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John Paul Stevens

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Cover Page Footnote

Associate Justice, Supreme Court of the United States. These remarks were made on September 30, 2005, at the Symposium on The Jurisprudence of Justice Stevens held at Fordham University School of Law. The transcript of Justice Stevens's remarks has been lightly edited.

LEARNING ON THE JOB

*John Paul Stevens**

When I was a student at the University of Chicago, I assumed that Robert Hutchins and Mortimer Adler, who taught the “Great Books” class, were the wisest and best-educated men on the campus, if not in all of academia. It was unsettling to learn that they had opposite views on the most important issue facing the country: whether to provide active assistance to Britain in its war against Hitler.

When I was a law student at Northwestern, I assumed that the opinions of Justice Holmes and Justice Brandeis would contain the correct answers to questions of constitutional law. It was unsettling to learn that they had reached different conclusions in the *Pennsylvania Coal* case that is the source of our regulatory takings jurisprudence.¹

When I became a federal judge in 1970, I thought that the text of the Due Process Clause defined the limits of its coverage. A literal reading of that text provides procedural safeguards, but has no substantive conduct.

When a panel on which I sat was confronted with the question whether the Fourteenth Amendment protected the right of a father who had received Lamaze training to be present at the birth of his child, I assumed that a citation to Holmes’s dissent in the *Lochner* case would provide adequate authority for rejecting the claim.² It was only after a careful reading of that dissent that I realized that Justice Holmes’s rejection of the constitutional claim in *Lochner* rested on a “judgment or intuition more subtle than any articulate major premise,”³ rather than on the text of the Clause. He reasoned that

the word “liberty” in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.⁴

It was after my belated discovery that Justice Holmes’s understanding of so-called substantive due process was not defined in constitutional text that

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1. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

2. See *Fitzgerald v. Porter Mem’l Hosp.*, 523 F.2d 716 (7th Cir. 1975).

3. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

4. *Id.*

I took note of Justice Brandeis's confession that his comparable opinion had been formed after he had become a judge. I refer to these two sentences in his stirring opinion in *Whitney v. California*:

Despite arguments to the contrary which had seemed to me persuasive, it is [now] settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the states.⁵

Although Justices Holmes and Brandeis both recognized that the Due Process Clause contains a substantive component, they did not always agree on the scope of its protections. For instance, in 1923 Brandeis, unlike Holmes, joined the Court's opinion in *Meyer v. Nebraska*,⁶ setting aside Meyer's criminal conviction for teaching the German language to a ten-year-old child. On the other hand, two years later, both Holmes and Brandeis joined the opinion in *Pierce v. Society of Sisters*,⁷ holding that the liberty of parents to direct the upbringing of their children included the right to have them educated in parochial schools and military schools.

Holmes's different votes in those similar cases may indicate that he placed a higher value on parents' right to choose an educational institution for their children than on the right to study a foreign language, or it may indicate a change in his understanding of the idea of liberty. Whatever may have been true of Holmes, I know that I, like most of my colleagues, have continued to participate in a learning process while serving on the bench.

One of my favorite examples is my experience with a patronage case that arose out of the designation in 1970 of a Republican secretary of state in Illinois. The new secretary, a Republican, had allegedly discharged all of those non-civil-service employees who had been hired by his Democratic predecessor and who declined to become Republicans. The appeal presented the legal question whether non-policy-making employees, including janitors, clerical workers, and license examiners, could be discharged for refusing to transfer their political allegiance from one party to another.

When I first looked at the papers, I was happy to have such an easy case to decide. Like both of my colleagues on the panel, I thought it obvious that patronage practices, which had long been entrenched in American history, must be constitutional.

Nevertheless, argument and study of the First Amendment cases cited by the Court in *Perry v. Sindermann*⁸ convinced me that the plaintiffs had alleged an impermissible basis for their discharge. I concluded my rather laborious opinion, which neither of my colleagues joined, by observing that even though "the patronage system is defended in the name of democratic

5. *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

6. 262 U.S. 390 (1923).

7. 268 U.S. 510 (1925).

8. 408 U.S. 593 (1972).

tradition, its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment.”⁹

The separate concurrence written by Judge Campbell made it perfectly clear that he also had not expected to appraise the case as he ultimately did. It is that case that first persuaded me that a judge’s pre-argument predictions should not be admissible in confirmation hearings because they are inherently unreliable.

The opinions in three later Supreme Court cases, each raising a question similar to the one that Judge Campbell and I confronted on the Seventh Circuit, also support that proposition.

