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TESTING MINIMALISM: A REPLY

Cass R. Sunstein*

Some judges are less ambitious than others; they have minimalist tendencies. Minimalists are unambitious along two dimensions. First, they seek to rule narrowly rather than broadly. In a single case, they do not wish to resolve other, related problems that might have relevant differences. They are willing to live with the costs and burdens of uncertainty, which they tend to prefer to the risks of premature resolution of difficult issues.¹ Second, minimalists seek to rule shallowly rather than deeply, in the sense that they favor arguments that do not take a stand on the foundational debates in law and politics. They prefer incompletely theorized agreements, by which diverse people, from their different perspectives, can unite behind modest rather than immodest theorizing.² They believe that such agreements recognize the difficulty of resolving foundational debates, and that they also allow people, including judges, to show one another a large measure of mutual respect.

In prominent cases, some judges favor minimalism, and others do not. Justice O'Connor, for example, has often shown a preference for case-by-case judgments that leave the most difficult questions for another day.³ Justice Scalia, by contrast, is no minimalist.⁴ He endorses an ambitious theory of constitutionalism—"originalism"—and he often uses that theory to decide cases.⁵ Much of the time, he prefers to rule broadly rather than narrowly, because of his preference for rule-bound judgments that give clear guidance for the future. Of course minimalism and maximalism should be seen as relative rather than absolute. Justice O'Connor is a minimalist, much of the time, but she does not always follow a minimalist path, and even when she does, she does not say that her rulings are limited to people with the same initials as the parties to the particular litigation.

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1. E.g., RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 80 (2003):

The pragmatic judge tends to favor narrow over broad grounds of decision in the early stages in the development of a legal doctrine. . . . What the judge has before him is the facts of the particular case, not the facts of future cases. He can try to imagine what those cases will be like, but the likelihood of error in such an imaginative projection is great. Working outward, in stages, from the facts before him to future cases with new facts that may suggest the desirability of altering the contours of the applicable rules, the judge avoids premature generalization

2. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 103 HARV. L. REV. 1733 (1995).

3. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 579–85 (2003) (O'Connor, J., concurring); *City of Chicago v. Morales*, 527 U.S. 41, 64–69 (1999) (O'Connor, J., concurring); *Washington v. Glucksberg*, 521 U.S. 702, 736–38 (1997) (O'Connor, J., concurring).

4. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

5. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

Justice Scalia has maximalist tendencies, but he does not try, in a single equal protection case, to resolve all imaginable equal protection cases.

I am extremely grateful to Neil Siegel for his generous and careful analysis of my claims about minimalism and the Supreme Court.⁶ Siegel offers three objections to those claims.⁷ First, he contends that minimalism has not been precisely defined, and that the presence of diverse and inconsistent definitions makes it difficult to test the claim that any particular court, or any particular decision, is minimalist in character. Second, Siegel claims that the most usable definition of minimalism is palpably inconsistent with Court's behavior during the 2003 term (and probably more generally). Third, he contends that minimalism, suitably defined, is unattractive, among other things because it violates the Supreme Court's roles as guide and as guardian. These are instructive objections. But the disagreement between Siegel and me is smaller (more minimal!) than it appears, and I hope that a few clarifying remarks will help to illuminate both the nature and the uses of the minimalist project.

I. MINIMALISMS

What is minimalism? Let us begin with three distinctions. First, *procedural minimalism* entails an effort to limit the scope and ambition of judicial rulings; procedural minimalism should be distinguished from what I call *minimalism's substance*, which entails an identifiable set of substantive commitments (to, for example, fair procedures and the rule of law).⁸ Second, procedural minimalism as a general category should be distinguished from the subcategory of *democracy-forcing minimalism*, which involves an effort to issue narrow rulings that do not mandate ultimate outcomes but that force decisions by politically accountable actors.⁹ The Court might, for example, refuse to resolve a hard constitutional problem and rule more narrowly that Congress must authorize an intrusion on constitutionally sensitive interests.¹⁰ Third, denials of certiorari and justiciability doctrines, by which the Court refuses to reach the merits, should be distinguished from narrow and incompletely theorized judgments, by which the Court resolves the merits

6. Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005).

7. He focuses on CASS R. SUNSTEIN, ONE CASE AT A TIME (1999) [hereinafter SUNSTEIN, ONE CASE AT A TIME] and 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*]. I discuss minimalism at various points in CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREMIST RIGHT-WING COURTS ARE WRONG FOR AMERICA (forthcoming 2005).

