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## YALE LAW & POLICY REVIEW

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### A Conversation with Justice Stevens

*Justice John Paul Stevens\* with Linda Greenhouse†*

**GREENHOUSE:** Let me start out by quoting you, Justice Stevens. You've said many times that "learning on the job" was an important part of your long tenure. You were already an experienced federal judge by the time you got to the Court at the age of fifty-five, but things looked different by the end of your tenure than they had seemed at the beginning, so I wanted to give you a chance to reflect on some of what that learning consisted of.

**STEVENS:** Well, the answer to that question would be rather long. But it's true: Every judge learns on the job. Every good judge learns on the job, that is. Your comment makes me think a little bit about the confirmation process, and when I went through the process, Ed Levi, who was the Attorney General, didn't give me any advice on how to answer questions, and neither did anyone else in the White House.

**GREENHOUSE:** It was a simpler age.

**STEVENS:** And I remember talking to him about it some years later, when we were talking about the apparently detailed preparation that nominees for some offices, such as the Attorney General or members of the Court were getting. I mentioned to him, "Well, you didn't give me any help—what's different?" He said that he thought that a person who was nominated for the job ought to be able to answer the questions that are raised. It occurred to me then—and it has occurred to me many times since—that, really, the

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nominee should not be prepared to answer all the questions that are asked. The right answer is, “I’d rather wait to read the briefs and think about the issues before I tell you what my answer would be.” The notion that you should, in advance, understand how a nominee is going to vote on and decide cases really produces exactly the opposite of what you want in a nominee. You want a nominee who will not come in with a predetermined agenda, but rather will try to decide cases as they arise. As Byron White said many, many times, “You learn about the case and then decide what to do.” You don’t have all the answers beforehand.

**GREENHOUSE:** You made a comment in your very interesting memoir, *Five Chiefs*, which I’m sure everybody here has read, talking about the *Harmelin* case in 1991.<sup>1</sup> That was a case in which a life sentence was meted out to a first-time offender for a rather minor drug offense. The Court, by a vote of five to four, upheld the life sentence against an Eighth Amendment challenge. And what you wrote in the book, and what you had said earlier in a speech, was that the three Justices who made up the core of the five who voted to uphold the sentence were rather new on the Court—

**STEVENS:** Yes, they were.

**GREENHOUSE:** —and that the Justices that they replaced—Justice Powell, Justice Stewart, and Justice Brennan—certainly would have voted the other way. I want to quote the way you put this, because it’s a rather provocative way to put it. You said, “[J]ust 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.”<sup>2</sup> I want to give you a chance to expand on that a little. I should mention that the three Justices about whom you made this remark were Justice Kennedy, Justice O’Connor, and Justice Souter, and they all underwent some change on the bench in twenty years.

**STEVENS:** It’s interesting that you mention that case, because I think about it a lot. There were two issues in the case. One was the basic question of whether proportionality is a part of the cruel-and-unusual-punishments analysis, and I just think that the evidence is overwhelmingly in favor of Justice Kennedy’s conclusion that it was, even though his reasoning didn’t go much beyond *stare decisis*—saying we’ve done it in the past. But Justice White wrote on both issues: whether proportionality is part of the analysis, and then on the question of whether the particular sentence was cruel and unusual. And I didn’t say as much about that, although I have thought about it since then, and I just think it’s abundantly clear that, under today’s standards, the sentence would be held to be impermissible. I would think that all three of the Justices probably would come to a different conclusion today. I feel quite sure that Justice Kennedy would, and also that Justice

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1. *Harmelin v. Michigan*, 501 U.S. 957 (1991).

2. JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 226 (2011).

Souter would. But it's out there, the precedent is still there, and it's really a very unfortunate case.

**GREENHOUSE:** Well, speaking of the Eighth Amendment, you came on the Court in January of 1975 in the shadow of *Furman*<sup>3</sup> but with the post-*Furman* cases about the new death penalty statutes looming. In the book you expressed some regret over your vote to uphold the Texas statute.<sup>4</sup>

**STEVENS:** That's correct. I think the vote in the other cases in which we upheld the statute at issue was correct. But the Texas statute was particularly unfortunate because it imposed a mandatory death penalty upon a finding of future dangerousness. I can still remember discussing the issue with my law clerk, George Rutherglen, who now teaches at the University of Virginia Law School, and he felt strongly that I should have voted the other way. I've often thought about that because he was dead right. As I reflect on it, I was definitely wrong on that one.

**GREENHOUSE:** I guess there was a promise implicit in *Gregg*,<sup>5</sup> in the post-*Furman* death penalty cases.

**STEVENS:** Well, there was sort of an understanding among those of us who voted that way in the case that, in actual operation, Texas had given indication that they would construe the statute more narrowly than the text really opened the door for.

**GREENHOUSE:** And of course, toward the very end of your career, in the *Baze* case,<sup>6</sup> you basically walked away from the death penalty, although not from the stare decisis aspect of upholding the Court's precedents. That was the end of a long journey of thought about this for you.

