

JUDICIAL PREDILECTIONS

The Honorable John Paul Stevens*

An issue that often produces debate among mediocre golfers before they tee off on the first hole is whether to allow a poor drive to be replaced by a “mulligan.” For the most part, second chances are forbidden fare in golf. If your ball goes in the water or you shank an approach into a sand trap, you just have to grin and bear it.

Today, however, you have given me a second chance to address the Clark County Bar Association. Your president, Bryan K. Scott, has assured me that your motivation was not merely a charitable interest in allowing me to try to improve upon my first shot. Nevertheless, you have provided me with a welcome opportunity to do better this time.

When I was here in 2002, I took advantage of a gracious captive audience by commenting on some then-recent Supreme Court opinions with which I strongly disagreed. For a dissenting judge, addressing bar associations sometimes serves the same therapeutic purposes that the petition for rehearing serves for the lawyer of a defeated litigant: as a substitute for more aggressive forms of civil disobedience, it is a futile but non-violent form of protest that seldom does any harm.

Today I propose a different tack. I will again comment on a few recent Supreme Court opinions that produced—or in the case of dissenting opinions, would have produced—results that I consider unwise. But unlike those I discussed on my last visit, these are all opinions that I either wrote or joined. In each I was convinced that the law compelled a result that I would have opposed if I were a legislator.

Two of these cases involved questions of federal procedure of greater interest to lawyers than to members of the general public. In the first, *Exxon Mobil v. Allapattah*,¹ the Court decided that a rather poorly drafted statute—§ 1367 of the Judicial Code,² which was enacted to overrule a narrow interpretation of our jurisdiction under the Federal Tort Claims Act³—had also dramatically expanded federal supplemental jurisdiction over class actions. While as a matter of policy I believe federal courts are better equipped than state courts to process nation-wide class actions, and therefore favored the result that the Court reached, I dissented for two reasons. As Justice Ginsberg explained in her dissent, which I joined, a narrower reading of the text was more consistent

* Associate Justice, Supreme Court of the United States. Justice Stevens delivered this address at a Clark County Bar Association Luncheon Meeting at the Wynn Las Vegas Hotel, Las Vegas, Nevada, August 18, 2005.

¹ *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611 (2005).

² 28 U.S.C. § 1367 (2005).

³ 28 U.S.C. § 1346 (2005).

with the entire statutory scheme;⁴ moreover, I concluded that the legislative history flatly rejected the result that the majority reached.⁵

As it often does in statutory construction cases, the Court solemnly declared that legislative history plays a role only when the statutory text is ambiguous, and that, despite Justice Ginsberg's contrary opinion, this statute was not even ambiguous. Because ambiguity, like beauty, is in the eye of the beholder, I remain convinced that it is unwise to treat ambiguity as a necessary precondition to the consultation of legislative history. Indeed, I believe judges are more, rather than less, constrained when we make ourselves accountable to all reliable evidence of legislative intent.

The second procedural case involved the federal sentencing guidelines. Five years ago, in *Apprendi v. New Jersey*,⁶ the Court held that, except for the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. We subsequently held that the *Apprendi* rule applies to sentences imposed pursuant to mandatory guidelines in both state⁷ and federal courts.⁸ In the *Booker* case, the jury's finding that the defendant had possessed approximately ninety-two grams of cocaine base authorized a maximum sentence under the federal guidelines of twenty-one years and ten months in prison, but in a post-trial sentencing proceeding the judge found by a preponderance of the evidence that he had possessed an additional 566 grams and imposed a thirty-year sentence.

After we held that this sentence had been imposed pursuant to an unconstitutional procedure, we had to decide on the proper remedy. In my opinion we had a duty to prescribe the same remedy that state courts had applied in similar situations, namely, to set aside the portion of the sentence that exceeded the limit authorized by the jury's finding and make it clear that in future sentencing proceedings, unless the defendant had waived his jury trial rights or the facts were admitted by him, the maximum sentence must be based on facts found by a jury beyond a reasonable doubt.⁹ The majority, however, adopted a system-wide remedy that transformed the Federal Sentencing Guidelines from a set of prescribed mandatory maximum and mandatory minimum sentences into a discretionary system.

In my judgment that wholesale remedy represents much wiser policy than the retail remedy that I thought the law required. I have long been convinced that the exercise of judicial discretion in sentencing, based on the particular facts of each individual case, is far more likely to produce results that are fair to both the prosecutor and the defendant than the rather mechanical application of broad categorical rules. Moreover, since it costs over \$20,000 a year to incar-

⁴ *Allapattah*, 125 S. Ct. at 2632-41 (Ginsburg, J., dissenting).

⁵ *Id.* at 2628-29 (Stevens, J., dissenting) (quoting H.R. Rep. No. 101-734, at 28-29 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6874-74).

