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Commemorative Essays

JUSTICE STEVENS AND THE PROJECT OF PERFECTING THE CONSTITUTION

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I had the privilege of clerking for Justice Stevens during the 2007–2008 Term.[1] When my clerkship ended in July 2008, I took an unpaid legal position on then-Senator Barack Obama's presidential campaign. The shift was dramatic: within weeks I'd traded the silent, marble halls of the Supreme Court for the cacophonous, chaotic, and wildly crowded offices of a presidential campaign's state headquarters in the homestretch. The whiplash was intense but the work seemed vital, so I bought a good set of noise-canceling headphones, settled into supporter housing (first a couch; later an attic), and got to work.

That campaign work led to a position as a lawyer on the presidential transition, and later to the White House Counsel's Office. The transition's legal operation was tiny, so the lawyers touched a dizzying array of issues. At one point, during a discussion of matters related to the presidential inauguration, I semi-seriously proposed that Justice Stevens be invited to administer the presidential oath of office. Like all former Stevens clerks, I was fiercely loyal to the Justice; it also seemed to me that as the Justice was likely to retire before long, and was a Chicagoan to boot, it would be an appropriate honor for the president-elect's team to extend. But it was a dumb idea, as I suspect the Justice himself would have gently explained if I had proposed it to him directly. Fortunately things never got that far, as others in the office killed the idea quickly—presidents are typically sworn in by Chief Justices,[2] and beginning a new president's term by slighting the most powerful jurist in the country is ordinarily discouraged. (In my defense, there's every indication that Justice Stevens would have gotten the oath right on his first try; Chief Justice Roberts flubbed his administration of the oath,

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[1] I've written about that experience a bit in the pages of this *Law Review*. *See* Katherine Shaw, *Reflections on OT07*, 106 NW. U. L. REV. 833 (2012).

[2] *See Federal Judiciary Continues Long History of Swearing In President*, U.S. CTS. (Jan. 22, 2013), https://www.uscourts.gov/news/2013/01/22/federal-judiciary-continues-long-history-swearing-president [https://perma.cc/7G8N-6TQW].

necessitating a private do-over the next day and creating some short-lived uncertainty about the constitutional status of actions taken prior to the readministration of the oath.[3])

Although my idea was quickly rejected, the decision *was* made to invite Justice Stevens to swear in Vice President Biden, and Justice Stevens was by all accounts delighted to brave that day's bitter cold to take part in the ceremony. His administration of the oath was flawless, and there's a wonderful picture of the moment, with the Justice and Vice President Biden surrounded by former Presidents Bush 41, Clinton, and Bush 43, together with the Obamas, the Bidens, and a number of other officials. In 2010, when I was serving in the White House Counsel's Office, several other former Stevens clerks and I had the happy task of delivering a framed print of the picture to the Justice, accompanied by a handwritten note from Vice President Biden, who as a young Senator on the Judiciary Committee had voted to confirm Justice Stevens to the Court in 1975.[4]

Although Justice Stevens was glad to participate in the administration of the vice presidential oath, he held strong views about how and where *Justices* should take their own oaths of office. The Justice was a committed guardian of the Court's independence, and he thought it critical that Justices quickly distance themselves from political actors, in particular appointing presidents, following confirmation. As he wrote in his memoir *Five Chiefs*, he viewed it as quite improper for newly confirmed Justices to be sworn in at the White House.[5] He explained that he had been sworn in at the Supreme Court, with President Ford in attendance to witness the event, but that thereafter the practice had changed: Chief Justice Rehnquist and Justices Scalia and Kennedy were all sworn in at the White House, rather than the Court.[6] Justice Stevens explained that President Reagan's remarks at Justice Kennedy's swearing-in had been "offensive and inappropriate," so much so that they had convinced him to avoid such ceremonies in the future (although he made an exception to administer the oath to John Roberts following Roberts's confirmation as Chief Justice in 2005).[7] Due in no small part to Justice Stevens's views on the matter, which a number of Stevens clerks in

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[3] *See* Jeff Zeleny, *I Really Do Swear, Faithfully: Obama and Roberts Try Again*, N.Y. TIMES (Jan. 21, 2009), https://www.nytimes.com/2009/01/22/us/politics/22oath.html [https://perma.cc/ZKA4-MWDX]; JEFFREY TOOBIN, THE OATH 8–15 (2012); *see also* Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 327–28 (2016).

