

VIRGINIA LAW REVIEW ONLINE

VOLUME 106

APRIL 2020

28–46

ESSAY

SELF-PORTRAIT IN A COMPLEX MIRROR: REFLECTIONS ON
THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94
YEARS BY JOHN PAUL STEVENS

*George Rutherglen**

Immediately after his death last year, Justice John Paul Stevens received a number of moving eulogies, several by former law clerks published in the *Harvard Law Review*, along with a tribute from Chief Justice Roberts.¹ Former law clerks—and I am one myself—must be given the latitude to reminisce about what they learned from their judge and what the judge’s contributions were. This Essay takes up a different task: to reflect on the man, the lawyer, and the judge as portrayed in his memoirs, *The Making of a Justice: Reflections on My First 94 Years*, published only months before he died at age ninety-nine. If the reflections in this Essay suffer from the distortions of hagiography, I hope they do so only to this extent: in observing that Justice Stevens does not need hagiography and would not have wanted it. On the contrary, he thought he could win any argument without fear or favor of any kind. And by the same token, he would have been completely confident of his account of his life and career. A comment by Paul Clement, a leading member of the

* John Barbee Minor Professor of Law, University of Virginia. I clerked for Justice Stevens in the 1975 term of the Supreme Court.

¹ Memoriam: Justice John Paul Stevens, 133 Harv. L. Rev. 747 (2020).

Supreme Court bar, sets the tone for these reflections: Justice Stevens's questions at oral argument were "[o]ften fatal; always kind."²

Such paradoxes lie at the center of Justice Stevens's character and his career as a lawyer and a judge. He showed extraordinary independence in a branch of government and a profession immersed in rules. He had a keen sense of competition, evident outside of court in his pursuit of golf, tennis, and bridge. In his memoirs, he confesses to only a few errors in his many opinions as a judge, and he points repeatedly to cases in which the Supreme Court eventually came around to the position he first took in dissent.³ Yet he was known to be genial as well as generous in victory (which he much preferred) and in defeat (which he would rarely concede).⁴ He also had a fine sense of irony and a sharp sense of humor, notable for its telling and understated delivery. In a personal jurisdiction case, familiar mainly to experts in the arcana of civil procedure, the Court reached a unanimous result by way of several separate opinions. Justice Stevens agreed with the judgment in the case but not with the separate opinions, making clear his reservations in this footnote: "Perhaps the adage about hard cases making bad law should be revised to cover easy cases."⁵

Justice Stevens's independence raises pointed questions: Independence from what? And with allegiance to what principles? No individual, let alone a lawyer or a judge, would admit to a lack of independence. So does Justice Stevens's independence really distinguish him from others in the same profession? The answer is a matter of both degree and kind: in degree, in his enthusiasm for the back-and-forth of legal argument, and in kind, in his skill and affinity for "the artificial reason and judgment of law," as Lord Chief Justice Coke put it in confronting James I over his royal prerogative to act as a judge.⁶ Justice Stevens was a lawyer's lawyer in his facility and engagement with the dialectic of legal discourse. This accords with both his competitiveness and his genial irony. Legal

² Paul Clement, Justice Stevens at Oral Argument: Often Fatal; Always Kind, SCOTUSblog (July 19, 2019, 1:18 PM), <https://www.scotusblog.com/2019/07/justice-stevens-at-oral-argument-often-fatal-always-kind/> [<https://perma.cc/6ZBF-KH27>].

³ John Paul Stevens, *The Making of a Justice: Reflections on My First 94 Years* 147, 153–54, 199–200 (2019) [hereinafter *The Making of a Justice*] (decisions on gay rights, pregnancy discrimination, and sentencing in death penalty cases).

⁴ *Id.* at 143 (conceding a mistake in one of five capital cases decided the same term).

⁵ *Burnham v. Superior Court*, 495 U.S. 604, 640 n.* (1990) (Stevens, J., concurring in the judgment).

⁶ 12 Edward Coke, *Reports of Sir Edward Coke* 65 (1738).

advocacy is a winner-take-all sport. It requires a truly competitive spirit, yet at the same time a willingness to graciously accept defeat.

In genuinely hard cases, the kind that make it to the Supreme Court, lawyers and judges must accept something like a major league batter's average—ideally .500, but realistically .300. They prevail in hard cases or on difficult issues about a third of the time. This figure holds for Justice Stevens, as assessed through his opinions. He wrote a record-breaking 628 dissents as compared to 398 opinions for a majority or a prevailing plurality, and for good measure, he also wrote 375 concurring opinions.⁷ It follows that a certain degree of humility is in order. This attitude might be hard to miss in Justice Stevens's memoirs, which can be read as a history of arguments he won—or thought he should have won. To take this view, however, would be to discount Justice Stevens's love of legal argument. As one of his former clerks, now Judge David Barron, observed: "Have you ever seen someone chuckle while reading a brief in a difficult case?"⁸

This Essay proceeds in three parts: first, in examining Justice Stevens's personal and professional background and how that might have influenced his decisions as a judge; second, in accounting for the growing salience of the positions he took over his career; and third, in assessing the lessons from his long tenure as a Justice.

