Minimalism and Deliberative Democracy: A Closer Look at the Virtues of "Shallowness"

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In hard cases, people can often agree that a certain practice is or is not constitutional, even when the theories that underlie their judgments sharply diverge. . . . In ordinary life, we might attempt to bracket the fundamental issues and decide that however they are best resolved, a particular approach makes sense for the next month or year. So too in law, politics, and morality. . . . This phenomenon has an especially notable feature: It enlists silence, on certain basic questions, as a device for producing convergence despite disagreement, uncertainty, limits of time and capacity, and heterogeneity. In short, silence can be a constructive force. \(\frac{1}{2} \)

I. INTRODUCTION

Judicial minimalism is an account of how judges should, and sometimes do, decide the cases before them.² Generally speaking, minimalist judges prefer to resolve difficult cases in a modest way.³ They favor narrow decisions, confined to the facts of the case; and they favor shallow decisions, avoiding any large account of the problem at hand and how it should be resolved.⁴ "Instead of adopting theories," Cass Sunstein says, minimalist judges "decide cases."⁵

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^{1.} Cass R. Sunstein, Beyond Judicial Minimalism, 43 TULSA L. REV. 825, 828–29 (2008).

^{2.} See generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Sunstein, Beyond Judicial Minimalism, supra note 1; Cass R. Sunstein, Burkean Minimalism, 105 MICH. L. REV. 353 (2006); Cass R. Sunstein, Incompletely Theorized Agreements, 108 HARV. L. REV. 1733 (1995); see also Cass R. Sunstein, If People Would be Outraged by Their Rulings, Should Judges Care?, 60 STAN. L. REV. 155 (2007).

^{3.} Sunstein, Beyond Judicial Minimalism, supra note 1, at 825.

^{4.} Id. at 825-26.

^{5.} SUNSTEIN, supra note 2, at 9.

Although minimalism has proven a popular target, it has also had a tremendous influence, and there is much to like about the theory.⁶ For one, minimalism reflects the common sense we use when making decisions in our own lives. When faced with a complex problem, such as whether to choose a certain career or how to invest our savings, we may be inclined, out of caution, to take small steps, just as minimalism advocates. When a dispute arises with a loved one, we may be wise to bracket "foundational issues" and simply seek an agreement about how to resolve the problem at hand. Minimalism is also attractive because it coheres with strongly held intuitions about how courts in a democracy ought to operate.⁸ In a democracy, the idea goes, foundational issues are supposed to be resolved by the people or their elected representatives. The minimalist judge respects this intuition by leaving foundational issues unresolved. Her opinions rely only on rationales that "diverse people can agree [on], notwithstanding their disagreement on or uncertainty about the most fundamental issues." ¹⁰

This article is about a second connection between judicial minimalism and democracy. The central claim of the article is that minimalism does not "spur" or "promote" democracy, as Sunstein has long argued it does. ¹¹ Sunstein's basic idea is that a court can promote democratic activity by using certain procedures or doctrines to issue minimalist decisions. ¹² For example, a court could use the non-delegation doctrine to require that a matter be addressed by legislation rather than simply by executive discretion. ¹³ Requiring the legislature to address the matter promotes democratic activity. My argument is that minimalism does not

^{6.} For a sampling of recent criticisms of minimalism, see Owen Fiss, *The Perils of Minimalism*, 9 THEORETICAL INQUIRIES L. 643 (2008); Andrew B. Coan, *Well, Should They? A Response to* If People Would be Outraged by Their Rulings, Should Judges Care?, 60 STAN. L. REV. 213 (2007); Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005); Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753 (2004). Notably, Sunstein himself has offered some criticism of minimalism. *See, e.g.*, Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899 (2006).

^{7.} See Sunstein, Beyond Judicial Minimalism, supra note 1, at 826, 828.

^{8.} Here and throughout, by "courts," I mean courts whose judges are unelected—principally the federal courts in our system. Elected judges, in contrast, are in some respects the elected representatives of the people and arguably do not face the same questions of legitimacy faced by unelected judges.

^{9.} Sunstein, Beyond Judicial Minimalism, supra note 1, at 827.

^{10.} Sunstein, Burkean Minimalism, supra note 2, at 364.

^{11.} See SUNSTEIN, supra note 2, at 24–28. The thesis is distinct from the one already mentioned, supra. It is one thing to argue that a minimalist decision makes room for democracy by leaving a foundational issue unresolved; it is another thing to say that doing so will somehow spur its democratic resolution. Sunstein himself makes this distinction. Id. at 26.

^{12.} Id. at 5, 27.

^{13.} Id. at 27.

promote democracy because minimalist decisions lack the depth necessary to promote democratic activity. Like Sunstein, I endorse a view of democracy that is based on *deliberation*. Democracy is, at its heart, a procedure for exercising state power based on reasoning between free and equal citizens. Minimalist decisions do not promote democratic deliberation because they fail to give those of a different viewpoint a reason to change their minds. Whereas minimalism advocates "shallow" decisions, changing minds often requires "deep" arguments.

Let me illustrate the problem using a simple, non-legal example. Suppose you are of the view that the government should not permit the media to photograph returning coffins of soldiers who have died in war. ¹⁶ You think such photographs would undermine morale. I favor allowing them, on the grounds that they would help the public understand the true cost of war. A minimalist resolution of this dispute might let the families of the fallen soldiers decide on a case-by-case basis, out of respect for their wishes—a principle that you and I can agree is important. But does the decision "spur" us to resolve our differences by reasoning through them together? I do not see how it would.

Consider another example, based on one of Sunstein's own. ¹⁷ You are of the view that endangered animal species should be protected because we have an obligation not to destroy animals, at least if we can prevent it. I agree with you that protecting endangered species is important, but my view is based on utilitarian considerations: a species may prove vitally important to us—for example, as the source of a medicine—and we should preserve these resources. ¹⁸ The minimalist sees no need for us to resolve our differences, as long as we can agree on a course of action. ¹⁹ That may be a wise approach, but I do not see how it promotes deliberation between us. It would seem to do just the opposite.

^{14.} Id. at 24-25.

^{15.} Joshua Cohen, *Procedure and Substance in Deliberative Democracy, in DEMOCRACY & DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 99 (Seyla Benhabib ed., 1996) (1989) ("The deliberative conception of democracy is organized around an ideal of political justification. According to this ideal, to justify the exercise of collective political power is to proceed on the basis of a free public reasoning among equals.").*

^{16.} See Ann Scott Tyson, Media Ban Lifted for Bodies' Return, WASH. POST, Feb. 27, 2009, at A2.

^{17.} See Sunstein, Incompletely Theorized Agreements, supra note 2, at 1736.

^{18.} See MARK SAGOFF, PRICE, PRINCIPLE, AND THE ENVIRONMENT 29–55 (2004) (distinguishing similar approaches to resource conservation and managing pollution).

^{19.} Sunstein, *Incompletely Theorized Agreements*, *supra* note 2, at 1736.

The thesis that judicial minimalism promotes democracy is an important part of the broader theory of minimalism.²⁰ It constitutes in large part minimalism's response to the familiar concerns of countermajoritarianism; a court that promotes the democratic resolution of the most fundamental issues before it cannot fairly be charged with "judicial lawmaking" on those issues.²¹ More generally, the thesis shows, in an intuitive way, how the court as an institution fits within our scheme of democratic government. Minimalist decisions reflect the special institutional competence of the court: resolving disputes.²² When a court attempts to do more—for example, propound deep theories about the law or human conduct—it risks erring in ways that have significant effects and are not easily correctable.²³ Minimalism thus reduces the probability of judicial error and promotes the democratic resolution of fundamental social issues, which the political branches of government have the competence to properly resolve.²⁴ By acknowledging its own limitations in these matters, the court also shows respect for those who do not share its views.²⁵

The aim of this article is to show why these important claims do not succeed, by developing, at greater length, the argument outlined above. The article proceeds in three parts. Part II begins with an analysis of the structure of minimalism. It examines the ideas of narrowness and shallowness in depth, drawing on the Supreme Court's decisions in *United States v. Virginia* and *Brandenburg v. Ohio*. With this groundwork laid, Part III reconstructs Sunstein's thesis that minimalism promotes democ-

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^{20.} Neil Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1974–78 (1999) (reviewing SUNSTEIN, *supra* note 2) (describing Sunstein's concern with showing the connection between minimalism and democracy).

^{21.} See SUNSTEIN, supra note 2, at 5 ("The first suggestion is that certain forms of minimalism can be democracy-promoting, not only in the sense that they leave issues open for democratic deliberation, but also and more fundamentally in the sense that they promote reason-giving and ensure that certain important decisions are made by democratically accountable actors." (emphasis added)).

^{22.} See Sunstein, Incompletely Theorized Agreements, supra note 2, at 1738 (noting that shallow decisions are "well suited to the institutional limits of the judiciary.").

^{23.} Josh Benson, *The Past Does Not Repeat Itself, but It Rhymes: The Second Coming of the Liberal Anti-Court Movement*, 33 LAW & SOC. INQUIRY 1071, 1081 (2008) ("The second main advantage of minimalism is that it comports with the Court's narrow institutional competence. Unlike a legislature, which can correct mistakes and draw on expert information, the Court lacks serious policy expertise. This means not only that sweeping rulings are likely to be wrong, but they acquire precedential value that makes them difficult to correct.").

^{24.} See SUNSTEIN, supra note 2, at 39–41; Sheldon Gelman, The Hedgehog, the Fox, and the Minimalist, 89 Geo. L.J. 2297, 2307 (2001) (reviewing SUNSTEIN, supra note 2) ("[Minimalism] turns a failure to resolve constitutional issues . . . into a positive political good, and not merely the means by which the Court protects its institutional position. When the Court leaves a constitutional issue open, the nation continues to deliberate about it. This process allows a democratic solution in Sunstein's special sense of democracy-to-emerge. Completing the circle, the Court eventually embraces the democratic solution. Doing so, it simultaneously remains in tune with the nation, safeguards its position, and advances democracy.").

^{25.} See SUNSTEIN, supra note 2, at 40-41, 259.

racy. It begins by examining the deliberative account of democracy and uses the case of *Papachristou v. City of Jacksonville* to show how minimalism could be thought to promote deliberative democracy.²⁶ Part IV then criticizes the democracy-promotion thesis along the lines of the argument sketched above and anticipates several objections to the argument. Finally, the article concludes by drawing on the theory of popular constitutionalism to show why *deep* decisions need not transgress the proper role of courts within democratic society.

II. ANALYZING MINIMALISM

A. The Components of Minimalism

In the opening pages of *One Case at a Time*, Sunstein lays out the procedural characteristics of the minimalist court.²⁷ The description in these pages, although compressed, introduces many of the ideas that form the core of minimalism. Several things are notable about the court Sunstein envisions. First, it exhibits a remarkable sense of self-awareness, or self-consciousness, for an institution of government.²⁸ Second, the characteristics of the court on which Sunstein is focused seem to fall into several rough categories. This becomes apparent if we rearrange the characteristics and put them into a list.²⁹ The minimalist court:

- (1) is "alert to the existence of reasonable disagreement in a heterogeneous society";³⁰
- (2) "knows there is much it does not know"; is "intensely aware of its own limitations"; ³¹
- (3) is "[a]lert to the problem of unanticipated consequences";³²
- (4) "wants to accommodate new judgments about facts and values", 33

^{26.} Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

^{27.} See SUNSTEIN, supra note 2, at ix-xiv, 8-14.

^{28.} Sunstein's court is deeply concerned about its own limits and its role in society. Why a court should be so self-aware is an interesting question. Minimalism seems uniquely appropriate in contexts where the legitimacy or role of the court in the broader system of government has been challenged.

^{29.} Notably, with the exception of characteristics ten and eleven, the quotations listed below come from the Preface to *One Case at a Time*. For some reason, Sunstein says rather little about shallowness in the Preface, and so I have helped myself to descriptions of shallowness occurring in the first chapter.

^{30.} SUNSTEIN, supra note 2, at ix.

^{31.} Id.

^{32.} *Id*.

