Litigation

Judicial Restraint And The Supreme Court: *Phillip Morris USA v. Williams*

*By Raymond J. Tittmann**

Judicial pragmatists have implicitly ceded the moral high ground to more restrained approaches to constitutional interpretation.[1] People for the American Way (PFAW), for example, did not oppose Judge Alito for rejecting judicial activism. They rather opposed him for allegedly embracing judicial activism: "Judge Alito… has a record of *ideological activism* against privacy rights, civil rights, workers' rights, and more…. far-right *judicial activists* like Samuel Alito… would threaten hundreds of Supreme Court decisions…."[2] Judicial restraint has evidently prevailed, at least in theory.

Reality, however, is a different matter altogether. Many judges now extol the virtue of judicial restraint, but do they practice it? Even the greatest advocates of judicial restraint, such as Justice Alito, are accused of becoming judicial activists clothed deceptively in the rhetoric of judicial restraint. This is a serious accusation. Advocates of judicial restraint ought to examine their own consciences: do they truly follow their own principles of judicial restraint, or is that simply cover for "ideological activism," as PFAW contends?

Philip Morris USA v. Williams: A Litmus Test of Judicial Activism

The U.S. Supreme Court's recent decision on punitive damages, *Philip Morris USA v. Williams,* provides an interesting case study because it pits political ideology against judicial philosophy.[3] While political conservatives generally share the Supreme Court's "concern about punitive damages [ ] 'run wild'," advocates of judicial restraint are hard-pressed to find a constitutional basis to overturn state court jury awards.[4] Conservative political ideology appears to be directly at odds with principles of judicial restraint.

Philip Morris therefore provides an early glimpse into the judicial temperament of Justices Alito and John Roberts. By joining the majority opinion in *Philip Morris*, overturning the punitive damage award based on the Due Process Clause, Justices Alito and Roberts compromised judicial restraint, at least in the strict sense advocated by dissenting Justices Clarence Thomas and Antonin Scalia. Justice Scalia had previously criticized judicial limits on punitive damages for resting on an imaginary "excessive damages clause of the bill of rights."[5]

The Facts and Holding of *Philip Morris*

In *Philip Morris,* an Oregon jury found that plaintiff Jesse Williams' death was caused by smoking and that Philip Morris knowingly and falsely led Williams to believe smoking was safe. The jury awarded $821,000 in compensatory damages and $79.5 million in punitive damages, a ratio of nearly 100:1.[6] The jury had considered evidence of damages to other non-party smokers to justify the high ratio of punitive damages. The trial court reduced the punitive award, which was later restored by the Oregon Court of Appeals. The Oregon Supreme Court rejected Philip Morris' arguments (1) that the trial court should have accepted a proposed jury instruction directing the jury that it could not punish Philip Morris for the injuries of non-parties and (2) that the 100:1 ratio of punitive to compensatory damages was excessive.

The Supreme Court granted certiorari on the second issue, excessive damages, but reversed the decision of the Oregon Supreme Court on the first issue, punishment based on damages to nonparties. A five-member majority held that:

> [T]he Constitution's Due Process Clause [does not] permit[ ] a jury to base that award in part upon its desire to *punish* the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent). We hold that such an award would amount to a taking of "property" from the defendant without due process.[7]

The Supreme Court therefore reversed the punitive damage award.

The majority opinion and the dissents reveal differing degrees of adherence to or rejection of judicial restraint. The four Supreme Court Justices that PFAW probably classifies as "far-right judicial activists" along with Justice Alito split their four votes. Justices Roberts and Alito interpreted the Due Process Clause to prohibit consideration of injury to non-parties, and therefore joined the majority opinion overturning the jury award. Justices Scalia and Thomas dissented, finding the Due Process Clause inapplicable.

Dissenting Opinions of Justices Scalia and Thomas Reveal Strict Adherence to Judicial Restraint

The dissents by Justices Scalia, Thomas and Ruth Bader Ginsburg show judicial restraint with various degrees of consistency, clarity, and force. The dissent by Justice Stevens dismisses judicial restraint altogether by uncritically endorsing substantive due process without recognizing that this is a current field of debate.

