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Judicial Restraint†

JUSTICE JOHN PAUL STEVENS

Judges, like other thoughtful Americans, love mystery. Justice Rehnquist began his dissenting opinion in a case presenting a rather technical question of statutory construction by observing that the "effort to determine congressional intent here might better be entrusted to a detective than to a judge." He drew an inference from the silence of Congress that paralleled the reasoning of Sherlock Holmes who had recognized the significance of a watchdog's silence when a critical event occurred in its presence. The skillful author of a mystery story may provide us with a handful of clues in his first chapter, but then require us to consider a variety of alternative solutions while the story unfolds before we realize just why the dog failed to bark.

The Constitution of the United States is a mysterious document. The wisdom that created the Constitution is evidenced not only by the handful of clues that are set forth in its text, but also by what the document does not say. The text does not expressly tell us why so many questions are left unanswered — why the power to answer them was delegated to future generations of lawmakers — or even

† Address by Justice Stevens, *The Nathaniel L. Nathanson Memorial Lecture Series* at The University of San Diego School of Law, San Diego, California (October 10, 1984).

2. See id. at 596, 602. In his account of the "Silver Blaze" Holmes had explained:

Before deciding that question I grasped the significance of the silence of the dog, for one true inference invariably suggests others. The Simpson incident had shown me that a dog was kept in the stables, and yet, though someone had been in and had fetched out a horse, he had not barked enough to arouse the two lads in the loft. Obviously the midnight visitor was someone whom the dog knew well.

A. DOYLE, *THE COMPLETE SHERLOCK HOLMES* 349 (1905).
how some rather obvious questions should be resolved.

Article II vests executive power in the President, and expressly authorizes him to appoint various officials. It provides that:

[He shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.]

Curiously, although the President's power of appointment is thus carefully defined, except for the guarantees of life tenure for judges and the description of the impeachment process, the constitutional text does not mention the power of removal. Specifically, it does not tell us whether an officer appointed by the President with the consent of the Senate may be removed by the President without such consent.

That question has been debated more than once. In 1789, when Congress enacted legislation creating the Department of Foreign Affairs, it apparently concluded that the President did have the power of removal, at least in the absence of legislation purporting to constrain that power. In 1867, when it enacted the Tenure of Office Act, Congress decided that officers appointed with the consent of the Senate should not be removed without such consent. The confrontation between Congress and President Johnson over that Act was the subject of impeachment proceedings; nevertheless, it was not until 1926 that the Supreme Court squarely addressed the question— as it is framed in the first sentence of Chief Justice Taft's opinion in the Myers case— "whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate."

The extended opinion by the Chief Justice concluded by first noting that the Court had "studiously avoided deciding the issue until it was presented in such a way that it could not be avoided," and then holding

that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.

The Myers case, however, did not by any means provide us with the last chapter in the story of the President's power of removal.

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3. U.S. CONST. art. II.
5. See id. at 166.
6. Id. at 106.
7. Id. at 176.
Less than a decade later, in *Humphrey's Executor v. United States*, the Court unanimously held that President Roosevelt's removal of a member of the Federal Trade Commission was invalid because his action did not comply with the governing statute. At the end of an opinion that described the so-called "quasi-legislative" and "quasi-judicial" powers of the commission, the Court wrote:

To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.9

The "field of doubt" described by Justice Sutherland provided fertile ground for discussion in the constitutional law class taught by Professor Nathaniel L. Nathanson at the Northwestern University School of Law in 1945. Like other students in that class, I felt that I could often tell whether a case had been decided correctly or incorrectly by reference to certain fundamental propositions. I placed special confidence in these: "Ours is a government of laws, not men." "The Constitution created a government in which three kinds of power — Legislative, Executive, and Judicial — are to be exercised by three separate branches — the Congress, the President, and the Judiciary." On a somewhat more sophisticated level, I knew that a case decided in the 1920's — a period that was perceived by freshman law students in the 1940's as only slightly less remote than the dark ages — was wrongly decided if Justice Holmes and Justice Brandeis dissented — as they had in the *Myers* case — whereas a case decided in the 1930's was surely correct if those two jurists joined the opinion — as they had in the case of *Humphrey's Executor*. The use of Justice Brandeis' position as a litmus test seemed particularly safe because we knew that Professor Nathanson — "Nate" as his students affectionately referred to him in their private conversations — had served as a law clerk to the great Justice and therefore could be counted on to align himself with his mentor's views.

