Background to Two Dissents Invoking Judicial Restraint

In Marbury v. Madison (1803), Chief Justice John Marshall explicitly recognized judicial review, the power of the court to determine constitutionality. In Fletcher v. Peck (1810), Marshall included a cautionary paragraph on the court's need for judicial restraint when deciding whether to exercise judicial review and overturn a law:

> The question, whether a law be void for its repugnancy to the constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution & the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

No justice on the Supreme Court of the United States would find fault with Marshall's words. The reality, however, is that some justices have followed them better than others. Two justices who made it a point to emphasize judicial restraint were Byron White and William Rehnquist. Byron White served as an Associate Justice of the Supreme Court for 31 years, from 1962 when he was appointed by President Kennedy until 1993 when he retired. William Rehnquist served on the Supreme Court for 33 years, first as an Associate Justice when appointed by President Nixon in 1972 and then as Chief Justice when elevated by President Reagan in 1986; Rehnquist continued to serve as Chief Justice until his death in 2005.

White's first dissenting opinion came only two months into his time on the Court, and he was already chiding the majority for failing to practice judicial restraint: "And I believe the Court has departed from its wise rule of not deciding constitutional questions except where necessary…" In 1987, Rehnquist first published an insightful book on the history of the Supreme Court. He ends the book with a discussion of judicial restraint, making plain that, "The justices were not appointed to roam at large in the realm of public policy and strike down laws that offend their own ideas of what is desirable and what is undesirable."

Roe v. Wade (1973) and *First National Bank of Boston v. Bellotti* (1978) are two highly significant Supreme Court cases where both White and Rehnquist dissented from the majority opinion with major concerns about the majority's lack of restraint. *Roe v. Wade* held that a woman has a privacy right to an abortion through the second trimester of pregnancy. *First National Bank of Boston v. Bellotti*, or *Bellotti* for short, ruled that business corporations have a First Amendment right to speak and spend freely on ballot measures, also known as referendums. While *Roe v. Wade* is the much more famous—or infamous—of these two Supreme Court decisions, *Bellotti* gave business corporations the right to influence referendum politics directly and opened the door to a similar right with respect to candidate elections. The two documents that follow are White's ringing dissent in *Roe v. Wade* and Rehnquist's more measured though still powerful dissent in *Bellotti*.