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Bookends: Justice Stevens and Justice Scalia

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BOOKENDS: JUSTICE STEVENS AND JUSTICE SCALIA

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The great importance Justice John Paul Stevens attaches to his bonds with former colleagues has long shone through his words and actions. Anyone who knows Justice Stevens knows of his deep admiration for his former boss, Justice Wiley Rutledge, whose deep ties to Washington University Justice Stevens emphasized in his recent remarks here.[1] During the year I had the privilege of serving as one of Justice Stevens' law clerks, retired Chief Justice Warren Burger passed away. A few days after Chief Justice Burger's death, Justice Stevens announced a decision from the bench. He revised his explanation of the majority's reasoning to incorporate a key precedent authored by Chief Justice Burger, whom Justice Stevens made a point of honoring by name. Of the very few other American jurists who approach Justice Stevens' achievements and renown, surely none ever wrote a first book that focused not on themselves or their views about the law but on other people. In *Five Chiefs*,[2] Justice Stevens did just that, building his narrative around the five leaders of the Supreme Court, from Fred Vinson through John Roberts Jr., whom he knew as a law clerk, advocate, and justice.

Justice Stevens' Washington University remarks about the late Justice Antonin Scalia follow the same form. With great nuance, Justice Stevens explored some of his and Justice Scalia's occasional convergences and more frequent divergences. Their joint history has great consequence for the history of American law. Justices Stevens and Scalia shared the Supreme Court bench for a quarter century, from Justice Scalia's arrival in 1986 until Justice Stevens' retirement in 2010. For much of that time they faced off as the intellectual leaders of the Court's left and right wings, the liberal and conservative bookends of the Rehnquist Court and the early Roberts Court.

In this brief essay, I take a step back from the detail of Justice Stevens' remarks to identify what seem to me some of the most broadly interesting and consequential contrasts that stand behind these two jurists' "liberal" and "conservative" identities. Here I want to set aside my reverence for Justice Stevens and my often critical view of Justice Scalia, in an effort to emulate the analytic integrity of Justice Stevens' remarks. I mean simply to describe

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1. *See* John Paul Stevens, Some Thoughts on a Former Colleague (Apr. 25, 2016).
2. JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 53–227 (2011).

three notable dichotomies that characterize the two Justices' bodies of work: Justice Scalia's methodological purism, traditionalism, and priority for order versus Justice Stevens' methodological eclecticism, openness to change, and dynamism. I think these contrasting facets of Justice Scalia's conservatism and Justice Stevens's liberalism reflect fissures that will continue to define our judicial system's differing perspectives on legal problems.

I. METHODOLOGICAL PURISM VS. METHODOLOGICAL ECLECTICISM

Perhaps the most emblematic feature of Justice Scalia's career was his advocacy and modeling of theoretically precise approaches to judicial decisionmaking. He was committed to firm legal rules and mistrusted flexible standards.[3] He was a rigid statutory textualist, almost singlehandedly persuading or browbeating his colleagues into cutting back their reliance on secondary evidence of statutory meaning, especially legislative history.[4] As a constitutional interpreter, Justice Scalia promoted originalism, culminating in his reliance on "original public meaning" in the landmark Second Amendment case *District of Columbia v. Heller*,[5] the apex of originalist jurisprudence on the Supreme Court. He rendered his interpretive methodologies not just as judicial opinions but as scholarship.[6] No judge ever achieves total purity of method, but Justice Scalia hewed more consistently to his methodological choices than any U.S. judge or justice of his generation.

When Justice Stevens made methodological arguments, they almost always inclined toward less rigidity and greater decisional flexibility. In free speech cases he argued, contrary to the most familiar axiom of First Amendment law, that the Court should not reflexively hold all content-based regulations of speech to violate the Constitution.[7] Early in his tenure he argued that the Court should abandon its tiered structure of variable equal protection scrutiny in favor of a uniform but flexible species of rationality review.[8] He lessened the Court's control over statutory interpretation by

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3. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

4. *See, e.g.*, Graham Cty. Soil & Water Conservation Dist. v. United States, 559 U.S. 280, 302 (2010) (Scalia, J., concurring in the judgment) (criticizing the partial reliance of Justice Stevens' majority opinion on legislative history evidence).

