BYU Law Review

Volume 1982 | Issue 4 Article 5

11-1-1982

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As a legal practitioner and academician, I have had two basic areas of substantive interest: constitutional law and antitrust law. Each of these is, I submit, the closest living relative of the other. And, since each is principally a product of Supreme Court decisions, the study of either provides opportunity to examine not only a substantive body of law, but also an important governmental institution. The perspective of my remarks will be broader than the antitrust cases presently pending in the Supreme Court, and indeed broader than antitrust itself. I would like to consider not only the Supreme Court's treatment of its cases, but also the government's presentation of those cases. In addition, I will examine the relationship of each to larger questions of governmental policy, particularly the allocation of governmental authority among the three branches of government. The principal focus of these remarks will be the nature and extent of judicial participation in the lawmaking process.

When one compares constitutional and antitrust law and considers the proper degree of judicial involvement in each, two realities should be kept in mind. The first is that by the very nature of the judicial process, some involvement by the courts is inevitable in the most elementary form of lawmaking: choosing between competing substantive policies. The second, and even more important, reality is that in both the constitutional and antitrust areas the initial lawmakers must have assumed the risk of some judicial involvement in substantive lawmaking. This is true of both the delegates to the Constitutional Convention of 1787 and the members of Congress who passed the Sherman Act.

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The reason this risk must have been accepted by these lawmakers is rooted in the nature of the documents they drafted and which the courts must interpret. Both the Constitution and the Sherman Act are cast in terms of such breadth and vagueness that judicial involvement in the lawmaking process is not only permitted, but required. The fundamental task of a federal court is to decide cases or controversies that come before it. When those cases or controversies turn on the interpretation of such words as "due process of law," "equal protection of the laws," "commerce among the several states," or "restraint of trade," the court must necessarily decide what those vague terms mean in the context of the lawsuit before the court. Otherwise the court cannot perform its duty to resolve that lawsuit. As a result, over the years a body of law defining those terms has necessarily evolved.

Thus, both the 18th-century Framers of the Constitution and the 19th-century trustbusters necessarily vested in the judiciary the responsibility of filling the interstices of their broad policy objectives concerning governmental power, individual rights, and restraints of trade and monopoly. As a consequence, the courts have the power to make law to the extent that they must make choices among competing substantive policies. The question is not whether they should have this power—they should and they do. The question is how they should exercise it. For reasons that will be developed below, the answers in the antitrust area may not necessarily be the same as in the constitutional area.

The Sherman Act and the most important provisions of the Constitution vest some lawmaking opportunity in the Executive Branch, though to a lesser extent than in the Judiciary. In deciding what cases to bring, when to bring them, and what position to take, Assistant Attorney General William Baxter, as head of the Antitrust Division, can have a significant effect on the long-range development and content of antitrust law in this country. With respect to issues beyond antitrust, the same is true of his colleagues in the other litigating divisions and in the Solicitor General's office. Just as in the Judiciary, the source of this executive lawmaking power is the breadth and ambiguity of such terms as "restraint of trade," "commerce among the several states," "monopoly," and "equal protection of the laws."

Another overlap between antitrust law and constitutional law, perhaps not quite so obvious, concerns the exemption, or

immunity, from federal antitrust law afforded the states when they act in their governmental capacity. There is probably no more pervasive problem of constitutional law than the accommodation of conflicting state and federal law and policy. The subsets of this problem include no lesser issues than burden on commerce, state taxation of interstate companies and events, federal pre-emption, and congressional authority to enact law pursuant to the commerce clause and other enumerated powers. It is interesting, and probably significant, that in the leading case dealing with the immunity that state laws and schemes enjoy from federal antitrust law, the state scheme was attacked on three grounds. Only one of those grounds was antitrust, though the name of the case, *Parker v. Brown*,[1] has become synonomous with a major antitrust doctrine. The other two grounds were constitutional.[2]

Last fall Attorney General William French Smith announced a conscious effort by the Department of Justice to promote the exercise of judicial self-restraint. Attorneys within the Department of Justice have been directed to take into account, as they formulate their litigating strategy on a case-by-case basis, the importance of judicial restraint and the relevance to judicial restraint of careful structuring and presentation of the government's cases. The emphasis being placed on judicial restraint by the Department of Justice underscores its crucial impact on the proper allocation of authority among the branches of government. Once again, the two most instructive contexts in which to consider that influence are constitutional law and antitrust law.

Judicial restraint is a value which lies at the bedrock of our system of separation of powers. Its essence, I believe, is a respect for the judicial power manifested by refraining from using it unless necessary. This view of judicial restraint proceeds from the premise that judicial decisions can have the effect of reversing policy choices made by the elected representatives of government and suggests that judges should take this into account by declining, where appropriate, to exercise their own judicial power. It recognizes that policy choices are better left to legislators than to courts because the people are entitled to a voice in

1. 317 U.S. 341 (1943).

