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Beyond Judicial Minimalism

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BEYOND JUDICIAL MINIMALISM

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I. THE ARGUMENT

Many judges want to avoid broad rulings and theoretical ambition. My goal here is to attempt to understand the grounds for this desire and to explore its limitations. As we shall see, avoidance and modest ambition have an important place in law. But in some domains, minimalism is a terrible blunder.

To offer a preview of my central claims here: Many of the arguments on behalf of minimalism are essentially pragmatic. They involve the costs of decision and the costs of error. Minimalists believe that their approach will minimize both of these costs. Additional arguments for minimalism involve democratic self-government and a norm of civic respect. Minimalists believe that by leaving central issues undecided, they can maintain space for self-governance while also demonstrating respect to people who disagree on fundamental matters.

In many contexts, however, these arguments fail to provide an adequate defense of minimalism. Sometimes minimalist rulings increase the costs of decisions and the magnitude and costs of errors. Predictability is an important value, and minimalist rulings make predictability impossible to achieve. Sometimes nonminimalist rulings increase democratic space, while minimalist decisions require officials to speculate about what the Court will ultimately do. Civic respect is unquestionably important, but sometimes the Constitution is properly read to declare certain practices off-limits. In law, as in ordinary life, the justifications for minimalism often fail, and it is necessary to go well beyond minimalism.

II. MINIMALISMS

A. Shallow and Narrow

When people are confronted with a difficult decision, they often move in the direction of minimalism. Minimalists prefer small steps over large ones. This

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* Felix Frankfurter Professor of Law, Harvard Law School (on leave). I have dealt with aspects of this problem in other places, and I draw on some of the treatments there. *See e.g.* Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harv. U. Press 1999); Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford U. Press 1996). The distinctive feature of this essay consists in the effort to describe the limits of minimalism—and to specify the circumstances in which judges should go beyond it. An earlier version of this essay was delivered as the Kobe Lecture in Japan in August 2008; I am most grateful to my hosts for their kindness and substantive suggestions on that occasion.

preference operates along two distinct dimensions.

First, minimalists want to proceed in a way that is *shallow rather than deep.* In deciding what to do with a relationship or a medical problem, minimalists want to leave the foundational issues undecided. They want to decide what to do, today or tomorrow or next month, without resolving the deepest questions, or without accepting some large account of how the relationship or the problem should be handled.

Second, minimalists want to proceed in way that is *narrow rather than wide.* They want to decide what to do about next month's vacation, or a current problem in the workplace, without deciding how to handle many future vacations, or what to do about problems in the workplace in general. In ordinary life, minimalism, in the form of shallowness and narrowness, can provide a great deal of help with difficult situations. Sensible people often take small steps for that reason.

But for those who embrace minimalism, there is an evident problem. Sometimes shallowness is a bad idea; sometimes it is best to rethink foundational issues. Occasionally one needs to make a large-scale decision about a relationship or a medical problem. Sometimes it is best to settle on a course of action for the workplace and even vacations, rather than to rest content with a series of small decisions. Minimalism might be easiest in the short-run, but in the long-run, it can be extremely destructive. It can be destructive in part because it exports the burdens of decision to one's future self, in a way that might produce a great deal of trouble. However difficult a large decision may be, it may be best to make it, and sooner rather than later.

To come to terms with minimalism, it is necessary to consider two factors: the costs of decisions and the costs of errors. Minimalist rulings might decrease those costs, because they reduce the burdens of decisions in particular cases, and because in some circumstances, they reduce the number and magnitude of errors as well. Both shallowness and narrowness might have virtues on these counts. But we can easily imagine situations in which both depth and width are preferable. A series of case-by-case decisions, with respect to the workplace or a course of medical treatment, might increase the burdens of decision on balance. In addition, such decisions might increase rather than decrease errors. Sometimes people take large steps, rather than small ones, as a way of simplifying their decision-making burdens and ensuring that overall errors will be reduced.

In law, minimalism plays an exceedingly important role. Some judges favor shallow rulings. Such rulings attempt to produce rationales and outcomes on which diverse people can agree, notwithstanding their disagreement on fundamental issues. For example, there are vigorous disputes about the underlying purpose of the free speech guarantee: Should the guarantee be seen as protecting democratic self-government, or the marketplace of ideas, or individual autonomy? Minimalists hope not to resolve these disputes. They seek judgments and rulings that can attract shared support from people who are committed to one or another of these foundational understandings, or who are unsure about the foundations of the free speech principle.

Minimalist judges also like narrow rulings, which do not venture far beyond the problem at hand. They attempt to focus on the particulars of the dispute before the Court. Consider in this light American Chief Justice John Roberts's suggestion that one

advantage of unanimous decisions from the Court is that unanimity leads to narrower rulings. In his words, "[t]he broader the agreement among the justices, the more likely it is [a] decision . . . on the narrowest possible ground[s]."[1] The nine justices have highly diverse views, and if they are able to join a single opinion, that opinion is likely to be narrow rather than broad. This, in the Chief Justice's view, is entirely desirable, as he explained with an aphoristic summary of the pro-narrowness position in constitutional law: "If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more."[2]

Note that shallowness and narrowness are very different. We could imagine a decision that is *shallow but wide*. Consider, for example, the view that racial segregation is always forbidden, unaccompanied by any deep account of what is wrong with racial segregation. We could also imagine a decision that is *deep but narrow*. Consider, for example, a ban on censorship of a particular political protest, accompanied by a theoretically ambitious account of the free speech principle, but limited to the particular situation in which censorship has been imposed. A decision might be both shallow and narrow or both wide and deep, but the two distinctions point in different directions.