5. 554 U.S. 570 (2008).

6. *See, e.g.*, ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

7. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 277-81 (1981) (Stevens, J., concurring in the judgment).

8. *See* Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring).

articulating the *Chevron* principle of deference to administrative agencies' constructions of statutes within their mandates.[9] As the Court focused the law of racial discrimination ever more intently on white people's asserted grievances, Justice Stevens avidly resisted the application of strict scrutiny to remedial race-based classifications.[10] More generally, Justice Stevens modeled a methodological eclecticism grounded in common law modes of judging. As a statutory interpreter, he was equally comfortable with legislative history and textual deep diving. As a constitutional interpreter, he drew effectively on history, societal consensus, and structural principles. His consistency lay not in any claim to methodological purity but in his readiness to consider, and to thoroughly work through, a wide variety of interpretive evidence.

One highlight of my year as a clerk for Justice Stevens was his battle with Justice Scalia in a challenging statutory construction case about whether the Department of Interior had properly interpreted the Endangered Species Act to restrict projects that interfered with endangered animals' habitats.[11] Justice Stevens for the majority and Justice Scalia in dissent pulled out all their methodological stops, from plain meaning to textual canons of construction to analysis of the broader statutory context. The case is notable for having compelled Justice Scalia to make a rare foray, under protest of course, into legislative history.[12] I seem to recall that Justice Stevens took some minor satisfaction from pushing his colleague onto that unwelcome terrain.

II. TRADITIONALISM VS. OPENNESS TO CHANGE

Justice Scalia sought to anchor our legal system in time-tested practices and precepts. He maintained that, where a constitutional provision's original intent or meaning could not fully resolve a present dispute, the Court should rely on traditional practices to foreclose any temptation of judges to impose their subjective will.[13] He generally refused to recognize individual rights claims where past courts had permitted regulation, as when he led a majority in ending the Court's noncommittal experiment with strict scrutiny for

9. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

10. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 676-79 (1993) (Stevens, J., dissenting) (defending "majority minority" legislative districts).

11. *See* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).

12. *See id.* at 726-29 (Scalia, J., dissenting).

13. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion) (rejecting a substantive due process challenge to a state's presumption of paternity for a marital spouse).

religious accommodation claims under the Free Exercise Clause.[14] Perhaps most vividly, Justice Scalia's series of dissents from the Court's landmark LGBT rights decisions appealed passionately to an account of traditional morality that he viewed the Court's decisions as disrespecting.[15] In other circumstances, though, Justice Scalia identified and extended traditions of protection for rights. After Chief Justice Roberts channeled Justice Scalia to make tradition the central justification for placing some categories of speech outside the First Amendment's protection,[16] Justice Scalia in a follow-up case delivered what may be his boldest defense of free speech rights.[17] His traditionalism also provided crucial backup for his originalism in the *Heller* Second Amendment case.[18]

Even though Justice Stevens had become one of the oldest and longest-tenured Justices in the Supreme Court's history by the time he retired at age 90, he rarely privileged tradition or fixated on the past. To the contrary, in a variety of legal settings he showed a rare capacity to look and think beyond his own experiences. True, no one but Justice Stevens would have dropped a reference in 1995 to the nineteenth century gold rush chronicler Bret Harte in a judicial opinion (or almost anywhere else).[19] Even so, this man who fondly remembers watching Babe Ruth's "called shot" at Wrigley Field in 1932 became one of our era's most forward-looking jurists. Born before the age of radio, he led the Court in celebrating and protecting from reckless regulation "the vast democratic forums of the Internet."[20] Unlikely to have known an out gay man or lesbian until well into his AARP eligibility, he drew the template for the Court's eventual constitutional protections of LGBT rights.[21] Perhaps Justice Stevens' most striking embrace of innovation lay in his willingness, at important junctures, to revise his own prior views. Initially one of affirmative action's fiercest constitutional skeptics,[22] he retired as a consistent advocate for the constitutionality of

14. *See* Emp't Div. v. Smith, 494 U.S. 872 (1990).

15. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2626 31 (2015) (Scalia, J., dissenting) (objecting to the majority's finding of a constitutional right for same-sex couples to marry).

16. *See* United States v. Stevens, 559 U.S. 460 (2010).

17. *See* Brown v. Entertainment Merchants Assn., 564 U.S. 786 (2011) (striking down a state's restriction on the sale to minors of violent video games).

18. *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

19. *See* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465 (1995).

20. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 868 (1997) (striking down federal restrictions on "indecent" online communications).

21. *See* Bowers v. Hardwick, 478 U.S. 186, 214 (1986) (Stevens, J., dissenting) (objecting to the majority's rejection of a constitutional challenge to a state ban on sex between same-sex couples); *cf.* Lawrence v. Texas, 539 U.S. 558, 577-78 (2003) (explicitly adopting the reasoning of Justice Stevens' *Bowers* dissent).

22. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 532 (1980) (Stevens, J., dissenting) (objecting

race-based programs designed to promote equality.[23] A decisive vote for restoring capital punishment in the 1970s,[24] he eventually declared that the death penalty violated the Eighth Amendment's prohibition on cruel and unusual punishment.[25]

III. PREFERENCE FOR ORDER VS. DYNAMISM

Justice Scalia's jurisprudence gave great latitude to institutions that exercise authority to prevent discord and maintain social order. He backed police against criminal suspects much more commonly than some revisionist histories have suggested,[26] disfavored habeas corpus petitions in the name of finality,[27] and usually deferred to the Executive Branch in national security matters.[28] He favored smaller institutions over larger ones in some key contexts. He was a staunch supporter of federalism arguments that increased states' power and reduced the power of the federal government.[29] He also supported institutions of civil society, from the major political parties[30] to religious institutions[31] to business corporations,[32] as counterweights to government authority. He had little time for individuals or groups that sought legal sanction for challenging established arrangements of power – political insurgents, social misfits, or novel rights claimants. In First Amendment law, for example, he was an intellectual architect of the mode I have called managed speech, under which the

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to a federal set-aside program for minority-owned government contractors).

23. *See, e.g.*, Adarand Constructors, Inc. v. Pena, A, 515 U.S. 200, 242 (1995) (Stevens, J. dissenting) (defending a federal incentive program for minority-owned subcontractors).

24. *See* Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion).

25. *See* Baze v. Rees, 553 U.S. 35, 71 (2008) (Stevens, J., concurring in the judgment).

26. *See generally* Barry Friedman, *How Did Justice Scalia Shape American Policing?*, THE ATLANTIC (Aug. 20, 2016), https://www.theatlantic.com/politics/archive/2016/08/scalia-and-american-policing/496604/ (last visited Feb. 28, 2017).

27. *See, e.g.*, Schriro v. Summerlin, 542 U.S. 348 (2004).

28. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 655 (2006) (Scalia, J., dissenting) (objecting to a decision that alleged enemy combatants held at Guantanamo Bay had a right of access to Article III courts).

29. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2642 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (objecting to the Court's rejection of a federalism challenge to the individual mandate of the federal Patient Protection and Affordable Care Act).

30. *See, e.g.*, California Democratic Party v. Jones, 530 U.S. 567 (2000) (striking down California's "blanket primary" system, which the major parties claimed violated their associational rights).

31. *See, e.g.*, McCreary Cty. v. Am. Civil Liberties Union, 545 U.S. 844, 885 (2005) (Scalia, J., dissenting) (objecting to the Court's decision that a Ten Commandments display at a county courthouse violated the Establishment Clause).

32. *See* McConnell v. FEC, 540 U.S. 93, 257-58 (2003) (opinion of Scalia, J.) (calling corporations, in the context of campaign finance, "the voices that best represent the most significant segments of the economy").