Justice Thomas demonstrated the most forceful commitment to judicial restraint in this case. He interpreted the Due Process Clause narrowly to establish *procedural* rights only, not *substantive* rights: "the Constitution does not constrain the size of punitive damage awards."[8] Justice Thomas therefore rejected substantive due process, however pragmatic or just the substantive right might appear.[9]

Justices Ginsburg's dissent, joined by Justices Scalia and Thomas, reached the same conclusion in less absolute terms. Her dissent "accord[s] more respectful treatment to the proceedings and dispositions of state courts," without rejecting the entire line of punitive damage cases outright or stating at what point—if any—she would stop respecting state court dispositions.

Prior decisions, however, shed more light on Justice Scalia and Justice Ginsburg's construction of the Due Process Clause.

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Justice Scalia had previously rejected this line of punitive damage cases because the Due Process Clause did not impose such limitations.[10] Presumably, Justice Scalia still rejects judicially mandated substantive due process limits on punitive damages, though he did not reiterate that position in *Philip Morris*. Therefore, Justices Thomas and Scalia both consistently adhered to principles of judicial restraint, even though the result—and excessive punitive damage award—was contrary to their presumed political preferences, or at least contrary to common sense and good governance.

Justice Ginsburg's history of jurisprudence reveals a broad view of the Due Process Clause, and she specifically relied on substantive due process to overturn state limits on abortion.[11] Her decision to endorse substantive due process in the case of abortion and reject it in the case of punitive damages suggests classic judicial activism—altering a judicial philosophy as it supports the desired result.

Justice Stevens likewise dissented to approve the high punitive damage award, but not based on a narrow interpretation of the Due Process Clause. Indeed, he expressly rejected a narrow interpretation:

> It is far too late in the day to argue that the Due Process Clause merely guarantees fair procedure and imposes no substantive limits on a State's lawmaking power.[12]

Justice Stevens therefore dismisses the debate over substantive due process, not on any principle of judicial construction, but because it was evidently "too late in the day." In fact, the Due Process Clause's silence on substantive limits presented the critical issue in *Philip Morris* for the other dissenting Justices as well as those in the majority.

Majority Opinion Joined by Justices Roberts and Alito Compromises Judicial Restraint

The majority opinion in *Philip Morris* reflects a compromise between judicial pragmatism and judicial restraint. Prior Supreme Court decisions on punitive damages impose substantive limits on "excessive" or "unreasonable" punitive damages, even prohibiting punitive-to-compensatory damage ratios greater than single digits.[13] Had the Justices in the majority here held the same point of view as the majority in prior decisions, they likely would have overturned the 100:1 ratio in *Philip Morris*. Yet the majority in *Philip Morris* did not even address the ratio or the "reasonableness" of the award. Instead the majority in *Philip Morris* focused only on alleged procedural defects:

> Because we shall not decide whether the award here at issue is "grossly excessive," we need now only consider the Constitution's procedural limitations.[14]

In other words, the majority opinion in *Philip Morris* interprets the Due Process Clause to impose certain *procedural* limitations with regard to a punitive damage award without expressly imposing substantive limitations. In so doing, the *Philip Morris* majority strives to have its cake and eat it too, i.e., exercise judicial restraint and rein in punitive damages in the same bite.

The history of Supreme Court punitive damage decisions suggests that the new Justices Roberts and/or Alito played a significant role in this compromise. The other members of the *Philip Morris* majority demonstrated no difficulty applying the doctrine of substantive due process to impose a single-digit ratio in *State Farm v. Campbell*.[15] And yet the *Philip Morris* decision is strangely silent on the single digit rule. The new justices apparently refused to adopt such a rule, presumably because such a substantive limitation is not found in the Due Process Clause. If that is correct, Justices Roberts and/or Alito probably insisted on some judicial restraint as a condition to joining the majority. They deserve credit.

