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Bench Memoirs: A Review of *Five Chiefs* by John Paul Stevens

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FIVE CHIEFS: A SUPREME COURT MEMOIR. By John Paul Stevens. New York: Little, Brown & Co. 2011. 292 pp. \$24.99.

INTRODUCTION

When Justice John Paul Stevens rose from the Supreme Court bench for the final time on June 28, 2010,¹ he had worn the robes of a Justice longer than all but two of his one hundred predecessors: Justice William O. Douglas, who held the seat immediately before him,² and the nineteenth-century Justice Stephen Field.³ As Chief Justice John Roberts noted in saying farewell, Stevens's tenure on the Court accounts "for nearly one sixth of its existence."⁴

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1. Adam Liptak, *Justices Bid Farewells on Last Day*, N.Y. TIMES, June 29, 2010, at A18.
2. *Members of the Supreme Court of the United States*, SUP. CT. U.S., <http://www.supremecourt.gov/about/members.aspx> (last visited Dec. 18, 2011). Justices Stevens and Douglas held the seat from 1939 to 2010, a period that spans the tenure of thirty-eight other Justices and every President from Franklin Roosevelt to Barack Obama.
3. *Id.* Some commentators have noted that Stevens's service exceeds Justice Field's if one excludes the period in 1881 when Field "abandoned Court work in favor of an extended overseas vacation." See Ross E. Davies, Craig D. Rust & Adam Aft, *Supreme Court Sluggers: John Paul Stevens Is No Stephen J. Field*, 13 GREEN BAG 465, 465-66 (2010).
4. See Liptak, *supra* note 1, at A18.

Longevity, however, hardly represents Stevens's only notable achievement. In his thirty-four Terms, he authored some of the Court's most cited,⁵ most despised,⁶ and most significant⁷ majority opinions. He dissented frequently⁸ and forcefully, taking the dramatic step of reading a dissent aloud from the bench more than twenty times.⁹ As the Senior Associate Justice for sixteen years

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5. See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); Thomas W. Merrill, *The Story of Chevron*, *USA Inc. v. Natural Resources Defense Council, Inc.: Sometimes Great Cases Are Made Not Born*, in *STATUTORY INTERPRETATION STORIES* 165, 165 (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2011) (calling *Chevron* "one of the most frequently cited cases in law").
 6. See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005); THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 1242-43 (2007) (noting that *Kelo* provoked "a storm of protest" and "public repudiation"); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 *MINN. L. REV.* 2100, 2103 (2009) (describing the response to *Kelo* as a "massive and unprecedented backlash").
 7. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that Massachusetts had standing to sue the federal government for failure to regulate greenhouse gas emissions as a pollutant under the Clean Air Act); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that military commissions to try terrorist suspects were not properly constituted); *Gonzales v. Raich*, 545 U.S. 1 (2005) (interpreting the Commerce Clause to permit federal drug laws); *United States v. Booker*, 543 U.S. 220, 226 (2005) (opinion of Stevens, J.) (holding that the Federal Sentencing Guidelines violate the Sixth Amendment in their mandatory form); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of a mentally retarded convict violates the Eighth Amendment); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding that a moment of silence for prayer in public schools violates the Establishment Clause).
 8. See BILL BARNHART & GENE SCHLICKMAN, *JOHN PAUL STEVENS: AN INDEPENDENT LIFE* 4 (2010) (describing Stevens as "by far, the Court's most prolific writer of . . . concurrences and dissents"); Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, *N.Y. TIMES*, Sept. 23, 2007, § F (Magazine), at 55 ("Stevens . . . has written more dissenting and separate concurring opinions than any of his colleagues.").
 9. Jill Duffy & Elizabeth Lambert, *Dissents from the Bench: A Compilation of Oral Dissents Issued by U.S. Supreme Court Justices*, 102 *L. LIBR. J.* 7, 8, 35-37 (2010) (chronicling oral dissents since 1970). Oral dissents are rare and carry significant meaning. See *id.* (describing oral dissents as a "rare . . . added gesture Justices make when they wish to underscore that, in their view, the majority opinion is flawed or fundamentally wrong"); Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 *HARV. L. REV.* 4, 30 (2008) ("I see oral dissents as a skylight that can open up a Justice's meaning to a lay audience."); Timothy R. Johnson, Ryan C. Black & Eve M. Ringsmuth, *Hear Me Roar: What Provokes Supreme Court Justices To Dissent from the Bench?*, 93 *MINN. L. REV.* 1560, 1564 (2009) (characterizing oral dissents as "a different order of magnitude of dissent" (quoting Robert Barnes, *Over Ginsburg's Dissent, Court Limits Bias Suits*, *WASH. POST*, May 30, 2007, at A1 (internal quotation marks omitted))). Stevens's most passionate oral dissent came in oppo-

on the Rehnquist and Roberts Courts,¹⁰ he assigned opinions when he voted with the majority and the Chief Justice dissented, making him effectively “the Chief Justice of the Liberal Supreme Court.”¹¹ Since his retirement, commentators have shown how his jurisprudence shaped the law in areas from abortion¹² to affirmative action¹³ to antitrust¹⁴—his field of practice in Chicago a half-century ago.¹⁵

If Stevens ranks among the Court’s most influential Justices, he also qualifies as one of its most enigmatic. The sole biography published about him describes his image as that of “a hermit in a monastery.”¹⁶ A cover story in the *New York Times Magazine* noted his “reputation as an idiosyncratic loner.”¹⁷ His preference to work remotely from his condominium in Florida earned him the nickname, “the FedEx justice.”¹⁸ For much of his career, he was the only Jus-

sition to the Court’s decision that a Texas statute banning flag desecration violated the First Amendment. See *Texas v. Johnson*, 491 U.S. 397, 436 (1989) (Stevens, J., dissenting); BARNHART & SCHLICKMAN, *supra* note 8, at 18 (quoting an observer of Stevens’s oral dissent in *Johnson* as saying, “As he reached his peroration, his face was flush, his eyes just shy of tears.” (citing EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* 35-36 (1999))).