It should be clear that both distinctions are ones of degree rather than kind. In most contexts, courts should not decide important cases without giving reasons, and reasons ensure at least some degree of depth. No one favors rulings that are limited to people with the same names or initials as those of the litigants before the Court. But among reasonable alternatives, minimalists show a persistent preference for the shallower and narrower options, especially in cases at the frontiers of constitutional law. In such cases, minimalists fear that justices lack relevant information; they do not have a full sense of the many situations to which a broad rule might apply. Minimalists also fear the potentially harmful effects of decisions that reach far beyond the case at hand. They distrust width and depth because they think that judges are often in a poor position to adopt a theoretically contentious view or to produce a wide rule.

I will return to these points, and to minimalists' characteristic timidity (cowardice?) shortly. For the moment let us notice that to defend their approach, minimalists will have to argue that shallow, narrow rulings will minimize decision costs and error costs. By avoiding depth and width, minimalists hope to eliminate large decision-making burdens. And emphasizing what judges do not know, minimalists characteristically believe that theoretical depth, and width, will produce a great deal of trouble for the future. As in ordinary life, however, we can imagine circumstances in which minimalism cannot be defended on the pragmatic grounds that minimalists characteristically invoke. A series of case-by-case rulings might increase the burden of decision, rather than diminishing them. And if minimalists avoid width, they might unleash subsequent decisionmakers in a way that will produce more errors overall. I will return to these objections below.

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1. Cass R. Sunstein, *The Minimalist*, L.A. Times B11 (May 25, 2006) (quoting Hon. John G. Roberts, Jr., Commencement Address, *Chief Justice Roberts 2006 Commencement Address* (Geo. U. L. Ctr, May 21, 2006) (webcast available at www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=144)).

2. *Id.* (quoting Roberts, *supra* n. 1).

B. *Hollowness, Shallowness, and Conceptual Descents*

It seems clear that people can often agree on constitutional *practices*, and even on constitutional rights, when they cannot agree on constitutional *theories*. In other words, well-functioning constitutional orders try to solve problems through *incompletely theorized agreements*.[3]

Sometimes these agreements involve abstractions, accepted as such amidst severe disagreements on particular cases. We might think of incompletely theorized abstractions as *hollow*, in the sense that they must be filled, and have not yet been filled, with some kind of specification. Thus, people who disagree on whether the Constitution should protect incitement to violence and hate speech can accept a general free speech principle, and those who disagree about whether the Constitution should protect same-sex relationships can accept an abstract antidiscrimination principle. This is an important phenomenon in constitutional law and politics; it makes constitution-making possible. Constitution-makers can agree on abstractions without agreeing on the particular meaning of those abstractions.

A pragmatic argument on behalf of hollowness, in the form of incompletely theorized abstractions, is that nothing else is feasible. Perhaps an effort at specification will prove too contentious; citizens will support the abstraction but not the specification. Or perhaps constitution-makers lack the information that would give them reason for confidence in any specification. If so, the best way to proceed may be to set out a general norm, and to allow posterity to fill it in as it seems fit. As with small steps, hollowness may reduce the burdens of decisions while also minimizing errors. If the drafters of a constitution attempt to specify certain provisions—involving, for example, the power of the executive branch, or the precise content of an equality principle—they may blunder badly, especially when circumstances are likely to change over time.

But sometimes incompletely theorized agreements involve concrete outcomes rather than abstractions. In hard cases, people can agree that a certain practice is or is not constitutional, even when the theories that underlie their judgments sharply diverge. In the day-to-day operation of constitutional practice, shallow rulings help to ensure a sense of what the law is, even amidst large-scale disagreements about what, particularly, accounts for those rules and doctrines.

This latter phenomenon suggests a general strategy for handling some of the most difficult decisions. In ordinary life, we might attempt to bracket the fundamental issues and decide that however they are best resolved, a particular approach makes sense for the next month or year. So too in law, politics, and morality. When people disagree or are uncertain about an abstract issue—is equality more important than liberty? does free will exist? is utilitarianism right? does punishment have retributive aims?—they can often make progress by moving to a level of greater particularity. They attempt a *conceptual descent*. This phenomenon has an especially notable feature: It enlists silence, on certain basic questions, as a device for producing convergence despite disagreement, uncertainty, limits of time and capacity, and heterogeneity. In short, silence can be a

3. I discuss such agreements in detail in Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford U. Press 1996).

constructive force. Incompletely theorized agreements are an important source of successful constitutionalism and social stability; they also provide a way for people to demonstrate mutual respect.

Consider some examples. People may believe that it is important to protect religious liberty while having quite diverse theories about why this is so. Some people may stress what they see as the need for social peace; others may think that religious liberty reflects a principle of equality and a recognition of human dignity; others may invoke utilitarian considerations; still others may think that religious liberty is itself a theological command. Similarly, people may invoke many different grounds for their shared belief that the Constitution should ensure an independent judiciary. Some may think that judicial independence helps ensure against tyranny; others may think that it makes government more democratic; still others may think that it leads to greater efficiency in economic terms.