But how much credit? On the one hand, the majority opinion in *Philip Morris* is fairly grounded on a true due process right. *Philip Morris* is based on a recognized procedural right to "present every available defense."[16] Due process prohibits using evidence of non-party injuries where the defendant is unable to conduct discovery as to the nonparties. As the majority opinion explained,

> [A] defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.[17]

Consequently, the holding can be supported by the Due Process Clause.

On the other hand, this "procedural" limitation potentially opens a backdoor to challenge jury awards substantively by characterizing the challenge as "procedural." Creative counsel will search for ways to express every substantive argument can be expressed in procedural terms. Moreover, the majority opinion in *Philip Morris* is ripe with inspiration for such creativity:

- "We have emphasized the need to avoid arbitrary determinations of an award's amount. Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of fair notice… of the severity of the penalty that a State may impose."[18]
- "And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified."[19]
- "We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the potential harm the defendant's conduct could have caused."[20]
- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible…"[20]

Justice Thomas's dissent is therefore well-taken:

> It matters not that the Court styles today's holding as "procedural" because the "procedural" rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages.[22]

He has a point.

Endnotes

1 In general, "judicial restraint" in this article refers to methods of constitutional interpretation focused on the meaning of the words in the Constitution, thus narrowly interpreting clauses even at the risk of allowing politically undesirable results. "Judicial pragmatism" and "judicial activism" are used synonymously, and refer to methods of interpretation focused on reaching politically desirable results. These definitions paint regretfully broad strokes attempting to cover complex judicial philosophies. More subtle distinctions are beyond the scope of this article.

2 People for the American Way Press Release, "Bush Puts Demands Of Far-Right Above Interests Of Americans With High Court Nomination Of Right-Wing Activist Alito," October 31, 2005.

3 127 S. Ct. 1057 (2007).

4 Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

5 *See* TXO Production Corp. v. Alliance Resources, 509 U.S. 443 (1993) (Scalia, J., concurring); BMW v. Gore, 517 U.S. 559 (1996) (Scalia, dissenting).

6 The Supreme Court originally granted certiori to consider the 100:1 punitive-to-compensatory damage ratio in light of the prior Supreme Court's analysis in *State Farm Mut. Ins. v. Campbell*, 538 U.S. 408 (2003). This ratio had been of great interest to litigants because defendants interpret *State Farm* to prohibit double-digit ratios or higher, while plaintiffs interpret *State Farm* more broadly.

7 *Philip Morris*, 127 S. Ct. at 1060.

8 *Id*. at 1067-68 (Thomas, J., dissenting).

9 Justice Thomas previously joined Justice Scalia's dissent rejecting the Court's contention that the Due Process Clause granted "substantive due process" rights against "excessive" punitive damages, because the Clause refers only to due *process. See, e.g.,* BMW of North America v. Gore, 116 S. Ct. 1589, 1611 (1996) (J. Scalia, joined by J. Thomas, dissenting). Justice Thomas cited this dissent from *Gore* again in *Philip Morris*.

10 *See supra* note 8.

11 Justice Ginsburg, before her nomination to the Supreme Court, stated that abortion rights were not appropriately founded in the Fourteenth Amendment's Due Process Clause. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L.Rev. 375 (1985). As Supreme Court Justice, she nevertheless relied on substantive due process to enforce abortion rights. Stenberg v. Carhart, 530 U.S. 914 (2000) (Ginsburg, J., concurring) (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 877 (1992) ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall 'deprive any person of life, liberty, or property, without due process of law.'").

12 *Philip Morris*, at 1067 (Stevens, J., dissenting).

13 The single digit rule was established in *State Farm*.

14 *Philip Morris*, 127 S. Ct. at 1063.

15 *538* U.S. *408 (2003).*

16 *Id*. at 1063 (citing Lindsey v. Normet, *92* S.Ct. 862 (1972)).

17 *Id*. at 1063.

18 *Id*. at 1062.

19 *Id*. at *1063.*

20 *Id*.

21 *Id*. at 1064.

22 *Id*. at 1067 (Thomas, J., dissenting).