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The Revolution Will Be Sub Silento: The Roberts Court and the Democratic Costs of Judicial Minimalism

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**Abstract:** Various theorists have touted the virtues of the jurisprudence known as “minimalism,” in which judges avoid broad holdings and try to avoid reaching large constitutional issues if narrower holdings are available. Minimalism, its proponents assert, increases judicial modesty, improves the quality of political deliberation, and enhances the legitimacy of the court. The first terms of the Roberts Court (as well as the late Rehnquist Court), however, raise doubts about these purported virtues. In practice, judicial minimalism does not have a strong relationship with judicial modesty, various techniques associated with minimalism carry serious democratic costs, and courts are not inherently entitled to a fixed level of political legitimacy irrespective of their behavior. While minimalism may be valuable in some cases (and given the structure of courts is certainly inevitable), its very real downsides demand more substantial consideration.
Introduction: The Minimalist Court

Shortly after his confirmation as the seventeenth Chief Justice of the United States, John Roberts told the graduating students at the Georgetown University Law Center what kind of opinions he would prefer his Court to issue:

If it is not necessary to decide more to a case, then in my view it is necessary not to decide more to a case. Division should not be artificially suppressed, but the rule of law benefits from a broader agreement. The broader the agreement among the justices, the more likely it is a decision on the narrowest possible grounds.\(^1\)

Roberts’s statement suggests a commitment to the school of jurisprudence known as “minimalism.” In the words of Cass Sunstein, its leading proponent, it consists of “saying no more than necessary to justify an outcome, and leaving as much as possible undecided.”\(^2\) This method of judging is often associated with judiciary that has relatively chastened ambitions. Minimalism, argues Mark Tushnet, is the ideal jurisprudence of the “substantively modest” post-New Deal/Great Society constitutional order.\(^3\) When combined with the appointment of Samuel Alito—who also seemed to avoid broad pronouncements and demonstrated little interest in grand interpretive theories—the appointment of Roberts seemed likely to continue the frequently minimalist opinions of the late Rehnquist Court, despite the presence of two colleagues hostile to the approach in Justices Scalia and Thomas.

Due at least in part to his stated commitment to a minimalist jurisprudence, the confirmation of Chief Justice Roberts was supported by a number of law professors—

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\(^3\) MARK V. TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 130 (2003).
including Sunstein himself—who one would not expect to sympathetic to his general ideological orientation. And, indeed, many of the major decisions of the first one and a half terms of the Roberts Court can be reasonably characterized as minimalist. The cautious approval the new Chief Justice received from scholars with largely antithetical views is in some measure reflective of a tendency to associate minimalism with judicial modesty: any justice appointed by President Bush will be a conservative, the argument may run, but a minimalist court will be much less aggressive about pursuing the legal goals conservatives support.

However, it should be noted that the defense of judicial minimalism by Justice Roberts quoted above does not emphasize judicial modesty per se, but rather claims that minimalist opinions will enhance the reputation of the Court. A minimalist court may therefore be able to do more, not less. A dissent by Chief Justice Roberts in a recent decision holding that state courts were free to retroactively apply a legal rule favoring defendants in state cases even if the Supreme Court did not retroactively apply the rule in federal cases shows that judicial minimalism does not necessarily lead to a commitment to judicial modesty. The result of the case “is contrary to the Supremacy Clause and the Framers’ decision to vest in ‘one supreme Court’ the responsibility and authority to ensure the uniformity of federal law,” Roberts argued, and “the Constitution requires us to be more jealous of that responsibility and authority.” Although if it had carried a majority of votes this particular admonition would restrict the power of state courts rather than legislatures, his strong defense of the Supreme Court as the dominant arbiter of constitutional

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4 For a summary of some of the liberal law professors who supported Roberts’s confirmation, as well as their reactions after the first full term of the Roberts Court, see Emily Bazelon, Sorry Now?, Slate (June 28, 2007), http://www.slate.com/id/2169344. Site last accessed on December 3, 2007.
6 Id. at 878.
requirements (even when other actors wish to provide greater protection for minority rights than the Supreme Court has mandated) strongly suggests that he is unlikely to oppose the tendency towards ever-stronger assertions of judicial supremacy by the Supreme Court (including by its minimalists).  

Indications that the new Chief Justice is unlikely to lead the Court into a new era of judicial modesty are also evident in a number of the Roberts Court’s major holdings. These cases raise important questions about the virtues of minimalism claimed by its proponents. Although the most important advantage claimed for the approach is its tendency to leave more discretion in the hands of the political branches and to promote more deliberative solutions to public policy problems, the Court’s minimalist decisions have generally deferred to the political branches only insofar as deference was consistent with the substantive preferences of the majority of the Court. And in such cases, a more maximalist decision would have led to greater latitude for legislative action. In other cases, minimalist jurisprudence has proven to be perfectly compatible with making it more difficult for the political branches to expand the rights of American citizens. And while minimalists often tout the extent to which the jurisprudence they favor can protect the reputation of the Court, the first terms of the Roberts Court raise the possibility that even if true this effect comes with serious democratic costs, as the Court can effect substantial changes in the law while minimizing public scrutiny. The Court’s treatment of precedents is also consistent with minimalism, but is very difficult to defend in terms of democratic legitimacy, as the precedents nominally being upheld become increasingly devoid of meaningful content. The Roberts Court is also likely to build on the decisions of previous judicial minimalists—

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including the arch-minimalist Felix Frankfurter—
to assert broader conceptions of judicial
supremacy, at least in areas where increased judicial power is not inconsistent with the
substantive preferences of a majority of justices.

The positive values attributed to minimalism, this paper argues, have been largely
absent from the first years of the Roberts Court. This is not because the jurisprudence of
the Roberts Court openly contradicts the claims he made to the students at Georgetown: the
major majority opinions of the Court have indeed shown a strong tendency towards formal
minimalism. Rather, these opinions suggest—as have numerous examples past eras of the
Court—that undertheorized, narrowly argued opinions can be put to the service of ends that
are not particularly minimalist. The particular minimalism most common on the Roberts
Court emphasizes the weaknesses of minimalism while undermining its most evident virtues.

Before proceeding to this evaluation of minimalism through some of the first major
cases of the Roberts Court era, I will briefly outline the potential strengths of minimalism, as
well as some theoretical objections to these claims on its behalf. I will then briefly discuss
the rise of minimalism as an important element of the Rehnquist and Burger Courts, arguing
in particular that it is important not to overstate the significance of the fact that these courts
formally left most important Warren Court precedents untouched. Finally, I will argue that
several important decisions of the early Roberts Court have refined the minimalist
techniques of its predecessors. In doing so, they have advanced a particularly indefensible
variant of minimalism: using minimalist techniques to conceal major substantive changes in
legal doctrine. The apparent conflicts between conservative minimalists and maximalists in
cases concerning abortion, campaign finance, and jurisdiction in Establishment Clause cases
have been largely illusory, with essentially arbitrary distinctions about whether precedents are

8 See COOPER v. AARON 358 U.S. 1 (1958) at 20-3.
being overruled masking underlying substantive agreements. In addition, the use of minimalism by the Roberts Court suggests that defenses of minimalism that rely on its ability to preserve the prestige of the Court are especially problematic. From a democratic standpoint, it is better when major substantive changes are made explicitly rather than covertly. Excessive focus on the formal distinctions between more maximalist and minimalist conservative judges obscures what it likely to be a central feature of Roberts Court conservatism: modifying the New Deal/Great Society regulatory state not through the outright nullification of major statutes but by reading existing laws narrowly and making the enforcement of both statutory and constitutional rights more difficult. The use of minimalism by the Roberts Court would serve Republicans in Congress who seek the maximum policy change with a minimum of public scrutiny very well, but whether it is similarly valuable to democratic governance in general is much less clear.

Deliberation and Reputation: The Virtues Claimed for Minimalism

As with any other jurisprudence, minimalism comes in any number of variants with subtle differences. The post-World War II grandfather of the minimalist approach was Alexander Bickel, who argued that the Supreme Court should use the various procedural techniques at its disposal to avoid deciding politically divisive cases unless its intervention was absolutely necessary. Without denying Bickel’s influence, I will primarily focus on minimalism as it has been elaborated and defended by its most extensive and persuasive contemporary proponent, Cass Sunstein. Evidently, not all defenders of minimalism have

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identical approaches. Neal Devins, for example, while broadly sympathetic argues that Sunstein’s minimalist approach would benefit from more attention to the use of procedural discretion advocated by Bickel, while also criticizing Sunstein for advocating an excessively constrained court.\textsuperscript{12} And as Sunstein argues, the content of any minimalism will depend on a variety of underlying substantive assumptions that will vary depending on the theorist (or judge).\textsuperscript{13} It should be noted as well that Sunstein does not claim that minimalist jurisprudence is appropriate in all contexts. Rather, he argues that it is useful for some types of cases but not in others. When judges have a high degree of justified confidence about the effects of an opinion or a stable foundation for advance planning is required, a maximalist opinion will be preferable.\textsuperscript{14} For our purposes, any jurisprudence with a preference for relatively undertheorized and particularized judicial opinions can be fairly classified under the “minimalist” rubric.

Sunstein identifies two axes along which decisions may be relatively minimalist or maximalist: narrowness/width and shallowness/depth.\textsuperscript{15} The former refers to the effect of a holding on future cases. A “narrow” holding will resolve a case in a way which will have a relatively minimal impact on future cases, while a “wide” ruling will announce a rule that can be expected to control a substantial number of future cases as well. The latter axis refers to the type of reasoning used to defend an outcome. A “shallow” opinion will avoid reference to grand theories of interpretation or broad moral principles, and will instead focus on concrete details of the particular case at hand and emphasize points of agreement among otherwise divergent viewpoints. A “broad” opinion is more completely theorized and will try to derive individual case outcomes from more abstract principles.

\textsuperscript{13} Sunstein, \textit{supra} note 11 at ch.4.
\textsuperscript{14} Id. at 57-60.
\textsuperscript{15} Id. at 10-14.
One wrinkle of particular importance in analyzing of the Roberts Court is Sunstein’s treatment of *stare decisis*. One might expect a minimalist court to place relatively little weight on precedent, because relatively strict *stare decisis* has the effect of retroactively broadening a previous holding. On the other hand, from a formal standpoint a Court that frequently announces the overturning of precedents is likely to be writing deep opinions, saying more than is strictly necessary to resolve an individual case. By focusing on concrete details, a minimalist judge will usually be able to find distinguishing features that can render a precedent inapplicable to the case at hand without requiring it to be overturned. While Sunstein is not entirely clear about his conclusions on this point in his most comprehensive analysis of minimalism, it seems fair to assume that a minimalist judge will be reluctant to explicitly announce the overturning of precedents in the manner of Justice Kennedy in *Lawrence v. Texas,* but will also not give precedent a large amount of weight in resolving a particular case. In a more recent book, he more forcefully identifies the robust application of *stare decisis* with a minimalist approach, but without addressing the retrospective breadth problem (and, it should probably be noted, in the context of a larger argument expressing serious apprehensions about the future direction of the Court.)