The agreement on particulars is incompletely theorized in the sense that the relevant participants are clear on the practice or the result without agreeing on the most general theory that accounts for it. Often people can agree that a rule—protecting political dissenters, forbidding government to take private property without paying compensation—makes sense without entirely agreeing on the foundations of their belief. They may accept an outcome—affirming the right to marry, protecting sexually explicit art, banning racial segregation—without understanding or converging on an ultimate ground for that acceptance. Often people can agree not merely on the outcome, but also on a rationale offering low-level or mid-level principles on its behalf. But what ultimately accounts for the outcome, in terms of a full-scale theory of the right or the good, is left unexplained.

There is an extreme case of incomplete theorization, offered when disagreement is especially intense: *full particularity*. This phenomenon occurs when people agree on a result without agreeing on any kind of supporting rationale. They announce what they want to do without offering a reason for doing it. Any rationale—any reason—is by definition more abstract than the result that it supports. Sometimes people do not offer reasons at all, because they do not know what those reasons are, or because they cannot agree on reasons, or because they fear that the reasons that they have would turn out, on reflection, to be inadequate and hence to be misused in the future. Here, decisions are maximally shallow and maximally narrow. Juries usually do not offer reasons for outcomes, and negotiators sometimes conclude that something should happen without saying why it should happen. I will not emphasize this limiting case here, and shall focus instead on outcomes accompanied by low-level or mid-level principles.

My emphasis on incompletely theorized agreements is intended partly as descriptive. These agreements are a pervasive phenomenon in constitution-making and constitutional law. Such agreements are crucial to the effort to make effective decisions amidst intense disagreement. But I mean to make some points about constitutionalism amidst pluralism as well. In short, there are real virtues to avoiding large-scale theoretical conflicts. Incompletely theorized agreements can operate as foundations for both rules and analogies, and such agreements are especially well-suited to the limits of many diverse institutions, including legislators and courts. Incompletely theorized

agreements have their place in the private sector as well. They can be found on university faculties, in the workplace, and even within families. At the same time, there are many problems with incomplete theorization, and those problems are among my central topics here.

C. *Converging on Practices*

It seems clear that outside of law, people may agree on a *correct* outcome even though they do not have a theory to account for their judgments. You may know that dropped objects fall, that snow melts, and that hot stoves burn, without knowing exactly why these facts are true. The same is true for morality, both in general and insofar as it bears on constitutional law. You may know that slavery and genocide are wrong, that government may not stop political protests, that every person should have just one vote, and that it is bad for government to take your land unless it pays for it, without knowing exactly or entirely why these things are so. Moral judgments may be right or true even if they are reached by people who lack a full account of those judgments (though moral reasoners may well do better if they try to offer such an account, a point to which I will return). The same is true for law, constitutional and otherwise. A judge may know that if government punishes religious behavior, it has acted unlawfully, without having a full account of why this principle has been accepted as law. We may thus offer an epistemological point: People can know *that* X is true without entirely knowing *why* X is true.

There is a political point as well. Sometimes people can agree on individual judgments even if they disagree on general theory. In American constitutional law, for example, diverse judges may agree that *Roe v. Wade,*[4] protecting the right to choose abortion, should not be overruled, though the reasons that lead each of them to that conclusion sharply diverge. Some people think that the Court should respect its own precedents; others think that *Roe* was rightly decided as a way of protecting women's equality; others think that the case was rightly decided as a way of protecting privacy; others think that the decision reflects an appropriate judgment about the social role of religion; still others think that restrictions on abortion are unlikely to protect fetuses in the world, and so the decision is good for pragmatic or consequentialist reasons. We can find incompletely theorized political agreements on particular outcomes in many areas of law and politics—on both sides of disputes over national security, on both sides of equality controversies, both sides of disputes over criminal justice, both sides of disputes over taxation.

D. *Hollowness vs. Shallowness*

Incompletely theorized agreements play a pervasive role in constitutional law and in society generally. Return to agreements that are hollow in the sense that people who accept the principle need not agree on what it entails in particular cases. The agreement is hollow in the sense that it is incompletely specified. Much of the key work must be

4. 410 U.S. 113 (1973). On the refusal to overrule *Roe*, see *Planned Parenthood v. Casey*, 505 U.S. 833, 845-46 (1992).

done by others, often through case-by-case judgments, specifying the hollow abstraction at the point of application. Constitutional provisions usually protect such rights as "freedom of speech," "religious liberty," and "equality under the law," and citizens agree on those abstractions in the midst of sharp dispute about what these provisions really entail. Much lawmaking also becomes possible only because of this phenomenon. And when agreement on a written constitution is difficult or impossible, it is because it is hard to obtain consensus on the governing abstractions. Consider the case of Israel, which lacks a written constitution because citizens have been unable to agree about basic principles, even if they are pitched at a high level of abstraction.

Observers of democratic constitutionalism might place particular emphasis on a different kind of phenomenon, of special interest for constitutional law in courts: incompletely theorized agreements on particular outcomes, accompanied by agreements on the shallow principles that account for them. There is no algorithm by which to distinguish between a high-level theory and one that operates at an intermediate or lower level. We might consider, as conspicuous examples of high-level theories, Kantianism and utilitarianism, and see illustrations in the many distinguished (academic) efforts to understand such areas as tort law, contract law, free speech, and the law of equality as undergirded by highly abstract theories of the right or the good. By contrast, we might think of shallow principles as including most of the ordinary material of constitutional justification or constitutional "doctrine"—the general class of principles and justifications that courts tend to offer. These principles and justifications are not said to derive from any particular large theories of the right or the good, have ambiguous relations to large theories, and are compatible with more than one such theory.

