

Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court

Abstract:

One of the most influential recent theories of Supreme Court decision-making is Cass Sunstein's "judicial minimalism." Sunstein argues that a majority of the justices of the Rehnquist Court were "minimalists," preferring to leave things undecided by favoring case-by-case adjudication over ambitious judicial agendas. While many legal scholars have embraced Sunstein's argument, no piece of scholarship has attempted a quantitative empirical test of the theory. This paper develops an empirical measure for judicial minimalism and examines whether minimalism affected the opinion writing and voting of the justices in the Rehnquist and Roberts Courts. The empirical analysis supports the conclusion that judicial minimalism has a statistically significant effect on the opinions of the justices, providing the first quantitative evidence of "meta-doctrine" in the Supreme Court.

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Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court

One of the most influential recent theories of Supreme Court decision-making is Cass Sunstein's theory of "judicial minimalism." In a series of books and articles,¹ Sunstein has developed the thesis that a primary source of division among the justices on the Rehnquist Supreme Court was judicial minimalism—that is, not over *how* to decide individual cases, but over *how much* to decide in individual cases. Sunstein describes as "minimalists" those justices on the Rehnquist Court who preferred case-by-case adjudication of disputes on the unique facts before them, but who avoided venturing "broad rules and abstract theories" that resolved cases not before them.² In contrast, he describes as "maximalists" those justices who preferred to "set[] broad rules for the future" and "give[] ambitious theoretical justifications for outcomes."³ In the Rehnquist Court, Sunstein argues, the justices regularly clashed over whether to issue the narrow, shallow rulings of judicial minimalism, or the broad, deep rulings of judicial maximalism. Sunstein further contends that this conflict over the scope of judicial decision-making was, essentially, the distinctive characteristic of the Rehnquist Court, constituting "the most striking feature of American law in the 1990s."⁴

¹ See, e.g., Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1993); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6 (1996) [hereinafter *Foreword*]; CASS. R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) [hereinafter *ONE CASE AT A TIME*]; Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47 (2004) [hereinafter *Minimalism at War*]; CASS. R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005) [hereinafter *RADICALS IN ROBES*]; Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006) [hereinafter *Burkean Minimalism*]; Cass R. Sunstein, *Minimalism Versus Perfectionism in Constitutional Theory: Second-Order Perfectionism*, 75 FORDHAM L. REV. 2867 (2007).

² SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1, at 9.

³ *Id.* at 9-10.

⁴ *Id.* at xi.

Sunstein's theory of judicial minimalism has potentially sweeping implications for the study of the Supreme Court in general, and for the legacy of the Rehnquist Court in particular. Sunstein argues that minimalism has been one of the most significant and divisive issues among justices in the Rehnquist Court. He asserts that a majority of the justices on the most recent Rehnquist Court (1994-2005) were minimalists, including the important swing justices in the ideological center of the Court, such as Kennedy and O'Connor.⁵ Moreover, Sunstein does not view minimalism as an abstract philosophical difference that only occasionally surfaced in the justices' written opinions. Instead, he argues that "the largest struggles on the Supreme Court have been over when to speak and when to remain silent," and that in many cases "the justices contest exactly that issue."⁶ If this account of Supreme Court decision-making is true, then scholarship on the Court has overlooked much of what is really driving disagreement among the justices.

The practical significance of minimalism, however, is difficult to ascertain without objective empirical evidence of whether minimalism actually influences the opinion writing and voting of the justices.⁷ Although many scholars have embraced Sunstein's characterization of the Rehnquist Court,⁸ other scholars have criticized his failure to provide empirical support for the theory.⁹ One recent article, in fact, goes

⁵ *Id.* at 9 (arguing that the justices comprising the "analytical heart" of the Court, including Kennedy and O'Connor, are minimalists).

⁶ *Id.* at xi-xii.

⁷ Stephen M. Griffin, *Has the Hour of Democracy Come Round at Last? The New Critique of Judicial Review*, 17 CONSTITUTIONAL COMMENTARY 683, 689 (2000).

⁸ One commentator even goes so far as to describe the descriptive theory of minimalism as "unquestionably correct." Mark Tushnet, *The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 92 (1999). *See also* Jeffrey Rosen, *1999 Survey of Books Relating to the Law*, 97 MICH. L. REV. 1323, 1327 (1999) ("It is rare that a work of constitutional theory so enthusiastically celebrates, and so precisely expresses, the mood of a particular Supreme Court.").

⁹ Griffin, *supra* note 7, at 689. Commentators have also noted Sunstein's failure to provide evidence of the categorizations of various justices. *See, e.g.*, Sheldon Gelman, *The Hedgehog, the Fox, and the Minimalist*, 89 GEO. L.J. 2297, 2339 (2001) ("Sunstein simply classifies the Justices as one or the other without

farther, arguing that the empirical evidence contradicts Sunstein's theory.¹⁰ In that article, Professor Neil Siegel undertook a detailed analysis of selected cases from the Court's October 2003 term docket and concluded that the Court's decisions should not be described as minimalist according to his "falsifiable" version of minimalism.¹¹ Similarly, Sunstein has been criticized for focusing on specific types of cases and for relying on "too few data points to be truly convincing."¹² Thus, while it is certain that judicial minimalism has had an important influence on scholarship, stimulating an "ever-burgeoning literature"¹³ on the subject, it is less certain whether minimalism has, in fact, had an important influence on the justices.

The resolution of this empirical controversy is important not only for positive research on judicial decision-making, but also for normative theorizing about judicial modesty and judicial restraint. There are two principal reasons for this. First, the idea of minimalism as a normative theory is controversial, and has generated a tremendous "buzz" in legal scholarship.¹⁴ Yet, despite the scholarly interest, there is certainly nothing like a consensus on the normative desirability of minimalism. Second, even if scholars came to consensus on the merits of minimalism (a seemingly unlikely prospect), the descriptive accuracy of the minimalist account is important to evaluating minimalism

examining their records. Thus, we do not know whether Justice O'Connor or Justice Souter really qualifies as more minimalist than Chief Justice Rehnquist.").

¹⁰ See SUNSTEIN, RADICALS IN ROBES S. Siegel, *A Theory In Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005).

¹¹ See *infra* Part IV-D-5.

¹² Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1992 (1999).

¹³ Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1211 n.182.

¹⁴ A LexisNexis search on August 27, 2007 returned 483 works citing Sunstein's book ONE CASE AT A TIME, *supra* note 1, and 99 works citing to Sunstein's *Foreword*, *supra* note 1.

as a normative theory of adjudication.¹⁵ This is because, as Sunstein himself acknowledges, “it is unhelpful to urge courts to adopt a role that they will predictably refuse to assume.”¹⁶ In this sense, it seems that both Sunstein and his critics would agree that there is an urgent need for an empirical assessment of the *descriptive* theory of judicial minimalism.

This article is an attempt to provide the first quantitative empirical assessment of Sunstein’s theory of judicial minimalism. Using new data on the Rehnquist Court covering the 1994 to 2005 terms and the Roberts Court from the 2005 and 2006 terms, this article finds considerable evidence for a “meta-doctrinal” divide among the justices that is largely consistent with Sunstein’s theory of judicial minimalism. The data suggest that the patterns of disagreement in the justices’ written opinions differ systematically from the patterns of agreement in their voting on case outcomes, a phenomenon consistent with the hypothesis of judicial minimalism. In addition, these patterns of agreement and disagreement mirror, in large measure, Sunstein’s descriptive claims about which justices are minimalist and which are maximalist. Although the evidence for minimalism probably does not rise to the level of the “most striking feature of American law in the 1990s,”¹⁷ these relationships provide the first objective quantitative evidence for a systematic and theoretically important meta-doctrinal divide among the justices of the Supreme Court.

¹⁵ It is important to note that Sunstein does not present minimalism as normatively desirable under all circumstances. *See, e.g.*, Cass R. Sunstein, *Problems with Minimalism*, 59 STAN. L. REV. 1899, 1902-1903 (2006) (“the choice between narrow and wide rulings cannot itself be resolved by rule...the better approach calls instead for a case-by-case inquiry into whether case-by-case decisions are desirable”).

¹⁶ *See* Sunstein, *Minimalism at War*, *supra* note 1, at 51, n. 20 and accompanying text.

¹⁷ *See supra* note 4 and accompanying text.

The results also suggest several important and even surprising amendments to Sunstein's descriptive account, amendments that respond in part to the comments of some of Sunstein's critics. First, the results suggest that Justice Rehnquist was, in fact, one of the most minimalist members of the Court, not the maximalist Sunstein makes him out to be. Second, the results suggest that Justices Kennedy and Breyer were less minimalist than Justices Ginsburg, Souter, Rehnquist, and even Stevens, a finding that contrasts with Sunstein's account. Third, the results suggest that most of the minimalism-maximalism distinction was between Justices Scalia and Thomas, on the one hand, and the other seven justices on the other. Finally, and perhaps most importantly, this study provides the first quantitative measure of judicial minimalism, which should provide a new perspective on the legacy of the Rehnquist Court and a glimpse of what to expect from the Roberts Court.

The argument in this article proceeds in six parts. Part I introduces Sunstein's concept of judicial minimalism and outlines in broad terms a strategy for capturing the concept of judicial minimalism in a quantitative measure. Part II turns Sunstein's theory into a set of hypotheses and outlines the methodological aspects of the paper's empirical tests. Part III presents the key results of the paper, illustrating that Sunstein's minimalism plays a statistically significant role in the opinion output of the justices. The results in this Part present the first quantitative measures of minimalism of justices on the Rehnquist Court. Part IV discusses some implications of minimalism for studying the Supreme Court and addresses some alternative explanations. Part V applies the method to the new Roberts Court, assessing whether the early data supports Sunstein's

classification of John Roberts as a minimalist. Part VI concludes with some potential implications of this new measure of judicial minimalism.

I. Measuring Judicial Minimalism

A. *Introducing Sunstein's Minimalism*

The distinguishing feature of minimalist justices as described by Sunstein is that they tend to “leave things undecided.”¹⁸ The idea of judges deliberately “leaving things undecided” is in many ways evocative of the “passive virtues” of the Bickelian tradition of judicial modesty,¹⁹ but the account developed by Sunstein differs from other approaches to judicial modesty in two important ways. First, the theory is in large part a positive, as opposed to a purely normative, account of Supreme Court decision-making. That is, although Sunstein’s work has often been interpreted primarily as a theory of how much Supreme Court justices *should* decide, much of Sunstein’s work is about how much Supreme Court justices *do* decide.²⁰ Second, while minimalism is a theory *about* constitutional interpretation, minimalism is not itself a theory *of* constitutional interpretation.²¹ That is, Sunstein’s minimalism does not dictate (and often does not even

¹⁸ “Leaving Things Undecided” was the title of Sunstein’s 1996 Harvard Law Review Foreword, Sunstein, *Foreword*, *supra* note 1, as well as a chapter heading in *ONE CASE AT A TIME*, *supra* note 1.

¹⁹ See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

²⁰ Sunstein’s theory of minimalism goes beyond merely descriptive claims about the Supreme Court, however, to provide some prescriptive guidance for constitutional decision-making. In general, Sunstein advocates the philosophy of judicial minimalism in constitutional cases, arguing that “leaving things undecided” will encourage resolution of controversial issues through the deliberative democratic process. Sunstein particularly supports the minimalist approach in the context of novel or controversial constitutional issues where uncertainty is great and the costs of decision and error are potentially large. Sunstein does not, however, argue that minimalism is always desirable. In cases where “planning is important and judges can devise decent rules, width is all to the good.” See *SUNSTEIN, ONE CASE AT A TIME*, *supra* note 1, at 209. But even in the cases when Sunstein does not see minimalism as desirable, he suggests that on a multi-member tribunal with diverse opinions, minimalism may “not be so much desirable as inevitable.” *Id.* at 57. This article is focused on the empirical assessment of Sunstein’s descriptive claims, as a necessary precondition to evaluating his normative claims. Accordingly, Sunstein’s normative claims about minimalism will not be discussed further in this article.

²¹ See, e.g., Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2213 (2006) (reviewing *SUNSTEIN, RADICALS IN ROBES*,

suggest) the answers to how to resolve constitutional questions in individual cases.

Instead, minimalism is almost purely “meta-doctrinal,” a doctrine about doctrine, but not a judicial guide for resolving individual cases.²²

Minimalism has two primary dimensions, which Sunstein calls the “narrowness” and “shallowness” of decisions.²³ The “narrowness” dimension means that minimalists avoid rulings that implicitly resolve many other cases in addition to the current one.²⁴

That is, a minimalist is reluctant to write an opinion setting down broad rules controlling many future cases. The “shallowness” dimension means that minimalists prefer

“incompletely theorized agreements” to conclusive decisions on issues of “basic principle.”²⁵ That is, the minimalist does not attempt to connect the decision in the

instant case to some larger theoretical apparatus of constitutional interpretation. This

allows minimalists to agree on particulars without agreeing on the “basis” for the

particulars, and agree on abstractions without agreeing on the “meaning” of the

abstractions.²⁶ The combination of the two features of narrowness and shallowness

means that a minimalist Court “settles the case before it, but leaves many things

supra note 1) (“Properly understood, minimalism is not a theory of interpretation at all, at least not as most people understand ‘interpretation.’”); James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1626 (2006) (“[M]inimalism’ is not a theory of interpretation”). Indeed, minimalism is a sort of an “anti-theory” of constitutional interpretation. *See, e.g.*, SUNSTEIN, ONE CASE AT A TIME, *supra* note 1, at 9 (“[i]nstead of adopting theories, [minimalists] decide cases”).

