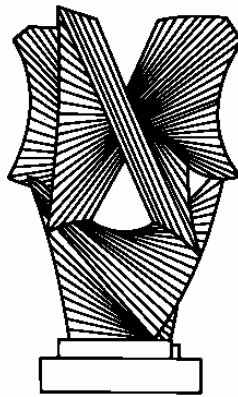


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Problems with Minimalism

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Problems with Minimalism

Cass R. Sunstein*

Abstract

Much of Justice Sandra Day O'Connor's work on the Supreme Court embodies a commitment to judicial minimalism, understood as a preference for narrow rulings, closely attuned to particular facts. This preference reflects a belief that at least in adjudication, standards ought to be preferred to rules. In many contexts, however, that belief is hard to justify, simply because it imposes severe decision-making burdens on others and may well create more, rather than fewer, errors. For this reason, a general preference for minimalism is no more defensible than a general preference for rules. The choice between narrow and wide rulings cannot itself be made by rules or even presumptions; it requires a case-by-case inquiry. The argument is illustrated throughout with reference to the problem of affirmative action, where Justice O'Connor's preference for particularity resulted in the imposition of a constitutional mandate on admissions offices that is not simple to defend in principle. In some contexts, however, narrow rulings are indeed preferable, in large part because they give flexibility to politically accountable officials. Justice O'Connor's minimalism is best understood as reflecting a belief that in difficult cases, at the frontiers of constitutional law, judges do best to avoid firm rules that they might come to regret.

Consider two admissions programs:

1. Program A gives a specified number of points to every African-American applicant. More particularly, every such applicant receives five points, simply by virtue of being African-American. Five points are not trivial, but they are far from enough to ensure admission. Children of alumni, for example, receive fifteen points; specified academic achievements produce thirty points; athletic accomplishments produce fifteen points. Admission is unlikely unless an applicant receives at least sixty points.
2. Program B dispenses with a point system. Every applicant receives individualized consideration from one of eight admissions officers. In hard cases, the admissions officers meet in "teams" of three; in the hardest cases,

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all eight admissions officers meet as a group. For African-American applicants, race counts as a plus, though numbers are not assigned.

Under existing law, Program A is unconstitutional because it is too rule-bound.¹ Program B is permissible because it calls for “holistic” consideration of individual applicants.² More than anyone else, Justice Sandra Day O’Connor is responsible for the fact that constitutional law distinguishes so sharply between the two programs. Seven of the nine other justices would treat the two the same, either upholding or invalidating both programs.³

Consistent with its general opposition to rigid affirmative action programs, the Court has long made clear that educational institutions cannot insulate “each category of applicants with certain desired qualifications from competition with all other applicants.”⁴ Extending that principle, the Court has also invalidated a “point system,” similar to Program A, used for undergraduate admissions at the University of Michigan.⁵ In that system, students received a specified set of points for various attributes, including academic performance (up to 110 points), in-state residence (10 points), having alumni parents (4 points), athletic recruitment (20 points), and being a member of an underrepresented minority group (20 points).

The Court did not rule that the 20 points were too high; it ruled instead that a point system, in the context of racial preference, is invalid as such. The Court stressed “the importance of considering each particular applicant as an individual, assessing all of the qualities that the individual possesses, and in turn, evaluating that individual’s ability to contribute to the unique setting of higher education.”⁶ The problem with the point system is that it fails to “provide such individualized consideration,” simply because of its automatic nature. And “the fact that the implementation of a program capable of

¹ Gratz v. Bollinger, 539 US 244, 270-72 (2003)

² Grutter v. Bollinger, 539 US 306, 337 (2003) (emphasizing that the admissions program in question “engages in a highly-individualized, holistic review of each applicant’s file . . .”).

³ Justices O’Connor and Breyer voted to strike down a variation on Program A and to uphold a variation on Program B. See Gratz, 539 US at 276-80 (O’Connor, J., concurring) & 281-82 (Breyer, J., concurring); see Grutter, 539 US at 311-44 (O’Connor, J.).

⁴ Grutter v. Bollinger, 539 US 306, 334 (2003) (quoting Regents of Univ. of Cal. v. Bakke, 438 US 265, 315 (1978) (opinion of Powell, J.)).

⁵ Gratz v. Bollinger, 539 US 244, 249-51, 271-72 (2003).

⁶ Gratz v. Bollinger, 539 US 244, 271 (2003).

providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.”⁷

By contrast, Justice O’Connor led the Court to permit educational institutions to create affirmative action programs if they do not assign points or impose quotas, but merely include race as a “plus” within a system of highly individualized judgment.⁸ At least such programs are acceptable if they remain “flexible enough to ensure that each applicant is evaluated as an individual.”⁹ Hence the Court permits race-conscious admissions if, in the words of Justice O’Connor’s opinion, there is “a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”¹⁰ When no policy gives “automatic acceptance or rejection based on any single ‘soft’ variable,” and when there are “no mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity,” affirmative action is permissible.¹¹

In drawing a sharp line between rigid and more particularized programs, Justice O’Connor acted in a way that fits with her jurisprudence far more generally. She has essentially required educational institutions to proceed in a way that fits her own “holistic” practice—her preference for case-by-case judgment, unburdened by clear rules. Because of her general commitment to particularized consideration, Justice O’Connor has stood as the Court’s most prominent minimalist, asking for narrow rulings rather than broad ones. In joining the Court’s decision to invalidate a Chicago gang loitering ordinance, for example, Justice O’Connor went out of her way to suggest that another such ordinance, more cautiously drawn, might well pass constitutional muster.¹² Of course Justice O’Connor is largely responsible for the “undue burden” standard in the area of abortion¹³—a standard that is rule-free and that calls for close attention to the details of the particular restriction at issue. In the context of restrictions on commercial advertising, Justice O’Connor has also written narrow opinions, carefully tailored to

⁷ Id. at 275.