I. INDIVIDUAL AND FAMILY

Looking back over a life that extends to nearly a century, and over a career that was only a few decades shorter, requires continued adjustment of focus. Justice Stevens grew up in another era, one in which he could see Babe Ruth's "called shot" before he hit a home run in the World Series.⁹ He served with distinction in World War II and graduated from Northwestern University School of Law shortly after the war.¹⁰ He then served as a law clerk for Justice Wiley Rutledge in the 1947 term of the Supreme Court.¹¹ He returned to Chicago to practice law, focused upon

⁷ Lee Epstein et al., *The Supreme Court Compendium: Data, Decisions, and Developments* 634 (6th ed. 2015).

⁸ David Barron, *Memoriam: Justice John Paul Stevens*, 133 *Harv. L. Rev.* 747, 749 (2020).

⁹ *The Making of a Justice*, *supra* note 3, at 17–18. He does admit to some uncertainty over where Ruth's home run landed, which he resolved in favor of his initial recollection by looking at the box score for the game. *Id.* at 18.

¹⁰ *Id.* at 35–41, 53–59.

¹¹ *Id.* at 61–68.

antitrust cases, and returned only briefly to Washington to serve on the staff of the House Judiciary Committee.¹² He was appointed to the U.S. Court of Appeals for the Seventh Circuit in 1970 and then to the Supreme Court in 1975.¹³

Justice Stevens established his reputation outside the antitrust field when he volunteered to serve, pro bono, as the general counsel to a commission investigating corruption in the Illinois Supreme Court.¹⁴ The commission, composed of practicing lawyers, was widely expected to exonerate the justices on the court, but Justice Stevens's vigorous investigation corroborated the charges against two justices, who promptly resigned after the commission recommended that they do so. The investigation made Justice Stevens a prominent member of the Chicago bar, and soon after it concluded, Senator Charles Percy approached Justice Stevens about the possibility of appointment to the Seventh Circuit.¹⁵ The rest is history.

The smooth upward rise in his legal career might lead an observer to conclude that his personal life exemplified a similarly tranquil progression. This partly results from the illusion of a retrospective account of his career and partly from the evident satisfaction that Justice Stevens took in both his professional and his personal life. This mistake is understandable, but still a mistake. In his youth, his father was tried and convicted of financial fraud relating to the operation of the Stevens Hotel, which Justice Stevens's family owned and managed. His father succeeded in having his conviction reversed on appeal a year after it was entered, but the entire process took a toll on the family, apparently contributing to a stroke suffered by Justice Stevens's grandfather and the suicide of one of his uncles.¹⁶ Justice Stevens's father never recovered his financial position, experienced failure as a restaurateur, and later had only limited success as the owner of a resort in Wisconsin.

After he reached the Supreme Court, Justice Stevens faced other personal trials. His adopted son, John Joseph Stevens, served in Vietnam and then encountered difficulties in civilian life. He died prematurely

¹² Id. at 69–92.

¹³ Id. at 107–10, 124–32.

¹⁴ Id. at 101–06.

¹⁵ Id. at 107–08.

¹⁶ Id. at 19–20, 24–25; see also Bill Barnhart & Gene Schlickman, John Paul Stevens: An Independent Life 34–35 (2010) (describing the “fresh humiliation” faced by the Stevens family even after their father’s verdict was overturned).

from a brain tumor in 1996.¹⁷ Earlier, in 1979, Justice Stevens divorced his first wife, Elizabeth, and immediately married his second wife, Maryan. She had been the wife in a couple who lived near the Stevens family in Chicago and socialized with them, including with the children.¹⁸ The lessons from his personal life do not yield determinate implications for his judicial career or, indeed, for his life as a whole. What they do show, along with his service in World War II, is that he was someone acquainted with the crises in human affairs and their profound effects on individual lives, including his own.

His practice as a lawyer in Chicago, and a Republican in the era of the Democratic Daley machine, also reveals his ambivalent status as an establishment figure who was nevertheless, in some respects, an outsider. He notes in his memoirs, with characteristic irony, that when he entered the practice of law, “the Republican Party was still the party of Abraham Lincoln.”¹⁹ Now, of course, Republicans of this persuasion are as scarce nationally as all Republicans were in Chicago during his time there. After he became a judge, Justice Stevens refused to reveal his political affiliation, and several of his former law clerks speculate that he would have resisted the label that he was the leader of the liberal wing of the Supreme Court.²⁰ An accurate account of his judicial philosophy is so elusive partly because he was temperamentally averse to anything that resembled the party line.

II. THE EVOLUTION OF A JUSTICE

It is only a slight exaggeration to say that Justice Stevens moved from the center to the liberal wing of the Supreme Court without ever changing position. He did change position on issues such as affirmative action and capital punishment, moving away from disapproval of the first and

¹⁷ Barnhart & Schlickman, *supra* note 16, at 139, 193, 252.

¹⁸ *Id.* at 220–22.

¹⁹ The Making of a Justice, *supra* note 3, at 81.