10. Stevens became Senior Associate Justice when Justice Harry Blackmun retired in 1994. See *Members of the Supreme Court of the United States*, *supra* note 2. For a detailed analysis of the Senior Associate Justice’s role and Stevens’s approach to the position, see Charles F. Jacobs & Christopher E. Smith, *The Influence of Justice John Paul Stevens: Opinion Assignments by the Senior Associate Justice*, 51 SANTA CLARA L. REV. 743 (2011).
11. Jeffrey Toobin, *After Stevens: What Will the Supreme Court Be Like Without Its Liberal Leader?*, NEW YORKER, Mar. 22, 2010, at 38 (quoting Clinton Administration Acting Solicitor General Walter Dellinger).
12. See Linda Greenhouse, *Justice John Paul Stevens as Abortion-Rights Strategist*, 43 U.C. DAVIS L. REV. 749 (2010).
13. See Diane Marie Amann, *John Paul Stevens and Equally Impartial Government*, 43 U.C. DAVIS L. REV. 885 (2010).
14. See Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 SMU L. REV. 693 (2009).
15. JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 86 (2011).
16. BARNHART & SCHLICKMAN, *supra* note 8, at 9.
17. Rosen, *supra* note 8, at 72.
18. *Id.* (explaining that Stevens used FedEx to send handwritten drafts of opinions to his chambers in Washington, D.C., in “his early years on the court,” but later switched to computers and became “the first telecommuting justice”); see Toobin, *supra* note 11, at 40; see also THE SUPREME COURT: A C-SPAN BOOK FEATURING THE JUSTICES IN THEIR OWN WORDS 44 (Brian Lamb, Susan Swain & Mark Farkas eds., 2010) (recalling Stevens’s memory of an occasion when he “shook sand out

tice who reviewed certiorari petitions himself, rather than relying on the “pool” staffed by law clerks from other chambers.¹⁹ As one observer summarized it, Stevens “always stood apart” from his colleagues.²⁰ His distinctive approach extended all the way to his trademark sartorial flourish, the bow tie.²¹

This combination of influence and intrigue makes Stevens a captivating figure for Court followers. His decision to publish a memoir shortly after leaving the bench offered the enticing prospect of a new window into his life and work. The result of his efforts hit the shelf, fittingly, on the first Monday in October 2011—the same day the Court opened its Fall Term.²²

Rather than reflecting directly on his own career, Stevens structures *Five Chiefs: A Supreme Court Memoir* around profiles of the five Chief Justices with whom he crossed paths: Fred Vinson, whom Stevens met when he was a law clerk to Justice Wiley Rutledge;²³ Earl Warren, who presided over Stevens’s only oral argument before the Supreme Court as an advocate;²⁴ and Warren Burger, William Rehnquist, and John Roberts, with whom Stevens served.²⁵ Stevens also

of” his case briefs, leaving his colleagues on the Court “a little jealous of the way [he] prepare[d]”).

19. See THE SUPREME COURT, *supra* note 18, at 45-46. Seven thousand petitions for certiorari—requests by litigants that the Supreme Court hear their cases—are filed each year. See Rosen, *supra* note 8, at 72.
20. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 6 (2007) (“Respected by his colleagues, if not really known to them, Stevens always stood apart.”); see also Toobin, *supra* note 11, at 41 (“[Stevens’s] law clerks report that months go by without another Justice visiting his chambers. . . . Stevens . . . is, while cordial, remote.”).
21. See BARNHART & SCHLICKMAN, *supra* note 8, at 8 (describing the bow tie as a “statement of nonconformity”).
22. Adam Liptak, *As Justices Get Back to Business, Old Pro Reveals Tricks of the Trade*, N.Y. TIMES, Oct. 4, 2011, at A12 (“In time for the start of a new term on Monday, Justice Stevens has just published an engaging and candid memoir.”).
23. See STEVENS, *supra* note 15, at 53-80. Vinson, appointed by President Harry Truman, served as Chief Justice from 1946 to 1953; Rutledge, appointed by President Franklin Roosevelt, served as Associate Justice from 1943 to 1949. *Members of the Supreme Court of the United States*, *supra* note 2.
24. See STEVENS, *supra* note 15, at 81-110. Warren, appointed by President Dwight Eisenhower, served as Chief Justice from 1953 to 1969. *Members of the Supreme Court of the United States*, *supra* note 2.
25. See STEVENS, *supra* note 15, at 111-228. Burger, appointed by President Richard Nixon, served as Chief Justice from 1969 to 1986; Rehnquist, appointed as an Associate Justice by President Nixon in 1972 and elevated to Chief Justice by President Ronald Reagan, served as Chief Justice from 1986 to 2005; Roberts, appointed by President George W. Bush, has served as Chief Justice since 2005. *Members of the Supreme Court of the United States*, *supra* note 2.