⁶ 530 U.S. 466 (2000).

⁷ *Blakely v. Washington*, 542 U.S. 296 (2004).

⁸ *United States v. Booker*, 125 S. Ct. 738 (2005).

⁹ *See, e.g., State v. Hughes*, 110 P.3d 192 (Wash. 2005).

cerate a federal prisoner,¹⁰ an unnecessarily long sentence may impose a significant burden on taxpayers.

Accordingly, even though I used up nineteen pages of the Supreme Court Reporter with a dissenting opinion explaining why I was convinced that the law did not authorize that remedy, as a matter of sound policy, I enthusiastically agree with what I regard as the “activist” decision to replace the mandatory guidelines system prescribed by Congress with a system that allows for more discretion.

The third case in which my opinion of what the law authorized is entirely divorced from my judgment concerning the wisdom of the program that was attacked on constitutional grounds is our much criticized decision in *Kelo v. City of New London*.¹¹ After several years of deliberation and planning by state and local agencies, the City of New London decided to respond to the depressed conditions that had followed the closing of a major naval facility that had provided over 1,500 jobs by adopting an elaborate plan to revitalize the community. With the aid of funding from the State, the City decided to acquire some ninety acres of land and to construct new commercial and residential buildings, as well as a park and a museum, for the purpose of transforming a depressed area into a more vibrant community. Included within the targeted area were a few homeowners unwilling to sell. To carry out the City’s plan it was therefore necessary for the City to use its power of condemnation to acquire the homeowners’ property in exchange for the payment of just compensation. The homeowners challenged those takings on various grounds, including a claim that they violated the Fifth Amendment to the Federal Constitution.

That Amendment, of course, provides that private property shall not “be taken for public use, without just compensation.” As originally enacted, the Fifth Amendment imposed limits only on the Federal Government, and simply did not apply to state action. It was only at the end of the nineteenth century that the Court decided that the so-called “Takings Clause” applies to the States as well.¹² Read literally, however, the Clause does not limit the government’s power to take property, but merely requires that it pay just compensation whenever it exercises that power. Nevertheless, our cases have consistently construed the Clause as implicitly limiting the power to condemn to acquisitions that are for a “public use.” On the other hand, and with equal consistency, since 1896¹³ our cases—including an opinion by Justice Holmes¹⁴—have interpreted the term “public use” to mean “public purpose,” and we have upheld takings that served a valid public purpose even though the property was either initially or ultimately transferred to private owners.

Moreover, in evaluating the validity of comprehensive programs, we have focused on the purpose of the entire project, rather than its impact on individuals who happen to own property in the targeted area. For example, in 1954 the

¹⁰ Executive Office of the President, Office of National Drug Control Policy, Drug Treatment in the Criminal Justice System Fact Sheet (2001), <http://www.whitehousedrugpolicy.gov/publications/factsht/treatment/>

¹¹ 125 S. Ct. 2655 (2005).

¹² *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

¹³ *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403 (1896).

¹⁴ *E.g.*, *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925).

Court unanimously upheld the condemnation of a large blighted area in Washington D.C. even though the department store owned by the individual who challenged the taking was in good condition.¹⁵ In short, while our cases have repeatedly stated that private property may not be taken from individual A in order to transfer it to individual B, we have always allowed local policy makers wide latitude in determining how best to achieve legitimate public goals.

My own view is that the allocation of economic resources that result from the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials. But, as Justice Holmes famously observed in his dissent in the *Lochner* case, the Constitution did not enact Mr. Herbert Spencer's "Social Statics."¹⁶ Time and again judges who truly believe in judicial restraint have avoided the powerful temptation to impose their views of sound economic theory on the policy choices of local legislators. Notably, most of the highly vocal critics of our decision in *Kelo* have argued that New London's decision was unwise as a matter of policy. Be that as it may, I believe that the public outcry that greeted *Kelo* is some evidence that the political process is up to the task of addressing such policy concerns.

The fourth case in which I was unhappy about the consequences of an opinion that I authored presented the question whether the use of locally grown marijuana for medicinal purposes pursuant to the advice of a competent physician may be punished as a federal crime.¹⁷ The uncontradicted evidence in the record indicated that marijuana provided important therapeutic benefits to the two petitioners, that no other medicine was effective, and that without access to that drug one of the petitioners may not survive. Moreover, the petitioners' cultivation and use of marijuana for health reasons was perfectly lawful as a matter of California law. I have no hesitation in telling you that I agree with the policy choice made by the millions of California voters, as well as the voters in at least nine other states (including Nevada), that such use of the drug should be permitted, and that I disagree with executive decisions to invoke criminal sanctions to punish such use. Moreover, as I noted in a footnote to our opinion, Judge Kozinski has chronicled medical studies that cast serious doubt on Congress' assessment that marijuana has no accepted medical uses.¹⁸ Nevertheless, those policy preferences obviously could not play any part in the analysis of the constitutional issue that the case raised. Unless we were to revert to a narrow interpretation of Congress' power to regulate commerce among the States that has been consistently rejected since the Great Depression,¹⁹ in my judgment our duty to uphold the application of the federal statute was pellucidly clear.

