by way of prediction at this point. The Court left open the possibility that all of Title II is valid under Section 5. It also left open the possibility that Title II is valid under Section 5 only in those classes of cases (however defined) implicating fundamental rights — though in *Lane* itself the factual nexus to any fundamental-rights violation was highly attenuated.²⁴³

As a general matter, there seems to be little reason to suppose that overall costs in the legal and political systems will be minimized by a Supreme Court that decides cases as narrowly and shallowly as reasonably possible. Pre-empirically, it appears more likely that whatever costs the Court saves itself by taking a minimalist path will be outweighed by the costs incurred by litigants, lower courts, and political bodies at the federal, state, and local levels, as judicial, legislative, and executive officials are required to act in the wake of guidance from the Court that would have been clearer had its opinion been broader and deeper.²⁴⁴ Professor Rosen has advanced a persuasive argument along these lines:

When the Supreme Court issues terse opinions whose reasoning is hard to discern, it compounds the confusion of inferior courts in precisely those cases where the relevant actors are pleading for a clear resolution. The result is a national exercise in clairvoyance, as lower courts, citizens, and legislatures spend great energy and expense trying to puzzle through

242. On May 16, 2005, the Court granted certiorari in, and consolidated, two cases involving the Section 5 validity of Title II as applied to the administration of prison systems. *See United States v. Georgia*, No. 04-1203; *Goodman v. Georgia*, No. 04-1236.

243. Respondent Beverly Jones never came close to suffering a violation of any of her constitutional rights. She was a disabled court reporter who alleged lost work and inability to participate in the judicial process. *See* 124 S. Ct. at 1982-83; *id.* at 2000, n.4 (Rehnquist, C.J., dissenting). Respondent George Lane presents a somewhat closer case. He was initially required to crawl up two flights of stairs to attend the hearings in his criminal trial. When he returned to the courthouse for a subsequent hearing and refused to crawl again or be carried up the stairs by officers, he was arrested and imprisoned for failure to appear. The state, however, later held a preliminary hearing in Lane's case in the first-floor courthouse library and offered to move all further proceedings to an accessible courthouse in a town nearby. *See* 124 S. Ct. at 1982-83; *id.* at 2000, n.4 (Rehnquist, C.J., dissenting). Considering Jones and Lane together, it would seem inappropriate after *Lane* for courts to require even as much as a reasonable probability of a fundamental-rights violation in a particular setting before declaring Title II valid under Section 5 across the implicated class of cases. Some possibility of such a violation would appear to suffice. Of course, in the event all of Title II remains valid under Section 5, this "nexus" question need not be asked.

244. *See, e.g., Leading Cases, supra* note 64, at 253 (calling *Cheney* "a model of judicial minimalism" and stating that "[t]he Court's opinion, if nothing else an exercise in measured unclarity, left lower courts with little guidance in effectuating the Court's holding").

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problems that the Supreme Court promised but then refused to resolve.²⁴⁵

Perhaps this concern explains why Professor Sunstein vacillates between asserting confidently that “minimalism is likely to make judicial errors less frequent and (above all) less damaging,”²⁴⁶ and conceding cautiously that “[i]t is not, however, clear that minimalism is the best way to reduce total error costs.”²⁴⁷

Indeed, often it is critical that the Court provide guidance, either to the lower courts or to the political process. Even nonminimalist decisions such as *Blakely*, which leave thousands of judges and lawyers alike in semi-desperate need of guidance, ought to give pause to advocates of less-is-more jurisprudence. Judicial “activism,” “overreaching,” and “arrogance” are charges that are most familiar,²⁴⁸ but there also exists the danger that the Court will say too little. As Chief Justice Marshall stressed early on, “[i]t is emphatically” not only the “province” but also the “duty” of the Supreme Court “to say what the law is.”²⁴⁹

Professor Sunstein acknowledges “the need for planning”; he notes that “[m]inimalism might be threatening to the rule of law insofar as it does not ensure that decisions are announced in advance.”²⁵⁰ At the same time, however, one must wonder whether that “qualificatio[n]”²⁵¹ will tend to swallow the theory most of the time. Granted, *Blakely* constitutes an extreme example of a pressing need for planning. But that need will often be pressing when the Supreme Court grants certiorari in a case to resolve a conflict over the resolution of an important but unsettled question of federal law.²⁵² In other words, cases in which the need for planning — for ordering human affairs in reliance on a relatively stable legal rule — is not implicated do not tend to be important cases. And with grants so few and therefore so precious,²⁵³ the Justices endeavor to avoid granting certiorari to resolve unimportant questions.