2. These grounds were the commerce clause and the doctrine of pre-emption. *See id.* at 348-49.

policy matters and should be the ultimate authority on policy matters. Unlike federal judges, legislators periodically face reelection and are thus more likely to be responsive to the policies desired by the voting populace. Additionally, legislators are better able to gather and evaluate information concerning policy matters since they are not limited in their fact-finding capability by the case or controversy limitation. Legislators can also devise broad and comprehensive solutions, while courts must inevitably act on an ad hoc basis.

Judicial restraint does not and could not mean that courts never make decisions that might displace legislative judgments; that would be tantamount to a repeal of judicial review, which is as central to the judiciary as lawmaking is to the legislature. Rather, in my view, judicial restraint means that courts should exercise their unquestioned authority of judicial review only in compelling cases. This view reflects two fundamental facts: (1) the line between constitutional adjudication and the substitution of the judicial will for that of the legislature in policy matters is not always a fine, bright one; and (2) any time a legislative enactment is held unconstitutional, the inevitable result will be a reversal or, at the least, a modification of legislative policy choices. Thus, in general, courts should exercise judicial review only where the legislative objective falls outside the scope of legislative authority or where there is no rational linkage between means and end.

Judicial restraint in constitutional matters is not only important to good government; it is a mainstay of our constitutional system. It is also an essential element of a strong judiciary, paradoxical though that may appear at first glance. Federal courts were insulated from direct popular pressure by the Framers because they were not generally expected to engage in policymaking, which is properly the subject of popular pressure and input. Courts undermine the basis for their independence when they too readily overturn the policy choices of elected representatives. If courts unnecessarily intrude into political debates, they invite popular attack and criticism. By avoiding such intrusions courts act to secure their own independence. For that reason, the most effective restraints against judicial excess are those that come from the judges themselves.

Judicial restraint is a free-standing value, whose worth is independent of the substantive issue in the particular case. As obvious as this principle should be, many have failed to appreciate

it. For example, the same voices that are raised so mightily, and so properly, against such cases as *Lochner v. New York*[3] and *Coppage v. Kansas*[4] are often content with their modern counterparts.

The activities of the Executive Branch also have an effect on judicial restraint in several aspects. First, the party that appears before the United States courts most frequently and in the most important cases is, by a large margin, the United States itself, represented by the Department of Justice. Judicial decisions are usually influenced by what lawyers urge the courts to do, not because judges become less bold once they don their robes of office, but because that is the way a legal system governed by the case or controversy limitation works. The judge makes his or her decision in the context of competing views presented by adversaries in a lawsuit. Consider your favorite example of what you regard as judicial excess. The likelihood is that the judge's opinion in that case does not substantially exceed the resolution urged by the lawyers. Indeed, the decision may even be a little less extreme than that advocated by the attorneys.

It is for this reason that there is such a intimate relationship between executive restraint—particularly on the part of the Department of Justice lawyers—and judicial restraint. Regardless of the correctness or error of the view that government counsel generally enjoy a special measure of credibility before the federal courts, the Executive Branch can influence judicial restraint solely because of the volume of its cases.

There is another difference between the roles played by the government lawyer and the lawyer representing private clients. Each wants to win the particular case in which he is an adversary, and each owes an obligation to the court as one of its officers. Beyond that, however, the government lawyer should further the values and objectives pertaining to the functioning of government qua government, including the preservation of separation of powers principles. As a result, the government lawyer should be concerned about the proper allocation of authority among the various branches of government. These concerns reach beyond victory or defeat in the particular case and have no counterpart for the private practitioner.

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3. 198 U.S. 45 (1905).

4. 236 U.S. 1 (1915).

I turn next to a feature that distinguishes these two fields of constitutional and antitrust law that otherwise have so much in common. In constitutional cases, the government lawyer presenting the case to the judge, and the judge making his decision, should take into account the fact that in the great majority of instances, and arguably in all instances, a holding of unconstitutionality will necessarily displace a legislative policy choice. It is a policy choice made by the branch of government which, under our system of separation of powers, is charged with the responsibility of deciding our nation's fundamental policy questions and which, by virtue of its structure and expertise, is best able to do so.

