Review Essay

The Jurisprudence of Uncertainty

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Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*. Cambridge: Harvard University Press, 1999. xiv + 290 pages. $29.95 cloth; $18.95 paper.

In 1959, the political scientist Charles Lindblom published a celebrated defense of incremental policymaking (Lindblom 1988a). In theory, Lindblom observed, policymakers are expected to formulate plans in a comprehensive fashion, clearly identifying their objectives and carefully comparing every alternative means of action. Yet in practice, Lindblom argued, comprehensive policy formulation is almost never performed. Policymaking cannot begin with the ranking of goals because the necessary consensus on political ends usually does not exist and cannot be manufactured. With high-level agreement practically impossible, policymakers seek agreement on a more concrete plane: they limit their attention to policy alternatives that differ only slightly from the status quo, thereby reducing debate to a narrow set of marginal comparisons. Rather than developing a comprehensive account of the best policy option, policymakers simply muddle through, making whatever incremental judgments the prevailing conditions of incomplete information and partial agreement will allow.

If one were to look for a contemporary exemplar of Lindblom's incrementalism, one might well be drawn to Justice Sandra Day O'Connor. Justice O'Connor currently sits in the center of the Supreme Court's ideological spectrum, a position that makes her views decisive in controversies ranging from abortion to affirmative action. O'Connor generally uses her swing position to forge a narrow path. She routinely limits her rulings to the facts of the case at hand, reaching results that resolve specific aspects of the dispute while leaving broader legal questions open

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(Maveety 1996). Instead of adhering to a comprehensive jurisprudential theory, she tends to fashion her opinions around limited cores of agreement, blurring hard-edged principles for the sake of compromise solutions. Much like Lindblom's prototypical policymaker, O'Connor moves from decision to decision, pursuing small-scale settlements rather than seeking sweeping conclusions.

O'Connor is not the only Justice in the history of the Supreme Court who might be described as following a path of compromise and accommodation (Jeffries 1994). Yet, just as incrementalism runs counter to the expectation that policymakers will formulate comprehensive plans, O'Connor's strategy is at odds with conventional expectations about judicial action. According to the common ideal, judicial decisionmaking is meant to be rooted in the clear articulation and neutral application of general principles (Peretti 1999:11–35). The origin and content of these general principles may be conceptualized along many different lines. In whatever way they are understood, however, the principles are taken to be of primary importance. Judges should strive to assimilate each dispute into a principled order, articulating a framework of rules and standards capable of regulating subsequent judicial decisions (Wasserstrom 1961:14–22). In the ideal case, the principled legal order makes judicial action perfectly reasoned and predictable: every legal outcome is reached by the logical application of preexisting rules and standards to each new fact situation. Moreover, within such an ideal system the exercise of judicial power is restrained and impartial: court decisions do not depend on the private whim or bias of the judge presiding over the case, but on a known set of legal principles.[1]

The problem is not that Justice O'Connor falls short of the ideal, but that she does not appear to aspire to it in the first place. She inverts the ideal priorities by adjusting legal principles to suit political constraints. Like an ordinary politician, O'Connor seems to pay attention to the different interests at stake in a given controversy, seeking whatever reasons are acceptable to participating parties rather than strictly applying general principles that transcend the issue at hand. The results of such a strategy are not necessarily unfair, for compromise may in some instances be the most just outcome. Nonetheless, incrementalism lacks the virtues of principled judicial action. It is unreasoned and unpredictable (in the sense that judicial rulings do not flow strictly from the logical application of preexisting principles);

[1] This aspirational view of judicial action has deep roots, reaching back at least to the nineteenth-century "legal science" of Christopher Columbus Langdell (Grey 1983). Even though Langdell's particular theories have long since fallen into disrepute, the claim that judicial decisionmaking ideally rests on the articulation and application of impartial principles has survived (Wechsler 1959; Singer 1988; Fischer 1991). It is still the pursuit of such principles that is commonly thought to give court decisions a distinctively legal quality, distinguishing the judiciary from the other branches of government.

and it is unrestrained and partial (in the sense that decisions depend on the shifting distribution of judicial preferences). When compared to the conventional legal ideal, incrementalism appears to be an irresponsible exercise of judicial power.