provides a brief history of the first twelve Chief Justices²⁶ and analyzes the role of Senior Associate Justice—or, as he calls it, “Second Among Equals.”²⁷

Five Chiefs hardly reads as a typical Washington tell-all memoir. Indeed, mainstream press reviews of the memoir lamented the relative lack of news.²⁸ Nevertheless, a close read of *Five Chiefs* yields insights for legal scholars and general interest readers alike. This Review argues that Stevens’s portraits of the men who have led the Court reveal as much about their artist as about his subjects. In his distinctive account, Stevens emerges as an independent, often idiosyncratic, Justice. He exudes reverence for the Court and its traditions. His tone chills noticeably, however, as he discusses the Rehnquist and Roberts Courts, on which he frequently found himself outvoted. In sum, Stevens offers a readable and revealing take on the Court in which, as he warns with characteristic humility, “some autobiographical comments must be tolerated.”²⁹

I. THE JUSTICE AS AUTHOR

While *Five Chiefs* represents Stevens’s debut as a book author, the memoir benefits from his lifetime of experience in the craft of writing.³⁰ Stevens presents his perspective in the crisp, confident prose of a man who knows what he thinks and how to express it. Many of his biographical sketches begin with a concise sentence conveying an illustrative fact about his subject, such as “Warren Burger was president of the student council,”³¹ or “Bill Rehnquist was a meteorologist in the Air Force during World War II.”³² Stevens also sprinkles his narrative

26. See STEVENS, *supra* note 15, at 9-38.

27. *Id.* at 231.

28. See, e.g., Jim Newton, *Book Review: Jurist’s Gentle Prudence: Former Justice John Paul Stevens Ruminates Generously on a Quintet of Chiefs of the Land’s Highest Court*, L.A. TIMES, Oct. 16, 2011, at E10 (“Stevens’ memoir is not a source of court gossip or even deep insight into its inner workings.”); Adam J. White, *Off the Bench, into the Fray*, WALL ST. J., Oct. 6, 2011, at A17 (“[T]he chapters . . . serve mainly as the basis for Justice Stevens’s general discussions of constitutional law. And there the book falters.”); Garrett Epps, *Five Chiefs: John Paul Stevens and the Library of Babel*, ATLANTIC (Oct. 19, 2011, 3:20 PM), <http://www.theatlantic.com/national/archive/2011/10/five-chiefs-john-paul-stevens-and-the-library-of-babel/246997> (expressing the reviewer’s hope that “having warmed up with this reticent finger exercise, [Stevens] will now turn to a true autobiography”).

29. STEVENS, *supra* note 15, at 8.

30. Prior to serving on the Supreme Court, Stevens served on the U.S. Court of Appeals for the Seventh Circuit from 1970 to 1975, meaning that he spent forty years in positions that required him to write judicial opinions. *Biographies of the Current Justices of the Supreme Court*, SUP. CT. U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited May 29, 2012).

31. STEVENS, *supra* note 15, at 113.

32. *Id.* at 169.

with wit. He jokes that he began his tenure on the Court as a “member of a small minority” because five Justices stood over six feet tall.³³ In recounting conferences—the formal meetings in which the Justices gather to deliberate and vote on cases—he recalls that Justice Byron White typically answered the telephone with the salutation, “Joe’s Bar.”³⁴ These humorous and personal touches enliven Stevens’s account; they also signal that he genuinely enjoyed serving on the Court and writing about the experience.

Stevens, who famously continues to play tennis in his nineties,³⁵ notes many positive qualities in his fellow Justices. Yet his treatment of them hardly resembles lobbed second serves. In a passage that offers a glimpse of both his polite tone and the brand of subtle criticism that he is willing to level, Stevens states that his purpose for writing the book is “to share memories of these men and . . . the office that they each occupied with honor and varying degrees of expertise.”³⁶ He deploys similarly diplomatic digs throughout the book, noting, for example, that he sometimes “received the impression that [Justice Felix Frankfurter] had not yet read the briefs and was relying on counsel to identify the exact issue in dispute,”³⁷ and that Chief Justice Vinson was “a decisive judge, [but] he was by no means the intellectual leader of the Court.”³⁸ While Stevens’s criticism grows more biting when he describes contemporary Justices with whom he disagreed,³⁹ he generally strikes a deft balance between showing respect for the Court as an institution and producing a book that reviewers have recognized as a “candid memoir.”⁴⁰

As a literary work, *Five Chiefs* represents a new model in the burgeoning genre of the Supreme Court memoir.⁴¹ Stevens’s writing lacks the emotional

33. *Id.* at 136.

34. *Id.* at 213.

35. See Robert Barnes, *Now Retired, Justice Stevens Is Still Cheerfully Issuing Opinions—of His Colleagues*, WASH. POST, Oct. 3, 2011, at A15.

36. STEVENS, *supra* note 15, at 6.

37. *Id.* at 71. Stevens, clearly no fan of Frankfurter, also explains, “I understand that Justice Frankfurter occasionally provided his colleagues with comments akin to a fifty-minute classroom lecture.” *Id.* at 74.

