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# The Democracy-Forcing Constitution

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# THE DEMOCRACY-FORCING CONSTITUTION

*Neal Devins\**

ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT. By *Cass R. Sunstein*. Cambridge: Harvard University Press. 1999. Pp. xiv, 290. \$29.95.

During my freshman year in college, I was told not to judge a book by its cover. The book in question — *Lolita*; the cover suggested something quite salacious. My professor explained that a soldier, who had purchased *Lolita* to work out some of the kinks of military life, found himself tossing the book out, proclaiming in disgust “Literature!” Well, I cannot claim precisely the same reaction to Cass Sunstein’s *One Case at a Time*<sup>1</sup> (my expectations were lower than the soldier’s). Nevertheless, for those expecting a lefty defense of judicial restraint, *One Case at a Time* is not your book. Rather, Sunstein very much wants the Supreme Court to play an active role in abortion, affirmative action, the right to die, and much more. But Sunstein’s brand of activism is minimalist. Rather than look to the judiciary to settle these issues once and for all, Sunstein sees the Court as a “democracy forcing” facilitator, encouraging elected government and the people to engage in constructive constitutional dialogues.<sup>2</sup>

As rallying cries go, Sunstein’s plea for judicial minimalism has broad appeal. After all, social conservatives still complain about judge-made rights and the left, smarting from several Rehnquist Court defeats, increasingly sees elected government as more apt to embrace their agenda than the judiciary. With both sides ready to jettison judicial activism, judicial minimalism seems an idea whose time has come.

Indeed, as Sunstein tells it, his brand of minimalism has already arrived. Proclaiming minimalism “the most striking feature of American law in the 1990s” (p. xi), Sunstein argues that the Court is

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1. Cass Sunstein is the Karl N. Llewellyn Professor of Jurisprudence, University of Chicago.

2. For another treatment of how the Court ought to decide cases to promote democratic dialogue, see ROBERT BURT, *THE CONSTITUTION IN CONFLICT* (1992).

cautious about imposing its views on the rest of society, "prefer[ring] to leave fundamental issues undecided" (p. x). In this way, Sunstein sees Justice Sandra Day O'Connor (and to a lesser extent Justice Anthony Kennedy) as part of a solid block of minimalist Justices (that also include Justices Breyer, Ginsburg, Souter, and Stevens).<sup>3</sup>

By simultaneously embracing minimalism and treating it as a *fait accompli*, *One Case at a Time*'s subtitle ought to be the more emphatic *The King is Dead; Long Live the King!*, not the drab *Judicial Minimalism on the Supreme Court*. But drabness may well be the effect that Sunstein covets. By speaking in such a matter-of-fact tone, *One Case at a Time* suggests a bloodless revolution that has run its course. Put another way, Sunstein sees himself as the victor and *One Case at a Time* a retrospective manifesto that will explain the soundness of his victory.

Remarkably, Sunstein accomplishes this feat with hardly a mention of what many consider the classic minimalist tract, Alexander Bickel's *The Least Dangerous Branch*.<sup>4</sup> According to Bickel, the Supreme Court ought to avoid debilitating conflicts with elected government by making use of the "passive virtues," that is, procedural and jurisdictional delays that provide a "time lag between legislation and adjudication."<sup>5</sup> But for Sunstein, the question is not "when" the Court ought to resolve a constitutional dispute. The question, instead, is "how" the Court ought to make its voice heard. *One Case at a Time*'s stated goal "is to identify and defend a distinctive form of judicial decision-making" (p. ix).

By focusing on "how" the Court ought to decide cases before it, Sunstein pays only lip service to those limits in judicial capacity that justify Court invocations of the "passive virtues." In this way, *One Case at a Time* pays insufficient attention to the reasons why the Supreme Court ought to craft minimalist opinions. Although Sunstein acknowledges several powerful reasons supporting judicial minimalism (inherent limits both in the Court's factfinding powers and the Court's ability to compel elected officials to implement politically unpopular decisions), *One Case at a Time* largely overlooks these justifications. In this way, *One Case at a Time* is not at all hinged to some vision of the Court's institutional strengths and weaknesses. Instead, the focus of *One Case at a Time* is a delineation of how a minimalist Court would tackle those issues that have

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3. According to this account, the Justices most interested in "lay[ing] down clear, bright-line rules" that will bind both the Court and elected officials are Justices Clarence Thomas and Antonin Scalia, as well Chief Justice William Rehnquist. See p. xiii.

4. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). Sunstein acknowledges that a minimalist Court might well make use of the "passive virtues." Pp. 5, 39-40. But Sunstein does not return to this theme in any meaningful way.

5. BICKEL, *supra* note 4, at 116.

divided the nation during the 1990s — the right to die, affirmative action, government linedrawing on the basis of sex and sexual orientation, and the relationship between the First Amendment and new technologies. It also advances the highly debatable proposition that minimalist decisionmaking, in fact, will improve the quality of constitutional discourse outside the courts (pp. 25-27).

In this review, I will argue that inherent limits in judicial capacity support a more expansive vision of judicial minimalism than the one articulated by Sunstein. In particular, certiorari denials and other “passive virtues” work hand-in-glove with Sunstein’s brand of minimalism. Sunstein acknowledges this *but* does not seriously consider how the constructive uses of the “passive virtues” will advance his project. In other words, Sunstein is too obsessed with the democracy-forcing nature of judicial review to see how his and Alexander Bickel’s brand of minimalism complement each other.

But the problem with *One Case at a Time* is not simply that it does not go far enough. In critical respects, Sunstein’s brand of minimalism goes too far. By making democratic deliberation and not some theory of what the Constitution means the lodestar of his proposal, Sunstein never considers the possibility that the Supreme Court ought to speak to basic questions of values on matters that divide the nation. While it often makes sense to defer such decisions, the Court should not put off such decisions forever. Whether the issue is abortion, affirmative action, or the death penalty, the Court’s unique voice ought not to be muted simply because its members are appointed, not elected. Sunstein’s brand of minimalism, however, allows for “maximalist” decisionmaking in very limited circumstances — when such a decision would cement a preexisting societal consensus.

Constitutional dialogues between the Court, elected government, and the people go a long way towards making the Constitution more relevant and stable.<sup>6</sup> For these dialogues to occur, the Court cannot simply engage in minimalist decisionmaking. Rather, there are times when the Court must shape political and popular discourse — just as there are times when the Court ought to be shaped by the world around it. Of course, the Court may sometimes opt to function as a facilitator of a dialogue between elected government and the people (as Sunstein proposes) or it may opt out of the controversy altogether (as Bickel suggests). But the Court’s voice is simply too important to leave the basic questions of constitutional decisionmaking exclusively in the hands of democratic government.

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6. Along with Lou Fisher, I have developed this point elsewhere. See Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998). See also *infra* notes 72-80 and accompanying text.

In the end, Cass Sunstein's *One Case at a Time* is provocative, important, and helpful. But it is also incomplete. While the Supreme Court would do well to leave most fundamental questions undecided, Sunstein does not satisfactorily come to grips with the possibility that the Court ought to tackle some issues head on and duck some issues altogether.

