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Introduction

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Constitutional Law Symposium: Allocation of Policymaking Authority Between Court and Legislature

On November 7, 1975, the J. Reuben Clark Law School at Brigham Young University conducted a symposium on constitutional law. Participants included Robert G. Dixon, Jr. of Washington University, Edward L. Barrett of the University of California at Davis, Gerald Gunther of Stanford University, Arvo Van Alstyne of the University of Utah, Laurence H. Tribe of Harvard University, and C. Keith Rooker of Brigham Young University. Although the lectures and comments dealt primarily with judicial use of the due process and equal protection clauses, the central inquiry of the symposium was broader, focusing on the constitutional allocation of policymaking authority between the judiciary and the legislature. Two of the participants, Professors Dixon and Barrett, developed their key lectures into the articles printed here. Dean Rex E. Lee, the symposium's chief architect, introduces those articles with a preface defining and setting in its historical context the central inquiry of the symposium.

Introduction

*Rex E. Lee**

In the *Slaughter-House Cases* of 1873,[1] the first test of the Fourteenth Amendment, the United States Supreme Court held that none of the three provisions of that Amendment—due process, equal protection, or privileges and immunities—could be utilized as a substantive restraint on state legislation.[2] The contrary position of the *Slaughter-House* dissenters[3] remained in

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1. 83 U.S. (16 Wall.) 36 (1873).

2. *Id.* at 74-83. The legislation contested in the *Slaughter-House Cases* conferred upon the Crescent City Live-Stock Landing and Slaughter-House Company (a corporation) the exclusive right, for a period of 25 years, "to maintain slaughterhouses, landings for cattle and stockyards" within three parishes. The three parishes contained a population of over 200,000, including the City of New Orleans, and covered an area of 1,154 square miles. The law was also attacked on Thirteenth Amendment grounds. *Id.* at 38-43.

3. Mr. Justice Field's dissenting opinion was joined by Chief Justice Chase, Mr. Justice Swayne, and Mr. Justice Bradley. Justices Bradley and Swayne also wrote separate dissenting opinions. *Id.* at 83.

embryo for the next two decades until in *Allgeyer v. Louisiana*,[4] the Court for the first time invalidated a state statute because its substance was incompatible with the Fourteenth Amendment—specifically, the liberty component of the due process clause.

Allgeyer and its progeny—including such notable precedents as *Lochner v. New York*,[5] *Coppage v. Kansas*,[6] and *Adkins v. Children's Hospital*[7]—represented prevailing Supreme Court doctrine for over a third of a century. This was a period in which the Court invalidated many state legislative programs, mostly economic, on the grounds of substantive inconsistency with the Fourteenth Amendment's guarantee against deprivation of life, liberty, or property without due process of law. Since federal judges were guided by nothing more concrete than their own subjective perceptions concerning the substantive content of the due process clause, they were necessarily cast in the role of policy-makers—or, at least, policy-reviewers with a veto power—concerning economic issues.

It is conventional wisdom that *Allgeyer* and its progeny represent one of the clearest, and most serious, examples of judicial misguidance in our constitutional history. Thus, the Supreme Court observed in a unanimous opinion in *Williamson v. Lee Optical Co.*[8] that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought . . . ."[9] Furthermore, in the economic context to which the label "substantive due process" traditionally attaches, the rhetoric has been matched by consistent holding. Since 1936,[10] the Supreme Court has not invalidated any

4. 165 U.S. 578 (1897).

5. 198 U.S. 45 (1905).

6. 236 U.S. 1 (1915).

7. 261 U.S. 525 (1923).

8. 348 U.S. 483 (1955). *See also* Ferguson v. Skrupa, 372 U.S. 726 (1963); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); Olsen v. Nebraska, 313 U.S. 236 (1941).

9. 348 U.S. at 488.

10. The historical shift to the present standard that economic regulatory statutes are valid so long as they "have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory" came in Nebbia v. New York, 291 U.S. 502, 537 (1934). The firmness of the *Nebbia* precedent was temporarily called into question when the Court adhered to *Adkins v. Children's Hospital* in Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936). *Nebbia's* place in history was assured when, ten months after

state economic regulatory program on grounds of substantive incompatibility with the due process clause.

It is the opinion of some, however, that the assumed interment of *Allgeyer, Lochner*, and similar cases is illusory, and that although their return as resurrected beings has assuredly taken a different, noneconomic form, the mischiefmaking substance of such cases as *Griswold v. Connecticut,*[11] *Kramer v. Union Free School District No. 15,*[12] and *Roe v. Wade*[13] is the same. The only real difference, according to this view, is the nature of the individual interests which trigger the substitution of the wisdom of the judges for the wisdom of the legislators.