Though any judicial invalidation of a statute would suffice, consider for example the Supreme Court's holding in *Zablocki v. Redhail.*[5] *Zablocki* declared unconstitutional a Wisconsin statute requiring persons with certain existing child support obligations to demonstrate an ability to discharge those obligations as a prerequisite to marriage. As is true in virtually all cases of policymaking, the Wisconsin legislature was faced with competing social values when it passed this statute. One of these competing values was the interest in pursuing one's life as a member of a traditional family unit by marrying. This value focuses on the interest of the adult as a prospective marriage partner and parent. The other value, deriving from the interest of the child, seeks to assure that the child's basic needs for survival and sustenance are not disregarded by those who bring him or her into the world. This kind of choice between opposing values is the very essence of lawmaking. In this case, the Wisconsin legislature chose the interests of the child over those of the adult, favoring the value in assuring the minor's welfare over the value of unfettered freedom to marry.

Did the Wisconsin legislators make the right choice? The only answer that can fairly be given to that question is that reasonable persons will differ. But one thing is very clear: the making of such choices is what we elect legislators to do. That is their job. If we disagree with them, we have an opportunity to express this disagreement on the first Tuesday after the first Monday in November of each even-numbered year.

In *Zablocki,* the Supreme Court held that Wisconsin's choice was unconstitutional because it violated the right to

5. 434 U.S. 374 (1978).

marry, which in view of the majority of the Court is a fundamental right.[6] Classifying one of the two competing values considered by the Wisconsin legislature as "fundamental" means that any other value with which it conflicts may be preferred by legislators only on a showing of a compelling state interest not achievable through less intrusive means. The net result in *Zablocki* was a reversal of the legislative judgment. The Wisconsin legislature gave primacy to the interests of the children, and the Supreme Court gave primacy to the interests of the parents. Since the judicial judgment was the final judgment, its determination ultimately prevailed.

This is not a plea that judges should never render decisions whose effect is to reverse the policy judgments made by legislatures. Reversal of legislative choice is often the necessary effect of judicial review, and judicial review is a mainstay of our constitutionally ordained checks and balances. To reiterate my suggestion, the courts should recognize that the use of this power necessarily reverses legislative policy choices and that, consequently, this power should be exercised sparingly.

This consideration of deference to the legislature—both by the Executive in presenting its cases and the Judiciary in deciding them—has no counterpart in the antitrust context. It is true that in interpreting the Constitution and the Sherman Act both branches should feel obligated to ascertain the intent of those who drafted the language at issue. But that is a different kind of legislative deference. Judicial displacement of particular substantive policy choices already made by the legislature is a factor absent from antitrust issues.

Consider, for example, whether a certain horizontal merger is a violation of Section 1 of the Sherman Act. Once again, there are competing values on both sides, one relating to the freedom of markets to redeploy productive resources, and the other to the risk that further concentration will be conducive to cartel-like behavior. The persuasiveness of either will depend on the facts of the particular case. Quite clearly, when Assistant Attorney General William Baxter makes a decision concerning the position the Antitrust Division of the Department of Justice will take in litigation aimed at determining whether the arrangement is or is not a forbidden restraint of trade, and when the federal judge makes his decision either agreeing or disagreeing with him,

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6. *Id.* at 388-91.

each is making law in the most elementary sense—selecting one policy or economic value over another. The difference is that in making a final judgment, neither William Baxter nor the federal court needs to take into account the fact that this same choice among competing values has already been made by a legislature. For that reason, all other things being equal, I believe there is more room for Executive and Judicial exercise of the lawmaking function when resolving antitrust issues than when deciding the constitutionality of legislative enactments.

Just about two centuries ago, Alexander Hamilton expressed in *The Federalist Papers* his oft-quoted view that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution . . . ."[7] Hamilton's statement was based upon the checks and balances which would result from the vesting of the other two branches with powers not exercisable by the courts. As he noted, "[t]he Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated."[8]

Hamilton, of course, was right. The existence of these ultimate checking powers, as well as others that he did not mention, is obvious. But is should be equally obvious in our day—as it may have been in Hamilton's—that the use of these ultimate powers to correct judicial excesses could create more governmental distortions than it would correct.

The fact that the judicial check suggested by the Attorney General of the United States in the 1980's is much less drastic than that suggested by Alexander Hamilton in the 1780's may be a sign that in two centuries have made some progress. It may also indicate that neither Hamilton nor his colleagues ever envisioned the extent of the power the courts would exercise under the banner of judicial review. Both views may be partially correct.

In any event, the most effective check of judicial power comes from judges themselves. It is the most effective not only because the judges are in a better position to police their own activities, but also because self-imposed restraints—unlike those enumerated by Hamilton and unlike other restraints that have

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7. THE FEDERALIST No. 78, at 483 (A. Hamilton) (H. Lodge ed. 1888)
8. *Id.*

been proposed in more modern times—do not possess the unfortunate capacity of distorting more than they correct. Judicial restraint is, therefore, a good example of the even broader principle that the highest manifestation of respect for power is willingness, on appropriate occasions, to refrain from using it.