

2010

Justice Stevens' Temperance

Jamal Greene

Columbia Law School, jgreen5@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Supreme Court of the United States Commons](#)

Recommended Citation

Jamal Greene, *Justice Stevens' Temperance*, 94 JUDICATURE 11 (2010).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3299

This Article 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, rwitt@law.columbia.edu.

Justice Stevens' temperance by Jamal Greene

On the last opinion day of the last of his 35 Terms on the Supreme Court, Justice John Paul Stevens issued his valedictory opinion, a 57-page dissent in *McDonald v. City of Chicago*. Justice Stevens laid out an expansive vision of constitutional interpretation that Justice Alito aptly called "eloquent" in his plurality opinion. Not one for sentimental farewells, Justice Scalia was less generous: "Justice Stevens' approach," he wrote in the last line of his concurring opinion, "puts democracy in peril."

Those who read Supreme Court opinions will have become accustomed to this sort of calculated incivility. Over the years Justice Scalia has accused his senior colleague of "rule by judicial fiat," and has called Justice Stevens' good-faith arguments "unorthodox," "dead wrong," "bizarre," and "less a legal analysis than a manifesto." I could go on.

I doubt I reveal too much in saying that history will one day show that Justice Scalia has at times circulated

even less cautious language than he has published. My co-clerks and I tended to respond to Scalia's sharp language with emotions bounding from seething annoyance to apoplectic outrage. Justice Stevens' range of responses was very different, usually falling somewhere between amusement and delight: a chuckle, or two; a slow shaking of the head, smiling; a lightening of the eyes as he formulated his response. Never anger, not that I saw.

On one level, Justice Stevens' preternatural resistance to Justice Scalia's needling is simply an Article III imperative. Clerks come and go in a year's time, but when you and your colleagues have life tenure, letting them get under your skin does not lend itself to longevity. I understood that by the time my year was over.

But there is a more significant lesson in Justice Stevens' temperance that I did not fully appreciate until some time after I left. Far from an irritant, caustic, witty repartee from the Court's most gifted writer was often exactly what Justice Stevens wanted. For one thing, Justice

Stevens laughs easily, and he often found Justice Scalia's writings especially funny. More importantly, the more vehement the Scalia opinion, the more the American people would be inspired to read it. The more people who read a Scalia opinion directed at Justice Stevens, the more people would be obligated to read Justice Stevens' opinion to find out what the fuss was about. They would then have to reconcile the two, and would have to think, perhaps anew, about the important work of the Court.

It is difficult to count the number of Scalia concurrences that begin, to paraphrase, "I join the Court's opinion in full, but I add a few words to respond to Justice Stevens." Every such response was a victory for Justice Stevens and yes, Justice Scalia, for democracy.

JAMAL GREENE

is an associate professor at Columbia Law School.
(jgreen5@law.columbia.edu)

West LegalEdcenter

LOG ON. LOOK UP.

Gain online access to quality legal training and CLE from the
American Judicature Society

Members get a special discount. Log on today!

<http://westlegaledcenter.com/link/AJS>

1.800.241.0214



WEST

©2010 Thomson Reuters
Thomson Reuters and the Kinesis logo are trademarks of Thomson Reuters.