## I. MINIMALISM, THE JUDICIAL ROLE, AND THE DEMOCRATIC PROJECT

Starting with *Marbury v. Madison*, the Supreme Court has been attacked for addressing issues not before it.<sup>7</sup> No doubt, when the Court "seek[s] to decide cases in a way that sets broad rules for the future and that also gives ambitious theoretical justifications for outcomes" (p. 9), the Court risks making costly mistakes. Witness, for example, the damage that both the Court and the nation suffered as a result of the *Lochner*<sup>8</sup> era, a period from 1905 to 1937 in which the Court infused laissez-faire economics into the due process clause to strike down roughly two hundred social and economic laws.<sup>9</sup> An enduring Depression made a mockery of the factual premise of *Lochner*'s free market philosophy.<sup>10</sup> By 1937, populist, political, and academic attacks against the Court prompted a full-scale judicial retreat.

How then to avoid such debacles? *One Case at a Time* suggests that Court decisionmaking should be both narrow and shallow. By narrow, Sunstein means that the Justices should only decide the case before them, saying nothing (if possible) about the range of cases that raise related issues (p. 10). By shallow, Sunstein calls for "incompletely theorized agreements," that is, decisional rules that do not establish basic principles so that "people who disagree on the deepest issues [can] converge" (p. 11). Needless to say, the decisions of the *Lochner* Court were wide and deep.

Narrow and shallow decisionmaking, then, is "likely to make judicial errors less frequent and (above all) less damaging" (p. 4). Correspondingly, perceiving that "[f]ar more progress might be made through an empirically informed constitutional law" (p. 255),

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7. 5 U.S. 137 (1803). For the classic critique of *Marbury*, see William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

8. *Lochner v. New York*, 198 U.S. 45 (1905).

9. There is some reason to think that the *Lochner* era was not all bad. David Bernstein, for example, makes a fairly persuasive case that racial minorities were well served by "right to contract" decisionmaking that resulted in the invalidation, among other things, of restrictive covenants. See David E. Bernstein, *Phillip Sober Controlling Phillip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797 (1998).

10. For a competing perspective, see Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of Liberty*, 41 WM. & MARY L. REV. (forthcoming 1999).

judicial minimalism affords courts an opportunity to learn more about the consequences of different rules. “[U]nintended social consequences” (p. 120), including elected government resistance to Court decisionmaking, also suggest that the Court should look before it leaps.

At this level, Sunstein’s minimalism is highly pragmatic. For example, when “the relevant facts are in flux and changing very rapidly, and the consequences of current developments are hard to foresee” (p. 174), the Court ought to exercise caution before invalidating regulating controls. For this reason, it is hard to disagree with Sunstein’s call for minimalist review of the regulation of the Internet and other new communications technologies (pp. 194-201). Furthermore, lacking the powers of purse and sword, the Court must recognize that its power lies “in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary.”<sup>11</sup> Otherwise, the Court risks both populist attacks on its legitimacy and elected government reprisals.

Sunstein’s minimalism goes well beyond the costs of judicial error, however. The “connection between judicial minimalism and democratic self-government” is Sunstein’s “most important goal” (p. xiv). Specifically, perceiving deliberation about constitutional ideals as promoting “a democratic nation’s highest aspirations” (p. xiv), Sunstein defends judicial minimalism above all on the grounds that it will catalyze democratic processes “rather than preempt democratic deliberation” (p. xiv).

This brand of minimalism, however, is hardly a call for majority rule. Sunstein wants deliberation more than anything else. To accomplish this feat, the Court cannot simply stand on the sidelines, rubber-stamping elected government decisionmaking. Correspondingly, while Sunstein acknowledges that a minimalist Court might use standing, ripeness, certiorari denials, and the like to steer clear of constitutional disputes, *One Case at a Time* does not consider the circumstances in which the “passive virtues” ought to be invoked. The name of the game is how Court decisions can spur elected officials and the people to deliberate over the Constitution’s meaning, not whether the Court ought to steer clear of certain disputes. Words and deeds, not passivity, are essential to this lofty task. “Minimalist judges,” according to this account, “are entirely willing to invalidate some laws . . . [for] [m]ajoritarianism is itself a form of maximalism” (p. x).

What is striking here is that Sunstein suggests that Supreme Court Justices should care more about encouraging democratic deliberation than correctly deciding the case before them. Under this

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11. *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992) (plurality opinion).

view, a minimalist Court may well invalidate governmental conduct that is constitutional in order to promote democratic deliberation. When it comes to affirmative action, for example, Sunstein commends the Court for its occasional invalidation of such programs while, without blinking, offering a spirited defense of why such programs are constitutional (pp. 125-29). Moreover, noting that the arguments for and against affirmative action "have not received much in the way of a public airing until the last several years" (p. 117), Sunstein applauds the Court for "helping to stimulate public processes" through its "complex, rule-free, highly particularistic opinions" (p. 118). Specifically, since neither proponents nor opponents of race preferences can count on the Court to behave in a predictable way, both sides of the affirmative action wars have incentives to participate in an ongoing conversation about the soundness of preferences. For Sunstein, this Court-inspired discussion of affirmative action's underlying questions of policy and principle may well stem the "public backlash against affirmative action" (p. 130). But even if this does not occur, Sunstein sees the judicial role as salutary, notwithstanding his belief that the constitutional attacks against affirmative action are unconvincing.

Sunstein's discussion of affirmative action is revealing for other reasons. First, perceiving that "judicial signaling" can shape the content of "public discussion" (p. 131), Sunstein appears to embrace the view that Supreme Court decisions serve a vital educational function, offering lessons that inspire citizens to think seriously about constitutional issues.<sup>12</sup> Second, by democratic deliberation, Sunstein does not mean direct democracy. In discussing the recent spate of citizen initiatives on affirmative action, Sunstein suggests an "unusually high degree of skepticism" by reviewing courts might be appropriate (p. 134). Warning of the danger of "we-they thinking" and fearful that "a careful assessment of facts and values" will not dominate citizen balloting, Sunstein both defends "the ordinary (and constitutionally central) filters of political representation" and suggests that "politically insulated groups" ought to sort out the actual effects of affirmative action.<sup>13</sup> Third, Sunstein sees little value in *stare decisis* or other rule of law constraints. His call for nongeneralizable "fact-specific" decisionmaking is directly at odds with the belief that "settling" authoritatively what is to be done" is a critical function of law and, as such, the

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12. On this point, see Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952). For further discussion, see *infra* Part III.

13. Pp. 133-34. Apparently, elected officials would then act upon this information. The question of what role, if any, interest groups should play in affecting elected government decisionmaking is not addressed by Sunstein. For further discussion, see *infra* text accompanying notes 68-69.