In 1976, the Court upheld a similar complaint arising out of the Cook County Sheriff’s patronage practices.¹⁰ Justice Powell, joined by Chief Justice Burger and then-Justice Rehnquist, dissented. Four years later, however, Chief Justice Burger joined a majority of the Court in concluding that two assistant public defenders were protected from discharge because of their political beliefs.¹¹ More recently, in *O’Hare Truck Service v. City of Northlake*,¹² Chief Justice Rehnquist joined a majority opinion in which the Court concluded that an independent contractor had stated a cause of action by alleging that the mayor of Northlake, Illinois, had removed his company from a list of firms eligible to perform towing services because he had refused to contribute to the mayor’s electoral campaign.

In each of these cases the decision of the Court was faithful to the law as it had previously developed. However, I cite them not for that reason, but because they demonstrate that pre-argument predictions about how a judge or Justice is likely to vote are far less significant than the knowledge that he or she will analyze the cases with an open mind and with respect for the law as it exists at the time of the decision.

The importance of full argument and deliberation has been confirmed during my time as an Associate Justice in other ways. Perhaps most striking in this regard are those cases in which summary dispositions, or proposed summary dispositions, differed dramatically from the ultimate decision.

In my first Term on the Court, we were presented with an appeal from a three-judge district court decision upholding the criminal conviction of a man who had violated Virginia’s sodomy statute. Justice Blackmun was a member of the six-Justice majority that concluded that the appeal did not even raise a substantial federal question. A few years later, however, with the benefit of full briefing and argument, he authored an eloquent dissent in *Bowers v. Hardwick*,¹³ which later became law.¹⁴

9. *Ill. State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972).

10. *See Elrod v. Burns*, 427 U.S. 347 (1976).

11. *See Branti v. Finkel*, 445 U.S. 507 (1980).

12. 518 U.S. 712 (1996).

13. 478 U.S. 186, 199 (1986).

14. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

Equally dramatic is the contrast between the final ruling of the unanimous Court in *Palmore v. Sidoti*¹⁵ and the Court's reaction to the case when it first appeared on the conference list. The case involved a dispute between divorced Caucasian parents over the custody of their daughter. In the 1980 divorce decree, custody of the three-year-old child was awarded to the mother, who later married an African-American. Without any evidence that the mother had become unfit, the Florida court entered an order transferring custody to the father in order to protect the child from anticipated "social stigmatization."¹⁶

By a vote of 8-1—and I am proud that I was the one—the Court denied an application to stay the mandate of the Florida court transferring custody. However, after granting certiorari and hearing argument, we unequivocally held that the effects of racial prejudice, however real, could not justify the removal of an infant child from the custody of her natural mother. Of course, despite the clarity of the Court's opinion, that is exactly what its earlier refusal to stay the order modifying custody had done.

A few years earlier, the Court had been required to decide the fate of the snail darter, an endangered species that was threatened with extinction by the completion of a dam on the Little Tennessee River.¹⁷ I think the case may have played a role in stimulating Dan Farber's interest in environmental law.

In May of 1977, when the government sought certiorari from the court of appeals' order enjoining the operation of the virtually completed project, Dan wrote me a memo stating that the "arguments made in the petition are so feeble that it is surprising that the S.G.'s office was willing to take the appeal."

When the case appeared on the conference list in September, however, there appeared to be a majority favoring not just a grant of certiorari but a summary reversal, and the case was relisted for the preparation of a per curiam opinion. The draft per curiam prompted two dissents, one by Justice Stewart and one by myself, as well as a concurrence by Justice Powell. The proposed summary disposition did not carry the day and certiorari was granted.

After the oral argument, in which Griffin Bell, then Attorney General, brought a snail darter in a glass jar into the courtroom to dramatize the de minimis character of the public interest at stake, the Court, by a vote of 6-3, upheld the injunction. The excellent and thoroughly persuasive opinion for the Court was authored by Chief Justice Burger and joined by Justice White, both of whom had favored a summary reversal in the fall.

The judicial learning process is ongoing in other areas of the law, such as affirmative action and the prohibition against taking private property for public use without just compensation.

15. 466 U.S. 429 (1984).

16. *Id.* at 431 (citation omitted).

17. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

During my early tenure on the Court, I thought it perfectly clear that the Civil Rights Act of 1964 prohibited discrimination against whites as well as blacks, even though Congress was principally concerned with discrimination against minorities. I joined Justice Marshall's opinion for the Court expressing that understanding of Title VII in the *McDonald* case,¹⁸ I explained why Title VI was also colorblind in my opinion in the *Bakke* case,¹⁹ and I would have joined Justice Rehnquist's dissent in the *Weber* case,²⁰ in which he disagreed with the majority's conclusion that Title VII permits private employers to adopt voluntary race-conscious affirmative action plans, had I not been disqualified. I remain convinced that Justice Rehnquist's thorough analysis of the legislative history of the statute was entirely correct. The majority in *Weber* came to a different conclusion, however, and since Congress has acquiesced in that reading of the law, we must accept it.

With respect to the constitutionality of affirmative action, we have learned that justifications based on past sins may be less persuasive than those predicated on anticipated future benefits.