**STEVENS:** It was. Actually, I still remember reading Chief Justice Roberts's first draft in the *Baze* case—and it sort of sunk in on me how, when you go to such lengths to be sure that the death penalty is administered in a painless fashion and not with undue suffering, you are really eliminating what many people think is the proper justification for the penalty in the first place, which is retribution: Do to the defendant the same kind of harm that he did to his victims. If you are protecting the defendant from that kind of harm, you're not inflicting the kind of punishment that the people who are strongly in favor of the death penalty think is the real reason to justify it. So it did hit me when that case was decided that the penalty really doesn't make much sense.

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3. *Furman v. Georgia*, 408 U.S. 238 (1972).

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

5. *Gregg v. Georgia*, 428 U.S. 153 (1976).

6. *Baze v. Reese*, 553 U.S. 35, 71 (2008) (Stevens, J., concurring in the judgment).

**GREENHOUSE:** And I remember that one case that you cited in your separate opinion in *Baze* was the recent habeas case from which you had vigorously dissented: the *Uttecht* case<sup>7</sup> on jury qualification and the ability of federal courts to look into the behavior of the state trial judge in death-qualifying the jury. That seemed to have been almost a turning point in your own thinking about the intersection between habeas and capital punishment.

**STEVENS:** Well, there had been a number of jury cases, because things kind of moved in that direction. The whole process of death-qualifying the jurors really accomplishes the prosecutor's objective of tending to get a jury that's more prone to convict than to acquit, and I think it does load the dice against the defendants in a way that is peculiar to capital cases and really quite unfair. It seemed to be quite inconsistent with the cross-section idea that the jury should represent a cross-section of the community, and, if there happen to be people out there who are opposed to the death penalty, they are still part of the cross-section.

**GREENHOUSE:** 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?

**STEVENS:** Well, you're always troubled in every case—every case is troublesome for all sorts of different reasons. But I 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.

**GREENHOUSE:** Before we get into some of the other areas of the Court's jurisprudence, I just want to make sure people realize how busy you have been since you retired. I read somewhere that you still read every opinion of the Court that comes down.

**STEVENS:** Yes, I do, and with interest. It's funny because when I finished my year as a law clerk, I remember thinking, "Well, I know a little bit about the Court now; I'm going to read every case as it comes down." And that lasted for about three months. But since then, in my present position, I do have time to read the opinions, and I do read all of them and have reactions to them.

**GREENHOUSE:** And you have some public reactions to them. I remember you said that you would have voted with Justice Alito's solitary dissent in the Westboro Baptist Church case, the First Amendment case.<sup>8</sup>

**STEVENS:** Yes, I really thought he got it right. In the slander area, the rules under the First Amendment are that if the person is a public figure, you can be more robust and not as thorough and careful in criticizing him because a public figure can pretty well defend himself. It contributes to wide-open

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7. *Uttecht v. Brown*, 551 U.S. 1, 35 (2007) (Stevens, J., dissenting).

8. *Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting).

debate to have that kind of rule there. But you treat private figures differently. It didn't seem to me to make sense to treat this particular family as though they were public figures. They were the victims of some very scurrilous attacks—according to the jury, it was deliberate infliction of emotional harm—and it doesn't seem to me that there should be a First Amendment right to engage in that kind of attack on private members of the community. I thought it was very much like the defamation cases. And I thought that Justice Alito was dead right in his appraisal of the case, and I guess I was willing to say so.

**GREENHOUSE:** You've also spoken publicly about your views of the Affordable Care Act case<sup>9</sup>—the health care case—as the author of the *Raich* opinion,<sup>10</sup> which a lot of people cite as the Commerce Clause foundation for upholding the statute.

**STEVENS:** Well, on the Commerce Clause issue, *Wickard* against *Filburn*<sup>11</sup> and the marijuana case seem to pretty well answer that, but there are other cases that they'll have to grapple with. One of the cases that helped confine the Commerce Clause, you might say, was the Violence Against Women Act case.<sup>12</sup> Bill Rehnquist wrote on that, and it is an issue that's coming back.

**GREENHOUSE:** On a finding that there was not enough of a commerce connection.

**STEVENS:** Yes.

**GREENHOUSE:** But on the pending health care case, do you have a view as to how that ought to come out?

**STEVENS:** Well, I haven't read the briefs, and I really wouldn't want to express an opinion on the bottom line of the case or the Anti-Injunction Act issue or any of those issues unless I have a chance to read the briefs, but I will be interested in seeing what they decide.

**GREENHOUSE:** You've written a couple of pieces for the *New York Review of Books*, which is certainly an aspiration of many writers. You had one recently, a review of the book about that interesting Delaware capital case.

