



RECKLESS CAUTION: THE PERILS OF JUDICIAL MINIMALISM

Tara Smith*

ABSTRACT

Judicial Minimalism is the increasingly popular view that judges decide cases properly to the extent that they minimize their own imprint on the law by meticulously assessing “one case at a time,” ruling on narrow and shallow grounds, eschewing broader theories, and altering entrenched legal practices only incrementally. Minimalism’s ascendancy across the political spectrum, being embraced by advocates of both right-wing and left-wing ideologies, is touted as a sign of its appropriate value-neutrality.

This paper argues that such sought-after neutrality is, in fact, untenable. While others have objected to some of Minimalism’s specific tenets, critics have missed its more fundamental failing: it is an incoherent concept. On analysis, Minimalism’s several planks and rationales prove mutually contradictory and, correspondingly, offer conflicting guidance to judges. Thus the reason that Minimalism can appeal to people of such disparate substantive views is that in practice, it is merely a placeholder invoked to

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sanction a grab-bag of desiderata rather than a distinctive method of decision-making that offers genuine guidance.

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I. INTRODUCTION

It has become increasingly fashionable in the past few years to describe various approaches to appellate court jurisprudence as “Minimalist.” Many view Minimalism as an alternative to the long dominant schools of proper adjudication that favor original intent, original understanding, textualism, perfectionism, representation reinforcement, etc.¹ Briefly, Minimalism is the policy of judges “say- ing no more than necessary to justify an outcome and leaving as

¹ I will capitalize all references to “Minimalism” and Minimalists, although some authors do not. Where I am quoting others, I will leave their usage intact.

much as possible undecided.”² It advocates judicial restraint; judges should refrain from grafting their own views onto the law. Minimalists counsel courts to a course of patience, moderation, and compromise on contentious issues. Judges rule properly to the extent that they meticulously assess “one case at a time,” ruling on “narrow” and “shallow” grounds, eschewing broader theories, and altering entrenched legal practices only incrementally.³

Minimalism is unusual insofar as it draws support from across customary political divisions. Its advocates count such champions of opposing ideologies as Stephen Breyer and the late William Rehnquist, John Roberts and Ruth Bader Ginsberg, Cass Sunstein and Sandra Day O’Connor. Other theoreticians and practitioners of the Minimalist method have included Oliver Wendell Holmes, Felix Frankfurter, Edmund Burke, Michael Oakeshott, James Bradley Thayer, Alexander Bickel, Samuel Alito, Antonin Scalia, Anthony Kennedy, David Souter, John Harlan II (of the Warren Court),⁴ Charles Fried, Henry Friendly, David Strauss, Daniel Farber, Suzanna Sherry, and Adrian Vermeule.⁵ (Some of these are self-described

² CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–4 (1999).

³ *Id.* at 9.

⁴ Harlan’s grandfather served on the Supreme Court from 1877 to 1911. See LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE (1992).

⁵ See generally, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); STEPHEN BREYER, ACTIVE LIBERTY (2005); Steven G. Calabresi, *Introduction to ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 1–42 (Steven G. Calabresi ed. 2007); DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002); SUNSTEIN, *supra* note 2; CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT WING COURTS ARE WRONG FOR AMERICA (2005) [hereinafter SUNSTEIN, RADICALS]; JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 245 (2007); Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O’Connor: A Refusal to “Foreclose the Unanticipated,”* 39 AKRON L. REV. 373, 379–84 (2006); David E. Klein, *Modesty, of a Sort, in the Setting of Precedents,* 86 N.C. L. REV. 1213, 1213–50 (2008); Douglas W. Kmiec, *Overview of the Term: The Rule of Law and Roberts’s Revolution of Restraint,* 34 PEPP. L. REV. 495, 497 (2007); John O. McGinnis & Michael Rappaport, *Panel on Originalism and Pragmatism,* in ORIGINALISM, *supra* at 164; Jeffrey Rosen, *Panel on Originalism and Pragmatism,* in ORIGINALISM, *supra* at 178; Eric J. Segall, *Justice O’Connor and the Rule of Law,* 17 U. FLA. J.L. & PUB. POL’Y 107, 108 (2006); David A. Strauss, *Common Law Constitutional Interpretation,* 63 U. CHI. L. REV. 877 (1996) [hereinafter Strauss, *Common Law*]; David Strauss, *Panel on Originalism and Precedent,* in ORIGINALISM, *supra* at 217 [hereinafter Strauss, *Panel*]; Cass R. Sunstein, *Debate on*

Minimalists, others have been so described by others.) Even President Obama⁶ has earned the label, as has his first Supreme Court appointee, Sonia Sotomayor.⁷ Indeed, this range of advocates is taken as a sign of Minimalism's wisdom. Insofar as adjudication should be ideologically neutral, the fact that proponents of competing policy agendas can all endorse this judicial methodology suggests that Minimalism stands suitably above the political fray. Minimalism, in other words, seemingly offers the exact kind of neutrality that adjudication should offer, thus it stands to reason that it wins support from people devoted to competing political values.

In fact, Minimalism's breadth of appeal, far from testifying to its strength, is a tip-off that something is amiss. Critics have launched a number of lines of attack on Minimalism, several of which are valid.⁸ My focus here, however, will be on one objection that, to my knowledge, has not been heretofore appreciated. Because it is the single most fundamental failing of Minimalism, it lies at the root of many of Minimalism's other defects and helps us to see that the core idea of Minimalism is completely untenable.⁹

Radicals in Robes, in ORIGINALISM, *supra* at 287 [hereinafter Sunstein, *Debate*]; Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234 (2006) [hereinafter Sunstein, *Snakes*].

⁶ Jodi Kantor, *As a Professor, Obama Held Pragmatic Views on the Court*, N.Y. TIMES, May 3, 2009, at A1.

⁷ David Brooks, *Cautious at Heart*, N.Y. TIMES, June 9, 2009, at A27.

⁸ For a variety of criticisms, see, for example, SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS (2007); Sheldon Gelman, *The Hedgehog, The Fox, and the Minimalist*, 89 GEO. L.J. 2297 (2001); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000); Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left Wing Law Professors are Wrong for America*, 106 COLUM. L. REV. 2207 (2006) (reviewing SUNSTEIN, RADICALS, *supra* note 5); Jeffrey Rosen, *The Age of Mixed Results*, THE NEW REPUBLIC, June 28, 1999, at 46; James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623 (2006); 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). For a very brief critical discussion, also see Tara Smith, *Why Originalism Won't Die: Common Mistakes in Competing Theories of Judicial Interpretation*, 2 DUKE J. CONST. L. & PUB. POL'Y 159, 182-83 (2007).

⁹ If Minimalism offers an alternative to other schools of jurisprudence, one might naturally wonder how certain of the figures named here (such as those who are known as strong advocates of originalism) can be included among its ranks. While a fuller answer should become clear from the course of our discussion, suffice it to note here that Minimalism means to transcend certain differences over judicial

As one might expect, the strange bedfellows united by their devotion to Minimalism co-habit peaceably for just so long. Accusations of bad faith are rife, both within the Minimalist ranks and from outside observers. Sunstein claims that conservatives on the bench who preach judicial restraint are really “radicals in robes” offering “conservative perfectionism in historical guise.”¹⁰ Jeffrey Rosen describes himself as a recovering originalist who grew disillusioned when he found that advocates did not practice their creed consistently. Originalists, he complains, are false friends to the principle of restraint.¹¹ For his part, Saikrishna Prakash charges that Sunstein is a “fair weather” Minimalist who actually wants judges to be deferential only in regard to precedents that he likes.¹² Charles Cooper condemns Minimalism as camouflage for a liberal agenda:

The minimalist doctrine is not so much an interpretive methodology as a litigation strategy designed to bring about judicial imposition of the liberal social agenda more gradually and, therefore, more certainly than the abrupt and sweeping edicts favored by the liberal “perfectionists.” But minimalism is liberal judicial activism on the installment plan.¹³

Charges of hypocrisy are easy to make, difficult to prove, and usually philosophically uninteresting, given that they at best indict particular individuals rather than ideas. Yet in this case, what explains the perception of so much bad faith is Minimalism itself. The source of the problem is the idea.

methodology as well as political ideology. See Sunstein, *Snakes*, *supra* note 5, at 2241. Thus it is an “alternative” that will incorporate elements from other theories. Also note that Scalia admits to being a “faint hearted” originalist who, under certain conditions, will surrender his allegiance to the original meaning of a legal text. His jurisprudence is an admitted hybrid, in other words. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 139 (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). Sunstein discusses this in *Debate*, *supra* note 5, at 292.

¹⁰ ORIGINALISM, *supra* note 5, at 32; Sunstein, *Debate*, *supra* note 5, at 296.

¹¹ See Rosen, *McJustice*, THE NEW REPUBLIC, Nov. 5, 2008, at 19; Rosen, *supra* note 5, at 179, 183.

¹² Prakash, *supra* note 8, at 2215; see also *id.* at 2232.

¹³ Charles Cooper, *Debate on Radicals in Robes*, in ORIGINALISM, *supra* note 5, at 303.

Minimalism's primary weakness is not insincerity among the troops; Minimalism would not deliver proper adjudication, if only Minimalists were of better faith and more steadfast in adhering to it. The problem, rather, is in what Minimalists profess to be faithful to. Minimalism *requires* inconsistency because it lacks distinctive content and has no stable identity. It fails to refer to a unique method of judicial decision-making. The prevalent appearance of bad faith is a symptom of the fact that Minimalism lacks a definite identity and correspondingly lacks the ability either to discipline or to guide its would-be practitioners. The concept is incoherent. Or so I will argue.¹⁴

In what follows, I will begin (in Parts II and III) by presenting the basic doctrine of Minimalism and sketching the major rationales typically given on its behalf. The core of the paper (beginning in Part IV) will elaborate my critique, centering on the thesis that Minimalism, in practice, serves as a placeholder for a grab-bag of desiderata rather than as a genuine method of decision-making that carves out a definite and distinctive type of guidance. The very concept, in other words, is a non-starter.

In Part V, I consider the most likely defenses of Minimalism from these charges, finding that they fail to rescue it. Part VI explains how the aims of Minimalism, on analysis, reflect an essentially distinct mission from that normally addressed in debates over judicial decision-making. Finally, Part VII highlights the damage done by the promiscuous "guidance" of this ideal.

II. MINIMALISM'S BASIC TENETS

Minimalism is the view that courts should resolve cases by issuing narrow rulings that steer clear of broad principles and wide implications. The title of one of Sunstein's books, *One Case at a Time*,¹⁵ aptly conveys the basic idea. Whatever changes are effected through judicial rulings should be small and incremental, as judges should resolve as little as necessary in order to decide the dispute at hand. On the minimalist view, judicial reasoning is not about a court's finding bright lines, but about close work, looking intently

¹⁴ Strictly, Minimalism requires what *looks* like inconsistency; if, indeed, Minimalism has no identity, then "it" cannot be violated. I will expand on this below.

¹⁵ SUNSTEIN, *supra* note 2.

at the particulars of the immediate case before it. Justice O'Connor was fond of saying that justices should be like turtles—"slow and steady," not moving "too fast in any direction."¹⁶ In her final majority opinion before retirement, O'Connor explained the narrowness of the Court's ruling in an abortion case by writing, "we try to limit the solution to the problem."¹⁷ This tack is similarly reflected in Justice Douglas's majority opinion in *Berman v. Parker*, where he wrote that, for the Court to attempt "to define" or trace the limits of the police power (which was central to its ruling) would be fruitless, "for each case must turn on its own facts."¹⁸

As Sunstein explains, Minimalists "favor decisions that are narrow, in the sense that they do not want to resolve issues not before the Court," and decisions that are "shallow, in the sense that they avoid the largest theoretical controversies and can attract support from those with diverse perspectives on the most contentious questions."¹⁹ A Minimalist court is "intensely aware of its own limitations" and thus seeks to confine its rulings by avoiding "clear rules," "abstract theories," and "final resolutions."²⁰ Justice Alito articulated this basic idea in his Senate confirmation hearings, describing his judicial philosophy as centered around trying "to make sure that I get right what I decide," which "counsels in favor of not trying to do too much, not trying to decide questions that are too broad, not trying to decide questions that don't have to be decided, and not going to broader grounds for a decision when a narrower ground is available."²¹ While originalists paint a "heroic picture of judging," according to Sunstein, Minimalism is

¹⁶ TOOBIN, *supra* note 5, at 96.

