

Michigan Law Review

Volume 118 | Issue 6

2020

The Passion of John Paul Stevens

Linda Greenhouse
Yale Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Judges Commons](#), [Legal Biography Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Linda Greenhouse, *The Passion of John Paul Stevens*, 118 MICH. L. REV. 939 (2020).
Available at: <https://repository.law.umich.edu/mlr/vol118/iss6/3>

<https://doi.org/10.36644/mlr.118.6.passion>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE PASSION OF JOHN PAUL STEVENS

Linda Greenhouse*

THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS. By *John Paul Stevens*. New York: Little, Brown and Company. 2019. Pp. ix, 549. \$35.

I.

Justice John Paul Stevens was more celebrated in retirement and after his death, on July 16, 2019 at age ninety-nine, than he was during his nearly thirty-five years on the Supreme Court.¹ It's not difficult to understand why. His retirement in 2010 freed him from the constraints inherent in serving on a collegial court. No longer did he have to worry about accommodating colleagues whose "joins" he might need to create or hold a majority—a particular challenge during the final sixteen years of his tenure, when he was the senior associate justice, responsible for assigning the majority opinion in cases in which he and the chief justice diverged and the chief was in dissent.²

No longer was the judicial opinion the only form of literature open to him for expressing dismay about the Court's steady shift to the right on issues he cared about. (Although in one late dissenting opinion, in the Seattle and Louisville school case in 2007,³ he permitted himself an unusually personal expression of "righteous anger"⁴ when he wrote: "It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision."⁵)

At a still-energetic age ninety, the retired justice became a public intellectual. Beginning just months after leaving the Court, he wrote eight articles for the *New York Review of Books* on such topics as hate speech, the death

* Knight Distinguished Journalist in Residence and Joseph M. Goldstein Lecturer in Law, Yale Law School.

1. Linda Greenhouse, *Supreme Court Justice John Paul Stevens, Who Led Liberal Wing, Dies at 99*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/us/john-paul-stevens-dead.html> [<https://perma.cc/MX8R-B97S>].

2. *Supreme Court Procedures*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/GWC9-W27N>].

3. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

4. Andrew Siegel, *Justice Stevens and the Seattle Schools Case: A Case Study on the Role of Righteous Anger in Constitutional Discourse*, 43 U.C. DAVIS L. REV. 927 (2010).

5. *Parents Involved*, 551 U.S. at 803 (Stevens, J., dissenting).

penalty, and statutory interpretation;⁶ the last article, an essay on Judge Jeffrey Sutton's book about state constitutions, appeared in December 2018.⁷ In 2019, he published a book review essay in Volume 117 of this law review.⁸ In March 2018, weeks after the gunfire murders of seventeen students and staff members at a high school in Parkland, Florida, he wrote a *New York Times* op-ed calling for repeal of the Second Amendment as "a relic of the 18th century."⁹

He accepted many invitations to give speeches and participate in symposia; in one particularly interesting speech titled *Originalism and History*, delivered at a *Georgia Law Review* symposium in 2013, he recounted his experience watching the movie *Gone with the Wind* shortly after its release in 1939.¹⁰ He used that memory as a frame for dissecting the popular movie's distortions of post-Civil War history and to then make a larger point about the unreliability of history as a tool for constitutional interpretation. Referring with evident disdain to "the so-called Jurisprudence of Original Intent," he said: "My conclusions are twofold: first, history is at best an inexact field of study, particularly when employed by judges. Second, the doctrine of original intent may identify a floor that includes some of a rule's coverage, but it is never a sufficient basis for defining the ceiling."¹¹

In retirement, Justice Stevens wrote two books in addition to the one under review. The more recent, *Six Amendments: How and Why We Should Change the Constitution*,¹² is straightforward in its recommendations for overturning *Citizens United*,¹³ *Heller*,¹⁴ and the anticommandeering princi-

6. John Paul Stevens, N.Y. REV. BOOKS, <https://www.nybooks.com/contributors/john-paul-stevens/> [https://perma.cc/9RCU-65J9].

7. John Paul Stevens, *The Other Constitutions*, N.Y. REV. BOOKS (Dec. 6, 2018) (reviewing JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018)), <https://www.nybooks.com/articles/2018/12/06/other-constitutions/> [https://perma.cc/JH29-B5ZQ]. All eight of the articles are available at <https://www.nybooks.com/contributors/john-paul-stevens/> [https://perma.cc/S5AV-32K8].

