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DO COURTS SET ECONOMIC POLICY?

*Justice Ben F. Overton**

Most members of the public, including many within the business community, fail to realize that courts are major decision-makers of economic policy. Further, in many instances, neither the lawyers presenting the case nor the judge hearing the case consider the potential economic impact that the court's holding may have on industry or consumers.

In this article, I will illustrate how courts are thrust into the position of deciding economic policy and will suggest that the litigants need to make the courts more cognizant of the relevant economic principles.

The fact that courts make economic policy is nothing new.[1] A clear example of this is the well-established common law rule against per-

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1. As Richard Posner, a well-known author on law and economics states:

> The application of economics to law is not in itself either new or controversial. What is new and controversial is the variety of problems in the world of law to which economics is now being applied . . . . Until about 15 years ago the term "law and economics" primarily signified the application of economics to antitrust law, although there was some scattered but important economic work on taxation, corporations, and public utility and common carrier regulation. The use of economics in antitrust law was conventional and unthreatening. The records in antitrust cases provided a rich mine of information about business practices, and economists set about to discover the economic rationales and consequences of such practices. Their discoveries had implications for legal policy, of course, but basically what they were doing was no different from what economists traditionally have done — trying to explain the behavior of explicit economic markets.

petuities, which restricts transfers of real and personal property, stating: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[2] The judiciary established this rule in 1682 because "the public welfare was threatened by the desires of the great families to parcel out the soil of England among them and impose upon it the dead-hand control of perpetual family settlements."[3] The purpose of the rule was "to prevent the restraint on alienation that may result from the creation of a series of future interests some of which might neither vest nor fail within the perpetuities period,"[4] thus assuring that land would become productive at some reasonable time in the future. If a court rendered this rule today, the newspaper headlines would most likely read: "Court Sets Major Land Reform Policy."

Years later, economic concerns, including the need for a single form of currency, free and open commerce between the states, a consistent economic policy with foreign countries, and the protection of private property rights, constituted significant factors uniting the delegates of our Constitutional Convention.[5] To a great extent, the United States Constitution was brought about to establish and protect a free market system. Referring to taxation and tariff restraints between states, James Madison wrote before the Constitutional Convention: "New Jersey, . . . placed between Philadelphia and New York, was likened to a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms."[6]

> . . . [T]he hallmark of the "new" law and economics — the law and economics that is almost entirely new within the last decade and a half — is the application of the theories and empirical methods of economics to the legal system across the board — to common law fields such as tort, contract, and property, to the theory and practice of punishment, to civil, criminal, and administrative procedure, to the theory of legislation, and to law enforcement and judicial administration. Whereas the "old" law and economics confined its attention to laws governing explicit economic relationships, and indeed to a quite limited subset of such laws (the law of contracts, for example, was omitted), the "new" law and economics recognizes no such limitation on the domain of economic analysis of law.

R. POSNER, ECONOMIC ANALYSIS OF LAW 15-16 (2d ed. 1977).

2. J. GRAY, THE RULE AGAINST PERPETUITIES § 191 (4th ed. 1942).

3. Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 725-26 (1952). The first decision concerning the rule against perpetuities was the Duke of Norfolk's Case, 22 ENG. REP. 931 (ch. 1682). For a more complete history of the rule, see Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19 (1977).

4. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 3.17 (Lawyers ed. 1984).

5. Dolbeare & Mecalf, *The Political Economy of the Constitution*, THIS CONSTITUTION 4.

6. Quoted in C. BOWEN, MIRACLE AT PHILADELPHIA 9 (1966).

After the Constitution was adopted and the government was organized, it did not take long for the judiciary to establish itself as the branch responsible for construing the Constitution.[7] Many cases involving constitutional construction were initiated for economic reasons. Although many may find it hard to believe, the principal basis for a number of economic decisions is the fourteenth amendment, which was adopted immediately after the Civil War in 1868.[8] It states, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[9] While the amendment was created to protect the rights afforded minorities, especially blacks,[10] courts, towards the end of the nineteenth century and the beginning of the twentieth century, construed the amendment to protect the business community against unwanted regulation.[11] In 1886, in *Santa Clara v. Southern Pacific Railroad*,[12] Chief Justice Waite of the United States Supreme Court commented on behalf of the Court that the fourteenth amendment applied not only to persons but to corporations as well.[13] About twenty years later, in *Lochner v. New York*,[14] the Court found that a New York statute, which restricted the number of hours bakers could work,[15] violated the fourteenth amendment.[16] The Court held that "the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution."[17] As stated by one commentator, "These deci-

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7. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

8. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 616 (2d ed. 1983) [hereinafter CONSTITUTIONAL LAW].

9. U.S. CONST. amend. XIV, § 1.

10. CONSTITUTIONAL LAW, *supra* note 8.

11. *Id.* at 435.

12. 118 U.S. 394 (1886).

13. *Id.* at 396; J. LIEBERMAN, MILESTONES 174 (1976).

14. 198 U.S. 45 (1905).

15. The applicable statute, § 110, stated:

> No employé shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employé shall work.

Id. at 46 n.1.

