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JUDICIAL MINIMALISM IN THE LOWER COURTS

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Debate about the virtues and vices of “judicial minimalism” is evergreen. But as is often the case in public law, that debate so far has centered on the Supreme Court. Minimalism arose and has been defended as a theory about how Justices should judge. This Article considers judicial minimalism as an approach for lower courts, which have become conspicuous and powerful actors on the public law scene. It begins by offering a framework that disentangles the three basic meanings of the term “judicial minimalism”: decisional minimalism, which counsels judges to decide cases on narrow and shallow grounds; prudential minimalism, which counsels judges to avail themselves of various techniques of not deciding cases (the so-called “passive virtues”) on grounds of prudence; and Thayerian minimalism, which counsels judges to refrain from invalidating the actions of the political branches except in cases of clear illegality. This Article then argues that several institutional features of lower courts make judicial minimalism in most of its forms a particularly compelling ideal for lower court judges. Further, attending to the differences between the

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lower courts and the Supreme Court reveals that minimalism is in tension with the institutional logic of the Supreme Court. In all, this Article aims both to clarify the concept of minimalism and to place it in its proper institutional home. After making the case for lower court minimalism, this Article proposes some strategies for realizing it: first, developing a concept of judicial role fidelity that is tailored to the institutional realities of lower courts, and second, reforming case-assignment rules, nationwide injunctions, and the size of the federal bench to help channel lower courts toward more minimalist outcomes.

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INTRODUCTION

The lower federal courts are active and conspicuous these days. “[I]nferior” Article III courts (as the Constitution calls them¹) have “now assumed enormous legal, political, and cultural significance.”² They have repeatedly reviewed and halted major initiatives of the Trump and Biden Administrations,³ often generating front-page headlines and issuing decisive nationwide relief that reshapes American life.⁴ In the process, they have decided—at least provisionally—major questions roiling the nation, involving everything from abortion to race, religious freedom, public health, immigration, and presidential power. It is an opportune time to reflect on the proper role of a lower court judge in a public law case.

One of the most prominent theories addressing that general issue—the proper role of a judge—goes by the label “judicial minimalism.” Minimalism seems to be everywhere: it is deployed in court opinions,⁵

¹ U.S. Const. art. III, § 1.

² Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What *The Dialogue* (Still) Has To Teach Us*, 69 *Duke L.J.* 1, 32 (2019). The present salience of lower federal courts may not be historically unprecedented. One thinks, for instance, of the lower courts as a focal point in the fight over federalism in the early Republic, Alison L. LaCroix, *The Ideological Origins of American Federalism* 179 (2010); of lower court enforcement of the fugitive slave laws, Robert Cover, *Justice Accused: Antislavery and the Judicial Process* 159–74 (1975); or of lower courts issuing injunctions against organized labor in the Progressive Era, William E. Forbath, *The Shaping of the American Labor Movement*, 102 *Harv. L. Rev.* 1109, 1148–65 (1989).

³ See Bert I. Huang, *Judicial Credibility*, 61 *Wm. & Mary L. Rev.* 1053, 1060 (2020) (noting that the Trump era was “a political moment when numerous government actions [were] being blocked by the lower federal courts”); Fred Barbash, Deanna Paul, Brittany Renee Mayes & Danielle Rindler, *Federal Courts Have Ruled Against Trump Administration Policies at Least 70 Times*, *Wash. Post* (Apr. 26, 2019), <https://www.washingtonpost.com/graphics/2019/politics/trump-overruled/> [<https://perma.cc/MR8E-WMTX>] (“All administrations lose cases, but experts cannot recall so many losses in such a short time.”); Ian Millhiser, *Just How Much Is Trump’s Judiciary Sabotaging the Biden Presidency?*, *Vox* (Dec. 27, 2021) (on file with editors), <https://www.vox.com/22820378/trump-biden-supreme-court-judiciary-sabotage>.

⁴ E.g., Michael D. Shear, Stacy Cowley & Alan Rappoport, *Biden’s Efforts at Race Equity Run into Snags*, *N.Y. Times*, June 27, 2021, at A1; Alexander Burns, *Federal Judge Blocks New Ban on Travel to U.S.*, *N.Y. Times*, Mar. 16, 2017, at A1. I represented the plaintiffs in the second of these cases, culminating in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). The views expressed in this Article are my own.

⁵ See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (ruling on narrow, case-specific grounds); *id.* at 1883 (Barrett, J., concurring) (defending this narrow disposition); *id.* at 1887–88 (Alito, J., concurring in the judgment) (criticizing the majority’s narrow disposition). I represented the City of Philadelphia in the Supreme Court in *Fulton*. Again, the positions taken here are mine.

theorized in the legal academy,⁶ and debated in the commentariat.⁷ It is a “dominant school of thought” today, with deep roots in our legal culture.⁸ Eminences like James Bradley Thayer, Oliver Wendell Holmes, Alexander Bickel, Ruth Bader Ginsburg, and Cass Sunstein, to name only a few, have embraced variants of minimalism.⁹

To date, however, debates about lower court judging and debates about minimalism have rarely intersected. The bulging literature on judicial minimalism has focused on the *Supreme* Court of the United States. Minimalism developed and has been offered as a philosophy for Justices, not judges. As far as I am aware, no one has systematically considered whether judicial minimalism makes sense as a model for lower court judges, who handle the vast bulk of Article III adjudication.¹⁰

This Article takes up that question and answers yes: the institutional situation of lower courts makes judicial minimalism in most of its forms a particularly compelling model for a lower court judge. Substantiating that claim requires a few steps. The first is to define what judicial minimalism is and unpack why it has been defended, and so this Article begins by offering a framework that disentangles the three core meanings of judicial minimalism. Next, this Article walks through the institutional

⁶ See *infra* Part I.

⁷ E.g., David Cole, *Surprising Consensus at the Supreme Court*, N.Y. Rev. of Books (July 7, 2021), <https://www.nybooks.com/articles/2021/08/19/surprising-consensus-at-the-supreme-court/> [<https://perma.cc/2VZH-9GDU>] (discussing “minimalism” in the Supreme Court’s recently concluded Term); Jay Michaelson, *Your Father’s Supreme Court*, *Intelligencer*, N.Y. Mag. (July 3, 2021) (on file with editors), <https://nymag.com/intelligencer/2021/07/your-fathers-supreme-court.html> (same).

⁸ Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 Va. L. Rev. 1753, 1776 (2004); Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 Vand. L. Rev. 935, 938–39 (2016) (“Minimalism remains vibrant and is almost certainly the most important contemporary constitutional theory that formally takes into account the dynamic between the Supreme Court and elected government.”).

⁹ See *infra* Part I.

¹⁰ See Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 93 (2006) (noting that “the eighty cases that the Supreme Court hears annually represent the small tip of a vast iceberg” and that “most determinative legal interpretations occur instead in the federal courts of appeals, in the state supreme courts, and in state appellate courts”); Sanford Levinson, *On Positivism and Potted Plants: Inferior Judges and the Task of Constitutional Interpretation*, 25 Conn. L. Rev. 843, 844 (1993) (“The behavior of the roughly 100 circuit judges and 500 district judges is, for most citizens most of the time, far more likely to count as ‘the law’ than the pronouncements of the nine denizens of the Supreme Court . . .”).

features of lower courts that distinguish them from the Supreme Court and explores how those features bear upon the judicial role. I argue that, taken together, those features counsel in favor of an approach to judging that coincides closely with the program of judicial minimalism. The call for institutional “situation-sense” that motivates this Article yields more than just a prescription for lower courts. Attending to the full context of the judicial system calls into question judicial minimalism as an ideal for the Supreme Court—the institution it was designed to address. Finally, the Article closes with some proposed reforms to cultivate a measure of minimalism in the lower courts. In a word, I aim to give the concept of judicial minimalism more analytical precision and to place it in its proper institutional home.

Such a project seems timely. As noted, lower courts have become highly visible and powerful actors on the public law scene.¹¹ They are, as a result, starting more and more to attract the notice of theorists and commentators.¹² This attention is welcome. The traditional (if often implicit) focus of public law scholarship has been the Supreme Court, and the lower courts, as a result, were often overlooked.¹³ In recent years, though, scholars have paid increasing heed to the *variety* of institutions that consider and decide questions of public law.¹⁴ The core contention of this “institutional turn” is that normative theory about legal decision making ought to be bespoke, tailored to the manifold institutional settings

¹¹ See *supra* note 2.

¹² See, e.g., Perry Bacon Jr., *The Most Dangerous Conservative Judges Aren't on the Supreme Court*, *Wash. Post* (Dec. 21, 2021), <https://www.washingtonpost.com/opinions/2021/12/21/most-dangerous-conservative-judges-arent-supreme-court/> [<https://perma.cc/J4KJ-VZTH>].

¹³ See Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 *Law & Soc. Inquiry* 679, 681 (1999) (“Our excessive focus on the Supreme Court . . . has over the years minimized and obscured large areas of American experience . . .”); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 *Tex. L. Rev.* 1, 4 (1994) (“[W]hile numerous scholars have comprehensively explored the nature and function of judicial law declaration from the perspective of the Supreme Court or a hypothetical single-judge judiciary, few have considered the view from below and the interaction between subordinacy and function.”).

¹⁴ See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 *Mich. L. Rev.* 885, 920–22 (2003). Of course, at a high level of generality, legal scholarship had been preoccupied with institutional questions since at least the legal process school, see Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 *Harv. L. Rev.* 1393, 1396 (1996), but Professors Sunstein and Vermeule called for a more rigorously empirical and less stylized approach to institutional analysis. Sunstein & Vermeule, *supra*, at 897–913.

in which questions of public law are resolved.¹⁵ The study of lower courts has been a beneficiary of this institutional turn: recent scholarship has examined originalism,¹⁶ popular constitutionalism,¹⁷ statutory interpretation,¹⁸ stare decisis,¹⁹ foreign law,²⁰ *Chevron* deference,²¹ and other topics in the context of lower federal courts,²² to say nothing of state courts.²³ This scholarship has usefully foregrounded the judicial bodies that decide many multiples more cases than the ever-vanishing sliver that makes its way to the Supreme Court.²⁴ But the void regarding judicial

¹⁵ Sunstein & Vermeule, *supra* note 14, at 886.

¹⁶ See Ryan C. Williams, Lower Court Originalism, 45 *Harv. J.L. & Pub. Pol’y* 257 (2022).

¹⁷ Katie Eyer, Lower Court Popular Constitutionalism, 123 *Yale L.J. Online* 197, 215–18 (2013).

¹⁸ James J. Brudney & Lawrence Baum, Protean Statutory Interpretation in the Courts of Appeals, 58 *Wm. & Mary L. Rev.* 681, 686 (2017); Aaron-Andrew P. Bruhl, Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court, 97 *Cornell L. Rev.* 433, 470–84 (2012).

¹⁹ Amy Coney Barrett, Statutory Stare Decisis in the Courts of Appeals, 73 *Geo. Wash. L. Rev.* 317, 318 (2005).

²⁰ Roger P. Alford, Lower Courts and Constitutional Comparativism, 77 *Fordham L. Rev.* 647, 656–64 (2008).

²¹ Michael Coenen & Seth Davis, Minor Courts, Major Questions, 70 *Vand. L. Rev.* 777, 799–820 (2017) (arguing that the “major questions” exception to *Chevron* deference should not be applied in lower courts).

²² Z. Payvand Ahdout, Enforcement Lawmaking and Judicial Review, 135 *Harv. L. Rev.* 937, 960–73 (2022) (evaluating lower courts’ use of case management techniques in recent separation-of-powers suits); Richard M. Re, Narrowing Supreme Court Precedent from Below, 104 *Geo. L.J.* 921, 925 (2016) (arguing that lower courts can legitimately “narrow” Supreme Court precedent in certain circumstances); Doni Gewirtzman, Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System, 61 *Am. U. L. Rev.* 457, 506–09 (2012) (viewing lower court decision making through the lens of complexity theory). For a critique of the federal courts of appeals as they currently operate that blends historical, empirical, and normative strands, see generally William M. Richman & William L. Reynolds, *Injustice on Appeal: The United States Courts of Appeals in Crisis* (2013).

²³ See David E. Pozen, Judicial Elections as Popular Constitutionalism, 110 *Colum. L. Rev.* 2047, 2064–86 (2011) (exploring how judicial elections for state courts relate to theories of popular constitutionalism); Helen Hershkoff, State Courts and the “Passive Virtues”: Rethinking the Judicial Function, 114 *Harv. L. Rev.* 1833, 1842–76 (2001) (offering a comprehensive survey of justiciability doctrines in state courts); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 *Ga. L. Rev.* 165, 166 (1984) (exploring the relationship between constitutional theory and “the world of the state courts”).

²⁴ In the 2020 Term, the Supreme Court issued only fifty-seven decisions in argued cases (and sixty-seven decisions including summary reversals and orders on the shadow docket). Stat Pack for the Supreme Court’s 2020–21 Term, SCOTUSBlog, <https://www.scotusblog.com/statistics> [<https://perma.cc/SUY9-X5RD>] (last visited May 20, 2022). The federal courts of appeals decide nearly fifty thousand cases per year. Admin. Off. of the U.S. Cts., Table B: U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2019 and 2020, at 1 (Sept. 30, 2020),

minimalism persists. And, in some ways, minimalism is even more fundamental than these other questions because it goes to the basic attitude a judge should have toward the task of adjudication and so is interwoven with all the first-order interpretive debates just noted.²⁵

Judicial minimalism also relates to larger public controversies unfolding now about whether the federal judiciary should be reorganized or limited. Many feel that the judiciary is out of step with the political and legal mainstream.²⁶ Prominent academics have called for major court reforms.²⁷ President Biden appointed a commission to explore, among other things, changing the size of the Supreme Court—a proposal that would have been nearly unthinkable not long ago.²⁸ Other scholars have objected to the increasingly prevalent “nationwide” injunction.²⁹ Still others have criticized the federal courts for insulating certain forms of structural inequality in American society and have called for a reorientation of public law scholarship toward “institutional reform and democratic action.”³⁰ Many of these proposals borrow overtly or implicitly from theories of judicial minimalism—for instance, institutionalizing a norm of deference to the political branches through supermajority voting requirements or limiting courts’ jurisdiction and

https://www.uscourts.gov/sites/default/files/data_tables/jb_b_0930.2020.pdf
[<https://perma.cc/U7M2-ESJB>].

²⁵ See *infra* notes 98–103 and accompanying text.

²⁶ See Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. Rev. (manuscript at 20) (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797051 [<https://perma.cc/56BE-6CKF>] (noting the pro-Republican structural biases in our method for selecting judges); Joshua P. Zoffer & David Singh Grewal, *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 Calif. L. Rev. Online 437, 454–62 (2020) (documenting the rise of federal judges appointed by Presidents and Senators representing a minority of the populace and the resulting legitimacy crisis in the federal judiciary).

²⁷ See generally Presidential Comm’n on the Sup. Ct. of the U.S., *Final Report* (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/K69J-T2C8>] (summarizing and assessing potential Supreme Court reforms).

²⁸ Michael D. Shear & Carl Hulse, *Biden Orders Panel’s Review on Expanding Supreme Court*, N.Y. Times, Apr. 10, 2021, at A13; cf. David E. Pozen, *Self-Help and the Separation of Powers*, 124 Yale L.J. 2, 34 (2014) (“‘Court packing’ is especially out of bounds.”).

²⁹ E.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 457–65 (2017).

³⁰ Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 Yale L.J. 1784, 1807, 1829 (2020).

remedial powers.³¹ More broadly, these controversies about the judicial power confirm the growing need for public law theorists to grapple with *lower courts*, who define, as a practical matter, the meaning of federal law for so many people.³²

This Article has three Parts. Judicial minimalism is a woolly concept that is often invoked to mean different and even contradictory things. Part I offers a novel typology of judicial minimalisms to set the analytical table for the rest of the discussion. As a preview, judicial minimalism has three core senses: first, *decisional* minimalism, associated most closely with Professor Cass Sunstein,³³ which counsels judges to decide cases on narrow and shallow grounds; second, *prudential* minimalism, associated most closely with Professor Alexander Bickel,³⁴ which counsels judges to avail themselves of various techniques of *not* deciding cases (the so-called “passive virtues”) on grounds of prudence; and third, *Thayerian* minimalism, associated originally with Professor James Bradley Thayer,³⁵ which counsels judges to refrain from invalidating the actions of the political branches except in cases of clear illegality. My focus in this Article is decisional minimalism, but I define the other two forms and consider their applications in lower courts too.

³¹ See, e.g., Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 *Calif. L. Rev.* 1703, 1727 (2021) (proposing that a supermajority of Justices be required to strike down federal legislation); Howard M. Wasserman, *Congress and Universal Injunctions*, 2021 *Cardozo L. Rev. De Novo* 187, 192–201 (discussing various proposals to reform nationwide or “universal” injunctions in Congress); cf. K. Sabeel Rahman, *Constitutional Law 101: A Primer for the Law and Political Economy Blog*, LPE Project (Nov. 23, 2018), <https://lpeproject.org/blog/constitutional-law-101-a-primer-for-the-law-and-political-economy-blog-3/> [<https://perma.cc/UK7N-BSVU>] (“[V]iewed from a political economic lens, the battle for inclusion may sometimes involve judicial intervention, and other times involve judicial minimalism.”).

³² See *supra* notes 10, 24. Indeed, it is even possible that lower court reform could achieve some of the same ends as “packing” the Supreme Court. See McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 *S. Cal. L. Rev.* 1631, 1634 (1995) (“[U]nder the appropriate circumstances, expansion of the lower judiciary can have the same effect on judicial doctrine as packing the Supreme Court.”).

³³ Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 3–6 (1999) [hereinafter Sunstein, *One Case at a Time*]; Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 *Harv. L. Rev.* 4, 6–10 (1996) [hereinafter Sunstein, *Leaving Things Undecided*].

³⁴ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 111–98 (1962) [hereinafter Bickel, *Least Dangerous Branch*]; Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 *Harv. L. Rev.* 40, 47–51 (1961) [hereinafter Bickel, *Passive Virtues*].

³⁵ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129, 144 (1893).

Equipped with this taxonomy, Part II surveys several key institutional features of lower federal courts that distinguish them from the Supreme Court and evaluates how these features might affect the proper judicial role.³⁶ The variables include docket size and judicial workload, the operative rules of stare decisis, the assignment of judges, the methods of case selection, and the processes of judicial appointment. I argue that the differences between lower courts and the Supreme Court along these lines make judicial minimalism in most of its forms a more compelling ideal in the lower courts.³⁷ The differences also reveal that decisional minimalism is in deep tension with the institutional logic of the Supreme Court in its present form. The Court's near-total control over its agenda, its own stated criteria for granting certiorari, its limited case load, and its structural role as a superintendent of federal law through rare and episodic interventions

³⁶ This Article is confined to the federal district courts and courts of appeals. There is much greater institutional variety among state courts than there is among lower federal courts, and that variety would have to inform any analysis of minimalism in those venues. Judicial elections, in particular, would affect the democracy-based justifications for minimalism. See Pozen, *supra* note 23, at 2052 (“Elected judges . . . might claim a special license to incorporate public opinion into their decisional process, to engage in *majoritarian review*.”); Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 *Colum. L. Rev.* (forthcoming 2022) (manuscript at 5–14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4016573 [<https://perma.cc/WWC6-P82S>] (laying out similarities and differences between state and federal courts). Nor will I discuss minimalism for so-called “Article I” judges or administrative agencies. See Laura K. Donohue & Jeremy McCabe, *Federal Courts: Art. III(1), Art. I(8), Art. IV(3)(2), Art. II(2)/I(8)(3), and Art. II(1) Adjudication*, 71 *Cath. U. L. Rev.* (forthcoming 2022) (manuscript at 3–5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3825670 [<https://perma.cc/4ZVH-XHJY>] (discussing the full range of congressionally created courts); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 *Geo. L.J.* 53, 56–77 (2011) (discussing a form of “minimalism” in agency policymaking).

³⁷ My focus is public law cases, particularly constitutional and administrative law. See Hanoch Dagan & Benjamin C. Zipursky, *Introduction: The Distinction Between Private Law and Public Law*, in *Research Handbook on Private Law Theory* 1, 3 (Benjamin C. Zipursky & Hanoch Dagan eds., 2020). Private law in lower federal courts is complicated by *Erie Railroad Co. v. Tompkins* and the frequent primacy of state law. See 304 U.S. 64, 78 (1938). That said, decisional minimalism is a framework that is potentially applicable in any case, and this Article may very well have implications for federalized areas of private law like intellectual property, antitrust, or labor law. Cf. Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 *Vand. L. Rev.* 1543, 1564–67 (2010) (defending a minimalist approach to intellectual property disputes). But my normative prescriptions will probably have the most bite in prominent public law cases because that is where non-minimalist decisions will be rewarded most in our current partisan ecosystem. See *infra* notes 42, 375.

all make the modern Court, in an important sense, an inherently anti-minimalist institution.³⁸

Part III considers how judicial minimalism might be inculcated in lower courts. I begin with the need to develop a distinctive concept of role fidelity for lower court judges fitted to their institutional situation. “Role fidelity” refers to the ways that a judge’s socially conditioned understanding of her role affects the way she fulfills that role.³⁹ One consequence of the Supreme Court fixation of so much public law scholarship (and pedagogy) is that it tends to flatten concepts of judicial role fidelity.⁴⁰ A lower court judge is implicitly encouraged to act like a mini-Justice. But ideals of judicial craft should not be flat.⁴¹ And an important element of “role fidelity” for a lower court judge—that can be given life through doctrine, commentary, and the appointment process—is judicial minimalism.

Urging judges to be more minimalist is unlikely to be enough, however, because the current political climate and structure of the lower federal judiciary at times enable and even incentivize non-minimalist behavior by motivated judges.⁴² As a result, some structural reform is also

³⁸ See Frederick Schauer, *Abandoning the Guidance Function: Morse v Frederick*, 2007 Sup. Ct. Rev. 205, 207–08 (criticizing decisional minimalism for undermining the Court’s “guidance function” in light of its limited case load); Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 Cornell L. Rev. 1, 3 (2009) (arguing that minimalism is in tension with the Constitution, which makes the Supreme Court “supreme” in defining the content of federal law). On the Supreme Court’s extensive powers of agenda control, see Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 Colum. L. Rev. 665, 683–711 (2012).

³⁹ The concept of judicial “role fidelity” was pioneered by Professor Robert Cover in his study of anti-slavery judges before the Civil War. See Cover, *supra* note 2, at 7, 192–93; see also Pozen, *supra* note 23, at 2084 (defining “role fidelity”).

⁴⁰ See Barrett, *supra* note 19, at 352 (“We tend to take a one-size-fits-all approach to federal court decision-making, assuming that the same interpretive practices should apply throughout the federal courts.”).

⁴¹ Pozen, *supra* note 23, at 2084 (noting the view that “there is no global ideal of judicial craft that exists independent of judicial structure”); Coenen & Davis, *supra* note 21, at 783 (arguing in favor of “assigning to different types of federal courts differentiated approaches to reviewing government action”) (italics omitted).

⁴² Professor Suzanna Sherry has observed that Supreme Court Justices increasingly seem to “seek[] the approval of [their] own ideologically-polarized in-group” and that “[j]udicial polarization becomes a larger problem when coupled with the modern trend of declining institutional loyalty.” Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 Iowa L. Rev. 181, 191–92 (2020). Some recent instances of lower court maximalism suggest that similar forces may be seeping into all levels of the federal judiciary. Cf. Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. Rev. 1373, 1437 (2021) (documenting a “dramatic spike in partisan en banc decision-making” in the courts of appeals and suggesting

important. I suggest reforming case-assignment rules, requiring the concurrence of more than one judge for nationwide injunctions, and, for reasons that are not entirely intuitive but that I will explain below, expanding the size of the federal bench. This may sound like an ambitious program. But, given that structural reform of the judiciary is on the table right now in a way that it has not been for generations, there is reason to be hopeful.

I. THREE CONCEPTS OF MINIMALISM

The word minimalism is a coat of many colors.⁴³ In this Part, I anatomize it into its three basic senses in legal theory—decisional, prudential, and Thayerian. At the outset, it may be useful to classify these minimalisms in terms of what they minimize. Decisional minimalism—the narrow and shallow disposition of cases—minimizes the scope and impact of judicial opinions and so minimizes the sum total of decision costs and error costs as well as judicial interference with the political branches.⁴⁴ Prudential minimalism—what Bickel called the passive

that there “are significant red flags to indicate that longstanding rule-of-law and collegiality norms on the federal bench are eroding”). One virtue of lower court minimalism is that it insists on a kind of judicial craft and humility that could resist the encroachments of polarization in the lower federal judiciary. See Frederick Schauer, Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior, 68 U. Cin. L. Rev. 615, 631 (2000) (suggesting that, at least twenty years ago, “prose and craft” might have been more important “determinants of reputation” for lower court judges than substantive outcomes, in contrast to Supreme Court Justices).

⁴³ The literature on judicial minimalism is vast. For some prominent works beyond the Sunstein-Bickel-Thayer canon, see generally Jamal Greene, Maximinimalism, 38 Cardozo L. Rev. 623 (2016); Devins, *supra* note 8; Tara Smith, Reckless Caution: The Perils of Judicial Minimalism, 5 N.Y.U. J.L. & Liberty 347 (2010); Grove, *supra* note 38; Schauer, *supra* note 38; Christopher J. Peters & Neal Devins, Alexander Bickel and the New Judicial Minimalism, *in* The Judiciary and American Democracy: Alexander Bickel, the Countermajoritarian Difficulty, and Contemporary Constitutional Theory 45 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005); 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); Molot, *supra* note 8; Heather K. Gerken, The Costs and Causes of Minimalism in Voting Cases: *Baker v. Carr* and Its Progeny, 80 N.C. L. Rev. 1411 (2002); Sheldon Gelman, The Hedgehog, the Fox, and the Minimalist, 89 Geo. L.J. 2297 (2001); Christopher J. Peters, Assessing the New Judicial Minimalism, 100 Colum. L. Rev. 1454 (2000); Michael J. Perry, Constitution, the Courts, and the Question of Minimalism, 88 Nw. U. L. Rev. 84 (1993).

⁴⁴ As I will explain below, one could also understand decisional minimalism as minimizing “jurispathy,” in Professor Robert Cover’s sense. See Robert M. Cover, Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 40 (1983); Greene, *supra* note 43, at 647 (linking minimalism with the avoidance of “jurispathic” court decisions).

virtues—minimizes the occasions for judicial involvement in the first place. Finally, Thayerian minimalism minimizes the instances in which judges invalidate the work of the political branches.

These minimalisms also aim ideally to generate different forms of deliberation and dialogue in the wider political system.⁴⁵ Decisional minimalism will generally leave space for dialogue in the political branches while also recognizing that certain narrow and shallow interventions can improve the quality of public deliberation. Prudential minimalism is sensitive to the fact that premature (or sometimes *any*) judicial engagement can thwart political dialogue that might either (1) ready the nation for a principled judicial ruling or (2) produce information to improve judicial decision making. And Thayerian minimalism favors across-the-board deference to protect the interpretive primacy of the political branches and thereby improve the quality of deliberation in those branches.

These forms of minimalism are analytically independent. One can be a decisional minimalist and not a Thayerian minimalist, and so on.⁴⁶ But what unites all three is that—in different ways and to varying degrees—they ask courts to do less and thus to leave ordinary political processes relatively free of judicial interference.