8. John Paul Stevens, *Review by Justice John Paul Stevens (Ret.)*, 117 MICH. L. REV. 1019 (2019) (reviewing NOAH FELDMAN, *THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT* (2017)).

9. John Paul Stevens, *Opinion, Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html> [https://perma.cc/85CU-BAC8]; see Emily Shapiro et al., *Parkland Shooting 2 Years Later: Remembering the 17 Victims of the School Massacre*, ABC News (Feb. 14, 2020, 9:59 AM), <https://abcnews.go.com/US/teacher-coach14-year-freshman-florida-high-school-massacre/story?id=53092879> [https://perma.cc/6C5S-FPQH].

10. Justice John Paul Stevens (Ret.), *Address at the University of Georgia Law Review Symposium: Originalism and History* 5 (Nov. 6, 2013), [https://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech\(Georgia\)_11-06-2013.pdf](https://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech(Georgia)_11-06-2013.pdf) [https://perma.cc/9E7K-WA5R].

11. *Id.*

12. JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* (2014).

13. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

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

ple of *Printz v. United States*;¹⁵ abolishing capital punishment and political gerrymandering; and curbing governments' use of the sovereign immunity defense. These had been the subjects of Justice Stevens's most notable dissenting opinions, as well as of his writing and speaking during the years between his retirement and the book's publication.

I focus briefly here on the first of the books, *Five Chiefs: A Supreme Court Memoir*,¹⁶ published in 2011, barely a year after Justice Stevens's retirement. In both structure and style, this little book (248 pages of text, plus an appendix containing the text of the Constitution) offers a foretaste of the 531-page *The Making of a Justice: Reflections on My First 94 Years*¹⁷ that the justice published two months before his death. In that way, this first book offers a prelude to the eventual summing up, and it pays to consider the two together. (Although it seems odd to call the death of a ninety-nine-year-old man unexpected, his in fact was; the previous week, he had joined Justices Ginsburg and Sotomayor at a conference in Lisbon during which, Justice Ginsburg said in her eulogy, he was completely engaged, in command of detail, and fully enjoying himself.¹⁸)

The five chiefs of the book's title are the five chief justices the author encountered during his career, beginning with his clerkship for Justice Wiley Rutledge on the Vinson Court during the 1947 Term and concluding with the first five Terms of the Roberts Court.¹⁹ In between, we encounter Chief Justice Warren, before whom the young John Paul Stevens, practicing anti-trust law with a Chicago firm, argued his only Supreme Court case;²⁰ Chief Justice Burger, whose inadequacies as a manager Justice Stevens describes in pointed detail;²¹ Chief Justice Rehnquist, with whom he disagreed profound-

15. 521 U.S. 898 (1997).

16. JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* (2011).

17. John Paul Stevens was an Associate Justice of the United States Supreme Court from 1975 to 2010.

18. Ruth Bader Ginsburg, Remarks for Justice John Paul Stevens's Funeral (July 23, 2019), <https://www.cnn.com/2019/07/23/politics/ruth-bader-ginsburg-eulogy-john-paul-stevens/index.html> [<https://perma.cc/38V7-TJB8>]

19. STEVENS, *supra* note 16, at 6, 58–59.

20. *Id.* at 93–94.

21. *Id.* at 154–58. Some examples Justice Stevens gives are well known, such as Chief Justice Burger's manipulation of the opinion-assignment function. See, e.g., BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 65 (1979). But he offered an additional example of the Chief Justice's pettiness that I found particularly striking. Burger objected to a new justice's use in opinions of the conventional word "we" to describe controlling precedent, evidently in the belief that admission to the fellowship of "we" had to be earned:

He suggested that a new justice needed at least two years to become comfortable in dealing with the awesome responsibilities that membership on the Court entailed. Moreover, he argued, it was not accurate to use the word *we* to describe a group of judges that did not include the author. There is no doubt some merit to the view he expressed. I do not share it because I remain persuaded that the most junior justice is just as much an equal of the chief as their seven other colleagues.

