COMMENTS

Studying the Court of Justice: What Messages for Federal Jurisdiction?

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The European Economic Community has adopted a form of "federal" union. Within the Community is a Court of Justice that, as Professor Barav's Article shows,[1] functions somewhat like our Supreme Court in maintaining the boundaries of lawmaking authority between the Community (or in the United States, the federal government) and its member states implicit in the concept of federalism. For example, the Court of Justice can declare that Community acts are inconsistent with the treaty that established the Community,[2] and the court can also declare that actions of the member states are inconsistent with Community laws.[3] This brief Comment notes some features of the Court's practice that may provide interesting comparisons with the practice of our federal courts. My interest is primarily that of an importer: Does study of the organization and output of the Court of Justice suggest useful ideas about issues in American law?

I. ILLUSTRATIVE DIFFERENCES

A. STANDING

Although the concept of standing to sue in federal court is still evolving, it seems settled that a litigant can challenge the validity of government action in federal court only if the litigant is "injured" by that

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1. *See generally* Barav, *The Judicial Power of the European Economic Community*, 53 S. CAL. L. REV. 461 (1980).

2. *See id.* at 486-88.

3. *Id.* at 499-504.

action.[4] The Supreme Court has said that this injury requirement ensures that the litigant has a "personal stake" in the outcome of the litigation, thereby providing the "concrete adverseness" necessary for proper judicial decision making.[5]

Usually, this injury requirement serves to preclude federal court suits by some, but not all, of the persons who wish to challenge government action. In *Sierra Club v. Morton*,[6] for example, the Court held that an environmental group lacked standing to challenge development of a national forest because none of the group's members were alleged to use that particular forest, and thus the group could not claim that any of its members would be injured by the development. The Court acknowledged, however, that someone who did use the forest could claim injury to his or her aesthetic and recreational interests and therefore would have standing to challenge the development.[7]

Some recent cases have indicated that the injury requirement of standing may bar *all* would-be litigants from suing. In *United States v. Richardson*,[8] for example, a federal taxpayer asserted that the manner in which the Central Intelligence Agency (C.I.A.) reported its expenditures violated the provision of the Constitution requiring "a regular Statement and Account of the Receipts and Expenditures of all public Money."[9] The Court held that the taxpayer lacked standing to challenge the government's alleged noncompliance with the reporting procedure, because he had not suffered any identifiable injury. The Court recognized that if this plaintiff lacked standing, all other conceivable plaintiffs also probably lacked standing, but held that this was an inadequate reason to allow suit in the absence of injury.[10]

Under American law, states must also satisfy this injury requirement to establish standing to sue in federal court. A mere "abstract

4. *See* Association of Data Processing Serv. Organizations Inc. v. Camp, 397 U.S. 150, 153-55 (1970).

5. Baker v. Carr, 369 U.S. 186, 204 (1962). Although "injury" is generally required to establish "personal stake," the Supreme Court has recognized, in a narrow class of cases brought by federal taxpayers, that personal stake may be established in the absence of injury. Flast v. Cohen, 392 U.S. 83, 101-03, 105-06 (1968). Recent cases have indicated that this exception is probably restricted to cases raising first amendment establishment clause claims. *See, e.g.*, Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

6. 405 U.S. 727 (1972).

7. *Id.* at 734-35.

8. 418 U.S. 166 (1974).

9. U.S. CONST. art. I, § 9, cl. 7.

10. 418 U.S. at 179. *Accord*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974).

concern" that the federal government or other state governments are violating constitutional or federal law is insufficient for suit; the complaining state must be injured by the allegedly illegal action it seeks to challenge. Thus, the State of California would probably be no more able to challenge the sufficiency of the C.I.A. expenditure reports than was the individual taxpayer in *Richardson*.

The law of standing in the Court of Justice is significantly different. The court has one standing rule for member states and another standing requirement for the citizens of those states.[11] The member states are allowed to challenge the action of the Community or other member states without alleging that the action causes them injury.[12] Thus, the member states have easier access to the Court of Justice than American states have to the Supreme Court. In contrast, individual citizens can gain direct access to the Court of Justice only if they can allege injury. Because they must also satisfy other standing requirements not required of American citizens for access to the Supreme Court, however, they are, in effect, afforded a more restrictive access to the Court of Justice than American citizens are afforded to the Supreme Court.[13]

B. SUPERVISION OF STATE COURT DECISIONS BY THE SUPREME COURT

The Supreme Court's power to review state court decisions pertaining to federal law is a fundamental feature of American judicial organization. It occurs, usually at the Court's discretion, following a final judgment in the highest state court in which a decision on the federal issue could be obtained.[14] In contrast, the Court of Justice does *not* have such direct appellate jurisdiction over the final decisions of the courts of the member states. While state courts can "refer" questions of Community law to the Court of Justice under the preliminary ruling procedure, there is controversy about whether a state court is obligated to refer all issues of Community law or only those of which it has genuine doubt.[15] Reference occurs *before* a final judgment in the state court is made, and the Court of Justice can give only an abstract "interpretation" of Community law; it cannot decide the correct application of

11. Barav, *supra* note 1, at 471.
12. *Id.*
13. *Id.* at 471-74.
14. Most cases come from the state courts on a writ of certiorari. *See* 28 U.S.C. § 1257 (1976).
15. Barav, *supra* note 1, at 511-13.