[4] 121 CONG. REC. 41128 (daily ed. Dec. 17, 1975) (Senate roll call).

[5] JOHN PAUL STEVENS, FIVE CHIEFS 207 (2011) ("The president and the Senate play critical roles in the nomination and confirmation process. After that process ends, however, the 'separate but equal' regime takes over.").

[6] *Id*.

[7] *Id*. at 207–08.

the Obama White House channeled, Justices Sotomayor and Kagan were both sworn in at the Court.[8] Alas, the practice appears to have reverted back to the norm Justice Stevens decried: both Justice Gorsuch in 2017 and Justice Kavanaugh in 2018 took their oaths at the White House.[9] Although I never spoke to Justice Stevens about this, I am quite sure he disapproved. But the Justice was rarely discouraged when his positions failed to carry the day, and he always took the long view.

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I'm not sure if the Justice had this same equanimity during his early days on the Court, but it was on full display when I clerked for him. By then he had been on the Court long enough to see his dissenting positions come to command majorities in more than one case. I always got the sense that he took special pride in the afterlife of his dissent in *Bowers v. Hardwick*.[10] He had been one of three dissenters from the Court's 1986 decision upholding Georgia's criminal sodomy statute; seventeen years later, he assigned Justice Kennedy the majority opinion in *Lawrence v. Texas*, in which the Court overruled *Bowers*, with Justice Kennedy explaining along the way that "Justice Stevens' analysis . . . should have been controlling in *Bowers* and should control here."[11]

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[8] Charlie Savage, *Sotomayor Sworn In as Supreme Court Justice*, N.Y. TIMES (Aug. 8, 2009), https://www.nytimes.com/2009/08/09/us/politics/09sotomayor.html [https://perma.cc/KS7F-GX73]; Peter Baker, *Kagan Is Sworn In as Fourth Woman, and 112th Justice, on the Supreme Court*, N.Y. TIMES (Aug. 7, 2010), https://www.nytimes.com/2010/08/08/us/08kagan.html [https://perma.cc/PPH6-C2ZS].

[9] Robert Barnes & Ashley Parker, *Neil M. Gorsuch Sworn In as 113th Supreme Court Justice*, WASH. POST (Apr. 10, 2017), https://www.washingtonpost.com/politics/courts_law/gorsuch-to-be-sworn-in-to-supreme-court-today-in-two-ceremonies/2017/04/10/9ac361fe-1ddb-11e7-ad74-3a742a6e93a7_story.html [https://perma.cc/EEU8-PCZ6]; Lauren Egan, *Trump Apologizes to Kavanaugh on 'Behalf of Our Nation,' Says Judge 'Proven Innocent,'* NBCNews.com (Oct. 8, 2018), https://www.nbcnews.com/politics/white-house/trump-apologizes-behalf-nation-kavanaugh-says-he-was-proven-innocent-n917956 [https://perma.cc/KCP8-84ZE]; *see also* Michael Eric Herz, *Why Kavanaugh Should Not Attend the White House Ceremony,* N.Y. TIMES (Oct. 8, 2018), https://www.nytimes.com/2018/10/08/opinion/kavanaugh-white-house-ceremony.html [https://perma.cc/W5UE-N5U4]. (Note that in both cases, public White House ceremonies actually followed private oaths administered immediately following confirmation, *see* Barnes & Parker, *supra*; Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in the Senate,* N.Y. TIMES, (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html [https://perma.cc/NE8B-S2Q2].)

[10] Bowers v. Hardwick, 478 U.S. 186, 214 (1986) (Stevens, J., dissenting). This was not Justice Stevens's first such vote; indeed, a decade earlier, during the Justice's first term on the Court, he noted his disagreement with the Court's summary affirmance of an opinion upholding Virginia's criminal sodomy statute. *See* Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976) (mem.) (Justice Stevens, together with Justices Brennan and Marshall, "would note probable jurisdiction and set case for oral argument.").