¹⁷ *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006). The case concerned a law that restricted teenagers' access to abortion, and the court reaffirmed the need to include an exception for medical emergencies but sidestepped larger aspects of abortion's legal status. *See id.*

¹⁸ *Berman v. Parker*, 348 U.S. 26, 32 (1954).

¹⁹ Sunstein, *Snakes*, *supra* note 5, at 2242. As Neil Siegel puts it, Minimalists "decide a case on the narrowest and shallowest grounds reasonably open to them, even though broader and deeper rationale(s) were reasonably available." Siegel, *supra* note 8, at 1963.

²⁰ SUNSTEIN, *supra* note 2, at 9.

²¹ *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 343 (2006) [hereinafter *Hearing*] (statement of J. Samuel A. Alito, Jr.).

far “too quiet” for such grandiosity.²² Under Minimalism, the judicial footprint is minimized. Judges tiptoe.²³

Minimalism is thus averse to finality and to theory. It is skeptical of theoretical “ambition,” favoring decisions that reflect “incompletely theorized agreements in which the most fundamental questions are left undecided.”²⁴ Its strongly Burkean strains “prize stability” and “distrust visionaries.”²⁵ The perfectionism of Ronald Dworkin

²² Sunstein, *Debate*, *supra* note 5, at 296.

²³ Some differentiate finer gradations of Minimalism that emphasize certain of its ends and arguments more than others. See Peters, *supra* note 8 (discussing policentric and juricentric Minimalism and procedural and substantive Minimalism). On procedural Minimalism, also see Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1990 (1999).

²⁴ SUNSTEIN, RADICALS, *supra* note 5, at 27–28 (emphasis in original); Sunstein, *Debate*, *supra* note 5, at 289; Sunstein, *Snakes*, *supra* note 5, at 2242. Several of the high profile rulings with which the Supreme Court concluded the 2008–2009 term reflected this tendency. In *Northwest Austin Municipal Utility District No. 1 v. Holder*, a case concerning the Voting Rights Act, the court focused on the exemption provision and, as described in the *New York Times*, “ducked the central question.” Adam Liptak, *Justices Retain Oversight by U.S. on Voting Rights*, N.Y. TIMES, June 23, 2009, at A1; see also *Nw. Austin Mun. Util. Dist. No. One v. Holder*, No. 08-322, slip op. at 17–18 (U.S. June 22, 2009) (noting that “whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today”). In *Ricci v. DeStefano*, the court’s 5–4 ruling in favor of New Haven fire fighters in a race discrimination case, with Kennedy writing for the majority, “exemplified the cautious approach to judging championed by John Roberts.” *Fairness for Firefighters*, THE ECONOMIST, July 4, 2009, at 26; see also *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009). “Rather than seeking to scrap the whole notion of ‘disparate impact’ law,” the decision restricted the scope of its application. *Fairness for Firefighters*, *supra*. Scalia called attention to the Court’s evasive posture in his concurring opinion, predicting that the larger constitutional issue—“the war between disparate impact and equal protection”—would eventually have to be waged. *Ricci*, 129 S.Ct. at 2683 (Scalia, J., concurring). And in *Caperton v. Massey*, 129 S.Ct. 2252 (2009), a case concerning judicial conflicts of interest, the Court ruled 5–4 (with Kennedy again writing for the majority) that a West Virginia State Supreme Court Justice should have recused himself from a case that involved a company that had given 3 million dollars to his election to the bench. The court refrained, however, from laying out clear guidelines for what constitutes a conflict that would trigger this obligation, confining itself to the more modest conclusion that this much of a donation was too much. See “Not for Sale,” THE ECONOMIST, June 13, 2009, at 36.

²⁵ CASS A. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE 38, 39 (2009). Sunstein cites Scalia’s reasoning as sometimes Burkean, as on the sexual segregation at the Virginia Military Institute in *United States v. Virginia*, 518 U.S. 513 (1996). See SUNSTEIN, *supra*, at 55 nn.50, 56, 66. Sunstein also points to Rehnquist’s concurring opinion in a pledge of

or Justice Brennan, who believed that the “transformative purpose” of the Constitution “embodies an aspiration to social justice, brotherhood, and human dignity,” would be anathema.²⁶ Courts should leave issues open to further deliberation, not presuming to resolve differences definitively. Justice O’Connor, perhaps the most frequently cited practitioner of recent decades, “abhorred absolutes”²⁷ and “offered few principles to support her rulings.”²⁸ Witness her majority opinion in *Richmond v. Croson*²⁹ (a case involving government set-asides for minorities), which basically held that “some affirmative action was permissible—but not too much.”³⁰ In the University of Michigan affirmative action cases a few years later, O’Connor’s siding with the university in *Grutter*³¹ and with the student in *Gratz*³² was explained on the basis of small differences in particulars.³³

Justice Breyer is likewise wary of “any single theory or grand view of law”; the proper approach is a more nimble “attitude.”³⁴ Breyer’s reasoning for splitting his votes in the two Ten Commandments cases of 2005, rejecting the Kentucky courthouse’s display but upholding the display on the Texas state capitol grounds, was quintessential Minimalism insofar as it turned on such factors as who constructed the displays and whether either had provoked complaints from citizens.³⁵

allegiance case, which stressed the fact of the historical practice of reciting “under god” rather than the justification of that practice, as an example of this, see SUNSTEIN, *supra* at 56; the case was *Elk Grove United Sch. Dist. v. Newdow*, 542 US 1, 26–33 (2004).

²⁶ ORIGINALISM, *supra* note 5, at 6–7 (quoting William J. Brennan, Jr., Speech at Georgetown University (1985)).

²⁷ TOOBIN, *supra* note 5, at 218.

²⁸ Jeffrey Rosen, *Supreme Leader*, THE NEW REPUBLIC, June 18, 2007, at 21.

²⁹ 488 U.S. 469 (1989).

³⁰ This characterization is from TOOBIN, *supra* note 5, at 209–10.

³¹ *Grutter v. Bollinger*, 539 U.S. 306, 334–35 (2003).

³² *Gratz v. Bollinger*, 539 U.S. 244, 278 (2003).

³³ TOOBIN, *supra* note 5, at 222–25.

³⁴ BREYER, *supra* note 5, at 19. Breyer was the one Justice who voted exactly as O’Connor had on the two University of Michigan cases. See *Gratz*, 539 U.S. at 281; *Grutter*, 539 U.S. at 310.

³⁵ *McCreary County v. Am. Civil Liberties Union*, 545 U.S. 844 (2005) (rejecting the Kentucky courthouse’s display); *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that the Texas state capitol’s religious monument did not violate the Establishment

In line with this rejection of theory, the Minimalist judge is neutral when it comes to substantive values and policy.³⁶ Minimalists wish to avoid “[taking] sides in large-scale social controversies” or on “the biggest and most contested questions of constitutional law.”³⁷ “Minimalists want judges to decide cases without taking stands on the deepest questions in social life,” Sunstein writes.³⁸ Indeed, this, it is argued, is the strength of Minimalism. It is not aligned with a particular ideology. As Sunstein explains, “Minimalism does not specify the small steps that judges ought to take. It is possible to imagine liberal minimalists and conservative minimalists; majoritarian minimalists and originalist minimalists; ‘active liberty’ minimalists and ‘negative liberty’ minimalists.”³⁹ Judicial “restraint” and judicial “activism,” correspondingly, are understood in value-neutral terms: “Judicial activism is the decision to strike down a federal or state law. Judicial restraint is the decision to uphold it.”⁴⁰

Minimalism, then, is a jurisprudence of deference—to existing law, to previous courts, to the will of the people. It “recognizes the limited role of the federal judiciary and makes a large space for democratic self-government.”⁴¹ “The most important thing we do,” Justice Brandeis said of the Court, “is not doing.”⁴² Justice Roberts has neatly condensed this perspective: “If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more.”⁴³ Indeed, Roberts has frequently expressed his desire for an increase in the number of unanimous and lopsided majority decisions while he is Chief Justice, on the belief that this would reflect a properly narrow, case-bound approach. “The broader the agreement

Clause); TOOBIN, *supra* note 5, at 303–04; *see also* FARBER & SHERRY, *supra* note 5, at 140–68 (discussing Minimalism’s anti-theory cast).

³⁶ See David Strauss’s emphasis on neutrality in *Panel on Originalism and Precedent*, in CALABRESI, *supra* note 5, at 217.

³⁷ SUNSTEIN, *supra* note 5, at 27.

³⁸ *Id.*, at 42.

³⁹ Sunstein, *Snakes*, *supra* note 5, at 2241.

⁴⁰ Rosen, *supra* note 5, at 217 (stating that this is Sunstein’s conception, as well as his own).

⁴¹ SUNSTEIN, *supra* note 5, at xv.

⁴² See BICKEL, *supra* note 5, at 71.

⁴³ SUNSTEIN, *supra* note 25, at 43 (quoting Chief Justice John G. Roberts, Jr., Commencement Address at Georgetown University Law Center (May 21, 2006)).

among the justices, the more likely it is a decision on the narrowest possible grounds."⁴⁴ To frame his thought the other way around: the less "ambitious" and consequential a decision, the easier it should be to attract a large number of Justices' support for it.

At the same time, Justices need to be flexible about Minimalism itself. Sunstein observes that "while minimalism is generally the proper approach to 'frontiers' issues in constitutional law, its own pragmatic foundations suggest that constitutional law should not be insistently or dogmatically minimalist."⁴⁵ "[T]here are times and places in which minimalism is rightly abandoned."⁴⁶ Those who he considers "Rationalist Minimalists," such as Justices Breyer and Ginsberg (contrasted with "Burkean Minimalists"),⁴⁷ seem most sensitive to this. "Rationalist minimalists seek narrowness and shallowness, but they are entirely willing to rethink traditions and established practices. Rationalists are interested in the reasons behind practices, not in practices themselves."⁴⁸ In this respect, they are somewhat less deferential. Yet even the Burkean David Strauss allows that when moral and policy arguments outweigh the concerns that normally counsel acquiescence to traditions, traditionalism must give way.⁴⁹ In the end, Breyer may well speak for all Minimalists when he describes judicial Minimalism not as a "general theory" to be applied in a uniform way, but as akin to a musical score, where different players may legitimately emphasize one theme rather than another.⁵⁰

Part of what this means is that Minimalists do not revere restraint for its own sake. Restraint is desirable for the sake of having the best law. When a non-Minimalist ruling is needed to advance that, the Minimalist can provide it. (We should not be surprised,

⁴⁴ TOOBIN, *supra* note 5, at 308 (quoting John Roberts).

⁴⁵ Sunstein, *Snakes*, *supra* note 5, at 2234.

⁴⁶ *Id.*; see also SUNSTEIN, *supra* note 2, at 54–60.

⁴⁷ Sunstein also distinguishes finer grades of Burkean Minimalism. See SUNSTEIN, *supra* note 25, at 47–49, 57.

⁴⁸ *Id.* at 60; see also *id.* at 47. He discusses the differences between these two types of Minimalism at length in chapters 2 and 3.

⁴⁹ Strauss, *Common Law*, *supra* note 5, at 902.

⁵⁰ BREYER, *supra* note 5, at 7.

therefore, to encounter O'Connor's dissent in *Kelo*, a seemingly strongly un-Minimalist opinion on her part.⁵¹)

Interestingly, two cases that are widely considered black marks on the recent history of the high court—cases criticized primarily by members of opposing political camps, *Kelo v. City of New London*⁵² and *Bush v. Gore*⁵³—draw ire largely for the Minimalism in their reasoning. The Minimalism is rarely named, since that label has only recently been surfacing beyond academia, but their Minimalist character is a prime target of rebuke. In *Kelo*, of course, it was the substance of the Court's ruling in allowing the taking of a private home for the "public use" of development that most galled critics. Yet Justice Kennedy's reasoning in his concurring opinion significantly fueled the backlash. Kennedy averred that by allowing this particular taking of property, the court did not "foreclose the possibility that a more stringent standard of review . . . might be appropriate" for other takings, but held that "this is not the occasion for conjecture as to what sort of cases might justify a more demanding standard."⁵⁴ It is this Minimalist resistance to clarifying the salient principle involved that made the decision especially ominous. If the Court couldn't say what sorts of takings were and were not justified by the constitutional standard of "public use," all property might be subject to government seizure.