I remember a conversation with my good friend Lewis Powell a few days before the argument in the *Wygant* case,²¹ which presented the question whether a school board had violated the Equal Protection Clause by extending preferential protection against layoffs to the few black teachers on its faculty. As we parted, we agreed that we were happy to have a case in this area of the law that would be easy to decide. Neither of us realized why the other thought it easy. Indeed, it was decided in a plurality opinion by Justice Powell from which I dissented.

In my view, the school board's action permissibly advanced the public interest in educating children for the future. A comparable interest in the educational benefits associated with a diverse student body persuaded Justice O'Connor to uphold the Michigan Law School's affirmative action policy a few years ago.²² We've referred to that earlier.

We have learned that there is a critical difference between using race as a criterion for hiring when the race of the employee is not directly related to the objectives of the employer—for example, in the construction of highways—and recognizing its relevance in law enforcement and educational contexts.

We have yet to appreciate fully, however, the important difference between a decision to include members of a minority race in a protected class and a decision to exclude them from preferred treatment. As I wrote in *Wygant*, the "inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that

18. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

19. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 412-21 (1978).

20. *United Steelworkers v. Weber*, 443 U.S. 193, 219-55 (1979) (Rehnquist, J., dissenting).

21. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

22. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

principle.”²³ A presumption of validity should attend a decision by the majority to extend benefits to a disadvantaged class. In its racial gerrymandering cases, the majority fashioned standards that enabled them to condemn districting decisions that were designed to include more minority participation in the political process.²⁴ Ironically, the Court has since concluded that such standards are inapplicable to address districting decisions that disadvantage political minorities.²⁵

Two cases this Term shed light on the learning process in our takings law. Justice O’Connor’s exceptionally lucid opinion for a unanimous Court in *Lingle v. Chevron*²⁶ repudiated a dictum that had been treated as a settled part of our takings jurisprudence for a quarter of a century. She explained that the statement in *Agins v. City of Tiburon*²⁷ that government regulation of private property effects a taking if it “does not substantially advance legitimate state interests” had been derived from due process, rather than takings precedence, and that it “has no proper place in our takings jurisprudence.”²⁸

Whereas *Lingle* corrected a past misunderstanding, the second case, *Kelo v. City of New London*,²⁹ which upheld an integrated development plan designed to revitalize a city’s economy, adhered to precedent while noting that different plans may well pose questions for the future.

Though much criticized, the *Kelo* opinion was surely not an example of “judicial activism” because it rejected arguments that federal judges should review the feasibility of redevelopment plans, that they should evaluate the justification for the taking of each individual parcel rather than the entire plan, and that they should craft a constitutional distinction between blighted areas and depressed areas targeted for redevelopment. Indeed, the dissent criticized the opinion for being unduly deferential to the decisions of state legislative and administrative bodies.

A second criticism, however, brings me back to the thought that I expressed at the outset of these remarks. It is the criticism that the opinion was not faithful to—indeed, that it was “wholly divorced from”—the text of the Constitution.³⁰ The relevant constitutional text provides that private property shall not “be taken for public use, without just compensation.”³¹ As Justice O’Connor explained in her *Lingle* opinion, that text does not prohibit any taking of private property, but instead merely places a condition on the exercise of the takings power.³² Thus, just as a purely literal reading of the text of the Due Process Clause would confine its

23. *Wygant*, 476 U.S. at 316.

24. *See, e.g., Shaw v. Reno*, 509 U.S. 630 (1993).

25. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004).

26. 125 S. Ct. 2074 (2005).

27. 447 U.S. 255, 260 (1980).

28. *Lingle*, 125 S. Ct. at 2087.

29. 125 S. Ct. 2655 (2005).

30. *Id.* at 2687 (Thomas, J., dissenting).

31. U.S. Const. amend. V.

32. *Lingle*, 125 S. Ct. at 2080.

coverage to procedural safeguards and entirely eliminate its substantive protections, including those that have made provisions of the first ten Amendments applicable to the states, a purely literal reading of the Takings Clause would limit its coverage to a guarantee of just compensation.

We have nevertheless assumed that the reference to “public use” does describe an implicit limit on the power to condemn private property, but over the years we have frequently and consistently read those words broadly to refer to a “public purpose.” Because one of the opinions rejecting “use by the public” as the proper interpretation of those words was authored by Justice Holmes, and because the debate between Holmes and Brandeis in the *Pennsylvania Coal* case demonstrates that Brandeis’s views with respect to takings were even more deferential than Holmes’s, I am confident that both of them would have endorsed our holding in *Kelo*, just as both of them ultimately endorsed the doctrine of substantive due process.

I suspect that Justices Holmes and Brandeis would also agree that learning on the job is essential to the process of judging. At the very least, I know that learning on the bench has been one of the most important and rewarding aspects of my own experience over the last thirty-five years.

Thank you very much.

Notes & Observations