Recall that by the term "shallow principles," I refer to something relative, not absolute; I mean to do the same thing with the terms "theories" and "abstractions" (which I use interchangeably). In this setting, the notions "shallow," "high," and "abstract" are best understood in comparative terms, like the terms "big" and "old" and "unusual." Thus the "clear and present danger" standard for regulation of speech in American law is a relative abstraction when compared with the claim that government may not stop a terrorist's speech counseling violence on the Internet, or that members of the Nazi Party may march in some large city. But the "clear and present danger" idea is relatively particular when compared with the claim that nations should adopt the constitutional abstraction "freedom of speech." The term "freedom of speech" is a relative abstraction when measured against the claim that campaign finance laws are acceptable, but the same term is less abstract than the grounds that justify free speech, as in, for example, the principle of personal autonomy or the idea of an unrestricted marketplace of ideas.

In analogical reasoning, this phenomenon occurs all the time. In the law of discrimination, for example, many people think that sex discrimination is "like" race discrimination, and should be treated similarly even if they lack or cannot agree on a general theory of when discrimination is unacceptable. In the law of free speech, many people agree that a ban on speech by a terrorist or a Communist is "like" a ban on speech by a member of any opposing party, and should be treated similarly—even if they lack or cannot agree on a general theory about the foundations of the free speech principle.

III. DEFENDING SMALL STEPS

A. Incomplete Theorization and Silence

What might be said on behalf of incompletely theorized agreements about the content of a Constitution, or incompletely theorized judgments about particular constitutional cases? What is so good about shallowness? Some people think of incomplete theorization as quite unfortunate—as embarrassing, or reflective of some important problem, or a failure of nerve, or even philistine. When people theorize, by raising the level of abstraction, they do so to reveal bias, or confusion, or inconsistency. Surely participants in politics and constitutional law should not abandon this effort.

There is important truth in these usual thoughts, as we shall see below; it would be senseless to celebrate theoretical modesty at all times and in all contexts. Sometimes participants in constitutional law and politics have sufficient information, and sufficient agreement, to be very ambitious. Sometimes they have to reason ambitiously in order to resolve cases. To the extent that the theoretical capacities of judges, or others, are infallible, theoretical ambition seems like nothing to lament. But judges are hardly infallible, and incompletely theorized judgments help make constitutions and constitutional law possible. They even help make social life possible. Silence—on something that may prove false, obtuse, or excessively contentious—can help minimize conflict, allow the present to learn from the future, and save a great deal of time and expense. What is said and resolved may be no more important than what is left out. There are a number of points here.

The first and most obvious point is that incompletely theorized agreements about constitutional principles and cases may be necessary for social stability. They are well-suited to a world—and especially a legal world—containing social disagreement on large-scale issues. Stability would be difficult to obtain if fundamental disagreements broke out in every case of public or private dispute. In the nations of Eastern Europe, stable constitution-making has been possible only because the meaning of the document's broad terms has not been specified in advance.

Second, incompletely theorized agreements can promote two goals of a constitutional democracy and a liberal legal system: to enable people to live together, and to permit them to show each other a measure of reciprocity and mutual respect. The use of low-level principles or rules allows judges on multimember bodies and perhaps even citizens generally to find a common way of life without producing unnecessary antagonism. Both rules and low-level principles make it unnecessary to resolve fundamental disagreements. At the same time, incompletely theorized agreements allow people to show each other a high degree of mutual respect, civility, reciprocity, or even charity. Frequently ordinary people disagree in some deep way on an issue—what to do in the Middle East, pornography, same-sex marriages, the war on terror—and sometimes they agree not to discuss that issue much, as a way of deferring to each other's strong convictions and showing a measure of reciprocity and respect (even if they do not at all respect the particular conviction that is at stake). If reciprocity and mutual respect are desirable, it follows that public officials or judges, perhaps even more than ordinary people, should not challenge their fellow citizens' deepest and most defining

commitments, at least if those commitments are reasonable and if there is no need for them to do so. Indeed, we can see a kind of political charity in the refusal to contest those commitments when life can proceed without any such contest.

To be sure, some fundamental commitments are appropriately challenged in the legal system or within other multimember bodies. Some such commitments are ruled off-limits by the Constitution itself. Many provisions involving basic rights have this function. Of course it is not always disrespectful to disagree with someone in a fundamental way; on the contrary, such disagreements may sometimes reflect profound respect. When defining commitments are based on demonstrable errors of fact or logic, it is appropriate to contest them. So too when those commitments are rooted in a rejection of the basic dignity of all human beings, or when it is necessary to undertake the contest to resolve a genuine problem. But many cases can be resolved in an incompletely theorized way, and this is the ordinary stuff of constitutional law; that is what I am emphasizing here.

The third point is that for arbiters of social controversies, incompletely theorized agreements have the crucial function of reducing the political cost of enduring disagreements. If participants in constitutional law disavow large-scale theories, then losers in particular cases lose much less. They lose a decision, but not the world. They may win on another occasion. Their own theory has not been rejected or ruled inadmissible. When the authoritative rationale for the result is disconnected from abstract theories of the good or the right, the losers can submit to legal obligations, even if reluctantly, without being forced to renounce their largest ideals.