16. *Id.* at 64; J. LIEBERMAN, *supra* note 13, at 177-78.

17. 198 U.S. at 64.

sions transformed the Fourteenth Amendment from a constitutional provision intended to secure the rights of minorities — particularly the blacks — to a charter of economic *laissez faire* that corporations could use to have courts void unfavorable legislations."[18] As Nowak, Rotunda, and Young stated:

> Many of the Supreme Court justices believed they had an obligation to protect the free enterprise system as it was embodied in the concept of laissez faire. It must be stressed that their position resulted from their independent reading of the Constitution and the historic economic freedom of action in American life rather than from some arbitrary desire to protect big business.[19]

The construction of this provision has changed over time. Today it reflects the drafters' initial intentions — that is, protecting minorities; however, the term "persons" within the fourteenth amendment still includes corporations.[20]

Although courts have made major economic decisions in the first two hundred years of this country's existence, they will render even more in the future. This country has progressed from an agrarian society to a highly regulated industrial and service-oriented society. Due to the substantial increase in governmental regulation of business entities, the courts are now responsible for resolving numerous regulatory questions having considerable economic impact. To illustrate the type of economic impact decisions state courts encounter, I have selected five recent cases which were argued before the Florida Supreme Court between November 1988 and February 1989. It should be noted that these five are but a few of the cases argued before the court involving economic implications.

In *Interest on Trust Accounts: A Petition to Amend the Rules Regulating the Florida Bar*,[21] the Supreme Court of Florida recently held that Florida should adopt a mandatory interest on trust accounts (IOTA) program requiring attorneys to place nominal and short-term trust funds into interest-bearing trust accounts.[22] The rule provides

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18. J. LIEBERMAN, *supra* note 13, at 178.

19. CONSTITUTIONAL LAW, *supra* note 8, at 438 (footnote omitted).

20. *See, e.g.*, Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Des Vergnes v. Seekonk Water Dist., 601 F.2d 9 (1st Cir. 1979); Fulton Mkt. Cold Storage Co. v. Cullerton, 582 F.2d 1071, *cert. denied*, 439 U.S. 1121 (1978); Sterngass v. Bowman, 563 F. Supp. 456 (D.C.N.Y. 1983).

21. 538 So. 2d 448 (Fla. 1989).

22. *Id.* at 451.

that the interest generated by these accounts would go directly to the Florida Bar Foundation, which uses a substantial portion of the interest on these trust funds to provide legal aid to indigent persons.[23] The Special Commission on Access to the Legal System estimated that the interest generated would provide the fund with more than $12 million a year.[24] Prior to the adoption of this rule, neither the lawyers nor the clients received interest on the funds. In fact, the beneficiaries of the earned-interest were the banks.[25] The economic effect of the rule was the movement of earned-interest income from the banking industry to a legal program aiding indigents.

In *Ivey v. Bacardi Imports Co.*,[26] the Supreme Court of Florida was called upon to construe and enforce the commerce clause of the United States Constitution. The commerce clause states: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[27] The purpose of the commerce clause was to ensure "free and unrestricted trade among the several states."[28] In *Bacardi*, the Supreme Court of Florida affirmed the trial court's finding that sections 564.06(1)-(10) and 565.12(1)-(5), Florida Statutes (Supp. 1988), created to impose discriminatory taxes to benefit Florida's wine-distilling industry, were unconstitutional under the commerce clause.[29] Since Colonial times, state and local governmental entities have used taxes or tax exemptions for local industries as a means to provide competitive economic advantages. The courts are generally the governmental entity given the responsibility to determine what is proper in these cases.

In another area reflecting economic decision-making, courts are frequently asked to determine what is the requisite duty of care and who should bear the risk of loss and injury in our society. In *Insinga v. LaBella*,[30] the United States Court of Appeals for the Eleventh

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23. *Id.* at 450; Matter of Interest on Trusts Accounts, 372 So. 2d 67, 68 (Fla. 1979); Interest on Trust Accounts, A Petition of The Florida Bar, 356 So. 2d 799, 805 (Fla. 1978).

24. 538 So. 2d at 450 n.3 (citing Recommendations of the Special Commission on Access to the Legal System 8 (May 16, 1985)).

25. 356 So. 2d at 802. "Even small amounts received from a variety of clients for varying periods can result in large average monthly balances in attorney trust accounts." *Id.* at 802 n.20.

26. 541 So. 2d 1129 (Fla. 1989).

27. U.S. CONST. art. I, § 8, cl. 3.

28. 541 So. 2d at 1137. "The delegates adopted the clause to prevent tariffs among the states and to unify the states' relationships with other nations." *See* Comment, Garcia v. San Antonio Metropolitan Transit Authority: *Dismantling a Nation of Many Sovereign States*, 37 MERCER L. REV. 523, 526 (1985) (citing THE FEDERALIST, No. 42, at 305-06 (J. Madison) (B. Wright ed. 1974)).

29. 541 So. 2d at 1131.

30. 543 So. 2d 209 (Fla. 1989).