I am not the first to attempt a typology of minimalisms. Until now, the dominant approach has been to distinguish between “procedural” and “substantive” minimalism.⁴⁷ I find the substance-procedure dichotomy to be unclear.⁴⁸ This lack of clarity is exemplified by the fact that two of the

⁴⁵ I am grateful to Professor Chuck Sabel for suggesting this frame. Cf. Charles F. Sabel & William H. Simon, Democratic Experimentalism, in *Searching for Contemporary Legal Thought* 477, 486 (Justin Desautels-Stein & Christopher Tomlins eds., 2017) (exploring how constitutional “values arise in mutually transformative dialogue between individuals and institutions in their immediate contexts and courts articulating the framing values of the society as a whole”); Barry Friedman, Dialogue and Judicial Review, 91 *Mich. L. Rev.* 577, 581 (1993) (“Courts serve to facilitate and mold the national dialogue concerning the meaning of the Constitution . . .”).

⁴⁶ For a brief discussion of the way that different forms of minimalism interact, see *infra* note 153.

⁴⁷ See Devins, *supra* note 8, at 941; Peters, *supra* note 43, at 1459–60; see also Cass R. Sunstein, Testing Minimalism: A Reply, 104 *Mich. L. Rev.* 123, 124–25 (2005) [hereinafter Sunstein, Testing Minimalism] (distinguishing “procedural minimalism” from “minimalism’s substance” (emphasis omitted)).

⁴⁸ Cf. Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 *Yale L.J.* 333, 336–37 (1933) (noting that the distinction between “substance” and “procedure” is illusory and unhelpful for at least some purposes).

leadings scholars of minimalism seem to use the terms in opposite senses.⁴⁹ Hence, my own proposed trichotomy, to which I now turn.

A. *Decisional Minimalism*

Decisional minimalism is in some ways an old and familiar idea. As early as 1875, the Supreme Court extolled the “rule,” which “ought always to govern this court, to decide nothing beyond what is necessary to the judgment we are to render.”⁵⁰ Justice Brandeis later made the same point in his *Ashwander v. Tennessee Valley Authority* concurrence: “The Court will not ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’”⁵¹ The modern academic most responsible for giving minimalism its present prominence and theoretical grounding is Professor Cass Sunstein,⁵² though it has also been embraced by a number of other public law scholars, including

⁴⁹ Compare Peters, *supra* note 43, at 1461 (“Both narrowness and shallowness are manifestations of *procedural* minimalism . . .”), with Devins, *supra* note 8, at 941 (“Substantive minimalism . . . envisions that the Supreme Court will decide the dispute at hand but issue ‘narrow and shallow’ decisions.”).

⁵⁰ *United States v. Joseph*, 94 U.S. 614, 618 (1876).

⁵¹ 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & P.S.S. Co. v. Emigration Comm’rs*, 113 U.S. 33, 39 (1885)); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 596 (1952) (Frankfurter, J., concurring) (“It is . . . incumbent upon this Court to avoid putting fetters upon the future by needless pronouncements today.”); *PDK Lab’ys Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) (“[I]f it is not necessary to decide more, it is necessary not to decide more . . .”). Justice Holmes meant something similar when he said in a common law admiralty context: “I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.” *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). In other words, judges should make small choices to fill small gaps. See Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 *Wm. & Mary L. Rev.* 19, 35 (1995) (explicating Holmes’ rather opaque metaphor); *id.* at 45 (“The Holmesian judge is an austere minimalist . . .”).

⁵² Greene, *supra* note 43, at 624 (calling Sunstein “the American academy’s most articulate minimalist”). Some credit Sunstein with “coin[ing]” the phrase judicial minimalism, Grove, *supra* note 38, at 5, though the word was in circulation earlier. See, e.g., Cover, *supra* note 44, at 57 n.158 (describing Thayer and Bickel as holding a “minimalist position on judicial review”).

Professors Robert Burt,⁵³ William Eskridge,⁵⁴ and Jamal Greene,⁵⁵ as well as then-Judge Ruth Bader Ginsburg.⁵⁶

Minimalist opinions exhibit two features.⁵⁷ First, they are *narrow* rather than wide—that is, they “decide the case at hand” and “do not decide other cases too, except to the extent that one decision necessarily bears on other cases.”⁵⁸ Second, they are *shallow* rather than deep—that is, they eschew ambitious and abstract theoretical justifications.⁵⁹ A court can resolve a concrete case without an account of the ultimate theoretical foundations of its judgment.⁶⁰ For instance, two judges might have different foundational theories of the First Amendment or political morality but nevertheless agree (and join an opinion stating) that political speech warrants special protection.⁶¹

⁵³ Robert A. Burt, *The Constitution in Conflict*, 5–6 (1992); see Peters, *supra* note 43, at 1470 (“Robert Burt might be considered a progenitor of the new judicial minimalism.”). Sunstein acknowledged the affinities of his program and Burt’s program. Sunstein, *Leaving Things Undecided*, *supra* note 33, at 8 n.5.

⁵⁴ See William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *Yale L.J.* 1279, 1310–11 (2005).

⁵⁵ Greene, *supra* note 43, at 646–49. While Greene defends “narrow” judicial decisions that give constitutional culture “breathing room” to grow and develop, he is skeptical of shallowness because, in his view, shallowness can “obscure the basis for the Court’s decisions” and thus undermine public deliberation. *Id.* at 647–48. Greene’s critique of the regnant rights-as-trumps framework also bears a family resemblance to minimalism, in that it favors “particularist” resolutions of rights disputes. See Jamal Greene, *Foreword: Rights as Trumps?*, 132 *Harv. L. Rev.* 28, 61–63 (2018). Rather than “homogenize the law,” Greene suggests that “substantive norms cannot be realized without significant specificity in their application.” *Id.* at 62.

⁵⁶ Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 *N.Y.U. L. Rev.* 1185, 1198 (1992).

⁵⁷ In this Section, I use “minimalist” and “minimalism” as a shorthand to refer to “decisional minimalism.” In later sections, I will specify which form of minimalism I mean.

⁵⁸ Sunstein, *One Case at a Time*, *supra* note 33, at 10.

⁵⁹ *Id.* at 11–14.

⁶⁰ *Id.* at 13.

⁶¹ Sunstein calls this an “incompletely theorized agreement[.]” *Id.* at 11 (emphasis omitted); see Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 *Harv. L. Rev.* 1733, 1735–36 (1995) [hereinafter Sunstein, *Incompletely Theorized Agreements*]. Professor Lawrence Solum has similarly defended “shallow” judicial decision making. Lawrence B. Solum, *Public Legal Reason*, 92 *Va. L. Rev.* 1449, 1501 (2006) (“Law’s deliberations should be shallow and not deep.”). See also John Rawls’s acknowledgement that “justice as fairness deliberately stays on the surface, philosophically speaking,” John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 *Phil. & Pub. Affs.* 223, 230 (1985), and Richard Rorty’s argument on the value of “philosophical superficiality” to liberal democracy. Richard Rorty, *The Priority of Democracy to Philosophy*, in *The Pragmatism Reader: From Peirce Through the Present* 381, 393–94 (Robert B. Talisse & Scott F. Aikin eds., 2011).

Narrowness and shallowness are relative, rather than absolute, characteristics.⁶² A stylized example will illustrate this point. Imagine a stripped-down process for resolving disputes where two parties present arguments to a judge. The most narrow and shallow disposition would be for the judge simply to declare one party the winner with no explanation at all. Such a disposition would not establish a principle broader than the particular case and would not exhibit any theoretical depth. But that level of reticence is not always possible or desirable, especially in a federal courtroom. It inheres in our ideal of the rule of law and our basic expectations of judicial craft that judges will give reasons for their dispositions.⁶³ To give a reason is typically to appeal to some governing principle that is more general than the particularities of the dispute before the judge.⁶⁴ And, in a legal culture like ours, which values consistency in the disposition of cases and adheres to a version of *stare decisis*, to decide a case by reference to some general principle may effectively resolve other cases as well.⁶⁵

Decisional minimalism does not negate the obligation to give reasons; rather, it concerns the *scope* of the reasons given. A decision is narrow, relatively speaking, if it resolves the dispute at hand and fewer other cases

⁶² Sunstein, *One Case at a Time*, supra note 33, at 10, 16; Sunstein, *Testing Minimalism*, supra note 47, at 125–26. They are also technically independent of one another; a decision may be both narrow and deep or both broad and shallow. See Greene, supra note 43, at 625; Gerken, supra note 43, at 1440–41. That said, “[a]mbitious reasoning typically produces width.” Sunstein, *One Case at a Time*, supra note 33, at 18. For that reason, a deep but narrow opinion may be dynamically unstable because the deep reasoning may lead to wider opinions in the future.

⁶³ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *Harv. L. Rev.* 353, 387 (1978) (“We tend to think of the judge . . . as one who decides and who gives reasons for his decision.”); Frederick Schauer, *Giving Reasons*, 47 *Stan. L. Rev.* 633, 633 (1995) (“The conventional picture of legal decision-making . . . is one in which giving reasons is both the norm and the ideal.”). While federal judges are not, for the most part, legally *required* to give reasons, cf. Fed. R. Civ. P. 52, as a practical matter “[r]eason-giving is so instinctive and commonplace in the U.S. judicial culture that the practice has hardly needed formalization.” Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 *Wash. & Lee L. Rev.* 483, 531 (2015).

⁶⁴ Schauer, supra note 63, at 638 (“[R]easons are typically propositions of greater generality than the conclusions they are reasons for . . .”).

⁶⁵ Joseph Story, *Commentaries on the Constitution of the United States* § 377 (Hillard, Gray, & Co., Bos., 1833) (“The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence.”); Henry J. Friendly, *Indiscretion about Discretion*, 31 *Emory L.J.* 747, 758 (1982) (quoting *Ward v. James* [1966] 1 *QB* 273, 294 (Eng.)) (“[The] most basic principle of jurisprudence [is] that ‘we must act alike in all cases of like nature.’”).

than another possible disposition.⁶⁶ And a decision is shallow, relatively speaking, if it stops short of rooting its governing principle in more general theoretical grounds. To call a decision “minimalist” is not to identify an immanent feature that can be measured in a vacuum but rather to compare the decision to other possible decisions that could have been issued to resolve the same legal dispute.

A rather humdrum example may help to flesh these concepts out. In *AKM LLC v. Secretary of Labor*, the Occupational Safety and Health Administration fined a company for violating its recordkeeping regulations, and the company responded that the fines were barred by the statute of limitations in the Occupational Safety and Health Act (“OSH Act”).⁶⁷ A panel of the U.S. Court of Appeals for the D.C. Circuit issued three separate opinions. The majority opinion, signed by two judges, reserved the question whether *Chevron* deference applied to an agency’s interpretation of a statute of limitations but held that the statute of limitations in the OSH Act could not reasonably be read to authorize a continuing violation theory for the failure to create records.⁶⁸ Judge Garland, concurring in the judgment, would have resolved the case on the ground that, whatever the meaning of the statute of limitations, the regulations that the company had allegedly violated did not create any continuing obligations.⁶⁹ Finally, Judge Brown wrote a concurrence explaining why, in her view, a court does not owe *Chevron* deference to

⁶⁶ It will sometimes be difficult to judge relative narrowness because the principles in question operate in different spheres. A decision based on Article III standing, for instance, may be “narrow” in the sense that it leaves a merits question undecided, but it may be “broad” in the sense that it affects access to courts in many other substantive areas. See Siegel, *supra* note 43, at 1981. It may be impossible “to rank all principles in a single scale of generality.” R.M. Hare, *Principles*, in *Essays in Ethical Theory* 49, 51 (1989); see Schauer, *supra* note 63, at 639 n.16. Professor Ronald Dworkin has made a similar point with respect to ascertaining relative shallowness. Ronald Dworkin, Reply, 29 *Ariz. St. L.J.* 431, 449 (1997). Still, whatever the difficulties of abstract definition and borderline cases, judges and lawyers will in many, if not most, instances have a reliable pragmatic intuition about which disposition is more “minimalist.” Cf. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv. L. Rev.* 1189, 1195 (1987) (“Although the categories do sometimes blur or otherwise depend on one another, it would be a plain if familiar error to suppose that ‘unless a distinction can be made rigorous and precise it isn’t really a distinction at all.’” (quoting John Searle, *The World Turned Upside Down*, *N.Y. Rev. Books*, Oct. 27, 1983, at 74, 78), <https://www.nybooks.com/articles/1983/10/27/the-word-turned-upside-down/> [<https://perma.cc/6BLL-GA2W>]).

⁶⁷ 675 F.3d 752, 754 (D.C. Cir. 2012).

⁶⁸ *Id.* at 753–59.

⁶⁹ *Id.* at 759–64 (Garland, J., concurring in the judgment).

an agency's interpretation of a statutory provision limiting the agency's jurisdiction, and, by extension, a statute of limitations.⁷⁰

The narrowest of those three opinions was Judge Garland's. By focusing only on the specific regulations that the company was cited for violating, he did not have to reach any questions about whether the statute of limitations would "admit of a continuing violation theory under other circumstances."⁷¹ The majority opinion was wider than Judge Garland's opinion but narrower than Judge Brown's concurrence: it bracketed the question of *Chevron* deference, but, by focusing on the meaning of the statute of limitations, it could have (and in fact did have) impacts in other contexts.⁷² Judge Brown's opinion was the widest: her discussion of *Chevron* deference would have had significant implications for a wide range of administrative law cases. Her opinion was also the deepest: she expressly resorted to "first principles" about *Chevron* deference and the judicial role.⁷³

Why might a minimalist decision, like Judge Garland's, be better than a relatively more "maximalist" one? There are two classes of reasons—one class sounding in democracy and the other in judicial administration.

The democratic case for minimalism begins with the point that narrower decisions will foreclose fewer options to the political branches.⁷⁴ If a court strikes down a law on narrow constitutional grounds, it will leave open more possible statutes that the legislature might enact in the future. Similarly, in the *AKM* case, Judge Garland's disposition would have allowed the agency to promulgate new regulations more clearly imposing continuing obligations without prejudging whether such regulations would conform to the statute. Narrow, case-specific decisions can then lead to productive dialogue between the courts and political

⁷⁰ Id. at 764–69 (Brown, J., concurring).

⁷¹ Id. at 759 (Garland, J., concurring in the judgment).

⁷² Id. at 754–59. For instance, the U.S. Court of Appeals for the Fifth Circuit endorsed the D.C. Circuit's reasoning and observed that "nothing in the majority opinion purports to limit its reach to Part 1904 record-making regulations." *Delek Refin., Ltd. v. Occupational Safety & Health Rev. Comm'n*, 845 F.3d 170, 176 n.7 (5th Cir. 2016). A D.C. district court applied the *AKM LLC* majority's reasoning about the nature of continuing violations to a disability discrimination claim. *Leiterman v. Johnson*, 60 F. Supp. 3d 166, 187–88 (D.D.C. 2014).

⁷³ *AKM LLC*, 675 F.3d at 765.

⁷⁴ Sunstein, *One Case at a Time*, supra note 33, at 26. Sunstein's conception of democracy is not simple majoritarianism. As he puts it, "[t]he American system is one of representative rather than direct democracy, partly because of a judgment that political deliberation can best be promoted through a representative system." Id. at 133. His primary concern is the extent to which a judicial decision forecloses options to representative branches of government.

process, which can, in turn, inform future judicial decisions.⁷⁵ Then-Judge Ruth Bader Ginsburg defended the Court's deployment of intermediate scrutiny in the sex equality cases that she had litigated on these grounds: the Court "did not utterly condemn the legislature's product" and "put forward no grand philosophy."⁷⁶ Instead, it "opened a dialogue with the political branches of government," essentially instructing them to "rethink ancient positions" on sex equality.⁷⁷

Minimalism may also do more than just leave space for democracy—it may be affirmatively democracy-promoting.⁷⁸ That is, "[m]inimalist courts can provide spurs and prods to promote democratic deliberation itself."⁷⁹ For instance, when a court strikes down a law on vagueness grounds or construes a statute in light of the canon of constitutional avoidance, the decision may provoke the political branches to respond. In that way, even a counter-majoritarian decision invalidating a statute can, if it is narrow, be in the ultimate service of deliberative democracy by ensuring that decisions are made deliberately by accountable actors.⁸⁰

Finally, minimalist decisions respect political liberalism and what John Rawls has called "the fact of pluralism."⁸¹ In a large, free, and heterogeneous democracy, reasonable people may disagree on fundamental questions.⁸² The basic idea of political liberalism is that "diverse people, operating from their own foundational accounts, can converge on a range of basic principles, thus making it possible to achieve

⁷⁵ Eskridge, *supra* note 54, at 1283, 1310–11.

⁷⁶ Ginsburg, *supra* note 56, at 1204.

⁷⁷ *Id.* On intermediate scrutiny as a form of judicial minimalism, see Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 *Geo. Wash. L. Rev.* 298, 303 (1998).

⁷⁸ For a somewhat skeptical discussion of this rationale, see *infra* notes 253–57 and accompanying text.

⁷⁹ Sunstein, *One Case at a Time*, *supra* note 33, at 27.

⁸⁰ *Id.* at 31.

⁸¹ John Rawls, *The Idea of an Overlapping Consensus*, 7 *Oxford J. Legal Stud.* 1, 1 (1987); *id.* at 4 ("[T]he plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life . . . affirmed by the citizens of democratic societies."). The classic account of political liberalism is John Rawls, *Political Liberalism* (1996). Revealingly, Professor Michael Sandel has labeled as "minimalist" the form of liberalism that "proposes bracketing controversial moral and religious issues for the sake of securing social cooperation." Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 *Calif. L. Rev.* 521, 531 (1989).

⁸² Jeremy Waldron, *Law and Disagreement* 1 (1999); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 *Harv. L. Rev.* 54, 57–59 (1997); Eskridge, *supra* note 54, at 1293–96.

an ‘overlapping consensus’ on those principles.”⁸³ A narrow and shallow disposition of a case may itself reflect a kind of “overlapping consensus;” judges may converge on particular resolutions of cases or specific governing principles even if they disagree on fundamental jurisprudential questions.⁸⁴ In that way, judges may embody a similar overlapping consensus in the polity.⁸⁵ Further, as Jamal Greene has observed, “[n]arrow” judicial decisions give constitutional culture “breathing room” to grow and develop.⁸⁶ Giving social conflict the space “to play out for longer rather than cutting it off through what Robert Cover called ‘jurispathic’ court decisions can serve the values of a pluralistic, participatory democracy.”⁸⁷

The second class of justifications for minimalism has to do with judicial administration—reducing the burdens of decision making and minimizing the impact of incorrect decisions. Judges, like everyone else, are boundedly rational.⁸⁸ They face limits of time, intellect, and information that may lead them to err.⁸⁹ Minimalism caters to this lack of

⁸³ Sunstein, *One Case at a Time*, supra note 33, at 50 (citing Rawls, supra note 81).

⁸⁴ Sunstein, *Incompletely Theorized Agreements*, supra note 61, at 1735–36 & n.8. In addition to facilitating an overlapping consensus among different judges, a minimalist outcome may enable several different accepted forms of argument in a pluralist legal culture to converge. There are several accepted modalities of constitutional argument—textual, historical, structural, prudential, and so on. See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 7 (1982); David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 *Mich. L. Rev.* 729, 730–31 (2021). To the extent the modalities may tug in different directions in a particular case, a narrower and shallower disposition could reflect a kind of “overlapping consensus” of the modalities of constitutional argument. In this way, minimalism could help the modalities cohere. Cf. Fallon, supra note 66, at 1189–90 (analyzing the “commensurability problem” of modalities pointing in different directions).

⁸⁵ The practice of implementing the Constitution through doctrinal tests may have a similar justification. Justices may agree on doctrines to operationalize constitutional values even if they disagree on deeper questions of constitutional meaning and theory. “Doctrine clearly abets incompletely theorized judgments by furnishing a framework in which determinations can be reached and ‘minimalistically’ rationalized—that is, explained as defensible within the doctrinal framework, even if the framework is not itself justified by any broader theory.” Fallon, supra note 82, at 116. The same could be said of precedent itself. See Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 *Tex. L. Rev.* 1711, 1711 (2013) (“[A]n overlooked function of stare decisis is mediating jurisprudential disagreement.”).

⁸⁶ Greene, supra note 43, at 647–48.

⁸⁷ *Id.* at 647.

⁸⁸ Sunstein, *One Case at a Time*, supra note 33, at 51–53; see Christine Jolls, *Bounded Rationality, Behavioral Economics, and the Law*, in 1 *Oxford Handbook of Law and Economics* 60 (Francesco Parisi ed., 2017).

⁸⁹ Cass R. Sunstein, *Burkean Minimalism*, 105 *Mich. L. Rev.* 353, 362–66 (2006).

omniscience and encourages a kind of judicial humility.⁹⁰ A narrow and shallow decision will generally be less difficult to do well—requiring less time, cognitive energy, and data—than a wider and deeper decision.⁹¹ And a narrow and shallow disposition will make inevitable errors of either law or foresight less damaging. Sunstein calls this “minimiz[ing] the sum of decision costs and error costs.”⁹²

Take the *AKM* case discussed above: a decision focused on interpreting a set of discrete regulations is less resource-intensive than a (competent) decision about the meaning of a more general statute of limitations or the application of a general doctrine of deference in administrative law. Those latter issues require greater study of the implications of any decision and the possibility—if not inevitability—that some implications will be overlooked. And an erroneous holding will be costlier the wider it is. In fact, Judge Brown’s view of *Chevron* deference was ultimately rejected by the Supreme Court.⁹³ If the D.C. Circuit panel had endorsed her view of *Chevron* deference, then the D.C. Circuit as a whole might have employed the wrong standard of deference (measured against the Supreme Court’s ultimate understanding of the issue) in a wide range of cases.⁹⁴

If these are minimalism’s justifications, when should minimalism be deployed? Sunstein acknowledges that minimalism is not a universal prescription. A minimalist decision from the Supreme Court may “export” decision and error costs to other officials; it may lead to “unfairness through dissimilar treatment of the similarly situated”; and some issues may not, in fact, be amenable to democratic deliberation at

⁹⁰ Cf. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 *Fordham L. Rev.* 1269, 1292–93 (1997) (defending the importance of judicial humility).

⁹¹ Sunstein, *One Case at a Time*, *supra* note 33, at 47; see also Henry J. Friendly, “Some Kind of Hearing,” 123 *U. Pa. L. Rev.* 1267, 1302 (1975) (observing that “[c]ourts are good at deciding cases” but “bad at drafting legislation; typically they see the case at hand and a few others but not the entire spectrum”).

⁹² Sunstein, *One Case at a Time*, *supra* note 33, at 46. But see Justin Fox & Georg Vanberg, *Narrow Versus Broad Judicial Decisions*, 26 *J. Theoretical Pol.* 355, 357 (2014) (arguing that, in some circumstances, broad judicial decisions can elicit useful information from policymakers).

⁹³ See *City of Arlington v. FCC*, 569 U.S. 290, 296–301 (2013).

⁹⁴ I am cognizant of the difficulty of locating some Archimedean point from which to evaluate whether a judicial decision is right or wrong. See Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 *B.C. L. Rev.* 685, 751–52, 757 (2009). But in reviewing lower court decisions—especially in the context of considering the costs of errors—the Supreme Court’s resolution seems like a reasonable, pragmatic proxy.

all.⁹⁵ The choice between minimalism and maximalism is a pragmatic judgment that cannot be reduced to a precise algorithm.⁹⁶ But Sunstein suggests that a non-minimalist decision may make sense “if diverse judges have considerable confidence in the merits of that solution, if the solution can reduce costly uncertainty for other branches, future courts, and litigants (and hence decision costs would otherwise be high), or if advance planning is important.”⁹⁷ These are guideposts, not rules.

One final point of clarification: I understand decisional minimalism as a theory of adjudication, not as a theory of interpretation.⁹⁸ In other words, minimalism is “a normative theory about how to fashion a plausible approach to *decision making*, not to *meaning*.”⁹⁹ Sunstein calls it a “mood.”¹⁰⁰ One can, in theory, be an originalist minimalist, if one takes an originalist approach to ascertaining the meaning of the Constitution but a minimalist approach to specifying how that meaning plays out in a particular case.¹⁰¹ Or one may be an anti-oligarchy minimalist, a “common good” minimalist, and so on.¹⁰² Sunstein (especially in later writings) sometimes uses “minimalism” in a more capacious sense to describe a minimal set of substantive, liberal-democratic commitments that judges ought to apply or to describe an interpretive theory opposed

⁹⁵ Sunstein, *Leaving Things Undecided*, supra note 33, at 27–30.

⁹⁶ *Id.* at 30.

⁹⁷ *Id.*

⁹⁸ See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 *Geo. L.J.* 1823, 1823 (1997) (drawing this distinction); see also Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 *Tex. L. Rev.* 1739, 1739–40 (2013) (“A view about what the law is or what it consists of does not by itself entail or presuppose any position about how judges are supposed to adjudicate constitutional disputes; and a view about how judges should go about adjudicating constitutional disputes does not by itself entail or presuppose any position about what the law is or consists of.”).

⁹⁹ Benjamin C. Zipursky, *Minimalism, Perfectionism, and Common Law Constitutionalism: Reflections on Sunstein’s and Fleming’s Efforts to Find the Sweet Spot in Constitutional Theory*, 75 *Fordham L. Rev.* 2997, 3001 (2007).

¹⁰⁰ Sunstein, *One Case at a Time*, supra note 33, at 257; cf. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (describing judicial deference to administrative agencies as a “mood”).

¹⁰¹ Cf. Perry, supra note 43, at 106 (“One can be both an originalist and a minimalist . . . , but one need not be.”). Professor Perry was using “minimalist” primarily in its Thayerian sense, but the distinction he makes between interpretation and specification holds for decisional minimalism too. See *id.* at 87.

¹⁰² See Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* 8–12 (2022); Adrian Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* 1 (2022).

to originalism.¹⁰³ In this Article, I use “decisional minimalism” in a more limited way—a theory of adjudication that is agnostic about primary interpretive method.¹⁰⁴

B. Prudential Minimalism

While decisional minimalism is concerned with how judges fashion opinions, prudential minimalism involves techniques for avoiding or limiting judicial involvement in the first place. Both minimalisms are concerned with what Sunstein terms “leaving things undecided,”¹⁰⁵ but they achieve that goal through different means. Prudential minimalism does so through the discretionary withholding of the judicial power while decisional minimalism does so through crafting “narrow” and “shallow” opinions.¹⁰⁶ There is some overlap between these categories: an unexplained order denying certiorari, for example, could be seen as a form of either decisional minimalism or prudential minimalism. But these two minimalisms leave things undecided in different ways.

¹⁰³ See Sunstein, *One Case at a Time*, supra note 33, at 61–72; Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America*, at xii–xiii (2005); cf. James E. Fleming, *The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the Minimal Constitution*, 75 *Fordham L. Rev.* 2885, 2912 (2007) (“[I]n *Radicals in Robes*, the distinction between a theory of the Constitution and a theory of judicial review (or judicial strategy) becomes blurred.”).

