

Minimalism and Its Limits

*by Diane S. Sykes**

Next month [October 2014] the curtain rises on the 10th term of the Roberts Court. From the beginning, Chief Justice Roberts has been explicit about wanting to foster greater consensus on the Court. It's often suggested that the Court's legitimacy would be enhanced by fewer 5–4 rulings along the usual conservative/liberal fault line. In his confirmation-hearing testimony, and more fully in his first major public address, the Chief Justice articulated his view that although differences among the justices should not be “artificially suppressed,” a greater degree of consensus in the Court's decisions would bring “clear [jurisprudential] benefits.”¹ He explained that unanimous or near-unanimous decisions “promote clarity and guidance for the lawyers and for the lower courts trying to figure out what the Supreme Court meant.”² More fundamentally, he said, “The rule of law is strengthened when there is greater coherence and agreement about what the law is.”³ And he famously set for himself this guiding principle: “If it's not necessary to decide more to dispose of a case, in my view it is necessary not to decide more. The broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible ground.”⁴

Much of the early commentary about the Court's 2013–2014 term focused on the significant increase in the number of unanimous judgments. For the first time since the 1940s, almost two-thirds of

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¹ Chief Justice John G. Roberts, Jr., Address at the 2006 Georgetown Law Center Commencement Ceremony (May 21, 2006), <http://www.law.georgetown.edu/web-cast/eventDetail.cfm?eventID=144>.

² *Id.*

³ *Id.*

⁴ *Id.*

the Court's merits opinions were unanimous on the bottom line, if not necessarily in their reasoning. This is generally thought to be a striking and welcome development. In some key respects it is, although it's important to note that a significant part of the Court's docket each term consists of technical statutory or procedural issues that do not engage the philosophical differences among the justices. Still, the uptick in bottom-line agreement is remarkable, especially in cases raising difficult constitutional questions. In this category the Court achieved this greater degree of consensus (if that's what it is) mostly by following the Chief's maxim about narrow decisions, applying one technique or another of judicial minimalism. This dynamic will undoubtedly fuel the ongoing debate about whether the Roberts Court is committed to minimalism and, if so, whether that's a good thing.

I should probably begin by defining the term. Modern judicial minimalism as a distinctive theory of decision-making is usually credited to Professor Cass Sunstein of Harvard Law School, who coined the term and is the leading academic proponent of this approach to judging.⁵ Sunstein proposes that judges should generally "avoid broad rules and abstract theories, and attempt to focus their attention only on what is necessary to resolve particular disputes."⁶ He advocates the practice of "saying no more than necessary to justify an outcome, and leaving as much as possible undecided."⁷ Minimalist judging of the Sunstein variant proceeds along two dimensions. First, judicial opinions should be narrow rather than wide, deciding the case at hand while avoiding pronouncing rules for resolving future cases.⁸ Second, judicial opinions should be shallow rather than deep, avoiding large theoretical controversies and issues of basic principle. Judicial opinions should rely instead on incompletely theorized agreements that enable judges with diverse philosophical commitments to join in bottom-line judgments, leaving the more fundamental questions of principle undecided.⁹

⁵ See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

⁶ *Id.* at 9.

⁷ *Id.* at 3–4.

⁸ *Id.* at 10–14.

⁹ Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* 28 (2005).

Modern minimalism is justified primarily on pragmatic grounds. Minimalist decision methods (so the argument goes) account for the limitations on judicial competence—in particular, the limits on the judge’s ability to accurately assess the consequences of a decision one way or the other. Narrow, shallow decisions reduce the risk and cost of error. Minimalist decisions are also said to be more pluralistic, demonstrating respect for diverse perspectives by leaving fundamental matters of principle unaddressed. Minimalism recommends itself for other reasons, too. It claims to promote stability and predictability, to maintain flexibility for future courts, and to empower democratic deliberation by giving political decision-makers room to maneuver and respond to constitutional questions left open by the Supreme Court.¹⁰