Circuit asked the Supreme Court of Florida to determine whether Florida recognizes the recently developed "corporate negligence doctrine,"[31] which imposes on hospitals "an independent duty to select and retain competent independent physicians seeking staff privileges."[32] The court, in holding that hospitals owe such a duty, effectively broadened the hospitals' responsibility and accountability to their patients.[33] Now, hospitals, along with the doctors, are responsible for injuries caused by a physician's negligent act when a hospital improperly selects or retains that physician for staff privileges. This increased duty could result in higher costs to hospitals, which might be reflected in higher charges for medical care.

Another decision which involved a potential increase in the duty of care owed by one party to another is *Leon County School Board v. Grimes*.[34] In *Grimes*, an employee, who was required to wear a leg brace as a result of contracting polio as a child, fell and injured herself at work when her brace gave way. After suffering an ankle injury from the fall, she sought workers' compensation benefits from her employer. The deputy commissioner determined that her personal physical condition caused the injury.

The duty of care at that time limited industry's liability to those injuries caused by employment.[35] The Supreme Court of Florida had established that principle as the legislative purpose of the Workers' Compensation Act.[36] In *Grimes*, the district court of appeal reversed the deputy commissioner[37] and suggested that the supreme court broaden the purpose of workers' compensation "to provide compensability of any injury to a worker during the course of his or her employment resulting from a fall at any place where the employee's duties require him to be, regardless of whether the act of falling was initiated by a condition personal to the claimant."[38] Here the claimant effectively asked the court to shift the burden of bearing the cost of those injuries

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31. Insinga v. LaBella, 845 F.2d 249 (11th Cir. 1988).

32. 543 So. 2d at 213.

33. The public policy reason for placing this duty on hospitals is that they are in the best position to control and review the medical staff, thus protecting those persons who seek medical treatment in a hospital. *Id.* at 214.

34. 548 So. 2d 205 (Fla. 1989). See decision below at 518 So. 2d 327 (Fla. 1st D.C.A. 1987).

35. In Southern Bell Tel. & Tel. Co. v. McCook, 355 So. 2d 1166 (Fla. 1977), the Florida Supreme Court held that an idiopathic injury is not compensable under workers' compensation "unless the employment in some way contributes to the risk or aggravates the injury." *Id.* at 1168 (footnote omitted); *see also* Foxworth v. Florida Indus. Comm'n, 86 So. 2d 147 (Fla. 1955).

36. Protectu Awning Shutter Co. v. Cline, 154 Fla. 30, 16 So. 2d 342 (1944).

37. Grimes v. Leon County School Bd., 518 So. 2d 327 (Fla. 1st D.C.A. 1987).

38. *Id.* at 331.

not caused by employment from the employee to the industry. The supreme court reaffirmed its prior decisions, quashed the district court's decision, and denied recovery, finding that the legislature, the branch which created this remedy, was the proper branch to expand the coverage of workers' compensation, if it deemed a change to be necessary. Permitting recovery in this case would have broadened the employer's exposure and, consequently, resulted in a higher cost for workers' compensation coverage, which would eventually be passed on to the consumer.

The final case involves the effect of private restrictions on the value of real property for tax purposes. In *Valencia Center, Inc. v. Bystrom*,[39] a lessor and lessee entered into a long-term lease which specifically limited the construction of high-rise buildings. The applicable zoning laws permitted high-rise buildings in excess of that agreed to between the parties. In determining the property value for tax purposes, the appraiser assessed the property on the basis of its highest and best commercial use. The Supreme Court of Florida's decision to approve the assessment,[40] thus permitting the consideration of the property's potential future use as a high-rise building, will most likely force this property to be utilized for its best use within the zoning restrictions. It would not be economically feasible to pay increased taxes over a significant period of time while not receiving the most beneficial use of the property.

The preceding cases illustrate just a few examples of legal issues having potential economic impact. I believe it is extremely important for litigants to inform the courts of the *relevant* economic impact in a case. When appropriate, the parties should make every effort to include this information in the trial record. Even if the potential economic impact is significant in a certain case, the trial record limits the scope of the factors which courts may consider in reaching their decision.

In some cases, courts may not consider the economic impact of a decision because their decision is controlled either by legislation or a constitutional provision that affords the court no discretion. Although numerous cases fall within this category, I would note that both trial and appellate courts frequently have the discretionary authority to consider the relevant economic factors.

Only within the last decade and a half has there been a true recognition that courts do substantially contribute to the country's economic policy.[41] Law and economics has recently become part of the

39. 543 So. 2d 214 (Fla. 1989).

40. *Id.* at 217.

41. R. POSNER, *supra* note 1, at 16.

regular curriculum in many law schools, and numerous books have been written on the topic.[42] In my view, the substantial expansion of government control of business enterprises by regulatory laws and agency regulations places a much greater responsibility on the judicial system. How well courts perform depends, in part, on how well educated and informed the legal profession and the judiciary are about economic factors.

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42. *See, e.g.*, B. ACKERMAN, ECONOMIC FOUNDATIONS OF PROPERTY LAW (1975); C. GOETZ, CASES AND MATERIALS ON LAW AND ECONOMICS (1984); A. KRONMAN & R. POSNER, THE ECONOMICS OF CONTRACT LAW (1979).