Another way of putting the distinction which is preferable in some respects is to distinguish between *formal* minimalism and *substantive* minimalism, where formal minimalism refers to the reasoning of the opinion (the shallowness/depth axis), and substantive minimalism refers not to the reasoning, but the result (to some extent, the narrowness/width

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16 Id. at 19-22.
17 “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.” 539 U.S. 558 (1986) at 578.
18 Sunstein also argues, in the midst of his discussion of *Romer v. Evans* [517 U.S. 620 (1996)], that it “would certainly not have been minimalist” to reject “a precedent that is fairly long-standing and that has helped stake out important position on the meaning and future of the due process clause.” See supra note 11 at 152.
axis.) In evaluating the latter, it is important to address not only whether a rule will bind future cases but also on the impact of a decision on the other actors involved in a case (i.e. how much does this holding affect the range of action available to the legislative and executive branches? How will it affect the ability of citizens to participate in politics? How is the policy status quo affected?) Focusing on the likely extrajudicial effects of a holding is particularly important because, as Sunstein notes, the ultimate breadth of an precedent is largely in the hands of future courts rather than the court issuing the original decision. A broad opinion means little if future minimalists can avoid applying it to concrete cases that superficially appear to be controlled by the broad rule by declaring the relevant parts of the prior case *dicta*.

As my choice of terms might imply, a central argument of this paper is that in terms of the effect of judicial decisions on a democratic polity whether a decision is *substantively* minimalist is of far greater importance than whether a decision is formally minimalist.

To illustrate the distinction, consider two landmark abortion decisions. *Roe v. Wade* might be the case of the last 40 years most cited as a case of judicial overreaching (and therefore as a strong potential exhibit in a brief for judicial minimalism), including by Sunstein himself. And, indeed, whether or not one believes that that Court overreached with its holding in *Roe*, it is difficult to argue against the “maximalist” label for the decision.

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20 The impact of the invalidation of a statute, for example, will depend on such factors as whether the statute is being seriously enforced, or whether it can be fairly said to represent a current legislative majority as opposed to a never-repealed legislative majority that is several generations old and whose past legislation is protected by the multiple veto points of Madisonian political institutions, which make it much easier for minorities to block the repeal of old legislation than to get new legislation passed. *See* George Lovell and Scott Lemieux, *Assessing Juristocracy: Are Judges Rulers or Agents?* 65 Md. L. Rev. 105-109 (2006).


22 410 U.S. 113 (1973).


24 My own position is that, at least in the context of laws that either lack a strong connection with legitimate state objectives or are arbitrarily enforced, *Roe* was not excessively broad. *Scott Lemieux, For Richer or Poorer,*
The Court invalidated forty-six abortion statutes, and while the majority opinion inevitably left a few related questions—such as whether the government could withhold general medical funding for abortions\textsuperscript{25} or what kind of regulations might be consistent with advancing a state’s legitimate post-first-trimester interest in a woman’s health\textsuperscript{26}—unanswered it foreclosed a great deal of potential abortion regulation as well. And yet, according to Sunstein’s typology \textit{Roe} was maximalist on one dimension but minimalist in another.\textsuperscript{27} While it was certainly a “wide” decision, it was also a “shallow” one, saying very little about the relevant due process rights that were being applied and, famously, nothing about the implications of the holding for gender equality.\textsuperscript{28} Indeed, by Sunstein’s criterion that shallow decisions are “incompletely theorized,”\textsuperscript{29} \textit{Roe} is a nearly definitive example of a minimalist opinion. And yet, it seems clear that \textit{Roe}’s substantive breadth is of considerably greater legal and political import than its theoretical shallowness. The result in \textit{Roe} had a clear and substantial impact on policy and politics. How these policy and political outcomes would have changed had Justice Blackmun written the opinion differently is unclear but it is overwhelmingly likely that any such changes would have been minimal.\textsuperscript{30}


\textsuperscript{25} Harris v. McRae, 448 U.S. 297 (1980).

\textsuperscript{26} City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

\textsuperscript{27} Sunstein, supra note 11 at 17.


\textsuperscript{29} Sunstein, supra note 11 at 11.

\textsuperscript{30} It could be argued that a more carefully written due process opinion would have limited the subsequent development of the Court’s substantive due process jurisprudence, but this seems implausible. Focusing on the particulars of the invasion of the marital relationship in \textit{Griswold} did not prevent the court from extending the right to use and obtain contraception to unmarried couples, and then from extending this to the case of abortion. It may have made some difference to subsequent cases had Blackmun located the right to obtain an abortion in the equal protection clause and emphasized issues of gender inequity, but 1) as the failure to mention gender rights at all itself suggests any mention of gender rights would not have been particularly
Planned Parenthood v. Casey\textsuperscript{31}—which re-affirmed Roe while considerably modifying it and narrowing its restrictions on the state's ability to regulate abortion—is a harder opinion to classify. The best option, though, is to categorize it as the opposite of Roe—a narrow but deep holding. The “undue burden” standard the plurality opinion used to evaluate abortion regulations is a highly vague one on its face, and was applied in a deferential manner to the regulations at hand in the case (finding all but a spousal notification provision constitutional.) Particularly compared to the “trimester framework” the case replaced, the “undue burden” standard is a very minimalist one. The opinion was not entirely minimalist in substantive terms because two precedents were overturned, but these overrulings seem broadly consistent with a minimalist perspective because they came as an alternative to overruling a much longer-established landmark. While the decision was narrow, however, it was also deep in many respects, with broad, detailed pronouncements about \textit{stare decisis}, the role of the Court in American society, and the evolutionary nature of constitutional liberties. For example: “Each generation must learn anew that the Constitution’s written terms embody ideas and aspirations that must survive more ages than one.”\textsuperscript{32} Or, to use perhaps the most-often quoted (and criticized) passage: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”\textsuperscript{33} The opinion also had considerably more content about the implications of reproductive freedom for gender equality than Roe. In striking down the spousal notification provision, for example, the plurality argued that the provision

\textsuperscript{31} 505 U.S. 833 (1992).
\textsuperscript{32} Id. at 901.
\textsuperscript{33} Id. at 851.
embodied “a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution.” But again, the decision’s substantively minimalist aspects seem much more consequential than its formally maximalist ones. The substantive holding permitted considerably more state regulation of abortion. On the other hand, believing that (for example) the plurality’s admittedly grandiose assertion that the “Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution” had a significant impact on the politics of abortion seems as implausible as the Court’s confidence that it could end the abortion controversy itself.

When evaluating the minimalist nature of various opinions, it is important to be mindful of the different ways in which they can be minimalist, because different manifestations of minimalism can have different implications for democratic politics. The choice between substantive minimalism and maximalism is likely to have concrete, identifiable effects on the public policy and the powers of the state (and the relationship of citizens to the state), while the effects of formal minimalism are more speculative and likely to be much more modest where the impact of judicial decision-making is concerned. With this in mind, we may turn next to briefly outlining some of the key potential strengths and weaknesses of the minimalist approach. I do not intend this to be an exhaustive list; rather, the goal of this section is to identify the aspects of minimalism that are most relevant to the evaluation of the late Rehnquist and Roberts Courts.

Democracy Promotion

34 Id., 898.
The most important virtue claimed for the new judicial minimalism is its strengthening of democratic self-governance. Minimalism, according to Sunstein, “attempts to promote the democratic ideals of participation, deliberation, and responsiveness” and “allows continued space for democratic reflection from Congress and the states.” While Bickel was primarily (although certainly not exclusively) concerned with maintaining the legitimacy of the courts, Sunstein and other contemporary minimalists “defend minimalism almost solely as a way of deferring to and bolstering the legitimacy and efficacy of the political branches.” (In this way, these defenses of minimalism have important commonalities with the “representation-reinforcing” jurisprudence of John Hart Ely, which operated under the premise that judicial review should generally focus on removing barriers to political participation rather than imposing substantive values.) By minimizing the impact of judicial errors, as well as compelling legislatures to address flaws in their enactments while not necessarily denying them the ability to pursue particular ends, minimalist judges can contribute to democratic debate and the functioning of democratic institutions. This democracy-promotion does not consist of a mechanical deference to the political branches, but does involve a preference for striking down a statute when necessary on, for example, vagueness or nondelegation grounds rather than on the basis of a broad constitutional principle. Doing so forces political actors to give more convincing reasons for their actions or to craft legislation more carefully rather than forestalling legislative action altogether.

36 Sunstein, supra note 11 at x.
38 JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).
39 Sunstein, supra note 11 at 27-8.
crucial to his defense of minimalism but is also crucial to defining its limits.\footnote{Although this is largely beyond the scope of this paper, another potential critique of Sunstein’s minimalism is that the concept of “deliberative democracy” is highly flawed. See IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY (2005).} He identifies a set of core values that act as a crucial democratic background to constitutionalism, and generally justify a more maximalist approach from judges when they are enforcing them.\footnote{Sunstein, supra note 11 at ch. 4.}

The potential of minimalism to contribute to the functioning of democratic institutions, insuring that constitutional interpretation is a collaborative rather than a unilateral affair, is one of the strongest points in its favor. There are nonetheless several potential objections to this purported virtue of minimalism. The first is that it represents excessive deference to the legislature, because courts have a significant comparative advantage when it comes to constitutional interpretation. One way of putting this argument is that minimalism undervalues the ability of courts to protect valued constitutional norms.\footnote{See, for example, Devins, supra note 12; Peters, supra note 37.}

(As we will see, however, the extent to which minimalist form actually constrains judges from protecting values they consider important is likely to be very limited.) A related objection is that minimalism throws out what is most distinctive and valuable about judicial interpretation of the Constitution: the requirement that judges defend their actions explicitly and be compelled to apply consistent legal principles.\footnote{See e.g. RONALD DWORKIN, A MATTER OF PRINCIPLE (1986).} The line between a “minimalist” and merely “unprincipled” decision can often be somewhat thin. This is one difference between contemporary minimalists and Alexander Bickel: while Bickel thought that, once the Court decided to take a case, it should decide according to a generally applicable principle, Sunstein is skeptical of grand theory when it comes to decisions on the merits as well.\footnote{For further elaboration, see Christopher Peters and Neal Devins, Alexander Bickel and the New Judicial Minimalism in Ward and Castillo supra note 10 at 46-7.} This debate in part is a debate about the rule of law. The Court’s most prominent maximalist, Antonin

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Scalia, has argued that the rule of law in a democratic state requires clear, consistent rules.\textsuperscript{45} Sunstein, conversely, has emphasized the centrality of the incrementalism and particularism of common law judging to the Anglo-American legal tradition,\textsuperscript{46} and also correctly notes the importance of creative ambiguity in constructing constitutions for pluralistic societies.\textsuperscript{47} For the purposes of this paper, this debate about the rule of law is important primarily because Scalia’s arguments have created some measure of tension among the Court’s more conservative members as well as drawing fire from more liberal critics.