¹⁰⁴ The minimalists canvassed in this section mostly focus on constitutional law. That may be due to the fact that constitutional law is where the democratic stakes of adjudication are highest: if federal judges claim interpretive supremacy over the Constitution, see *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), then constitutional adjudications will trench most powerfully on the prerogatives of the political branches. But the virtues of decisional minimalism are not confined to constitutional cases. See supra note 37. Many of the justifications for minimalism are based on judicial capacities and decision costs, which are constant features of the judiciary. And, even as to the democracy-based justifications, many non-constitutional decisions of public law will displace interpretations of the executive branch, see *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984), or will put in place a rule without current popular and political support, given the inertial forces built into the Constitution’s lawmaking processes. See Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 *Harv. L. Rev.* 2109, 2119 (2015).

¹⁰⁵ Sunstein, *Leaving Things Undecided*, supra note 33, at 101.

¹⁰⁶ See Greene, supra note 43, at 625 (distinguishing Sunstein’s and Bickel’s brands of minimalism); Mark Tushnet, *The Jurisprudence of Constitutional Regimes: Alexander Bickel and Cass Sunstein*, in *The Judiciary and American Democracy*, supra note 43, at 23, 31 (“Where Bickel urged the Court to exercise political judgment in deciding which cases to decide and then to make fully principled decisions on the merits, Sunstein asks the Court to exercise political judgment at both stages.”). For a discussion of how the passive virtues—i.e., prudential minimalism—can complement Sunstein’s decisional minimalism, see Neal Devins, *The Democracy-Forcing Constitution*, 97 *Mich. L. Rev.* 1971, 1982–84 (1999).

The great exegete of prudential minimalism was Professor Alexander Bickel.¹⁰⁷ In the *Least Dangerous Branch*, he famously observed that judicial review “is a deviant institution in the American democracy” because it is a “counter-majoritarian force in our system.”¹⁰⁸ That deviance turned out to be the judiciary’s strength. Judicial review was justifiable, for Bickel, because it “injects into representative government something that is not already there”—a commitment to “principle.”¹⁰⁹ Government should serve not only “our immediate material needs but also certain enduring values.”¹¹⁰ And courts have the “habit[s] of mind” and “institutional customs” to “sort[] out the enduring values of a society.”¹¹¹ The judiciary thus brings something new and important to the table of American government.

This was, so far, standard “legal process” thinking.¹¹² But then came Bickel’s swerve: there were circumstances, he thought, where it was impossible or unwise—imprudent, to use a more Bickellian word—for the Supreme Court to intervene in a principled fashion. In those cases, the Court should avail itself of a suite of techniques he called the “passive virtues” to stay its hand and avoid reaching certain issues on the merits. The passive virtues would allow the Court to give “leeway to expediency

¹⁰⁷ See Jonathan S. Gould, *Law Within Congress*, 129 *Yale L.J.* 1946, 2012 (2020) (calling Bickel an “advocate[] for judicial minimalism”); Peters, *supra* note 43, at 1457 (referring to Bickel’s *The Least Dangerous Branch* as “the original minimalist manifesto”).

¹⁰⁸ Bickel, *Least Dangerous Branch*, *supra* note 34, at 16, 18.

¹⁰⁹ *Id.* at 58.

¹¹⁰ *Id.* at 24.

¹¹¹ *Id.* at 26. In this view, Bickel was following his teacher, Henry Hart. *Id.* at 27.

¹¹² The core principle of the legal process school, which peaked in the American legal academy in the mid-twentieth century, was “institutional settlement”: the idea that, even if people disagree about substantive ends, “the legal system could provide rules and procedures sufficiently fair and reasonable that its resolutions of disputes—its ‘settlements’ by legislatures, agencies, or courts—would be accepted by the disputants.” 3 G. Edward White, *Law in American History* 353 (2019). A “settlement” would be acceptable if disputes were assigned to institutions according to their distinctive competences. *Id.* at 353–54; Rubin, *supra* note 13, at 1396; see also Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 *Va. L. Rev.* 1, 29–30 (2013) (discussing an apparent conflict between the concept of the “institutional settlement” and purposivist adjudication). The distinctive competence of courts, according to process theory, is to resolve cases according to reasoned argument and principle. Fuller, *supra* note 63, at 366; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 15 (1959); see White, *supra*, at 354–55. These ideas were propounded in an influential set of course materials put together by Professors Henry Hart and Albert Sacks at Harvard in the 1950s and ‘60s. Barzun, *supra*, at 3 & n.3 (citing Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

without abandoning principle” and therefore “make possible performance of the Court’s grand function.”¹¹³ Bickel then catalogued these techniques. They included denials of certiorari, dismissals of appeals falling within the Court’s mandatory jurisdiction, dismissals for lack of standing or ripeness, deciding cases on non-constitutional grounds, and the political question doctrine.¹¹⁴ In addition, the Court could mold its equitable remedies in a way that would mediate the tension between expediency and principle.¹¹⁵

These techniques, in themselves, were not new.¹¹⁶ But Bickel radically reconceived them. His key departure from the received wisdom of the legal process school was to argue that the Court did not need to be principled in its application of the passive virtues.¹¹⁷ “[T]he techniques and allied devices for staying the Court’s hand . . . cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled.”¹¹⁸ Rather, they “mark the point . . . where the Court is most a political animal.”¹¹⁹ But to be “political” did not mean to wield “unchanneled, undirected, uncharted discretion.”¹²⁰ For Bickel,

¹¹³ Bickel, *Least Dangerous Branch*, supra note 34, at 71. It was critical to Bickel that the passive virtues be separate from the merits. Otherwise, by upholding some government action on the merits, the Court would validate that action in the popular mind by stamping it with the imprimatur of principle. *Id.* at 128–29. This function of judicial review was explored in Charles L. Black, Jr., *The People and the Court: Judicial Review in a Democracy* 52 (1960). See Benno C. Schmidt, Jr., *A Postscript for Charles Black: The Supreme Court and Race During the Progressive Era*, 95 *Yale L.J.* 1681, 1681 (1986) (noting that one of Black’s “most important insights about judicial review” is that its “prime importance lies not in its checking function but rather in its capacity to give legitimacy to the exercise of governmental power”).

¹¹⁴ Bickel, *Least Dangerous Branch*, supra note 34, at 111–98.

¹¹⁵ *Id.* at 247–54.

¹¹⁶ Bickel’s list was much influenced by Justice Brandeis and his old boss Justice Frankfurter. See Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 *Harv. C.R.-C.L. L. Rev.* 521, 527, 536 & n.70 (1976). It also resembled the taxonomy of justiciability doctrines offered in the first edition of Hart and Wechsler’s famous casebook. Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 *Stan. L. Rev.* 169, 204 (1968).

¹¹⁷ The orthodox view was that the “judicial process” had to rest “with respect to *every step* that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.” Wechsler, supra note 112, at 15 (emphasis added). Bickel was quickly remonstrated by the votaries of legal process for his apostasy. Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 *Colum. L. Rev.* 1, 3, 9–10, 24–25 (1964); Herbert Wechsler, *Reviews*, 75 *Yale L.J.* 672, 674 (1966) (reviewing Bickel, *Least Dangerous Branch*, supra note 34).

¹¹⁸ Bickel, *Least Dangerous Branch*, supra note 34, at 132.

¹¹⁹ *Id.*

¹²⁰ *Id.*

“[t]he antithesis of principle in an institution that represents decency and reason is not whim or even expediency, but *prudence*.”¹²¹

Prudence is a central concept in Bickel’s judicial and political philosophy.¹²² It denotes a kind of “practical wisdom,” an attitude that respects the complexity of human institutions even as it undertakes to align them more closely with our political ideals.¹²³ The opposite of prudence is the “overly philosophical insistence on principles for their own sake” and the incapacity to tolerate any gap, even temporary, between principle and reality.¹²⁴ The passive virtues were, for Bickel, the “modalities of prudence,” the techniques at the Court’s disposal for acting prudently while remaining, in the end, a defender of principle.¹²⁵ I group them under the rubric of prudential minimalism.

C. Thayerian Minimalism

A third version of minimalism tells judges to refrain from striking down laws or other government policies except in cases of clear illegality.¹²⁶ It is named after its academic progenitor, Professor James Bradley Thayer. In an influential article published in 1893, Thayer argued that a court should only invalidate a law of Congress on constitutional grounds when Congress has made a clear legal mistake.¹²⁷ He gave a few interrelated reasons: First, as a structural matter, Congress is charged with judging, in the first instance, whether a law is constitutional in the course of passing it, while the judiciary’s input is only “incidental and postponed,” if it comes at all.¹²⁸ The judiciary should respect the

¹²¹ *Id.* at 133 (emphasis added).

¹²² See Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 *Yale L.J.* 1567, 1569 (1985).

¹²³ *Id.* at 1569–70 (quoting Alexander M. Bickel, *The Morality of Consent* 23 (1975)).

¹²⁴ *Id.* at 1569, 1590.

¹²⁵ *Id.* at 1584.

¹²⁶ See, e.g., Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 *U. Pa. L. Rev.* 759, 846 (1997) (“Minimalism requires that an act of Congress not be invalidated unless ‘clearly’ unconstitutional.” (citation omitted)); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 *Mich. L. Rev.* 245, 245 n.4 (1995) (discussing “Thayer’s minimalism”).

¹²⁷ Thayer, *supra* note 35, at 144; see also Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 *Calif. L. Rev.* 621, 624 (2012) (arguing that Thayer’s rule of the clear mistake had roots in the early republic).

¹²⁸ Thayer, *supra* note 35, at 135–36.

Congress's "primary authority to interpret" the Constitution.¹²⁹ Second, the Constitution is made up of broad generalities that are subject to reasonable disagreement and must be applied to the "complex, ever-unfolding exigencies of government."¹³⁰ Congress is best suited to that interpretive task, and a congressional choice that "is rational is constitutional."¹³¹ Third, an overactive judiciary could vitiate Congress's own sense of responsibility to consider constitutional matters conscientiously.¹³² For these reasons, the Court should not resolve a case based on its "independent judgment" of the constitutional merits but should ask only whether Congress's constitutional judgment is reasonable.¹³³

Thayer's essay had a huge influence in the Progressive Era and beyond.¹³⁴ Justice Holmes "heartily" endorsed it,¹³⁵ Justice Frankfurter called it the "most important single essay" in constitutional law,¹³⁶ and Judge Learned Hand was deeply impressed too.¹³⁷ Thayer's star waned for a time as the Warren Court revived liberal faith in the judiciary.¹³⁸ But Thayer is now back in several forms.

¹²⁹ *Id.* On the practical impossibility of subjecting most of the activities of modern government to judicial review, see Neil K. Komisar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 251–53 (1994).

¹³⁰ Thayer, *supra* note 35, at 144.

¹³¹ *Id.*

¹³² *Id.* at 156.

¹³³ Henry P. Monaghan, *Marbury and the Administrative State*, 83 *Colum. L. Rev.* 1, 7–14 (1983).

¹³⁴ Wallace Mendelson, *The Influence of James B. Thayer Upon the Work of Holmes, Brandeis, and Frankfurter*, 31 *Vand. L. Rev.* 71, 71–74 (1978); Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 *Nw. U. L. Rev.* 1419, 1420 (2019). Thayer's progressive acolytes transformed his position in important ways. Most notably, they extended the call for restraint to judicial review of *state* legislation in addition to federal legislation. See Edward A. Purcell, *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 *Buff. L. Rev.* 873, 892–94 (1995).

¹³⁵ David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 *Duke L.J.* 449, 462 n.34 (1994) (quoting Letter from Oliver W. Holmes to James B. Thayer (Nov. 2, 1893) (on file with Harvard Law School Library)).

¹³⁶ Felix Frankfurter *Reminisces* 299–301 (1960) (recorded in talks with Dr. Harlan B. Phillips); see also Samuel Moyn, *On Human Rights and Majority Politics: Felix Frankfurter's Democratic Theory*, 52 *Vand. J. Transnat'l L.* 1135, 1150–53 (2019) (describing Thayer's influence on Justice Frankfurter).

¹³⁷ See Gerald Gunther, *Learned Hand: The Man and the Judge* 41–43 (2d ed. 2011).

¹³⁸ Cf. Barry Friedman, *The Cycles of Constitutional Theory*, 67 *Law & Contemp. Probs.* 149, 149 (2004) ("When the ideological valence of Supreme Court decisions shifts, constitutional theorizing about judicial review tends to shift as well."). I use the word "liberal" to distinguish the defenders of the Warren Court from Thayer's progressive supporters. Cf.

One avowed neo-Thayerian is Professor Adrian Vermeule. He bases his defense of Thayerian minimalism on “institutional capacities and systemic effects” and suggests that judges should employ “a rule-bound decision-procedure for constitutional cases,” enforcing “clear and specific constitutional texts” but “defer[ring] to legislatures on the interpretation of constitutional texts” that are vague or ambiguous.¹³⁹ Professor Jeremy Waldron wrote an influential challenge to judicial review of legislation.¹⁴⁰ Another group of modern Thayerian minimalists, like Thayer’s original followers, are reform-minded progressives who want to get the Supreme Court out of the way. Professors Ryan Doerfler and Samuel Moyn, for instance, propose disempowering the Supreme Court in various ways to weaken judicial review of federal legislation.¹⁴¹ Among other things, they suggest implementing Thayer’s “clear mistake” rule by requiring a supermajority vote on the Supreme Court to invalidate a federal statute.¹⁴² Professors Daniel Epps and Ganesh Sitaraman have also advanced a number of Supreme Court reform proposals that are “descend[ed]” from Thayer and his concern that courts “do not improperly usurp democratic authority.”¹⁴³ Some of this neo-Thayerian work builds upon the “popular constitutionalism” movement, which also sought to cut down the power of the Supreme Court and relocate interpretive authority over the Constitution in the “people.”¹⁴⁴ Further, Professors David Pozen and

Emma Kaufman, *The New Legal Liberalism*, 86 U. Chi. L. Rev. 187, 195–96 (2019) (distinguishing liberalism and progressivism).

¹³⁹ Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* 230–88 (2006).

¹⁴⁰ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346 (2006).

¹⁴¹ See Doerfler & Moyn, *supra* note 31, at 1725.

¹⁴² *Id.* at 1727. Others have made or considered similar proposals for supermajority voting rules in the Supreme Court. See Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 Yale L.J. 148, 182 (2019); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 Ga. L. Rev. 893, 894 (2003); Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 Ind. L.J. 73, 78 (2003).

¹⁴³ Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 Yale L.J.F. 821, 826 (2021).

¹⁴⁴ Mark Tushnet, *Taking the Constitution Away from the Courts* 182, 186–87 (1999); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 247–48 (2004). For a brief history of popular constitutionalism, see Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. Chi. L. Rev. 1819, 1854–59 (2016). Several years earlier, Professor Robin West also mounted a progressive case for Thayerianism. See Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* 290–318 (1994).

Adam Samaha recently proposed another version of Thayerian minimalism. They suggest “a presumption against constitutionalizing contested issues” because the norms of constitutional argument exclude considerations that likely shape the way that most people would resolve those contested issues.¹⁴⁵ In all, Thayer is not wanting for adherents in the modern academy.

* * *

To sum up: Decisional minimalism prefers decisions that are narrow and shallow. It is attuned to empirical facts and suspicious of abstraction. As a result, it tends to favor standards over rules, at least in the early stages of inductively building up some area of law. It is temperamentally humble and pragmatic, respecting the limits of judicial foresight and competence. It increases the space in which the political branches may maneuver. Finally, it buttresses pluralism by limiting the violence judges do to the “nomic” outgrowths of constitutional culture.

Prudential minimalism cautions judges that they are custodians of the judiciary. Judges must decide cases on principled grounds. Where a felt need for pragmatic compromise makes principled decision impossible, a judge should avoid decision rather than wound the judiciary’s institutional health. Beyond justiciability doctrines, one appropriate way for a court to equilibrate principle and pragmatism is to temper the remedy it issues in a case.

Thayerian minimalism recognizes that the judicial duty to declare the law in resolving a case does not entail the duty to exercise independent judgment on all legal questions. And it posits that judges sensitive to their institutional positions should defer to reasonable judgments of the legislature on the meaning of the Constitution.

II. THE CASE FOR LOWER COURT MINIMALISM

With this conceptual vocabulary in place, I turn to the heart of the paper—evaluating minimalism in the lower courts. I focus on decisional minimalism, the most prominent modern variety, though I address

¹⁴⁵ David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 *Mich. L. Rev.* 729, 792 (2021). Pozen and Samaha call this position “constitutional minimalism.” *Id.* As the label indicates, it is in an important respect broader than typical Thayerian minimalism—it seeks to reduce the scope of the Constitution for all actors, not just judges. *Id.* But one effect would be a reduced scope for judicial review. *Id.*; see also David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 *Colum. L. Rev.* 2317, 2390 (2021) (advocating a “Thayerian” approach to judging the validity of contested constitutional amendments).

prudential and Thayerian minimalism too. The discussion walks through several institutional features of lower courts, as they currently operate, that distinguish them from the Supreme Court. It then assesses how those features affect the case for minimalism.¹⁴⁶ In brief, the features I consider are the limits of judicial capacity, the quality of briefing (and relative paucity of amicus briefs), the rules of precedent, the fact that cases are decided either alone or in small panels, the mostly mandatory nature of lower court jurisdiction, and democratic legitimacy deficits relative even to the Supreme Court. Taken together, these features make the lower courts different in kind from the Supreme Court, and that difference makes minimalism in the lower courts a considerably more attractive approach. The flip side is that minimalism holds less appeal for the Supreme Court in light of its own institutional situation.

One helpful way to categorize the differences between the various federal courts is to resort to the familiar scholarly distinction between a “dispute resolution” and a “law declaration” court.¹⁴⁷ A dispute resolution court treats its power to expound the law as “incidental to its responsibility to resolve a concrete dispute,” while a law declaration court sees itself as vested with a “special function” to expound federal law.¹⁴⁸ All federal courts, to some extent, partake in both models. But as one moves down the federal judicial hierarchy, the law declaration function cedes to dispute resolution. The Supreme Court, in its current institutional form, is predominantly a law declaration court.¹⁴⁹ It still formally decides cases, but, at least since the Judges’ Bill of 1925, cases are largely vehicles for “expounding and stabilizing principles of law for the benefit

¹⁴⁶ The roles I describe, and even the basic structure of the system of federal courts, are not mandated by the spare text of Article III. Conceptions of the nature and function of federal courts have changed dramatically over our history. See Daniel J. Meltzer, *The Judiciary’s Bicentennial*, 56 U. Chi. L. Rev. 423 (1989); Thomas H. Lee, *Article IX, Article III, and the First Congress: The Original Constitutional Plan for the Federal Courts, 1787–1792*, 89 *Fordham L. Rev.* 1895 (2021).

¹⁴⁷ See Richard H. Fallon, Jr., John Manning, Daniel Meltzer & David Shapiro, *Hart and Wechsler’s the Federal Courts and the Federal System* 73–74 (7th ed. 2015).

¹⁴⁸ *Id.*; see Monaghan, *supra* note 38, at 668.

¹⁴⁹ See *infra* Section II.E; Monaghan, *supra* note 2, at 23–26; Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the “Judicial Power,”* 80 *B.U. L. Rev.* 967, 993–96 (2000). Again, the Court’s role in the early republic was very different from its role today. See Akhil Reed Amar, *The Words That Made Us: America’s Constitutional Conversation, 1760–1840*, at 332–34 (2021); Thomas P. Schmidt, *Courts in Conversation*, 2022 *Mich. St. L. Rev.* (forthcoming) (manuscript at 6–13) (on file with author).

of the people of the country.”¹⁵⁰ Decisional minimalism is in deep tension with the institutional premises of such a court. By contrast, the main function of the federal district courts is not to declare law for the public’s benefit but rather to enforce federal law against private parties and government actors in particular disputes.¹⁵¹ Decisional minimalism fits that function. The federal courts of appeals have a mixed role: they review resolutions of particular disputes by the district courts, but they have “a related function in helping to create a stable body of national law.”¹⁵² They can discharge that function, however, in a manner very different from the Supreme Court: because they have a large, mandatory docket, they can declare the law through modest and interstitial interventions. And for the reasons discussed in this Part, they should do so.¹⁵³

¹⁵⁰ Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing Before the H. Comm. on the Judiciary, 67th Cong. 2 (1922) (statement of Chief Justice Taft).

¹⁵¹ This function, too, is a product of history. In the early republic, lower federal courts were largely commercial courts, hearing maritime and diversity cases. See Lee, *supra* note 146, at 1912, 1939. But the aftermath of the Civil War brought a “sea change in the structure of federal jurisdiction.” Meltzer, *supra* note 146, at 425. Congress passed civil rights laws enforceable in federal court, extended federal habeas corpus to state prisoners, and granted general federal question jurisdiction. *Id.* Federal courts became primarily concerned with enforcing federal law. *Id.* at 426. That trend continued into the twentieth century. Judith Resnik, Revising Our “Common Intellectual Heritage”: Federal and State Courts in Our Federal System, 91 *Notre Dame L. Rev.* 1831, 1847 (2016).

¹⁵² Paul D. Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 *Harv. L. Rev.* 542, 551 (1969).

¹⁵³ In the discussion that follows I evaluate each type of minimalism in isolation. If the judiciary were to embrace all three types in tandem, they might interact in complex ways. Three potential complications stand out. First, a decisional minimalist court might be hesitant to embrace Thayerian minimalism, because it is a broad rule. But Thayerianism could be imposed externally by the Supreme Court or Congress, rather than by the lower courts themselves, so there is no necessary inconsistency. Second, a prudentially minimalist court may have less need for Thayerian minimalism, because it can avoid invalidating laws by refusing to decide and therefore achieve Thayerianism by other means. But, in addition to Black’s caution about the legitimating function of judicial review, see *supra* note 113, the present reality is that lower courts do not have enough tools of prudential minimalism at their disposal to make this a viable possibility. See *infra* Section II.C. Third, one might think that there would be less need for decisional minimalism on a Thayerian court because the court would be less powerful and less important. But even a Thayerian court invalidates legislation sometimes and must provide guidance on the outer bounds of the political branches’ discretion. And judicial review of federal legislation—the specific circumstance addressed by Thayer—is only a portion of a lower court’s public law docket. Seth F. Kreimer, Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s, 5 *Wm. & Mary Bill Rts. J.* 427, 524 (1997).

*A. Decisional Minimalism**1. The Time Chart of the Judges*¹⁵⁴

Lower court judges have a crushing workload. Congress “substantially established the framework of the contemporary” judicial system in the Evarts Act of 1891,¹⁵⁵ and the federal courts of appeals assumed more or less their current function in the so-called Judges’ Bill of 1925.¹⁵⁶ Since then, case numbers have mushroomed dramatically, yet the number of judges has not come close to keeping pace. In 1960, there were 3,899 cases filed in the regional courts of appeals.¹⁵⁷ By 2020, that number was nearly fifty thousand—a twelvefold increase.¹⁵⁸ In 1960, there were 68 authorized judges in the regional courts of appeals (and an additional 10 judgeships were added the following year).¹⁵⁹ In 1990, that number had increased only to 167, where it remains today.¹⁶⁰ Putting these numbers together, in 1960, there were about 57 appeals filed per judgeship; in 2020, there were about 289 appeals filed per judgeship.¹⁶¹ That is a staggering difference—a 500% increase in judicial workload, based on case numbers.

Taking a cue from Henry Hart, I will break down what the current numbers mean in real terms. Assume generously that a federal circuit judge does eight hours of substantive intellectual labor a day, five days a

¹⁵⁴ I am alluding to Henry M. Hart, Jr., Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 84–86 (1959), breaking down the time available to Justices to draft opinions and considering the implications for the Court’s role.

¹⁵⁵ Fallon et al., supra note 147, at 29; Act of March 3, 1891, 26 Stat. 826. For more in-depth histories of the lower federal courts, see Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1927); Richman & Reynolds, supra note 22, at 1–9; Peter S. Menell & Ryan Vacca, Revisiting and Confronting the Federal Judiciary Capacity “Crisis”: Charting a Path for Federal Judiciary Reform, 108 Calif. L. Rev. 789, 795–843 (2020); Paul D. Carrington, The Function of the Civil Appeal: A Late-Century View, 38 S.C. L. Rev. 411, 411–31 (1987).

¹⁵⁶ Richman & Reynolds, supra note 22, at 2.

¹⁵⁷ Id. at 3.

¹⁵⁸ Admin. Off. of the U.S. Cts., supra note 24.

¹⁵⁹ Richman & Reynolds, supra note 22, at 5–6; see Admin. Off. of the U.S. Cts., Authorized Judgeships 6 (2022), <https://www.uscourts.gov/sites/default/files/allauth.pdf> [<https://perma.cc/N8ZG-Y7MC>].

¹⁶⁰ Richman & Reynolds, supra note 22, at 7–8.

¹⁶¹ The number is about the same if one includes the U.S. Court of Appeals for the Federal Circuit. See Marin K. Levy, The Promise of Senior Judges, 115 Nw. U. L. Rev. 1227, 1237 n.59 (2021). For similar numbers on the workload crisis, see Menell & Vacca, supra note 155, at 851–55.

week, for forty-eight weeks per year. And assume that a judge is involved in deciding 867 cases per year, since judges sit in panels of three. That means that an appellate judge has roughly two hours and thirteen minutes to give to each case.¹⁶² That includes reading the briefs, oral argument, in-chambers discussion with clerks, opinion writing (for the author), and opinion review (for the other members of the panel). It is, of course, an absurdly small amount of time, and it does not even factor in administrative responsibilities, en banc proceedings, motions panels, and other miscellaneous impositions on a judge's schedule. Hart thought that twenty-four hours of devoted work was inadequate just for the opinion-writing phase of a case in the Supreme Court; circuit judges have a minuscule fraction of that.¹⁶³

This time crunch matters because the function of an appeal is not just to give a thumbs up or a thumbs down to the trial court or agency; appellate courts also give reasons for their dispositions that clarify the law of the circuit.¹⁶⁴ In 1960, it was possible to lavish most appeals with what Professors William Richman and Williams Reynolds call the "Learned Hand Treatment": this consisted of review of the briefs, oral argument, collective deliberation, and drafting opinions by the judges themselves.¹⁶⁵ But, as Professor Henry Monaghan observed a generation ago, "[t]he litigation explosion carries with it the increasing bureaucratization of the federal appellate process, a development that severely undermines the

¹⁶² If one factors in the 111 senior judges on the regional courts of appeals, that number increases a bit. Assuming that a senior judge carries fifty percent of the workload of an active judge, see Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970–2009*, 161 *U. Pa. L. Rev.* 1, 29 (2012), the number becomes about three hours. I obtained the number of senior circuit judges by using the "Advanced Search Criteria" at Federal Judicial Center, *Biographical Directory of Article III Federal Judges, 1789–present*, <https://www.fjc.gov/history/judges/search/advanced-search> [<https://perma.cc/3TEV-SAQP>] (last visited Mar. 4, 2022) (filter to include all U.S. courts of appeals except the Federal Circuit under "Court" and filter by senior status judge under "Limit to Sitting Judges").

¹⁶³ See Hart, *supra* note 154, at 99–100 ("Ideas which will stand the test of time as instruments for the solution of hard problems do not come even to the most gifted of lawyers in twenty-four hours."). Professor Charles Alan Wright wrote in 1964 that, on the courts of appeals, "80 cases per judge is the greatest number of dispositions which can be reasonably expected, and may well be too high for the average judge." Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 *Tex. L. Rev.* 949, 957 (1964). We are now at many multiples of that.