245. Rosen, *supra* note 48, at 46; *see also supra* note 81.

246. SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 4.

247. *Id.* at 49.

248. *See, e.g.*, George W. Bush, State of the Union Address (February 2, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html> (“Because marriage is a sacred institution and the foundation of society, it should not be re-defined by activist judges. For the good of families, children, and society, I support a constitutional amendment to protect the institution of marriage.”).

249. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

250. SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 55.

251. *Id.* at 57.

252. *See* Rosen, *supra* note 48, at 46 (“But isn’t ‘planning’ important in every case that the Supreme Court agrees to hear?”).

253. *See supra* note 33.

Rasul, another nonminimalist decision, also nicely illustrates this point. The Court's refusal in that case to move beyond the threshold jurisdictional question and to address the merits of the petitioners' due process challenges has resulted in substantial confusion. Specifically, two federal district courts in the D.C. Circuit have rendered diametrically opposed decisions concerning the constitutional rights of the detainees being held at Guantanamo Bay, Cuba.²⁵⁴ The Court's relative modesty in *Rasul*, therefore, has generated massive headaches for litigants and the lower federal courts. One legal commentator has captured the public spectacle with insightful humor:

It's almost impossible to comprehend how, as of yesterday, two federal judges in the District of Columbia managed to read *Rasul* to mean two completely opposite things — as though it's one of those pick-your-own-endings books from the 1980s. . . .

. . . .

. . . [W]hile we are laying blame here, it may be worth considering that the Supreme Court bears the most responsibility for not getting *Rasul* right — or at least clear — the first time. The opaque John Paul Stevens opinion, coupled with Anthony Kennedy's concurrence (which at least implies that military tribunals might provide sufficient due process for these prisoners), are ambiguous enough to allow the government and judiciary to play the kinds of semantic chutes and ladders it now plays. . . . No one opposes judicial restraint or minimalism; judges should decide only the matters directly before them. But when the highest court in the land only half decides a matter squarely before it — when it decides that prisoners languishing for years in detention have certain inalienable-rights-to-be-named-later, it's tantamount to having decided nothing at all.²⁵⁵

This wasteful legal wrangling in the D.C. Circuit might not be taking place had the Supreme Court decided more in *Rasul*. Yet minimalism would have had the Court decide even less.

254. *Compare* Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005) (holding, in denying habeas petitions, that the President's war powers and a federal statute authorized him to capture and detain combatants; that his authority was not confined to capture and detention on battlefields in Afghanistan; that nonresident aliens captured and detained outside the United States have no cognizable constitutional rights; that their capture and detention did not violate any federal law or treaty giving rise to rights; and that separation of powers principles prohibited inquiry into the conditions of their detention under international norms), *with In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) (holding that the detainees have a Fifth Amendment right to due process of law; that they stated a Fifth Amendment claim because the Combatant Status Review Tribunal relied on classified information not shown to them; that due process required the tribunal to determine whether evidence was gained through torture; that the detainees had a valid due process claim based on the government's use of an overly broad definition of "enemy combatant" subject to indefinite detention; and that the Geneva Conventions applied to Taliban detainees, but not to members of al Qaeda).

255. Dahlia Lithwick, *Supreme Chickens?: The high court's Gitmo confusion comes home to roost*, SLATE, Feb. 1, 2005, at <http://politics.slate.msn.com/id/2113003>.

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Newdow exemplifies another problem with the prospect of a truly minimalist Court. The Chief Justice's criticism of the majority opinion as disingenuous, as in essence "good for this day only," raises a significant concern: From the standpoint of legal technique and craft, deciding a case as narrowly and shallowly as reasonably possible may invite unprincipled decisionmaking because the minimalist decision commits the Court to little in the future. And even if one assumes that the Justices themselves (including future Justices) will be able to tell when and why they "cheated" in a previous case, they make law for many other courts as well. The jobs of the jurists who sit on those tribunals are difficult enough without their also having to figure out when to take Supreme Court decisions seriously and when to squint.²⁵⁶ Moreover, unprincipled judicial decisionmaking imposes distinct legitimacy costs on the Court itself.

