CASS R. SUNSTEIN

ONE CASE AT A TIME

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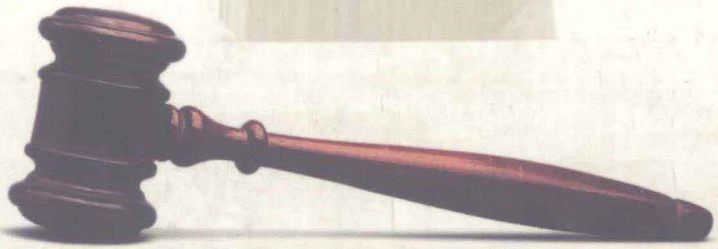

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Judicial Minimalism on the Supreme Court

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For Ellen

Preface

The most remarkable constitutional case in recent years involved the "right to die." The particular question was whether the Constitution confers a right to physician-assisted suicide. The Supreme Court appeared to say that the Constitution confers no such right; at least this was how the case was widely reported. But a careful reading shows something different. A majority of five justices merely said that there is no general right to suicide, assisted or otherwise, and it left open the possibility that under special circumstances, people might have a right to physician-assisted suicide after all. In other words, the Court left the most fundamental questions undecided. Far from being odd or anomalous, this is the current Court's usual approach. In this way, the Court is part of a long historical tradition. Anglo-American courts often take small rather than large steps, bracketing the hardest and most divisive issues.

My goal in this book is to identify and to defend a distinctive form of judicial decision-making, which I call "minimalism." Judicial minimalism has both procedural and substantive components. I devote more space to the procedural components, but the substance is also important.

Procedure and Substance

Procedure first: 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 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.

Judicial minimalism can be characterized as a form of "judicial restraint," but it is certainly not an ordinary form. Minimalist judges are entirely willing to invalidate some laws. They reject "restraint" as a general creed, because it is excessively general. Minimalists are not committed to majority rule in all contexts. Majoritarianism is itself a form of maximalism.

Nor do minimalists embrace the contemporary enthusiasm for reliance on the original meaning of the Constitution. For good minimalists, "originalism" is unacceptable precisely because it is so broad and ambitious. Originalists have a general theory and favor wide rules; minimalists are for this reason highly suspicious of originalism.

But judicial minimalism is hardly well treated as a form of judicial "activism." Minimalists are protective of their own precedents and cautious about imposing their own views on the rest of society. Certainly they disfavor broad rules that would draw a wide range of democratically enacted legislation into question. Nor is minimalism easily characterized as "liberal" or "conservative." On the contrary, minimalists attempt, to the extent that they can, to bracket debates between liberals and conservatives. They prefer to leave fundamental issues undecided. This is their most distinctive characteristic.

With respect to substance: Any minimalist will operate against an agreed-upon background. Anyone who seeks to leave things undecided is likely to accept a wide range of things, and these constitute a "core" of agreement about constitutional essentials. In American constitutional law at the turn of the century, a distinctive set of substantive ideals now forms that core. All members of the constitutional culture agree, for example, that the Constitution protects broad rights to engage in political dissent; to be free from discrimination or mistreatment because of one's religious convictions; to be protected against torture or physical abuse by the police; to be ruled by laws that have a degree of clarity, and to have access to court to ensure that the laws have been

accurately applied; to be free from subordination on the basis of race and sex. Minimalism's substance can be captured in these central ideas. Constitutional debates operate with these fixed points in the background.

From these points it follows that a minimalist court is not skeptical or agnostic. On the contrary, it is committed to a set of animating ideals. One of my goals here is to elaborate, in minimalist fashion, a particular set of ideals, taken as the preconditions of a well-functioning constitutional democracy. The ideal of democracy comes with its own internal morality—the internal morality of democracy—and there is a large difference between democracy, properly understood, and whatever it is that a certain majority has chosen to do at a certain time. The most important features of democracy's internal morality are connected with the principle of political equality. This principle animates the free speech ideal; it shows why the government may not entrench itself; it shows why there is a special barrier to government efforts to interfere with political speech; and it also explains why some efforts to regulate the "speech market" may be consistent with the free speech principle. The principle of political equality also helps explain the operation of the equal protection clause. It shows why government may not impose second-class citizenship on any group—why there are no "castes" here. I connect this understanding with discrimination on the basis of race, sex, and sexual orientation, and also with the project of minimalism.