²⁰ He is reported to have said, when asked about his political affiliation, “[t]hat’s the kind of issue I shouldn’t comment on, either in private or in public!” Jeffrey Rosen, *The Dissenter*, Justice John Paul Stevens, *N.Y. Times Mag.*, Sept. 23, 2007, at 50; see also Christopher L. Eisgruber, *Memoriam: Justice John Paul Stevens*, 133 *Harv. L. Rev.* 747, 757–60 (2020) (commenting on Stevens’s possible reaction to being identified as “[l]eader of the Court’s liberal wing”); Eduardo M. Peñalver, *Memoriam: Justice John Paul Stevens*, 133 *Harv. L. Rev.* 747, 765 (2020) (discussing how Stevens identified as a Republican).

approval of the second.²¹ But as Justice Stevens himself has noted, the Court changed around him more than he changed within it. Every Justice appointed during his time at the Court was more conservative than the Justice he or she replaced.²² That change brought into greater relief the distinctiveness of his opinions and reasoning. When he challenged the old orthodoxy of the Warren and Burger Courts early in his career, his arguments mattered less to observers because that orthodoxy seemed so firmly established. As it has been systematically dismantled by the Rehnquist and Roberts Courts, the positions that he took appeared to be far more consequential. He ended his career challenging the emerging orthodoxy of originalism, textualism, and the primacy of rules over standards, and he invoked precedent more frequently to defend established doctrine as he saw it.

Tracing continuous themes in his career is a daunting task, made more daunting as his judicial record expanded over more than thirty-four years on the Court, and it has been augmented by the books he has published in retirement. The overall contours of his jurisprudence threaten to dissolve into a pointillist array of particular decisions and case-specific reasoning. General observations remain subject to qualifications, exceptions, and even refutation from the imposing number of opinions that he wrote, more than any other Justice in history. Hence, any attempt to identify principles and methods characteristic of his decisions has to be selective and by way of example rather than by an attempt to be comprehensive and definitive. This Essay therefore focuses on three opinions in which he took distinctive and noteworthy positions: *Craig v. Boren*,²³ on sex discrimination and equal protection; *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁴ on judicial review of administrative action; and *District of Columbia v. Heller*,²⁵ on the right to bear arms under the Second Amendment.

Each of these opinions comes from a different era in Justice Stevens's tenure as a Justice—early, middle, and late—and each has had varying degrees of influence—from indirect and implicit, to significant and

²¹ He changed his mind about affirmative action, or at least his general attitude, if not his position on particular cases. *The Making of a Justice*, supra note 3, at 160–61, 175–76, 218–19, 259–60, 398–401. With respect to the death penalty, his position evolved from approval in some cases to disapproval in all. *Id.* at 141–44, 476–77.

²² Peñalver, supra note 20, at 765.

²³ 429 U.S. 190 (1976).

²⁴ 467 U.S. 837 (1984).

²⁵ 554 U.S. 570 (2008).

canonical, to oppositional and dissenting. The following discussion takes them up in chronological order.

A. Craig v. Boren

This case concerned two Oklahoma statutes that prohibited the sale of 3.2% beer to young men aged eighteen to twenty, but not to women of the same age. The majority opinion, by Justice Brennan, applied a form of “intermediate scrutiny” to hold the statutes unconstitutional because they did not “serve important governmental objectives” and were not “substantially related to achievement of those objectives.”²⁶ The statistical evidence marshalled by the state did not establish a sufficient relation between the discrimination against young men and the state’s legitimate interest in traffic safety. Several separate opinions, either concurring or dissenting, raised issues about the appropriate standard of review.²⁷ Justice Stevens wrote another concurring opinion where he roundly declared: “There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.”²⁸ The Equal Protection Clause, as he read it, did not divide cases into those triggering strict scrutiny, rational basis review, and intermediate scrutiny.

Adherents to the orthodox view of judicial review would find this claim to be heresy, as it was then and still is now. The only difference in constitutional doctrine since then has been the shift towards increased scrutiny of sex-based classifications from the standard applied in *Craig v. Boren* to the more exacting standard of *United States v. Virginia*, requiring “an exceedingly persuasive justification” for government action based on gender.²⁹ While Justice Stevens concurred in these later opinions, he never retreated from his skepticism over “tiers of scrutiny.” He was “still convinced that carefully analyzing in each case the reasons why a state enacts legislation treating different classes of its citizens differently is far wiser than applying a different level of scrutiny based on the class of persons subject to disparate treatment.”³⁰ The reason for his

²⁶ *Craig*, 429 U.S. at 197.

²⁷ *Id.* at 210 (Powell, J., concurring); *id.* at 215 (Stewart, J., concurring in the judgment); *id.* at 217 (Burger, C.J., dissenting); *id.* at 218–21 (Rehnquist, J., dissenting).

²⁸ *Id.* at 211–12 (Stevens, J., concurring).

²⁹ 518 U.S. 515, 531 (1996) (internal quotation marks omitted).

³⁰ *The Making of a Justice*, *supra* note 3, at 155.

skepticism has as much to do with the logic of equality as with text of the Constitution. Assuring equal treatment among persons does not obviously require different standards of review and, as Justice Stevens suggests, seems to preclude it.