38. *Id.* at 64. Elsewhere in the book, Stevens concedes that he was “not an especial admirer of” Chief Justice Vinson, *id.* at 65, criticizes Vinson’s secretary as being “somewhat officious,” *id.* at 75, and notes that Vinson’s clerks were required to give the Justice a ride when his car and driver were “put at Mrs. Vinson’s service,” *id.* 76.

39. See *infra* Part III (discussing Stevens’s criticisms of Chief Justice Rehnquist and Justice Thomas).

40. Liptak, *supra* note 22, at A12.

41. By my count, six current or recently retired Justices have published books. See STEPHEN G. BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* (2010) [hereinafter BREYER, *MAKING OUR DEMOCRACY WORK*]; STEPHEN G. BREYER,

power of Justice Clarence Thomas's *My Grandfather's Son*⁴² or the nostalgic reminiscences of Justice Sandra Day O'Connor's *Lazy B*.⁴³ But it includes more personal reflection than the scholarly works of Justices Stephen Breyer and Antonin Scalia.⁴⁴ (Mercifully, Stevens rejects the multivolume, self-aggrandizing approach of his predecessor, Justice Douglas.⁴⁵) *Five Chiefs* thus occupies an independent space among books written by Justices, much like the place Stevens himself occupied on the Court.

Unsurprisingly, the writing in *Five Chiefs* evokes Stevens's judicial opinions. While known for drafting the initial version of all his opinions himself,⁴⁶ Stevens has perhaps not received the credit that he deserves as a writer. His ability to capture his views in concise, colorful language characterizes both his memoir and his best work on the bench. He authored what is arguably the most memorable passage in the most memorable case of his tenure, declaring in his *Bush v. Gore* dissent, "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is

ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005) [hereinafter BREYER, ACTIVE LIBERTY]; SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE (2003); SANDRA DAY O'CONNOR, LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST (2002) [hereinafter O'CONNOR, LAZY B]; WILLIAM H. REHNQUIST, THE SUPREME COURT (2001); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); STEVENS, *supra* note 15; CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007). According to media reports, Justice Sonia Sotomayor will soon join the club. See Adam Liptak, *\$1.175 Million to Sotomayor for Memoir, Forms Reveal*, N.Y. TIMES, May 28, 2011, at A16.

42. THOMAS, *supra* note 41 (describing Thomas's upbringing amid rural poverty in the segregated South and discussing sensitive issues such as his struggles with drinking, decision to divorce his first wife, development of faith, and rancorous confirmation hearings).
43. O'CONNOR, LAZY B, *supra* note 41 (recounting stories from O'Connor's childhood on a ranch in Arizona).
44. See BREYER, MAKING OUR DEMOCRACY WORK, *supra* note 41; BREYER, ACTIVE LIBERTY, *supra* note 41 (describing Breyer's approach to the role of courts in American democracy and to issues of constitutional and statutory interpretation); SCALIA, *supra* note 41 (laying out Scalia's theory of textualist statutory interpretation). Justices Breyer and Scalia would probably not consider these books "memoirs."
45. See 1 WILLIAM O. DOUGLAS, GO EAST YOUNG MAN: THE EARLY YEARS (1974); 2 WILLIAM O. DOUGLAS, THE COURT YEARS, 1937-1975, at 3 (1980) (noting, in the volume's first paragraph, that "some were promoting me for the presidency").
46. THE SUPREME COURT, *supra* note 18, at 38; Rosen, *supra* note 8, at 72 ("Since Stevens joined the court, he has also been the only justice routinely to write the first drafts of his own opinions—the other justices have generally relied on clerks to write their first drafts and then rewritten (or at least edited) the drafts to various degrees.").

perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."⁴⁷ His distinction between the "welcome mat" of affirmative action and the "No Trespassing" sign of segregation remains one of the most accessible and vivid images in modern civil rights jurisprudence.⁴⁸ In some ways, Stevens's writing in his later opinions foreshadows his memoir, as he included wistful passages on his memories of Prohibition,⁴⁹ the transformation of his thinking on the death penalty,⁵⁰ and his place on the Court.⁵¹ By uniting these reflections with his broader perspective on the Court, *Five Chiefs* represents a continuation and culmination of Stevens's project as Justice and author.

II. DECLARATIONS OF INDEPENDENCE

While observers have long recognized Stevens's judicial independence,⁵² few have explored the roots of his approach. The Justice offers some clues in *Five Chiefs*, beginning with his profile of the first twelve Chief Justices. While Stevens never identifies the Court's most important decision, he singles out its "most influential dissenting opinion"—Justice Oliver Wendell Holmes's dissent in *Lochner v. New York*,⁵³ rejecting the majority's position that a law regulating hours for bakery employees violated the constitutionally protected "liberty of contract."⁵⁴ Stevens notes that Holmes's opinion, a "solo dissent" that "con-

47. 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting).

48. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) ("The consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat.").

49. See *Morse v. Frederick*, 551 U.S. 393, 447 (2007) (Stevens, J., dissenting) ("[T]he current dominant opinion supporting the war on drugs in general, and our anti-marijuana laws in particular, is reminiscent of the opinion that supported the nationwide ban on alcohol consumption when I was a student.").

50. *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) ("I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'" (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring) (alteration in original))).

51. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007) (Stevens, J., dissenting) ("It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision.").

