
Remarks of Ms. Teresa Wynn Roseborough

*Teresa Wynn Roseborough**

Thank you everybody. Don't be alarmed; don't let the presence of one of Snoopy's lawyers concern you. I'm here to express my own views, not, unfortunately for your sakes, those of Snoopy.

I'm going to look at Justice Stevens's views through the lens of *Bush v. Gore*.¹ And I'm going to borrow from Professor Andrew Siegel's observation that Justice Stevens's writings on equal protection involve a lot more showing than telling. So, I'll use the example of the voting machines that were at work in *Bush v. Gore* to highlight the wisdom of Justice Stevens's restraint in declining to find an equal protection violation in the statewide recount ordered by the Florida Supreme Court.

I want to first note though how proud I am to be here for this event. As a distinct beneficiary of the civil rights movement in this country, I'm honored to be a part of the celebration of the Fortieth Anniversary of the dedication of King Hall, and at least by implication, also a celebration of the life of Dr. Martin Luther King. There's no doubt in my mind that Dr. King would be very proud of this institution that you have named after him and proud of the bold and committed acts that have been done through these halls in the interest of creating a more just society. Dr. King noted that the moral arch of the universe is long but inclined toward justice. I'm sure he'll regard King Hall as one of those dense singularities, holding the light path of that arch in the right direction.

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¹ See generally *Bush v. Gore*, 531 U.S. 98 (2000) (resolving 2000 presidential election in favor of George W. Bush, finding that Florida Supreme Court's decision to recount ballots was violation of Fourteenth Amendment's Equal Protection Clause).

I'm also proud to be part of a program honoring a man who I respect so much, Justice John Paul Stevens. And I am especially indebted to Dianne for thinking of me and inviting me to participate. My coclerks and I refer to Justice Stevens as "the boss." And while this reference was literally true, it was also our acknowledgement of his unparalleled intellect and his incredible command of the law. The title "boss" also, for us, reflected the privilege we felt to be working for someone of such incredible character. Justice Stevens is truly one of those people. I think my coclerks and fellow clerks in the room would back me in saying that you'd be just as happy working for him were he the proprietor of a gasoline station or a Justice of the United States Supreme Court.

One of my great opportunities as a practicing lawyer was to argue a case before the United States Supreme Court and it just happened to be during the time that Chief Justice Rehnquist was injured and not taking the bench, and Justice Stevens was acting as Chief Justice. So I got to open my argument with "Justice Stevens" and "may it please the court." I am confident to this moment that he winked at me when I said that. It turned out to be the highlight of the argument! Even though I was representing disabled children in foster care — one would think I was on the side of the angels — I managed to lose the case nine to zip.

Much is said and will be said of Justice Stevens's perspicacity: his keen insight, his searching quest to know all about the thing before he judged it, and his intellectual prowess are distinct. I got a chance to talk to him a couple days after the inauguration; I thought it would be great to take advantage of the moment to congratulate him on getting his part of the swearing in ceremony right. And he took the moment to ask me whether I recall this case in which he contends that I persuaded him to add a rather lengthy footnote to an otherwise short and concise opinion. When I gave him one of my blank "what are you talking about?" stares, he described the opinion to me in such detail and still failed to draw a recollection from me, and was kind enough to say "I must be mistaken." But of course he wasn't. I went back to the books and found the case he was talking about. He just had this incredibly agile mind that serves him in so many great ways.

It's notable, however, that Justice Stevens's intellect carries with it no condescension; no disregard for the views of others; no hesitance to defer to the judgment, the labor, and the good will of others; and no bias. And in particular, he harbors no insecurity about the ability of others to approach an issue in good faith to reach the right result. This abiding respect for others not only made him a great boss, but it also

constantly shaped his approach to cases and informed his intellectual preference for context over doctrine.

As a general matter, many legal scholars, including those beside me, have acknowledged the difficulty in applying traditional labels to Justice Stevens. He eschews structure and doctrinal notions that might produce bias towards a particular class of outcomes and a particular class of cases in favor of a more contextual approach of studying each statute, each case, each constitutional principle, for an understanding that is direct, and in its own context aimed at achieving the paramount goal — a correct conclusion of law. He seeks nothing more and nothing less in every case.

In examining Justice Stevens's equal protection cases, he's noted that he defies A-to-Z characterization and noted his rejection of the tiered approach to the equal protection analysis in favor of a context driven approach to determining whether or not a decision is rational, whether or not it appears to come from an impartial government. In Justice Stevens's vision, one cannot determine whether a government's actions are rational and impartial without knowing the full context in which the government acted.

Let me turn now to a discussion of Justice Stevens's rejection of an equal protection argument made in *Bush v. Gore* and provide to you, through an examination of the punch-card ballots and the voting machines — the issue in that case — the pragmatic confirmation of the wisdom of that judgment. But first, it bears noting of some due weight that seven Justices found the order of the Florida Supreme Court regarding the statewide recount of most of the ballots counted in Florida in the 2000 elections to violate the equal protection clause. Faced with a challenge brought by then Vice President Gore to the former Secretary of State's certification of then Governor Bush as winner of the Florida's electoral college votes, the Florida Supreme Court held that a statewide manual recount was required to effect the legislative policy that every citizen's vote be counted whenever possible. Every ballot, the Florida Supreme Court held, that reflected a clear indication of the intent of the voter as determined by the Count Canvassing Board had to be counted as a legal vote. Outrageous enough — but that was their holding.