¹⁶⁴ See Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 *Harv. L. Rev.* 542, 551 (1969).

¹⁶⁵ Richman & Reynolds, *supra* note 22, at 3. Learned Hand died in 1961 and continued to hear cases until nearly the end. Gunther, *supra* note 137, at 585.

institutional premises of the Hart-Hand model.”¹⁶⁶ The Learned Hand Treatment for every appeal is now mostly a wistful fantasy.

As one would expect, the progress of a case through a court of appeals looks very different now than in Judge Hand’s day. In order to manage their staggering workload, appellate judges have had to triage appeals.¹⁶⁷ Oral argument is heard in less than twenty percent of cases.¹⁶⁸ Nearly ninety percent of appellate opinions are now unpublished.¹⁶⁹ A large (though difficult to quantify) proportion of those opinions are either unreasoned or affirmed on the basis of the district court’s decision.¹⁷⁰ Many of those unreasoned orders would doubtless have warranted full opinions in an earlier time.¹⁷¹ There is also disturbing empirical evidence that crowded dockets cause the courts of appeals to affirm at a higher rate, thus undermining their core function to identify and correct errors in lower courts (and agencies).¹⁷²

The situation in district courts is also bleak. In 2020, statistics from the Judicial Conference indicated that there were 332,732 civil cases filed and

¹⁶⁶ Henry Paul Monaghan, *Taking Bureaucracy Seriously*, 99 *Harv. L. Rev.* 344, 345 (1985).

¹⁶⁷ Richman & Reynolds, *supra* note 22, at xii (describing the “Appellate Triage” system).

¹⁶⁸ Admin Off. of the U.S. Cts, Table B-10: Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2020 (2020), https://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2020.pdf [<https://perma.cc/P3EQ-QJ44>].

¹⁶⁹ Admin Off. of the U.S. Cts, Table B-12: U.S. Courts of Appeals—Type of Opinion or Order Filed in Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2020 (2020), https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2020.pdf [<https://perma.cc/TYV7-M3EE>].

¹⁷⁰ See Merritt E. McAlister, “Downright Indifference”: Examining Unpublished Decisions in the Federal Courts of Appeals, 118 *Mich. L. Rev.* 533, 575–82 (2020).

¹⁷¹ See Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 *Harv. L. Rev.* 887, 904 (1987) (quoting Thomas E. Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 *Fla. L. Rev.* 225, 250 (1985)) (“Most federal judges will admit ‘[t]he reality is that the courts of appeals are silently deciding appeals that twenty years ago would have been thought to merit a full opinion.’”).

¹⁷² See Bert I. Huang, *Lightened Scrutiny*, 124 *Harv. L. Rev.* 1109, 1130–33 (2011); Menell & Vacca, *supra* note 155, at 870; see also Richard A. Posner, *The Federal Courts: Challenge and Reform* 345 (1996) (“[O]ne consequence of the heavy caseload pressures on the courts of appeals has been an increase in the deference paid by those courts to the rulings made by district judges.”).

93,213 criminal cases.¹⁷³ There are 667 authorized judgeships.¹⁷⁴ That is about 639 cases per judge per year. Case terminations have risen about fivefold since 1970.¹⁷⁵ Factoring in new judges, senior judges, magistrate judges, and case difficulty, district court judge workloads have nearly doubled in the last fifty years by one measure.¹⁷⁶ There are subtleties that these raw numbers do not capture,¹⁷⁷ but it is plain that, when one factors in the managerial responsibilities (and smaller clerical staff) of district judges, along with the need to preside over trials, the time for deliberation and opinion writing is severely limited. In the Supreme Court's understated words, "trial judges often must resolve complicated legal questions without [the] benefit of 'extended reflection [or] extensive information.'"¹⁷⁸

The upshot of all this is obvious. An important justification of decisional minimalism, even in the Supreme Court, is limited judicial capacity and bounded rationality. That justification is substantially more powerful in lower courts. The time available for reflection and opinion writing is far scarcer. There is thus added reason to be skeptical that a wide and deep opinion, ambitiously essaying to clarify the law, will be successful at both anticipating unknown circumstances and laying down an effective rule.

There is one immediate objection that one can imagine related to the courts of appeals: the problem is overstated because circuit judges can organize their time to only focus their attention on a few opinions a year,

¹⁷³ Admin. Off. of the U.S. Cts., Federal Judicial Caseload Statistics 2020, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020> [<https://perma.cc/5NUW-EYUS>] (last visited Feb. 18, 2022).

¹⁷⁴ Admin. Off. of the U.S. Cts., U.S. District Courts: Additional Authorized Judgeships, <https://www.uscourts.gov/sites/default/files/districtauth.pdf> [<https://perma.cc/EM37-GXNL>] (last accessed Jan. 22, 2022).

¹⁷⁵ Menell & Vacca, *supra* note 155, at 846.

¹⁷⁶ *Id.* at 848 ("[W]eighted caseloads per judge have climbed 47% based on filings and 90% based on terminations from 1971 to 2017."). Case numbers seem to have plateaued in recent years, however. See Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure* at 75, 162 U. Pa. L. Rev. 1793, 1825–26, 1826–29 figs.8, 9, 10, 11 & 12 (2014); Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. Ill. L. Rev. 1177, 1182–83.

¹⁷⁷ Cf. Philip Habel & Kevin Scott, *New Measures of Judges' Caseload for the Federal District Courts, 1964–2012*, 2 J.L. & Cts. 153, 166–68 (2014) (proposing more precise empirical methods for calculating caseloads in district court).

¹⁷⁸ *Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991) (quoting Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 Minn. L. Rev. 899, 923 (1989)).

and *those* opinions may—perhaps even *should*—be wide and deep. Maybe, then, court of appeals judges can be maximalist in a few published opinions per year, but not the rest. This objection does not hold water.

First, though this is difficult to quantify, it appears that the time constraints on circuit judges would still be severe as long as they were giving a minimal level of attention to their other work. The judicial time spent per case is cut to the bone as it is. It is hard to see how one could take time spent on other matters to create more time for published opinions without cutting well into the bone. This is consistent with the testimony of judges themselves, who have lamented time constraints even after the practice of unpublished opinions took hold.¹⁷⁹

Second, to focus on a few cases for privileged treatment at the expense of everything else is inconsistent with the letter and spirit of the statutes governing appellate jurisdiction and is normatively problematic. Litigants have, by statute, the right to an appeal in the federal courts of appeals.¹⁸⁰ An appeal as of right “assures litigants that the decision in their case is not prey to the failings of whichever mortal happened to render it, but bears the institutional imprimatur and approval of the whole social order as represented by its legal system.”¹⁸¹ A cursory review by a staff attorney or law clerk—supplemented by a small chance of winning the lottery and getting a published opinion—should not be deemed to satisfy a litigant’s right to an appeal.¹⁸² I do not mean to deny the very real workload constraints that haven driven the courts of appeals to this bifurcated system. But the remedy should not be the effective conversion of the courts of appeals into certiorari courts that get to pick their cases.¹⁸³ In

¹⁷⁹ For a particularly harrowing account, see Diarmuid F. O’Scannlain, *Striking a Devil’s Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 *Lewis & Clark L. Rev.* 473, 474 (2009) (noting that courts of appeals “have made a devil’s bargain to achieve some semblance of order”); see also Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, 79 *A.B.A. J.* 52, 52 (1993) (“Those who believe we are doing the same quality work that we did in the past are simply fooling themselves.”).

¹⁸⁰ 28 U.S.C. § 1291 (“The courts of appeals . . . shall have jurisdiction of appeals from *all* final decisions of the district courts . . .”) (emphasis added); see Fed. R. App. P. 3(a)(1) (referring to an appeal “as of right”). There are some exceptions, like certain appeals from habeas petitions. See, e.g., 28 U.S.C. § 2253.

¹⁸¹ Paul D. Carrington, Daniel J. Meador & Maurice Rosenberg, *Justice on Appeal 2* (1976).

¹⁸² See Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 *Duke L.J.* 315, 344–54 (2011) (describing the process of staff attorney review for non-argument dispositions in several circuits).

¹⁸³ See Richman & Reynolds, *supra* note 22, at 115, 118–19 (arguing that the courts of appeals have effectively transformed themselves into certiorari courts); Marin K. Levy,

Judge Richard Arnold's words, the "remedy" is "to create enough judgeships to handle the volume" or "for each judge to take enough time to do a competent job with each case," even if the result is "backlogs."¹⁸⁴ Adhering to decisional minimalism would allow judges to handle a greater number of cases competently.¹⁸⁵

To urge lower court judges to focus their attention on a few maximalist published opinions, then, has perverse effects. It leaves judges with less time for the rest of the docket. That would likely result in more "subminimalist" dispositions that do not meet the rudiments of procedural justice.¹⁸⁶ That shift would probably most affect the disadvantaged—prisoners, noncitizens, and *pro se* litigants—who are less likely to be the beneficiaries of published opinions.¹⁸⁷ Favoring minimalist opinions would not solve the workload crisis, but it would at least begin to distribute the scarce resource of judicial attention a little more equitably.¹⁸⁸

Judging Justice on Appeal, 123 Yale L.J. 2386, 2402 (2014) (noting that this "analogy" has "limitations" but agreeing that "circuit courts have altered the way that they review cases"); Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 Fla. L. Rev. 205, 222 (1985) ("A peremptory judgment without any stated reason bears an uncomfortably close resemblance to simple rejection of a case as unworthy of review.").

¹⁸⁴ *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000), vacated as moot en banc, 235 F.3d 1054 (8th Cir. 2000).

¹⁸⁵ One empirical assumption of decisional minimalism is that wide and deep opinions take more time and resources to write, at least if they are competent. See Sunstein, *Leaving Things Undecided*, supra note 33, at 16–17. That seems like a fair assumption. A court fashioning a wide and deep opinion will have to research not only the law but also the theory and history underlying the law, will have to consider how its holding will apply in other factual scenarios, and will have to explore how its rule might interact with other bodies of law. See *id.* at 17. On a multimember tribunal, it may also be harder to forge consensus with colleagues and to review colleagues' draft opinions. *Id.* at 65. To be sure, a judge *could* do a quick and cursory job on a broad and deep opinion. The point, though, is that it takes more time to produce a *good* maximalist opinion, and a minimalist opinion will make less consequential errors.

¹⁸⁶ Cf. Sunstein, *Leaving Things Undecided*, supra note 33, at 15 (using "subminimalism" to describe opinions that are "conclusory and opaque, and that offer little in the way of justification or guidance for the future"); *McAlister*, supra note 170, at 582–91 (arguing against unreasoned and unpublished decisions in the courts of appeals).

¹⁸⁷ See *McAlister*, supra note 170, at 536–37, 556 ("[F]or [the] have-nots, the promise of an appeal as of right has become little more than a rubber stamp . . .").

¹⁸⁸ Another possible objection is that "maximalist" decisions may *alleviate* workload problems by making the resolution of future cases easier. Whether a minimalist resolution will export "decision costs" to future decision makers is one factor that may inform whether a court follows a minimalist path in a particular case. See Sunstein, *One Case at a Time*, supra note 33, at 48. But this does not categorically undercut the case for decisional minimalism in lower courts, for two reasons. First, decision costs should not be considered in a vacuum. Minimalism seeks to minimize decision costs *and* error costs. Given the resource constraints

2. *The Quality of Advocacy*

A brief note on a related point: judges depend upon information and arguments presented to them in briefs. The typical brief in the lower courts is inferior in quality and comprehensiveness to briefing in the Supreme Court.¹⁸⁹ Further, in many cases the Supreme Court gets a range of amicus briefs from trade associations, public interest organizations, and scholars specializing in the issues before the Court.¹⁹⁰ As a result, the Supreme Court gets a fuller picture of existing law and the likely effects of its ruling.¹⁹¹ And even when it does not, the Supreme Court has the time and resources—between its clerks and dedicated library staff—to do independent research.

The picture is quite different in the lower courts. The quality of briefing varies. There is a greater possibility that a party may lose simply by being out-lawyered, meaning the content of opinions may not reflect the intrinsic merits of the parties' positions.¹⁹² Amicus briefs are less frequent in the lower courts than they are in the Supreme Court.¹⁹³ And there is less time for independent research. All of these facts about lower court

of lower courts, the likelihood that a broad rule will also be erroneous reinforces the general case for minimalism. Second, because broader and deeper rules may emerge in lower courts through a series of minimalist adjudications, it is not necessarily the case that a broad and deep opinion issued by the first panel to see a complex issue is the best or only way to reduce future decision costs. See *infra* notes 269–70 and accompanying text.

¹⁸⁹ Bryan A. Garner, Stephen G. Breyer, 13 *Scribes J. Legal Writing* (Special Issue) 145, 160 (2010) (interview with Justice Breyer). But see *id.* at 51, 54 (interview with Justice Scalia) (discussing the “specialized” D.C. Circuit bar in “various fields” and denying that Supreme Court briefs were superior to D.C. Circuit briefs). I suspect the gap has widened since these interviews were conducted in 2006, with the continued emergence of a specialized Supreme Court bar. See Joan Biskupic, Janet Roberts & John Shiffman, *The Echo Chamber: At America’s Court of Last Resort, a Handful of Lawyers Now Dominates the Docket*, *Reuters* (Dec. 8, 2014, 10:30 AM), <http://www.reuters.com/investigates/special-report/scotus/> [<https://perma.cc/4ZTV-99KA>] (noting that many Justices “welcome” the “growing specialization of the Supreme Court bar” because it “help[s] them understand and sift through complex legal issues”).

¹⁹⁰ See Bruhl, *supra* note 18, at 470–71.

¹⁹¹ See Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 *Va. L. Rev.* 1901, 1952–57 (2016) (arguing that amicus briefs help the Court declare “broad legal rules”).

¹⁹² See Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Uppercourts and Underdogs in the United States Courts of Appeals*, 36 *Am. J. Pol. Sci.* 235, 253 (1992) (“The parties that may be presumed to have superior litigation resources consistently fared better [in the courts of appeals] than their weaker opponents, and the disparity in success rates was greatest when the disparity in strength was greatest.”); Ashlyn K. Kuersten & Donald R. Songer, *Decisions on the U.S. Courts of Appeals* 188–89 (2001) (similar).

¹⁹³ Bruhl, *supra* note 18, at 472; Kuersten & Songer, *supra* note 192, at 186.

practice counsel in favor of narrower and shallower rulings that avoid forays into areas where the briefs provide dim or unhelpful illumination.¹⁹⁴

3. Rules of Precedent

The approach to precedent followed by the courts of appeals is another strong reason to favor decisional minimalism there. Every circuit adheres to the same basic rule: a decision by one panel on a question of law is binding on all subsequent panels, barring some intervention by a higher authority (like a Supreme Court decision, an en banc decision, or a law of Congress).¹⁹⁵ That is a more rigid rule than exists in the Supreme Court and delegates considerable power to the first panel to consider an issue. Once that first panel resolves an issue of law, it is the “law of the circuit” and can only be changed by going en banc.¹⁹⁶ Going en banc is a rare and cumbersome process. The en banc standard is similar to the certiorari standard,¹⁹⁷ and en banc review is granted in a tiny fraction of cases.¹⁹⁸ Indeed, it is even rarer than certiorari: in the twelve-month period ending in September 2020, only forty cases were decided en banc in all the regional circuits combined.¹⁹⁹

The rigidity of *stare decisis* in the courts of appeals bolsters the case for decisional minimalism. Once a panel decides an issue, future panels are stuck with that decision unless the circuit goes en banc or a lightning

¹⁹⁴ See Peters, *supra* note 43, at 1514–20 (defending decisional minimalism in the Supreme Court based on the adversarial nature of the judicial system and judicial competence).

¹⁹⁵ See Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 *Brook. L. Rev.* 685, 721 (2000). The panel precedent rule is of surprisingly recent vintage: it developed in the courts of appeals in the second half of the twentieth century. See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 *U. Colo. L. Rev.* 1011, 1066 n.214 (2003).

¹⁹⁶ Cooper & Berman, *supra* note 195, at 739. Some circuits have procedures by which a panel opinion can be overruled by another panel if the latter panel circulates its draft opinion to the full court and either every judge or a majority of judges accedes. Barrett, *supra* note 195, at 1045 n.136. This happens in a very small number of cases relative to the courts of appeals’ total docket. *Id.*; Amy E. Sloan, *The Dog That Didn’t Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 *Fordham L. Rev.* 713, 726–28 (2009) (charting the frequency of informal en bancs).

¹⁹⁷ Compare Fed. R. App. P. 35(a) (stating the standard for rehearing en banc), with S. Ct. R. 10 (stating the certiorari standard).

¹⁹⁸ Ryan W. Copus, *Statistical Precedent: Allocating Judicial Attention*, 73 *Vand. L. Rev.* 605, 608 (2020) (“The courts [of appeals] now review a mere 0.19% of decisions en banc . . .”).

¹⁹⁹ Admin. Off. of the U.S. Cts., *supra* note 168, at Table B-10.

bolt strikes from the Supreme Court. Further, the panel's decision will effectively resolve the issue for persons subject to the circuit's jurisdiction even if they are not in litigation. To put it in Sunstein's terms, the "error costs" of a wrong decision are thus very high. In these circumstances, and especially when paired with the capacity constraints highlighted above, it makes eminent sense for a panel to proceed cautiously and to favor narrow and shallow dispositions.

One possible counterargument is that the rigidity of *stare decisis* is softened in practice by a subsequent panel's ability to distinguish prior precedents or recharacterize assertions as *dicta*. That does not solve the problem. It is of course true that the apparent hard edges of some holdings may prove porous on close inspection. But it is a *non sequitur* to move from this porosity in edge cases to the proposition that precedent has no constraining force.²⁰⁰ To take a metaphor from everyday life, it may be possible to ignore a stop sign and drive through it without slowing, but that possibility does not mean a stop sign does not have a significant effect on behavior.²⁰¹ Even a dyed-in-the-wool Realist like Professor Karl Llewellyn acknowledged that judges are "law-conditioned" officials, which means that legal doctrine "is to control the deciding" of cases where there is "no real room for doubt" and still "guide[s]" decision where there is room for doubt.²⁰² Further, even if a panel precedent may be distinguishable in cases that come back to the court of appeals, that does not mean that it does not have a significant constraining effect on innumerable cases that never make it to litigation at all.²⁰³

²⁰⁰ Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 410–11 (1985).

²⁰¹ *Id.* at 424.

²⁰² Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 19–20 (1960); see also Barrett, *supra* note 195, at 1023 ("[N]either judges nor litigants behave as if precedent were meaningless.").

²⁰³ See Schauer, *supra* note 200, at 422–23. I would add, though, that the rigidity of the panel precedent rule furnishes a good reason to attend carefully to the distinction between holding and *dicta*. See Pierre N. Leval, *Judging under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. 1249, 1250 (2006) (urging judges not to disregard the distinction between holding and *dictum*). As Judge Friendly once observed, "[a] judge's power to bind is limited to the issue that is before him; he cannot transmute *dictum* into decision by waving a wand and uttering the word 'hold.'" *United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring). Indeed, the minimalism or maximalism of a decision is, to an extent, constituted by how that opinion is read by future judges. See Sunstein, *Leaving Things Undecided*, *supra* note 33, at 25–26. That means a court of appeals panel (and even a district judge) might enforce a norm of minimalism by reading a panel precedent "minimally" *ex post*. This point could be broadened: non-judicial officials, other members of the legal community, and the broader public could, to some extent, enforce a norm of judicial minimalism by reading

The situation in district courts is more mixed. As a formal matter, district court decisions do not create binding precedent.²⁰⁴ That is, other district courts within the same district are not obliged to follow prior decisions by other district courts on questions of law, although those prior decisions may be persuasive (and often are, to a time-strapped judge). On the one hand, that feature of district court decisions shows why minimalism makes eminent sense: a district court is predominately an enforcement court, tethered to the circumstances of the parties before it, and an ambitious attempt to clarify the law for non-parties is not worth the candle.

On the other hand, one could argue that the lack of precedential effect means that the imperative of narrow and shallow decisions is not as urgent in district courts as it is in the courts of appeals. But the imperative is not empty: to discount entirely the importance of district court decisions of law because they lack formal *stare decisis* effect would be to miss some important, if subtle, dimensions of such decisions.

First, “[a]s a practical matter, we know that many trial court rulings . . . do influence conduct, as indications of the likely behavior of courts in future cases.”²⁰⁵ District court rulings can thus function as *de facto* precedents. Second, a district court ruling can have dramatic and immediate real-world effects. A decision striking down a law on its face and enjoining its operation nationwide, for instance, can establish the practical law of the land while appellate review is unfolding.²⁰⁶ A narrower ruling would have a more circumscribed real-world effect.²⁰⁷

opinions “minimally,” either based on the departmentalist view that only a court’s judgment is legally binding, see William Baude, *The Judgment Power*, 96 *Geo. L.J.* 1807, 1844 (2008), or simply by attending to the holding/dictum distinction as suggested above.

²⁰⁴ *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 *Duke L.J.* 503, 518 (2000). As with many generalities about district court procedure, there seem to be some variations in individual judges’ practices. See Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 *Nev. L.J.* 787, 800–04 (2012).

²⁰⁵ Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *Harv. L. Rev.* 1016, 1057 (2004).

²⁰⁶ One district court’s nationwide injunction against President Trump’s second travel ban, for example, effectively determined the travel ban’s status until the Ninth Circuit’s denial of the government’s stay three months later and the Supreme Court’s partial stay after that. See *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2083–85, 2089 (2017) (*per curiam*).

²⁰⁷ See Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 *Calif. L. Rev.* 915, 923–24 n.31 (2011) (arguing that the distinction between facial and as-applied challenges

Third, a district court's resolution of an issue of law generally serves as the "law of the case" going forward until appeal.²⁰⁸ In many cases, the district court's initial ruling furnishes the final and operative rules to the parties in the case because they settle, do not appeal, or enter into a consent decree on the basis of that ruling. And the law of the case may undergird any number of managerial decisions of the district court that can have a significant impact on the parties and how the legal issues are framed on appeal.²⁰⁹ Finally, the district court's opinion may have a meaningful impact on the parties themselves; indeed, the parties are the intended audience of a trial court opinion to a greater extent than they are of an appellate court opinion.²¹⁰ A minimalist opinion may, in the language of procedural justice, respect the dignity or sense of fairness of the losing litigant by stopping short of a broad and deep repudiation of a strongly held conviction.²¹¹ Put another way, a minimalist district court decision will be less "jurispathic" to the losing party; it will dispense a loss without squashing as much of the losing party's normative world as a broader decision might.²¹²

In sum, the law of the circuit rule, by which the first panel to decide an issue sets down the rule which all subsequent panels must follow unless

in district courts should be thought of in terms of breadth and narrowness and preclusive effect).

²⁰⁸ See *Entek GRB, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1240 (10th Cir. 2016) (Gorsuch, J.) ("Law of the case doctrine permits a court to decline the invitation to reconsider issues already resolved earlier in the life of a litigation."). Not every commentator and court agrees that "law of the case" is the right label for a district court's reluctance to reconsider its rulings before final judgment. See 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478.1 (2d ed. 2002). But it is a common and useful shorthand. *Id.* It is also not a limit on a district court's *power* to reconsider if circumstances warrant; rather, it "merely expresses the practice of courts generally to refuse to reopen what has been decided." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.); see Fed. R. Civ. P. 54(b).

²⁰⁹ See Ahdout, *supra* note 22, at 942–43; Judith Resnik, *Managerial Judges*, 96 *Harv. L. Rev.* 374, 378 (1982); Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 *Vill. L. Rev.* 973, 978 (2008).

²¹⁰ See David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, in *Common Law Theory* 134, 148–49 (Douglas E. Edlin ed., 2007).

²¹¹ Cf. *id.* (noting that a judge's "statement of reasons" respects "the dignitary values of the person"). Indeed, some social science work suggests that "in civil cases, defendants rate mediation to be fairer than a formal trial." Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 *Int'l J. Psych.* 117, 121 (2000); see also *id.* at 122 (noting that procedural justice is enhanced when authorities "make clear that they have listened to and considered the arguments made" and respect disputants' dignity).

²¹² See Greene, *supra* note 43, at 647 (quoting Cover, *supra* note 44, at 40).

overturned by a higher authority, provides strong support for decisional minimalism in the courts of appeals. As for district courts, on the one hand, the lack of formal precedential effect makes minimalism somewhat less compelling at that level relative to appellate courts; on the other hand, district court decisions have a host of practical effects that make decisional minimalism a valuable and important goal in light of other elements of the case for minimalism discussed in this Part.

4. *Size and Voting Rules*

A defining feature of the Supreme Court is that it is a single, large, multimember body. Assuming no recusals or vacancies, a majority opinion must win five votes to attain the force of law.²¹³ The Court's size conduces to collective deliberation, full ventilation of legal issues, and some moderation in the final outcome.²¹⁴ As Justice Cardozo memorably put it, "out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements."²¹⁵ In contrast to the Supreme Court, the courts of appeals sit in panels of three, selected more or less at random.²¹⁶ District

²¹³ An opinion with fewer than five votes may sometimes have the force of law when the Court splinters. See *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation marks omitted)). It is notable that, even there, the bias of the system is toward "narrow[ness]." *Id.* On the many complexities of the *Marks* rule, see generally Richard M. Re, *Beyond the Marks Rule*, 132 *Harv. L. Rev.* 1942 (2019).

²¹⁴ See Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 *Yale L.J.* 82, 83 (1986) (arguing that "enlarging the number of judges who sit on a court can be expected to improve the court's performance"); Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 *Mich. L. Rev.* 2297, 2310–11 (1999) ("The process of collective deliberation can improve autonomous decisionmaking.").

²¹⁵ Benjamin N. Cardozo, *The Nature of the Judicial Process* 177 (1921).

²¹⁶ Interestingly, neither the statute nor the Rules of Appellate Procedure specify how panels should be populated, so the task is handled either by chief judges or court staff, depending upon the circuit. See 28 U.S.C. § 46; Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 *Cornell L. Rev.* 65, 75–76 (2017). There are some deviations from strict randomness to equalize workloads, to accommodate schedules, to reassign returning cases to the panel that originally heard them, and a few other considerations. *Id.* at 81–93; see Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 *Cornell L. Rev.* 1, 5–6 (2015); Matthew Hall, *Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Courts of Appeals*, 7 *J. Empirical Legal Stud.* 574, 578–79 (2010). Those small deviations, which do not appear to have any ideological motivation, Levy, *supra*, at 68, do not affect my basic argument here.

judges, by and large, are randomly assigned to cases and act alone.²¹⁷ These differences make decisional minimalism more important as a conscious goal to pursue in the lower courts.

It will likely not come as a surprise that “there is a large body of empirical research that suggests that the ideological composition of three-judge panels has an effect on case outcomes (with ideology being defined by the party of the appointing president).”²¹⁸ The effects are most pronounced when a panel contains either three Democratic appointees or Republican appointees, although they are still significant on mixed panels.²¹⁹ Decisional minimalism is a strategy to cabin the effects of random panel variation. By definition, a maximalist opinion announces a broad and deep rule that is likely to impact other cases. The content of such a broad rule should not be determined by the happenstance of who is assigned to a panel. Sudden and significant legal change based on that sort of fortuity corrodes at least the perception of an impersonal rule of law.²²⁰ And the problem is exacerbated by the rigid rule of stare decisis in

²¹⁷ District judge assignment rules are even more obscure and varied than assignment rules in the courts of appeals. See 28 U.S.C. § 137(a) (delegating authority to create rules of case assignment to individual courts). But the “majority of courts use some variation of a random drawing.” FAQs: Filing a Case, Admin. Off. U.S. Cts., <https://www.uscourts.gov/faqs-filing-case> [<https://perma.cc/3TJ2-27XM>] (last visited Feb. 18, 2022); see, e.g., D.D.C. Local Civ. R. 40.3(a) (“[C]ases shall be assigned to judges of this Court selected at random . . .”). For an overview of district court case assignment procedures, see Alex Botoman, Note, Divisional Judge-Shopping, 49 Colum. Hum. Rts. L. Rev., Winter 2018, at 297, 308–20. As I discuss below, the case assignment process can be manipulated in troubling ways. See *infra* Subsection III.B.2.