- (5) "settles the case before it, but . . . leaves many things undecided"; 34
- (6) "seeks to decide cases on narrow grounds";³⁵
- (7) "avoids clear rules"; 36
- (8) "[avoids] final resolutions";³⁷
- (9) "seeks to provide rulings that can attract support from people with diverse [moral, religious and philosophical] commitments", 38
- (10) seeks "[a]greements on particulars";³⁹
- (11) justifies its opinions "not by abstract theories but by unambitious reasoning"; 40
- (12) "sees itself as part of a system of democratic deliberation";⁴¹
- (13) "attempts to promote . . . participation, deliberation, and responsiveness", 42
- (14) "allows continued space for democratic reflection from Congress and the states." ⁴³

I count three categories of characteristics in this list. The first four characteristics describe the minimalist court's understanding of its own *epistemic position*, that is, of what the court can *know*, particularly in light of the legal issues it faces and the diversity of beliefs about those issues. These "epistemic characteristics" describe a court that acknowledges its understanding to be limited in a non-trivial way. Of course, everyone's understanding is limited in a broad sense; the idea here is that the limits are substantial and may cause the court to overreach.

Characteristics five through eleven describe norms that govern *decision-making* itself. We have already discussed several of these "decisional characteristics" and will explore them at length below; roughly speaking, they describe decisions closely tied to the facts of the case and justified by run-of-the-mill judicial reasoning (for example, the use of the canons of statutory interpretation or citation to binding authority). An

^{33.} Id. at x.

^{34.} Id. at ix.

^{35.} *Id*.

^{36.} *Id*.

^{37.} Id.

^{38.} Id. at x.

^{39.} Id. at 13.

^{40.} Id.

^{41.} Id. at ix-x.

^{42.} Id. at x.

^{43.} *Id*.

important feature of the decisional characteristics is their relationship to the epistemic characteristics identified above. According to the minimalist, narrow and shallow decisions are appropriate in light of the epistemic limitations faced by the court. For example, because the court is "alert to the existence of reasonable disagreement in a heterogeneous society," it should seek to issue decisions that can attract support from the members of this heterogeneous group.

The final characteristics, twelve through fourteen, capture the minimalist court's role within broader *political society*. These are the "political characteristics" of the minimalist court. The political characteristics of greatest importance to the minimalist are leaving room for and promoting democratic deliberation on matters of fundamental importance to society.

To summarize, then, the view is this: the procedural characteristics of the minimalist court can be divided into three groups:

Epistemic Characteristics {E} Is alert to reasonable disagreement Knows it does not know Is alert to unanticipated consequences Wants to accommodate new judgments	Decisional Characteristics {D} Settles only the case before it Decides cases on narrow grounds Avoids clear rules Avoids final resolutions Seeks rulings that attract support from diverse people Seeks agreement on particulars Justifies decisions by	Political Characteristics {P} Sees itself as part of deliberative democracy Attempts to promote participation, deliberation, responsiveness Allows space for democratic reflection
	Justifies decisions by unambitious reasoning	

The characteristics in each group are related to those in the other two groups in important ways for the theory. For example, as discussed above, minimalist courts issue decisions described in $\{D\}$ because they acknowledge the epistemic limits described in $\{E\}$. We might say that the minimalist court is a $\{D\}$ court because it is an $\{E\}$ court. In a similar sense, the limits acknowledged in $\{E\}$ support the role for courts described in $\{P\}$. And courts that issue decisions described in $\{D\}$ relate to political society as described in $\{P\}$.

None of this, of course, is meant to represent a deep insight into Sunstein's minimalism. What it does do is help to organize the components of the theory. On the organization above, minimalism is fundamentally an account of the relationship between the epistemic and political characteristics of the federal courts. The decisional characteristics most commonly identified with minimalism—narrowness and shallowness—provide a kind of bridge between the epistemic and the political. They show how an institution such as the court, which faces significant epistemic limits, can situate itself comfortably within our democratic constitutional system. It can do so, says the minimalist, by issuing narrow and shallow decisions, which is consistent with both the court's epistemic limitations and its role in a democracy.

This makes it crucially important, for purposes of deciding whether courts should issue narrow and shallow decisions, to determine whether or not such opinions do promote democracy. Before answering that question, however, it is necessary to say more about narrowness and shallowness.

B. Narrowness

When a court makes a narrow decision, it resolves the particular case before it instead of issuing a broad rule.⁴⁷ A narrow decision "attempt[s] to focus on the particulars of the dispute," which allows the court to "leav[e] a great deal undecided."⁴⁸

1. United States v. Virginia and Narrowness as "Prophylaxis"

To better understand what narrowness means, consider the case of *United States v. Virginia*, where the Court determined whether the refusal of the Virginia Military Institute (VMI) to admit women violated the

^{44.} See id. at 40-41.

^{45.} See id. at 259.

^{46.} See id.

^{47.} See, e.g., SUNSTEIN, supra note 2, at 10; Sunstein, Beyond Judicial Minimalism, supra note 1, at 826; Sunstein, Burkean Minimalism, supra note 2, at 363.

^{48.} Sunstein, Burkean Minimalism, supra note 2, at 362.

Equal Protection Clause.⁴⁹ The state of Virginia advanced several arguments in support of VMI's exclusionary policy. First, it argued that the existence of an all-male VMI was justified because it diversified the educational opportunities available to male Virginians.⁵⁰ Second, it argued that to admit women into VMI would fundamentally change the kind of education the institution could offer, since by nature women were not suited to the school's "adversative" pedagogical method.⁵¹ Third, it argued that even if VMI's refusal to admit women violated the Equal Protection Clause, the appropriate remedy was the establishment of the Virginia Women's Institute for Leadership (VWIL), a liberal arts college solely for women.⁵²

The Court rejected all three of Virginia's claims, but it did so in a way that left central questions unanswered. The first argument was rejected after an examination of the history of education in Virginia and the establishment of VMI.⁵³ This examination evidenced that, at the time of VMI's founding, there were few educational opportunities for women. That being the case, VMI could not have been introduced in order to broaden the educational opportunities for men, who would have had access to single-sex education as it was.⁵⁴ Thus, history being what it was, Virginia's justification failed to meet the applicable constitutional standard, which required an "exceedingly persuasive" justification for the discrimination.⁵⁵ The Court's argument implies that had Virginia founded VMI to diversify the educational opportunities for Virginia men, the Court might have upheld its exclusionary policy. In fact, the Court noted that an express effort to promote educational diversity by offering single-sex education, committed to equality of opportunity, might be constitutional.⁵⁶ In this way, the Court's decision left open the issue of whether in another case the diversification-through-exclusion argument might meet the "exceedingly persuasive" standard. 57 The second proposed justification was rejected in a similarly narrow fashion.

^{49.} United States v. Virginia, 518 U.S. 515 (1996). Although the following analysis is consistent with Sunstein's, it is developed differently in some respects. *Cf.* SUNSTEIN, *supra* note 2, at 165–67.

^{50.} Virginia, 518 U.S. at 535-38.

^{51.} Id. at 540.

^{52.} Id. at 547.

^{53.} Id. at 535–38.

^{54.} See id. at 539-40.

^{55.} See id. at 539 ("In sum, we find no persuasive evidence in this record that VMI's male-only admission policy is in furtherance of a state policy of 'diversity." (internal quotation marks and citation omitted)).

^{56.} *Id.* at 534–35; see SUNSTEIN, supra note 2, at 164.

^{57.} Virginia, 518 U.S. at 533.

The remedy suggested by Virginia was rejected on comparatively narrow grounds as well. Virginia proposed the admission of women into what was, in effect, a "separate but equal" institution to VMI, VWIL.⁵⁸ The Court rejected this remedy, but not because it held anything as broad as the *Brown-v.-Board* proposition that separate facilities were inherently unequal. Rather, it again looked to the particular facts of the case. As it happened, VWIL did not offer its female students the same "adversative" military-style education that VMI offered its male students.⁵⁹ For example, VWIL students did not live in a military-style residence and were not required to wear uniforms or eat their meals together—features regarded at VMI as essential to the adversative method. 60 Nor did a VWIL education include many of the benefits that accompanied a VMI education, principally the financial resources available to the school and the alumni network available to its graduates. 61 Again, a focus on the particular facts of the case left Virginia's general argument open. A state certainly *could* offer a fully adversative education for women. Nowhere did the Court hold that a women's institution that did so would nevertheless provide an insufficient remedy for women excluded from a fully parallel, military-style "brother" institution.

Thus, it was the Supreme Court's use of the facts in *Virginia* that made the decision "narrow." The Court's use of the facts differed from two more familiar senses in which courts use the facts to dispose of a case. First, whether a particular statute or common-law principle applies in a case will depend on the case's facts. That is just to say that the applicability of legal principles turns on facts. Second, the facts of a case define, in part, both the structure and the limits of any legal rule established by the court in that case. In other words, the scope of the precedent established in a case depends on the facts. Loosely speaking, we might refer to these uses of the facts as, respectively, "deductive" and "inductive." The first use is "deductive" because, in a very rough sense, the facts permit the court to deduce the outcome of the case from the rule. The second use is "inductive" because the facts constitute the basis from which a general legal rule might be induced. Facility with the facts in both senses is the bread and butter of litigation.

The Court made a different use of the facts in *Virginia*. In the arguments discussed above, the Court used the facts to prevent it from hav-

^{58.} Id. at 546.

^{59.} Id. at 548-49.

^{60.} Id.

^{61.} Id. at 551-54.

^{62.} These expressions are not meant in any kind of a technical sense, despite the fact that they have a technical sound to them. To change the comparison slightly, the facts act as a kind of "minor premise" in a syllogism.

ing to "deductively" apply a broad legal principle or to "inductively" generate one. Of course, elsewhere the Court did set out a broad legal principle. Justice Ginsburg's opinion requires sex-based discrimination to have an "exceedingly persuasive" justification. ⁶³ But the arguments discussed do not set out broad principles. For example, the Court never arrived at the question of whether diversification amounted to an exceedingly persuasive justification for discrimination, since it was cut short by the fact that this case did not present an instance of diversification through exclusion. In a similar fashion, the Court did not fully resolve the question of whether sexually segregated educational institutions that offered truly equal opportunities would be constitutional. It did not need to, since VWIL was clearly unequal to VMI in the relevant respects. By avoiding the consideration of propositions that would have applicability outside a very narrow range of cases factually similar to Virginia, the Court effectively confined the precedential scope of its holding. In a sense, it employed the facts as a kind of *prophylactic*: the facts prevented the Court from reaching questions that would have had wide effect had they been decided. 64 Instead, the Court resolved only the case before it.

2. Other Senses of Narrowness

"Prophylaxis" is neither the only way, nor the most obvious way, that a decision can be narrow. A decision may also be narrow if it is handed down in a case involving unique parties or unusual facts. Unusual facts will work to confine a holding even if that holding is expressed in general terms. Decisions may also be narrow by stipulation, when a court expressly states that its reasoning in the case at hand will not have precedential value outside of those confines. The Court's opinion in *Bush v. Gore* famously contained such a stipulation. Indeed, Sunstein sometimes speaks of narrowness in these ways.

64. In this context, "prophylactic" and "prophylaxis" are meant in a figurative sense, as suggesting a preventative mechanism of some kind. Here, the Court is using the facts to prevent it from reaching a broad question.

^{63.} Virginia, 518 U.S. at 532-33.

^{65.} See, e.g., Cone v. Bell, 129 S. Ct. 1769, 1786 (2009) ("The Court's decision is grounded in unusual facts that necessarily limit its reach.") (Roberts, C.J., concurring).

^{66.} Bush v. Gore, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

^{67.} See SUNSTEIN, supra note 2, at 18–19. Sunstein in effect combines the two alternative senses of narrowness when he writes, "In United States v. Virginia, the Court was careful to limit its decision to VMI, a 'unique' institution." *Id.* In my judgment, this suggestion—which is not elaborated anywhere else—presents a less plausible view of what makes *Virginia* a narrow decision than the account above

However, Virginia is not the only leading case where the Court has employed the facts as a prophylactic to issue a narrow decision. The Court used a similar strategy in Romer v. Evans, 68 Rasul v. Bush, 69 and Hamdi v. Rumsfeld⁷⁰—all decisions that Sunstein has described as narrow. 71 In Romer, the Court avoided the question of whether the Constitution protected specific gay rights, such as a right to marry. ⁷² Instead, the Court examined the provision and concluded that it was "inexplicable by anything but animus toward the class that it affects" and therefore lacked a rational relationship to any legitimate state interest.⁷³ By using rational basis review as it did, the Court avoided contentious questions about constitutional protections for gay rights. Similarly, in *Rasul*, the Court expressly declined to reach the question of whether Guantanamo detainees had a constitutional right to petition for the writ of habeas corpus and fastened onto the statutory basis on which federal court jurisdiction over such petitions rested.⁷⁴ Finally, in *Hamdi*, the Court held only that the petitioner, a United States citizen detained as an enemy combatant, was entitled to a more elaborate set of procedures for challenging his detention than he had in fact been granted—not that the power of the executive to indefinitely detain enemy combatants was subject to any substantive limitation under constitutional guarantees of liberty. 75

Moreover, there is an important reason to doubt that other interpretations of narrowness (unique facts and stipulation by the court) capture the important idea. Prophylaxis is the only account of narrowness that explains how *deep* decisions can also be narrow.⁷⁶

According to Sunstein, narrowness and shallowness are conceptually independent features.⁷⁷ Thus, he argues that a decision can be wide

^{68.} Romer v. Evans, 517 U.S. 620 (1996).