8. See SUNSTEIN, ONE CASE AT A TIME, *supra* note 7, at 61–68. In particular, see the suggestion that it is “important to distinguish between minimalist procedure and minimalist substance.” *Id.* at 61.

9. *Id.* at 24–36.

10. See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958).

but without much foreclosing the future.¹¹ When the Court denies certiorari, or holds that a decision is unreviewable, it is adopting a form of procedural minimalism, but that form is importantly different from narrow and incompletely theorized judgments. I hope that I made these distinctions adequately in earlier writings, but very possibly not; Siegel is certainly correct to insist on their importance.

Siegel's principal concern, and mine as well, is procedural minimalism in the form of narrow and incompletely theorized rulings. Quoting from a 2004 op-ed of mine, Siegel suggests that procedural minimalism requires courts to decide "the largest issues of the day . . . as narrowly as possible."¹² Hence he offers a testable hypothesis, to the effect that a decision is minimalist if it involves an "intentional choice by a majority of the Justices . . . to decide a case on the narrowest and shallowest grounds reasonably open to them, even though broader and deeper rationale(s) were reasonably available."¹³

Siegel should certainly be commended for offering a testable hypothesis, as I did not. He is right to say that there is a great deal of room for empirical work on the Supreme Court's uses of minimalism. But I never meant to suggest that members of the Court pursue minimalism with the intensity and rigor suggested by Siegel's hypothesis. To be sure, it is possible to imagine a set of judges, or perhaps even a court, taking the trouble to identify the possible rationales for certain decisions and consistently selecting the narrowest and less ambitious of these. But no real-world court is likely to act in this way; and for reasons that Siegel identifies, such a court would be nothing to celebrate, if only because it would give so little guidance for the future. A court of this kind would turn minimalism into a kind of dogma or theology. It would not use minimalism on the intensely pragmatic grounds that sometimes support it.¹⁴

When I suggest that the current Supreme Court (often) favors procedural minimalism, then, I mean to say only that in the most difficult and controversial domains, the Court tends to choose relatively narrow and unambitious grounds.¹⁵ The Court has not accepted a large-scale theory of constitutional interpretation; it proceeds by building cautiously on precedent, in the fashion of common law courts. Unfortunately, my claim—that minimalists prefer relatively narrow and unambitious

11. See SUNSTEIN, ONE CASE AT A TIME, *supra* note 7, at 39–41.

12. Siegel, *supra* note 6, at 1954 (quoting Sunstein, *The Smallest Court*, *supra* note 7).

13. Siegel, *supra* note 6, at 1963.

14. See SUNSTEIN, ONE CASE AT A TIME, *supra* note 7, at 46–60. Note, in the spirit of Siegel's critique, that a decision that is both wide and deep might also leave many issues undecided. Consider, for example, a decision to the effect that people have a constitutional right, on autonomy grounds, to avoid "undue burdens" on their medical choices. Courts that leave things undecided after broad and ambitious rulings should not be treated as minimalist.

15. Siegel identifies this possibility. Siegel, *supra* note 6, at 2016. He adds that the suggestion that the Court favors "relatively narrow and shallow holdings" is "less clearly inaccurate," and notes that this claim could be tested empirically. *Id.* at 2019. I agree.

grounds—is not entirely easy to test empirically. To test that claim, it would be necessary to identify a large number of cases, to specify the possible grounds for decision, and to see how often the Court selected narrower grounds in the face of competing possibilities. It would also be necessary to specify what counts as minimalism along all relevant dimensions, and to decide how to count a decision in which minimalism along one dimension (say, avoiding the merits) produces maximalism along another dimension (say, through a wide ruling on standing). A great deal of coding would be necessary by people with internal understanding of the relevant cases. Notwithstanding the difficulties, there is a great deal of room for empirical testing of minimalism. In the absence of empirical work, I can suggest only that in many of the most prominent cases in recent years, the Court has rejected both width and depth. Siegel himself offers a number of examples.¹⁶

II. MINIMALISM FALSIFIED?

As I have said, Siegel understands minimalism in absolute rather than relative terms, as involving an intentional decision “to decide a case on the narrowest and shallowest grounds reasonably open to” the Court.¹⁷ He explores a number of decisions from the October 2003 term to see whether the Court was minimalist in that sense. He finds that if this is the right account of minimalism, the Court has not consistently followed it.