Fourth, incompletely theorized agreements are especially valuable when a society seeks moral evolution and even progress over time. Consider the area of equality, where considerable change has occurred in the past and will inevitably occur in the future. A completely theorized judgment would be unable to accommodate changes in facts or values. If a culture really did attain a theoretical end-state, it would become rigid and calcified; we would know what we thought about everything. Unless the complete theorization were error-free, this would disserve posterity. Hence incompletely theorized agreements are a key to debates over equality in both law and politics, with issues being raised about whether discrimination on the basis of sexual orientation, age, disability, and others are analogous to discrimination on the basis of race; such agreements have the important advantage of allowing a large degree of openness to new facts and perspectives.

At one point, we might think that same-sex relations are akin to incest; at another point, we might find the analogy bizarre. Of course a completely theorized judgment would have many virtues if it is correct. But at any particular moment in time, this is an unlikely prospect for human beings, not excluding judges in constitutional disputes, or those entrusted with the task of creating constitutional provisions.

Compare practical reasoning in ordinary life. At a certain time, you may well refuse to make decisions that seem foundational in character—about, for example, whether to get married within the next year, or whether to have two, three, or four children, or whether to live in London or Paris. Part of the reason for this refusal is knowledge that your understandings of both facts and values may well change. Indeed,

your identity may itself change in important and relevant ways, and for this reason, a set of firm commitments in advance—something like a fully theorized conception of your life course—would make no sense. Legal systems and nations are not altogether different. I will turn shortly to the limitations of these arguments.

Fifth, shallow rulings seem well-suited to the institutional limits of the federal judiciary, which might well blunder if it tries for theoretical depth. Recall that shallowness can reduce the costs of decisions and the costs of errors. If judges were infallible, and if they had immediate access to the correct theory, there would be little reason to object to depth. But if judges do not think easily or well about theoretical questions, they might favor shallowness, which minimizes their own burdens at the same time that it reduces errors.

I am not attempting to defend shallowness in all circumstances. We will soon see that much can be wrong with it. The point is that for a series of reasons, many of them pragmatic, shallowness might be chosen by sensible judges.

B. Burke and His Rationalist Adversaries

Those who emphasize incompletely theorized agreements owe an evident debt to Edmund Burke, who was, in a sense, the great theorist of incomplete theorization. I do not attempt anything like an exegesis of Burke, an exceedingly complex figure, in this space, but let us turn briefly to Burke himself and, in particular, to his great essay on the French Revolution, in which he rejected the revolutionary temperament because of its theoretical ambition.[5]

Burke's key claim is that the "science of constructing a commonwealth, . . . or reforming it, is, like every other experimental science, not to be taught *a priori*."[6] To make this argument, Burke opposes theories and abstractions, developed by individual minds, to traditions, built up by many minds over long periods. In his most vivid passage, Burke writes:

> The science of government being, therefore, so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution than any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again without having models and patterns of approved utility before his eyes.[7]

It is for this reason that Burke describes the "spirit of innovation" as "the result of a selfish temper and confined views,"[8] and offers the term "prejudice" as one of enthusiastic approval, noting that "instead of casting away all our old prejudices, we cherish them to a very considerable degree."[9] Emphasizing the critical importance of stability, Burke adds a reference to "the evils of inconstancy and versatility, ten thousand

5. Edmund Burke, *Reflections on the Revolution in France*, in *The Portable Edmund Burke* 416 (Isaac Kramnick ed., Penguin 1999).

6. *Id.* at 442.

7. *Id.* at 443.

8. *Id.* at 428.

9. *Id.* at 451.

times worse than those of obstinacy and the blindest prejudice."[10] Burke's sharpest distinction, then, is between established practices and individual reason. He contends that reasonable citizens, aware of their own limitations, will effectively delegate decision-making authority to their own traditions.

> We are afraid to put men to live and trade each on his own private stock of reason; [simply] because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages. Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them.[11]

Burke was enthusiastic about reasoning by analogy, and it is easy to imagine an unambivalently Burkean advocate of incompletely theorized agreements. But Burke's enthusiasm for traditions is contentious, and for good reason. In the aftermath of apartheid, should South Africa have built carefully, and in a tradition-bound way, on its own past? Or should it have adopted a constitution on the basis of some kind of account of human liberty and equality? Social practices, and constitution-making, can be incompletely theorized while also being anti-Burkean. The South African Constitution itself includes stirring and tradition-rejecting ideals of various kinds, and those ideals can be accepted from many different foundations. In constitutional adjudication, judges who believe in incompletely theorized agreements might require government to come up with a reason for its practice—and insist that a tradition, or a longstanding practice, is not itself a reason.

In constitutional law, we can imagine fierce contests between Burkeans and their more rationalist adversaries, even if both camps are willing to march under the banner of incomplete theorization.[12] Those contests cannot be resolved in the abstract; everything depends on the nature of the relevant traditions and the competence of those who propose to subject them to critical scrutiny. If traditions are good, and if the scrutinizers are bad, traditionalism is appealing. If the traditions include injustice and cruelty, and if the scrutinizers are reliable, then traditionalism makes no sense. We shall shortly see how these points bears on theoretical ambition in constitutional law.