Considering decision costs and error costs together, Professor Sunstein offers this sobering qualification, which threatens to give away his entire theory:

In this light it would be foolish to suggest either that minimalism is generally a good strategy or that minimalism is generally a blunder. Everything depends on contextual considerations. The only point that is clear even in the abstract is that sometimes the minimalist approach is the best way to minimize the sum of error costs and decision costs.²⁵⁷

This is a remarkably weak statement. Substitute the words "maximalism" and "maximalist approach" for "minimalism" and "minimalist approach" in the above quotation, and the reasoning remains equally plausible. It seems, therefore, that Professor Sunstein's theoretical defense of judicial minimalism has less to do with minimizing decision and error costs, and more to do with other considerations.²⁵⁸

256. Larry Alexander and Frederick Schauer have written:

The vision of the Court as constitutional interpreter, which is our vision, . . . is a vision that sees the Court being much more concerned with instructing, guiding, helping, and, indeed, ordering other bodies and other branches than the volume and style of its current output would suggest. And if these are or should be the Court's concerns, then we would expect to see more clear rules, fewer divided judgments without a majority opinion, more concern by the Justices for the Court speaking with a single voice than with making their own points or even with insisting on their own view about the outcome, even more concern with *stare decisis*, and in general more Supreme Court behavior befitting the law-maker that the Supreme Court undeniably is, and in our judgment inevitably must be. . . . [U]nder our vision it needs to spend much more time thinking about how it can give better guidance to Congress, to the executive, to lower courts, and to the states.

Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 479-80 (2000) (footnotes omitted).

257. SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 50.

258. Professor Sunstein's concession that the case for minimalism ultimately turns on distinctly empirical — as opposed to theoretical — questions is noteworthy because he advocates minimalism without first having conducted any sort of empirical analysis of the

B. *Leaving Things to the Courts, Not the Country*

“My most important goal,” Professor Sunstein writes in the Preface to *One Case at a Time*, “is to explore the connection between judicial minimalism and democratic self-government.”²⁵⁹ Likewise, the Conclusion to the book is entitled “Minimalism and Democracy.”²⁶⁰ From start to finish, the theme on which he lays greatest emphasis is the connection he proffers between judicial minimalism and democratic deliberation:

The final and perhaps most important point involves the relationship between minimalism and democracy. We have seen that one of the major advantages of minimalism is that it grants a certain latitude to other branches. It allows the democratic process a great deal of room in which to adapt to coming developments, to produce mutually advantageous compromises, and to add new information and perspectives to legal issues.²⁶¹

Respectfully, Professor Sunstein fails to establish that minimalism significantly advances his deliberative democratic project: rather than leaving issues to the democratic process and promoting democratic deliberation, minimalist Justices often simply postpone the questions they do not decide for future litigation. Consider again, for example, the minimalism evident in *Newdow*.²⁶² The Court in effect left the question presented on the merits — the constitutionality of voluntary public-school Pledge-recitation policies — for the lower federal courts and, possibly, for the Court itself in a later case. Absent a constitutional amendment, the federal courts, not the democratic process, will ultimately decide whether public-school recitations of the phrase “under God” in the Pledge of Allegiance violate the Establishment Clause. Even putting the decisionmaker aside, moreover, it is difficult to see what the minimalism evident in *Newdow*

relative costs and benefits. His approach illustrates the force of Judge Richard Posner’s argument that constitutional law is in need of less theory and more facts:

[C]onstitutional theory is not responsive to, and indeed tends to occlude, the greatest need of constitutional adjudicators, which is the need for empirical knowledge I know that just getting the facts right can’t decide a case. There has to be an analytic framework to fit the facts into; without it they can have no normative significance. Only I don’t think that constitutional theory can supply that framework. Nor that the design of the framework, as distinct from fitting the facts into it, is the big problem in constitutional law today. The big problem is not lack of theory, but lack of knowledge — lack of the very knowledge that academic research, rather than the litigation process, is best designed to produce. But it is a different kind of research from what constitutional theorists conduct.