**STEVENS:** Oh, *The Rape Case* by Irving Morris. Well, one reason I was interested in writing that review is that Irving is an old friend, and he had actually (and I didn't get the message) asked me to write an introduction to the book. The book review gave me a chance to talk about a case in which Irving represented me in a suit arising out of my service as a director of a corporation that had nothing, no assets except a tax loss to sell. After we arranged to sell the corporation to a very profitable concern, they brought

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9. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

10. Gonzales v. Raich, 545 U.S. 1 (2005).

11. Wickard v. Filburn, 317 U.S. 111 (1942).

12. United States v. Morrison, 529 U.S. 598 (2000).

suit to cancel the stock options that the directors had granted to themselves. They said that there was a breach of trust. I was one of those who thought it was an appropriate method of compensation. They brought litigation against us, and Irving Morris represented me in that case. So he was my lawyer, and one of the reasons I had an interest in writing a review of his book was an incident that happened during the trial of the case. I got a chance to tell about it in the review: The lawyer for the other side represented to the judge that I had been untruthful in my testimony in the case. And Irving said, "Well, you've got to put a witness on to say that." So they called their witness to the stand. As he got on the stand, he was going to contradict my testimony, and I was quite confident that my memory was accurate. When he got on the stand to testify, he had a heart attack and died in open court. That was a rather dramatic—

**GREENHOUSE:** Don't mess with John Stevens.

**STEVENS:** Yes. And so it gave me the chance to tell that story.

**GREENHOUSE:** That's a pretty good story. So, during the thirty years or so that you and I were both in the same venue, we actually didn't talk very often at all, but the few times we did, I always came away with some really interesting little window into your thinking. I'll just recount one as a segue to another subject. It was the case of *Scott* against *Harris*.<sup>13</sup> If you remember that case, it was a due process case that had come up on summary judgment. It involved a police chase in which the police forced a young driver off the road on the grounds that he was driving so dangerously that the public was endangered. The car went down an embankment, the driver was rendered a quadriplegic, and the question was whether his due process rights were violated by unreasonable police behavior. The Court posted the video of the chase on the website when the case came down, and, by a vote of eight to one, the Court found that the chase was reasonable. And you were the one. So I remember running into you at the Court, and I said, "You know, Justice Stevens, I think you were the only one who got it right in *Scott* against *Harris*." And you said to me, "Well, I'm the only one who knows how to drive."

**STEVENS:** I don't remember that, but I might well have said it. Because I learned to drive when two-lane roads were common. You had to learn to pass in fast traffic and so forth and so on. But one of the interesting features of that case, Linda, was that when you look at the video—it was in the record, so it was proper to look at it—but when you look at it by yourself in your chambers, you don't get the help you would get from a lawyer if you were in open court commenting on it or asking questions of witnesses about what went on. The thing that struck me about the video was that it shows these other cars after the police lights were already on. The video was taken from the police car chasing the speeding motorist, and they had a

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13. *Scott v. Harris*, 550 U.S. 372 (2007).

camera in the police car and the camera shows other cars' lights zooming at you—just, you know, very frightening. The other cars get off the road just in time, and it looked like it really was a terribly dangerous thing. The only thing that you didn't get if you just watched the video—unless you listen very, very carefully—was that there were sirens on the police cars that were chasing the suspect so that the motorists had notice in advance. It was like a fire engine coming down the road, so they pulled off the road. Looking at it in high speed, it looked terribly dangerous, but you get a very different impression if you realize that, at the time, the other motorists had adequate warning. Just like any other time when an ambulance or a fire truck is going with sirens, people get out of the way, and there's not that much risk. And so the videos without the explanation of counsel or witnesses gave a very misleading impression. And they were not shown in open court—we were given copies to look at in chambers. It took me a while to figure out what was going on with my law clerk, and I think that my colleagues came to an inaccurate factual determination in a case in which appellate judges should rely on trial judges and lower courts to sort out the facts. And in the case, both the trial judge and the members of the court of appeals had held that it was a jury question that should be resolved, and that no summary judgment should be granted. I felt that it was an example of appellate judges not really participating in the limited way that they should in the appellate court, and I was really—as you can tell—bothered by the result. I think it was an incorrect decision, and when they show the video to the public as they did, they still won't get the answer because it won't be entirely clear to them. A piece of evidence should not be analyzed all by itself by judges without the assistance of counsel and witnesses and the like. I just felt that they did not discharge their duty properly, and they were more conservative drivers than I am and thought it was much more dangerous than I did, and that showed up in the case.

**GREENHOUSE:** Yes, you flew your own plane until not too long ago, as I recall.

**STEVENS:** Yes, that's right. Well, it's been several years.

**GREENHOUSE:** But, I mean, obviously the case bothered you. What you just said about it is so obviously reasonable, it's just kind of surprising that nobody in the conference could be persuaded by the force of what you just said here.

**STEVENS:** Well, if I were to tell you about all my failed efforts to persuade my colleagues in conference, we'd be here a long time. [Laughter]

**GREENHOUSE:** Well, that's the subject I wanted to move to. So, you published 720 dissenting opinions during your tenure, which is the most of any Justice in history. Justice Douglas comes in second with 486, so you were way, way ahead. These are not my counts, these are recently published articles.