Whatever the merits of this argument, it certainly has not proved to be persuasive. It has not attracted the agreement of any other Justice. The debate among the other Justices over standards of judicial review has, instead, taken place within the framework of different levels of scrutiny. Yet the paradox he has noted has not been resolved, and it reappears whenever a new basis of classification, such as sexual orientation, comes under constitutional attack.³¹ Justice Stevens's failure to address such questions in terms of strict scrutiny might lead one to conclude that he was unsympathetic to novel claims of discrimination. The reverse, however, is true. On the particular issue of sexual orientation, in his very first term at the Court, he dissented from a summary affirmance of a decision upholding a criminal prohibition against sodomy,³² as he did years later from a decision of the Court reaching the same conclusion on the merits,³³ and when the Court eventually overruled the latter decision, he joined the opinion doing so.³⁴

On the general issue of sex discrimination, as in *Craig v. Boren*, Justice Stevens nearly always voted to hold government action on the basis of sex unconstitutional. He did so in dissent from a decision upholding sex-based distinctions in defining statutory rape,³⁵ as he did in joining the opinions for the Court that established an elevated standard of scrutiny for sex-based classifications.³⁶ His refusal to frame the issue in terms of standards of review did not prevent him from reaching largely the same results. Occasional departures from this trend, as in his early vote to join in an opinion upholding a statute requiring only men to register for the draft³⁷ or a late vote to join in an opinion upholding different standards

³¹ *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (criticizing the majority's holding that homosexual sodomy was protected by the Constitution without identifying the standard of review).

³² *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976) (voting to note probable jurisdiction for full briefing and oral argument).

³³ *Bowers v. Hardwick*, 478 U.S. 186, 218–20 (1986) (Stevens, J., dissenting).

³⁴ *Lawrence*, 539 U.S. at 561.

³⁵ *Michael M. v. Superior Court*, 450 U.S. 464, 496–502 (1981) (Stevens, J., dissenting).

³⁶ *United States v. Virginia*, 518 U.S. 515, 518, 531 (1996); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 127, 136–37 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 719, 724 (1982).

³⁷ *Rostker v. Goldberg*, 453 U.S. 57, 58 (1981).

for proof of paternity, rather than maternity, in immigration cases,³⁸ stand out as exceptions based on very narrow grounds. These are, in the case of the draft, entirely superseded by the subsequent integration of women into all parts of the armed forces.³⁹

More prominent and more immediately influential was Justice Stevens's insistence on a unitary approach to claims of sex discrimination under Title VII of the Civil Rights Act of 1964.⁴⁰ He treated these claims just like claims of race discrimination, subject only to the narrow exceptions in the statute for employment discrimination on grounds other than race. In an early decision, *City of Los Angeles Department of Water & Power v. Manhart*,⁴¹ he established what would soon become the dominant approach to sex discrimination under Title VII. His opinion held that an employer violated Title VII whenever it made a classification on the basis of sex that fell outside the exceptions found in the statute.⁴² In a dissent from an earlier decision, he had already applied this principle to classifications on the basis of pregnancy,⁴³ and Congress soon amended Title VII to reach the result for which he had advocated.⁴⁴ He then elaborated upon it in an opinion that held, paradoxically, that male employees could be victims of pregnancy discrimination that restricted medical coverage for their wives.⁴⁵ This opinion was then further extended by the Court to exclusions from employment based on a woman's capacity to become pregnant.⁴⁶ The Court's position became identical to his own.

Is there a contrast between the standard "to govern impartially" that Justice Stevens found in the Equal Protection Clause and the rule prohibiting almost all classifications on the basis of sex under Title VII? If any exists, it arises from the more specific and less abstract terms of the statute, which lends itself to interpretation as a rule. Even so, this rule of statutory interpretation admitted some classifications on the basis of sex

³⁸ *Nguyen v. INS*, 533 U.S. 53, 56 (2001).

³⁹ *Nat'l Coal. for Men v. Selective Serv. Sys.*, 355 F. Supp. 3d 568, 576–77 (S.D. Tex. 2019) (holding *Rostker v. Goldberg* not binding because of the expansion of women's opportunities in the military).

⁴⁰ Codified at 42 U.S.C. §§ 2000e et seq. (2012).

⁴¹ 435 U.S. 702 (1978).

⁴² *Id.* at 708–10.

⁴³ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 161–62 (1976) (Stevens, J., dissenting).

⁴⁴ Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978), codified at 42 U.S.C. § 2000e(k) (2012).

⁴⁵ *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682–85 (1983).

⁴⁶ *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197–200 (1991).

beyond those covered by exceptions in the statute itself. For instance, Justice Stevens found a California statute requiring paid leave for pregnant employees, but not for prospective fathers, to be consistent with Title VII. He reasoned that it was “consistent with ‘accomplishing the goal that Congress designed Title VII to achieve.’”⁴⁷ Justice Stevens’s interpretation of Title VII did not have to overcome any established orthodoxy, unlike the different standards of judicial review under the Constitution. Justice Stevens took issue with the latter orthodoxy and continued to do so throughout his career and in his memoirs,⁴⁸ even if he could not persuade his colleagues explicitly to depart from it.

B. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.