STEVENS, *supra* note 16, at 158 (emphasis in original).

ly on questions of federalism and sovereign immunity;²² and Chief Justice Roberts, who was a law clerk early in Justice Stevens's tenure and about whom Justice Stevens writes with admiration for his personal qualities if not for his jurisprudence.²³

Five Chiefs was received with more indulgence than enthusiasm. Garrett Epps, writing in the *Atlantic*, called it a "reticent finger exercise."²⁴ Yet there is a good deal more substance in the book than appears on the surface; clues to how the author has processed his long experience at the apex of the legal world are hiding in plain sight for readers with open eyes. One example is his comment on *Harmelin v. Michigan*,²⁵ an Eighth Amendment case in which the 5–4 majority rejected a proportionality challenge to a mandatory life sentence imposed on a man convicted of possessing less than a pound and a half of cocaine. Of the five members of the majority, three were "relatively new occupants of the seats formerly occupied by Justices Stewart, Powell, and Brennan," Justice Stevens writes, referring to Justices O'Connor, Kennedy, and Souter.²⁶

I am persuaded that all three of those then recently retired justices would have shared Justice White's [dissenting] views in *Harmelin*. Moreover, just as the meaning of the Eighth Amendment itself responds to evolving standards of decency in a maturing society, so also may the views of individual justices become more civilized after twenty years of service on the Court.²⁷

More civilized? Some months after *Five Chiefs* was published, I ran into Justice Stevens in New York City. "I think there's a lot more in your book than people seem to realize," I told him. His eyes twinkled. "You're right," he said.

II.

The Making of a Justice shares important features with *Five Chiefs*. It is relentlessly chronological, meaning that it is the reader who has to extract a coherent narrative from the doctrinal thicket. There is no index entry for "abortion," for example, although Justice Stevens's role in preserving what remains of *Roe v. Wade*²⁸ was substantial and well documented.²⁹ Neither is

22. STEVENS, *supra* note 16, at 197 ("Like the gold stripes on his robes, Chief Justice Rehnquist's writing about sovereignty was ostentatious and more reflective of the ancient British monarchy than our modern republic.").

23. *Id.* at 210–11, 218–21.

24. Garrett Epps, *Five Chiefs: John Paul Stevens and the Library of Babel*, ATLANTIC (Oct. 19, 2011), <https://www.theatlantic.com/national/archive/2011/10/five-chiefs-john-paul-stevens-and-the-library-of-babel/246997/> [https://perma.cc/8K9S-HCW9].

25. 501 U.S. 957 (1991).

26. See STEVENS, *supra* note 16, at 226.

27. *Id.*

28. 410 U.S. 113 (1973).

there an entry for “death penalty” or “capital punishment,” despite the fact that his repudiation of the death penalty in *Baze v. Rees*³⁰ late in his tenure was one of the major developments of the 2007 Term;³¹ his jurisprudential journey to that endpoint from having written the plurality opinion that upheld the Texas death penalty statute in one of the early post-*Furman* cases,³² just months after joining the Court, is one of the most fascinating aspects of his career.³³ That individual case names are indexed is not useful to a lay reader who doesn’t know the names—and this is a trade book for nonlawyers. In fact, Justice Stevens explains in a prologue that his goal was to “write an account of some of my remembrances of a past that included both mundane and unusual experiences that my nine grandchildren and thirteen great-grandchildren may one day enjoy reading” (p. 3).

Perhaps the index’s deficiencies reflect only on the indexer, but I have a different theory. It is that Justice Stevens didn’t think in categories. As he went about his work, Term in and Term out, he didn’t have an agenda or a long-term project. He was disdainful of those who did, writing with uncharacteristic asperity that by the 1983 Term, “a majority of the Court had formed the view that its mission was to roll back the Warren Court’s procedural protections for criminal defendants” and was on a “forced march against the exclusionary rule” (p. 205). Having a mission of this sort was, he believed, incompatible with the judicial role. He didn’t arrive in chambers on the first Monday of each October with a plan for how a particular doctrine should emerge at the end of June; rather, his only plan was to decide each case as it came along. He said as much when he visited Yale Law School in 2012 and sat with me for an onstage interview. After we had discussed his observations about the death penalty that led to his opinion in *Baze*, I probed for some deeper account of his evolution on the question of capital punishment. I asked: “So, in your consideration of the death penalty over thirty-plus years, did you wrestle with the issue consciously or was it something that just kind of grew on you as you saw the way the Court was handling some of these cases?”