**STEVENS:** That's a little embarrassing.

**GREENHOUSE:** Obviously, you're a believer in the utility of a dissenting opinion, and a passage in your book that grabbed my attention was on the una-

nimity in *Brown* against *Board of Education*.<sup>14</sup> Everybody holds up that decision and says, “Look, how wonderful: Chief Justice Warren managed to extract a unanimous opinion in this landmark case.” And what you say in the book is that the unanimity in *Brown* came at a price, and the price was the compromise of not dealing immediately with the remedial question and the “all deliberate speed” language, which left everything just kind of out there, happening slowly. So I want to give you a chance to talk about why a judge publishes a dissent—why you published so many dissents.

**STEVENS:** Well, in that case, I think probably they all did end up persuaded that it was the correct decision. But I don’t think that the fact that it was unanimous was really all that important. And I do think that sending it back for further consideration and so forth actually lent strength to the people who did not want to comply. I was just expressing my opinion at the time I wrote the book, but since then, I’ve read a biography of Judge Tuttle written by one of his former law clerks who is a teacher at the University of Georgia Law School,<sup>15</sup> and I commend it to everybody in the room, to look at what kind of a judge Elbert Tuttle was. He was really a surprisingly fine judge. But one of the things that comes out in that book is that eight or nine years after *Brown* was decided, the University of Mississippi, the University of Georgia, and the University of Alabama were still all-white schools. And nine years went by. And I really think that, if the Court had dealt with the decision ordering immediate relief in the particular cases before the Court, as had been done in the Delaware case,<sup>16</sup> there would’ve been a very different and much more prompt solution to that very difficult period in our history.

**GREENHOUSE:** Even with a couple dissenting opinions?

**STEVENS:** Absolutely. The dissenting opinions would merely make it clear that there were one or two Justices on the Court who agreed with the thinking that was prevalent in a large part of the country. There were a lot of very, very fine judges—now I don’t think they were fine on this issue, but they were respected judges—who took the dissenting position in resisting implementation later on. And that comes out in some of the writing in the book about Judge Tuttle. I don’t think that *Brown* would have been non-unanimous, but the fact that there might have been a dissent wouldn’t have been all that harmful.

**GREENHOUSE:** Of course, you’re the author of some passionate dissenting opinions of which you should be proud in *Heller*,<sup>17</sup> *Citizens United*,<sup>18</sup> *Bush*

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14. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

15. ANNE EMANUEL, *ELBERT PARR TUTTLE: CHIEF JURIST OF THE CIVIL RIGHTS REVOLUTION* (2011).

16. *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952), *aff’d*, *Brown*, 347 U.S. 483.

17. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting).



against *Gore*,<sup>19</sup> and I'll mention *Texas* against *Johnson*,<sup>20</sup> a dissenting opinion that maybe not everybody expected—in the flag-burning case.

**STEVENS:** Right.

**GREENHOUSE:** There were two that you single out in the book that people might not necessarily off the top of their heads think of when they think of your jurisprudence. One was your separate opinion in *Karcher* against *Daggett*,<sup>21</sup> the redistricting case, in which you think the Court took a serious wrong turn. Why don't I stop there and let you talk a little bit about where the promise of *Baker* against *Carr*,<sup>22</sup> in your view, got distorted.

**STEVENS:** It's interesting you mention *Karcher* against *Daggett*. For those who are not familiar with the case, basically the Court held that the one-person, one-vote requirement was very, very strict. Very, very minor deviations were sufficient to violate the rule because the State of New Jersey had been unable to justify them, and that was the holding in Justice Brennan's opinion. And I wrote a separate opinion saying that I thought that the gerrymander violated the Equal Protection Clause, and we attached a map of different districts and showed how gross the gerrymandering was. Just within the last two or three days, I was talking to Dina Mishra, my law clerk, and we talked about that case. And I mentioned to her that I have thought maybe I should've identified that as a case in which I did make a mistake. And my mistake, I think, was in joining Brennan's opinion and not writing merely my separate opinion, because then my separate opinion might have been controlling because it was a five-to-four case. I went along with the numerical decision, which I really didn't think was all that persuasive because, if you require such complete equality of numbers, the numbers of people in the district will change between the time of the census and the time of election anyway, so it's an impossible goal. And we were talking about that case, which you bring up, and I was thinking, "Well, maybe that was a mistake; I should not have joined the majority."

**GREENHOUSE:** The other dissenting opinion that certainly comes through in the book that you felt very strongly about was *Seminole Tribe*.<sup>23</sup>

**STEVENS:** Yes.

**GREENHOUSE:** You feel the Court made a drastic wrong turn.

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18. *Citizens United v. FEC*, 130 S. Ct. 876, 929 (2010) (Stevens, J., concurring in part and dissenting in part).
  19. *Bush v. Gore*, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).
  20. *Texas v. Johnson*, 491 U.S. 397, 436 (1989) (Stevens, J., dissenting).
  21. *Karcher v. Daggett*, 462 U.S. 725, 744 (1983) (Stevens, J., concurring).
  22. *Baker v. Carr*, 369 U.S. 186 (1962).
  23. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996) (Stevens, J., dissenting).

