Resolutions of the Bar of the Supreme Court of the United States In Gratitude and Appreciation for the Life, Work, and Service of Justice John Paul Stevens

May 2, 2022

Today the bar of the Supreme Court of the United States gathers to pay tribute to John Paul Stevens, a model of integrity, independence, and intellectual honesty who served the nation for thirty-five years as an Associate Justice of this Court, from December 1975 to June 2010.

A proud Chicago native and U.S. Navy veteran, Justice Stevens was a lawyer of the highest quality and a human being of the highest character. Gifted with an extraordinarily agile and curious mind, he used it well, writing more than 1,000 Supreme Court opinions, three books, and numerous articles. He was a patriot, with a profound, infectious sense of optimism, and yet his eyes stayed clear and his pragmatism never waned. Independent to the core and thoroughly decent, Justice Stevens lived a life dedicated to the rule of law and to equal justice under it.

Justice Stevens was married to Elizabeth Jane Sheeren for 37 years, and they had four children, nine grandchildren, and thirteen great-grandchildren. The Justice was married to his second wife, Maryan Mulholland, for 35 years, until her death in 2015. The Justice and Maryan are buried together at Arlington National Cemetery.

<u>The Path to the Court</u>

John Paul Stevens was born on April 20, 1920, in Chicago's Hyde Park neighborhood. He attended the University of Chicago Laboratory Schools for elementary and high school, then enrolled at the University of Chicago, where he was a brilliant student, majoring in English literature and graduating Phi Beta Kappa and with the university's highest honors.

In 1927, his family opened what was then the largest hotel in the world, the Stevens Hotel in downtown Chicago (which went into insolvency during the Depression and is now the Chicago Hilton). The young John Paul Stevens crossed paths with a number of noted guests, including Amelia Earhart and Charles Lindbergh. Despite his South Side origins, Stevens was a lifelong and diehard fan of the Chicago Cubs. Together with his father and older brothers, he attended the opening game of the 1929 World Series, in which the Cubs played the

Philadelphia Athletics. He was also present for the third game of the 1932 Cubs-Yankees World Series, during which Babe Ruth hit his famous "called shot" home run. Justice Stevens proudly displayed a framed scorecard from that game in his Supreme Court chambers. Much later, to the delight of the hometown crowd, he attended Game 4 of the 2016 World Series at Wrigley Field. When the Cubs went on to win the World Series for the first time since 1908, the Justice wrote, in his understated way, that he was "more than pleased."[1]

Stevens was commissioned as a Naval officer on December 6, 1941, the day before the Japanese attack on Pearl Harbor. He spent much of the war stationed at Pearl Harbor, working as a signals intelligence officer breaking Japanese codes, and was awarded the Bronze Star.

Stevens decided to go to law school after his discharge from the Navy. His older brother Jim, a practicing lawyer, told him how much satisfaction and pleasure a lawyer could derive from helping people. He selected Northwestern University School of Law because he intended to practice law in Chicago. In October 1945, he enrolled in an accelerated postwar course with summer classes that led to a law degree in two years. Northwestern's approach to teaching the law had a lasting effect on Stevens's thinking. Unlike Michigan and Harvard, Northwestern did not emphasize legal rules. Stevens's law professors, including Dean Leon Green, focused on facts, context, and procedure (including the identity of the decisionmaker). Stevens often quoted Professor Nathaniel Nathanson's advice: "Beware of glittering generalities." He recalled that Nathanson taught his students in constitutional law and administrative law to understand the arguments on both sides of each case. Nathanson sought to teach his students how to think about the law, and to their frustration, he declined to tell them what the right answer was.

Stevens's interest in antitrust law began at Northwestern, when he was assigned to write a law review comment on price-fixing in the

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[1] John Paul Stevens, The Making of a Justice: Reflections on My First 94 Years 451 (2019).

movie industry.[2] Antitrust law taught him an important lesson in statutory interpretation—that sometimes the text of a federal statute cannot be read literally. Stevens became co-editor-in-chief of the law review and graduated first in his class, with the highest grades achieved to date in the history of the law school.

During Stevens's final year at Northwestern, he learned that he and his co-editor-in-chief would be offered Supreme Court clerkships: one for Chief Justice Fred Vinson, during the 1948 Term, and one for Justice Wiley Rutledge, during the 1947 Term. Both of them preferred the earlier opportunity, so they flipped a coin. Stevens won and spent the 1947-1948 Term clerking for Justice Rutledge. During his time as a law clerk, Stevens wrote the first draft of Justice Rutledge's opinion for the Court in the antitrust case *Mandeville Island Farms. Inc. v. American Crystal Sugar Co*.[3] During that same term Justice Rutledge dissented in *Ahrens v. Clark*,[4] in which the majority concluded that a group of German prisoners held at Ellis Island pending deportation could not bring a habeas case outside the territorial district in which they were held. Nearly sixty years later, Justice Stevens's majority opinion in the 2004 case *Rasul v. Bush*[5] (discussed below) would vindicate the core insight of Justice Rutledge's dissenting position.

Following his clerkship with Justice Rutledge, Stevens returned home to Chicago, where he joined the prominent law firm known today as Jenner & Block. Four years later, in 1952, he and a few young colleagues hung out their own shingle. The firm of Rothschild, Stevens, Barry & Myers was unusual for the time, counting among its name partners persons of Protestant, Catholic, and Jewish backgrounds. Stevens distinguished himself as a litigator with particular

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[2] Comment, *Price-Fixing in the Motion Picture Industry*, 41 Ill. L. Rev. 630 (1947).
[3] 334 U.S. 219 (1948).
[4] 335 U.S. 188 (1948).
[5] 542 U.S. 466 (2004).

expertise in antitrust law. He argued one antitrust case before the Supreme Court of the United States,[6] and taught antitrust law as an adjunct professor at both Northwestern University (1950-54) and the University of Chicago (1955-58).