Against such criticism, one could argue that the difficulty is less with Justice O'Connor than with the expectations applied to judicial practice. After all, Lindblom himself continued to insist that incrementalism was largely unavoidable regardless of what others might think.[2] If Lindblom is right, then policymakers cannot successfully deal with uncertain, conflict-laden issues except by muddling through them. In a similar vein, one could argue that O'Connor's piecemeal opinions are the only effective kind of judicial decisions possible under conditions of disagreement and limited information. Members of the bench may try to ignore such political limits and, in doing so, they may consistently strive to apply general principles to concrete controversies. But decisions that ignore political context are unlikely to be actual successes (Rosenberg 1991). If judges want to be (and understand how to be) effective, they will see that judicial action is bound up with political circumstance. When the political context is fragmented and in flux, the conventional ideal of principled judicial decisionmaking will be put aside for the sake of acceptable settlements, as the practical task of resolving disputes crowds out the aspiration for carefully reasoned legal judgment. As Edward Levi once put it, "The pretense is that the law is a system of known rules applied by a judge. . . . [Yet in] an important sense legal rules are never clear, and if a rule had to be clear before it could be imposed, society would be impossible" (1949:1).

In short, if one considers judicial action as an exercise in the logical application of general principles to specific controversies, then any judicial process that proceeds from one ambiguous decision to another is a disaster. But, if advocates of legal incrementalism are to be believed, then logical consistency and completeness are not the standards against which the judicial process should be measured in the first place. Although it may lack logical elegance and rigor, a legal system in which the rules are incomplete and in flux is "the only kind of system which will work when people do not agree completely" (Levi 1949:104).

[2] As Lindblom wrote twenty years after the publication of his original article, "I have never understood why incrementalism in its various forms has come to so prominent a place in the policy making literature. [My original] article has been reprinted in roughly forty anthologies. I always thought that, although some purpose was served by clarifying incremental strategies of policy analysis and policy making, to do so was only to add a touch of articulation and organization to ideas already in wide circulation. Nor have I well understood the frequency with which incremental analysis as a norm is resisted. That complex problems cannot be completely analyzed and that we therefore require strategies for skillful incompleteness still seem close to obvious to me" (Lindblom 1988b:257).

The Case for Judicial Incrementalism

Is there anything to the claims of judicial incrementalism? The legal battle spawned by the 2000 presidential election makes this question particularly relevant. During the recount struggle, supporters of Bush and Gore both lambasted the courts for violating the boundaries of judicial power. Although each partisan camp directed its ire toward different decisions and different courts, the overall tenor of their criticism was consistent with the conventional ideal of judicial action. At one point or another, everyone decried the judicial failure to seek the guidance (and obey the constraints) of general principle. From this angle, one could argue that the electoral dispute simply reinforced the value of principled judicial decisionmaking, demonstrating that without the discipline of legal rules and standards judges are just as partisan as everyone else.

Yet, contrary to the conventional view, one might also argue that the line of court decisions culminating in *Bush v. Gore* (2000) actually demonstrated the need for judicial incrementalism. It is true that Bush and Gore partisans called for the courts to apply general principles. But it is also true that what the partisans ultimately resented was not the absence of such principles. The most troublesome fact was that judges issued sweeping orders with decisive consequences. Given the depth of disagreement between partisans, judicial decisions awarding clear victory to one side were inevitably denounced by the loser, regardless of how many general principles judges cited to support their rulings. Under such circumstances, one could argue that the better course would have been to forgo broad judicial decisions. If the judges had behaved in good incrementalist fashion, limiting themselves to whatever narrow core of legal agreement was possible under the conditions of tremendous uncertainty and conflict, then the election dispute would have been pushed out of the courts into the hands of elected officials. These officials may or may not have been capable of brokering a widely acceptable resolution. Whatever the final outcome, however, the power of resolution would have been held by politically accountable actors, and the courts would have been spared the virtually impossible task of imposing a general settlement on deeply divided parties.