⁸ *Grutter v. Bollinger*, 539 US 306, 334 (2003).

⁹ Id. at 337.

¹⁰ Id. at 337.

¹¹ Id.

¹² See *City of Chicago v. Morales*, 527 US 41, 68 (1999) (O’Connor, J., concurring).

¹³ See *Planned Parenthood v. Casey*, 505 US 833 (1992).

particular facts.¹⁴ The same is true in the context of the Establishment Clause, where her jurisprudence has a noteworthy minimalist dimension.¹⁵

To be sure, no one believes that all details are relevant. No one contends that judges should attend to the astrological sign of the litigants, or the second letter of their last names, or the hour of the day on which certiorari was sought. But in many cases, Justice O'Connor has shown an unquestionable preference for decisions that are narrowly tailored, that leave a great deal undecided, and that preserve flexibility for the future. In these respects, Justice O'Connor has taken an approach to constitutional law that builds on common law processes, with their tendency toward incremental development.¹⁶

My purpose here is to raise questions about that preference. I begin with the suggestion that in the context of affirmative action, Justice O'Connor's interest in case-by-case judgment has led her to a puzzling and probably indefensible conclusion. It is hardly clear that the Constitution should be taken to require a procedure that sacrifices transparency, predictability, and equal treatment—and that does so while imposing significant burdens on officials who must pass on particular applications for admission. This objection leads to a much more general point. Any defense of minimalist adjudication is essentially the same, in principle, as a defense of standards over rules—and there is no reason to think that such a defense can be made convincing in all of the contexts in which Justice O'Connor has ruled narrowly. In short, the choice between narrow and wide rulings cannot itself be resolved by rule.

Ironically, Justice O'Connor's own practice suggested a kind of presumption in favor of minimalism. As a first approximation, the better approach rejects any such presumption and calls instead for a case-by-case inquiry into whether case-by-case decisions are desirable. This point serves as challenge to minimalism as a general project, but it also helps to produce a reconstruction and defense of the claim that seems to me to animate much of Justice O'Connor's work: In the hardest cases, at the frontiers of constitutional law, the Court usually does best if it proceeds narrowly, and if it avoids steps that might be confounded by unanticipated circumstances. The arguments that

¹⁴ See *Thompson v. Western States Medical Center*, 535 US 357 (2002).

¹⁵ *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 26 (2004) (O'Connor, J., dissenting).

¹⁶ For a classic treatment, see Edward Levi, *An Introduction to Legal Reasoning* (1949); for an effort to link constitutional law and common law, see David Strauss, *Common Law Constitutional Interpretation*, 63 *U Chi L Rev* 877 (1996).

support minimalism in particular cases also support this general use of minimalism. As we shall see, there is a democratic argument on behalf of the same position.

II. Affirmative Action, Rules, and Transparency

Begin with affirmative action. We can imagine an admissions program that operates on the basis of a simple rule, as in the idea that anyone with a certain score on the LSAT will be admitted, and anyone with a score below that level will be rejected. If affirmative action is to be introduced, we could imagine an equally simple rule—saying, for example, that African-American candidates will be admitted even if their LSAT is below the ordinary requirement so long as it is also above a specified level. We could also imagine an admissions program that operates on the basis of a complex rule. The University of Michigan undergraduate program is an example; it offered a range of factors listed in advance, with each being given a specified weight. Rules can certainly make reference to a large numbers of factors, and in that sense incorporate a high degree of particularity. The identifying feature of a rule-bound system is not that it makes one or two features central, but that it involves full or nearly full specification, before the fact, of the factors that are relevant, and also of the weight that will be assigned to them.¹⁷

Such a system contrasts with rule-free systems, which involve no such before-the-fact specification, and which require officials to specify, in individual cases, either the relevant factors or the weight to be given to each (or both). We could imagine an entirely open-ended admissions process, in which admissions officers are asked to identify the governing criteria as they see fit. Under such a process, individual officers could decide whether to consider, and how much to consider LSAT scores, extracurricular activities, background, geography, essays, race, religion, point of view, musical tastes, and so forth; their exercise of discretion would be unmonitored and unconstrained. Alternatively, we could imagine a process that rested on factors that were specified but unweighted—saying, for example, that officers must consider academic achievement, extracurricular activities, race, geography, athletic achievement, familial connections to the institutions, and so forth.

¹⁷ See Kaplow, *supra* note 30.