He didn’t take the bait. “Well,” he answered, “you’re always troubled in every case—every case is troublesome for all sorts of different reasons. But I

29. See, e.g., Linda Greenhouse, *Justice John Paul Stevens as Abortion-Rights Strategist*, 43 U.C. DAVIS L. REV. 749 (2010).

30. 553 U.S. 35 (2008).

31. See Linda Greenhouse, *Supreme Court Allows Lethal Injection for Execution*, N.Y. TIMES (Apr. 17, 2008), <https://www.nytimes.com/2008/04/17/us/16cnd-scotus.html> [<https://perma.cc/3PYV-PJW7>] (“The set of opinions in this case put the personalities and priorities of the individual justices on display as much as any case in recent years.” (citation omitted)).

32. *Jurek v. Texas*, 428 U.S. 262 (1976).

33. Linda Greenhouse, *Justice Stevens Renounces Capital Punishment*, N.Y. TIMES (Apr. 18, 2008), <https://www.nytimes.com/2008/04/18/washington/18memo.html> [<https://perma.cc/EH9V-9Z2N>] (describing Justice Stevens’s transition from *Jurek* to *Baze* as “a remarkable journey for a Republican antitrust lawyer”).

wouldn't say it was a continuing struggle or anything like that. You have to take the cases as they arise and do the best you can with each one."³⁴

Reviews of *The Making of a Justice* appeared while Justice Stevens was still alive, and reviewers tended to treat the book gently.³⁵ In fact, it is not a fully satisfying book. Its largely uninflected prose makes for frustrating reading: we often learn what happened in a given case without knowing why it turned out that way or what Justice Stevens thought about it—or even why he selected a particular case to write about. For example, *Nevada Department of Human Resources v. Hibbs* was a leading case of the 2002 Term in which Chief Justice Rehnquist broke with his conservative colleagues, writing the majority opinion that upheld the federal Family and Medical Leave Act's application to state employees.³⁶ The decision was a surprise, coming after a series of cases in which a narrow majority had immunized state governments from the reach of various federal civil rights laws.³⁷ In some respects, *Hibbs* marked the end of what had come to be known as the Rehnquist Court's federalism revolution.³⁸ But beyond noting that "[m]any observers familiar with Chief Justice Rehnquist's views of federalism and states' rights in particular were no doubt surprised by his vote and opinion in that case" (p. 402), Justice Stevens tells us nothing about his own response to the decision or what might have happened behind the scenes to produce it.

He briefly discusses *Craig v. Boren*,³⁹ the 1976 decision in which the Court formally adopted the regime of three-tiered scrutiny for claims of unconstitutional discrimination (pp. 154–55). In his separate concurrence, which was to become one of his best-known opinions, Justice Stevens renounced this approach, declaring: "There is only one Equal Protection Clause. It requires every State to govern impartially."⁴⁰ In the book, he adds, "I am still convinced that carefully analyzing in each case the reasons why a

34. John Paul Stevens with Linda Greenhouse, *A Conversation with Justice Stevens*, 30 YALE L. & POL'Y REV. 303, 306 (2012).

35. One notable exception was a scathing review on *Law & Liberty* by Michael S. Greve, who called it an "exasperating" and "mind-numbing summary of cases and opinions." Michael S. Greve, *How to Think Like John Paul Stevens, and How Not to*, LAW & LIBERTY (May 29, 2019), <https://www.lawliberty.org/2019/05/29/how-to-think-like-john-paul-stevens-and-how-not-to> [<https://perma.cc/7TDT-4C9V>].

36. 538 U.S. 721 (2003).

37. See, e.g., Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that individuals may not sue states for violations of the Americans with Disabilities Act of 1990); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act of 1967 exceeded Congress's authority to abrogate states' Eleventh Amendment immunity).

38. Or at least the beginning of the end. Two years later, in Chief Justice Rehnquist's final Term, Justice Stevens wrote the majority opinion, over the Chief Justice's dissent, in *Gonzales v. Raich*, 545 U.S. 1 (2005), upholding federal authority under the Commerce Clause to prohibit the intrastate cultivation and possession of marijuana in compliance with state medical marijuana laws.