In *Bush v. Gore*, it was Justice Kennedy who again exhibited Minimalism in his opinion for the Court, declaring that its ruling was limited to only that particular case: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."⁵⁵ The narrowness of this decision is precisely what has led many to regard it as an ad hoc exercise of political will rather than adjudication based strictly and exclusively on the law.

⁵¹ *Kelo v. City of New London*, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting) I shall comment further on this aspect of Minimalism later. See *infra* text accompanying notes 106–108.

⁵² 545 U.S. at 494.

⁵³ 531 U.S. 98, 109 (2000) (per curiam).

⁵⁴ *Kelo*, 545 U.S. at 493 (2005) (Kennedy, J., concurring).

⁵⁵ *Bush*, 531 U.S. at 109; TOOBIN, *supra* note 5, at 173. The case was labeled *per curiam* ("for the court").

III. THE RATIONALE FOR MINIMALISM

Minimalism is supported by a family of partially overlapping arguments. What follows is an abbreviated sketch of the principal threads.⁵⁶

A. *Stability and the Rule of Law*

One contention is that the Minimalist course of small, unobtrusive steps fosters predictability and stability, important elements of the rule of law. When judges are not effecting radical breaks with the reigning legal conventions, the law remains constant and knowable. Moreover, such an approach tends to foster respect for the law—for the courts and for the legal system as a whole. Insofar as the Minimalist method deliberately steers close to the societal consensus on issues, people will feel as if their views count and it is “their” government, rather than that the law is imposed from on high. The Minimalist effort to rule in ways that reflect common ground is a means of showing respect for people of disparate opinions (recall Sunstein’s desire to “attract support from those with diverse perspectives”⁵⁷) which, in turn, engenders their respect for the law.⁵⁸ While more ambitious judicial methods can be “profoundly destabilizing,”⁵⁹ Minimalism is an effective way of keeping the peace.⁶⁰ According to Strauss, it is sometimes more important to settle a controversy than to settle it rightly.⁶¹

B. *Epistemic Humility*

Another major leg of the case for Minimalism rests in its appeal to epistemic humility. Human beings’ intellectual capacities are quite limited, it posits. Certainty is elusive. The firm beliefs of one day are frequently overturned on another. It would be hubris for a

⁵⁶ Some of these arguments are used at times to argue for alternative decision-making methods or for elements thereof (e.g., for granting great weight to precedent or the doctrine of stare decisis). What is important here is that they are all typically part of the case for Minimalism.

⁵⁷ Sunstein, *Snakes*, *supra* note 5, at 2242.

⁵⁸ See Strauss, *Common Law*, *supra* note 5, at 908.

⁵⁹ Sunstein, *Debate*, *supra* note 5, at 295

⁶⁰ See Strauss, *Common Law*, *supra* note 5, at 907; SUNSTEIN, *supra* note 5, at 27–29.

⁶¹ Strauss, *Common Law*, *supra* note 5, at 907–08.

court to suppose that it knows better than all the generations of voters, legislators, and judges, past and present, whose reflections have crafted the law that they inherit. Since “no one, and no court, has a monopoly on wisdom,” it is best to “. . . give many minds an opportunity to contribute.”⁶² Burkeans are particular champions of this rationale: “If many people have accepted some practice in the past, shouldn’t we defer to them . . . shouldn’t we show respect for their collective judgment?”⁶³ Strauss describes traditionalism as a “counsel of humility,” writing that “no single individual or group of individuals should think that they are so much more able than previous generations.”⁶⁴

While “many minds” arguments have their pitfalls (several of which Sunstein forthrightly discusses⁶⁵), the basic idea is that, in light of individuals’ limited capacities, the prudent course is to proceed with the modesty and caution that Minimalism advises. This best positions the court to get its answers right and offers the additional benefit of limiting the damage done by erroneous decisions. Small steps risk less. Sunstein contends that by reducing the burden of judicial decision-making, Minimalism is likely to make judicial errors not only less damaging, but also less frequent.⁶⁶

C. Value-Neutrality

Yet a third alleged benefit of Minimalism is its neutrality concerning competing ideologies and substantive values. It allows for “reasonable pluralism.”⁶⁷ By attending exclusively to the form of decisions, Minimalism refuses to take sides in disagreements about the content of law, bypassing “the biggest and most contested questions

⁶² SUNSTEIN, *supra* note 25, at 45.

⁶³ *Id.* at 36; *see also id.* at 36–43.

⁶⁴ Strauss, *Common Law*, *supra* note 5, at 892.

⁶⁵ SUNSTEIN, *supra* note 25, at 212–13; *see also id.* at 65, 82, 97.

⁶⁶ SUNSTEIN, *supra* note 2, at 4. For more on this type of argument, *see* SUNSTEIN, *supra* note 25, at 36–43, 134–35, 169; SUNSTEIN, *supra* note 5, at 27–29. Breyer makes repeated references to the propriety of humility and modesty throughout *Active Liberty*, *supra* note 5, *passim*. Michael Oakeshott is another theorist associated with this type of argument. *See supra* note 5. For a recent variation that is not focused exclusively on the judicial realm, *see* JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004).

⁶⁷ SUNSTEIN, *supra* note 5, at 50.

of constitutional law.”⁶⁸ Minimalists will avoid, for example, “the deepest questions about . . . the meaning of the free speech guarantee . . . [or] the extent of the Constitution’s protection of ‘liberty.’”⁶⁹ Adjudication must be value-free. A Minimalist court refrains from asserting its views about a just society or good government and serves merely in the role of impartial umpire.⁷⁰ Indeed, it is largely by maintaining this posture that courts win respect from the people.⁷¹

D. Flexibility

Further, because of its refusal to commit on substantive value questions, Minimalism offers flexibility. By attending closely to only the immediate case, courts resist the temptation to tie the hands of legislatures and of other courts. The court has an obligation “to avoid putting fetters upon the future by needless pronouncements today,” Justice Frankfurter once opined.⁷² Far from reining us in, Sunstein explains, Minimalism seeks “to accommodate new judgments about facts and values.”⁷³

E. Democracy

And in this way, Minimalism leaves sovereignty to the democratic branches of government. This is perhaps the single most widely emphasized argument for Minimalism, one that unites advocates of disparate political persuasions. Indeed, some take it to be *the* rationale for Minimalism.

The animating concern here is that “federal judges are removing too many issues . . . from the purview of elected legislatures and therewith popular choice.”⁷⁴ More ambitious judicial methods (such as Dworkin’s) “rob popular majorities of the opportunity to deliberate about, and through deliberation to reach consensus about,

⁶⁸ Sunstein, *Radicals*, *supra* note 5, at 27.

⁶⁹ *Id.* at 28.

⁷⁰ TOOBIN, *supra* note 5, at 281 (citing Justice Roberts). Sunstein cites Adrian Vermeule as a vigorous contemporary advocate of this sort of neutrality in *Debate on Radicals in Robes*, *supra* note 5, at 289.

⁷¹ Sunstein, *Radicals*, *supra* note 5, at 27–29.

⁷² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 596 (1952) (Frankfurter, J., concurring).

⁷³ SUNSTEIN, *supra* note 2, at x; *see also id.* at 44.

⁷⁴ BARBER & FLEMING, *supra* note 8, at 140.

divisive moral issues.”⁷⁵ On this line of thinking, whatever advantages might arise from having judges make decisions “are outweighed by the superior democratic legitimacy of political decisionmaking.”⁷⁶ Correspondingly, in the view of many Minimalists, “the Constitution should be invoked to disable the democratic process, only when it plainly does so.”⁷⁷ Judges should defer to the democratic will, in other words, in all but the most egregious cases of a constitutional violation.

All of this recommends Minimalism insofar as, by deciding very little, a Minimalist court leaves a large area in which issues will be decided by majority will. As Breyer reasons, narrow judicial decisions allow ongoing democratic “conversations” about contested issues to mold future law. It thus offers an enhancement of our democratic structure.⁷⁸ O’Connor maintains that “when we are concerned with extremely sensitive issues . . . ‘the appropriate forum for their resolution in a democracy is the legislature.’”⁷⁹

Overall, Minimalism sells itself largely as a precautionary principle, a mechanism of insurance. Sunstein has described dedication to judicial restraint as a kind of arms control that is sensible for people who might otherwise be tempted to employ judicial power to promote their favored causes.⁸⁰ Yet restraint is also advised as a prudent bet about the comparative wisdom of others and of the ages. Minimalism offers protection from our own intellectual limitations as well as from the ambitions of one’s ideological opponents.⁸¹

⁷⁵ *Id.*

⁷⁶ Peters, *supra* note 8, at 1476, 1459 (“The new judicial minimalism is animated by the twin perceptions that judicial decisionmaking generally is less democratically legitimate, but not less fallible, than decision-making by the political branches.”); see also SUNSTEIN, *supra* note 25, at 111; Peters, *supra* note 8, at 1458, 1469

⁷⁷ Sunstein, *Debate*, *supra* note 5, at 313 (attributing this view to Thayer and Vermeule); see also SUNSTEIN, *supra* note 5, at 45–46.

⁷⁸ BREYER, *supra* note 5, at 72; see also *id.* at 5, 37.

⁷⁹ TOOBIN, *supra* note 5, at 51 (quoting *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 465 (1983) (O’Connor, J., dissenting) (quoting *Missouri, K. & T. R. Co. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.))); see also BICKEL, *supra* note 5, at 70; Sunstein, *Debate*, *supra* note 5, at 313.

⁸⁰ Sunstein, *Debate*, *supra* note 5, at 290.

⁸¹ Other useful summaries of the reasoning behind Minimalism can be found in Peters, *supra* note 8, at 1462–63; Prakash, *supra* note 8, at 2213.

IV. MINIMALISM'S FUNDAMENTAL FAILINGS

We can now consider the fundamental failings that are fatal, I think, to the Minimalist project.

My principal contention is that Minimalism is not a coherent concept. It fails to identify a distinctive method of adjudication. The instruction to the judiciary to "minimize your impact" is hollow. Correspondingly, Minimalism offers no genuine guidance to judges concerning how they should proceed. I will begin by briefly elaborating on the vacuity at Minimalism's core and then consider more closely Minimalism's assorted rationales and aspirations in order to make plain how seminal and how inescapable these failings are.

A. *Hollowness at the Core*

As its name indicates, Minimalism focuses entirely on the degree to which an activity is pursued. That is the single thing that judges must do, in order to properly fulfill their role: minimize. Degree is a red herring, however. More exactly, it is a derivative aspect of proper adjudication.

The degree of any activity per se is neither good nor bad. Proper degree always depends on the nature of the activity and the full context in which it is pursued. The desirability of consuming a lot or a little of x (of milk? alcohol? a prescription drug?) or of deciding quickly or slowly about y (a job? an appetizer?) depends on several factors concerning the conditions in which the activity occurs and the relevant party's goals. Should we treat the tumor aggressively? That depends on how advanced it is, how harmful it is, the side effects of the treatment, the patient's other health conditions, medications, age, quality of life aims, and so on.

A focus on degree at the expense of content is, of course, the fatal defect in Aristotle's doctrine that virtue resides in a mean. Because he mistakenly fastens on the degree of a characteristic⁸² rather than its substantive character, Aristotle can deal with the obvious counterexamples in only an ad hoc manner. "So *some* degree of

⁸² Aristotle held that virtue is a function of feelings and action, where "excess and deficiency constitute misses of the mark, while the mean is praised and on target Virtue, then, is a kind of mean . . ." ARISTOTLE, NICOMACHEAN ETHICS, bk. II, ch. 6.

envy, spite, murder or adultery are okay?”⁸³ Aristotle’s denial, when he addresses this, is utterly arbitrary, divorced from the larger account of the basis of virtue that he proposes.