²² *See generally* SUNSTEIN, ONE CASE AT A TIME. Sunstein distinguishes between procedural minimalism, which affects the scope of opinions but not how cases are decided, and “minimalism’s substance,” which may affect how cases are decided. This second aspect of “substantive” minimalism constitutes a “core” of “basic commitments” of substantive minimalism. *See* SUNSTEIN, ONE CASE AT A TIME, *supra* note 1, at 61-72. The main focus of Sunstein’s work, however, is on procedural minimalism. *See id.* at ix; *see also* Christopher J. Peters, *Assessing the New Judicial Minimalism* 100 Colum. L. Rev. 1454, 1464 (2000). This paper deals uniquely with Sunstein’s “procedural minimalism,” which is how “broadly” and “deeply” cases are decided. Thus, the results presented in Part III should not be construed as support for what Sunstein calls “minimalism’s substance.”

²³ *See One Case at a Time, supra* note 1, at 10 (“[T]he practice of minimalism involves two principal features, narrowness and shallowness.”)

²⁴ *Id.*

²⁵ *Id.* at 10-11. Sunstein describes these two minimalist virtues as “narrowness” and “shallowness,” and their “maximalist” opposites as “width” and “depth,” respectively.

²⁶ *Id.* at 11.

undecided.”²⁷ A minimalist Court prefers “saying no more than necessary to justify an outcome,”²⁸ rather than rendering “clear rules and final resolutions” on the issues involved in a case.²⁹

Sunstein argues that the most recent Rehnquist Court provides a good illustration of minimalist jurisprudence, as he argues that a majority (but not all) of the Rehnquist Court justices followed a minimalist approach.³⁰ The five justices Sunstein clearly identifies as minimalist are Ginsburg, Souter, O’Connor, Breyer, and Kennedy.³¹ The two justices Sunstein clearly identifies as non-minimalists (maximalists) are Scalia and Thomas.³² Between the two extremes of minimalism and maximalism are Chief Justice Rehnquist, who was “sometimes” maximalist, and Justice Stevens, who was “sometimes” minimalist.³³ The ends of the minimalism spectrum in Sunstein’s formulation are anchored by O’Connor, the “most notably” minimalist justice on the Court, and Scalia, the “most notably” maximalist justice on the Court.³⁴

The categorization of justices as “minimalist” or “non-minimalist” with some in between suggests that we order the justices along what Sunstein calls a “rough continuum” of minimalism from “reasonlessness/silence” (i.e., total minimalism) to “complete rules/full theoretical grounding” (i.e., total maximalism).³⁵ While Sunstein is not explicit about an ordering of the justices, his work suggests an ordering of the justices

²⁷ *Id.* at ix.

²⁸ *Id.* at 3; *see also* Sunstein, *Foreword*, *supra* note 1, at 6.

²⁹ SUNSTEIN, ONE CASE AT A TIME, *supra* note 1, at ix.

³⁰ *Id.* at 262.

³¹ *Id.* at 9; *see also* Sunstein, *Foreword*, *supra* note 1, at 14.

³² SUNSTEIN, ONE CASE AT A TIME, *supra* note 1, at xiii.

³³ *Id.*

³⁴ *Id.* at xiii; *see also* Sunstein, *Minimalism at War*, *supra* note 1, at 30 (O’Connor is “the Court’s leading minimalist”); Sunstein, *Problems with Minimalism*, *supra* note 15, 1901-1902 (O’Connor is “the Court’s most prominent minimalist”).

³⁵ SUNSTEIN, ONE CASE AT A TIME, *supra* note 1, at 10.

along a maximalism-minimalism dimension something like that in Figure 1, with Scalia and Thomas at the maximalist end, O'Connor at the minimalist end, and the rest of the justices in between. The exact positions of the justices along the maximalism-minimalism dimension are left somewhat ambiguous in Sunstein's work,³⁶ but two broad groupings emerge. The minimalist category clearly includes Breyer, Ginsburg, Kennedy, O'Connor, and Souter, and the maximalist group clearly includes Scalia and Thomas. The two remaining justices, Rehnquist and Stevens, are likely somewhere in the middle, with Rehnquist toward the maximalist end and Stevens toward the minimalist end.

[Figure 1 Here]

B. An Empirical Definition of Minimalism

The most challenging task is to develop an empirical measure of minimalism that would allow scholars to objectively determine which justices are “minimalist” and “maximalist,” as well as permitting empirical assessment of the theory of judicial minimalism. The uniquely meta-doctrinal nature of minimalism, however, makes such a measure possible, at least in relative terms.³⁷ The description of minimalists as “settling cases” but not saying “more than necessary to justify an outcome” evokes the distinction between the two key outputs of the Supreme Court's decision-making process: the “judgments” and the “opinions.” The “judgments” are the dispositions in the individual case before the Court, what Sunstein calls “settling cases.”³⁸ The “opinions” are the reasoning supporting the justices' votes in the case, which may include opinions “for” the

³⁶ Compare, for example, the list of minimalists on page xiii of *ONE CASE AT A TIME*, *supra* note 1, where Stevens seems to be identified as a minimalist, with the list on page 9, which does not include Stevens.

³⁷ In spite of Sunstein's occasional claims that the Rehnquist Court is “minimalist,” which seems to imply that levels of minimalism can be identified in some absolute sense, it seems clear that Sunstein intends minimalism as a relative, not an absolute concept. *See infra* notes 107-109 and accompanying text.

³⁸ The Court's judgment takes the form of a brief statement at the end of the majority opinion such as “affirmed,” “reversed,” “reversed and remanded,” “vacated and remanded,” and so forth. The judgment only affects the specific parties involved in the case.

Court,³⁹ as well as one or more other opinions “concurring” in or “dissenting” from the judgment. Thus, “settling cases” in Sunstein’s formulation evokes the judgment in a cases, while the “justify[ing] an outcome” evokes the opinions in a case. The key distinction between these two products of Supreme Court decision-making is that both minimalists and maximalists must settle cases, but that minimalists and maximalist vary greatly in the way in which they justify outcomes.

The strategy for disentangling the effects of minimalism from substantive doctrine relies on the idea that minimalism affects the *opinions* that the justices write but not the *judgments* in individual cases.⁴⁰ This is because the two dimensions of minimalism—narrowness and shallowness—are characteristics of the justices’ reasoning in their *opinions* in the case,⁴¹ not about the dispositions of the cases between the parties. One judgment cannot be more “minimalist” or “maximalist” than another, as the judgment itself is as “narrow” as possible—it only binds the immediate parties to the dispute—and as “shallow” as possible—it *literally* contains no reasoning. In contrast, the opinions the justices write can certainly differ in this respect; some are narrow and shallow, some wide and deep. In Sunstein’s theory, minimalist justices can agree on “concrete particulars,” despite “disagreements or uncertainty about the basis of those concrete particulars.”⁴² That is because minimalists, like non-minimalists, must issue judgments

³⁹ In some cases no majority can be reached on an opinion, in which case a justice announces the judgment of the Court but there is no opinion “for the Court.”

⁴⁰ To reiterate, this is the “decisional” or “procedural” aspect of minimalism being tested, not what Sunstein calls “minimalism’s substance.” In addition, the phenomenon of jurisdictional dissents may constitute an exception from this general assumption. These are relatively rare, however, and would not affect the analysis.

⁴¹ That is, “the scope of their reasoning,” because the “decisional” form of minimalism examined here is not even about the content of the opinions, as opposed to their scope. *See* Ryan, *supra* note 21, at 1650 (minimalism “tells you how judges should write opinions, suggesting that they should try to reach some agreement on some narrow grounds. But it is quite silent as to the substance of that agreement.”)

⁴² SUNSTEIN, ONE CASE AT A TIME, *supra* note 1, at 11.

or “render decisions” favoring one party or the other based on their assessment of the facts and law.⁴³ Minimalism does not tell the judge what the judgment should be in individual cases. Indeed, minimalist justices are free to decide the *judgment* in individual cases according to their own interpretations,⁴⁴ as minimalists can be conservative, liberal, or anything in between.⁴⁵

This argument that minimalism enters into the opinions of the justices but not into their judgments⁴⁶ suggests a way of measuring minimalism based on the differences in patterns of inter-agreement among the justices on these two aspects of decision-making. To obtain a proxy for minimalism, we could examine the relationships among the justices with respect to votes on the opinions, compare them with the relationships with respect to votes on the judgments, and estimate the effect of minimalism from the differences. We would expect that maximalist justices would write and join more maximalist opinions, and minimalist justices would write and join more minimalist opinions. For example, a

⁴³ As Professor Bybee observes, even “a minimalist-minded Court will in fact declare one party the winner,” but will leave “the principled underpinning of the opinion incomplete,” Keith J. Bybee, *Review: The Jurisprudence of Uncertainty*, 35 LAW & SOC’Y. REV. 943, 952 (2001). The exception is that a purely minimalist Court might use principles of jurisdiction and justiciability to avoid taking the case at all.

⁴⁴ See SUNSTEIN, *RADICALS IN ROBES*, *supra* note 1, at 29 (“By itself, minimalism is a method and a constraint; it is not a method, and it does not dictate particular results.”) See also Ryan, *supra* note 21, at 1654 (minimalism “does not help explain or justify why judges should decide concrete cases in one way or another” and gives “little explanation as to how or why judges should rule in particular cases”); James E. Fleming, *The Incredible Shrinking Constitutional Theory: From the Partial Constitution To The Minimal Constitution*, 75 FORDHAM L. REV. 2885 (“Instead of advising judges and other interpreters how to find what the Constitution means, minimalism tells judges what to do after they have decided that question. In other words, minimalism tells judges the kind of thing they should say to the public in constitutional cases, not how to decide what the Constitution means”).

⁴⁵ Sunstein poignantly makes the point that minimalism does not require any particular ideological commitment by noting that “[w]e could even imagine liberal minimalism, socialist minimalism, Ku Klux Klan minimalism, libertarian minimalism, Aristotelian minimalism, communist minimalism, Nazi minimalism, and so forth,” SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1, at 62. Apparently we can now add *Burkean Minimalism* to the list as well. See Sunstein, *Burkean Minimalism*, *supra* note 1. The concept of judicial minimalism also is not the same as judicial restraint (or activism); minimalists can be characterized by “judicial activism” or “judicial restraint.” SUNSTEIN, *RADICALS IN ROBES*, *supra* note 1, at 43-44.

⁴⁶ It is important to point out that this argument is my own interpretation of Sunstein’s work and is not directly derived from his work. Sunstein never explicitly says that opinions are affected by minimalism to a greater extent than judgments, although I believe this is a fair inference from what he has written.

minimalist justice who objects to the maximalist character of a majority opinion might concur in the judgment (i.e. not join the opinion at all), concur in part in the opinion (that is, join only a portion of the opinion), or join the opinion in full but write a concurring opinion clarifying his or her minimalist views about the case. Minimalists should tend to be closer to one another (that is, agree more frequently) on the opinions than we would expect from their agreement on the judgments, since they can agree on a minimalist ruling “notwithstanding their disagreement on fundamental issues.”⁴⁷

Thus, the approach of this article, therefore, is to find a way to measure disagreement on the reasoning of opinions while somehow “holding constant” the disagreement on the judgments. The residual disagreement, that is, the disagreement on reasoning in opinions that is not attributable to disagreement on the judgments, is a candidate measure for the minimalism or maximalism of the justices. I develop the theoretical model for this approach in more detail below.

II. Hypotheses, Data, and Methods

A. The Data

To provide a quantitative measure of minimalism, I developed a new dataset containing opinions from merits dispositions for the most recent Rehnquist Supreme Court (1994-2005).⁴⁸ For each case, the data include each justice’s vote on the disposition of the case and each justice’s vote on each opinion written in the case (e.g., majority, concurring, concurring in the judgment, dissenting, etc.), including each part of

⁴⁷ Sunstein, *Problems with Minimalism*, *supra* note 15, at 1907.

⁴⁸ The data exclude *per curiam* opinions, dismissal of *certiorari*, dissents from denial of *certiorari*, summary dispositions, decrees, applications for stays, etc. The data also include opinions in which one or more justices did not participate. The latter exclusion is limited to a trivial percentage of the total cases in the Rehnquist Court, but constitutes a significant percentage of cases in the Roberts Court, as Justice Alito joined the Court later than Chief Justice Roberts.

each opinion joined separately (when applicable),⁴⁹ a feature absent in other datasets. This dataset makes it possible to ascertain the degree of agreement or disagreement among the justices on the opinions (i.e., the reasoning) in the case, not just in the disposition (i.e. the judgment) in the case.⁵⁰ This dataset also allows the analysis of the “part-by-part voting”⁵¹ that is increasingly common in the Supreme Court and seems to have a very close relationship to judicial minimalism and maximalism.

Sunstein’s theory of judicial minimalism applies primarily to constitutional cases, and as a result most of the analysis in this paper centers on constitutional cases. The emphasis on constitutional cases makes intuitive sense; there are simply fewer opportunities to be a “maximalist” in the case of statutory interpretation than constitutional interpretation.⁵² However, a complete assessment of the theory of minimalism should examine the extent to which the measure of minimalism is different between constitutional and non-constitutional cases. If Sunstein’s hypothesis about minimalism is correct, we would expect to see a greater effect of minimalism in constitutional cases versus non-constitutional cases. To test this prediction, I will explicitly draw distinctions between the constitutional and non-constitutional cases later

⁴⁹ For example, if a justice joined Part I of an opinion but not Part II, the parts are encoded as separate opinions with the justice joining one opinion and not the other.

⁵⁰ The previous literature, as well as the most well-known Spaeth database, have dichotomized “concurring in part” opinions into either “regular concurrences” or “special concurrences.” Harold J. Spaeth, *Documentation for the United States Supreme Court Judicial Database 1953–2004 Terms*, Inter-University Consortium for Political and Social Research, Ann Arbor, MI. (2006). This simplification is more than adequate for most purposes, but omits too much information for an empirical analysis that *distinguishes* between judgments and opinions, as this one does.