This process would be “holistic,” not in the sense that admissions officers could consider such factors as they saw fit, but in the sense that it would not offer anything like a specification of the weight to be assigned to the different variables. That weight would be decided in particular cases. If admissions officers wanted to give great weight to extracurricular activities, but little weight to familial connections, they would be permitted to do exactly that; the opposite preference would be acceptable as well, as far as the institution is concerned. Indeed, a near-zero weight would seem to be permissible. Perhaps admissions officers could even give no weight to race, or some other factor, if that is what they wanted to do.

The key point is that to the extent that institutions do not specify admissions criteria in advance, or permit officers to weight those criteria in individual cases, they ensure that the content of the governing “law” will be made on the spot, in the process of assessing applications. This is the essential difference between a rule-bound and a rule-free system. Of course there is a continuum here, not a sharp dichotomy. We could imagine admissions systems that specify a great deal, but that leave some discretion for on-the-spot decisions; we could imagine systems that specify little, but that do not leave admissions officers utterly unconstrained.

A court could coherently say that the constitutional issue turns on the *degree* of the racial preference. Perhaps a constitutional distinction should be drawn between different sorts of rules: those that give excessive weight to race, and those that do not. On this view, an admissions office may not accord “undue significance” to race, in a kind of analogue to the “undue burden” standard in the law of abortion. Undue significance would be found, for example, in a rule allowing all African-American applicants to be admitted simply by virtue of their skin color. At the same time, an admissions office might be allowed to grant one point, or a few more, to African-American applicants. In other words, there would be no logical difficulty with saying that some weight, but not too much, may be given to race. An “undue significance” standard would itself require a form of individuation at the level of judicial administration, but perhaps it could be specified either in advance or through application.

But—and this is the key point—undue significance, in the form of excessive weight is not Justice O’Connor’s concern. Rigidity, not weight, is her problem. She does

not contend that the University of Michigan accorded “too many” points to race—an objection that would also apply to rule-free systems if, in actual operation, they gave an extremely strong preference to African-American applicants. Justice O’Connor’s complaint is about ruleness as such, in the form of an ex ante specification of the weight to be given to race. Hence the distinction between Program A and Program B is not that Program A gives more attention to race; it is that Program A is more rigid, and imposes firm limits on individual discretion.

But is this objection convincing? Consider the behavior of an admissions officer engaged in review of applications under Program B. So long as affirmative action is in place, Program B will operate, in a sense, as the functional equivalent of a point system; the only difference is that its essential characteristics, above all the weight given to race, are not disclosed or systematized. As Program B is administered, each admissions officer will inevitably be operating with her own informal point system, in the form of a rough sense of how much weight to give to the relevant factors. (If an officer’s decisions were recorded, and if there were enough of them, it should be possible to discern, retrospectively at least, the number of “points” given to race.) Whether the implicit point system will be constant across officers, or across applicants, is anyone’s guess. We can go further. Program B can be drawn up so as to require each officer to give some (unspecified) weight to race, or so as to permit officers to give some (unspecified) weight to race if they choose. In this sense, race may or may not matter at all, depending on the judgment of each officer.

The key point is that under Program B, it is unlikely that any particular officer will be able to give constant, rather than fluctuating, weight to race. It is even less likely that different officers will use the same system, in the sense that they will allocate the same informal points, or weight, to race. The resulting criteria should be highly variable across applicants, and they will not be transparent to anyone. It follows that as compared to Program A, Program B sacrifices three important values: predictability, transparency, and equal treatment. It does so while also imposing significant decision-making burdens on individual officers, who have to decide how much weight to give to race in individual cases.

It is tempting to think that the real difference between Program A and Program B is that the latter is more fair, less mechanical, and more accurate, precisely because it is so highly individualized. In fact Justice O'Connor's opinion in *Grutter* seems to be based on a judgment to precisely this effect.¹⁸ But the appearance is a kind of optical illusion. Program B also involves something akin to a point system, in the sense that affirmative value is placed on race; the difference is that points are not formally assigned, and hence variability will likely arise from applicant to applicant, with a corresponding lack of transparency and equal treatment. Different African-Americans will be treated differently, as some obtain larger racial bonuses than others. At first glance, it is not at all clear why that procedure should be constitutionally preferred.

Is anything at all gained with Program B? The most obvious point is that under Program B, there will be a greater lack of knowledge, in individual cases, about what role, if any, race played in an admissions decision. For this reason, the lack of transparency may itself be a benefit; perhaps there are expressive reasons for it. With Program B, a successful applicant does not know that he was the beneficiary of (much or perhaps any) affirmative action. Such an applicant can think, plausibly, that affirmative action played no role in his case. Perhaps Program A imposes a kind of general stigma that Program B does not, simply because under Program A, every African-American knows that a certain number of points were awarded (and every white applicant knows that the same points were not awarded). Under Program B, perhaps applicants can think that their own individual characteristics may have been all that mattered, with race playing little or no role.

But it is reasonable to wonder whether this possibility, a matter of appearance and psychology rather than reality, really distinguishes the two programs—and to doubt that it should make a constitutional difference. Under Program A, it remains possible that African-American applicants, like athletes and children of alumni, did not really “need” the points—that race played no role in their admission. Along this dimension, there is no evident difference between the two programs. At least it is not clear that beneficiaries of Program A feel more stigmatized, or are more stigmatized, than beneficiaries of Program

¹⁸ See *Grutter*, 539 US at 337 (“The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.”).