All of this makes judicial incrementalism look appealing. But the underlying question remains: Is there anything to the idea of judicial incrementalism in the first place? One of the best places to look for an answer to this question is in the work of Cass Sunstein. In his recent book *One Case at a Time*, Sunstein (1999) presents an extended account of incrementalism on the Supreme Court.

According to Sunstein, the issues before the Supreme Court are often deeply controversial, with no clear consensus on how to

proceed and contradictory information on the consequences of alternative approaches. Mired in disagreement and uncertainty, members of the Court may find it difficult to reach consensus on comprehensive conclusions. Even if judicial consensus can be achieved, sweeping decisions may be nothing more than stabs in the dark that yield unintended and unfortunate consequences. The high cost of reaching broad agreement, coupled with the risk of making blunders, may lead some members of the Court to endorse incremental rulings—a practice Sunstein calls "decisional minimalism" (1999:4). Hobbled by conflict and poor information, the minimalist Justices choose to forgo the forced resolution of fundamental issues and to settle instead for agreement on a few particulars.

With eminently Lindblomian logic, Sunstein thus describes a process of localized adaptation, in which the success of a judicial decision is dependent on the degree to which it suits its political context.[3] Judicial minimalism, like incrementalist policymaking, is valuable because it facilitates political accommodation in times of conflict and uncertainty. Instead of seeking broad settlements, the minimalist members of the Court "ask that decisions be *narrow rather than wide.* They decide the case at hand; they do not decide other cases too, except to the extent that one decision bears on other cases, unless they are pretty much forced to do so" (10, emphasis original). Moreover, minimalist Justices "generally try to avoid issues of basic principle. They want to allow people who disagree on the deepest issues to converge. In this way they attempt to reach *incompletely theorized agreements*" (11, emphasis original). Minimalists thus serve the "great goal" of a free society, "making agreement possible when agreement is necessary, and making agreement unnecessary when it is impossible" (50).

Minimalism or Maximalism?

Read for all it's worth, Sunstein's argument suggests that there is room for nothing but minimalism on the high bench. Indeed, in good Lindblomian fashion Sunstein comes very close to claiming that minimalism is a necessity for the Supreme Court: "As a practical matter, minimalism may be the only possible route for a multimember tribunal, which may be incapable of bridging its many disagreements, and which may be able to converge only on a minimal ruling. If this is so, minimalism will not be so much desirable as inevitable" (57).

[3] This is not to say that Sunstein's book is an overt application of Lindblomian logic. Sunstein draws on a variety of sources, including his own previous statements of minimalist themes (Sunstein 1996). Sunstein's linkage to Lindblom, although indirect, is nonetheless present: Sunstein (1999:52-53) draws on Scott (1998), a book that relies on Lindblomian incrementalism. As will become evident later, I raise the profile of Lindblom's work in this essay because it provides a useful way of highlighting paradoxical tensions within Sunstein's argument.

Sunstein illustrates the practical necessity of minimalism in a variety of domains. He examines current debates over the existence of a right to die; the propriety of affirmative action; the equal treatment of different sexes and sexual orientations; and the extent of free speech in the context of modern mass communication. In each area, he discovers judicial minimalism produced amid the conflict and uncertainty of cutting-edge controversies, proving that in many instances the Court's "best decision is to leave things undecided" (263).

Sunstein buttresses this general finding with criticisms of specific jurists that have failed to appreciate the virtues of minimalism. A number of prominent legal figures, including members of the Supreme Court like Justice Antonin Scalia, universally favor rule-governed, formalistic judicial decisions (Scalia 1997). At any given time, the advocates of such formalism may have enough support on the high bench to prevail over the advocates of case-by-case particularism.[4] But that hardly means that strict formalism makes for better judicial decisions. Formalists always want the Court to maintain a background of clear, broadly applicable legal rules; in times of conflict and uncertainty, however, the judicial assertion of clear rules is often a recipe for ineffective (and perhaps deeply mistaken) judicial action. Whatever influence Justice Scalia may wield, Sunstein insists that the efficacious Court is still the Court that attends to the limits of the political landscape.