Justice Stevens’s opinion for the Court in *Chevron* has likely received more citations than any other of his opinions. It is cited in nearly 17,000 judicial opinions and over 20,000 secondary sources.⁴⁹ By way of comparison, his decision upholding the exercise of the eminent domain power in *Kelo v. City of New London*,⁵⁰ which he regards as the most unpopular of his career,⁵¹ has been cited in opinions just over 500 times and in secondary sources just under 6000 times.⁵² In administrative law, *Chevron* has become something of a world unto itself. Its holding appears in a paragraph that has been endlessly interpreted by courts and commentators:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the

⁴⁷ *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 294–95 (1987) (Stevens, J., concurring in part and concurring in the judgment) (quoting *Steelworkers v. Weber*, 443 U.S. 193, 204 (1979)).

⁴⁸ *The Making of a Justice*, supra note 3, at 155.

⁴⁹ WestLaw Search for Citations to *Chevron*, WestLaw, [https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default)) (enter “Chevron” into the search bar and select the “search” button; then inspect the “Content types” column on the left for the numbers of citations) (last visited Feb. 2020). Professor Thomas W. Merrill regards *Chevron* as “his most famous opinion.” Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in *Administrative Law Stories* 398, 420 (Peter L. Strauss ed., 2006).

⁵⁰ 545 U.S. 469 (2005).

⁵¹ *The Making of a Justice*, supra note 3, at 431.

⁵² WestLaw Search for Citations to *Kelo*, WestLaw, [https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default)) (enter “Kelo” into the search bar and select the “search” button; then inspect the “Content types” column on the left for the numbers of citations) (last visited Feb. 2020).

question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁵³

In his memoirs, as in his opinions after *Chevron*, Justice Stevens went to some length to downplay its significance, emphasizing its continuity with prior decisions deferring to agency expertise and reserving to the courts the power to decide “pure question[s] of statutory construction.”⁵⁴ For him, there was no “*Chevron* revolution.”⁵⁵ To the consternation of Justice Scalia, he departed from the orthodoxy that would have elevated the significance of his own opinion.⁵⁶ In its place, Justice Stevens relied on a disputable distinction between pure questions of law for the courts and questions of application of law to fact for the agencies, complicating the seemingly simple procedure endorsed in *Chevron* itself.⁵⁷ As a consequence, he appears to have minimized the implications of one of his most influential decisions—and to be one of the few Justices in history to do so. His aversion to rigid rules of decision extended even to those derived from his own opinions.

The most fundamental objection to a broad view of *Chevron* goes to its deference to administrative agencies on questions of law. Under current doctrine, administrative agencies can essentially “say what the law is.”⁵⁸ This question has been, since *Marbury v. Madison*, traditionally thought

⁵³ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (footnotes omitted).

⁵⁴ *Negusie v. Holder*, 555 U.S. 511, 529–31 (2009) (Stevens, J., concurring in part and dissenting in part); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445–46 & n.29 (1987); see also *The Making of a Justice*, supra note 3, at 228 (“[T]he judiciary ‘must reject administrative constructions which are contrary to clear congressional intent.’” (quoting *Chevron*, 467 U.S. at 843 n.9)).

⁵⁵ Gary Lawson, *Federal Administrative Law* 601 (8th ed. 2019) (“Was the *Chevron* revolution over before it actually began?”).

⁵⁶ *Cardoza-Fonseca*, 480 U.S. at 453–55 (Scalia, J., concurring in the judgment).

⁵⁷ *Id.* at 445–46 & n.29 (majority opinion).

⁵⁸ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting).

to be “emphatically the province and duty of the judicial department.”⁵⁹ A further objection follows from the provision in the Administrative Procedure Act that authorizes judicial review of “all relevant questions of law”⁶⁰ and from the historical practice of review of agency action by writ of mandamus.⁶¹ Justice Stevens’s view of *Chevron* reduces the force of those objections, as compared to the usual understanding of the decision, by opening the door at the outset of the inquiry to judicial resolution of “pure question[s] of statutory construction.”⁶² Still, if *Chevron* means anything, it leaves some questions of law for agency determination. Justice Stevens’s view of the decision does not eliminate all objections to it or put an end to the seemingly endless disputes over its proper interpretation.⁶³ What it does illustrate is Justice Stevens’s preference for continuity and common sense over radical restructuring and formal inquiry.

In a revealing aside in his memoirs, Justice Stevens identifies *Chevron* as the only case in which he visited the chambers of another Justice to secure agreement with his draft opinion. He visited Justice Brennan to convince him to join the opinion for the Court, which made it unanimous.⁶⁴ The need to secure another vote, when Justice Stevens already had a majority of five, does not seem obvious based on considerations internal to the opinion itself. Yet as an institutional matter, the Supreme Court was handicapped in deciding *Chevron* by the recusal of three Justices,⁶⁵ making any bare majority a fragile basis for guiding lower courts and administrative agencies. Concerns over continuity of precedent influenced both the opinion itself and the method of securing support for it.

Scholars of administrative law might well find Justice Stevens’s attempt to generate consensus ironic, as it resulted in a precedent that has since become an occasion for proliferating disputes. In addition to the issues mentioned earlier, it has generated disputes over the deference

⁵⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁶⁰ 5 U.S.C. § 706 (2012).

⁶¹ Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 *Yale L.J.* 908, 930–97 (2017).

⁶² *Cardoza-Fonseca*, 480 U.S. at 445–46 & n.29.