**STEVENS:** Yes. In a way, I've thought of the book as a petition for rehearing in *Seminole Tribe* because I guess I did spend more time on that case than I should. But I still find it mindboggling that, in the *Chisholm* case<sup>24</sup> and the Eleventh Amendment and so forth, the country in essence decided that the common-law rule of sovereign immunity had not been repudiated by the Constitution and had survived. The fact that it had not been made unconstitutional doesn't seem to me to be the equivalent to saying it has been permanently enshrined in the Constitution as part of the design of the republic or something like that. Accepting a common-law rule should not be translated into the formation of a constitutional rule. I have tried to make that point unsuccessfully over and over again.

**GREENHOUSE:** And you write that you think Chief Justice Rehnquist's majority opinion in *Seminole Tribe* is going to go down as the most important opinion with his name attached to it.

**STEVENS:** I think—well, perhaps that or the case reaffirming *Miranda*,<sup>25</sup> upholding *Miranda*, is a very important opinion of his. But one of the opinions in that sequence of state sovereign immunity cases invalidated a congressional statute that made states subject to liability and patent infringement suits, which is totally inconsistent with the notion of protecting the dignity of the sovereign. As Judge Wood pointed out in a recent opinion in the Seventh Circuit,<sup>26</sup> the doctrine should not extend to the commercial acts of sovereigns because that would not have been part of sovereign immunity in the common law or the early days. To extend the doctrine beyond its source is totally, totally unjustified.

**GREENHOUSE:** So, in writing about your years as the senior Associate Justice, with the power to assign the majority opinion when you were in the majority and the Chief Justice was not, you mention your assignment to Sandra O'Connor in the *Grutter* case,<sup>27</sup> and you say that you are pleased with the outcome and happy with *Grutter*, and that it will "pass the test of time with flying colors."

**STEVENS:** Yes. Well, and people who heard the argument today [on *Fisher v. University of Texas at Austin*<sup>28</sup> at Yale Law School's moot court] may not agree, you know.

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24. *Chisholm v. Georgia*, 2 U.S. (1 Dall.) 419 (1793).

25. *Dickerson v. United States*, 530 U.S. 428 (2000) (reaffirming *Miranda v. Arizona*, 384 U.S. 436 (1966)).

26. *Bd. of Regents of Univ. of Wis. Sys. v. Phoenix Int'l Software, Inc.*, 653 F.3d 448 (7th Cir. 2011).

27. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

28. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

**GREENHOUSE:** So, do you think *Grutter* passed the test of history with flying colors?

**STEVENS:** Yes, I do. I think the decision was correct. And of course, the experience of the military was a very, very big part of that decision. So, yes, I think it will pass the test of time.

**GREENHOUSE:** You tell the story of going to Carter Phillips after you left the Court to ask him where the idea for that famous military brief came from, and the answer, in case people don't know, was that it came from Gerald Ford.

**STEVENS:** That's right.

**GREENHOUSE:** Is there any *deus ex machina* today that you think might save *Grutter* from the current Court?

**STEVENS:** [Laughs] I don't know, I don't know.

**GREENHOUSE:** In your own encounter with affirmative action over your long career on the Court—starting with *Bakke*,<sup>29</sup> through *Fullilove*,<sup>30</sup> and on to *Croson*,<sup>31</sup> *Adarand*,<sup>32</sup> and the cases since then—it seems, at least from the outside, that you came to see the issues in a different light over time.

**STEVENS:** You know, the case I think of as really most significant in my own development and my own thinking on affirmative action was the *Wygant* case.<sup>33</sup> It was not a case involving a preference for students; the question in the case was whether a contract that had been given to an African American teacher to retain her services in the event of a cut-down in the size of the faculty would be enforceable notwithstanding the fact that it only benefited the teacher. I remember, when the case came up, that I thought that fact was really significant because they were looking at the future benefit of having an African American on the faculty and the educational benefits that the students would derive from keeping that faculty member for the future. Whereas, if they let her go, they would return to an all-white faculty, and it seemed to me that the planning ahead, which protected her job, was thinking about the future educational benefits of that particular rule. And I remember, after reading the briefs in preparation for the case, I had a meeting with Justice Powell in his chambers to talk about something else—I don't remember exactly what it was, but I remember going down and talking to him about something. And just as I was leaving, I remember saying to Lewis, "Well, we finally got an affirmative action case that's going to be easy. I think it's a clear case." And he said, "You're absolutely right. It's great to get

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29. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

30. Fullilove v. Klutznick, 448 U.S. 448 (1980).

31. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

32. Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

33. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

an easy case in affirmative action.” And we left and that’s the way it was. Each of us thought it was easy for different reasons, as we found out afterward. But I thought that case was so significant because it focused on the future of the program and its impact on people who would be affected rather than as a payment for justification of harms that have been done in the past. And I think that makes a world of difference when you look at these issues: If you look at it in a forward-looking capacity rather than a backward capacity, you appraise it in a different way.