In law, as in virtue: a rational assessment of degrees cannot avoid addressing the kinds of activities being measured. What is appropriately minimal in any sphere is dependent on judgments concerning the value of what is being minimized. Counsels of “restraint” or “balance” suffer from the same incompleteness: *What* is to be minimized, or restrained, or balanced? To what extent? And why—on what basis, for what reason? Without good answers to these questions, a policy of “minimizing” is a wild card. (This implication will become more apparent as we proceed.)

We had a glimpse of this vacuity in Justice Alito’s declaration of Minimalism. Consider his Senate confirmation statement again:

I think that my philosophy of the way I approached issues is to try to make sure that I get right what I decide. And that counsels in favor of not trying to do too much, not trying to decide questions that are too broad, not trying to decide questions that don’t have to be decided, and not going to broader grounds for a decision when a narrower ground is available.⁸⁴

Alito’s first sentence announces that his philosophy is to try to practice the right philosophy, which says nothing about what that philosophy is. In his attempt to flesh that out, unfortunately, the void remains. For Alito’s references to avoiding doing “too much,” to making decisions that are “too” broad, and to questions that “don’t have to be decided” completely sidestep the standards employed to determine what does have to be decided and what constitutes “too much.”

This is not to indict all concepts that designate degree, of course. “Minimum,” “maximum,” “large,” “small,” “fast,” “slow,” and countless others are perfectly valid concepts that usefully identify the extent or intensity of particular phenomena. Judicial *Minimalism*, however, is a policy prescription. It does not merely describe. It is

⁸³ For Aristotle’s discussion of this, see *id.*

⁸⁴ *Hearing, supra* note 21, at 343 (statement of J. Samuel A. Alito, Jr.).

commended as a method of decision-making on the premise that the degree of decisions is the very thing that distinguishes right decisions from wrong. My claim is that that makes no sense, for the measure of a phenomenon in itself carries no value significance, positive or negative. An extreme advocate of free speech and an extreme advocate of censorship are not equally praiseworthy in virtue of the equal extremeness of their positions.⁸⁵ As Prakash observes, Minimalism's emphasis on the size of steps neglects the direction of those steps.⁸⁶

Notice, further, and from a slightly wider angle, that the appeal of judicial Minimalism itself relies heavily on the broader context in which it is advocated. The propriety of a court's effecting exclusively small impact is plausible only within a legal system that is fundamentally just. In a system that is grossly unjust, sweeping decisions that quickly undo the offending precedents might be far more appropriate. Granted, even when people agree on the need for radical change, how abruptly to implement that change is a fair question. But it is a different question from whether something *is* the law. And that is the role of judges: to decipher and apply the law. To do that, however, judges must attend to the substance of law.

This is the basic point. The instruction to "minimize" is empty without specification of what is to be minimized and in what respects. Moreover, the instruction is sensible only if a logically compelling case is made for why one should minimize these things. The problem for Minimalism, however, is that the provision of that case will inescapably incorporate judgments about value. For Minimalism invites the question: what makes that which is less, *good*? The purported propriety of the minimizing strategy must emerge as a function of other "good" things. In order for its counsel to have content, in other words—in order for Minimalism to constitute a method that genuinely offers direction to judges—Minimalism must betray its own purported neutrality on values.

⁸⁵ See OBJECTIVELY SPEAKING: AYN RAND INTERVIEWED 24 (Marlene Podtriske & Peter Schwartz eds., 2009); see also Ayn Rand, 'Extremism,' or the Art of Smearing, in CAPITALISM: THE UNKNOWN IDEAL, 178 (1967).

⁸⁶ Prakash, *supra* note 8, at 2215.

B. Absence of Univocal Instruction

Looking more closely at the mechanics of Minimalism only makes its failings more apparent and reveals how deeply embedded these failings are.

Some of the confusion in Minimalism is revealed when we notice that certain arguments in defense of it actually support something other than Minimalism. The epistemic humility argument especially favored by Strauss and Burkeans, for instance, holds that, given the limits of contemporary judges' comparative knowledge, courts should minimize the risk of doing great harm by hewing to a path of small, cautious steps. Such a course is unlikely to drastically disrupt society or to commit large, very damaging mistakes. In truth, however, this is an argument for gradualism, which concerns the pace at which we should move toward a particular goal. Minimalism, in contrast, purports to be an account of how judges should discover what the law is—in effect, what the relevant “goals” are. (That is, the goals established by a proper understanding of the Constitution [which is the legal system's most fundamental law], and whether any changes to existing legal practices must be made in order to comply with the Constitution.) Gradualism might be a respectable view on the question of how to get somewhere from here, yet the role of a judge is to determine where the relevant somewhere is (again, as dictated by the Constitution). Obviously, the two are related. Arguments for a particular route presuppose a destination. What that is, however—where a proper application of the law would take us—is exactly what is in question and what Minimalism claims to give us a means of discovering. It only garbles things to defend Minimalism as the best method to *find* the law by means of arguments that actually address how it is prudent to move the law.⁸⁷

One might suspect that this is an unfair criticism of Minimalism given that sometimes, restoration of proper law (of what the

⁸⁷ My immediate point is not to accuse Minimalism of seeking to change the law, rather than apply it. I mean “move” here only in the sense that a correction of a reigning misunderstanding of law (again, of fundamental law, as established by the Constitution) does require “movement” or change in the dominant legal practices that directly flow from that misunderstanding. “Movement” in law at the behest of judges is thus sometimes proper, when it refers to this type of correction.

fundamental law truly demands), due to longstanding practices built on earlier misapplications of that law, will be disruptive. This is certainly true. All that shows, however, is that the question of how best to restore law is a serious (and, I'd agree, often quite difficult) one. What I am insisting on here is that it is a derivative question. Arguments concerning how to restore law (gradually or otherwise) cannot be presented as if they support conclusions about what the law *is*. Conclusions about the latter must be reached first, before we can rationally address the pace and full manner in which to best effect changes in entrenched practices that are required by fidelity to that determination of what the law *is*.^{88,89}

This is but a symptom of the deeper problem. "Minimizing" does not name a singular type of adjudication. Minimalism takes stands on disparate issues that are not unified, in principle. Because Minimalism reflects a misguided attempt to collect, under a single

⁸⁸ Notice, also, that the more one thinks Minimalism appropriate for judges' work in determining appropriate *goals*, the less appropriate gradualism will be as something that it makes sense even to consider. When we are not trying to effect significant changes—not moving to a very distant place—the question of moving there gradually or rapidly does not arise. It is only when a person is committed to traversing vast territory that he considers whether to travel to his destination in a few large steps or by a more incremental schedule.

⁸⁹ One might contend, on behalf of Minimalism, that apart from its implications for the question of how best to effect change in prevailing legal practices, epistemic humility does carry implications concerning a court's ability to determine what the law is. Recognition of any set of justices' intellectual limitations suggests that they cannot be confident about their determinations and, accordingly, that the cautious course of Minimalism is most prudent. The problem, however, is that if the humility argument is pressed to support *that* conclusion, it is far less plausible (which is why I think it actually serves as an argument for gradualism). For the more that one emphasizes judges' fallibility and limitations, the more one counsels complete judicial passivity, which would be an abdication of the court's role. The court is not a legal fire department; it is not the equivalent of an Emergency Medical Services unit, charged to actually do something only in rare emergencies. To regard it as if it were denigrates the value of the law by implying that, for the most part, it doesn't matter very much what the law says and how it is applied. Questions and disputes about that are not sufficiently important as to warrant clarifying judgments from a court. (In Alito's terms, the court's actions would almost always be "too much." *Hearing, supra* note 21 (statement of J. Samuel A. Alito, Jr.)). The very existence of the judiciary, however, is premised on the belief that trained and thoughtful professionals should and can soundly (albeit, not infallibly) answer the serious questions of legal interpretation that are brought to it.

method, an assortment of ends, actions, and strategies that are not fundamentally alike, it does not cohere in a unique and stable identity and it cannot issue univocal guidance. Its fundamental incoherence in conception, in other words, results in and is evidenced by its erratic course in practice.⁹⁰

Consider the array of issues that Minimalism is a doctrine of:

- the size of steps
- the pace of change
- the impact of rulings
- the basis for rulings
- the ambition of rulings
- the desirability and means of gaining support from people of diverse perspectives
- the desirability and means of gaining consensus on the court
- the weight of precedent
- the place of values
- the stringency of Minimalism's demands

Even this does not exhaust Minimalism's ambit. But it amply exposes the difficulty (and shows Minimalism itself to be an ironically ambitious theory).

One might attempt to preempt this criticism by objecting that these planks are not as disparate as they initially appear, given the complexity of proper judicial decision-making in its full dimension. Legitimate questions about appropriate regard for values, for precedent, for popular will, etc., need to be answered. So doesn't it make perfect sense that a theory of adjudication would take a stand on all of these? Indeed, that seems desirable in a comprehensive theory.

The fact that one might need to address many of these issues in order to provide a complete account of proper adjudication does not entail that one can do so through a single concept, however.

⁹⁰ By "univocal," I do not mean that individual justices following Minimalism (or any judicial methodology) should be expected to issue rulings that are absolutely, comprehensively uniform—identical in every particular. I do mean that they should reach decisions that are justified by the rational application of the relevant guiding standards.

More exactly, it does not mean that Minimalism offers a coherent way of doing it. Stating positions on many of these issues does not suffice for the assorted positions to reflect a recognizable pattern or a distinctive methodology. The problem is not that Minimalism *addresses* many different aspects of judicial decision-making; when a theory does that well, it is a significant virtue. The problem is that Minimalist judges could give conflicting answers to the questions the doctrine addresses. Because Minimalism isolates no fundamental common denominator in the qualities that it commends, it has no logical unity and it issues instructions that are mutually independent and potentially contradictory.

Consider the relationships among some of Minimalism's individual aims. The goal of attaining support from people of "diverse perspectives" represents a "primacy of the current" insofar as it elevates the significance of contemporary preferences. Yet at least certain strains of the epistemic humility argument ("Minimalist deference to previous law is a prudent bet, given the comparative wisdom of people in the past over people today"⁹¹) direct judges to yield to the past. Which is it? A commitment to the alleged wisdom of the past cannot justify deference to contemporary preferences.

Or again, what if a court ruling that would precipitate a radical change in the legal landscape (and thus be a highly un-Minimalist ruling, by one measure) would, at the same time and in accordance with another Minimalist aim, win more universal support than the court's taking smaller steps and effecting less drastic change? Which way should a conscientious Minimalist rule?⁹²

The Minimalist's goal of stability in the law⁹³ comes into conflict with a number of Minimalism's other desiderata. How is stability to be squared with flexibility? With the desire (voiced by Frankfurter, Breyer, and Kennedy, among others) to refrain from tying others' hands or cutting off the public "conversation?" The posture of perpetual uncertainty that lends itself to "accommodating new judgments" sacrifices the predictability that constitutes much of the

⁹¹ See *supra* text accompanying notes 62–64.

⁹² This situation could arise when an existing law is widely viewed as a relic of a less enlightened era, for instance.

⁹³ Recall that many Minimalists "prize stability" and their concern about the "profoundly destabilizing" effects of alternative adjudicative methods. SUNSTEIN, *supra* note 25, at 38; Sunstein, *Debate, supra* note 5, at 295.

value of stability in law.⁹⁴ As Prakash has observed, “The Court often grants a writ of *certiorari* precisely because it hopes to, once and for all, resolve some contentious question. Issuing a narrow opinion in this scenario may only continue the confusion and non-uniformity plaguing the lower federal courts. Sometimes there are rather good reasons for broad opinions that leave little wiggle room for interpretation.”⁹⁵ More acerbically, Jeffrey Rosen writes that judicial opinions that do not make clear the principles beneath a ruling only compound confusion and necessitate clairvoyance.⁹⁶

Similarly, we might wonder about how comfortably the goal of stability can sit alongside deference to democratic sovereignty. The preferences of the masses are notoriously fickle. One needn’t exaggerate this volatility to appreciate that the tides of public support for government policies often change relatively abruptly. (During the recent economic contraction, for example, popular support for environmentalist restrictions has declined precipitously.⁹⁷) While nearly all of the advocates of Minimalism (however otherwise ideologically divided) unite in lauding its

⁹⁴ Admittedly, stability poses a somewhat tricky question for any account of proper adjudication. The challenge to identify the weight to accord stability is especially acute, however, for those who regard stability as an end in itself.