52. See *supra* notes 8-9, 16-21, and accompanying text.

53. 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("[A] Constitution is not intended to embody a particular economic theory . . ."); STEVENS, *supra* note 15, at 25.

54. 198 U.S. at 61.

tained just two paragraphs,⁵⁵ influenced his decision as a court of appeals judge that “substantive due process” does not prevent a hospital from barring husbands from the delivery room during the birth of their children.⁵⁶

Stevens also spotlights the solo dissent by Justice Harlan Fiske Stone in *Minersville School District v. Gobitis*,⁵⁷ in which Stone argued that children have the constitutional right to abstain from saluting the American flag. Like Holmes’s opinion in *Lochner*,⁵⁸ Stone’s prescient dissent in *Gobitis* served as a basis for the Court to overrule its earlier decision.⁵⁹ Stevens’s appreciation for these two solo dissents suggests that Stevens views separate opinions not merely as assertions of independence, but also as seeds for future majority opinions.

Stevens uses *Five Chiefs* to introduce two figures who helped shape his independent outlook. The first is Nathaniel Nathanson, a “brilliant and lovable” constitutional law professor at Northwestern whom Stevens credits in the book’s first paragraph with exerting “a profound influence on [his] understanding of the law.”⁶⁰ Nat, as Stevens calls him, admonished his students to “beware of glittering generalities,”⁶¹ a credo that inspired Stevens to probe for details and subtle distinctions throughout his legal career.

Stevens’s other early model was Justice Rutledge, for whom he served as a law clerk in the 1947 Term. Rutledge, a former University of Iowa Law School dean whom Stevens has described as “one of my heroes,”⁶² dissented frequently from Chief Justice Vinson’s majority.⁶³ The “troubl[ing]”⁶⁴ case of *Ahrens v.*

55. STEVENS, *supra* note 15, at 25.

56. *Id.* at 26-27 (discussing *Fitzgerald v. Porter Mem’l Hosp.*, 523 F.2d 716 (7th Cir. 1975)).

57. 310 U.S. 586, 601 (1940) (Stone, J., dissenting); STEVENS, *supra* note 15, at 35.

58. *See* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (using a rationale similar to that articulated by Holmes in *Lochner* to reject the “freedom of contract” principle underlying *Lochner*).

59. *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (citing *Gobitis*, 310 U.S. at 604). Stone, then the Chief Justice, selflessly assigned the majority opinion in *Barnette* to Justice Robert Jackson, who produced one of the most stirring passages in the Court’s history. *See id.* at 642 (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

60. STEVENS, *supra* note 15, at 5. In a comment that may give solace to law students everywhere, Stevens writes that he and his classmates referred to Professor Nathanson’s Constitutional Law class as “Nat’s mystery hour.” *Id.*

61. *Id.* at 226 (internal quotation marks omitted).

62. THE SUPREME COURT, *supra* note 18, at 37 (noting that Stevens honored Rutledge by hanging a portrait of his mentor on the wall in his Supreme Court chambers).

63. STEVENS, *supra* note 15, at 65.

64. STEVENS, *supra* note 15, at 68 (noting that the case “troubled” him).

Clark,⁶⁵ in which Rutledge dissented from the Court's holding that habeas corpus did not extend to enemy aliens detained at Ellis Island,⁶⁶ made a particular impression on his young clerk.⁶⁷ In what can only be described as a law clerk's dream, Stevens not only lived to see his Justice's dissenting views resurrected by the Court, but performed the act himself.⁶⁸

Stevens's affinity for separate opinions also colors his perspective on Chief Justice Earl Warren. He describes Warren's unanimous opinion in *Brown v. Board of Education*⁶⁹ as "dead right" on the merits and "one of the greatest achievements in the history of the Court," but he criticizes Warren's strategy as "tentative" and overly focused on achieving consensus.⁷⁰ Stevens argues that the failure to remand the case immediately, combined with the Court's later order that public schools desegregate "with all deliberate speed,"⁷¹ diluted its message more than any dissent would have. As Stevens explains in a revealing passage, "[T]he institution and the public are better served by an accurate disclosure of the views of all the justices in every argued case."⁷²

This creed of judicial individualism defined Stevens's approach when he ascended to the bench. In one of his first cases on the Court of Appeals for the Seventh Circuit, he dissented from the en banc court's decision affirming the conviction of a protestor who pledged to remain in the Wisconsin state capitol until legislators restored welfare funding.⁷³ While the Supreme Court agreed with him in a unanimous opinion,⁷⁴ Stevens believed his dissent from the law-and-order position "put an end to any possibility that [he] might be con-

65. 335 U.S. 188 (1948).

66. 335 U.S. at 193 (Rutledge, J., dissenting).

67. See STEVENS, *supra* note 15, at 68.

68. See *Rasul v. Bush*, 542 U.S. 466, 477 (2004) (citing Rutledge's dissent in *Ahrens*); see also Joseph T. Thai, *The Law Clerk Who Wrote Rasul v. Bush: John Paul Stevens's Influence from World War II to the War on Terror*, 92 VA. L. REV. 501, 503 (2006) (noting "the intriguing extent to which Stevens's work in *Ahrens* over fifty years ago influenced the reasoning, if not the result, in *Rasul*").

69. 347 U.S. 483 (1954).

