# REALISM, PRAGMATISM, AND JOHN PAUL STEVENS

Ward Farnsworth*

When William Rehnquist became Chief Justice in 1986, John Paul Stevens seemed an unlikely candidate for status as his Court's leading dissenter; by reputation he was a centrist and too idiosyncratic to be labeled a reliable friend or foe of anyone. In the end, however, Stevens turned out be an ideal foil for the Rehnquist Court's conservative majorities, being nearly their opposite in both substance and method. When the Court went right, Stevens did not follow; when the Court made rules, Stevens wanted standards; when the Court made large pronouncements of law, he tried to confine his decisions to cases. Much can be learned about the Rehnquist Court by considering what it was not, and what it most was not was Stevens.

## I. Background and overview

John Stevens finished first in his law school class at Northwestern, clerked for Justice Wiley Rutledge, and then spent twenty years working as a lawyer in Chicago, specializing in antitrust cases. He was appointed to the Seventh Circuit by Richard Nixon in 1970, and was regarded as a moderately conservative judge at the time of his nomination to the Supreme Court by Gerald Ford in 1975. The Senate was then under Democratic control, and as an unelected president Ford was in no position to push through a controversial nominee; Ford picked Stevens over other candidates for William O. Douglas's slot, such as Robert Bork, partly to ensure a painless confirmation, and that is what he got. The confirmation hearings presented Stevens as intelligent, modest, and not particularly political; his views on various subjects were probed only mildly. The hearings took two days, and ended with a unanimous vote to confirm.

Stevens joined the Court in the middle of its 1975 term, and right away gained a reputation for unpredictability. Right away he became a frequent issuer of separate opinions, apparently setting a record during his first term for lone dissents by a new Justice. He often relied on reasoning that seemed idiosyncratic and that sometimes allowed him to straddle divisions that more usually were sources of consistent opposition; in his first term he voted with Chief Justice Burger to uphold capital sentencing schemes in Georgia and Florida, but with Brennan and Marshall to strike them down in Texas, Louisiana, and North Carolina. By the close of the 1980s he had come to be viewed as moderately liberal, but still essentially a centrist. His continued unpredictability caused commentators to regard him as guided by his own somewhat quirky take on each case, and as nearly lacking in politics. The standard account of Stevens, perhaps, is that he was a centrist when appointed to the Court but became a "liberal" by comparison as the rest of the Court moved to the right through a series of replacements, until at last he stood as the Court's left-most member in 1994. This account contains some truth; the Court did move to the right around Stevens, and his role did change in the 1990s when, with the retirement of Justice Blackmun, he became the Court's ranking liberal in both politics and seniority. He will be remembered as a centrist figure on the Burger Court, but as the leader in dissent during the heyday of the Rehnquist Court.

All along, however, Stevens has been liberal in several recognizable senses, even if he did "grow"—i.e., move to the left—a little bit over the years. The meaning of liberalism in this context bears some explanation, for the words "liberal" and "conservative" have nonstandard meanings when applied to Supreme Court Justices, and may simply be misnomers. Clarence Thomas, who often is said to be conservative,

* Associate Professor of Law, Boston University. Many thanks to Jack Beermann, Ronald Cass, Kelly Klaus, Gary Lawson, and Larry Yackle for comments on earlier drafts.

is perhaps the Court's least conservative member on a traditional interpretation of the word;[1] he is a right-winger, but he is readier than any of his colleagues to reconsider settled precedent.[2] "Liberalism" likewise is a placeholder term for a set of preferences that have no rigorous relationship to the word itself. And yet, as we shall see, in many areas there are persistent, predictable differences in the votes the Justices cast, and the differences generally can be mapped without much difficulty onto the political preferences conventionally associated with the Republican and Democratic parties. It is useful to have a vocabulary to describe this phenomenon, so for now I will use the "conservative" and "liberal" labels despite their shortcomings.

In the time and place where Stevens was judging, "liberalism" generally was associated with broad views of federal congressional power, with a willingness to recognize unenumerated constitutional rights through the doctrine of substantive due process, with support for affirmative action but otherwise with expansive readings of what the "equal protection of the laws" forbids, with robust interpretations of the establishment clause, and with solicitude for the rights of criminal defendants. Within these positions there of course is much room for differences of style and degree, and Stevens' own variety of liberalism had two aspects. The first consisted of a fairly straightforward set of beliefs about the Constitution's meaning that put him at odds with the conservative majorities of his times on several of the issues just described. The second and more interesting aspect was a distinctive judicial method that was itself conservative but that usually generated results that seemed liberal. Most of this inquiry will focus on this second sense of Stevens' liberalism, but first let us briefly review the broad outlines of his positions in a few critical areas.

First, Stevens fervently resisted the Rehnquist Court's federalism decisions. He dissented from all of its cases limiting the federal government's power to legislate using the commerce power,[3] and he dissented from all of its cases holding that the Eleventh Amendment forbids Congress to use its powers under Article I to pass laws subjecting the states to lawsuits for damages. The latter doctrine Stevens protested with special vigor, finding it "so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court."[4]

Second, Stevens was the *bete noire* of religious conservatives. He provided regular support for a constitutional "right to die" and for abortion rights, and made the startling claim in *Webster v. Reproductive Health Services* that a statutory preamble stating that human life begins at conception violated the Establishment Clause because it served "no identifiable secular purpose."[5] He was a rare adherent to views of both the establishment clause and free exercise clause that were unhelpful to religious groups;[6] indeed, Stevens was the only Justice to consistently vote both to single out religious organizations for exclusion from generally available benefits[7] and not to single them out

---

[1] See note xx, *infra*, for examples and references.

[2] See, e.g., *Whitman v. American Trucking Associations*, 531 U.S. 457, 486 (2000) (Thomas, J., concurring); *United States v. Hubbell*, 530 U.S. 27, 49 (2000) (Thomas, J., concurring); *Saenz v. Roe*, 119 S.Ct. 1518, 1538 (1999) (Thomas, J., concurring); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 538 (1998) (Thomas, J., concurring); *White v. Illinois*, 502 U.S. 346, 366 (1992) (Thomas, J., concurring).

[3] See *United States v. Lopez*, 514 U.S. 549, 602 (1995) (Stevens, J., dissenting); *United States v. Morrison*, 529 U.S. 598 (2000). .

[4] *Kimel v. Florida Board of Regents*, 528 U.S. 62, 97-98 (2000) (Stevens, J., dissenting).

[5] 492 U.S. 490, 566 (concurring opinion).

[6] See, e.g., *Santa Fe Independent School District v. Doe*, 120 S.Ct. 2266 (2000); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Employment Division v. Smith*, 494 U.S. 872 (1990); *City of Boerne v. Flores*, 521 U.S. 507, 536-537 (1997).

[7] See, e.g., *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 671 1980) (dissenting opinion); *Wolman v. Walter*, 433 U.S. 229, 264 (1977) (concurring in part and

for protection from the burdens of generally applicable laws.[8] And he alone argued that accommodations of religion are, by their nature, violations of the Establishment Clause.[9] Stevens also was the author of the rhetoric most mistrustful of religion during his time on the Court.[10]

Third, on race and other questions of equal protection Stevens had a mixed record. During the first half of his career he regularly voted to invalidate racial preferences in various forms;[11] as time passed he began voting the other way.[12] The shift was accompanied by a change in rhetoric. In *Fullilove v. Klutznick* (1980), the Court held that the use of a minority set-aside program for federal government contractors was a valid means to accomplish legitimate objectives. Stevens dissented, providing a stern lecture on the dangers of racial classifications; in a remarkable footnote, he claimed that the "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals," and advised that the government "study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935"—and then quoted from Nazi Germany's rules defining who was Jewish. But Stevens soon returned to more characteristic form, evaluating affirmative action programs and similar laws based on details of their rationale and effects. Thus in *Wygant v. Jackson Board of Education*,[13] the Court held that a school district could not give preferential treatment to minority teachers in deciding who would be laid off; Stevens dissented, saying that "a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all- white, or nearly all-white, faculty." But then in *City of Richmond v. J.A. Croson Co.*,[14] Stevens voted to invalidate a city's program that required construction contractors to subcontract 30% of their work to minority-owned businesses. He thought that in construction, unlike in education, there was no reason to think there were benefits to racial diversity. A few years later, in *Adarand Constructors, Inc. v. Pena*, Stevens dissented from a decision striking down preferences that were similar in many ways to those at issue in *Fullilove* fifteen years earlier. He criticized the majority for delivering a "disconcerting lecture about the evils of government racial classifications,"[15] and said that its analysis "ignores a difference,

---

dissenting part); *County of Allegheny v. ACLU*, 492 U.S. 573, 651 n. 7 (concurring in part and dissenting in part).