The similarities and differences between the old and the new cases in which the Supreme Court and other federal courts have invalidated legislative policy decisions because of substantive inconsistency with the Fourteenth Amendment are of great historical interest. It is at least equally important to constitutional lawyers, however, whether in either the *Allgeyer-Lochner-Coppage* or the *Griswold-Kramer-Roe* setting the judicial performance was wise or constitutionally acceptable.

The catchphrase notwithstanding, the issue is not whether the due process clause of the Fourteenth Amendment has substantive content. It clearly has, as the incorporation cases illustrate.[14] Nor is the issue limited to the due process clause, or even to the Fourteenth Amendment, although that Amendment has surely been the principal testing ground. Rather, in my view, the fundamental issue concerns the allocation of policymaking authority between the legislative and judicial branches of govern-

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the *Morehead* decision, *Adkins* was overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

Morehead and *West Coast Hotel* were both 5-4 decisions, and Mr. Justice Roberts, the author of the majority opinion in *Nebbia* (also 5-4), was with the majority in both cases. President Roosevelt had announced his court-packing plan after *Morehead* and before *West Coast Hotel*, leading to speculation that the reason for Justice Roberts' shift was to lessen the pressure for court-packing. Justice Roberts' explanation, in a memorandum left with Justice Frankfurter, is that the conference vote in *West Coast Hotel* was taken weeks before the announcement of the court-packing plan, and that he voted to adhere to *Adkins* in *Morehead* because in that case, unlike *West Coast Hotel*, the petitioners did not ask the Court to overrule *Adkins*. *See* Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955). *See also* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 583 (9th ed. 1975).

11. 381 U.S. 479 (1965).

12. 395 U.S. 621 (1969).

13. 410 U.S. 113 (1973).

14. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 361 U.S. 643 (1961).

ment. The fact that the governmental entities involved are typically a state legislature and a federal court imparts a layer of federalism over this fundamental separation of powers problem.

Initially, it might appear that phrasing the issue in terms of the allocation of policymaking authority between legislators and judges is necessarily to imply the answer. This, in fact, represents my own bottom-line judgment.[15] The analysis is not easy, however, and the relevant considerations—although fundamental to our constitutional system—do not all point in the same direction.

On the one hand, policymaking is the essential and traditional domain of the Legislature. Not being constitutionally limited in their processes by the case or controversy requirement, legislatures are free to investigate and consider all relevant aspects of policy problems and not just those that are presented by disputes between particular individuals. Public money is available, at the will of the Legislature, for whatever hearings, studies, or other investigative work is required to develop and illuminate the underlying facts. Courts, by contrast, are dependent on the typically more limited resources of private litigants. Moreover, if one accepts the relevance of public opinion to public policy, it is significant that legislators, unlike most judges, are elected by the people and periodically must answer to them. In short, legislators are more capable than courts both of making good policy decisions and of adequately reflecting the public view.

On the other hand, judicial involvement in policymaking has been a mainstay of our constitutional system almost from the beginning. It is an involvement that follows ineluctably from the doctrine of judicial review and the vagueness of the most important provisions of the United States Constitution. Given the breadth and imprecision of such terms as "freedom of speech," "due process," "equal protection," and "regulate commerce," the process of pouring content into such terms will necessarily result in policymaking that is both extensive in scope and significant in impact. Since *Marbury v. Madison*,[16] the responsibility for defining these terms—in the absence of constitutional amendment—belongs to the judiciary. Judicial policymaking has therefore been a constitutional fact of life for at least 170 years.

Moreover, the dominant purpose of the American Constitution is the preservation and protection of individual rights against

15. *See* Lee, *Mr. Herbert Spencer and the Bachelor Stockbroker; Kramer v. Union Free School District No. 15*, 15 ARIZ. L. REV. 457 (1973).

16. 5 U.S. (1 Cranch) 137 (1803).

governmental action. In the usual case, these are minority rights, not just in the ethnic sense, but also because the views, interests, and practices protected are not shared by most people. It arguable follows that judicial deference to a branch of Government that is selected by, and answerable to, the majority would compromise the judges' responsibilities as guardians of individual rights, which are usually minority rights.

The subject of this symposium is one of the great enduring issues of constitutional law. It concerns a problem whose existence follows inevitably from the judicial policymaking that is not only permitted but required by the confluences of judicial review and constitutional vagueness. The resulting tension between the basic functions of two branches of Government makes the present subject an important one for students of constitutional law at all stages of their understanding and professional development.