On the surface the theory sounds like it’s limited to process values, but it’s not. Substantively, minimalism starts from a presumption of deference to the political branches. It self-consciously avoids invalidating acts of the legislative and executive branches either by upholding them on the merits or by using various techniques for avoiding constitutional questions. The point of defaulting to deference is to “recognize[] the limited role of the federal judiciary and [to] make[] a large space for democratic self-government.”¹¹ Minimalism also advocates a strong version of *stare decisis*; consistent adherence to precedent promotes stability and predictability, thereby preserving the Court’s institutional interests.¹² On a more philosophical level, modern minimalism promotes itself as a hedge against judicial supremacy. It calls on judges to go slowly and in small steps.

The emphasis on incrementalism and gradualism evokes the philosophy of Edmund Burke, who viewed governance as a practical endeavor guided by experience grounded in skepticism of grand political theories.¹³ Burke counseled deference to long-settled practices and traditions tested by experience and the collective wisdom of society accumulated over generations. He held the common law in high regard.¹⁴

¹⁰ Sunstein, *One Case at a Time*, *supra* note 5, at 51–54.

¹¹ Sunstein, *Radicals in Robes*, *supra* note 9, at xv.

¹² *Id.* at 28.

¹³ See Cass R. Sunstein, *Burkean Minimalism*, 105 Mich. L. Rev. 353, 369–70 (2006).

¹⁴ *Id.*

Of course, the Founding generation didn't need a theory of judicial minimalism. The common-law tradition, as it was understood and practiced at the time, was itself essentially minimalist, and important minimalist features are embedded in our constitutional design. The common law as applied in the courts of the new American states was based on English customary law, and in the Blackstonian tradition it was found, not made.¹⁵

The philosophical terrain was also different than it is now. The Framers inherited a strong natural-rights tradition, but they also understood that because natural-rights principles are quite general—today we would say “underdetermined”—the judges of the new federal judiciary, like their counterparts in the states, would be called upon to exercise a substantial element of judgment in individual cases. As a constraint on that authority, Article III limits the judicial power to cases or controversies that are explicitly *judicial* in nature. The Framers rejected a more active political role for judicial review by deciding against a Council of Revision.¹⁶ Beyond the constraining effect of the case-or-controversy limitation, the Framing generation generally understood that federal judges would follow long-established norms of judicial practice. They would be bound down by rules and precedents, to paraphrase *The Federalist No. 78*.¹⁷ This was thought to be a sufficient check against arbitrary decisions based on will rather than judgment.

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

Now, no one in this audience needs to be reminded of the normative constitutional theories that have been in contention since the New Deal, but I'll remind you anyway because it helps to place the new minimalism in proper historical perspective. The

¹⁵ William Blackstone, 1 Commentaries, *71.

¹⁶ See Jonathan T. Molot, Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles, 90 Va. L. Rev. 1753, 1762 (2004).

¹⁷ *The Federalist No. 78*, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

“living constitution” school of thought held sway in the decades that spanned the Warren Court and the early years of the Burger Court. This evolutionary approach authorized judges to interpret the core principles of the Bill of Rights and the Fourteenth Amendment in a way that reflects contemporary values and allowed them to adapt the Constitution’s broad language to address modern conditions and problems. In practice this theory produced the “rights revolution” of the 1950s and ’60s, which was aggressively interventionist in implementing social, political, and legal reform by judicial decree. The results were in some cases a virtue and in others, well, not so much.¹⁸ But in all cases the theory empowered the judiciary to deploy the Constitution as a malleable instrument of social and legal change at the expense of the democratic process.

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

The animating principles of originalism arise from the legal justification for judicial review—the duty to decide cases according to law, including the law of the Constitution. Briefly stated, the basic theory is this: Because our Constitution is written, unlike the British Constitution, and because it is supreme law adopted by the people as the original sovereign that brought the American government into being, constitutional interpretation ought to be grounded in the public meaning of the text as understood at the time of ratification.