In this vein, Sunstein also criticizes historic judicial decisions that have been insufficiently minimalist. Examining *Dred Scott v. Sanford* (1857), for example, Sunstein argues that the Supreme Court unwisely attempted to resolve the debate over slavery once and for all. "There was no need for the Court to have been so ambitious. If the Court had wanted to do so, it could have avoided the controversial issues entirely. . . . In that event, the large issues in the case would have been left alone, and the *Dred Scott* case would have been a relatively unimportant episode in American law" (36–37).

Yet, in spite of all this, Sunstein is not content to live by minimalism alone. Over the course of his argument, he claims that there are many occasions when the Court rightly practices "judicial maximalism." Within a single judicial decision, Sunstein notes, it is often possible to find constricted, thinly justified claims existing right alongside sweeping, fully theorized arguments. Depending on the angle from which it's viewed, a decision may be *both* minimalist and maximalist.

[4] More generally, Sunstein acknowledges that the Supreme Court as a whole may flout minimalism for long periods of time (p. xiii). As I discuss at greater length later, Sunstein's argument is not that minimalism is the only mode of judicial activity possible, but that it is often the best mode available.

As an illustration, Sunstein gives the hypothetical example of a lawsuit asking the Supreme Court to strike down a law regulating sexually explicit speech on the Internet. The Court might invalidate the law on the grounds that it is impermissibly vague, and do so in a way that leaves open the broader question of whether sexually explicit speech in cyberspace should be given the same kind of judicial protection as sexually explicit speech in the bricks-and-mortar world. Since this ruling would leave key questions unresolved, it should be seen as a minimalist decision. Yet, if the doctrine of vagueness were also supported by an ambitious account of rule-of-law requirements that applied to many different contexts, then the same decision should be viewed as maximalist. The general lesson, Sunstein notes, is simple: "[D]ecisions are not usually minimalist or not; they are minimalist *along certain dimensions*" (19, emphasis original).

In short, Sunstein's commitment to minimalism is itself minimalist. He does not think that the Supreme Court should always render narrow or shallow decisions. He argues, for example, that minimalism is insufficient to protect the constitutional background against which the Court operates. By Sunstein's count, the constitutional background is made up of ten broad principles, ranging from the "protection against unauthorized imprisonment" to the "substantive protection of the human body against government invasion" (63–67). The ten principles are themselves the product of minimalist decisionmaking; they have developed over time as a result of close encounters with the contingencies of particular disputes. But the means by which our core constitutional commitments are produced are not necessarily the same means by which these commitments are best defended. When one or more of our core constitutional commitments is contravened, the "internal morality" of our democracy is threatened and a sweeping judicial response is preferable to muddled temporizing (55–56).

In fact, judicial maximalism may not only be necessary to preserve the preconditions of self-government but may also be valuable in a range of less critical circumstances. Sunstein argues that far-reaching, theoretically ambitious decisions may make sense when the cost of continued uncertainty is great, when the need for advanced planning is important, or when members of the Court are confident about their conclusions.

With his endorsement of judicial maximalism, Sunstein distances himself from pure incrementalism. Unlike Lindblom, Sunstein is unwilling to mount a full-scale defense of fragmented decisionmaking. Political divisions and doubt hem in members of the Supreme Court, but the Justices remain able to rise above their circumstances and issue broad, well-justified rulings. In Sunstein's view, the judiciary is not simply a forum of principle nor strictly an agent of political accommodation. Instead, the Su-

preme Court is both, depending on the demands of a particular context. Minimalism and maximalism are, at most, contingent virtues: "When planning is important and judges can devise decent rules, width is all to the good. But when judges lack sufficient information, and when legally relevant facts and values are in flux, minimalism may well be the better route" (209). Sunstein therefore defends the halting minimalism of the Court's affirmative action decisions along with the breathtaking maximalism of *Brown v. Board of Education* (1954).[5]

There is certainly something to be said for such eclecticism. For one thing, it relieves Sunstein from the impossible task of demonstrating that all Supreme Court actions are minimalist. It would be quite hard, for example, to portray *Roe v. Wade* (1973) as something other than the highly detailed, ambitious decision that it is. The efficacy of decisions like *Roe* may certainly be evaluated on minimalist grounds.[6] But the existence of non-minimalist decisions is undeniable. By explicitly acknowledging a world beyond minimalism, Sunstein not only avoids difficult interpretive problems but also gains the ability to describe any judicial decision in terms of his categories. Whatever topic a case concerns or however many opinions a controversy elicits, he can present the resulting ruling as a collage of maximalist and minimalist elements.