Public service also formed a cornerstone of Stevens's career during his twenty-two years in law practice. Moving to Washington, D.C. to serve as Associate Counsel to the Subcommittee on the Study of Monopoly Power of the House Judiciary Committee (1951-52), Stevens helped investigate practices in the steel industry and in Major League Baseball. Hearings in the baseball inquiry featured testimony by figures such as Ty Cobb and Branch Rickey. Later, Stevens was a member of the Attorney General's Committee to Study the Antitrust Laws (1953-55).

Stevens also accepted numerous pro bono appointments. Among those that made a lasting impression was the case of *People v. La Frana*,[7] in which Stevens persuaded the Illinois Supreme Court to reverse his client's murder conviction. The case had turned on a confession coerced over the course of several days of incommunicado interrogation, during which La Frana was blindfolded, handcuffed behind his back, hanged from a door by his wrists, and beaten. This and other experiences influenced Justice Stevens's insistence that criminal defendants receive full and fair trials and appeals.

A longtime leader in the Chicago Bar Association, Stevens was chosen in 1969 as Counsel to a Special Commission convened to investigate charges of corruption in the Illinois Supreme Court. The swift and impartial work of Stevens and his small team of lawyers resulted in the resignation of two of that court's justices.

The year following the investigation of the Illinois Supreme Court, Stevens received an invitation to meet with Senator Charles H. Percy of Illinois. Percy, a liberal Republican who had known Stevens at the University of Chicago, was making an effort to get the best judges, regardless of party affiliation, appointed to the federal courts in Illinois. As Stevens expected, Percy began the meeting by soliciting

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[6] United States v. Borden Co., 370 U.S. 460 (1962).

[7] 122 N.E.2d 583 (Ill. 1954).

suggestions for potential nominees to fill judicial vacancies. But near the end of their meeting, he took Stevens by surprise and asked if he would be interested in an appointment to the Seventh Circuit. Although the offer came at a time when his law practice was starting to thrive, Stevens overcame his initial hesitation and later agreed to accept President Richard Nixon's nomination. The Senate swiftly confirmed Stevens without opposition, and he took the judicial oath on November 2, 1970, launching a federal judicial career that would span four decades.

In urging Stevens to accept the nomination, Senator Percy had made the prescient observation that a seat on the court of appeals might one day lead to an appointment to the Supreme Court. Not long after taking the bench, however, Stevens assumed he had lost any possibility of promotion when the Seventh Circuit decided the case of the peace activist Rev. James E. Groppi. The Wisconsin State Assembly, without a hearing, had jailed Father Groppi for criminal contempt after he led a protest on the Assembly floor. A closely divided Seventh Circuit, sitting en banc, rejected Groppi's due process challenge to his punishment, with Stevens writing the principal dissent.[8] Stevens realized that the "law and order" side of the case would be popular at a time of social and political turmoil. He later recalled, "I thought to myself, 'Well, I can kiss goodbye to any notion of ever being on the Supreme Court.'" That prospect did not deter him from dissenting—a position vindicated later when the Supreme Court unanimously reversed the Seventh Circuit's decision.

Stevens served for five years on the Seventh Circuit, a court he described as both strong and collegial. When Justice William O. Douglas retired in 1975, Stevens was President Gerald R. Ford's choice to be the 101st Justice of the Supreme Court. Ford had given Attorney General Edward H. Levi the task of preparing a list of candidates for the position. Levi, who knew Stevens from Chicago, read federal judicial opinions extensively and concluded that Stevens was an outstanding judge—a "craftsman of the highest order" whose opin-

[8] Groppi v. Leslie, 436 F.2d 331 (7th Cir. 1971) (en banc), *rev'd*, 404 U.S. 496 (1972); *id.* at 332 (Stevens, J., dissenting).

ions were "gems of perfection." Stevens's Senate Judiciary Committee confirmation hearings, the last before the arrival of television cameras, were brief, and he was confirmed by a vote of 98–0 only nineteen days after his nomination. He was sworn in as an Associate Justice of the Supreme Court on December 19, 1975.

The absence of controversy surrounding Justice Stevens's nomination and confirmation might seem surprising at first blush. After all, he was nominated by a Republican president and confirmed by a Democratic Senate, and he was the first Supreme Court nominee since the Court's decisions in *Furman v. Georgia*,[9] which placed a nationwide moratorium on capital punishment, and *Roe v. Wade*,[10] which recognized a constitutional right to abortion. Two months before his nomination, Stevens had written a Seventh Circuit opinion in which he expressed skepticism about what he called the "so-called" right of privacy, which had formed the basis for the decision in *Roe*.[11]

But President Ford chose Stevens for his integrity and his excellence rather than for any particular ideology. Plain-spoken, direct, and lawyerly, he was not given to grand theories or one-size-fits-all solutions to complex legal problems. His approach to his work did not emerge from any single major premise but was grounded in fastidious attention to the facts of the case, the values of the American constitutional tradition, consideration of precedent, context, and common sense. Justice Stevens's commitment to the rule of law was second to none, and for him, the conscientious exercise of independent judgment was what the rule of law required.