⁵¹ See Robert Anderson IV and Alexander M. Tahk, *Institutions and Equilibrium in the United States Supreme Court*, 101 AM. POL. SCI. REV. __ (forthcoming 2007) (developing a formal model of part-by-part voting).

⁵² This is not to say that there are no opportunities for minimalists and maximalists to diverge on statutory issues. One can easily imagine a distinction between justices who attempt to construct a unified, coherent legislative purpose in interpreting statutes, and those who interpret statutes on a case-by-case basis, informed by the facts of individual disputes.

in the article. Some descriptive statistics for the constitutional cases and the non-constitutional cases are set forth in Table I.⁵³

[Table I Here]

B. The Justices in “Minimalist Space”

To measure minimalism, this article compares the pattern of the justices’ agreement on the judgments with the pattern of their agreement on the opinions. If minimalism (or a similar effect) were influencing the opinions of the justices but not the judgments, we would expect these two patterns to differ in a systematic way. To make this more concrete, I introduce the idea of “distances” (or “differences”) between pairs of justices in three different “spaces,” “judgment space,” “opinion space,” and “minimalism space.” The distance between any two judges in judgment space is the proportion of cases in which the two justices disagree on the judgment in a case (e.g., dissenting from the judgment or concurring in the judgment). The distance between any two justices in opinion space is the proportion of opinions (or parts of opinions) in which the justices disagree on the opinion (or part of an opinion). The opinion distances are weighted so that each case counts equally, whether the case is a unanimous one with a single opinion or a highly fractured one with many opinions.⁵⁴

The distance in minimalism space then is the distance in opinion space holding constant the distance between the two justices in judgment space. The intuition for this distance measure is that justices should be “far apart” in the minimalism space to the

⁵³ A case is coded as involving constitutional issues if the case contains at least one “Constitutional Law” LexisNexis headnote. This measure is probably over-inclusive, as many cases that are not really constitutional have at least one “Constitutional Law” headnote. This over-inclusiveness should, if anything, introduce noise into the measure and make it less likely to find a systematic relationship.

⁵⁴ This is necessary because some cases have many opinions and “parts” of opinions, while others have few. If the opinion parts were not adjusted for equal case weight, cases with more opinions would weigh more heavily. This is a conservative assumption, as weighing cases with more opinions more heavily would have tended to increase the effect of minimalism.

extent that they agree on outcomes (the judgments) but disagree on reasoning (the opinions). Thus, by holding the judgments constant, the distance in minimalist space represents the “excess” disagreement on opinions relative to what we would expect from looking at the disagreement on judgments. It is this “excess” disagreement that is produced by the justices’ distance (i.e., dissimilarity) in minimalism space.

In technical terms, the distance in minimalism space for any two justices, then, is estimated as the residual of an ordinary least squares regression of each unique pair of opinion space distances on the corresponding unique pair of judgment space distances. If we let the judgment-space distance between justice *i* and justice *j* be denoted by γ_{ij} , the opinion-space distance be denoted by θ_{ij} , and the minimalism-space distance be denoted by μ_{ij} , then the minimalism space distance is:

$$\mu_{ij} = \theta_{ij} - \alpha_{OLS} - \beta_{OLS}\gamma_{ij}$$

where the parameters α_{OLS} and β_{OLS} are ordinary least squares estimates⁵⁵ of the opinion space distance pairs on the judgment space distance pairs.

The relationship between these two distance measures is linear and, as we would expect, very strong, as depicted in Figure 2. This Figure presents the $9(9-1)/2 = 36$ unique pairs of justices in opinion space versus judgment space, with a diagonal showing the ordinary least squares fit to the points. We can clearly see that the more two justices disagree on the judgments, the more they disagree on the opinions, which is not surprising. In fact, the correlation between the judgment distance and the opinion

⁵⁵ Ordinary least squares is a statistical technique that finds the best linear relationship between a dependent variable and one or more independent variables. In the equation presented here, the ordinary least squares technique finds the intercept (alpha) and the slope (beta) for the line of best fit to the judgment distances and opinion distances presented in Figure 2. These estimates are, in turn, used to predict the “expected” opinion space distance for any given judgment space distance. The deviation from the expected opinion space distance is the minimalism space distance.

distance is approximately .97, which means that the bulk of the disagreement on opinions coincides with disagreement on the judgments. In spite of this correlation, however, it is the deviations from the diagonal line that are the quantities of interest in attempting to quantify minimalism. Each point above the line represents a pair of justices who are farther in opinion space than we would expect based on their distance in judgment space. Each point below the line represents a pair of justices who are closer in opinion space than we would expect based on their distance in judgment space. The justice pairs above the line are being “pushed apart” on the reasoning in opinions relative to the judgments, and the justice pairs below the line are being “pulled together” on the reasoning in opinions relative to the judgments.

To turn these distances in “minimalism space” into measures of minimalism, we need a model of how minimalism affects opinions relative to judgments. Suppose, therefore, that each justice has a level of maximalism corresponding to a position in a single-dimensional space similar to that depicted in Figure 1. A higher number denotes a higher level of maximalism so that, for example, Scalia and Thomas would have high values, and O’Connor would have a low value. Based on Sunstein’s work, we would hypothesize that the level of minimalism or maximalism has two distinct effects: (1) higher levels of maximalism should tend to push justices apart in opinion space; and (2) differences in levels of maximalism between justices should tend to push them apart in opinion space. Conversely, lower levels of maximalism should tend to draw justices together in opinion space and similar levels of minimalism-maximalism should draw justices together in opinion space. The reason is that as justices become more maximalist, they want to give broader and deeper justifications, which will create

opportunities for conflict in the opinions even when justices agree on judgments.

Similarly, maximalist justices should find it difficult to agree on opinions with minimalist justices, as the former want to say more in justification of the outcome and the latter want to say less.

Translating the verbal model into a mathematical model, let m_i denote the level of minimalism for justice i , and λ denote a scaling parameter for the relative influence of these two effects. Then one possible formalization of the relationship between minimalism and distance in minimalist space for any two justices i and j can be expressed as:

$$\mu_{ij} = \sum_{i=1}^{n-1} \sum_{j=i}^n (m_i + m_j) - \lambda(m_i - m_j)^2$$

The intuition behind this equation is more straightforward than the formalization may initially appear. The first term on the right-hand side is a measure of the absolute level of maximalism of each pair of justices. The theory here is that as justices become more maximalist, they should tend to disagree more in minimalism space. The second term on the right-hand side is a measure of the squared difference in maximalism of each pair of justices. The idea here is that justices who have very different levels of minimalism should disagree more in minimalism space. Sunstein's theory (as operationalized here) would predict that both terms should contribute positively to the value of μ_{ij} , which is the "excess" opinion disagreement, implying that m_1, m_2, \dots, m_9 should be larger for more maximalist justices, and λ should be positive. To estimate the level of maximalism for each justice, we minimize the above equation with respect to m_i for $i = 1, 2, \dots, 9$ and λ . In other words, this amounts to finding values of minimalism

for each of the nine justices that accounts as well as possible for the “excess” opinion distance between all the pairs of justices.

The next step, therefore, is to investigate whether this effect represents systematic differences between justices on some meta-doctrinal influence like minimalism, or merely random variation. The procedure described above will provide point estimates of the level of maximalism for each justice, as well as the scaling parameter λ that measures the relative influence of the two hypothesized effects. In order to have some idea of whether our estimates are capturing systematic differences or mere random variation in the data we will need some measure of the confidence to attach to these estimates. Because there is not an obvious sampling distribution for this statistic, this paper generates confidence intervals using non-parametric bootstrap resampling.⁵⁶ The technical properties of this approach are beyond the scope of this article, but one feature is important to point out. The bootstrap approach has the advantage of requiring fewer assumptions about a statistical model of the data,⁵⁷ which is a potential pitfall in the relatively complicated estimation described above.

With this background, we move to the results in the next Part, where we present the minimalism estimates for the Rehnquist Court.

III. The Evidence for Minimalism on the Rehnquist Court

A. Measuring Maximalism

⁵⁶ See generally BRADLEY EFRON AND ROBERT TIBSHIRANI, AN INTRODUCTION TO THE BOOTSTRAP (1993); A.C. DAVISON AND D.V. HINKLEY, BOOTSTRAP METHODS AND THEIR APPLICATION (1997). The non-parametric bootstrap is a way of assessing the variability of an estimator, such as our estimates of minimalism, without “long-winded and error-prone analytical calculation.” *Id.* at 2-3. In a nutshell, the method involves drawing repeated samples from the data and repeating the original calculation over and over, then assessing variability from the distribution of repeated samples. *Id.*

⁵⁷ See TREVOR HASTIE, ROBERT TIBSHIRANI, AND JEROME FRIEDMAN, THE ELEMENTS OF STATISTICAL LEARNING 228 (2001) (“[T]he method is ‘model-free,’ since it uses the raw data, not a specific parametric model, to generate new datasets.”).

The results of the analysis support the finding of a meta-doctrinal influence like minimalism acting on the justices on the Rehnquist Court. Figure 3 presents a graphical depiction of the justices' distances from one another in "minimalism space." Each plot in the Figure represents the "minimalism space" distance of a justice on the Rehnquist Court with respect to each other justice on the Court. In other words, the vertical bars represent, for each pair of justices, the relationship of the "opinion space" distance of the justices to the distance we would expect based on the "judgment space" distance. The justice pairs above the horizontal line represent justices who are farther in opinion space than we would expect based on their distance in judgment space (i.e. far apart in minimalism space), and justice pairs below the horizontal line represent justices who are closer in opinion space than we would expect based on their distance in judgment space (i.e., closer in minimalism space). The height of each distribution is a measure of its uncertainty based on non-parametric bootstrap resampling.

The Figure already suggests several interesting relationships. First, Justices Thomas and Scalia are relatively far from almost all other justices in minimalism space, but they are also somewhat far from each other. In contrast, Chief Justice Rehnquist is relatively close to most of the other justices, including both justices to whom he is ideologically close (e.g., Kennedy) and justices from whom he is ideologically distant (e.g., Stevens), but is quite far from Scalia and Thomas. Justice Breyer is relatively neutral toward all other justices except Kennedy, Scalia, and Thomas, from whom he is quite distant. The remaining justices (Ginsburg, Kennedy, O'Connor, Souter, and Stevens) are relatively close to one another (as well as to Chief Justice Rehnquist), but are all far from Scalia and Thomas. The plots as a whole suggest that Scalia and Thomas are

relatively far from everyone else (including each other), but that the other justices have mixed relationships with their colleagues in minimalism space. At this point it is important to reiterate that the distances in these diagrams have no relationship to the justices' patterns of decision-making over the judgments.⁵⁸

The next step is to use the model introduced in Part II to translate these distances in “minimalism space” into estimates of the justices’ position on the minimalism-maximalism continuum.⁵⁹ The results of this estimation are presented in Table II, divided by columns into constitutional cases and non-constitutional cases. Looking first at the constitutional cases column, we note that many of the results are consistent with Sunstein’s predictions. First, Justices Ginsburg, O’Connor, and Souter all have low values of maximalism (i.e., high levels of minimalism). The three justices actually have almost identical values of minimalism, which suggests that they have similar relationships to the other justices in minimalism space. Second, Justices Scalia and Thomas have very high values of maximalism (i.e., low levels of minimalism). They are both considerably more maximalist than any of the other justices, and are somewhat far from each other as well. Finally, Justice Stevens is somewhere in the middle of the distribution, which is what we anticipated in Figure 1. Stevens’ status as a “sometimes minimalist” member of the Court means that he does not clearly identify with either extreme on the minimalism-maximalism scale. All of these relationships are consistent with the hypotheses of Sunstein’s theory.

[Table II Here]

⁵⁸ In fact, true by the way the measures are constructed.

⁵⁹ From this point forward we will talk primarily about “maximalism” values, understanding that these are the opposite of “minimalism” values.

The table does reveal several surprises, however, that deviate in important ways from Sunstein's theory. Sunstein depicts Chief Justice Rehnquist as somewhat maximalist, although certainly not as maximalist as Scalia and Thomas. According to the quantitative measure of maximalism, however, Rehnquist actually had the most⁶⁰ *minimalist* estimate on the Court in constitutional cases.⁶¹ Similarly, in Sunstein's theory, Justices Breyer and Kennedy are supposed to be among the most minimalist members of the Court, yet according to this measure they are more *maximalist* on constitutional cases than any other justices except Scalia and Thomas. Further, while it is not surprising that Scalia and Thomas occupy the maximalist end of the spectrum, it is somewhat surprising both that they are on the opposite end of the Scale from Chief Justice Rehnquist and that they are reasonably far from each other in minimalist space. The latter fact seems to provide support for the hypothesis that maximalists not only find it difficult to agree on opinions with minimalists, they also find it difficult, *ceteris paribus*, to agree on opinions with one-another.

The results for non-constitutional cases are, for the most part, similar to those for constitutional cases. The most obvious difference is that the distances among all the justices in minimalist space are much smaller in non-constitutional cases. This makes intuitive sense, as Sunstein's theory of minimalism is really about constitutional decision-making, and we would expect that minimalism would make less difference in statutory cases than in constitutional cases. Another significant difference is that Breyer and

⁶⁰ Note that this refers only to the point estimate of Rehnquist's position. There is a sufficient amount of uncertainty about Rehnquist's position that his confidence interval extends into the middle of the minimalism-maximalism continuum.

⁶¹ At least one commentator has pointed out that Rehnquist seems to belong to Sunstein's "minimalist" category. See Gelman, *supra* note 9, at 2338 ("[I]t is hardly obvious why Chief Justice Rehnquist does not qualify as a minimalist.").

