Case Note

Narrow Clauses and Trial Balloons

Club Misty, Inc. v. Laski, 208 F.3d 615 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3157 (U.S. Aug. 18, 2000) (No. 00-270).

The Illinois Liquor Control Act creates a referendum mechanism whereby the residents of a precinct may revoke the liquor license of an individual in that precinct.[1] The process begins when 40% of the precinct's registered voters petition the board of elections for a vote on whether the sale of liquor at a particular address should be prohibited. The question is then put to the precinct electorate at the next election. If a majority thereof votes in favor of prohibition, the liquor license associated with that address becomes void after thirty days.

Soon after the passage of these amendments to the Liquor Control Act, referenda threatened the liquor licenses of three Chicago taverns, which responded by challenging the Act's constitutionality in federal district court.[2] They claimed that the statute violated, inter alia, the Due Process Clause of the Fourteenth Amendment and the nonattainder rule of Article I, Section 10. The district court upheld the statute, and two of the plaintiffs appealed the decision. The circuit court, in an opinion written by then-Chief Judge Posner, reversed.[3] Posner's opinion begins with an examination of the attainder challenge: "On the view we take of the case, we shall not have to decide whether the statute is a bill of attainder; but we shall not conceal our skepticism that it is."[4] After briefly indulging this skepticism, the opinion reveals its actual legal underpinning: "We need not pursue the [attainder] issue further, as we think the statute is unconstitutional as a

1. Liquor Control Act of 1934, 235 ILL. COMP. STAT. 5/9-2 (1995).
2. N & N Catering Co. v. City of Chicago, 37 F. Supp. 2d 1056 (N.D. Ill. 1999).
3. Club Misty, Inc. v. Laski, 208 F.3d 615 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3157 (U.S. Aug. 18, 2000) (No. 00-270).
4. *Id.* at 617.

denial of due process of law even if it is not a bill of attainder."[5] The remainder of the opinion defends this assertion.

I take issue here neither with the appeals court's understanding of the nonattainder rule nor with its interpretation of due process. I propose, more abstractly, to outline a theoretical framework within which the following assertion becomes plausible: The court should have pursued the attainder route more thoroughly, and should have invoked due process only if the attainder route proved fruitless or impassable.

My argument proceeds from the assumption that courts ought, at least in certain circumstances, to "leav[e] as much as possible undecided."[6] By deferring decisionmaking to the more electorally tethered legislative branch, judicial silence promotes democratic procedure.[7] This minimalist perspective on the judicial function, championed today by Cass Sunstein, has a venerable pedigree. Already in 1893, James Thayer suggested that a court ought to invoke a constitutional clause against a legislative act only if there is no reasonable interpretation of the former that is consistent with the latter.[8] Later, Alexander Bickel, responding to the countermajoritarian difficulty, urged Justices to practice the "passive virtues": to deny certiorari; to winnow petitioners through the sieves of standing and ripeness; to avoid questions by making them "political."[9]

Yet the minimalist seems to sacrifice too much when she bids courts to be silent. Judicial silence exacerbates gaps in the rule of law by leaving future courts and litigants without guidance. Moreover, while life tenure argues against judicial decisionmaking by distancing Article III judges from the popular will, life tenure makes their opinions an especially valuable resource in guiding legislatures toward the right answers. Lifetime appointment opens to judges a space for thoughtful deliberation, from which the mechanisms of popular election often bar the politically accountable actors.[10] Furthermore, life tenure not infrequently reflects intrinsic deliberative ability, and necessarily provides valuable decisional experience. These considerations suggest that if judges should not dominate

5. *Id.*

6. CASS SUNSTEIN, ONE CASE AT A TIME 3 (1999).

7. *Id.* at 31.

8. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

9. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 111-98 (2d ed. 1986). For further reading on minimalism, see Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84 (1993); and Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298 (1998). See also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 16-32 (1982), for a theory of constitutional invalidation of statutes that embraces minimalist principles.

10. Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1712 (1998).

constitutional conversation, they ought nevertheless to have some speaking role.[11]

Various benefits accrue, then, when judges air their views on constitutional questions. But the minimalist seems forced to forgo these benefits, since views expressed in the traditional forum for judicial speech, the court opinion, are transformed by the power of precedent into conversation-stoppers. This dilemma may usefully be reframed in the vocabulary of Sunstein's scheme. A minimalist decision, says Sunstein, is narrow rather than broad, and shallow rather than wide. It is narrow because it frames its decision in terms of the facts of the case rather than in terms of a broad rule, and shallow because it skirts issues of basic principle in explaining its decision.[12] Insofar as the minimalist goal is to decide as little as possible, only narrowness is truly essential. However, since deep reasoning generally produces widely applicable rules, a minimalist opinion seeks to rest its outcome on shallow grounds.[13] But the shallow path to narrowness comes at a price: The author of a narrow and shallow opinion is only a witness to, not a participant in, the constitutional conversation.