The Importance of Judgment

Justice Stevens's succinct opinion in a personal jurisdiction case, *Burnham v. Superior Court of California*,[12] nicely illustrates his aversion to overbroad legal theories. A California woman had served her husband, a New Jersey resident, with divorce papers while he was vis-

[9] 408 U.S. 238 (1972).
[10] 410 U.S. 113 (1973).
[11] Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 721 (7th Cir. 1975).
[12] 495 U.S. 604 (1990).

iting their children on a business trip. Did the California court's exercise of jurisdiction over a nonresident violate the Fourteenth Amendment's due process clause? Justice Antonin Scalia's lengthy opinion for four justices concluded that jurisdiction would lie based largely on the common understanding at the time of the Fourteenth Amendment's adoption that state courts could exercise jurisdiction over transient nonresidents who were served with process while in the state. Justice William Brennan's lengthy opinion for four other justices agreed that the California court had jurisdiction but insisted that it be grounded in contemporary notions of fairness rather than set in stone by tradition and history. Perceiving both sides of this clash of legal titans to be "unnecessarily broad," Justice Stevens wrote briefly to say that "historical evidence," "considerations of fairness," and "common sense" "all combine to demonstrate that this is, indeed, a very easy case."[13] His single-paragraph concurrence was the controlling opinion.

Across myriad areas of the law, Justice Stevens displayed a fearlessness about a judge's exercise of judgment. For example, early in his tenure on the Supreme Court, Justice Stevens declared his independence from the orthodoxy of different tiers of judicial review under the Equal Protection Clause. In *Craig v. Boren*,[14] a case involving two Oklahoma statutes that prohibited the sale of beer to men, but not women, age 18-20, Justice Stevens filed a concurring opinion invoking the principle that "[t]here is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."[15] Elaborating on this principle in a reapportionment case, he wrote that "the Clause does not make some groups of citizens more equal than others."[16] In both cases he found the justification offered by the state insufficient after a careful review of the evidence, in

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[13] *Id*. at 640.
[14] 429 U.S. 190 (1976).
[15] *Id.* at 211–12 (Stevens, J., concurring).
[16] Karcher v. Daggett, 462 U.S. 725, 749 (1983) (Stevens, J., concurring).

one to support a sex-based classification and in the other to support an oddly shaped congressional district.

Justice Stevens went on to apply a similarly nuanced approach in other cases under the Equal Protection Clause. In fact, one is hard pressed to find an opinion of his that uses the term "strict scrutiny," other than to reject an argument proposed by counsel or adopted by a lower court.[17] In a case involving a city ordinance that discriminated against individuals with intellectual disabilities, he refused to single out one standard of review among three identified by the court of appeals. As he wrote, "Rather, our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other. I have never been persuaded that these so-called 'standards' adequately explain the decisional process.'"[18] He deployed the same approach in his opinions on affirmative action (discussed below), freeing him to reach different outcomes depending on the context and the applicable constitutional and statutory provisions.

Justice Stevens's freedom of speech opinions similarly reveal a taste for the particular and the contextual over grand theory. In his first such opinion, *Young v. American Mini Theatres*,[19] a challenge to a Detroit zoning ordinance for adult movie theaters, he distinguished the content at issue from what he saw as the First Amendment's core concerns: "[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."[20] Likewise, in *F.C.C. v. Pacifica Foundation*,[21] which upheld the F.C.C.'s power to regulate vulgarity

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[17] *E.g.*, Crawford v. Marion County Election Bd., 553 U.S. 181, 188 (2008) (plurality opinion).

[18] Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 451 (1985) (Stevens, J., concurring).

[19] 427 U.S. 50 (1976).

[20] *Id*. at 70 (plurality opinion).

[21] 438 U.S. 726 (1978).

on daytime radio, Justice Stevens wrote that although offensive language is "unquestionably protected," its constitutional protection "need not be the same in every context."[22] In particular, at the time of the decision (1978), broadcast media was pervasive in the lives of Americans and easily and uniquely accessible to children.[23]

Justice Stevens's granular approach to free speech helps to make sense of his dissenting opinion in *Texas v. Johnson*,[24] in which he would have upheld a criminal conviction for burning an American flag. Stevens's vote is attributable at least in part to his military service. His opinion alludes to "the soldiers who scaled the bluff at Omaha Beach," motivated by the "ideas of liberty and equality."[25] But Justice Stevens's dissent was also a paean to case-by-case adjudication. Citing to both *Young* and *Pacifica*, he wrote that "rules that apply to a host of other symbols" should not apply to the American flag, which for Justice Stevens stood as a unique "symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations."[26]

In his last term on the Court, Justice Stevens used *McDonald v. City of Chicago*,[27] a gun rights case out of his hometown, to offer a final defense of careful judgment over "any all-purpose, top-down, totalizing theory of 'liberty.'"[28] The question in *McDonald* was whether the Fourteenth Amendment protected an individual right to bear arms against state and local interference. Justice Stevens had dissented in the precursor to *McDonald*, *District of Columbia v. Heller*,[29] which declared that the Second Amendment protected an individual right to gun possession in the home. He thought *Heller* ignored the militia-oriented purpose of the Second Amendment; he would later call it the "most clearly incorrect" decision of his tenure and "the

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[22] *Id*. at 746–47 (plurality opinion).
[23] *Id*. at 748–49 (majority opinion).
[24] 491 U.S. 397 (1989).
[25] *Id*. at 439.
[26] *Id*. at 437.
[27] 561 U.S. 742 (2010).
[28] *Id*. at 878 (Stevens, J., dissenting).
[29] 554 U.S. 570 (2008).

worst self-inflicted wound in the Court's history."[30] For Justice Stevens, then, it was especially important to emphasize that *McDonald* was no occasion for mechanical "jot-for-jot incorporation" of the Bill of Rights against state and local governments. Rather, as a case of substantive due process, it called for a flexible inquiry into "[t]extual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies, and above all else, the 'traditions and conscience of our people.'"[31] A judge's sensitivity not to the judge's own grand theory but rather to "the intrinsic aspects of liberty and the practical realities of contemporary society" lives up to the Constitution's commands while nodding, appropriately, to "humility and caution."[32] Applying this test, the erroneous decision in *Heller* should not, he believed, extend to state and local gun control laws.