B. And even if this is so, it is not clear that Program A is *constitutionally* inferior for that reason. Stigmas of various kinds are imposed by many public decisions, such as the decision to admit a child of an alumnus or an especially good football player; and stigmas are not unconstitutional because of their status as such. In any case Program A, far more than Program B, is likely to yield unequal treatment. Why is the former superior to the latter?

Any judgment on that point requires an interpretation of the Equal Protection Clause, which is not my topic here. Perhaps Justice O'Connor believes that expressive values lie at the heart of the Clause, that Program A is far inferior to Program B on expressive grounds, and that the constitutional issue must turn on that distinction. But at the very least, we should be able to see that it is not simple to explain why Justice O'Connor concluded that Program B is constitutionally acceptable, whereas Program A is not. To be sure, a holistic, particularistic program is less transparent and less predictable than one that uses points; but is that a constitutional advantage?

My discussion of the example is meant not only to indicate a difficulty with an important area of constitutional law, but also to help to identify a series of problems with particularistic judgments. They might well lead to inequality. They impose burdens on subsequent decision-makers, in a way that might lead to errors and arbitrariness. They increase unpredictability. They reduce transparency. They might increase the number and size of mistakes at the same time that they increase the costs of decisions. These problems beset not only case-by-case admissions decisions, but also what Justice O'Connor frequently prefers: case-by-case rulings from the Supreme Court.

III. Rules, Standards, and Minimalism

For the last generation, Justice O'Connor has been the Court's leading minimalist, in a way that has left a large impact on American law. Her minimalism embodies an interest in small steps, and along two distinct dimensions.¹⁹ First, she favors rulings that are *narrow rather than wide*. Narrow rulings do not venture far beyond the problem at hand; they attempt to focus on the particulars of the dispute before the Court. When

¹⁹ I explore minimalism in Cass R. Sunstein, *One Case At A Time* (1999); Cass R. Sunstein, *Radicals in Robes* (2005).

presented with a choice between narrow and wide rulings, Justice O'Connor often opts for the former.²⁰ To be sure, the difference between narrowness and width is one of degree rather than kind; no one favors rulings that are limited to people with the same birthdays as those of the litigants before the Court. But among the reasonable alternatives, Justice O'Connor shows a frequent preference for the narrower options.

Justice O'Connor also seeks rulings that are *shallow rather than deep*. Shallow rulings attempt to produce outcomes and rationales on which diverse people can agree, notwithstanding their disagreement on fundamental issues. For example, there are many disputes about the underlying purpose of the free speech guarantee²¹: Does the guarantee aim of protect democratic self-government, or the marketplace of ideas, or individual autonomy? Minimalists hope not to resolve these disputes.²² They seek judgments and rulings that can attract support from people who are committed to one or another of these foundational understandings, or who are unsure about the foundations of the free speech principle.²³ The interest in shallowness raises distinctive issues,²⁴ and I shall be exploring narrowness rather than shallowness here.

A. Minimalism and Its Discontents

The discussion of affirmative action does not demonstrate that minimalism is a mistake, or that Justice O'Connor has generally been wrong in seeking narrow rulings and in expressing caution about judgments that extend far beyond the facts of particular cases. To understand the uses and limits of minimalism, it is necessary to broaden the view screen, venturing well beyond any particular context. Consider, for example, the following propositions:

1. The constitutional status of sex segregation in education cannot be settled by rule. Often segregated institutions will be invalid, but it remains possible that they can be adequately justified.²⁵

²⁰ See notes supra.

²¹ See Frederick Schauer, *Free Speech: A Philosophical Inquiry* (1990).

²² See, e.g., *Virginia v. Black*, 538 US 343 (2003) (upholding cross-burning ban without ambitious account of first amendment); *Hamdi v. Rumsfeld*, 542 US 507 (2004) (refusing to offer ambitious account of President's authority as Commander-in-Chief).

²³ See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv L Rev 1733 (1993).

²⁴ See *id.*

²⁵ *Mississippi Univ. for Women v. Hogan*, 458 US 718 (1982). See also *United States v. Virginia*, 518

2. The President is required to provide some kind of procedure before detaining suspected terrorists, but the extent of the required procedure should be elaborated in particular cases, not through firm rules laid down in advance.²⁶
3. Commercial advertising is often entitled to protection under the first amendment, but the protection is far from absolute; the extent of protection, in individual cases, depends on a balancing test.²⁷
4. Under the Equal Protection Clause, most classifications face mere rationality review. But for some classifications, rationality review is heightened, in a way that will doom (among other measures) some but not all forms of discrimination on the basis of sexual orientation.²⁸
5. In the context of state-wide recounts held under a single judge, states must develop adequate standards to constrain the exercise of discretion by those who are counting votes.²⁹ But this requirement may not be applicable in other settings.³⁰
6. Restrictions on the right to choose abortion should be evaluated not through the rigid trimester system of *Roe v. Wade*, but through a more flexible standard, one that forbids any “undue burden” on the right to choose.³¹
7. Public acknowledgements of the existence of God do not always offend the Establishment Clause; history and context matter a great deal.³²

In all of these cases, it would be possible to argue that case-by-case judgments are desirable, not for the obscure reasons that underlie *Grutter*, but on the ground that the Court lacks the information that would permit it to produce sensible rules. For example, a judge might not want to set out any rule to govern the constitutional status of commercial advertising, on the ground that the relevant situations are hard to foresee in advance, and any simple rule would be confounded by circumstances. Or a judge might believe that the

US 515 (1996).