The second objection to arguments about the democracy-promoting value of minimalism is that—at least as practiced by the Supreme Court—minimalism frequently does not result in increased authority for the political branches and deliberative space for political actors but rather simply increases the authority of lower federal and state courts. Such “minimalist” balancing tests as the \textit{Lemon} test\textsuperscript{48} or the “undue burden” standard of \textit{Casey} only allow as much authority for legislatures as lower courts choose to give them, and lower courts can plausibly justify a wide variety of outcomes (including those striking down legislative and executive acts) under such standards. In contrast, \textit{Miranda v. Arizona},\textsuperscript{49} which famously set out a detailed standard for admissible confessions in an opinion with a patent “legislative quality,”\textsuperscript{50} may be seen as the antithesis of minimalism. But the \textit{Miranda} rule gave much less discretion to lower courts than the “totality of the circumstances” test it replaced, and not all state courts would necessarily interpret the more minimalist test in a way which gave more deference to public officials. Even if it reduces the authority of the

\textsuperscript{45} \textsc{Antonin Scalia}, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1998).
\textsuperscript{46} Sunstein evaluates Scalia’s theory at length in \textsc{supra} note 11 at Ch.9.
\textsuperscript{47} Sunstein, \textsc{supra} note 11 at 11-2.
\textsuperscript{48} \textit{Lemon v. Kurtzman}, 403 U.S. 602 (1971). The most crucial element of the three-pronged test the opinion created for Establishment Clause cases held that a government subsidy must not represent an “excessive government entanglement” with religion.
\textsuperscript{49} 384 U.S. 436 (1966).
\textsuperscript{50} \textsc{Lucas A. Powe}, THE WARREN COURT IN AMERICAN POLITICS 395 (2000).
Supreme Court, then, it is far from clear that minimalist jurisprudence removes power from the judiciary as a whole. The “extraordinary growth in the ratio of lower court to Supreme Court decisions” makes minimalism on the part of the Supreme Court particularly less likely to increase legislative deliberation and more likely to increase judicial power overall as lower courts gain a large amount of discretion in resolving cases.\textsuperscript{51}

A final potential objection to this justification for minimalism is its implicit assumption that judicial power exists in a largely zero-sum relationship with power in the political branches, with expanded judicial policy-making resulting in a diminution of legislative and/or executive power. In practice, however, judicial power is often exercised in response to legislative deferral or delegation,\textsuperscript{52} and in the American system a great deal of the power the judiciary possesses is the product of statutes passed by Congress.\textsuperscript{53} Minimalist opinions, then, may not be consistent with the preferences of a majority of elected officials in some cases, as they may prefer that the judiciary resolve certain questions that they prefer not to. For example, Sunstein’s claim that the Court in its infamous \textit{Dred Scott} decision “wanted to take the slavery issue out of politics”\textsuperscript{54} fails to acknowledge that many prominent elected officials urged the Court to resolve the issue broadly,\textsuperscript{55} and that it is highly implausible that a minimalist ruling would have forestalled the collapse of the Jacksonian Democratic coalition that led to the Civil War.\textsuperscript{56} In other cases, there may be no meaningful

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\item \textsuperscript{51} Only 0.12\% of eligible cases were reviewed by the Supreme Court in 2003. Richard A. Posner, \textit{Foreward: A Political Court}, 119 Harv. L. Rev 35-6 (2005).
\item \textsuperscript{52} GEORGE I. LOVELL, \textit{LEGISLATIVE DEFERRALS} (2003).
\item Sunstein supra note 11 at 37.
\item \textsuperscript{55} MARK A. GRABER, \textit{DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL} 33-5 (2006).
\item \textsuperscript{56} Id. at 35-45.
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current legislative majority for courts to contradict.\textsuperscript{57} On the other hand, taking a more complex and realistic view of the sometimes symbiotic relationship between courts and legislatures can also be turned into another argument in favor of the minimalist approach. By issuing a minimalist opinion, the courts may thwart attempts by the political branches to avoid taking responsibility for important issues by returning the ball to the legislative court, and hence enhance democratic self-government in a way that a maximalist opinion that let the political branches evade responsibility (at least in the short-term) would not.

\textit{Protecting the Reputation of the Courts}

Another defense of judicial minimalism is that it can serve to preserve the public reputation of the courts, which is of particular importance because of the extent to which the courts require the collaboration or acquiescence of the other branches in order to maintain their capacity.\textsuperscript{58} This factor was particularly central to Bickel’s conception of minimalism. He believed that the courts should use the “passive virtues” of rejecting grants of \textit{certiorari} and other procedural tools in order to dodge some politically difficult cases so that the court’s capacity could be saved for cases in which its intervention was truly necessary.\textsuperscript{59} Although he generally characterizes himself as a proponent of judicial restraint or “democratic constitutionalism” rather than a minimalist \textit{per se} Jeffrey Rosen’s defense of cautious judging and opposition to judicial “unilateralism” shares important points in common with Sunstein’s claim that minimalist judges enhance democracy by increasing deliberative space.\textsuperscript{60} To a greater degree than Sunstein, he emphasizes the necessity of

\textsuperscript{59} See esp. Bickel, \textit{supra} note 9 at ch. 4-5.
\textsuperscript{60} JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH (2006).
judges acting deferentially to preserve the Court’s reputation, arguing that maximalist judges such as William O. Douglas and Antonin Scalia have damaged it while more minimalist judges have preserved it. In a related argument, proponents also argue that the use of minimalism could also reduce the social conflict that can be created by a maximalist opinion. By avoiding broad (and inevitably contestable) moral or political claims, courts on this account can emphasize agreement and minimize political conflict by resting on points of consensus between people with divergent views.

To be sure, there may be circumstances in which preserving judicial authority is a desirable political good. When a court’s basic authority is in question, for example, avoiding excessive commitment to clear rules and being willing to tolerate a significant measure of inconsistency may be a price worth paying to ensure that the judicial branch maintains at least some level of autonomy from the political branches. Given a sufficiently established court, however, it is not clear why preserving the Court’s reputation is necessarily a good thing in itself. Bickel’s goal of preserving the court’s authority for the times in which it must intervene is only a worthy one to the extent that we can trust the Court to both save its interventions for the right cases and to resolve these cases correctly—and if we can reliably do so, it is hard to see why the constraints of minimalism are valuable at all. The chief problem with this defense for minimalist theory is that its emphasis on conflict reduction ends up conflating what’s good for the courts with what’s good for the polity. It is certainly in the interest of the judicial branch itself to minimize opposition from the political branches and the public, and it is possible that providing a minimum of explanation and framing

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62 See, for example, Sunstein’s treatment of Roe, supra note 11 at 251-2.
decisions as being consistent with existing precedents whenever possible may create an impression among some informed observers that the courts are acting more moderately than they are. But this is not always truly desirable for democratic politics. In many cases, it is surely preferable for conflicts to be stated openly so that the actions of the court can be more fairly evaluated: the policymaking power of the Court hardly vanishes merely because the Court isn’t transparent about the implications of its actions. And it is far from clear why the judiciary, any more than the other branches of government, should be entitled to a fixed degree of legitimacy irrespective of the nature of their actions. On balance, clarity and candor from the Court (when possible) is arguably more consistent with democratic values than opinions that claim to be of less important than they actually are, as this will make the Courts (and the actors responsible of judicial appointments) more accountable in the long run. In this sense, Sunstein’s minimalism (with its focus on strengthening the political branches) is considerably more normatively attractive than Bickel’s focus on preserving the legitimacy of the judiciary.

Another extension of the reputation argument is the claim that substantively and/or formally maximalist opinions create uniquely harsh backlashes against the judiciary. Leaving aside the question of whether such heightened conflict is a serious problem, with respect to substantive maximalism the empirical support for this claim is weaker than is often supposed. Pro-life opposition to abortion legalization, for example, was much more well-organized and effective prior to 1973 than is usually assumed.64 With respect to the potentially destabilizing effects of formal minimalism, the argument is implausible on its

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face. The broader public has little knowledge about the specific reasoning in legal opinions and generally evaluates judicial opinions on their results rather than their jufiscatory reasoning. Moreover, as previously discussed, the reasoning (as opposed to the result) of Roe was minimalist if not subminimalist. So in addition to the problems with the assumption that having a high reputation for the courts is a good in itself, the backlash generated by judicial opinions can sometimes be overstated. There is also little reason to believe that the use of shallow opinions is an effective way of concealing underlying substantive conflicts. The formal minimalism of Brown II was unable to produce anything but token integration in the Deep South and also failed to forestall the radicalization of Southern politics. There is little reason to think that formal—as opposed to substantive—minimalism has a significant impact in the political impact of judicial decisions. Even if one assumes the preserving the Court’s legitimacy is generally desirable, the ability of formal minimalism to insulate the Court from decisions that arouse significant political opposition is likely to be highly limited.

Pragmatic Considerations

A final defense of minimalism involves political self-interest. Minimalism can be argued to have a moderating effect on judicial opinions (both because minimalist opinions are less far-reaching and minimalist judges are more ideologically unpredictable) that protects the interests of electoral losers. In the crudest version, liberals would prefer minimalist

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65 One example of this argument would be Ruth Bader Ginsburg’s argument that Roe would have been better received had the Court waited for gender equality jurisprudence to develop. Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. (1985).
66 TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT ch.6 (1999).
68 Rosenberg, supra note 58 at 49-54.
courts when the median vote is conservative, and vice versa. (It should be noted that it would be unfair to see this as a crucial motivating factor for Sunstein; when he first introduced his theory in 1996 and expanded it in 1999 there was a good chance that a Democratic victory in the 2000 elections would shift the median vote of the Court to the left.) Stated this way, there would seem to be little to recommend this motivation for minimalism, but in more general terms this moderating effect is related to serious democratic arguments for judicial review. Tom Ginsburg’s study of judicial review in emerging democracies found that judicial review can contribute to democracy by providing “insurance” to political losers.70 Parties that lose power are likely to be represented in the judiciary, allowing them to maintain some degree of representation within the state and hence promoting political stability. Minimalism may enhance this effect by both increasing the chances that holdover judicial regimes don’t overreach and provoke a constitutional crisis and by increasing the chances that a factional takeover of the court will not necessarily result in the immediate reversal of precedents valuable to the minority faction. Minimalism, if it has the effects assumed by its proponents, may also make the changes brought on by changes judicial personnel less dramatic than they might be otherwise, which would further facilitate smooth transitions as losers will find the decisions of the new judiciary more acceptable.