[11] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

Of course, most of the time, the Justice's losses did not turn to wins, and the Term I clerked for him featured an especially difficult loss: the Court's 5–4 decision in the Second Amendment case *District of Columbia v. Heller*,[12] which the Justice later described as the worst decision of his time on the Court.[13] Following the Justice's retirement, both the case and the Second Amendment continued to feature prominently in his public writings. Indeed, one of his most significant acts of public engagement following his 2010 retirement was his publication of the book *Six Amendments*. The other two books he wrote in those years—*Five Chiefs* and *The Making of a Justice*—were both memoirs of sorts. But *Six Amendments* was different: a tight and persuasive articulation of some of his most strongly held views about the Constitution's shortcomings. As he explained in the book's prologue, the Constitution, though "far 'more perfect' than its predecessor," still contained "important imperfections;"[14] in addition, he contended, in recent decades, "rules crafted by a slim majority of the members of the Supreme Court have had such a profound and unfortunate impact on our basic law that resort to the process of amendment is warranted."[15]

In the book he argued, among other things, that the Eighth Amendment should be revised to append the words "such as the death penalty" to the Constitution's prohibition of cruel and unusual punishments;[16] that the best response to what he viewed as the Court's grave error in *Citizens United*[17] was a constitutional amendment to explicitly protect legislatures' ability to impose reasonable regulations on money in politics;[18] and, perhaps most significantly, that the Second Amendment's protection of a right to "keep and bear Arms," should include the explicit limitation, "when serving in the Militia," a change he contended would more clearly align the text of the Amendment with its true purpose.[19]

It felt almost taboo for a Supreme Court Justice, even a retired one, to critique the Constitution in such a sweeping and public way. But Justice Stevens was a fiercely independent thinker—I'd even say an iconoclast,

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[12] District of Columbia v. Heller, 554 U.S. 570 (2008).

[13] John Paul Stevens, *The Supreme Court's Worst Decision of My Tenure*, ATLANTIC (May 14, 2019), https://www.theatlantic.com/ideas/archive/2019/05/john-paul-stevens-court-failed-gun-control/587272/ [https://perma.cc/54ZN-64EZ].

[14] JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 4 (2014).

[15] *Id*. at 11.

[16] *Id.* at 122–23.

[17] Citizens United v. FEC, 558 U.S. 310 (2010).

[18] STEVENS, *supra* note 14, at 79.

[19] *Id*. at 132–33; *see also* JOHN PAUL STEVENS, THE MAKING OF A JUSTICE 482–87 (2019); District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting).

though there's some disagreement about the accuracy of that descriptor[20]—and the Constitution was no exception.

The Justice's ability to take the long view, and his appreciation of the Constitution's fallibility, were no doubt related to the legal and constitutional change he had witnessed over the course of his long life and career. By the time I clerked for him, the Justice was already history personified: at the time of his 1947 clerkship for Justice Wiley Rutledge, the Supreme Court building was still a fairly new addition to the capitol, *Brown v. Board of Education* was nearly a decade away, and the Court was populated by the likes of Robert Jackson, Felix Frankfurter, Hugo Black, and William O. Douglas.[21] But the Justice's life spanned still more American and constitutional history. He was born the year the Nineteenth Amendment was ratified, and was a teenager when the Twenty-First Amendment ended the country's experiment with Prohibition.[22] So he had witnessed and participated in the project of perfecting the Constitution through both interpretation and amendment.

I sometimes wonder whether the Justice's experience with Prohibition had any impact on his views of the Constitution's imperfections. His memories of that historical episode clearly impacted his thinking about at least one case, *Morse v. Frederick*.[23] The majority in that 2007 case found that the First Amendment did *not* protect from sanction a high school student who had unfurled a banner displaying the message "Bong Hits 4 Jesus" across the street from his school.[24] Justice Stevens dissented, writing that "[t]he First Amendment demands more, indeed, much more," before permitting a school official to discipline a student for a message "simply because it contained an oblique reference to drugs."[25] In explaining his position, Justice Stevens relied on the Vietnam War-era precedent *Tinker v. Des Moines Independent Community School District*, in which the Court struck down a school district policy that prohibited students from wearing black arm bands in silent protest of the Vietnam War.[26] But in explaining the value of the student's "Bong Hits" banner, Justice Stevens "[r]each[ed] back still further," reasoning that:

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[20] *See* Jamal Greene, *John Paul Stevens Was Justice Incarnate*, N.Y. TIMES (July 17, 2019), https://www.nytimes.com/2019/07/17/opinion/john-paul-stevens.html ("He believed firmly that it is the job of each Justice to speak his or her mind rather than to go along to get along. He has, for that reason, also been called a maverick, but he wasn't an iconoclast.") [https://perma.cc/EQ59-URCN].