²⁶ *Hamdi v. Rumsfeld*, 542 US 507 (2004).

²⁷ *Thompson v. Western States Medical Center*, 535 US 357 (2002).

²⁸ *Lawrence v. Texas*, 539 US 558, 579-85 (2003). (O’Connor, J., concurring).

²⁹ *Bush v. Gore*, 531 US 98 (2000).

³⁰ *Id.* at 107 (emphasizing a lack of uniform standards guiding the discretion of vote counters).

³¹ *Planned Parenthood v. Casey*, 505 US 833 (1992); see also *Webster v. Reproductive Health Services*, 492 US 490, 522-31 (1989) (O’Connor, J., concurring).

³² See *Newdow*, *supra* note (O’Connor, J., concurring).

procedural protection to be accorded to enemy combatants cannot easily be specified in an initial encounter with that problem; perhaps it is best to avoid rules and to rely instead on an incompletely specified decision, one that will be given content as particular cases arise. Perhaps public acknowledgements of God are acceptable if they do not amount to an effort to inculcate any particular set of religious convictions, but perhaps that test is itself only a crude gesture toward an appropriate set of governing principles, which must emerge from the cases.

If all this is so, then Justice O'Connor's general preference for minimalism can be justified on the same grounds that support standards over rules³³; indeed, her own preference for minimalism is very close, analytically, to a preference for standards over rules. Importantly, the two preferences are not identical. A holding that is governed by a standard is in a relevant respect narrow, because the standard needs to be specified in particular cases; but a narrow decision need not be a standard at all. Such a decision may even be a rule, restricted to an unusual set of facts; it may endorse a rule and reject a standard of any kind. (Indeed, a holding is always a rule, at least insofar as it binds the parties, and a rationale is often a standard.) What I am emphasizing is that by its very nature, a minimalist ruling leaves a great deal undecided, in a way that frees up future decision-makers but also leaves them to some extent at sea. This is exactly the characteristic that distinguishes standards from rules. Insofar as Justice O'Connor prefers narrow rulings to wide ones, it is for the same kinds of reasons that lead some people to prefer standards to rules.

That preference makes best sense when it serves to reduce the number and magnitude of errors, and when it serves as well to reduce the aggregate burdens of decision.³⁴ Suppose that the Supreme Court is attempting to resolve a difficult question involving, say, the constitutional status of segregation on the basis of sex. The Court might think that it lacks the information that would enable it to set out a sensible rule. It may believe that sex segregation is not acceptable when it excludes women from a valuable educational opportunity, but that it is permissible to have sex-segregated sports teams, and that the legitimacy of sex-segregated high school education presents difficult

³³ See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 41 *Duke LJ* 557 (1992).

³⁴ See *id.*

question. The Court might believe that a simple rule—sex segregation yes, or sex segregation no—would be outrun by reality. It might also believe that a complex rule, specifying the validity of segregation across diverse contexts, is too difficult to specify during an early encounter with the question.

Points of this kind might well justify a preference for narrow rulings in many contexts. The problem—a general one for those who favor narrowness—is that there is no reason to think that judges should *systematically* favor standards over rules. Whether standards are desirable, and whether narrowness makes sense, depend on whether the arguments that justify them apply in the particular case. There is no justification for a general presumption in favor of standards or minimalism. To the extent that Justice O’Connor has adopted such a general presumption,³⁵ she seems to have erred.

B. The Case for Rules?

1. *In defense of rules.* It would be possible to go further. In a powerful and influential essay, Justice Scalia made a *general* argument on behalf of rules over case-by-case judgments.³⁶ Justice Scalia marshals a range of considerations on behalf of rules—considerations that track those that argue against a “holistic” admissions process. Justice Scalia emphasizes that case-by-case judgments introduce unpredictability.³⁷ They threaten to deny both the reality and the appearance of equal treatment.³⁸ They export decision costs to others—above all, lower courts and litigants, who must give effective content to the law.³⁹ At the same time, they leave judges free to exercise their discretion so as to favor their preferred causes, in a way that also leaves liberty at risk when the Court faces intense political pressure.⁴⁰

Rule-bound decisions thus have the dual virtues of binding judges, and thus reducing the exercise of discretion, and also stiffening the judicial spine when the stakes

³⁵ I do not claim that she has adopted any such presumption; a judgment to that effect would require a sustained analysis of her votes and opinions. I contend only that in many prominent cases, she has struck a minimalist chord and embraced narrowness.

³⁶ Antonin Scalia, *The Rule of Law Is A Law of Rules*, 56 U Chi L Rev 1175 (1989).

³⁷ *Id.* at 1179.

³⁸ *Id.* at 1178.

³⁹ *Id.* at 1181.

⁴⁰ *Id.* at 1180.

are highest.⁴¹ “The chances that frail men and women will stand up to their unpleasant duty are greatly increased if they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases.”⁴² This point, made in 1989, has evident power in the face of contemporary conflicts between individual rights and efforts to protect the nation against terror. Justice Scalia is linking a point about method with a point about substance. If judges embrace his method, they are more likely to respect the Constitution’s substance when the going gets tough.

