

2011

## Justice Stevens and the Obligations of Judgment

David Pozen

*Columbia Law School*, [dpozen@law.columbia.edu](mailto:dpozen@law.columbia.edu)

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty\\_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)



Part of the [Constitutional Law Commons](#), [Judges Commons](#), and the [Jurisprudence Commons](#)

---

### Recommended Citation

David Pozen, *Justice Stevens and the Obligations of Judgment*, 44 LOY. L.A. L. REV. 851 (2011).

Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/1672](https://scholarship.law.columbia.edu/faculty_scholarship/1672)

This Essay is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact [scholarshiparchive@law.columbia.edu](mailto:scholarshiparchive@law.columbia.edu).

---

---

## JUSTICE STEVENS AND THE OBLIGATIONS OF JUDGMENT

*David E. Pozen\**

How to sum up a corpus of opinions that spans dozens of legal fields and four decades on the bench? How to make the most sense of a jurisprudence that has always been resistant to classification, by a jurist widely believed to have “no discernible judicial philosophy”?<sup>1</sup> These questions have stirred Justice Stevens’ former clerks in recent months. Since his retirement, many of us have been trying to capture in some meaningful if partial way what we found vital and praiseworthy in his approach to the law.<sup>2</sup> There may be something paradoxical about the attempt to encapsulate in a formula the views of someone who was so sensitive to the potential tyranny of labels, to taxonomize the output of someone so skeptical about neat legal categories. There is certainly something reductive about it. Be that as it may, I will try in these pages to contribute to the effort by suggesting that an important clue to Justice Stevens’ jurisprudence can be found in his frequent recourse to the notion of judicial “judgment.” If one word must be selected to illuminate a life’s work, this would be my submission.

\* \* \*

I do not have the space here to make good on this claim in any robust way, but I believe the record would demonstrate that, to a degree unmatched by his colleagues, Justice Stevens tended to draw

---

\* Special Advisor to the Legal Adviser, U.S. Department of State; J.D., Yale Law School. The author served as a law clerk to the Hon. John Paul Stevens during the 2009 Supreme Court Term. The views expressed herein are the author’s alone and do not necessarily reflect the views of the Department of State or the United States Government.

1. RICHARD A. POSNER, HOW JUDGES THINK 346 (2008) (describing Justice Stevens). Judge Posner further characterizes Stevens as “leaning toward pragmatism.” *Id.*

2. See, e.g., Symposium, *The Honorable John Paul Stevens*, 43 U.C. DAVIS L. REV. 713 (2010); Symposium, “*The Finest Legal Mind*”: *A Symposium in Celebration of Justice John Paul Stevens*, 99 GEO. L.J. (forthcoming 2011).

on—and draw attention to—the idea of judicial judgment. He did this in three main contexts.

First, Justice Stevens consistently tempered his separate writings, including nearly all of his most ambitious ones, with the qualifier “in my judgment.”<sup>3</sup> Thus, in the first paragraph of his opinion in *Citizens United v. FEC*<sup>4</sup> and in the last paragraph of his opinion in *Davis v. FEC*,<sup>5</sup> Justice Stevens explained that the majority’s approach to campaign finance regulation was, “in [his] judgment,” deeply flawed. His vigorous dissents in *California Democratic Party v. Jones*<sup>6</sup> and *United States v. Booker*<sup>7</sup> similarly moderated with this phrase the charge that the Court was doing something unprecedented and unwarranted. Such ritualistic references to one’s own “judgment” are hardly earth-shattering. But they bespeak a sense of humility and personal responsibility that is sometimes missing from the justices’ pronouncements, as well as a level of comfort with the existence of disagreement. They provide a diplomatic counterweight to the exceptionally candid and, often, stinging appraisals that follow—the handshake before the duel.

Second, Justice Stevens consistently called on judges to exercise independent judgment in the face of constrictive standards of review. Throughout his tenure, he challenged the Court’s “rigid adherence to tiers of scrutiny” in equal protection analysis.<sup>8</sup> He opposed the line of decisions that progressively narrowed the appellate courts’ power under Federal Rule of Criminal Procedure 52(b) to recognize “plain” errors not timely raised in district court, so as to protect a defendant’s

---

3. This was not an ironclad rule. Justice Stevens’ *Bush v. Gore* dissent notably used no such qualifiers in excoriating the majority for the “certain” damage it had done to “the Nation’s confidence in the judge as an impartial guardian of the rule of law.” 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting).

4. 130 S. Ct. 876, 929 (2010) (Stevens, J., concurring in part and dissenting in part); see also *id.* at 961 (“[T]he approach [to Congress’s anticorruption interest] taken by the majority cannot be right, in my judgment.”).

5. 554 U.S. 724, 757 (2008) (Stevens, J., concurring in part and dissenting in part).

6. 530 U.S. 567, 590 (2000) (Stevens, J., dissenting) (“The Court’s holding is novel and, in my judgment, plainly wrong.”).

7. 543 U.S. 220, 274 (2005) (Stevens, J., dissenting in part) (“In my judgment, it is therefore clear that the Court’s creative remedy is an exercise of legislative, rather than judicial, power.”).

8. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 800–01 (2007) (Stevens, J., dissenting); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451–54 (1985) (Stevens, J., concurring); *Craig v. Boren*, 429 U.S. 190, 211–14 (1976) (Stevens, J., concurring).

“substantial rights.”<sup>9</sup> And with particular zeal, he resisted the Court’s winnowing of its own habeas authority under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>10</sup> No one doubts that AEDPA limited federal court review of state habeas petitions in a variety of respects, further diminishing inmates’ prospects for relief.<sup>11</sup> But just how severely AEDPA limited the substantive dimension of federal court review quickly proved controversial. In *Williams v. Taylor*,<sup>12</sup> Justice Stevens staked out a minimalist vision of what AEDPA had changed. “Whatever ‘deference’ Congress had in mind” in crafting 28 U.S.C. § 2254(d), he wrote for a plurality, “it surely is not a requirement that federal courts actually defer to a state-court application of the federal law that is, in the independent judgment of the federal court, in error.”<sup>13</sup>

That “surely” seems an immoderate touch. Yet were things otherwise, Justice Stevens insisted, both the longstanding role of the federal courts in considering habeas claims and the uniformity of federal law could be compromised.<sup>14</sup> To avert these perceived harms, he posited something like a clear statement rule, requiring Congress to express its intent “with much greater clarity” if it wishes to disable federal judges from drawing and enforcing their own legal conclusions.<sup>15</sup>

The debate over AEDPA is not merely technical in nature for Justice Stevens, then, because in his view the extreme subordination of a federal court’s legal analysis to the analysis of the state court, in a context such as habeas, risks nothing less than a subversion of the

---

9. See, e.g., *United States v. Marcus*, 130 S. Ct. 2159, 2167–69 (2010) (Stevens, J., dissenting); *United States v. Olano*, 507 U. S. 725, 743–45 (1993) (Stevens, J., dissenting).

10. Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

11. See Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 812 n.74 (2009) (summarizing AEDPA’s key “innovations”).

12. 529 U.S. 362 (2000).

13. *Id.* at 387 (opinion of Stevens, J.).

14. *Id.* at 386–90.

15. *Id.* at 379; see also *Renico v. Lett*, 130 S. Ct. 1855, 1876 (2010) (Stevens, J., dissenting) (“Any attempt to prevent federal courts from exercising independent review of habeas applications would have been a radical reform of dubious constitutionality, and Congress ‘would have spoken with much greater clarity’ if that had been its intent.” (quoting *Williams v. Taylor*, 529 U.S. 362, 379 (2000))); *In re Davis*, 130 S. Ct. 1, 1–2 (2009) (Stevens, J., concurring) (suggesting AEDPA applies with lesser force, if at all, to “actual innocence” claims and to original habeas petitions filed initially in Supreme Court).

judicial role. On issues of federal law, state judges are supposed to take their cues from Article III judges, not the other way around.<sup>16</sup> An excessively deferential approach also invites logical confusion, because the determination whether any given state court adjudication was “unreasonable” under AEDPA necessarily entails an assessment of what that court has done; the *reasonableness* of a ruling is inextricably bound up with its *correctness*. No matter how rigidly one interprets § 2254(d) or any other legal standard, Justice Stevens reminded his colleagues this past Term, “there is no escaping the burden of judgment.”<sup>17</sup>

Finally, and most pointedly, Justice Stevens consistently affirmed the value of judicial judgment in construing the Constitution’s most expansively worded provisions and the Court’s only slightly less open-ended implementing standards. The First Amendment was an early target. In his 1984 opinion for the Court in *Bose Corp. v. Consumers Union of United States, Inc.*,<sup>18</sup> for instance, Justice Stevens admonished the courts of appeals to exercise “independent judgment” in deciding whether particular speech acts lose protection as “fighting words,” incitements to imminent lawlessness, obscenity, child pornography, or libel.<sup>19</sup> Lest future appellate judges be tempted to shirk this duty or to underestimate its discretionary aspect, Stevens declared boldly, if cryptically, that “[t]he requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law.”<sup>20</sup>

Justice Stevens elaborated on the imperative of judgment in greater depth in his Eighth Amendment jurisprudence. The central statement appears in his 2008 *Baze v. Rees*<sup>21</sup> concurrence, the opinion that signaled his willingness to find the death penalty

---

16. Justice Stevens was equally vigilant about maintaining the reverse hierarchy, respecting the interpretive supremacy of state judges on issues of state law. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1065–72 (1983) (Stevens, J., dissenting) (advocating presumption against federal jurisdiction in cases resolved on adequate state grounds).

17. *Renico*, 130 S. Ct. at 1876 (Stevens, J., dissenting); *cf. JOHN RAWLS, POLITICAL LIBERALISM* 54–58 (1993) (describing “burdens of judgment” that give rise to reasonable disagreement about matters of value in democratic societies). The burdens of judgment identified by Rawls exacerbate the judge’s burden of judgment invoked by Stevens, by making it virtually inevitable that certain judicial decisions—decisions that touch on important issues of morality or justice—will engender dissensus among reasonable persons.

18. 466 U.S. 485 (1984).

19. *Id.* at 505–11 (opinion of Stevens, J.).

20. *Id.* at 510.

21. 553 U.S. 35 (2008).

unconstitutional. Defending a line of cases in which the Court had struck down state practices as “cruel and unusual” under the Eighth Amendment, Stevens explained that “[i]n those opinions we acknowledged that ‘objective evidence, though of great importance, did not “wholly determine” the controversy, “for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.’”<sup>22</sup> He associated himself with Justice White, who “was exercising his own judgment in 1972 when he provided the decisive vote in *Furman*, the case that led to a nationwide reexamination of the death penalty.”<sup>23</sup> “As a matter of fact,” Justice Stevens observed, Justice White had no choice but to “arrive at judgment,” for “there are occasions when a Member of this Court has a duty to make judgments on the basis of data that falls short of absolute proof.”<sup>24</sup>

This sentiment found its fullest expression in Justice Stevens’ writings on substantive due process, culminating in the final dissent of his career in *McDonald v. City of Chicago*.<sup>25</sup> In that opinion, Stevens identified heavily with the second Justice Harlan, and took as a touchstone his predecessor’s observation that “[n]o formula could serve as a substitute, in this area, for judgment and restraint.”<sup>26</sup> He emphasized at several points, in outlining his views on how a judge should approach substantive due process analysis, both the constraining force and the affirmative virtue of “reasoned judgment.”<sup>27</sup> And in his valedictory exchange with Justice Scalia, he upbraided his colleague for making a quixotic attempt to escape from

---

22. *Id.* at 83 (Stevens, J., concurring in judgment) (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)) (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion)).

23. *Id.*

24. *Id.* at 83–84 (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)). In a series of opinions whittling away at the margins of capital punishment, Justice Kennedy has endorsed a similar understanding of the Eighth Amendment. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008) (opinion of Kennedy, J.).

25. 130 S. Ct. 3020 (2010).

26. *Id.* at 3102 (Stevens, J., dissenting) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). The affinities with Harlan transcend this one area. In his commitment to reasoned elaboration of the law, his interpretive purposivism, his common-law orientation, and his concern for the optimal allocation of decision-making authority across institutions, Justice Stevens carried on a number of the legal process school values that Justice Harlan is often seen as having “personified.” Donald A. Dripps, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 OHIO ST. J. CRIM. L. 125, 132 (2005).

27. *McDonald*, 130 S. Ct. at 3096, 3099 n.22, 3100, 3119 (Stevens, J., dissenting).

judgment through an exclusively historicized methodology.<sup>28</sup> Whether or not the Court's substantive due process decisions facilitate or frustrate democratic values, Justice Stevens concluded, "all depends on judges' exercising careful, reasoned judgment. As it always has, and as it always will."<sup>29</sup>

\* \* \*

So what insight into Justice Stevens can we derive from these observations? To be sure, a judge's use of a term as common as "judgment" is not, on its face, all that striking; Justice Breyer's penchant for invoking "workability" as a constitutional norm certainly invites greater scrutiny and contributes more self-consciously to his particular brand of pragmatism.<sup>30</sup> Yet, especially in an age when younger liberal justices are content to stand on technocratic ideals such as workability, the significance of Justice Stevens' insistence on judgment cannot be discounted.<sup>31</sup> I believe his repeated foregrounding of the term, his thematization of judgment, sheds light on at least three notable aspects of his jurisprudence.

First, it illuminates the faith Justice Stevens places in the capacity of practical reason to broker between illegitimate subjective preferences and infeasible objective standards. Wholly private beliefs have no place in judging, Justice Stevens would be the first to avow; as guides to judicial decision they are, almost by definition, arbitrary and capricious. Universally accepted principles could have a large place, except that in the legal culture we live in—marked by diversity and disagreement—and in the constitutional tradition we inhabit—marked by textual parsimony and linguistic plasticity—such principles will rarely exist. So, in construing a phrase such as "cruel and unusual punishments" or "due process," how does a judge set aside personal sentiment and remain faithful to the internal

---

28. *Id.* at 3116–19.

29. *Id.* at 3119.

30. See, e.g., STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW, at xii (2010) ("In the framers' eyes, then, the Court would help to maintain the *workable democracy* that the Constitution sought to create. . . . The present book focuses on the Supreme Court's role in maintaining a *workable* constitutional system of government."); see also David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 303 & n.148 (2010) (noting Justice Breyer's interest in ideal of "workability," as evidenced by prior writings).

31. Thanks to Jeremy Kessler for discussion on this point.

perspective of the lawyer, while also doing justice to the interpretive license and freedom of action that those formulations allow? And how does a judge respect the fact of moral and political pluralism, while also fulfilling her duty to say what the law is without fear or favor? For Stevens, part of the answer lies in an analytic method that looks outward and forward as well as backward, assessing the relevant legal materials in light of the particular facts, underlying goals, and widely shared expectations that attend them. To avoid the twin shoals of willful and “wooden”<sup>32</sup> decision-making, the judge must evaluate her options critically and pragmatically: she must “employ the distinctly human faculty of judgment.”<sup>33</sup> Contextual values and case-specific variables stand in for abstract propositions and categorical truths. Practical reason guides the way.

This helps explain the purposivist streak in Justice Stevens’ jurisprudence, along with his skepticism of more formalistic models of interpretation that aspire principally to fetter judges or to identify “correct” answers.<sup>34</sup> Those aspirations can never be fully realized, and in any event they may not be desirable. They would reduce judging to a kind of analytic puzzle, even though it inescapably involves the privileging of certain legal premises, historical perspectives, and social values over others, with profound consequences for us all. Thus, in *District of Columbia v. Heller*,<sup>35</sup> a case that still rankles,<sup>36</sup> when Justice Scalia summarily asserted that the rule of decision would be the original meaning of the Second Amendment,<sup>37</sup> he moved too quickly for Stevens. He never addressed the logically prior question of why that should be the rule. Why not

---

32. The charge of “woodenness” was one of Justice Stevens’ signature rebukes. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 948, 979 (2010) (Stevens, J., concurring in part and dissenting in part); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 800 (2007) (Stevens, J., dissenting); *Rice v. Cayetano*, 528 U.S. 495, 547 (2000) (Stevens, J., dissenting).

33. Neil S. Siegel, *Prudentialism in McDonald v. City of Chicago*, 6 DUKE J. CONST. L. & PUB. POL’Y 16, 30 (2010) (limning connection between judicial discretion and judgment, with reference to Justice Stevens’ *McDonald* dissent).

34. In his contribution to this tribute issue, Bill Araiza insightfully explores Justice Stevens’ skepticism of rigid rules in the areas of equal protection and free speech. William D. Araiza, *Justice Stevens and Constitutional Adjudication: The Law Beyond the Rules*, 44 LOY. L.A. L. REV. 889 (2011).

35. 554 U.S. 570 (2008).

36. See Jeffrey Toobin, *After Stevens: What Will the Supreme Court Be Like Without Its Liberal Leader?*, NEW YORKER, Mar. 22, 2010, at 38, 41 (quoting Justice Stevens listing *Heller* and *Bush v. Gore* as cases “I’m very unhappy with”).

37. *Heller*, 554 U.S. at 576–77 (opinion of Scalia, J.).



look instead to stare decisis?<sup>38</sup> Why not look to the ends the Second Amendment was meant to serve?<sup>39</sup> To the basic needs and ideals of American communities today?<sup>40</sup> Original meaning can never be ignored—certainly Justice Stevens’ opinion lavished attention on it<sup>41</sup>—but when judges like Scalia suggest that their hands are clean because they are *just* applying text or tradition or Founding-era understandings, they are being overly optimistic at best. They are wrongly denying to the public, and perhaps also to themselves, their own normativity.

Judicial judgment is more than a decisional imperative on this account. It is an ethical obligation. To accept the role of judgment is to reckon both with the irreducible uncertainty of legal norms and with the judge’s power to do violence to the social fabric. Judgment entails a taking on of responsibility.<sup>42</sup>

Second, Justice Stevens’ emphasis on judgment illuminates his faith in the capacity of reason-giving to mediate conflict and ensure the reasonableness of the Court’s decisions. As Justice Scalia has never tired of pointing out, there are obvious pitfalls to a jurisprudence that draws on uncodified intersubjective norms and that refuses to elevate any one interpretive modality above all others in a rigid hierarchy.<sup>43</sup> In particular, there is potential for idiosyncratic and instrumental behavior. To ensure against such risks, Justice Stevens realized early on, something more than good faith may be needed.

He therefore developed various tools of self-restraint. He avoided relying on deeply contested, high-level theories of the good

---

38. *See, e.g., id.* at 639 (Stevens, J., dissenting) (“Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself, would prevent most jurists from endorsing such a dramatic upheaval in the law.” (internal citations omitted)).

39. *See, e.g., id.* at 643 (arguing that Second Amendment should be construed in light of “the clear statement of [militia-related] purpose announced in the Amendment’s preamble”).

40. *See, e.g., id.* at 689–723 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting) (advocating and applying “interest-balancing” approach to Second Amendment review that explicitly weighs current public interest in regulation).

41. *Id.* at 639–67 (Stevens, J., dissenting).

42. Efforts to escape from judgment, accordingly, may reflect not so much modesty as a kind of existentialist bad faith. *Cf.* POSNER, *supra* note 1, at 104 (arguing that originalists’ “pretense” to having prepolitical, value-neutral methodology is “an example of bad faith in Sartre’s sense—bad faith as the denial of freedom to choose, and so the shirking of personal responsibility”).

43. *See, e.g., McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050–58 (2010) (Scalia, J., concurring).

or the right, drawing instead (when germane) on the common experiences and aspirations of the American people: although one virtually never found Justice Stevens appealing to any comprehensive moral or political doctrine, one would often find him appealing to the reader's common sense, to canonical events in U.S. history, to the minimal demands of personal dignity and autonomy, or to basic notions of fair play.<sup>44</sup> He favored case-specific rulings over broad pronouncements. And, especially pertinent here, he adhered to an ethic of strict transparency. Notwithstanding his genial, unassuming nature, Stevens distinguished himself from the start by his willingness to write separately, his insistence on explaining rather than asserting his positions, and his plainspoken, argumentative style. If he was not entirely happy with or convinced by what his colleagues were doing, he would say so.

"Our practice of disclosing conflicting views," Justice Stevens once wrote, "not only gives the public an opportunity to evaluate our work more intelligently," thereby fostering dialogue and accountability, "but also reduces the danger that troublesome questions will be swept under the rug."<sup>45</sup> In this way, the transparency of one's jurisprudence can serve as both an internal and external check on its normative aspect. Practical reason informs judicial judgment; public reasoning disciplines it. Judgment must be justified.

Finally, and implicit in the points above, Justice Stevens' ideal of judgment illuminates his faith in the capacity of federal judges to apply their discretion in an appropriately lawful and democracy-respecting manner. The prospect of federal judges exercising independent judgment never frightened Justice Stevens the way it has frightened some, because he never signed on to the premise that

---

44. In other words, Justice Stevens employed only what Lawrence Solum, building on John Rawls, has termed "public legal reasons": reasons that draw on policies and principles accessible by, and potentially acceptable to, all reasonable citizens. Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449 (2006); cf. Jeremy Waldron, *Planning for Legality*, 109 MICH. L. REV. 883, 901 (2011) (book review) (discussing, in light of Scott Shapiro's planning theory of law, virtue of judges' favoring "strategies that give greater weight to values or modes of thinking that are already well established in society").

45. Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens's Free Speech Jurisprudence*, 74 FORDHAM L. REV. 2201, 2239 (2006) (quoting John Paul Stevens, *What I Did This Summer*, 18-OCT CBA REC., Oct. 2004, at 34, 34).

they are intrinsically threatening, or “deviant,”<sup>46</sup> actors in a democratic polity. As Justice Brennan once observed, “[t]o Justice Stevens, we are all part of a vast web that includes present and future judges, practicing lawyers, academics, and the public, all engaged in the profoundly important task of self-governance through law.”<sup>47</sup> The courts, on this view, do not stand outside of the processes of collective will-formation and self-determination; nor are Congress and the executive branch commensurate with “We the People.” If their presidential appointments and life tenure give federal judges a weaker popular pedigree as compared to their counterparts in the other branches, the former have compensating virtues borne of their structural independence, their critical distance from everyday politics, and their distinctive professional norms.

The best judges, moreover, have earned the trust of the American people over time, through the cogency and integrity of the decisions they have rendered. When referencing an earlier Supreme Court opinion, Justice Stevens was uniquely likely to invoke its author by name. This habit served not only to establish continuity and remind readers that real human beings—persons with the capacity for reasoned judgment—invariably mold the law, but also to establish the significance of Supreme Court justices in the historical (and still unfolding) process of molding what this nation has become. These references served a legitimating function as well. Because the work of the Court, for Stevens, involves the application of judgment above and beyond the application of formal logic and legal craft, the fact that venerable jurists from decades past would have endorsed a proposition tends to confirm its validity.<sup>48</sup>

None of this is to say that Justice Stevens’ faith in judges was naïve or without meaningful boundaries. To the contrary, he persistently noted the ways in which misplaced judicial interventions could circumscribe the domains of both individual and societal self-governance. And to this end, he persistently inquired into which

---

46. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 18 (2d ed. 1986) (describing judicial review as “deviant institution” in American democracy).

47. Magarian, *supra* note 45, at 2239 (quoting William J. Brennan, Jr., *Tribute to Justice Stevens*, 1992/1993 ANN. SURV. AM. L., at xxi, xxiii).

48. At times, Justice Stevens’ transtemporal communion with his predecessors could verge on the uncanny. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 912 n.1 (1992) (Stevens, J., concurring in part and dissenting in part) (observing that eleven of previous fifteen justices would have disagreed with dissent’s position).

institution would be best suited to address a particular question—an inquiry formalized in *Chevron*'s famous two-step test<sup>49</sup>—and contrasted judicial judgment with other forms of specialized reasoning, such as “legislative judgment,”<sup>50</sup> “policy judgment,”<sup>51</sup> and “professional judgment.”<sup>52</sup> Each has its place in a democratic society. One of the judge's tasks is to maintain a suitable allocation of decision-making authority across institutions.<sup>53</sup> Deferring to the judgment of other bodies, in the right circumstances, ensures that judges remain faithful to their constitutional role and do not arrogate to themselves outsized significance in resolving value-laden questions. Failing to acknowledge or employ judicial judgment on an appropriate matter, on the other hand, advances no such goods. It simply reflects a failure to come to terms with one's own freedom and responsibility, and therefore a failure of moral seriousness.

\* \* \*

The Supreme Court justice wields awesome discretionary power to shape the law, giving rise to an equally awesome burden of judgment. Justice Stevens felt this burden keenly and grappled with

---

49. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) (opinion of Stevens, J.); *id.* at 864–66 (contrasting policymaking expertise and mandate of political branches with competencies and duties of courts); *see also supra* note 26 (noting Justice Stevens' adherence to certain legal process school values).

50. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 480, 482 (2005) (opinion of Stevens, J.); *McConnell v. FEC*, 540 U.S. 93, 144, 205 (2003) (joint opinion of Stevens and O'Connor, JJ.).

51. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (opinion of Stevens, J.); *Gonzales v. Raich*, 545 U.S. 1, 26 (2005) (opinion of Stevens, J.).

52. *See, e.g.*, *Kalina v. Fletcher*, 522 U.S. 118, 130 (1997) (opinion of Stevens, J.); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (opinion of Stevens, J.).

53. This inquiry could be rather nuanced, because in addition to considering whether another institution has generic advantages over the courts in a certain area, Justice Stevens was willing to consider the manner in which that institution applied its judgment to a given case. *See, e.g.*, *Doe v. Reed*, 130 S. Ct. 2811, 2830 n.3 (2010) (Stevens, J., concurring in part and concurring in judgment) (“The degree to which we defer to a judgment by the political branches must vary up and down with the degree to which that judgment reflects considered, public-minded decision making. Thus, when a law appears to have been adopted without reasoned consideration, for discriminatory purposes, or to entrench political majorities, we are less willing to defer to the institutional strengths of the legislature.” (internal citations omitted)). In this vein, one wonders whether some part of Justice Stevens' reluctance to defer to state courts on habeas claims, *see supra* notes 10–17 and accompanying text, reflected his deep concern about the influence of judicial elections on those courts' treatment of criminal defendants. *See* John Paul Stevens, *Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida, Aug. 3, 1996*, 12 ST. JOHN'S J. LEGAL COMMENT. 21, 30–31 (1996).

it forthrightly throughout his career. Because Justice Stevens never committed to any distinct brand of jurisprudence or theory of the judicial role, his place in history will have to rest on an evaluation of how he applied his judgment in scores upon scores of individual cases—whether he did so fairly and wisely, or unsatisfyingly and imprudently, whether his decisions advanced or arrested the cause of legality, liberty, and justice. He wouldn't have it any other way.