Supreme Court contributes to political stability through its interpretations of the Constitution.<sup>14</sup>

*One Case at a Time*, ultimately, is a paean for the Court to keep its options open — speaking out in ways that give neither side of an issue a complete victory. This is true even on matters where the Court should defer to reasonable legislative judgments. On physician-assisted suicide, for example, Sunstein argues that with “no palpable defect in the system of democratic deliberation” (p. 102), the Court should not “intrude into ongoing deliberative processes in circumstances in which reasonable people might differ” (p. 101). Rather, it ought to allow “diverse solutions in diverse states” (p. 101). At the same time, however, Sunstein contends that the Court should assume that there is a constitutional right to physician-assisted suicide (pp. 93-94). Under this approach, the Court would serve as a czar of reasonableness, ensuring that the state has good reason to interfere with this hypothesized fundamental liberty interest.<sup>15</sup>

The explanation for an ongoing judicial role here is that the issue of physician-assisted suicide is highly contested and, as such, the circumstances warranting a maximalist (wide and deep) decision are not present. For Sunstein, wide and deep decisions cement a societal consensus and must therefore be “earned by both thought and experience.”<sup>16</sup> Democratic deliberation, in contrast, best occurs in the shadow of uncertainty. Unless and until that uncertainty becomes irrelevant (because a consensus is reached), the prospect of active judicial review is a necessary component of Sunstein’s minimalist creed.

In advancing this argument, Sunstein goes out of his way to depict the core of the current Court as minimalist. Indeed, his case studies focus on decisions that he deems minimalist and, hence, cor-

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14. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). For further discussion, see *infra* text accompanying notes 75-76.

15. For Sunstein, the implementation of this model will be anything but disruptive, for there are several reasonable grounds for state “intrusions” of this hypothesized right. See pp. 94-98. With that said, Sunstein seems to embrace a right to physician-assisted suicide under hopeless conditions. Pp. 88-90.

16. P. 257. Sunstein provides little guidance on how much consensus is needed before the Court issues a maximalist opinion. Sunstein likewise says very little about how to measure societal consensus — opinion polls, elite opinion, whatever. Furthermore, in his discussion of *United States v. Virginia*, 518 U.S. 515 (1996), Sunstein endorses the Court’s deep “contentious” repudiation of the Virginia Military Institute’s exclusion of women. See pp. 163-70. Qualifying his basic claim, Sunstein argues that “a deep understanding of a constitutional provision is nothing to lament when a variety of justices can converge on it (and we) have good reason to believe that it is right.” P. 170. As to who the “we” are, Sunstein does not say.



rectly decided.<sup>17</sup> For Justices (like Sandra Day O'Connor) who are sometimes described as willing participants in a conservative counterrevolution, Sunstein suggests that their flag flies elsewhere. *One Case at a Time*, in this way, is intended to help Court watchers (and even Justices?) understand both the Rehnquist Court's emerging legacy "and to defend its controversial way of proceeding as admirably well suited to a number of issues on which the nation is currently in moral flux" (p. xiv).

## II. A KINDER, GENTLER MINIMALISM?

*One Case at a Time's* call for narrow and shallow decision-making is sound in critical respects. To start with, the factual assumptions that underlie *One Case at a Time* are correct. Inherent limits in judicial factfinding suggest that courts are apt to be mistaken in their judgments. In part, courts cannot escape "the unfortunate consequences of judicial ignorance of the social realities behind the issues with which they grapple."<sup>18</sup> As Judge Richard Posner puts it: "The first thing the courts have to learn is how little they know."<sup>19</sup> While better social science research can help solve this problem (assuming that there are answers to questions like "what is the cause of homosexuality?" or "do the costs of single sex education outweigh its benefits?"), courts nevertheless will be shackled by the temporal and reactive nature of litigation. Specifically, with judges and advocates relying on precedent-based legal arguments, courts simply cannot engage in thorough cost-benefit analysis.<sup>20</sup> Courts are also hamstrung in that they decide cases at a

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17. While conceding that one must be "attuned to the Court's minimalist tendencies" to recognize that some of these decisions, in fact, are minimalist, Sunstein argues that the Rehnquist Court defines its mission narrowly. See p. xii. For example, while recognizing that Chief Justice Rehnquist's majority opinion in the physician-assisted suicide decision (limiting the Court's power to create fundamental rights to "deeply rooted . . . traditions and practices") is anything but minimalist, Sunstein claims that, upon closer inspection, five members of the Court adopted a minimalist approach. See pp. xii, 77 (discussing *Washington v. Glucksberg*, 521 U.S. 702 (1997)). But there is reason to question Sunstein's depiction of the Rehnquist Court's minimalist tendencies. On physician-assisted suicide, for example, Sunstein does not take into account that lower courts (or the Supreme Court in a subsequent decision) may be more attuned to the fact that five members of the Court signed onto the Rehnquist opinion. See Michael W. McConnell, *Supreme Humility*, WALL ST. J., July 2, 1997, at A14. For similar reasons, Rehnquist Court affirmative action decisions can be recalibrated into something quite maximalist. See *infra* text accompanying notes 56-62. Furthermore, by only considering a subset of the Court's decisionmaking, Sunstein does not consider arguably maximalist Rehnquist Court decisionmaking, including the Court's invalidation of the Religious Freedom Restoration Act, Brady handgun legislation, and 1996 line item veto legislation. See *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Printz v. United States*, 521 U.S. 898 (1997); *Clinton v. City of New York*, 524 U.S. 417 (1998).

18. Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 12 (1998).

19. *Id.* at 18.

20. Cost-benefit review, of course, is one of the hallmarks of the administrative state. See, e.g., Exec. Order No. 12,866, 3 C.F.R. 638 (1993) (requiring cost-benefit review of agency rulemaking).

moment in time so that a changed understanding of the underlying facts can only be corrected through a reversal.<sup>21</sup> Moreover, notwithstanding *amicus curiae* filings, the Court often relies on the arguments made by the parties before it, and the parties before it frequently frame the issues that the Court will consider. Correspondingly, the Court may “anchor” its decisionmaking on its perceptions of whether the parties before it are sympathetic or not. Problems may arise, however, when different parties raising identical legal issues may appear more or less sympathetic and, as such, the Court’s decision may well be tied to the accident of which plaintiff presents its case to the Court.<sup>22</sup>

Beyond the Court’s propensity to get the facts wrong, the risks of elected government reprisals to unpopular decisionmaking may well be too great to warrant wide and deep decisionmaking on highly contested issues. Consider, for example, *Roe v. Wade*.<sup>23</sup> By grounding its decision in a woman’s right to bodily integrity and prohibiting state regulation of abortion during the first trimester, *Roe* is an extraordinarily wide decision. Indeed, this was the Court’s intent. Justice Harry Blackmun advanced his trimester test to forestall future government efforts to sidestep the decision and, in so doing, to settle the abortion controversy once and for all.<sup>24</sup> From 1973 to 1989, however, 306 abortion-restricting measures were passed by forty-eight states.<sup>25</sup> In 1992, after twenty years of elected government resistance as well as the appointment of new Supreme Court Justices, the Court responded to these pressures and returned much of the decisionmaking power related to this divisive issue back to the states. For this reason, Ruth Bader Ginsburg, in December 1992, lambasted *Roe* for “prolong[ing] divisiveness and deferr[ing] stable settlement of the [abortion] issue” by short-circuiting early 1970s legislative reform efforts.<sup>26</sup>

The political maelstrom that followed *Roe*, of course, is unique. Nevertheless, there are countless examples of elected government

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21. Correspondingly, judges must operate around “real time” constraints, that is, courts cannot defer decisions on the cases before them. In particular, rather than risk a backlog of cases, judges must do the best they can with the information that they have.