39. 429 U.S. 190 (1976).

40. *Craig*, 429 U.S. at 211.

state enacts legislation treating different classes of its citizens differently is far wiser than applying a different level of scrutiny based on the class of persons subject to disparate treatment” (p. 155).

Given his attention to the development of equal protection jurisprudence during the early years of his time on the Court, I was surprised to find no reference in the book to a crucially important equal protection case that was also decided in 1976, albeit in the preceding Term. That case was *Washington v. Davis*,⁴¹ in which the Court for the first time interpreted the Fourteenth Amendment to require proof of purposeful discrimination in order to make out a violation of the Equal Protection Clause.

The significance of the Court’s turn in *Washington v. Davis*, decided by a 7–2 vote with only Justices Brennan and Marshall dissenting, was not immediately apparent because the Court appeared open to a plaintiff-friendly interpretation of the necessary proof.⁴² Stevens wrote a concurring opinion. It would be “unrealistic,” he said, “to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker.”⁴³ Rather, “[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.”⁴⁴ And then he added this important sentence: “For normally the actor is presumed to have intended the natural consequences of his deeds.”⁴⁵

It took a second equal protection case three years later, *Personnel Administrator of Massachusetts v. Feeney*,⁴⁶ to begin to make clear that the Court had in fact set a high bar for proof of unconstitutional discrimination. Deciding a case that it had earlier remanded to a three-judge district court for reconsideration in light of *Washington v. Davis*, the Court rejected a constitutional challenge to a state’s veterans-preference law for public employment, a law that had the foreseeable effect of making it nearly impossible for women to qualify for state jobs. Although that was not the law’s intent, it was its “natural consequence,” given the paucity of female veterans compared with men who had seen military service.⁴⁷ (Of those eligible for the benefit, 98.2 percent were men when the litigation began.⁴⁸) The vote was the same 7–2.⁴⁹ Justice Stevens concurred on the ground that while many women

41. 426 U.S. 229 (1976).

42. Justice White, writing for the majority, explained that “[t]his is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law’s disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination.” *Davis*, 426 U.S. at 241.

43. *Id.* at 253 (Stevens, J., concurring).

44. *Id.*

45. *Id.*

46. 442 U.S. 256 (1979).

47. *See Feeney*, 442 U.S. at 278–81.

48. *Id.* at 270.

49. *Id.* at 258.

could not qualify for the veterans preference, neither could the many men who were not veterans.⁵⁰

Feeney, like *Washington v. Davis*, goes unmentioned in *The Making of a Justice*. Did equal protection jurisprudence turn out the way Justice Stevens expected? I wonder whether he ever had any regret about having joined these decisions, perhaps similar to the unease he expressed about his role in the 1976 Texas death penalty case, writing that “if I had carefully stated the facts in *Jurek v. Texas*, I might well have changed my vote in that case” (p. 143).

I don’t think Justice Stevens deliberately avoided discussing the equal protection cases. Rather, I think their omission, and the randomness of the cases mentioned throughout the book, is the product of the method he used to construct his chronological Term-by-Term accounts. He told his former law clerk Kate Shaw in a June 2019 SCOTUSBlog interview that while he wrote the biographical portions of the book largely from memory, “[w]hen I got up to the court, it occurred to me that I should ask my law clerks for help, and I wrote a letter to all of the clerks, asking them for their memories of their own terms.”⁵¹ Perhaps not all the clerks responded, or perhaps those who did remembered vividly only the cases on which they had worked.

Despite these frustrations, there is much of value in *The Making of a Justice*, many needles to find in this haystack. There is a lively behind-the-scenes account of *Bush v. Gore*,⁵² including the suggestion that law clerks working for the conservative justices initially exaggerated the vote count in support of the supposed equal protection violation by incorrectly implying, in the proposed final draft of the per curiam opinion, that Justice Stevens agreed that there was such a violation (pp. 373–74). But Justice Stevens explains that “[b]oth Ruth Ginsburg and I saw no equal protection problem with the recount” (p. 373). This “attempt to show a supermajority on the equal protection question” was in fact a “glaring error in that the math did not add up,” Justice Stevens writes, adding that the effort “did little to hide the fact that the end result was a five-to-four decision to halt the recounting of votes in Florida” (pp. 373–74).