**GREENHOUSE:** So the benefit is not only to the individual involved, but to the wider community.

**STEVENS:** Correct, correct. There was a public interest in having a faculty in the high school in Jackson, Michigan, that was not an all-white faculty.

**GREENHOUSE:** Well, speaking of the moot court, you seem to still be really bothered by Chief Justice Roberts’s little saying about how to end discrimination<sup>34</sup>—that seems to still rankle.

**STEVENS:** Well, I think it’s a very persuasive statement; I mean, a lot of people are very much persuaded by it.

**GREENHOUSE:** So you had your own chance once at oral argument before the Supreme Court.

**STEVENS:** Yes.

**GREENHOUSE:** Which, you write, you found a rather surprising experience since, as a law clerk, you thought you knew the Court pretty well.

**STEVENS:** Well, the surprising thing, as you know from the book—and I verified this with John Roberts and with Ruth Ginsburg and others, too—is that the first time you get up to address the Court, it really is a frightening experience to have that sudden feeling of, “By golly, these guys are right within arm’s reach!” And I remember that very vividly.

**GREENHOUSE:** When you mentioned, just now, visiting Lewis Powell in his chambers, am I right that one reason that that stands out in your mind, aside from the fact that the *Wygant* case came up in conversation, is that Justices don’t tend to just kind of bop into one another’s chambers?

**STEVENS:** That’s true. Of course, I don’t always know about my colleagues, but I very rarely would visit in another Justice’s chambers. They would very rarely come to my chambers. But it happens. I’d been in Justice Brennan’s chambers to talk about cases, and others had come in to talk to me, but it did not really happen very often. We did generally communicate in writing with memos about cases, and then we’d also talk on the phone a good deal about a particular case, but it’s not something that’s routine.

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34. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J.) (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

**GREENHOUSE:** So it stands out in your memory as not an everyday thing.

**STEVENS:** That's right. Although, I must say that I did have conversations with Justice Powell more than most members of the Court. He would stop in and see me, and I would talk to him. We had certain common history that gave us a common interest in a number of things.

**GREENHOUSE:** The history of actually having been practicing lawyers?

**STEVENS:** Well, both practicing lawyers and our military experience had a certain similarity to it. He was involved in communicating to the operating forces the results of our intelligence obtained from decryption, and it was very important not to let them know where that information came from, because they might be captured.

**GREENHOUSE:** He was decorated for that, as I recall.

**STEVENS:** Yes, he was.

**GREENHOUSE:** There's just few more areas I want to talk about, and then we've got some written questions from the audience. One is *City of Boerne*,<sup>35</sup> the Fourteenth Amendment, Section 5 case that overturned the Religious Freedom Restoration Act as applied to the states. You voted with the majority in *City of Boerne*, and I just wondered whether, with the passage of time, you had had occasion to wonder whether that case became what you thought it was.

**STEVENS:** Well, it certainly became more than I realized at the time. But I still think it was a correct decision. I think that Congress was trying to amend the Constitution when they enacted that statute.

**GREENHOUSE:** Right, right. How about *Chevron*?<sup>36</sup> Most cited case in history. Did you think you were launching a revolution?

**STEVENS:** No. No, I really didn't, and I'm not an expert on everything that's happened to *Chevron* since, but I thought it was really pretty well-settled law that we should defer to the agency in a case like that. And, of course, that was not unanimous. When it was discussed at conference, Warren Burger passed, and Bill Brennan voted the other way, so Byron had to assign the case, and he asked me if I'd be willing to take it on. I spent most of my writing on the case in a very careful study of the facts and the history. The part of the opinion that's most frequently quoted is only two or three pages in the middle, and there are about thirty or forty pages before and after that I wrote out on a yellow pad.

**GREENHOUSE:** You quote, in the book, somebody who said that an author is seldom the best judge of how readers will react to his work.

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35. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

36. *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

STEVENS: Right. I have quoted that. That's a quote from President Abraham Lincoln. "The world will little note, nor long remember, what we say here . . . ." <sup>37</sup>

GREENHOUSE: So that would probably apply to *Chevron*—

STEVENS: Oh, I don't know. They're not in the same ball park.

GREENHOUSE: —it would maybe apply to your opinion in the Paula Jones case, <sup>38</sup> maybe apply to *Kelo*, <sup>39</sup> the takings case, which you thought was quite an ordinary application of takings law yet it launched a firestorm of controversy.

STEVENS: That's probably the most unpopular opinion that anybody has written during my term. But it was dead right. It was absolutely right. And it's interesting, because it's criticized for not being faithful to the text of the Constitution, whereas the text of the Constitution merely requires that when there's a taking, the person whose property has been taken be compensated. A literal reading of the text is merely a requirement that there be compensation paid. It doesn't place any limit on the purpose for which a taking can be made. And Dean Treanor has studied that at some length, and that was the purpose. It was to prevent further uncompensated taking. And of course, if you read the earlier cases, they go much, much farther in their language than even *Kelo* did. But there were all sorts of reasons why *Kelo* was unpopular. The project was not well thought out; the big drug company abandoned the city after it started, so the thing was not a success. And of course it was a private home and a very sympathetic person who lost her property.