[8] *City of Boerne v. Flores*, 521 U.S. 507, 536-537 (1997) (concurring opinion); *United States v. Lee*, 455 U.S. 252, 263 (1982) (concurring opinion).

[9] *City of Boerne v. Flores*, *supra*, 521 U.S. at 536-537 (arguing that the Religious Freedom Restoration Act violated the Establishment Clause). For some discussion of the relationship between Justice Stevens' views of the religion clauses, see Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Ge. Wash. L. Rev. 685, 730 & n. 205 (1992).

[10] See, e.g., *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 286-288 (dissenting opinion) (characterizing religion as a "divisive" force and worrying that "student-initiated religious groups may exert a considerable degree of pressure even without official school sponsorship"); *Santa Fe Independent School District v. Doe*, 120 S.Ct. 2266 (2000) ("the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship"); see also Stevens' views in *Cruzan v. Director, Missouri Dept. of Health*, discussed *infra*.

[11] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers v. Weber*, 443 U.S. 193 (1979), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

[12] *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Miller v. Johnson*, 515 U.S. 900 (1995); *Adarand Constructors v. Pena*, 515 U.S. 200 (1995); *Missouri v. Jenkins*, 515 U.S. 70 (1995).

[13] 476 U.S. 267 (1986).

[14] 488 U.S. 469 (1989).

[15] *Adarand, surpa*, at 242.

fundamental to the idea of equal protection, between oppression and assistance." This made for a striking contrast with the lecture on the dangers of racial classifications Stevens himself had provided in *Fullilove*. At the same time, Stevens became a perennial dissenter to the Rehnquist Court's decisions of the 1990's limiting the use of race-conscious legislative redistricting under the Voting Rights Act.[16] These votes, along with his opinion in *Adarand* and his votes in a few other cases, caused him to be considered a fairly reliable liberal on matters of race during the Rehnquist years.

Meanwhile Stevens also used characteristically fine methods, and reached results typically but not reliably liberal, in evaluating sex discrimination under the Constitution. In *Craig v. Boren*,[17] a majority of the Court struck down an Oklahoma law forbidding the sale of 3.2% beer to males under the age of twenty-one and to females under eighteen. The Court adopted that variety of review now commonly known as "intermediate scrutiny": "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[18] This caused Stevens to warn in a concurring opinion that "[t]here is only one Equal Protection Clause";[19] he said that the clause simply "requires every State to govern impartially," and that he opposed to the creation of distinct "tiers" of equal protection analysis.[20] But this was not because he wanted a method of reviewing legal classifications in which one size fits all. On the contrary: "instead of applying a 'mid-level' form of scrutiny in all sex discrimination cases, perhaps the burden is heavier in some than in others."[21] There is "one Equal Protection Clause" for Stevens in the sense that every case about it asks whether the harm done by a classification is out of proportion to its public benefits;[22] and as an analytical matter this entailed a sliding scale of review with various analytical distinctions along the way. He suggested that laws connected to physical differences between the sexes might be considered presumptively valid, and those not so connected might be presumptively invalid.[23] The presumptions could then be rebutted with evidence bearing one way or the other on the link between the laws involved and the justifications for them, and this in turn would require detailed inquiries into the reasons the laws were passed. In *Califano v. Goldfarb*[24] and *Michael M. v. Superior Court*,[25] Stevens found no permissible justifications for the law involved, and this was a common conclusion for him to reach in sex discrimination cases in subsequent years; but then in *Miller v. Albright*[26]he voted to uphold a statute providing automatic citizenship to children born out of wedlock to American mothers and foreign fathers, but imposing greater burdens on children born out of wedlock to American fathers and foreign mothers. In this last case he thought the classification reasonable because "[t]he blood relationship to the birth mother is immediately obvious and is typically established by hospital records and birth certificates; the relationship to the unmarried father may often be undisclosed and unrecorded in any contemporary public record." Here as elsewhere, Stevens' preference

---

[16] See *Shaw v. Reno*, 509 U.S. 630 (1993); *Holder v. Hall*, 512 U.S. 874 (1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Abrams v. Johnson*, 521 U.S. 74 (1997).

[17] 429 U.S. 190, 211 (Stevens, J., concurring).

[18] 429 U.S. at 197.

[19] 429 U.S. at 211.

[20] *Ibid*.

[21] *Michael M. v. Superior Court*, 450 U.S. 464, 497 n. 4 (1981) (Stevens, J., dissenting).

[22] *Ibid*.

[23] *Ibid*.

[24] 430 U.S. 199 (1977) (striking down provision of Social Security Act that imposed greater burdens on widowers than on widows seeking to collect benefits).

[25] 450 U.S. 464 (1981) (upholding a statutory rape law that applied to men but not women; Stevens dissented)..

[26] 523 U.S. 420 (1998).

for evaluating the details of a case rather than deciding it by reference to generalities sometimes made his votes difficult to predict.

The same penchant for particularity dominated Justice Stevens' decisions in cases involving the freedom of speech. Broad rules would not do; everything depended on the value and context of the speech involved. Thus Stevens argued in *Young v. American Mini Theatres*[27] and *FCC v. Pacifica Foundation*[28] that indecent speech was of "slight social value" and that "any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." The time and place and means of communication all were relevant, too; when the FCC decided that a radio station violated federal law by broadcasting George Carlin reciting his "seven dirty words" monologue, wrote Stevens,

> [t]he Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote a "nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.[29]

Stevens' jurisprudence of speech is in significant part a matter of distinguishing between parlors and barnyards. His idea that some speech is worth less than others, and thus easier to regulate, never commanded majority support on the Court, and he did not press the point twenty years later when he wrote a majority opinion in *Reno v. ACLU*[30] striking down restrictions on "indecent transmissions" over the Internet. Here the context was different; Stevens thought the features of the broadcasting spectrum that permitted extensive regulation in that setting did not apply "online." It is less any particular a particular result than this *style* of decision—microanalysis of the kind of speech at issue and the nature of the restriction on it—that is the constant in Stevens' speech jurisprudence; and again it sometimes made his decisions hard to predict, though it seems clear that it left him less inclined to uphold First Amendment claims than some of his colleagues who adhered to more categorical approaches. He prominently staked out positions against protecting hate speech[31] and the burning of American flags,[32] and was a consistent vote to uphold restrictive campaign finance laws.[33] When he wrote in these cases, the sound of his thought process tended to be similar, and if it had to be summarized in a few words they would be "it all depends." The extent of the protection

---

[27] 427 U.S. 50 (1976) (sustaining zoning ordinance that forbade operation of adult theater within 1,000 feet of similar establishment or within 500 feet of residential area).

[28] 438 U.S. 726 (1978) (finding constitutional the FCC's determination that the petitioner's broadcast of obscenities violated federal law).

[29] Id. at 750-751 (citations and footnote omitted).

[30] 521 U.S. 844 (1997).

[31] See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 416 (1992) (Stevens, J., concurring in the judgment)..

[32] See *Texas v. Johnson*, 491 U.S. 397, 436 (1989); *United States v. Eichman*, 496 U.S. 310, 319 (1990) (Stevens, J., dissenting). .

[33] See, e.g., *FEC v. Colorado Republican Federal Campaign Committee*, 121 S.Ct. 2351 (2001); *Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897, 910 (2000) (Stevens, J., concurring); *Colorado Republican Federal Campaign Committee v. FCC*, 518 U.S. 604, 648 (1996) (Stevens, J., dissenting).

depends on the value of the speech, the time and place it is being communicated, and from whom to whom, and then also value of the other interests involved.[34]

Finally, no inquiry into the Rehnquist Court should fail to take notice of the remarkable divisions it produced in criminal cases. Most such cases may seem minor when considered individually and attract little public attention; taken together, however, they comprise a large and consequential share of the Court's work product. From October Term 1994 to OT 1999, almost a third of the Court's docket consisted of criminal matters (broadly defined to include review on habeas corpus and other complaints by prisoners),[35] and Stevens' role in them was distinctive. Of the 160 criminal matters the Court decided during that period, 51 resulted in unanimous judgments. In the remaining 109 cases, Stevens and Rehnquist disagreed 89 times (and they often disagreed as well over the reasoning that formed the basis for the Court's unanimous judgments). Stevens' votes in the non-unanimous cases favored the defendant 92 times and the government 15 times; his votes were the mirror image of those cast by Rehnquist, who voted for defendants 16 times and for the government 91 times. By way of comparison, Stephen Breyer—one of the Court's only two "Democrat" appointees during this period—voted for defendants 58 times and for the government 44 times. This was another area of "growth" for Stevens. From the 1975 Term when he started through October Term 1980, he voted for the government in criminal cases 43% of the time; from the 1994 Term through OT 1999, he voted for the government 26% of the time. (Rehnquist's rate of votes for the government during the same period went from 80% to 75%.)