22. For an overview treatment of anchoring and other behavioral economics topics, see Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).

23. 410 U.S. 113 (1973).

24. See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 585-87 (1994).

25. See NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES* 60-63 (1996).

26. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992). For an argument that the states were unlikely to liberalize abortion rights, see David Garrow, *History Lesson for the Judge: What Clinton’s Supreme Court Nominee Doesn’t Know About Roe*, WASH. POST, June 20, 1993, at C3.

attacking unpopular Supreme Court decisionmaking.<sup>27</sup> Indeed, the historical record makes clear that the Court is hardly ever successful "in blocking a determined and persistent lawmaking majority on a major policy."<sup>28</sup> Rather, the "policy views dominant on the Court are never long out of line with the policy views dominant among the lawmaking majorities of the United States."<sup>29</sup> None of this is to suggest that court-ordered reform is a "hollow hope"<sup>30</sup>; it is to suggest, however, that courts should look before they leap.

Sunstein, in his brief discussion of *Roe*, echoes these themes. Depicting the post-*Roe* social upheaval as "destructive and unnecessary," he argues that the Court ought to have proceeded narrowly, engaging "in a form of dialogue with the political process" (p. 114). The question remains: How does the Court proceed narrowly? *One Case at a Time* answers this question by extolling the virtues of narrow and shallow decisionmaking. The possibility of steering clear of controversy altogether, by employing the "passive virtues," is not factored into the equation (at least not in a meaningful way).<sup>31</sup> Here, I think, Sunstein loses the forest for the trees.

Warren Court efforts to eradicate racial segregation in the post-*Brown*<sup>32</sup> South highlight why it is that the Court must sometimes walk away from controversy. To begin with, the Court's decisions in *Brown* are extraordinarily shallow. Rather than require southern systems to take concrete steps to dismantle dual school systems, the Court recognized that "varied local problems" were best solved by "[s]chool authorities," that district court judges were best suited to examine "local conditions," and that delays associated with "problems related to administration" were to be expected.<sup>33</sup> By recognizing that "some achievable remedial effectiveness may be sacrificed *because of* other social interests" and that "a limited remedy [may be chosen] when a more effective one is too costly to

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27. For a sampling, see LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* (2d ed. 1996).

28. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. PUB. LAW 279, 286 (1957).

29. *Id.* at 285. For other treatments of this subject, see LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* (1988); GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975); Symposium, *Elected Branch Influences in Constitutional Decisionmaking*, 56 LAW & CONTEMP. PROBS., Autumn 1993, at 1.

30. ROSENBERG, *supra* note 29. For critiques of Rosenberg, see generally, Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027 (1992); Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763 (1993).

31. Sunstein, for example, never explains how (if ever) a minimalist Court ought to employ the "passive virtues."

32. See *Brown v. Board of Education II*, 349 U.S. 294 (1955) (unanimous decision).

33. 349 U.S. at 299-300.

other interests,"<sup>34</sup> the Justices sought to improve the acceptability of their decision by speaking in a single moderate voice.

More striking, following its rulings in *Brown*, the Court steered clear of the school desegregation issue for a decade.<sup>35</sup> Indeed, well aware of the "momentum of history" and the "deep feeling" people had about school segregation, the Court refused to hear a 1955 challenge to Virginia's miscegenation law rather than risk "thwarting or seriously handicapping" its decision in *Brown* and, with it, its institutional prestige.<sup>36</sup> In particular, with critics of *Brown* warning that integrated schools would produce a "mongrelization" of the white race, the Justices were unwilling to place themselves "into the vortex of the present disquietude . . . [and risk] the carrying-out of the Court's decree."<sup>37</sup>

By 1964, however, Congress and the White House — through the monumental 1964 Civil Rights Act<sup>38</sup> — made clear that they were prepared to lend their institutional support to the dismantling of single-race schools. It was against this backdrop that the Warren Court finally returned to school desegregation, declaring in 1964 that "the time for mere deliberate speed has run out."<sup>39</sup> This parallelism should come as no surprise. Unlike *Brown*, when judicial intervention ran against the grain of majoritarian preferences, court-ordered reform was now consistent with the initiatives taken by the elected branches. In 1967, with the principle of desegregation safely established, the Justices revisited the miscegenation question, unanimously striking down the Virginia statute.<sup>40</sup>

The Court's ability to navigate desegregation (at least before forced busing, when judicial hubris overtook common sense) is truly remarkable. It reveals that the Court can pursue radical social change while taking into account inherent limits in its authority. What would have happened if the Court followed this course on

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34. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 599 (1983). Cass Sunstein clearly embraces this type of shallow decisionmaking. See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 50-51 (1996).

35. During this period, its only foray into school desegregation was *Cooper v. Aaron*, 358 U.S. 1 (1958), a decision reprimanding Arkansas governor Orval Faubus for blocking school desegregation in Little Rock. But *Cooper* was all symbolism and no substance, for the Court's decision occurred the year after President Dwight Eisenhower sent federal troops into Little Rock to force compliance with the district court's order in the case.

36. Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 YALE L.J. 1423, 1476 & n.317 (1994) (quoting a Nov. 4, 1955 memorandum from Justice Felix N. Frankfurter to the Conference).

37. *Id.* For the classic defense of the Court's action, see BICKEL, *supra* note 4, at 174; for the classic critique, see Herbert Weschler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

38. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000 *et seq.* (1994)).

39. *Griffin v. County School Bd.*, 377 U.S. 218, 234 (1964).

40. See *Loving v. Virginia*, 388 U.S. 1 (1967).

abortion, issuing a less ambitious decision in *Roe* and then steering clear of the controversy for several years? Would the acrimony that followed in *Roe*'s wake have been moderated? Quite possibly. First, populist resistance to *Roe*, in part, is a by product of the decision's absolutist nature. A decision permitting rape victims to seek abortions and no more would have held open the possibility that the Court might well approve less draconian regulations. In so ruling, the Court would have appeared less extreme and, as such, may not have galvanized pro-life interests. Second, a more ambiguous decision might well have spurred the pro-choice community into action. *Roe* and its progeny, by assuring pro-choicers that they could not lose the benefits they had won, eliminated the demand for pro-choice legislation. Otherwise, pro-choice and pro-life interests would have pursued abortion legislation in the shadow of constitutional uncertainty. Over time, it is possible that some consensus would have emerged.<sup>41</sup>

The lesson here is simple: Courts do not resolve contentious social questions once and for all in a single decision. Rather, Court decisionmaking ought to leave room for democratic deliberation, including populist resistance. Sunstein, as his criticism of *Roe* makes clear, understands this. Indeed, in some ways, this is the point of *One Case at a Time*. By not considering how it is that the "passive virtues" fit into this equation, however, a key element is missing from Sunstein's elaboration of how a minimalist Court should behave. Specifically, the "passive virtues" allow a minimalist Court to take the long view. By seeing each decision (including a decision not to decide) as part of a broader mosaic, the Court can allow time for cultural norms to change and settle so that its decisions can win wider acceptability.<sup>42</sup>