⁹⁵ Prakash, *supra* note 8, at 2216 n.15.

⁹⁶ Rosen, *supra* note 8, at 46. Note that the absence of clear guidance provided by the recent minimalist decisions mentioned above, *see supra* note 24, all brought immediate comment. The voting-rights decision “all but invited further challenges.” Liptak, *supra* note 24. The fire-fighters ruling, in the view of many legal experts, “left things as muddled as ever for the nation’s employers.” Steven Greenhouse, *For Employers, Ruling Offers Little Guidance on How to Make their Hiring Fair*, N.Y. TIMES, June 30, 2009, at A13. And in the wake of the *Caperton* decision, “much uncertainty remains.” *Not for Sale*, *supra* note 24. Even the Minimalist Roberts could not abide the obscurity of the Court’s resolution of that judicial conflict of interest case. In his dissent, Roberts complained that “the standard the majority articulates—‘probability of bias’—fails to provide clear, workable guidance for future cases,” and he enumerated some forty “fundamental questions” which lower courts will have to answer “with little help from the majority” (e.g., How much money is too much? What qualifies as “disproportionate?” How long does a probability of bias last? What if the judge in question has voted against the supporter in other cases? Does it matter whether the pending is by a group rather than an individual?). *Caperton v. A. T. Massey Coal Co.*, 129 S.Ct. 2252, 2269–73 (2009) (Roberts, C.J., dissenting).

⁹⁷ Vanessa Hernandez, *Recession Erodes Support for Environment*, NEW AMERICA MEDIA, Aug. 2, 2009, http://news.newamericamedia.org/news/view_article.html?article_id=0b5609213f0e2ca9b18db1b7e0a0f2d9.

acquiescence to the people's will, courts that cater to that will cannot maintain an equal allegiance to stability in the law.

The inescapable fact is that in practice, if a judge attempts to abide by Minimalism, he encounters conflicts between its multiple aspirations. Minimalism's guidance, consequently, is equivocal.⁹⁸ To some extent, this may result from a simple refusal by Minimalists to choose among mutually exclusive ends or to rank their ends' relative significance. But the internal inconsistencies are abetted by the haziness of many of its pivotal ambitions. Minimalists' desiderata are riddled with ambiguities.

What counts as a "diverse perspective," for instance, as one of the sort that warrants a court's respect? Is any such perspective legitimate and of equal weight, *qua* diverse? That of bigamists, or of the Man-Boy Love Association, or members of the Ku Klux Klan or the Taliban? Given that the two parties in any litigation reflect divergent perspectives, should a Minimalist court appease them by always splitting their differences?

How flexible is appropriate "flexibility"? Which aspects of a case may be bent, reduced in their significance, or set aside, and which, if any, are non-negotiable? When a judge shies away from tying others' hands or imposing "fetters" (Frankfurter's worry⁹⁹), is he being nimbly accommodating, or is he shirking his responsibility by simply exporting decision-making's burdens to others?¹⁰⁰

In light of Minimalism's desire for neutrality on the bench and for "reasonable pluralism," another question arises: does deference to democratic sovereignty qualify as appropriately value-neutral? In one respect, it seems to: such deference accepts whatever values the majority chooses to promote. Yet in another respect, it seems not to, for deference to majority will favors having the masses decide certain issues over the value of alternative methods which might do a better job of deciding those matters—at least, a "better" job by certain standards. But the adoption of a standard to resolve certain policy questions itself reflects the valuing of that which is expected

⁹⁸ Sunstein acknowledges some of Minimalism's internal tensions. See SUNSTEIN, *supra* note 25, at 45–46.

⁹⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 596 (1952) (Frankfurter, J., concurring).

¹⁰⁰ See SUNSTEIN, *supra* note 25, at 46.

to be fostered by the use of *that* standard, as opposed to others. The point is that the more strictly we take the ideal of adjudication's being value-free, the more intense its collision with the desideratum of democratic supremacy. (This observation also suggests the need for Minimalism to explain more precisely the exact type of neutrality it seeks.)

"Modesty" in adjudication is yet another of Minimalism's nebulous aspirations, since modesty can take different forms. A court might modestly defer to existing precedents, yet it could also set precedents in ways that leave considerable discretion to other judges. Would doing the latter be un-Minimalist, insofar as the court is setting precedent, or Minimalist, by virtue of its doing so gently?¹⁰¹

Indeed, this leads one to wonder whether deference to precedent itself is truly Minimalist. While it minimizes the influence of the contemporary judge, it extends the influence of the previous judges who established the precedent in question. Thus it is hard to tell. Certain exertions of judicial authority are minimized via respect for precedent only because other such exertions are maximized in the effect given to them.

If one still needs convincing, then to see just how protean the ideal of the "minimal" is, consider Minimalism's prized narrowness.

"Narrow" is a relative term. Moreover, narrowness can be measured along different dimensions (for example, the basis for a ruling, or a ruling's impact on entrenched societal expectations, or a ruling's impact on popular support for the court). These can sometimes cut against one another. A very narrow basis for a ruling might undo the prevailing application of a law in a way that carries extensive repercussions (uprooting the entrenched practices that grew out of *Miranda v. Arizona*¹⁰² or *Mapp v. Ohio*,¹⁰³ for instance, concerning the right to remain silent and the exclusionary rule). A slightly different reading of just a few words, depending on the words, could bring a broad impact. (Consider the celebrated commas in the Second

¹⁰¹ This example is from Klein, *supra* note 5, at 106. For further discussion of some of the internal tensions that arise in the application of minimalism, see *id.* at 112. For more general cautions about illusions of judicial modesty, see LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 124–26 (2008).

¹⁰² 348 U.S. 436 (1966).

¹⁰³ 367 U.S. 643 (1961).

Amendment.¹⁰⁴) In defending narrowness, it certainly sounds reasonable for the Minimalist to say that a court should not decide issues not before it, yet much of what is in question is how much *is* before the court in a given case. To apply the law to a particular controversy requires a judgment on what the law is, which includes a judgment about its scope. We have no reason to suppose that the scope of laws is always narrow, however. Sometimes, the ambition of a particular law is broad. When confronting such a law, should a judge ignore that, in deference to the Minimalist method? Or should he abandon Minimalism in this case? This seems to position the Minimalist method against the law, rather than as a means of illuminating it.

Notice, further, that certain kinds of narrowness are not favored by Minimalists. Declaring that a given ruling applies only until midnight tonight or only to the two parties in the immediate dispute are not, seemingly, to be seriously entertained.¹⁰⁵ Yet if some kinds of narrowness are to be fostered and other types are to be avoided, what is the basis for the difference? And—here’s the nub of the problem—won’t that basis necessarily smuggle in some substantive commitments? Judgments that posit value in regard to something other than degree? Mustn’t a justice at least implicitly rely on some qualitative grounds for favoring these sorts of judgments rather than those? He must value narrowness of basis more than narrowness of impact, for instance, or narrowness of division among members of the court more than narrowness of division among the populace.

While Minimalism purports to maintain neutrality on matters of substance, its noncommittal perch is untenable. For “less-ness” has no content. By itself, “do less” or “do the least” offers no guidance. Minimalism’s core instruction is meaningless unless supplemented by judgments about values.

This ultimate vacuity of Minimalism is starkly revealed when Sunstein allows that Minimalists should be Minimalist about Minimalism itself. Recall his claim that “minimalism is generally the proper approach” but that one should not be dogmatic about it and that “there

¹⁰⁴ See Adam Freedman, *Clause and Effect*, N.Y. TIMES, Dec. 16, 2007, available at <http://www.nytimes.com/2007/12/16/opinion/16freedman.html?th&emc=th>.

¹⁰⁵ Prakash, *supra* note 8, at 2215. Indeed, Kennedy’s framing of *Bush v. Gore*, 531 U.S. 98 (2000), in such terms is what excites excoriation of that ruling.

are times and places in which minimalism is rightly abandoned.”¹⁰⁶ “Sensible minimalists,” he avers, “offer no theology or dogma. They freely admit that when predictability is important, narrowness can be a big mistake.”¹⁰⁷ “No sensible person could embrace minimalism in all times and places.”¹⁰⁸

Being “sensible,” in other words, trumps adherence to Minimalism. A judge should practice Minimalism . . . except when he shouldn’t. What is “sensible?” What standard governs whether he should or shouldn’t follow Minimalism in a given case? That is up to the judge. Minimalism does not tell him.

What all of this reveals is that when it comes to being applied, Minimalism actually functions as a shell, a label attached to disparate deliberative procedures united by no distinctive identity. (Thus my earlier reference to it as a wild card.¹⁰⁹) I do not mean that this is necessarily self-conscious on the part of Minimalism’s advocates, deliberate disingenuousness. The point, though, is that strictly, “it” cannot be practiced, since Minimalism names no singular method.¹¹⁰ If minimizing the number and range of considerations brought to bear in reaching a decision is Minimalist and minimizing disagreement with one’s judicial brethren is Minimalist and minimizing changes in a ruling’s effects on current understandings of the law is Minimalist and reducing social discord is Minimalist and limiting the distance from legal judgments of the past is Minimalist—and so on—and if what “minimizing” in each of these cases is continually shifting—we are hard pressed to know what Minimalism is not. However radical or consequential a decision might be in certain respects, the panoply of aims and techniques claimed by Minimalism means that by other of its elements, that decision is bound to also qualify as Minimalist.

¹⁰⁶ Sunstein, *Snakes*, *supra* note 5, at 2234.

¹⁰⁷ *Id.* at 2242. This is a particularly problematic concession, given that Minimalism is often defended in large part on grounds of its conduciveness to predictability.

¹⁰⁸ *Id.*, at 2242.

¹⁰⁹ See *infra* Part IV.A.

¹¹⁰ My earlier reference to Breyer’s reasoning in the Ten Commandments cases as “quintessential” Minimalism, therefore, is, strictly speaking, misplaced. For an enduring essence is exactly what I am arguing the Minimalist methodology lacks. See *supra* note 35 and accompanying text.

Minimalism's lack of a constant, essential identity is crystallized in the fact that *Brown v. Board of Education*¹¹¹ — as sweeping and apparently un-Minimalist a decision as one might imagine — was actually Minimalist. Or, perhaps we should say: also Minimalist. Sunstein admits as much, writing that *Brown was* Minimalist, insofar as it can be viewed as the culmination of a long line of precedents.¹¹² (He also tacitly acknowledges the fluidity of Minimalist standards when he writes that *Lawrence v. Texas*¹¹³ can be read either as Minimalist or as perfectionist.¹¹⁴)

Given the ambiguities and the tensions that riddle Minimalism's multi-plank platform alongside the permission to drop Minimalist "strictures" whenever a judge thinks best, we can only conclude that any decision might be fairly cast as Minimalist. And: as un-Minimalist. Minimalism is truly a chameleonic catch-all.¹¹⁵

V. DEFENSE: AN UNFAIR PORTRAIT?

Given the harshness of this critique and the roster of thinkers who have embraced Minimalism, one might wonder whether I have properly fixed my target. We should consider some reservations about my characterization of Minimalism.

A. *Too Crude a Characterization?*

One might object that my portrait of Minimalism is too coarse-grained. It is easy to find ambiguities and internal tensions, one might contend, because I have batched together several different advocates and arguments for Minimalism as if they constitute a single position. Perhaps this represents Minimalism too crudely, however. Not every Minimalist necessarily endorses all the arguments for Minimalism that other Minimalists do, and once we untangle some of these individual arguments, the internal tensions may disappear.

¹¹¹ 347 U.S. 483 (1954).

¹¹² SUNSTEIN, *supra* note 25, at 40.

¹¹³ 539 U.S. 558 (2003).

¹¹⁴ SUNSTEIN, *supra* note 25, at 55 n.49. Bear in mind that perfectionism is usually understood as Minimalism's antithesis.