Consider a few examples. In *Blakely v. Washington*,¹⁸ the Court did refuse to decide the validity of the Federal Sentencing Guidelines, but that should be unsurprising; what matters is that the Court could have ruled on the Sixth Amendment question in a way that was more narrowly limited to the facts. In *McConnell v. Federal Election Commission*,¹⁹ the Court left many issues undecided and generally avoided width, but it did not rule on the narrowest possible grounds, especially in its expansive understanding of “corruption” in politics.²⁰ Siegel agrees that the Court pursued a fairly minimalist path in *Locke v. Davey*²¹ and *Tennessee v. Lane*,²² though more in the latter case than in the former.²³ But he does not find minimalism in two of the Court’s most eagerly awaited decisions, *Elk Grove Unified School District v. Newdow*²⁴ and *Rumsfeld v.*

16. See Siegel, *supra* note 6, at 1978–82; see also SUNSTEIN, ONE CASE AT A TIME, *supra* note 7, at 76–205.

17. Siegel, *supra* note 6, at 1963.

18. 542 U.S. 296 (2004).

19. 540 U.S. 93 (2003).

20. *Id.* at 223–24.

21. 540 U.S. 712 (2004).

22. 541 U.S. 509 (2004).

23. Siegel, *supra* note 6, at 1978, 1980.

24. 542 U.S. 1 (2004).

Padilla.²⁵ He acknowledges that *Newdow*, refusing to resolve the constitutionality of the Pledge of Allegiance, was in a sense minimalist,²⁶ but he thinks that *Padilla*, involving a merits-avoiding procedural ground, announced a broad (procedural) rule with large implications for other issues.²⁷

In a series of instructive discussions, Siegel convincingly shows that, in a number of cases in the 2003 term, the Court did not rule in the narrowest imaginable way. But is that big news? Let us identify a continuum of possible outcomes, from a denial of certiorari, to a refusal to reach the merits, to a fact-bound decision that goes barely beyond the immediate parties, to a decision that states an identifiable if narrow rule with an identifiable if shallow rationale, to a decision that offers an identifiable but broad rule, and so on, culminating in a truly maximalist (if also unfathomable) decision that resolves all questions for all time by reference to the most fundamental of principles. Focusing on the 2003 term, Siegel makes a special target of my 2004 op-ed, which, to be sure, does not analyze minimalism in much detail. But the essential claims in that little op-ed may nonetheless hold. In *Newdow*, the Court did refuse to assess the Pledge of Allegiance on the merits. In *Padilla*, the Court did refuse to rule on the merits of an exceptionally controversial issue of presidential authority; the same is true of the *Cheney* case.²⁸ In cases involving sexually explicit material²⁹ and enemy combatants,³⁰ the Court did say more than was strictly speaking “necessary,” but it also showed a tendency toward both narrowness and shallowness insofar as it deliberately refused to resolve some of the key questions raised by the litigants.³¹

Siegel’s most interesting point, it seems to me, is that a decision that is minimalist along one dimension may be wide or deep on another. If a court invokes a procedural ground to avoid the merits, that very ground might be ambitiously reasoned or apply to a wide range of problems not before the Court. Siegel is right to emphasize this possibility. He is also right to identify many ways during the 2003 term in which the Court failed to choose the narrowest possible rationale for its decision. But I wonder if that is the appropriate test of the minimalist hypothesis. Notwithstanding a regrettably loose phrase in an op-ed (“as narrowly as possible”), those who find strong minimalist tendencies in the Supreme Court are inclined to think that Siegel may have mounted an attack, illuminating to be sure, on a strawman.

25. 542 U.S. 426 (2004). The case is discussed in Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47.

26. Siegel, *supra* note 6, at 1982.

27. *Id.* at 1985.

28. *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004).

29. *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

30. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

31. For detailed discussion, see Sunstein, *supra* note 25.

III. IS MINIMALISM BAD?

Siegel dislikes minimalism; he believes that it is normatively unattractive, because it leaves so much uncertainty. He emphasizes that “often it is critical that the Court provide guidance, either to the lower courts or to the political process.”³² Objecting to the uncertainty introduced by *Rasul v. Bush*,³³ *Newdow*,³⁴ and *Lane*,³⁵ he thinks that the Court should try to provide clear rules for others, so as to reduce aggregate decision costs. Siegel fears that minimalist decisions often leave important problems to lower courts, not to citizens and their representatives, and to that extent such decisions do not promote democratic goals. He believes that the Supreme Court is a guardian as well as a guide, and he insists that it is appropriate for constitutional theory to specify the areas in which ambitious rulings are justified, even when those rulings reject the outcomes of political processes.