On this view, constitutional adjudication begins with an inquiry into the meaning and scope of the provision in question based on the Constitution’s original meaning. Anchoring constitutional adjudication in the document’s text, structure, and history is thought to best legitimize the power of judicial review. We all know *Marbury v.*

¹⁸ For one view of the era, see J. Harvie Wilkinson III, *Cosmic Constitutional Theory* 13–32 (2012).

Madison:¹⁹ The judiciary's authority to set aside a validly enacted law in the name of the Constitution arises by inference from the judge's duty to apply the law in individual cases. Originalism holds that the interpretive inquiry into the law of the Constitution ought to be grounded in, and tethered to, the principles fixed in its text and structure.

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

This brings me to my final point about modern judicial minimalism: the theory is flexible about when judges should proceed minimally. It explicitly acknowledges that not every case calls for a minimalist ruling. As Sunstein puts it, "[T]he pragmatic foundations [of minimalism] suggest that constitutional law should not be insistently or dogmatically minimalist."²⁰ In other words, "there are times and places in which minimalism is rightly abandoned."²¹ There's a nonexclusive, multifactor test for determining when it's best to issue a minimalist decision and when it's best to go maximalist—but you probably guessed that already.

It should be clear from this description that although minimalism is an approach to judging, it's *not* a theory of constitutional interpretation. Unlike originalism, it's not a method for determining the meaning, scope, and application of the Constitution. Instead, it's a theory of deference. Judges should defer to the political branches of government and to the decisions of prior courts—except when they shouldn't.²² It's also a theory of avoidance. Judges should not make

¹⁹ 5 U.S. (1 Cranch) 137 (1803).

²⁰ Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 *Colum. L. Rev.* 2234, 2234 (2006).

²¹ *Id.*

²² See Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 *N.Y.U. J.L. & Liberty* 347, 374 (2010).

broad pronouncements on foundational matters of constitutional principle—except when they should. Got that?

As you've probably gathered, minimalism can and has been criticized for offering "no genuine guidance to judges."²³ As the philosopher Tara Smith observes, "[T]he instruction to the judiciary to 'minimize your impact' is hollow."²⁴ Critics have also attacked minimalism for "privileg[ing] the doctrinal status quo."²⁵ Sai Prakash, a law professor at the University of Virginia, notes that whereas originalism privileges the original public meaning of the Constitution, "minimalism—because it is precedent focused—tends to privilege the views of the Warren and Burger Courts."²⁶ Other critics have argued that by promoting shallow decision-making—especially in cases involving broad constitutional principles like free speech and equality—the theory permits judges to smuggle in their own unstated and unexamined ethical assumptions and preferences.²⁷ And as I have already noted, the pragmatic flexibility in minimalist theory provides no rule or standard for deciding when it should apply and when it should not.²⁸

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

²³ *Id.* at 363.

²⁴ *Id.*

²⁵ Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong For America*, 106 *Colum. L. Rev.* 2207, 2212 (2006) (reviewing Cass R. Sunstein, *Radicals in Robes*).

²⁶ *Id.* at 2213–14.

²⁷ See, e.g., Steven D. Smith, *The Disenchantment of Secular Discourse* 26–37 (2010).

²⁸ See Tara Smith, *supra* note 22, at 373–74; Prakash, *supra* note 25, at 2215–17.

So with the theory now in place and my own position confessed, let's return to the question of the extent to which our current Supreme Court relies on minimalist methods. I've selected four representative examples from the more important constitutional cases of the 2013–2014 term—three unanimous, one not.

McCullen v. Coakley was the abortion-clinic protest buffer-zone case.²⁹ A Massachusetts law established a 35-foot buffer zone around the entrance to abortion clinics and made it a crime for anyone other than employees, patients, and their escorts to enter. The Court unanimously held that the law violated the First Amendment. But the justices were sharply divided on the rationale. Chief Justice Roberts wrote for himself and Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. He first addressed whether the buffer-zone law was a content-based restriction on speech. This inquiry determined the standard of review. Content-based laws are presumptively unconstitutional and get strict judicial scrutiny; content-*neutral* laws are subject to a more relaxed standard of review. The Chief held that the Massachusetts law was content neutral but failed intermediate scrutiny because it burdened more speech than necessary.