GREENHOUSE: Right, right. I'll ask you about one more topic, and then we'll turn to a few questions from the audience. As you've written and as we know, when you were nominated to the Court at the end of 1974 in the shadow of *Roe* against *Wade*, <sup>40</sup> you were the first person nominated to the Court after the Court decided *Roe*. You didn't get a single question about *Roe* in your confirmation hearing.

STEVENS: That's right.

GREENHOUSE: And I gather that you hadn't, yourself, had much occasion even to think about the issue. So I just wanted to give you a chance to reflect on that simple age when abortion was not a highly politicized topic.

STEVENS: Well, one of the things that reminded me of that situation was the fact that, when Justice Thomas went through his confirmation hearings, he was asked about it, and was asked about whether this was the subject of dis-

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37. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

38. *Clinton v. Jones*, 520 U.S. 681 (1997).

39. *Kelo v. City of New London*, 545 U.S. 469 (2005).

40. *Roe v. Wade*, 410 U.S. 113 (1973).

cussion here at Yale Law School when he was a student. And he said, “No, it really wasn’t.” And people thought he was not being truthful in his testimony. I felt that was terribly unfair to him because that was about the same time that I went through the hearings, and I wasn’t asked questions about it in the context in which you would have expected a question if it was a burning issue. And I just thought it was interesting that it later became—of course, there was a lot of mail was sent to Harry [Blackmun], there’s no doubt about that—but as to whether it was a prevalent topic, I really don’t think it was at the time. At least that’s my memory.

**GREENHOUSE:** And so how did it happen that, in your view, it became such a prevalent topic?

**STEVENS:** Well, of course, for some of the same reasons that *Kelo* was so unpopular. There are groups out there that don’t like some of our decisions, and they explain publicly what their views are and stir up positions that later have political significance.

**GREENHOUSE:** And when you came on the Court, you had no particular view about *Roe* one way or the other.

**STEVENS:** No, I didn’t.

**GREENHOUSE:** I gather you hadn’t had much occasion to think about it. But by the end of your tenure, you were one of the most stalwart, significant defenders of *Roe*.

**STEVENS:** I think, well, I was one of them, yes.

**GREENHOUSE:** Right. I mean, did that reflect your stare decisis view?

**STEVENS:** Well, I think I make this point in the book. I never thought that the right was best explained as a right of privacy following from Justice Douglas’s opinion in *Griswold*.<sup>41</sup> I thought that was not a very persuasive opinion, talking about the numbers and all, and I still think that Potter Stewart wrote a very succinct statement that this is a terribly important liberty interest, and, if you focus on the liberty interest and the importance of the decision to the person who has to make the decision, you get a better appraisal of why it is of constitutional significance. And then we talk about it as sort of a penumbra in privacy and all that.

**GREENHOUSE:** Yes. I guess people were busy running from *Lochner*<sup>42</sup> and running from substantive due process, which, in your view, would’ve been a stronger basis.

**STEVENS:** That’s right. Talking about substantive due process—the *Kelo* decision, you know, was a substantive due process decision. The old *Chicago*,

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41. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

42. *Lochner v. New York*, 198 U.S. 45 (1905).

*B., and Q* case<sup>43</sup> is cited—I made the mistake in a footnote in *Kelo* of citing that as having incorporated the Fifth Amendment. But that case doesn't even cite the Fifth Amendment. It's a case that held that the Fourteenth Amendment has substantive as well as procedural significance and that, as an old common-law rule, there must be compensation on a taking, and that's what the case held. It was a substantive due process case.

**GREENHOUSE:** Well, maybe not the last one ever to come down, but people are afraid of that kind of response. Okay, here's a question from the audience: Since you left the Court, what decision has been the most disappointing and, on the other hand, the most heartening?

**STEVENS:** Well, I really think the most disappointing case has been the case in which the Louisiana prosecutor concealed evidence that resulted in a man having to stand death—

**GREENHOUSE:** Right, the *Connick* case.<sup>44</sup>

**STEVENS:** I think that was a really bad case on two levels. One, I think it incorrectly concluded that there was no liability under existing law for failure to train the members of the staff for the very flagrant violations of the duty to disclose exculpatory evidence. But even beyond that, the case illustrates how wrong the court was in *Tuttle* against *Oklahoma City*<sup>45</sup> in not applying respondeat superior as a basis for liability against public officials. Because *Tuttle* and the earlier case, *Monell*,<sup>46</sup> relied on very incorrect analysis of legislative history and reached a flagrantly improper result, and, if the court and/or Congress simply applied the respondeat superior rule to the prosecutor's office, they wouldn't have to engage in lengthy trials about whether training was adequate or all this sort of stuff. It would simply provide a rule that would lead to careful attention to the constitutional requirements. So that's one that has really bothered me.

**GREENHOUSE:** Right. Next question: Do you agree that the best way to end discrimination on the basis of race is to stop discriminating on the basis of race?