Community law on the facts of the concrete case presented. Although there may be some political remedies available to a citizen whose state courts do not correctly apply Community law, it seems clear that the Court of Justice has less supervisory power over the decisions of the state courts than does the United States Supreme Court.

C. Time Limits on the Challenge of Community Enactments

Direct challenges to Community enactments must be brought in the Court of Justice within a short time after their publication or notice to the plaintiff. In the case of regulations, *i.e.*, promulgations of general application, the time limitation apparently means that the Court must assess the validity of enactments before a pattern of enforcement or application has emerged. Moreover, if an enactment is not challenged directly during the short period following promulgation, litigants apparently may lose their right to challenge its validity in subsequent *enforcement* proceedings in the Court of Justice. Litigants, however, may raise the enactment's invalidity by a plea of "inapplicability" in another related action for annulment, or, much more importantly, in an action for damages for harm caused by application of the enactment.[16]

Such short time limits on challenging government action are not unknown to American federal law. The Emergency Price Control Act of 1942,[17] for example, required that a person challenge the validity of price control regulations within sixty days of their promulgation. Such requirements, however, are rare. Generally, a litigant can challenge the validity of a federal law or regulation so long as the regulation remains in force. Moreover, federal law generally does not allow an action for damages for harm caused by enforcement of a law while at the same time disallowing suit for injunctive relief against future enforcement of that law. Indeed, partly because of limitations imposed by sovereign immunity, injunctive relief is often much easier to obtain than is an award of damages.[18]

D. State Court Definition of Community Rights

The Supreme Court of the United States has often been willing to define federal rights with particularity. Famous cases like *Miranda v. Ari-*

16. *Id.* at 479-85.

17. Pub. L. No. 77-421, § 203, 56 Stat. 23 (1942). The time limitation was repealed in 1944. Act of June 30, 1944, Pub. L. No. 78-383, § 203, 58 Stat. 632.

18. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974).

zona[19] and *Roe v. Wade*[20] testify to the Supreme Court's willingness to be specific about the steps that government must take to comply with constitutional norms. Sometimes the Supreme Court has even required state courts hearing issues of federal law to use different procedures than they would follow had the case involved only state law issues. For example, in *Dice v. Akron, Canton & Youngstown Railroad*,[21] the Supreme Court held that when a particular claim under federal law is presented to a state court, the court must deviate from its normal practice and submit to the jury a question normally decided by the judge because jury determinations are important to the federal right involved.[22]

The Court of Justice has been much more reluctant to give specific instructions about what states must do to comply with Community norms;[23] instead, it has accorded state courts substantial leeway to use state procedures in adjudicating Community rights.[24]

II. FEDERALISM AND COURT PRACTICE

The Community's "federal" system allocates far less governmental power to the central government and thus allocates far more of the attributes of sovereignty to the member states than our federal system does. Hence, member states are more significant political entities in the Community than the states are in the United States. This more important status as sovereign nations may partially explain some of the differences in court practice between the European and American systems. Because they are more significant sovereigns, states of the Community can gain access to the Court of Justice, essentially, by simply requesting it. Their lower courts are afforded a significant role in defining the contours of Community law and furthermore, are not subject to direct appellate review by the Court of Justice.

Another partial explanation for the differences in court practice may be that their concept of "citizenship in the Community" is not nearly as well developed as our notion of "citizenship in the United

19. 384 U.S. 436 (1966) (outlining specific procedural safeguards that must be followed during police interrogations to satisfy the fifth amendment protection against self-incrimination).

20. 410 U.S. 113 (1973) (outlining the extent to which state abortion laws may limit a woman's right to terminate her pregnancy without violating the due process clause of the fourteenth amendment).

21. 342 U.S. 359 (1952).

22. *Id.* at 363.

23. Barav, *supra* note 1, at 517-19.

24. *Id.* at 519-25.

States." The idea seems to be that persons should look primarily to their own "state" governments, in the first instance, to protect them from harmful actions of the Community or of other states. The states of the Community therefore recognize a *parens patriae* responsibility vis-a-vis their citizens on Community matters, a responsibility that explains why individual citizens are not often allowed to sue the Community directly in the Court of Justice and why they cannot sue member states in that Court at all.

Numerous other reasons also partially account for differences between Community and American law. Indeed, the constrasting distributions of sovereignty and citizenship do not seem to account for the short time period allowed for direct attack on Community enactments, a limitation that apparently reflects a strong interest in the stability of Community enactments. Nevertheless, let us assume for present purposes that there is a connection between the form of federalism that a political system chooses and the judicial organization and practice that it adopts, and that these two features of federalism partially explain the differences between Community and American practice. What, if anything, can we gain in our thinking about American issues by studying the organization and output of a court that is rooted in a different form of federalistic system?

