



CHOOSING THE NEXT SUPREME COURT JUSTICE:

LESSONS FROM THE JURISPRUDENCE OF ASSOCIATE JUSTICE JOHN PAUL STEVENS

The announcement on April 9, 2010 that Associate Justice John Paul Stevens will retire from the Supreme Court of the United States after almost 35 years of service reminded us of the remarkable impact Justice Stevens has had on this country and created another opportunity for President Barack Obama to nominate a Supreme Court jurist. As President Obama stated in a speech in the White House Rose Garden shortly after the announcement, “While we cannot replace Justice Stevens’ experience or wisdom, I will seek someone in the coming weeks with similar qualities – an independent mind, a record of excellence and integrity, a fierce dedication to the rule of law, and a keen understanding of how the law affects the daily lives of the American people. It will also be someone who, like Justice Stevens, knows that in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens.”

We wholeheartedly concur with President Obama and submit that this country can readily glean what kind of Supreme Court Justice we would want President Obama to nominate by looking to what kind of jurist Justice Stevens has been. Towards that end, this report will examine a handful of Justice Stevens’s opinions – writing for the Court, concurring in the judgment, or dissenting from the majority – that illuminate certain key aspects of his jurisprudence. The selection of opinions in this short presentation is not intended to (nor could it) provide a comprehensive or exhaustive treatment of the legal issues that have come before the Court during Justice Stevens’s tenure, nor necessarily a survey of Justice Stevens’s most notable writings. Rather, they are meant to illustrate the breadth of matters on which he has written and highlight some of the many different, but complementary, aspects of his jurisprudence.¹ Among the themes and principles that these decisions showcase are an adherence to protecting the rights

¹ For the most part, this presentation does not focus on Justice Stevens’s writings in the criminal field.

of all people, and not just a privileged few; a dedication to providing meaning and life to individual rights; an unwavering commitment to this Nation's bedrock democratic principles; a desire to uncover the reasons animating the law; and a profound respect for the precedents of the Court.

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Protecting the Rights of All People, Not Just a Privileged Few. Surely one of Justice Stevens's greatest legacies to American jurisprudence is his focus on the seemingly simple yet profound notion that the law protects the rights of all people, and not just a privileged few. For Justice Stevens no person is so unworthy as to be deprived of his or her rights under the law. For example, in *Zatko v. California*, 502 U.S. 16 (1991), the Court for the first time denied a request to waive its own filing fees by indigent petitioners who repeatedly filed frivolous certiorari petitions. Justice Stevens took the Court to task in a succinct dissent, accusing the majority of treating these petitions differently from the hundreds of other frivolous petitions. While acknowledging that declining to waive the filing fees was, in practical effect, no different from denying the petitions on the merits, Justice Stevens poignantly noted the "powerful" and "symbolic effect of the Court's effort to draw distinctions among the multitude of frivolous petitions." For Justice Stevens, "[a]lthough the Court may have intended to send a message about the need for the orderly administration of justice and respect for the judicial process, the message that it actually conveys is that the Court does not have an overriding concern about equal access to justice for both the rich and the poor." Thus, in his view, the Court had erected a barrier for indigent petitioners and even branded these petitioners in such a manner that "increases the chances that their future petitions, which may very well contain a colorable claim, will not be evaluated with the attention they deserve."

Indeed, protecting the rights of those who are least equipped to protect themselves has long been a recurring theme in Justice Stevens's opinions. For example, in a short dissent written just one year after he was appointed to the Court, Justice Stevens disagreed with the majority's ruling in *Meachum v. Fano*, 427 U.S. 215 (1976), in which the Court held that the Due Process Clause did not entitle a state prisoner to a hearing when he is transferred to a prison where the conditions of incarceration are substantially less favorable, absent a state law or practice conditioning such transfers on proof of serious misconduct or the like. In his dissent, Justice Stevens wrote eloquently of the dignity and worth of these individuals who had already had some of their liberty curtailed: "I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations." In Justice Stevens's view, "[i]mprisonment is intended to accomplish more than the temporary removal of the offender from society in order to prevent him from committing like offenses during the period of his incarceration." Thus, for him, "if the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases. I think it clear that even the inmate retains an unalienable interest in liberty at the very minimum the right to be treated with dignity which the Constitution may never ignore."