Posner, *supra* note 1, at 3.

259. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 9, at xiv.

260. *Id.* at 259.

261. *Id.* at 53.

262. See *supra* notes 142-150 and accompanying text.

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has to do with the principled promotion of democratic deliberation or negotiation of moral fault lines in American society. The vast majority of Americans, the President, and members of Congress are not going to be persuaded that it is unconstitutional for public-school children voluntarily to recite the words “under God” in the Pledge.

Newdow is hardly unique in this regard; the consequences of other minimalist decisions could be used to make a similar point. After the Court’s holding in *Tennessee v. Lane*,²⁶³ the courts, not the political process, will decide whether States can be sued by private citizens under Title II of the ADA in contexts other than that of access to the courts. Similarly, the courts, not the people or their representatives, will decide the sensitive, complex legal questions implicated in the *Cheney* case.²⁶⁴

Newdow illustrates another mismatch between the means of judicial minimalism and the end of democracy promotion. One cost of minimalist decisions is that they do not attract the same level of public attention as do sweeping judicial rulings, and therefore do not prompt the same type of vigorous public response. Had the Supreme Court in *Newdow* declared unconstitutional voluntary public-school Pledge-recitation policies, the issue of future judicial appointments would have played a far larger role in the 2004 Presidential election than it in fact did.²⁶⁵

To be sure, none of these examples compels the conclusion that the practice of judicial minimalism will never serve to enhance the quality of democratic deliberation in American society. But they do suggest how attenuated the link is between the practice of minimalism and the democratic values motivating Professor Sunstein’s project.

C. *Overlapping Consensus: Why and How?*

The political philosophy of John Rawls stresses the challenge of negotiating successfully the reasonable yet irreconcilable disagreements regarding basic questions of religion, morality, and philosophy that characterize modern, heterogeneous, democratic societies.²⁶⁶ Rawls asks how such a pluralistic society can achieve social unity in the context of a just society, constituted by free and equal

263. See *supra* notes 135-141, 240-243 and accompanying text.

264. See *supra* notes 197-207, 244 and accompanying text.

265. On judicial appointments and the election, see, for example, Neil S. Siegel, *The election and the U.S. Supreme Court*, CHI. TRIB., Nov. 2, 2004, § 1, at 21, which states:

It is unfortunate that a sitting justice’s illness should be necessary to focus the public’s attention on the critical legal questions that hang in the balance. But that is where we are. Voters should ask what kind of Supreme Court they want for the next few decades before casting their ballots.

266. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

citizens, and governed through democratic institutions. His answer is an overlapping consensus on a political conception of justice.²⁶⁷ “Such a consensus,” he writes, “consists of all the reasonable opposing religious, philosophical, and moral doctrines likely to persist over generations and to gain a sizable body of adherents in a more or less just constitutional regime, a regime in which the criterion of justice is that political conception itself.”²⁶⁸

Inspired by Rawls’ theorizing about justice, Professor Sunstein seeks to apply Rawlsian political philosophy to constitutional decisionmaking:

[A] minimalist court attempts to achieve a great goal of [a heterogeneous] society: making agreement possible when agreement is necessary, and making agreement unnecessary when agreement is impossible. This goal is associated both with promoting social stability and with achieving a form of mutual respect.²⁶⁹

Professor Sunstein’s assumptions and conclusions are suspect. For one thing, this defense of minimalism assumes that “promoting social stability” and “achieving a form of mutual respect” can be more important than protecting fundamental constitutional rights. More concretely, considerations of social stability support the proposition that the Court should not have decided *Brown v. Board of Education*.²⁷⁰ It was not obvious to many Americans in the 1950s that de jure segregation was unreasonable, let alone a moral and constitutional outrage. Indeed, parts of the country were polarized over the issue, and the Court came close to losing its bet with constitutional destiny as massive resistance in Southern states threatened outright repudiation of the *Brown* decision.²⁷¹

Nor is it evident that minimalist judicial decisions actually will tend to achieve the goal of stabilizing society and promoting mutual respect. One possible approach to this vexing problem would be to suggest that the common ground among diverse Justices who sign on to minimalist decisions may have the best chance of matching the overlapping consensus in American society. Yet this line of thinking is subject to the critique previously articulated at the end of Part I: minimalism requires a story connecting the ideological and methodological views of the Justices to divergences in the population at large. Otherwise, compromising on principle to get along with one’s colleagues has little to do with the democratic values minimalism seeks to promote. Pre-empirically and as a general matter, it seems

267. *See id.* at 15.

