THE YALE LAW JOURNAL POCKET PART

WILLIAM J. RINNER

Roberts Court Jurisprudence and Legislative Enactment Costs

Professor Matthew Stephenson's recent article[1] highlights a crucial but overlooked function of the judiciary in crafting doctrines that discourage constitutionally problematic statutes. Rather than drawing explicit boundaries of permissible and impermissible statutory schemes, courts can and do produce constitutional doctrine that leaves these boundaries blurry, thus raising the risk of reversal for time- and resource-strapped legislators.[2]

I seek to apply Stephenson's theory to interpret the nature and scope of the Roberts Court's jurisprudence—in particular, the likely impact of judicial minimalism—on statutory enactments and lower court decisions. Critics have charged that the Roberts Court's emphasis on narrow holdings limited to specific factual circumstances undermines the Court's guidance function for lower courts and legislators alike.[3] Such objections are misplaced. Minimalism, or the preference for narrow decisionmaking in the exercise of judicial review, offers underappreciated benefits in deterring constitutional violations in legislative enactments. The indirect result of such jurisprudence is to raise the risk that subsequent, constitutionally problematic legislative enactments might be overturned. Legislators only can consider a finite number of bills during each session. They might be more wary to pass or even to consider constitutionally questionable legislation when factoring in the risk of judicial invalidation. Thus, the second-order benefit of judicial minimalism becomes

1. Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2 (2008).

2. *See* Stephenson, *supra* note 1, at 36-42 (discussing the Court's reliance on interpretive presumptions and clear statement rules as evidence of congressional intent in the context of specific statutory enactments).

3. *See, e.g.*, Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 205, 235.

apparent. Without making sweeping pronouncements of the constitutionality of various legislative acts, the Court can nevertheless reduce the frequency of constitutional violations while avoiding the countermajoritarian difficulty raised by judicial review.[4]

Members of the Roberts Court have recognized the impact of constitutional doctrine on legislative enactment costs. In particular, Justice Alito's dissent in *Kennedy v. Louisiana*[5] highlighted the flaw in inferring a "'national consensus' that the death penalty is never acceptable for the rape of a child"[6] when prior Court dicta left legislators unsure as to whether enacting the death penalty for such crimes would be struck down in violation of the Eighth Amendment. Justice Alito pointed to the dicta of *Coker v. Georgia*[7] as "g[iving] state legislators and others good reason to fear that *any* law permitting the imposition of the death penalty for this crime would meet precisely the fate . . . [of] the Louisiana statute," which "strongly discouraged state legislators – regardless of their own values and those of their constituents – from supporting the enactment of such legislation."[8]

Through the lens of Stephenson's theory – that opaque constitutional doctrine can reduce the instances of legislators enacting constitutionally questionable statutes[9] – Justice Alito's dissent suggests that dicta itself might serve as a means of raising doctrinal uncertainty. Scholars often have encouraged extensive court dicta as a beneficial means of guiding legislative activity,[10] but in recent years many have noted that the fuzzy contours of dicta might impede sound resolution of similar cases and controversies.[11] Lower courts might disagree in whether to apply sweeping dicta not central to a Court holding, causing ambiguity or divergence in how these statements might apply

4. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (1986).

5. 128 S. Ct. 2641 (2008).

6. Kennedy v. Louisiana, 128 S. Ct. 2641, 2665 (2008) (Alito, J., dissenting).

7. 433 U.S. 584 (1977).

8. Kennedy v. Louisiana, 128 S. Ct. at 2665-66 (emphasis added).

9. *See* Stephenson, *supra* note 1, at 55-58 (2008) (discussing how doctrinal uncertainty discounts the benefits of constitutionally problematic legislation and may deter its enactment).

10. *See, e.g.*, Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1716 ("Instead of reaching to decide constitutional issues not squarely presented, the Court can use clarification to advise the political branches of possible constitutional problems and encourage them to revise their statutes.").

11. *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 991-95 (2005); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2027 (1994) (acknowledging "[l]ower courts' confusion about how to treat higher courts' dicta" and attempting to provide a clear dicta/holding distinction).

in various jurisdictions. This seemingly problematic nature of dicta might stand as a further benefit: constitutionally suspect policies might be deterred if the dicta/holding distinction is blurred and doctrinal uncertainty results. Justice Alito's argument—that inferring a "national consensus" regarding the death penalty for child rape might be premature—nevertheless acknowledges that unclear Court dicta increased the legislative costs of imposing capital punishment for such crimes.[12] The behavior of state legislatures suggests that doctrinal uncertainty played an important role in filtering out death penalty statutes that were not sufficiently meritorious to compel legislators to risk their passage and then a subsequent finding of unconstitutionality.[13]

Legislative enactment costs imposed by the Court's constitutional doctrine or dicta highlight the underappreciated role of judicial minimalism or "modesty"[14] in the Roberts Court's jurisprudence. The Court's practice of construing questions posed by cases narrowly, limiting holdings carefully to the circumstances presented,[15] and taking on a historically low caseload[16] have prompted critics to charge that minimalism represents an abandonment of its guidance function.[17] Supporters and critics of judicial minimalism focus on the coherence of its resulting doctrine and the role of courts vis-à-vis the other branches of government.[18] These critiques miss the more subtle form of guidance inherent in such jurisprudence. Minimalist decisions or narrow holdings on constitutional questions can raise the cost of problematic legislation, suggesting an indirect guidance function.