A Minimalist Supreme Court

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, 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.

The current Supreme Court embraces minimalism. Indeed, judicial minimalism has been the most striking feature of American law in the 1990s. The largest struggles on the Supreme Court have been over

when to speak and when to remain silent, and opposing camps among the justices contest exactly that issue, with the minimalists generally prevailing. There are many examples. Return to the question of physician-assisted suicide. This issue is important in itself, but it is even more important because its resolution bears on the whole question of whether there is a general constitutional right to privacy (including abortion, sexual autonomy, parental rights, and a great deal more). In his opinion for the five-justice majority, Chief Justice William Rehnquist wrote the ambitious, emphatically nonminimalist opinion that he and Justice Scalia have been (unsuccessfully) urging on the Court in the abortion cases—an opinion that would limit the right of privacy, and indeed all fundamental rights under the due process clause, to those rights that are "deeply rooted" in our long-standing "traditions and practices." For better or worse, this idea would nearly bring to a halt the judicial protection of fundamental rights (aside from those specifically mentioned in the Bill of Rights).

Five justices signed the Rehnquist opinion, which seems like a large development that goes well beyond what was necessary to decide the particular case. But for those attuned to the Court's minimalist tendencies, the crucial aspects of the case lie elsewhere. Justice Sandra Day O'Connor wrote one of her characteristic separate opinions, suggesting that any new development was small and incremental. In her view, all the Court held was that there was no general right to commit suicide. She cautioned that the Court had not decided whether a competent person experiencing great suffering had a constitutional right to control the circumstances of an imminent death. That issue remained to be decided on another day. And, in a revealing and in its way hilarious opening to his own separate opinion, Justice Stephen Breyer wrote, "I believe that Justice O'Connor's views, which I share, have greater legal significance than the Court's opinion suggests. I join her separate opinion, except insofar as it joins the majority."

What this means is that a majority of five justices on the Court has signaled the possible existence of a right to physician-assisted suicide in compelling circumstances—and thus a five-justice majority has rejected the whole approach in Rehnquist's opinion (for a five-justice majority). O'Connor's opinion speaks for a group of justices who are not quite clear on how to handle fundamental rights under the due process clause

and who want to leave the hardest and most contested issues for continuing democratic, and judicial, debate.

This is one of a large number of examples. In dealing with free speech and new communications technologies, discrimination on the basis of sexual orientation, affirmative action, and same-sex education, the Court has spoken narrowly and left the fundamental questions undecided. Thus the right to die case signals something large about the Supreme Court as a whole, and offers a clue to understanding the Court's minimalist character. Several of the justices, most notably O'Connor (but also Justices Breyer, Ginsburg, Stevens, and Souter), are cautious about broad rulings and ambitious pronouncements. Usually, they like to decide cases on the narrowest possible grounds. Justice O'Connor's concurrences typically limit the reach of majority decisions, suggest ways of accommodating both sides, and insist to the losers that they haven't lost everything, or for all time. By contrast, other justices, most notably Justice Antonin Scalia (but also Justice Clarence Thomas and sometimes Chief Justice William Rehnquist), think that it is important for the Court to lay down clear, bright-line rules, producing stability and clarity in the law.

One of my goals in this book is to draw some general lessons from an understanding of the U.S. Supreme Court as it enters the new century. In its enthusiasm for minimalism, the Court is not exactly unique, for American constitutional law is rooted in the common law, and the common law process of judgment typically proceeds case by case, offering broad rulings only on rare occasions, when the time seems right. But the current Court is sharply distinguishable from its predecessor courts under Chief Justices Earl Warren and Warren Burger. The Warren Court in particular was enthusiastic about broad rulings, and the Court was not reluctant to accept theoretically ambitious arguments about equality and liberty. The most vivid example is the great case abolishing segregation in the United States, Brown v. Board of Education; but consider also the requirements of the emphatically nonminimalist one person–one vote decision and the mandated Miranda warnings—simply two more illustrations of a tendency to produce broad, rule-like decisions. The Burger Court was quite different—a heterogeneous Court, with a variety of shifting coalitions—but it too showed no general preference for minimalism. I attempt to capture the

character of the Supreme Court in the present era and to defend its controversial way of proceeding as admirably well suited to a number of issues on which the nation is currently in moral flux.