C. *Narrowness*

My emphasis thus far has been on shallowness; it is time to reintroduce narrowness, which is simpler to handle. In some domains of constitutional law, it does seem best to focus on the particulars and to avoid width. A court might sensibly rule that one exercise of presidential power is unconstitutional, without saying much about other imaginable exercises of presidential power. A court might sensibly rule that sex segregation is impermissible in one domain, without saying much about whether sex segregation might be impermissible in other domains. A court might strike one restriction on speech on the Internet, while also refusing to lay down broad rules governing restrictions of speech on the Internet. Recall here Chief Justice Roberts's plea

10. Burke, *supra* n. 5, at 457.
11. *Id.* at 451.
12. For a discussion, see Cass R. Sunstein, *Burkean Minimalism*, 105 Mich. L. Rev. 353 (2006).

for narrowness and his suggestion that if it is not necessary for a court to say more to decide a case, it is necessary for a court not to say more to decide a case.

But is Chief Justice Roberts correct? Why would sensible judges embrace narrowness? We can isolate several reasons. First, institutional reality may require it. On a multimember court, consisted of several (strong-willed?) people, it might be possible to reach a consensus on a particular outcome but not on a wide rule. Second, wide rulings might impose serious decisional burdens on judges, even if the institutional problem could be overcome. To issue a wide ruling that covers sex segregation, or speech on the Internet, may require judges to ask and answer questions for which they lack relevant information. Third, wide rulings might turn out to embarrass the future. To the extent that courts are in a poor position to generate rules that fit diverse situations, their efforts to do so might produce serious blunders.

These are (again) points about the costs of decisions and the costs of errors. But there is an additional point, involving democratic self-government. In the constitutional domain, narrow rules preserve a great deal of space for continuing discussion and debate. Imagine, for example, that a court is asked to issue some wide ruling involving the rights of gays and lesbians or the authority of the President. A refusal to issue that ruling, and a narrow ruling focused on particulars, allows room for continuing argument in the democratic domain. To be sure, a judicial decision that refuses to impose constitutional constraints, and that says (for example) that governments can discriminate against gays and lesbians as they choose, allows democratic space by definition. But in many nations, arguments about morality, and about what government legitimately does, take place in the domain of constitutional argument. In many ways, it is desirable if leaders and citizens generally are permitted to offer their competing views about the meaning of the Constitution itself.

IV. AGAINST MINIMALISM

A. Beyond Narrowness

To see what might be wrong, let us notice that the points just offered are subject to reasonable objections. They do not, in the end, provide an adequate justification of minimalism.

Suppose, for example, that a court is operating in a domain where predictability is extremely important—as, for example, because the issue comes up often, and it is simply too messy to have to proceed without a sense of what the law is. If this is so, narrow rulings will impose significant decisionmaking burdens on others—and very possibly increase decision costs on balance. Imagine that the question is the appropriate scope of review of judicial review of agency interpretations of law. That question arises with great frequency, and if a high court does not issue a wide ruling, then lower courts will have to handle a lot of uncertainty. If an area of law is a mess, because of a series of narrow rulings, posterity might be harmed rather than helped.

We can see here a serious problem with Chief Justice Roberts' embrace of unanimous rulings. Roberts favors such rulings in part on the ground that they promote predictability. If the court is not fractured, everyone will know what the law is. But as

Roberts also contends, a unanimous ruling is more likely to be narrow, simply because a wide ruling is unlikely to be able to attract a consensus. The problem is that a unanimous, narrow ruling might offer significantly less guidance than a divided, wide ruling. From the standpoint of promoting predictability, it is better, perhaps, to have a 7-2 ruling in favor of some general proposition than a 9-0 ruling in favor of some narrow proposition, limited to particular facts.

It is possible in this light to appreciate certain movements toward width in constitutional law. After decades of grappling with the question of when, exactly, a confession can be said to be voluntary, the Supreme Court issued its wide ruling in *Miranda*[13] case—essentially requiring a set of warnings to precede any interrogation.[14] An explanation of this unusually wide step is that the task of deciding on the voluntariness of confessions, on a case-by-case basis, was simply too confusing and difficult. In the interest of clarity and predictability, a wide rule seemed best. Or consider the question whether and when a sexually explicit film should be regulable as "obscenity." After decades of administering a test that invited difficult case-by-case inquiries, the Court adopted for an approach that included greater clarity and width.[15] A defense of that approach is that it greatly reduced decisional burdens, in a way that was justified in light of a) the Court's considerable experience with the problem and b) the frequency with which the issue had arisen.

As a third example, consider the problem of school segregation. For decades, the Court investigated, on a case-by-case basis, the question whether "separate" really was "equal." In ruling that separate was inherently unequal,[16] the Court adopted a general principle about equality, to be sure (and I will have something to say about that in a moment). But the Court also issued a wide rule, one that ensured a simple, clear answer to a question that had been pressed repeatedly and been answered only with difficulty.

B. Narrowness and Width, Standards and Rules

We should now be able to see that the choice between narrowness and width raises many of the questions raised by the choice between standards and rules, a topic that has produced a large literature.[17] A standard leads a great deal of work to be done by subsequent decision-makers; by contrast, a rule resolves cases in advance, and ensures that the work of subsequent decision-makers is essentially mechanical. For example, a 60 mile per hour speed limit is a rule, whereas a standard might say that a driver must drive in a "reasonable and prudent manner." Under the specified speed limit, it is obvious whether someone has violated the law; under a standard, the judge has to do a fair bit of work to decide that question.