Can narrowness be preserved without sacrificing depth? Some minimalists find a space for narrow but deep decisions in the realm of nonprecedential jurisprudence. Thus Neal Katyal suggests that judges couple narrow holdings with advice-giving dicta.[14] Because dicta do not bind future courts, opinions of this sort may reason deeply without thereby undermining their narrow application.[15] Similarly, others advocate, in the context of appellate court decisionmaking, wider use of unpublished opinions. "An unpublished opinion, lacking full precedential weight," would permit an appellate court to offer deep reasoning without binding other decisionmakers to its approach.[16] These proposals, while useful,

11. *Cf.* Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) ("The process of forming public opinion . . . is a continuous one with many participants . . . . The discussion of problems and the declaration of *broad principles* by the Courts is a vital element in the community experience through which American policy is made. The Supreme Court is . . . an educational body." (emphasis added)).

12. SUNSTEIN, *supra* note 6, at 10-11.

13. *Id.* at 18. Sunstein observes that shallowness functions positively "to allow people who disagree on the deepest issues to converge." *Id.* at 11. Judges can agree about how to decide a case even if they disagree about why it should be so decided. An opinion that sticks doggedly to its bottom line, and says little about how it gets there, will therefore win broad-based allegiance more readily than one subtly theorized. Shallowness thus figures importantly in explaining the feasibility of a minimalist jurisprudence. It does not, however, contribute to the minimalist goal per se, namely, deciding as little as possible; indeed, shallowness, in this respect, actually facilitates decisionmaking.

14. Katyal, *supra* note 10, at 1715.

15. *See also* Matthew C. Solomon, *The Perils of Minimalism:* United States v. Bajakajian *in the Wake of the Supreme Court's Civil Double Jeopardy Excursion*, 87 GEO. L.J. 849, 852-53 (1999).

16. Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L.J. 2025, 2040 (1999).

perhaps compromise the minimalist project too much. While dicta do not technically bind future courts, "'[f]ine distinctions between holding and dicta are rarely relevant.'"[17] Deep reasoning tends, therefore, to seep out from dicta into law, and thence into broad rules, thus undermining the minimalist goal of narrow decisionmaking. Unpublished opinions, which often bear legally acknowledged precedential weight,[18] are still more porous. The failure of these strategies to contain deep reasoning is exacerbated by the fact they are available in *any* case that comes before a court.

I offer here a more restrictive source of narrow but deep decisions. My argument proceeds from Justice Frankfurter's observation that there are two distinct sorts of constitutional clauses:

> Most constitutional issues derive from the broad standards of fairness written into the Constitution (*e.g.* "due process," "equal protection of the laws," "just compensation"), and the division of power as between State and Nation. Such questions, by their very nature, allow a relatively wide play for the individual legal judgment. The other class gives no such scope. For this second class of constitutional issues derives from very specific provisions of the Constitution. These had their source in definite grievances . . . . Their meaning was so settled by history that definition was superfluous. . . .
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> The prohibition of bills of attainder falls . . . among these very specific constitutional provisions.[19]

Constitutional clauses divide, then, into narrow clauses, such as the nonattainder rule and the guarantee of habeas corpus, which are grounded

17. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 75 n.262 (1994) (quoting Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683 (1986)).

18. Berman & Cooper, *supra* note 16, at 2026 n.4 (listing circuits that permit citation to unpublished opinions).

19. United States v. Lovett, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring). It is useful to contrast Frankfurter's observation to an earlier narrow-versus-broad distinction drawn by Edward Corwin: "[I]t will be generally found that words which refer to governing institutions, like 'jury,' 'legislature,' 'election' have been given their strictly historical meaning, while words defining the subject-matter of power or of rights like 'commerce,' 'liberty,' 'property,' have been deliberately moulded to the views of contemporary society." Edward S. Corwin, *Judicial Review in Action*, 74 U. PA. L. REV. 639, 659-60 (1926) (footnotes omitted). *But see* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 361-67 (1981) (criticizing Corwin's division). Corwin matches form vocabulary to narrowness, and substance vocabulary to breadth. Frankfurter shows that, at least at the clause level, this pairing does not hold, since some substance provisions, like the nonattainder rule, are narrow. At this point, the box-happy theorist begins to twitch. Constitutional clauses may fall, roughly, into any of four boxes: substance-narrow (e.g., prohibition of bills of attainder), substance-broad (e.g., due process), form-narrow (e.g., minimum ages for elected office), and form-broad (e.g., the republican-government guarantee). My analysis here is conceived primarily in terms of the substance categories; its applicability to the form categories is uncertain.

in specific historical circumstances, and broader clauses, such as the guarantees of equal protection and due process, which invoke larger and more abstract principles. The distinction itself is, of course, only a rough one. Each broad clause, too, has its historical baggage, even if this baggage weighs not quite so heavily as in the case of a narrow clause.[20] More importantly for present purposes, the two groups of clauses interweave on a theoretical level: The abstract principles of the broad clauses undergird the specific mandates of the narrow provisions. Bills of attainder, to take the most pertinent example, are prohibited by the Constitution because they are inconsistent with, inter alia, the principles of procedural due process and separation of powers.[21]