Kennedy are considerably more minimalist in non-constitutional cases, especially Justice Kennedy, who becomes one of the most minimalist members of the Court. Finally, Justices Scalia and Thomas, while still somewhat far from each other, switch places in the non-constitutional cases, with Justice Scalia the more maximalist and Justice Thomas slightly more minimalist. This difference may reflect important differences between the two justices' constitutional and statutory interpretation approaches as discussed below.⁶²

B. Visualizing Minimalism

The “minimalism space” relationships in Figure 3 are somewhat difficult to interpret in their raw form, so in this section we present a way of visualizing these relationships among the justices in “minimalism space.” Figure 4 presents a representation of the distances from Figure 3 in a two-dimensional plane using multidimensional scaling (MDS).⁶³ MDS takes as its input the matrix corresponding to the minimalism space distances in Figure 3 and constructs a configuration of the justices in a two-dimensional space to correspond as closely as possible to the distances in Figure 3.⁶⁴ The relative positions of the justices represent, in a graphically interpretable way, the extent to which the patterns of agreements on the opinions differ from the patterns of agreements on the judgments. Justices who are far apart in “minimalism space” disagree on the opinions more than we would expect from their disagreement on the judgments. Justices who are close in this minimalism space agree on the opinions more than we would expect from their agreement on the judgments.

⁶² See *infra* notes 79 to 80 and accompanying text.

⁶³ Specifically, this paper uses metric multidimensional scaling, although ordinal scaling produced virtually identical results.

⁶⁴ As a result, for two-dimensional space, MDS will take an input distance matrix (in this case the symmetric 9-by-9 matrix of distances between the justices) and attempt to find locations in 2-dimensional plane such that the distances between those positions match as closely as possible the distances between the justices in the input matrix.

The relationships described above are apparent in the graphical depiction of minimalism. In Figure 4, we see a cluster of five justices in the left center (Ginsburg, O'Connor, Rehnquist, Scalia, Souter, and Stevens), who are all quite close together. The justices in this cluster are the most minimalist justices according to the constitutional cases measure in Table II. Situated around the periphery of the Figure are Breyer and Kennedy, who are far from each other and relatively far from the cluster, and Scalia and Thomas, who are somewhat far from each other and even farther from the center cluster. These justices situated around the periphery are the more maximalist justices according to the measure in Table II.

The Figure depicts rather clearly in this Figure the two distinct hypothesized effects of maximalism. Maximalism tends to push minimalists apart from minimalists, and maximalism tends to push even maximalists apart from one-another (hence the “ring” of maximalists encircling the minimalist cluster). Second, minimalism tends to pull minimalists together (hence the center cluster), while keeping them apart from maximalists. We will return to this Figure and the interpretation of these measures in Part IV, below, where we explore in more substantive terms the meaning of these measures.

C. *Some Corroborating Evidence*

The evidence presented above requires a caveat; while the results are consistent with a meta-doctrinal influence like minimalism, the measures in this article *do not directly measure* minimalism. In other words, there may be another explanation for the patterns shown above. Indeed, in Part IV-D, below, I explore some of the alternative interpretations to the “minimalism” conclusion and rebut some (but not all) of those

alternative interpretations. In this section, however, I will briefly present two different types of corroborating evidence that supports the conclusion that we really are measuring something like minimalism with this analysis. The two pieces of evidence, taken together, provide significant support to the minimalism hypothesis.

1. Dissents from Denial of Certiorari

The first piece of corroborating data comes from opinions written in dissent from denial of certiorari. In the overwhelming majority of cases, the Court denies certiorari without any comment, which is the most minimalist disposition possible.⁶⁵ In some cases, however, justices who voted to grant certiorari write opinions dissenting from the denial. As discussed above, the hallmark of minimalists is that they “render decisions that are no broader than necessary to support the outcome”⁶⁶ But it is hard to think of anything more “unnecessary to the outcome” than dissents from denial of certiorari. Indeed, Justice Stevens has described dissents from denial as “totally unnecessary” and “the purest form of dicta.”⁶⁷ If minimalism means anything, it certainly must mean avoiding totally unnecessary dicta.⁶⁸ Thus, there is a sense in which the number of dissents from denial of certiorari provides a direct (although very rough) measure of minimalism.

The number of opinions written in dissent from denial is presented in Table III. Justice Thomas is in a class by himself, writing 23 dissenting opinions during the period. Scalia is next, with 15 dissents. The next group is Breyer and Rehnquist with about ten each. The other five justices have very few dissents during the period. This rough

⁶⁵ See Sunstein, *Foreword*, *supra* note 1, at 15 (“At the opposite pole from maximalism is reasonlessness, as in a denial of certiorari.”)

⁶⁶ SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1, at 11.

⁶⁷ *Singleton v. Commissioner*, 439 U.S. 940, 944—945 (1978) (Stevens, J., opinion respecting denial of certiorari).

⁶⁸ See Sunstein, *Foreword*, *supra* note 1, at 15 (explaining that minimalists “avoid dicta.”)

measure very closely parallels what we would expect from the minimalism measure, in the sense that there seem to be two separate groups; one maximalist group with Breyer, Rehnquist Scalia, Thomas, and one minimalist group with Ginsburg, Kennedy, O'Connor, Souter, and Stevens. The only clear aberration is Chief Justice Rehnquist, who appears more maximalist in this respect than in the minimalism measure. In addition, we might expect Kennedy and Stevens to appear slightly more maximalist than they appear here, as they fall in the middle of the primary minimalism scale developed earlier, but fall at the far minimalist end of the scale here. There are different dimensions of minimalism, however, and some of these discrepancies are reversed in the second measure discussed next.

[Table III Here]

2. Coalition Size

The second piece of corroborating evidence is the size of the coalitions that the justices join. In his recent article, *Burkean Minimalism*,⁶⁹ Sunstein hypothesizes a new empirical regularity related to minimalism: that unanimous opinions are more likely to be minimalist.⁷⁰ This is because unanimous opinions are likely to be narrow, as “consensus leads to narrower decisions,”⁷¹ and shallow, as “diverse people are unlikely to be able to agree on a theoretically ambitious account of some area of the law.”⁷² Extending this principle from unanimous opinions slightly, we might hypothesize more broadly that minimalist justices in general write and join opinions that gather broader support, and maximalist justices write and join opinions that gather less support.

⁶⁹ See Sunstein, *Burkean Minimalism*, *supra* note 1.

⁷⁰ *Id.* at 364-365.

⁷¹ *Id.* at 362.

⁷² *Id.* at 365.

The second column of Table III presents some evidence along these lines, giving the average “coalition size” for each opinion or part of opinion each justice joined. Again, Justice Thomas is the most “maximalist,” with the opinions he wrote or joined only attracting 4.97 votes on average (including Thomas himself). Stevens, Scalia, and Breyer find themselves in the next smallest coalitions, with 5.04 5.11, 5.33 votes on average, respectively. The other justices have larger coalitions, led by Rehnquist who joined the largest coalitions (5.8 votes) and O’Connor in a close second (5.76 votes). Again, this measure roughly tracks the primary minimalism measure in this article, but this time with Stevens appearing more *maximalist* than in the primary measure.

Combining the two measures into one we come very close to the original minimalism measure with this new data. If we take the four most maximalist justices from both measures, the only three to appear in both measures are Breyer, Scalia, and Thomas, our prime candidates for maximalism. In addition, in both measures Scalia and Thomas are the most maximalist, and Thomas is really in a category by himself. All of this parallels the account of maximalism presented above. Thomas is the most maximalist justice (in all versions), followed by Scalia (again, in all versions), with Breyer significantly more maximalist than the “minimalist cluster,” but significantly less minimalist than Scalia and Thomas. Thus, this independent evidence of minimalism and maximalism provides some support for the interpretation of our results as measuring the minimalism or maximalism of the justices.

D. Summary and Some Qualifications

The combination of these three data sources shows relatively clear, consistent evidence of some sort of meta-doctrinal divide in the Rehnquist Court. In addition, the

corroborating evidence suggests support for the idea that this divide is roughly consistent with judicial minimalism. However, a couple of qualifications are in order. First, the measure described above is designed to measure the extent to which the justices disagree about minimalism or maximalism, not whether the justices are in some “absolute” sense minimalists or maximalists. While Sunstein refers to some justices as “minimalists” or “maximalists,” he makes it clear that the term is relative, not absolute.⁷³ Thus, while this analysis suggests that the justices on the Rehnquist Court divided along minimalism lines, it does not suggest that the justices are minimalist or maximalist in any absolute sense, or even in historical context.⁷⁴

Second, the fact that a majority of the justices on a Court are more minimalist than the minority may not be necessary or sufficient for the Court to reach a minimalist outcome. The minimalist majority may not be sufficient because often the minimalists on the Court will fall on opposite sides of the judgment, meaning that the majority opinion may not have five minimalists to produce a majority vote on a minimalist opinion. The minimalist majority may not be necessary because the “median” or “pivotal” justice, who on most issues in the Rehnquist Court was the relatively minimalist O’Connor, may be able to dictate the terms of the majority opinion.⁷⁵ Thus, discovering whether the minimalist majority or the minimalist “median justice” in the Rehnquist Court guided the Court as an institution toward more minimalist opinions is beyond the scope of this article.

⁷³ See *infra* notes 108 to 110 and accompanying text.

⁷⁴ The question of historical context, however, could be answered by gathering additional data on historical courts and performing a similar analysis.

⁷⁵ See Anderson and Tahk, *supra* note 51, at

IV. The Meaning of Minimalism

The statistical analysis of opinions and judgments described above provides quantitative evidence that the justices clash not only over the *content* of opinions, but also over the *scope* of opinions. Initially, this conclusion may seem unsurprising; after all, the justices often quite explicitly emphasize the narrowness of their holdings or criticize the broadness of dicta in other opinions. The cynical observer, however, might regard this “minimalist rhetoric” as a cloak for substantive disagreement with the majority rather than a genuine preference for narrowness over breadth. That is, we might suspect that the justices criticize as “unnecessary” or “dicta” those rules that do not support their favored rule, while embracing unnecessary pronouncements and dicta that support their favored rule. The skepticism of this view could lead to a view of the Court that questions whether the justices really disagree over the scope of their opinions, or simply favor narrow, shallow opinions when they disagree with the Court’s holding, and broad, deep opinions when they agree with the Court’s holding.

The findings in this paper, however, challenge that cynical view of the Court, and suggest that the justices really do disagree over how much to decide in Supreme Court opinions. The key here is the difference in the pattern of agreement over the judgments and the opinions. If justices were only dismissing as “too broad” or “dicta” opinions they disagreed with, while embracing broad opinions they agreed with, the patterns of agreement and disagreement should wash out when we hold agreement on the judgments constant.⁷⁶ Thus, we are left with explaining the fact that justices disagree over opinions

⁷⁶ Note that this does not mean the justices do not tend to dismiss broad arguments more when they disagree with them than when they agree with them. In fact, most of them probably do tend to favor broadness more when they agree than when they disagree. The point of the empirical analysis in this piece is that some justices, the minimalists, will not join broad opinions even when they *do* agree with them.

in ways that they do not disagree over the judgments, a phenomenon consistent with, and possibly supportive of, the hypothesis of judicial minimalism. This Part explores some explanations for how minimalism might produce these results and investigate some alternative explanations that might account for this effect.

A. *Interpreting Minimalism*

As suggested above, the tendency of justices toward minimalism or maximalism is probably best described as a “meta-doctrinal” phenomenon. Minimalism is a doctrine about the desirable breadth and depth of doctrine, but does not dictate the content of that doctrine. This is how minimalism allows people with diverse doctrinal preferences to bury their differences and agree on a compromise.⁷⁷ This may be the reason why, in Figure 3, we see a group of tight “minimalist cluster” of justices (Ginsburg, O’Connor, Rehnquist, Souter, and Stevens), some whom have very different substantive preferences about substantive doctrine, but relatively similar meta-doctrinal preferences about breadth and depth. In contrast, maximalism seems to transform latent disagreement into actual doctrinal disagreement. This may be the reason why in Figure 3 the maximalists Scalia and Thomas are not only far from the minimalists, but also relatively far from each other. Thus, minimalism allows justices to reach some common ground even when they disagree about a great deal, while maximalism drives justices apart even when they agree about a great deal. In this sense, the measure of minimalism is unique because it is able to disentangle the somewhat similar effects of decisional *minimalism* from ideological *moderation*.

⁷⁷ See SUNSTEIN, ONE CASE AT A TIME, *supra* note 1, at 11 (“[M]inimalists generally try to avoid issues of basic principle. They want to allow people who disagree on the deepest issues to converge.”)

This feature of the quantitative approach of this paper also overcomes a potentially significant criticism of Sunstein’s theory of minimalism—that the theory confounds “minimalism” with “moderation” or even equates minimalism with liberal ideological preferences. In Sunstein’s formulation, the most “minimalist” members of the Court are those commonly portrayed as the most “moderate” members of the Court,⁷⁸ with Justice O’Connor as the most common example. In contrast, the most “maximalist” members of the Court according to Sunstein’s formulation are also those portrayed as the most extreme (and the most conservative), with Justices Scalia and Thomas as the most common examples. This raises the suspicion that minimalism is simply moderation—or at least non-conservatism—and minimalist expressions by justices are merely another way of expressing ideological disagreement. According to this argument, there are two, potentially observationally equivalent, ways to appear minimalist; a justice might be able to reach agreement with other justices of diverse ideological commitments because she is a minimalist, or the justice may be able to reach agreement with other justices because she is a moderate.