A preference for minimalism is very close, analytically, to a preference for standards over rules. To be sure, the two preferences are not identical. A holding that is governed by a standard is in an important respect narrow, because the standard needs to

13. 384 U.S. 436 (1966).
14. *Id.* at 478–79.
15. *Miller v. Cal.*, 413 U.S. 15, 24 (1973).
16. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).
17. *E.g.* Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992).

be specified in particular cases; but a narrow decision need not be a standard at all. Such a decision may even be a rule, restricted to an unusual set of facts; it may not set out a standard of any kind. What I am emphasizing is that by its very nature, a minimalist ruling leaves a great deal undecided, in a way that frees up future decision-makers but also leaves them to some extent at sea. This is exactly the characteristic that distinguishes standards from rules.

A preference for standards makes best sense when it serves to reduce the number and magnitude of errors, and when it serves as well to reduce the aggregate burdens of decision. Suppose again that the Supreme Court is attempting to resolve a difficult question involving, say, the constitutional status of segregation on the basis of sex. The Court might think that it lacks the information that would enable it to set out a sensible rule. It may believe that sex segregation is not acceptable when it excludes women from a valuable educational opportunity, but that it is permissible to have sex-segregated sports teams, and that the legitimacy of sex-segregated high school education presents a difficult question. The Court might believe that a simple rule—sex segregation yes, or sex segregation no—would be outrun by reality. It might also believe that a complex rule, specifying the validity of segregation across diverse contexts, is too difficult to specify during an early encounter with the question.

Points of this kind do justify a preference for narrow rulings in many contexts. The problem—the general one for those who favor narrowness—is that there is no reason to think that judges should *systematically* favor standards over rules. Whether standards are desirable, and whether narrowness makes sense depend on whether the arguments that justify them apply in the particular case. There is no justification for a general presumption in favor of standards or narrowness. The pragmatic arguments that justify narrowness will often call for its repudiation. I am suggesting, then, that it is often sensible for judges to go beyond minimalism in the form of narrowness, because the pragmatic and democratic arguments that (sometimes) call for small steps often argue strongly in favor of large ones. If judges are concerned with the costs of decisions and the costs of errors, they will often find themselves settling on wide rules.

Let us now turn to the question of shallowness in this light.

C. *Conceptual Ascents: From Shallowness to Depth*

Borrowing from Henry Sidgwick's writings on ethical method,[18] a critic of shallowness, in the form of incompletely theorized agreements, might respond that constitutional law should frequently use ambitious theories.[19] For example, there is often good reason for people interested in constitutional rights to raise the level of abstraction and ultimately to resort to large-scale theory. Concrete judgments about particular cases can prove inadequate for morality or constitutional law. Sometimes people do not have clear intuitions about how cases should come out. Sometimes their intuitions are insufficiently reflective. Sometimes seemingly similar cases provoke different reactions, and it is necessary to raise the level of theoretical ambition to explain

18. *See* Henry Sidgwick, *The Methods of Ethics* 96–104 (7th ed., U. Chi. Press 1907).

19. This is the tendency in Ronald Dworkin's *Law's Empire* (Belknap Press 1986).

whether those different reactions are justified, or to show that the seemingly similar cases are different after all. Sometimes people simply disagree.

By looking at broader principles, we may be able to mediate the disagreement. In any case there is a problem of explaining our considered judgments about particular cases, in order to see whether they are not just a product of accident or error. When modest judges joins an opinion that is incompletely theorized, they must rely on a reason or a principle, justifying one outcome rather than another. The opinion must itself refer to a reason or principle; it cannot just announce a victor. Perhaps the low-level principle is wrong, because it fails to fit with other cases, or because it is not defensible as a matter of (legally relevant) political morality.

Here is another way to put the point. Sometimes it is burdensome to rule in a theoretically ambitious way, and sometimes shallow decisions can be wrong. A judge who thinks more ambitiously—about, for example, affirmative action, abortion, and discrimination on the basis of sexual orientation—might be able to produce safeguards against blunders. In the abstract, the incompletely theorized agreement may be nothing to celebrate. If a judge is reasoning well, he should have before him a range of other cases, C through Z, in which the principle is tested against others and refined. At least if he is a distinguished judge, he will experience a kind of "conceptual ascent," in which the more or less isolated and small low-level principle is finally made part of a more general theory. Perhaps this would be a paralyzing task, and perhaps our judge need not often attempt it. But it is an appropriate model for understanding law and an appropriate aspiration for evaluating judicial and political outcomes. Judges who insist on staying at a low level of theoretical ambition are philistines, even ostriches.

Return to ordinary life. If someone is unsure what to do with a relationship or a medical problem, he might not do so well if he avoids the foundational questions. If he can answer those questions well, he might be able to choose far more wisely than he will do if he plods along with decisions that are at once narrow and shallow. Something similar seems to be true in the constitutional domain. Indeed, we might go beyond necessity and speak instead of opportunity. Perhaps it is best to see constitutional provisions as positively inviting a degree of depth, and therefore to celebrate those occasions in which courts announce the nature of the foundational commitments that underlie one or another right. In the domain of equality, the ban on racial segregation is not properly taken as a tribute to the importance of predictability. Instead the Court deepened the foundations of the equality norm, essentially seeing it as a ban on government efforts to subordinate an identifiable group. In the domain of sex equality, the Supreme Court has issued a narrow ruling that also offers a degree of depth, because it opts for a particular conception of what the equality principle is about.