70. See STEVENS, *supra* note 15, at 99-101.

71. *Brown v. Bd. of Educ. (Brown II)*, 340 U.S. 294, 301 (1955).

72. STEVENS, *supra* note 15, at 124; see also *id.* at 99-101 ("Even when a dissenting opinion makes convincing arguments on the losing party's behalf, responses by the majority may not only clarify and strengthen the Court's reasoning, but also demonstrate to the public that the dissenter's views were carefully considered before they were rejected.").

73. STEVENS, *supra* note 15, at 121-22 (discussing *Groppi v. Leslie*, 436 F.2d 331, 332 (7th Cir. 1971) (en banc) (Stevens, J., dissenting), *rev'd*, 404 U.S. 496 (1972)).

74. See *Groppi*, 404 U.S. 496.

sidered for appointment to the Supreme Court.⁷⁵ President Ford dissented from that prediction when he nominated Stevens to the Court four years later.⁷⁶

When Stevens returned to Washington—he was the third law clerk to serve as a Justice⁷⁷—he brought with him the same contrarian approach that he had followed on the court of appeals. The first Supreme Court opinion he authored was a solo dissent from Justice Rehnquist’s opinion holding that a federal labor statute did not reach state government functions.⁷⁸ Nine years later, the Court overturned its holding in favor of Stevens’s view.⁷⁹ Stevens acknowledges that his frequent separate opinions may have alienated some colleagues, namely Chief Justice Burger.⁸⁰ Despite the impact on collegiality, however, Stevens refused to engage in what Justice White called “graveyard dissents”—joining the majority opinion while taking his doubts with him to the grave.⁸¹ Stevens clearly views his willingness to write separately as a point of pride. Along with the formal Supreme Court photos that appear throughout the book, he includes a political cartoon from the *Chicago Tribune*. The drawing depicts the Chief Justice scowling toward the end of the bench as he says, “I take it the ‘oink’ means you’re dissenting again, Mr. Stevens?”⁸²

III. “CHIEF JUSTICE OF THE LIBERAL SUPREME COURT”

Portraying Stevens as a paragon of independence invites two principal counterarguments—or, at least, two demands to qualify the term. The first is

75. STEVENS, *supra* note 15, at 124.

76. Ford retained his admiration for Stevens, writing in the final year of his life, “I am prepared to allow history’s judgment of my term in office to rest (if necessary, exclusively) on my nomination thirty years ago of John Paul Stevens to the U.S. Supreme Court.” Toobin, *supra* note 11, at 47.

77. Justices Byron White and William Rehnquist were the first two, and Justice Stephen Breyer, Chief Justice John Roberts, and Justice Elena Kagan have since followed the same path. See STEVENS, *supra* note 15, at 61; *Biographies of Current Justices of the Supreme Court*, *supra* note 30.

78. See *Nat’l League of Cities v. Usery*, 426 U.S. 833, 880 (1976) (Stevens, J., dissenting).

79. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling *Usery*).

80. STEVENS, *supra* note 15, at 140; see also Toobin, *supra* note 11, at 44–45 (“Especially in his early years, Stevens wrote a lot of opinions, including many short dissents and concurrences. The point of all this writing has not always been clear—he’s not warning of corruption among his colleagues—and initially the number of opinions gave Stevens a reputation for eccentricity.”).

81. STEVENS, *supra* note 15, at 156.

82. *Id.* at 162 (quoting a cartoon from the *Chicago Tribune*) (internal quotation marks omitted).

that Stevens's "independence" is really a cloak for unpredictable, "eccentric" judging devoid of any guiding principles.⁸³ While Stevens might not dispute that he lacked an all-encompassing judicial philosophy—he once praised Justice White as "a great judge," in part because he "took the cases one at a time"⁸⁴—the charge of eccentric judging rings false. Indeed, outside a few notable areas such as the death penalty⁸⁵ and affirmative action,⁸⁶ Stevens's views remained relatively consistent throughout his career. That leads to the second counterargument—articulated by Professor Richard Epstein, among others—that the label most accurately describing Stevens is not "independent," but rather "liberal."⁸⁷ In this context, Stevens's "independence" amounts to a willingness to depart from the philosophy of the Republican presidents who appointed him and the conservative trends on the Court.

This second objection finds more support in Stevens's work, both on the bench and in *Five Chiefs*. Stevens earned a reputation as the "leader of the Su-

83. See, e.g., Robert F. Nagel, *Six Opinions by Mr. Justice Stevens: A New Methodology for Constitutional Cases?*, 78 CHI.-KENT L. REV. 509, 510 (2003) (noting that some would label Stevens's jurisprudence as "sometimes eccentric" and willing to "disregard established doctrinal formulations"); Rosen, *supra* note 8, at 77 ("Stevens's conservative critics have been skeptical of his claims of judicial neutrality."); Toobin, *supra* note 11, at 39 (noting Stevens's "lack of" a "deep theoretical foundation"); White, *supra* note 28, at A17 ("Lacking an overarching theory of constitutional interpretation, [Stevens] often appeared to indulge sentimental or ideological instincts under the guise of judicial restraint.").

84. White, *supra* note 28, at A17.

85. See John Paul Stevens, *On the Death Sentence*, N.Y. REV. BOOKS, Dec. 23, 2010, at 8-14 (reviewing DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* (2010)) (outlining Stevens's current views on the death penalty); *supra* note 50; see also Christopher E. Smith, *Justice John Paul Stevens and Capital Punishment*, 15 BERKELEY J. CRIM. L. 205 (2010) (describing the transformation of Stevens's position on capital punishment).