¹¹⁵ This is why, as noted earlier, there is no inconsistency vis-a-vis Minimalism between O'Connor's opinion in *Croson* and her opinion in *Kelo*. See *supra* Part II.

Whether that is true seemingly depends on the exact lines of reasoning offered by each Minimalist, such that a full response would require a thorough, one-by-one review of each advocate's specific reasoning, the result of which would likely be the exoneration of some and condemnation of others, rather than an indictment of Minimalism itself. Sunstein, it should be said, conspicuously embraces a number of mutually incompatible positions.¹¹⁶ Moreover, the term *is* routinely used to refer to the range of rationales and ends that I have enumerated. Nonetheless, one might think that not all advocates of Minimalism are necessarily guilty of all of the internal inconsistencies that emerge from the assemblage of their positions.

On a little further reflection, however, it becomes plain that an exhaustive, advocate-by-advocate audit is not what is needed to meet this objection. Minimalism cannot be salvaged by reviewing individual advocates and shaving away the particular inconsistencies that arise in some of their reasoning. For, on any of its rationales, Minimalism's central thrust—its direction about degree—is untenable. Degree *per se*, in the absence of a commitment to certain substantive values, cannot guide. And for this reason, internal conflicts in the directions given by Minimalism are not simply the result of isolated weak reasoning on the part of a particular advocate. They are inescapable.

To fully appreciate this, consider again a very basic question: How much is "minimal?" How different could O'Connor's majority opinion in *Ayotte*¹¹⁷ or Kennedy's concurring opinion in *Kelo*¹¹⁸ have been, for instance, while still winning the Minimalist seal of approval? It would be unfair to hold Minimalism to standards of precision that we do not require of other theories, of course. I am not asking for an account of technical medical detail in the abortion case, for instance. I am asking, though, for the range of rulings that qualify as Minimalist because that is necessary in order to know which decisions fall inside and outside of Minimalist territory. Indeed, Minimalism *makes* degree the focal point: that is what proper

¹¹⁶ Sunstein is aware of some of Minimalism's internal contradictions that I have pointed to, but he is relatively blithe about them. See SUNSTEIN, *supra* note 25, at 60–92.

¹¹⁷ *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006).

¹¹⁸ *Kelo v. City of New London*, 545 U.S. 469, 490–93 (2005) (Kennedy, J., concurring).

decision-making is all about, it contends. Thus degree counts for Minimalism in a way that it does not for other judicial methods.

To the extent that a policy of “minimizing” lacks content, it can only be “followed” in a given case when a particular judge supplements it with his own judgments about suitable values to promote. Since different judges’ values are disparate and often contradictory, so will be the rulings reached under the banner of Minimalism.

The reason that Minimalism attracts support despite this vagueness at its core, I think, is the appeal of many of its individual concerns when considered in isolation. That is, many of the ends that it seeks do have merit *under certain circumstances* or when pursued for very particular, delimited purposes. These purposes are not all identical with the purpose of understanding and upholding the meaning of the law, however. Often (not always), other things being equal—or more precisely, when other, more important conditions have been satisfied—it *is* desirable to have input from diverse quarters or to carry the approval of a majority of people or to maintain stability in the law. The problem is that the Minimalist wants it all; he espouses all of these ends without establishing the relationships among them and, more importantly, without establishing the exact roles (if any) that these play in illuminating the meaning of the law. Given that a single court ruling cannot equally satisfy all of Minimalism’s desiderata and given the tensions that consequently arise between these ends, if these ends are actually to be pursued in practice, Minimalism must explain their relative weight and demonstrate how they serve to advance our understanding of existing law.

Suppose that a particular Minimalist theorist attempts to do that. If, to eliminate inconsistencies and to provide more definite guidance to judges, he articulates more precisely what to minimize and what not to minimize, by doing so, he would be drifting from Minimalism. That is, to the extent that he clarified his allegiances and excised contradictory directions by ranking Minimalism’s ends (prizing support from diverse quarters more highly than value-neutrality, for instance, or narrowness of the impact of a ruling above narrowness of its reasoning, or stability over flexibility or flexibility over stability), the role of minimizing would be marginalized. For “minimizing” is not what dictates a commitment to diversity or to stability or to any of the Minimalist candidates that might be proposed as paramount. Minimalism can be saved from the

vagueness and internal inconsistencies I have catalogued, in other words, only by becoming something other than Minimalism.

B. Descriptive Rather Than Prescriptive?

Another reservation concerning my portrait of Minimalism might also suggest itself. Perhaps Minimalism does not mean to furnish a *method* for guiding judicial decision-making, so much as a description of the character of an oft-used and sensible approach. If Minimalism were a prescription for how judges should proceed in all cases, then the conflicts that I have pointed to would indeed pose a serious defect. That is not what Minimalism means to provide, however. Indeed, one might think, the reason that Minimalism brings together people of such diverse political and judicial philosophies (including advocates of originalist, precedentialist, and democratic sovereignty jurisprudence) is precisely that it does not constitute a method of adjudication that competes with these other methods. Moreover, when Sunstein allows that a Minimalist may legitimately stray sometimes by taking the un-Minimalist course,¹¹⁹ isn't he essentially acknowledging that Minimalism is not a rigid instruction manual for how judges should always reason?¹²⁰

Unfortunately, this characterization of Minimalism is completely belied by the way in which its advocates speak of it and by the way in which it is widely understood. We can certainly distinguish descriptive and prescriptive senses of Minimalism.¹²¹ Yet even discussions contending that Minimalism *is* the approach informing actual court practices (i.e., the descriptive sense of Minimalism) are typically designed to showcase the merits of Minimalism and to commend it as the most sage adjudicative approach. The point of calling attention to Minimalism's purported practice, in other words, is to endorse the propriety of judges treading minimally. (Obviously, I am not referring here to discussions that are directly critical of Minimalism.)

¹¹⁹ See *supra* notes 45–48 and accompanying text.

¹²⁰ Perhaps this explains why he is comparatively blithe about internal tensions.

¹²¹ Peters observes that Minimalism can be used to refer to either the actual practice of courts or to “theoretical defenses of, or entreaties for, the practice of minimalism by courts.” Peters, *supra* note 8, at 1457 n.12.

Moreover, advocates and commentators alike clearly understand Minimalism as a prescription. Sunstein calls Minimalism “a method” and writes that “federal courts *do best*” when, at least in the most controversial cases, they adhere to a narrow, incrementalist path.¹²² Throughout *Radicals in Robes*, he presents Minimalism as an alternative to other methods.¹²³ In the more recent *Constitution of Many Minds*, Sunstein continues to characterize Minimalism as a view concerning the types of factors that judges “should” weigh and of the types of steps that judges “should” take.¹²⁴

This prescriptive conception of Minimalism is hardly peculiar to Sunstein. The debate about Minimalism completely revolves around its merits as guidance,¹²⁵ and in this vein, several federal judges have explicitly invoked Minimalism as having (properly) influenced their reasoning. The upshot is that one cannot defend Minimalism’s issuing equivocal and conflicting prescriptions by claiming that Minimalism is not truly prescriptive at all. It does mean to guide, and the inconsistencies in the guidance that it provides remain a crippling infirmity.

C. A Rule of Thumb?

A slightly different defense of Minimalism might be more promising. Acknowledging that Minimalism is prescriptive, one might argue that its prescriptions do not purport to be foolproof. The tensions I have pointed out are problematic only if one expects perfect, unailing guidance from a method of adjudication, but Minimalism does not claim to offer that. Indeed, its skepticism toward theory seems premised on the belief that no failsafe formula could be provided by any method. Correspondingly, one might argue, Minimalism is proposed more as a rule of thumb than as a firm

¹²² SUNSTEIN, *supra* note 5, at 29, 36 (emphasis added).

¹²³ In that book, he focuses on the alternatives that he calls fundamentalism and perfectionism. *Id.*

¹²⁴ See SUNSTEIN, *supra* note 25, at 7, 21; see also *id.* at 7–8, 10–14, 36, 41–43 (casting Minimalism as a method of decision-making).

¹²⁵ See BARBER & FLEMING, *supra* note 8, at 140–41; FARBER & SHERRY, *supra* note 5, at 140–68; JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY 12, 160–63 (2006). Peters, who explicitly distinguishes the descriptive and prescriptive conceptions of Minimalism, clearly portrays Sunstein as using it prescriptively and commends a certain form of it, himself. See Peters, *supra* note 8, at 1455.

or absolute principle. It is not an approach for all seasons, though it is the best approach for most seasons and is thus to be followed much of the time. Its periodic failure to deliver unequivocal instruction is not a failing of the method, but is endemic in the nature of the enterprise.¹²⁶

This relaxing of the rigor of Minimalism's demands gives it a down-to-earth feel that makes it seem more realistic and thus more sensible. Why not capitalize on what Minimalism can offer by following it in just those cases in which it is most advantageous? This pragmatic, "common sense" defense fares no better under scrutiny, however.

Consider what a rule of thumb is: a rule of convenience; a default procedure to be employed when a person lacks other, more telling information that would give him compelling reason to proceed in a particular way. (In the *Oxford English Dictionary Online*, a rule of thumb is defined as "a method or procedure derived entirely from practice or experience, without any basis in scientific knowledge; a roughly practical method."¹²⁷) To rely on a rule of thumb is to think: *do this, because it seems to work – though we don't know why and we don't know whether its working in the past has been merely accidental.*

While such a makeshift policy can sometimes get a person through a pinch, it has serious limitations. If a person does not know why something works, he cannot be confident that it actually does. The basis for his rule may simply be a streak of coincidence. Such uncertainty is a particularly fragile scaffold for the application of law.

The Rule-of-Thumb Minimalist contends that Minimalist rulings work most of the time. But he bypasses the critical question: "work" by what standard? Any claim that something works presupposes a standard by which its success is measured. Yet when a person relies on a rule of thumb, that is precisely what he lacks.¹²⁸

¹²⁶ Along these lines, Sunstein claims that Burkeanism operates as a rule of thumb and that the case for it is much stronger in some areas than in others. See SUNSTEIN, *supra* note 25, at 40, 92.

¹²⁷ Oxford English Dictionary Online, available at <http://dictionary.oed.com>.

¹²⁸ Adoption of a goal is obviously important to the identification of an appropriate standard, but it is not sufficient. A goal and a rational standard for marking progress or the status of that goal are not one and the same thing.

No one knows why the relevant action “works;” people simply observe certain coincidences. The danger in relying on what is merely a rule of thumb rather than on the salient and more fully understood principle (which will reflect the causal relationships at work) is that the course indicated by the rule of thumb may not advance the goal in question as effectively as alternatives would and, in the worst case, may actually undermine that end (or other more important ends). The fact that a body builder, for example, might quickly gain muscle mass by taking certain hormones for a period does not mean that this course will be sustainable over a longer term without deleterious side effects. It may, in fact, weaken his ability to sustain muscle or undermine his broader fitness or health. The focus on results that reliance on a rule of thumb reflects leaves crucial questions perilously unaddressed.

For the Minimalist, an even more basic problem lurks here. What would constitute a given policy’s genuinely working depends (in part) on what the ultimate aim is. On this, however, Minimalism’s promiscuity leaves it noncommittal. Minimalism seeks so many different things that we cannot tell when it is being served – and, correlatively, when the Minimalist method is working. Until we know what Minimalism’s paramount end and hierarchy of ends are, we cannot assess what “works” even by the superficial scale of observed coincidences.¹²⁹

The denial of Minimalism’s being a *firm* method (like the denial of its being a method, at all) is symptomatic of its more basic inadequacy: its lack of identity and corresponding failure to isolate a distinct type of substantive guidance. The disavowal of absolutism seen in the rule-of-thumb defense reflects Minimalism’s broader aversion to being tied down as any one definite thing. The cost of this “options perpetually open” stance, however, is its failing to

¹²⁹ This also explains why a similar defense of Minimalism fails. Some might contend that judges and legal theorists tend to be better at deciding cases – at reaching good outcomes in resolving specific cases – than at articulating clear principles that support those outcomes. And on that basis, the anti-theory stance of Minimalism seems warranted. This argument faces the same basic difficulty, however: “better” by what standard? The fact that a person might approve of certain cases’ resolutions does not mean that those resolutions objectively apply existing law. (Thanks to Al Martinich who, without advocating it, prodded me to address this type of defense of Minimalism.)

truly supply a method of adjudication (even a relatively lax, rule-of-thumb-style method). This is apparent as soon as one contemplates concretely an attempt to follow the counsel of such “sometimes” Minimalism: When should a judge follow Minimalism and when should he not? On what basis should he determine this? An answer to this question would mean that *that* consideration is the true arbiter of proper decision-making, rather than the activity of minimizing anything. A failure to answer, on the other hand, would mean that the “practitioner” of Minimalism is left to do whatever he deems sensible. To counter by claiming that wise Minimalists will know when to abandon Minimalism would (beyond begging the question) merely admit that in the final analysis, Minimalism does not truly guide judges. Minimalism’s practitioners—and their practices—set the theory, rather than the other way around. That is, whatever purported Minimalists choose to do is considered Minimalism, rather than Minimalism’s being a distinctive conception of proper adjudication that guides and constrains the rulings of those judges who subscribe to it.