The rate and direction of a Justice's dissents likewise are interesting measures of where he stands relative to his colleagues and relative to Court's center of gravity. In criminal matters decided during the 1994-1999 terms, Stevens wrote or joined dissents in favor of defendants or convicts 63 times, including 18 times by himself. Rehnquist dissented in favor of defendants four times, and never by himself. Rehnquist dissented in favor of the government 20 times; Stevens dissented in favor of the government in a criminal case just once. (Trivia question: what was the one case?)[36] Again by way of comparison, Justice Kennedy dissented in favor of defendants or convicts five times, and in favor of the government 10 times. As for Stevens' rate of dissent over time, he wrote or joined dissents in favor of the government fifteen times during his first five years on the Court, and just nine times in the twenty years that followed. We will consider Stevens' behavior in criminal cases in further detail later.

For a long time—continuing through the early 1990's,[37] and perhaps among some constituencies even now—Stevens nevertheless enjoyed a generally moderate reputation that arose from several sources. The first is that for many years he was sitting next to William Brennan and Thurgood Marshall, whose votes were to the left of Stevens' in some high-profile instances, most notably capital punishment and some

---

[34] For a more complete discussion of the intersection between Stevens' judicial style and his speech jurisprudence—and for an excellent general discussion of Stevens—see Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions,* 27 Rutgers L.J. 543 (1996).

[35] My definition of a criminal matter is expansive; it includes a case like *Hanlon v. Berger,* 119 S.Ct. 1706 (1999), where the plaintiff brought a *Bivens* suit complaining that his Fourth Amendment rights had been violated. Narrower definitions are possible, of course, but would not change the thrust of the numbers offered here.

[36] This is a trick question; the answer is *United States v. Lopez,* where a 5-4 majority struck down the Gun-Free School Zone Act as beyond Congress's power to pass. *Lopez* is of course remembered as a very important decision about federalism; only incidentally was it a criminal case.

[37] See Sickels, *John Paul Stevens and the Constitution* ix, x, 5 (1988); *The Oxford Companion to the Supreme Court of the United States* 836 (1992) (Stevens was "[n]ot easily associated with any particular voting bloc" and was "case in a centrist, mediating role on an increasingly polarized Rehnquist Court"); Stuart Taylor, *The Last Moderate*, The American Lawyer 48 (June 1990).

cases under the equal protection clause.[38] The second reason is that while Stevens' votes tended toward the left, his judicial style tended to be conservative. He generally favored narrow reasoning and modest holdings. Not always, of course; his dissents to the Court's federalism cases were categorical; likewise his views on religion; and he suggested a broad exemption of campaign finance laws from First Amendment scrutiny on the ground that "money is property; it is not speech."[39] But in many other areas, and when he was at his most distinctive, Stevens acted in the model of a common law judge, and this muffled the sound of his liberalism—though in fact his method and politics frequently were of a piece, expressing the same values and following from the same vision of the judicial role. The paradox between Stevens' liberal politics and his conservative methods, in other words, was apparent rather than real. The relationship between them is the most interesting feature of Stevens' work, and the one that sheds the most light on the majorities he opposed. For it was just this pairing of conservative method and liberal outcomes that made Stevens the opposite of Justices like Antonin Scalia, the most prominent advocate of the expansive method and conservative politics for which the Rehnquist Court is likely to be remembered.

## II. Characteristic behavior

To consider Stevens' judicial style and its relationship to the substance of his decisions, we need to begin by having a closer look at both. I will illustrate them with some examples from his work in two areas: substantive due process and criminal law.

### 1. *Substantive due process.*

a. In *BMW of North America v. Gore*,[40] BMW retouched the paint on the plaintiff's car before selling it to him, but did not disclose this. An Alabama jury found BMW liable for fraud and awarded the plaintiff $4,000 in compensatory damages and $4 million in punitive damages. The state's supreme court trimmed the award of punitive damages to $2 million. The Supreme Court reversed, finding the reduced award still excessive; a majority held for the first time that an excessively high award of damages in a civil suit violated the due process clause. Justice Stevens' opinion[41] identified three "guideposts" indicating that BMW did not receive adequate notice of its exposure to such a large award of damages, and that the award therefore was grossly excessive. The first guidepost was the reprehensibility of the defendant's conduct; BMW had not shown indifference to public safety, or deliberately concealed evidence, or violated any criminal laws. The second guidepost was the ratio between the compensatory damages and punitive damages awarded in the case—500 to 1. Stevens said that "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"; "[w]hen the ratio is a breathtaking 500 to 1,

---

[38] See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (concurring opinion); *Parham v. Hughes*, 441 U.S. 347 (1979); *Rostker v. Goldberg*, 453 U.S. 57 (1981); cf. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (concurring opinion) (arguing that state's affirmative action program violated Title VI of the Civil Rights Act of 1964, and that the Court therefore did not need to reach the constitutional question).

[39] *Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897, 910 (2000) (Stevens, J., concurring).

[40] 517 U.S. 559 (1996).

[41] I generally will attribute the views and stylistic choices in opinions, including majority opinions, to their authors.

however, the award must surely raise a suspicious judicial eyebrow."[42] The third guidepost was the relationship between the size of the punitive damages award and the size of criminal penalties available for comparable misconduct. The maximum criminal penalty for BMW's acts imposed by any state was $5,000-$10,000. Stevens concluded that while "we are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award," the Court nevertheless was "fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit."[43] The *BMW* analysis is characteristic Stevens: factors are considered that produce a judgment on the facts; the balancing will have to be repeated by other judges in other cases.

b. Perhaps more suggestive as an illustration of the intersection between Stevens' method and *politics* are his opinions in the Court's two leading cases on the existence of a constitutional "right to die." In the *Cruzan* case,[44] Stevens dissented from the Court's decision that the state could forbid the parents of a woman in a vegetative state to withdraw medical support from her. He said that "in answering the important question presented by this tragic case, it is wise not to attempt, by any general statement, to cover every possible phase of the subject,"[45] and that "Nancy Cruzan's liberty to be free from medical treatment must be understood in light of the facts and circumstances particular to her."[46] But his bottom line was broader:

> [T]here is no reasonable ground for believing that Nancy Beth Cruzan has any personal interest in the perpetuation of what the State has decided is her life. As I have already suggested, it would be possible to hypothesize such an interest on the basis of theological or philosophical conjecture. But even to posit such a basis for the State's action is to condemn it. It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life.[47]

The sequel to *Cruzan* was *Washington v. Glucksburg*,[48] where the Court held that there is no right to assisted suicide protected by the Constitution. There were eight votes in support of that proposition to a greater or lesser degree. In a solo concurring opinion, however—in many ways a dissent in all but name—Justice Stevens again combined a preference for balancing and case-by-case analysis with indications that he considered physician-assisted suicide a plausible candidate for constitutional protection:

> Although, as the Court concludes today, [the] potential harms [cited by the State] are sufficient to support the State's general public policy against assisted suicide, they will not always outweigh the individual liberty interest of a particular patient. Unlike the Court of Appeals, I would not say as a categorical matter that these state interests are invalid as to the entire class of terminally ill, mentally competent patients. I do not, however, foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge. […]

---

[42] *Id.* at 583.
[43] *Id.* at 584.
[44] *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 331 (1990).
[45] *Id.* at 331.
[46] *Ibid.*
[47] *Id.* at 350.
[48] 521 U.S. 702 (1997).

> How such cases may be decided will depend on their specific facts. In my judgment, however, it is clear that the so-called "unqualified interest in the preservation of human life" is not itself sufficient to outweigh the interest in liberty that may justify the only possible means of preserving a dying patient's dignity and alleviating her intolerable suffering.[49]

c. Stevens also has been a consistent supporter of the notion that the Constitution protects abortion rights.[50] Here his most characteristic work has come in assessing laws that require parental notification or consent when a minor seeks an abortion. When the Court first confronted the issue in *Planned Parenthood of Central Missouri v. Danforth*,[51] Stevens argued in dissent that a state constitutionally could require that a doctor obtain the consent of one of a minor's parents before performing an abortion for her; the state's interest in the welfare of its minors justified such protective measures, he argued, even if that meant parents sometimes would not let the abortion go forward. And a few years later, Stevens joined a majority in upholding a state law requiring a physician to notify a minor's parents before performing an abortion.