²¹⁸ Levy, *supra* note 216, at 101 n.189; see also Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andrew Sawicki, Are Judges Political? An Empirical Analysis of the Federal Judiciary 11 (2006) (“[V]ariations in panel composition lead to dramatically different outcomes, in a way that creates serious problems for the rule of law.”); Stephen B. Burbank & Sean Farhang, Politics, Identity, and Pleading Decisions on the U.S. Courts of Appeals, 169 U. Pa. L. Rev. 2127, 2146 (2021) (“By now it will surprise few people that measures of judge ideology based, in whole or in part, on party of appointing president are associated with decision-making on the Courts of Appeals.”); Barry Friedman, The Politics of Judicial Review, 84 Tex. L. Rev. 257, 300 (2005) (“[S]tudy after study . . . makes equally clear that ideology plays a role in lower court decisions.”); Jonathan P. Kastellec, Panel Composition and Voting on the U.S. Courts of Appeals over Time, 64 Pol. Rsch. Q. 377, 387 (2011) (finding that a “meaningful relationship between panel composition and panel outcomes” emerged in the mid-1980s).

²¹⁹ Sunstein et al., *supra* note 218, at 11–12; see also Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717, 1719 (1997) (finding, based on a study of environmental law cases in the D.C. Circuit, that a judge’s individual vote is “greatly affected by the identity of the other judges sitting on the panel”).

²²⁰ Cf. Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U. L. Rev. 781, 781 (1989) (“The ideal of ‘the rule of law, not of men’ calls upon us to strive to ensure that our

the courts of appeals: a random panel composed of three ideologically aligned judges has the formal power to issue a broad holding that will then bind all future panels. A norm of decisional minimalism would counteract this temptation.

The situation is intensified in district courts. Because district judges act alone in almost all cases, they do not need to persuade any colleagues to take far-reaching actions—like a nationwide injunction against a government policy—based on an idiosyncratic view of the law.²²¹ Of course, the threat of reversal will exert some moderating force. But a district court’s order can have dramatic effects before there is time for appellate review,²²² when a large proportion of a district court’s orders in the course of a case are not subject to effective appellate review at all,²²³ and when the final-judgment rule means that appellate review will often be so delayed as to be practically valueless for some parties.²²⁴ Many parties will settle based on a district judge’s erroneous view of the law rather than chance an appellate reversal several years in the future. Like the courts of appeals, then, the possibility of a maximalist and outlier ruling from a district court judge based on a random case assignment militates strongly in favor of a norm of decisional minimalism.²²⁵

law itself will rule (govern) us, not the wishes of powerful individuals.”); Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 *Colum. L. Rev.* 1, 2–3 (1997) (noting the foundational distinction in American legal discourse between the rule of law and the rule of individuals).

²²¹ Empirical study of district court decision making is complicated by the fact that so much of what district courts do is not visible in reported decisions. See Christina L. Boyd, Pauline T. Kim & Margo Schlanger, Mapping the Iceberg: The Impact of Data Sources on the Study of District Courts, 17 *J. Empirical Legal Stud.* 466, 467–69 (2020).

²²² See supra note 206.

²²³ See Resnik, supra note 209, at 378 (“Managerial judges frequently work . . . out of reach of appellate review.”).

²²⁴ See 28 U.S.C. § 1291 (generally confining appeals to “final decisions of the district courts”).

²²⁵ The Supreme Court’s recent decision in *Seila Law LLC v. Consumer Financial Protection Bureau* rested on a similar skepticism of a single individual wielding too much power. 140 S. Ct. 2183 at 2203–04 (2020). The Court held that an independent agency with a single director (rather than a multimember board) was unconstitutional because a single director could “dictate and enforce policy for a vital segment of the economy affecting millions of Americans” without having to “persuade” any colleagues to go along. *Id.* at 2204. Then-Judge Kavanaugh had written in a related case that a multimember board, with “its inherent requirement for compromise and consensus,” will “tend to lead to decisions that are not as extreme, idiosyncratic, or otherwise off the rails.” *PHH Corp. v. CFPB*, 881 F.3d 75, 184 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). If we are concerned about a single, independent director “dictat[ing] and enforc[ing] policy,” we should be concerned about

5. Case Selection

The Supreme Court's docket is almost totally discretionary. With a few narrow exceptions, it has complete control over which cases it hears through certiorari.²²⁶ And it exercises that discretion sparingly; in the 2020 Term, it gave plenary review to only fifty-seven cases.²²⁷ The jurisdiction of the lower courts, by contrast, is almost entirely mandatory; they have no formal version of certiorari to allow them to refuse to adjudicate a case properly before them.²²⁸ This difference, too, bears on the case for decisional minimalism.

First, the lower courts cannot so easily wriggle out of deciding cases that they would prefer not to hear—whether because they are politically explosive, because the political, social, or technological circumstances are changing rapidly, or because they are unsure how the case should be resolved.²²⁹ As a result, the best a lower court can do is resolve a case in a manner that does not resolve more than necessary. Second, as will be explored more fully below, because the Supreme Court hears so few cases, it must often issue wide opinions to adequately perform its guidance function.²³⁰ A narrow opinion that resolves little more than the case at hand is an inefficient use of a limited certiorari docket (as the criteria for certiorari reflect).²³¹ Lower courts, however, can discharge the guidance function in a different manner. Because they decide so many more cases than the Supreme Court, they can clarify the law in a more

single judges and small, randomized panels with a similar power. *Seila Law*, 140 S. Ct. at 2204.

²²⁶ 28 U.S.C. §§ 1254, 1257.

²²⁷ *Supra* note 24.

²²⁸ Lower courts may have *some* discretion to control what they decide, but their discretion is different in kind from certiorari. See *infra* notes 298–305 and accompanying text. There are a few small pockets of cases where the courts of appeals have a certiorari-like discretion, including appeals of class certification decisions under Federal Rule of Civil Procedure 23(f) and interlocutory appeals certified by the district court. See 28 U.S.C. § 1292(b).

²²⁹ Put another way, they have less room for prudential minimalism. See *infra* Section II.C.

²³⁰ Cf. Schauer, *supra* note 38, at 208 (arguing that “[g]uidance and minimalism are thus opposing virtues” in the Supreme Court); Randy J. Kozel & Jeffrey A. Pojanowski, *Discretionary Dockets*, 31 *Const. Comment.* 221, 247 (2016) (“A court that speaks both rarely and guardedly fails to provide the requisite clarity and certainty regarding the content of constitutional norms.”).

²³¹ See S. Ct. R. 10 (indicating that certiorari is generally confined to “important” issues); *infra* note 341 and accompanying text.

classic, common law fashion by deciding a large number of cases narrowly and incrementally.²³²

One last point warrants discussion. The paradigmatic instance of judicial review in the public imagination (which underlies the counter-majoritarian difficulty) is a challenge in the Supreme Court to a legislative act. But judicial review in lower courts tends to look different. As Professor Seth Kreimer has shown, the “Constitution in action at the trial court level most frequently involves damage actions seeking to invoke protections of minimal civil decency against street-level bureaucrats who exercise delegated discretion.”²³³ In this kind of case, the Supreme Court enunciates broad doctrinal standards—“deliberate indifference,” “legitimate expectations,” unreasonable use of force, and the like—and the lower courts give those standards life and specificity in particular disputes.²³⁴ As a result, the role of district courts in much constitutional litigation “differs importantly from that of the seekers of neutral principles, the strivers for social aspiration and prophecy, or the archaeologists of historical intention that appear in most constitutional theory.”²³⁵ Instead they give Supreme Court doctrine “the reality of justice through repeated application.”²³⁶ That task is fundamentally minimalist.

6. *Democratic Legitimacy*

Democratic legitimacy is a complex concept that is usually used in one of two senses: aggregative or deliberative.²³⁷ The aggregative concept of democracy is that governance is legitimate to the extent that policy decisions are made by voters or those for whom the voters voted.²³⁸ The

²³² See Kozel & Pojanowski, *supra* note 230, at 244; Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 *Ind. L.J.* 297, 353 (1996).

²³³ Kreimer, *supra* note 153, at 432.

²³⁴ *Id.* at 463.

²³⁵ *Id.* at 516.

²³⁶ *Id.* at 519 n.221.

²³⁷ Jerry L. Mashaw, *Reasoned Administration and Democratic Legitimacy: How Administrative Law Supports Democratic Government* 165–70 (2018); see also Fabienne Peter, *Democratic Legitimacy I* (2009) (calling “aggregative and deliberative democracy” the “two main paradigms” in “contemporary democratic theory”).

²³⁸ Mashaw, *supra* note 237, at 165. Bickel’s counter-majoritarian difficulty is premised on this concept of democratic legitimacy. See Bickel, *Least Dangerous Branch*, *supra* note 34, at 16–17; see also Waldron, *supra* note 140, at 1386–93 (assessing the relative legitimacy of courts and legislatures in similar terms). On the Framers’ complex relationship to democracy, see David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127

deliberative concept of democracy “situates the legitimacy of political decision-making not in elections, but in the process of public deliberation between free and equal citizens.”²³⁹ The theory of decisional minimalism rests on both ideas of democracy: minimalism is democracy-permitting, and therefore good, because it “allows the democratic process a great deal of room.”²⁴⁰ But it is also good because, through techniques like void-for-vagueness and constitutional avoidance, it “can provide spurs and prods to promote democratic deliberation itself.”²⁴¹ How do these democratic justifications fare in the lower courts?

From the perspective of aggregative democracy, the House and Senate are democratically legitimate because they are elected by the people and must face periodic reelection. The executive branch is legitimate relative to the judiciary because the President is elected, and high-level officials are nominated by the President, confirmed by the Senate, and generally accountable to the President.²⁴² When an administration ends, a new administration takes office that tends to reflect the policies of the new President.²⁴³ The judiciary, on this scale, is the least democratically legitimate. Though judges are appointed by the President with the consent of the Senate, they have life tenure. As a result, a judge’s connection to democratic politics in the appointment process may have occurred long in the past, and judges do not face reelection. Hence the appeal of decisional minimalism: it forecloses fewer policy options to the more democratically legitimate branches of government.

This justification for minimalism is stronger in the context of lower courts. Supreme Court Justices have a stronger claim to “aggregative” democratic legitimacy than lower court judges because so much more political attention is lavished on the Supreme Court appointment process. Indeed, some have pointed to the “democratic pedigree” of the Supreme

Yale L.J. 664, 677–81 (2018) (reviewing Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (2016)).

²³⁹ Mashaw, *supra* note 237, at 167; see Sunstein, *One Case at a Time*, *supra* note 33, at 24–25 (“[I]n a deliberative democracy, a premium is also placed on the exchange of reasons by people with different information and diverse perspectives.”).

²⁴⁰ Sunstein, *One Case at a Time*, *supra* note 33, at 53.

²⁴¹ *Id.* at 27.

²⁴² Mashaw, *supra* note 237, at 170. One could, of course, agree that the executive branch has more democratic legitimacy than the judiciary without agreeing that it is legitimate full stop. See *id.*; Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 *Harv. L. Rev.* 718, 718–19 (2016) (reviewing Daniel R. Ernst, *Tocqueville’s Nightmare: The Administrative State Emerges in America, 1900–1940* (2014)).

²⁴³ See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

Court as a way to undercut the premises of the counter-majoritarian difficulty.²⁴⁴ But the democratic pedigrees of Justices and judges differ. To be sure, they go through the same formal process of nomination and confirmation.²⁴⁵ In practice, however, a President will devote more time to picking a Justice than to picking a lower court judge. After all, that Justice will likely project the President's legacy far into the future, and so the President will take care to select someone whose constitutional vision is reasonably consonant with her own.²⁴⁶ Second, a nominee for Supreme Court Justice will receive closer scrutiny from the Senate, outside groups, and the public at large than a nominee to a lower court will receive.²⁴⁷ It is hard to imagine anything like the high drama and public salience of the Bork confirmation hearing in the case of a court of appeals judge, let alone a district judge. As a result, lower court judges typically have a less compelling claim to a "democratic pedigree" than Supreme Court Justices. And the case for democracy-permitting minimalism is accordingly stronger.²⁴⁸

²⁴⁴ See, e.g., Christopher L. Eisgruber, *Constitutional Self-Government* 64–65 (2001).

²⁴⁵ See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 *B.U. L. Rev.* 205, 221 (1985) (noting the "structural parity" of all Article III judges).

²⁴⁶ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *J. Pub. L.* 279, 284 (1957) ("Presidents are not famous for appointing [J]ustices hostile to their own views on public policy . . ."); see Lee Epstein & Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* 50–52 (2005); Barack Obama, *A Responsibility I Take Seriously*, *SCOTUSblog* (Feb. 24, 2016, 8:00 AM), <https://www.scotusblog.com/2016/02/a-responsibility-i-take-seriously/> [<https://perma.cc/R3N7-3KNZ>].

²⁴⁷ Bruhl, *supra* note 18, at 488; see Sarah A. Binder & Forrest Maltzman, *Advice and Dissent: The Struggle to Shape the Federal Judiciary* 2 (2009) ("[A] typical nomination to the lower federal courts receives far less scrutiny than would a nomination to the Supreme Court.").

²⁴⁸ There is one respect in which district judges may have a superior democratic pedigree: they "have special ties to local constituencies, which may afford them special leeway in their own communities." Bruhl, *supra* note 18, at 491; see also Emily Buss, *The Divisive Supreme Court*, 2016 *Sup. Ct. Rev.* 25, 44 (noting the "distinctly local pedigrees" of many district judges); Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 *U. Mich. J.L. Reform* 971, 1013 (2010) ("[T]rial judges are generally understood to be cognizant of, and often expected to be responsive to, local sensibilities."). In public law cases, however, lower court judges will generally be interpreting federal statutes and constitutional provisions and thus engaged largely in discerning national policies—especially when the endgame is nationwide relief. And district court judges "have a lesser claim, as compared to Supreme Court Justices, to have been democratically authorized to make national policy." Bruhl, *supra* note 18, at 491 (emphasis omitted).

There is another, subtler facet of aggregative legitimacy on the lower courts. The Justices decide cases as a single, unified body that does not change without a resignation and appointment.²⁴⁹ The Court thus deepens the temporality of representation in a relatively constant way. It aggregates the choices and priorities of the past several presidents and Senates.²⁵⁰ Though chance and Justices' retirement decisions unquestionably play an important role, a party that controls the presidency for long stretches of time will tend to have more opportunities for appointments to the Court. These political dynamics and the fact that the Court is a single, continuing body tend to ensure that the median Justice is, on any particular issue, not terribly far from the legal mainstream.²⁵¹ These mechanisms are, of course, far from perfect.²⁵² But there is an even greater danger of unrepresentative decision making in the lower courts. Because (for the most part) an appellate panel is randomly assembled and a district judge is randomly assigned, there is no structural guarantee that there will not be a very large disconnect between the ideological leanings of a panel or judge and the median voter. Decisional minimalism would serve to temper this legitimacy problem by confining the effects of the resulting decision to a smaller compass.

The case for decisional minimalism based on deliberative democracy, however, is a different story. As noted above, Sunstein also lauds the capacity of some minimalist dispositions, like invalidating a statute on void-for-vagueness grounds, to spur activity in the political branches. As a general matter, this defense of minimalism seems less compelling in the lower courts for two reasons. First, many lower court decisions are less visible, and there is no guarantee that the political branches will take

²⁴⁹ There are certain motions and applications that are presented, in the first instance, to individual Justices, who have the power to act on them alone. S. Ct. R. 22. But even there, the individual Justice can be overridden by the Court as a whole, and as a practical matter, the individual Justices will refer controversial applications to the whole Court. See Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett & Dan Himmelfarb, *Supreme Court Practice* 17-29 (11th ed. 2019).

²⁵⁰ See Michael W. McConnell, *What Are The Judiciary's Politics?*, 45 *Pepp. L. Rev.* 455, 462-66 (2018).

²⁵¹ This tendency has been descriptively plausible for much of American history. See Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 14 (2009) (“[O]ver time . . . Supreme Court decisions tend to converge with the considered judgment of the American people.”); Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 *Harv. L. Rev.* 31, 61 (2016) (“[T]he empirical reality appears to be that the Court will rarely drift very far from the agenda of a dominant national political coalition.”).

²⁵² See *supra* note 26 and accompanying text.

notice of their work.²⁵³ Indeed, Congress “tends to give little attention to the large number of statutory opinions of the lower courts.”²⁵⁴ If Congress is unaware of a lower court decision, then the decision cannot effectively provoke a response. Second, as Professor Vermeule has observed, the lower judiciary is a “they,” not an “it.”²⁵⁵ Because of the lower judiciary’s collective character, “[i]f judges cannot coordinate on a particular democracy-forcing regime, then decisions by individual judges in accordance with democracy-forcing precepts will be futile, perhaps even perverse.”²⁵⁶ Such decisions would be “futile” because Congress is unlikely to be “forced” into action by isolated decisions, and they would be “perverse” because they might distort the law to elicit a congressional response without actually obtaining that offsetting benefit.²⁵⁷

In short, the democratic case for decisional minimalism in the lower courts, relative to the Supreme Court, is something of a mixed bag. From the point of view of aggregative democracy, the case is stronger: lower court judges have an inferior claim to legitimacy, and the case-assignment system makes outlier judges and panels real possibilities. From the point of view of deliberative democracy, the capacity of lower courts to spur the political branches into deliberation is arguably weaker. That said, in many salient disputes of public law, the political branches may in fact be paying close attention to the lower courts, meaning the lower courts are still capable of provoking dialogue. And lower courts can still themselves

²⁵³ See Barrett, *supra* note 19, at 331–35 (surveying the literature); Victoria F. Nourse, Response, Overrides: The Super-Study, 92 *Tex. L. Rev.* 205, 209 (2014) (“Supreme Court decisions are also visible to the public—and voters—in a way that appellate decisions generally are not.”).

²⁵⁴ Robert A. Katzmann, Statutes, 87 *N.Y.U. L. Rev.* 637, 685 (2012); see William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 *Yale L.J.* 331, 416 (1991) (“Just as the present study shows impressive congressional activity in connection with Supreme Court decisions, it shows an unimpressive knowledge of and response to the far more numerous lower federal court statutory interpretation decisions.”); Robert A. Katzmann, Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory, 80 *Geo. L.J.* 653, 662 (1992) (finding, based on a small study, that congressional staffs were not even aware of twelve of fifteen statutory D.C. Circuit decisions warranting congressional attention).

²⁵⁵ Vermeule, *supra* note 139, at 118–19.

²⁵⁶ *Id.* at 118.

²⁵⁷ *Id.* at 133–37. Vermeule’s point does not undercut the case for decisional minimalism more broadly. His objection only “bites against interpretive accounts that explicitly or implicitly require coordinated judicial action.” *Id.* at 124. Minimalism’s benefits, for the most part, do not depend on coordination. Any given instance of minimalism will have the benefit of reduced decision and error costs, as well as reduced interference with the political branches.

embody deliberative ideals of public reason in their opinions, apart from provoking activities in other branches. On balance, the democratic case for minimalism seems to be stronger in lower courts and, at worst, neutral relative to the Supreme Court.²⁵⁸

B. Some Objections

One common objection to judicial minimalism is that it undersells the capacity of courts to achieve change for the good. This might be called the “judicial heroism” critique: that courts can and should step in to protect marginalized people or to guard important rights. “Had citizens . . . heeded minimalism’s counsel in the past,” the argument goes, “there would have been no *Brown* or *Frontiero*.”²⁵⁹ And “[t]o adopt minimalist premises now is to foreswear such decisions in the [future].”²⁶⁰ Professor Justin Driver has added that judicial minimalism borrows certain rhetorical tropes common among reactionary counterarguments to progressive change, tropes that were catalogued by Albert Hirschman.²⁶¹ The rhetorical overlap does not mean that the case for judicial minimalism is wrong, but it may “instill an unduly anemic understanding of the Supreme Court’s capacity to promote social change.”²⁶²

²⁵⁸ In addition, the same thing that makes lower courts less likely to provoke democratic deliberation may actually weaken one objection to judicial minimalism too. Professors Robert Post and Reva Siegel have argued that maximalist Supreme Court opinions can galvanize popular movements that invigorate and shape our constitutional law. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373, 401–06 (2007). In that way, even backlash can reinforce constitutional legitimacy. *Id.* But the relative invisibility of lower court opinions deflates that objection as applied to lower court minimalism.

²⁵⁹ Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *The Constitution in 2020*, at 25, 33 (Jack M. Balkin & Reva B. Siegel eds., 2009).

²⁶⁰ *Id.*

²⁶¹ See Justin Driver, *Reactionary Rhetoric and Liberal Legal Academia*, 123 Yale L.J. 2616, 2631 (2014). The tropes are as follows: perversity (that a proposed reform will worsen the very thing it purports to improve), futility (that reform efforts cannot change fundamental social conditions that give rise to the targeted injustice or inequality), and jeopardy (that reform will endanger some prior and more important public value). *Id.* at 2622–25. See generally Albert O. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* 7 (1991) (cataloguing these three “reactive-reactionary theses”). Professors James Fleming and Linda McClain have also linked Sunstein’s minimalism and Hirschman’s rhetoric of reaction. See James E. Fleming & Linda C. McClain, *Ordered Liberty: Rights, Responsibilities, and Virtues* 232 (2013).

²⁶² Driver, *supra* note 261, at 2637; see also Kate Andrias, *The Fortification of Inequality: Constitutional Doctrine and the Political Economy*, 93 Ind. L.J. 5, 25 (2018) (arguing that

The heroism critique rests on an undeniably appealing vision of judicial power, but the critique has less bite in the context of lower courts. After all, *Brown v. Board of Education* and *Frontiero v. Richardson* were Supreme Court cases.²⁶³ To embrace judicial minimalism in the lower courts is not necessarily to deny that the Supreme Court may, and perhaps should, “quicken the conscience of the nation” when the occasion demands.²⁶⁴ It just assigns the lower courts a more modest role. By and large, they dispense justice on a smaller scale.²⁶⁵ Indeed, given the stark congestion of lower court dockets, reining in judicial ambition may have the happy effect of allowing lower courts to dispense justice more equitably to more people. Nor does lower court minimalism mean that lower courts cannot move the law in a better direction. It is only a question of *how*—a minimalist urges lower courts to advance the law in “molecular” rather than “molar” motions, to use Justice Holmes’s metaphor.²⁶⁶ In all, lower court minimalism preserves room for bold action by the Supreme Court and does not rule out “creative, important judicial contributions” from lower courts that are suited to their institutional position.²⁶⁷

“judicial minimalism” has “encouraged liberal justices, wary of judicial activism, to acquiesce to legislation and common law rules that promote inequality”).

²⁶³ They may also have been more minimalist than is commonly appreciated. On *Frontiero*, see Ginsburg, *supra* note 56, at 1204. As for *Brown*, it was the culmination of a litigation campaign that had chipped away at *Plessy v. Ferguson*, 163 U.S. 537 (1896), until it collapsed. In a 1950 speech, Thurgood Marshall said that “[t]he true liberal believes that it is important to use all of our legal machinery to correct the evils now present,” and that “[o]ur legal machinery requires a step by step procedure.” Thurgood Marshall, Special Counsel, NAACP, Significance of the Recent Supreme Court Decisions, Speech at Fisk University (July 5, 1950), *quoted in* Robert Post, Marshall as a Judge, 88 *Fordham L. Rev.* 1, 7 (2019).

²⁶⁴ Alexander M. Bickel, *Integration: The Second Year in Perspective*, 135 *New Republic*, Oct. 8, 1956, at 12.

²⁶⁵ Even this more modest role, which would include enforcing bold mandates from the Supreme Court, can take tremendous fortitude. Consider Judge Wright’s heroic efforts to enforce the *Brown* decision in a deeply hostile New Orleans in the 1950s. See Richard H. Fallon, Jr., Greatness in a Lower Federal Court Judge: The Case of J. Skelly Wright, 61 *Loy. L. Rev.* 29, 33–36 (2015).

²⁶⁶ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting); see Grey, *supra* note 51, at 35.

²⁶⁷ Ginsburg, *supra* note 56, at 1209; Fallon, *supra* note 265, at 56 (“We should probably be grateful that most lower-court judges would not even aspire to greatness.”). It may also be worth asking whom judicial heroism in the lower courts is most likely to serve, given the makeup of the federal judiciary. See McConnell, *supra* note 250, at 458 (noting that the federal judiciary “has always been richer, older, whiter, maler, more secular, and more prominent and successful than the American population as a whole” (citing Jonathan K. Stubbs, A

A second objection is that a norm of minimalism would truncate the law-development process. Case law in the courts of appeals and district courts (the argument goes) would collapse into a mess of pointillistic rulings that do little to provide guidance to the parties or to further the reasoned elaboration of the law.²⁶⁸ As I will explain below, this objection has force when applied to the Supreme Court, given the Court's severely limited docket. But it is defanged by the size of dockets in the lower courts. A large docket generally allows the law to emerge through repeated, incremental interventions.²⁶⁹ The Supreme Court's decisions are a few, distant points in a constellation; lower court decisions—even narrow ones—can form a rich, pixelated image if they are numerous enough. Further, after a period of doctrinal development through frequent and narrow rulings, a minimalist court may have the “confidence” to consummate that development by articulating the wider and deeper rule that has emerged from the bottom up.²⁷⁰ That is a variation of the more general point that minimalism is a “mood” or “presumption,” not an ironclad rule, and any departures must be judged on the merits.²⁷¹

Another version of this second objection is that a few broad and deep opinions from select lower court judges may be beneficial to get “big” ideas out there for the Supreme Court to consider. To use a common metaphor, perhaps a few maximalist opinions could aid the “percolation” of legal issues in the federal system.²⁷² This potential benefit seems to me

Demographic History of Federal Judicial Appointments by Sex and Race: 1789–2016, 26 *Berkeley La Raza L.J.* 92, 109–12 (2016)).

²⁶⁸ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. Chi. L. Rev.* 1175, 1177 (1989) (rejecting the theory by which “law grows and develops . . . not through the pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time”).

²⁶⁹ See Kozel & Pojanowski, *supra* note 230, at 238–39, 244. And it is not clear that numerous non-minimalist opinions in lower courts would in fact produce greater clarity and integrity rather than a maximalist cacophony.

²⁷⁰ See Sunstein, *One Case at a Time*, *supra* note 33, at 59. Decisional minimalism in qualified immunity cases gives rise to a unique pathology. Because an officer can only be liable if the law was “clearly established” at the time of the conduct in question, a court adjudicating a qualified immunity case always has the option of denying relief on the relatively narrow ground that a right was not “clearly established” without addressing whether the right does in fact exist. See *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). If judges always followed that minimalist course, it would halt “the development of constitutional precedent.” *Id.* For that reason, decisional minimalism should not be a general goal in that context, even in lower courts.