Delay makes sense for other reasons. As Sunstein recognizes, Court decisionmaking ought to be minimalist, in part, because the Court will sometimes get the facts wrong. But limitations in the Court's factfinding may also warrant delaying strategies. This, I think, is particularly true in separation of powers decisionmaking.<sup>43</sup>

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41. There is reason to think that a narrow ruling in *Roe* would have had this effect. Following the Court's narrow decision in *Planned Parenthood v. Casey* — reaffirming *Roe* while expanding state regulatory authority — a consensus of sorts has emerged. Most significantly, the pace of abortion-related legislation has slowed dramatically. States no longer pursue legislative initiatives outlawing abortion. Rather, notwithstanding the recent furor over partial birth abortion, the focus of state action involves restrictions approved by the Court: waiting periods, informed consent requirements, and parental notification. See DEVINS, *supra* note 25, at 73-74.

42. Cultural norms, of course, may not change. As to whether the Court should risk political reprisals in such circumstances, see *infra* text accompanying notes 77-80.

43. Sunstein limits his "applications" to speech, equality, and privacy cases. Since *One Case at a Time* advances a generalist model of Court decisionmaking, this purposeful narrowing of focus is unfortunate.

Unlike most challenges to a congressional statute, the frequent interplay between the branches can make the ultimate impact of a new rule quite unpredictable, just as the political accommodations between the branches can redefine or even undo the substantive impact.<sup>44</sup> For this reason, certiorari denials, findings of no ripeness, and the like are particularly appropriate in this context. Take the line-item veto. Will it be used by the President to threaten individual members of Congress simply to pursue executive pet projects? Or will it serve as a defensive mechanism to protect the President from "veto proof" continuing resolutions? In other words, will it transform the substantive quality of legislation in a significant way, and if so, in what direction? Moreover, will experience with the line-item veto affect the ultimate operation of this device? That is, will Congress and the White House recalibrate their budgetary policymaking against the backdrop of their experiences with the line-item veto?<sup>45</sup>

The independent counsel statute provides another example of this phenomenon. Ten years ago, in concluding that the statute was constitutional, the Court found that the Attorney General exercised meaningful control over independent counsel investigations and that, in any event, the statute did not undermine the President's ability to manage the executive branch.<sup>46</sup> With the benefit of ten years hindsight, of course, these conclusions seem, well, suspect.

Delay, as Alexander Bickel put it, has the advantage of allowing the "full political and historical context, the relationship between the Court and the representative institutions of government" to be made clearer.<sup>47</sup> While delay may not always be practical or necessary,<sup>48</sup> a minimalist Court should see great advantage in delaying strategies. Sunstein very much embraces certain types of delaying strategies. His notion that Court decisionmaking ought to be narrow and shallow, that the Court's reasoning ought to be incom-

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44. Mike Fitts and I develop this point in Neal Devins & Michael A. Fitts, *The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Confrontations*, 86 GEO. L.J. 351, 367-68 (1997).

45. The answer to these questions remains a mystery, for the Court — in a maximalist opinion — struck down the line-item veto statute before Congress and the White House had significant experience negotiating around it. See *Clinton v. New York*, 524 U.S. 417 (1998).

46. See *Morrison v. Olson*, 487 U.S. 654 (1988).

47. See BICKEL, *supra* note 4, at 124.

48. In the independent counsel case, for example, a lower court finding that the statute was unconstitutional, *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988), made it impractical for the Court to refuse to hear the case. Otherwise, the statute would have been effectively voided in the D.C. Circuit, the very circuit in which a three-judge panel appoints independent counsels. With that said, the Court could have issued (*à la* Sunstein) a narrower opinion, one that left open the question of whether the President's control of the executive branch might be undermined by the statute. Such a decision would have sent a cautionary note to zealous independent counsels, whereas *Morrison* is a green light for monomaniacal prosecutors to push the envelope as far as it will go.

pletely theorized, and that issues ought to be left undecided, in the end, is a rallying cry for delay. In this way, *One Case at a Time* sounds a similar theme to the *Least Dangerous Branch*. Nevertheless, Sunstein commits error by presenting a theory of minimalism that does not take into account the appropriate uses of the "passive" virtues. Rather, by limiting his project to merits-based decisionmaking, *One Case at a Time* is anything but a plea for the judiciary to steer clear of the issues that divide the nation. As such, there is a hollowness to Sunstein's call for courts to recognize inherent limits in their authority. Does it cloak his desire for courts to play an active role in shaping public policy, a desire grounded in judicial supremacy? Perhaps not.<sup>49</sup> But, as the next part will show, there is very little in *One Case at a Time* to suggest otherwise.

### III. SHAPING CONSTITUTIONAL VALUES

The Constitution's text, its original intent, and intervening practice support three-branch interpretation.<sup>50</sup> For this reason, as Ruth Bader Ginsburg observed, "[J]udges play an interdependent part in our democracy. They do not alone shape legal doctrine but . . . they participate in a dialogue with other organs of government, and with the people as well."<sup>51</sup> But how should judges participate in constitutional dialogues with elected officials and the people? More precisely, should judges, as Sunstein suggests, encourage democratic deliberation through ambiguous, incompletely theorized opinions?

No doubt, as the prior section underscores, inherent limits in the judicial role make it sensible for the Court (at least some of the time) to issue narrow and shallow decisions. But these are pragmatic restraints, not driven by some grand theory of democracy-forcing judicial review. As such, they apply in a sporadic, ad hoc manner, allowing the Court to issue "maximalist" decisions when the circumstances warrant it. Sunstein's call for across-the-board minimalism, on the other hand, is grounded in a normative vision — democracy-forcing judicial review. In assessing Sunstein's normative theory, two questions therefore remain: First, can the Court craft minimalist doctrine in such a way as to promote democratic deliberation? Second, if it can, should it? The answer to both questions, as this section will suggest, is no.

The Court's power to alter the course of democratic deliberation is premised on the belief that people pay attention to the Court

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49. In an article entitled *Leaving Things Undecided*, Sunstein spoke of the synergies between his and Bickel's work. "The project of the minimalist judge," wrote Sunstein, "is easily linked with the project of exemplifying the 'passive virtues,' a project that is associated with a court's refusal to assume jurisdiction." Sunstein, *supra* note 34, at 51.