Justice Antonin Scalia concurred in the judgment only, excoriating the Court for gratuitously deciding the content-neutrality question. If the statute was unconstitutional under the less demanding standard of review, then there was no need to address content neutrality, the predicate for strict scrutiny. In other words, resolving the question was logically unnecessary once the Court concluded that the Massachusetts law flunked the more lenient standard of review; the Court could have taken a minimalist approach and reserved the question for another day. To no one's surprise, Justice Scalia also thought the Court was wrong about content neutrality; he explained his view that the Massachusetts law flagrantly targeted antiabortion speech. Justices Anthony Kennedy and Clarence Thomas joined his concurrence. Justice Samuel Alito separately concurred, although he essentially agreed with Justice Scalia that the buffer-zone law discriminated on the basis of viewpoint.

Justice Scalia was quite right that a more limited approach—assuming but not deciding the content-neutrality question—would

²⁹ 134 S. Ct. 2518 (2014).

have gotten the job done in *McCullen*. The Massachusetts law would fail, but the Court would not pronounce judgment on the constitutionality of abortion-clinic buffer zones more generally. That kind of decision would have been minimalist in the sense of deciding no more than necessary. Instead, by deciding the question as he did, the Chief achieved a unanimous judgment, and he did so by writing an opinion that might be characterized as minimalist in a more *substantive* sense. By ruling that the Massachusetts law was content neutral, the Court signaled that buffer-zone laws are permissible *if* properly tailored. That holding leaves room for political decision-makers to maneuver in this speech-sensitive area. If the decision on content neutrality had gone the other way, *all* abortion-clinic buffer-zone laws would be presumptively unconstitutional, and the Court's controversial decision in *Hill v. Colorado*³⁰—which upheld a buffer-zone law—would have to be overruled or strictly limited to its facts. Indeed, the *McCullen* certiorari grant had included that very question, as Justice Scalia noted in his concurrence. The Chief's content-neutrality holding allowed the Court to avoid overruling a precedent.

In notable contrast, in *McCutcheon v. Federal Election Commission*,³¹ another important free-speech case decided earlier in the term, the Court specifically *declined* to address a key question about the standard of review *precisely because* doing so would have meant revisiting a long-standing precedent. *McCutcheon* raised a challenge to the federal limits on the aggregate amount a person may contribute to candidates and political committees in a single election cycle. In *Buckley v. Valeo*,³² the seminal 1976 campaign-finance decision, the Court drew a distinction, for First Amendment purposes, between campaign *contributions* and campaign *expenditures*: Limits on contributions to candidates are evaluated under intermediate scrutiny and may be justified based on the government's interest in preventing corruption or its appearance; but limits on expenditures get strict scrutiny and usually flunk. The contribution/expenditure distinction—and the different standards of review—were specifically challenged in *McCutcheon*. The Court sidestepped the question, finding it unnecessary to “parse the differences between the two standards”

³⁰ 530 U.S. 703 (2000).

³¹ 134 S. Ct. 1434 (2014).

³² 424 U.S. 1 (1976).

because the aggregate limits were unconstitutional even under the more lenient test.³³

When *McCullen* was later decided, Justice Scalia saw something amiss in the Court's earlier decision to avoid the predicate standard-of-review question in *McCutcheon*—yet decide it now in *McCullen*. He bluntly confronted the Court in his *McCullen* concurrence: "What has changed since [*McCutcheon*]?" "Quite simple," he said, "This is an abortion case, and *McCutcheon* was not."³⁴ The Chief responded that "[a]pplying any standard of review other than intermediate scrutiny in *McCutcheon* . . . would have required overruling a precedent."³⁵ Yes, but the same was true in *McCullen*; *Hill v. Colorado* was on the line if strict scrutiny applied, though perhaps it could have been limited or distinguished, neither of which were viable options if the Court had taken the plunge and revisited the contribution/expenditure distinction in *McCutcheon*. Overruling this aspect of *Buckley* was fraught with consequences for our politics; deciding the content-neutrality question in *McCullen* was not.