⁶³ Gary Lawson, *supra* note 55, at 659, 689–92, 718–19, 735–46.

⁶⁴ *The Making of a Justice*, *supra* note 3, at 205.

⁶⁵ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (Justices Marshall and Rehnquist took no part in the case. Justice O’Connor heard oral argument but took no part in the decision).

accorded to an agency's interpretation of its own regulations⁶⁶ and over the forms of agency interpretations, from regulations to positions taken in litigation, that deserve deference.⁶⁷ A further limitation on the decision puts "question[s] of deep economic and political significance" beyond its scope.⁶⁸ It also does not apply to purely interpretive rules promulgated by an agency that Congress did not intend to have the force of law⁶⁹ or when settled judicial interpretation has eliminated any ambiguity in a statute.⁷⁰ Instead of simplifying judicial review of administrative action, *Chevron* has resulted in the multiplication of doctrinal issues that limit or trigger its application. Perhaps the vast scale of the administrative state would have resulted in disputes over similar issues under different headings, but they now come under the heading of *Chevron*, limiting its scope and significance. If so, in another ironic twist, this development tends to support Justice Stevens's view of the decision as a modest innovation on existing precedents.

C. District of Columbia v. Heller

Precedent figured far more prominently in Justice Stevens's dissent from the Supreme Court's reinvigoration of the Second Amendment as the source of individual rights to gun ownership, possession, and use. His opinion relied primarily on the authority of *United States v. Miller*,⁷¹ a decision from the 1930s that upheld a federal prohibition applicable to sawed-off shotguns. He fully endorsed the reasoning of that decision requiring that firearms protected by the Second Amendment must have "some reasonable relationship to the preservation or efficiency of a well regulated militia."⁷² Justice Scalia, writing for the Court, took issue with the breadth and soundness of *Miller* because that opinion says "[n]ot a

⁶⁶ *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997).

⁶⁷ *United States v. Mead Corp.*, 533 U.S. 218, 229–34 (2001) (excluding deference to classification rulings by the Customs Service); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (excluding deference to "interpretations contained in policy statements, agency manuals, and enforcement guidelines").

⁶⁸ *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (internal quotation marks omitted) (definition of allowable subsidies in health insurance exchanges).

⁶⁹ *Gonzales v. Oregon*, 546 U.S. 243, 268 (2006).

⁷⁰ *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487–90 (2012) (opinion of Breyer, J.); *id.* at 496 (Scalia, J., concurring in part and concurring in the judgment).

⁷¹ 307 U.S. 174 (1939).

⁷² *Id.* at 178; see also *District of Columbia v. Heller*, 554 U.S. 570, 637 (2008) (Stevens, J., dissenting) (quoting language from *Miller*, 307 U.S. at 178).

word (*not a word*) about the history of the Second Amendment.”⁷³ After his own lengthy review of the historical record, Justice Stevens found that Scalia offered “insufficient reason to disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years.”⁷⁴

Debate has ensued over whether the difference between the two opinions arose from applying a common originalist methodology⁷⁵ or from contrasting originalism with adherence to precedent.⁷⁶ To be sure, Justice Stevens felt the need to meet Scalia’s arguments from the historical record on their own terms, even though he believed *Miller* to provide an entirely sufficient basis for his dissent.⁷⁷ He did not become an originalist by taking on originalist arguments. Indeed, his appeal to the historical record appears to be confirmed on a crucial issue in *Heller*: whether “the right to bear arms” in the Second Amendment was primarily understood at the time of its ratification in a military context. Scalia conceded that the phrase took on that meaning when it was used with the preposition “against,”⁷⁸ as in “the right to bear arms against a foreign enemy.” More recent and more extensive searches of eighteenth-century texts reveal that the phrase was used most commonly in a military context.⁷⁹ A rigorous originalist, who would overrule precedents contrary to the common public meaning of constitutional language at the time of enactment, might well have doubts about the continued force of *Heller* itself as a precedent.⁸⁰

In his dissent, Justice Stevens did not appeal directly to public policy but to the need to give elected officials the power to make the policy judgments inherent in gun control legislation.⁸¹ His memoirs, like his

⁷³ *Heller*, 554 U.S. at 624.

⁷⁴ *Id.* at 679 (Stevens, J., dissenting).

⁷⁵ Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 *UCLA L. Rev.* 1343, 1346 (2009) (“All nine members of the *Heller* Court began by accepting the foundation of originalist theory . . .”).

⁷⁶ Jamal Greene, *Selling Originalism*, 97 *Geo. L.J.* 657, 686 (2009) (interpreting the majority opinion as giving priority to originalism over precedent); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 *Va. L. Rev.* 253, 272–73 (2009) (criticizing the majority opinion for relying on originalist reasoning to create “a new substantive constitutional right that had not been recognized in over 200 years”).

⁷⁷ *The Making of a Justice*, *supra* note 3, at 485.

⁷⁸ *Heller*, 554 U.S. at 586.

⁷⁹ Darrell A.H. Miller, *Owning Heller*, 1 *U. Fla. J.L. & Pub. Pol’y F.* 1, 7–9 (2019).

⁸⁰ *Id.* at 10–15.