50. For a sketch of why this is so, see Devins & Fisher, *supra* note 6, at 85-90.

51. Ginsburg, *supra* note 26, at 1198.

(not simply the holdings of cases *but* the Justices' reasoning as well). The sad truth, however, is that the public is generally unaware of Court decisionmaking.<sup>52</sup> Correspondingly, it may be that media outlets, although reporting the Court's decisions, do not see the Court as an agenda setter; that is, coverage of an issue (school desegregation, for example) is not tied to landmark Supreme Court decisionmaking (*Brown*).<sup>53</sup> More telling, it is unclear whether lawmakers pay much attention to court decisionmaking. Six years ago, the D.C. Circuit Court of Appeals and Congress agreed that the Clerk of the Court ought to inform Congress of instances where the D.C. Circuit construed a congressional statute.<sup>54</sup> The reason for this reform: Congress was not paying attention to these decisions, some of which invalidated or severely constrained Congress's handiwork.<sup>55</sup>

When Congress does listen, moreover, it rarely considers the Court's reasoning. Instead, its focus is on whether the Court's decision stands as a roadblock to reform. Fact-specific, indeterminate, incompletely theorized minimalist decisionmaking does not stand as a roadblock to anything. Rather, members who support the result reached by the Court will treat minimalist decisionmaking as something quite maximalist while members who oppose the outcome will characterize such decisions as inconsequential. In the end, when the Court leaves issues undecided, lawmakers will simply chart a course to the outcome they prefer.

This is the lesson of the Supreme Court's 1995 *Adarand Constructors, Inc. v. Peña*<sup>56</sup> decision. Insisting that federal, as well as state, affirmative action programs be "narrowly tailored" to serve a "compelling governmental interest,"<sup>57</sup> *Adarand* tightened the standards governing affirmative action. Rather than apply this standard, however, the Court sent the dispute back to the district court where it originated. More significantly, the Justices neither repudiated diversity-based affirmative action nor prohibited government from "acting in response" to "both the practice and lingering effects of racial discrimination."<sup>58</sup> In this way, *Adarand* is a

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52. See David Adamany & Joel B. Grossman, *Support for the Supreme Court as National Policymaker*, 5 LAW & POLICY Q. 405, 407 (1983) (citing studies).

53. See ROSENBERG, *supra* note 29, at 111-16.

54. See ROBERT A. KATZMANN, COURTS AND CONGRESS 69-81 (1997).

55. This experiment has "not caused any flurry of legislative action" perhaps because Congress is still not paying much attention. Abner J. Mikva, *Why Judges Should Not be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825, 1828 (1998).

56. 515 U.S. 200 (1995).

57. 515 U.S. at 227.

58. 515 U.S. at 237. See also Neal Devins, *Adarand Constructors, Inc. v. Peña and the Continuing Irrelevance of Supreme Court Affirmative Action Decisionmaking*, 37 WM. & MARY L. REV. 673 (1996) (criticizing *Adarand* for saying so little).



quintessentially minimalist opinion and, not surprisingly, Sunstein praises it for its shallowness (pp. 124, 130-32).

But, by saying so little, *Adarand* leaves it to lawmakers to spin the decision to fit their needs. Inside the Washington, D.C. beltway, where affirmative action is entrenched, *Adarand* is of little consequence, if any at all. A vivid illustration of this reality occurred in July 1995 when Senator Phil Gramm proposed eliminating set-asides for minorities and women in federal contracting.<sup>59</sup> In defending this measure, Gramm explained that "my amendment is written in total conformity with *Adarand*. . . . That is, if the court finds that a contractor was [personally] subject to discrimination, the court may provide a remedy with a set-aside . . . ."<sup>60</sup> In sharp contrast, Senator Arlen Specter called attention to *Adarand*'s recognition that the government may act in response to "both the practice and the lingering effects of racial discrimination."<sup>61</sup> Along these lines, Senator Patty Murray countered Gramm's efforts by proposing that federal funds can only be used for "programs . . . completely consistent with the Supreme Court's recent decision in . . . *Adarand*."<sup>62</sup> In the end, the Murray amendment was approved by a lopsided eighty-four to thirteen vote and the Gramm amendment was soundly defeated by a bipartisan sixty-one to thirty-six vote.

By not placing meaningful constraints on elected officials, decisions like *Adarand* suggest that minimalist decisionmaking may be a lot of smoke with very little fire. As such, the principal consequence of minimalist decisionmaking may be the delegation of decisionmaking authority away from the Supreme Court and to lower federal courts. For example, by recalibrating the Supreme Court's careful parsing of words in *Adarand*, some lower courts have concluded that diversity-based preferences are unconstitutional.<sup>63</sup> Along the same lines, because courts will constantly be filling in the gaps left by fact-specific rulings, minimalist decisionmaking forces courts to actively oversee elected government. Correspondingly, since lawmakers and regulators will not know what is and is not constitutional, courts will inevitably find themselves in the thick of the policymaking soup. Over time, of course, a societal consensus

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59. 141 CONG. REC. S10,401 (daily ed. July 20, 1995) (statement of Sen. Gramm).

60. *Id.* at S10,408 (statement of Sen. Gramm).

61. *Id.* at S10,409 (statement of Sen. Specter).

62. *Id.* at S10,405 (statement of Sen. Murray).

63. The most vivid example of this is *Hopwood v. Texas*, 78 F.3d 932, 944-48 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). This, of course, begs the question of whether the Supreme Court has a responsibility to guide lower courts through clear standards, if not rules. See Ashutosh Bhagwat, *Hard Cases and the (D)evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 992-93 (1998); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 401 n.6 (1985).

may be reached, prompting the Court to issue a maximalist decision.<sup>64</sup> Until that time, however, courts are more apt to function as technocrats, speaking narrowly to the question before them, than they are to prompt constructive democratic discourse.

But even if Court decisions shape democratic deliberation, there is reason to doubt that minimalist decisionmaking is, ultimately, more democracy-forcing than majoritarianism. After all, the Court's unqualified approval of governmental decisionmaking leaves it to lawmakers and the people to define for themselves the reaches and limits of constitutional protections. Consider, for example, the willingness of democratic institutions to correct majoritarian decisionmaking. Starting with Thomas Jefferson's declaration that the Alien and Sedition Acts, which criminalized speech critical of the government, were unconstitutional and that every person convicted under the sedition law ought to be pardoned,<sup>65</sup> presidents have countermanded majoritarian decisionmaking. Andrew Jackson's veto of legislation rechartering the Bank of the United States, Ronald Reagan's refusal to sign legislation codifying the fairness doctrine, and Bill Clinton's repeal of anti-abortion regulations are examples of this phenomenon.<sup>66</sup> Congress, too, has expanded constitutional protections in the face of Supreme Court decisions curtailing individual rights, including legislation limiting third-party searches of newspapers; legislation authorizing disparate impact proofs in voting rights and employment discrimination legislation; legislation authorizing the assignment of women to combat aircraft; legislation allowing federal employees, including members of the armed services, to wear an item of religious apparel on their clothing; and much, much more.<sup>67</sup> Rather

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64. The Supreme Court may well prefer this state of affairs. For example, it can issue a shallow decision on affirmative action, gay rights, or states' rights. If a societal consensus supporting a deep decision emerges, the Court can treat its earlier decision as a wedge, that is, the Court can subsequently redescribe that precedent in maximalist terms. See Posner, *supra* note 18, at 9-10 (suggesting that some of the decisions that Sunstein describes as minimalist are, in fact, wedge decisions). On the other hand, if the Court later decides that it would be a mistake to issue a deep decision, its earlier decision can be treated as a shallow minimalist holding. An example of this phenomenon is *Griswold v. Connecticut*, 381 U.S. 479 (1965). When decided, *Griswold* seemed to speak more to the marital bedroom than, say, abortion rights. Today, of course, *Griswold* is often depicted as a maximalist decision. Judge Bork, for example, labeled *Griswold* as the embodiment of "unprincipled" judicial activism. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971).

65. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 907 (noting that the effect of Jefferson's pardon was to nullify the statutes "as much as if the Supreme Court had held them unconstitutional").

66. See DEVINS, *supra* note 25, at 14 (discussing the bank veto), 35 (discussing the fairness veto), 115-18 (discussing the repeal of anti-abortion regulations, including abortion counseling and fetal tissue research).

67. See FISHER & DEVINS, *supra* note 27, at 3 (discussing newsroom protections), 283-302 (discussing employment), 322-33 (discussing women in the military); 10 U.S.C. § 774 (1994) (addressing religious apparel in the military).

than view the Court's decision as the last word, elected officials, after engaging in constitutional interpretation, have chosen to limit themselves in ways that the Court would not limit them.

Majoritarianism, therefore, cannot simply be dismissed as antithetical to Sunstein's project of democracy-forcing constitutional deliberation. But even if minimalism is more democracy-forcing than majoritarianism, there is reason to doubt the Court's ability to conduct this enterprise in the real world. Consider, for example, the Court's recent decisions upholding state bans on physician-assisted suicide.<sup>68</sup> Sunstein applauds the democracy-forcing nature of these decisions, noting that the Justices, by suggesting that state authority may be limited but not specifying when this may be the case, created incentives for both sides of the debate to engage in democratic deliberation (pp. 93-99). Yet, since courts must give reasons for their holdings, an incompletely theorized minimalist decision would still speak to the legitimacy of state regulations. In this way, minimalist decisionmaking would necessarily affect the content of democratic discourse, especially if the Court — in filling in the gaps of earlier decisions — finds itself a repeat player on an issue.

Courts, moreover, may face an array of possible options and outcomes, each of which might be deemed minimalist. How then should courts choose between competing minimalist decisions? For example, as Mark Tushnet argues, a minimalist decision striking down the assisted suicide bans might have been more democracy-forcing "by assuring that democratic consideration of the issue was not obstructed by inertia or other procedural impediments to public, and particularly legislative, discussion."<sup>69</sup> Along these lines, given the burden of inertia (which makes it more difficult to enact legislation than to defeat the enactment of legislation), a minimalist decision invalidating assisted suicide prohibitions would promote democratic deliberation *if* "right-to-life" interests (who support such laws) have substantially more political power than "choice-in-dying" interests. Under this scenario, "choice-in-dying" interests, although lacking the power to compel serious legislative consideration of their reform agenda, might be able to force legislative consideration of their arguments *if* politically powerful "right-to-life" interests would have to overcome the burden of legislative inertia. The flip side of this coin, of course, is that a decision upholding assisted suicide prohibitions would foster democratic deliberation *if*

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68. See *Vacco v. Quill*, 521 U.S. 793 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

69. Mark Tushnet, *How to Deny a Constitutional Right: Reflections on the Assisted Suicide Cases*, 1 GREEN BAG 2D 55, 57 (1997).

“choice-in-dying” interests had more political power than “right-to-life” interests.

But can courts sort out which side of a divisive issue has more political power? Sometimes discrete and insular minorities, who have certain organizational advantages, have substantial political power.<sup>70</sup> Also, in states with direct democracy procedures, political power may be defined by public opinion. Should courts take opinion polls? And what happens if political power varies from state to state? Should courts opt for the solution that maximizes democratic deliberation in the majority of states? Or should it focus on the most populated states? Or should it care the most about states that it deems parochial?

Sunstein does not suggest that courts should do any of these things. But he does reject the proposition that courts ought to defer to democratic processes, dubbing majoritarianism a form of maximalism (p. x). Apparently, Sunstein’s preferred system is one in which judges make seat-of-the-pants calls about the political marketplace. On the one hand, “if the Court cannot identify malfunctions in the system of deliberative democracy” and “if very reasonable people can [disagree]” (p. 76), courts should either “leave things undecided” or defer to “reasonable” political judgments (p. 103). On the other hand, “the existence of political inequality” (p. 103) or possible bias (pp. 133-34) supports more intrusive judicial review.<sup>71</sup> The problem here, of course, is that judges’ values and beliefs will play a large part in sorting out whether there are defects in the political marketplace.<sup>72</sup>

Perhaps I am being unfair. Sunstein’s claim is that minimalist decisionmaking promotes democratic deliberation, not that minimalism is perfect. That judges will have difficulty determining which side should win, among other things, should not overshadow the virtues of democracy-forcing minimalism. Courts are apt to make mistakes anyway. So a system which promotes democratic deliberation must be better than the alternatives.

But this simply begs the question: Why democratic deliberation? The answer does not come from the Constitution’s text, the framers’ intent, or tradition. Those sources, more than anything, speak of a system of checks and balances, with each branch asserting its own powers and protecting its own prerogatives. More fun-

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70. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 728 (1985) (discussing, among other things, the power of voting blocs).

71. In this way, Sunstein’s argument is reminiscent of John Hart Ely’s classic defense of the nonminimalist Warren Court in JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

72. Mark Tushnet condemns minimalism for this very reason, arguing that “minimalism asks judges to make precisely those judgments that its premise[] [that political judgments are best left to public discussion] assert[s] judges should not make.” Tushnet, *supra* note 69, at 60.

damentally, as a freestanding normative theory, minimalism is flawed. There are occasions where courts ought to speak about right and wrong on highly contested divisive social issues.

Judges, thanks principally to life tenure, are less likely to be driven by political expediency than elected officials. Moreover, because courts must offer reasons for their decisions, judges are more apt to take seriously their responsibility in advancing logical coherent arguments. In other words, just as courts have institutional weaknesses, they have institutional strengths.<sup>73</sup> In particular, more than any other part of the government, courts are more apt "to appeal to men's better natures, to call forth their aspirations,"<sup>74</sup> and "to be a voice of reason . . . articulating and developing impersonal and durable principles."<sup>75</sup>

Judges, of course, are not philosopher kings. But their willingness to speak about principle can be salutary, even if the principles they identify are wrongheaded. No branch should be the final arbiter of the Constitution's meaning. Rather, the Constitution is made more vibrant and, ultimately, more stable by a give and take process. Just as the courts need elected government to implement their decisions, Congress and the White House need the courts, as well as each other. This is the logic of our system of checks and balances, that "the effectiveness of the whole depends on [each branch's] involvement with one another . . . even if it often is the sweaty intimacy of creatures locked in combat."<sup>76</sup>

More specifically, by sometimes invoking high-sounding principles when striking down elected government action, courts are well positioned to validate governmental decisionmaking. Charles L. Black, Jr. has explained the way this works: "What a government of limited powers needs, at the beginning and forever, is some means of satisfying the people that it has taken all steps humanly possible to stay within its powers. . . . [T]he Court, through its history, has acted as the legitimator of government."<sup>77</sup> In other words, by speaking about right and wrong, judges can perform their most important task — affirming and legitimating the actions of elected government. In contrast, ambiguous, fact-specific, minimalist decisionmaking purposefully lacks moral force. As a result, a minimalist judge cannot really validate governmental decisionmaking.