Ten years later, however, came *Hodgson v. Minnesota*. Here the state required that before performing an abortion for a minor, the physician must notify both parents if possible. Stevens, writing for a majority, found the notification requirement unconstitutional. He said that while past cases had approved statutes requiring that a minor's parents be notified, they had not focused specifically on requirements that notification go to *both* parents. Here the district court had taken evidence and found that the two-parent notification requirement could be harmful to a minor when her parents were divorced or separated, or when domestic violence was a problem in the household. Stevens found this compelling.[52] He said that "three separate but related interests—the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit—are relevant to our consideration of the constitutionality of the 48-hour waiting period and the two-parent notification requirement"; he considered those interests and concluded that "the requirement that both parents be notified, whether or not both wish to be notified or have assumed responsibility for the upbringing of the child, does not reasonably further any legitimate state interest." *Either* parent presumably would act in the child's best interests and assure that the child's decision would be intelligent; and a two-parent notification requirement "disserves the state interest in protecting and assisting the minor with respect to dysfunctional families." Thus at various points in his career Stevens took the position that it is constitutional to require that a minor obtain *consent* from *one* of her parents before having an abortion (though only if there is a judicial bypass option); but he also took the position that the Constitution forbids a state to require *notification* of *both* parents before a minor has an abortion, regardless of whether there is a judicial bypass option.[53]

---

[49] *Id.* at 749-750, 752.

[50] *Stenberg v. Carhart*, 120 S.Ct. 2597 (2000). Stevens argued in *Planned Parenthood of v. Casey* that the joint opinion of Justices O'Connor, Kennedy and Souter did not go far enough; he would have held the counseling and spousal notification requirements at issue in that case invalid, as the "troika" did not. See 505 U.S. 833, 912 (1992).

[51] 428 U.S. 52, 102 (1976).

[52] The case also involved the constitutionality of a 48-hour waiting period for abortions; I dispense with that aspect of the decision in order to keep the discussion manageable.

[53] The state law in *Hodgkins* provided that if its terms were invalidated, they would be replaced by identical provisions but with a "judicial bypass" option enabling the minor to avoid notification by appealing to a judge. A separate majority upheld this fallback position, but Stevens dissented: since the two-parent notification requirement was itself unreasonable, it could not be saved by the option of instead going to court.

We will consider later the trends that emerge from Stevens' decisions, but note here his penchant for fine distinctions based on perceived factual consequences, and the role of interest balancing as a recurring motif in his work.

2. *Crime; the rights of defendants.*

a. *Capital punishment*. Stevens made important contributions to the Court's criminal jurisprudence immediately upon his arrival in 1975. A few years earlier, in *Furman v. Georgia*,[54] the Court had struck down Georgia's death penalty law and generally cast the constitutionality of the death penalty into doubt. Three months after Stevens arrived the Court heard oral arguments in *Gregg v. Georgia* and companion cases that tested the legality of death penalty statutes passed in response to *Furman*. Stevens delivered joint opinions in the cases with Potter Stewart and Lewis Powell.[55] Taken together, the opinions established several principles: that the decision to impose a death sentence has to be guided by criteria that make its application predictable and reviewable, but that the sentencing court's discretion *not* to impose the death penalty cannot likewise be limited (e.g., by mandatory death sentences for certain crimes). Viewed more broadly, the cases introduced a judicial regulatory regime for capital punishment. Certain types of "aggravators" offended the Constitution because they did not sufficiently narrow the class of murderers eligible for execution, but the particulars would need to be considered case by case. Future cases thus established that an instruction that a jury could impose a death sentence if the defendant's crime was "outrageously or wantonly vile, horrible or inhuman" was unconstitutional because it was not narrow enough;[56] likewise the criteria that the crime be "unusually heinous, atrocious, and cruel."[57] But it was all right to impose death sentences for crimes "especially heinous, cruel, or depraved" if those words were construed by the state courts to only cover "depraved" crimes where the perpetrator "relishes the murder, evidencing debasement or perversion," or "shows an indifference to the suffering of the victim and evidences a sense of pleasure in the killing."[58] Also acceptable was another state's limitation of death sentences to defendants who exhibited "utter disregard for human life"—so long as that generality had been narrowed by the state court to refer to a defendant who was a "cold-blooded, pitiless slayer."[59] Stevens did not join all of these opinions; in the last one mentioned, for example, he joined a dissent taking issue with the majority's interpretation of the words "cold-blooded." The point of the examples is to demonstrate the character of the jurisprudence to which Stevens' original position on capital punishment has led. He favored detailed judicial supervision and regulation rather than either abolition or deference; and details are what the Court has argued about ever since.

2. *Habeas corpus.* Stevens' tenure on the Court coincided with a line of decisions constricting the availability of writs of habeas corpus,[60] and Stevens generally

---

[54] 408 U.S. 238 (1972).

[55] *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

[56] *Godfrey v. Georgia*, 486 U.S. 356 (1980).

[57] *Maynard v. Cartwright*, 486 U.S. 356 (1988).

[58] *Walton v. Arizona*, 497 U.S. 639, 655 (1990) (internal quotation marks omitted).

[59] *Arave v. Creech*, 507 U.S. 463 (1993).

[60] In 1995 Congress passed the Anti-Terrorism and Effective Death Penalty Act, which codified many principles the Court had announced over the preceding twenty years in interpreting the habeas corpus statute.

resisted the trend. The question in *Rose v. Lundy*,[61] for example, was what federal judges should do with habeas corpus petitions that contained some claims that had been exhausted in the state courts and some that had not. The Court said such petitions should be dismissed. Stevens alone dissented, arguing that "[i]n considering whether the error in these two exhausted claims was sufficient to justify a grant of habeas corpus relief, the federal court—like the state court—had a duty to look at the context in which the error occurred to determine whether it was either aggravated or mitigated by other aspects of the proceeding" such as the seriousness of the error or the prisoner's failure to exhaust other claims. Said Stevens, "The inflexible, mechanical rule the Court adopts today arbitrarily denies district judges the kind of authority they need to administer their calendars effectively."[62]

Similarly, in *Murray v. Carrier*[63] the question was whether a prisoner should be allowed to bring a claim in a habeas corpus proceeding when his lawyer inadvertently had failed to raise the issue on appeal in the state courts. The Court held that such claims are defaulted; a prisoner must therefore show that the "constitutional violation has probably resulted in the conviction of one who is actually innocent" in order to obtain relief. Stevens dissented from the holding, writing that the inquiry into "cause and prejudice" must be considered "within an overall inquiry into justice"[64] which in turn "requires a consideration, not only of the nature and strength of the constitutional claim, but also of the nature and strength of the state procedural rule that has not been observed." When a lawyer defaults a claim on appeal, "the state interest in procedural rigor is weaker than at trial, and the transcendence of the Great Writ is correspondingly clearer." In this case—where the petitioner, convicted of rape, claimed that he had been wrongly deprived of a chance to see the victim's statement to the police—Stevens said that the trial judge should hold a hearing to determine whether justice demanded that the petition be considered despite the default.[65]

III. *Assessment*

1. *Stevens and the common law.* Set to one side the merits of Stevens' decisions considered above and consider more generally the judicial style they represent. Stevens' favored approach at its most characteristic involves identifying the interests bearing on a decision and making an all-things-considered judgment about the balance between them. The judgment may be made by balancing but then take the form of a rule (as in *Hodgson*, the abortion case); or the judgment may involve a kind of balancing that will need to be repeated whenever similar facts arise (as in the *BMW* case). Either way, the resulting judgment—even if it takes the form of a rule—tends to be relatively narrow and fact-specific. Stevens also has a taste for fine constitutional distinctions. The law of abortion rights and the law of capital sentencing are full of niceties supported and often written by Stevens: requiring notification of one of a minor's parents before performing an abortion is constitutional, but requiring notification of both parents is unconstitutional. A judge should be allowed to impose a capital sentence when a jury has declined to do so, but only if he has found by clear and convincing evidence that virtually no reasonable person would have decided otherwise.