Yet, if the goal is to generate a theory capable of guiding judicial choice, then Sunstein's brand of eclecticism is less appealing. The difficulty here is that Sunstein supports maximalism in instances that often look indistinguishable from the cases in which he calls for minimalism. On one hand, Sunstein argues that under conditions of conflict and uncertainty, members of the Court can and should muddle through their decisions one case at a time. On the other hand, he supplies a list of circumstances—circumstances that are themselves characterized by conflict and uncertainty—in which the Court can and should produce wide, deeply theorized decisions. The end result is that Sunstein appears to have his cake and eat it too: judicial minimalism is called for in every case of conflict and uncertainty, except when it is not.

Consider Sunstein's claim that the Court rightly reaches maximalist decisions in order to preserve the "internal morality" of democracy. In controversies involving the preconditions of democracy, it is fair to say that the Court will confront highly contentious questions. Applying the logic of Sunstein's general argument, one might therefore expect such questions to elicit minimalist judicial responses. But this is not the conclusion that Sunstein draws. Although he acknowledges that disputes over

[5] As Sunstein notes, there are also minimalist dimensions to *Brown* (37–38).

[6] Sunstein assesses *Roe* in precisely this way (54).

democratic fundamentals will be serious, Sunstein insists that these disputes will take place in the midst of "striking agreement" about the minimal content of these fundamentals (67). It is this core of agreement that calls for judicial maximalism, even as the conflict and uncertainty buzzing around this core call for judicial minimalism. The simultaneous presence of consensus and dissent requires a delicate touch. When democratic foundations are at stake, the Court should take care (1) to make maximalist claims in defense of core agreements; and (2) to make minimalist claims in response to the surrounding field of conflict and uncertainty.

Sunstein's theory consequently appears to provide fine-grained guidance for justices sorting through heated controversies. But this appearance is deceiving, especially in the context of hard cases. The problem is that disputing parties do not typically confront a situation in which there is common knowledge about what is certain and what is in flux. On the contrary, the boundary between the core of agreement and the zone of uncertainty is *itself* hotly contested (Dworkin 1986:1–44). When litigants argue foundational questions, the relevant regions of uncertainty and agreement do not exist outside the dispute; instead, the definition of these regions is part of the dispute. Thus, in deciding hard cases, the Court not only chooses among zones of consensus and conflict but also determines what is to compose the pertinent zones in the first place. This means that the questions Sunstein uses to steer between minimalism and maximalism (e.g., Does this case involve a fundamental precondition of democracy? What is the content of this precondition?) do not provide an independent basis on which hard cases may be resolved, for the questions that Sunstein poses are the very questions that *constitute* such cases. No matter what decision is reached, members of the Court can always claim to be right on Sunstein's terms, for the same issues that are treated maximally one day may be treated minimally the next, depending on the particular dynamics of litigation. The gulf that Sunstein sees between himself and formalists like Justice Scalia thus disappears: both Sunstein and Scalia can be seen as minimalists (or maximalists) that merely make different judgment calls about when minimalism (or maximalism) is appropriate.