^{69.} Rasul v. Bush, 542 U.S. 466 (2004).

^{70.} Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

^{71.} See SUNSTEIN, supra note 2, at 17 (table); Sunstein, Burkean Minimalism, supra note 2, at 362 n.46.

^{72.} See Romer, 517 U.S. at 631–32 (striking down Colorado's "Amendment 2" on rational basis review).

^{73.} Id. at 632.

^{74.} See Rasul, 542 U.S. at 475 ("The question now before us is whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ultimate sovereignty." (internal quotation marks and footnote omitted)). Although the Court avoided reaching the constitutional question in Rasul, it reached that question subsequently in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

^{75.} Hamdi, 542 U.S. at 509.

^{76.} See, e.g., SUNSTEIN, supra note 2, at 16–19; Sunstein, Beyond Judicial Minimalism, supra note 1, at 827; Sunstein, Burkean Minimalism, supra note 2, at 365 (identifying United States v. Virginia as being deep and narrow).

^{77.} See, e.g., Sunstein, Beyond Judicial Minimalism, supra note 1, at 827 ("[T]he two distinctions point in different directions.").

and shallow, or narrow and deep.⁷⁸ Yet the latter possibility—the narrow and deep decision—poses a difficulty that is easy to appreciate. A deep decision is supported by abstract arguments from fields like political science, economics, philosophy and religion.⁷⁹ For example, a deep decision might limit the power of the state to restrain certain kinds of speech on the theory that the free communication of ideas is the best means of preventing speech from causing injury.⁸⁰ Such a decision would seem necessarily to have a wide effect. The theory of speech on which such a decision relies is a general one. If the theory justifies striking down one prior restraint, then *ipso facto* it will justify striking down another.⁸¹

Prophylaxis explains how depth is compatible with narrowness. Although using a theory of free speech to justify a decision will give a decision wider effect, it does not prevent a court from using the facts of the case to avoid reaching certain questions. Consider again the Court's decision in Virginia. As we saw, the Court avoided the question of whether diversification of educational opportunities could constitute an "exceedingly persuasive" justification for discrimination by finding that VMI had not been created in order to diversify the educational opportunities for men.⁸² Nevertheless, as Sunstein has observed, the opinion "ventured some ambitious remarks." In particular, Justice Ginsburg used the principle that the "opportunity to aspire, achieve, participate in and contribute to society" ought to be made available to citizens on the basis of their individual "talents and capacities" to support her conclusion that gender classifications may not lawfully deny "full citizenship stature" to women simply because they are women. 84 This conclusion, in turn, was used to justify application of an elevated standard of review to gender classifications. 85 Thus, the Court's use of the facts to avoid reaching certain questions and its more ambitious efforts to justify the heightened standard of review applicable in cases of gender discrimination were independent of each other.

^{78.} See SUNSTEIN, supra note 2, at 17-19.

^{79.} See id. at 13.

^{80.} See Part II.C, infra (discussing Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring)).

^{81.} See Sunstein, Incompletely Theorized Agreements, supra note 2, at 1755 ("Whenever a court offers reasons, there is a risk of future regret . . . because the reasons offered in case A may turn out, on reflection, to generate a standard, a principle, or a rule that collides with the court's considered judgment about case B.").

^{82.} United States v. Virginia, 518 U.S. 515, 539 (1996).

^{83.} SUNSTEIN, supra note 2, at 19.

^{84.} Virginia, 518 U.S. at 532.

^{85.} *Id.* at 532–33.

We have now seen, in depth, how the Supreme Court can issue *nar-row* opinions. Next I turn to the primary focus of this article, shallowness.

C. Shallowness

In its most basic sense, shallowness is a limit on the theoretical depth of a decision. A shallow decision is "unaccompanied by abstract accounts" of the basis for the decision. Of course, shallow decisions are supported by reasons; what they avoid is taking on "foundational issues" or offering a "general theory" or "large account" of the matter at hand.

1. An Illustration: Brandenburg v. Ohio

To better understand shallowness, consider the case of *Brandenburg v. Ohio.*⁹⁰ In *Brandenburg*, the Court faced the question of what limits the First Amendment places on the power of the state to punish "subversive advocacy," or speech critical of the state and advocating radical change.⁹¹ Brandenburg was a Ku Klux Klan leader who was videotaped by a journalist delivering a speech, in full Klan regalia, to Klan members at an Ohio rally. At one point in his speech, Brandenburg said: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengence taken." He then suggested that 400,000 Klansmen would "march[] on Congress," split into two groups, and continue on to Mississippi and to Florida.⁹³

Ohio prosecuted Brandenburg under its Criminal Syndicalism statute, which prohibited "advocat[ing] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," as well as "voluntarily assembling with any society, group, or assemblage of persons formed to

^{86.} SUNSTEIN, *supra* note 2, at 11–14.

^{87.} *Id.* at 13; Sunstein, *Incompletely Theorized Agreements*, *supra* note 2, at 1742 ("I am especially concerned with the use of ambitious thinking to produce 'depth'—full accounts of the foundations of a decision, in the form of attempts to find ever deeper reasons behind the outcome.").

^{88.} SUNSTEIN, *supra* note 2, at 13; Sunstein, *Incompletely Theorized Agreements*, *supra* note 2, at 1737, 1755.

^{89.} Sunstein, Beyond Judicial Minimalism, supra note 1, at 826, 829; see also SUNSTEIN, supra note 2, at 13–14.

^{90.} Brandenburg v. Ohio, 395 U.S. 444 (1969); SUNSTEIN, *supra* note 2, at 17 (identifying *Brandenburg* as a shallow decision).

^{91.} See HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 119–24 (Jamie Kalven ed., 1988).

^{92.} Brandenburg, 395 U.S. at 446.

^{93.} *Id*.

teach or advocate" such doctrines.⁹⁴ The statute, which had been passed in 1919, was originally aimed at the Industrial Workers of the World, or "I.W.W.," a militant union of the early twentieth century that advocated the use of violence to appropriate industrial control and end the wage system.⁹⁵ After a jury trial, Brandenburg was convicted and sentenced to one to ten years in prison.⁹⁶ The intermediate state appellate court affirmed the conviction without an opinion, and the state supreme court dismissed the appeal sua sponte, stating simply that "no substantial constitutional question exists herein."⁹⁷

The attention afforded the case by the Ohio appellate courts may have made reversal by the United States Supreme Court predictable.⁹⁸ However, as one leading commentator has pointed out, the Court's treatment of the case was in some ways surprising. The facts of the case did not "offer[] an occasion for rethinking basic doctrine"; while Klan rallies had certainly produced violence in the past, neither the context nor the content of Brandenburg's speech suggested that violence was going to occur. 99 Moreover, Ohio's power to punish "criminal syndicalism" was well established; as the Court itself noted, a similar statute had been upheld over forty years earlier in Whitney v. California. 100 There, the Court had affirmed the conviction of Anita Whitney, a well known social activist, who was prosecuted under California's criminal syndicalism act after she attended a convention of the Communist Labor Party where a resolution was adopted expressing approval of the I.W.W. 101 The prosecution's theory was that the Communist Labor Party of California had adopted the militant stance of the I.W.W. 102 In upholding the conviction, Justice Sanford gave "great weight" to the state legislature's judgment,

^{94.} Id. at 444–45.

^{95.} See KALVEN, supra note 91, at 121; Vincent Blasi, The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California, 29 WM. & MARY L. REV. 653, 653–55 (1988) (describing I.W.W. and the conflicts of the period).

^{96.} Brandenburg, 395 U.S. at 445, 448; Stewart Jay, The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century, 34 WM. MITCHELL L. REV. 773, 997 (2008).

^{97.} Brandenburg, 395 U.S. at 445.

^{98.} Hans A. Linde, "Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto, 22 STAN. L. REV. 1163, 1165 (1970).

^{99.} KALVEN, supra note 91, at 122.

^{100.} Brandenburg, 395 U.S. at 447.

^{101.} See Whitney v. California, 274 U.S. 357, 364–66 (1927); see also KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 33–34 (2d. ed. 2003); Ronald K. L. Collins & David M. Skover, Curious Concurrence: Justice Brandeis's Vote in Whitney v. California, 2005 SUP. CT. REV. 333, 341–42 (2006); Blasi, supra note 95, at 657–58.

^{102.} Collins & Skover, supra note 101, at 343, 347.

evidenced in the criminal syndicalism act, that such associations posed a serious threat to the security of the state. ¹⁰³

Given the facts in the case and the *Whitney* precedent, the most likely outcome of *Brandenburg* seemed to be a reversal of the conviction. Yet, the Supreme Court struck down the Ohio statute and announced a new rule that afforded subversive advocacy broader protections under the First Amendment. Under the rule announced by the Court, a state may not punish subversive advocacy consistent with the First Amendment unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

The manner in which the Court struck down the Ohio statute and announced its new rule was also surprising. The opinion was per curiam—a device usually reserved to signal a decision of little significance—and the Court's description of the new rule lasted only a few pages. Justification for the new standard was essentially confined to a single paragraph. The Court stated:

[In Whitney we] upheld the [criminal syndicalism] statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. Cf. Fiske v. Kansas, 274 U.S. 380 (1927). But Whitney has been thoroughly discredited by later decisions. See Dennis v. United States, 341 U.S. 494, 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. [Here the Court's footnote cites *Dennis* and Yates v. United States, 354 U.S. 298, 320-324 (1957).] As we said in Noto v. United States, 367 U.S. 290, 297-298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to that action."107

^{103.} Whitney, 274 U.S. at 371.

^{104.} *Brandenburg*, 395 U.S. at 448–49. Note that Sunstein characterizes the *Brandenburg* decision as shallow but wide; this reflects the breadth of the rule the Court announced. *See* SUNSTEIN, *supra* note 2, at 17.

^{105.} Brandenburg, 395 U.S. at 447.

^{106.} KALVEN, *supra* note 91, at 122, 123 (describing the opinion as "delphic" because of its length).

^{107.} Brandenburg, 395 U.S. at 447–48 (internal footnotes omitted).

It is this defense of the Court's new rule that makes *Brandenburg* a "shallow" decision in Sunstein's sense. There are several points worth making about the passage above. First, it satisfies Sunstein's basic description of shallowness. The Court makes no attempt to justify the new rule by reference to a "general theory" of free speech. It offers no account of the "foundations" of the First Amendment or of how a rule limiting the power of the state to punish subversive advocacy to cases of "imminent lawless action" derives from those foundations.

To be sure, the Court did cite earlier decisions that it characterized as having "thoroughly discredited" the position it wanted to discard. Yet, as several commentators have observed, the decisions cited by the Court do not hold that the state may not punish a speaker that advocates using violence to accomplish change. 108 Dennis v. United States, in which the Court upheld the conviction of several Communist leaders under the Smith Act, is memorable mostly for the Court's application of Judge Learned Hand's tort-inspired interpretation of the clear-andpresent-danger test. 109 Judge Hand's test required the Court to consider, among other factors, the gravity of the harm the state sought to prevent. 110 Because the gravity of the harm was so great in *Dennis* eventual revolution by the proletariat—the Court was able to affirm the convictions even though there was no evidence of an imminent threat to the security of the state. 111 Subsequently, in Yates v. United States, Justice Harlan drew the line at "urg[ing someone] to do something, now or in the future, rather than merely to believe in something." 112 But this standard, like the standard in *Dennis*, plainly permits the state to punish advocacy of violence even when it is not imminent but merely lies "in the future." Because these decisions affirm the power of the state to prohibit a speaker from advocating future violence to effect change, they

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^{108.} See KALVEN, supra note 91, at 232–33 (referring to the Court's view of *Dennis* as "revisionist"); Linde, supra note 98, at 1167.

