



Strengths and Weaknesses of Minimalism

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Considers Limitations of Judicial Competence

Minimalism theory has the advantage of considering the limitations of judicial competence such as the limitations of a judge's capacity to accurately evaluate the impacts of sentences. Adoption of the shallow and narrow decisions minimizes the risks of committing errors in the adopting particular judicial decisions. As a result minimalist judicial sentencing is considered pluralistic as they depict a consideration for flexible perspectives. Flexibility in minimalist choices is observed through leaving out decisions that touch on significant principle issues. Judges just say what is needed to justify the impacts of their decisions but at the same time leave substantial amounts of the issues quite undecided. The theory observes that the judicial decisions require being narrow and not full so that the pronouncement resolves only cases under consideration.

On the other hand, the legal statement should not make efforts to address future instances¹. To address the concerns, public observe several political and social viewpoints. Just like in any society some perspectives adhere to extreme approaches while others perceive moderation in the path to all controversial constitutional issues. Minimalism theory also observes that judicial decisions should be shallow instead of deep in the attempt to avoid controversies on various issues of public concern. The narrow and shallow decisions adopted in the court cases avoid making pronouncements which could be misconstrued to control future court determinations. Thus the legal opinions should be dependent on theorized ideas enabling the judges with broad thinking capabilities to make acceptable judgments but still leave the fundamental questions undecided.

¹ Wilkinson III, J. Harvie. *Cosmic constitutional theory: why Americans are losing their inalienable right to self-governance*. Oxford University Press, (2012), 86.



Observes a Moderate Ground

Minimalism theory assumes some moderate ground leading to judicial pragmatism. The concept is a flexible aspect to court decisions which avoid adverse effects of legal sentencing. Minimalism approach has the objective to achieve positive overall results. One of the most flexible features of the minimalist approach is the ability to combine politics with the law, making it manageable in the sense that it is readily applicable in the two fields. In the observation of decisions, the theory enhances stability which is essential in promoting flexibility in the future court decisions. The concept of flexibility in the court is also enhanced creating a future for the courts on particular topics.

Such a flexible approach in the courts is necessary as it improves the democratic deliberations by creating room for policymakers to be flexible in approach and hence respond to constitutional issues. The method allows the political decisions makers to return to the open questions in the constitution that even the US Supreme Court considers quite public and subject to various interpretations. Sunstein and Wilkinson present themselves as individuals who could engage in serious debates related various controversial issues. They focus their attention on required areas in resolving particular cases². The implication is that the judges should only focus on the necessary details regarding a specific sentencing and all matters related to dispute resolution³. Legal minds endeavor to act as a voice of reason in the midst of various perspectives.

Minimalism Observes Political Branches

Minimalism theory makes the presumption that there is adherence of political branches. As a result, the approach allows judicial decisions to avoid invalidating decisions of the

² Wilkinson III, J. Harvie. *Cosmic constitutional theory: why Americans are losing their inalienable right to self-governance*. Oxford University Press, (2012), 115.

³ Sunstein, Cass R. "Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America." (2005), 213.



legislative and the executive branches by upholding on their merits⁴. Alternatively, the use of various techniques makes it possible to prevent constitutional issues that may arise. Thus the minimalism theory limits the role of the national judiciary and enhances the democratic space necessary for self-determination⁵. As a result, the court's institutional interests are preserved so that the agencies overcome controversies that could interfere with the public good. In the process, the theory overcomes judicial supremacy by making it possible for judges to move in small steps and hence avoiding creating space for legal misinterpretation.

An example of a case that demonstrates the strength of the minimalist approach is reflected in an abortion case *Whole Woman's Health v. Hellerstedt*. In the case justice, Anthony Kennedy proposed that the case is returned to lower courts with an objective to develop the necessary evidence required for the regulations of abortion clinics. The decision of the judge was instrumental in that it raised the possibility of an application of the minimalist theory and hence avoided widening the scope which could lay the ground for future judicial decisions.

In a related case US Supreme Court ordered to remand a contraceptive out of procedure as a narrow ruling with the effort to avoid 4-4 ties in the judicial decision. *Zubik v. Burwell* case involved a dispute where organizations related to particular religious organizations were not willing to offer contraceptive coverage for their employees. In the effort to determine the fact, the Supreme Court realizes that there could be a potential compromise and thus recommends a remand of the case with the aim to find other avenues for determination.

⁴ Sunstein, Cass R. "Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America." (2005), 102.

⁵ Scriven, Michael. "Minimalist theory: The least theory that practice requires." *The American Journal of Evaluation* 19, no. 1 (1998), 58.



Weaknesses of Minimalism Approach

Minimalism Is Not a Theory of Constitutional Interpretation

One of the significant flaws of minimalism approach is that it is not a theory of constitutional interpretation. It ignores the fact that judicial proceedings should largely be based on constitutional interpretation and not on the perceptions of the public on topical issues. In regard to constitution interpretation, the theory lacks the usefulness of other approaches that are related to judicial sentencing. Therefore, the argument fails to provide the benefits that the public would expect to achieve from theories about constitutionalism and law application.

Usefulness of the Theory Not Clearly Defined

However, some of the practitioners say that the concept of positive results has not been defined. The judicial decisions resulting from the minimalist approach fails to acknowledge the fact that probably making wide and deep choices could improve the situation and the controversies that surround various issues. Further, the decisions reached favor one of the parties due to their narrow and shallow approach and could shift to favor the other side if more information concerning the issues is produced. Minimalist theory allows exhaustion of all the details regarding a particular case than leaving most of the issues undecided. As a result, the satisfaction associated with draining all the angles related to an incident is lacking in judicial decisions that apply the minimalist approach in the sentencing. As a result, the constitutional interpretation is not dependent on the original meaning of the constitution as written. A failure to adhere to the originality of the legal text takes away the courts authority as well as its legitimacy.

An example of the weakness of the minimalism theory is demonstrated in a case *Bob Jones University v. the United States*. In the case, the US Supreme Court observed that



preventing the discrimination involves overriding government interest⁶. According to the judges, such prevention implies that burden on religious freedom is justified. The court concluded that homosexuality is a different matter and has been treated as such for a long time. Despite that, many religious traditions consider same sex practices as wrong despite the fact that people might doubt the rationale behind such doctrine. It should also be understood that protecting same sex relationship is not the official national public policy which continues to define the racial equality.

Opposed Theories

US constitution adheres to living constitution also referred to as loose constructionism. The approach observes that the constitution has a dynamic meaning and thus subject to changes based on unique contexts of each case. The constitution changes depending on new circumstances without the need for amendments. Another theory is originalism which observes that the constitution is a stable document since creation. As a result, originalism recommends that the constitution only be changed according to procedures in article five.

⁶ Sunstein, Cass R. "Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America." (2005), 187.



References

Scriven, Michael. "Minimalist theory: The least theory that practice requires." *The American Journal of Evaluation* 19, no. 1 (1998): 57-70.

Sunstein, Cass R. "Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America." (2005).

Wilkinson III, J. Harvie. *Cosmic constitutional theory: why Americans are losing their inalienable right to self-governance*. Oxford University Press, 2012.