Originalism v. Minimalism

On September 17, 1787, the delegates to the Constitutional Convention gathered in Philadelphia’s Independence Hall to sign the newly drafted U.S. Constitution. Every year, to celebrate that momentous date in liberty’s history, the Cato Institute hosts a daylong conference. At the 13th Annual Constitution Day event this year, the Hon. Diane Sykes—a federal judge on the U.S. Court of Appeals for the Seventh Circuit and a former justice of the Wisconsin Supreme Court—delivered the B. Kenneth Simon Lecture on Constitutional Thought. In her address, excerpted below, Judge Sykes examined the pitfalls of modern-day minimalism, a legal approach that emphasizes decisions that are both narrow and shallow. She argued instead that constitutional interpretation should remain anchored in the original meaning of the Constitution’s text, which is the source of the Court’s authority and legitimacy.

Next month the curtain rises on the 10th term of the Roberts Court. From the beginning, Chief Justice Roberts has been explicit about wanting to foster greater consensus on the Court. It’s often suggested that the Court’s legitimacy would be enhanced by fewer five-four rulings along the usual conservative-liberal fault line. In his confirmation-hearing testimony, and more fully in his first major public address, Roberts articulated his view that although differences among the Justices should not be “artificially suppressed,” a greater degree of consensus in the Court’s decisions would bring “clear [jurisprudential] benefits.” He explained that unanimous or near-unanimous decisions “promote clarity and guidance for the lawyers and for the lower courts trying to figure out what the Supreme Court meant.” More fundamentally, he said, “[t]he rule of law is strengthened when there is greater coherence and agreement about what the law is.” And he famously set for himself this guiding principle: “If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more. The broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible ground.”

Much of the early commentary about the Court’s last term focused on the significant increase in the number of unanimous judgments. For the first time since the 1940s, almost two-thirds of the Court’s merits opinions were unanimous on the bottom line, if not necessarily in their reasoning. This is generally thought to be a striking and welcome development. In some key respects it is, although it’s important to note that a significant part of the Court’s docket each term consists of technical statutory or procedural issues that do not engage the philosophical differences among the Justices. Still, the uptick in bottom-line agreement is remarkable, especially in cases raising difficult constitutional questions. In this category the Court achieved this greater degree of consensus—if that’s what it is—for the most part by following the Chief’s maxim about narrow decisions, applying one technique or another of judicial minimalism. This dynamic will undoubtedly fuel the ongoing debate about whether the Roberts Court is committed to minimalism and, if so, whether that’s a good thing.

I should probably begin by defining these terms. Modern judicial minimalism as a distinctive theory of decisionmaking is usually credited to Professor Cass Sunstein of Harvard Law School, who coined the term and is the leading academic proponent of this approach to judging. Sunstein proposes that judges should generally avoid broad rules and abstract theories and attempt to focus their attention only on what is necessary to justify an outcome and leaving as much as possible undecided. Minimalist judging of the Sunstein variant proceeds along two dimensions. First, judicial opinions should be narrow rather than wide, deciding the case at hand while avoiding pronouncing rules for resolving future cases. Second, judicial opinions should be shallow rather than deep, avoiding large theoretical controversies and issues of basic principle. Judicial opinions should rely instead on incompletely theorized agreements that enable judges with diverse philosophical commitments to join in bottom-line judgments, leaving the more fundamental questions of principle undecided.

Modern minimalism is justified primarily on pragmatic grounds. Minimalist decision methods—so the argument goes—account for the limitations on judicial competence and in particular the limits on the judge’s ability to accurately assess the consequences of a decision one way or the other. Narrow, shallow decisions reduce the risk and cost of error. Minimalist decisions are also said to be more pluralistic, demonstrating respect for diverse perspectives by leaving fundamental matters of principle unaddressed. Minimalism recommends itself for other reasons, too. It claims to promote stability and predictability, to maintain flexibility for future courts, and to empower democratic deliberation by giving political decisionmakers room to maneuver and respond to constitutional questions left open by the Supreme Court.