The findings in this paper, however, allow us to overcome the observational equivalence problem by exploiting the differences between the judgments and the opinions. By “canceling out” the differences in the judgments, we find that, in contrast to Sunstein’s formulation, the most ideologically moderate members of the Court are not always the most minimalist. In fact, Kennedy and Breyer, who sat on either side of the ideological center of the Rehnquist Court (Justice O’Connor), were not particularly

⁷⁸ See, e.g., Symposium, *Locating the Constitutional Center Centrist Judges and Mainstream Values: A Multidisciplinary Exploration: Unpacking the Idea of the Judicial Center*, 83 N.C.L. REV. 1089, 1175-1179 (2005) (describing “the current association of jurisprudential centrism with what is now typically called judicial minimalism”).

minimalist in constitutional cases. In contrast, Rehnquist, who sat relatively far toward the right of the Court, was clearly a minimalist member of the Court. Thus, the new minimalism measure allows us to avoid the criticism that minimalism is really nothing more than ideological moderation.

B. The Impact of Minimalism on Supreme Court Doctrine

The analysis in this paper suggests that minimalism is a “significant” influence on the justices in a statistical sense. But is minimalism “significant” in the practical sense of having a real-world effect on the Supreme Court’s opinions? The question is important for assessing Sunstein’s theory, as he asserts that the “largest struggles” in the Court involve when to speak and when to remain silent. Yet there is reason for doubt; recalling Figure 2 we note that the pattern of agreement on the opinions is highly correlated with the pattern of agreement on the judgments. As a result, our distances in “minimalism space” are relatively small—ranging from single digits to low double digits. So how important is minimalism for understanding the Rehnquist Supreme Court?

The answer largely depends on the research question we are interested in investigating. While it is probably an exaggeration to say that the “largest struggles” among the justices on the Rehnquist Court revolved around minimalism, it is probably not an exaggeration to say minimalism was one of the largest struggles among certain pairs of justices. Consider, for example, the relationship between Scalia and Rehnquist. While their absolute distance in minimalism space for constitutional cases is only 0.098, that distance constitutes 43.7% of their total disagreement on opinions. Similarly, consider Justices Scalia and Thomas who, as described above, are very close in judgment space. In both constitutional and non-constitutional cases, Scalia and Thomas are

actually farther apart in minimalism space than the average pair of justices, and the minimalism distance constitutes 63% of their total disagreement on opinions. Thus, if we are trying to investigate the jurisprudential differences between two very different justices such as Ginsburg and Thomas, minimalism is likely to be a minor issue, even though Thomas is quite maximalist and Ginsburg quite minimalist. But if we are trying to investigate the differences between Scalia and Rehnquist, who are rather similar in their ideology, this analysis suggests that minimalism might be an important part of the explanation.

In fact, the relationship between Justices Scalia and Thomas is an excellent example of the research questions that this measure of minimalism can raise. Justices Scalia and Thomas do not disagree very often; they cast different votes on the disposition in only about 6.5% of cases. As a result, they are often treated as indistinguishable in the law review literature.⁷⁹ Yet as discussed earlier, Scalia and Thomas are relatively far apart in minimalism space, both in constitutional and non-constitutional cases. Even more interesting is that while Thomas is the most maximalist on constitutional issues, Scalia is the most maximalist on non-constitutional issues. What is it about these two justices that leads Scalia to more maximalist approaches in statutory cases and Thomas to more maximalist approaches in constitutional cases? While various answers might be proposed,⁸⁰ the important point for present purposes is that there is something that pushes these two justices apart that needs to be explained.

⁷⁹ As an informal (but enlightening) illustration, try doing a Lexis-Nexis (or Google) search for the phrase “Scalia and Thomas,” and compare the number of results with any other pair of justices’ names, such as, for example, “Kennedy and Stevens,” who have much more common surnames than Scalia.

⁸⁰ One answer might be Justice Scalia’s greater tendency than Thomas to respect *stare decisis* even in constitutional cases. See Ryan, *supra* note 21, at 1631 (“Justice Scalia - much more so than Justice Thomas - is willing to dilute his originalism with a healthy dollop of *stare decisis*.”)

C. *An Example*

Our discussion over minimalism to this point has been somewhat abstract, with few individualized references to actual Supreme Court cases. To make the intuition about conflict over minimalism more accessible, consider the example of *Webster v. Reproductive Health Services*.⁸¹ *Webster* is a particularly apt case because it provides a stark example of conflict over minimalism but is not included in the data for this analysis, and thus is an additional “out of sample” data point. In *Webster*, the plaintiff health professionals (two physicians, a nurse, and a social worker) and two organizations providing abortion services challenged a Missouri statute that imposed a variety of restrictions on abortions.⁸² The plaintiffs argued that the statute violated the constitutional requirements of *Roe v. Wade*⁸³ and its progeny, and asked the court for declaratory and injunctive relief from the statute. The District Court agreed with the plaintiffs, and struck down several provisions of the act.⁸⁴ The Court of Appeals for the Eighth Circuit affirmed, except for one issue not relevant to the Supreme Court case.⁸⁵ The Supreme Court noted probable jurisdiction⁸⁶ and reversed the Eighth Circuit in the type of fractured opinion we have come to expect from the Supreme Court’s abortion decisions. The majority opinion, written by Chief Justice Rehnquist, clearly exposes the key fault line between the minimalists and the maximalists in the Rehnquist Supreme Court.

The Webster Court split 5-4 on the judgment with the majority writing three separate opinions. Chief Justice Rehnquist wrote the majority opinion (part of which was

⁸¹ 492 U.S. 490 (1989).

⁸² *Id.* at 501-502.

⁸³ 410 U.S. 113 (1973).

⁸⁴ 492 U.S. 490 at 502-503.

⁸⁵ *Id.* at 503-504. (The Eighth Circuit reversed one portion of the lower court’s ruling, but that portion did not reach the Supreme Court in *Webster*).

⁸⁶ 488 U.S. 1003 (1989).

unanimous and part of which received five votes) and a plurality opinion (which was joined only by Justices White and Kennedy). The majority opinion upheld two sections of the Missouri act, and punted the decision on two other sections as moot or otherwise unnecessary to decide. The plurality opinion, joined by Justices White and Kennedy, was characterized by a minimalist approach, criticizing the maximalism of the “rigid trimester analysis” of *Roe v. Wade*,⁸⁷ and advocating a constitution “cast in general terms ... and usually speaking in general principles.”⁸⁸ The plurality further criticized the maximalist tendency of the abortion decisions, lamenting that those decisions have created “a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.”⁸⁹ Thus, the plurality opinion clearly (and self-consciously) steered a moderately minimalist course, acknowledging a conflict with *Roe*, but blaming the “rigid” “legal rules” of *Roe* for the conflict.

In contrast to the plurality opinion, the two special concurrences of O’Connor and Scalia took extreme and diametrically opposed positions on the minimalism dimension. While O’Connor and Scalia agreed on the judgment in the case, they disagreed about the breadth of the rule that should be adopted. On the minimalist side, Justice O’Connor concurred in the judgment, but objected to Rehnquist’s plurality opinion on the grounds that there was “no necessity to accept the State’s invitation to reexamine the constitutional validity of *Roe v. Wade*.”⁹⁰ Justice O’Connor thought the Court should not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be

⁸⁷ 492 U.S. 490, at 517.

⁸⁸ *Id.* at 518.

⁸⁹ *Id.*

⁹⁰ *Id.* at 525.

applied,”⁹¹ On the maximalist side, Justice Scalia also criticized the Rehnquist plurality opinion, calling the Court’s holding “the most stingy possible,” and urged the Court to reconsider *Roe v. Wade* rather than “avoid[ing] the question.”⁹²

The *Webster* case presents the conflict over minimalism very clearly, with justices disagreeing explicitly over the scope of the appropriate decision. The justices who agreed on the judgment splintered into three camps largely over the issue of how much to decide and how much to leave undecided. The *Webster* case does not, however, appear as a prominent example of the minimalism rift in Sunstein’s work. In part, this is probably because Sunstein’s focus is primarily on the most recent Rehnquist Court, and a handful of justices had not yet joined the Court at the time of *Webster*. However, it seems probable that Sunstein overlooked *Webster* as an ideal illustration of minimalism because he had not seen Chief Justice Rehnquist as a minimalist. Thus, the example of *Webster* shows how a quantitative measure of minimalism, while admittedly rough, can contribute to greater understanding of some of the most significant modern cases.

D. Objections to the Minimalism Measure

The analysis in this article shows that there is a systematic difference between the patterns of agreement on judgments and opinions in the Rehnquist Court. However, the statistical analysis cannot “prove” that minimalism is the sole, or even primary, cause of these differences. It is possible that the systematic influences identified here as “meta-doctrinal” actually reflect the effect of some other disagreement or difference among the justices. This section explores some alternative explanations that could account for the phenomenon identified here. Interestingly, it seems that the many initially attractive

⁹¹ *Id.* at 526 (citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936)).

⁹² *Id.* at 536-537. He also characterized part of Justice O’Connor’s analysis “simply irrational.” *Id.*, at 536 n. 1.

alternative explanations seem quite vulnerable upon closer scrutiny. Ultimately whether the measure of meta-doctrine in this article captures minimalism or some other phenomenon, the patterns identified here are still very important to studying the Court and its decisions. Whether the effect here is minimalism, some other meta-doctrine, or some other influence altogether, systematic differences in patterns of agreement over quantities as general and fundamental as “judgments” and “opinions” requires an explanation.

1. Theories of Constitutional Interpretation

The most obvious objection to the measure of minimalism developed in this paper is that the measure may not really capture minimalism, but rather some disagreement over substantive approaches to constitutional interpretation. The fact that Scalia and Thomas are off to one side, relatively far away from the other justices, suggests an obvious culprit: some species of “originalism.” The problem with this interpretation from a substantive perspective, however, is the trouble it would pose for the rest of the configuration. After all, while Kennedy certainly is not an originalist in the same way Scalia and Thomas are, it would seem very strange that Stevens would be closer to Scalia and Thomas in Figure 3 than Kennedy (or for that matter, Rehnquist) if the diagram were depicting divisions based on originalism. Moreover, it does not make sense that as two justices become more “originalist” that they would disagree more with each other on the opinions (holding constant the difference in “originalism” between them). But that is what we do observe with our maximalism measure, and in fact the absolute measure of “maximalism” appears to dominate the difference of “maximalism” in the minimalism

space. Thus, originalism, while initially appealing, does not make substantive sense in the context of this configuration.

There are more general reasons, however, for skepticism about whether some alternative theoretical commitment (such as originalism) could account for these results. The differences between the judgment space and the opinions space are caused by a mismatch between what the justices “say” by writing and joining opinions and what they “do” by voting on the judgments. Almost any other philosophical or jurisprudential commitment that affected the opinions would also affect the judgments in individual cases, and therefore would not produce a distance in minimalism space using this measure.⁹³ It is the special nature of minimalism—that it affects how much the justices “say” in the opinions but not what they “do” in the judgments—that makes it emerge through this technique.⁹⁴ Perhaps, however, there is some theoretical disagreement among the justices that very regularly rears its head in opinions and has little or no effect on the judgments. Ironically, such a case might actually be evidence *for* a minimalism divide, not evidence *against* it.⁹⁵

2. Fractiousness or Proclivity to Write Separately

Another possibility is that the results in this article reflect non-ideological, even “stylistic” differences in the justices, such as how likely justices are to write separate opinions or how “picky” justices are about the opinions they join. One argument would be that a justice’s proclivity to write his or her own separate opinions, such as separate

⁹³ It is important to note that specific theoretical differences among the justices, such as disagreements in particular areas of the law, probably could not account for these results, even if recurrent and relatively bitter. Anything that could cause this level of dislocation between judgments and opinions would need to spill across many issue areas, arising in case after case. This all but rules out any specific doctrinal difference, or even a general disposition to large areas of the law.

⁹⁴ Even *stare decisis*, which is, in a sense, the paradigmatic meta-doctrinal concept, would generally affect the judgments in cases, not just the opinions.

⁹⁵ See *infra* Part IV.D.4.

concurrences or dissents, is what is driving justices like Scalia (who writes many opinions) apart from justices like Ginsburg (who writes few opinions). While this interpretation works well for some justices, it does not work well for others. Consider the third column of Table III, which presents the number of opinions (and parts of opinions) written by each justice. Justice Stevens, for example, wrote the most opinions (by far) of any of the justices and yet he is in the center minimalist cluster of Figure 3. Similarly, Justice O'Connor, who is minimalist by all measures, wrote approximately as many opinions as Justice Thomas, who is the most extreme maximalist by all measures. Thus, the number of opinions written cannot be driving these results. Moreover, even if we did find that maximalists consistently wrote more opinions than minimalists (and there is some evidence of this, albeit inconsistent), there are reasons to think that is exactly what we would expect from maximalists under Sunstein's theory. By definition a maximalist has more to say, whether others agree with his views or not. Thus, the proclivity to write separate opinions seems unable to account for the results, and to the extent it can account for the results, the proliferation of separate opinions by maximalists is what we would expect under minimalism anyway.

What about the explanation that sheer fractiousness or "pickiness" about opinions could account for the results? On the one hand, we would probably expect "pickiness" to tend to push the picky justices away from other justices, similar to the first hypothesized effect of maximalism. In fact, there are probably good reasons to think that being picky about opinions is a feature of a maximalist. However, pickiness really cannot explain the second effect we have identified, related to the *differences* in maximalism among the justices. The difference in maximalism among the justices appears to have a statistically

significant effect tending to push justices apart as their difference in maximalism widens, even holding the absolute levels of maximalism constant. But it is hard to see how differences in “pickiness” would push two justices apart in this way. Instead, we would expect that, holding absolute levels of “total” pickiness constant, a difference in pickiness between justices might tend to pull them *closer* on opinions, as the less picky justice would tend to accommodate the more picky justice. Thus, “pickiness,” as well as other idiosyncratic explanations such as personal likes and dislikes among the justices, simply cannot account for so systematic and structured a phenomenon as we observe here.