[21] John P. Frank, *The United States Supreme Court: 1947–48*, 16 U. CHI. L. REV. 1, 46 (1948), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2499&context=uclrev.

[22] U.S. CONST. amend. XXI (ratified in 1933).

[23] Morse v. Frederick, 551 U.S. 393, 397–98 (2007).

[24] *Id.*

[25] *Id.* at 434 (Stevens, J., dissenting).

[26] *Id.* at 435 (citing *Tinker*, 393 U.S. 503, 524 (1969)).

> [T]he current dominant opinion supporting the war on drugs in general, and our antimarijuana laws in particular, is reminiscent of the opinion that supported the nationwide ban on alcohol consumption when I was a student. While alcoholic beverages are now regarded as ordinary articles of commerce, their use was then condemned with the same moral fervor that now supports the war on drugs. . . . just as prohibition in the 1920's and early 1930's was secretly questioned by thousands of otherwise law-abiding patrons of bootleggers and speakeasies, today the actions of literally millions of otherwise law-abiding users of marijuana . . . lead me to wonder whether the fear of disapproval by those in the majority is silencing opponents of the war on drugs. Surely our national experience with alcohol should make us wary of dampening speech suggesting—however inarticulately—that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely.[27]

Prohibition, it was clear Justice Stevens believed, had been a failed experiment. But of course, what we brought about through amending the Constitution, we undid in the same way.[28] Justice Stevens well understood that the Constitution contained flaws, but that part of its wisdom lay in its provision of the mechanisms of its own improvement: the Article V amendment process, an important part of the Constitution's design.[29]

In a way, Justice Stevens was himself the product of constitutional failure and constitutional amendment. The original Constitution created a decidedly imperfect method for selecting the President and Vice President. In each presidential election, members of the Electoral College would meet to cast two votes: the individual garnering the most votes would become the President, and the runner-up the Vice President.[30] After the election of 1800 resulted in a tie that took thirty-six ballots for the House of Representatives to break, the country enacted the Twelfth Amendment, which revised the process to provide for separate elector votes for the President and Vice President.[31] But this fix did not address several other failures of constitutional

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[27] *Id*. at 447–48.

[28] *See generally* DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION (2010).

[29] *See* STEVENS, *supra* note 15, at 4–5.

[30] U.S. CONST. art. II, § 1.

[31] U.S. CONST. amend. XII, § 1 ("The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each. . . ."). *See generally* TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE

design when it came to the presidency and vice presidency, including those related to how and under what circumstances the Vice President would become President, and how to fill a vacancy in the office of Vice President.

We finally remedied *those* constitutional deficiencies in 1967, with the Twenty-Fifth Amendment. The most talked-about provision of that amendment is the fourth Section, which creates a thus far never-used mechanism under which the Vice President and the Cabinet, and ultimately supermajorities of both Houses of Congress, can remove the President from office on a determination that he "is unable to discharge the powers and duties" of the presidency.[32] But the second Section of the Twenty-Fifth Amendment also created a process for filling a vacancy in the office of Vice President.[33] That mechanism was used for the first time in 1973, after Vice President Spiro Agnew resigned and President Richard Nixon nominated Michigan Congressman Gerald Ford to replace him pursuant to Section Two.[34] In December 1973, Ford received the congressional approval required by Section Two, and became the Vice President.[35] Less than a year later, Ford became President following Nixon's resignation.[36] And of course, as President Ford himself recognized, one of his most consequential acts during his brief time as President was his nomination of Justice Stevens to serve on the Supreme Court. As Stevens clerks well know, the crown jewel of the collection of memorabilia in the Justice's chambers was probably a framed letter former President Ford wrote in 2005,[37] containing the memorable line: "I am prepared to allow history's judgment of my term in office to rest (if

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EARLY REPUBLIC, 1787–1804, at 105 (1994); JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE 88–92 (2020).

[32] U.S. CONST. amend. XXV, § 4. *See generally* BRIAN C. KALT, UNABLE: THE LAW, POLITICS, AND LIMITS OF SECTION 4 OF THE TWENTY-FIFTH AMENDMENT (2019).