⁸¹ *Heller*, 554 U.S. at 679–80 (Stevens, J., dissenting).

previous book, *Six Amendments*, are another matter. He “find[s] it incredible that policymakers in a democratic society have failed to impose more effective regulations on the ownership and use of firearms than they have.”⁸² He also regrets that he did not emphasize the human costs of the decision in his conversations with fellow Justices.⁸³ While the coincidence of his views on the policy issue and the constitutional issue is not surprising, the framing of his legal argument to turn decisively on precedent is revealing. His heavy reliance upon *Miller* was not an instance of looking into a crowd and seeing his friends. *Miller* was the only decision on point from the Supreme Court. His faith in precedent went hand-in-hand with his emphasis upon case-by-case adjudication.⁸⁴

In this respect, he was a Burkean conservative, who could depart from precedent only if he understood all features of the past decision and all features of the present case. Incremental change for Edmund Burke was far superior to revolutionary transformations. As Burke said, “I must see with my own eyes, I must, in a manner, touch with my own hands, not only the fixed but the momentary circumstances, before I could venture to suggest any political project whatsoever.”⁸⁵ So too, Justice Stevens had to see and handle all the dimensions of a case or a precedent. This can prove maddening to anyone trying to extract general principles from his opinions, but it is an undeniable characteristic of his jurisprudence.⁸⁶

While Justice Stevens was reluctant to overrule past decisions, he could readily distinguish them. For instance, in a case on sovereign immunity, *Seminole Tribe v. Florida*,⁸⁷ he questioned the scope of a precedent that extended the Eleventh Amendment to suits by a citizen of a state against that citizen’s own state. He did not, however, see any need to overrule it because it did not, like *Seminole Tribe*, concern a claim under a federal statute.⁸⁸ Justice Stevens took the same position on the scope of the

⁸² The Making of a Justice, *supra* note 3, at 484; see also John Paul Stevens, *Six Amendments: How and Why We Should Change the Constitution* 174 (2014) [hereinafter *Six Amendments*] (proposing an amendment to the Second Amendment partly on this ground).

⁸³ The Making of a Justice, *supra* note 3, at 485.

⁸⁴ William D. Popkin, A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens, 1989 *Duke L.J.* 1087, 1105–10.

⁸⁵ Edmund Burke, Letter to a Member of the National Assembly, *in* IV *The Writings and Speeches of Edmund Burke* 43 (1901).

⁸⁶ Judge Alison J. Nathan, Memoriam: Justice John Paul Stevens, 133 *Harv. L. Rev.* 747, 753 (2020) (“[H]is judicial philosophy fundamentally defies categorization.”).

⁸⁷ 517 U.S. 44, 84 (1996) (Stevens, J., dissenting).

⁸⁸ *Id.* at 84–93 (Stevens, J., dissenting) (refusing to apply immunity under *Hans v. Louisiana*, 134 U.S. 1 (1890), to claims under a federal statute).

Eleventh Amendment in his book, *Six Amendments*, urging that the Amendment itself should be amended to make clear that it does not apply to claims under federal statutes or the Constitution.⁸⁹ In a later case, *Kimel v. Florida Board of Regents*,⁹⁰ he would have overruled *Seminole Tribe*, but on the ground that that decision itself did not respect precedent.⁹¹ Whether or not one finds this intricate reasoning persuasive, it indicates the lengths to which he would go in order to preserve a semblance of continuity in the Court's rulings.

This strategy had untoward consequences in *Heller* and in the ensuing decision in *McDonald v. City of Chicago*,⁹² which applied the Second Amendment to the states. The majority opinions in both cases have a decidedly anti-precedential undertone, arguing that the Second Amendment has not received the respect it deserves. The majority opinion in *Heller* concluded that “it is not the role of this Court to pronounce the Second Amendment extinct,”⁹³ and the majority opinion in *McDonald* decided “whether the right to keep and bear arms is fundamental to our scheme of ordered liberty.”⁹⁴ The Court in *McDonald* also noted that a number of decisions selectively incorporating the Bill of Rights in the Fourteenth Amendment also overruled prior precedents.⁹⁵ When overruling is the order of the day, an appeal to precedent can seem to be both futile and self-defeating.

That still leaves open the question of how a nonconformist, like Justice Stevens, could genuinely follow precedent. The answer goes back to an opinion early in his career. In *Runyon v. McCrary*,⁹⁶ the Supreme Court applied the Civil Rights Act of 1866⁹⁷ to private discrimination, based on its earlier decision in *Jones v. Alfred H. Mayer Co.*⁹⁸ In a concurring opinion, Justice Stevens stated that his “conviction that *Jones* was wrongly decided is firm,” but that *Jones* accorded with the “policy of the Nation as formulated by the Congress in recent years.”⁹⁹ The statutory

⁸⁹ *Six Amendments*, supra note 82, at 146–47.

⁹⁰ 528 U.S. 62, 92 (2000) (Stevens, J., dissenting in part and concurring in part).

⁹¹ *Id.* at 97–99 (Stevens, J., dissenting in part and concurring in part).

⁹² 561 U.S. 742 (2010).

⁹³ *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

⁹⁴ 561 U.S. at 767.

⁹⁵ *Id.* at 763–66.

⁹⁶ 427 U.S. 160, 173 (1976).

⁹⁷ Codified at 42 U.S.C. § 1981 (2012).

⁹⁸ 392 U.S. 409, 420–21 (1968).

⁹⁹ *Runyon*, 427 U.S. at 190–91 (Stevens, J., concurring).

context favored the continued vitality of *Jones* even if it was wrongly decided in the first instance. By contrast, when the statutory or constitutional context of a prior decision had changed to its disadvantage, Justice Stevens favored overruling or drastically narrowing its scope, as he said in opinions in areas as different as maritime law and habeas corpus.¹⁰⁰ Precedent for him, perhaps more so than for most judges, enabled as much as it constrained his decision making. It provided the language of the law in which he framed his argument rather than dictating his decisions.

III. THE INFLUENCE OF AN ICONOCLAST

Memoirs necessarily are a retrospective genre, looking back over an entire life and career. They invite the nostalgic thought that the author's like will not be seen again. Of course, this is true. No veteran of World War II or a graduate from law school in the 1940s will be seen again on the Supreme Court. The more urgent question is whether conditions have so greatly changed that they leave no room for a Justice with the independence of mind that Justice Stevens displayed. It is, however, a question for the long term. It is not one that can be answered by a search for the acceptance of his views by a majority of Justices before his death. His memoirs could be read in this way, but scorekeeping along this dimension alone misses what was essential to his style of reasoning.

The justification for what he wrote in his many opinions was internal to the arguments he advanced, not external and dependent upon acceptance by others. An iconoclast, as he was in an insistent and understated way, does not expect to gain immediate agreement. Justice Stevens was not searching for the median position that would attract a majority of Justices. Anyone who spoke out against the established tiers of judicial review, as Justice Stevens did in *Craig v. Boren*, was not seeking consensus support for his views. *Chevron* might be taken to be an exceptional case in which Justice Stevens did seek consensus, but his minimalist interpretation of that decision represents a minority view. His attempt to confront originalism on its own terms in *District of Columbia v. Heller* hardly constitutes a concession to this influential method of

¹⁰⁰ Compare *American Dredging Co. v. Miller*, 510 U.S. 443, 458–62 (1994) (Stevens, J., concurring in part and concurring in the judgment) (preemption of state remedies for maritime workers), with *Rasul v. Bush*, 542 U.S. 466, 478–79 (2004) (jurisdiction of federal district court to issue writ of habeas corpus on behalf of prisoners held outside territory of district).

constitutional interpretation. It instead rests on his refusal to depart from established precedent.

In offering his many separate dissents and concurrences, Justice Stevens did not expect to be vindicated by agreement. It is not that he was indifferent to the outcome in those cases. Even a cursory look at his dissents, for instance, in the cases in which he would have denied First Amendment protection for flag burning,¹⁰¹ demonstrates this conclusion to be deeply erroneous. He was by nature too serious and competitive to be indifferent. Otherwise, he would not have written his book, *Six Amendments*,¹⁰² arguing for changes to the Constitution to overrule several decisions, from most of which he dissented. The question elided by that book is whether he would have overruled those precedents once they had been handed down. Proposing amendments finessed this question and relieved him of the need to reveal how far he would depart from his general respect for precedent.

The hazards of a purely effects-based test for influence put skeptics of the reigning orthodoxy at a systematic disadvantage. It also invites a premature historical inquiry into the legacy of a Justice's tenure at the Supreme Court. The evidence is not all in, even after a tenure and life as long as his. The vicissitudes of historical understanding, with each generation of historians offering an account that might be at odds with its predecessors, adds another dimension of uncertainty to the assessment of effects. Is Justice Story now regarded as highly as he was in the early nineteenth century, when he was well known as a prolific treatise writer and an influential professor at Harvard Law School, in addition to his role as a Justice of the Supreme Court?¹⁰³ One hesitates to offer any simple, formulaic answer to such questions.

Our assessment now must be based on the integrity, originality, and soundness of Justice Stevens's judicial record. Members of the legal profession would admire all these attributes of his decisions, even as they disagreed with him on the merits. One suspects that he would demand as much independence of judgment from them as he expected of himself. As Professor Olatunde Johnson wryly recounts of her clerkship with him:

¹⁰¹ *United States v. Eichman*, 496 U.S. 310, 323–24 (1990) (Stevens, J., dissenting); *Texas v. Johnson*, 491 U.S. 397, 438–39 (1989) (Stevens, J., dissenting).

¹⁰² *Six Amendments*, supra note 82, at 15–17.

¹⁰³ See R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* 385 (1985) (“Even at Harvard Law School, the judge’s stature and relevancy declined with an uncharitable swiftness.”).

“We discussed the cases vigorously. He listened to us carefully and graciously; it often seemed hard to change his mind.”¹⁰⁴ His legacy rests for the present on the example he set. It offers, within the legal profession, an alternative to the divisive politics that mark the current era. Whether it is an alternative that will be embraced or forsaken in American public life remains to be seen. His memoirs demonstrate exactly what is at stake in this choice.

¹⁰⁴ Olatunde C.A. Johnson, Memoriam: Justice John Paul Stevens, 133 Harv. L. Rev. 747, 762 (2020).