The questions that were raised during our class discussion of these two cases were not nearly as easy, or as predictable, as we had anticipated. Surprisingly, the Professor's questions treated the rationale of Chief Justice Taft's majority opinion and the rationale of Justice

9. Id. at 632.
Brandeis' dissent with equal respect. His questions implied that we should understand both arguments before deciding to prefer one over the other. They also implied that there might be a difference of constitutional significance between the power of appointment and the power of removal, and also between the latter power and the power to suspend an employee, and, of course, that the Legislature's power to place conditions on the Executive's power of removal might depend on whether the condition was a flat legislative veto or merely the formulation of a governing standard. But then one could not be confident that any of these distinctions really mattered because the unanimous opinion in *Humphrey's Executor* had relied on the overriding distinction between an office that was purely executive in character and one that could be characterized as "quasi-legislative" or "quasi-judicial." The description of such hybrids in the Court's opinion had, of course, had a somewhat unsettling effect upon the freshman law student's original understanding of the basic doctrine of separation of powers, but even more unsettling was the Professor's line of questioning that seemed to undermine the Court's implicit assumption that an executive officer such as the postmaster general does not exercise any rulemaking or adjudicatory authority. Was such an officer performing a purely executive task when he decided whether a postcard was too obscene to be mailable?

After a number of class sessions it eventually began to dawn on the students that we were not merely talking about the Executive's power of removal, or about the Legislature's power to attach conditions to that power, but rather about the whole doctrine of separation of powers. The omission from the text of the Constitution of any reference to the power of removal suddenly seemed insignificant compared to the omission of any categorical description of the principles that either prohibited or delimited the exercise of Legislative, Executive, or Judicial power by a particular branch of the Government. When we began to feel that we had at long last perceived the underlying issue that our Professor was raising with us, we assumed that he would begin to provide us with some of the answers that we could use when the time of real decision — final examination — arrived. For we knew that our Socratic dialogue had been led by a truly great mind, a man who was helping us to get an understanding of our basic law with the complete impartiality and intellectual honesty of the pure scholar, and one whose experience and training had given him a peculiar ability to answer questions about the meaning of the Constitution.

Categorical answers, however, were not forthcoming. Instead, Nat — as I later came to know him — surprised us by introducing new material that we considered outside the record that we had been required to study. He called our attention to the arguments that had
been raised in the briefs in the *Humphrey* case concerning the difference between the critical statutory language in the two cases and left us with the question why the Court had chosen to base its decision on a rationale that ignored the statutory points. Instead of answers, we had been given not merely another question, but a whole new line of inquiry to be used in seeking an understanding of a Supreme Court opinion.

One reason I have dwelt on the discussion of these two cases is to suggest why Nat’s constitutional law class came to be known as “Nate’s Mystery Hour.” A more important reason is to provide you with a background for understanding a few sentences that he wrote more than thirty years after I studied under him. In a talk that he gave to a Northwestern alumni faculty luncheon in 1976 — which he appropriately titled “The Mystery of Teaching Law” — he explained that one who is engaged in “teaching for the long pull” endeavors to impart some understanding of “the basic themes that appear again and again in different guises over the years.” He referred to his faith “that such understanding will provide our students with a firm foundation for grappling with problems that none of us can foresee, except in their most elemental and perhaps abstruse terms, separated from the contemporary garb of the future which will give them a new vitality and significance.” According to Nat, the law teacher’s function

is to some extent a negative one: we are the sworn enemies of the glittering half-truths, the oversimplified explanations. We are constantly at war with our own offspring, the black-letter law, the restatements, the hornbooks, and their latest West Publishing Company incarnation, which purport to give the basic law of each subject “in a nutshell.”\(^\text{10}\)

Professor Nathanson’s refusal to unravel the mystery of the *Myers* case with a succinct statement of a black-letter rule defining the scope of the President’s power of removal is not entirely explained by his teaching philosophy. It also rested, in part, on his conviction that it is often wise to avoid answering profound questions of constitu-

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10. Nathanson, *The Mystery of Teaching Law*, Nw. Rep., Winter 1977, at 9. It is interesting to compare these comments with Professor Nathanson’s earlier description of his professor’s respect for the doctrine of judicial restraint:

This cautious refusal to go a step beyond the necessities of the issue presented may try the patience of those anxious for guiding principles to control the course of future proceedings. For those more impressed with the proclivity of ambitious dicta to mislead rather than illuminate, the Justice’s rigorous restraint may have much to recommend it.