Distinctions like these often seem unfathomable as interpretations of constitutional or statutory text; they become comprehensible only by reference to a different model—viz., that of the common-law judge. All of the Justices must partly regard themselves in that way at times. The clauses of the Constitution are interpreted

[61] 455 U.S. 509 (1982).
[62] *Id.* at 546 (dissenting opinion).
[63] 477 U.S. 478 (1986).
[64] *Id.* at 505 (concurring opinion).
[65] *Id.* at 506.

by cases; the cases themselves are "constitutional law," and they rather than the constitutional text routinely become the focus of analysis in later cases.[66] But not all case-based jurisprudence is quite common-law jurisprudence; even in a system of case law new questions can be answered generally or specifically. Justice Scalia has praised the generality provided by decisions in the form of rules, and interpretive methods that lend themselves to rule-like holdings.[67] Stevens, however, favors a common law approach in the strong sense of making narrow, factbound decisions, and also in the strong sense of preferring to reason about reasonableness without being overmuch distracted by the project of interpreting whatever texts are on point. (Against this it is natural to point to Stevens' opinion in the *Chevron* case, which gave rise to an important rule and has become one of his most oft-cited decisions; but as later became clear, Stevens did not intend that opinion to have quite the meaning that it came to acquire.[68])

Another aspect of the distinction between case law and common law involves the extent to which a Justice focuses on answering questions or on deciding *cases*, and—relatedly—the extent to which he gives the facts of a case in which a question arises a leading role or pushes them into the background. For most of the Court most of the time, cases are regarded as more or less suitable "vehicles" for deciding *questions* that need to be answered for the sake of uniformity or for other reasons. Stevens seemed less likely than his colleagues to treat cases as vehicles, however, and more likely to treat them just as cases in the same way a court of appeals judge would. The most important thing was to get each case decided right on all its facts; Stevens fit Holmes' description of the common law judge as one who "decides the case first and determines the principle afterwards."[69]

The common law preferences associated with Stevens are in some respects an awkward fit on the Supreme Court. In most areas the Court takes too few cases to close in on the law itself one case at a time; its decisions about any given subject will not be numerous enough to comprise the sort of edifice or "grown order" often thought to be a payoff of the common law.[70] Narrow decisions therefore leave the task of working out implications case-by-case to judges in lower courts. Especially if those courts are applying standards with discretionary content (think of the *BMW* test, or of Stevens' argument in *Murray v. Carrier* that cases like the petitioner's all require an inquiry into what justice requires), the resulting decisions are likely to lack uniformity. The disuniformities may be especially persistent when the Court declines to range into an area—e.g., punitive damages—for many years at a time.[71]

Yet while the Court's use of a common law approach may not have all the systemic benefits associated with traditional common law, it may have some other advantages. One has to do with humility. It may be that judges are better at deciding how cases should come out than they are at answering general of questions of law, and so should prefer the former to the latter whenever there is a choice. A decision about a *case* can be grounded in factual details that give the decision a firmer basis than an abstract statement of law is likely to have; true, that leaves more work to be done by other judges in subsequent cases—but then they, too, should be deciding just their cases

---

[66] See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996).

[67] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

[68] See Gary Lawson, *Cases and Materials on Administrative Law* xx ( ).

[69] Oliver W. Holmes, Jr., *Codes and the Arrangements of Law*, 5 Am. L. Rev. 1 (1870), reprinted at 44 Harv. L. Rev. 725, 725 (1931).

[70] See Mark F. Grady, *Positive Theories and Grown Order Conceptions of the Law*, 23 Sw. U. L. Rev. 461 (1994).

[71] This is one of Justice Scalia's complaints about standards. See Scalia, *supra* note X, at 1178-1179.

rather than answering questions. Stevens once put it this way: "When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication."[72]

The approach that Stevens favors maximizes, however, the importance of the *judge;* he and his powers of judgment are likely to be necessary in every case, and the quality of the result in a case will depend on his skill at balancing the relevant factors. Stevens' method thus implies both a conservative and an expansive judicial role. He decides little in the case at hand, stating the result on the facts but not saying too much about how the law would apply in other circumstances. In this sense Stevens is a minimalist. There is a different sense of minimalism, of course, that involves limiting the role of the courts and judges in giving restrictive or detailed instructions to other branches of government; minimalism in this sense often can be achieved through rules. Stevens' approach, however, ensures a large role for other judges in adjudicating similar controversies that arise in the future. He assigns a narrow, case-bound role to himself and to any *given* judge, but a correspondingly large role to judges generally, who are left with a broad mandate of supervision (e.g., of punitive damages, of habeas corpus petitions, and of abortion regulations) and also with substantial discretion in conducting that supervision case by case. Unsurprisingly, in many areas of law Stevens then favors deference to judges when they make those calls.[73]

Stevens' favored approach to lawmaking has the benefit of ensuring that no legal decision gets made without at least one judge satisfying himself that it actually makes sense—that the purpose and logic of the doctrine involved are expressed in the outcome of the case. It also means that when a factual variant arises the judge deciding what to do with it will have a free hand to decide it "right" in view of the interests behind the doctrine; he will not be constrained to mechanically apply a rule that may be a bad fit to unexpected circumstances. But of course there are costs of all this. Maximizing the role of the judge makes it harder for parties to know what the law is, whether they are trying to settle a lawsuit or plan their affairs in advance of litigation; the consequences of their decisions will depend on how the judge they draw balances the interests involved. Second and relatedly, requiring fresh acts of judgment in every case makes it more likely that similar cases will be decided differently just because they are brought before different judges. Like cases may yield different results.[74] Last, while deciding cases narrowly lets future judges adapt the law to new circumstances, it also creates opportunities for inconsistency; the next judge—or indeed the same judge—may be able to wriggle out of the prior holding without much trouble, making it a less valuable precedent. Stevens' own jurisprudence is an example. He was unusually prone to voting differently in cases that appeared similar to the naked eye, because he would find the first case a little different from the second; uncharitable observers sometimes felt that his jurisprudence started from scratch each term.

In short, Stevens weights the importance of enabling courts to do precise, individualized justice more heavily than the importance of avoiding the costs and abuses that rules prevent. The large judicial role that Stevens favors implies an idealistic view

---

[72] *New York v. Ferber*, 458 U.S. 747, 781 (1982) (concurring opinion).

[73] See, e.g., *Burger v. Kemp*, 483 U.S. 776 (1987); *Bishop v. Wood*, 426 U.S. 341 (1976); *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) (dissenting opinion); cf. *Moore v. City of East Cleveland*, 431 U.S. 494, 514 n. 1 (concurring opinion).

[74] Cf. Kathleen Sullivan, *The Justice of Rules and the Justices of Standards*, 106 Harv. L.Rev. 22, 62 (1992) ("A decision favoring rules thus reflects the judgment that the danger of unfairness from official arbitrariness or bias is greater than the danger of unfairness from the arbitrariness that flows from the grossness of rules.").

of the capacities of humans in robes. Thus in his dissent to *Bush v. Gore*,[75] Stevens said he regarded the majority's lack of respect for the impartiality of judges as the most bothersome feature of its decision:

> What must underlie petitioners' entire federal assault on the Florida election procedures is 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. […] The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.[76]

Nobody would deny the importance of public confidence in judges, but it is particularly characteristic of Stevens to *identify* the rule of law with a sense of confidence in the front-line people who apply law to fact. A lover of rules like Justice Scalia would identify the rule of law precisely with distrust of any given individuals, and with attempts to create rules that constrain their discretion whenever feasible;[77] Stevens likely would consider that emphasis unrealistic. In a speech delivered shortly after his arrival at the Court, Stevens said that his former teacher, Leon Green, had a "special influence on my understanding of the law"; he then described Green's view that "any workable system of law depends as heavily on the quality of the persons who administer it as on the form that particular rules take."[78]

2. *Stevens and pragmatism: The value of facts, details, and distinctions.* Stevens' judicial style reflects a preference for complexity, subtlety, and accuracy in individual cases over predictability, clarity, finality, and cheapness. He generally is prepared to make an inquiry as complicated as need be to capture the considerations he thinks relevant, even if this makes the operation of the resulting test hard to predict; again the *BMW* case is an example. Stevens' preference for accuracy over finality also is visible in his habeas corpus opinions; there and elsewhere he tends to weight accuracy heavily vis a vis administrative costs.[79] He revels in doctrinal subtleties and chastises his colleagues when they trade them away for clarity, as *RAV v. City of St. Paul*[80] illustrates. There the majority struck down a law punishing "hate speech" because it prohibited "otherwise permitted speech solely on the basis of the subjects the speech addresses."[81] Stevens objected that the majority's approach had "simplistic appeal," but did not do justice to the case law. He also rejected Justice White's argument that "fighting words" are an entirely unprotected category of speech, concluding that this approach "sacrifices subtlety for clarity and is, I am convinced, ultimately unsound," that "the concept of 'categories' fits poorly with the complex reality of expression," and that "the categorical approach does not take seriously the importance of *context.*"[82]

---

[75] 531 U.S. at X; 121 S.Ct. 525 (2000).
[76] 121 S.Ct. at 542 (dissenting opinion).
[77] See Scalia, *The Rule of Law as a Law of Rules*, *supra* note X.
[78] John Paul Stevens, *Mr. Justice Rutledge*, in *Mr. Justice* 319, X (Dunham & Kurland, eds., 1956).
[79] For another good example, see the opinions in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).
[80] 505 U.S. 377 (1992).
[81] *Id.* at 381.
[82] *Id.* at 425.