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73. Sunstein acknowledges this, although he concludes that, more than anything, judicial insulation makes "it less legitimate for judges to choose what to do in the face of factual uncertainty." P. 103.

74. BICKEL, *supra* note 4, at 26.

75. Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959).

76. BICKEL, *supra* note 4, at 261.

77. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURTS* 52 (1960).

Beyond these institutional advantages, there are other reasons that courts might sometimes issue wide and deep decisions. In particular, dialogues between the Court and elected officials must take context into account. A democracy-forcing decision assumes that the political marketplace can work. That, however, is not always the case. Sometimes, for example, elected officials need the Court to play a leadership role. Late 1960s voting rights decisions upholding congressional reforms gave cover to Southern officials willing to comply with the new policy *but* unwilling to take responsibility for it.<sup>78</sup> In 1983, a logjam between Congress and the White House could only be broken by a Supreme Court declaration that racist private schools were not entitled to tax breaks.<sup>79</sup>

Admittedly, there are risks in seeing the courts as fixers. Sometimes the courts may see a failure in the political marketplace that isn't really there; other times elected officials may find it expedient to punt their duties as constitutional interpreters. Nevertheless, there is a rigidity to democracy-forcing minimalism that seems at odds with our system of checks and balances. Dialogues between the branches are ongoing and require a certain amount of give and take, including contextual decisionmaking.

None of this is to say that courts ought to be value-laden flame-throwers. Inherent limits in the judicial function support delaying strategies, including minimalist decisionmaking.<sup>80</sup> But courts should sometimes eschew incompletely theorized agreements and democracy-forcing strategies. If courts think segregation is morally repugnant or that life does (or does not) begin at conception, why favor a strategy that leaves it to democratic deliberation. Why not favor a strategy in which the Court — a coequal branch of government — cares about outcomes as well as processes? After all, democracy will ultimately prevail. If elected government and the people disagree with the Court, they will countermand its decisionmaking.<sup>81</sup>

#### IV. CONCLUSION

Constitutional decisionmaking is a never-ending process involving all parts of the government and the people as well. *One Case at a Time*, to its credit, recognizes that no part of government holds a monopoly over the Constitution. Moreover, in calling attention to inherent limits in judicial review, Sunstein rightly suggests that the Court ought to move incrementally, issuing narrow and shallow de-

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78. See Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985, 1017 (1990).

79. See *Bob Jones University v. United States*, 461 U.S. 574 (1983).

80. See sources cited *supra* notes 18-29.

81. See sources cited *supra* notes 27-29.

cisions. Nevertheless, *One Case at a Time* is incomplete. In some ways, it goes too far in discounting the virtues of judicial review, especially with regard to occasions when the judiciary should embrace some interpretive theory of what the Constitution means and thereby play a leadership role in the shaping of constitutional values. In other ways, it does not go far enough. In failing to detail how (and whether) a minimalist Court ought to make use of the "passive virtues," Sunstein never comes to terms with how the Court's institutional strengths and weaknesses should shape judicial review.

*One Case at a Time* is incomplete for other reasons as well. Most striking, by hinging his theory of judicial minimalism on a handful of Rehnquist Court decisions, Sunstein opens himself to attack on several fronts. First, if some of these decisions can be characterized as maximalist (or if Rehnquist Court decisionmaking not considered by Sunstein can be characterized as maximalist), there is reason to question the verity and portability of his model.<sup>82</sup> Second, even if his case analyses are sound, *One Case at a Time* relies on too few data points to be truly convincing. Rehnquist Court decisionmaking on affirmative action, physician-assisted suicide, and gender discrimination does not occur in a vacuum. These decisions are part of a larger mosaic of cases and, as such, should be considered in this broader context.<sup>83</sup> Third (and correspondingly), by focusing on 1990s decisionmaking, *One Case at a Time* is too temporal. What would Sunstein say about the maximalist decisions of the Warren Court? Did decisions on, say, reapportionment foster or impede democratic deliberation? Moreover, given Sunstein's left-leaning politics, his efforts at depicting the right-leaning Rehnquist Court as minimalist invites suspicion. Specifically, is Sunstein's objective to prevent the Rehnquist Court from going too far or is *One Case at a Time* a book for the ages (one that would condemn the maximalist decisionmaking of the Warren Court)?

When all is said and done, *One Case at a Time* has the vices and virtues of a tactician's effort to solve a problem before him. By giving short shrift both to institutional and interpretive theories of judicial review,<sup>84</sup> Sunstein's defense of judicial minimalism is less

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82. Some of Sunstein's case analyses (including his choice of case studies) can be challenged on these grounds. See *supra* notes 16-17, 43-45.

83. See *supra* notes 32-40 and accompanying text (depicting *Brown* and its progeny as part of a larger mosaic).

84. Unlike Bickel, who linked his call for the "passive virtues" with a desire for the Court to ground their decisionmaking (in those cases where they *did* speak) in interpretive theories, Sunstein strongly opposes any delineation of transcendent "neutral principles." Consequently, where Bickel was criticized for "100% insistence on principle, 20% of the time," Sunstein seems to ask for 0% principle 100% of the time. See Gerald Gunther, *The Subtle Vices of the "Passive Virtues"* — A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1, 3 (1964).

than convincing. Too many questions are left unanswered and, as such, Sunstein's argument seems, well, too incompletely theorized. To his credit, however, Sunstein pulls off a near-impossible feat. At a time when both the left and right call for a diminishing judicial role, Sunstein somehow manages to chart a "consensus" course for active judicial review. Calling attention to the inherent limits of judicial review, Sunstein's plea for narrow, shallow decisionmaking appeals to conservatives who prefer cost-benefit analysis to values-based decisionmaking.<sup>85</sup> But Sunstein also appeals to the sentiments that made the left like activist judicial review in the first place. He contends, for example, that minimalist review will be of particular use to underrepresented groups and that minimalist review compels lawmakers to justify the reasonableness of their decisionmaking.<sup>86</sup>

Ultimately, *One Case at a Time* may be understood as a necessary complement to Alexander Bickel's *The Least Dangerous Branch*. In particular, by calling attention to how it is that narrow and shallow decisionmaking operates as a delaying strategy, Sunstein makes clear that democratic decisionmaking and judicial review can complement each other. That Sunstein's call for democracy-forcing judicial review is a nonstarter does not cast doubt on this achievement. In other words, while the particulars of *One Case at a Time* may not stand the test of time, Sunstein's call for narrow and shallow decisionmaking may prove a critical (if incomplete) bridge between the "passive virtues" and active judicial review.

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85. See Posner, *supra* note 18, at 9 (describing his approach as "similar" to that of Sunstein).

86. See *supra* text accompanying note 71.