At least if they have time and competence, moral and constitutional reasoners thinking about basic rights should be encouraged to attempt a degree of theoretical ambition. In democratic processes, it is appropriate and sometimes indispensable to challenge existing practice in abstract terms. The same is true in constitutional law. And while narrow rulings leave posterity less constrained, the absence of constraint may be a vice, rather than a virtue, if the result is to leave nearly everything up for grabs.

As I have noted, minimalist decisions have many virtues. They might reflect the

institutional limits of the judiciary; they can reduce the social costs of disagreement; they seem to demonstrate humility and mutual respect. Both narrowness and shallowness may be critical to successful constitution-making in a pluralistic society. The points bear on constitutional disputes as well. In a well-functioning constitutional democracy, judges are usually reluctant to invoke philosophical abstractions as a basis for invalidating the outcomes of electoral processes. They are reluctant because they know that they may misunderstand the relevant philosophical arguments, and they seek to show respect to the diverse citizens in their nation. A conceptual ascent might be appealing in the abstract, but if those who ascend will blunder, they might stay close to the ground. But as judicial confidence grows, perhaps because of extended experience, the argument for depth grows as well.

D. Fundamentals

Incompletely theorized agreements, reflecting a degree of shallowness, have many virtues, but I have said enough to show that their virtues are partial. Stability, for example, is brought about by such agreements, and stability is usually desirable; but a constitutional system that is stable and unjust should probably be made less stable. Consider two qualifications to what has been said thus far. Some cases cannot be decided *at all* without introducing a fair amount in the way of theory. Some constitutional cases cannot be decided *well* without introducing more ambitious theory. If a good theory (involving, for example, the right to free speech) is available, and if judges can be persuaded that the theory is good, there should be no taboo on its judicial acceptance.

What of disagreement? The discussion thus far has focused on the need for convergence. There is indeed such a need; but it is only part of the picture. In law, as in politics, disagreement can be a productive and creative force, revealing error, showing gaps, moving discussion and results in good directions. Many constitutional orders place a high premium on "government by discussion," and when the process is working well, this is true for the judiciary as well as for other institutions. Agreements may be a product of coercion, subtle or not, or of a failure of imagination.

Constitutional disagreements have many legitimate sources. Two of these sources are especially important. First, people may share general commitments but disagree on particular outcomes. Second, people's disagreements on general principles may produce disagreement over particular outcomes and low-level propositions as well. People who think that an autonomy principle accounts for freedom of speech may also think that the government cannot regulate truthful, nondeceptive commercial advertising—whereas people who think that freedom of speech is basically a democratic idea, and is focused on political speech, may have no interest in protecting commercial advertising at all. Constitutional theorizing can have a salutary function in part because it tests low-level principles by reference to more ambitious claims. Disagreements can be productive by virtue of this process of testing.

Certainly if everyone having a reasonable general view converges on a particular (by hypothesis reasonable) judgment, nothing is amiss. But if an agreement is incompletely theorized, there is a risk that everyone who participates in the agreement is

mistaken, and hence that the outcome is mistaken. There is also a risk that someone who is reasonable has not participated, and that if that person were included, the agreement would break down. Over time, incompletely theorized agreements should be subject to scrutiny and critique, at least in democratic arenas, and sometimes in courtrooms as well. That process may result in more ambitious thinking than constitutional law ordinarily entails.

Social consensus is hardly a consideration that outweighs everything else. Usually it would be much better to have a just outcome, rejected by many people, than an unjust outcome with which all or most agree. A just constitution is more important than an agreed-upon constitution. Consensus or agreement is important largely because of its connection with stability, itself a valuable but far from overriding social goal. It may well be right to make an unjust constitutional order a lot less stable. We have seen that incompletely theorized agreements, even if stable and broadly supported, may conceal or reflect injustice. Certainly agreements should be more fully theorized when the relevant theory is plainly right and people can be shown that it is right, or when the invocation of the theory is necessary to decide cases. None of this is inconsistent with what I have claimed here.

It would be foolish to say that no general theory about constitutional law or rights can produce agreement, even more foolish to deny that some general theories deserve support, and most foolish of all to say that incompletely theorized agreements warrant respect whatever their content. Shallowness, no less than narrowness, has pragmatic justifications, and in some cases, those justifications will often prove inadequate. It is true that more ambitious decisions create real losers, who will not be pleased to find that their defining commitments have been ruled off-limits. But sometimes the losers deserve to lose. Consider, for example, the ambition and relative depth embodied in judicial rulings that racial segregation is unconstitutional, that government may not take stands in favor of particular religions, that the free speech principle is rooted in the ideal of democratic self-government, and that the equality principle prevents governments from turning the sex difference into a systematic source of social disadvantages.

For good reasons, deep rulings of this kind are rare; most of the time, shallowness and narrowness play crucial roles. But in the most glorious moments in democratic life, national decisions reflect a degree of theoretical depth, and they are wide rather than narrow; consider the American Revolution, the Emancipation Proclamation, the New Deal, the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990. The same is true of constitutional law; consider *Brown v. Board of Education*,[20] *New York Times Company v. Sullivan*,[21] *Brandenburg v. Ohio*.[22] Those moments deserve celebration, not lament.

20. 347 U.S. 483.
21. 376 U.S. 254 (1964).
22. 395 U.S. 444 (1969).