On the surface, the theory sounds like it’s limited to process values, but it’s not. Substantively, minimalism starts from a pre-
sumption of deference to the political branches. It self-consciously avoids invalidating acts of the legislative and executive branches either by upholding them on the merits or by using various techniques for avoiding constitutional questions. The point of defaulting to deference is to recognize the limited role of the federal judiciary and to make a large space for democratic self-govern-ment. Minimalism also advocates a strong version of *stare decisis*; consistent adherence to precedent promotes stability and predictability, thereby preserving the Court’s institutional interests. On a more philosophical level, modern minimalism promotes itself as a hedge against judicial supremacy. It calls on judges to go slowly and in small steps.

The emphasis on incrementalism and gradualism evokes the philosophy of Edmund Burke, who viewed governance as a practical endeavor guided by experience and was skeptical of grand political theories. Burke counseled deference to long-settled practices and traditions tested by experience and the collective wisdom of society accumulated over generations. He held the common law in high regard.

Of course, the Founding generation didn’t need a theory of judicial minimalism. The common-law tradition, as it was understood and practiced at the time, was itself essentially minimalist, and important minimalist features are embedded in our constitutional design. The common law as applied in the courts of the new American states was based on English customary law and in the Blackstonian tradition was found, not made. The philosophical terrain was also different than it is now. The Framers inherited a strong natural-rights tradition, but they also understood that because natural-rights principles are quite general—today we would say “underdetermined”—the judges of the new federal judiciary, like their counterparts in the states, would be called upon to exercise a substantial element of judgment in individual cases. As a constraint on that authority, Article III limits the judicial power to cases or controversies that are explicitly *judicial* in nature. The Framers rejected a more active political role for judicial review by deciding against a Council of Revision. Beyond the constraining effect of the case-or-controversy limitation, the Framing generation generally understood that federal judges would follow long-established norms of judicial practice. They would be bound by rules and precedents, to para-

Now, no one in this room needs to be reminded of the normative constitutional theories that have been in contention since the New Deal, but I’ll remind you anyway because it helps to place the new minimalism in its proper historical perspective. The “living constitution” school of thought held sway in the decades that spanned the Warren Court and the early years of the Burger Court. This evolutionary approach authorized judges to interpret the core principles of the Bill of Rights and the Fourteenth Amendment in a way that reflects contemporary values and allowed them to adapt the Constitution’s broad language to address modern conditions and problems. In practice this theory produced the rights revolution of the 1950s and 60s, which was aggressively interventionist in implementing social, political, and legal reform by judicial decree. The results were in some cases a virtue and in others, well, not so much. But in all cases the theory empowered the judiciary to deploy the Constitution as a malleable instrument of social and legal change at the expense of the democratic process.

The conservative counterrevolution began in earnest in the 1980s and initially focused on restoring the practice of restraint, understood as judicial deference to the policy choices and value judgments of the political branches. In the early years, the primary concern was to stand athwart the jurisprudence of the Warren Court yelling, “Stop!” (apologies to William F. Buckley). But the emphasis on restraint did not address how the Constitution ought to be interpreted and applied. That would come later, as originalism was recovered, developed, and refined.

The animating principles of originalism arise from the legal justification for judicial review—the duty to decide cases according to law, including the law of the Constitution. Briefly stated, the basic theory is this: Because our Constitution is written, unlike the British constitution, and because it is supreme law adopted by the people as the original sovereign that brought the American government phrase the *Federalist* no. 78. This was thought to be a sufficient check against arbitrary decisions based on will rather than judgment.

That was the “old” form of judicial minimalism; it was swept away by the legal realism of the 20th century. The “new” judicial minimalism is a response to the realist idea that appellate judges engage in discretionary lawmaking when they decide cases, including and especially cases of constitutional interpretation. If judges *make* constitutional law, then we need some theory or method to guide them in that enterprise.

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into being, constitutional interpretation ought to be grounded in the public meaning of the text as understood at the time of ratification. On this view, constitutional adjudication begins with an inquiry into the meaning and scope of the provision in question based on the Constitution’s original meaning.