Minimalism and Democratic Deliberation

Although Sunstein does not clearly explain how Justices should choose between minimalism and maximalism, he does assign important consequences to the minimalist decisions that are reached. In his view, minimalist rulings "increase the space for further reflection and debate at the local, state, and national levels, simply because they do not foreclose subsequent deci-

sions" (4). More fundamentally, minimalist decisions promote democratic deliberation by prodding other political actors to address unsettled issues in specific ways. Even as they leave many issues open, incompletely theorized decisions establish the terms on which such issues ought to be resolved, compelling elected officials to develop clear policies based on public-regarding justifications (70–71). Thus, by respecting the conflict and uncertainty that attends a particular controversy, the Court helps create the grounds on which such conflict and uncertainty can be overcome. Judicial minimalism generates a kind of deliberative modus vivendi: the Court's incremental claims form a set of practical compromises that point beyond themselves toward a higher political goal.[7]

Sunstein sees this dynamic at work in the politics of affirmative action. Beginning with *Regents of the University of California v. Bakke* (1978), Sunstein describes a long string of fragmented affirmative action rulings. On the whole, the Court has not authoritatively endorsed racial preferences, but neither has it banished such policies from the public domain. Such indeterminacy is just what democracy requires: "The Court's willingness to hear a number of affirmative action cases and its complex, rule-free, highly particularistic opinions have the salutary consequence of helping to stimulate public processes and directing the citizenry toward more open discussion of underlying questions of policy and principle" (118). The Court has fastened national attention on a thorny political issue without preempting public debate, leaving the hard questions about affirmative action's value to citizens and their elected representatives.

The deliberation-enhancing effects of minimalism play an important role for Sunstein. The basic argument that minimalism is an adaptation to uncertainty and conflict explains why members of the Court issue incremental decisions, but it says little about why other political actors accept such decisions. Sunstein's additional claim that minimalist decisions catalyze democratic deliberation speaks directly to the question of public acquiescence. If Sunstein is correct, then political actors accept narrow, thinly justified judicial decisions because such decisions create a flexible framework in which political argument can continue to unfold. It remains true, of course, that in any given legal dispute each party will prefer a ruling in its favor. And it is also true that in any given decision a minimalist-minded Court will in fact declare one party the winner. But such a Court will do so by leaving many dimensions of the dispute open and the principled underpinning of the opinion incomplete. As a consequence, the Court will reward victorious litigants with less than they might have won and will divest defeated litigants of less than they might

[7] I thank Pratap Mehta for suggesting this formulation to me.

have lost. Both winner and loser might have done better, but they also could have done worse. Moreover, both winner and loser will be left with a flexible legal framework that over time can be invoked to meet different demands, adapted to address developing disputes, and called upon to mobilize political action. The ambiguous, fragmented decision that the Court develops in response to its own confrontation with conflict and uncertainty ends up creating new opportunities for other actors. Minimalism is thus sauce for the judicial goose as well as the public gander.

Unfortunately, Sunstein's argument for democracy-promoting minimalism is seriously underdeveloped. Although he posits a positive link between judicial minimalism and enhanced democratic deliberation, he does little to establish this relationship. More importantly, Sunstein makes no real effort to demonstrate that piecemeal decisions generally stimulate political deliberation more than do sweeping decisions. Since incremental judicial action may easily slip past without public notice, one could argue that minimalist decisions are far more likely to foster political indifference than to arouse spirited debate.[8] Maximalist decisions, by contrast, are broad statements that affect many sectors of society at once. One could argue that when a maximalist decision contravenes important interests, affected groups are likely to take note and engage in political discussion about the propriety of the Court's action. Sunstein does not, of course, view maximalist decisions this way. Yet, in the absence of evidence to the contrary, why should one believe that minimalist decisions do a better job of catalyzing public deliberation than their maximalist counterparts?

Sunstein concedes that his argument requires greater corroboration. Indeed, he explicitly admits that his position would be "much strengthened by evidence that judicial decisions will *in fact* spur, or at least be a healthy part of, ongoing processes of public deliberation" (132, emphasis added). In the end, he decides to celebrate the democratic credentials of judicial minimalism in spite of a frankly acknowledged lack of supporting evidence.[9] "Obviously," he writes, "there are empirical issues here that I have not resolved" (132).

The Future of Judicial Incrementalism

Where does all this leave us? I began this essay by examining the general case for judicial incrementalism. In essence, judicial incrementalism argues that there is value in piecemeal decisions: when faced with conditions of conflict and uncertainty, the wise

[8] I thank Helena Silverstein for suggesting this point to me.