These preferences all bear on the claim often made that Stevens is a "pragmatist"[83]—indeed, that he is the "heir to Holmes"[84] on the contemporary Court. The "pragmatist" label often is used in unhappily vague ways, but it generally is associated with a taste for facts and distaste for abstractions and theories. Stevens is indeed more likely than his colleagues to pore over the facts in the record of a case and tie his proposed resolution to them snugly. He worries about how legal rules actually will play out; that is why he was ready to say that the Constitution allows a state to require that one parent be notified before a minor gets an abortion, but forbids a requirement that both parents be notified: he thought that the practical benefits of notifying one parent rather than two were likely to be small, and that the harm to the child in certain types of families might be great if both parents had to be notified. This is a good example of pragmatism if "pragmatic" is given its negative meaning: a disinclination to make decisions by pushing legal concepts around. But in that sense all of the Justices probably are pragmatists. Even one who dismisses abortion rights because they are not mentioned in the Constitution can be understood as a pragmatist if the choice of that interpretive strategy can be traced to a concern about consequences, as it can be, at least partially, in Justice Scalia's case.[85]

Pragmatism might be given more specific affirmative content if defined as a close interest in the practical consequences of a decision and the facts bearing on it, and a comparative lack of interest in abstractions like legitimacy or fidelity (except insofar as indifference to those concepts has identifiable concrete consequences of its own). But the facts then of interest to a pragmatist cannot be just the facts of the case; they must also be facts about various ways of making decisions and their consequences. "The relevant consequences to the pragmatist are long run as well as short run, systemic as well as individual, the importance of stability and predictability as well as of justice to the individual parties[.]"[86] A constitutional jurisprudence that draws a lot of fine distinctions in the name of practicality creates practical problems of its own. It requires a level of detailed knowledge about the world that is likely to be hard for appellate judges to come by; a member of the Supreme Court is in an especially awkward position to "do" pragmatism in the sense of crafting minute doctrinal distinctions tailored to the facts of the world being regulated, because he rarely will have the knowledge required to make precise and accurate judgments of that sort. One of the counsels of pragmatism is that judges should make their judgments at a level of abstraction commensurate with their institutional competence. The parental notification cases are an example; if the issue must be constitutionalized, the costs and benefits of notifying one parent or two might seem better estimated by legislatures or by trial judges case-by-case than by Supreme Court Justices speculating in the large. This was a case where Stevens' preference for distinctions got the better of his preference for leaving judgments in the hands of front-line judges.

It would not be fair to complain that Stevens *isn't* pragmatic. A fair complaint would have to be stated as a criticism of the trade-offs his brand of pragmatism entails. Pragmatism, like economics, requires notions about what to value that must be imported from outside itself; otherwise it is just an unhelpful injunction to do what works without criteria for deciding what "works" means when it is controversial.[87] Sometimes a consensus about consequences may be so robust that the pragmatist label has meaning on its own, in the same way that economic analysis of a problem means something clear

---

[83] Sickels, *John Paul Stevens and the Constitution* 1 (1988); Norman Dorsen, *John Paul Stevens*, 1992/1993 Ann. Surv. Am. L. XXV, XXV.

[84] Sullivan, *supra* note X, at 90.

[85] See Antonin Scalia, *Originalism: The Lesser Evil*, 57 Cin. L. Rev. 849 (1989).

[86] Richard A. Posner, *Overcoming Law* 400-401 (1995).

[87] See Ronald Dworkin, *Darwin's New Bulldog*, 111 Harv. L. Rev. 1718 (1998); Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. Chi. L. Rev. 1447 (1990).

when, but only when, there is a background consensus about what ends to pursue. But in an environment like the Supreme Court where values and ends are contested as a matter of course, labeling someone a pragmatist is uninformative without more. The more that is needed is a maximand—i.e., a specification of the consequences the judge regards as important. Stevens is an example. He is a pragmatist, but of a sort that greatly values accuracy in individual cases and exactitude in doctrine: microperfectionism.

Consider what the following Stevensisms have in common. (1) His decision that punitive damage awards should be reviewed by judges to see if they are unreasonable in view of three factors laid out in his opinion; (2) his opinions arguing that instead of rules denying review in various types of habeas corpus cases, the Court should give trial judges discretion to balance the interests in each case; (3) his frequent preference for deciding cases on their facts rather than answering questions in the large;[88] (4) his habit of writing separate concurring or dissenting opinions more often than any of his colleagues. What these behaviors evidence is the tremendous significance of correctness in individual cases, and particularly *individual judgments*, in Stevens' vision of law—individual judgment as a duty, a necessity, and an object of faith. Stevens estimates the number of mistakes caused by rules highly, or weights them heavily, or both; he reckons the "error costs" associated with individual judgments as relatively small, or weights them lightly, or both. So far as he is concerned a decision that sacrifices individualized accuracy for clarity and predictability does not *work* well. Yet of course there are those who think Stevens' opinions are the ones that do not work precisely because they create too much unpredictability. His opinions reduce error costs of one type and increase those of another. When you have decided which types of errors trouble you more—because of their likely size or felt importance—you will know whether to conclude that Stevens was a *good* pragmatist.

Stevens' favored brand of pragmatism fits him into a larger line of 20th-century debates about how best to do law. It is the difference between those who prefer choice of law rules like *lex loci delicti* and those who prefer the "most significant contacts" test of the Second Restatement, the interest balancing of which resembles many of Justice Stevens' constitutional opinions. The general repudiation of mechanical rules in favor of functional analysis generally is associated with the rise of legal realism[89] and, occasionally, pragmatism.[90] Again, the association with pragmatism makes sense if interest balancing is viewed as a repudiation of formalism—e.g., of the understanding that the law of the place of the wrong always governs a case for reasons related to natural law. But whether interest balancing is *good* pragmatism depends on how its consequences compare to the consequences of alternatives, including the consequences of the formalistic approach; and a comparison of the consequences requires opinions about which sorts of problems one prefers to have: the crudity of the rule or the indeterminacy of the standard. Stevens often argued for the constitutional equivalent of interest balancing approaches to conflicts of laws; criticisms of his jurisprudence sound very much like the criticisms of the Second Restatement. He seemed to think like a pragmatist of the mid-20th-century school, meaning the values he used to assess consequences were individualized accuracy and fairness, a relatively low degree of concern about administrative cost and predictability, and a high degree of trust in front-line judges to apply standards correctly. Stevens' approach to judging did not really catch on for the same reason that the net benefits of the conflict of laws revolution

[88] For another good example, see *Hopkins v. Reeves*, 524 U.S. 88 (1998) (dissenting opinion).

[89] See Lea Brilmayer, Conflict of Laws: Foundations and Future Directions chs. 1-2 (2d ed. 1995); Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public-Policy Exception, 106 Yale L.J. 1965, 2008 n. 105 (1997).

[90] See Patrick J. Borchers, *Conflicts Pragmatism*, 56 Albany L. Rev. 883, 899-901 (1993).

remained controversial by the end of the century[91]—not because either of the approaches reflected a want of pragmatism, but because in their pragmatism they struck a balance between priorities that was in questionable keeping with the mainstream values of the times, which weighted clarity, finality, predictability, and generality as more important virtues than those approaches did.