Anchoring constitutional adjudication in the document’s text, structure, and history is thought to best legitimize the power of judicial review. We all know *Marbury v. Madison.* The judiciary’s authority to set aside an otherwise valid law in the name of the Constitution arises by inference from the judges’ duty to apply the law in individual cases. Originalism holds that the interpretive inquiry into the law of the Constitution ought to be grounded in, and tethered to, the principles fixed in its text and structure.

Originalism first established a foothold in the legal academy and eventually arrived at the Supreme Court. Professor Sunstein’s minimalism is a response to the rise of originalism and is meant to counter it. Minimalist theory occupies some common ground with what has come to be known as judicial pragmatism, which is a flexible approach to judging that focuses on the consequences of judicial decisions. The aim of pragmatism is to achieve good overall outcomes, although its practitioners differ in their account of what is a good outcome. Minimalism and pragmatism are overlapping theories of consequentialist judging. Both mix law with politics.

This brings me to my final point about modern judicial minimalism: the theory is flexible about when judges should proceed minimally. It explicitly acknowledges that not every case calls for a minimalist ruling. As Sunstein puts it, “[t]he pragmatic foundations of minimalism suggest that constitutional law should not be insistently or dogmatically minimalist.” In other words, there are times and places in which minimalism is rightly abandoned. There’s a nonexclusive, multifactor test for determining when it’s best to issue a minimalist decision and when it’s best to go *maximalist*—but you probably guessed that already.

It should be clear from this discussion that although minimalism is an approach to judging, it’s *not* a theory of constitutional interpretation. Unlike originalism, it’s not a method for determining the meaning, scope, and application of the Constitution or the liberty guarantees in the Bill of Rights. Instead, it’s a theory of deference. Judges should defer to the political branches of government and to the decisions of prior courts—except when they shouldn’t. It’s also a theory of avoidance. Judges should not make broad pronouncements on foundational matters of constitutional principle—except when they should. Got that?

As you’ve probably gathered, minimalism can and has been criticized for offering no genuine guidance to judges. As the philosopher Tara Smith has noted, “the instruction to the judiciary to ‘minimize your impact’ is hollow.” Critics have also attacked minimalism for privileging the doctrinal status quo. Sai Prakash, a law professor at the University of Virginia, has noted that whereas originalism privileges the original public meaning of the Constitution, minimalism—because it is precedent focused—tends to privilege the views of the Warren and Burger Courts. Other critics have argued that by promoting shallow decisionmaking—especially in cases involving broad constitutional principles like free speech and equality—the theory permits judges to smuggle in their own unstated and unexamined ethical assumptions and preferences. And as I have already noted, the pragmatic flexibility in minimalist theory provides no rule or standard for deciding when it should apply and when it should not.

For my part, I tend to side with the critics. A unifying theory of minimalism is both unworkable and unwise. The Article III constraints on the judicial power already enforce a degree of minimalism, and all judges respect and reason from precedent. We have well-established doctrines to ensure that judges do not unnecessarily decide constitutional questions, and the norm of analogical reasoning has a natural constraining effect. In other words, minimalism is inherent in standard judicial method. We do not need a heavy theoretical thumb on the scales. What’s important is how the traditional sources of law and legal interpretation—text, history, canons of interpretation, precedent, and other well-established tools of the judicial craft—are prioritized, weighted, and applied.

At a time of deep political polarization, the modesty and consensus values claimed by judicial minimalism seem especially attractive. Restraint is indeed a judicial virtue. Judicial mistakes on constitutional questions are extraordinarily difficult to fix. Arrogating too much power to the judiciary distorts our politics and undermines our ability to democratically shape and alter our basic legal, social, and economic institutions. But strong avoidance and deference doctrines are not the answer. They may serve prudential or political concerns, but they are not necessary to enforce the separation of powers and indeed may undermine that critical feature in our constitutional design. The Court’s legitimacy arises from the source of its authority—which is, of course, the Constitution—and is best preserved by adhering to decision methods that neither expand, nor contract, but *legitimize* the power of judicial review. The Court’s primary duty, in short, is not to minimize its role or avoid friction with the political branches, but to try as best it can to get the Constitution right.