[9] For criticism of the evidence supporting Sunstein's initial articulations of the minimalist argument, see Graber 1999:307–10.

judge responds by limiting the range and logical rigor of his or her ruling. The promised payoff of judicial incrementalism is a fresh analytical perspective on court behavior. Rather than assessing a given judicial action in terms of its distance from conventional ideals of principled decisionmaking, judicial incrementalism calls attention to the importance of ambiguity, compromise, and fragmentation. When looking at *Bush v. Gore* (2000), for example, the question of interest is not whether the Supreme Court crafted a more or less principled result, but whether the Court produced a more or less suitable muddle.

Cass Sunstein is to be commended for taking strides down this road. He develops the incrementalist insight into an account of minimalism on the Supreme Court and, in doing so, he makes several important claims that must be part of any incrementalist approach to the judiciary. First, Sunstein rightly acknowledges that narrow, thinly justified decisions are not the only kind of decisions the Court makes. To study minimalist opinions is not to claim that minimalism is the only important form of judicial action. Second, Sunstein correctly insists that the connection between judicial minimalism and the larger political context be explained. Assessments of minimalist decisionmaking are incomplete without an account of why the public continues to use and obey courts that operate in such a fashion.

Although Sunstein establishes these important general points, his specific account of the relationship between different modes of judicial action is unclear, and his particular explanation of the relationship between the minimalist Court and the public is unsubstantiated. One might argue that these difficulties reveal fundamental problems with the idea of judicial incrementalism itself. But I think the reason for Sunstein's problems is more prosaic: he paints with a broad brush, sacrificing analytical precision for the sake of expressing something general about the Supreme Court.

In my view, the validation of judicial incrementalism awaits a more tightly focused study. Rather than canvassing the Court's entire range of activity, it is worth concentrating on selected areas where the Justices have persistently issued fragmented, thinly justified opinions. The duration of such judicial ambiguity is important. In the short run, incrementalist decisions can be viewed as ephemeral phenomena, the dross that will be washed away as the judicial process advances toward fully theorized opinions one case at a time. In this way, it is possible to accept incomplete, compromise rulings and nonetheless remain committed to the conventional ideal of principled judicial decisionmaking. The true test of judicial incrementalism is therefore in the long run: the claim that muddled judicial decisions have a distinct value has the greatest bite when the muddles in question are long-standing. If the long-term significance of incrementalism can be

demonstrated, then it becomes less plausible to consider it to be a temporary imperfection that the legal process constantly labors to overcome.

Beyond the issue of duration, the selection of specific areas of incrementalist decisionmaking is important because it allows for the careful (and comparative) study of context. How did the members of the Court fashion particular sets of incrementalist rulings? On what resources of argument did they rely? Why these resources rather than others? What are the differences and commonalities between distinct domains of incrementalism? What do other political actors gain from the disjointed claims issued by the Court in each area? These questions echo the ones that guide Sunstein. But in the more constrained setting of a specific analysis these questions can be answered with greater detail and depth. The benefit of better answers is not only that they provide a sharper picture of judicial incrementalism but also that they open the door to informed normative criticism. By practicing incrementalism, the Court draws disputing parties into an unfinished legal world and solicits their help in continuing that world's construction. The terms of participation offered by the judiciary, as incomplete and unsettled as they may be, are worth evaluating for the kind of relationships they seek to engender. Detailed empirical analysis makes this kind of normative assessment possible.

This is not to say that a more focused study will in fact validate the assertions of judicial incrementalism.[10] In any case, it remains true that judicial opinions often appear to be fragmented, ramshackle affairs cobbled together to dispose of the case at hand. At the level of the Supreme Court in particular, judicial decisions often look less like exemplars of careful justification than like the choices a person makes when picking out a midnight snack from whatever looks good in the refrigerator (Carter 1985:22). Advocates of incrementalism argue that such judicial behavior serves important purposes. I believe that this is an argument worth investigating.

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[10] For my own efforts in this vein, see Bybee 2000.

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