Thanks to Marcia Coyle of *The National Law Journal*, we have a window on the Chief's thinking in *McCullen*. In a revealing interview with Justice Ginsburg in August 2014, the veteran Supreme Court reporter asked the Justice why she had joined the Chief's opinion in *McCullen*. Justice Ginsburg replied that the Chief "made a very important case that . . . regulation[s] [on abortion-clinic] protests are content-neutral. That was the most important thing to me about the [C]hief's decision."³⁶ She continued: "My initial view was this is permissible legislation but if you looked at the record, it was so sparse. . . . It wasn't necessary to have that 35-foot zone."³⁷ She also observed that Massachusetts had already "gone back and changed [its buffer-zone law]."³⁸ How interesting! The Chief joined with his more liberal colleagues to leave open the possibility of regulation in this area. The Court's content-neutrality holding may be debatable, but there is clear deference to political policymakers here.

³³ *McCutcheon*, 134 S. Ct. at 1446.

³⁴ *McCullen*, 134 S. Ct. at 2542 (Scalia, J., concurring) (footnote omitted).

³⁵ *Id.* at 2530 (majority opinion).

³⁶ Marcia Coyle, Ginsburg on Rulings, Race, Nat'l L.J., Aug. 22, 2014.

³⁷ *Id.*

³⁸ *Id.*

*Harris v. Quinn*³⁹ is another example of the Court's complex relationship with the minimalist impulse to avoid confrontations with precedent. The question in *Harris* was whether Illinois violated the First Amendment by requiring in-home caregivers to pay public-employee union dues even if they did not support the union's activities. In *Abood v. Detroit Board of Education*,⁴⁰ the Court had rejected a claim by public-school teachers that requiring them to pay union dues violated their right to free speech and association. The in-home caregivers in *Harris*, however, were not public-sector employees in the usual sense. They were employed primarily by their private customers; the State's role was limited to compensating them with Medicaid funds. The issue in *Harris* was whether *Abood* controlled, and if so, whether it should be overruled.

The Court broke 5–4 along the usual conservative/liberal fault line. Writing for the majority, Justice Alito held that the First Amendment prohibited the collection of union dues from the in-home caregivers. The decision was carefully limited to quasi-public employees; the Court left *Abood* intact.

The interesting thing about Justice Alito's opinion is its extended discussion of *Abood's* "questionable foundations,"⁴¹ with particular emphasis on the conceptual and practical distinctions between private- and public-sector collective bargaining and the special problem in public-sector cases of "distinguishing . . . between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends."⁴² For the dissenters, this was all just "gratuitous dicta."⁴³ (Now we see the shoe on the other foot!) Justice Kagan, writing for herself and Justices Ginsburg, Breyer, and Sotomayor, pointedly criticized her colleagues for failing to suppress the urge to "tak[e] potshots at *Abood*."⁴⁴ Her complaint is understandable but misplaced. The first question in *Harris* was whether the rule of *Abood* was controlling; that necessarily required the Court to decide whether to extend the holding of the case

³⁹ 134 S. Ct. 2618 (2014).

⁴⁰ 431 U.S. 209 (1977).

⁴¹ 134 S. Ct. at 2638.

⁴² *Id.* at 2632.

⁴³ *Id.* at 2645 (Kagan, J., dissenting).

⁴⁴ *Id.*

to quasi-public employees. The majority concluded that it should not, and that conclusion required an explanation. True, a minimalist justice might have said less, but under-reasoned decisions can seem arbitrary and evasive. In the minimalist taxonomy, perhaps *Harris* is best classified as an opinion of *narrow deepness*. The opinion is *narrow* because it is limited to its facts. But it is also *deep* because the constitutional principle is carefully explained.