^{109.} Dennis v. United States, 341 U.S. 494, 510 (1951); see KALVEN, supra note 91, at 190 (describing *Dennis* as having "no doctrinal significance in its own right").

^{110.} *Dennis*, 341 U.S. at 510 ("In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." (quoting United States v. Dennis, 183 F.3d 201, 212 (2d Cir. 1950))).

^{111.} See id. at 509–10; KALVEN, supra note 91, at 198, 210 ("Dennis can be said, in effect, to ... enlarge the censor's domain so that it once again includes general advocacy of violent overthrow.").

^{112.} See Yates v. United States, 354 U.S. 298, 325 (1957); Jay, supra note 96, at 942 (describing Yates and stating "[n]o time limit was placed on how far in the future the action needed to be"); Linde, supra note 98, at 1167 ("Imminent lawless action? . . . The Yates and Scales opinions took pains to deny that the unlawful action advocated needed to be 'imminent'").

^{113.} Noto v. United States simply applied Yates. See Noto v. United States, 367 U.S. 290, 296–97 (1961).

provide no justification—and certainly not a highly theoretical one—for the Court's holding in *Brandenburg*.

Brandenburg's shallowness is especially apparent when compared with Justice Brandeis's concurrence in Whitney. Like the Brandenburg Court, Justice Brandeis believed that the First Amendment requires a harm to be imminent before speech may be abridged. However, unlike the Brandenburg Court, Justice Brandeis marshaled a number of ambitious arguments in support of his position:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. 116

This passage contains at least four theoretical justifications for broad First-Amendment protections of subversive advocacy. The last clause in particular addresses Justice Sanford's concern about the "spark" of speech that could "explode," suggesting that the best way to prevent the spark from exploding was to allow further speech to smother it. Government censorship would have precisely the opposite effect. Over the spark from exploding was to allow further speech to smother it.

2. Shallowness and Context in Brandenburg

The shallowness of *Brandenburg* leaves us with something of a puzzle. Why would the Supreme Court reverse a forty-year-old precedent in a per curiam opinion but devote only a paragraph to justifying its new approach? Neither the facts of the case nor the precedents cited by the Court readily explain its conduct. Why reverse *Whitney* in this way?

117. For an insightful reading of the Brandeis concurrence, see generally Blasi, supra note 95.

^{114.} Whitney v. California, 274 U.S. 357, 372 (1927). For the story of how the concurrence ended up in *Whitney*, see generally Collins & Skover, *supra* note 101.

^{115.} See Whitney, 274 U.S. at 374-75.

^{116.} Id. at 375

^{118.} For a detailed account of the Sanford v. Brandeis "debate," see KALVEN, supra note 91, at 150–66.

Although a number of factors undoubtedly explain the Court's conduct in *Brandenburg*, one is the effect of political context on the decision. Here, "political context" does not mean "politics" or the idea that politics influence the Supreme Court's decisions in an inappropriate way. "Political context" refers instead to the important questions of public policy that are pressing at any one moment in our democracy. In this sense, it seems likely that political context often affects how the Supreme Court resolves the dispute before it. In particular, the question of the limits of state power to punish subversive advocacy has been posed to the Court in a number of different political contexts and with different effect. 119 Political context has affected how the Court understood "subversive advocacy," what the competing interests were, and how those interests should be balanced.¹²⁰ Less obviously, perhaps, political context has also affected how the Court has gone about justifying its decisions to the rest of government and to the public at large. Although not Sunstein's, this idea both helps to explain shallowness and will figure centrally in the argument developed below.

The effect of political context on legal justification is apparent when the political context of *Whitney* is compared to that of *Brandenburg*. Anita Whitney was arrested and charged with criminal syndicalism in November 1919, in the midst of the first great "Red Scare" to grip the United States. ¹²¹ The recent victory of the Bolsheviks in the Russian Revolution had precipitated the formation of an American Communist party. ¹²² Several different factions emerged; the "Communist Labor Party of America," of which Whitney was a member, called for a "unified revolutionary working class movement in America" and endorsed the "revolutionary industrial unionism" of the I.W.W., which was engaged, it said, in a "long and valiant struggle . . . in the class war." ¹²³ The CLP was the less radical of the two dominant Communist factions. ¹²⁴ At the

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^{119.} While Kalven himself does not develop the idea at length, the germ of the idea is present in *A Worthy Tradition*. KALVEN, *supra* note 91, at 227 ("[T]he central fact about the Court's experience with [the question of subversive advocacy] is that in every instance it has been posed in a political context."); *id.* at 235 ("[T]he problem [for courts] has been to keep in mind always that the instances of inciting speech the law will in fact confront arise in a political context.").

^{120.} See, e.g., Schenck v. United States, 249 U.S. 47, 52 (1919) ("We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." (internal citations omitted)).

^{121.} Jay, *supra* note 96, at 831 (describing the Red Scare); Blasi, *supra* note 95, at 656–57 (describing Whitney's arrest).

^{122.} Blasi, supra note 95, at 657.

^{123.} Collins & Skover, supra note 101, at 342.

^{124.} *Id*.

same time that the party began to take root, "thousands" of labor strikes took place across the country, and beginning in May 1919, self-described "anarchists" undertook a series of bombings as part of an effort to strike at "the capitalist class." The September 1920 bomb attack on Wall Street killed thirty and stood as the worst terrorist attack on American soil until the Oklahoma City bombing in 1995. Days after the bombing, President Woodrow Wilson suffered a "catastrophic stroke." Waves of panic, reactive violence, and nativism swept the country throughout the period. 128

The rhetoric of the revolutionaries of the time—the Socialists, the Communists, the anarchists, and the militant branches of organized labor—was often abstract and utopian. 129 Yet, these revolutionaries were no less committed or violent for their turgid prose. With actual revolutions occurring abroad and instability being felt at home, the Supreme Court in Whitney may have viewed even the abstract advocacy of future violence as evidencing a potentially serious threat to state security and public safety. 130 This may explain, in part, the Court's willingness at the time to permit the punishment of speakers advocating violent revolution sometime in the distant future. Two years before Whitney, Justice Sanford described the Court's reasoning this way: "A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration." With this understanding of the political context, the Supreme Court was unwilling to interpose an imminence requirement between the state and the speaker. If the state legislature deemed it appropriate to ban abstract subversive advocacy, then the First Amendment did not require the Court to intervene. 132

^{125.} Jay, *supra* note 96, at 840–41.

^{126.} Id. at 842.

^{127.} Id. at 842-43.

^{128.} *Id.* at 831 ("[T]he period from 1917 to 1920 was marked by a wave of xenophobia and super-patriotism . . . " (internal quotation marks and footnote omitted)); Blasi, *supra* note 95, at 654–55.

^{129.} See, e.g., KALVEN, supra note 91, at 140 (describing a period anarchist leaflet, which read: "The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine! Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM."); id. (quoting another anarchist leaflet: "Workers, our reply to the barbaric intervention has to be the general strike! An open challenge only will let the Government know that not only the Russian Worker fights for freedom, but also here in America lives the spirit of Revolution."); Blasi, supra note 95, at 653–54 (quoting the Preamble to the Constitution of the I.W.W., which read: "[T]he working class and the employing class having nothing in common... Between these two classes a struggle must go on until the workers of the World organizes as a class, take possession of the earth, and the machinery of production and abolish the wage system.").

^{130.} See SULLIVAN & GUNTHER, supra note 101, at 29-39.

^{131.} Gitlow v. New York, 268 U.S. 652, 669 (1925).

^{132.} Consider this passage from Gitlow:

By the time of *Brandenburg*, the political context in which the Court was working had shifted considerably. The Smith Act of 1940, which made advocating the violent overthrow of any government in the United States unlawful, had been used to crush the Communist party at home. The second "Red Scare" had passed, and Communism was now principally an external threat. Internally, a different set of changes were taking place. These changes were primarily social in nature, including the movement to guarantee the civil rights of all citizens. The civil rights movement and the associated anti-Vietnam war movement were by no means without violence. Nevertheless, these movements differed in an important respect from the events of the 19-teens and 1920s: they did not really present a genuine threat to the security of the state. Moreover, while violence did occur, "[n]onviolence was the watchword of the civil rights movement, as it was for most anti-Vietnam activists." Most reformers sought to instigate political change *within* the system.

The altered political context explains, in part, why the Supreme Court could write such a shallow decision in *Brandenburg*. It did not need to rebut the *Whitney* majority as Justice Brandeis had attempted to do in his concurrence. The idea that abstract advocacy of violence could pose a threat to the security of the state and public safety was simply much less convincing in 1969 than it was in the 1920s.

Stepping back, we can see that the *context* of a shallow decision may play an important role in justifying its outcome. Shallow decisions are "unaccompanied by abstract accounts" justifying their outcomes. Abstraction is always abstraction *away* from the facts of a particular context. Thus, shallow decisions, which lack abstractions, *impli-*

That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale.

Id. at 669.

- 133. Jay, supra note 96, at 922, 930.
- 134. See id. at 930-31.
- 135. See id. at 973-74.
- 136. Id.
- 137. Id. at 974.
- 138. See id. at 973-75 (describing the movement).
- 139. Although Sunstein does not make this point himself, something like the idea is already present in the theory. See Sunstein, Incompletely Theorized Agreements, supra note 2, at 1742.
 - 140. SUNSTEIN, supra note 2, at 13.

cate the facts of the particular context in which they occur. These facts may have a persuasive effect, as they likely had in *Brandenburg*. The facts may suggest, without the need for an ambitious theoretical argument, that a particular outcome is appropriate or inappropriate. In short, where a deep decision is justified ultimately by an abstraction, a shallow decision is justified in large part by the context in which it occurs. ¹⁴¹

III. CONNECTING MINIMALISM AND DELIBERATIVE DEMOCRACY

With a firmer grip on narrowness and shallowness, we are now in a position to consider why Sunstein believes that decisions that manifest these characteristics promote democracy.

A. An Account of Deliberative Democracy

Sunstein thinks that "the American constitutional system" aspires to be a deliberative democracy and that minimalism promotes deliberative democracy. "Deliberative democracy" is an account of democracy that puts political deliberation—"reason-giving in the public domain"—at the center of collective policy-making and the exercise of state power. To understand how minimalism might promote deliberative democracy in particular, we need to take a closer look at deliberative democracy and the role it allots to minimalist courts.

1. Accountability and the Justification of State Power

In a "democratic constitutional system," policies are set by representatives who are made accountable to the public through a framework of political institutions and personal rights. For example, the popular vote gives the public electoral control over its representatives. A legislator who displeases her constituency is likely to soon be replaced; in some cases, the public may even possess the power of recall. Rights of speech and assembly enable the public to engage in open deliberation over the wisdom of collective policies and to present its views to the government. Other rights, such as the equal weighting of votes, the

^{141.} The notion of context and its effect on deliberation will play a central role in the argument that minimalism does not promote deliberative democracy. In short, the problem context poses for Sunstein is that without a *deep* argument, it is sometimes impossible to overcome the effect of the particular assumptions in the view of a deliberative opponent. These assumptions are supplied in part by context. *See* Part IV, *infra*.

^{142.} SUNSTEIN, supra note 2, at 24.

^{143.} Id. at 25.

^{144.} See id. at 24–25; John Rawls, *The Idea of Public Reason Revisited*, in The LAW OF THE PEOPLES 139 (1999); Joshua Cohen, *Pluralism and Proceduralism*, 69 CHI.-KENT L. REV. 589, 600–01 (1994).

^{145.} See SUNSTEIN, supra note 2, at 24.

equal opportunity to influence one's elected representatives, and the equal access to elected office also function in part to ensure accountability. The aim of this framework of rights and institutions is to "connect[] [political decision-making] to the interests and judgments of those whose conduct is to be regulated by the decisions"—namely, the public 147

Accountability in turn plays an important role in justifying the exercise of state power. To accomplish its ends, the government must be able to bind individuals with collective policies. He government must be sure public safety, the government will need to prohibit attacks on others. To ensure health, the government will need to regulate the disposal of hazardous wastes. When individuals fail to comply with such policies, the government may need to employ coercion. The legitimacy of such measures in a democracy is based in part on the accountability of the government to the public. The framework of rights and institutions described above, which makes the government answerable to the people, also allows the public to collectively authorize the exercise of state power. This authorization is what makes the exercise of state power in a democracy legitimate.