Roberts Court has invoked the First Amendment to promote order, favoring the government and powerful institutional speakers while disfavoring politically, socially, and economically marginal speakers.[33]

Justice Stevens displayed a strong nationalistic streak that usually led him to favor federal power over state power[34] and sometimes led him to mistrust the balkanizing tendencies of civil society institutions.[35] His tolerance for dissent had limits, expressed most forcefully in the opinion that probably displeased his fan base more than any other: his defense of legal bans on expressive flag burning.[36] In general, though, he showed a high comfort level with political and social discord. He sharply criticized the Court's purported gambit to avoid constitutional upheaval in *Bush v. Gore*.[37] He did more than perhaps any Justice in the Court's history to check the competitive entrenchment[38] and repressive authority[39] of the major political parties. He often disfavored claims for religious accommodations and for religious institutional prerogatives,[40] but he reserved his strongest skepticism for religious authorities that he viewed as oppressing vulnerable subjects.[41] His free speech opinions deployed the First Amendment as a broad protection for resistance to government's hegemonic power,[42] most dramatically in his extension of free speech protection to civil rights activists' incendiary rhetoric in a high-stakes commercial boycott.[43]

Despite their sharp divergence on many matters of order and dynamism,

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33. *See* United States v. Williams, 553 U.S. 285 (2008) (rejecting a criminal defendant's First Amendment challenge to a federal criminal penalty for pandering nonexistent child pornography); New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196 (2008) (rejecting an unsuccessful candidate's First Amendment challenge to a state's restrictive system for the major political parties' nominations of candidates); Davenport v. Washington Educational Assn., 551 U.S. 177 (2007) (rejecting a public employee labor union's First Amendment challenge to a state's presumption that nonunion workers don't intend to fund unions' political activities). *See generally* GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT (2017).

34. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005) (upholding the application of federal marijuana laws to noncommercial production).

35. *See generally* Gregory P. Magarian, *Justice Stevens, Religion, and Civil Society*, 2011 WIS. L. REV. 733 (2011).

36. *See* Texas v. Johnson, 491 U.S. 397, 436 (1989) (Stevens, J., dissenting).

37. 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).

38. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780 (1983) (striking down a state's restrictive procedures for minor parties to secure ballot access).

39. *See* Branti v. Finkel, 445 U.S. 507 (1980) (expanding public employees' protection from patronage dismissals).

40. *See generally* Magarian, *supra* note 35.

41. *See, e.g.*, Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 711 (1994) (Stevens, J., concurring) (arguing that dangers of coercive religious indoctrination helped to justify the Court's Establishment Clause rejection of a sect-specific public school district).

42. *See generally* Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens's Free Speech Jurisprudence*, 74 FORDHAM L. REV. 2201 (2006).

43. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

Justice Scalia's sense of constitutional propriety occasionally found common cause with Justice Stevens' priority for individual rights. In their most notable convergence, Justice Scalia wrote an important dissent, joined by Justice Stevens alone, from the Court's allowance for the federal government to detain a U.S. citizen as an enemy combatant.[44]

CONCLUSION

The divide between liberalism and conservatism in judicial decisions inspires a lot of criticism, some of it well founded. At a deep level, however, "liberal" and "conservative" describe inevitable, sometimes constructive differences in how judges do their work. Justice Scalia's conservatism encompassed his methodological purism, traditionalism, and preference for order. Justice Stevens's liberalism encompassed his methodological eclecticism, openness to change, and dynamism. Most of us have preferences as between these opposing tendencies, but to argue that one set of tendencies is right and the other wrong by some neutral or objective measure would be absurd. In fighting along these fault lines for a quarter century, Justices Stevens and Scalia did the work of the Supreme Court, at a high level of analytic abstraction, as it needs to be done. Understanding their contrasting elaborations of liberal and conservative approaches to judging can help us argue more cogently and honestly about the new problems, and new iterations of old problems, that will confront us going forward.

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44. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).