tional law for as long as possible. This, of course, is the accepted doctrine, as Chief Justice Taft had noted in his *Myers* opinion. It increases the likelihood that the answer, when given, will be fully informed, and tends to minimize the risk of error associated with premature decision. But in an article about the separation of powers doctrine that he penned in 1981, Professor Nathanson made a quite different point concerning the desirability of postponing the decision of constitutional questions. He suggested that positive benefits may be associated with indecision and uncertainty in some contexts. The suggestion is made at the end of an article which actually provides us with some of Nat’s answers to the questions presented by the *Myers* and *Humphrey’s* cases and which explains the basis for his opinion that the legislative veto was constitutional. The concluding sentences of that article merit quotation in full:

I would not want my support of the constitutional validity of the congressional veto to be interpreted as support for its political wisdom or its administrative practicality. On the whole, it seems to me that the experience with the congressional veto demonstrates its undesirability except in very limited circumstances. Somewhat paradoxically, I am also inclined to doubt the desirability of a judicial resolution of this vexing question. Even though I disagree with the President’s legal position on the congressional veto, I would not like to see it irrevocably decided against him.

At this point, Professor Nathanson noted that former Attorney General Levi had expressed a different opinion on the merits of the constitutional issue but had also suggested that judicial resolution of the question might nevertheless be undesirable. Nat then concluded:

[I]n some areas of government consistency, like certainty, is not the greatest desideratum. In my view, this is one of those areas. The use of the congressional veto should not be encouraged, but neither should it be constitutionally outlawed. The President should be left free to insist upon his view of constitutionality and the Congress upon its view. If both are reasonably uncertain of success, perhaps neither will be apt to push for final resolution.

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12. Professor Nathanson expressed his agreement with the following comment by former Attorney General Levi:

Resolution of such disputes provides a kind of certainty. But this is an area of great difficulty, requiring caution. There is no doubt that judicial intervention is sometimes essential. However, the danger in attempting to provide final answers is not only that the courts will inevitably alter the balance between Congress and the Executive in the context of a particular situation, but also that the very nature of this kind of determination, when the interactions of a government of checks and balances are involved, may then require continuing judicial supervision. This would constitute a removal to the courts of judgments of responsibility and discretion, and would significantly alter the balance between the courts and the other branches. The consequence may well be to weaken rather than strengthen accountability. We are sometimes said to be a litigious people, but the Constitution, while it establishes a rule of law, was not intended to create a government by litigation. A government by representation through different branches, and with interaction and discussion, would be much nearer the mark.

In terms of the particular controversies now pending, it seems hardly thinkable that Congress would risk the constitutionality of the veto as a whole upon the provision of the Education Act regulations now in dispute. Conversely, it seems highly unlikely that the Federal Trade Commission would dare to ignore a concurrent resolution of the Congress disapproving one of its regulations. If neither Congress nor the President were inclined to litigate the constitutional question, it is also possible that the Court might continue to find ways to avoid deciding the issue even if it were pressed by private parties. To my mind, this would, for the foreseeable future, be the happiest solution.13

The fields in which the powers of the three Branches of Government overlap are not the only areas in which neither consistency nor certainty is the greatest desideratum. Nor are they the only areas in which the process of constitutional adjudication may be well served by a policy of procrastination and indecision. Another such area encompasses the troublesome issues raised by the kind of affirmative action program that was adopted by the University of California Medical School and challenged in the Bakke case.14 Although this point is not expressly made in an article that Professor Nathanson co-authored for the Chicago Bar Record in 1977 before the Supreme Court decided the Bakke case, his concluding paragraph is implicitly concerned with the impact of the passage of time on the process of constitutional adjudication. Because that paragraph will serve to remind us of both the difficulty and the importance of the constitutional issues, I shall read it to you:

For a great many reasons, it would be unwise to abandon strict judicial scrutiny of racial classifications. Quotas and ratios can be used as easily to exclude minorities as to admit them. Minority preferences may serve a compelling interest in today's society, but it does not follow that they should be institutionalized as a normal part of the American social scene. As emergency measures, they are temporary expedients, designed as a response to the traumatic experiences of the 1960's and the warnings of the Kerner Commission report. The sooner their objectives of integration and racial equality are achieved, the more quickly can racial preferences be dispensed with in education and employment. As the opinion in Shelly v. Kraemer wisely observed: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." It would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life. But this is not the rationale for programs of preferential treatment; the acid test of their justification will be their efficacy in eliminating the need for any racial or ethnic preference at all. At most, they are entitled to a reasonable trial period. If they serve their purposes well enough, they should disappear of their own accord. If they fail, they should be abandoned in favor of other

alternatives. But no court is in a position to make this ultimate determina-
tion now, and it will be years before sufficient data are available to enable a
court to form a reasoned judgment. Until that time comes, preferential
treatment should receive a carefully qualified judicial approval, accompa-
nied by clear notice that it may subsequently be withdrawn, either because
the programs have substantially served their purpose or because they have
been fairly tried and found wanting.\textsuperscript{16}

When Nat wrote that paragraph, and when I first read it, it was
generally assumed that the \textit{Bakke} case presented only a constitu-
tional issue. The briefing of the case in the Supreme Court, however,
made it apparent that it was possible that the decision of the Califor-
nia Supreme Court might be affirmed on a statutory ground that
would have obviated the need to address the constitutional issue. I do
not propose to reargue the merits of the statutory issue, but I think it
may be useful, with the benefit of hindsight, to consider whether the
orderly development of the law might have been better served if the
statutory issue had been decisive. In reflecting about that question
one must not forget that while the case was pending there was a
great public interest in receiving a definitive and clear cut answer to
the constitutional question from the Court as promptly as possible.
Indeed, both parties to the litigation asked the Court to determine
the legality of the University's special admissions program on consti-
tutional grounds.

The relevant statutory language, Section 601 of the Civil Rights
Act of 1964, provides:

\begin{quote}
No person in the United States shall, on the ground of race, color, or
national origin, be excluded from participation in, be denied the benefits of,
or be subjected to discrimination under any program or activity receiving
Federal financial assistance.\textsuperscript{16}
\end{quote}

The record established that the University, through its special ad-
missions policy, had excluded Bakke from participation in its pro-
gram of medical education because of his race. The University had
also acknowledged that it was receiving federal financial assistance.
Believing that the statute contained a straightforward prohibition
against discrimination on account of race, four Members of the
Court concluded that their duty to affirm was clear.

The majority, however, was persuaded that Congress had intended
to enact a narrower prohibition — one that was coextensive with the
coverage of the equal protection clause of the fourteenth amend-
ment.\textsuperscript{17} Thus, to the extent that there might have been uncertainty

\begin{enumerate}
\item Nathanson \& Bartnik, \textit{The Constitutionality of Preferential Treatment for
\item In view of the clear legislative intent, Title VI must be held to proscribe only
those racial classifications that would violate the Equal Protection Clause or the Fifth
Amendment.
\end{enumerate}

438 U.S. at 287 (Opinion of Powell, J.).
in the meaning of the constitutional provision in 1954, Congress in effect delegated to the Judiciary the task of defining the precise contours of the statutory prohibition it was enacting. As a result of this delegation, two extremely significant later interpretations of the constitutional provision — the holding in Washington v. Davis, 18 that only intentional discrimination is prohibited by the equal protection clause, and the implicit holding in Bakke itself that some measure of affirmative action is constitutionally permissible — are now a part of the statute even though it is arguable that in 1964 Congress could not have anticipated either holding.

The majority’s conclusion in Bakke that it had a duty to provide guidance concerning the meaning of the Constitution has, of course, created some uncertainty concerning the meaning of Title VI, and also, perhaps, of other federal statutes that were patterned after it. The array of opinions in the Guardians case 19 illustrates some of the confusion that has been engendered by the narrow construction of Title VI that confines its coverage to intentional discrimination. Perhaps, as judges like to suggest, that confusion should be attributed to Congress for failing to express its meaning in plainer language. The rejoinder from the Legislature, of course, would imply that closer attention to the policy of judicial restraint might have avoided the confusion entirely.

A determination that the University of California’s quota system violated Title VI would have had precisely the same impact on Alan Bakke’s medical career as the Court’s actual disposition. The impact of such a holding on affirmative action in educational programs receiving federal financial assistance would, however, presumably have been significant enough to require Congress to consider some of the policy questions that are raised by these programs. Congressional consideration of the extent to which affirmative action has been, or may become, successful in achieving the objective of full integration and true racial equality would help us to understand whether these programs should be characterized as temporary expedients or as

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In sum, Congress’ equating of Title VI’s prohibition with the commands of the Fifth and Fourteenth Amendments, its refusal precisely to define that racial discrimination which it intended to prohibit, and its expectation that the statute would be administered in a flexible manner, compel the conclusion that Congress intended the meaning of the statute’s prohibition to evolve with the interpretation of the commands of the Constitution.