I'll spend just a few moments on *Noel Canning*, the Recess Appointments Clause case.⁴⁵ As in *McCullen* the Court was unanimous in the judgment but split 5–4 on the rationale. All nine justices agreed that President Obama lacked the authority to make three recess appointments to the NLRB when the Senate was in *pro forma* session in January 2012. Justice Breyer, writing for a majority that included Justice Kennedy and the left side of the bench, held that the “*pro forma* sessions count as sessions, not as periods of recess.”⁴⁶ But on the remaining questions in the case—the meaning of the term “recess” and whether the vacancy must actually “happen” during a recess—Justice Breyer deferred to presidential practice, which since the Civil War era had shown increased reliance on the recess-appointment power. Based on this historical experience, Justice Breyer held that the term “recess” included *intra*-session recesses and that the vacancy need not “happen” during a recess.

The minimalist data point in Justice Breyer’s opinion is this: He thought it best not “to upset the compromises and working arrangements that the elected branches of Government have themselves reached.”⁴⁷ Judicially updating the Clause to reflect the more expansive, modern-day understanding required the Court to set some artificial barriers on the President’s use of this power. Justice Breyer declared that a recess of three days is too short to permit an appointment without Senate consent; a recess of more than ten days is generally long enough; and a recess between three and ten days may or may not qualify, depending upon exigencies.

Justice Scalia’s concurrence is both rigorously originalist and emphatic that the Court’s duty in structure-of-government cases is to enforce the original boundaries of the separation of powers, not to

⁴⁵ NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).

⁴⁶ *Id.* at 2574.

⁴⁷ *Id.* at 2560.

endorse practices that seem more prudent in light of modern experience.⁴⁸ He was joined by the Chief and Justices Thomas and Alito.

The last case I'll mention is the term's most important federalism challenge: *Bond v. United States*.⁴⁹ The facts were unusual; the case illustrates how an aggressive charging decision by a local U.S. Attorney can resurface a profound but long dormant constitutional question. In 2006 Carol Anne Bond learned that her best friend was pregnant and that her own husband was the child's father. She responded to this betrayal by repeatedly trying to injure her now ex-friend by assaulting her with toxic chemicals. On many occasions over a period of seven months, Bond applied the chemicals to items that her rival would touch—a mailbox, a car door, a doorknob at her house. The victim was not seriously injured, but postal inspectors put the house under surveillance and caught Bond stealing mail from the victim's mailbox and putting chemicals in the muffler of her car.

Bond was charged with mail theft, but prosecutors also threw in charges of possessing and using a chemical weapon in violation of the Chemical Weapons Convention Implementation Act,⁵⁰ adopted in 1998 to implement the international Convention on Chemical Weapons.⁵¹ The Act defines "chemical weapon" very broadly and included Bond's conduct. She argued that the crime was purely local, and that the chemical-weapons statute exceeded the enumerated powers of Congress and invaded powers reserved to the states by the Tenth Amendment. The first time her case was before the Court, back in 2011, the justices addressed only the question of standing: May an individual assert a Tenth Amendment challenge? The Court unanimously said "yes," the Constitution's federal structure "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions."⁵²

When the case returned to the Court on the merits, the government specifically disclaimed any reliance on the Commerce Power and defended the statute based solely on the Necessary and Proper

⁴⁸ *Id.* at 2617 (Scalia, J., concurring).

⁴⁹ 134 S. Ct. 2077 (2014).

⁵⁰ 18 U.S.C. § 229(a)(1).

⁵¹ 134 S. Ct. at 2083–85.

⁵² *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

Clause as applied to the authority of the national government to make treaties. This argument rested largely on a single statement in the 1920 decision in *Missouri v. Holland*.⁵³ While the first appeal in *Bond* raised a narrow question of standing, this time the stakes were very different. The case pressed hard on the boundaries of the Necessary and Proper Clause and its interplay with the Treaty Power. It also tested the Court's willingness to enforce the Tenth Amendment. To complicate matters, the case called into question a long-standing but largely unexamined precedent. A perfect storm.