Attention to Legislative Purpose

Justice Stevens's antiformalism was not limited to constitutional adjudication. In antitrust cases, his understanding of the Sherman Act as demanding a functional, factually sensitive rather than formalistic inquiry, stayed with him from his law school days through his last term as a Justice.[33] More generally, Justice Stevens's antitrust opinions bore significant responsibility for adding flexibility to the law of horizontal restraints[34] and tying arrangements.[35] An antitrust sensibility also infuses his most significant intellectual property opinion, *Sony Corporation of America v. Universal City Studios*, *Inc.* ("the Betamax

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[30] John Paul Stevens, *The Supreme Court's Worst Decision of My Tenure*, Atlantic, May 14, 2019.
[31] *McDonald*, 561 U.S. at 872 (Stevens, J., dissenting).
[32] *Id*. at 881.
[33] *See* Am. Needle Inc. v. Nat'l Football League, 560 U.S. 183 (2010).
[34] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); Ariz. v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).
[35] *See* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610 (1977).

case"),[36] in which Justice Stevens held for the majority that home video recordings of television shows fall within a safe harbor against copyright challenges. Stevens's opinion in the case characterizes the Copyright Act, which confers a limited monopoly, as striking a "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."[37] In deciding that noncommercial home video recordings constituted fair use, Justice Stevens relied on the pragmatic temperament that characterized his jurisprudence in many other areas: "One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible."[38]

In the realm of statutory interpretation more generally, Justice Stevens believed in the importance of considering the legislature's purposes and not just its text. He did not ignore the words of statutes; indeed many of his opinions engaged in close analysis of specific statutory terms and of the structure of the statute.[39] Yet he eschewed a "purely literal approach" to reading a statute and refused to put on "thick grammarian's spectacles."[40] Instead he preferred an approach "that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation."[41]

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[36] 464 U.S. 417 (1984).
[37] *Id*. at 429.
[38] *Id*. at 456.
[39] *See, e.g.,* Mass. v. E.P.A., 549 U.S. 497*,* 528–29 (2007); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697 (1995); Chisom v. Roemer, 501 U.S. 380, 397–402 (1991); McNally v. United States, 483 U.S. 350, 365 (1987) (Stevens, J., dissenting).
[40] W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 112–13 (1991) (Stevens, J., dissenting).
[41] *Id*. at 112.

Justice Stevens would frequently draw on legislative history to discover or confirm textual meaning,[42] contending that "it is always appropriate to consider all available evidence of Congress's true intent when interpreting its work product."[43] He also often relied on the broad remedial purpose of a statute to determine contested interpretive questions.

For example, in holding that section 2 of the Voting Rights Act applied to judicial elections, Justice Stevens gave the "broadest possible scope" to Congress's goal of 'rid[ding] the country of racial discrimination in voting."[44] In environmental cases involving interpretations of the Clean Water Act and Endangered Species Act, Justice Stevens gave interpretive weight to Congress's broad remedial goal of protecting the environment.[45] In a case involving whether airline pilots with myopia were disabled within the meaning of the Americans with Disabilities Act (ADA), Justices Stevens argued in dissent that recognizing myopia as a disability even if it could be corrected was consistent with the congressional goal of providing a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;" the Court, Justice Stevens argued, should give the ADA "a generous, rather than a miserly, construction."[46]

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[42] *See Chisom*, 501 U.S. at 396; Green v. Bock Laundry Mach. Co., 490 U.S. 504, 523 (1989); Pittston Coal Group v. Sebben, 488 U.S. 105, 147 (1988) (Stevens, J., dissenting).

[43] Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) (Stevens, J., concurring).

[44] *Chisom*, 501 U.S. at 403 (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969)).

[45] *See* Rapanos v. United States, 547 U.S. 715, 787, 809 (2006) (Stevens, J., dissenting); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs., 531 U.S. 159, 174–5, 179–80 (2001) (Stevens, J., dissenting); *Babbitt*, 515 U.S. at 698.

[46] Sutton v. United Air Lines, Inc., 527 U.S. 471, 495, 497 (1999) (Stevens, J., dissenting).