Since narrow clauses have deep rationales, judges, in applying them, have the opportunity to speak on broad constitutional principles. At the same time, the specific, historically determined boundaries of these provisions mean that they are not, despite their depth, widely applicable. The narrow applicability of narrow clauses manifests itself in two ways. Most obviously, narrow clauses apply to fewer fact patterns than broad provisions. If, for example, a due process issue arises in situations *A*, *B*, and *C*, the Bill of Attainder Clause will be relevant only to situation *A*. Thus, an interpretation of the latter resolves fewer questions than an interpretation of the former. Second, and relatedly, interpretations of broad clauses more rapidly entrench themselves than interpretations of narrow ones. Since the Due Process Clause is relevant to situations *A*, *B*, and *C*, a judicial interpretation of that clause tightens its hold on the precedential body each time a situation *A*, *B*, or *C* arises. Very quickly that interpretation insinuates itself throughout the legal system, and becomes too foundational, too heavily relied upon, to be overturned. Since the Bill of Attainder Clause is relevant only to situation *A*, a judicial interpretation of that clause spreads much more slowly; only far later in the day does reversing it become a real difficulty.

Narrow clauses thus offer another source of narrow but deep rulings. The creation of a narrow-clause jurisprudence demands, however, the combined efforts of judges and academics. Judges must take care to preserve the historical moorings of narrow clauses. If narrow clauses are torn too violently from their historical moorings—if, for example, the nonattainder rule is read to prohibit any violation of separation of powers—then they become functionally identical to wide clauses, and lose their

20. *See, e.g.*, Hurtado v. California, 110 U.S. 516, 528 (1884) (observing that due process is defined, at least in part, by the "settled usage" of pre-Revolutionary England).

21. *E.g.*, Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203, 211 n.23 (1996) (identifying five constitutional principles underlying the nonattainder rule).

minimalist value.[22] If, on the other hand, narrow clauses are defined too narrowly—if, for example, the nonattainder rule is read to apply only to bills that dictate capital punishment for rebels[23]—then they become essentially irrelevant, and lose their value as fora for judicial speech.[24] Academics, at the same time, must identify and elaborate the broad constitutional principles that instantiate themselves in the narrow clauses, so as to provide judges the raw material for deep reasoning.

Through the combined efforts of judges and academics, narrow constitutional clauses transform into trial balloons. By tethering them to particular, historically derived circumstances, judges can inflate narrow clauses with broad principles, and air their interpretations of the latter, without the risk that these interpretations will petrify into law. Rather than deciding, "Due process means *X*," and watching as *X* parades, on the shoulders of stare decisis, across the landscape of due process adjudication, a court can decide, "The nonattainder rule, because it is grounded in due process concerns, means *X*." The court thus *conceptually* associates *X* with due process, but *precedentially* associates it only with the nonattainder rule. Other entities—the legislature, individual citizens, other courts—may then, in future due process contexts, try out an *X* perspective, or adopt another.

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22. Indeed, a narrow clause, stripped of its historically derived conditions, may become a super-broad clause if, as in the case of the Bill of Attainder Clause, *supra* note 21, it instantiates not just one but a number of different broad principles.

23. Such was the practical scope of the classic bill of attainder in sixteenth- and seventeenth-century England. Note, *The Bill of Attainder Clauses and Legislative and Administrative Suppression of "Subversives,"* 67 COLUM. L. REV. 1490, 1491-92 (1967). For a modern argument in favor of cutting down the nonattainder rule to something like this size, see Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355 (1978).

24. There is another, more general, technique of constitutional interpretation that endangers a narrow-clause jurisprudence. My analysis of the relationship between narrow and broad provisions argues centrally that these categories overlap at a theoretical level, that the narrow clauses do not actually "add" anything to the broad clauses but merely offer concrete, historical instantiations of the principles contained therein. This proposition flies in the face of an unsophisticated understanding of the hermeneutical maxim, that the Constitution ought to be interpreted so that it is not redundant. According to this understanding, constitutional superfluity is wholly impermissible. Thus, if clause *A* forbids *X*, and if *Y* is a subset of *X*, then clause *B* cannot be interpreted such that its sole function is to forbid *Y*. A narrow-clause jurisprudence, however, will generally desire this very result, since it permits judges, by invoking *B*, to offer their views on *A* while deciding only *Y*. There is, of course, a place for the antiredundancy principle in the canon of construction rules, but the considerations of conscientious minimalism militate against its too overeager application. *See also* Akhil Reed Amar, *Constitutional Redundancy and Clarifying Clauses*, 33 VAL. U. L. REV. 1 (1998) (critiquing the naïve understanding of the antiredundancy principle on textual and historical grounds).