I am not sure how much Siegel and I disagree on the normative questions. I have not argued, and I do not believe, that minimalism is generally or always the right path.³⁶ When planning is important, minimalism is hazardous; when minimalism imposes high decisional burdens on others, the argument for minimalism is weakened. Hence minimalism must be evaluated in terms that have become familiar from the rules-standards debate in many domains of the law.³⁷ If it is desirable for the Supreme Court to leave decisions to lower courts, it is partly because lower court decisions are less final, and a degree of percolation can occur there at the same time that deliberative debate takes place within the citizenry as a whole. In the end Siegel and I agree that the argument for minimalism is strongest in an identifiable class of cases: those in which American society is morally divided, those in which the Court is not confident that it knows the right answer, and those in which the citizenry is likely to profit from more sustained debate and reflection.³⁸

If Siegel and I have a normative disagreement, it is because he is more confident than I am about what he calls “the Supreme Court’s role—and comparative advantage—in our constitutional system of separate but interrelated powers.”³⁹ Invoking *Brown v. Board of Education*,⁴⁰ which he labels “heroic,”⁴¹ he emphasizes that as compared to other institutions, “the Justices

32. Siegel, *supra* note 6, at 2003.

33. *Rasul v. Bush*, 542 U.S. 466 (2004).

34. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

35. *Tennessee v. Lane*, 541 U.S. 509 (2004).

36. See SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 7, at 54–60.

37. *See id.* at 57–60.

38. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 7, at 59, 257–58; Siegel, *supra* note 6, at 2016.

39. Siegel, *supra* note 6, at 2015.

40. 347 U.S. 483 (1954).

41. Siegel, *supra* note 6, at 2015.

are more insulated from the pressures of majoritarian politics and therefore better equipped to protect minority rights.”⁴² This is of course a plausible and time-honored view, defended in whole or in part by the early Bickel,⁴³ Dworkin,⁴⁴ and Ely.⁴⁵ Certainly it is easy to find cases in which the Court’s insulation served the nation well. But if we are going to celebrate *Brown*,⁴⁶ we had better not forget about *Dred Scott v. Sandford*⁴⁷ or *Lochner v. New York*⁴⁸ or *Coppage v. Kansas*⁴⁹—or, for that matter, *United States v. Morrison*,⁵⁰ *Kimel v. Florida Board of Regents*,⁵¹ *City of Boerne v. Flores*,⁵² *Board of Trustees of the University of Alabama v. Garrett*,⁵³ *Adarand Constructors, Inc. v. Peña*,⁵⁴ and *Gratz v. Bollinger*.⁵⁵ The Court’s conception of what principle requires, and its understanding of what it means to defend “minority rights,” should not be taken as unerring. From the moral point of view, insulation from majoritarian pressures is sometimes the problem, not the solution.

But good minimalists do not mean to attack the structure of judicial review. They mean to insist instead on Learned Hand’s suggestion, in the midst of World War II, that “[t]he spirit of liberty is that spirit which is not too sure that it is right”⁵⁶ In many of its best moments, the Rehnquist Court has respected that spirit, not least in decisions involving free speech,⁵⁷ sex equality,⁵⁸ the war on terrorism,⁵⁹ and even federalism.⁶⁰ In its own small way, minimalism can be heroic too.

42. *Id.*

43. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

44. RONALD DWORKIN, *LAW’S EMPIRE* (1986).

45. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

46. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

47. 60 U.S. 393 (1857).

48. 198 U.S. 45 (1905).

49. 236 U.S. 1 (1915).

50. 529 U.S. 598 (2000).

51. 528 U.S. 62 (2000).

52. 521 U.S. 507 (1997).

53. 531 U.S. 356 (2001).

54. 515 U.S. 200 (1995).

55. 539 U.S. 244 (2003).

56. LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 190 (Irving Dillard ed., Alfred A. Knopf 1952).

57. *Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Communications Comm’n*, 518 U.S. 727 (1996).

58. *United States v. Virginia*, 518 U.S. 515 (1996).

59. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

60. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159 (2001).