Minimalism and the Democratic Project

My most important goal is to explore the connection between judicial minimalism and democratic self-government. When should a constitutional court rule broadly, and when narrowly? For what conception of democracy ought the Constitution be taken to stand? How might a court best preserve both democratic government and individual rights? How should the Court understand the constitutional ideals of liberty and equality?

In asking such questions, I attempt to show how certain minimalist steps promote rather than undermine democratic processes and catalyze rather than preempt democratic deliberation. My particular areas of concern include affirmative action, discrimination on the basis of sex and sexual orientation, the right to die, and new issues of free speech raised by the explosion of communications technologies. One of my principal goals is to identify the distinctive kinds of minimalism that serve to improve political deliberation; the underlying conception of democracy thus places a high premium on both deliberation (in the sense of reflection and reason-giving) and accountability (in the sense of control by the voters).

The most tyrannical governments are neither deliberative nor accountable. Contemporary America might well be said to have a high degree of accountability but a low level of deliberation. In the notion of deliberative democracy lies the basis of a claim about how a minimalist Supreme Court, concerned about both constitutional ideals and its limited place in the American order, might promote a democratic nation's highest aspirations without preempting democratic processes.

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I

ARGUMENT

1

Leaving Things Undecided

The Constitution speaks broadly and abstractly and about some of our highest aspirations. Many of the great constitutional issues involve the meaning of the basic ideas of "equality" and "liberty." When, if ever, might the government discriminate on the basis of race or sex or sexual orientation? Does the government restrict free speech by, for example, regulating expenditures on campaigns, or controlling the Internet, or requiring educational programming for children or free air time for candidates?

These are large questions. Sometimes the Supreme Court answers them. We will have occasion to discuss the substance of those answers. For the moment let us notice something equally interesting: frequently judges decide very little. They leave things open. About both liberty and equality, they make deliberate decisions about what should be left unsaid. This is a pervasive practice: doing and saying as little as is necessary in order to justify an outcome.

Consider some recent examples. When the Court ruled that the Virginia Military Institute could not exclude women, it pointedly refused to say much about the legitimacy of other single-sex institutions; it left the general question undecided.[1] When the Court struck down an affirmative action program in Richmond, Virginia, it self-consciously refused to impose a broad ban on race-conscious programs; it left that question for another day.[2] When the Court invalidated a Colorado law forbidding measures banning discrimination on the basis of sexual orientation, it said almost nothing about how the Constitution bears on other issues involving homosexuality.[3]

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." Decisional minimalism has two attractive features. First, it is likely to reduce the burdens of judicial decision. It may be very hard, for example, to obtain a ruling on the circumstances under which single-sex education is legitimate. It may be especially hard to do this on a multimember court, consisting of diverse people who disagree on a great deal. A court that tries to agree on that question may find itself with no time for anything else. And a court that tries to agree on that question may find itself in the position of having to obtain and use a great deal of information, information that may not be available to courts (and perhaps not to anyone else).

Second, and more fundamentally, minimalism is likely to make judicial errors less frequent and (above all) less damaging. A court that leaves things open will not foreclose options in a way that may do a great deal of harm. A court may well blunder if it tries, for example, to resolve the question of affirmative action once and for all, or to issue definitive rulings about the role of the First Amendment in an area of new communications technologies. A court that decides relatively little will also reduce the risks that come from intervening in complex systems, where a single-shot intervention can have a range of unanticipated bad consequences.

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. If, for example, the Court says that any regulation of the Internet must be clear rather than vague, and that a ban on "indecent" speech is therefore unconstitutional simply because it is vague, the Court will, in a sense, promote democratic processes by requiring Congress to legislate with specificity. Or if the Court says that any discrimination against homosexuals must be justified in some way, it will promote political deliberation by ensuring that law is not simply a product of unthinking hatred or contempt.