Justice Stevens has shown concern for the rights of non-citizens as well as citizens. In this Term's *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), he wrote the majority opinion holding that criminal defense counsel must inform their clients whether a guilty plea carries the risk of deportation under the immigration laws. In his view, it is the Court's "responsibility under the Constitution to ensure that no criminal defendant – whether a citizen or not – is left to the mercies of incompetent counsel." The dramatic changes he recounted in the immigration laws over the last century only confirmed his conclusion that, "as a matter of federal law, deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." Thus, for Justice Stevens, the Court's "longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less."

Giving Meaning and Life to Individual Rights. Justice Stevens has also focused on giving meaning and life to individual rights. For example, his support for an expansive notion of free speech has had an important impact on the Court's First Amendment jurisprudence. Rather than speaking of free speech as an abstract principle designed simply to negate governmental regulation, Justice Stevens has understood the right as a positive means to democratic debate. As he summarized in an early dissent from a decision upholding a county jail's restriction of press access, "The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment."² Later free speech opinions have similarly focused on the underlying facts and practical realities of the disputes before the Court, rather than on lofty judge-made categories. In particular, his decisions have demonstrated a concern and sensitivity to the rights of economically and politically marginalized speakers whose participation in the public discourse was essential to a robust democratic process.

Justice Stevens's concern for ensuring opportunities for communication, regardless of a person's means, found expression in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), a decision that struck down a Missouri ban on residential signs that had the practical effect of limiting political speech. Justice Stevens's opinion for the majority evaluated the signs as a particularly inexpensive and convenient form of speech whose availability was important to underfinanced speakers. A year later, in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), Justice Stevens similarly led the majority to invalidate an Ohio ban on the distribution of anonymous political leaflets. Aiming to protect individuals from ostracism or reprisal by ensuring a modest but effective means of anonymous expression, Justice Stevens explained that anonymous pamphleteering "exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." That same theme reverberated in his dissent in *Ashcroft v. ACLU (Ashcroft I)*, 535 U.S. 564 (2002), a decision that considered the Child Online Protection Act and its restrictions on "indecent" speech on the Internet. Underscoring the importance of the unlimited and low-cost opportunities for speech in cyberspace, Justice Stevens rejected the majority's "community standards" approach to define materials banned as harmful to minors, explaining that "the community that wishes to live without certain material risks not only itself, but the entire Internet, of the offending speech."

² *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

Justice Stevens's disapproval of the way that restrictions on speech can perpetuate harmful social hierarchies was evident in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), a decision that reversed the Mississippi Supreme Court's judgment that organizers of a civil rights boycott were jointly and severally liable for acts of violence occurring during the boycott. Explaining that the state could not punish political dissent with such sweeping theories of liability, Justice Stevens explicated that, through speech, assembly, and petition, "petitioners sought to change a social order that had consistently treated them as second-class citizens." Similarly, recognizing such social inequalities, Justice Stevens wrote the Court's opinion in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), which invalidated a federal statute banning federal employees from receiving honoraria for their speaking and writing activities. Justice Stevens observed that Congress's deterrent to an entire category of expression by a great number of potential speakers was at odds with the public's right to read and hear opposing viewpoints, especially from lower-paid employees who had potentially valuable perspectives.

In a manner that mirrors his approach to free speech cases, Justice Stevens has evaluated equal protection cases with a profound understanding of the unique facts they involve. In lieu of developing complex doctrinal frameworks in this context that avoided dealing with important details on the ground, Justice Stevens has focused on a simple and unitary standard: "There is only one Equal Protection Clause," and "[it] does not direct the courts to apply one standard of review in some cases and a different standard in other cases."³ Justice Stevens has thereby formulated a workable approach in which the Court asks certain basic questions, including the public purpose being served by the challenged law, and conducts a case-by-case inquiry into the relevance of a classification to that particular purpose. Where the purpose has been valid and beneficial for society, he has voted to uphold the classification scheme. Applying this standard, he sought to include minorities in the institutions and activities of American society in a much more forward-looking manner.