We might strengthen Justice Scalia’s argument by noting that the Supreme Court is not an ordinary tribunal, entrusted with deciding cases. It is not a trial court or even a court of appeals. One of its principal functions is to provide guidance for numerous other judges, public officials, and private actors potentially involved with the legal system.⁴³ Focusing on a particular case, the Court may not readily “see” the large assortment of burdens that it imposes on others by virtue of its reticence. It may be much better for the Court to risk error, by venturing more broadly, than to leave others at sea about the law’s requirements. If the Court does not say much about the obligation to provide procedures to enemy combatants, it may create terrible guessing-games for the executive branch and for lower courts, in a way that imposes high costs and burdens. Alert to the Court’s role in a hierarchical legal system, Justice Scalia contends that the preference for common law methods, focused on narrow rulings, should be reversed.

In attacking case-by-case judgments, Justice Scalia is best taken as marshalling a set of considerations that support rules over standards. If we are interested in minimizing the costs of errors and the costs of decisions, we might well conclude that the Court should frequently choose width over narrowness. Wide rulings will impose decisional burdens on the Court, to be sure; but those burdens might well be lower than those associated with narrow rulings. Perhaps rules will be overinclusive, but they might well produce lower error costs, on balance, than those emerging from a regime of case-by-case decisions.

⁴¹ Id.

⁴² Id.

⁴³ See Peter Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 Colum L Rev 1093 (1987).

2. *Meta-questions.* But Justice Scalia does not make the implausible suggestion that the Court should always avoid case-by-case particularism. He acknowledges that a degree of particularism is sometimes not “avoidable.”⁴⁴ His claim is only that when rules are “possible,” the Court should rely on them. But why does Justice Scalia contend that rules should be chosen unless the Rule of Law “*must . . . leave off*”⁴⁵? It would be more plausible to say that the choice between rules and particularity should depend on which is best, all things considered. Rules should not be selected merely because they are possible, if they are not optimal. The question whether they are optimal cannot itself be settled by rule. And if this point is right, then at the meta-level—in the choice between rules and particularity—we should follow Justice O’Connor’s approach and be particularistic. No formula can possibly resolve the meta-question. It follows that a case-by-case inquiry, into the choice between rules and particularity, is the correct way to make that choice.

But this conclusion does not mean that Justice O’Connor has been right to opt, so much of the time, for particularity. On the contrary, it immediately raises the possibility that she has been wrong, simply because it is unlikely that a case-by-case inquiry would generally suggest that a case-by-case inquiry is best. But Justice Scalia has not adequately supported his apparent suggestion that there should be a kind of presumption in favor of rules, rather than a case-by-case inquiry into whether rules make sense in the particular context.

Is there anything that Justice Scalia might say at this point? Perhaps Justice Scalia believes that there is a real risk that a case-by-case inquiry at the meta-level will misfire—that if we are concerned with decision costs and error costs, we will do best with a presumption in favor of rules, or at least with constant alertness to their virtues. On this view, the problems that beset case-by-case decisions in individual cases also beset such decisions about whether to proceed via rules or instead through particularized decisions. The idea that courts should reject case-by-case judgments unless that course is not “avoidable” might not produce the optimal results that would follow if courts could costlessly engage in accurate case-by-case inquiries. But because they cannot, they might do best with a presumption on behalf of rules. The presumption makes case-by-case

⁴⁴ 56 U Chi L Rev at 1187.

⁴⁵ *Id.*

decisions less burdensome (at the meta-level, as elsewhere), simply because it is a presumption. And perhaps the presumption pushes judges, and especially justices, in the right direction, in a way that replicates what would emerge from a system in which case-by-case judgments could be made costlessly and accurately.

But Justice Scalia does not attempt to defend his position in this way, and for excellent reason. He is best taken to have marshaled a series of considerations against case-by-case judgments, without having demonstrated that those considerations justify a rule or a presumption in favor of wide rulings from the Supreme Court. The weight, or force, of those considerations depends on the same factors that underlie the general choice between rules and standards. To summarize a complex story⁴⁶: When the Court's decision must be applied by numerous actors, dealing with frequent or common situations, the argument for rule-bound decisions has great force. When there is reason to distrust those who would operate free from rules, there is a good argument for rules. When predictability is exceedingly important, case-by-case decisions impose high costs. When the potential rule-maker has the information to produce good rules, there is every reason to produce rules.

But no general argument would make much sense in favor of rules, even at the meta-level. When the Court lacks relevant information, so that any rule will predictably misfire, rules are hazardous. When decisions in the pertinent domain are few, the argument for rules is less insistent. When the potential rule-maker cannot be confident about any rule, rules may not be worthwhile. When subsequent decisionmakers can be trusted, because of their competence and lack of bias, the argument for avoiding rules is certainly strengthened.