A deliberative conception of democracy begins to emerge when we take a closer look at this simple account of legitimacy. Several deficiencies with the above account are immediately apparent. To begin with, while it is "the public"—the citizens as a whole—that authorizes the state to exercise power, it is *individuals*, for the most part, on whom state power is applied. Unlike "the public," individual citizens have very little control over election outcomes. Despite possessing rights to vote, to speak and publish, and to assemble, an individual will often find that someone other than his preferred candidate has been elected. Even if a preferred candidate does prevail, once in office she will inevitably support some policies with which the constituent disagrees, even strongly. This is the normal course of events in a democracy of heterogeneous individuals. But if individuals do not "authorize" the exercise of state power, with what legitimacy does the state enforce its laws against them? Why should citizens regard themselves as being "bound to honor the

^{146.} Cohen, supra note 15, at 106.

^{147.} See Joshua Cohen, Reflections on Deliberative Democracy, in PHILOSOPHY, POLITICS, AND DEMOCRACY: SELECTED PAPERS (forthcoming 2009) (manuscript at 5).

^{148.} See ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS, 83, 106 (1989).

^{149.} See Cohen, supra note 15, at 95 ("The fundamental idea of democratic legitimacy is that the authorization to exercise state power must arise from the collective decisions of the members of society who are governed by that power.").

structure of their constitutional democratic regime and abide by the statutes and laws enacted under it"?¹⁵⁰

The deliberative view of democracy is based on an account of the justification of state power that answers these questions. 151 According to the deliberative account, state power is justified when it arises out of an ideal procedure of political justification, namely, deliberation among free and equal citizens. 152 In this context, to say that citizens are "free" is to say that their status as citizens does not depend on whether they ascribe to a particular set of fundamental beliefs and values. ¹⁵³ Free citizens are free to revise their fundamental beliefs and values—to leave one religious denomination for another, for example—without giving up the rights and privileges of citizenship. In making such decisions, they regard themselves as having the power to judge the merits of competing value systems. Similarly, in making claims on the resources of government and society, they regard their concerns and reasons as having weight independent of any relation to a value system. ¹⁵⁴ To say that citizens are "equal" is to say that each is recognized as possessing the capacities necessary to engage in political life, in particular, to engage in deliberation with others over the wisdom of collective policies. 155

Deliberation among free and equal citizens imposes special demands on its participants. In general, deliberation is the process of weighing reasons to act or to believe and tying one's decision to the outcome of that weighing. In a democracy, deliberation is among equals in the sense described above. Each citizen is regarded as possessing the necessary capacities to participate in deliberation, and thus, each person has equal standing in the process. This means that decision-making cannot proceed by ignoring the concerns of some of its participants or by treating those concerns as having less weight or no weight at all. Moreover, because those deliberating are free, the considerations that are compelling are simply those that the participants would regard as being so;

^{150.} Rawls, supra note 144, at 136.

^{151.} See Cohen, supra note 15, at 100. Of course, while I say "the" deliberative account of democracy, there are a variety of views that can fairly be called deliberative democracy. The approach I take here, with its focus on political justification, is heavily influenced by Rawls and Cohen. For a useful compilation of works on deliberative democracy, see Deliberative Democracy: ESSAYS ON REASON AND POLITICS (James Bohman & William Rehg eds., 1997).

^{152.} Cohen, supra note 147 (manuscript at 5–6); Cohen, supra note 15, at 99–100.

^{153.} JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 21 (Erin Kelly ed., 2001).

^{154.} Id. at 23 ("[T]hey regard themselves as self-authenticating sources of valid claims.").

^{155.} Id. at 20.

^{156.} Cohen, supra note 147 (manuscript at 4).

^{157.} Id. (manuscript at 7).

no system of fundamental values and beliefs provides the measure of persuasiveness. 158

In this setting, justification for the exercise of state power takes the form of adducing considerations in support of a collective policy that others have reason to accept. This gives individuals who disagree with a collective policy a reason to nonetheless accept it as legitimate.

2. The Substantive Constraints of Political Justification

While deliberation is most fundamentally a justificatory *procedure*, deliberative democracy also incorporates several key limits on the *substance* of political justification. First, participants must assume the validity of the democratic constitutional system, along with its associated political rights and institutions. Views inconsistent with this system are afforded no weight. For example, one could not justify a policy of guardianship over a class of adults by arguing that not all citizens should be treated as political equals because political equality is an intrinsic feature of citizenship in democracy. Nor does the ideal of political justification in deliberative democracy require persuasion of one who holds such views; only those holding "reasonable" doctrines must be reached. 162

The most significant substantive limit on justification under the deliberative view arises from what John Rawls has referred to as "the fact of reasonable pluralism." Reasonable pluralism is the diversity of fundamental values and beliefs held by citizens. The existence of such diversity is a permanent and natural feature of democracies, in which citizens are "free" in the above-discussed sense, and the social diversity of the population is augmented by strong traditions of free speech, religious liberty, and the right of association. There are deeper reasons to expect reasonable pluralism as well. As history shows, collective reasoning about what we ought to do simply does not produce convergence in our most basic beliefs and values. Nor is there any theory of practical reason that says it should. 167

^{158.} See Cohen, supra note 15, at 100.

^{159.} See Rawls, supra note 144, at 136–37.

^{160.} See generally Cohen, supra note 15, at 102-13 (discussing this distinction).

^{161.} See SUNSTEIN, supra note 2, at 25; Cohen, supra note 15, at 101 (discussing the implication of the background).

^{162.} See Rawls, supra note 144, at 132.

^{163.} Id. at 131

¹*64 Id*

^{165.} See RAWLS, supra note 153, at 40-41.

^{166.} See Cohen, supra note 15, at 96.

^{167.} *Id*.

The fact of reasonable pluralism narrows the class of considerations that can justify a proposed policy under the deliberative procedure described above. Remember, deliberation is among *free* citizens. This means that to justify a policy, one must adduce considerations that other citizens regard as persuasive. If we now assume that citizens vary widely in their fundamental beliefs and values, and that these commitments affect what considerations they find persuasive, it follows that few considerations will be regarded as persuasive by all. Even among those who recognize the relevance of a particular consideration, different individuals will afford the consideration different weight in their reasoning. The body of reason that emerges—those considerations that are regarded by reasonable individuals as giving them reason to support a collective policy—is known as "public reason." ¹⁶⁸

Public reason is perhaps most significant for the considerations it excludes from the justificatory procedure at the heart of deliberative democracy. Proponents argue that the substantive limits encoded in public reason work to justify, on democratic grounds, important negative liberties, such as religious liberty and freedom of expression. In alternative accounts of democracy, such liberties are often conceived of as external limits on the democratic process, thus calling into question their source of legitimacy. In alternative accounts of democratic process, thus calling into question their source of legitimacy.

Just as significantly, public reason suggests an answer to the problem of legitimacy we posed above. To recall, the problem was to explain why the exercise of state power is legitimate when done in execution of democratically enacted law. The framework of rights and institutions that makes the government accountable to the public explains this legitimacy in part—an accountable government is one authorized to act by those to whom it is accountable—but does not provide a fully satisfactory account of why dissenting individuals ought to feel obliged to obey the law.

Public reason explains the source of obligation to comply with democratically enacted law.¹⁷¹ A law justified by public reason is *ipso facto* one each reasonable citizen has reason to accept. While consensus on any policy of significance is unlikely, justification by public reason means that even those who reject a policy as being the most reasonable have some reason to accept it.¹⁷² Dissenting individuals may accept such a policy for a number of reasons, including the value of following the

^{168.} Rawls, supra note 144, at 136-37; Cohen, supra note 15, at 100.

^{169.} See Cohen, supra note 15, at 103-05.

^{170.} Id. at 97-98.

^{171.} See Rawls, supra note 144, at 136-37.

^{172.} See Cohen, supra note 147 (manuscript at 6-8).

deliberative procedure.¹⁷³ Whatever the calculus of reason, however, the result is that under the deliberative account of democracy, even dissenting individuals can endorse a policy according to the terms of their own reason.¹⁷⁴ Because each citizen can endorse the policy as reasonable, the state's enforcement of the policy by application of coercive force is legitimate, and all are obliged to obey the law's terms.¹⁷⁵

B. Minimalism and Democratic Deliberation

Sunstein believes that our democratic constitutional system aspires to the deliberative process described above. According to Sunstein, judicial decision-making interacts with this system in three different ways. First, a legal decision might validate the outcome of the democratic process, which Sunstein refers to as a "democracy-permitting outcome." Second, a legal decision might insulate conduct from control by democratically enacted rules. This is a "democracy-foreclosing outcome." Finally, "democracy-promoting outcomes" are decisions in which the court requires a political result to meet the strictures of the deliberative model of democracy. To

That judicial minimalism can produce democracy-permitting outcomes is perhaps obvious. A narrow decision can validate the outcome of a democratic process by declining to reach a substantive legal challenge to that outcome. As Sunstein notes, this is a good way to understand how courts conduct themselves when they are inserted into politically charged contexts. Courts "in the midst of a 'political thicket'" can avoid suffering the costs of wrongly deciding the politicized question (or the cost to institutional reputation of deciding it *at all*) by ruling narrowly, using the facts to avoid reaching the substance of the political controversy. In a similar sense, minimalist techniques could be used to prevent "foreclosing" on democratic activity.

^{173.} *Id.* (manuscript at 6–7); Rawls, *supra* note 144, at 137; Cohen, *supra* note 15, at 100–01.

^{174.} Cohen, *supra* note 147 (manuscript at 13); *see* Rawls, *supra* note 144, at 137.

^{175.} *Cf.* Cohen, *supra* note 147 (manuscript at 13) (noting that this is "as close as we can get to the Rousseauean ideal of giving the law to ourselves"); Cohen, *supra* note 15, at 101–02 (arguing that the deliberative view of democracy gives substance to the idea that policy-making in a democracy proceeds by collective decisions).

^{176.} SUNSTEIN, supra note 2, at 24.

^{177.} Id. at 26.

^{178.} Id.

^{179.} *Id*.

^{180.} Id.

^{181.} Id.

^{182.} See id. ("To avoid foreclosure and allow democratically accountable bodies to function, a court might decline to hear a case at all or rule narrowly rather than broadly.").

The heart of Sunstein's position, however, is that judicial minimalism can actively *promote* deliberative democracy as well.¹⁸³ It is perhaps less obvious why this should be so. Democracy-promotion involves triggering democratic deliberation on a matter of controversy.¹⁸⁴ In contrast, judicial minimalism is about ways that courts can do less. In particular, it requires that courts say less, especially on matters of fundamental importance for society. How could saying less promote deliberative political activity?

Sunstein's answer is that even while saying less, courts can use certain procedures or doctrines to "spur" democratic deliberation. Sunstein lists six such doctrines:

- (1) Void-for-vagueness doctrine
- (2) Nondelegation doctrine
- (3) Clear statement rule
- (4) Desuetude
- (5) Requiring justification of discrimination by actual purposes
- (6) Requiring court decisions to employ public reason. 186

To see how a court might spur deliberative democracy by using the doctrines on this list, consider the first example, vagueness. ¹⁸⁷

1. Papachristou and the Vagueness Doctrine

In *Papachristou v. City of Jacksonville*, the Supreme Court heard a challenge to a Florida anti-vagrancy law. Petitioners in the case were eight individuals charged and convicted under the law, which deemed as vagrants those who were, among others, "[r]ogues and vagabonds, . . . dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, [or] persons wandering or strolling around from place to place without any lawful purpose or object" The Court

^{183.} See id. at 259–60 (discussing the democracy-promotion thesis, and characterizing it as "an especially important strand in constitutional doctrine and a distinctive form of minimalism . . . ").

^{184.} Id. at 27.

^{185.} Id. at 27-28

^{186.} Id. at 27.

^{187.} A comprehensive treatment of Sunstein's thesis would require examining all of the doctrines identified here. While I do not do this, the argument developed below about the vagueness doctrine applies in large part to the other doctrines Sunstein lists as well.

^{188.} Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Sunstein cites *Papachristou* as an example of how he proposes minimalist courts could use the void-for-vagueness doctrine. SUNSTEIN, *supra* note 2, at 27 n.3.