It might appear that one of Justice Stevens's most cited opinions, *Chevron*, *U.S.A.*, *Inc. v. Natural Resources Defense Council*, *Inc.*,[47] which announced a rule of judicial deference to reasonable agency interpretations of ambiguous federal statutes, marks something of a departure from his usual contextually sensitive approach. *Chevron* has been read as narrowing and disciplining what had been a more wide-ranging inquiry into agency interpretations.[48] Justice Stevens, however, consistently maintained that *Chevron* was simply a restatement of pre-existing administrative law, and his subsequent opinions seemed to confirm that view.[49]

After Justice Stevens retired from the Court, he continued to defend attention to legislative history against textualist critics: relying on the intent of the legislature resulted in better statutory interpretation given the large number of statutes, the central role of legislative committees in the lawmaking process, and the role administrative agencies play in the implementation of statutes.[50] Justice Stevens took on the standard textualist critiques of judicial reliance on legislative history. To Justice Stevens, ignoring legislative history would be "disrespectful to the professionals employed by a co-equal branch of our government."[51] And, rather than enlarging judicial discretion, giving weight to legislative history could serve as an appropriate constraint on judges.[52]

Liberty and Justice, for All

Justice Stevens's frequent appeals to factual sensitivity and context should not be mistaken for indifference to the stakes of a case or

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[47] 467 U.S. 837 (1984).
[48] *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[49] *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).
[50] *See* John Paul Stevens, *Law Without History?*, N.Y. Rev. Books, Oct. 23, 2014 (reviewing Robert A. Katzmann, Judging Statutes (2014)).
[51] *Id*.
[52] *See id*.

to the broader values underlying the U.S. Constitution and the American project. To the contrary, Justice Stevens saw upholding these values as essential in guiding a judge's exercise of judgment.

This perspective was quickly evident in a dissent that Justice Stevens filed during his first term on the Court. *Meachum v. Fano* addressed whether the Due Process Clause gave a state prisoner the right to contest his transfer to a less hospitable facility.[53] Justice Stevens took issue both with the majority's holding and its reasoning, which held that a liberty interest existed only if created by law. Law, he wrote, "is not the source of liberty, and surely not the exclusive source. I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects . . . ."[54] That steadfast commitment to the rights of the individual litigant resonated throughout Justice Stevens's jurisprudence, especially in his many opinions interpreting the meaning of the Fourteenth Amendment's protection of liberty under what he sometimes called the "Liberty Clause."[55]

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[53] Meachum v. Fano, 427 U.S. 215 (1976).

[54] *Id*. at 230 (Stevens, J., dissenting).

[55] *See* John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. Chi. L. Rev. 13, 20 (1992); *see also McDonald*, 561 U.S. at 864 (Stevens, J., dissenting); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 915–16 (1992) (Stevens, J., concurring in part and dissenting in part); Bowers v. Hardwick, 478 U.S. 186, 216–18 (1986) (Stevens, J., dissenting); Washington v. Glucksberg, 521 U.S. 702, 743–45 (1997) (Stevens, J., concurring in the judgments); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 330–31, 339–44 (1990) (Stevens, J., dissenting); *Fitzgerald*, 523 F.2d at 719–20.

In cases involving the democratic process, Justice Stevens consistently emphasized the role of the people in electing their representatives without interference or dilution from partisan legislators,[56] corporate money,[57] or the Supreme Court itself.[58] Justice Stevens cowrote (with Justice Sandra Day O'Connor) the majority opinion in *McConnell v. F.E.C.* upholding the parts of a bipartisan federal law that regulated corporate campaign spending and that prohibited national political parties from receiving or spending "soft money."[59] Seven years later, in *Citizens United v. F.E.C.*, a new majority overturned the part of the law requiring corporations to direct some of their electioneering expenditures through a separate political action committee.[60] "On a variety of levels," Justice Stevens wrote in dissent, "unregulated corporate electioneering might diminish the ability of citizens to 'hold officials accountable to the people,' and disserve the goal of a public debate that is 'uninhibited, robust, and wide-open.'"[61]

The great value Justice Stevens placed on equal democratic citizenship underlay, at least in part, his religion jurisprudence as well. For him, the religion clauses not only protected freedom of conscience—a theme that he believed unified all the First Amendment's freedoms[62]—but also implicated equal treatment. Justice Stevens adopted a strong stance against government subsidies of religious institutions and practices,[63] and against state preference for religious over secular interests. He was the only justice, for example, who viewed the Religious Freedom Restoration Act (RFRA) as a violation

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[56] *See* Karcher v. Daggett, 462 U.S. 725, 748–61 (1983) (Stevens, J., concurring); Vieth v. Jubelirer, 541 U.S. 267, 317–18 (Stevens, J., dissenting).

[57] *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 678 (1990) (Stevens, J., concurring); McConnell v. F.E.C., 540 U.S. 93, 203–08 (2003); Citizens United v. F.E.C., 558 U.S. 310, 393–95, 423–24 (2010) (Stevens, J., concurring in part and dissenting in part).

[58] *See* Bush v. Gore, 531 U.S. 98, 126–29 (Stevens, J., dissenting).

[59] *McConnell*, 540 U.S. at 114–224.

[60] *Citizens United*, 558 U.S. at 318.

[61] *Id*. at 471 (Stevens, J., dissenting).

[62] *See* Wallace v. Jaffree, 472 U.S. 38, 50 (1985).