(From a somewhat different angle, we can also see Minimalism’s failure to furnish a useable method when we consider the range of thinkers who pay it homage. This variety, far from buttressing one of these looser interpretations of Minimalism, only underscores how un-fundamental and, correlatively, unhelpful a designation “Minimalism” is. Consider: is Scalia, at bottom, more truly a Minimalist or a Textualist? Is Sunstein (or Roberts, or Holmes) more truly a Minimalist or an advocate of democratic sovereignty? Would Strauss, given the choice between them that will sometimes arise, stand by Minimalism or by precedent? The difficulty of answering such questions cannot be brushed off as a function of inconsistencies in the minds or practices of these particular individuals. The tentative, fluid character of Minimalism—its refusal to rank and explain the relationships among its assorted aims—makes it impossible to classify even the most consistent Minimalist’s ultimate allegiances. Indeed, it makes it impossible to determine what constitutes a *consistent* Minimalist.)

In short, the contention that Minimalism should only be followed sometimes, like a rule of thumb, does not avert the fundamental problem. Insofar as Minimalism is not a coherent doctrine, “it” cannot ever be practiced.

VI. MINIMALISM'S MISSION

To this stage, I have argued that the protean character of Minimalism prevents it from accomplishing what it sets out to. Yet probing the nature of Minimalism's guidance reveals an even deeper problem. It is not only Minimalism's proposed method whose identity is hard to pin down. So is its mission. That is, exactly what the Minimalist method is meant to accomplish is uncertain.

Recall the multifaceted agenda embraced by Minimalists, ranging from such concerns as the legal impact and the popularity of rulings to the weight of precedent, deference to democracy, and the narrowness of justices' reasoning. In light of this variety, one might reasonably wonder what Minimalism is an account of. What is it meant to do? The Minimalist literature contains arguments and conclusions supporting a number of possible job descriptions.¹³⁰

Minimalism might be intended to provide an account of interpretation as it applies in the legal domain, where providing such an account is understood to consist of articulating valid means of discovering the pre-existing meaning of the law. Yet Minimalism might also be offered as an account of what the law is, where part of what it is is taken to be constructed by judges in the process of applying law. Minimalism could also be meant as an account of the broader subject of judicial review—of how judges should decide cases, addressing not only how to decipher the meaning of the law but also incorporating strategic considerations, such as rulings' impact on future collegiality on the court or on popular respect for the court. Then again, Minimalism might be an account of only such strategic questions, to the exclusion of interpretation.

Alternatively, Minimalism could be meant to guide determinations of what would be the best law—of what the law should be, or should be made to do, in the present political climate. Or, still another possibility, it could be an account of what judges should say the law is (as distinguished from what it actually is).¹³¹

¹³⁰ See *supra* note 5.

¹³¹ These last possibilities are suggested by its commending stability, for instance, regardless of how destabilizing a valid application of existing law might be, or by its commending narrow steps regardless of how broad the relevant law's scope might be, or by its urging flexibility so as to "accommodate new judgments about facts and values" regardless of whether new judgments have resulted in changes in the law

These possibilities are not necessarily exhaustive, but they adequately expose the difficulty. For each of them is a distinct task.¹³²

What all of this should make us appreciate is that, to whatever extent Minimalism can be said to have a mission, it is fundamentally different from that pursued by most other schools of thought in the debate over proper judicial decision-making. Originalism, for instance, clearly centers around illuminating the meaning of the law. It is uncertainty about what the law is and properly requires in a particular case, after all, that invites appeals to the judiciary. Thus, meaning is what needs to be ascertained through the courts, and originalism offers an account of how judges should do that. Even advocates of different species of originalism such as original intent, original understanding, and textualism are united in seeing meaning as the salient issue; what they differ over is the truest means of uncovering that meaning.¹³³ Perfectionists, such as Dworkin and Brennan, also provide accounts of the meaning of law.¹³⁴ Defenders of precedent and common law similarly argue that the meaning of our law is cumulatively clarified through its piecemeal application

effected according to constitutionally specified means. *See generally* SUNSTEIN, *supra* note 2, at 46–60 (discussing the virtues of minimalism).

¹³² On the destructive impact more generally of ill-formed concepts that do not unite distinctively unique concretes, see AYN RAND, *Credibility and Polarization*, 1 THE AYN RAND LETTER, Oct. 11, 1971, at 1 (discussing “package deals” and “anti-concepts”); Rand, *supra* note 85, and her discussion of proper concept formation in AYN RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY (Leonard Peikoff & Harry Binswanger eds., Penguin 2d ed. 1990). On a somewhat similar type of error, among legal theorists, of confusing significantly dissimilar tasks, see ALEXANDER & SHERWIN, *supra* note 101, 213–14 (discussing what they call “dynamic statutory interpretation” or “practical reason interpretation,” citing Sunstein as among its advocates).

¹³³ *See, e.g.*, WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY & ELIZABETH GARRET, LEGISLATION AND STATUTORY INTERPRETATION 221–26, 231–38 (2d ed. 2006); Scalia, *Originalism*, *supra* note 9, at 851–52.

¹³⁴ *See* Sunstein, *Debate*, *supra* note 5, at 288 (discussing Dworkin as a perfectionist). While Brennan’s belief in the “transformative purpose” of the constitutional text, *see supra* text accompanying note 26, might lead one to suppose that he does not view the Court’s role as one of discerning meaning, Brennan frames an extended discussion of the judge’s proper role entirely around interpretation, stating quite simply that “the debate is really a debate about how to read the text, about constraints on what is legitimate interpretation.” Brennan, Speech to the Text and Teaching Symposium at Georgetown University, October 12, 1985, in ORIGINALISM, *supra* note 5, at 55–70 (see especially pages 55–62).

over generations; that is why we should respect these earlier rulings as law. My point here is not to claim that any of these schools maintains purity in pursuing a strictly interpretive task, but simply to remind us that finding the law's meaning standardly is seen as what the debate over proper adjudication is about.¹³⁵

For Minimalism, by contrast, meaning is in the background—at best, one of a number of considerations that compete to fashion a ruling. In the array of ambitions that define Minimalist jurisprudence, questions about the written law's meaning are conspicuously absent. Respect for meaning is subordinated to concern for the results expected from treating the law in a particular way on a given occasion.¹³⁶

Sunstein is quite explicit about this. The “best” argument for Burkean Minimalism, he writes, is that it is “likely to produce better results, all things considered, than the alternatives.”¹³⁷ More generally, he holds that the question of which approach to legal interpretation judges should employ “requires attention not to the concept of interpretation but to the consequences of the recommended approach—to whether it would make our constitutional order better or worse.”¹³⁸ At the same time, Sunstein assures us that interpreters of the Constitution cannot “substitute the best imaginable constitution for our own constitution.”¹³⁹

It is instructive to consider why Sunstein believes that such substitution would be out of bounds: “The Constitution is binding

¹³⁵ The abundance of books and articles on this subject whose titles include the word “interpretation” is the most obvious evidence of this, and even when that word is not so featured in titles, discussion overwhelmingly revolves around it. Challenges to the centrality of meaning and interpretation arise, of course (and often pose interesting additional issues), but they stand decidedly at the periphery. See LUC B. TREMBLAY, *THE RULE OF LAW, JUSTICE, AND INTERPRETATION* (1997).

¹³⁶ Prakash, *supra* note 8, at 2213. Jed Rubenfeld observes that the vogue for pragmatism in law (a category to which Minimalism definitely belongs, I would argue) marks “a turn away from the entire discipline of interpretation.” He quotes the proudly pragmatist Richard Posner as saying that a judge has no “moral or even political duty to abide by constitutional or statutory text.” JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 10 (2005) (quoting Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 *STAN. L. REV.* 737, 739 (2002)).

¹³⁷ SUNSTEIN, *supra* note 25, at 40.

¹³⁸ *Id.* at 29.

¹³⁹ *Id.* at 28; see also *id.* at 32.

because it is good to take it as binding.”¹⁴⁰ Read from a certain perspective, this is an astonishing claim.

On one level, Sunstein has a sensible point: the reason we adopt this Constitution is the good governance that it provides. The problem is that Sunstein treats this fact as if it licenses judges to treat “goodness” as the criterion for their decisions about what the Constitution is. That is, it is precisely the presumed goodness of a particular law’s being one thing or another, he holds, that a judge is to consider in deciding how to rule in a given dispute. If a particular law were taken to mean *x*, it might be likely to precipitate one set of consequences, while if it were taken to mean *y*, to precipitate this other set; if *z*, yet another set, and so on. The question a Sunsteinian judge must then pose is: which of these projected outcomes is best, “all things considered?”

Notice, though, that this is an account of how to change the law rather than of how to apply the law. Confronting a case, a judge is instructed to conduct a personal, internal referendum on the wisdom of the existing law. He is to weigh a congeries of past rulings, contemporary perspectives, narrowness of impact, likely social tumult, etc., in order to decide what he considers it most prudent that the law be, today. The fundamental difference between this enterprise and the interpretation and application of existing law is camouflaged by Minimalism’s call for small, inconspicuous steps (at least, for typically small steps). It is also obscured by the fact that sometimes, proper application of law *will* significantly alter entrenched legal practices. That is, the application of law and the creation of law occasionally will carry the same sort of large-scale effects (as occurs when an existing law has been severely misapplied for a long time). Similar effects do not always result from similar causes, however. A new interpretation of existing law (one that corrects a previous misinterpretation) is different from a new law. The problem is that Minimalism instructs judges to deliberate about whether to impose new law — about *which* law they think it best to say that we have, rather than to clarify the law that we do have.

Sunstein has been only more transparent about this consequentialist agenda in some of his most recent writings. The subtitle of *A Constitution of Many Minds* is: *Why the Founding Document Doesn’t*

¹⁴⁰ SUNSTEIN, *supra* note 5, at 74.

Mean What it Meant Before, which implies that the law's meaning is indefinite, in flux.¹⁴¹ Further, the book's first chapter defends the claim that "there is nothing that interpretation just is,"¹⁴² which implies that to interpret the Constitution could be to do any of a number of distinct things. Lest this view seem to threaten the rule of law, Sunstein hastens to reassure us that "the meaning of the Constitution must be made rather than found, not in the sense that it is entirely up for grabs, but in the sense that it must be settled by an account of interpretation that it does not itself contain."¹⁴³

This attempt to straddle the fence between Minimalists' making law and finding law does not succeed, however, for one cannot elude the fundamental difference between the two. Sunstein's observation that the Constitution does not supply an account of how it should be interpreted is true, but beside the point: most things that must be interpreted (including my words on this page) are not accompanied by instructions for how to interpret them. Even rule-books and instruction manuals do not ordinarily include such meta-instruction; they simply tell you how to play contract bridge or sync your iPod or make crème brûlée. We do not conclude from the absence of "an account of interpretation" that their meanings must be "made."¹⁴⁴

More important, Sunstein's twin claims that interpretation is no particular type of activity and that the Constitution has no enduring meaning, added to his contention that the best method of applying the law is determined by the consequences of employing that

¹⁴¹ The book's framework makes plain the view that that law's meaning changes independently of law's being deliberately altered according to constitutionally prescribed procedures. Also, while Minimalism is not the single focus or thesis of this book, it remains one of its principal themes. See generally SUNSTEIN, *supra* note 25.