Perhaps Justice O'Connor's view is the converse of Justice Scalia's—and similarly vulnerable. Perhaps she believes that for the Supreme Court, it is frequently or typically the case that the case-by-case inquiry, at the meta-level, will produce a judgment in favor of case-by-case decisions. Her implicit judgment to that effect might reflect the application of a case-by-case meta-rule. But it is difficult to see how such a meta-rule might be defended, especially if we notice that minimalist decisions from the Court do not promote predictability and impose high decisional burdens on fallible actors

⁴⁶ The best discussion remains Kaplow, *supra* note.

at later stages. Too much of the time, narrow rulings are properly subject to Justice Scalia's critique.

It is possible to identify specific domains in which the argument for rules is difficult to resist. Consider the question whether speed limits should involve standards or rules—a question easily resolved in favor of the latter in part because of the sheer number of decisions that must be made. So too, there are domains in which the argument for standards is strong. For decisions involving parole, for example, a rigidly rule-bound system, forbidding a degree of individualized attention, would risk a high level of error. But for adjudication as a whole, even at the Supreme Court, no general conclusion makes much sense.

3. *Minimalism's domain.* It might be possible, however, to defend Justice O'Connor's approach in narrower terms; and the discussion thus far should enable us to see the form the defense might take.

In my view, the most promising claim on her behalf involves a particularly important subset of cases on the Supreme Court's docket: the "frontiers" questions in constitutional law. By their very nature, these questions are unlikely to come up often and require answers about which the Court cannot always be confident. In those domains, the argument for wide rulings, offering large and near-irreversible steps, is substantially weakened. Two considerations are relevant here. First, predictability is likely to be less important, simply because the relevant questions arise infrequently. Second, the likelihood that a wide ruling will misfire is often high, simply because the Court lacks much familiarity with the context.

Indeed, this latter point has been emphasized by Justice Breyer in the context of use of new technologies to compromise privacy, where he insists that courts do not have the experience that would justify width.⁴⁷ Much of Justice O'Connor's jurisprudence might be taken to have generalized the point. Her largely minimalist opinion in *Hamdi* can be understood in exactly these terms⁴⁸; in its first conflicts between constitutional rights and the war on terror, the Court had good reason to proceed cautiously. So too with the Court's minimalism in *Bush v. Gore*, where a most unusual controversy with

⁴⁷ See Stephen Breyer, *Active Liberty* 70-73 (2005).

⁴⁸ See *Hamdi*, *supra* note.

enormous stakes might be taken as a good occasion for particularly small steps.⁴⁹ So too, plausibly, with Justice O'Connor's reluctance to embrace a broad ruling during the Court's first encounter with "gang loitering" legislation.⁵⁰

None of this means that minimalism is always appropriate in constitutional cases. When the area requires a high degree of predictability, and when the Court has had a great deal of experience with the area, width might well be justified. The same conclusion follows if the Court, notwithstanding its lack of experience, has good reason for confidence in a wide ruling. The only point is that in many "frontiers" cases, the very arguments that justify standards will justify minimalism as well. In short, Justice O'Connor's practice of minimalism is best defended on the ground that it can be found in exactly the areas in which an assessment of the contest between rules and standards argues most powerfully in favor of the latter.

IV. Democracy

Thus far my emphasis has been on error costs and decision costs—the conventional foundation for analysis of the choice between rules and standards. But there is another point, and it has to do with the relationship between Justice O'Connor's preference for minimalism and democratic self-government. There are two different points here.

First, the Court might choose a narrow ruling precisely because it seeks to retain room for democratic debate and experimentation. Justice Frankfurter's concurring opinion in *The Steel Seizure Case* offers the most elaborate discussion of the basic claim.⁵¹ He emphasized that "[r]igorous adherence to the narrow scope of the judicial function" is especially important in constitutional cases when national security is at risk, notwithstanding the national "eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncement."⁵² In his view, the Court's duty "lies in the opposite direction," through judgments that make it unnecessary

⁴⁹ See *Bush v. Gore*, *supra* note.

⁵⁰ See *City of Chicago v. Morales*, *supra* note.

⁵¹ 343 US at 594-97.

⁵² *Id.* at 594.

to consider “delicate problems of power under the Constitution.”⁵³ Thus the Court has an obligation “to avoid putting fetters upon the future by needless pronouncements today.”⁵⁴ Justice Frankfurter is naturally read to be emphasizing the costs of error, but his emphasis is also on “putting fetters” on those involved in democratic self-government.

If the Court were able to invalidate a legally unacceptable decision in a way that nonetheless maintains flexibility for other institutions, it might do so for that very reason, at least if it cannot be confident that a broader ruling is correct.⁵⁵ And indeed, Justice O’Connor’s separate opinion in the gang loitering case emphasized the continued authority of state and local governments.⁵⁶ Narrow rulings permit a kind of continuing dialogue within the polity—and between the Court and other institutions, in a way that promotes learning.⁵⁷ As between wide and narrow invalidations, the latter have significant advantages for just that reason.

This, in fact, is a large part of Justice Breyer’s claim in the context of privacy,⁵⁸ where narrowness ensures that the legislature will not be foreclosed by an inadequately informed decision from the Supreme Court. The same point emphatically holds amidst the war on terror. In *Hamdi*, the Court pointedly declined to say anything about the President’s power as Commander-in-Chief, relying instead on statutory authorization.⁵⁹ At least where the issue has a great deal of novelty, and where the Court is unsure how to handle it, a great deal is to be gained by allowing the democratic process continuing room for experimentation.