268. *Id.*

269. SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 50.

270. 347 U.S. 483 (1954).

271. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 694 (2d ed. 2005).

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just as likely that narrow and shallow Supreme Court rulings will extend the agony by stringing the country along with unclear decisions as social conflicts continue to fester — until the Court finally steps in and provides real guidance.

D. *Theory's Unavoidability*

As explored earlier,²⁷² there is much to be said for Professor Sunstein's recognition that the theoretical ambition of contemporary constitutional theory renders the field somewhat out of touch with the practice of constitutional adjudication. He goes too far in the other direction, however, in suggesting that judicial minimalists can sidestep basic questions about "the legitimate role of the Supreme Court in the constitutional order."²⁷³ This is a critical point. Minimalists cannot avoid constitutional theory because minimalism cannot identify when minimalism should be employed. Rather, minimalism itself presupposes an antecedent, broader theoretical enterprise, one of whose purposes is to evaluate whether and when a narrow and shallow approach makes sense. The basic aim of this nonminimalist theoretical endeavor is to distinguish questions that are for the political process from those that are for the courts. Professor Sunstein implicitly, if unwittingly, concedes this point in stating that most of the Justices "embrace minimalism — usually, not always — for reasons connected with their conception of the role of the Supreme Court in American government."²⁷⁴

Indeed, Professor Sunstein himself participates in this broader theoretical enterprise in at least two ways. First, he chooses to focus on the avoidance of decision and error costs and the promotion of democratic deliberation and overlapping consensus as constitutional values that judicial decisionmaking should advance. Second, he sketches when a narrow and shallow approach makes sense from the standpoint of best advancing those values.²⁷⁵ He therefore stresses that

272. See *supra* notes 1-9 and accompanying text (critiquing the turn to high theory in academic constitutional law).

273. SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 8.

274. *Id.* at 9. It might be suggested in response that Professor Sunstein's theory makes room for broad *Hamdi*-type decisions — that it allows for the exceptional movement to grand theory. Indeed, minimalism might be justified in part because it not only allows for the special, grand case but also gives special import and majesty to such a case. To be sure, Professor Sunstein would agree that there is some place, however limited, for breadth and depth on the Supreme Court. But the point remains that in order to create such space, he must step outside his theory of judicial minimalism; the theory itself does not provide any room.

275. *Id.* at 46-60 (identifying, *inter alia*, the problems with judicial minimalism in certain settings, and recommending when minimalism, as opposed to maximalism, should be employed).

“the choice between minimalism and the alternatives depends partly on pragmatic considerations and partly on judgments about the capacities of various institutional actors.”²⁷⁶ He further submits that a minimalist approach is not advisable when “the interest at stake ought to be judged off-limits to politics,”²⁷⁷ but that in other situations “democracy-promoting forms of minimalism, designed to promote both accountability and reason-giving, are appropriate and salutary judicial functions; they promote constitutional ideals without risking excessive judicial intervention into political domains.”²⁷⁸

The theory of judicial minimalism, therefore, does not alter the important lesson, instantiated in decisions such as *Brown* and *Hamdi*, for which modern constitutional theory must account: leaving questions to the majoritarian political process is not an inherent good in a democratic society. Rather, a constitutional democracy should be guided by a persuasive account of which issues are for the political process and which are for the courts. Constitutional theory will prove useful in this regard only to the extent it makes sense of the actual practice of constitutional adjudication and helps that practice to fulfill its deepest aspirations by clarifying the judiciary’s appropriate role in the American system of government.