Justice Stevens spoke with personal warmth about nearly all his colleagues, even those with whom he usually disagreed, making his clenched-teeth description of Justice Samuel Alito all the more noticeable.⁵³ Here is how he describes Justice Alito, who took Justice O’Connor’s seat in the middle of the 2005 Term:

50. *Id.* at 281 (Stevens, J., concurring).

51. Kate Shaw, *Ask the Author: Interview with Justice John Paul Stevens*, SCOTUSBLOG (June 12, 2019, 10:26 AM), <https://www.scotusblog.com/2019/06/ask-the-author-interview-with-justice-john-paul-stevens/> [<https://perma.cc/E5NW-JNTM>].

52. 531 U.S. 98 (2000).

53. See, e.g., pp. 225–26 (detailing how Justice Stevens and Justice Scalia “became good friends as soon as [Scalia] joined the Court”).

He was well known by opponents for his vote to uphold the constitutionality of a Pennsylvania statute requiring (with certain exceptions) a wife to obtain her husband's consent before obtaining an abortion. At his confirmation hearings, however, he was strongly supported by all of his colleagues on the Third Circuit. (p. 450)

The “however” hangs in the air. Is his disapproval aimed at Justice Alito (whose opinion on the spousal notice requirement the Court had overturned fourteen years earlier in *Planned Parenthood v. Casey*⁵⁴)? At the Third Circuit judges? At both?

After several hundred pages of largely judgment-free descriptions of cases and decisions, Justice Stevens adopts a different tone when he comes to *District of Columbia v. Heller*,⁵⁵ “unquestionably the most clearly incorrect decision that the Court announced during my tenure on the bench” (p. 482). It was also “the worst self-inflicted wound in the Court’s history” and “the most disappointing task on which I worked as a member of the Court” (p. 485). Here there is real passion. Rereading *Heller*’s pages as I wrote this Review in the days following the mass murders by gunmen in El Paso and Dayton,⁵⁶ I felt almost grateful that Justice Stevens had not lived another few weeks to have his worst fears about gun violence confirmed.

He writes that after the justices had voted in conference to recognize an individual right to gun ownership under the Second Amendment, he took the unusual—and, for him, unique—step of circulating his dissenting opinion to the other justices in advance of Justice Scalia’s circulation of his majority opinion: “After the oral argument and despite the narrow vote at our conference about the case, I continued to think it possible to persuade either Tony Kennedy or Clarence Thomas to change his vote” (p. 485). He thought he was getting close with Justice Kennedy, but

I now realize that I failed to emphasize sufficiently the human aspects of the issue as providing unanswerable support for the stare decisis argument for affirmance. After all, Tony had been one of the three decisive votes that had saved *Roe v. Wade* from being overruled in *Planned Parenthood v. Casey*. (p. 485)

In retrospect, of course, the notion that support for reproductive freedom could have translated for Justice Kennedy into support for gun control sounds naïve, but the effort was evidently not without some benefit:

In the end of course, beating Nino to the punch did not change the result, but I do think it forced him to significantly revise his opinion to respond to the points I raised in my dissent. And although I failed to persuade Tony to

54. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 888–99 (1992).

55. 554 U.S. 570 (2008).

56. Campbell Robertson et al., *Back-to-Back Outbreaks of Gun Violence in El Paso and Dayton Stun Country*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/us/mass-shootings-dayton-el-paso.html> [<https://perma.cc/AU7C-TVQT>].

change his vote, I think our talks may have contributed to his insisting on some important changes before signing on to the Court's opinion. (p. 487)

To the extent that *Heller* placed some brakes on the Second Amendment as the Court unleashed it on the world, whether those brakes will hold depends on a new Court from which not only Justice Stevens is gone but Justices Scalia and Kennedy as well. The reason we celebrate Justice Stevens in retirement and in death is that we are only now coming to realize how valuable he was in life. He was moved by the very things that are missing now in our public life: the power of facts, of logic, and of approaching each problem with an open mind, ready to be persuaded or, if his luck was running, to persuade.

Justice Stevens ended each of his speeches with what over the years became a signature line: "Thank you for your attention." *The Making of a Justice* may try our patience at times, but it ultimately rewards our attention.