^{189.} Papachristou, 405 U.S. at 158 n.1.

invalidated the law because it was unconstitutionally vague, declaring that it failed to "give a person of ordinary intelligence fair notice" of the criminality of his conduct, and that it encouraged the police to make "arbitrary and erratic" arrests and prosecutions. This two-pronged test—fair notice and arbitrary enforcement—still forms the basis of the contemporary vagueness doctrine. ¹⁹¹

The decision in *Papachristou* was narrow. Despite recognizing that loitering was "historically part of the amenities of life as we have known them," the Court did not strike down the anti-vagrancy law on *substantive* due process grounds. ¹⁹² Such a holding would have dramatically limited the power of municipal authorities to regulate similar conduct, in particular, as part of an effort to combat the criminality with which loitering is sometimes associated. ¹⁹³ Instead, the Court held that because the activities were "historically part of the amenities of life as we have understood them," those convicted for engaging in the activities would have had no notice that their conduct was criminal. ¹⁹⁴ The constitutional error in the law was thus procedural, not substantive.

By ruling on procedural grounds, the Court triggered the democratic process. With Jacksonville's ordinance declared unconstitutional, the municipality had to rewrite the law. A broader, substantive due process holding would have effectively eliminated the possibility of such an ordinance. The narrower, procedural due process holding instead simply required the city to rewrite the ordinance with a greater degree of precision. The political process in Jacksonville was thereby forced to determine how to refashion its ordinance so as to pass constitutional muster while still accomplishing the goals of catching inchoate criminal conduct. Since precision was required, the local legislature would be required to settle on the ordinance's terms; it could not simply pass off to the police a blank check to arrest whoever seemed suspicious. By voiding for vagueness, the Court spurred political processes to reform the invalidated law.

^{190.} Id. at 162.

^{191.} See Andrew E. Goldsmith, The Void-for-Vagueness Doctrine in the Supreme Court, Revisited, 30 Am. J. Crim. L. 279, 286, 288 (2003) (citing Hill v. Colorado, 530 U.S. 703, 732 (2000)).

^{192.} *Papachristou*, 405 U.S. at 164. Notably, the same Justice Douglas who spoke of "penumbras" in the Bill of Rights seven years earlier in *Griswold* noted in *Papachristou* simply that these activities "are not mentioned in the Constitution or Bill of Rights." *Id.*; *see* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

^{193.} For an example of such an effort, see discussion *infra*, Part III.B.2, of *City of Chicago v. Morales*, 527 U.S. 41 (1999).

^{194.} See Papachristou, 405 U.S. at 162, 164.

2. Chicago v. Morales: A Constitutional Right to Loiter?

It is revealing to compare *Papachristou* with the Supreme Court's subsequent decision in *Chicago v. Morales*, where the Court struck down another anti-loitering ordinance. Morales concerned the constitutionality of Chicago's "Gang Congregation Ordinance," which permitted municipal police to arrest "any group of two or more people who remained in a public place 'with no apparent purpose' if the police 'reasonably believe[d]' the group included a gang member and if the loiterers failed to disperse" upon police order. As it had in *Papachristou*, the Court in *Morales* invalidated the law on vagueness grounds, concluding that it failed to provide adequate guidelines to law enforcement. 197

However, in a section of the opinion joined by only a plurality of the justices, Justice Stevens adopted the position of the Illinois Supreme Court that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." While the position did not garner a majority, Justice Stevens seemed to regard due process and vagueness as being jointly sufficient to facially invalidate the ordinance. Writing in dissent, Justice Scalia characterized the majority's position in a similar way. Moreover, as one commentator noted, by singling out loitering and stating that its lawfulness could not turn on the unguided exercise of police discretion, the Court impliedly recognized a liberty interest to engage in such con-

^{195.} City of Chicago v. Morales, 527 U.S. 41 (1999).

^{196.} Kim Strosnider, *Anti-Gang Ordinances After* City of Chicago v. Morales: *The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 102 (2002); *see* CHICAGO, ILL., MUN. CODE § 8-4-015 (1992).

^{197.} Morales, 527 U.S. at 56, 60.

^{198.} Id. at 53.

^{199.} *Id.* at 55 ("There is no need, however, to decide whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine. For it is clear that the vagueness of this enactment makes a facial challenge appropriate. This is not an ordinance that 'simply regulates business behavior and contains a scienter requirement.' It is a criminal law that contains no *mens rea* requirement, and infringes on constitutionally protected rights. When vagueness permeates the text of such a law, it is subject to facial attack." (citations omitted)).

^{200.} *Id.* at 86–87 (Scalia, J., dissenting) ("It would be unfair, however, to criticize the plurality's failed attempt to establish that loitering is a constitutionally protected right while saying nothing of the concurrences. The plurality at least makes an attempt. The concurrences, on the other hand, make no pretense at attaching their broad 'vagueness invalidates' rule to a liberty interest."); *see also id.* at 105 (Thomas, J., dissenting); Layli Eskandari, Note & Comment, *Is Loitering a Fundamental Right?* City of Chicago v. Morales, 17 N.Y.L. SCH. J. HUM. RTS. 371, 381–82 (2001).

duct.²⁰¹ The result has been confusion about the vagueness doctrine and whether the defect in *Morales* was procedural or substantive in nature.²⁰²

This confusion is evident in decisions following *Morales*. For example, while courts have struck down anti-loitering ordinances under *Morales*, they have tended to uphold public-order ordinances directed at similar activities, such as "obstruction," in effect limiting *Morales* to loitering. Driven by alternative views of the constitutional issue, legislative bodies seeking to enact similar provisions have also taken a variety of approaches. Chicago gave up criminalizing "innocent" loitering by non-gang members altogether; it defined a new crime, "gang loitering," by incorporating verbatim language from Justice O'Connor's *Morales* concurrence. Nevertheless, the city still declined to impose a *mens rea* requirement—the absence of which had drawn the plurality's attention²⁰⁷—and applied the new ordinance to only certain designated "hot spots" within the city, raising questions about its constitutionality under the Equal Protection Clause. 208

Although the comparison is imperfect, the aftermath of *Morales* illustrates the importance of narrow decisions for democracy. The holding in *Morales* comes close enough to protecting loitering that it problematizes efforts to regulate similar conduct even where guidelines for enforcement are provided. In contrast, no such difficulty was created by the decision in *Papachristou*, which left open the power of the legislature to regulate the conduct in question. By striking down the regulation on strictly procedural grounds, the Court spurred the legislature to reexamine the matter and to pass a new law.

IV. WHY MINIMALISM DOES NOT PROMOTE DELIBERATIVE DEMOCRACY

There are two significant problems with the minimalist view of *Papachristou* offered above. First, while *Papachristou* was a narrow decision, it was also relatively deep. Justice Douglas rested the Court's decision,

^{201.} Strosnider, *supra* note 196, at 101 ("The Court's vagueness jurisprudence, which frequently lies at the heart of challenges to anti-gang ordinances, has become entangled with other doctrines, including substantive due process ").

^{202.} Id. at 118.

^{203.} E.g., Betancourt v. Bloomberg, 448 F.3d 547 (2006) (upholding anti-obstruction regulation against vagueness challenge).

^{204.} Strosnider, supra note 196, at 131.

^{205.} See, e.g., J. Elizabeth Packebush, Note, Gang Loitering Ordinances Post-Morales: Has Vagueness been Remedied? Somerville, Massachusetts Says Yes, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 161, 165–66 (2006) (discussing the shift in emphasis from notice to enforcement).

^{206.} Strosnider, supra note 196, at 135-36.

^{207.} City of Chicago v. Morales, 527 U.S. 41, 55 (1999) (plurality opinion).

^{208.} See Strosnider, supra note 196, at 136–38; Packebush, supra note 205, at 167–69.

sion on an examination of the history of anti-vagrancy laws as well as our own traditions of "wandering." He based the fair notice analysis on the premise that "[l]iving under a rule of law entails various suppositions," such as fair notice. This depth complicates the account offered above. Second, the notion of deliberation seems to be doing no work in the account above of how minimalism triggers democracy. Why should we believe that *Papachristou* triggered deliberation in particular? Certainly the minimalist character of the decision provides no reason to think that this is the case.

It was the *maximalist* character of *Papachristou*—its depth—that suggests it triggered democratic deliberation. To show why this is true, I am going to develop a simple model of deliberation based on the examples we have already discussed. This model will highlight the difficulties that shallow decisions face in spurring deliberation.

A. The Argument

Deliberation is an exchange of reasons. However, not all exchanges of reason count as deliberation. Generally, speakers must offer reasons that "conflict" to count as deliberating with each other. Consider the following case, in which the reasons offered do not conflict:

STUDENT: Smith ought to take a bus, because it doesn't cost much.

BUSINESSPERSON: Smith ought to take a train, because it is a safe way to travel.

Assume that the conduct recommended by the student is inconsistent with the conduct recommended by the businessperson. If Smith takes a bus, then he cannot also take a train. Even so, the reason the student gives for taking a bus does not on its face conflict with the reason given by the businessperson. The businessperson, being in business, understands the value of doing things at low cost. Surely the businessperson could believe both that one ought to travel cheaply and that one ought to travel safely. Presumably the student and Smith could also have both beliefs. In this sense, the student's and the businessperson's reasons do not conflict. In a conversation where each uttered the sentence above, they would not really be deliberating about what Smith ought to do; they would be "talking past each other," in the usual sense of the expression.

There are other ways in which reasons can fail to conflict. Consider this example:

^{209.} Papachristou v. City of Jacksonville, 405 U.S. 156, 163-65 (1972).

^{210.} Id. at 162.

BELIEVER: Smith ought not to compete on Sunday, since by doing so he would be breaking the Sabbath.

SECULARIST: Smith ought to compete on Sunday, since Sunday has no special significance, and if Smith does not participate, he cannot win the competition.

Here again Smith must choose between two inconsistent courses of conduct, and here again the reasons offered by the believer and the secularist do not conflict. But in this case, the absence of conflict cannot be explained in the same way. Smith cannot simultaneously acknowledge both the believer's and the secularist's considerations as reasons for him to act.

Sunday has significance for the believer because of his values and beliefs. Just to put a word to this, we might say that Sunday is religiously significant—i.e., Sunday is the Sabbath—from the "point of view" of the believer. This is just meant to reflect the intuitive sense in which our beliefs, values, and interests are like a location from which we view the world and the demands it places on us. Sabbath-breaking becomes a matter of practical significance when one takes a religious point of view. In contrast, from the secularist point of view, working on Sunday has no such practical significance. For our purposes, the important point is that Smith cannot take both points of view simultaneously; to be a secularist is *eo ipso* not to be a believer, and vice versa. Because Smith cannot take both points of view simultaneously, Smith cannot acknowledge both considerations as compelling.

Nevertheless, there is an important sense in which the reasons offered by the believer and by the secularist do not conflict. The believer and the secularist have different points of view. It is only because each has the point of view he has that Sunday means what it does to him. But that Sunday has special significance for a believer is perfectly consistent with the proposition that Sunday lacks special significance for a secularist. In this sense, the reasons offered do not conflict, and the believer and the secularist are not deliberating.

I want to consider one more example. I am going to change things slightly by introducing a third conversational partner. Nevertheless, the example will be quite familiar:

^{211.} See A.W. Moore, Points of View 6 (1997).

^{212.} See id.

SANFORD: Anita Whitney's conviction should be upheld because her speech was a "spark" that in this fragile political climate could explode into full-scale terrorism or revolution. ²¹³

PER CURIAM: Anita Whitney's conviction should be struck because she associated with those who only *abstractly* advocated terrorism or revolution. ²¹⁴

BRANDEIS: Anita Whitney's conviction should be struck because the best medicine for speech is more speech. This is especially the case in a fragile political climate, because in such a situation, government censorship is more likely than speech to ignite violence.²¹⁵

Sanford is at odds with both "Per Curiam" and Brandeis over what to do with Anita Whitney's conviction. On its face, the reason offered by Per Curiam to strike Whitney's conviction does not conflict with the reason offered by Sanford to uphold it. In contrast, Brandeis's reason to strike Whitney's conviction does conflict with Sanford's reason because it expressly mentions Sanford's statement and explains why it is mistaken. To Brandeis, a fragile political climate does not call for censorship because censorship is even more likely than abstract speech to ignite a violent response. By taking up Sanford's reasons for upholding Whitney's conviction and suggesting why they are mistaken, Brandeis invites Sanford to respond in defense of his view. In short, Brandeis's statement will spur deliberation.