For example, in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), contrary to the majority, Justice Stevens would have upheld a collective bargaining agreement to maintain the prevailing percentage of minority teachers within a Michigan city. He found a valid and practical purpose behind the agreement, not in redress for past discrimination, but in the future value of educating children, explaining that an integrated faculty was beneficial to the entire community. In *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), he joined an opinion of the Court that upheld a minority preference for FCC licensing because it had the future benefit of fostering more diversity in broadcasting. Consistent with this approach, Justice Stevens concluded that the state fulfills its duty of impartiality when it considers race in service of other future benefits, such as maintaining an integrated police force (*United States v. Paradise*, 480 U.S. 149 (1987)), or preparing schoolchildren to live in an integrated world (*Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)).

Of course, Justice Stevens's focus on practical impacts has at times yielded unfavorable outcomes to disadvantaged groups. For example, in *Fullilove v. Klutznick*, 448 U.S. 448 (1980),

³ *Craig v. Boren*, 429 U.S. 190 (1976).

Justice Stevens dissented from the majority and voted to strike down a federal public works statute that set aside ten percent of funding for minority-owned businesses. Concerned with the way in which a seemingly random distribution of benefits operated, he noted that, without a duty “to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate a ‘piece of the action’ for its members.” Similarly, almost a decade later, in his dissent in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), he criticized an affirmative action program in part because it failed to focus on the “probable impact on the future.”

The wisdom of Justice Stevens’s approach was particularly evident in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), a decision in which he voted to overturn a zoning ordinance requiring a special-use permit for a group home for the mentally disabled. The majority had attempted to avoid creating a new quasi-suspect classification for the mentally disabled and purported to employ the rational basis test to invalidate the ordinance as it applied to the group home. However, the Court effectively subjected the ordinance to a heightened form of scrutiny, holding that the record did not justify requiring a special permit for the home. Under the traditional rational basis test, the Court would not have been required to examine the record to determine whether the underlying policies were actually supported by facts. Justice Stevens reached the same result as the majority without resort to a categorical treatment of mentally disabled individuals or the inconsistency that such treatment could involve. After noting the historically unfair treatment of the mentally disabled, Justice Stevens examined the record and rejected the government’s stated purpose behind the classification, concluding that the city’s actions were based upon the “the irrational fears of neighboring property owners.” Abstract categories aside, Justice Stevens spoke directly to the question of whether the classification was relevant to any valid public purpose. Instead of forging new suspect or non-suspect categories, Justice Stevens recognized that laws treating mentally disabled individuals differently could not be reflexively characterized as rational or irrational, but rather had to be evaluated on their own merits based upon the purpose underlying the classification.

Commitment to Democratic Principles. Justice Stevens has also been a stalwart defender of the Nation’s democratic principles, demonstrating his appreciation for this country’s origins and history. Although his writings in this area have been by no means limited to issues relating to elections and campaign finance, his commitment to democratic ideals is perhaps best illustrated by his many well-known decisions on those issues. For example, in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), he led a 5-4 majority to hold that states cannot impose qualifications for prospective members of the U.S. Congress beyond those specified in the Constitution, thereby invalidating the congressional term limit provisions of 23 states. The case involved a challenge to an amendment to the Arkansas State Constitution that denied ballot access to any federal congressional candidate who had already served three terms in the U.S. House of Representatives or two terms in the U.S. Senate.

His majority opinion was a beautifully crafted exposition on the founding of the Republic, reaffirming the “basic principles of our democratic system” and reminding us of the Framers’ debates regarding the very subject of term limits. In the end, Justice Stevens concluded that “[s]uch a state-imposed restriction is contrary to the ‘fundamental principle of our representative

democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern them.'" Thus, "[a]llowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States" and "would effect a fundamental change in the constitutional framework" that can be changed only through the amendment process.