Second, some minimalist rulings are *democracy-forcing*, in the particular sense that they work to ensure that decisions are made by the democratically preferred institution of government. The most prominent example is the Avoidance Canon—the idea that intrusions on constitutionally sensitive interests must be authorized by Congress, and may not be made by the executive alone.⁶⁰ Justice O’Connor has attempted to

⁵³ Id. at 595.

⁵⁴ Id. at 596.

⁵⁵ See *Hamdi*, supra, at 577-78 (Scalia, J., concurring) (contrasting the Court’s institutional deficiencies with Congress’s flexibility in setting terms for suspension of writ of habeas corpus).

⁵⁶ See *Chicago v. Morales*, supra note.

⁵⁷ See Stephen Breyer, *Active Liberty* 73-74 (2005).

⁵⁸ See id.

⁵⁹ See *Hamdi*, 542 US at 517 (“We do not reach the question whether Article II provides such authority, however, because . . . Congress has in fact authorized Hamdi’s detention”).

⁶⁰ See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958).

vindicate this idea in prominent cases.⁶¹ The simple idea is that when a reasonable constitutional objection is raised, the Court does best, if it possibly can, to construe the relevant statute so as to make it unnecessary to address that issue, and so as to force the national legislature to confront it directly and first. The Avoidance Canon is minimalist in the simple sense that it ensures narrower rulings than constitutional invalidations. But it also has the distinctive property of forcing national legislators to deal with the question squarely and unambiguously.

The same general idea helps to explain Justice O'Connor's controversial opinion in the *Brown & Williamson* case.⁶² There the Court struck down the FDA's assertion of jurisdiction over tobacco and tobacco products, notwithstanding the ambiguity of the statutory language and the ordinary rule that agencies are permitted to interpret ambiguous statutes as they see fit.⁶³ Early on, Justice O'Connor's opinion suggests that "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."⁶⁴ This is a clear suggestion that for certain questions, of great "economic and political magnitude," a legislative resolution, rather than a delegation to an agency, will be anticipated. And in closing, her opinion insists "that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."⁶⁵ We might well take this passage to suggest a kind of democracy-forcing minimalism, in the form of a suggestion that if the United States government is going to assert jurisdiction over the tobacco industry, it must be because of a clear judgment to that effect from Congress, and not because of the construction of ambiguous terms by an administrative agency.

A general effort to defend Justice O'Connor's approach, focusing on frontiers cases, might invoke these points as well. When minimalism is defensible in democratic terms, it is in precisely these areas, simply because it is there that the Court should be reluctant to foreclose democratic experimentation, and there too that the Court might

⁶¹ See *Rust v. Sullivan*, 500 US 173, 223-25 (1991) (O'Connor, J., dissenting).

⁶² *FDA v. Brown and Williamson*, 529 US 120 (2000).

⁶³ See *Chevron v. NRDC*, 467 US 837 (1984).

⁶⁴ *Brown and Williamson*, 529 US at 133.

⁶⁵ *Id.* at 160.

evinced a preference for judgments by the nation's lawmakers. At the very least, I suggest that ideas of this kind play a significant role in Justice O'Connor's work on the Court.

Conclusion

One of my central goals in this essay has been to raise some questions about minimalism—to suggest that any general preference for narrow, case-by-case rulings would be too crude and reflexive, and insufficiently attuned to the frequent advantages of width. In Justice O'Connor's opinions, the most vivid example of this problem can be found in the context of affirmative action, where she approves "holistic" admissions decisions but disapproves of point systems. The difficulty is that in key respects, holistic decisions involve the functional equivalent of a point system—but in a way that is not transparent, that eliminates predictability, and that almost certainly ensures unequal treatment of the similarly situated. The idea that the Constitution requires "holistic" judgment neglects the many benefits of clarity and width, not least from the standpoint of equality itself.

None of this means that width is always preferable, or even that courts should adopt a presumption in its favor. The choice between narrow and broad rulings must itself be made on a case-by-case basis; no rule is adequate to the task. Where the Court's decision must be applied in many contexts, and when the issue frequently recurs, the argument for width may well be irresistible. But where the issue arises infrequently, and when the Court lacks the information that would enable it to produce a rule in which it has much confidence, the argument for narrowness is quite strong.

In the context of the war on terror, there is good reason to avoid wide rules, simply because they are so likely to misfire. But in the context of sex discrimination, the Court has earned the right to create strong presumptions that are also wide. Ideas of this kind follow from a conventional inquiry into the costs of decisions and the costs of errors. They are also supported by reference to democratic considerations. I have emphasized that narrow rulings often leave democracy room to maneuver; an additional point is that some forms of minimalism turn out to be democracy-forcing.

With respect to method, a sympathetic understanding of Justice O'Connor's legacy might therefore take the following form. In the most difficult and sensitive cases,

at the frontiers of constitutional law, the Court usually does best if it proceeds narrowly. It does so not because there is any general reason to prefer narrowness to width, but because there are identifiable settings in which width is likely to misfire, and in which it is best to preserve a large space for public dialogue and debate. Understood in these (narrow) terms, Justice O'Connor's preference for narrowness is likely to leave an enduring mark on constitutional law.

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