Note that Brandeis's statement is characterized by a level of abstraction absent from both Sanford's and Per Curiam's statements. Brandeis has identified a shared understanding of the First Amendment in virtue of which Sanford's concern about political fragility appears misguided. The shared understanding is that, all other things being equal, the First Amendment reflects the founders' belief that the best medicine for bad speech is more speech. This principle says why the First Amendment should protect even bad speech, such as speech that abstractly advocates violence. Applied to Anita Whitney, the principle gives someone as concerned as Sanford a reason to believe that Whitney's conviction ought to be struck. In other words, *in virtue of* this First Amendment theory, Whitney's conviction ought to be struck.

Sunstein's "shallowness" is the *absence* of abstraction in precisely this sense. The *Brandenburg* decision was shallow precisely because it refrained from invoking a theory of free speech to justify its rejection of

^{213.} Cf. Gitlow v. New York, 268 U.S. 652, 669 (1925).

^{214.} Cf. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

^{215.} See Whitney v. California, 274 U.S. 357, 374-75 (Brandeis, J., concurring).

the *Whitney* majority.²¹⁶ Its rejection of *Whitney* was conclusory, and it may have reflected changes in the political context and the Court's understanding of the threat posed by the abstract advocacy of violence. The Court made no attempt to abstract away from the political context and provide neutral reasons rooted in political philosophy that would have given a Sanford-sympathizer reason to surrender her concerns. In short, no effort was made to deliberate with the Sanford sympathizer. Like Sanford and Per Curiam in the above dialogue, the reasons of the *Whitney* majority and those of the *Brandenburg* Court simply do not conflict.

The point can be expressed in the form of a dilemma. Consider the following four propositions:

- (1) Sunstein's thesis (ST): Minimalism promotes deliberative democracy.
- (2) Minimalism definition (MD): Minimalism is narrowness and shallowness.
- (3) Shallowness definition (SD): Shallow decisions do not contain abstract considerations.
- (4) Deliberation (D): Deliberation often requires abstraction.

Loosely speaking, (ST) and (MD) together imply that shallowness promotes deliberative democracy. Yet, (MD) and (SD) together imply that minimalist decisions are not abstract, and together with (D), this proposition implies that minimalism will often undercut deliberation. The proposition that minimalism often undercuts deliberation is obviously inconsistent with (ST). Because the four propositions "imply" a contradiction, one of the propositions must be false.

In a sentence, the problem is that shallowness strips a court's decision of what is often required for another party to *deliberatively* engage that decision. To be sure, this is a problem with the thesis that minimalism *promotes* deliberative democracy. It is not a problem with the thesis that minimalism *permits* democracy or may be used to *prevent the foreclosure of* democracy. Unlike these two latter claims, the promotion thesis involves the Court in *spurring* democratic deliberation. *But spurring deliberation often requires precisely the sort of abstraction that shallow decisions lack.*

Recall the case of *Papachristou*. I argued above that *Papachristou* was a deep decision and asserted that it was democracy-promoting precisely because it was deep. If the decision was to provide guidance to

^{216.} See discussion supra Part II.

localities as to how, within constitutional limits, they could control suspicious behavior, then a developed theory of those limits had to be deployed. Without such a theory, Jacksonville would have had little idea as to how to correct its constitutional error. Any subsequent ordinance would have represented the city's own estimation of what the Constitution required. By imagining the Supreme Court and Jacksonville as deliberative partners in a democratic constitutional system, we can put the point this way: unless the Court delivered a suitably *abstract* decision, Jacksonville would not have been able to respond with an ordinance that vindicated the policy behind due process. The Court would not have given reasons to Jacksonville with which it could comply by constructing an ordinance that acknowledged the force of those reasons.

What emerges on this approach is that the Supreme Court promotes deliberative democracy by engaging the political branches, the states, and the people as a deliberative partner. 217 As a deliberative partner, what restricts the Court is exactly what enables it to promote deliberative democracy: giving reasons. Requiring the Supreme Court to support its decisions with deep reasons promotes democracy in two ways. First, it narrows the options available to the Court in any case it faces. A Court bound by reason and precedent is a court of limited power. Since the justices of the Supreme Court are appointed, limiting the power of the justices both permits and prevents the foreclosure of democratic processes in the same sense that minimalism does. Second, reasoning deeply in decisions engages the Supreme Court with the other parts of our constitutional system. When the Court gives reasons, it can be deliberatively rejected by the people. The states and Congress can design their laws in ways that respond to the reasons the Court has struck down or modified previous legislative efforts. The more the Court engages in deep reasoning, the less it appears (and functions) as a kind of constitutional oracle, responsive and responsible to nothing.

Putting the point differently, *spurring* deliberation requires *participating* in the deliberative process by giving reasons. Even in defending his claim that a minimalist court can spur deliberation, Sunstein does not view the Supreme Court as a deliberative partner in the ensuing discussion. But where the Supreme Court simply utilizes procedural devices to return a matter of dispute to the political branches of government or to

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^{217.} See Larry D. Kramer, "The Interest of Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, 41 VAL. U. L. REV. 697, 749–753 (2006) (discussing Madison's theory of departmentalism, or the idea that different branches of government had the authority to act on their own understanding of the Constitution).

^{218.} See SUNSTEIN, supra note 2, at 26–27 (describing the democracy-promotion thesis and characterizing the procedural devices used for it as simply "leav[ing] open many of the largest questions").

the people, there is no reason to think that deliberation—reason-giving, in the sense described above—will occur.

B. Four Objections

The argument of this article—that minimalist decisions do not promote democracy because they lack the abstraction necessary for deliberation—is itself open to several obvious objections. The argument relies on descriptions of minimalism, democracy, and deliberation that Sunstein may not share or that may be incoherent. Answering these objections helps to clarify the argument in several crucial respects.

Below I consider four such objections: (1) that the argument above takes minimalism to advocate foregoing reason in judicial decisions, which it does not; (2) that the model of deliberation presented above fails because it assumes that individuals will agree about abstract matters, while Sunstein's point is precisely that individuals often disagree about them; (3) that Sunstein does not accept the theories of deliberation and deliberative democracy outlined above; and (4) that minimalism is preferable even if it does not spur deliberation because it communicates respect to those with different views—an important value for unelected judicial officers. As will become clear, while I regard these objections as containing important insights, none casts serious doubt on the argument presented above.

1. Minimalism Does Not Advocate Foregoing Reasons

How is minimalism inconsistent with the view advocated here? Sunstein has always been careful to observe that shallowness and narrowness are matters of degree. Minimalists do not argue that courts should eschew justifying their decisions with reasons. In that respect, the role of a judge importantly differs from the role of a jury, because the jury need not justify its verdict. This position, which Sunstein refers to as "full particularity" or "reasonlessness" is, according to minimalism, a "limiting case" desirable only when disagreement is particularly intense and widespread. Elsewhere, it is desirable to support the outcome of a dispute with reasons adequate to justify that outcome. What level of depth is desirable on any particular occasion will be guided by

^{219.} See id. at 15, 16; Sunstein, Beyond Judicial Minimalism, supra note 1, at 827.

^{220.} See SUNSTEIN, supra note 2, at 13.

^{221.} See Sunstein, Beyond Judicial Minimalism, supra note 1, at 835.

^{222.} Id. at 829.

^{223.} See SUNSTEIN, supra note 2, at 10.

^{224.} See Sunstein, Beyond Judicial Minimalism, supra note 1, at 829.

^{225.} SUNSTEIN, supra note 2, at 15.

the amount of disagreement over proffered theoretical justifications, the amount of information available to the court, and the judge's reasonable confidence in setting out her theory. On occasion, the benefit of ambitious theoretical support will outweigh the costs, and the costs of shallow reasoning may from time to time outweigh the benefits.

It is true that minimalism does not advocate eschewing the use of reasons in judicial decisions. Nonetheless, minimalism is inconsistent with the position defended here. That position is not simply that reasoned decisions are preferable to "reasonless" ones. Rather, the argument of this article is that in some cases, justifying a decision by reference to deeper principles will be necessary to promote democratic deliberation about the issue. The minimalist straightforwardly denies this thesis; as the minimalist conceives it, deep decisions usurp the democratic resolution of an issue. According to the position defended here, that is not always true. Sometimes deep decisions are necessary to promote ongoing deliberation among the branches of government and the people.

2. Individuals Often Disagree About Foundational Matters

The discussion above suggests another objection as well. I argue that abstraction is necessary for deliberation. But how could abstraction be necessary for deliberation in cases where there is disagreement about the abstractions themselves? Where abstraction provides no common ground, how could its use spur deliberation—at least on the simple model of deliberation outlined above? Sunstein does argue that decisions should avoid abstract justification where such a justification will generate disagreement.²²⁸ Is Sunstein's point not simply that judges should avoid using abstract accounts to justify the outcomes in their decisions, because such accounts are unlikely to be shared?²²⁹

I do not deny that we often disagree about foundational matters, such as the reason it is important to protect subversive advocacy in democracy, or the basis for prohibiting government from "establishing" a religion. My point is simply that avoiding abstraction does not promote democracy because abstraction is a common means we employ to deliberate with each other. Using abstraction, I can meet your objection to my view and give you reason to abandon it. Abstraction may not always work, but unless there is another model of deliberation in the offing, one cannot promote deliberation by avoiding abstractions. Abstraction is the heart of deliberation because, as Sunstein says, reasons are abstrac-

228. See, e.g., Sunstein, Incompletely Theorized Agreements, supra note 2, at 1740.

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^{226.} See generally Sunstein, Beyond Judicial Minimalism, supra note 1, at 838-41.

^{227.} See id. at 826.

^{229.} See SUNSTEIN, supra note 2, at 13.

tions.²³⁰ When faced with a disagreement, if a court engages in what Sunstein refers to as "conceptual descent"—focusing on a more concrete question—it will not spur deliberation. Where "conceptual ascent" results in further disagreement, the best course may be to "ascend" to a higher level of abstraction where an agreement is still possible.

Sunstein often speaks as if disagreement were the principal problem with providing an ambitious theoretical support for a decision.²³¹ He suggests that we can often agree about particular outcomes without agreeing about the theories that justify those outcomes.²³² In these cases, an "incompletely theorized" decision will result in agreement where a more ambitiously reasoned decision could not.²³³ The point of excess depth, then, is the highest conceptual point of agreement.²³⁴

However, it is a serious question whether there is *ever* a highest conceptual point of agreement. Consider that there is no consensus on the vast majority of significant legal questions before the Supreme Court. Of course, the Court decides many of its cases with unanimous opinions and demonstrates a kind of unanimity on these matters. But in broader society, there is no such unanimity on these issues. After all, the Supreme Court often grants certiorari because there is a split among lower courts about how to resolve a matter. Even when no such split exists, the parties themselves take different views, and their views nearly always have some merit to them, or the Court would not grant certiorari. Even decisions that seemed unremarkable to the Court have inspired significant disagreement among the public at large.

As an empirical matter, it seems unlikely that there is complete agreement about how to resolve any set of significant cases, whether at

^{230.} *Id.* at 14. However, it is at best only partially true that "reasons are abstractions." There are things that fairly go by the title "reason" that are not abstractions. For example, if you ask me what my reason was for choosing strawberry ice cream, I may say that I like its flavor. That I like the flavor of strawberry ice cream is my reason for choosing it. But it is not an "abstraction" in any obvious sense. There may be accounts of deliberation other than the very simple one I have presented here that, drawing on observations about reasoning such as the one above, explain how deliberation is possible without abstraction.

^{231.} See id.; Sunstein, Beyond Judicial Minimalism, supra note 1, at 829; Sunstein, Burkean Minimalism, supra note 2, at 364.

^{232.} See Sunstein, Incompletely Theorized Agreements, supra note 2, at 1740–41.

^{233.} See Sunstein, Beyond Judicial Minimalism, supra note 1, at 829.

^{234.} See Sunstein, Incompletely Theorized Agreements, supra note 2, at 1740-41.

^{235.} See Nina Totenberg, Roberts Court Produces More Unanimous Decisions (NPR Radio broadcast May 22, 2006).

^{236.} See SUP. CT. R. 10(a) (setting out considerations governing review on writ of certiorari).