In the fifth opinion that I shall mention, the Court's decision also rested on an interpretation of the Commerce Clause. Rather than involving the extent of Congress' power to enact federal legislation, however, it involved what is referred to as the "negative" or "dormant" Commerce Clause. In what was

¹⁵ *Berman v. Parker*, 348 U.S. 26 (1954).

¹⁶ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

¹⁷ *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

¹⁸ *Conant v. Walters*, 309 F.3d 629, 640-43 (9th Cir. 2002) (Kozinski, J., concurring).

¹⁹ *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

unquestionably a popular decision with both consumers of wine and economists who believe in the value of free competition in a free market, the Court held that the Michigan and New York state statutes that prohibited out-of-state wineries from making direct sales to local consumers—while permitting such sales by local wineries—were unconstitutional because they discriminated against interstate commerce.²⁰

If alcoholic beverages were ordinary articles of commerce, as most people view them today, the invalidity of the New York and Michigan statutes would be perfectly obvious. Those statutes had, however, been enacted in reliance on the Twenty-first Amendment to the Constitution, ratified in 1933. Section 1 of that Amendment repealed the Eighteenth Amendment, which had imposed a nation-wide total prohibition on commerce in alcoholic beverages for the preceding fifteen years. Section 2 replaced the national prohibition with a grant to each State of authority to maintain an equally comprehensive state-wide prohibition; it expressly gave each State plenary power to regulate the importation of intoxicating liquors for local delivery or use. If anything has seemed clear to me during my tenure on the Court, it is the fact that in the early part of the twentieth century—in dramatic contrast to today—alcoholic beverages were not an ordinary article of commerce.

In a sense, the issue before the Court was whether the intent of the Framers of the Eighteenth and Twenty-first Amendments should be given controlling weight, or, since the Constitution is often described as a living document, the views that prevail today should be decisive. There are unquestionably cases in which today's perspective must be controlling. Those are cases in which the scope of the principle enacted into law was either not fully recognized at the time of the enactment, or contemplated changing responses to changes in society. The most obvious example of the former is the prohibition of racial discrimination embodied in the Equal Protection Clause of the Fourteenth Amendment. The fact that the Framers of that Amendment did not view segregated schools as an evil should not, and has not, provided a justification for limiting the reach of the constitutional principle that they introduced into our law. Examples of the latter are the regulatory power that the Commerce Clause has vested in the Congress, which must take account of changes in the commercial world since the eighteenth century,²¹ and the Eighth Amendment's ban on the infliction of cruel and unusual punishments, which takes account of the evolving standards of decency in a civilized society.²²

In my judgment, the changes in the public's evaluation of the harmful consequences of consuming alcoholic beverages do not provide a principled justification for limiting the States' power to regulate a commodity that they are expressly authorized to exclude from the market entirely. The Twenty-first Amendment did not enact a rule of law embodying any principle whose scope was unforeseen when it was ratified. Nor did it create either an authority or a prohibition that contemplated change in response to changing conditions.

²⁰ *Granholt v. Heald*, 125 S. Ct. 1885 (2005).

²¹ For a list of several early cases recognizing and applying this principle, see *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 256-57 (1964).

²² *E.g.*, *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (finding cruel and unusual the capital punishment of juveniles under the age of eighteen).

Rather, as the opinions of Justice Brandeis and others who were in office in the 1930's have made clear, the Twenty-first Amendment was intended to return absolute control of liquor traffic to the States free of all restrictions that the negative Commerce Clause would otherwise impose.²³

Whether or not the four of us who came to that conclusion correctly interpreted the Twenty-first Amendment, I have no hesitation in assuring you that our analysis of the legal issue was not influenced in the slightest by our so-called policy predilections. Indeed, the distinction between a judge's understanding of the law and his or her views about sound policy characterizes not only the wine case and the other four cases that I have discussed today, but the cases that I discussed with you three years ago, and, indeed, the entire workload of the typical federal judge. While the desire for popularity is a matter that poses a threat to the independence of every elected judge, thanks to the foresight of men like Alexander Hamilton (who provided us with life-tenure) our job is vastly simplified by our duty to allow legislatures and executives to fashion policy in response to their understanding of the popular will.

Thank you for your attention.

²³ *E.g.*, State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59, 62-63 (1936).