3. Rules versus Standards

One alternative explanation of the results in this article, however, does seem to withstand some scrutiny. The phenomenon presented here might really be capturing the preferences of justices for rules versus standards, rather than maximalism versus minimalism. An interpretation based on rules versus standards makes a certain amount of sense in the present context. It is easy to imagine a situation where two justices are able to agree on decisions in concrete fact patterns (the judgments) but disagree about rules versus standards in justifying those decisions (in the opinions). Thus, it seems at least plausible that preferences for rules versus standards could produce similar empirical patterns.

The question of whether rules/standards or maximalism/minimalism accounts for the results really does not seem to make much difference for the key results of this article. First, both are meta-doctrinal preferences of the justices, so the results still establish, for the first time, evidence of a meta-doctrinal divide in the Court. Second, it is not even clear that there is much difference between rules and maximalism on the one hand, and

standards and minimalism on the other, and scholars often lump the two categories together.⁹⁶ It may be that “rules” and “standards” is nothing more than a special case of minimalism: rules say more than is necessary to resolve individual cases, and standards rely on the case-by-case evaluation of unique fact patterns. Thus, it is not clear that we would actually observe any difference empirically between maximalism/minimalism relative to rules/standards, so there is little need to agonize about which of the two accounts for the results in this paper. Indeed, even Sunstein agrees that the distinction between rules and standards is very close to distinctions over minimalism.⁹⁷

In light of the close relationship between the two concepts, it is encouraging that the “justices of standards” generally turn out to be the minimalist justices in this analysis, and the “justices of rules” generally turn out to be the maximalist justices in this analysis.⁹⁸ It is interesting to note, however, that both rules/standards scholarship and maximalism/minimalism scholarship places Chief Justice Rehnquist in the maximalist/rules category⁹⁹ where this analysis suggests he belongs in the minimalist/standards category. Similarly, both authors place Kennedy in the minimalist/standards category¹⁰⁰ when this analysis suggests he belongs (somewhat

⁹⁶ See, e.g., Rex R. Perschbacher and Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 40 (2004) (equating minimalism with “standards” and maximalism with “rules”). See also Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1300 (2002) (describing “two general approaches” that lie “along a continuum, going from minimalist standards on one end to maximalist rules on the other end.”)

⁹⁷ See Sunstein, *Foreword*, *supra* note 1, at 52; see also Sunstein, *Problems with Minimalism*, *supra* note 15, at 1902 (“Any defense of minimalist adjudication is essentially the same in principle as a defense of standards over rules”). In particular, Sunstein states that Justice O’Connor’s “preference for minimalism is very close, analytically, to a preference for standards over rules,” but “not identical.” *Id.* at 1909.

⁹⁸ See Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

⁹⁹ See *id.* at n. 567. (“Justice Scalia’s approach to the three levels of the rules/standards question usually attracts Chief Justice Rehnquist and Justice Thomas, and sometimes Justice White”).

¹⁰⁰ See *id.* at 117 (“Together with Justice Stevens, Justices O’Connor, Kennedy and Souter last Term evinced a skepticism toward rules suggesting quite a different view of knowledge from that of Justice

more) in the maximalist/rules category. The temptation to see the ideological middle as minimalist and the ideological extremes as maximalist seems to have influenced the way both authors interpreted Chief Justice Rehnquist's role in the Court.

4. General Reasons for the Minimalism Interpretation

The possibility remains, of course, that some other substantive theoretical disagreement is the real driving force behind this minimalism result. The justices may disagree on some issue or group of issues that divides them in opinion writing but that has no systematic effect in how they actually decide cases. In looking for such an alternative explanation, we need not look very far. Any such explanation would need to arise in a significant portion of the cases to account for the phenomenon described here. The need to arise over and over in a systematic fashion probably rules out differences related to any specific issue, even high-profile issues such as free speech or abortion. Thus, we are probably looking for something like a meta-doctrinal disagreement; a disagreement that could, at least in principle, arise in any case. Even with this narrowing of the type of alternative explanations, the fact remains that while we can limit the range of likely explanations to minimalism and a handful of other possibilities, we cannot "prove" that minimalism rather than some other meta-doctrinal disagreement accounts for the empirical regularities described in this article.

Interestingly, however, we may not need to exclude other explanations for the results here to provide strong evidence of minimalism. Recall that a plausible alternative explanation would require finding a source of theoretical disagreement among the justices that affected the opinions they write and join, but had little practical "bite" in

Scalia's"); *see also id.* at 122 ("When Justices O'Connor, Kennedy, and Souter proved to be Justices of standards, they slowed the Court's predicted veer to the political right.").

their decisions on judgments. But even if there were some deep theoretical rift that somehow had no “bite” in the judgments, that fact itself would suggest that differences over minimalism and maximalism divided the justices. After all, minimalists would surely shrink from engaging in a theoretical debate that had no practical import on judgments—what could be more “unnecessary” than theorizing that has no effect on the Court’s decisions in concrete factual situations?

This means that observing a systematic difference between opinions and judgments would be evidence of at least *maximalism* in the justices’ decision-making. The more justices engage in this type of inconsequential theoretical bickering, the more likely the justices are to embrace a maximalist perspective, pulling them apart from one another on the opinions. Moreover, there must be differences in the levels of maximalism among the justices, otherwise we would not have the two separate effects that we observe. As a result, even if the minimalism measure in this article is really capturing some other ideological or jurisprudential difference among the justices, it seems likely that minimalism versus maximalism is behind the results as well.¹⁰¹

5. Professor Siegel’s Analysis

The final objection to minimalism brings us back to part of the motivation for this article—Professor Siegel’s argument that Sunstein’s minimalism is an inaccurate descriptive account of the Rehnquist Court. Writing in the *Michigan Law Review*, Siegel develops an “operational definition” of minimalism that classifies decisions as minimalist

¹⁰¹ A related point is the possibility the opinions are simply a better measure of ideology than the judgments, and that consequently the difference merely reflects the “extra” ideology in the opinions. This seems plausible, since the opinions really carry the ideological content of the justices’ decisions. The problem with this explanation is that if the opinion measure were just a more accurate measure of ideology, then we would not expect to see statistically significant differences between opinions and judgments, just more noise in the judgments. Thus, we are left with the conclusion that, at a minimum, the opinions reflect *different* ideological structures than the judgments.

only if they “(a) result from the (apparently) intentional choice by a majority of the Justices (b) to decide a case on the narrowest and shallowest grounds reasonably open to them, even though broader and deeper rationale(s) were reasonably available.”¹⁰² He does this because he argues that “[t]o the extent the theory of judicial minimalism aspires to be a descriptively accurate account of the Court’s work, it requires a relatively crisp operational definition that can be falsified,”¹⁰³ and the definition Siegel develops, he argues, is “only version of minimalism that does not incorporate criteria so vague and contestable as to render the theory non-falsifiable and thus empirically useless.”¹⁰⁴ With this falsifiable version of minimalism in hand, Siegel analyzes a selection of cases from the October 2003 term of the Supreme Court, and finds their minimalism wanting according to his “operational definition.”¹⁰⁵ Professor Siegel therefore concludes that to the extent the October 2003 term is “illustrative of a larger reality,” Sunstein’s theory of minimalism is “descriptively false.”¹⁰⁶

The criticisms leveled by Professor Siegel against Sunstein’s work really are, as Sunstein suggested in his reply, a devastating blow to a strawman of Siegel’s own creation.¹⁰⁷ I will leave to one side Siegel’s implicit assumptions about the philosophy of science,¹⁰⁸ along with the subjectiveness of Siegel’s own analysis, and the pervasive

¹⁰² Siegel, *supra* note 10, at 1963.

¹⁰³ *Id.* at 2018.

¹⁰⁴ *Id.* at 1956.

¹⁰⁵ The method of Siegel’s article essentially consists of his reading each case and determining whether the justices decided the case on “the narrowest and shallowest grounds reasonably open to them, even though broader and deeper rationale(s) were reasonably available,” *id.* at 1963. It should be obvious that this method involves high degree of subjectivity, both as to whether justices used the “narrowest and shallowest grounds reasonably available,” and as to whether “broader and deeper rationale(s) were reasonably available.”

¹⁰⁶ *Id.* at 2018.

¹⁰⁷ Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123 (2005).

¹⁰⁸ Siegel focuses on “falsifiability” as an exclusive criterion for evaluating Sunstien’s theory, without so much as even dropping a perfunctory footnote to Karl Popper, or even acknowledging that there may be disagreement about this particular criterion as a definition of science.

suggestion that Siegel’s analysis is in some way different from standard law review doctrinal analysis because of its “empirical” approach.¹⁰⁹ The main point for my purposes is that reading Sunstein’s work it seems clear that minimalism is, as Sunstein says in multiple places, “relative, not absolute.”¹¹⁰ In light of this language, it seems odd to require so extreme and absolute a definition of minimalism, especially because the notion of minimalism itself is necessarily relative. This is because, as other commentators have pointed out, “[o]ne can almost always imagine a narrower and shallower decision, unless the Court has simply denied certiorari without comment. And there is always a broader possible outcome (for example, all laws are unconstitutional), which makes any actual decision seem minimal.”¹¹¹ Yet Professor Siegel seems almost fixated on some casual language Sunstein wrote in an op-ed—that minimalists decide cases “as narrowly as possible”¹¹²—citing it over and over. In this sense, Siegel’s analysis seems particularly off the mark.

Siegel’s avenue for criticizing Sunstein is particularly puzzling because he appears to have clearly anticipated what Sunstein was trying to say. As noted above, Professor Siegel initially says that his “falsifiable” version “is the only version of minimalism that does not incorporate criteria so vague and contestable as to render the theory non-falsifiable and thus empirically useless.”¹¹³ Yet Siegel notes later on that “a respectable minimalism of *relative* narrowness and shallowness, both empirically and

¹⁰⁹ Siegel uses terminology such as “sample size” and “empirical analysis,” Siegel, *supra* note 10, at 1965-1966, that might suggest he has conducted some quantitative data analysis, when in fact he has not. I have no objection to qualitative research methods in general, but it is important to clarify what Siegel’s analysis is and what it is not.

¹¹⁰ SUNSTEIN, ONE CASE AT A TIME, *supra* note 1, at 10; Sunstein, *Foreword*, *supra* note 1, at 15.

¹¹¹ Gelman, *supra* note 9, at 2301-2302.

¹¹² Cass R. Sunstein, Op-Ed., *The Smallest Court in the Land*, N.Y. TIMES, July 4, 2004, 4 (Week in Review) (arguing that the minimalist justices resolved contentious issues “as narrowly as possible”).

¹¹³ Siegel, *supra* note 10, at 1956.

normatively, may still be possible”¹¹⁴ Indeed, Siegel suggests an alternative formulation of Sunstein’s hypothesis, which is, in fact, exactly what Sunstein seems to have claimed, namely that “a majority of the Justices (whether considered individually or collectively) tend to favor relatively narrow and shallow holdings...even if they do not go so far as to adopt the narrowest and shallowest rationale reasonably available,” which Siegel says “could nonetheless then be subjected to empirical testing.”¹¹⁵ In this article, I have provided empirical support for this hypothesis, that some judges tend to favor relatively narrow and shallow holdings, which is the hypothesis that I take Sunstein to have proffered.

D. A Summary and Some Affirmative Reasons for this Measure of Minimalism

The discussion in the preceding section has identified and discussed several alternative interpretations of the results in this paper, and attempted to defend the basic idea of minimalism against some likely objections. Although each of the objections and alternative explanations seems to have serious flaws, the list of potential alternative explanations is endless. Therefore, rather than merely dismissing the primary alternative candidates, it also makes sense to focus on the affirmative reasons that we might believe this measure captures a distinction between minimalism and maximalism. There are two key affirmative reasons for believing this measure each of which, in its own right, suggests possible further insights about minimalism on the Supreme Court.

The first affirmative reason for believing this measure of minimalism is the difference in the results between constitutional and non-constitutional cases. The

¹¹⁴ *Id.* at 1965 (emphasis added).

¹¹⁵ *Id.* at 2018. One wonders why Siegel chose to test a contrived version of Sunstein’s hypothesis, based primarily on an op-ed piece, rather than the more reasonable hypothesis based on Sunstein’s academic writings that Siegel himself says “could...be subjected to empirical testing.”

difference between judgments and opinions is much smaller when we look at the non-constitutional cases than when we look at the constitutional cases. In fact, it is not even clear that there is a statistically significant distinction between the justices in the non-constitutional cases, whereas the minimalists and maximalists are clearly distinct in the constitutional cases. This is consistent with the hypothesis we suggested in Part III; specifically, we suggested that constitutional cases are where we would expect to see the greatest distinction between minimalism versus maximalism.

The second affirmative reason for believing this measure of minimalism is the statistical support for two distinct effects of maximalism. The first effect is that the total amount of maximalism of two justices tends to push those justices away from each other (holding differences in maximalism constant) and the second effect is that differences in maximalism between two justices tend to push justices away from each other (holding the total maximalism constant. The combination of these two effects tends to dismiss most alternative explanations of the measure. For example, differences in theoretical approach to constitutional interpretation could account for the second effect, but not the first. Similarly, differences among justices arising from personality traits or stylistic preferences could account for the first effect but not the second. In short, the combination of these two effects seems to suggest that something like minimalism was at work in the Rehnquist Supreme Court.