^{237.} See id.

^{238.} See Avi Salzman & Laura Mansnerus, For Homeowners, Frustration and Anger at Court Ruling, N.Y. TIMES, June 24, 2005, at A20 (discussing Kelo v. City of New London).

the level of particular outcomes or ambitious abstract accounts.²³⁹ More probable is that there is more or less pervasive disagreement. Some questions invite only a small number of people to disagree, while others divide citizens more evenly. Similarly, some questions generate stronger disagreements than others. Given that nearly everything before the Supreme Court invites reasonable disagreement, the question is how to resolve that disagreement in ways that are consistent with, and promote, our deliberative democracy.

The model of deliberation presented above did not assume that there would always be agreement about the abstract basis for a decision. Rather, there may be persistent disagreement about general theories. The important point is that such disagreement does not constitute a reason to avoid ambitious theoretical arguments. This is for two main reasons.

First, proponents of deliberative democracy have long acknowledged that consensus is unlikely on most matters of fundamental importance to society. This admission does not undercut the deliberative conception of democracy; namely, that the exercise of state power is justified when it results from an ideal procedure of political deliberation. Deliberative democracy requires only that collective policies are justified in terms that reasonable citizens can regard as reasonable, even if not ultimately persuasive or the *most* reasonable. For similar reasons, it does not offend principles of democracy for a judicial decision to cite ambitious reasoning that some happen to reject, as long as the justification remains within the boundaries of public reason.

Deliberative democracy is comfortable with majority rule.²⁴² It fully contemplates the possibility that individuals will be bound by policies that they do not regard as being the most reasonable or wise. Nevertheless, those policies will be democratically legitimate if enacted according to democratic procedures and justified in terms that even those who disagree can regard as reasonable. It is here that deliberative democracy parts company with minimalism, which urges silence on the judiciary where these sorts of disagreement are possible.²⁴³ Judicial silence, however, does not spur deliberation any more than silence does in ordinary life.

Second, even where there is strong, persistent disagreement about fundamental matters, offering a deep justification for a particular out-

^{239.} See discussion supra Part III (discussing the unlikelihood of consensus in democratic deliberation).

^{240.} See Rawls, supra note 144, at 137.

^{241.} Id.; Cohen, supra note 147 (manuscript at 7-8).

^{242.} See Cohen, supra note 147 (manuscript at 7–8).

^{243.} See Sunstein, Beyond Judicial Minimalism, supra note 1, at 828-29.

come can still spur the democratic process. This can happen for a number of reasons. Seeing an ambitious argument may drive an opponent to articulate an alternative justification. Moreover, those who initially disagree with a justification may come to agree with it after examining the basis of their own views. Most of us go through an ongoing process of revising our beliefs, and revision can be triggered by coming into contact with a persuasively rendered exposition of a view one had previously regarded as wrong-headed.

3. The Theories of Deliberation and Deliberative Democracy Presented Above Are Problematic and Are Not Sunstein's

On the view that was presented above, deliberative democracy is fundamentally about *justifying the exercise of state power*. A third objection is that Sunstein himself need not, and arguably does not, take such a view of deliberative democracy. In a looser sense, a deliberative conception of democracy is simply one that gives pride of place to public discussion of political issues—discussion in the broadest sense that includes simply talking and participating in the political process. The Supreme Court promotes public discussion, in this sense, when it avoids final, authoritative judgments and issues shallow decisions, leaving fundamental matters to be resolved by others.

Moreover, the view of deliberation presented above is artificially narrow; it excludes a significant amount of activity that could fairly be called "deliberation." Consider the example of the student and the businessperson above; the student recommends that Smith travel by bus because of cost, while the businessperson recommends that Smith travel by train because of safety. I concluded that the student and the businessperson were not deliberating because the reasons they offered Smith did not "conflict." But in a perfectly normal sense of the term, of course, they are "deliberating." For example, if the businessperson overlooked cost considerations, the student's observation might lead him to change his mind and recommend taking the bus. Are we to say that they did not "deliberate"?

While these criticisms are understandable, they miss the mark. To begin with, there are reasons to think that Sunstein's view of deliberative democracy *is* based on the justification of state power, like the view above. For example, Sunstein writes, "[l]egislation cannot be supported on purely religious grounds; legislation rooted only in religious

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^{244.} Contrast this with Sunstein's point that "incompletely theorized agreements are especially valuable when a society seeks moral evolution and even progress over time." *Id.* at 833. Sunstein evidently thinks the court interferes with—rather than contributes to—moral evolution.

^{245.} See SUNSTEIN, supra note 2, at 25.

convictions could not count as valid for citizens who reject those grounds as justificatory."²⁴⁶ More generally, in his view, "[f]or the deliberative democrat, political outcomes cannot be supported by self-interest or force."²⁴⁷ Sunstein's view of deliberative democracy thus may in fact focus on the problem of political justification. But apart from whether Sunstein in fact takes this view of deliberative democracy, the justification of state power is an appropriate focus for a deliberative theory of democracy. It would be a significant conclusion that the democracy-promotion thesis is incompatible with such an account of deliberative democracy.

Moreover, given the focus on justification, the model of deliberation presented here is a natural one, even if it is narrow and idealized. We humans may do many things that can fairly be called "deliberation." Public discussion, as explained above, is surely "deliberation" in a very broad sense of the term. However, in that sense, it is not obvious how deliberation is relevant to *justifying* the exercise of state power. In other words, if what makes the exercise of state power properly democratic is its justification by deliberative processes, it is not obvious how simply discussing current events could constitute deliberation. Discussing current events does not justify or legitimize the exercise of state power. Rather, "support[ing] political outcomes," in Sunstein's phrase, requires a certain kind of public discussion. It requires a discussion in which participants support outcomes with reasons that reasonable members of society can accept. To do this, participants will often need to abstract away from their own beliefs and values. This is precisely the model of deliberation presented above.

With this in mind, the businessperson and the student in the example above may or may not be "deliberating" in the relevant sense. The crucial requirement is that the participants provide each other with reasons that the other can regard as reason to abandon his or her current views. If the student's mention of cost causes the businessperson to reevaluate her commitment to train travel, then it counts as deliberation in my sense. This may not be the only sense of "deliberation," or even the best; however, it is the model of deliberation most appropriate here.

4. Deep Opinions Communicate Disrespect for Those Who Disagree and Risk Error

Lastly, it is important to consider Sunstein's point that ambitious theoretical reasoning in judicial decisions communicates disrespect for

^{246.} Id. (emphasis added).

^{247.} Id.

those who hold different fundamental views.²⁴⁸ We live in a heterogeneous society. There is a spectrum of reasonable views about matters of fundamental importance in our society. The minimalist argues that, in this context, judges ought to avoid employing their fundamental commitments because those views will likely not be shared, and "it is not very respectful to take on other people's most fundamental commitments if it is not necessary to do so."²⁴⁹ Moreover, the risk of error is increased by invoking fundamental considerations, which are extremely complex.²⁵⁰

While there is undoubtedly a sense in which it is respectful to avoid challenging someone on their fundamental views, it is far from obvious that it is also respectful to remain silent about such matters. Notably, a judge's decision is binding regardless of whether it explains, or exposes, the fundamental basis on which the decision was reached. But remaining silent about why a decision was reached is "respectful" only in an odd way. Few would describe it as "respectful" for government to reach a decision without explaining to those affected the actual basis for the decision.

Moreover, even where we disagree intractably, articulating my reasons for making a particular decision will increase our mutual understanding. It tells you how I think, and it likely reveals to me how you think differently. There is nothing about this process that need be disrespectful. Indeed, if we take the longer view, it is just the opposite. My decision as a judge is not the last time the issue will be confronted. Higher courts, later courts, or democratically enacted legislatures or executives will have an opportunity to revisit my decision and to reevaluate its wisdom. If the grounds for my decision remain unstated, the decision will be hermetic and improving on it will be considerably more difficult. Outside the realm of law this is true as well. It will be easier to offer advice to a friend who has made a bad decision if I know why he acted as he did to begin with. In adjusting my own behavior, insight into why I am inclined to act as I do is a necessary prerequisite.

Thus, not only do deep decisions often spur deliberative democracy, they can also be necessary to the subsequent correction of error. In the judicial context, a deep decision striking down a law will help a legislature craft a constitutional replacement. It may also help a lower court

^{248.} See id. at 259 ("Sometimes minimalism is a way for people who disagree to show one another mutual respect.").

^{249.} Id. at 250.

^{250.} See id. at 255-56.

^{251.} Sunstein has recognized this point. See Sunstein, Beyond Judicial Minimalism, supra note 1, at 833.

test a related law. It may help higher courts and subsequent courts as well when faced with revisiting the decision initially made. In short, where the outcome has been settled on, articulating one's reasons can be of great help in correcting error. Otherwise, one's next move is likely to be a stab in the dark.

V. CONCLUSION: DEPTH, DEMOCRACY, AND POPULAR CONSTITUTIONALISM

This article argues that shallow decisions do not promote deliberative democracy because deliberation often requires abstraction. The minimalist advocates avoiding abstract accounts where they generate disagreement. Since the possibility of disagreement is likely widespread, minimalists will often be forced to resist precisely the sort of conduct necessary for deliberation. It follows that minimalism does not promote deliberative democracy.

This argument is relatively focused. I have not argued that, all things being equal, deep decisions are preferable to shallow decisions. I have not argued that deep decisions will always succeed in promoting democratic deliberation. Nor have I advocated a "moral reading" of the Constitution, or any similar approach to constitutional decision-making.²⁵²

Nonetheless, the position taken in this article fits in with a broader view of the proper role of the federal courts in our democratic constitutional system. This is because, on the view taken in this article, courts that offer a more ambitious theoretical justification for their decisions do at least part of what is necessary to spur, or promote, deliberation about how our society ought to resolve the issues it faces. In some cases, courts will frame a debate that is then carried out by the legislature, the executive, and the people. In this sense, the court becomes a kind of deliberative partner with the branches of the government, and with the people, in the process of resolving the issues that face political society.

Some supporters of "popular constitutionalism" take a very similar view of the courts. ²⁵³ Larry Kramer has argued that Madison understood the courts as one voice among several offering an interpretation of the Constitution:

The judiciary became an additional voice when it came to constitutional questions: another source of leadership for the community, and one more potential check in the system of popular constitutio-

^{252.} See generally, Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution (1996).

^{253.} See, e.g., Kramer, supra note 217, at 741–42 (describing courts as engaging in "the process of public deliberation").

nalism built into our complex government. If a bill passed Congress and was signed by the President without a protest from the states, it was still possible for the Supreme Court to raise a constitutional objection and ask the public to reconsider by wielding its power of review as what amounted to a judicial veto.²⁵⁴

The design of the government, including the courts, was meant to improve public deliberation in a system where the ultimate authority to resolve an issue lay with the public.²⁵⁵

In the Introduction, I argued that one of the most attractive attributes of Sunstein's minimalism was that it explained how courts could fit into our broader democratic constitutional system. The idea, in brief, was that a minimalist court left the most difficult issues unresolved, so that the people and the popular branches of government could address them. This view undercut, in part, the criticism of the judiciary as a countermajoritarian force usurping powers properly reserved to the other branches of government.

Advocating theoretical depth in judicial decisions does not necessitate giving up on a satisfying view of the place of courts in our democracy. If one conceives of the judiciary as a deliberative partner in a system where the people have the final authority over the interpretation of the Constitution, the presence of ambitious theoretical reasoning in judicial decisions loses much of its threatening, anti-democratic character. Indeed, by providing depth, the judiciary can contribute to "refin[ing] and improv[ing] public deliberations, so as to ensure that the sovereign, controlling public opinion [is] also reasonable and just." In many ways, the judiciary is well suited to this task, given its particular institutional competences and its relative insulation from popular control.

Sunstein's minimalism remains for many reasons an attractive account of judicial decision-making. It has been the argument of this article, however, that the connection between minimalism and democracy is highly problematic. Moreover, it is not obvious that theoretical depth is anti-democratic, or countermajoritarian. Indeed, depth may be the judiciary's contribution to a healthy public deliberation about the most difficult questions we face.

^{254.} Id. at 742.

^{255.} See id. at 715 (describing Madison's "republican" view); id. at 734–43 (describing how the design of the constitutional system was meant to improve the quality of public deliberation and popular control).

^{256.} Id. at 729.