438 U.S. at 340 (Opinion of Brennan, White, Marshall, and Blackmun, JJ.).
permanent institutions. Experience in other areas of constitutional adjudication suggests that even though the basic themes that characterize the advantages and disadvantages of affirmative action can readily be discerned, the contemporary garb in which these programs will appear in the future may not be entirely clear and that further study in a legislative forum, as well as elsewhere, would minimize the risk of error associated with the ultimate judicial resolution of the underlying constitutional questions.

Avoiding the constitutional issue in the *Bakke* case arguably would itself have been nothing more than a temporary expedient. But one cannot be sure how soon the constitutional issue would again have been presented in a justiciable context. Moreover, no matter how the issue might ultimately be decided, the passage of time might soften the impact of the decision — either because of the gains in minority participation in our professions that are achieved while the debate is carried on, or because the opponents of these programs might be more willing to accept them as a fair solution to a serious problem.

The actual disposition of the constitutional question presented in the *Bakke* case has been criticized because there was no single opinion for the Court, because it is arguable that there is some internal inconsistency in the prevailing opinion, and because it cannot be confidently asserted that all constitutional doubts concerning affirmative action programs have been finally put to rest. Two points, however, must be remembered: First, that the author of the prevailing opinion is an exceptionally wise judge; and second, that an "intuition more subtle than any articulate major premise" may have persuaded him that a measure of uncertainty and inconsistency was an essential characteristic of the disposition of the case that would best serve the national interest at the time it was decided.

The doctrine of judicial restraint concerns the substance as well as the timing of judicial decisions. It is, of course, axiomatic that the judge is obligated to apply the law as he understands it to be rather than as he thinks it ought to be. I believe that every judge with whom I have served has conscientiously endeavored to perform that obligation. Judges often differ, however, not only with respect to the merits of particular issues, but also with respect to the number or the scope of the issues that should be decided in a particular case. It is this latter aspect of the decisional process to which the doctrine of judicial restraint has special relevance.

The doctrine teaches judges to focus their attention on the issue that must be addressed in order to decide the case or controversy between the specific litigants before the Court. There seems to be
growing support in the professional literature,\(^{20}\) and in the practice of capable judges,\(^ {21}\) for undertaking what Judge Harry Edwards has described as “wide-angle decisionmaking” in appropriate cases.\(^ {22}\) That type of decisionmaking may be considered desirable because it provides needed guidance to lower courts and gives appellate courts an opportunity for thorough clarification of existing case law. Stated in somewhat different terms, it provides them with the opportunity to state controlling propositions of law in large black letters and to formulate the glittering generalities that law students can memorize and computers can readily store in their data banks.

We must, however, always be conscious of the danger that the

\(^{20}\) See, e.g., Edwards, The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication, 32 CLEV. ST. L. REV. 385, 414 (1983-84). See also a student comment on the Court’s decision in Payton v. New York, 445 U.S. 573 (1980), which agrees with the Court’s disposition of the question presented by the case, but finds the opinion “seriously flawed” because it did not pass on three other questions that the author considers both important and interesting. The Supreme Court, 1979 Term, 94 HARV. L.REV. 75, 178-79 (1980).

\(^ {21}\) See the cases cited in my opinion concurring in part and concurring in the judgment in Berkemer v. McCarty, 104 S. Ct. 3138 (1984).

\(^ {22}\) It is important to note that Judge Edwards’ proposed use of wide-angle adjudication was intended as a very limited exception to the general practice followed by appellate judges. He introduced the subject as follows:

One of the most sacred tenets of appellate decisionmaking in the United States is that, in rendering an opinion, a court should reach only those issues essential to the resolution of the case before it and should discuss those issues only to the extent necessary to dispose of the matter. The principles on which the foregoing injunction is founded are basically sound, even constitutionally mandated. Federal courts may decide only “cases and controversies”; they lack the power to issue wholly advisory opinions. The advantages to well-informed decisionmaking gained by hearing the arguments of parties, each of whom has a significant stake in a live controversy, properly prompts courts to decline to pass upon disputes that have become moot or in which one of the disputants has only a tenuous interest. And similar considerations make courts reluctant to reach issues not briefed by the parties. The net result of these considerations is that we have a tradition of focused adjudication in the United States.