Justice Stevens's dissents in this arena have been equally instructive. For example, in *Bush v. Gore*, 531 U.S. 98 (2000), Justice Stevens disagreed with the Court's ruling that the Florida Supreme Court's method for recounting ballots violated the Fourteenth Amendment's Equal Protection Clause, and that no alternative method could be established within the time limits set by the state. The decision effectively resolved the 2000 presidential election in favor of George W. Bush. Justice Stevens was troubled by the intrusion of the Federal Judiciary into a democratic process that the Constitution itself left to the province of the states. Indeed, he noted that the Florida Legislature was empowered by the U.S. Constitution to direct the appointment of electors, and that that legislative power was subject to judicial review under Florida's own constitution. Thus, he concluded, "nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the State Constitution that created it," and neither a federal statute nor the U.S. Constitution "grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law."

Perceptively noting that underlying the challenge to the Florida election procedure was "an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed," Justice Stevens criticized the majority's endorsement of that position because it would "only lend credence to the most cynical appraisal of the work of judges throughout the land." He concluded his dissent by saying that, "[a]lthough we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law." Accordingly, for Justice Stevens, his commitment to the democratic values embedded in the federal constitution compelled him to disagree with the majority's intrusion into the state's election procedures.

In one of his most notable dissents in recent memory – and most certainly his longest – Justice Stevens delivered a rich and voluminous critique of the majority's 5-4 ruling just a few months ago in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), in which the Court held that a federal statute barring independent corporate expenditures for electioneering communications violated the First Amendment. The underlying dispute involved a non-profit corporation's attempt to air, via video-on-demand, a film critical of Hillary Clinton, who was then a candidate in the 2008 presidential election.

Throughout his dissent, Justice Stevens highlighted the role and function of the Legislature in a democratic society, accusing the majority of undermining the promotion of a free and democratic society. Specifically, he noted that "lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races." Thus, the majority's "great disrespect for a coequal branch" was, in Justice Stevens's view, equivalent to disregarding "our

constitutional history and the fundamental demands of a democratic society.” For Justice Stevens, “[t]he Court’s ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution.” At bottom, by overruling long-established precedent in the area of campaign finance, the majority, in Justice Stevens’s view, ignored fundamental concerns previously recognized by the Court and Congress, namely, “to safeguard the integrity, competitiveness, and democratic responsiveness of the electoral process.”

Recognizing the Reasons Behind the Laws. Another of Justice Stevens’s legacies is his careful approach to statutory interpretation, by which he considers the text of a statute, as well as prior cases, drafting history, and other evidence that would shed light on the meaning of a law. Throughout his opinions, Justice Stevens has resisted analysis that adhered solely to textual language and, instead, has sought information from a variety of sources to uncover the purposes behind Congress’s acts. As he put it, it was the Court’s duty to “consider all available evidence of Congress’s true intent when interpreting its work product” lest the Court’s decisions yield “unintended and profoundly unwise consequences.”⁴ Thus in one dissent, Justice Stevens cited to celebrated mid-century judge Learned Hand, who had counseled to “remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”⁵ Throughout his tenure on the Court, Justice Stevens has heeded this advice, seeking to discover the purpose behind a law in order to faithfully apply it.

Justice Stevens’s approach is apparent in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), in which the Court held that a winning party’s right to recover its “reasonable attorney’s fees” in certain civil rights lawsuits did not include fees for experts that were hired by the attorney. Justice Stevens dissented from the decision, observing that the statute at issue was enacted to ensure that private citizens with limited means could afford to sue to enforce their civil rights. He criticized the majority for narrowly reading the term “attorney’s fees,” observing that, when the Court had “put on its thick grammarian’s spectacles and ignored the available evidence of congressional purpose” in other cases, Congress had been forced to revise the statutes to overturn the Court’s interpretation.