To meet that challenge, an attractive constitutional theory must transcend a narrow and shallow approach to constitutional decisionmaking. Judicial minimalism can provide no guidance concerning the foundational questions of constitutional theory: clarifying whether and when the Supreme Court should stay its hand, when the Justices should intervene in the political process to a limited extent, and when the Court should step up and expound robustly the fundamental law of the Constitution. Rich jurisprudential traditions are associated with each of those postures. They include the judicial-restraint school of Justice Frankfurter and Professors Bickel and

276. *Id.* at 56. Specifically, Professor Sunstein argues:

[I]t is worthwhile to attempt a broad and deep solution (1) when judges have considerable confidence in the merits of that solution, (2) when the solution can reduce costly uncertainty for future courts and litigants, (3) when advance planning is important, and (4) when a maximalist approach will promote democratic goals either by creating the preconditions for democracy or by imposing good incentives on elected officials, incentives to which they are likely to be responsive. Minimalism becomes more attractive (1) when judges are proceeding in the midst of (constitutionally relevant) factual or moral uncertainty and rapidly changing circumstances, (2) when any solution seems likely to be confounded by future cases, (3) when the need for advance planning does not seem insistent, and (4) when the preconditions for democratic self-government are not at stake and democratic goals are not likely to be promoted by a rule-bound judgment.

Id. at 57.

277. *Id.* at 56.

278. *Id.* at 28. See also *id.* at 26 (distinguishing among “democracy-promoting, democracy-foreclosing, and democracy-permitting outcomes”).

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Ely,²⁷⁹ the heroic tradition of *Brown*, and — one should not forget — the negative heroic tradition of *Korematsu* and *Dred Scott v. Sandford*.²⁸⁰ Inductively, through close study of actual constitutional cases, modern constitutional theory can help the bench and bar to sort out when and why the Justices should assume one judicial role rather than another. The suggestion that one of those judicial postures does and should dominate misses a lot of what is — and ought to be — going on inside a sophisticated institution in our democracy and throughout much of our history.

Narrow and shallow decisions, in other words, constitute just one potential tool. And if all legal scholars have is a hammer, they will err in perceiving every problem as a nail. If Justices make the same mistake, the consequences can be unfortunate, even tragic.

E. *The Court as Guardian*

Implicit throughout the above assessment of judicial minimalism's normative attractiveness is this insistent demand of our constitutional culture: often the Justices have a duty to resolve important constitutional questions, especially those implicating the fundamental rights of individuals.²⁸¹ This obligation is more important than the rule-of-law values of stability, consistency, predictability, and (I would add) sincerity implicated in *Blakely* and *Newdow*. For example, the outcome in *Hamdi* underscores that minimalism writ large would eviscerate an essential part of the Supreme Court's role — and comparative advantage — in our constitutional system of separate but interrelated powers. Relative to the President, Congress, and the states, the Justices are more insulated from the pressures of majoritarian politics and therefore better equipped to protect minority rights.²⁸² Accordingly, there are times when the Court should step up to the plate and insist that the Constitution's protections be vindicated

279. See generally BICKEL, *supra* note 12; ELY, *supra* note 24.

280. 60 U.S. 393 (1856).

281. Cf. Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1838 (2004) (“A core value of the neutral-principles tradition that has been lacking from minimalist theory is its affirmative, as opposed to just negative, defense of judicial power. Rather than just defending judicial power on the ground that it is not so bad, the neutral-principles tradition affirmatively embraced judicial power as a mechanism to enforce the rule of law.”).

282. See, e.g., BICKEL, *supra* note 12, at 25-26 (“Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.”); STONE, *supra* note 214, at 543 (“The comparative advantages of courts over the executive and legislative branches in interpreting and enforcing constitutional rights are striking. Responsiveness to the electorate is essential to the day-to-day workings of democracy, but as the framers of the Constitution well understood, that responsiveness can also lead elected officials too readily to sacrifice the rights of a despised or feared minority.”).

robustly, not narrowly and shallowly. The Court's decision in *Brown v. Board of Education* came close to realizing that aspiration,²⁸³ and *Hamdi* is no minimalist tract. As the executive branch pressed the claim that the President possesses inherent authority as Commander in Chief to designate an American citizen an enemy combatant and to detain him indefinitely without access to counsel even absent congressional authorization, the Congress did nothing.²⁸⁴ Congress still has done nothing. Not so the Court.