By the same token, the comparisons of Stevens to Holmes and *his* pragmatism seem inapt. Holmes did often speak of the law as involving matters of degree rather than absolutes; he was a skeptic about grand theories, and Stevens generally did not have much use for those, either. But the pragmatism of Holmes was a tougher and more brutal variety than anything in Stevens' work. Holmes had a greater appreciation of the value of predictability: "Precisely my skepticism, my doubt as to the absolute worth of a large part of the system we administer, or of any other system, makes me very unwilling to increase the doubt as to what the court will do." The only legal value that could be "assumed as certainly to be wished," he once said, was "that men should know the rules by which the game will be played."[92] Holmes also had a large appreciation of the practical value of rules. A good example is the *Goodman* case,[93] where Holmes held that it was contributory negligence as a matter of law for a driver to fail to "stop, look, and listen" before entering onto the railroad tracks where he was hit by the defendant's train. Likewise the general discussion that foreshadowed that opinion in *The Common Law*.[94] Holmes worried about judges who excessively left questions of reasonableness to juries, for then they "simply confess their inability to state a very large part of the law which they required the defendant to know, and would assert, by implication, that nothing could be learned by experience."[95] Of course Holmes was speaking of the role of juries in the common law, whereas Stevens fought his battles in the arena of federal statutory and constitutional law; but as we have seen, Stevens brought a common-law approach to his work, and the point of Holmes' argument just quoted is similar to Scalia's criticism of federal judges who, by use of standards rather than rules, leave too many questions to be decided by later judges: "at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat—an acknowledgment that we have passed the point where 'law,' properly speaking, has any further application."[96]

Meanwhile Stevens was an anti-pragmatist in a separate sense: he showed little interest in sacrificing a full airing of his views of a case to secure a majority. "His concern with procedural safeguards was frequently expressed in separate opinions. The number of such opinions in part reflects his deep interest in issues which were to him fundamental, but it also reflects a quality of integrity that is difficult to describe….His conscience literally *forced* him to add the statement of the real basis for his vote."[97] That description was not written about Stevens; it is a description written *by* Stevens about his old boss, Justice Rutledge, when Stevens was a young lawyer in Chicago. Apparently Stevens admired Rutledge's practice well enough not only to emulate it but

---

[91] See Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 Geo.L.J. 1, 1-16 & n. 42 (1991); cf. Joseph W. Singer, *A Pragmatic Guide to Conflicts*, 70 B.U.L.Rev. 731, 731-741 (1990).

[92] Oliver Wendell Holmes, Jr., *Twenty Years in Retrospect*, in *The Occasional Speeches of Justice Oliver Wendell Holmes* 154, 155 (Mark DeWolfe Howe ed., 1962).

[93] *Baltimore & O. R. Co. v. Goodman*, 275 U.S. 66 (1927).

[94] Oliver Wendell Holmes, Jr., *The Common Law* 110 (1881).

[95] *Ibid.*

[96] Scalia, *supra* note X, at 1182.

[97] John Paul Stevens, *Mr. Justice Rutledge*, in *Mr. Justice* 319 (Dunham & Kurland, eds., 1956).

to surpass it.[98] This seems to reflect a want of pragmatism more in the colloquial sense of "realpolitik" than in the jurisprudential sense. Stevens' penchant for idiosyncratic grounds of decision may tend to minimize his legacy in the long run; while Holmes was the Great Dissenter, Stevens was the Great Concurrer-in-Part, taking "yes, but" positions that may inspire some others to a similar sort of rigor but do not lend themselves to the creation of schools of thought. Indeed, this is consistent with a jurisprudential rather than colloquial pragmatism, so long as it is a pragmatism that values the quest for accurate individual judgments in each case above almost all else.

*Method and politics*

The remaining issue I want to consider is the relationship between Stevens' methods and his politics. We have seen that his liberalism frequently is expressed through interest balancing, which gives it the look of moderation in any given case and can blunt its consequences. A reading of any one of Stevens' opinions likely would not suggest what his judicial politics are; they emerge from the pattern of results taken together. The natural question is whether his politics are a product of his method (or vice versa) or whether they are independent variables. I do not think they are entirely independent, especially in the criminal cases where Stevens most obviously staked out territory to the left of his colleagues during the 1990s. It is true that rules and standards, and general and specific answers to questions, often can be put in the service of either liberalism or conservatism. The Warren Court often spoke generally and through rules rather than balancing tests, just as the Rehnquist Court did; Justice Brennan often preferred rules to standards.[99] "No capital punishment" is as clear—clearer, actually—than a rule treating capital punishment as no different from imprisonment. So no particular political pattern necessarily follows from a preference for rules. At a sufficiently general level the same point can be made about standards; as Professor Sullivan has shown, standards have at times been the preferred tools of conservatives.[100] But it would be too strong to infer from this a random relationship between politics and method. Some substantive values are peculiarly suited to expression through certain methods and not through others.

In Stevens' case, we have seen that his preference for standards over rules seems an outgrowth of a larger set of values: a heavy valuation of accuracy in individual cases; a sense that faith in the judgment of judges is justified, necessary, and to be counted upon, rather than the occasions for it minimized; and a comparatively low valuation of the clarity, finality, and low administrative costs that rules and generalizations provide. Those values do not always translate into clear substantive preferences, but sometimes they will, especially in the criminal matters where Stevens was the later Rehnquist Court's most liberal member. A judge whose answer always is "sometimes" will consistently tug away from a majority trying hard to give a firm "no"; in any area where new claims are asserted—substantive due process cases are a natural example—Stevens' approach makes it more likely that they will survive and thus seems to pull to the left, because he is unlikely ever to shut the door all the way or say "never." Likewise, a Justice who favors a large role for judges in balancing interests will regularly be at odds with a Court trying to reduce the role and significance of federal judges in reviewing state criminal convictions. A court can make rules that erode finality and make the courts more generous to defendants, as well as rules that create

[98] See Lee Epstein et al, *The Supreme Court Compendium* 559-562 (2d ed. 1996).
[99] See, e.g., United States v. Leon, 468 U.S. 897, 928 (1984) (concurring opinion); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[100] See Sullivan, *supra* note X, at 96-100.

finality and limit defendants' right to appeal. But it is difficult to advance the cause of finality and cost savings *without* rules, and those were things the Rehnquist Court cared very much about.

We saw earlier that in criminal cases on which the later Rehnquist Court was not unanimous, Stevens voted for the defendant 93 times and for the government 16 times. Most of the 16 votes Stevens cast for the government concerned the definition of some element of a crime—e.g., whether a defendant "carries a firearm" in violation of 42 U.S.C. 924(c) when he keeps it in the glove compartment of his car.[101] In cases like these,[102] Stevens was not particularly likely to be helpful to defendants—yet Scalia was:[103] he dissented in almost all of those cases where Stevens voted in a majority that favored the government's position. This pattern can be explained largely by reference to the values discussed above that drive the Justices' decisions. A decision about whether to define an element of a crime more or less helpfully to a defendant does not bear on the trade-off that causes Stevens and the conservatives to disagree so often; it is not obvious which decision about the gun in the glove compartment would be more likely to result in clarity, predictability, finality, low administrative burdens, fairness, or accuracy. Those concerns become very important and have more obvious implications in cases involving the *procedures* bearing on the conviction and treatment of criminals—which are the cases where Stevens is well to the left of his colleagues. For the question in those cases, viewed most generally, is the extent of the sacrifices—in time, money, and the risk that a guilty defendant will escape his just deserts—that are justified for the sake of giving defendants more opportunities to protest their innocence and contest the fairness of the proceedings against them.

These considerations describe both the nature of Stevens' liberalism and also the limitations of it. He was not a crusader for social justice or for civil liberties. He was a lawyerly type who regarded his job as maximizing the accuracy and fairness of decisions in individual cases; so it is natural enough that his reaction to capital punishment was to micromanage rather than abolish it. Conservatives dislike his priorities and think he underestimates the costs of this approach, but it also makes him a frustrating if admired figure for ardent civil libertarians. Stevens was a nibbler who preferred inconspicuous rulings to grand gestures, and it is frustrating to have a nibbler as the champion of one's hopes at the Court.

The other peculiarity of Stevens' usual penchant for casebound adjudication is that it coexisted with an occasional tendency in the opposite direction. In certain politically charged areas noted at the start of this essay, he was prone to offering rather immodest declarations of law—that property is not speech, for example, or that anti-abortion legislation runs afoul of the establishment clause. Indeed, at times it seems that there were two strands in his judicial character: the instincts of the common law judge, but also the instinct for the grand statement that occasionally got the better of him. It probably is too early to say for sure whether those forays into grandeur will turn out to have been ahead of their time or will be confirmation of the soundness of Stevens's more usual aversion to them. At this writing it seems most likely that when students of the Court remember Stevens fondly, they will think of him in the common law mode that was his more usual signature. Whether or not it is the best way to be a Supreme Court Justice, it is what he did best.

*Conclusion: Stevens and legal realism.*

---

[101] See *Muscarello v. United States,* 118 S.Ct. 1911 (1998).

[102] Other examples include *United States v. X-citement Video, Inc.,* 115 S.Ct. 464 (1995); *United States v. O'Hagan,* 117 S.Ct. 2199 (1997); *Bryan v. United States,* 118 S.Ct. 1939 (1998); *Holloway v. United States,* 119 S.Ct. 966 (1999); *Fischer v. United States,* 120 S.Ct. 1780 (2000).