There are two potential problems with this justification. First, as with the reputation-enhancing justification it may be more relevant to states without established courts and party systems. In countries (such as the United States) in which a stable party system and peaceful succession are well-established, this moderating effect of minimalism is of less democratic value. In addition, even assuming this moderating effect is desirable its

70 TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).
existence is open to serious question, as courts can use formally minimalist opinions to displace long-standing doctrines. Justice Brennan regularly used minimalist techniques such as overbreadth and vagueness doctrines to advance fairly maximalist liberal positions.\textsuperscript{71} Similarly, the Court’s decision in \textit{Brown v. Board}\textsuperscript{72} limited itself to the specific facts of school segregation and did not explicitly overrule the “separate but equal” doctrine as it applied in other contexts, and yet the Court simply issued a series of unreasoned summary judgments citing \textit{Brown} in ruling segregation unconstitutional in beaches, golf course, bathhouses, and other non-educational contexts.\textsuperscript{73} The Court has also used a series of narrow, incrementalist holdings to substantially increase state regulation of tribal territories while diminishing tribal judicial sovereignty over non-tribal individuals.\textsuperscript{74} And in \textit{Dennis v. United States}, the Court significantly watered down protections to political speech while nominally applying a standard that had been more restrictive of state power in prior applications.\textsuperscript{75} This disjuncture between announced doctrines and results, moreover, has been present in First Amendment jurisprudence for a considerable period of time, as Justice Holmes failed to apply the standard in a case in which the presence of a “clear and present danger” was even less plausible than in \textit{Dennis} (but subsequently construed the standard as placing much greater limits on state power.)\textsuperscript{76} As Geoffrey Stone puts it, Chief Justice Vinson’s majority opinion (like Justice Holmes’s in \textit{Schenck}) declared that it was applying the “clear and present danger” standard for free speech, but “found the danger to be both ‘clear’ and ‘present’

\textsuperscript{72} 347 U.S. 483 (1954).
\textsuperscript{73} Powe, \textit{Warren Court}, 60.
\textsuperscript{75} 341 U.S. 494 (1951).
Although it was neither.” Nor does the Court need to announce the overturning of precedents to engage in innovative policymaking. For example, the Marshall and Taney Courts used the minimalist technique of construing statutes by assuming their constitutionality, rather than explicitly overruling statutes, to enforce maximalist property rights doctrines.78

The frequency with which courts have overturned doctrines *sub silento* or plainly altered the meaning of broad balancing tests should raise questions about the moderating effects of formal minimalism. The Supreme Court can, at least in some cases, transform constitutional law without drawing undue attention to the precedents being characterized. This fact is relevant to the consideration of the Rehnquist and Roberts Courts to which we now turn. Given the extent to which the former was identified with minimalism, it is useful to briefly discuss the Court and its use of minimalism before proceeding to an analysis of the first year and a half of the Roberts Court. Evidently, this is not intended to be a comprehensive analysis of that Court’s jurisprudence, but to provide a basic sketch of the trajectory of the Rehnquist Court and the tensions within it as background to an analysis of the first terms of the Roberts Court.

**Minimalism and the Rehnquist Court**

*The Counter-Revolution That Wasn’t?*

It is possible that with the shift in the median vote on the Court created by the re-election of George W. Bush we are on the cusp of a major transformation of constitutional law; indeed, some scholars think such a transformation is already underway. In light of the Supreme Court bringing the disputed 2000 election to its conclusion with a frequently

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77 GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 404 (2004).
criticized subminimalist opinion,\textsuperscript{79} in addition to a recent decision (as part of a recent string of opinions restricting the power of Congress) limiting the availability of remedies in cases when states violate the American With Disabilities Act,\textsuperscript{80} Balkin and Levinson argued that were in the midst of a “constitutional revolution.”\textsuperscript{81} Another legal scholar, Jeffrey Rosen, argued about the possibility that a newly conservative Court may seek to restore a “Constitution in Exile,” reviving long-discarded constitutional doctrines that would seriously threaten major aspects of the modern regulatory state.\textsuperscript{82} With Samuel Alito, almost certain to be a staunch conservative,\textsuperscript{83} replacing the more moderate Justice Sandra Day O’Connor while Chief Justice Rehnquist is replaced with another conservative in John Roberts, the possibility of a much more conservative court had to be considered likely as the two Justices appointed by George W. Bush heard their first cases.

Observers and scholars of the Court who expect the appointments of John Roberts and Samuel Alito to have a substantial impact on the Court’s direction, however, have to be mindful of the fact that previous Republican appointments have arguably had much less of an impact than was predicted (whether in hope or fear.) Past predictions of a new conservative era on the court have arguably proved premature. Following Lyndon Johnson’s botched attempt to replace Chief Justice Earl Warren,\textsuperscript{84} which allowed Richard Nixon to immediately re-shape the Court with four appointments, a major shift from the

\textsuperscript{80} Board of Trustees v. Garrett 531 U.S. 356 (2001).
\textsuperscript{83} One way of assessing Alito’s likely ideological orientation is the use of the “Segal/Cover” score, which empirically evaluates perceptions of judicial ideology from a scale of 0 (the most conservative score) to 1 (the most liberal.) These perceptions correlate to the future voting behavior of justices. \textit{See} Jeffrey Segal and Albert Cover, \textit{Ideological Values and the Votes of U.S. Supreme Court Justices} 83 Am. Pol. Sci. Rev. 557 (1989). Alito’s Segal/Cover score is .1, which is the second most conservative on the Court (between Chief Justice Roberts and Justice Scalia.)
\textsuperscript{84} For a detailed account, see Powe, \textit{infra} note 50 at ch.18.
Warren Court seemed inevitable. And yet, Vincent Blasi—who describes the Burger Court as ‘the counter-revolution that wasn’t’—points out that until the end of Burger’s tenure the new Court’s jurisprudence was not coherently conservative but consisted of “rootless, activist, compromising moderation.”85 The election of Ronald Reagan, which saw the elevation of William Rehnquist to the Chief Justice’s chair, created the possibility that a true counter-revolution was imminent—but one account of Rehnquist Court’s first years plausibly claimed that even before Bill Clinton was elected and appointed two justices “it was as though as more weight was piled onto the right wing of the Court, the moderate conservatives leaned left to preserve the balance” and that “some conservatives have reason to be doubly disappointed.”86

This way of looking at the Rehnquist Court is reflected in some measure in Sunstein’s contention towards the end of Rehnquist’s tenure that “[t]he current Supreme Court embraces minimalism. Indeed, judicial minimalism has been the most striking feature of American law in the 1990s.”87 And there is considerable ammunition for claims both that the Court was minimalist and that this minimalism had a moderating effect that created an asymmetry with the more ambitious Warren Court. The Rehnquist Court failed to overturn a single one of the precedents that most outraged conservative opponents of the Warren and early Burger Courts: landmark decisions holding prayer in public schools88 and bans on abortion89 unconstitutional were upheld,90 as was the Court’s holding that

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87 Sunstein, supra note 11 at xi.
89 Roe v. Wade (410 U.S).
90 The most explicit reaffirmance of Roe was in Planned Parenthood v. Casey (505 U.S.). On the Rehnquist Court’s Establishment Clause jurisprudence, see MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW, ch.7 (2005).
affirmative action was constitutional in some circumstances. The most prominent symbol of the Warren Court’s liberalism—Miranda v. Arizona—was explicitly (if tepidly) affirmed in a 7-2 decision written by Chief Justice Rehnquist himself. Given this history, it could be argued that considerable caution is in order when considering what to expect from the Roberts Court.

There is a considerable amount of truth in this narrative; the rightward shift in the Court under Burger and Rehnquist was less than might have been anticipated, and the same could well prove to be true about the Roberts Court. There is considerable truth as well in Mark Tushnet’s related claim that the “guiding principle” of the “new constitutional order” consolidated by the election of George W. Bush in 2000 “is not that government cannot solve problems, but that it cannot solve any more problems.” The fundamentals of the New Deal constitutional order—in particular, the modern regulatory state—survived the Rehnquist Court largely intact. In some areas, the Rehnquist Court’s tendency toward formal minimalism was married to substantive minimalism as well, including in doctrinal areas in which much larger changes seemed in the offing. As I will explain, federalism is the most obvious example of formal minimalism being wedded to substantive minimalism.

On the other hand, on issues of particular interest to the Republican Presidents appointing justices between 1969 and 1992, formal minimalism sometimes led to results of considerable substantive significance. For example, two major Supreme Court decisions (both 5-4, with all of Nixon’s appointees in the majority) significantly narrowed previously pro-integration applications of Brown v. Board without formally overruling or even

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93 Tushnet, op cit 3 at 32.
questioning the landmark precedent. This narrowing of Brown has substantially limited the ability of courts to facilitate integration or redress fundamental educational inequities. Similarly, although no major Warren Court criminal procedure decision was formally overruled, the precedents “have largely been gutted.” The formal minimalism that generally characterized the major majority opinions of the Burger and Rehnquist Courts by no means always produced substantively minimalist opinions, and the disagreements between the conservative minimalists on these Courts were often as important as the more widely noted conflicts between conservative minimalist and maximalists.

The Competing Minimalisms of William Rehnquist and Sandra Day O’Connor

The central reason why labeling the Rehnquist Court “minimalist” is plausible is the fact that in many areas Sandra Day O’Connor was the median vote. O’Connor not only preferred incrementalist, undertheorized, and particularistic opinions but often (although generally conservative) advanced substantively minimalist positions as well. Certainly, she had an ideologically moderating impact on the Court, qualifying both relatively conservative and liberal holdings with narrow concurrences. Sunstein writes about her limiting opinion in a landmark case on the right to assisted suicide in detail. This tendency can also be seen

94 San Antonio v. Rodriguez 411 U.S. 1 (1973) (upholding the financing of school districts through local property taxes no matter how inequitable the resulting funding), Miliken v. Bradley 418 U.S. 717 (1974) (ruling that integration remedies could not include metropolitan areas if the initial discrimination occurred in the city proper.)
98 Vacco v. Quill, 521 U.S. 793 (1997); Sunstein, supra note 11 at ch.5.
in affirmative action and sex discrimination cases. Another O'Connor concurrence limited a ruling in an Establishment Clause case upholding the display of a crèche by advancing as a standard whether the state had “endorsed Christianity by its display” rather than joining an opinion by Chief Justice Burger than might have given significantly greater leeway to the state. (The more liberal minimalist Justice Breyer also authored a limiting minimalist concurrence in a major church and state case.) Reproductive freedom, as I will detail later in this section, is another example.