V. Looking Ahead to the Roberts Court

This new perspective on minimalism in the Rehnquist Court naturally raises questions about the direction of the new Court with Chief Justice Roberts, rather than Chief Justice Rehnquist, at the helm. Will Chief Justice Roberts follow the minimalist

lead of his predecessor, or will he side with Scalia and Thomas on the battle minimalism versus maximalism and standards versus rules? Sunstein, for his part, has already weighed in, identifying Chief Justice Roberts as a minimalist.¹¹⁶ But if Sunstein is wrong and Roberts turns out to be a maximalist, then we might see a difference in the scope of Supreme Court opinions. If, for example, there is a “swing” or “median” justice on the minimalism dimension just as scholars have hypothesized along the left-right ideological dimension, then switching from a minimalist Rehnquist to a (possibly) maximalist Roberts would make the median justice more like Justices Scalia or Thomas and less like Justice O’Connor.¹¹⁷ Likewise, replacing O’Connor herself with Justice Alito, should he prove a maximalist, would move the median further toward the maximalism direction. This would, so the story goes, cause the overall level of maximalism of the Court to move slightly toward the direction of Scalia and Thomas and away from narrow, shallow rulings.

The preliminary data from the Roberts Court suggest that minimalists need not worry about a major change in the minimalism of the Court, at least not from the installment of Chief Justice Roberts. Table III sets forth minimalism estimates for the Roberts Court through the October 2006 term.¹¹⁸ The estimates suggest that Chief Justice Roberts is considerably less maximalist than Scalia and Thomas, and fits squarely within the minimalist cluster of Ginsburg, Souter, and Stevens. While it is still much too early

¹¹⁶ See, e.g., Cass R. Sunstein, Op-Ed., *The Minimalist; Chief Justice Roberts Favors Narrow Court Rulings That Create Consensus and Tolerate Diversity*, L.A. TIMES, May 25, 2006, at B11.

¹¹⁷ It is not clear that the “median justice” along the minimalism dimension is meaningful in the same way that the median justice is meaningful along substantive issue dimensions. Indeed, the significance of the “median justice” even along substantive issue dimensions is itself controversial in an environment with multidimensional issues like that of the Supreme Court. See generally Anderson and Tahk, *supra* note 51.

¹¹⁸ The estimates in this table are not broken out into constitutional cases and non-constitutional cases because there is so little data available for the Roberts Court. The data used includes only cases in which Roberts and Alito participated, which totals 93 cases.

to draw definitive statistical conclusions about Roberts' exact placement, he may, in fact, be among the most minimalist members of the Court remaining after Rehnquist and O'Connor's departures.

The evidence on Justice Alito suggests he is somewhat more maximalist than Chief Justice Roberts. The estimate for Justice Alito's maximalism 0.0352, which suggests some evidence that he is less maximalist than Scalia and Thomas but more maximalist than Chief Justice Roberts. Again, however, at this point, it is too early to draw any definitive statistical conclusions, as the number of available data points is rather limited. What we can say with some confidence, however, is that we do not see any evidence of an abrupt move toward maximalism in the Roberts Court, at least not from the installation of Roberts as Chief Justice. This is significant because a rather dramatic move might have been possible with the replacement of two of the leading minimalists on the Court, Chief Justice Rehnquist and Justice O'Connor.

More broadly, the finding that both Rehnquist and Roberts seem to have tendencies toward judicial minimalism invites institutional explanations that focus on the role as Chief Justice as an explanation of their minimalist behavior. The Chief Justice's power to assign opinions when in the majority could account for the tendency toward minimalism. This institutional explanation seems to flounder, however, when we consider that we should see similar effects with Justice Stevens, who assigned opinions as the Senior Associate Justice throughout the period when in the majority, yet Justice Stevens does not seem to have so unexpectedly a minimalist position as Rehnquist. Moreover, as I have argued elsewhere,¹¹⁹ there are good reasons to doubt the significance of the prerogative of opinion assignment on the ultimate outcome of the opinion. To the

¹¹⁹ See Anderson and Tahk, *supra* note 51.

extent that the institutional explanation of the Chief Justice's position is persuasive, it seems likely the reason would be that the Chief has a heightened interest in preserving the prestige and legitimacy of the Court as an institution, and that that interest can override ideological or doctrinal quibbles. Even if true, this explanation is really just another manifestation of minimalism, with a more clearly theorized motivation.¹²⁰

V. Conclusion

The data suggest a surprisingly important role for minimalism in the Rehnquist Court, supporting the hypothesis that a majority (but not all) of the justices exhibited a meta-doctrinal influence like judicial minimalism in their opinion writing and voting. The data support Sunstein's hypothesis that the justices regularly divided over the issue of *how much* to decide, joining and writing opinions in part based on preferences over minimalism, or at least some meta-doctrinal influence close to minimalism. In contrast to Sunstein's account, however, the analysis also reveals that Chief Justice Rehnquist was much more a force for the conservative minimalism of Justice O'Connor than for the conservative maximalism Justices Scalia and Thomas. Indeed, in terms of minimalism the voting decisions of Chief Justice Rehnquist appear closer to the voting decisions of Justices Ginsburg, O'Connor, and Souter than to those of Justices Scalia and Thomas. Thus, while some of the findings conflict with Sunstein's categorization, the analysis here supports Sunstein's claim that minimalism was an important feature of the Rehnquist Court and that "we can obtain a far better understanding of its distinctive character, and of continuing debates within the court itself, if we keep this point in view."¹²¹

¹²⁰ In this regard, it would be interesting to contrast Rehnquist's voting behavior as an Associate Justice with his subsequent voting behavior as Chief Justice. The methods described here, with slight modifications, could be used to examine the differences, if any, between the "two Rehnquists."

¹²¹ SUNSTEIN, ONE CASE AT A TIME, *supra* note 1, at 262

Table I. Descriptive Statistics: Rehnquist Court Data

	Number of Cases	Number of Majority or Plurality Opinions*	Number of Concurring Opinions*	Number of Dissenting Opinions*	Number of Opinions Concurring in the Judgment*	Number of Other Opinions*	Total Number of Opinions*
Constitutional	391	479	168	371	107	139	1264
Other	394	452	86	221	36	81	876
Total	785	931	254	592	143	220	2140

* Includes as separate opinions parts of opinions joined separately.

Figure 1. Hypothesized Minimalism-Maximalism Dimension

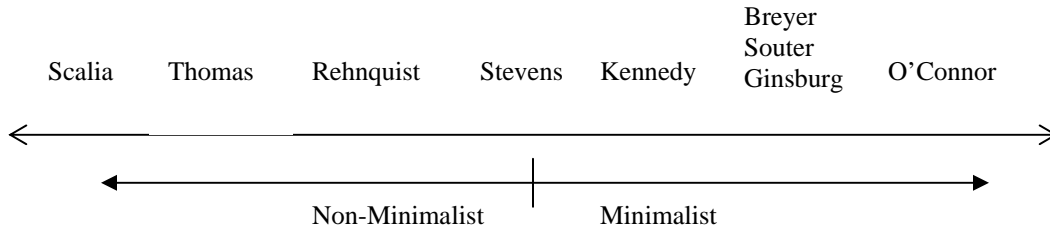


Figure 2.

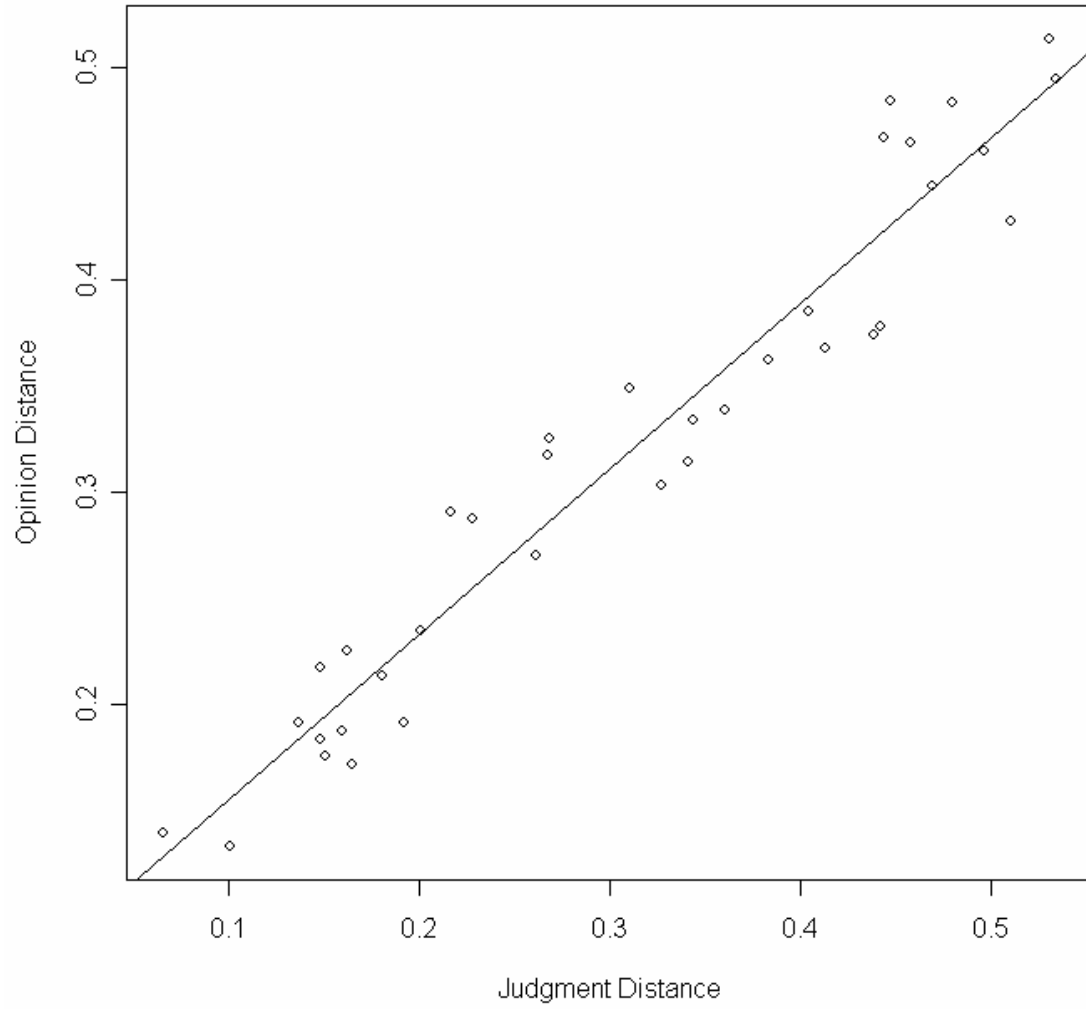


Figure 3. Minimalism Space Distance—Constitutional Cases

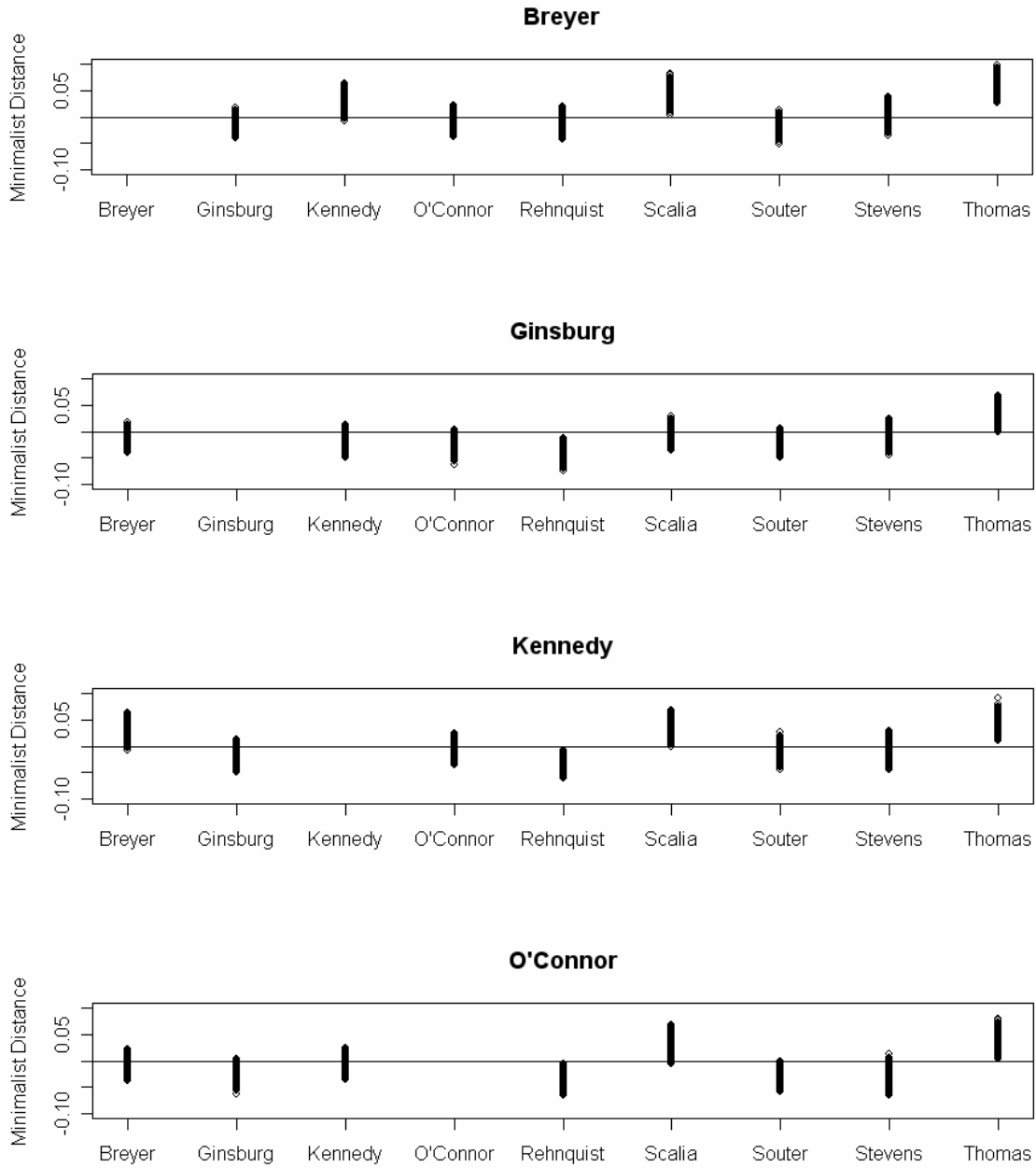


Figure 3 (Continued).