An understanding of minimalism helps to illuminate a range of important and time-honored ideas in constitutional law: that courts should not decide issues unnecessary to the resolution of a case; that courts should refuse to hear cases that are not "ripe" for decision; that courts should avoid deciding constitutional questions; that courts

should respect their own precedents; that courts should not issue advisory opinions; that courts should follow prior holdings but not necessarily prior dicta; that courts should exercise the "passive virtues" associated with maintaining silence on great issues of the day. All of these ideas involve the *constructive use of silence*. Judges often use silence for pragmatic, strategic, or democratic reasons. Of course it is important to study what judges say; but it is equally important to examine what judges do not say, and why they do not say it. As we shall see, the question whether to leave things undecided helps unite a series of otherwise disparate debates in constitutional law.

In this chapter I spell out these ideas. My basic goal is to give a descriptive account of minimalism. In the process I offer two preliminary suggestions about a minimalist path. The first suggestion is that certain forms of minimalism can be democracy-promoting, not only in the sense that they leave issues open for democratic deliberation, but also and more fundamentally in the sense that they promote reason-giving and ensure that certain important decisions are made by democratically accountable actors. Sometimes courts say that Congress, rather than the executive branch, must make particular decisions; sometimes they are careful to ensure that good reasons actually underlie challenged enactments. In so doing, courts are minimalist in the sense that they leave open the most fundamental and difficult constitutional questions; they also attempt to promote democratic accountability and democratic deliberation. Judge-made doctrines are thus part of an effort to ensure that legitimate reasons actually underlie the exercise of public power.

My second suggestion is that a minimalist path usually—not always, but usually—makes a good deal of sense *when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided (on moral or other grounds)*. The complexity may result from a lack of information, from changing circumstances, or from (legally relevant) moral uncertainty. Minimalism makes sense first because courts may resolve those issues incorrectly, and second because courts may create serious problems even if their answers are right. Courts thus try to economize on moral disagreement by refusing to take on other people's deeply held moral commitments when it is not necessary for them to do so in order to decide a case.[4] For this reason courts should usually attempt to issue rulings that leave

things undecided and that, if possible, are catalytic rather than preclusive. They should indulge a presumption in favor of minimalism.

We can link the two points with the suggestion that in such cases, courts should adopt forms of minimalism that can improve and fortify democratic processes. Many rules of constitutional law attempt to promote political accountability and political deliberation. Minimalism is not by any means democracy-promoting by its nature; but it is most interesting when it is democracy-promoting in this way.[5]

Theories

What is the relationship among the Supreme Court, the Constitution, and those whose acts are subject to constitutional attack? We can easily identify some theoretically ambitious responses.

Perhaps the simplest one is *originalist.* On this view, the Court's role is to vindicate an actual historical judgment made by those who ratified the Constitution. Justices Antonin Scalia and Clarence Thomas have been prominent enthusiasts for originalism, at least most of the time. The infamous *Dred Scott* case, saying that the Constitution forbids efforts to eliminate slavery, is a vigorous early statement of the originalist approach.[6] Originalists try to bracket questions of politics and morality and embark on a historical quest. In Chapter 9, I will discuss originalism in some detail. For the moment the central point is that originalism represents an effort to make constitutional law quite rule-like, and in that sense to settle a wide range of constitutional issues in advance. Indeed, that is a central part of the appeal of originalism.

The second response stems from the claim that majority rule is the basic presupposition of American democracy. This claim suggests that courts should uphold any plausible judgments from the democratic branches of government. On this view, courts should permit nonjudicial judgments unless those judgments are outlandish or clearly mistaken. James Bradley Thayer's famous law review article, advocating *a rule of clear mistake,* is the classic statement of this position.[7] The position can be found as well in the writings of Justice Oliver Wendell Holmes, the first Justice Harlan, Justice Felix Frankfurter, and, most recently, Chief Justice William Rehnquist. Innumerable post–New Deal Supreme Court cases, upholding social and economic regulation, fall in this category. Here too there is an effort to resolve constitutional