Justice Stevens has applied his broad-ranging analysis to questions of constitutional interpretation as well. In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Court struck down a congressional line-item veto statute after finding that it had violated the Presentment Clause of the U.S. Constitution.⁶ Writing for the majority, Justice Stevens reviewed the history of the clause, noting the extensive debate over the bill-enactment process during the Constitutional Convention, and held that the “finely-wrought” procedure described by the

⁴ *Koons Buick v. Nigh*, 543 U.S. 50 (2004); *Conroy v. Aniskoff*, 507 U.S. 511 (1993).

⁵ *Chapman v. United States*, 500 U.S. 453 (1991).

⁶ Art. I, § 7, cl. 2: “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections”

Presentment Clause would naturally preclude other means of bill enactment. Similarly, in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), in dissent, Justice Stevens examined the purpose of the Second Amendment in detail, reviewing the pre-Amendment history of statutes protecting private firearm use, the drafting history of the Amendment, and the objective identified in the Amendment’s preamble – “A well-regulated militia, being necessary to the security of a free state” As a result, Justice Stevens reasoned that the goal of the Amendment was to protect the people’s right to use weapons for military purposes and concluded that the statute at issue limiting the private use of handguns was constitutional.

Respecting Prior Decisions. Learned Hand was not the only judge whose teachings Justice Stevens has followed. Throughout his career, Justice Stevens has demonstrated a deep respect for the prior decisions of the Court, even when those decisions have conflicted with his own views. He has noted that following precedent is “the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion” based on more than the “proclivities of individuals.”⁷ Thus, in *Tenet v. Doe*, 544 U.S. 1 (2005), and *Hibbs v. Winn*, 542 U.S. 88 (2004), Justice Stevens wrote separate concurrences after joining the majority to note that the cases could have been decided based on precedent alone without any further justification.

Justice Stevens’s commitment to stare decisis has been most pronounced when he has disagreed with the Court’s precedents, but nonetheless deferred to them. For example, in *Baze v. Rees*, 553 U.S. 35 (2008), Justice Stevens joined the majority to uphold a Kentucky death penalty provision, even though he wrote in a concurring opinion that there was no justification for the death penalty, that it lacked procedural safeguards, and that it was often applied in a discriminatory and erroneous manner. He noted that his decision to uphold the law was “particularly difficult” given his views about the death penalty, but that he felt obliged to “respect precedents that remain a part of our law.” Similarly, in *Florida Dep’t of Health & Rehabilitative Services v. Florida Nursing Home Ass’n*, 450 U.S. 147 (1981) (per curiam), Justice Stevens joined the majority and deferred to precedent interpreting the Eleventh Amendment, despite his belief that the precedent had been wrongly decided. Justice Stevens explained his decision by noting that the legal system could be damaged by “sudden reversals of direction,” and that “the adverse consequences of adhering to an arguably erroneous precedent” were less serious than the consequences of ignoring prior decisions.

When his colleagues have not accorded other precedents the same level of respect, Justice Stevens has expressed considerable dismay. In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), Justice Stevens castigated the majority for ignoring the “well-settled views of all of our predecessors on this Court.” He noted that, if judges rewrote the law every time they disagreed with a prior decision, they would undermine society’s faith in the rule of law. In that regard, Justice Stevens may best be remembered for the concern he expressed about this issue in his great dissent in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). There, Justice Stevens accused the majority of resuscitating arguments that had been rejected in two prior cases and overturning those decisions simply because it did not “like” their outcomes. Although Justice Stevens observed that overruling established precedent was occasionally

⁷ *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

necessary when special reasons arose, the only relevant issues that had changed since the prior cases had been decided were the “preferences of five justices” and the “composition of this Court.”

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Justice John Paul Stevens has epitomized many of the qualities we would want all of our Supreme Court Justices to possess – a powerful intellectual ability to persuade through the marshaling of legal analysis, facts, evidence, history, policy, and philosophy, combined with integrity, wisdom, and rich life experience. He is the kind of jurist all Americans should overwhelmingly want nominated and confirmed as the next Justice.