Minimalism's promise, therefore, does not lie in providing a template for how the Justices should decide most or all cases before the Court. The potential payoff, rather, resides in prescribing targeted interventions in a limited number of cases. Those cases do not include the *Blakelys* and *Hamdis* of the docket, where it is altogether appropriate for the Justices to vindicate basic rule-of-law and constitutional values. Rather, minimalism may be appropriate in cases raising questions concerning which, as Professor Sunstein has developed persuasively,²⁸⁵ there exists profound moral disagreement within American society; the Court has good reason not to be confident that it knows (or would be wise to impose on the country at a certain time) the appropriate resolution; and the citizenry, in grappling with the question, might profit from — and actually engage in — further democratic debate and reflection.

Of course, it can be extraordinarily difficult to discern whether a situation calls for maximalism, minimalism, or something in between. And while it is a primary task of constitutional theory to provide guidance on this question, no decision rules are available; resolutions ultimately turn on such considerations as those discussed immediately above, as well as careful exercises of the human faculty of judgment. The answers that are formulated, moreover, inevitably will be contestable and contested. Leaders within the gay-rights movement in this country, for example, are currently debating among themselves whether it would make sense to ease off of litigating the marriage issue for now and push harder for civil unions — the animating

283. 347 U.S. 483 (1954). Some commentators have argued that *Brown* was not decided as broadly and (especially) as deeply as the conventional wisdom would have it. *See, e.g.*, SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 37-39; Rosen, *supra* note 48, at 44-45. For example, a lack of depth may in part account for why the Warren Court's decisions were ambiguous as applied to the issue of affirmative action. Indeed, it would not be unfair to suggest that the discussion of *Brown* in this Article draws not only from what the Court in *Brown* actually said, but also from what the decision has come to represent. Even restricting oneself to the opinion itself, however, *Brown* is far from minimalist.

284. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639 (2004) ("The Government maintains that no explicit authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution."); Brief for the Respondents at 13-18, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696) (making this argument).

285. *See* SUNSTEIN, ONE CASE AT A TIME, *supra* note 9, at 54-60 (articulating the view expressed in the text).

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concern being that the movements's legal goals may be years ahead of its political and cultural strategy.²⁸⁶

Such difficulties of discernment notwithstanding, prescription in select situations constitutes the defining theme of the legal tradition from which Professor Sunstein draws much inspiration. *Naim v. Naim*,²⁸⁷ to cite an historic example whose extraordinary circumstances underscore the point, was not understood by Justice Frankfurter or Professor Bickel to exemplify how the Court should go about its daily business.²⁸⁸ Rather, it constituted a rare accommodation that principle made with pragmatism for the ultimate purpose of vindicating *Brown*'s promise. Principle lost the battle for a few more years,²⁸⁹ a significant — and perhaps intolerable — cost, but at least principle put itself in a position not to lose the war. In other circumstances, however, leaving more questions to the political process clearly will not be advisable. In *Brown* itself, the minimalist option would have been for the Court to hold that racially segregated schools violated equal protection because they were funded unequally. The contemporary constitutional culture in the United States would reject as indefensible any constitutional theory endorsing that hypothetical outcome in *Brown* as preferable to the Court's actual holding.²⁹⁰ Similarly, it is difficult to see how the country or the Court would have been better served by a narrower and shallower decision in *Hamdi*.

286. See, e.g., John M. Broder, *Groups Debate Slower Strategy on Gay Rights*, N.Y. TIMES, Dec. 9, 2004, at A1 (“Leaders of the gay rights movement are embroiled in a bitter and increasingly public debate over whether they should moderate their goals in the wake of bruising losses in November when 11 states approved constitutional amendments prohibiting same-sex marriages.”); Adam Liptak, *Caution in Court for Gay Rights Groups*, N.Y. TIMES, Nov. 12, 2004, at A16 (“Fearful that aggressive action could backfire and generate public hostility, gay rights groups are planning to limit the scope of their legal challenges to the constitutional amendments banning gay marriage that were passed by 11 states last week. The groups are making a temporary retreat from their most fundamental goal, winning the right for same-sex marriages, and focusing instead on those measures that addressed civil unions in some way.”).