For the most part, I am a strong disciple of focused adjudication and see no good reasons to challenge its traditional application. Nevertheless, there is a highly naive and mythical quality to any suggestion that focused adjudication is or should be the sole method of appellate decisionmaking. It should, I believe, be the predominant method; however, in certain narrow categories of cases, this presumed tradition should give way to what I call “wide-angle adjudication.”

Before proceeding with my thesis, I should stress that what I have to say does not reflect a novel idea. Indeed, I believe that appellate judges, for many years now, have indulged a practice of wide-angle adjudication on appropriate occasions, while simultaneously proclaiming the inviolate virtues of focused adjudication. My mission in this part of the article, therefore, will be to rationalize and justify an existing form of appellate decisionmaking that I find perfectly appropriate in certain limited circumstances.

Edwards, supra note 20, at 410-11.
glittering generality will turn out to be an overstatement that fails to anticipate the contemporary garb in which a basic theme will appear in future cases. Such overstatements may mislead students, judges, and even Presidents of the United States. As Nat has reminded us, we should

Consider, for example, the experience of President Roosevelt relying on Myers v. United States, 272 U.S. 52 (1926), in discharging the Chairman of the Federal Trade Commission, only to be told in Humphrey's Ex'r v. United States, 295 U.S. 602, 626 (1935), that the 'expressions . . . which tend to sustain the government's contention . . . are beyond the point involved and, therefore, do not come within the rule of stare decisis.'

Let me further illustrate the point with a comment on the doctrine of substantive due process. When the Court repudiated the line of cases that is often identified with Lochner v. New York, it did so in strong language that not only glittered but seemed to foreclose forever any suggestion that the due process clause of the fourteenth amendment gave any power to federal judges to pass on the substance of the work product of state legislatures. The passage of time has taught us, however, to beware of any such oversimplified explanation of the doctrine.

24. 198 U.S. 45 (1905).
25. This Court beginning at least as early as 1934, when the Nebbia case was decided, has steadily rejected the due process philosophy enunciated in the Adair-Coppage line of cases. In doing so, it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.


The 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.


The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, "We are not concerned . . . with the wisdom, need, or appropriateness of the legislation." Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to "subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure." It is now settled that States "have power to legislate against what was found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."

The unequivocal repudiation of the doctrine of substantive due process as exemplified by the Court’s decision in *Lochner* might have left us with at least three quite different conceptions of the meaning of the fourth amendment’s prohibition against state action that deprives a person of his liberty without due process of law. First, the Court might have concluded that the clause is merely a guarantee of fair procedure and affords the citizen no substantive protection at all. As Justice White correctly noted in his valuable dissent in *Moore v. East Cleveland*, the Court has never gone quite that far. Instead, “the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension.” Secondly, the Court might have adopted Justice Black’s opinion that while the due process clause has substantive as well as procedural content, its reach should not extend beyond the specific guarantee of liberty set forth in the Bill of Rights. The plurality opinion of Justice Powell, as well as the dissenting opinions of Justice Stewart, and Justice White, in the *Moore* case, all reject this categorical interpretation. A more opened-ended position was expressed by Justice Harlan who described the liberty protected by the clause as “a rational continuum which, broadly speaking, includes the freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.” The fact that

27. Id. at 543.
29. See *Moore*, 431 U.S. at 537.
30. Id. at 544.
31. Poe v. *Ullman*, 367 U.S. 497, 543 (1961) (dissenting opinion). In his separate opinion concurring in the judgment in *Griswold v. Connecticut*, 381 U.S. 479, 499-500 (1965), Justice Harlan expressly rejected the position that “the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some rights assured by the letter or penumbra of the Bill of Rights.” He went on to explain:

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values “implicit in the concept of ordered liberty,” *Palko v. Connecticut*, 302 U.S. 319, 325. For reasons stated at length in my dissenting opinion in *Poe v. Ullman*, supra, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

*Id.*
Justice Harlan's view is the most liberal of the three alternatives that I have identified does not, of course, imply that he had any sympathy for the wide ranging scope of review undertaken by the majority of the Court in the *Lochner* days. Quite the contrary. As Justice White, who of course served with Justice Harlan for several years, stated:

> [N]o one was more sensitive than Mr. Justice Harlan to any suggestion that his approach to the Due Process Clause would lead to judges 'roaming at large in the constitutional field.' *Griswold v. Connecticut*, *supra* at 502. No one proceeded with more caution than he did when the validity of state or federal legislation was challenged in the name of the Due Process Clause.\(^3\)

If, merely for the purpose of class discussion, we assume that there are three broad conceptions of the due process clause — the purely procedural view, the categorical view of Justice Black, and the relatively open-ended view of Justice Harlan — it may be instructive to apply the freshman law student's litmus test in an effort to determine which of the three is the most legitimate. The first step in such a process would be to ask how Justice Holmes had approached this kind of problem.