¹⁴² *Id.* at 19.

¹⁴³ *Id.* at 23.

¹⁴⁴ *Id.* The type of error committed here is a common one that rests on a false alternative. The fact that a document's interpreter cannot find every detail of that document's proper application simply dictated by the document does not mean that he cannot actually interpret it. It is not the case that a text either applies itself or else that the person who purports to understand and apply it is actually simply doing whatever he pleases. While a would-be interpreter certainly could refuse to respect the constraints of a text's meaning, he does not necessarily do this. Indeed, the very concept of "interpretation" is based on recognition of the difference between adhering to the meaning of a document (or at least, conscientiously striving to), ignoring it, and treating it as mere suggestion.

method, mean that by his account, contrary to his wish that it weren't so, the meaning of the Constitution *is* in fact "up for grabs." Sunstein's view that both the object of interpretation and the activity of interpretation lack a fixed identity makes this implication inescapable.

The larger point, again, of which Sunstein simply offers a stark illustration, is that Minimalism's mission is essentially different from the mission of those who strive to identify the proper means of courts' interpreting and applying existing law. Minimalism's incorporation of numerous disparate aims alongside the issue of accurately discerning law's meaning reveals that it is attempting to accomplish things far beyond the project pursued in the traditional debate over proper adjudication.

VII. THE DAMAGE

Suppose my critique holds up. If Minimalism is an invalid concept, why does that matter?

Essentially: because the practice of Minimalism (or strictly, its purported practice) lends respectability to rulings that do not uphold the law and the principles that the law incorporates.¹⁴⁵

Minimalism seems attractive to many because it claims to offer qualities that they consider important for a just legal system: impartiality, modesty, stability, maintenance of the rule of law. While one could argue about which elements are in fact essential to a proper system, the lesson from my critique is that, because Minimalism has no firm identity, "it" cannot reliably advance these (or any) ends. Since Minimalism is not a coherent methodology, a gulf looms between the label and the practice, between what it advertises and what it delivers. Given that the aim of "minimizing" without specification of content is vacuous, Minimalism fails to offer genuine instruction to those who would follow it. Its invocation serves, in actuality, only as a benediction bestowed on whatever a judge chooses to rule, on whatever bases he chooses to consider.

The label, in other words, licenses subjectivism. Minimalism authorizes the injection of judges' values into the determination of what

¹⁴⁵ If one believes, as I do, that the animating principle of a just legal system is individual rights, then what is at stake are those rights, but the exact principles of a proper legal system and of the U.S. legal system are issues for another day.

the law is and how it is to be applied. When a judge thinks that he is appropriately “minimizing” and thereby steering clear of value judgments, he cannot help but implicitly rely on substantive beliefs about values in order to answer the unavoidable questions: What to minimize? How to minimize? What degree—and of what, specifically—is suitably “minimal”? Because the answers to these questions are not given by Minimalism (or are given only in such vague and mutually contradictory ways as to be uninformative), the judge is on his own to supply them, unconstrained. A Minimalist judge is to do whatever he thinks best, for whatever reasons he deems most relevant. Contrary to its claim to foster steady predictability in law, this judicial improv only compounds uncertainty. (It essentially enthrones Justice Stewart’s infamous “I know it when I see it” test, with all its attendant unpredictability, as routine operating procedure.¹⁴⁶) Far from illuminating the basis for a particular application of the law, this loose, permissive method has the court simply tell the people: “trust us.”

The profound damage wrought by the practice of Minimalism, then, is that it shortchanges the enforcement of *law*. The laws of a nation inescapably reflect certain moral convictions—value judgments about the propriety of government coercion used to restrict certain types of action and not others. The application of those laws, correspondingly, cannot be blind to those values. Judges do need to refrain from using their rulings to impose their own value judgments concerning which laws we *should* have, to be sure. But to turn away from the values that are in the duly enacted law—as Minimalism urges, by advising judges to avoid “taking stands on the deepest questions in social life” and to “bracket” the “most contested questions of constitutional law”¹⁴⁷—is to turn away from the law. For if the law has taken a stand on some of “the deepest questions in social life,” judges must respect that stand (as long as it is constitutional). Similarly, the fact that a particular law concerns a question that might be “contested” does not mean that it is not the law.

By pretending that the law is devoid of values and by charging judges with the impossible task of applying the law by paying no heed to values, Minimalism requires tacit reliance on whatever

¹⁴⁶ *Jacobellis v. Ohio* 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (discussing the nature of pornography).

¹⁴⁷ See *supra* Parts II, III.C.

values individual judges find congenial. However well-intentioned the particular judges in question, this makes a travesty of the notion that they serve the law. Contrary to its image of sobriety and caution, Minimalism is reckless with those values that animate a specific legal system, as it readily replaces them with the judges' preferred values.¹⁴⁸

Destructive as this license for subjectivism is, it is not Minimalism's most worrisome threat. What is even more harmful, long-range, is the implication that judges *must* engage in such distortion, that they have no alternative.

Notice that the kinds of ends that Minimalist judges are instructed to seek are no different in kind from those that lawmakers routinely debate. That is, the alleged propriety of gaining consensus or of making changes slowly, for example, or of honoring tradition or honoring a diversity of opinion, are the very same ends that frequently feature prominently in policy arguments over the best course of government action. In other words, by its inattention to the meaning of the law and despite the fact that its advocates may not intend this, Minimalism has the effect of politicizing the law. For it substitutes questions of wise policy for questions of law, holding that the issues that should occupy judges and determine their rulings are political ones.

The broader result of this is to lend credence to the idea that adjudication is necessarily a contest of political values. This is Minimalism's most corrosive damage. It warps our very concept of the rule of law. If the ideal of objective adjudication governed by exclusively proper value judgments (i.e., judgments that rationally reflect those values that are in the law) is not thought possible, people will not attempt to understand the requirements of objective adjudication, let alone demand them. The objectivity of a legal system will be seen as a fiction to be paid lip service in polite company, rather

¹⁴⁸ The values that are inherent in a given legal system and the exact way in which they would properly influence judicial decision-making are obviously complex topics that warrant independent discussion. What I have argued throughout, however, should make clear that values are ineliminable from law and from the "practice" of Minimalism. In a related vein, I have briefly addressed the ideal of the rule of law as inescapably normative in Tara Smith, *Objective Law*, in *AYN RAND: A COMPANION TO HER WORKS AND THOUGHT* (Allan Gotthelf & Gregory Salmieri eds., forthcoming 2011).

than as a genuine and worthy ideal to which judges must actually aspire in their practice. This is hardly a foundation from which we can expect objective adjudication or justice.

VIII. CONCLUSION

While other critics have raised valid objections to some of Minimalism's specific tenets and arguments, they have missed, as far as I can tell, its more fundamental failing: it is an incoherent concept. My thesis is not simply that Minimalism is not a *good* theory; it is that it is not a theory, for it is not *anything* definite. The term functions merely as a placeholder invoked to sanction a grab-bag of desiderata rather than to designate a distinctive method of decision-making that offers genuine guidance.

At the start of this paper, I speculated that the unusual assortment of ordinarily antagonistic figures aligned under Minimalism was evidence not of the doctrine's vigor, but of some serious deficiency. I hope by now to have vindicated that belief. The reason that champions of such antithetical ideological persuasions co-mingle under the Minimalist tent is that nearly anyone can claim cover under its billowing canvas. Minimalism fails to exclude because it is a jurisprudential Oakland: there's no there, there.¹⁴⁹ Its breadth of appeal is bought at the price of its being *anything* in particular; the way to satisfy so many is to shrink the identity of Minimalism itself. By attempting to evade the values that are inherent in a legal system, nothing remains to hold Minimalism together as a unit. Its attempt to explain proper adjudication by severing the form of judicial decision-making from the content of the law that judges are making decisions *about* is self-defeating. An adequate account of how judges should apply the law cannot ignore the values that are in the law.

Minimalism's promiscuity in embracing a miscellany of ends means that, for all the professed prudence and caution of its course, Minimalism is actually reckless with the values for which we have a legal system. While separate arguments must determine exactly which fundamental values properly shape a legal system, what is

¹⁴⁹ This is Gertrude Stein's famous line, characterizing the city of Oakland, California. See GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 288 (1937).

undeniable is that the reason for having law is something that a society values. People establish a legal system in the first place in order to perform a function that they consider *worth* performing. To evade the role of that value when prescribing the proper means of applying the laws that they enact in order to accomplish that purpose is, by default, given that some values must at least tacitly steer judicial decisions, to erect other values in place of them.

The Appeal of Minimalism in the Contemporary Context

Let me raise one final angle on all this. Notwithstanding my contention that the very concept of Minimalism is hopelessly confused, the appeal of Minimalism is understandable, given our contemporary context. Minimalism is motivated (at least, for many) as a response to non-objective judging.¹⁵⁰ On the belief that judges often impose their personal policy preferences, Minimalism presents itself as a ceasefire. While left-wing and right-wing Minimalists accuse one another of bad faith, it is more instructive to assume good faith all around. This will enable us to appreciate a deeper issue involved.

Contemporary judges are in a tough spot. For they inherit a great deal of bad law—law that invites them to exert extra-judicial powers, to employ their judgments of what the law should be rather than of what the law is (or, in other cases, to rule in ways that look as if that is what they are doing). By “bad” law, I mean law that is non-objective in its content or in its formulation, as well as law that has been incorrectly applied by previous courts (i.e., invalid judicial precedent).¹⁵¹ Consider the frequency with which legislators, for example, to avoid alienating voters, evade difficult decisions by enacting statutes that include contradictory provisions or are framed in ambiguous language, essentially punting it to the courts to make the hard choices.¹⁵²

I would argue that, through a series of misguided actions by legislators, the executive branch, and the judiciary, accruing over decades, our system has become so encrusted with non-objective law that the strictly proper application of the Constitution today would radically alter many of our entrenched legal practices. The

¹⁵⁰ See, e.g., SUNSTEIN, *supra* note 25; SUNSTEIN, *supra* note 2.

¹⁵¹ For elaboration of the nature of non-objective law, see Smith, *supra* note 148.

¹⁵² See Tara Smith, Op-Ed, *Next Justice Will Interpret the Law*, ATLANTA J. CONST., May 28, 2009, at 13A.

effect of this (especially if courts required such corrections to be made abruptly) would naturally resemble the effects of inappropriate judicial *lawmaking*. Obviously, we can debate what constitutes bad law and how much of it infects our system. The more there is, the more acute the challenge for responsible judges to refrain from lawmaking (and the more difficult it will be for their proper actions not to look like lawmaking). The more basic problem, however, is that to the extent that the law as a whole is not what it is supposed to be, judges cannot do the job that they are supposed to do. Objective adjudication does not take place in a vacuum. Non-objective laws cannot be objectively applied.¹⁵³ Proper adjudication is but one component of a system of law, and judicial decision-making can function as it should only when the other components function as they should. Mistakes are bound to be made from time to time, but the better the courts, the more quickly mistakes will be caught and dismissed. It is only repeated failures in each of the branches that allow bad law to calcify.

The point is that in today's legal climate, anxiety about judges not exercising arbitrary powers is quite reasonable. And it lends the gingerly, "go slow, go small" tack of Minimalism a definite attraction. "Modesty" seems responsible when so much power is available to judges.

Indeed, this raises a natural question: If my assessment of the current state of the law is right and correct interpretation of the Constitution would provoke significant, potentially destabilizing changes in our legal practices, might Minimalism make sense simply as an interim measure? As the best approach to adopt for now, as a means of inching us back toward fully proper application of law with the least disruption possible?

No. I have argued that Minimalism is incoherent. It fails to identify a singular adjudicative methodology. Consequently, it cannot be the best approach for either the short-term or the long-term. Without a fixed identity, "it" is not the way to accomplish anything. The contention that it is can accomplish only one thing: the undoing of the rule of law.

¹⁵³ See Tara Smith, *How Activist Should Judges Be?: Objectivity in Judicial Decisions*, available at <http://www.aynrandbookstore2.com/>.