The Court unanimously reversed Bond's conviction, but again the justices were divided on the rationale. Writing for himself and five of his colleagues, the Chief Justice avoided the high-stakes constitutional question and the uncomfortable need to reconsider *Holland* by construing the statute so that it did not reach Bond's conduct. The Chief began his statutory analysis by noting that "Congress legislates against the backdrop of certain unexpressed presumptions," including "those grounded in the relationship between the Federal Government and the States."⁵⁴ In light of this "federalism presumption," the Chief found the statute ambiguous based on its "improbably broad reach."⁵⁵ So he trimmed the statute to cover only the possession and use of chemicals "of the sort that an ordinary person would associate with instruments of chemical warfare."⁵⁶

Once again, Justice Scalia cried foul. In yet another concurrence that reads like a dissent, he accused the Court of shirking its duty to decide the case by turning a "federalism-inspired interpretive presumption" on its head.⁵⁷ Background principles of federalism may be useful in choosing between two plausible readings of an ambiguous statute, but here the Court was using the statute's "disruptive effect on the 'federal-state balance'" as a reason to find an "utterly clear" statute ambiguous.⁵⁸ This interpretive move, he said, distorted the law and held the potential for future mischief. The vagueness of the Court's "ordinary person" test for criminal liability raised a whole

⁵³ 252 U.S. 416, 432 (1920).

⁵⁴ *Bond*, 134 S. Ct. at 2088 (citation omitted).

⁵⁵ *Id.* at 2090.

⁵⁶ *Id.*

⁵⁷ *Id.* at 2095 (Scalia, J., concurring).

⁵⁸ *Id.* at 2095–96.

new set of constitutional concerns. The Court had delivered “a supposedly ‘narrow’ opinion which, in order to be ‘narrow,’ set[] forth interpretive principles never before imagined that will bedevil our jurisprudence (and proliferate litigation) for years to come.”⁵⁹ Justice Scalia was joined by Justices Thomas and Alito in concluding that the statute exceeded Congress’s power under the Necessary and Proper Clause as applied to the Treaty Power.

Stepping back, these cases reflect what I think is indeed a noteworthy feature of the Roberts Court at age 10: its preference for using minimalist techniques to avoid or soften or at least postpone confrontation with the political branches in structurally or politically sensitive cases. Although the constitutional-avoidance doctrine was not specifically mentioned in *Bond*, the Chief’s analysis exemplifies the modern version of the doctrine. The original or “classic” avoidance canon dates to the Marshall Court.⁶⁰ As described by Justice Joseph Story, the basic rule is this: if a statute “admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of [C]ongress, it will become [the Court’s] duty to adopt the former construction . . . unless [the other] conclusion is forced upon the Court by language altogether unambiguous.”⁶¹

The avoidance canon underwent a subtle but important change in the twentieth century. The modern version directs judges to construe statutes to avoid constitutional *doubt*. This much broader idea of constitutional avoidance took hold in the New Deal era and was cemented in a famous concurring opinion by Justice Louis Brandeis in the 1936 case of *Ashwander v. Tennessee Valley Authority*.⁶² Critics charge that the modern version of the doctrine distorts rather than preserves the separation of powers. As my colleague Frank Easterbrook has memorably put it, modern avoidance doctrine “acts as a

⁵⁹ *Id.* at 2102.

⁶⁰ William K. Kelley, *Avoiding Constitutional Questions As A Three-Branch Problem*, 86 Cornell L. Rev. 831, 842–46 (2001).

⁶¹ *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 75–76 (1838) (Story, J.).

⁶² 297 U.S. 288, 345 (Brandeis, J., concurring) (“It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.” (quoting 1 Cooley, *Constitutional Limitations* (8th ed.) 332)).

roving commission to rewrite statutes to taste.”⁶³ On this view “the constitutional-doubt canon is simultaneously unfaithful to the statutory text *and* an affront to . . . the political branches.”⁶⁴ In other words, judicial amendment of statutes in the name of constitutional avoidance both distorts the law and displaces the prerogatives and responsibilities of the political branches. But, as Judge Easterbrook has noted, the justices are addicted to it.⁶⁵ There are many recent examples, perhaps the most controversial of which is *NFIB v. Sebelius*,⁶⁶ the challenge to the individual-insurance mandate in the Affordable Care Act.