²⁷¹ Sunstein, *One Case at a Time*, *supra* note 33, at 257.

²⁷² See *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (“We have in many instances recognized that when frontier legal problems are presented, periods of

overstated. First, it is far from clear that the same big ideas could not come to the Supreme Court from the parties' briefs, from amicus briefs, and from scholarship—to say nothing of social movements and constitutional culture.²⁷³ And the percolation metaphor may overestimate the extent to which Justices actually pay attention to lower court opinions.²⁷⁴ Second, to permit certain prominent judges to exempt themselves from a norm of minimalism would likely end up just defeating the norm; there would no effective way to control which judges become self-appointed producers of big ideas. Further, non-minimalist lower court decisions may harm the Supreme Court's decisional process because a broad and consequential mistake may compel the Court to grant certiorari before it would otherwise do so, effectively undermining the Court's prudential discretion over its docket.

A third objection is that a strong norm of vertical stare decisis renders decisional minimalism practically unimportant in the lower courts. In other words, if the Supreme Court decides the important questions of law and lower courts are strictly bound by those rulings, then perhaps the scope of a lower court's legal discretion is so narrow that there is no need for minimalism. This objection misses the mark in two ways. First, the Supreme Court's capacity constraints mean that it will not be able to decide all important questions of federal law. As Judge Friendly once observed, the courts of appeals every year face “significant issues of

‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”). But see Michael Coenen & Seth Davis, *Percolation's Value*, 73 *Stan. L. Rev.* 363, 366–69 (2021) (skeptically assessing the value of percolation).

²⁷³ See Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 *N.Y.U. L. Rev.* 1902, 1954 (2021) (arguing that courts are “important sites of communicative exchange” that “can amplify voices marginalized in politics and make audible claims that lawmakers and the public fail to consider”).

²⁷⁴ See Coenen & Davis, *supra* note 272, at 390–94; Caminker, *supra* note 13, at 56–57. From a litigation perspective, one benefit of percolation that may be difficult to replicate is information about the real-world effects of some particular rule of law on the ground. One common response to a parade-of-horribles-type argument about a proposed rule is to say that the rule has existed in *X* circuit for years without the sky falling. See, e.g., *Perry v. New Hampshire*, 565 U.S. 228, 262 (2012) (Sotomayor, J., dissenting) (deploying this argument); William N. Eskridge, Jr. & Christopher R. Riano, *Marriage Equality: From Outlaws to In-Laws* 638–40 (2020) (suggesting that lower court rulings can create the conditions for falsifying arguments based on stereotypes and slippery slopes). But see Coenen & Davis, *supra* note 272, at 398–402 (identifying and skeptically assessing this argument). But there is no apparent reason that a similar benefit could not come from a rule built up incrementally rather than in one fell swoop.

federal law, not controlled by Supreme Court decisions, which have not previously arisen in the circuit but which the Supreme Court will not regard as so important as to justify intervention until a conflict has arisen or, sometimes, even when it has.”²⁷⁵ Since Judge Friendly wrote those words, the Supreme Court’s docket has shrunk while the lower courts’ docket has ballooned. Indeed, one recent study concluded that the Supreme Court is only resolving about a third of all circuit splits.²⁷⁶ Second, even when the Supreme Court does tackle an issue, its precedents may be sparse or open to interpretation, leaving space for lower court creativity.²⁷⁷ Third, when the Supreme Court does take up a particular case, a lower court resolution of that case can have significant on-the-ground consequences until the Court’s ultimate decision.²⁷⁸ Finally, district courts in particular retain discretion in finding facts, applying law to facts, managing litigation, and calibrating remedies, much of which happens in the interstices of legal precedent.²⁷⁹ In all, ensuring that lower court judges are faithful to their proper role is “in some respects *more* important than doing the same for the Supreme Court.”²⁸⁰

A fourth objection is that decisional minimalism may be less a prescription than an inevitability. In other words, perhaps the very features I have identified that counsel in favor of minimalism will also reliably produce it. There is a small kernel of truth to this objection: I have described the “immanent normative structure” of the judiciary as it currently exists.²⁸¹ But while the design of lower courts does give rise to certain norms and expectations of judicial behavior, it does not guarantee them. Take the panel precedent rule. That rigid rule may, in a healthy, collegial culture, lead to a stable norm of not overreaching in panel

²⁷⁵ Henry J. Friendly, *The “Law of the Circuit” and All That*, 46 *St. John’s L. Rev.* 406, 411 (1972).

²⁷⁶ Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 *J. Empirical Legal Stud.* 448, 456 (2019).

²⁷⁷ Pauline T. Kim, *Lower Court Discretion*, 82 *N.Y.U. L. Rev.* 383, 417 (2007) (“[T]he Supreme Court’s opinions inevitably afford lower court judges some degree of discretion in deciding cases.”); *Re*, *supra* note 22, at 924–25.

²⁷⁸ See, e.g., *Trump v. Int’l Refugee Assistance Project*, 137 *S. Ct.* 2080, 2087 (2017).

²⁷⁹ See Resnik, *supra* note 209, at 378.

²⁸⁰ Barrett, *supra* note 19, at 319 (emphasis added); H. Jefferson Powell, *Judges as Superheroes: The Danger of Confusing Constitutional Decisions with Cosmic Battles*, 72 *S.C. L. Rev.* 917, 921–22 (2021) (“If [circuit] judges see the law and themselves in fundamentally distorted ways, the negative consequences—for the law and for human beings—are incalculable.”).

²⁸¹ Pozen, *supra* note 28, at 9.

decisions. But there is no formal reason that a judge—perhaps a new judge not steeped in institutional culture—could not break that norm on an issue that she cares about. After all, as Professor Carrington once observed, “[m]egalomania is an occupational hazard of the judicial office.”²⁸² A few instances of such norm violation could cause an equilibrium to disintegrate.²⁸³ The acceleration of nationwide injunctions over the past twenty or so years may be an example of a norm of self-restraint in lower courts eroding.²⁸⁴

A final question is what lessons this defense of decisional minimalism in the lower courts might have for so-called “structural reform” litigation. Structural reform litigation refers to attempts to vindicate statutory and constitutional values in the context of large, bureaucratic institutions.²⁸⁵ This kind of litigation is controversial because it often pushes a trial judge into a proactive, long-term, managerial role that differs from the traditional image of the judge as a passive umpire presiding over a bipolar, adversarial dispute.²⁸⁶

²⁸² Carrington, *supra* note 152, at 550.

²⁸³ See generally Josh Chafetz & David E. Pozen, How Constitutional Norms Break Down, 65 *UCLA L. Rev.* 1430, 1435–38 (2018) (describing the “latent instability” of norms regulating official behavior and the modes in which they break down).

²⁸⁴ See Jeffrey A. Rosen, Deputy Attorney General, Opening Remarks at Forum on Nationwide Injunctions and Federal Regulatory Programs (Feb. 12, 2020), <https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-opening-remarks-forum-nationwide> [<https://perma.cc/Z22D-FR9B>] (estimating that nationwide injunctions in 2020 were being issued at twelve times the rate that they were in President George W. Bush’s administration). The pace shows no signs of diminishing during the Biden Administration. See Avalon Zoppo, 5th Circuit Judge Gregg Costa to Return to Private Practice, Saying He’s “Better Suited to Being an Advocate,” *Law.com* (Feb. 9, 2022), <https://www.law.com/2022/02/09/5th-circuit-judge-gregg-costa-to-return-to-private-practice-saying-hes-better-suited-to-being-an-advocate/> [<https://perma.cc/AF5Q-QM5J>] (reporting Judge Costa’s statement in an interview that “[n]ow, it’s hard to keep track of all the nationwide injunctions that issue and reach the court in stay motions”).

²⁸⁵ For classic descriptions and defenses of this form of litigation, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281, 1284 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 *Harv. L. Rev.* 1, 2–5 (1979).

²⁸⁶ See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *Harv. L. Rev.* 1016, 1017–18 (2004) (“From the outset, the legitimacy of public law litigation was as suspect as its efficacy.”). The traditional image of the judge is often associated with Fuller, *supra* note 63, though that may be an oversimplification of Fuller’s views. See Robert G. Bone, *Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 *B.U. L. Rev.* 1273, 1275 (1995).

These controversies surrounding structural reform litigation are orthogonal to the question of decisional minimalism because they concern a different facet of the judicial function. Decisional minimalism is addressed to judges writing opinions about the law. The most controversial parts of structural reform litigation, by contrast, are *remedial* decisions that come after liability has been determined.²⁸⁷ Judges wear different hats and have different roles at different phases of litigation. Articulating legal norms (the concern of decisional minimalism) and managing organizational remedies are different “hats.” That said, the reasons given here for a measure of caution and humility in writing opinions about law—especially the limits of judicial capacity, the randomness of case assignments, and democratic legitimacy deficits—may very well inform how remedial discretion is exercised. In particular, they reinforce the arguments of some commentators for more limited, experimentalist remedies that result from a process of party deliberation rather than comprehensive, command-and-control remedies imposed unilaterally by the judge.²⁸⁸

C. Prudential Minimalism

Bickel’s basic argument for prudential minimalism had two steps: the counter-majoritarian difficulty rendered the legitimacy of judicial review questionable to the extent that it is not rigorously principled, but it is often imprudent or counterproductive to act in a rigorously principled fashion. As a result, the Supreme Court needs an escape hatch from principled adjudication. By exercising the passive virtues, the Court can avoid cases without having to distort merits rulings that ought to be principled.

Does this argument apply to lower courts too? As noted above, the counter-majoritarian difficulty is, if anything, heightened in lower courts because of the appointment process and the probability of an outlier judge or panel being assigned to a case. And the problem of precipitate and imprudent judicial involvement seems similar: if the public is not ready for a law to be judicially interred, then it is hard to see why it would matter from which court the interment comes. Bickel himself was rather dismissive of lower courts; he wrote that he had “not addressed” them because they act as “stop-gap or relatively ministerial decision-makers

²⁸⁷ See Susan P. Sturm, A Normative Theory of Public Law Remedies, 79 *Geo. L.J.* 1355, 1360–65 (1991).

²⁸⁸ See *id.* at 1427–44; Sabel & Simon, *supra* note 286, at 1019–20.

only.”²⁸⁹ Whatever the truth of that assessment sixty years ago, it does not cohere with present realities. There is nothing “stop-gap” or “ministerial” about a nationwide injunction (or vacatur) halting a signature initiative of a presidential administration. Since the need for prudential minimalism seems to be present, if not entirely undiminished, in lower courts, what tools of prudential minimalism are available?

Before answering that question, it is worth asking what contemporary relevance Bickel’s passive virtues have even in the Supreme Court. Gerald Gunther famously—and quite devastatingly—quipped that Bickel was endorsing “100% insistence on principle, 20% of the time.”²⁹⁰ His point, of course, was that one could not claim a commitment to principled adjudication and then condone a subterfuge designed to avoid principled adjudication. But, even at that time, the reality of the Supreme Court was closer to Bickel’s vision than Gunther and Herbert Wechsler’s classical view. A substantial part of the Court’s docket had already been converted to certiorari jurisdiction by the 1925 Judges’ Bill.²⁹¹ The Court had total discretion over whether to hear those cases. And, though Gunther and Wechsler did not like it,²⁹² the Court’s residual appellate jurisdiction was effectively treated as discretionary as well.²⁹³ That trend has only accelerated in Bickel’s favor. In 1988, certiorari was expanded to cover virtually all cases,²⁹⁴ and the Court only grants certiorari in a tiny fraction of cases. At best, the modern Supreme Court is, by the numbers, 100%

²⁸⁹ Bickel, *Least Dangerous Branch*, supra note 34, at 198. Bickel’s elision of lower courts is apparent in the very first sentence of his book: “The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known.” *Id.* at 1. However, the Supreme Court is not the judicial *branch*. See Amar, supra note 245, at 239 n.115 (noting the “false equation[] of the Supreme Court and the third branch” in Bickel’s opening).

²⁹⁰ Gunther, supra note 117, at 3.

²⁹¹ Robert Post, *The Incomparable Chief Justiceship of William Howard Taft*, 20 *Mich. St. L. Rev.* 1, 77–81 (2020); Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 *Harv. L. Rev.* 1, 1–3 (1928).

²⁹² See Gunther, supra note 117, at 11–12; Wechsler, supra note 112, at 9.

²⁹³ Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 *Colum. L. Rev.* 1643, 1708–12 (2000). In 1945, a deputy clerk of the Court said forthrightly that “[j]urisdictional statements and petitions for certiorari now stand on practically the same footing.” Harold B. Wiley, *Jurisdictional Statements on Appeals to U.S. Supreme Court*, 31 *A.B.A. J.* 239, 239 (1945).

²⁹⁴ Act of June 27, 1988, Pub. L. No. 100-352, § 3, 102 Stat. 662.

principle, 1% of the time.²⁹⁵ The triumph of certiorari has largely obviated the passive virtues as Bickel understood them.²⁹⁶ The Court now can just about always stay its hand simply by denying certiorari; there is no need for elaborate jurisdictional somersaults.²⁹⁷

But certiorari is unavailable to lower courts. So the question becomes: Are there other techniques of prudence that *are* available in lower courts that can function like Bickel's passive virtues? After all, many of the techniques of prudential minimalism that Bickel described—such as standing, mootness, ripeness, and the political question doctrine—are nominally available to lower courts.²⁹⁸ Bickel himself thought that the answer was largely no. He wrote that lower courts “must, indeed, resolve all controversies within their jurisdiction, because the alternative is chaos.”²⁹⁹ That may be a bit overstated, but it is basically right. Lower courts may have *some* discretion to control what they decide, through devices like abstention doctrines and “prudential” standing.³⁰⁰ But this discretion (to the extent it exists at all) is different in kind from certiorari.

The Supreme Court has “unlimited power” to make “ad hoc choices” about what cases to hear.³⁰¹ The lower courts, by contrast, have (at most)

²⁹⁵ During the 2019 Term, the total number of cases granted by the Court for plenary review was an even 1.0%. The Supreme Court, 2019 Term—The Statistics, 134 Harv. L. Rev. 610, 618 tbl.2 (2020).

²⁹⁶ See Monaghan, *supra* note 38, at 717–18. Indeed, Wechsler recognized that “a simple method for achieving” Bickel’s “goal” would be “the amendment of the statutes governing appellate jurisdiction to substitute certiorari for appeal.” Wechsler, *supra* note 112, at 675. That is what happened.

²⁹⁷ The passive virtues may still have a limited function in the Supreme Court when it wants, for some reason, to reverse or vacate a decision below without reaching the merits (which still requires it to grant certiorari). Cf. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004) (vacating lower court injunction on prudential standing grounds). But that is different and narrower role than Bickel envisaged.

²⁹⁸ See Wechsler, *supra* note 112, at 675 (“[T]he techniques for the avoidance of decision that Bickel so lucidly discusses are addressed to the propriety of any judicial intervention, not merely to adjudication by the highest court.”).

²⁹⁹ Bickel, *Least Dangerous Branch*, *supra* note 34, at 173.

³⁰⁰ See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 547–60 (1985). One could argue that lower courts have a great deal of discretion whether to issue decisions at all; theoretically, a district court could sit on a motion or a circuit could sit on appeal indefinitely, and that might be analogized to prudential minimalism in the Supreme Court. The problem, again, is that this sort of freewheeling refusal to adjudicate is inconsistent with the lower courts’ basic structural function, which is to be the first- and second-line resolvers of legal disputes. That function is reflected in mandatory jurisdictional statutes and the Federal Rules’s stated purpose “to secure the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1.

³⁰¹ Shapiro, *supra* note 300, at 547.

a limited, interstitial discretion that “carries with it an obligation of reasoned and articulated decision, and that can therefore exist within a regime of law.”³⁰² That discretion is itself limited by precedent and reviewable for legal error.³⁰³ It does not seem “minimalist,” in a colloquial sense, to give lower court judges a freewheeling power to refuse to adjudicate politically controversial cases.³⁰⁴ Further, the Court has recently “cut back on the ‘abstention doctrine’” and “expressed significant doubts about a longstanding assertion of judicial authority to enforce ‘prudential’ standing doctrines that are rooted not in Article III limits on judicial power, but rather in judicial notions of self-restraint.”³⁰⁵ In this doctrinal environment, the lower courts’ discretion to refuse to exercise statutorily conferred jurisdiction is limited.

There is, however, one other important tool of prudential minimalism that does not involve front-end justiciability doctrines. On the back end, judges have fairly wide discretion to limit or tailor the remedies that they order.³⁰⁶ Prudential minimalism can and should inform how that discretion is exercised. There is a spirited debate currently unfolding in law reviews and law reporters about the propriety of nationwide injunctions.³⁰⁷ Putting aside the question whether they are permissible

³⁰² *Id.* at 579.

³⁰³ See, e.g., *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127–28 (2014); *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 72–73 (2013).

³⁰⁴ See Mitchell Pearsall Reich, *Incomplete Designs*, 94 *Tex. L. Rev.* 807, 824–25 (2016).

³⁰⁵ John F. Manning, *Foreword: The Means of Constitutional Power*, 128 *Harv. L. Rev.* 1, 74 n.415 (2014); see also Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 *Notre Dame L. Rev.* 1807, 1811–12 (2016) (discussing the impact of *Lexmark* on standing doctrine); *The Supreme Court, 2013 Term—Leading Case*, 128 *Harv. L. Rev.* 321, 322 (2014) (discussing *Lexmark*).

³⁰⁶ See *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 394 (2006) (“[T]he decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts”); *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (“Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents.”).

³⁰⁷ For a sampling, see generally Wasserman, *supra* note 31; Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 *Geo. L.J.* 1263 (2021); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 *Harv. L. Rev.* 920 (2020); Zachary D. Clopton, *National Injunctions and Preclusion*, 118 *Mich. L. Rev.* 1 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 *N.Y.U. L. Rev.* 1065 (2018); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 *Tex. L. Rev.* 67 (2019); Zayn Siddique, *Nationwide Injunctions*, 117 *Colum. L. Rev.* 2095 (2017); Bray, *supra* note 29.

under Article III,³⁰⁸ nationwide injunctions are “now a fixture of the modern federal judiciary’s remedial practice.”³⁰⁹ Prudential minimalism is a helpful framework for seeing why and how nationwide injunctions should be cabined. Lower court judges, when acting individually or in random panels, *should* be haunted by a fear of illegitimacy, especially when they set themselves against the judgment of the political branches.³¹⁰ And they should be sensitive to how their discretionary, remedial choices will affect the institutional health of the judiciary as a whole. Nationwide injunctions can fuel perceptions of judicial overreach, interrupt the “percolation” of issues in the lower courts, and stack the deck against the government.³¹¹ Further, from a systemic point of view, a nationwide injunction may seize the Supreme Court’s prerogative to exercise prudential minimalism because a nationwide injunction from a lower court makes it difficult for the Supreme Court not to intervene in some fashion.³¹² In short, to put it in Bickellian terms, the unyielding insistence on principle in lower courts, embodied in a nationwide injunction, can do institutional damage.³¹³ As a matter of prudential minimalism, a nationwide injunction should be a rare remedy of last resort, reserved for cases of clear illegality and a strong showing of harm.

D. Thayerian Minimalism

Thayerian minimalism distinguishes between the “academic question” whether a particular government action is unlawful and the *institutional* question—“the really momentous question”—whether the Court should disregard or invalidate that action as a result.³¹⁴ In a nutshell, Thayer thought that courts should defer to the judgment of the legislature when it comes to how to apply a vague and open-ended document to the

³⁰⁸ I am skeptical of the argument that they are impermissible in all circumstances. See James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 *Stan. L. Rev.* 1269, 1354–55 (2020).

³⁰⁹ Ahdout, *supra* note 22, at 991. For a list of recent national injunctions, see Wasserman, *supra* note 31, at 188 n.4.

³¹⁰ See Burt, *supra* note 53, at 29–33 (noting that the relevant question in assessing the exercise of judicial authority is how a court should act despite its “questionable legitimacy” to do so).

³¹¹ See Bray, *supra* note 29, at 457–65.

³¹² Indeed, the increase in the number of nationwide injunctions is one factor driving the growth of the Supreme Court’s shadow docket. See Stephen I. Vladeck, *Essay, The Solicitor General and the Shadow Docket*, 133 *Harv. L. Rev.* 123, 134 (2019).

³¹³ See Kronman, *supra* note 122, at 1613–14.

³¹⁴ Thayer, *supra* note 35, at 143–44. See Monaghan, *supra* note 133, at 7–14.

“complex, ever-unfolding exigencies of government.”³¹⁵ For our purposes, the critical point is that Thayer’s second question—the institutional question—may look different in lower courts than it does in the Supreme Court. And, to the extent one finds Thayer’s position at all compelling in the Supreme Court, it grows even more compelling when transposed to the lower court context.³¹⁶

That is because of the institutional differences between lower courts and the Supreme Court canvassed above: the legitimacy deficit, size, mandatory jurisdiction, and the limits of judicial capacity. If the Supreme Court should defer to the reasonable judgment of the legislature, then a randomly selected district judge or panel of three, with questionable democratic credentials, working under severe limits of time and competence, has even more reason to defer.³¹⁷ This may be simpler to perceive when put in more colloquial terms. Imagine you are aggrieved by some change in government policy and you are offered two explanations: one, “the policy changed because the legislature, where everyone is represented more or less equally, voted on the issue;” and two, “the policy changed because a randomly selected judge, appointed a decade ago, thought it was inconsistent with the Constitution.” I expect that one would be considerably more chagrined by the second answer.³¹⁸ Put another way, Judge Learned Hand once protested against rule by a “bevy of Platonic Guardians”; whatever one feels about a “bevy” of nine

³¹⁵ Thayer, *supra* note 35, at 144.

³¹⁶ I recognize that there are few if any across-the-board Thayerians left on the bench, at least in constitutional cases. See Monaghan, *supra* note 133, at 9. My point here is limited: the case for Thayerian minimalism in the lower courts is *relatively* stronger than Thayerian minimalism in the Supreme Court. And there does seem to be a resurgence of interest in Thayerianism, at least in the academy, that may one day spill over into judicial practice. See *supra* notes 139–45 and accompanying text.

³¹⁷ One institutional feature of lower courts may seem to cut in the other direction: our strong norm of vertical *stare decisis*. An inferior court is bound by Supreme Court precedent and could not implement Thayerian minimalism by defying Supreme Court precedent. See Powell, *supra* note 280, at 929 n.50. But Supreme Court precedents often leave ample room for interpretive discretion in future lower court cases. Kim, *supra* note 277, at 417. So Thayerian minimalism could be effectuated through “narrowing” interpretations of precedent, as well as in cases of first impression not controlled by Supreme Court precedent. See Re, *supra* note 22, at 923–27; see also Brannon P. Denning, *Can Judges Be Uncivily Obedient?*, 60 *Wm. & Mary L. Rev.* 1, 49 (2018) (“[T]here is a norm among courts of appeals to read narrowly highly salient, potentially disruptive Supreme Court decisions . . .”).

³¹⁸ See Waldron, *supra* note 140, at 1386–95.

Justices, I would think that a random triumvirate or a single guardian would be worse.³¹⁹

How might Thayerian minimalism be invigorated in lower courts? One simple way would be to put some teeth into the presumption of constitutionality. As many have noted, the presumption partially implements Thayerian minimalism.³²⁰ Lower courts could insist that the presumption requires some deference to Congress's resolution of constitutional questions.³²¹ In other words, whatever one thinks of the Supreme Court, perhaps every single lower court should not be empowered to exercise independent judgment about the Constitution's meaning in the face of a prior legislative interpretation.³²²

Another possibility would be to retain or strengthen *Chevron* deference in lower courts,³²³ even if it is vitiated by the Supreme Court.³²⁴ *Chevron* deference can and has been understood as a form of Thayerian

³¹⁹ Learned Hand, *The Bill of Rights* 73 (1958).

³²⁰ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (Stewart, J., concurring); Gillian E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, 81 *Fordham L. Rev.* 1715, 1729–31 (2013); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 *Mich. L. Rev.* 80, 88–89 (2001). The presumption in some respects does not go as far as Thayer's prescription. It does not, for example, generally apply to cases involving "fundamental individual rights." Metzger & Morrison, *supra*, at 1730; see also F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 *Notre Dame L. Rev.* 1447, 1460 (2010) (contrasting Thayerian deference with the presumption of constitutionality).

³²¹ For one example, see Judge Silberman's opinion upholding the Affordable Care Act. *Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011) ("We are obliged—and this might well be our most important consideration—to presume that acts of Congress are constitutional."), abrogated by *NFIB v. Sebelius*, 567 U.S. 519 (2012).

³²² Cf. Monaghan, *supra* note 133, at 7–14 (distinguishing between independent judgment and deference, with Thayer advocating the latter). This brief discussion papers over some complexities, including whether the presumption should apply to all questions of law or fact, whether it should apply the same way in district courts and courts of appeals, and whether it should apply to state, as well as federal, legislation. A full exploration of the presumption of constitutionality in lower courts would be a separate, and quite worthwhile, project.

³²³ Richard J. Pierce, Jr., *Essay, The Future of Deference*, 84 *Geo. Wash. L. Rev.* 1293, 1313–14 (2016) (suggesting this possibility); Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 *Notre Dame L. Rev.* 727, 736–54 (2013) (making the case for greater deference in lower courts than the Supreme Court); cf. Coenen & Davis, *supra* note 21, at 799–820 (arguing that one exception to *Chevron* should be confined to the Supreme Court). *Chevron* deference may also facilitate decisional minimalism in lower courts (in addition to Thayerian minimalism) because a court applying *Chevron* deference will leave an agency with a range of reasonable readings of a statute to choose from rather than imposing the one reading that best accords with a court's independent judgment.

³²⁴ As many have noted, the Supreme Court in recent years "has significantly backed away from *Chevron* deference." Monaghan, *supra* note 2, at 59.

minimalism: in cases where the meaning of a statute is contestable, the theory goes, courts should defer to the more democratically accountable official.³²⁵ In light of the institutional features already discussed, the case for lower courts to defer to the expert and politically accountable agencies' reasonable interpretations of ambiguous statutes seems quite strong, at least relative to the Supreme Court. Indeed, as the Court considers the future of *Chevron*, the far-reaching importance of the sorts of statutory questions that come before it could warp the Court's sense of the quotidian reality of administrative law in the D.C. Circuit and other lower courts. To this, one could add a powerful pragmatic point stressed by Professor Peter Strauss: the *Chevron* doctrine has the effect of preventing circuit splits and ensuring that administration is not fractured by lower court judges disagreeing about the *de novo* meaning of federal statutes.³²⁶

E. Putting the Supreme Court in Context

To this point, we have studied how the institutional features of the lower courts bear on the proper role of a lower court judge. But appreciating the full institutional context of the judiciary also helps to bring the Supreme Court's proper role into focus. The Supreme Court supervises the lower judiciary by answering abstracted questions of law in the vanishingly small number of cases that it chooses to hear. In those circumstances, decisional minimalism does not make sense as a general norm of adjudication, though there are pockets of cases where it may be a useful tool.³²⁷

³²⁵ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984); Mashaw, *supra* note 237, at 170. See Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 *Harv. L. Rev.* 852, 867–68 (2020); Matthew Lewans, *Administrative Law and Judicial Deference* 12 (2016). One could question this account of *Chevron* on the ground that judicial review merely enforces *Congress's* choices, which is the most democratically legitimate branch. To the extent one is inclined to see judicial review in those terms, the suggestions in this section could be confined to cases of genuine ambiguity, where there is no congressional choice discernible.