Seven Justices concluded that in ordering a statewide recount, governed by no standard more precise than whether the intent of the voter can be discerned, the Florida Supreme Court fell below the minimum requirements of due process and equal protection. According to the concurring opinion, the recurring recount mechanisms and standards implemented in response to the Florida Supreme Court's demand that a vote be legally cast if the intent of a

voter be discerned, failed to provide necessary specific standards to ensure their equal application. Noting the different standards applied by the counties to determine whether and how to count hanging chads, dimpled chads, pregnant chads, one corner chads, two corner chads, three corner chads, and whether to include over votes or not to include over votes, the court said that the recount process is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instances of a statewide recount under the authority of a single state judicial officer.

Now, I don't want to bite my tongue to minimize the force of the ruling. As Justice Stevens himself acknowledges in his dissent, the use of different sub-standards for determining voter intent in different counties apparently using similar voting systems does raise serious constitutional concerns. Justice Stevens's concerns were ameliorated by the presence of a single judicial officer who would adjudicate the objections to the counting of specific ballots.

But it is not that those concerns didn't exist. And if you visualize across the state, the Florida Supreme Court issues a ruling that (a) requires a recounting of most of the ballots in the state, but not all of them; (b) determines that under-votes are going to be included but not over-votes; that in counties where recounts have already been included that included over-votes those votes need not be recounted and a full tally of those counties can be included; and (c) gives no guidance to the county officials trying to effectuate the policies, the pronouncements of the Florida Supreme Court other than see what you can figure out about the intent of the voter from the ambiguously-punched ballots. You already know how much those counties struggled with that very determination, and that does raise serious concerns. But I think Justice Stevens was comforted not only by the fact that there was a single judicial officer who was going to act for the whole state in determining whether or not to uphold objections to the counting of legal ballots, but also by his reliance on and his faith in that impartial judicial officer reaching the right conclusion and giving effect to equal protection in making judgments about ballots.

One of the things I want to illustrate to you today is that there are perfectly good factual, pragmatic reasons why it was important to leave to the individual county canvassing board the determination of whether or not a particular ballot reflected the intent of a voter in that county, that had nothing to do with, and would have been erased by, a single statewide rule that simply said that dimpled chads do or don't count. But it is important to notice that this is an opinion in which Justice Stevens gave vent to some of the righteous indignation that Professor Andrew Siegel referred to. Justice Stevens's ultimate lament

in the case was that the loser in the election was perfectly clear — the nation’s confidence in the Court as an impartial guardian of the rule of law. That to him was the most telling indictment of *Bush v. Gore*: its backhand to the Florida Supreme Court and to the independent judicial officer appointed to oversee the recount process.

So let’s see some of the evidence of Justice Stevens’s wisdom here. It bears noting that at the time of *Bush v. Gore*, some forty-nine percent of the U.S. voting population voted on punch card ballots. It was by far the most popular voting system in the United States. It had been created by IBM in the 1960s: IBM created the punch card as a device for programming computers, and when it came up with the innovation of a perforated punch card, it allowed voters to see on their cards that the punch-out spots on the cards had been perforated. I don’t know if any of you ever saw punch card operators or data punch operators that used to sit with large stacks of cards and, without looking at anything, punch holes in data cards. Well, these cards were an amazing innovation because they had preperforations that allowed them to be used for voting. So, IBM created a device called the “Vote-o-Matic.”

In order to separate the chad, the card requires a separate mechanical process. That can be your fingers; you can pull it off from the card. But part of the purpose of this Vote-o-Matic device was to achieve that second part of the process and separate the chad from the back of the card. Because these votes were counted as if they were run through a machine, the punch card would run through a machine, and the machine would shine a light through the card. Where there was a hole revealed by the light shining through, the machine would count a vote. It was important to the way the vote tabulation machine worked that a chad be fully separated and/or flip back up from the card in a way that allowed the light to shine through the card when it went through the counting machine.

In order to achieve the second part of the process of separating the chad from the card, the tabulation machine ran a rubber T-zone underneath the ballot. Voters would use a stylus to punch a hole through the card and straight into this rubber T-zone, which would then hold the chad. And when you removed the stylus and then pulled your card out of the machine, you would be left with holes. Now, at the time of the 2000 elections, these Vote-o-Matic machines were manufactured in Florida by no less than five different manufacturers. IBM’s patent had expired, and each of these manufacturers did something a little different with their machines. They used slightly different materials for the T-zone, they used slightly different materials for the ABS plastic templates, and each had a slightly different design in their styluses. So in reality, it would be possible for Palm Beach

County to say, “We’re seeing hundreds of dimpled chads — those must reflect a voter trying to accomplish something,” whereas in Collier County they might not see any dimpled chads, and if they saw one it would probably be ridiculous for them to decide that this one dimpled-chad ballot reflected the intent of the voter. It might be a defect, it might be someone who really tried to stop a vote or something else, but we are not seeing enough of them to think that this reflects the intent of the voter.

So, actually the standard the Florida Supreme Court attempted to use obliging each County Canvassing Board to judge what was happening in its own individual county to determine whether or not the intent of the voter could be discerned was actually more protective of the rights to vote and of equal protection than the uniform standard that the majority of the Supreme Court suggested would’ve been more consistent with equal protection. So once again, no surprise to most of us, Justice Stevens got it right.