[33] U.S. CONST. amend. XXV, § 2.

[34] *Gerald R. Ford, 40th Vice President (1973-1974)*, U.S. SENATE ARCHIVES, *https://www.senate.gov/about/officers-staff/vice-president/VP_Gerald_Ford.htm* [https://perma.cc/636H-WPAB]; *see also* John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment,* 79 FORDHAM L. REV. 933 (2010).

[35] *Id*.

[36] Carroll Kilpatrick, *Nixon Resigns,* WASH. POST (Aug. 9, 1974), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm [https://perma.cc/L9LK-UVYB]. Several months later Ford himself invoked Section Two to nominate Nelson Rockefeller to serve as Vice President. *See* CONG. RESEARCH SERV., 98-730, VICE PRESIDENTIAL VACANCIES: CONGRESSIONAL PROCEDURES IN THE FORD AND ROCKEFELLER NOMINATIONS 23 (1998), https://www.everycrsreport.com/files/19980821_98-730_add110a4a6216e0d5f733c990e773d105dd1871b.pdf [https://perma.cc/6UHA-YDWE].

[37] Well, that or the scorecard from the 1932 World Series in which a twelve-year-old Justice Stevens witnessed Babe Ruth's famous "called shot." *See* Merritt E. McAlister, *Judging and Baseball*, 114 NW. U. L. REV. 1765, 1766 (2020).

necessary, exclusively), on my nomination thirty years ago of Justice John Paul Stevens to the U.S. Supreme Court."[38]

So the amendability of the Constitution was not abstract to the Justice: he had witnessed it; he had been the direct beneficiary of it; and, during his final years in public life, he became an advocate for it, not just in his book *Six Amendments*, but in other venues as well. These included a widely read and controversial 2018 New York Times op-ed calling for the repeal of the Second Amendment.[39] That op-ed went out of its way to praise the students involved in the March for Our Lives, beginning: "Rarely in my lifetime have I seen the type of civic engagement schoolchildren and their supporters demonstrated in Washington and other major cities throughout the country this past Saturday."[40] He continued, "These demonstrations demand our respect," and "reveal the broad public support for legislation to minimize the risk of mass killings of schoolchildren and others in our society."[41] The op-ed urged the student activists to aim beyond legislative change, to "seek more effective and more lasting reform," by "demand[ing] a repeal of the Second Amendment."[42] Whatever the impact of that particular exhortation, the deeper message seemed to be that the project of improving and even perfecting the Constitution is one that requires broad public engagement; and that at particular moments in history, we may all be called to participate in that project. It is striking that this message was one he found so urgent during his final years in public life. And it is just one part of the extraordinary legacy Justice Stevens leaves behind.

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[38] Letter from Gerald R. Ford to William Michael Treanor, Dean, Fordham U. Sch. of Law (Sept. 21, 2005), http://graphics8.nytimes.com/packages/pdf/us/20100410_ford-stevens-letter.pdf [https://perma.cc/XQ9D-22L3].

[39] 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/Q4M3-R6MZ] [hereinafter Stevens, Op-ed].

[40] *Id*. Several recent pieces have identified the role of March for our Lives in constitutional mobilization in favor of gun safety. *See, e.g.*, Reva Siegel & Joseph Blocher, *Why Regulate Guns,* TAKE CARE BLOG (Nov. 30, 2019), https://takecareblog.com/blog/why-regulate-guns [https://perma.cc/T24G-TDGM]; Joshua Feinzig & Joshua Zoffer, *A Constitutional Case for Gun Control*, ATLANTIC (Oct. 28, 2019), https://www.theatlantic.com/ideas/archive/2019/10/constitutional-case-gun-control/600694/./ [https://perma.cc/H3HY-7RYL]. And the year after Justice Stevens's op-ed, the group March for Our Lives filed an amicus brief in the Supreme Court in favor of gun safety. Brief for March for Our Lives Action Fund as Amicus Curiae in Support of Respondents, New York State Rifle & Pistol Ass'n v. City of New York, 139 S. Ct. 939 (2019) (mem.) (No. 18-280), 2019 WL 3824702.

[41] Stevens, Op-ed, *supra* note 39.

[42] *Id.*