³²⁶ See Peter L. 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, 1121–22 (1987).

³²⁷ For similar arguments about the Supreme Court's role, see Schauer, *supra* note 38, at 206–08; Grove, *supra* note 38, at 3–4; Kozel & Pojanowski, *supra* note 230, at 224–25; Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 *Rutgers L.J.* 543, 559–61 (1996). Professor Tara Leigh Grove has also suggested that “minimalism” from the Supreme Court may thrust lower courts into political controversies and thus harm their

The critical moment in the creation of the modern Supreme Court was the Judiciary Act of February 13, 1925, known as the “Judges’ Bill” because it was drafted by the Court under the stewardship of Chief Justice Taft.³²⁸ The Judges’ Bill “acceded to the Court’s desire for drastic limitations upon its [mandatory] jurisdiction” by expanding the classes of cases that the Court reviews through the discretionary writ of certiorari.³²⁹ It embodied Taft’s “radical new theory” of the Supreme Court’s function: it exists to expound the law for the benefit of the public, not to resolve disputes between litigants.³³⁰ The essence was that a litigant is entitled to a hearing and disposition in a trial court and an appeal as of right in an intermediate court of appeals but has no right to Supreme Court review.³³¹ Supreme Court review “is not primarily to preserve the rights of the litigants.”³³² Rather, its purpose is “expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit.”³³³ As Taft recognized, the Judges’ Bill freed the Court to perform that function by enlarging its freedom to choose its cases.³³⁴ Indeed, even the pockets of mandatory jurisdiction that nominally remained, like certain appeals from state courts and questions certified by circuit courts, were largely converted by the Court to discretionary review

sociological legitimacy. Tara Leigh Grove, Essay, Sacrificing Legitimacy in a Hierarchical Judiciary, 121 Colum. L. Rev. 1555, 1611 (2021). On doctrinal techniques that help the Supreme Court constrain lower courts effectively, see Toby J. Heytens, Doctrine Formulation and Distrust, 83 Notre Dame L. Rev. 2045, 2048–49 (2008).

³²⁸ Pub. L. 68-415, 43 Stat. 936 (1925). See Hartnett, *supra* note 293, at 1644; Post, *supra* note 291, at 77.

³²⁹ Frankfurter & Landis, *supra* note 291, at 1–2. Congress had first authorized discretionary review through certiorari of certain cases out of the newly created circuit courts in the 1891 Evarts Act. See Circuit Court of Appeals Act of 1891, ch. 517, § 6, 26 Stat. 826, 828; Hartnett, *supra* note 293, at 1650–51.

³³⁰ Post, *supra* note 291, at 70, 82.

³³¹ Jurisdiction of Circuit Courts of Appeals and United States Supreme Court, *supra* note 150.

³³² *Id.*

³³³ *Id.*

³³⁴ William Howard Taft, The Jurisdiction of the Supreme Court under the Act of February 13, 1925, 35 Yale L.J. 1, 2 (1925).

as a practical matter.³³⁵ Beyond that, the Court claimed the power to limit grants of certiorari to particular questions.³³⁶

A century after the Judges' Bill, these trends have continued. In 1988, Congress eliminated most of the Court's remaining mandatory jurisdiction.³³⁷ And the Court has developed an array of "agenda control" devices that allow it to control with precision what questions it decides and when.³³⁸ The Court can even rewrite the questions as presented by the parties or decide the case on a ground that is not briefed.³³⁹

The upshot is that the Court is increasingly detached from the particular dispute before it. It primarily resolves questions rather than cases. In the lingo of the "cert pool," cases are "vehicles" through which the Court expounds the law for the public.³⁴⁰ The more contaminated by facts, the less attractive a case is for the Court's consideration. When the Court grants certiorari, it hopes and expects that its decisions will have a wide impact. As Chief Justice Vinson put it: "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."³⁴¹ Summing up these discretionary powers of agenda control, Professor Henry Monaghan has written that "[t]he Court's current place in our constitutional order distinguishes it in kind, not in degree, from other courts."³⁴²

³³⁵ Hartnett, *supra* note 293, at 1708–12. This development was not without its academic dissenters. See, e.g., Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 *Wash. & Lee L. Rev.* 1043, 1061 (1977) (arguing that it is "inadmissible" that the Court should treat its mandatory jurisdiction as equivalent to its certiorari jurisdiction).

³³⁶ See *Olmstead v. United States*, 277 U.S. 438, 455 (1928); Hartnett, *supra* note 293, at 1705–07.

³³⁷ Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

³³⁸ These are exhaustively catalogued in Monaghan, *supra* note 38, at 683–711.

³³⁹ Hartnett, *supra* note 293, at 1712. For a skeptical take on this practice, see generally Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 121 *Colum. L. Rev.* (forthcoming 2022) (on file with author).

³⁴⁰ See Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 *Harv. L. Rev.* 124, 136–37 (2014) (calling the "notion of a 'vehicle'" a "kind of supplementary 'standing'").

³⁴¹ Fred M. Vinson, *Address to the American Bar Association: Work of the Federal Courts* (Sept. 7, 1949), *reprinted in* 69 *S. Ct.*, at v, vi (1949).

³⁴² Monaghan, *supra* note 38, at 684; see also Neal Devins & Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 *U. Chi. L. Rev.* 859, 863 (2013) ("Over the past decade, the law declaration model has made substantial inroads and arguably now dominates Supreme Court decision making."). There is, as a result, a "profound tension between certiorari and classic conceptions of judicial power." Hartnett, *supra* note 293, at 1718. See Herbert Wechsler, *The Courts and the Constitution*, 65 *Colum. L. Rev.* 1001, 1006 (1965) (espousing the classical

That distinction “in kind” matters when it comes decisional minimalism. If the function of the modern Supreme Court is “to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved,” then it would be bizarre to resolve those cases narrowly and shallowly—that is, in a manner that would minimize those cases’ “importance . . . beyond the particular facts and parties involved.”³⁴³ A narrow disposition seems especially problematic given the scarcity of the Court’s time and attention, which at this point limits it to only sixty or so merits cases per year. To invoke the well-known distinction again, decisional minimalism makes less sense for a law-declaration court with a small, discretionary docket than it does for a dispute-resolution court with a large, mandatory docket.³⁴⁴ Indeed, there is almost nothing the Supreme Court does that is not by choice. Any time it grants certiorari and decides a case, there is a “narrower” option available—the denial of certiorari in the first place. To get involved at all, then, is already in part to traduce decisional minimalism.³⁴⁵

At the same time, the design of the Court is ironically more likely to produce minimalist outcomes than are the designs of appellate or district courts. That is because the Court is composed of nine Justices that always sit together when deciding merits cases. No decision can command a majority unless it gains the assent of five separate Justices. As Sunstein

view). The Court can no longer take refuge in the fact that it is forced by its jurisdictional statutes to decide a case. The triumph of certiorari thus had significant implications for the Court’s legitimacy. As Professor Robert Post has observed, after the Judges’ Bill “the Court would throughout the twentieth century be required to search for ways to justify its decisions despite the fact that it was selecting its own cases to serve ends extrinsic to the cases themselves.” Post, *supra* note 291, at 85. Consider, for example, Justice Scalia’s carefully worded Wechslerian defense of *Bush v. Gore*, 531 U.S. 98 (2000): “My court didn’t bring the case into the courts.” Nat’l Const. Ctr., Const. Daily, On This Day, *Bush v. Gore* Settles 2000 Presidential Race (Dec. 12, 2019), <https://constitutioncenter.org/blog/on-this-day-bush-v-gore-anniversary> [<https://perma.cc/65JG-RVFR>]. True, but it did choose to bring the case into *the Court*.

³⁴³ Vinson, *supra* note 341, at vi; see Strauss, *supra* note 326, at 1103 (“If the [Supreme Court’s] undertaking from the start were to address legal uncertainties of a general character, simply resolving the dispute in such a case would be an admission of defeat.”); Shyamkrishna Balganesh, Foreword: Clarifying the “Clear Meaning” of Separability, 166 U. Pa. L. Rev. 79, 82 (2017) (critiquing a copyright decision for hewing narrowly to the facts and failing to provide guidance to lower courts).

³⁴⁴ See Fallon et al., *supra* note 147, at 73–75 (distinguishing the law-declaration and dispute-resolution models).

³⁴⁵ Siegel, *supra* note 43, at 1958 (calling this “the paradox of certiorari”).

has noted, “[t]he constraints of group decisionmaking [on the Court] may make minimalism inevitable, at least if the Court seeks a majority opinion with at least five signatories.”³⁴⁶

In all, decisional minimalism is in deep tension with the institutional logic of the Supreme Court.³⁴⁷ And yet, some degree of decisional minimalism is inevitable in light of its multimember design. In these circumstances, decisional minimalism does not seem to make sense as a general prescription for Supreme Court decision making. This is not to say the Supreme Court must or should aspire to “maximalism” in every case. Sometimes the Court “behaves imprudently when it formulates broadly sweeping rules or tests without sufficient knowledge of the range of factual situations to which they will apply.”³⁴⁸ In particular, decisional minimalism may make sense when the Court is effectively compelled to grant certiorari and thus has its docket discretion undermined. That is the case, for instance, when a lower court invalidates a law of Congress and enters a broad remedy, because the Supreme Court feels a powerful institutional responsibility to intervene. But again, decisional minimalism does not seem advisable as a general prescription.

III. REALIZING LOWER COURT MINIMALISM

I have tried to show so far that the case for judicial minimalism is stronger in the lower courts than it is in the Supreme Court. In this Part, I turn to some suggestions for realizing lower court minimalism.³⁴⁹ I begin

³⁴⁶ Cass R. Sunstein, *Trimming*, 122 *Harv. L. Rev.* 1049, 1082 (2009).

³⁴⁷ This institutional logic is not constitutionally mandated or inherent in the idea of an apex court. Cf. *Grove*, *supra* note 38, at 40 (“[T]he Constitution creates a hierarchical judiciary and renders the Court ‘supreme’ in defining the content of federal law.”). My point is just that decisional minimalism is in tension with the premises of the institution as it actually has developed and now functions in our legal system. For a discussion of decisional minimalism in the very different environment of the European Court of Justice, arguing that judicial minimalism is largely “inevitable” there in light of the European Union’s “institutional architecture,” see Daniel Sarmiento, *Half a Case at a Time: Dealing with Judicial Minimalism at the European Court of Justice*, in *Constitutional Conversations in Europe: Actors, Topics and Procedures* 13, 14 (Monica Claes et al. eds., 2012).

³⁴⁸ Fallon, *supra* note 207, at 950–51.

³⁴⁹ In this Article, I have not tried to quantify in a rigorous way the extent of non-minimalism in the lower courts now or whether non-minimalism has increased in recent years. That would be a complex project because “coding” minimalism in a comprehensive empirical study would require a qualitative and time-intensive judgment that would have to be applied consistently to a huge dataset of opinions. While such a project would be valuable if it were executed well, the argument of this Article does not depend on having a particular quantum of non-minimalism in the lower courts. My ambition, rather, is to offer a theoretical and normative

with the need for situation-specific concepts of judicial role fidelity and then offer a few rough-hewn proposals for structural reform.

A. Unflattening Judicial Role Fidelity

“Role fidelity” refers to the way that a judge’s self-conception of her institutional role informs the way that she judges. Professor Cover, for instance, explored how anti-slavery judges enforced fugitive slave laws because they conceived their role to exclude reliance on personal morality.³⁵⁰ Judicial role fidelity is an application of the broader concept in social psychology of “role theory,” which studies how social positions and expectations shape behavior.³⁵¹

Judicial role fidelity has two notable features. First, it is not (or should not be) monolithic; that is, it is not uniform across all different judges embedded in different institutional positions.³⁵² The “role fidelity” of a lower court judge can and should be different from the “role fidelity” of a Supreme Court Justice. Second, “role fidelity” is not static. Our conception of the judicial role can respond to sociopolitical change. Professor Jed Shugerman, for instance, has posited that the rise of judicial elections in the nineteenth century may have “create[d] a new self-

model for lower court judging. That said, I believe there is a growing, inchoate sense in both the legal academy and the legal community more broadly that lower courts are overreaching in various ways, and I hope this Article will help to give that inchoate sense more analytical traction. The proliferation of nationwide injunctions is one trend contributing to that sense right now. See *supra* note 284 and accompanying text. And as an anecdotal matter, as I write these words in early 2022, there has over the past few months been a spate of notably non-minimalist opinions in lower courts—along all three dimensions of minimalism discussed above—on subjects ranging from vaccine mandates, *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021), stay dissolved by *In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021), stay granted sub nom. *NFIB v. OSHA*, Nos. 21A244 & 21A247, slip op. (U.S. Jan. 13, 2022) (per curiam); immigration policy, *Texas v. Biden*, 20 F.4th 928, 1004 (5th Cir. 2021), cert. granted, No. 21-954, 2022 WL 497412 (U.S. Feb. 18, 2022); gun rights, *McDougall v. Cnty. of Ventura*, 23 F.4th 1095 (9th Cir. 2022); and climate change, *Louisiana v. Biden*, No. 2:21-CV-01074, 2022 WL 438313 (W.D. La. Feb. 11, 2022), stay pending appeal granted, No. 22-30087, 2022 WL 866282 (5th Cir. Mar. 16, 2022). I do not mean to suggest that the trend is confined entirely to “conservative” judges. See, for example, notes 360–74 and accompanying text.

³⁵⁰ See Cover, *supra* note 2, at 192–93.

³⁵¹ Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 *Geo. L.J.* 1349, 1396–1401 (2010); see B.J. Biddle, *Recent Development in Role Theory*, 12 *Ann. Rev. Socio.* 67, 68 (1986). As Shugerman points out, the concept of judicial role fidelity resembles Llewellyn’s concept of judicial “situation-sense.” Shugerman, *supra*, at 1398 (citing Llewellyn, *supra* note 202, at 60–61, 122–23).

³⁵² Pozen, *supra* note 23, at 2084.

conception” of the judicial role, giving rise to “a more democratic approach” to judging “that legitimized both constituency and conscience.”³⁵³ Whether or not one agrees with Shugerman’s specific historical point, the more basic premise seems unexceptionable—that the parameters of judicial “role fidelity” can and do change over time.

Role models of judging—in law school and legal culture more generally—tend to be drawn from the ranks of Justices, and the resulting judicial role fidelity is skewed heavily toward apex courts.³⁵⁴ This has unduly flattened judicial role fidelity, even though a Justice is the rarest type of judge in numerical terms. The concept of role fidelity should be tailored to institutional situation, and, in my view, should inculcate in lower court judges an instinct to favor decisional minimalism.³⁵⁵ That new sense of role fidelity can be created in three fora: first, through academic and popular commentary (like this Article); second, through appellate review; and third, through the appointment process in the political branches.

1. Commentary

Judges are not walled off from academic and popular commentary. Despite the familiar lament that the academy and bench have drifted

³⁵³ Shugerman, *supra* note 351, at 1399.

³⁵⁴ Consider, for example, the case of Judge Friendly. Professor Vermeule has observed that his “characteristic mode of analysis . . . was to show that some sweeping proposition of law was oversimplified, and that the issues and cases covered by the proposition were in fact complex and heterogeneous, requiring fact-sensitive judgment according to standards rather than rules.” Adrian Vermeule, *Local Wisdom*, *New Republic* (Mar. 22, 2012), <https://newrepublic.com/article/98607/henry-friendly-supreme-court-david-dorsen> [<https://perma.cc/NKP3-MKMJ>]. Accordingly, “Friendly’s contribution was not to enrich the theory of the law but to provide a living model of lawyerly craft and good judgment.” *Id.* In other words, he was a minimalist. But, as Vermeule points out, “the reputations of judges such as Friendly generally have a shorter half-life than the reputations of judges who offer fertile theoretical ideas that can be distilled into formulas, theorems, and pithy aphorisms.” *Id.* Our legal culture tends to lionize the theorists but not the craftspeople, which may make some sense in the context of apex courts. But that tendency may inappropriately tempt lower court judges toward a more “law-declaration” mode.

³⁵⁵ To be more precise, “a particular social status involves, not a single associated role, but an array of associated roles” called a “*role-set*.” Robert K. Merton, *Social Theory and Social Structure* 369 (rev. ed. 1957). In other words, the status of a federal judge may entail not only a particular role in the resolution of cases, but also distinctive roles in interactions with clerks or in public appearances. See *id.* My focus here is on the role of federal judges in deciding public law cases.

apart,³⁵⁶ the reality is complex. Judges continue to cite scholarship in their opinions, and, perhaps more importantly, their chambers are staffed by clerks fresh out of law school who have been recently socialized there into a particular sense of the judicial role. For these reasons, “the sociological connections between the legal academy, the courts, and the administrative state are close enough to enable a prescriptive theory of public law, under the right conditions, to move quickly from the law reviews and lecture halls to the *United States Reports*”—and, I would add, the *Federal Reporter* and the *Federal Supplement*.³⁵⁷

The goal of this Article is to offer a trans-substantive, conceptual vocabulary for thinking about the proper role of lower court judges. This vocabulary allows us to evaluate and critique judicial behavior in a useful way—in a way that does not reduce to local disagreement with particular decisions and is not overtly partisan. Indeed, the institutional circumstances of lower courts are such that it may be possible for our legal culture to coalesce around an understanding of the proper role of a lower court judge in a way that is probably out of reach for the proper role of a Supreme Court Justice. In other words, the role of a Justice—whether a Justice should be a minimalist, a maximalist, an originalist, a moral philosopher in a Dworkinian sense, or what have you—is likely to remain essentially contested.³⁵⁸ But the role definition implied by the design of the *lower* judiciary for a judge seems to be clearer, less controversial, and therefore more normatively compelling than public law theories in the Supreme Court. And if legal elites can come together on a role definition for lower court judges, then that consensus can alter the sociological environment in which judges operate and therefore influence their behavior.³⁵⁹

³⁵⁶ See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 34 (1992).

³⁵⁷ Kessler & Pozen, *supra* note 144, at 1880; see also Bruce Ackerman, *Revolution on a Human Scale*, 108 Yale L.J. 2279, 2348–49 (1999) (describing the process of academic influence on judicial practice).

³⁵⁸ See Sanford Levinson, *Assessing the Supreme Court’s Current Caseload: A Question of Law or Politics?*, 119 Yale L.J. Online 99, 102 (2010) (“I am confident that there is today no widely shared view—let alone anything that could be called a ‘consensus’—as to what the Court’s role has been or should be in our twenty-first century world.”).

³⁵⁹ See Schauer, *supra* note 42, at 631.

2. Appellate Review

A little-noticed case decided by the Supreme Court in 2020 shows how appellate review may encourage and even enforce minimalism. In *United States v. Sineneng-Smith*,³⁶⁰ the defendant was convicted of violating a statute making it a federal crime to “encourag[e] or induc[e]” a noncitizen to enter the United States with knowledge that the entry would be unlawful.³⁶¹ In district court, she argued that the statute did not cover her conduct, was void for vagueness, and was an impermissible content-based restraint on speech.³⁶² She lost. On appeal, she repeated the same arguments in her briefs and oral argument.³⁶³ After argument, however, the U.S. Court of Appeals for the Ninth Circuit panel “moved” the case “onto a different track.”³⁶⁴ It invited three non-party organizations to file briefs as amici curiae addressing three questions framed by the panel, including a constitutional question that the defendant “herself never raised”: whether the statute was “facially overbroad” and therefore invalid under the First Amendment.³⁶⁵ The panel limited the parties to supplemental briefs responding to the amici and allocated twice as much oral argument time to the amici as to the defendant.³⁶⁶

The Supreme Court, in a unanimous opinion by Justice Ginsburg, held that “the appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion.”³⁶⁷ The Court explained that, “as a general rule, our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.”³⁶⁸ Simply put, “courts are essentially passive instruments of government.”³⁶⁹ They forsake that passivity if they seize control of a case from the parties. The Court acknowledged “circumstances in which a modest initiating role for a court is

³⁶⁰ 140 S. Ct. 1575 (2020).

³⁶¹ *Id.* at 1577 (quoting 8 U.S.C. § 1324(a)(1)(A)(iv)).

³⁶² *Id.* at 1580.

³⁶³ *Id.*

³⁶⁴ *Id.* at 1578.

³⁶⁵ *Id.* at 1578, 1581.

³⁶⁶ *Id.* at 1581.

³⁶⁷ *Id.* at 1578.

³⁶⁸ *Id.* at 1579 (internal quotation marks and alterations omitted) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgement)).

³⁶⁹ *Id.* (internal quotation marks and alterations omitted) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh’g en banc)).

appropriate.”³⁷⁰ But “the Ninth Circuit’s radical transformation” of that case went “well beyond the pale.”³⁷¹

Sineneng-Smith enforced a norm of decisional minimalism. A federal appeals court should, by and large, adjudicate the questions presented to it by the parties, not questions of its own devising. That will tend to prevent the court from deciding unnecessary questions. In *Sineneng-Smith*, for instance, the appeals panel not only injected a new constitutional issue into the case but arguably injected an issue that was broader than that already raised in the case because it was a facial rather than an as-applied challenge.³⁷² As the Court recognized, a departure from the party-presentation principle may be warranted when the case can “be resolved on a basis narrower than the question presented.”³⁷³ But that is a departure in the service of minimalism. In short, *Sineneng-Smith* should modestly encourage minimalism in lower courts and convey a sense of proper role fidelity for a lower court judge.³⁷⁴

3. *The Appointment Process*

The appointment process constructs judicial role fidelity in two ways. Most directly, it determines who becomes a federal judge. Anyone who aspires to a judgeship, then, will embody or emulate the traits that are rewarded in the judicial confirmation process. Second, even for those who

³⁷⁰ *Id.*

³⁷¹ *Id.* at 1581–82. On the uncertain outer bounds of the *Sineneng-Smith* doctrine, see Zachary B. Pohlman, *The Sineneng-Smith Doctrine*, 13 *Fed. Cts. L. Rev.* (forthcoming) (manuscript at 12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3862443 [<https://perma.cc/J5SG-YZMU>].

³⁷² Cf. Fallon, *supra* note 207, at 923–24 n.31 (suggesting that, in lower courts, the distinction between facial and as-applied challenges should be reconceived in terms of breadth and narrowness).

³⁷³ *Sineneng-Smith*, 140 S. Ct. at 1582; see Amanda Frost, *The Limits of Advocacy*, 59 *Duke L.J.* 447, 481 (2009) (“[J]udges might also raise new issues to *narrow* the scope of their decisions, thwarting litigants who would prefer a maximalist judicial decision over a minimalist one.”).

³⁷⁴ My quarrel with the Court’s opinion is its uncritical assumption that the Supreme Court should abide by the same rules. See *Sineneng-Smith*, 140 S. Ct. at 1579 n.4. The Justices have often transformed cases in radical ways. For a couple of famous examples, see *Mapp v. Ohio*, 367 U.S. 643 (1961); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The Court also often appoints amici to argue positions not taken by the parties. Monaghan, *supra* note 38, at 691–93. Indeed, in *Sineneng-Smith* itself, the party presentation issue was hardly briefed; the parties’ focus was on the merits of the First Amendment question. The Court’s hypocrisy, though, is only apparent because of the different structural function that the Court has now assumed as compared to the courts of appeals. The Court’s greater flexibility is well-suited to a predominantly “law-declaration” national court.

are already federal judges, the confirmation process may be influential. Lower court judges all enjoy at least a prospect of promotion—from district court to appellate court and from appellate court to Supreme Court. A view of judging articulated in the confirmation process can thus furnish a template for self-advancement.³⁷⁵ Finally, the confirmation hearing itself functions as a kind of ritualized focal point for exploring and contesting the nature of the judicial role.³⁷⁶ The questions and commentary of Senators and the answers of nominees are opportunities for collective reflection on how judges should judge.³⁷⁷

I cannot undertake here an exhaustive study of the appointment process in the lower courts or a comprehensive analysis of recent appointments.³⁷⁸ But two developments are concerning to the extent that one would look to the process to reinforce a norm of minimalism. First, the lower court appointment process has grown more politically contentious and dysfunctional.³⁷⁹ Second, the ideological purification of the parties and the elimination of the filibuster have made possible (and perhaps abetted)

³⁷⁵ Lee Epstein, William M. Landes & Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* 363 (2013) (“Our results suggest that court of appeals judges who have a good shot at the Supreme Court tend to alter their judicial behavior in order to increase their chances . . .”). To put this in the language of role theory, Senators have power (shared with the President) to control a judge’s further advancement in the organization of the federal judiciary. See Shugerman, *supra* note 351, at 1398 (“Organization role theorists have contended that those in organizational roles resolve their frequent role conflicts by judging who holds power in the organization and which norms are most legitimate.”).

³⁷⁶ See Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 *Yale L.J. Pocket Part* 38, 44–45 n.24 (2006) (noting that the confirmation process reflects “the Constitution’s dual commitment to self-government and the rule of law in matters concerning the structure of the judiciary”); Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 *Yale L.J.* 657, 658 (1970) (“The things which I contend are both proper and indispensable for a Senator’s consideration . . . are things that have definitely to do with the performance of the judicial function.”).

³⁷⁷ Consider, for instance, the success of Chief Justice Roberts’s “umpire” metaphor in a defining a certain conception of the judicial role. See Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 *Const. Comment.* 701, 702–03 (2007); see also Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary*, 39 *Loy. U. Chi. L.J.* 427, 436 (2008) (describing how the Chief Justice Roberts and Justice Alito hearings “offered an opportunity for Democrat and Republican Senators to articulate two very different ideas of what a Supreme Court Justice ought to do”). Of course, these representations of the judicial role blend myth and reality, but even myths may exert normative pull.

³⁷⁸ For a recent overview, see Devins & Larsen, *supra* note 42, at 1390–405.

³⁷⁹ See Binder & Maltzmann, *supra* note 247, at 2–6; Barry Friedman & Margaret H. Lemos, *Dysfunction, Deference, and Judicial Review*, 30 *Geo. Mason L. Rev.* (forthcoming 2022) (manuscript at 16–19) (on file with author).

more ideological judicial appointments.³⁸⁰ The result (to put it mildly) is that candidates tend not to be rewarded for judicial craft and role fidelity.

The recent elevation of Judge Justin R. Walker to the D.C. Circuit provides an opportunity to reflect on how the appointment process can inscribe a particular version of the judicial role. President Trump nominated Judge Walker to the D.C. Circuit on April 3, 2020, less than six months after taking his seat as a district judge in Kentucky.³⁸¹ Eight days later, in a case called *On Fire Christian Center, Inc. v. Fischer*, he enjoined the mayor of Louisville from enforcing “any prohibition on drive-in church services at” the plaintiff’s church, which had (putatively) been put in place as a result of the COVID-19 pandemic.³⁸² The *On Fire* decision was non-minimalist in all three senses of the term, and it seems only to have aided his confirmation.