86. Compare *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting) (arguing that a federal racial-minority preference program was unconstitutional and citing the citizenship law of the Nazi Third Reich as an analogy), with *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 242 (1995) (Stevens, J., dissenting) (arguing that a federal racial-minority preference program was constitutional). See also Amann, *supra* note 13 (tracing the transformation of Stevens's position on affirmative action); Christopher L. Eisgruber, *How the Maverick Became a Lion: Affirmative Action in the Jurisprudence of John Paul Stevens*, 99 GEO. L.J. 1279 (2011) (same).

87. See Toobin, *supra* note 11, at 39 (quoting Epstein as saying, "From the beginning of his time as a Justice, you could see Stevens's roots in the New Deal Court and his willingness to justify an expanding welfare state On these issues, he's been consistent and consistently wrong about everything—and highly influential.").

preme Court's liberal wing,"⁸⁸ and he generally lived up to it. To scan a list of Stevens's oral dissents—a reasonable proxy for the cases in which he felt the most passionately⁸⁹—is to view a conservative highlight reel of the past two decades. He announced dissents from the bench in foundational constitutional decisions on property rights,⁹⁰ federalism,⁹¹ sovereign immunity,⁹² gun ownership,⁹³ and political speech.⁹⁴ Careful readers can glimpse Stevens's leftward leanings in *Five Chiefs*, as well. For example, while he criticizes Chief Justice Burger as a presiding officer,⁹⁵ Stevens praises the Nixon-appointed Burger's opinions on gender discrimination,⁹⁶ school desegregation,⁹⁷ prisoners' rights,⁹⁸ environmental protection,⁹⁹ limits on capital punishment,¹⁰⁰ executive privilege,¹⁰¹ and gun control.¹⁰² Stevens writes that these decisions show that "Burg-

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88. Adam Liptak, *To Nudge, Shift, or Shove the Supreme Court Left*, N.Y. TIMES, Feb. 1, 2009, at WK1 (depicting Stevens as the "leader of the Supreme Court's liberal wing"); see also Rosen, *supra* note 8, at 52-53 (calling Stevens "arguably [the] most liberal justice" and a "passionate leader of the Court's liberal wing"); Toobin, *supra* note 11, at 38-39 (describing Stevens as the Court's "liberal leader" and a "liberal icon").
89. See *supra* note 9.
90. See *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) (Stevens, J., dissenting); Duffy & Lambert, *supra* note 9, at 30.
91. See *Printz v. United States*, 521 U.S. 898, 939 (1997) (Stevens, J., dissenting); Duffy & Lambert, *supra* note 9, at 31.
92. See *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (Stevens, J., dissenting); Duffy & Lambert, *supra* note 9, at 32.
93. See *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting); Duffy & Lambert, *supra* note 9, at 36.
94. See *Citizens United v. FEC*, 130 S. Ct. 876, 929 (2010) (Stevens, J., dissenting); Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1 (describing Stevens's oral dissent).
95. See STEVENS, *supra* note 15, at 155.
96. See *id.* at 114; see also *Reed v. Reed*, 401 U.S. 71 (1971).
97. See STEVENS, *supra* note 15, at 115; see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).
98. See STEVENS, *supra* note 15, at 115; see also *Morrissey v. Brewer*, 408 U.S. 471 (1972).
99. See STEVENS, *supra* note 15, at 144-45; see also *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).
100. See STEVENS, *supra* note 15, at 144; see also *Lockett v. Ohio*, 438 U.S. 586 (1978).
101. See STEVENS, *supra* note 15, at 114 (noting that the Court's decision on the Watergate tapes "may well have done more to inspire confidence in the work of judges . . . than any other decision in the history of the Court"); see also *United States v. Nixon*, 418 U.S. 683 (1974).

er's contributions to the law in the years after [he] joined the Court have not been fully appreciated."¹⁰³ That is not all the Burger opinions have in common. Each also stakes out a more liberal position than the Court would adopt in subsequent decades.

Stevens's frustration with the direction of the Court comes into sharper relief in his chapter on Chief Justice Rehnquist. While Stevens calls Rehnquist "a friend,"¹⁰⁴ praises his leadership as an efficient and "totally impartial presiding officer,"¹⁰⁵ and credits him with crafting an important opinion during the Iranian hostage crisis,¹⁰⁶ Stevens also targets Rehnquist with a series of barbs harsher than those he directs at any other Chief. He compares Rehnquist to a "hanging judge" for his votes to uphold death sentences,¹⁰⁷ suggests that the quality of Rehnquist's opinions suffered as a result of his quick writing,¹⁰⁸ and derides the Chief's decision to have gold stripes emblazoned on his robe.¹⁰⁹ Stevens is particularly critical of Rehnquist's expansive conception of sovereign immunity.¹¹⁰ He charges that Rehnquist's position on the "dignity of the sovereign states" was "ostentatious and more reflective of the ancient British monarchy than our modern republic."¹¹¹

In a passage that arguably maligns several Justices at once, Stevens suggests that "the most significant judicial event" of Chief Justice Rehnquist's tenure was the retirement of Justice Thurgood Marshall and the appointment of Justice Clarence Thomas to succeed him.¹¹² While the impact of Marshall's extraordinary career can hardly be overstated, it seems highly unlikely that historians will view his retirement at age eighty-three¹¹³ as more significant than the dozens of influential cases decided by the Rehnquist Court between 1986 and 2005. To be fair, Stevens invokes Marshall's retirement mostly as a segue to his biting cri-

102. See STEVENS, *supra* note 15, at 149-50; see also *Lewis v. United States*, 445 U.S. 55 (1980).

103. STEVENS, *supra* note 15, at 142.

104. *Id.* at 170.