**STEVENS:** Well, there are two parts to the question. You have to ask, "What is the discrimination on the basis of?" It's interesting—in the *Fisher* case, they're talking about the injury to two white students who did not qualify because the University of Texas at Austin has a larger pool of admissions slots available for other purposes, one of which was affirmative action. But if they had a larger pool available, say, for people who wanted to study oriental art or something—if they reserved two hundred places in the class for

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43. *Chicago, B., & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

44. *Connick v. Thompson*, 131 U.S. 1350 (2011).

45. *Tuttle v. Oklahoma City*, 471 U.S. 808 (1985).

46. *Monell v. City of N.Y. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).



people who wanted to specialize—there would have been the same harm to the plaintiffs as there was in *Fisher*. So they were not discriminated against on account of their own race. Some other people were benefited—different members of a different race—and the impact on the people who were hurt is exactly the same as if the same number of spaces had been reserved for a nonracial purpose. So was it discrimination on the basis of race, or wasn't it?

**GREENHOUSE:** Right. So that's the antecedent question that you have to answer before you get into that little slogan, I guess. Do you still hold to your opinion in *Texas* against *Johnson*, the flag-burning case?

**STEVENS:** Well, I think the case was incorrectly decided. I would not—obviously, I wouldn't overrule it now. There are two or three interesting things about that case. One is that nobody burns flags anymore, so it obviously isn't a vital method of expression. And the other thing that troubled me about this case was that, if you read the opinion closely, the rationale was viewpoint discrimination. It wasn't the fact that the people who were demonstrating and were opposing the Reagan Administration's policies didn't have an adequate opportunity to explain why Reagan was all wrong. But the message that the flag burning carried, according to the majority, was, "We don't like flags. We don't like statutes that prohibit flag burning." It was a point of view about flag burning, and, if you follow that reasoning, almost any kind of expressive conduct would be viewpoint related. For example, nude dancing or parading in the nude is against the law. But under the Court's rationale, it should be protected because you are expressing a viewpoint that parading in the nude is OK. And so it's a very broad rationale that the Court used in the case, which I really don't think is correct. So I remain persuaded that the case was incorrectly decided. Now, I think you can make an excellent argument, and it may well be true, that there is symbolic value in saying, "This is the kind of free country in which any citizen who wants to burn the flag can do so to show how free we are." There's great value in that, there's no doubt about that. But as for protecting an important means of expression, the case is a zero because nobody ever burns flags.

**GREENHOUSE:** Yes, once it became constitutional, it was no more fun.

**STEVENS:** That's right.

**GREENHOUSE:** You game for a couple more questions?

**STEVENS:** Sure.

**GREENHOUSE:** Okay. After the health care arguments, many Court-watchers lamented the Court's tone, separate and distinct from the substance of the arguments. How has the tone of the Court changed, and are you troubled by it? Did you listen to the arguments? Or did you read the transcripts?

**STEVENS:** No, I haven't; I've read excerpts of it. Well, it's always been a problem. I mean, there are some arguments in which the tone is a little more

adversarial than it might be in others. I really believe that the oral argument process works well on the whole, and I would not want to criticize any member of the Court for his participation in the dialogue. The dialogue is very helpful to the decision that is ultimately made.

**GREENHOUSE:** How about criticizing anybody for not participating?

**STEVENS:** I would never criticize Clarence Thomas. He believes, and I think correctly, that he wants to hear what other people have to say, and you may not know this because he doesn't ask questions, but he is always thoroughly prepared. Before argument, he knows everything in the briefs, he has thought about it a lot. He wants to hear what's said. And he thinks he gets more out of listening, and there's a lot to be said for his point of view.

**GREENHOUSE:** Do you believe the current rule of optional self-recusal should be changed? There's all this debate now about ethics and what should be binding on the Court.

**STEVENS:** No, no. And I also am very much opposed to the notion that Justices should be compelled to explain why they recuse themselves. There was a case that I recused myself from when I was a court of appeals judge in which the reason for my recusal was that I had some adverse opinion about one of the parties to the case, and I thought if I had been compelled to explain why I recused myself, it would have been very prejudicial to one of the litigants. And I think there are cases in which a disclosure rule requiring Justices to explain their reason for recusal would not be in the best interest of the Court or of the litigants.

**GREENHOUSE:** OK, we'll make this the last question. Do you think the Court's activity should be more transparent? Or, I guess to broaden that a little, do you think there's a way in which the Court could change its behavior to make the public at large have a deeper understanding of the Court and its processes and what it does?

**STEVENS:** Well, of course, there are people who say the Court should do this or that—for example, televising proceedings. But I would not do anything that would impair the ability of the members of the Court to conduct their oral arguments in the way they think is most effective. Televising would benefit the Court and the public from learning how well-prepared the Justices are and how they do have intelligent questions to ask. And so that would be a plus. But I think it is more important that the Court operate effectively. And I think that the oral argument on the whole is a constructive part of the process.

**GREENHOUSE:** Well, I think with that, we've had a good chat, and I thank you.

**STEVENS:** Thank you, Linda.