287. 350 U.S. 985 (1956) (refusing to hear a challenge to Virginia's antimiscegenation statute).

288. See BICKEL, *supra* note 12, at 174 (providing the classic defense of the Court's action); Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1981 (1999) (reviewing SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 9) (discussing the issue and quoting a November 4, 1955 memorandum by Justice Frankfurter to the Conference).

289. See *Loving v. Virginia*, 388 U.S. 1 (1967) (unanimously striking down Virginia's antimiscegenation statute as a violation of equal protection and due process).

290. To be sure, *Brown* had its share of legal critics in the years after it came down. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959) (using his notion of “neutral principles” to criticize *Brown*). But time has so secured the decision's legitimacy in the American popular and constitutional culture that not even a self-described staunch originalist like Justice Scalia is prepared to repudiate that most nonoriginalist decision. See Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, THE NEW YORKER, March 28, 2005, at 54 (“Though Scalia says that he would have voted with the majority in *Brown*, it's hard to see an originalist justification for it.”).

CONCLUSION

To the extent the theory of judicial minimalism aspires to be a descriptively accurate account of the Court's work, it requires a relatively crisp operational definition that can be falsified. But the only such definition reasonably available undercuts minimalism's normative aspirations. It is doubtful that, understood according to its operational criterion, the theory will generate the normative benefits Professor Sunstein identifies. Accordingly, minimalism must either give up its claims to falsifiability or significantly temper its assertion of prescriptive appeal.

Moreover, insofar as the foregoing analysis of the October 2003 Term is illustrative of a larger reality, the falsifiable variant of minimalism is, in fact, descriptively false as a general matter. This Article has taken seriously the only operational definition of minimalism discernable in Professor Sunstein's writings, applied that definition rigorously, and shown that it fails generally to account for the Justices' decisionmaking during an important, recent Term.

Minimalism, in short, cannot have it all. But can it have something? Most likely, it can. If the version of minimalism that is empirically testable is neither descriptively valid nor normatively attractive, then Professor Sunstein's work can be rehabilitated in at least two ways. First, minimalism could replace its provocative descriptive assertion that the Court typically decides cases "as narrowly and shallowly as possible" with the more modest — but less clearly inaccurate — suggestion that a majority of the Justices (whether considered individually or collectively) tend to favor *relatively* narrow and shallow holdings; that is, they tend to forego broader and deeper alternatives in deciding cases, even if they do not go so far as to adopt the narrowest and shallowest rationale reasonably available. That claim, although more difficult to test than Professor Sunstein's more aggressive description contention,²⁹¹ could nonetheless then be subjected to empirical testing.

Alternatively, judicial minimalism could abandon Professor Sunstein's claims of descriptive accuracy and reinterpret itself to be an entirely normative theory designed to serve certain substantive ends. Reformulated in this fashion, however, it is not clear what the thrust of the theory is. If the point is to conserve judicial legitimacy, how exactly is it distinct from, and similar to, Professor Bickel's foundational work on the passive virtues?²⁹² If the purpose, rather, is to promote democratic deliberation, what can courts do, beyond what

291. See *supra* note 48.

292. See *supra* note 12.

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Professor Ely has identified,²⁹³ meaningfully to advance that cause? If the goal is instead overlapping consensus, how does Professor Sunstein offer a *legal* theory at all? Finally, if the end of judicial minimalism is to advance all those values and perhaps others as well, how do they trade off when they conflict in a given case? In short, minimalism can be saved as a normative account, but then it seems underdeveloped at this point. Moreover, Professor Sunstein's emphasis on narrowness and shallowness is somewhat misplaced because a normative theory will call for breadth and depth whenever necessary to serve the values that the theory is supposed to advance.

My own judgment is that minimalism would be employed most usefully to counsel close consideration — at the opinion-writing phase in select situations — of the powerful lessons of prudence, caution, and restraint that are present in Professor Sunstein's work. As indicated above,²⁹⁴ such a move would bring the theory of judicial minimalism closer to the grand Bickelian tradition into which Professor Sunstein has breathed new life.

293. *See supra* note 24.

294. *See supra* text accompanying notes 285-290 (arguing that minimalism possesses greater power to prescribe in select situations than to describe the Supreme Court's general behavior).