105. *Id.* at 171.

106. See *id.* at 174; see also *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Stevens's praise may be an indirect compliment of Chief Justice Roberts, who served as Rehnquist's law clerk during the Term that *Dames & Moore* was decided. See *Biographies of Current Justices of the Supreme Court*, *supra* note 30.

107. STEVENS, *supra* note 15, at 184-85.

108. See *id.* at 174.

109. See *id.* at 173.

110. See *id.* at 191-97.

111. *Id.* at 195 (internal quotation marks omitted); *id.* at 197.

112. See *id.* at 186.

113. *Members of the Supreme Court of the United States*, *supra* note 2.

tique of Thomas. He blames Thomas for a series of five-to-four decisions on gun rights¹¹⁴ and claims that Thomas’s originalist jurisprudence “seems to assume that we should view the Union as perfect at the beginning”¹¹⁵—a striking allegation to level at a Justice descended from slaves.¹¹⁶

While Stevens’s criticism of Rehnquist and Thomas occasionally veers into the petty—he chides Thomas for disagreeing with “the only Court opinion that [Stevens] had an opportunity to draft as a clerk”¹¹⁷—his emphasis on their jurisprudential influence is telling. As Stevens has explained elsewhere, he sees himself as remaining consistent while the rest of the Court drifted right.¹¹⁸ Thus, if he emerged as the leader of the Court’s left, it was because—in his view—his colleagues left him no other choice.

Stevens’s image as “Chief Justice of the Liberal Supreme Court” also arose partly from his position as Senior Associate Justice, which he inherited after Justice Blackmun retired in 1994.¹¹⁹ The role empowered Stevens to assign majority opinions that he joined but the Chief Justice did not. As his decision to devote a full chapter of *Five Chiefs* to the position indicates, Stevens wielded his assignment power with considerable care.¹²⁰ Stevens explains that he often assigned opinions to the majority Justice with the greatest doubt about his position. His theory was that defending the majority view in writing would persuade the wavering Justice of its correctness.¹²¹ Stevens’s approach accounts for several landmark opinions issued by the Rehnquist and Roberts Courts. He mentions specifically that he assigned *Romer v. Evans*¹²² to Justice Kennedy and *Grutter v. Bollinger*¹²³ to Justice O’Connor to retain their (swing) votes.¹²⁴ Stevens’s will-

114. STEVENS, *supra* note 15, at 188-91.

115. *Id.* at 188.

116. See THOMAS, *supra* note 41, at 2.

117. STEVENS, *supra* note 15, at 189. Stevens is referring to Justice Rutledge’s majority opinion in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

118. See Rosen, *supra* note 8 (quoting Stevens as saying that, with one possible exception, “every judge who’s been appointed to the court since Lewis Powell,” who was appointed in 1971, “has been more conservative than his or her predecessor” (internal quotation marks omitted)); see also BARNHART & SCHLICKMAN, *supra* note 8, at 20.

119. See *Members of the Supreme Court of the United States*, *supra* note 2.

120. See STEVENS, *supra* note 15, at 231-44; see also *supra* note 11.

121. STEVENS, *supra* note 15, at 236-37 (drawing an analogy between this strategy, first practiced by Warren Burger, and Stevens’s experience as a litigator).

122. 517 U.S. 620 (1996) (striking down a Colorado constitutional amendment, which prohibited local governments from enacting measures that would bar discrimination based on sexual orientation, as a violation of the Equal Protection Clause).

123. 539 U.S. 306 (2003) (upholding the University of Michigan Law School’s affirmative action plan).

ingness to hand off such important opinions conveys both strategy and selflessness. However one analyzes the decisions that resulted, they deserve a place in assessing Stevens's legacy.

IV. FOR THE AGES

This Review has argued that *Five Chiefs* exposes as overly simplistic both the portrayal of Stevens as an independent and the opposing characterization of him as a liberal. For his part, Stevens offers few direct reflections on his legacy. But the sense of history that runs throughout the book makes clear that he is thinking about the long run. He opens the book with a quote from Abraham Lincoln at Gettysburg: "The world will little note nor long remember what we say here . . ." ¹²⁵ On one level, the quote conveys Stevens's humility. He acknowledges that he was but one Justice in one institution that is but one part of our democratic government. But the quote also operates on a more subtle level. As Stevens notes later in the book, Lincoln's prediction about his speech proved wrong ¹²⁶: Americans continue to find wisdom and power in his words at Gettysburg. In writing *Five Chiefs*, John Paul Stevens hopes that future generations might find inspiration in the reflections of another plain-spoken lawyer from Illinois.

124. See STEVENS, *supra* note 15, at 239-43.

125. *Id.* at ix (dedication page).

126. *Id.* at 184.