III. IMPLICATIONS FOR AMERICAN LAW

While it seems clear that the American federal system will never accord states the amount of sovereignty retained by the member states of the Community, we may be witnessing some increase in judicial respect for the political autonomy of state governments. After a period of fairly vigorous protection of state prerogative early in this century,[25] in more recent times the Supreme Court seemed to view federalism as simply a "process" guarantee: So long as the states had had their "day in Congress," the Supreme Court seemed to say, access to a meaningful second forum—the judiciary—was not required.[26] Thus, while the Court was willing to prevent states from unreasonably infringing on each other's interests without congressional approval (by invoking the "negative implications" of the commerce clause),[27] it declined to find that

25. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Hammer v. Dagenhart, 247 U.S. 251 (1918).

26. *See* Perez v. United States, 402 U.S. 146 (1971); United States v. Darby, 312 U.S. 100 (1941).

27. Illustrative cases are collected in G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 144-207 (1975).

any congressional enactments transgressed state policy autonomy.

This pattern, however, arguably was broken by *National League of Cities v. Usery*,[28] in which the Supreme Court sustained an attack against federal legislation that sought to regulate minimum wages and maximum hours of state employees. If *Usery* does signal renewed judicial respect for the political autonomy of the states vis-a-vis the federal government, it can be viewed as moving our concept of federalism—slightly, to be sure—in the direction of the Community model. Thus, it may be timely to ask ourselves whether any of the aspects of the Community's judicial organization and practice might, as a consequence, fruitfully be considered here.

One interesting possibility is the Community's distinction between the standing of states and the standing of citizens to challenge Community law. We could consider a similar distinction, waiving the injury requirement for states generally or, more modestly, waiving it in instances such as *Richardson*[29] in which no other litigant probably could show injury. If such an exception to the injury requirement were adopted, while federal courts would still be able to hold, as the Supreme Court in effect held in *Richardson*, that some *issues* are "political" and hence nonjusticiable, they would have to confront that question directly. Moreover, the other policies thought to preclude suits in the absence of injury would not seem to preclude these state suits. States have litigation resources sufficient to make them worthy adverse advocates, and a state's decision to challenge governmental action would presumably reflect the judgment that there was significant citizen concern in the outcome of the challenge. We would, of course, face the interesting question of who should decide whether the state cares enough to sue. Would it be the governor, the state legislature, the state attorney general, or some combination of these? Perhaps the Community experience could be instructive in this regard, but the question does not really seem significantly more difficult than a state deciding, where there has been injury, whether to sue. In considering whether abandonment of the injury requirement for states would be desirable, it would also be helpful to know whether the absence of an injury requirement has caused other problems for the Court of Justice.

Increased respect for state governments might also lead us to reevaluate our ideas about a *parens patriae* relationship between a state and its citizens. In American law, there is serious doubt about the abil-

28. 426 U.S. 833 (1976).

29. 418 U.S. 166 (1974); *see* text accompanying notes 8-10 *supra*.

ity of a state to represent its citizens in challenging the actions of the federal government or of another state.[30] The Community organization suggests that we might recognize such a relationship, at least in the context of widespread, but small, citizen injury. One of the problems that plagues class actions for damages in federal courts is that the person who seeks to represent the class of injured parties is often thought to be motivated more by the attorneys' fees generated than by a genuine interest in representing the class.[31] States may often represent their citizens more impartially than private attorneys do. Perhaps the state attorney general should therefore be the person presumptively authorized to bring suit for damages in cases of widespread, but small, harm.

The other organizational patterns and procedural practices of the Community seem less appealing to America. Even if we assume that states should be accorded a more significant juristic status, direct review of state court decisions by the Supreme Court is so central to our system that its abolition is unthinkable. Similarly, short time limitations on challenging government action do not accord with our generally accepted idea that a pattern of concrete applications over time enhances the Supreme Court's ability to judge the validity of enactments. Although it also seems unlikely that the Supreme Court would accord state courts a significant role in defining the content of federal rights, it is interesting to note that in recent years some courts have increasingly been affording more protection to the values and interests protected by federal constitutional law than the Supreme Court itself has been willing to afford, by holding that those values and interests are protected not only by the United States Constitution, but by state constitutional law as well.[32]

CONCLUSION

I have attempted to highlight some interesting differences between the Court of Justice and the Supreme Court, to suggest how these differences may in part reflect different distributions of sovereignty and recognitions of citizenship within the two federal systems, and to speculate about the doctrinal changes in Ameican law that might be considered in light of an increased respect for states as political institutions.

30. *See, e.g.,* Massachusetts v. Mellon, 262 U.S. 447, 485-86 (1923); Oklahoma v. Atchison Topeka & Santa Fe Ry. 220 U.S. 277, 288-89 (1911).

31. *See, e.g.,* Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221 (N.D. Ill. 1972).

32. *See, e.g.,* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

There are of course other comparative approaches suggested by Professor Barav's Article.

One could speculate about the doctrinal changes that may occur in the Community as the Community increases in importance as a political institution. For example, it scems plausible that a trend toward an increased importance of the Community would enhance the possibility of direct appellate review of state court decisions in the Court of Justice. Such a trend could also increase the probability of more detailed statements of Community law by the Court. I hope such comparisons will receive both scholarly and judicial attention as the Community and the Court of Justice evolve.