June 4, 2010

Justice Souter’s Counsel

Two recent moments have brought to mind Chief Justice John Roberts’s simplistic description of a Supreme Court justice as an umpire who confines himself to calling balls and strikes. The first was the reminder in Detroit on Wednesday night that umpires are highly fallible, and their calls subjective, even when something as important as Armando Galarraga’s nearly perfect game is at stake.

The other was former Justice David Souter’s brilliant demolition of the umpire metaphor in his commencement address at Harvard last week. It is hard to imagine a better preparation for the confirmation hearings of Elena Kagan later this month.

Justice Souter, of course, is too courtly to refer by name to the chief justice or anyone else who believes justices leave their life experiences at the courthouse door and decide every case based on a narrowly historical “fair reading” of the Constitution. But his target was clear. Justices have to understand the “meaning” of the facts presented to them, he said, going far beyond the objective sense on the printed page. And there is only one way to fully understand that meaning:

“The meaning of facts arises elsewhere,” he said, “and its judicial perception turns on the experience of the judges, and on their ability to think from a point of view different from their own.”

Only by bringing to bear an understanding of the human condition can a justice choose from among the conflicting values of the Constitution when deciding a case, Justice Souter said. There was no easy, originalist way to decide the Pentagon Papers case brought by The New York Times in 1971, he said, because it required choosing between the principles of the First Amendment and national security. And when the court decided in 1954 that racially separate
schools were not equal, it understood the impact of segregation in a way that the justices of 1896 did not when deciding Plessy v. Ferguson.

The senators who will soon decide Ms. Kagan’s nomination to the court should read Justice Souter on life experience in a changing world, and his appreciation of complexity. But more important, we hope the speech emboldens Ms. Kagan to speak her heart before the Senate in a way she has never done in public, which perhaps was Justice Souter’s intention. As the speech showed, rigid neutrality is not only disingenuous, it is a hindrance to proper decision-making. Certainty is an illusion, he said, quoting Oliver Wendell Holmes, and simplicity “devalues our aspirations.”