[63] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 684 (2002) (Stevens, J., dissenting).

of the Establishment Clause.[64] By seeking to impose heightened scrutiny on all laws that substantially burdened religious exercise, even unintentionally, RFRA constituted a "governmental preference for religion, as opposed to irreligion," he said.[65] Justice Stevens believed it a "paramount purpose" of the Establishment Clause to protect religious outsiders from being made to feel like "a stranger in the political community."[66]

In cases involving the rights of religious objectors to legal exemptions, Justice Stevens long maintained that "there is virtually no room for a 'constitutionally required exemption' on religious grounds from a valid . . . law that is entirely neutral in its general application,"[67] a position the Court subsequently adopted in *Employment Division v. Smith*.[68] For Justice Stevens, the primary reason for not allowing piecemeal exemptions was to avoid the government being forced, inevitably, to choose the religious claims of some over those of others.[69] On this equality-centered view of the religion clauses, providing relief to religious claimants who were singled out for disfavored treatment, which Justice Stevens voted to do on several occasions,[70] was entirely consistent with *Smith* and was required "to protect religious observers from unequal treatment."[71]

Justice Stevens maintained a keen sense of procedural justice and of the role of the courts as a refuge for the powerless. It was this sense that drove Stevens to dissent in his first published opinion, Father

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[64] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (Stevens, J., concurring).
[65] *Id*. at 537.
[66] Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting).
[67] United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., concurring in the judgment).
[68] 494 U.S. 872 (1990).
[69] *See Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring in the judgment).
[70] *See, e.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993); Frazee v. Ill. Dep't of Soc. Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Rev. Bd., 450 U.S. 707 (1981).
[71] *Hobbie*, 480 U.S. at 148 (Stevens, J., concurring in the judgment).

Groppi's en banc case before the Seventh Circuit. Even though there was no reason to believe Groppi was innocent of the legislative contempt charges he was facing, then-Judge Stevens saw the Fourteenth Amendment as guaranteeing procedural protections before a person's liberty could be denied, whether by a court or a legislature. "'At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen,'" Stevens wrote, quoting Justice Louis Brandeis, whose seat on the Supreme Court he would later occupy.

Justice Stevens's unwavering insistence on procedural regularity faced its highest profile test in a series of cases adjudicating the rights of detainees held at the Guantanamo Bay detention camp in the years following September 11, 2001. First, in *Rasul v. Bush*,[72] Stevens wrote for the Court that the federal habeas statute applied to Guantanamo and gave federal courts jurisdiction to hear the detainees' claims. For Stevens, the fact that the detention site was formally on Cuban soil was no obstacle to statutory habeas jurisdiction given that the site was under the complete control of the United States. He quoted Justice Rutledge's dissent from 56 years earlier in *Ahrens v. Clark*, decided during his term as a law clerk.[73]

Later, in *Hamdan v. Rumsfeld*,[74] Justice Stevens wrote for the Court invalidating the President's use of military commissions to try detainees who had been designated as enemy combatants. The Geneva Conventions and the Uniform Code of Military Justice forbid this, Justice Stevens wrote, notwithstanding the seriousness of the allegations made against the petitioner.[75] The principles of procedural justice that underlay the opinions in *Rasul* and *Hamdan* were evident as well in Justice Stevens's opinion in *I.N.S. v. St. Cyr*,[76] which refuted the government's argument that two federal statutes had impliedly

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[72] 542 U.S. 466 (2004).
[73] *Id*. at 477 n.7 (quoting *Ahrens*, 335 U.S. at 209 (Rutledge, J., dissenting)).
[74] 548 U.S. 557 (2006).
[75] *See id*. at 635.
[76] 533 U.S. 289 (2001).

stripped habeas courts of jurisdiction in deportation cases. The Court would not, he said, construe congressional statutes to preclude judicial consideration on habeas of important legal questions absent "a clear, unambiguous statement of congressional intent," which was wanting in *St. Cyr*.[77]

For Justice Stevens, the availability of strong, independent courts was essential to a just legal system. He accordingly favored accountability over immunity for governments and their officials. "The assumption that [immunity] could be supported by a belief that 'the King can do no wrong' has always been absurd," he wrote in dissent in *Seminole Tribe of Florida v. Florida*.[78] He thought it wrong—quite wrong—for the Court to stretch the Eleventh Amendment beyond its text and limit Congress's power to establish private rights of actions for citizens harmed by their states.[79] His opinion for the Court in *Clinton v. Jones* also emphasized accountability, holding that the office of the Presidency does not immunize its current occupant from civil liability for pre-presidential conduct.[80] And this theme came through reliably in smaller cases as well. In *Smith v. United States*, the rest of the Court read the waiver of immunity in the Federal Torts Claims Act narrowly to exclude acts occurring on the territory of Antarctica.[81] Not Justice Stevens. To him, the "international community includes sovereignless places but no places where there is no rule of law."[82]

The importance Justice Stevens placed in the availability of civil and criminal process is likewise evident across a range of cases spanning his career. He dissented forcefully in *Bell Atlantic v. Twombly*,[83] in which the Court heightened the standard for pleading under the Federal Rules of Civil Procedure to require that the plaintiff's claim be "plausible" (and in an antitrust case, at that). He authored the

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[77] *Id*. at 314.
[78] 517 U.S. 44, 95 (1996) (Stevens, J., dissenting).
[79] *See id*. at 76.
[80] 520 U.S. 681 (1997).
[81] Smith v. United States, 507 U.S. 197 (1993).
[82] *Id*. at 216–17 (Stevens, J., dissenting).
[83] 550 U.S. 544, 570 (2007) (Stevens, J., dissenting).

Court's opinion in *Apprendi v. New Jersey*,[84] the first in a momentous series of cases requiring that juries decide facts that increase a criminal defendant's sentencing exposure. And in *Scott v. Harris*,[85] Justice Stevens was the only dissenter in a case holding that the reasonableness of police using deadly force to stop a fleeing suspect could be decided as a matter of law, without the aid of a jury, based on the suspect's allegedly reckless driving. The record had included a video of the car chase that impressed the other justices more than Justice Stevens. He didn't let the opportunity for a gentle ribbing slip by: "Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slow-poke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately."[86]

Justice Stevens's Decency

Justice Stevens was kind, gracious, quick to smile, and unfailingly polite. His interventions at the Court's oral arguments were usually prefaced with a disarming, "May I ask you this?" or "May I ask you a question?" What followed was typically the most penetrating and difficult question of the argument. He was modest and unassuming; he enjoyed it when people did not recognize that he was a Supreme Court justice. His sizeable circle of clerks adored him, and frequently noted to anyone who would listen that he was the best boss they could ever hope to have.

Decency, independence, and humble brilliance ran through all his work. He stayed outside the cert pool, having his clerks review all petitions and bring significant ones to his attention. In preparing for oral argument, he asked for no bench memos from his clerks. Instead, after he had read all the papers, he would stroll into the clerks' office and settle himself into a well-worn armchair. Then he would talk through the cases, aided by near-perfect recall of every prior case that had come before the Court during his time on it. When he had an

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[84] 530 U.S. 466 (2000).
[85] 550 U.S. 372 (2007).
[86] *Id*. at 390 n.1 (Stevens, J., dissenting).

opinion to write, he always prepared the first draft himself, so as to be sure that he was clear on his own view of the case.

Many of these first drafts were separate opinions. Justice Stevens wrote more dissenting opinions than any justice in the history of the Court—and more concurring opinions as well. Influenced by his 1969 investigation of the Illinois Supreme Court, he sought to be clear, always, about why he had voted as he did. With his fearless independence, he was untroubled by occasionally being one against eight—although he wished his colleagues would rethink their votes.

Most of these dissents remain dissents, enduring markers of how Justice Stevens believed we could achieve a more just society. But on occasion they paved the way for future change. In *Bowers v. Hardwick*, Justice Stevens dissented from the Court's holding that the Constitution offers no protection against criminal liability for same-sex couples engaging in intimate conduct.[87] Rather, he concluded, individual decisions by a couple "concerning the intimacies of their physical relationship . . . are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[88] Seventeen years later, Justice Stevens assigned Justice Kennedy to write the opinion for the Court in *Lawrence v. Texas* overruling *Bowers*. The opinion stated: "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here."[89]

A Lifetime of Learning

Justice Stevens was deeply committed to the educative power of experience. As he memorably put it in a speech at Fordham Law School in 2005, "learning on the bench has been one of the most important and rewarding aspects of my own experience over the last thirty-five years [as a federal judge]."[90] Justice Stevens viewed his own willingness to engage in "learning on the job" as more than merely a natural inclination of his own (although it certainly was that). Intellectual curiosity and an openness to learning new lessons were,

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[87] *Bowers*, 478 U.S. at 214 (Stevens, J., dissenting).
[88] *Id*. at 216 (Stevens, J., dissenting).
[89] Lawrence v. Texas, 539 U.S. 558, 578 (2003).
[90] John Paul Stevens, *Learning on the Job*, 74 Fordham L. Rev. 1561, 1567 (2006).

in his view, essential virtues of any good judge. Every new case presented an opportunity for development. In a statement overflowing with his characteristically generous optimism, Justice Stevens said that "pre-argument predictions about how a judge or Justice is likely to vote are far less significant than the knowledge that he or she will analyze the cases with an open mind and with respect for the law as it exists at the time of the decision."[91]

Justice Stevens's evolution on the death penalty bears all the hallmarks of his judicial personality and his commitment to constant learning. The lead opinions (co-signed by Justices Stewart, Powell, and Stevens) in the 1976 decisions of *Gregg v. Georgia*,[92] *Proffitt v. Florida*,[93] and *Jurek v. Texas*,[94] upheld death penalty statutes in Georgia, Florida, and Texas, which had been revised in an effort to address the constitutional defects identified four years earlier in *Furman v. Georgia*.[95] The opinions—crafted narrowly to affirm the proposition that the Eighth Amendment did not categorically rule out the constitutionality of the death penalty—stressed the continuity of their approach with the earlier *Furman* decision, as well as the contingent and highly contextual nature of their conclusion. In that sense, the decisions themselves (implicitly) envisioned the possibility of change in the future.

During the ensuing decades, Justice Stevens was neither among the justices who invariably voted to overturn death sentences nor among those who seemingly reflexively upheld the sentences imposed and affirmed by lower courts. An indication that Justice Stevens's views on the death penalty were shifting against its permissibility came in the 2002 case of *Atkins v. Virginia*,[96] in which he wrote the opinion for the Court holding that severely mentally disabled defen-

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[91] *Id.* at 1563.
[92] 428 U.S. 153 (1976).
[93] 428 U.S. 242 (1976).
[94] 428 U.S. 262 (1976).
[95] 408 U.S. 238 (1972).
[96] 536 U.S. 304 (2002).

dants lack the culpability necessary to justify the death penalty. Tellingly, the opinion also notes that the death penalty is not constitutional when applied to these defendants because—owing to their limited ability to assist in their own defense—the process leading to its imposition was unreliable.

By 2008, Justice Stevens had come to a more categorical conclusion. In his concurring opinion in *Baze v. Rees*,[97] Justice Stevens painstakingly walked through the legal developments that had (in his view) rigged death cases against defendants as well as new information that he had come to appreciate more fully over the years after his 1976 vote to reinstate the death penalty.[98] "[J]ust as Justice White ultimately based his conclusion in *Furman* [that the death penalty was unconstitutional] on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.'"[99] This later opposition to the manner in which the death penalty came to be applied was facilitated by the qualified nature of Justice Stevens's earlier endorsement of the state's power to impose that penalty coupled with his resolute openness to learning.[100]

Another important area in which Justice Stevens's thinking remained flexible over time was race-based affirmative action. Justice Stevens first offered his views on affirmative action in *Regents of the University of California v. Bakke*.[101] Although *Bakke* is usually cited for its holding on constitutional law, Justice Stevens's separate opinion on behalf of four justices addressed only the statutory issue under Title VI of the Civil Rights Act of 1964. That statute prohibits racial

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[97] 553 U.S. 35, 71 (2008) (Stevens, J., concurring in the judgment).
[98] *See Gregg*, 428 U.S. at 153.
[99] *Baze*, 553 U.S. at 86 (quoting *Furman*, 408 U.S. at 312 (White, J., concurring)).
[100] *See* Gregg v. Georgia, 428 U.S. 153, 175 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *see also* Gardner v. Florida, 430 U.S. 349 (1977).
[101] 438 U.S. 265 (1978).

discrimination "under any program or activity receiving Federal financial assistance."[102] Justice Stevens concluded that the university's program that set aside a fixed percentage of admissions for favored racial minorities was contrary to the "plain language of the statute."[103] Although he later wrote several opinions upholding affirmative action programs, he stated in his memoirs that he believed the basis of his *Bakke* opinion to be sound. It rested on the proposition that the meaning of Title VI did not depend upon interpretation of the Constitution, but instead established an absolute right of access to federally financed programs regardless of race.[104]

By contrast, he refused to interpret the Constitution to impose an absolute prohibition upon considering race in any government program. He took this position, first, in a case upholding a federal statute that set aside ten percent of funds for local public works projects to be allocated to minority businesses.[105] Consistent with his aversion to tiers of judicial scrutiny, he would have invalidated the program because Congress failed "to demonstrate that its unique statutory preference is justified by a relevant characteristic that is shared by members of the preferred class."[106] He took the same position in a separate opinion in a case invalidating a set aside for construction contracts in Richmond, Virginia.[107] He would not have limited racial classifications by government only to "a remedy for a past wrong,"[108] but he found the set aside unconstitutional because, among other reasons, the city failed to argue that it promoted the efficient performance of city contracts.[109]

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[102] Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252, 42 U.S.C. § 2000d.
[103] 438 U.S. at 412 (Stevens, J., concurring in the judgment in part and dissenting in part).
[104] *See* Stevens, *supra* note 1, at 160–61.
[105] Fullilove v. Klutznick, 448 U.S. 448, 536 (1980) (Stevens, J., dissenting).
[106] *Id*. at 554.
[107] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 514–15 (1989) (Stevens, J., concurring in part and concurring in the judgment).
[108] *Id*. at 511.
[109] *Id*. at 512.

But he followed similarly contextual reasoning in upholding some racial preferences, first in a case protecting minority school teachers from layoffs.[110] He would have upheld this remedy on the ground that "in our present society, race is not always irrelevant to sound governmental decisionmaking,"[111] and the school district could reasonably conclude that an integrated faculty could provide benefits to the entire student body.[112] He took the same position in later cases on racial preferences by the federal government, first in concurring in a decision to give a preference to minority firms in obtaining broadcast licenses,[113] and then in dissenting from a decision that applied "strict scrutiny" to all such federal preferences.[114] In his dissent, he reiterated his skepticism of standards of review based on his judgment that, in practice, "uniform standards are often anything but uniform."[115]

The consistent judicial character revealed in these affirmative action decisions, separated by nearly 30 years on the Supreme Court, lend significant weight to Justice Stevens's frequent protests that he had not changed as much as people said he did. His 2019 memoir, *The Making of a Justice*, makes clear that his self-understanding as a thoroughgoing judicial moderate remained as firm as ever. In his view, his time on the Court did not fundamentally transform him. Rather, he learned from his experience as a Justice, as he constantly did from the world around him, and this led him to change the conclusions he reached on certain issues. But he remained steadfastly true to the incremental and nonideological vision of judging he articulated to the Chicago Bar the year before President Ford appointed him to the Supreme Court.

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[110] Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
[111] *Id*. at 314 (Stevens, J., dissenting).
[112] *Id*. at 315.
[113] Metro Broad., Inc. v. F.C.C., 497 U.S. 547, 601–02 (1990) (Stevens, J., concurring).
[114] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 242 (1995) (Stevens, J., dissenting).
[115] *Id*. at 242 (Stevens, J., dissenting).

On the thirtieth anniversary of that appointment, President Ford put it just right in a letter commemorating the event: "I am prepared to allow history's judgment to rest (if necessary, exclusively) on my nomination thirty years ago of Justice John Paul Stevens to the U.S. Supreme Court," Ford wrote. "He has served his nation well, at all times carrying out his judicial duties with dignity, intellect and without partisan political concerns. Justice Stevens has made me, and our fellow citizens, proud . . . ."[116]

Carrying on our tradition dating to the days of Chief Justice Marshall,[117] it is accordingly:

RESOLVED, that we, the Bar of the Supreme Court of the United States, express our great admiration and respect for Justice John Paul Stevens, our deep sense of loss upon his death, our appreciation for his contribution to the law, the Court, and the Nation, and our gratitude for his example of a life well spent; and it is further

RESOLVED that the Solicitor General be asked to present these resolutions to the Court and that the Attorney General be asked to move that they be inscribed on the Court's permanent records.

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[116] Stevens, *supra* note 1, at 527–28.
[117] 35 U.S. (10 Pet.) vii, viii (1836).