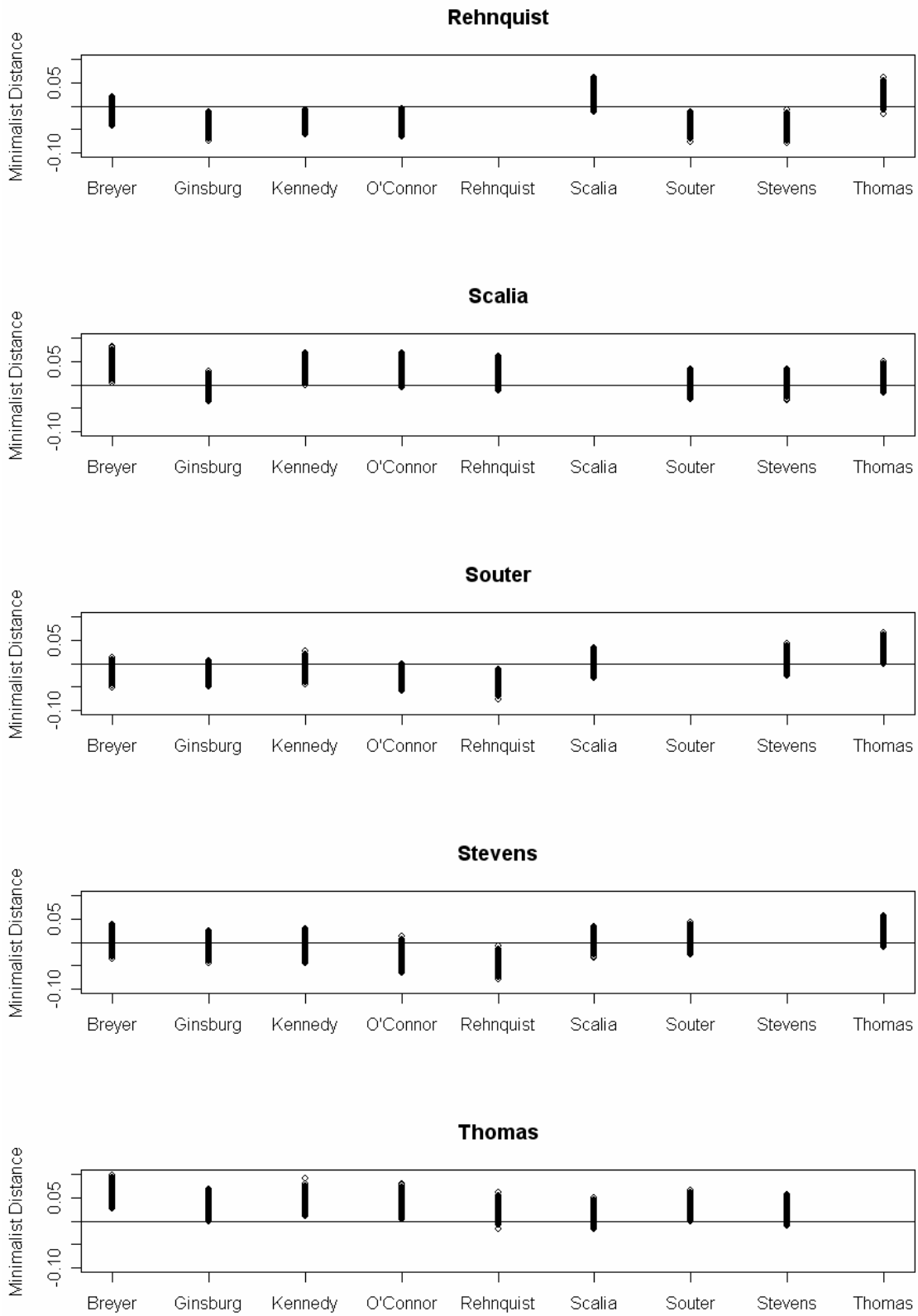


Table II. Maximalism Estimates—Rehnquist Court		
	Maximalism Estimates	
Justice	Constitutional Cases	Non-Constitutional Cases
Rehnquist	-0.0013 (-0.0266, 0.0563)	-0.0048 (-0.0132, 0.0313)
Ginsburg	0.0232 (0.0118, 0.0363)	-0.0143 (-0.0409, 0.0662)
O'Connor	0.0269 (0.0139, 0.0429)	0.0179 (0.0058, 0.0295)
Souter	0.0272 (0.0148, 0.0391)	0.0079 (-0.0096, 0.0158)
Stevens	0.0312 (0.0154, 0.0480)	0.0194 (-0.0024, 0.0320)
Kennedy	0.0400 (0.0257, 0.0518)	0.0066 (-0.0039, 0.0235)
Breyer	0.0451 (0.0284, 0.0580)	0.0153 (0.0009, 0.0271)
Scalia	0.0559 (0.0430, 0.0676)	0.0339 (0.0208, 0.0551)
Thomas	0.0659 (0.0496, 0.0773)	0.0253 (0.0076, 0.0391)
Lambda	8.986 (1.039, 18.421)	0.83 (-17.7092, 2.1838)
Bootstrap 95% stability intervals in parentheses, based on the basic bootstrap method with 499 bootstrap replicates.		

Table III. Corroborating Evidence.			
Justice	Dissents from Denial*	Average Opinion Coalition Size	Number of Opinions Written**
Rehnquist	11	5.80	110
Ginsburg	4	5.45	93
O'Connor	4	5.76	141
Souter	1	5.57	119
Stevens	0	5.04	202
Kennedy	4	5.65	134
Breyer	10	5.33	142
Scalia	15	5.11	176
Thomas	23	4.97	147
<p>* Includes only dissents from denial where an opinion was written, and excludes cases where dissent is noted only by a clerk's annotation. ** Includes parts of opinions as separate opinions.</p>			

Figure 4. Minimalism Space Distances—Constitutional Cases

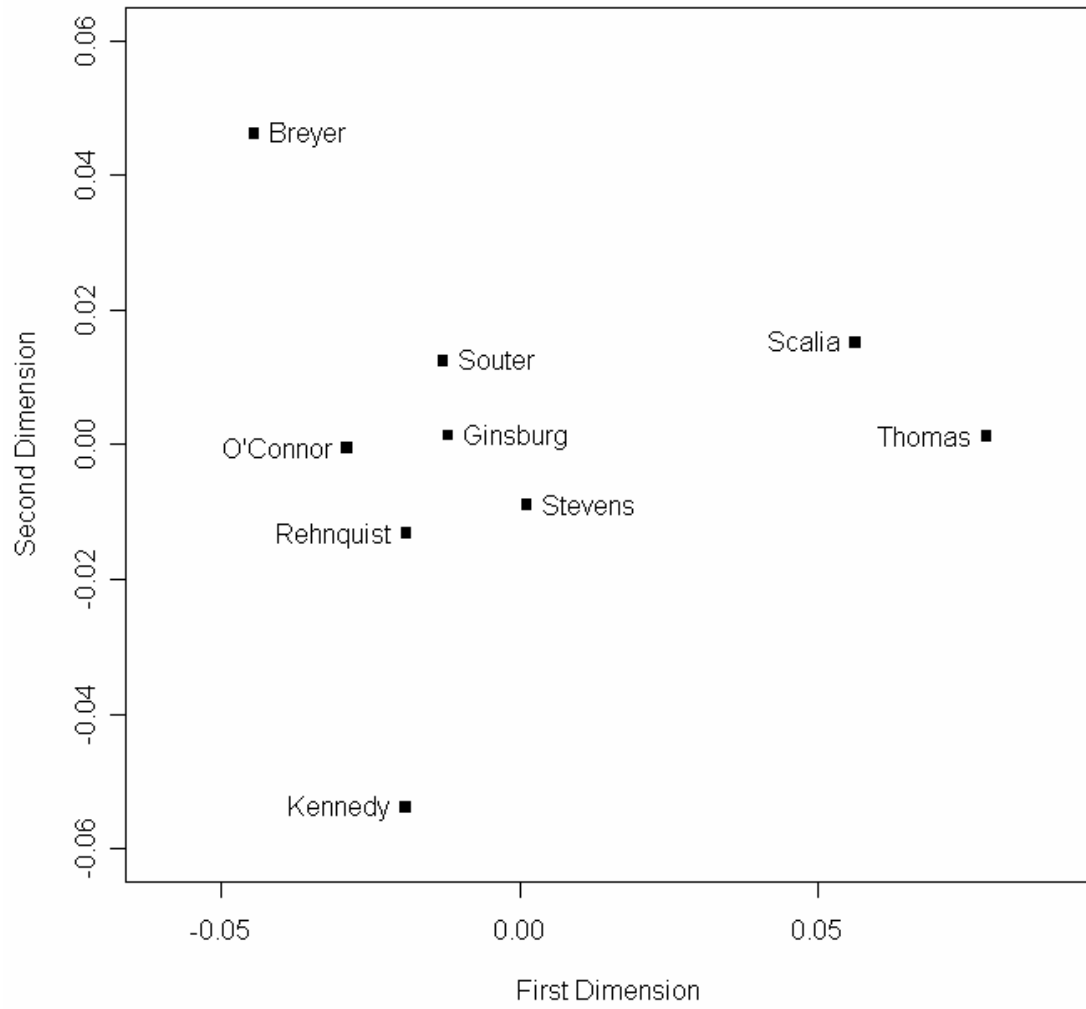


Figure 5. A Graphical Depiction of Ideological Proximity Based on Votes on the Judgments.

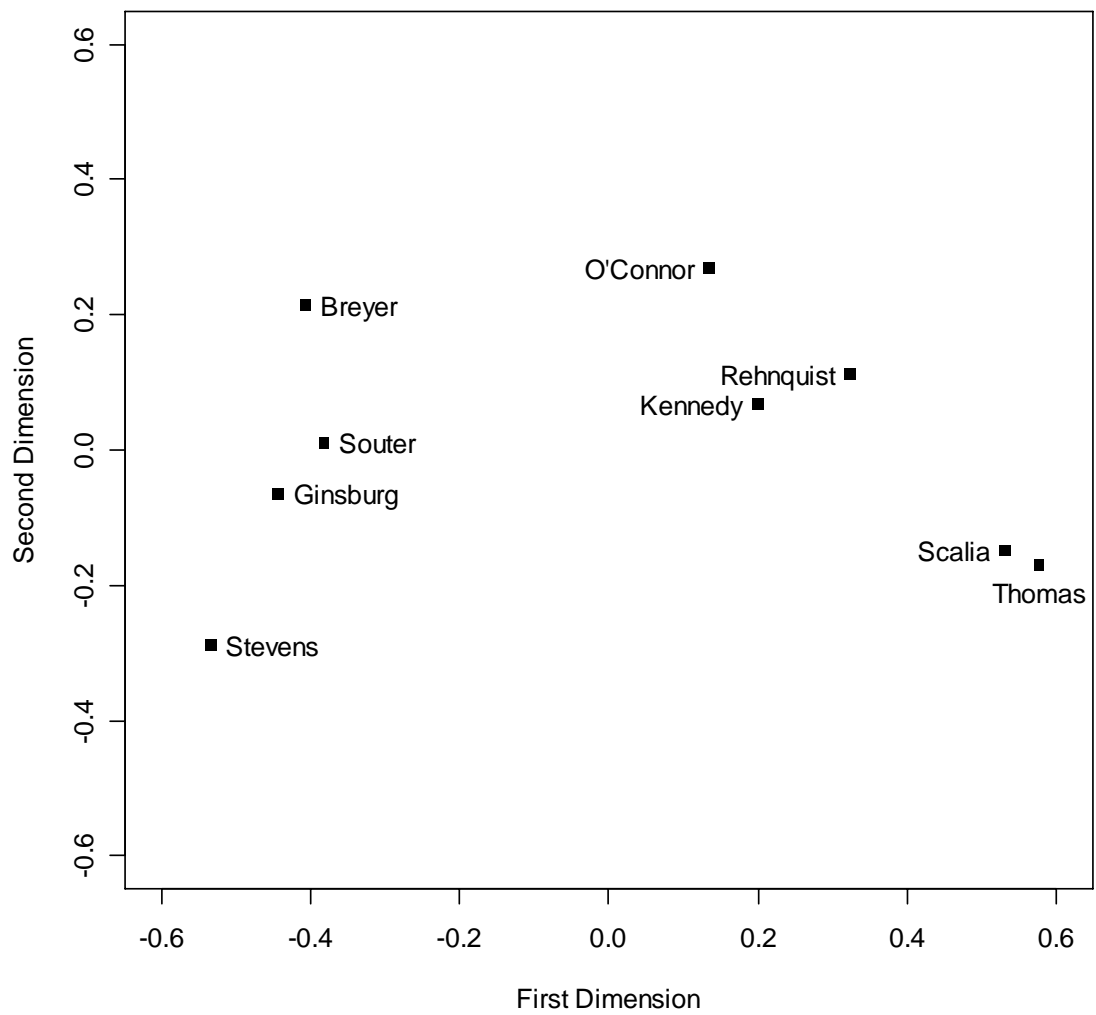


Table IV. Maximalism Estimates – Roberts Court	
Justice	Maximalism Estimates (All Cases)
Souter	0.0099
Roberts	0.0151
Kennedy	0.0286
Ginsburg	0.0293
Breyer	0.0334
Alito	0.0352
Stevens	0.0494
Scalia	0.0559
Thomas	0.0561
Lambda	-1.2488
Bootstrap 95% stability intervals in parentheses, based on the basic bootstrap method with 499 bootstrap replicates.	