If Justice Holmes had wanted to use a wide-angle approach to the issue, he might well have explained in straightforward language that the due process clause is merely a guarantee of fair procedure and that it does not give federal judges any power to review the substance of a state's laws. Indeed, his *Lochner* dissent has sometimes been thought to convey that message. But that is not what Justice Holmes' opinion actually said. He wrote:

> General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think 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. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us.\(^3\)

Thus, his opinion actually rested on the narrow proposition that the New York law was surely not irrational — a proposition that was adequate to dispose of the case before him.

We cannot rest entirely on a Holmes opinion, however, because it was Justice Brandeis for whom our Professor clerked. Indeed, it was in the 1934 Term when Nat served his clerkship that Justice Brandeis wrote a Court opinion that is seldom cited but which provides the kind of clue to his judicial philosophy that a person with the genius of Sherlock Holmes can best unravel. Let me bring this lec-

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ture to a close by reading two paragraphs that Professor Nathanson wrote about the case in his article on The Philosophy of Mr. Justice Brandeis and Civil Liberties Today, and then adding a brief postscript.

Consider, for example, Brandeis's opinion for the Court in Nashville, Chattanooga and St. Louis Railway v. Walters, holding that the state supreme court had erred in refusing to consider as relevant to the due process question proof of special facts designed to establish that it was arbitrary and unreasonable to require a railroad to bear half the cost of constructing an underpass required by the state. The special facts presented by the railroad to sustain this position were that the underpass was prescribed as part of a national system of federal aid to highways for the furtherance of motor vehicle traffic, much of which consisted of motor carriers in direct competition with the railroad; that the increase in such traffic would greatly decrease rail traffic and deplete the revenue of the railroad company; and that the amount of taxes paid by the railroads of the state, part of which was devoted to the upkeep of public highways used by motor carriers, was disproportionately higher than the amount paid by motor carriers. Surely if the spectacle of a railroad being forced to contribute to the success of a competing mode of transportation was sufficient to offend the Justice's sense of injustice and so qualify for the protection of property under the due process clause, the same could be said for the liberty of married couples to determine for themselves whether to practice birth control. Whether the Justice would have followed the Court in its next step, in effect extending the same freedom to unmarried persons, is a somewhat harder question. There is evidence that in sexual morals the Justice was an archconservative, but I think there is also reason to believe that he would have distinguished constitutionally between moral questions involving only consenting adults and those involving harm to third parties.

My principal point is that Brandeis would have been more comfortable with the Harlan opinions in Poe v. Ullman and Griswold than with that of Douglas in Griswold, because the Harlan approach was more consistent with the law Brandeis helped to make when he joined the opinions for the Court in Meyer v. Nebraska, and Pierce v. Society of Sisters, and when he wrote the opinion in the Nashville case. It is also relevant that, in his procedural due process opinions, the Justice did not hesitate to accord a higher degree of protection to personal rights as distinguished from property rights. Finally, I believe that Brandeis would have had more intellectual respect for Justice Harlan's willingness to admit and to struggle candidly with the elements of judgment involved in his approach than for the attempts of some members of the Court to paper over those elements with a parade of absolutes.34

Let me now return to the point where I began — the vast open spaces in the text of that mysterious document, the Constitution of the United States. The authors of that document implicitly delegated the power to fill those spaces to future generations of lawmakers.35

35. The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly
Some of those decisions must be made by judges in the exercise of the power vested in them pursuant to Article III to decide cases or controversies. But just as the Framers themselves decided to say no more than was necessary to complete the task they had set out to perform, is it not fair to infer that their silence was a command to the judges of the future to exercise comparable self-restraint?

changing environment in which they would live. Those who framed, adopted, and ratified the Civil War amendments to the Constitution likewise used what have been aptly described as “majestic generalities” in composing the fourteenth amendment. Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct. When the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.