First, it was wide and deep. The first sentence of the discussion will give a flavor: “According to St. Paul, the first pilgrim was Abel.”³⁸³ The opinion “provided a thorough exegesis of religious freedom from biblical times,” citing the Bible, Tacitus, and De Tocqueville.³⁸⁴ In other words, it gave a deep—historically and theoretically ambitious—account of the nature of religious liberty in America.³⁸⁵ It was also broad: after eight *Federal Supplement* pages devoted primarily to the federal constitutional

³⁸⁰ See Jonathan Remy Nash & Joanna Shepherd, *Filibuster Change and Judicial Appointments*, 17 *J. Empirical Legal Stud.* 646, 649 (2020); Devins & Larsen, *supra* note 42, at 1399. The withering of the so-called “blue-slip” process in the Senate—that is, the norm of deference to home state Senators on lower court nominees—may also have a part in this story, as it could plausibly have led to more ideological and nationally prominent nominees rather than qualified lawyers respected by the local legal community. See Joseph Fishkin & David E. Pozen, *Evaluating Constitutional Hardball: Two Fallacies and a Research Agenda*, 119 *Colum. L. Rev. Online* 158, 170–71 (2019) (discussing the demise of the blue-slip).

³⁸¹ Carl Hulse, *President Picks McConnell Protégé for Seat on Appeals Bench*, *N.Y. Times*, Apr. 4, 2020, at A21.

³⁸² 453 F. Supp. 3d 901, 904 (W.D. Ky. 2020).

³⁸³ *Id.* at 905.

³⁸⁴ Josh Blackman, *Courts Should Not Decide Issues That Are Not There, Reason: The Volokh Conspiracy* (Apr. 12, 2020, 2:35 PM), <https://reason.com/volokh/2020/04/12/courts-should-not-decide-issues-that-are-not-there/> [<https://perma.cc/D28G-4Q4H>].

³⁸⁵ At his confirmation hearing, Judge Walker suggested that “I did not believe that it would be possible to explain the meaning of the Free Exercise Clause without explaining the history of the Free Exercise Clause.” U.S. Court of Appeals DC Circuit Confirmation Hearing, CSPAN May 6, 2020, at 17:29–40, <https://www.c-span.org/video/?471829-1/us-court-appeals-dc-circuit-confirmation-hearing#> [hereinafter Confirmation Hearing]. That is not persuasive. One important function of doctrine implementing constitutional protections is to avoid these sorts of deep forays into history and theory in future cases, especially when a court is operating under extraordinary time pressure. Fallon, *supra* note 82, at 116.

claims, the court ruled that the mayor's order was unlawful on statutory grounds (specifically, because it violated Kentucky's Religious Freedom Restoration Act).³⁸⁶ A decision on the difficult federal constitutional question was not necessary to sustain the temporary restraining order ("TRO").³⁸⁷

Second, the order was apparently unnecessary. After the order issued, the mayor said that he had only "strongly suggest[ed]" that people not attend services for their own health and that there was "no legal enforcement mechanism."³⁸⁸ The TRO was issued *ex parte*, without hearing from the mayor, because (the opinion explained) providing notice would have been "impractical."³⁸⁹ But, as Professor Josh Blackman wrote soon after, the TRO might have been obviated by a fifteen-minute status conference.³⁹⁰ "[T]he District Court could have simply denied the TRO as moot on the Mayor's official representation that there would be no enforcement action."³⁹¹ Instead, the court spent twenty-four hours "writing a twenty-page published decision, with 86 footnotes."³⁹² If true,³⁹³ that is the antithesis of prudential minimalism.³⁹⁴ Finally, as for Thayerian minimalism, the order overturned (or purported to overturn)

³⁸⁶ *On Fire*, 453 F. Supp. 3d at 913. Technically, the court found that the plaintiff had a "strong likelihood of success" due to the preliminary procedural posture. *Id.* at 910, 913.

³⁸⁷ Blackman, *supra* note 384.

³⁸⁸ Matthew Glowicki, Judge Allows Drive-in Service at Louisville Church, Says Fischer "Criminalized" Easter, *Louisville Courier J.* (Apr. 11, 2020, 2:49 PM) <https://www.courier-journal.com/story/news/2020/04/11/covid-19-kentucky-judge-grants-churchs-request-hold-services/2976560001/> [<https://perma.cc/Z6Q5-T2LE>].

³⁸⁹ *On Fire*, 453 F. Supp. 3d at 904.

³⁹⁰ Blackman, *supra* note 384.

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ At his subsequent hearing, Judge Walker said that the Mayor had never tried to contact chambers and that the plaintiffs had reached out to the Mayor on the day before filing the suit to clarify whether they could hold their service but received no response. Confirmation Hearing, *supra* note 385, at 16:06–23, 1:57:00–24. But it seems probable that a compulsory status conference from the court would have elicited a response and may have obviated the dispute.

³⁹⁴ In addition, while Judge Walker nominally limited his injunction to the parties before the Court, he added in a footnote: "Louisville ought not to view the limits of this injunction as a green light to violate the religious liberty of non-parties." *On Fire*, 453 F. Supp. 3d at 904 n.2 (citing 42 U.S.C. § 1983). That seemed to be a threat to the Mayor not to enforce the order against other parties, even though Judge Walker's order had no formal preclusive or precedential effect beyond the parties.

the judgment of “politically accountable officials” in the midst of a public health crisis.³⁹⁵

In sum, the *On Fire* decision was non-minimalist in all three respects. And it was issued at a time of deep social and political conflict over both the pandemic and religious freedom—precisely when, according to minimalists, judges should proceed with the most humility and circumspection.³⁹⁶ How did it play in the confirmation process? Senator McConnell, who had sponsored Judge Walker’s nomination to the D.C. Circuit, swiftly issued a laudatory tweet.³⁹⁷ At Judge Walker’s hearing, the opinion garnered more praise than unease. Senator Rand Paul kicked off the hearing by praising Judge Walker’s “fidelity to our Constitution . . . even in times of crisis”—without asking about fidelity to role.³⁹⁸ Senator Graham asked Judge Walker to explain his ruling but asked no follow up questions.³⁹⁹ Senator Lee suggested it would be a “dereliction of . . . duty” *not* to intervene.⁴⁰⁰ In all, there was virtually no meaningful interrogation of whether the *On Fire* decision accorded with a district judge’s role fidelity in a hierarchical judiciary.⁴⁰¹

There are, of course, limits to the substantive engagement one can expect at a confirmation hearing. I am not sanguine about the intellectual promise of such a setting. But Judge Walker’s hearing illustrates how far we are from a political and legal culture that appreciates the distinct—and distinctly minimalist—role fidelity of a lower court judge.

³⁹⁵ *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (“Our Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’” (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905))).

³⁹⁶ See, e.g., Ian Lovett, *Some Churches Fight to Open on Easter Despite Coronavirus Shutdowns*, *Wall St. J.* (Apr. 12, 2020, 1:17 AM), <https://www.wsj.com/articles/some-churches-fight-to-open-on-easter-despite-coronavirus-shutdowns-11586622443> [<https://perma.cc/5TRE-7LTA>] (noting that “religious spaces have become a battleground”).

³⁹⁷ Mitchell McConnell (@LeaderMcConnell), Twitter (Apr. 11, 2020, 3:35 PM), <https://twitter.com/LeaderMcConnell/status/1249058586761846786> [<https://perma.cc/93SK-8W2E>] (praising the “strong, eloquent ruling”).

³⁹⁸ Confirmation Hearing, *supra* note 385, at 5:11–17.

³⁹⁹ *Id.* at 17:42–18:07.

⁴⁰⁰ *Id.* at 55:25.

⁴⁰¹ Democrats focused, by and large, on criticizing the fact that a confirmation hearing was being held at all during a pandemic. There were a few exceptions: Senator Leahy suggested that the opinion contained “overblown rhetoric” and that the judge had been “applying for a job” on the D.C. Circuit. *Id.* at 37:06–16. Senator Hirono criticized Judge Walker for not hearing from the city. *Id.* at 1:56:10–52.

B. Structural Reforms

There are probably limits to what one can achieve by importuning lower court judges (and aspirants to judicial office) to be more minimalist.⁴⁰² At the end of the day, the federal judiciary is large, and it is unrealistic to hope that the thousand or so federal judges will all fall in line for judicial minimalism without some external prodding.⁴⁰³ And even a few judges breaking ranks can be harmful, both because of the dangers of maximalist rulings already canvassed and because it could provoke others to even the score. So, a certain amount of attention to structure is important to the minimalist project.⁴⁰⁴ At the same time, I do not want reform proposals to appear unrealistic. I therefore take as given the basic structure of the federal judiciary, which has been in place since the 1891 Evarts Act and 1925 Judges' Bill, as well as our strong norms of vertical stare decisis and judicial supremacy. I put to the side possibilities such as a new national court of appeals or changing the size of appellate panels. I focus instead on low-hanging fruit that would be both achievable and meaningful in the near term.

1. Nationwide Injunctions

It is a general pattern of the judicial system that the more legally consequential a decision is, the more judges must concur in it.⁴⁰⁵ A district judge acts alone, a court of appeals sits in panels of three judges, and the Supreme Court sits together as nine Justices. This pattern reflects an instinct that collectivity improves judicial decision making.⁴⁰⁶ As discussed, collectivity also conduces to minimalism because it means

⁴⁰² Cf. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System*, 80 U. Chi. L. Rev. 1743, 1744–45 (2013) (highlighting the problem of normative proposals in public law scholarship that depend upon the very officials critiqued in a diagnostic section).

⁴⁰³ See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962, 996 (2002) (“A judiciary staffed by hundreds of judges, each with life tenure and an irreducible salary, cannot trust its individual members always to act discreetly—cannot, that is, count on them all to avoid trouble by exercising Alexander Bickel’s famous ‘passive virtues.’”).

⁴⁰⁴ Cf. Epps & Sitaraman, *supra* note 142, at 826–27 (distinguishing “internal,” “external,” and “structural” approaches to Thayerian reform, and advocating the latter two); Lewis Kornhauser, *Deciding Together*, 1 J. Institutional Stud. 38, 40–41 (2015) (“The designer must structure the institution in a way that maximizes its performance relative to the institutional aims.”).

⁴⁰⁵ See Kornhauser & Sager, *supra* note 214, at 82.

⁴⁰⁶ See *id.*; Hart, *supra* note 154, at 100; Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 Md. L. Rev. 1, 23–25 (1979).

certain decisions must reflect an overlapping consensus of more than one judge. Set against this pattern, nationwide injunctions are a striking anomaly. Few decisions are more legally consequential than halting a federal policy nationwide. In practical effect, it is like a decision from the Supreme Court, which can determine applicable rights and remedies around the country by virtue of vertical stare decisis.

History suggests one possible solution to this anomaly. In *Ex parte Young*, the Supreme Court held that a lower federal court could enjoin a state official acting in violation of the federal Constitution.⁴⁰⁷ Congress responded with a law providing that such an injunction could only issue from a three-judge panel.⁴⁰⁸ This law was driven by resistance to allowing, in the words of one of the law's proponents, "one little judge" to halt the policy of a "whole State."⁴⁰⁹ Congress expanded the three-judge procedure to suits seeking to enjoin federal laws in 1937, amidst the furor over injunctions against New Deal initiatives.⁴¹⁰ As Justice Frankfurter explained, these laws "sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge."⁴¹¹

That goal seems especially apt for nationwide injunctions. One way to achieve it would be through legislation.⁴¹² But there would be significant complications around defining the class of cases that should be channeled to three-judge courts and serious inefficiencies around managing the litigation beyond just the entry of the problematic relief.⁴¹³ A simpler and more targeted solution would be to require the concurrence of more than one judge for a nationwide injunction without establishing a new court. This could be achieved through circuit precedent, local rule, or a change to internal operating procedures. It would work like this: any district court injunction against a federal policy whose benefit extends beyond the

⁴⁰⁷ 209 U.S. 123, 155–56, 159–60 (1908).

⁴⁰⁸ Michael E. Solimine, Congress, *Ex Parte Young*, and the Fate of the Three-Judge District Court, 70 U. Pitt. L. Rev. 101, 111–18 (2008).

⁴⁰⁹ 45 Cong. Rec. 7256 (1910) (statement of Sen. Lee Overman).

⁴¹⁰ Solimine, *supra* note 408, at 124–25.

⁴¹¹ *Phillips v. United States*, 312 U.S. 246, 250 (1941). Congress mostly repealed the three-judge court requirement in 1976, though it retained such courts for a few categories of cases, like redistricting cases. Solimine, *supra* note 408, at 148–50.

⁴¹² See Gregg Costa, An Old Solution to the Nationwide Injunction Problem, Harv. L. Rev. Blog (Jan. 25, 2018), <https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem/> [<https://perma.cc/82AV-MLGH>].

⁴¹³ Cf. David P. Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 3, 78 (1964) (noting similar complications in the old three-judge court regime).

plaintiffs to the dispute would be automatically stayed (except as to the parties) when the government files a motion to stay in the applicable court of appeals. The full injunction would only go into effect if the court of appeals panel denies the stay motion.⁴¹⁴ That would mean that no nationwide injunction could issue without the concurrence of two circuit judges—an improvement on the current system and a salutary use of judicial structure to safeguard a measure of minimalism.

2. *Case-Assignment Rules*

Our current system for assigning cases, though mostly randomized, is an obscure hodge-podge and is sometimes taken advantage of by litigants in a way that harms minimalist outcomes. There are two culprits. The first is divisional judge assignment. District courts have wide latitude to determine their case-assignment rules.⁴¹⁵ More than half of the ninety-four judicial districts are broken up into “divisions” that are used for case-assignment purposes.⁴¹⁶ And at least eighty-one divisions in thirty judicial districts have only one or two judges.⁴¹⁷ That means litigants who file complaints in those divisions will either know exactly what judge will be assigned to the case or which of two judges will be randomly assigned.⁴¹⁸ In one instance, the State of Texas chose to file a challenge to President Obama’s deferred action immigration programs in Brownsville, Texas, where it had a fifty percent chance of drawing a judge who had “harshly criticized” the government’s leniency in immigration matters before.⁴¹⁹ Texas in fact drew that judge, who entered a nationwide injunction.⁴²⁰ In another instance, Texas filed a suit in Wichita Falls, Texas, challenging

⁴¹⁴ Another possibility would be for district courts themselves to convene “en banc” panels. This procedure is explored in Maggie Gardner, *District Court En Bancs*, 90 *Fordham L. Rev.* 1541 (2022).

⁴¹⁵ See 28 U.S.C. § 137(a).

⁴¹⁶ *Botoman*, *supra* note 217, at 299.

⁴¹⁷ *Id.* at 319. These numbers come from 2018.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 298; see Alicia A. Caldwell, *Judge: US Government Assisting Child Smuggling*, Associated Press (Dec. 19, 2013) (on file with editors), <https://apnews.com/article/8b6a395863f348c2b1d2cc47ed563a67> (“A federal judge in Texas said in a recent order that the U.S. Department of Homeland Security is assisting in criminal conspiracies to smuggle children into the country when it helps reunite them with parents who are known to be in the U.S. illegally.”).

⁴²⁰ *Texas v. United States*, 86 F. Supp. 3d 591, 604, 671–72, 676 (S.D. Tex. 2015), *aff’d*, 809 F. 3d 134 (5th Cir. 2015), *aff’d* by an equally divided Court, 136 S. Ct. 2271 (2016) (mem.).

the Obama Administration's guidance that schools receiving federal funds must allow students to use bathrooms consistent with their gender identities.⁴²¹ All cases filed in that division were assigned to a judge who had recently ruled against the Obama Administration by holding that "spouse" in the Family and Medical Leave Act could not include same-sex spouses.⁴²² That judge then issued a nationwide injunction against the Obama Administration's new policy.⁴²³

The second culprit is "related case" rules. When a complaint is filed, a plaintiff can indicate on the civil cover sheet that the case is "related" to an earlier-filed case, and the clerk will generally assign the case to the judge handling the earlier case.⁴²⁴ Only about half of judicial districts even have rules governing related cases, and the rules that do exist are "characterized by two features: heterogeneity among districts and vague standards that leave significant discretion to the decision-maker."⁴²⁵ That silence, vagueness, and heterogeneity invite "gamesmanship."⁴²⁶ For instance, Texas's most recent challenge to the Affordable Care Act ("ACA") was steered to a particular judge by noting two prior putatively "related" cases.⁴²⁷ As far as I can discern, there was no overlap of substantive issues between the two cases other than that they both involved the ACA.⁴²⁸ The judge then startled the legal world by declaring

⁴²¹ Botoman, *supra* note 217, at 304.

⁴²² *Id.* at 305 (citing *Texas v. United States*, 95 F. Supp. 3d 965, 980–81 (N.D. Tex. 2015)).

⁴²³ *Texas v. United States*, 201 F. Supp. 3d 810, 828–34, 836 (N.D. Tex. 2016) ("It cannot be disputed that the plain meaning of the term sex . . . meant the biological and anatomical differences between male and female students as determined at their birth."); *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 7852331, at *2 (N.D. Tex. Oct. 18, 2016) ("A nationwide injunction is necessary because the alleged violation extends nationwide.").

⁴²⁴ For a thorough overview of related case rules, see Marcel Kahan & Troy A. McKenzie, *Judge Shopping*, 13 *J. Legal Analysis* 341 (2021).

⁴²⁵ *Id.* at 347.

⁴²⁶ *Id.* at 341.

⁴²⁷ See Civil Cover Sheet at 1, 4, *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018) (No. 4:18-cv-00167), ECF No. 1-1.

⁴²⁸ One of the two "related" cases was *Texas v. Rettig*, which involved a complicated set of challenges to the method of computing Medicaid reimbursements under the ACA. 987 F.3d 518, 525–26 (5th Cir. 2021). In a strange twist, the other "related" case was a challenge to a regulation issued under the ACA prohibiting discrimination on the basis of pregnancy or gender identity in the provision of medical care. See *Franciscan All., Inc. v. Becerra*, 843 F. App'x 662 (5th Cir. 2021). *That* case had been steered to the same judge by listing it as "related" to the transgender student case discussed *supra* note 423. See Plaintiffs' Notice of Related Case, *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (No. 7:16-cv-00108), ECF No. 1-3, at 2.

the ACA invalid in its entirety.⁴²⁹ The recent invalidation of the deferred action programs likewise ended up in the same court that had previously enjoined the programs due to related case rules.⁴³⁰

These case assignment rules can serve some valid purposes. The Western District of Texas spans El Paso to Waco; one can appreciate that an individual should not have to drive nine hours to attend a hearing in a routine tort suit filed in diversity.⁴³¹ A judge who has invested a lot of time learning the technology underlying a patent should perhaps be assigned a new infringement suit involving that same patent. But to allow interested parties to take advantage of case-assignment rules to direct cases to their preferred judges in major public law cases strikes me as indefensible. Lower court judges wield far too much power for that kind of strategic manipulation. It undermines public confidence in the judiciary and sows cynicism about judicial outcomes.⁴³² It offends basic notions of fairness.⁴³³ And it has another critical effect, more relevant for my purposes here: it systematically skews lower courts away from minimalist outcomes. A plaintiff with any choice in the matter will pick a judge that will rule for her on broad grounds, that will not hesitate to strike down a law or policy, and that will not shrink from entering nationwide relief. To the extent case assignment rules allow choice, it will tilt the system away from minimalism.

This problem could be easily mitigated. Cases challenging the validity of federal or state laws or policies should be exempt from normal case-

⁴²⁹ *Texas v. United States*, 340 F. Supp. 3d 579, 585, 619 (N.D. Tex. 2018), *aff'd* in part and vacated in part, 945 F.3d 355, 403 (5th Cir. 2019), *rev'd* sub nom. *California v. Texas*, 141 S. Ct. 2104, 2120 (2021).

⁴³⁰ See *Texas v. United States*, No. 1:18-CV-00068, 2021 WL 3022434 (S.D. Tex. July 16, 2021); Civil Cover Sheet at 1, *id.*, ECF Doc. 1-1. For a discussion of the court's earlier decision enjoining the programs, see *supra* note 420 and accompanying text. Again, I do not mean to imply that these case-assignment rules uniquely benefit conservative causes. There have been controversies involving "related case" designations with different political configurations. See, e.g., Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Shaped Stop-and-Frisk Rulings*, 19 *Mich. J. Race & L.* 199, 204–05 (2014).

⁴³¹ See 28 U.S.C. § 124(d).

⁴³² *Botoman*, *supra* note 217, at 321–24.

⁴³³ *Id.* at 321–22. One might reasonably ask why even random case assignment is normatively acceptable given that our legal culture generally abhors the idea of deciding cases by a coin flip. For a defense of randomization, see Adam M. Samaha, *Randomization in Adjudication*, 51 *Wm. & Mary L. Rev.* 1 (2009).

assignment rules and be assigned randomly on a district-wide basis.⁴³⁴ These cases could be defined in terms of subject matter or parties and relief sought. Defendants should have an opportunity to contest a related case designation or divisional assignment.⁴³⁵ This change can be achieved through local rules or by statute. And it would be a boon both to judicial minimalism and public confidence in the judiciary.

3. The Size of the Lower Court Bench

Calls to add more federal district and circuit judges have proliferated for decades. The basic reasons are apparent and sound. The size of the bench has not kept pace with the growth in population and explosion in the federal case load. Basic math and countless judges have testified to the strain of this overload and how it damages the output of federal courts. No new appellate judgeships have been created since 1990, and only twenty-five new district judgeships have been added since 2000.⁴³⁶ Meanwhile, the Supreme Court has heard fewer and fewer cases, putting ever more emphasis on the lower courts as final arbiters of federal law. The bottleneck has tightened as the bottle has swollen.⁴³⁷

Decisional minimalism supplies yet another reason for an already needed reform. The caseload crisis has bifurcated the work of the courts of appeals: the large majority of cases receive unpublished opinions, often “subminimalist” dispositions drafted by staff attorneys.⁴³⁸ A select few cases result in published opinions that create circuit precedent. This bifurcation has converted courts of appeals into quasi-certiorari courts, a

⁴³⁴ Cf. Kahan & McKenzie, *supra* note 424, at 348 (noting that some districts have subject-matter specific exceptions to related case rules).

⁴³⁵ I think that it would be good practice to appoint a case management committee of three to five district judges who can oversee the assignment of cases and intervene if a judge retains a case without good cause. See, e.g., D.D.C. Local Civ. R. 40.1(b). And the courts of appeals should entertain mandamus petitions in cases where a district court abuses its discretion in keeping a case. Cf. *In re Flynn*, 973 F.3d 74, 82 (D.C. Cir. 2020) (en banc) (noting that mandamus is available to reassign a case “because the injury suffered by a party required to complete judicial proceedings overseen by a disqualified judicial officer is by its nature irreparable” (internal quotation marks and alterations omitted)).

⁴³⁶ Menell & Vacca, *supra* note 155, at 842.

⁴³⁷ Others have called on expanding the size of the bench to restore partisan balance to the judiciary or to retaliate against hardball tactics in the Senate. See, e.g., Leah Litman, *Expand the Lower Courts*, in *How to Fix the Supreme Court*, N.Y. Times (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/expand-federal-courts-judges.html> [<https://perma.cc/VAY9-F258>].

⁴³⁸ See *supra* notes 167–72, 182, 184 and accompanying text.

role for which they are not suited. It undermines decisional minimalism by inducing judges to widen and deepen the few opinions that are published. And that, in turn, means even less time for the rest of the docket. When Taft urged Congress to expand the Supreme Court's certiorari jurisdiction, the premise of his argument was that a litigant is entitled to an appeal in the intermediate courts of appeals.⁴³⁹ That policy is embodied in our jurisdictional statutes. But it has been hollowed out by exploding caseloads and a bench that has not kept pace. Increasing the number of judgeships can begin to restore that policy, distribute judicial resources more equitably, and lessen the inducements toward "maximalism" in published opinions.⁴⁴⁰

CONCLUSION

Judicial minimalism arose and has been defended as a theory about how Supreme Court Justices should judge. That is understandable: the Court is an alluring and powerful institution, and the literature on minimalism is just one instance of a broader bias in public law. But that focus on the Supreme Court overlooks vast, submerged continents of the American legal experience. I have tried to shine a light on judicial minimalism in the lower courts and to show that the case for minimalism is stronger there than in the Supreme Court. At the same time, appreciating the full institutional context of the judiciary lessens the appeal of decisional minimalism as a general approach for the Supreme Court.

The deeper ambition of this Article is to stimulate further thinking about how lower courts should exercise the judicial power. The "decentralized character" of judicial review—the fact that any judge, high

⁴³⁹ Jurisdiction of Circuit Courts of Appeals and United States Supreme Court, *supra* note 150 (indicating that a litigant is "entitled" to appellate review in the intermediate circuit courts); see Post, *supra* note 291, at 70.

⁴⁴⁰ The expansion could be made more politically feasible by introducing it in phases or by having it take effect several years in the future. See Menell & Vacca, *supra* note 155, at 879–80. Expanding the number of district judges could benefit decisional minimalism too, though for a different reason. Broad rules are generally easier and less resource-intensive to apply than narrow rules or more fact-sensitive standards. See Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 *Harv. L. Rev.* 22, 63 (1992). As a result, if district judges are starved for time and resources, appellate courts may feel compelled to fashion broader rules that are easier for district judges to apply. See generally Andrew Coan, *Rationing the Constitution: How Judicial Capacity Shapes Supreme Court Decision-Making* (2019) (exploring how limits on judicial resources influence rules of substantive law).

or low, has the power to enjoin a law or executive policy—is a distinguishing feature of the American legal system.⁴⁴¹ We tend to take decentralization as the necessary entailment of *Marbury*'s holding that the Constitution is ordinary—that is to say, justiciable—law.⁴⁴² But a glance around the world shows that to be untrue. “The United States is virtually unique in having . . . a system in which ordinary judges can review and strike down legislation.”⁴⁴³ The very fact that American-style lower courts are so rare in comparative terms should make them a special concern of legal theory. And there is a real danger that our focus on the Supreme Court or on an idealized judge shorn of institutional distinctness, like Professor Ronald Dworkin's Hercules,⁴⁴⁴ could lead lower court judges off the rails by erecting inapt, even counterproductive, models. After all, it is hard to imagine that a hierarchical judiciary could properly function if every judge, high and low, aspired to be Hercules. Perhaps a great lower judiciary is made up of judges who aspire not to be great, but merely good.

⁴⁴¹ See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 *Yale L.J.* 1363, 1375–76 (1973).

⁴⁴² See *id.* at 1376; Mauro Cappelletti, *Judicial Review in Comparative Perspective*, 58 *Calif. L. Rev.* 1017, 1043 (1970).

⁴⁴³ John E. Ferejohn, *Constitutional Review in the Global Context*, 6 *N.Y.U. J. Legis. & Pub. Pol'y* 49, 49 (2002); see Patricia M. Wald, *Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts*, 61 *U. Cin. L. Rev.* 771, 772 (1993) (“[I]t is the integration of the so-called ‘inferior courts’ into constitutional lawmaking that makes the United States’ system almost unique in the world.”). Most constitutional democracies follow the European or “Kelsenian” model of investing the power of constitutional review in a single, specialized court that is separate from the rest of the judicial system. Ferejohn, *supra*, at 50–51; Greene, *supra* note 340, at 141. See generally Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 *J. Politics* 183 (1942) (describing the specialized Constitutional Court of Austria).

⁴⁴⁴ See Ronald Dworkin, *Hard Cases*, 88 *Harv. L. Rev.* 1057, 1083 (1975).