Sometimes these avoidance techniques simply delay the confrontation. In *Shelby County v. Holder*,⁶⁷ decided in June 2013, the Court struck down the coverage formula in Section 4 of the Voting Rights Act, the trigger for the preclearance requirement in Section 5 of the Act. Four years earlier in *Northwest Austin Municipal Utility District v. Holder*,⁶⁸ the Court had transparently signaled its discomfort with the coverage formula, which was based on a decades-old baseline that did not reflect changes in voting and discriminatory election practices when Congress reauthorized the Act in 2006. In a decision by Chief Justice Roberts, the Court sidestepped the tough constitutional question about the validity of this part of the Act by issuing a narrow decision holding that the petitioner in the case—a Texas utility district—could bail out of the preclearance requirement. To reach this conclusion, however, the Court had to stretch the statutory definition of “political subdivision” well beyond its text. *Northwest Austin* was nearly unanimous; only Justice Thomas would have reached the constitutional question.

Northwest Austin might be understood as an example of minimalism as a signaling device or a form of temporary abstention to allow the political branches to correct an identified constitutional defect. Although the Court avoided the constitutional question, it took pains

⁶³ Frank H. Easterbrook, Do Liberals and Conservatives Differ in Judicial Activism?, 73 U. Colo. L. Rev. 1401, 1405 (2001).

⁶⁴ *Id.* at 1406 (emphasis added).

⁶⁵ *Id.*

⁶⁶ 132 S. Ct. 2566 (2012).

⁶⁷ 133 S. Ct. 2612 (2013).

⁶⁸ 557 U.S. 193 (2009).

to explain that the preclearance requirement and its application to a limited set of states cut against basic principles of federalism and equal sovereignty, clearly signaling what it wanted Congress to do. When Congress did not address the formula and the issue returned to the Court in *Shelby County*, the Court was direct about its methodology. With the Chief Justice again writing, this time for a five-justice majority, the Court candidly explained its use of the avoidance doctrine in *Northwest Austin*:

[I]n 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional.⁶⁹

The “no choice” language is interesting. A nearly unanimous Court used a minimalist decision as a soft-power tool to give the political branches an opportunity to correct an identified constitutional problem. But a narrow majority proceeded to judgment on the ultimate constitutional question when the political fix was not forthcoming. Minimalism simply put off the constitutional day of reckoning. In other contexts, however, the Court is slow to circle back to important structural questions left open.

In some areas of constitutional law, the Roberts Court has been decidedly nonminimalist. *Citizens United*,⁷⁰ the game-changing campaign-finance decision, is a prominent example—although it too was preceded by a minimalist compromise. In a plurality decision in the 2007 case of *Federal Election Commission v. Wisconsin Right to Life*,⁷¹ the Chief Justice had crafted a narrow, as-applied remedy to avoid striking down the federal ban on political speech sponsored by corporations. When that remedy was shown to be seriously inadequate, the Court revisited the matter in *Citizens United*, invalidating the ban as an unconstitutional restriction on core political speech.

⁶⁹ 133 S. Ct. at 2631.

⁷⁰ *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁷¹ 551 U.S. 449 (2007).

Riley v. California,⁷² handed down in June [2014], is another good example of anti-minimalism at work; we now have a clear rule that the police must obtain a warrant to search a cell phone seized incident to an arrest.⁷³ *Hosanna-Tabor*,⁷⁴ which recognized a ministerial exception to workplace discrimination laws under the Religion Clauses, is another example of anti-minimalism. These decisions are notable for giving us clear, foundational statements about what the law is, which in the end is the Court's duty.

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

⁷² 134 S. Ct. 2473 (2014).

⁷³ *Id.* at 2495.

⁷⁴ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).