---

12. Kennedy v. Louisiana, 128 S. Ct. at 2668 (2008) (Alito, J., dissenting) (pointing to "evidence that proposals to permit the imposition of the death penalty for child rape were opposed on the ground that enactment would be futile and costly).

13. *Cf.* Stephenson, *supra* note 1, at 58 (2008) ("[A]s the probability of judicial acceptance drops, the higher the anticipated benefits of the statute would have to be to justify enacting it.").

14. *See generally* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 88 (discussing "theories of judicial modesty in the face of another institution with greater competence: Congress").

15. *See, e.g.*, Morse v. Frederick, 127 S. Ct. 2618 (2007); *see also* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2573 (2007) (Scalia, J., dissenting) (arguing that the Court majority opinion (written by Justice Alito and joined by Chief Justice Roberts) creates "utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently").

16. *See* Robert Barnes, *Justices Continue Trend of Hearing Fewer Cases*, WASH. POST, Jan. 7, 2007, at A04.

17. *See* Schauer, *supra* note 3, at 208 ("[T]he Court's increasing abandonment of its guidance obligations might be seen as simply the cost of its increasing minimalism.").

18. *See, e.g.*, Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1914 (2006) (arguing that minimalism is best applied to "the 'frontiers' questions in constitutional law" where "predictability is likely to be less important").

Consider, for example, the Supreme Court's decision in *District of Columbia v. Heller*.[19] Though ostensibly resting on the shoulders of originalist analysis, the breadth of the decision is comparatively narrow.[20] While it invalidated the District of Columbia's ban on ownership of handguns based on its individual-right reading of the Second Amendment,[21] Justice Scalia's majority opinion took pains to suggest that the individual right should not "cast doubt" on various "longstanding prohibitions on . . . possession . . . or laws imposing conditions and qualifications on the commercial sale of arms."[22] Indeed, he suggests that the "list [of regulatory measures] does not purport to be exhaustive."[23] This dicta offers little doctrinal clarity to lower courts, which no doubt will hear constitutional challenges to a variety of firearm regulations, and murky jurisprudence seems inevitable.[24]

The Court's decision in *Heller* not only will lead to further constitutional challenges, but also might deter new gun control legislation that is unlikely to be upheld. Within weeks of the *Heller* decision, the District of Columbia's newly enacted gun registration system was challenged as violating the "letter and spirit" of the Court's prior ruling.[25] Two separate suits sought to overrule Chicago's gun ban—similar in nature to the one at issue in *Heller*—providing a challenge for various communities seeking to comply with the Court's decision.[26] Doctrinal clarity for Second Amendment jurisprudence appears to be but a glimmer on the horizon, but the risk posed by *Heller* to current and future enactments is palpable. The indirect result of the Court's narrow ruling is to raise the cost of legislation in an area where regulation threatens to impinge on the Second Amendment's guarantee of a right to bear arms.

---

19. 128 S. Ct. 2783 (2008).

20. *See* Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 248 (2008) ("*Heller* is a narrow ruling with strong minimalist features.").

21. District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008).

22. *Id.* at 2816-17.

23. *Id.* at 2817 n.26.

24. *See* Glenn H. Reynolds & Brannon P. Denning, Heller*'s Future in the Lower Courts*, 102 NW. U. L. REV. COLLOQUY 406 (2008), http://law.northwestern.edu/lawreview/colloquy/2008/23. A number of district courts have already ruled on post-*Heller* challenges to state-level firearm ownership regulations. *See, e.g.*, United States v. Yancey, No. 08-cr-103, at 3 (W.D. Wis. Oct. 3, 2008) (order denying motion to dismiss) ("*Heller* stands only for the proposition that the District of Columbia cannot constitutionally ban handgun possession in the home for use in self-defense by persons not otherwise prohibited from gun possession.").

25. Del Quentin Wilber & Paul Duggan, *D.C. Is Sued Again over Handgun Rules*, WASH. POST, July 29, 2008, at B01.

26. *See* Warren Richey, *Battle over Gun Rights—Round 2*, CHRISTIAN SCI. MONITOR, Aug. 14, 2008, at 1.

Minimalism and narrow decisionmaking in the Court's exercise of judicial review can deter unconstitutional legislation from being passed without usurping the judicial role. By emphasizing restraint in the scope of its holdings, the Roberts Court's jurisprudence may reduce the volume of constitutionally suspect policies and statutes as a consequence of the doctrinal uncertainty that emerges from its decisions.

William J. Rinner is a third- year student at Yale Law School.

Preferred Citation: William J. Rinner, *Roberts Court Jurisprudence and Legislative Enactment Costs*, 118 YALE L.J. POCKET PART 177 (2009), http://thepocketpart.org/2009/03/31/rinner.html.