

## Book Review

John Paul Stevens, *Five Chiefs: A Supreme Court Memoir*. New York: Little, Brown and Co., 2011, pp. 292, hardback \$24.99.

Reviewed by Thomas E. Baker

This is a good book—not a great book—written by a good justice—not a great justice.<sup>1</sup> Therefore, it is altogether fitting and proper that this review is written by a law professor who is “nobody particularly important.”<sup>2</sup> My modest qualification to write this review is that I am a veteran SCOTUS watcher. For over three decades, I have taught con law and studied the Supreme Court. It is my life’s work. So I read this book because it is my job. If you have the same job, you probably already have read the book. If you don’t and if you haven’t, this review might help you make up your mind whether to plunk down twenty-five bucks and spend a few hours reading it some weekend. What follows are selective highlights interspersed with some commentary.

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1. *See generally* William D. Pederson & Norman W. Provizer (eds.), *Leaders of the Pack: Polls & Case Studies of Great Supreme Court Justices* (Peter Lang Pub. 2003); James W. Ely, Jr. & Mark E. Brandon, *The Rankings Game*, 62 *Vand. L. Rev.* 311 (2009). However, a preliminary statistical compilation of his judicial output did praise Justice Stevens’ “impressive durability, productivity, and influence as a member of the federal judiciary.” Ross E. Davies, Craig D. Rust & Adam Aft, *John Paul Stevens is No Stephen J. Field*, 13 *Green Bag 2d* 465, 480 (2010). *See also* *The Finest Legal Mind: A Symposium in Celebration of Justice John Paul Stevens*, 99 *Geo. L.J.* ix (2011); *Dedication: John Paul Stevens*, 44 *Loy. L.A. L. Rev.* 813 (2011); *Symposium, Forward: The Legacy of Justice John Paul Stevens*, 106 *Nw. L. Rev.* 409 (2012); *Special Feature: 30 Days of Stevens*, *SCOTUSblog.com* (2010), *available at* <http://www.scotusblog.com/category/special-features/30-days-of-john-paul-stevens/>.
2. By comparison with the book’s author, who served for 34 years as one of only 112 persons ever to have served on the Supreme Court in the history of the United States, I am indeed “nobody particularly important.” Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 *Harv. L. Rev.* 1639, n.\*\* at 1639 (1993). For better or worse, I am a faculty member at the 113th ranked law school in the United States. Michael Vasquez, *FIU Law School Jumps in the Rankings*, *Miami Herald*, Mar. 13, 2012.

John Paul Stevens has led a remarkable life in the law.<sup>3</sup> An “About the Author” note provides some familiar highlights (291–92).<sup>4</sup> As the title suggests, his memoir is organized around his career experiences with five chief justices: Fred Vinson, Earl Warren, Warren Burger, William Rehnquist, and John Roberts.<sup>5</sup> John’s [sic] book does have a feature that I had considerable trouble getting used to: he refers to his colleagues by their first name, which is a convention within the Conference of course. (There is a wonderful anecdote—not in the book—about how, the newbie chief justice, John Roberts, presiding at his first conference of the justices, called on them in order of their seniority and referred to his older colleagues by their last name, e.g., “Justice Stevens,” “Justice O’Connor,” and then “Justice Scalia.” Antonin Scalia was quick to set things right. “I will always call you Chief,” Scalia announced, “but to you I’m Nino, and this is Sandra, and this is John.”)<sup>6</sup> Justice Stevens’—now that feels better—objectives are to “share memories” of these five chiefs and to “improve public understanding” of the Supreme Court (6). His vantages on the five chiefs mark the stages of his professional experiences: as a law clerk to Justice Wiley Rutledge on the Vinson Court; as a practicing lawyer during the Warren Court; as a circuit judge and an associate justice during the Burger Court; as

3. See generally Thomas E. Baker, John Paul Stevens, in Kermit L. Hall, James W. Ely & Joel B. Grossman, *The Oxford Companion to the Supreme Court of the United States* 976 (Oxford Press, 2d ed. 2005) (“John Paul Stevens has a deserved reputation for independence and moderation, for being a jurist who is determined to reach the right result for the right reason.”).
4. The formal citation when President Obama presented him with the Medal of Freedom in 2012 reads:

John Paul Stevens: Stevens served as an Associate Justice of the U.S. Supreme Court from 1975 to 2010, when he retired as the third longest-serving Justice in the Court’s history. Known for his independent, pragmatic and rigorous approach to judging, Justice Stevens and his work have left a lasting imprint on the law in areas such as civil rights, the First Amendment, the death penalty, administrative law, and the separation of powers. He was nominated to the Supreme Court by President Gerald Ford, and previously served as a judge on the U.S. Court of Appeals for the Seventh Circuit. Stevens is a veteran of World War II, in which he served as a naval intelligence officer and was awarded the Bronze Star.

The White House, President Obama names Presidential Medal of Freedom Recipients, Apr. 26, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/04/26/president-obama-names-presidential-medal-freedom-recipients>.

5. Felix Frankfurter originated this literary genre in a famous speech. Felix Frankfurter, Chief Justices I Have Known, 39 Va. L. Rev. 883 (1953). See also *infra* note 61.
6. Clarence Thomas told this anecdote at a judicial conference. