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## Memoriam: Justice John Paul Stevens

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HARVARD LAW REVIEW

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## MEMORIAM: JUSTICE JOHN PAUL STEVENS

The editors of the *Harvard Law Review* respectfully offer this collection of tributes to Justice John Paul Stevens.

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*Chief Justice John G. Roberts, Jr.\**

*In his opening remarks on the first day of the Supreme Court's 2019 Term, Chief Justice Roberts offered a tribute to Justice Stevens. His remembrance emphasized Justice Stevens's lifelong commitment to public service and his imprint on the Court, his colleagues, and the country. We are grateful to Chief Justice Roberts for contributing those remarks to this collection. We provide an excerpt from his statement as an Introduction to the collection of Tributes that follows.*

\* \* \*

Justice Stevens was nominated to the Court by President Ford on November 28, 1975, and was confirmed by the Senate less than twenty days later. He was an active member of the Court for more than thirty-four years. At the time of his retirement on June 29, 2010, Justice Stevens had become the third-longest serving Justice in the history of the Court.

Justice Stevens devoted his life to public service. He was a commissioned officer in the United States Navy from 1941 to 1945, receiving a Bronze Star for his service. During the 1947 Term he was a law clerk to Justice Wiley Rutledge of this Court. Before joining this Court, Justice Stevens served five years on the United States Court of Appeals for the Seventh Circuit.

His kindness, humility, independence, and wisdom have left us a better Court. His commitment to justice has left us a better nation.

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\* Chief Justice of the United States.

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*Judge David Barron\**

I clerked for Justice Stevens in the 1995–1996 Term. That was twenty years into his life on the Court when — amazingly — he still had more than a decade to go.

I want to remember the Justice on behalf of my fellow Stevens clerks, more than 100 strong. He loved us. We loved him. That is the essence of it. But I want to give some texture.

Where to begin? Perhaps with a story.

There is what I have come to think of as a genre of stories about the Justice: call this genre the “Unassuming Justice Stevens” story.

Each of us who clerked for him has one.

How he took a pot of coffee, when a female clerk had been instructed by an older Justice to pass it around, and said, “I think it is my turn now.”

How, when a litigant referred to a Justice as a judge at oral argument, Justice Stevens interjected to say: “Don’t worry about it. The Constitution makes the same mistake.”

Mine, I recall, happened on my first day with him in chambers. My task was simple: take a floppy disk with a draft opinion that he had prepared — he always prepared the first draft — and insert it into my computer’s disk drive so I could review it.

I was, sadly, not up to the task. The problem: I could not find the disk drive.

Then I felt a presence behind me. A man about my height. Older. Soon, that presence was bending down. Then that presence was on his hands and knees. Then that presence was gently taking the disk from my hand and inserting it into the disk drive under my desk.

You know who that older presence was. He got up, smiled, and said, “That should take care of it.”

That was not how I hoped it would all begin for me, but I did think to myself: “With a boss like this, this job was going to be very hard to screw up.”

But, I want to note, all “Unassuming Justice Stevens” stories are also “Supremely Competent Justice Stevens” stories.

He is passing around the coffee graciously to defuse the tension and extend a welcome; he is remembering the precise words of the Constitution

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\* Judge, United States Court of Appeals for the First Circuit. Judge Barron clerked for Justice Stevens from 1995–1996. This Tribute is adapted from remarks delivered at Justice Stevens’s funeral on July 23, 2019.

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to put a lawyer at ease, not show him up; he is flawlessly inserting a floppy disk into a computer to calm a new clerk, not embarrass him.

It is not as if the protagonist in these stories is spilling the coffee, making the mistaken salutation, or failing to load up a computer. Justice Stevens isn't likely to do such a thing.

Of course, no great life is as easy as it looks. But there was a lesson that we took from these stories.

You could be unassuming *and* supremely competent.

You could put others at ease, not call attention to yourself, beat clerks less than half your age at tennis, be a champion bridge player, fly to work on the plane that *you* piloted, moonlight as a substantial Shakespeare scholar, and yes, even help win the war for democracy by cracking the enemy's code as a young service member.

We learned how supremely competent he was up close when, during a conversation with us in chambers, he would sometimes suggest where we could find a precedent that had come to his mind by reeling off — from memory — the volume number and sometimes the page number of its place in the U.S. Reports.

"Really," we thought, "if we open 327 U.S. 1, we will find it and it will be right on point?" We would.

We learned it, too, while watching him flip through a brief. Have you ever seen someone chuckle while reading a brief in a difficult case?

We have. Justice Stevens chuckled as he read them, because he was fluent in the law in the way that we are fluent in English.

I see him — we all do — batting around a case with us, listening with a slight smile as we made some point that we hoped was novel and clever. A few words in, he would say, "I see the point." You only needed to hum a few bars for him when it came to law.

But we learned not just about how to treat others with respect and grace, but also how to judge that way.

Justice Stevens had a favorite phrase in his opinions: "quite wrong." As in, the majority is "quite wrong." Or, just as often, the dissent is "quite wrong."

I think it is a perfect Stevens-ism.

On the one hand, it is polite. The word "quite" is taking the sting off the harshness of the word "wrong."

But then you think about it. The word "quite" is also doing something else. It is emphasizing just how wrong Justice Stevens thought the position he was rejecting was.

This was an important lesson, too.

You could be kind and polite while being forceful and firm. Justice Stevens dissented as much as any Justice in the modern era. He believed fiercely in independence, in not going along with the crowd, in stating your own views no matter how distinctive, and in the capacity of the country to handle disagreement, even strong disagreement, and to learn from it, if respectfully offered and respectfully received.

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This, of course, is all about style. And style mattered to the Justice. He did wear a bow tie, after all.

But substance mattered, too.

Justice Stevens cared about outcomes and consequences. He knew how important the work of the Supreme Court is to people.

Still, it is remarkable to me how cases stayed with him even after he left the bench.

Not long ago, I had occasion to call the Justice for some advice. I was greeted with the following: “I was just looking at *Hans v. Louisiana*<sup>1</sup> again, and I really think they misread it in *Seminole Tribe*.”<sup>2</sup>

He was retired by then, mind you. Many years retired.

We had last talked about *Hans* — decided in 1890 — together in the October Term 1995–96, during the *Seminole Tribe* case itself, which concerned sovereign immunity under the Eleventh Amendment.<sup>3</sup>

I told him I wasn’t really prepared to get into *Hans* in the kind of depth that he clearly was.

But it is not surprising to me that the Eleventh Amendment was still on his mind.

Justice Stevens did not like official immunity of any kind. He was suspicious of unchecked governmental power, though he was profoundly respectful of its democratic exercise.

He had an innate sympathy for the outsider and the gadfly, and he had an intense aversion to concentrations of power.

Antitrust and its original common law principles for teasing out rules of fair competition ran deep within him — perhaps because he was such a competitor himself.

There is much written by commentators about whether he was liberal or conservative and whether he swung from one pole to the other over time.

I understand the reason to try to categorize him in this way. These cases matter to the people of this country, and he knew it.

But I do not think of him in those stark political terms, nor, I would hazard, do any of those who clerked for him.

Justice Stevens operated at a different register, a more timeless one.

Is a Frank Capra movie liberal or conservative?

Is Abraham Lincoln?

Is the American flag?

Questions about right and left are not always the best ones to ask about some of the greatest symbols of American life.

Timeless American figures like the Justice reflect something more profound about the country’s values and its traditions. They could see

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<sup>1</sup> 134 U.S. 1 (1890).

<sup>2</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>3</sup> *Id.* at 54.

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things in ways that might in the particular be susceptible of such political categorization, but that, from a broader vantage, called us (if we would listen) to think beyond the moment and to contemplate principles of justice and union, of integrity and decency, of honor and respect for institutions, and of equality and liberty that endure and thus transcend the particular politics of the day.

Justice Stevens invited us to think that way, too.

We had occasion recently — our clerk family — to have a reunion with him in Florida, thanks to the help of his daughter Sue; one of my fellow former clerks, Carol Lee; and his assistant, Janice Harley, who, with Nellie Pitts and Peter Edwards, had helped welcome us to his chambers over the years.

It was a moving occasion.

He had done so much for each of us throughout our lives in his gentle and unassuming way.

Most recently, in my case, he had reached out when I was nominated to become a judge and my confirmation hearing was looming. In his inimitable manner, he asked me: “David, do you think they would mind if I attended?”

“Mind?” I thought. “I am pretty sure they’ll be good with it.”

He said in the end he could not really hear most of what was said at the hearing (maybe he tuned it out).

I realized, though, that he probably knew that was going to be the case when he asked to attend.

He was past ninety by then, and his hearing sometimes failed him. He was aware, though, of the stature that he brought to every occasion, that his mere presence would be a reminder to everyone to act a little more dignified, a little less certain, a little more generously.

At our recent reunion, we held a Q-and-A with him, and one clerk asked him a great question — and this is my last “Unassuming Justice Stevens” story for now: “What decision are you most proud of?”

We all leaned in to hear. Was it his famous dissent in *Citizens United*<sup>4</sup> or in *Heller*<sup>5</sup> or *Bush v. Gore*<sup>6</sup> or *Bowers*?<sup>7</sup> Was it his opinion for the Court in *Chevron*<sup>8</sup> or *Term Limits*<sup>9</sup> or his opinion striking down the death penalty for people with intellectual disabilities?<sup>10</sup>

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<sup>4</sup> *Citizens United v. FEC*, 558 U.S. 310, 393 (2010) (Stevens, J., concurring in part and dissenting in part).

<sup>5</sup> *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting).

<sup>6</sup> 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).

<sup>7</sup> *Bowers v. Hardwick*, 478 U.S. 186, 214 (1986) (Stevens, J., dissenting).

<sup>8</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

<sup>9</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

<sup>10</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

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Without missing a beat, the Justice knew his answer: “Probably the *Sony* case,” he said.

*Sony Corp. of America v. Universal City Studios, Inc.*,<sup>11</sup> decided by him in 1984. It concerned the proper construction of the fair use provisions of the Copyright Act.<sup>12</sup>

Really, of all the cases?

But the answer is true to who he was.

It is not a case for the headlines. But it is a case about the things he valued: the craft of law, the satisfaction of resolving a difficulty in it, the learning of new things that gave him such great joy in judging, the application of common law principles to technical statutes, the engagement with legislative history, and the articulation of a vision of a country in which principles of fair competition and free and open debate would be advanced on behalf of ordinary people.

And then, too, it was a case that he had won, and he saw nothing wrong with winning.

I said at the beginning that we loved our Justice and he loved us. But we know — as we knew even then — that we were fortunate to work for a great man who taught us much and the country more. Justice Stevens so valued learning. To do him justice, we need only learn from him.

When our clerkships ended, he would give each of us a photograph of himself. It was inscribed with the same message that his Justice — the New Deal champion, Wiley Rutledge — had inscribed on the photo of him that he had given to Justice Stevens when his term as a law clerk on the Court had ended, now more than a half century ago.

The inscription reads, “To my friend and former clerk, with appreciation and affection.”

We, the Stevens clerks, wish to return the sentiment.

“To our friend and former Justice, with appreciation and affection.”

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*Judge Alison J. Nathan\**

In 2016, then-Dean of Harvard Law School Martha Minow invited Judge David Barron and me to judge the Harvard Law School Ames Moot Court Competition along with our former boss, Justice Stevens.

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<sup>11</sup> 464 U.S. 417 (1984).

<sup>12</sup> Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of the U.S. Code); see *Sony Corp.*, 464 U.S. at 432–34.

\* Judge Nathan is a United States District Judge in the Southern District of New York. She clerked for Justice Stevens during the 2001–2002 Term.



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The idea was to have two former law clerks of the Justice who had themselves become federal judges join the Justice on the moot court bench. During the break between the students' arguments and our pronouncement of the winning advocates, Judge Barron and I slipped on bow ties, the signature fashion statement of Justice Stevens, and returned to the bench. We wore the iconic emblem of the Justice as the symbol of our love and admiration for him.

Beyond symbols, in my daily life as a federal judge, I try to emulate Justice Stevens in ways large and small. When I review work from my law clerks, I will often leave a supportive note like the ones he left me and my co-clerks: "Nice job. Just a few fly specks." When I disagree with my clerks on the resolution of an issue in a case, I'll hear them out. If I'm not persuaded, I'll pat my left arm with my right hand to quietly signal the end of a discussion and say that the points they have raised are good ones, but that I will "remain in dissent." When one of my clerks leaves at the end of their term with me, I give them a picture of the two of us signed exactly as the one given to me by Justice Stevens on my last day clerking for him is signed (and just as his was signed by Justice Wiley Rutledge, for whom Justice Stevens clerked): "To my friend and former law clerk, with appreciation and affection." In each of these small gestures, the Justice modeled supportiveness, kindness, humility, and connection.

But the Justice served as a role model of judicial temperament well beyond his interaction with his law clerks. When Justice Stevens asked a question from the bench, it was inevitably because he genuinely needed an answer to that question in order to come to a decision in a case, or to test the boundaries of his analysis, or to understand a fact or procedural point critical to resolution. He would wait until there was a break from questioning, slide himself gently forward in his chair, and say: "Counselor, may I ask a question?" I never saw him try to show up the lawyers before him or his colleagues on the bench or to display even a moment of frustration or a flash of anger. To the contrary, he would lend a hand to a nervous lawyer. Take the time he famously stepped in when a lawyer was corrected by another Justice for referring to members of the Court as "judges." Justice Stevens said, "Don't worry about it. The Constitution makes the same mistake." Lessons abound from Justice Stevens about judicial humility, collegiality, and temperament.

And, of course, there are many enduring lessons about justice from his thirty-five years of jurisprudence. Although his judicial philosophy fundamentally defies categorization, he had a core set of substantive and procedural beliefs I would characterize as democratic fairness grounded in rationality and equality. For example, he detested the basic irrationality of invidious discrimination and inequality, as exemplified by his

dissent in *Bowers v. Hardwick*<sup>13</sup> and his rejection in *Craig v. Boren*<sup>14</sup> of different tiers of scrutiny in equal protection jurisprudence. He was deeply committed to principles of fair competition and innovation, which undergird his landmark decision in *Sony Corp. of America v. Universal City Studios, Inc.* He believed in the exercise of Article III powers with humility and with deference to democratic institutions, as can be seen in *Chevron v. Natural Resources Defense Council*. He sought to strenuously enforce procedural protections for the least powerful, such as people with mental disabilities facing the death penalty (*Atkins v. Virginia*<sup>15</sup>), or the least popular, such as accused terrorists held at Guantanamo Bay (*Rasul v. Bush*<sup>16</sup>). And he was skeptical of unchecked governmental power and was a steadfast and impartial guardian of the rule of law and democracy, which he feared was eroded by the Supreme Court's decision in *Bush v. Gore*.<sup>17</sup>

These were not principles that he evolved toward; rather, strains of each can be found throughout the Justice's long life. For example, when he wrote *Rasul v. Bush* in 2004 holding that detainees at Guantanamo Bay have the right to challenge their detention in federal court, he cited Justice Rutledge's dissent in *Ahrens v. Clark*,<sup>18</sup> which John Stevens had worked on as a law clerk fifty years earlier. His equality instincts can be found in a letter he wrote to Justice Rutledge shortly after completing his clerkship, in which he is grappling with where he will work. In the September 4, 1948 letter, John Stevens says that he is likely to accept an offer from the Poppenhusen firm (now Jenner & Block) because he was "particularly favorably impressed by the young fellows that [he] met there. Also by the fact that, contrary to the practice of most of the successful outfits in Chicago, there are several Jews in the organization."<sup>19</sup> His distrust of concentrations of power could be found in work throughout his career before the bench in his practice of antitrust law. And his dissent in *Bush v. Gore* was reminiscent of his dissent in *Hartke v. Roudebush*,<sup>20</sup> a case he heard when he was a judge on the Seventh Circuit and sitting on a special three-judge district court. As in *Bush v. Gore*, then-Judge Stevens argued that a recount being handled by the state courts should be allowed to proceed without interference from the federal courts.<sup>21</sup>

<sup>13</sup> See 478 U.S. 186, 214 (1986) (Stevens, J., dissenting).

<sup>14</sup> 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

<sup>15</sup> 536 U.S. 304 (2002).

<sup>16</sup> 542 U.S. 466 (2004).

<sup>17</sup> See 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting).

<sup>18</sup> 335 U.S. 188 (1948); see *Rasul*, 542 U.S. at 477 & n.7.

<sup>19</sup> Letter from John Paul Stevens to Wiley Rutledge, Assoc. Justice, U.S. Supreme Court (Sep. 4, 1948), in Wiley Rutledge Papers, Manuscript Division, Library of Congress, box 157.

<sup>20</sup> 321 F. Supp. 1370 (S.D. Ind. 1970).

<sup>21</sup> *Id.* at 1378 (Stevens, J., dissenting).

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But perhaps the most important judicial lessons I learned from Justice Stevens involved his fundamental approach to cases. Focus first and foremost on the facts. Faithfully apply precedent. Be intellectually honest and analytically rigorous. Think through the practical consequences of a holding. And, most importantly, decide cases independently and impartially.

As much as I try to emulate Justice Stevens, I know that I will not often have a question for oral argument that cuts to the heart of the case the way his did. I will often fail to understand or explain a complex issue with the kind of analytical elegance that Justice Stevens unfailingly displayed. I will never be as prolific an opinion writer. I will certainly lose my patience from time to time on the bench in a way that he never would. But I will always carry with me his embodiment of judicial temperament and humility and his lessons of rational-democratic fairness. And though I will come up well short, I will always strive to be more like Justice Stevens, my friend and forever mentor, for whom I have boundless appreciation and affection.

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*Christopher L. Eisgruber\**

“[D]eath is not life’s simple opposite, or its necessary terminus, but rather its completion,” wrote Justice John Paul Stevens in *Cruzan v. Director, Missouri Department of Health*,<sup>22</sup> a memorable opinion on which I worked when I clerked for him during the Court’s October 1989 Term. The Justice’s own passing concluded his life gracefully and consistently with the values and character manifest throughout his ninety-nine years. He published his autobiography<sup>23</sup> a mere two months before his fatal stroke, and when his clerks gathered to celebrate the book’s appearance, he was frail but still the JPS that we knew: smart, gracious, kind, and witty.<sup>24</sup> He spent some of his last days in Portugal, doing things that he loved: discussing the Constitution with professors,

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\* President, Princeton University. I would like to thank Chris Achen, Lewis Liman, Steve Macedo, Nancy Weiss Malkiel, and Joyce Rechtschaffen for comments on previous drafts.

<sup>22</sup> 497 U.S. 261, 343 (1990) (Stevens, J., dissenting) (footnote omitted).

<sup>23</sup> See JOHN PAUL STEVENS, *THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS* (2019).

<sup>24</sup> Stevens clerks invariably (so far as I know!) addressed their boss as “Justice Stevens” (“John” would have been unthinkable informal), but we affectionately referred to him as “JPS” in conversations with one another. I will follow that convention in this reflection.

lawyers, judges, and Justices, and traveling with them to cultural attractions.

In the days following his death, journalists tried to capture the arc of his long and accomplished life. Prominent commentators lauded him as a “canny strategist” and “leader of the [C]ourt’s liberal wing.”<sup>25</sup> I cannot help but wonder how JPS would have reacted back in 1989–1990, when I clerked for him, if some Dickensian ghost or Shakespearean seer had revealed those lines to him. My guess is that he would have winced at “canny strategist,” with its hint of manipulation or compromise. He thought it his duty to decide cases according to law and then state his reasons sincerely, even if it meant he concurred or dissented alone, as he not infrequently did. He wanted allies, but never at the expense of the integrity of legal reasoning or the judicial process.

The October 1989 Term, for example, included an abortion case, *Hodgson v. Minnesota*.<sup>26</sup> The case dealt with a Minnesota statute that, among its other provisions, required minors to give notice to both parents forty-eight hours before obtaining an abortion.<sup>27</sup> JPS had drafted an opinion that he hoped might attract the vote of Justice Sandra Day O’Connor, who had never previously found any portion of an abortion regulation unconstitutional. JPS circulated the opinion and time passed, but we heard nothing from the O’Connor chambers. In one of his daily meetings with his clerks, JPS wondered aloud what Justice O’Connor was thinking. We suggested that perhaps he might walk down the hall and speak to her. If she had some concern, he might dissuade her of it or amend the opinion to address it. No, he replied; he thought that would be wrong. His reasons should speak for themselves, he said. The Court in general emphasizes written reasoning over oral

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<sup>25</sup> See, e.g., Linda Greenhouse, *Supreme Court Justice John Paul Stevens, Who Led Liberal Wing, Dies at 99*, N.Y. TIMES (July 16, 2019), <https://nyti.ms/32vdKZ6> [<https://perma.cc/BN75-F8QD>] (stating that Stevens went from a “Republican antitrust lawyer [to] the outspoken leader of the [C]ourt’s liberal wing” and proved to be “a strategic thinker and canny tactician”); Adam Liptak, *John Paul Stevens: Canny Strategist and the “Finest Legal Mind” Ford Could Find*, N.Y. TIMES (July 16, 2019), <https://nyti.ms/2LpZH1L> [<https://perma.cc/7ZVY-TWMX>] (“Justice Stevens . . . assum[ed] leadership of [the Court’s] liberal wing . . . [and] was a “canny strategist . . . .”); Jess Bravin, *Former Clerks, Family, President Trump Pay Respects to John Paul Stevens*, WALL ST. J. (July 22, 2019), <https://www.wsj.com/articles/former-clerks-family-president-trump-pay-respects-to-john-paul-stevens-11563821070?> [<https://perma.cc/Y5PR-HWLK>] (“Justice Stevens . . . was leader of the [C]ourt’s liberal wing [who] emerged as a canny strategist . . . .”); Jeffrey Toobin, *The Humane Legacy of John Paul Stevens*, NEW YORKER (July 17, 2019), <https://www.newyorker.com/news/postscript/the-humane-legacy-of-john-paul-stevens-supreme-court-died> [<https://perma.cc/79VM-XZLNQ>] (noting that Justice Stevens retired as “the senior member of the Court’s liberal wing” and was “always a canny behind-the-scenes strategist”).

<sup>26</sup> 497 U.S. 417 (1990).

<sup>27</sup> See *id.* at 422.

exchange, but JPS's scrupulous forbearance from anything that might smack of "politicking" was extraordinary even by judicial standards.<sup>28</sup>

As for "leader of the liberal wing," JPS would undoubtedly have appreciated recognition as a jurisprudential "leader," but I believe he would have been disappointed with the factionalism implied by "wing." No Justice likes to think of the Court as riven on political lines. I don't know how he would have felt in 1990 about "liberal," either, not only because of its political overtones, but also because he wasn't wholly liberal at the time. On abortion and affirmative action, the two most durable and defining constitutional issues of his long tenure on the Court, JPS voted occasionally with the conservative Justices well into the 1980s, including with regard to portions of the statute at issue in *Hodgson*.

One of JPS's best-known opinions from my time as a clerk was his decidedly nonliberal dissent in the second flag-burning case, *United States v. Eichman*.<sup>29</sup> In *Eichman* and its predecessor, *Texas v. Johnson*,<sup>30</sup> the Court held that prohibitions on flag desecration discriminated on the basis of viewpoint and so violated the Constitution's guarantee of free speech.<sup>31</sup> The voting pattern in the cases was unusual. Justices Antonin Scalia and Anthony Kennedy joined Justice William Brennan's majority opinions,<sup>32</sup> but JPS dissented, contending that the laws permissibly protected the flag's unique symbolic value.<sup>33</sup> Though *Johnson* and *Eichman* have faded in the nation's memory, they were bombshells when they came down.

There is something paradoxical about JPS's two flag-burning dissents. They are mistakes in the view of most people who are otherwise sympathetic to him and his approach — and, interestingly, in his memoir JPS himself stops just shy of saying that he would have voted the same way today.<sup>34</sup> Yet, I do not think that you can understand JPS or his

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<sup>28</sup> I have told and commented upon this story previously, with permission from Justice Stevens, in CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 58–59 (2007). Justice O'Connor eventually voted to hold the two-parent notice provision unconstitutional, but she also concluded that the statute's "judicial bypass" provision saved it from invalidity, *Hodgson*, 497 U.S. at 461 (O'Connor, J., concurring in part and concurring in the judgment in part); she did not join as much of JPS's opinion as he had hoped she would do.

<sup>29</sup> 496 U.S. 310, 319 (1990) (Stevens, J., dissenting).

<sup>30</sup> 491 U.S. 397, 436 (1989) (Stevens, J., dissenting).

<sup>31</sup> *Eichman*, 496 U.S. at 318–19; *Johnson*, 491 U.S. at 420.

<sup>32</sup> See *Eichman*, 496 U.S. at 311; *Johnson*, 491 U.S. at 398.

<sup>33</sup> See *Eichman*, 496 U.S. at 321 (Stevens, J., dissenting); *Johnson*, 491 U.S. at 437–39 (Stevens, J., dissenting).

<sup>34</sup> He says that "[a]ll of us can be proud of [the Court majority's] symbolic decision even while I continue to disagree with the majority's failure to recognize the symbolic value of the Texas law." STEVENS, *supra* note 23, at 249. One might agree that the majority underestimated the "symbolic value of the Texas law" even if one agrees with the majority that the law was ultimately unconstitutional.

career on the Court without comprehending those cases. They reveal something about the wellsprings of his constitutional faith.

For the most part, JPS preferred a plain writing style characterized by elegant legal craftsmanship and reasoned judgment.<sup>35</sup> I occasionally wished he might have allowed himself more leeway to elaborate the character of, or sources for, his view of liberty and equality. JPS was, however, a lawyer's lawyer; neither soaring rhetoric nor philosophical reflection was his *métier*. But the flag-burning dissents are different. Justice Stevens's opinions in *Eichman* and *Johnson* brim with references to spirit, pride, passion, and inspiration. In the *Johnson* dissent's concluding paragraph alone, Philippine scouts fight at Bataan, soldiers scale the bluff at Omaha Beach, and Patrick Henry, Susan B. Anthony, President Abraham Lincoln, Nathan Hale, and Booker T. Washington dedicate their lives to American ideals.<sup>36</sup>

In his memoir, JPS recounts a visit to a military cemetery in Normandy and says that he thought about it while writing his dissents in *Johnson* and *Eichman*.<sup>37</sup> JPS took great pride in his own service as a naval code breaker in World War II, and he delighted in constitutional cases about the military. While I worked for him he got the assignment in *Perpich v. Department of Defense*,<sup>38</sup> a 9–0 decision upholding the federal government's authority to train National Guard units outside the United States during peacetime.<sup>39</sup> Unlike other Justices, JPS wrote first drafts of every opinion, but many were brief or skeletal rather than complete. In *Perpich*, he drafted nearly every word and supplied nearly every citation. He may have spent more time on it than any other opinion that Term. He eventually handed me the finished opinion to cite-check. I added an arguably superfluous footnote that ended with a citation to my wife's student comment.<sup>40</sup> JPS asked me about the note, I confessed its purpose, and he generously kept it, even though it digressed unnecessarily from his elegant essay.

For JPS, his military service and legal career were of a piece: personal roles within what he saw as America's grand, collective quest to form a more perfect union, secure the blessings of liberty, and guarantee every person the equal protection of the laws. His emotional investment in America's constitutional mission is on full display in the flag-burning cases. JPS's aspirational commitment to robust conceptions of equality and civil rights made him seem liberal, and his love for American traditions and institutions made him seem conservative. The combination of

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<sup>35</sup> I discuss — and praise — his style in more detail in Christopher L. Eisgruber, *John Paul Stevens and the Manners of Judging*, 1992/1993 N.Y.U. ANN. SURV. OF AM. L. xxix, xxxiii–xxxiv.

<sup>36</sup> *Johnson*, 491 U.S. at 439 (Stevens, J., dissenting).

<sup>37</sup> STEVENS, *supra* note 23, at 236.

<sup>38</sup> 496 U.S. 334 (1990).

<sup>39</sup> *Id.* at 339–40.

<sup>40</sup> *Id.* at 354 n.28 (citing Lori A. Martin, Comment, *The Legality of Nuclear-Free Zones*, 55 U. CHI. L. REV. 965, 991–97 (1988)).

the two made him different from many of his colleagues, and aloof from the dominant ideological trends on the Court, at least through the late 1980s.

I am sure that when JPS voted in the 1970s and 80s to strike down affirmative action plans, or to uphold restrictions on abortion, he did so with the firm conviction that America's constitutional traditions and institutions were propelling the nation inevitably, if too slowly, toward the as-yet-unrealized ideals of liberty and equality for which he and others had fought. I also believe that it became more difficult for him to maintain that conviction as time passed and racial inequality persisted.

As late as 1980, JPS had so much faith in America's march toward a color-blind society that in *Fullilove v. Klutznik*<sup>41</sup> he invoked analogies from Nazi Germany and the French Reign of Terror to illustrate how carelessly designed affirmative action policies might engender animus "harmful to the entire body politic."<sup>42</sup> Sixteen years later, however, JPS observed that in light of America's continuing struggle with racial injustice, he could find no way to "discern whether the message conveyed" by a race-conscious redistricting plan was "a distressing endorsement of racial separatism, or an inspiring call to integrate the political process."<sup>43</sup> There is nothing technically contradictory about the two positions; good lawyers can reconcile them. In my view, however, they represent two significantly different attitudes toward race and politics in America, and the shift from one to the other reflects at least modest disillusionment in the face of hopes unfulfilled and progress unmade.<sup>44</sup>

JPS famously insisted that his own views remained more or less constant while the Court became ever more conservative. Is that so? Did JPS change, or did the Court? It is a false dichotomy, I think. On a polarized Court in a polarized country, JPS had to choose sides regardless of whether his own views had changed.<sup>45</sup> In affirmative action cases in particular, JPS could join those who regarded America's campaign for racial equality as an urgent, ongoing constitutional priority — and therefore deferred to policymakers about the merits of race-based affirmative action — or he could vote with those who seemed to consider America's quest for racial justice to be more or less complete and regarded affirmative action policies as insufficiently related to any compelling national interest. The positions JPS had previously taken

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<sup>41</sup> 448 U.S. 448 (1980).

<sup>42</sup> *Id.* at 534 (Stevens, J., dissenting); *see id.* at 533–34, 534 n.5.

<sup>43</sup> *Shaw v. Hunt*, 517 U.S. 899, 925 (1996) (Stevens, J., dissenting).

<sup>44</sup> I analyze this question in more detail in Christopher L. Eisgruber, *How the Maverick Became a Lion: Affirmative Action in the Jurisprudence of John Paul Stevens*, 99 GEO. L.J. 1279 (2011).

<sup>45</sup> I offer some thoughts about how the abortion issue polarized the Court and affected Justice Stevens in Christopher L. Eisgruber, *Justice Stevens Will Not Be Easily Replaced*, L.A. TIMES (Apr. 20, 2010, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2010-apr-20-la-oe-eisgruber-20100420-story.html> [<https://perma.cc/KC9M-PHSK>].

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were theoretically imaginable but practically ineffectual: JPS could not sensibly emphasize legislators' constitutional responsibility to promote racial equality and simultaneously second guess the social meaning of the vehicles they crafted to carry out that mandate. The position he elaborated in *Fullilove* had become an anachronism, not unlike liberal Republicans on the national political scene.

I am speculating, of course. JPS was warm, kind, and polite, but also exceptionally reserved and private. If ever he mused about themes like those I have suggested, he never shared his thinking with me or, so far as I know, with any of his other clerks. Nor do any such themes emerge in his autobiography, which summarizes his published reasoning in major cases with little elaboration or embellishment. It treats *Fullilove*, for example, with clinical dispassion, neither mentioning nor disavowing JPS's jarring references to Robespierre's France and Hitler's Germany.<sup>46</sup> JPS might easily have commented on journalistic accounts of his retirement, all of which characterized him as liberal, but his book bypasses the topic entirely.

In any event, by the time JPS left the Court, his voting record had been consistently liberal for nearly two decades, and his post-judicial writings continued that trend. "Leader of the Court's liberal wing" might have puzzled or upset the Justice for whom I clerked during the October 1989 Term, but it would certainly not have surprised, and might even have pleased, the man who died this summer.

Now that his life is complete, JPS's legacy will reside partly with the Supreme Court, but I sometimes hear his lifelong constitutional vision affirmed even more clearly by the leadership of the United States armed services, the other American institution that mattered so much to his life and identity. General Mark Milley, who one week after JPS died was confirmed as Chairman of the Joint Chiefs of Staff, is a Princeton alumnus and has returned several times to swear in his alma mater's newly minted Army, Navy, and Air Force officers. He emphasizes to them that they will swear allegiance not to any person, nor even to a nation or a country, but to an idea, the Constitution of the United States. And then he tells them something like this:

Here in America, we will have a government of the people, by the people, and for the people. Regardless whether you're male or female, it doesn't matter if you're gay or straight, it doesn't matter if you are black or white, or Asian or Indian, or any other ethnic group. It doesn't matter what your country of origin is or the spelling of your last name. It does not matter if you are Catholic or Protestant, Muslim or Jew, and it doesn't matter if you don't believe at all. It does not matter if you're rich or poor, or common or famous. In this country, in these United States, under those colors of red, white, and blue, in this country all Americans are created free and equal, and

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<sup>46</sup> STEVENS, *supra* note 23, at 175-76.



we will rise or fall based on our merit, and we'll be judged by the content of our character not the color of our skin. That is the core organizing principle of the United States of America, and that is why we fight.<sup>47</sup>

I am certain that John Paul Stevens would have saluted. That principle is indeed what he fought for, in the Navy, on the Court, and throughout his life. It is a principle neither liberal nor conservative but deeply American. The campaign to vindicate it was for JPS, as for the United States military, vital, urgent, and ongoing. We honor him by continuing that fight on every front, and by remembering how admirably and faithfully he served the country and the Constitution that he loved.

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*Olatunde C.A. Johnson\**

When Justice John Paul Stevens passed away on July 16, 2019, I was flooded with personal memories of my year clerking for him. The standard words of comfort when someone dies are that they will live on through the individuals that knew and loved them. Justice Stevens sat on the Supreme Court for more than three decades; his loss would be felt beyond those who knew him personally. I wondered how history would remember him.

I sometimes ask my students what they know about Justice Stevens. Some remember that he wrote the opinion in *Chevron*, the most frequently cited case that he authored, to be sure.<sup>48</sup> More often they remember him as part of the five, or the four; a leader of the Court's so-called "liberal wing." His dissent in *Citizens United* was JPS's pop culture moment; his words that "democracy cannot function effectively when its constituent members believe laws are being bought and sold"<sup>49</sup> resonated beyond the usual Court observers. So too did his lengthy dissent in the Second Amendment case *Heller*, which carefully took on

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<sup>47</sup> The General's remarks at Princeton's commissioning ceremonies are unpublished; the quotation is transcribed from another speech posted in video format on YouTube. The U.S. Army, *Why We Fight*, YOUTUBE (July 2, 2018), [https://www.youtube.com/watch?v=n1wwJv\\_ndGM](https://www.youtube.com/watch?v=n1wwJv_ndGM) [<https://perma.cc/R6TE-NLJY>].

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<sup>48</sup> See STEVENS, *supra* note 23, at 202.

<sup>49</sup> *Citizens United v. FEC*, 558 U.S. 310, 453 (2010) (Stevens, J., concurring in part and dissenting in part).

the historical analysis offered by the majority as a reason for invalidating Washington, D.C.'s handgun ban.<sup>50</sup> Given his later writing about those cases after he left the Court, Justice Stevens might be happy to be remembered this way. He would call *Heller* “the most clearly incorrect decision” of the Court during his tenure.<sup>51</sup> He thought the Court's recent Second Amendment cases and *Citizens United* should be corrected through constitutional amendments.<sup>52</sup>

The conception of Justice Stevens as a leader of a liberal wing is partially faithful to my memory too. I clerked for him in what turned out to be the middle years of his tenure, October Term 1996. He had already spent twenty-one years on the Court. Though he would spend fourteen more, he was already the most senior Justice. That meant that in those divided cases my Term and beyond, he could decide who wrote the opinion, and sometimes he kept prominent cases for himself. He appeared to relish the role.

And yet remembering Justice Stevens as a voice for anyone but himself — or as a liberal — seems dissonant in other respects. During that clerkship year, I was never sure how he would vote in a particular case. He approached each matter with a lawyer's eye, reading the briefs himself, remembering in great detail, it seemed, all the cited cases and all the facts from the trial court. He dispensed with the formality of a bench memo from clerks. We discussed the cases vigorously. He listened to us carefully and graciously; it often seemed hard to change his mind. Commentators sometimes note his Chicagoan understanding of politics as informing some of his substantive positions on issues like election law.<sup>53</sup> But as a Justice, he seemed immune to politics. When it was suggested he might retire based on who was President, he reminded us that he was appointed by a Republican President, with bipartisan support.

Justice Stevens seemed to stand apart from the politics of the Court too. I remember no entreaties to other Justices to join his opinions; his circulated draft opinion was his only form of lobbying. He writes in his biography that only in trying to get a majority for *Chevron* did he visit

<sup>50</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 662–71 (2008) (Stevens, J., dissenting).

<sup>51</sup> John Paul Stevens, *The Supreme Court's Worst Decision of My Tenure*, THE ATLANTIC (May 14, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/john-paul-stevens-court-failed-gun-control/587272> [https://perma.cc/5HWG-SDX3].

<sup>52</sup> See JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 78 (2014) (advocating a constitutional amendment to “repudiate both the holding and the reasoning in the *Citizens United* case”).

<sup>53</sup> See, e.g., Pamela Karlan, *The Partisan of the Nonpartisan*, SCOTUSBLOG (May 14, 2010, 12:05 PM), <https://www.scotusblog.com/2j01e010/05/the-partisan-of-the-nonpartisan> [https://perma.cc/YRP6-XN3G].

another Justice's chambers to persuade them to join his opinion.<sup>54</sup> Justice Stevens wanted his clerks to be independent-minded also. He disapproved of us learning about the views of other Justices on cases before hearing from the litigants in oral argument. And we famously did not participate in the certiorari pool. He was the Justice of solitary dissents and separate concurrences,<sup>55</sup> unwilling to go along simply to form an easy majority. Known in his early years as a "maverick,"<sup>56</sup> he evaded the conventional labels.

I experienced his defiance of easy ideological categories first-hand. During the Term in which I clerked, the Court decided *City of Boerne v. Flores*.<sup>57</sup> Despite his views on the importance of deferring to Congress, Justice Stevens joined in the majority's opinion that the Religious Freedom Restoration Act of 1993<sup>58</sup> (RFRA) exceeded the scope of Congress's enforcement power under section 5 of the Fourteenth Amendment.<sup>59</sup> For Justice Stevens, RFRA was an affront to notions of church-state separation.<sup>60</sup> *Boerne*, however, was on a collision course with *Seminole Tribe*'s holding that Congress lacked authority under Article I's commerce power to abrogate state sovereign immunity, a case from which Justice Stevens had vigorously dissented the prior Term.<sup>61</sup> Justice Stevens's dissent was consistent with his skepticism of official immunity.<sup>62</sup> (His distaste for immunity would also present itself in another case in the 1996 Term, *Clinton v. Jones*,<sup>63</sup> in which the Justice

<sup>54</sup> See STEVENS, *supra* note 23, at 204–05 (describing visiting Justice Brennan to persuade him to join *Chevron*). Justice Stevens does note in a later article that he had conversations with Justice Thomas and Justice Kennedy when the Court was deciding *Heller*. See Stevens, *supra* note 51 ("During the drafting process, I had frequent conversations with [Justice] Kennedy, as well as occasional discussions with [Justice] Thomas, about historical issues, because I thought each of them had an open mind about the case.")

<sup>55</sup> See Craig D. Rust, *The Leadership Legacy of Justice John Paul Stevens*, 1 J. LEGAL METRICS 135, 136 (2012) (noting that Justice Stevens authored more dissents than any other Justice in history).

<sup>56</sup> William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1088 (quoting BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE BURGER COURT* 15 (1988)).

<sup>57</sup> 521 U.S. 507 (1997).

<sup>58</sup> 42 U.S.C. §§ 2000bb–2000bb-4 (2012), *invalidated as to state and local laws by Boerne*, 521 U.S. 507.

<sup>59</sup> See *Boerne*, 521 U.S. at 511.

<sup>60</sup> *Boerne*, 521 U.S. at 536 (Stevens, J., concurring) (stating that RFRA was a "law respecting an establishment of religion" and thus violated the First Amendment). For other examples of Justice Stevens's views on the separation of church and state, see *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), in which Justice Stevens wrote for the majority in holding that student-led prayers at high school football games violated the Establishment Clause, *id.* at 294, 317; and *Van Orden v. Perry*, 545 U.S. 677, 708 (2005), in which Justice Stevens dissented from the Court's decision upholding the constitutionality of a six-foot-high Ten Commandments monument on public property, *id.* at 707 (Stevens, J., dissenting).

<sup>61</sup> See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996); *id.* at 76 (Stevens, J., dissenting).

<sup>62</sup> See *id.* at 95–99 (Stevens, J., dissenting).

<sup>63</sup> 520 U.S. 681 (1997).

authored the opinion holding that a sitting president was not immune from civil suit while in office.<sup>64</sup>) He would later write that *Seminole Tribe* was to him “one of the most objectionable cases that the Court decided during my tenure as a justice, both in its reasoning and in the impact of its holding on the efficient functioning of our national government.”<sup>65</sup> And yet the arguably narrow view of section 5 that *Boerne* allowed would be used along with *Seminole Tribe* to limit the reach of civil rights laws like the Americans with Disabilities Act<sup>66</sup> — a result with which Justice Stevens disagreed.<sup>67</sup> If Justice Stevens feared that his joining *Boerne* would pave the way for such challenges, he didn’t linger on it. He decided the *Boerne* case as he saw it.

I asked the Justice whether he had changed his views on some issues. I remember him answering that the Court had changed around him, becoming more conservative. Which it no doubt had. Yet he seemed to have changed as well. I had affirmative action in mind. In his early years on the Court, he dissented in *Fullilove*, a case upholding a 10% set-aside for minority contractors,<sup>68</sup> which he cast as a monopoly privilege for a small, relatively privileged racial subclass.<sup>69</sup> But later he would draft a dissent when the Court applied strict scrutiny to an affirmative action program for federal contractors in *Adarand Constructors, Inc. v. Peña*.<sup>70</sup> A good lawyer can distinguish the cases based on the differences in the specific statutes at issue, and perhaps he was being faithful to intervening caselaw.<sup>71</sup> But Justice Stevens seemed to have changed his understanding of racial inequality, and to come to perceive a dissonance in casting the Fourteenth Amendment as an obstacle to providing a remedy.

I hope we continue to read and invoke these and others of Justice Stevens’s opinions. We might also remember his style of judging, which was independent and principled, but capable, it turns out, of evolution and change. This Justice with a “common law” approach,<sup>72</sup> and frequent dissenter, turned out to have had a theory of democracy.<sup>73</sup> Though he seemed reticent in person, he would become a leader on the Court and,

<sup>64</sup> See *id.* at 705–06.

<sup>65</sup> STEVENS, *supra* note 23, at 314.

<sup>66</sup> 42 U.S.C. §§ 12101–12213 (2012); see *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360, 364, 374 (2001) (holding that suits under Title I of the Americans with Disabilities Act (ADA) are barred by the Eleventh Amendment as that provision of the ADA went beyond Congress’s power to enforce the Fourteenth Amendment).

<sup>67</sup> See *Garrett*, 531 U.S. at 377 (Breyer, J., dissenting, joined by Stevens, J., among other Justices).

<sup>68</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980).

<sup>69</sup> See *id.* at 533 (Stevens, J., dissenting).

<sup>70</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995); *id.* at 242 (Stevens, J., dissenting).

<sup>71</sup> Justice Stevens had joined the Court’s opinion in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), upholding a race-conscious program distributing broadcast licenses, see *id.* at 552.

<sup>72</sup> See Popkin, *supra* note 56.

<sup>73</sup> This is evident in his popular writing and books, including in STEVENS, *supra* note 23.

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after his retirement, a frequent commentator who was unafraid to question the Court and its decisions. I carry the memories of his cases and judicial approach, as well as my personal memories of the kindness he showed to litigants and to us as clerks. For me, these memories are like a balm that counters the cynical perceptions of judging that often pervade our discourse today.

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*Eduardo M. Peñalver\**

Justice Stevens often bristled when people described him as a “liberal” or — even more provocatively — as the “leader of the [C]ourt’s liberal wing.”<sup>74</sup> Although I have no idea how the Justice voted in actual elections, when I clerked for him in the 2000 Term, he still very much identified as a Republican. He would sometimes (with a good-natured chuckle) describe malfunctioning office equipment — such as an errant fax machine — as having “gone Democratic.” As he told me on more than one occasion, during his time as a Justice he had not so much shifted to the left as the Court had shifted around him to the right. He liked to point out that each liberal Justice who retired during his tenure had been replaced by someone more conservative.

Nevertheless, the perception that Justice Stevens became more liberal over time has some empirical support. Using one prominent score of judicial ideology, Justice Stevens shifted during his years on the Court from an almost perfect centrist to a liberal comparable to Justice Ginsburg.<sup>75</sup> In this memorial essay, I would like to try to reconcile

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<sup>74</sup> Greenhouse, *supra* note 25 (“John Paul Stevens, whose 35 years on the United States Supreme Court transformed him, improbably, from a Republican antitrust lawyer into the outspoken leader of the court’s liberal wing, died on Tuesday . . .”).

<sup>75</sup> The Martin-Quinn (“MQ”) score is one of several prominent measures of judicial ideology. It measures judicial ideology in terms of deviation from a median of zero, with more liberal Justices having negative scores and more conservative Justices having more positive scores. See generally Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002). Martin-Quinn scores are “widely used.” Charles M. Cameron & Jee-Kwang Park, *How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937–2006*, 6 J. EMPIRICAL LEGAL STUD. 485, 486 (2009). During Justice Stevens’s first three years, his average MQ score was  $-0.035$  while, during his last three years, his average was  $-2.786$ . Justice Ginsburg’s average for the past five years is  $-2.78$ . (The MQ scores for Justice Stevens and Justice Ginsburg through the 2018–19 Term are available at *Martin-Quinn Scores: Measures*, U. MICH., <https://mqscores.lsa.umich.edu/measures>.)

Justice Stevens's repeated insistence that he always remained a nonideological, moderate judge who took cases as they came to him with the widespread perception that, in Linda Greenhouse's words, his "35 years on the Supreme Court transformed him" from a moderate into a liberal.<sup>76</sup> I will suggest three interacting factors that reconcile the well-founded observation that Justice Stevens's votes became somewhat more liberal over his three-plus decades on the Court with the Justice's own enduring understanding of himself as a judicial moderate.

I begin where the Justice himself did — with the Court. There is a great deal of truth in Justice Stevens's observation that people's perception of him as having become more liberal actually reflected the changing composition of the Court. There is more to this observation than the simple truism that, as the Court became more conservative, Justice Stevens's relative position moved from the ideological center of the Court to its liberal wing. It is undeniable that, by the end of the Clinton Administration, there was no longer anyone consistently to his left on the Court. But Justice Stevens's own votes did also change over time, particularly — as many have noted — in the areas of racial justice and the death penalty. In other words, he did seem to become a bit more liberal on a number of issues, even as the Court shifted to the right around him.

Does this mean that the Justice's core beliefs changed during his years on the Court — that those years "transformed him," as Greenhouse puts it? I am not so sure. In the context of a deliberative body that is drifting one way or another, a principled member is very likely to change positions in both relative *and* absolute terms in response to the changing environment. Because the Court can pick its own docket, a steady shift of personnel to the right means that Justice Stevens was not confronted with a homogeneous stream of voting opportunities over his thirty-five years. Instead, he was faced with a set of choices that was itself moving in a more conservative direction as the Court's increasingly conservative membership selected cases that allowed them to advance their ideological project.

As the conservative majority on the Court consolidated its position between the 1980s and the early 2000s, it took on an increasing number of cases that provided opportunities to advance the law in conservative directions.<sup>77</sup> Confronted with such a shifting judicial "Overton

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php [<https://perma.cc/P9AL-AVXW>].) Of course, such numerical measures of judicial ideology should be taken with an appropriate grain of salt, as I hope my discussion will make clear.

<sup>76</sup> Greenhouse, *supra* note 25.

<sup>77</sup> Obviously, this description paints in very broad strokes. At the level of individual cases or even doctrinal categories, the Supreme Court's shift to the right during Justice Stevens's tenure was not completely comprehensive. There were plenty of shifts to the left during that period, most obviously in the area of LGBTQ rights. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558 (2003). But the

window,” we would expect a judicial moderate with stable views about substantive legal outcomes to take more frequently liberal votes, like a person trying to stay upright on a tilting canoe. Indeed, we should expect this dynamic to operate even for fairly conservative Justices with stable preferences. And so it is perhaps not surprising that Chief Justice Rehnquist exhibited a nearly identical shift to the left in his ideology scores as did Justice Stevens over the course of his career.<sup>78</sup> And yet no one has described Chief Justice Rehnquist’s time on the Court as having “transformed” him from a conservative into a moderate.

The evolving context Justice Stevens confronted on the Court was coupled with characteristics of his own judicial style that made it easier for him to adjust in response. Justice Stevens was a quintessential common law judge. As he described his judicial philosophy in a 1974 speech to the Chicago Bar Association: “There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote . . . .”<sup>79</sup> Applying this model of the judge as first and foremost an adjudicator rather than a prospective policymaker, Justice Stevens self-consciously rejected a legislative, rule-crafting model of judging in favor of fact-centered, contextual casuistry.<sup>80</sup>

As all his clerks know, Justice Stevens loved to dive into the record of a case. He wrote the first draft of every opinion, but he took particular care in drafting the background sections. More than most appellate judges who have not served as trial judges, he was extremely respectful of the work of trial courts and of their factfinding expertise.<sup>81</sup> An important consequence of his approach to judging was that Justice Stevens did not box himself in. If he felt free to vote in favor of race-conscious

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ratio of liberal to conservative decisions declined significantly during Justice Stevens’s tenure. See Dave Gilson, *Charts: The Supreme Court’s Rightward Shift*, MOTHER JONES (June 26, 2012), <https://www.motherjones.com/politics/2012/06/supreme-court-roberts-obamacare-charts> [<https://perma.cc/XWZ8-PKX2>].

<sup>78</sup> Chief Justice Rehnquist’s average MQ score during his first three years versus his last three years shifted to the left during his career by almost exactly the same magnitude as Justice Stevens’s. Chief Justice Rehnquist’s shift was 2.64 points to the left while Justice Stevens’s was 2.75 points. See *Martin-Quinn Scores: Measures*, supra note 75.

<sup>79</sup> STEVENS, supra note 23, at 443.

<sup>80</sup> I’m using the term “casuistry” in its classical, nonpejorative sense of “case-by-case reasoning.” See Michael C. Dorf, *Malcolm Gladwell Mangles Casuistry*, DORF ON LAW (Aug. 2, 2019), <http://www.dorfonlaw.org/2019/08/malcolm-gladwell-mangles-casuistry.html> [<https://perma.cc/K4PS-P4XS>].

<sup>81</sup> Justice Stevens’s opinion in *Sony Corp.* is exemplary of this feature of the Justice’s style. As he said in his memoir, the district court’s findings of fact were “central” to the Court’s decision in the case. See STEVENS, supra note 23, at 200. Justice Stevens told his clerks at his final clerk reunion in May 2019 that — of his 542 opinions — *Sony Corp.* was his favorite, an assessment that he echoes in his memoirs. See *id.* at 201.

affirmative action later in his career,<sup>82</sup> it was because he had not categorically rejected race-conscious state action in earlier cases.<sup>83</sup> In the same way, his later opposition to the manner in which the death penalty came to be applied<sup>84</sup> was made possible by the qualified nature of his endorsement of the state's power to impose that penalty in his early years on the bench.<sup>85</sup>

The third — and arguably most important — factor that contributed to Justice Stevens's reputation for having evolved into a liberal was his remarkable commitment to intellectual openness. As Justice Stevens memorably put it in a speech at Fordham Law School in 2005: “[L]earning 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].”<sup>86</sup> 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 was, in his view, an essential virtue of any good judge. In a statement overflowing with the generous (and counterfactual) optimism that only a lifelong Cubs fan could exhibit, 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.”<sup>87</sup> This assertion was certainly true of Justice Stevens. Justice Stevens's evolution on the death penalty bears all the hallmarks of his judicial personality and commitment to constant learning, coupled with the shifting context in which he was being asked to decide cases. In his concurring opinion in *Baze v. Rees*,<sup>88</sup> Justice Stevens painstakingly walked through the conservative 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.<sup>89</sup> In Justice Stevens's words:

[J]ust as Justice White ultimately based his conclusion in *Furman* [*v. Georgia*]<sup>90</sup> that the death penalty was unconstitutional] on his extensive exposure to countless cases for which death is the authorized penalty, I have

<sup>82</sup> See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007) (Stevens, J., dissenting) (“It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision.”).

<sup>83</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 411 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part).

<sup>84</sup> See *Baze v. Rees*, 553 U.S. 35, 71 (2008) (Stevens, J., concurring in the judgment).

<sup>85</sup> See *Gregg v. Georgia*, 428 U.S. 153, 175, 187 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); see also *Gardner v. Florida*, 430 U.S. 349, 357–58 (1977).

<sup>86</sup> John Paul Stevens, *Learning on the Job*, 74 *FORDHAM L. REV.* 1561, 1567 (2006).

<sup>87</sup> *Id.* at 1563.

<sup>88</sup> 553 U.S. 35.

<sup>89</sup> *Id.* at 71–87 (Stevens, J., concurring in the judgment); see *Gregg*, 428 U.S. at 207.

<sup>90</sup> 408 U.S. 238 (1972).



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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.”<sup>91</sup>

In the end, I am persuaded by Justice Stevens’s protests that he had not changed as much as people thought. His 2019 memoir, *The Making of a Justice*,<sup>92</sup> makes clear that his self-understanding as a thoroughgoing judicial moderate remained as firm as ever. His time on the Court did not fundamentally transform him. He learned from his experience as a Justice, as he constantly did from the world around him, but he remained true to the incremental and nonideological vision of judging he articulated to the Chicago Bar the year before President Gerald Ford appointed him to the Supreme Court. Justice Stevens, the temperamentally humble, midwestern Republican who was appointed by a Republican president, confirmed by a unanimous Senate, and took each case as it came to him, presents us with an appealing model of judicial fairness and consistency in the face of a changing Court and a polarized nation that sometimes seems to have left such ideals behind.

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<sup>91</sup> *Baze*, 553 U.S. at 86 (Stevens, J., concurring in the judgment) (quoting *Furman*, 408 U.S. at 312 (White, J., concurring)).

<sup>92</sup> STEVENS, *supra* note 23.