Justice O'Connor was not the Court’s only important conservative minimalist, however. Chief Justice Rehnquist is something of the odd man out in Sunstein’s characterization of his namesake court. While he reasonably categorizes Justices Scalia and Thomas as originalists (or, later, as “fundamentalists,”) and Justices Ginsburg, Souter, O’Connor, Breyer and Kennedy as minimalists, Rehnquist (like the idiosyncratic John Paul Stevens) is placed in neither category. Rather, Sunstein argues that Rehnquist “has often endorsed the rule of clear mistake, and is probably the most consistent proponent of this view in recent decades,” although in some cases (like affirmative action) “his method is more like a form of independent constitutional judgment.” Describing Rehnquist, even in a qualified way, as a Thayerite is highly misleading. As with the other justices on the Court, his deference to the political branches was highly selective and tightly related to independent

102 Van Orden v. Perry, 545 U.S. 677 (2005), Breyer J. concurring.
103 Sunstein, supra note 11 at 8.
104 Sunstein, supra note 19 at ch.2.
105 Sunstein, supra note 11 at 9.
106 This is the idea, associated with James Bradley Thayer, that courts should overrule judgments of the political branches only in the case where no reasonable person could see the action as consistent with the Constitution. James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893).
107 Sunstein, supra note 11 at 8.
substantive commitments. While it is true that from 1993-2004 he was less likely than any other justice to strike down a state law, he was above average in his propensity to join votes striking down federal legislation.\(^\text{108}\) While Rehnquist (like virtually all justices when voting to uphold the acts of the political branches) would frequently use language advocating judicial deference and would also occasionally engage in originalist analysis,\(^\text{109}\) at least in formal terms he is most accurately described as a minimalist. His minimalism was just more substantively conservative than that of O'Connor, Powell or Potter Stewart.

Even more problematic in referring (even in qualified terms) to Rehnquist as a Thayerite is that the description fails to capture a major feature of the Rehnquist Court: its strong assertions of judicial supremacy.\(^\text{110}\) Rehnquist’s formally minimalist opinion upholding (what remained of) *Miranda,*\(^\text{111}\) for example, also entailed rebuking Congress for attempting via statute\(^\text{112}\) to re-instate the “totality of the circumstances” standard that *Miranda* had replaced. “Congress,” the Chief Justice declared, “may not legislatively supersede our decisions interpreting and applying the Constitution.”\(^\text{113}\) Even more important in this respect was Justice Kennedy’s opinion (signed by the Chief Justice, although not by Justice O’Connor) in *City of Boerne v. Flores,* which repudiated an attempt by Congress\(^\text{114}\) to assert its own interpretation of the free exercise clause, despite the fact that the legislature wanted to give *more* protection to minority rights than the Court had


\(^{111}\) Dickerson 530 U.S.


\(^{113}\) Dickerson 530 U.S. at 437.

required. Although the Boerne opinion overturned no precedents and was not notable for any connection with grand theories of interpretation, it represented the Court “fully exercising its power-maximizing capacity” against the attempts of Congress to enforce constitutional rights. These decisions are representative of a general trend in Rehnquist Court jurisprudence, the end of result of which was that “Congress ha[d] substantially diminished powers to conduct its internal affairs or to engage in factfinding and lawmaking that the judicial branch will respect.” Not only does the Rehnquist Court’s relationship with Congress make it clear that classifying Rehnquist as a Thayerite is implausible, it also suggests that the conflation of formal minimalism and judicial modesty is highly problematic. Rehnquist’s minimalism, like O’Connor’s, is not particularly deferential to political branches, although O’Connor’s assertions of judicial power are more likely to be extended to state legislatures.

A good example of the dueling minimalisms of O’Connor and Rehnquist can be found in Webster v. Reproductive Health Services, the major abortion case that preceded Casey and presented the Court with the opportunity to overturn Roe, but also permitted it to cut back at Roe by upholding a series of abortion regulations without overturning the prior opinion. Rehnquist announced a strategy to effectively do the former while apparently doing the latter when he started the conference discussion:

The Chief opened the discussion with a shocker. Instead of reiterating his previous opposition to Roe, he stated that he now thought Roe v. Wade had reached the right result given the specific facts of the case. Texas had banned all abortions except in the narrow circumstance where the life of the mother was at stake. In Rehnquist’s revised view, this was too restrictive. Although he remained sharply critical of Roe’s

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118 Ringhand, supra note 108.
trimester framework, he said that Missouri’s law, much less stringent than Texas’s had been, could be upheld in every aspect without explicitly overruling *Roe* itself.\(^\text{120}\)

In place of *Roe’s* trimester framework, Rehnquist proposed a new standard: any legislation that “reasonably furthered” the state’s interest in fetal life (which he held to be constant throughout pregnancy) would be constitutional. Had this standard been applied, *Roe’s* content would have been reduced to virtually nothing. Justice Stevens circulated a memo acidly pointing out that “If a simple showing that a state regulation 'reasonably furthers the state interest in protecting fetal life' is enough to justify an abortion regulation, the woman’s interest in making the abortion decision apparently is given no weight at all. A tax on abortions, a requirement that the pregnant woman must be able to stand on her head for fifteen minutes before she can have an abortion or a criminal prohibition would each pass your test.”\(^\text{121}\) In an attempt to keep a majority coalition, however, the opinion Rehnquist wrote replaced the “reasonably furthers” standard with the subminimalist tautology that a regulation was constitutional if it “permissibly furthered” the state’s interest in human life.\(^\text{122}\) Ultimately, this opinion commanded only a plurality, as O’Connor yet again moderated the impact of the Court’s judgment by advancing the “undue burden” standard that would ultimately prevail in *Casey*.\(^\text{123}\) But the difference in the outcomes O’Connor and Rehnquist preferred was not a product of O’Connor’s formal minimalism per se: *neither* opinion was deeply or broadly reasoned, and neither sought to overturn *Roe* explicitly. Rather, it was a case of two minimalist opinions reaching different substantive conclusions,


\(^{121}\) Id. at 409-10.

\(^{122}\) Id.

\(^{123}\) U.S. 833 at 874. For an account of *Webster* from O’Connor’s perspective, see JOAN BISKUPIC, SANDRA DAY O’CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 219-33 (2005).
with one opinion trying to overturn *Roe sub silento* while the other would retain at least some constitutional protection for pre-viability abortions.\(^{124}\)

There are other cases in which Rehnquist used or attempted to use minimalist techniques to push the law in a more conservative direction than O'Connor generally did. Rehnquist’s opinion in *Rumsfeld v. Padilla*\(^ {125}\) is a classic example of using the “passive virtues” of discretion over jurisdictional questions to avoid an unfavorable precedent (although in this case O'Connor joined Rehnquist’s opinion.) Had they reached the merits of the case, Justice Scalia’s dissent in another case released on the same day\(^ {126}\) combined with the four dissenters\(^ {127}\) in made it virtually certain that the Court would have determined that American citizens cannot be denied access to *habeas corpus* without an explicit act of Congress. By holding that Padilla had named the wrong defendant in his suit, however, Rehnquist was able to avoid a negative judgment on the merits.

A particularly direct contrast between Rehnquist and O’Connor can be seen in the University of Michigan affirmative action cases of 2003. O’Connor, repeating a trend of refusing to fully join her fellow conservatives (whether formally minimalist or maximalist) in advancing the idea of a “color-blind” Constitution that would forbid virtually all racial preferences,\(^ {128}\) wrote a minimalist opinion upholding the Law School’s admissions system.\(^ {129}\) However, Rehnquist’s majority opinion ruling the undergraduate admissions procedure

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\(^{124}\) Note that in addition to its famous criticisms of O’Connor, Justice Scalia’s concurrence denounced the minimalism of the plurality opinion as well: “Of the four courses we might have chosen today -- to reaffirm *Roe*, to overrule it explicitly, to overrule it *sub silentio*, or to avoid the question -- the last is the least responsible.” Even more scathingly, but no less accurately, Justice Blackmun’s dissent also denounced the minimalism in Rehnquist’s opinion: “Nor in my memory has a plurality gone about its business in such a deceptive fashion. At every level of its review, from its effort to read the real meaning out of the Missouri statute to its intended evisceration of precedents and its deafening silence about the constitutional protections that it would jettison, the plurality obscures the portent of its analysis.”

\(^{125}\) 542 U.S. 426 (2004).


unconstitutional\textsuperscript{130} and his dissent to O'Connor's opinion\textsuperscript{131} were also minimalist opinions: he did not call for any case to be overruled and based his rulings on the particulars of the cases. Given the outcomes of the cases, however, his formally minimalist holdings would seem to have been functionally indistinguishable from a clear ruling that the Constitution is “color-blind.”\textsuperscript{132} Similarly, his dissent in a key 2000 Establishment Clause case—although it would have clearly established a more substantively deferential standard—did not call for a precedent to be overturned and also advocated that the Court of Appeals be reversed because a facial challenge to the practice in question was inappropriate.\textsuperscript{133}

No discussion about minimalism and the Rehnquist Court would be complete without some discussion of the case that ended the disputed 2000 election.\textsuperscript{134} As Sunstein acknowledges, the decision reflected “some of the most severe vices of judicial minimalism.”\textsuperscript{135} The per curiam opinion was a combination of a superficially broad equal protection rationale combined with the famous (sub)minimalist caveat that “[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”\textsuperscript{136} On top of this was a remedy so inconsistent with the nominal holding as to be not merely subminimalist but to be inconsistent with basic principles of the rule of law.\textsuperscript{137} Rehnquist’s concurring opinion in the case, however, was minimalist without qualification; reversing the Florida Court based on a completely unprecedented reading of the provision in Article II regarding the appointment

\textsuperscript{130} Gratz v. Bollinger, 539 U.S. 244 (2003).
\textsuperscript{131} Grutter (539 U.S.), Rehnquist C.J. dissenting.
\textsuperscript{136} Bush v. Gore, op. cit., 532.
of electors\textsuperscript{138} would not have had any significant precedential value to limit. \textit{Bush v. Gore} provides another example of both Rehnquist’s minimalism and the fact that minimalism is no bar to an aggressively interventionist court.

Of course, as \textit{Webtser} and \textit{Casey} demonstrated not every attempt by Rehnquist to firmly nudge the law to the right was entirely successful. Most notably, the “federalism revolution” that seemed to be portended by \textit{U.S. v. Lopez}\textsuperscript{139} turned out to be of fairly minor consequence. As Mark Tushnet concludes, “scholars of real revolutions would be amused by the Rehnquist Court's federalism revolution. Not a single central feature of the New Deal's regulatory regime was overturned in that revolution, nor were central elements of the Great Society's programs displaced.”\textsuperscript{140} That this formally minimalist opinion turned out to have surprisingly little short-term impact can be seen as a point in favor of claims of the moderating effect of narrower opinions. However, it should be noted that it was not the arch-minimalist O’Connor (or Rehnquist) but the “fundamentalist” Scalia who cast a crucial vote and wrote a concurring opinion that signaled that \textit{Lopez} would not be applied broadly.\textsuperscript{141} The formal minimalism of \textit{Lopez} did not in itself require its limited impact. Rather, the modest nature of the Rehnquist Court’s federal powers jurisprudence suggests that a majority of justices do not support a substantial rollback of the modern regulatory state.

There are two points about the Rehnquist Court that are most relevant in terms of analyzing the Roberts Court. First, to the extent that the Rehnquist Court was ultimately less transformative than some expected, this was not a primarily a product of minimalism so much as the ideological moderation of the median votes on the Court. A Court in which

\textsuperscript{138} Art. II, §1, cl. 2.
\textsuperscript{140} Tushnet, supra note 90 at 277.
\textsuperscript{141} Gonzales v. Raich, 545 U.S. 1 (2005). Compare Scalia, J. (concurring) with O’Connor, J. (dissenting).
Chief Justice Rehnquist rather than Justice Powell or Justice O’Connor was the median vote
would likely have been no less formally minimalist but considerably more substantively
conservative. Second, it is important not to focus excessively on whether major Warren and
eyearly Burger Court precedents were formally overturned. Landmark decisions such as
Miranda, Engel, and Roe were not overturned, but their content was substantially cut back.
Such doctrinal shifts make clear that minimalism can be used to quietly achieve non-
minimalist substantive changes. Decisions by the Court to explicitly overturn precedents or
not can be largely arbitrary, and therefore the formal maintenance of precedents is often not
a reliable means of assessing the direction of the Court.

Judicial Modesty or “Faux Judicial Restraint”? Minimalism and the Roberts Court

A Split or Unified Conservative Bloc?

The appointments of John Roberts and Samuel Alito replaced at least one (and in my
view two) minimalist justices with two more. As previously discussed, the formally
minimalist approach of the new Chief Justice caused him to win broader support from the
legal academy than might have been expected. And although he was replacing a more
moderate justice, Alito’s similar disdain for grand theory caused some Court observers
(although not Sunstein)\(^{142}\) to predict that committed legal conservatives may once again be
disappointed by a Republican appointment. Wrote one Court watcher, “Alito will probably
be to the left of Antonin Scalia, albeit with less of a libertarian streak. He will be well to the
left of Clarence Thomas, and far more respectful of precedent.”\(^{143}\) Particularly crucial is the
assumption of some observers that Alito’s formal minimalism would lead him in

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substantively different directions than Scalia. Alito’s minimalism, this argument seems to imply, will make for less conservative substantive outcomes than Scalia would prefer and is also likely to entail a more modest role for the judiciary. The claim that Alito’s formal respect for precedent would be of substantive significance should also be emphasized.

After the full first term of the Roberts Court, Sunstein, while conceding that the new justices appointed by President Bush cast the same votes as their colleagues Scalia and Thomas “with stunning regularity,”144 insisted that the differences between the new justices and the “fundamentalist” Thomas and Scalia remained significant:

Despite this seeming consensus, however, an intriguing division is emerging among the Court's conservatives. Roberts and Alito are conservative minimalists. They prefer to preserve previous decisions and work within the law’s existing categories. Their opinions avoid theoretical ambition and tend to be narrowly focused on the particular problem at hand. By contrast, Scalia and Thomas are conservative visionaries, parallel, in many respects, to such liberal predecessors as Hugo Black and William O. Douglas. They favor fundamental change, immediately, and their opinions are sweeping and broad, often calling for overruling longstanding precedents.145

There indeed can be little doubt that in a formal sense Alito and Roberts are more “minimalist” judges than Scalia and Thomas. The key question, however, is whether this formal difference is of any substantive significance. Does this split represent a real difference in how the Court will evaluate the actions of other branches? Or does the split—like the nominal split between Rehnquist and Scalia in Webster—simply represent formally different paths leading to the same desired endpoint? To address this crucial distinction, I will evaluate several major areas in the first term and a half of the Roberts Court in which an important opinion can be described as minimalist, with particular attention to some cases where there were superficial splits between minimalist and maximalist opinions within the

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145 Ibid.
majority coalition. As with the previous discussion of the Rehnquist Court, this analysis cannot be exhaustive, and will also give short shrift to the Court’s more liberal minimalists because of their lesser influence under the new Court. In general, the Court’s major opinions so far suggest that the formal differences within the Court’s conservative bloc have been of very limited substantive significance.

Abortion

The Roberts Court has so far issued two abortion rulings which shed light on the potential impact of minimalist arguments. The first was the final opinion written by Sandra Day O’Connor, Ayotte v. Planned Parenthood. This unanimous opinion seems on the surface to be both formally and substantively minimalist. The case involved a parental notification regulation that—contrary to the Court’s precedents—did not contain an exemption in cases of a threat to a young woman’s health. Rather than strike down the statute or overrule the precedents that required a health exemption, the Court remanded the case with instructions to issue a narrow remedy (presumably, a ruling that would render the law inapplicable in cases of a threat to a woman’s health.) The remedy is, however, somewhat puzzling. While reading legislation to assume its constitutionality is a generally sound minimalist principle, to effectively “read in” a health exemption although, as Justice Souter noted at oral argument, “there seems to be an ample record here that the legislature or a majority of the legislature made a conscious choice that they would rather have no statute than a statute with a health exception in it” is highly problematic. If the legislature

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147 For a summary of Supreme Court doctrine on parental involvement laws, see HELENA SILVERSTEIN, GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS ch.2 (2007).
148 In some cases, however, this type of statutory construction can yield major restrictions on state and federal power, as was the case during the Marshall and Taney Courts. See Graber, supra note 78 and the relevant text.
149 Transcript of oral argument at 25, Ayotte (546 U.S.).
specifically elected not to include such an exemption it cannot be considered true deference
to the legislature to read such an exemption into the statute. Surely, the more properly
democracy-promoting remedy would be to send the issue back to the legislature and allow it
to craft legislation consistent with the Court's requirements. Also important about Ayotte is
its implication—which was a subject of considerable discussion at oral argument—that in
some cases a facial challenge to abortion legislation is inappropriate, and rather challenges
should be on an “as-applied” basis. Although upholding legislation on this ground would
be a typical formally minimalist technique, the substantive effect of making it more difficult
to claim rights has the potential to be considerable.\textsuperscript{150}

The second, more recent case is also in many respects minimalist on the surface.\textsuperscript{151}
The court’s decision in Gonzales v. Carhart (Carhart II) upheld the federal “Partial Birth
Abortion Ban Act” while simultaneously declining to explicitly overrule Stenberg v. Carhart,
although the latter decision had struck down a virtually identical state law.\textsuperscript{152} Both deferring
to the legislature in applying a vague judicial rule (in this case Casey’s “undue burden”
standard) and avoiding the unnecessary overturning of precedents provide superficially good
examples of formal minimalism. In substantive terms, however, the effect of nominally
upholding Carhart I is virtually nil; unless a future legislature were to pass a law banning
“partial birth” abortions using literally the same language as the Nebraska statute, it is
unclear how nominally upholding the precedent has any constraining effect on the state’s
ability to ban the procedure (and since Justice Kennedy dissented in the first case, even a re-
enactment of the Nebraska law voided in Carhart would presumably be upheld.) A refusal
to overrule a precedent is of little significance unless some of the substantive content of the

\textsuperscript{150} Scott Lemieux, “Endangering Roe,” The American Prospect (December 2, 2005).
\textsuperscript{151} 550 U. S. ____ (2007).
\textsuperscript{152} Stenberg v. Carhart, 530 U.S. 914 (2000).
precedent is retained, which is not the case with Carhart II. Declining to overrule a clearly conflicting precedent may have prevented headlines about the Court overturning a precedent in an abortion case but it does not affect the powers of the state in any discernible way.

**Standing**

In discussing the differences among the Court’s conservative bloc, Sunstein emphasized the competing opinions in *Hein v. Freedom From Religion Foundation.* In his formally minimalist plurality opinion, Justice Alito (joined by Chief Justice Roberts and Justice Kennedy) held that plaintiffs in an Establishment Clause suit did not have standing. In reaching its conclusion, Alito argued that the landmark standing case *Flast v. Cohen*—which had granted standing in an otherwise similar case—was inapplicable because the earlier case concerned a legislative enactment while the case at hand concerned the spending of appropriated funds by the executive branch. The formal minimalism of the holding is clear: it distinguished rather than formally overturning a major precedent, and did not set a clear rule to govern a broader set of cases. In a concurring opinion, Justice Scalia (joined by Justice Thomas) took a more maximalist approach, urging that *Flast v. Cohen* was inconsistent with the Court’s holding and should therefore be overruled.

Substantively, however, this is likely to be a distinction without a substantial difference. Whether the nominal retaining of precedent in this case matters will depend on whether lower courts interpret *Flast* as being overturned *sub silento.* Some justices in the lower Court may permit lawsuits challenging legislative subsidies of religious organizations under the *Flast* standard to proceed. But, certainly, given the patent illogic of having

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standing turn on the distinction between legislative and executive expenditures, lower courts will have strong ammunition if they decline to apply Flast, given that majority of the Court suggested that the earlier case had been effectively overruled. In his concurrence, Justice Scalia argued that the plurality opinion relied on “the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently.”\textsuperscript{156} Similarly, Justice Souter (speaking for the four dissenting justices) concluded that “the controlling, plurality opinion declares that Flast does not apply, but a search of that opinion for a suggestion that these taxpayers have any less stake in the outcome than the taxpayers in Flast will come up empty: the plurality makes no such finding, nor could it.”\textsuperscript{157}

Although it is impossible to be certain until the Court decides standing cases in the future, the most plausible outcome is that the Court’s conservative majority will continue to severely restrict the ability of taxpayers to challenge potential Establishment Clause violations, even where legislation as opposed to executive action is concerned. As long as the Court maintains the same personnel, however, it is unlikely to grant standing under Flast—\textsuperscript{158}—at least to litigants advancing substantive claims to which conservatives are unsympathetic—whether or not the decision is formally overruled. As with the importance of the facial challenge issue in abortion cases, the minimalist narrowing of standing is important for another reason: it effectively gives the government considerably more latitude to fund religious organizations while leaving existing Establishment Clause jurisprudence nominally

\textsuperscript{156} Hein (127 S. Ct.) at 56.
\textsuperscript{157} Id. at 89.
\textsuperscript{158} Although Justices Scalia and Thomas urged the overturning of Flast and a very narrow interpretation of standing rules in church and state cases, they have supported much broader standing rules in cases where they are more sympathetic to the substantive rights claims, permitting affirmative action litigation to proceed even in the absence of evidence that plaintiffs suffered a direct injury as the result of the policy. See Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville 508 U.S. 656 (1993).
undisturbed. Rights without a viable means of enforcement, however, might as well not be acknowledged by the Court at all.

**Campaign Finance**

A very similar division between the Court’s conservatives was evident in *F.E.C. v. Wisconsin Right to Life*, in which the Court nullified a ban on third-party election advertising in the sixty days prior to an election. The decision seemed to conflict with the Court’s recent ruling in *McConnell v. F.E.C.*, which upheld the most of the statute under which the advertising was banned. Again, however, Justice Roberts and Justice Alito declined to explicitly overrule *McConnell*, which once again provoked a biting reaction from Justice Scalia (this time joined by Justice Kennedy as well as Justice Thomas) questioning the use of formal minimalism in the plurality opinion:

> While its coverage is not entirely clear, it would apparently protect even *McConnell*’s paradigmatic example of the functional equivalent of express advocacy—the so-called “Jane Doe ad,” which “condemned Jane Doe’s record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think,’ ” Indeed, it at least arguably protects the most “striking” example of a so-called sham issue ad in the McConnell record, the notorious “Yellowtail ad,” which accused Bill Yellowtail of striking his wife and then urged listeners to call him and “[t]ell him to support family values.” The claim that §203 on its face does not reach a substantial amount of speech protected under the principal opinion’s test—and that the test is therefore compatible with *McConnell*—seems to me indefensible. Indeed, the principal opinion’s attempt at distinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so. This faux judicial restraint is judicial obfuscation.

Even more so than in *Hein*, it is difficult to argue with Scalia’s characterization. It is unclear what substantive effect the refusal to explicitly overturn a directly conflicting

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161 Id., Scalia J., concurring, fn. 7. Cites omitted.
precedent is likely to have on future jurisprudence. Again, the formal conflict within the conservative bloc does not seem to involve any substantive difference about what regulation of campaign finance law is permissible under the First Amendment. Given the substantive similarity which is discerned by the majority of the Court’s members, it is hard to imagine lower courts applying *McConnell* as good law, and it is even more difficult to imagine a future application of the advertising restrictions contained in the Bipartisan Campaign Reform Act being upheld by the Supreme Court barring a change in personnel. It is also hard to see the democratic benefits of an as-applied rather than facial ruling of unconstitutionality when given the premises of the majority future applications are almost certain to rule attempts to enforce the statute unconstitutional. Elections demand an especially high premium on knowing what actions are legal and which are not before the fact: a losing candidate affected by a campaign finance provision later ruled unconstitutional will have no useful recourse after the election is over.

*Limits on Punitive Damages*

One pragmatic defense of minimalism is that it will tend to make justices more moderate and ideologically unpredictable, and the jurisprudence of Justice O’Connor provides a compelling example. However, there are also cases in which it is more rule-bound judges who are more ideologically unpredictable, while a minimalist with strongly held substantive views need virtually never reach an outcome inconsistent with them. At least in cases that are not central to their substantive values maximalist judges may reach unpredictable outcomes in individual cases in order to advance broader legal values. Examples of both effects can be seen in *Phillip Morris v. Williams*.\(^{162}\) Narrowly, the case

\(^{162}\) 549 U.S. ___ (2007).
involved the question of whether a jury could consider harm inflicted on third parties when
determining punitive damage awards. The case also required the application of a previous
line of cases in which the Court had held that the Due Process Clause of the Fourteenth
Amendment should be interpreted as limiting the amount of punitive damage awards by
juries. On the one hand, Justice Breyer—arguably the liberal on the Court most associated
with minimalism—wrote a majority opinion rejecting the jury’s award of punitive damages
based on third party harm. This may be seen as an example of minimalism producing
ideological unpredictability, as one might expect a more liberal justice to be more
sympathetic to upholding punitive damage awards (although, given that the Chamber of
Commerce “was especially enthusiastic” about Breyer’s nomination because of his
reputation for being a pro-business moderate, the extent to which his minimalism led to a
conflict with his substantive values is far from clear.) The opinion from the Court was
joined by the Court’s two clearly minimalist conservatives, Chief Justice Roberts and Justice
Alito, as well as by Justice Kennedy.

On the other hand, however, Justices Scalia and Thomas dissented in the case.
These dissents are representative of their consistently applied rule that the Fourteenth
Amendment should not be interpreted as constraining punitive damage awards. This case
illustrates that the application of clear ideological rules can create as much or more
ideological unpredictability than a more minimalist jurisprudence. Justice Scalia’s preference
for rule-bound jurisprudence makes him more likely to differ from the policy preferences
one might expect from a Republican-appointed judge. For this reason, it is highly

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misleading to claim that Alito or Roberts’s “greater respect for precedent” should be seen as putting them to “the left” of Scalia or Thomas. In some cases this will be true, but in others it will not. Broad and/or deep rulings, no less than minimalist ones, can produce ideological unpredictability and moderate a judge’s votes.

Affirmative Action

A major ruling that was handed down on the last day of the first full term of the Roberts Court mirrored previous conflicts between Rehnquist and O’Connor. In a formally minimalist ruling, a plurality opinion by Chief Justice Roberts held that two programs that used race as a tie-breaker in determining pupil assignments in high schools were unconstitutional. Despite ruling the programs unconstitutional, however, the plurality did not explicitly overrule Grutter v. Bollinger, which upheld the principle that in the context of education race could sometimes me taken into account as a “plus factor” to promote diversity. Justice Kennedy’s concurrence was also formally minimalist, focusing on the particulars of the case and arguing that the program was unconstitutional based on the Court’s affirmative action precedents. On a substantive level, however, the concurrence was considerably more minimalist. Kennedy identified, and objected to, the Chief Justice’s de facto adoption of the “color-blind Constitution” invoked by Thomas in his maximalist concurrence: “parts of the opinion by The Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account.”

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168 Id. at 2782: “Most of the dissent’s criticisms of today’s result can be traced to its rejection of the color-blind Constitution...The dissent attempts to marginalize the notion of a color-blind Constitution by consigning it to me and Members of today’s plurality.”
169 Id. at 160.
that race could be used as a plus factor in a differently designed student assignment system, and he read Roberts’s opinion as foreclosing this possibility.

And, indeed, the plurality opinion’s concluding circularity that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race” did seem to effectively overturn *Grutter* and *Bakke* and adopt the “color blind Constitution.”

Kennedy’s reading is confirmed by Thomas’s characterization of Roberts’s opinion: “the Court holds that state entities may not experiment with race-based means to achieve ends they deem socially desirable.” *Parents Involved*, then, presents particularly strong evidence that the apparent conflict between the “minimalists” and “fundamentalists” among the Court’s four most conservative members is a largely cosmetic one. The first affirmative action opinion of the Roberts Court is telling because given the opportunity to join a concurrence that was *substantively* more minimalist than the position advanced by the Court’s conservative maximalists, the Court’s two new members did not join it. Rather, the Chief Justice authored an opinion that while rather shallow in terms of its reasoning and treatment of precedents clearly would have created a broad rule for future cases, almost always ruling out any consideration of race by state actors.

*Summary: Minimalist Form, Non-minimalist Substance*

The Court’s two most recent appointments have established clear formal differences with their conservative colleagues Thomas and Scalia. They have proven themselves more reluctant to formally overturn precedents and have little interest in linking case outcomes to originalism or another grand interpretive theory. *Substantive* differences between the justices, however, are much less evident. While they frequently disagree about how to characterize

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170 Id. at 2768.
171 Id. at 2768.
precedents, they seem to have very little disagreement about the scope of rights or how
d power should be apportioned among the branches and levels of government. To the extent
that there is a substantive contrast between the two pairs of conservatives, the minimalism
of Roberts and Alito allows them greater leeway to reach substantive outcomes consistent
with the preferences of the governing coalition that appointed them. If one returns to the
various virtues ascribed to jurisprudence described earlier, is there reason to see value in this
kind of formal minimalism?

Democracy Promotion

The minimalism that is evident in numerous major Roberts Court opinions presents
particular difficulties for democratic justifications of minimalism. The first term and a half
first of all illustrates that there isn’t (for better or worse) a particularly strong relationship
between minimalism and judicial modesty towards the political branches. (This could also
be seen in the late Rehnquist Court; in terms of the number of state and federal statutes
justices voted to strike down the arch-minimalist Justice O’Connor ranked tied for 3rd with
Justice Stevens with 63.)\(^{172}\) In some cases, such as reproductive freedom and religious
subsidies, minimalism produced greater deference and arguably left more room for political
deliberation. But in these cases, a maximalist opinion would have led even more deference,
as the state would by permitted to act with less constraints (or none at all.) And in the case
of Ayotte, it’s difficult to argue that the Court’s suggested minimalist remedy—essentially
reading a health exemption into a statute although the legislature declined to include one—
promoted democratic deliberation. In this case, striking down the bill and compelling the

\(^{172}\) Justice Kennedy and Justice Souter—also sometimes classified ranked as minimalists—finished 1st and 2nd, respectively. See Ringhand, supra note 108 at 6, 13. For further discussion of activism in the late Rehnquist Court, see Keck, supra note 7 at 250-3.
legislature to craft its own more narrow health exemption would arguably promote
democratic values more effectively. In the case of affirmative action, the Roberts Court’s
new minimalists reached the same non-deferential conclusions as the Court’s conservative
maximalists, taking away from local governments their ability to develop policies to facilitate
school integration. And in the case of punitive damages, the conservative maximalists
favored a more deferential outcome, and would have left it to legislatures to deliberate and
determine a remedy if they believed that excessive punitive damages were a problem. There
is no obvious trend within these decisions of minimalists promoting deliberative democracy.
Whether or not one believes the judicial interventions to be justified, then, has little to do
with the formal framing of these opinions and much more to do with whether one finds the
more conservative substantive outcomes of the Roberts Court desirable.

Even more problematic is the relationship between the minimalism of Roberts and
Alito and the rule of law. On this score, Justice Scalia’s critique of the unwillingness to
overturn precedents that directly conflict with the Court’s holdings is compelling. There are
good arguments for staying within established precedents when possible, but nominally
upholding precedents while refusing to apply their core reasoning to the case at hand is a
different story. And while there may be a good case for not basing a decision on broad
philosophical principles when they can be based on narrower points more justices and
citizens can agree on, when substantive outcomes clearly reflect a coherent substantive
worldview failing to acknowledge the underlying basis for an opinion is of negligible value.
And while formal minimalism is potentially valuable (and certainly inevitable) when
attempting to assemble a majority coalition among judges with divergent worldviews, in the
case of the Roberts Court there seems to be broad agreement about a large number of
substantive core principles among the Court’s majority bloc. Particularly from the
standpoint of deliberative democracy, in such cases transparency is preferable to obfuscation. The Supreme Court clearly stating the principles that underlie its opinions when the majority has reached a consensus makes it easier for public officials, scholars and reporters, and the informed public to evaluate the Court’s actions and consider whether they approve of the Court’s direction or not.

**Reputation Enhancing**

With respect to this defense of minimalism, it is too early in the life of the Court to know if its use of formal minimalism will enhance the reputation and authority of the Court. As previously discussed, given that the minimalism of the Roberts Court has been much more formal than substantive, it seems unlikely that it will have much effect on the Court’s reputation in the long run either way, but this will not be known for certain for several years. Although no single minimalist opinion is likely to have a significant impact on the public, it could be that a general refusal to overturn precedents even when making substantial changes in the law will reduce criticism of Court. It is conceivable that overturning seven or eight precedents in one term would have, for example, become an issue in the 2008 presidential campaign even if no one individual case would attract much public attention. If this were the case, however, the reputation-protecting effect of minimalism would hardly be desirable from a democratic perspective. If the same major opinions issued by the Court were written by Justice Scalia or Thomas and grounded in grand theories while squarely addressing conflicting precedents instead of being written in an incrementalist fashion, it probably would not significantly alter the policy effect of the Court’s holdings. If the Court’s reputation would decline if the same outcomes were couched in different formal terms, it would not be consistent with democratic accountability for the Court to preserve its
authority through obscuring its substantive ends. We cannot know how the Roberts Court would be judged by the public if they issued more maximalist rulings—but if their reputation is preserved or enhanced it should be because people approve of their actions, not because people fail to understand what they are doing. Several Roberts Court opinions are examples of Sarah Krakoff’s point that “judicial opinions that are shallow, whether narrow or not, may in fact conceal the assumptions underlying their outcomes in a manner that actually stifles democratic deliberation.”

Information is the lifeblood of democratic deliberation; this kind of minimalism obscures important information from public view for reasons that might be desirable from the standpoint of the Supreme Court and its political allies but are much less so from the standpoint of democratic deliberation.

Pragmatic Considerations

The more pragmatic defenses of minimalism rely on two factors sometimes associated with the jurisprudence: unpredictability and moderation. The minimalism of Justices Roberts and Alito, however, suggests that these characteristics may not be as closely associated with minimalism as one might assume. To perhaps an even greater extent than William Rehnquist, Roberts and Alito have been remarkably consistent votes; according to prominent Court observer Martin Lederman in his Court’s first full term “the Chief Justice voted for the more conservative result (by most observers' lights) in 24 out of the 24 cases decided by a 5-4 vote.”

Conversely, the more consistent application of broad theories by Scalia and Thomas will in some cases make them less predictable than judges with strong ideological commitments but with less interest in broad theorizing. There has also been

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173 Krakoff, supra note 74 at 1179-80.
little substantive difference between the Court’s more maximalist and minimalist judges. Even if one assumes *ceteris parabus* that minimalist judges are more likely to be moderate, this is beside the point when evaluating any individual judge. To this point, claims that their minimalism would make the two new justices significantly more unpredictable or moderate than their more maximalist colleagues have proven unfounded. Whether this is a good or bad thing, of course, depends on whether one substantively approves of their jurisprudence.

Finally, it should be noted that the minimalism of the Roberts Court is particularly well-suited to the tendency of Republican Congresses in the Bush era to employ “powerful ways to change policy without changing laws.” It is true that a minimalist court will not bring back the “Constitution in Exile,” but this was implausible in any case. And even should the courts start nullifying major elements of the New Deal/Great Society regulatory state, there is little reason to believe that the Court’s decisions would prove any more durable in the long run than the Court’s attempts to forestall the New Deal in 1935. The more likely relevance of the Court is better seen in its statutory decision in *Ledbetter v. Goodyear Tire.* The opinion, written by Justice Alito, overturned no precedents and made no grand theoretical pronouncements or broad public policy claims. Rather, it interpreted the Civil Rights Act in a manner that would make it more difficult to bring pay discrimination suits, although the more plaintiff-friendly standard rejected by the Court was supported by the Equal Employment Opportunity Commission’s own compliance manuals and adjudicatory decisions. This decision, like the Court’s narrow interpretation of standing requirements, suggests that like its primary effect will be to make enforcing existing constitutional and statutory rights supported by liberals more difficult rather than denying

177 *Ledbetter* 2007 U.S. LEXIS 6295 (GINSBURG J., dissenting) at 1009.
the existence of such rights altogether. In many cases, this will lead to the same result with much less public visibility, and it is important not to let an excessive focus on formal conflicts between conservative minimalists and maximalists obscure this development. In particular, arbitrary decisions about whether or not to self-identify a holding as overruling a precedent should not be allowed to mask major substantive shifts in the underlying doctrine.  

Conclusion: Rethinking Minimalism in the Wake of the Roberts Court

Several of the crucial minimalist opinions of the Roberts Court raise serious questions about the ability of minimalism to promote democratic values. It is important, however, to qualify my general argument. First of all, my goal is not to urge the replacement of minimalism with another grand theory of jurisprudence. All grand theories of constitutional interpretation have problems and potentially negative side-effects for democracy, and actually extant judges never apply grand theories with perfect consistency in any case. More importantly, my criticisms are not so much directed at minimalism per se as at a specific kind of minimalism: the use of formally minimalist opinions to achieve substantively broad results. To criticize this application of minimalism is not to deny that minimalist opinions are not sometimes wise and democracy-promoting, and certainly both

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178 For further elaboration of this point, see Scott E. Lemieux and George I. Lovell, Understanding the Impact and Visibility of Ideological Change on the Supreme Court, 44 Studies in Law, Politics and Society 15-21 (2008).


180 Even Clarence Thomas, the current justice who is probably the most consistent about applying a grand theory, will sometimes decline to apply it if it cannot seem to justify results to which he is strongly committed, and other applications of his originalist theory are historically dubious. See Mark A. Graber, Clarence Thomas and the Perils of Amateur History in Maltz, supra note 97.
formal and substantive minimalism will sometimes result from the need to assemble majority coalitions. A significant amount of minimalism in majority opinions is inevitable, therefore, and is not necessarily problematic when this minimalism is the result of genuine substantive dissensus with a majority coalition.

Nonetheless, in its first term and a half of cases the Roberts Court has tended to emphasize the flaws and minimize the strengths of the minimalist approach. While minimalism is a sound approach when it is necessary to find some measure of consensus between people with divergent theoretical perspectives, it is much less defensible when used to mask the implications of judgments reached between judges who seem to share fundamentally similar substantive convictions. The first full term of the Roberts Court particularly exposed minimalism’s treatment of *stare decisis* as problematic, precisely because the majority’s treatment of precedent in cases like *Carhart II, F.E.C. v. Wisconsin Right To Life*, and *Hein v. F.F.R.F.* seem fully consistent with a minimalist approach. Certainly, the Roberts Court in such cases can be accused of neither retroactively broadening rules nor aggressively reaching out to explicitly overturn precedents. But keeping precedents as Potemkin facades while fully gutting their content seems like the worst of all worlds: the thin form of minimalism attempting to cover significant substantive changes. And this is a recurrent pattern; the minimalist form of Alito and Roberts has not (for better or worse) generally led to a systematic increase in judicial modesty. It is the relatively maximalist Justice Scalia and Thomas, not the Court’s new minimalists, who have continued to resist reading limits on punitive damages into the due process clause of the Constitution.

To be sure, whatever one thinks of the normative outcomes it is perfectly legitimate and inevitable for a governing party to use its appointment powers to alter the substantive
direction of the Court. Although one can argue that, for example, the Court’s narrow readings of antidiscrimination statutes and reliance on anachronistic conceptions of gender are in conflict with democratic values, the fact that the Roberts Court has effected major changes in a number of important doctrinal areas is not for the most part a democratic problem in itself. But if the Court decides to overturn important, long-standing precedents, it ought to do so explicitly; it owes public officials and informed voters the most information possible. While it is true that many members of the relatively small audience for judicial opinions won’t be fooled, the Court is failing to perform an essential function: its requirement to justify outcomes with transparent reasons available for public scrutiny. Even if this illusion of stability protects the public reputation of the Court—which is empirically unclear—it does so at too high a price. Like any other institution, the judiciary is not entitled to a fixed level of public esteem irrespective of how it performs its functions.

Another of the key lessons of the young Roberts Court is that formal minimalism should not be conflated with substantive moderation. The many years during which the median seat on the Court was occupied by Sandra Day O’Connor and Lewis Powell—both cautious moderates on many issues and quintessential formal minimalists—makes the two kinds of minimalism seem logically intertwined, but the jurisprudence of Alito and Roberts demonstrates (as, arguably, did the jurisprudence of Roberts’s predecessor) that formal minimalism can coexist with less than moderate substantive commitments. It is important, therefore, for scholars of the Court to pay more attention to how a judicial opinion evaluates an enactment of the legislative branch or executive action or what scope of individual rights remains rather than how a Court characterizes the relationship between a case outcome and

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past precedents. The substantive effect of decision should be considered apart from its formal packaging when the latter amounts to political posturing rather than legal substance.

Of course, the importance of evaluating courts in a larger institutional context means that the ultimate political effect of the Roberts Court’s minimalism is unclear: the limited effect of formal minimalism on judicial power cuts both ways. As long as the lower federal courts remain very conservative, the substantively conservative minimalism of Roberts and Alito is likely to be a very effective way of quietly pushing the law to the right, arguably more effective than formally maximalist opinions would be. If a series of Democratic administrations significantly changes the ideological makeup of the lower courts, however, the strategy could backfire by leaving more leeway for lower courts to resist the rightward drift of the Supreme Court even if Democratic presidents are unable to immediately change the Court’s ideological makeup. And as history has already shown, there’s no reason that a future majority of liberal minimalists can’t treat precedents as cavalierly as Roberts and Alito have. If the ultimate impact of the particular form of minimalism that has emerged from the Roberts Court is uncertain, however, its democratic value is even more so. Democratic self-governance is not always well served by courts creating broad rules, but it is even less well served when courts create broad rules under the nominal cover of formally narrow opinions.