[103] Justice Scalia dissented from the majority view endorsed by Justice Stevens in all of the cases cited *supra.*

As mentioned at the outset, Justice Stevens occupied the seat held for the previous 36 years by William O. Douglas. The two men lend themselves to interesting and amusing comparisons. Both finished their careers regarded as the ranking liberals on their respective Courts in both politics and seniority—rather more surprisingly in Stevens' case. Both have been described as Justices in the common law tradition[104]—rather more surprisingly in Douglas's case. Both were individualists who showed little interest in compromising to create coalitions, and both may have seen their influence suffer as a result. And yet in other respects they are perfect opposites. Stevens was a conservative in method, Douglas a conservationist but not a conservative in anything. Stevens reveled in doctrinal subtleties; Douglas was atheoretical and during most of his judicial career had little use for doctrine. Stevens was the judge's Justice, Douglas the "anti-judge";[105] Stevens was a lawyer, Douglas a crusader. Taken together they illustrate the great range of meanings "liberalism" can have when applied to a member of the Court, and perhaps finally the uselessness of the term.

Douglas also was the Court's arch-realist. He writes of a formative moment soon after he joined the Court when the Chief Justice, Charles Evans Hughes,

> made a statement to me which at the time was shattering but which over the years turned out to be true: "Justice Douglas, you must remember one thing. At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.

Douglas went on to gain fame precisely for his habit of writing his point of view into the law without much mediation through doctrine or other legal materials. Justice Stevens was the other way, as suggested by one of his dissents:[106]

> Some students of the Court take for granted that our decisions represent the will of the judges rather than the will of the law. This dogma may be the current fashion, but I remain convinced that such remarks reflect a profound misunderstanding of the nature of our work. Unfortunately, however, cynics—parading under the banner of legal realism—are given a measure of credibility whenever the Court bases a decision on its own notions of sound policy, rather than on what the law commands.

And yet despite himself Stevens was a marvelous study in realism. Here was the lawyerly judge, meticulously scrutinizing the facts and doctrine of each case and eschewing ideology, and frequently offering idiosyncratic reasoning and arguments—and yet arriving at *results* in most politically sensitive areas about as predictable as those reached by Chief Justice Rehnquist, who at times has been accused of partisanship in rather blunt language.[107] Stevens' combination of meticulous methods and predictable outcomes can be understood as a lesson in how a minimalist style can give great sway to the underlying preferences of its user, though I do not mean to suggest that his colleagues were more constrained by their maximalism. More broadly it shows the difficulty any Justice faces in preventing his decisions from being driven by his own values. A judge who eschews theory in favor of practical reason still cannot avoid

---

[104] See Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 Duke L. J. 133 (1991).

[105] See G. Edward White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 Va. L. Rev. 17 (1988).

[106] *In Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 283-282 (1984).

[107] See Mark V. Tushnet, *A Republican Chief Justice*, 88 Mich. L. Rev. 1326, 1328 (1990).

expressing his own preferences through his decisions, and cannot avoid the predictability that results; or at least a *Justice* cannot. Judges in lower courts answer more easy questions—i.e., questions on which the legal materials bear clearly enough that most judges would answer them the same way. Those judges also are constrained by the chain of command. They have to worry about reversal, and are bound by what the Court already has said in ways that the Justices are not. But obedience to the will of the law generally does not produce answers to the kinds of questions the Supreme Court has to answer; decisions require background beliefs about the scope and style of a well-made decision and about the weight to give to the values in conflict in any case that finds its way onto the Court's docket. Those weights—the weights that very often separate Rehnquist from Stevens—generally cannot be found in the law itself. They have to be imported by the judge, implicitly or explicitly, consciously or not. This is why it so often was easy to guess where Stevens would come out on a question without knowing anything about the many factual or doctrinal details that he would rely on to get there.

There is no cause for embarrassment in this. It could not be otherwise. Or perhaps it could; for while a judge cannot avoid expressing values through his legal decisions, he can do it in ways more or less reverential to the forms of law. That is a principal difference between Douglas and Stevens. Douglas was a self-conscious legal realist, and so was prone to express his views without mediating them much through legal forms. Stevens, too, expressed his values through his decisions, but he did it humbly. He played the law game; he took it very seriously; regardless of what he was saying, he generally said it in the language of picky, realist-hating analysis of doctrine and facts. This was a salutary insistence. It ensured that if his values were going to exert an influence on his decisions, they would have to be transformed along the way into a shape that would constrain the scope of their consequences and leave room for the values and choices of others. We learn from Stevens that what Hughes said to Douglas probably was true, but that judges do better by doubting and hedging against it than they do by trying to internalize it.[108]

Yet while Douglas illustrates some of the hazards of trying to "do" realism, Stevens may illustrate some of the hazards of trying to "do" pragmatism of a certain type. It is doubtful that Stevens was a pragmatist in a self-conscious sense, but he did seem to try to deliberately make decisions that would create the most reasonable results on the facts as he understood them. This may sound like a sensible strategy, but Stevens' jurisprudence suggests that a quest of this sort for "what works" may be too direct for its own good. Its benefits are obvious in the case at hand, while its costs may be long-run, less visible, and very significant. In Stevens' hands, at least, the approach created unpredictability; it also was expensive, as it promoted an extensive role for judges in human affairs; and it sometimes required judgments and distinctions that Supreme Court Justices are not in a particularly good position to make. Difficulties of this general nature often crop up when pragmatism takes the brute form of attempts to maximize the good too deliberately and directly. Put more generally, formalisms and generalities can serve valuable purposes, and in some cases generate better results—better law, even judged pragmatically—than direct efforts to "be pragmatic" in a crude sense by weighing costs and benefits in every case.

Stevens' legacy is likely to be mixed in just the way these trade-offs suggest. He is an easy figure to admire, because a love of fairness in each individual case is an easy virtue to admire. But admiration and emulation are different things, and around Stevens there probably will always linger a sense that he also is a study in the limits and perils of pointillism as a style on the Supreme Court. As much as it is associated with fairness, his jurisprudence also will be associated with doctrinal unpredictability, a

[108] See Ronald A. Cass, *The Rule of Law in America* XX (2001).

certain ad hoc quality, and a level of influence that—in part for those reasons—turned out to be minor.

Naturalism, Realism and Pragmatism. Michael Williams. Johns Hopkins University. Article 4. Follow this and additional works at: http://digitalcommons.brockport.edu/phil_ex Part of the Epistemology Commons, History of Philosophy Commons, and the Metaphysics.Â  Quineâ€™s disquotationalist account of â€œtrueâ€ is only one version of deflationism. Other deflationary views are Paul Horwichâ€™s minimalism and Robert Brandomâ€™s anaphoric theory. Horwich thinks that truth is a property of propositions, so he thinks that our understanding of â€œtrueâ€ is constituted by a primitive disposition Published by Digital Commons @Brockport, 2007. 5. Philosophic Exchange, Vol. 37 [2007], No. 1, Art. 4 Naturalism, Realism and Pragmatism1 61. John Paul Stevens, Originalist. Northwestern University Law Review, Vol. 106, No. 2, p. 743, 2012. UGA Legal Studies Research Paper No. 2012-14.Â  Keywords: John Pau Stevens, Supreme Court, originalism, methodology, legal realism, judicial restraint, pragmatism, William O. Douglas, Felix Frankfurter, Robert H. Jackson, Hugo Black, Frank Murphy, Wiley B. Rutledge, Antonin Scalia, capital punishment, Second Amendment, national security. JEL Classification: K1, K19, K40, K41. Suggested Citation: Suggested Citation. Amann, Diane Marie, John Paul Stevens, Originalist (October 2, 2012). Northwestern University Law Review, Vol. 106, No. 2, p. 743, 2012, UGA Legal Studies Research Paper No. 2012-14, Available at SSRN: https://ssrn.com/abstract=2155844. Pragmatism originated in the United States around 1870, and now presents a growing third alternative to both analytic and â€˜Continentalâ€™ philosophical traditions worldwide. Its first generation was initiated by the so-called â€˜classical pragmatistsâ€™ Charles Sanders Peirce (1839â€“1914), who first defined and defended the view, and his close friend and colleague William James (1842â€“1910), who further developed and ably popularized it.Â  A second (still termed â€˜classicalâ€™) generation turned pragmatist philosophy more explicitly towards politics, education and other dimensions of social improvement, under the immense influence of John Dewey (1859â€“1952) and his friend Jane Addams...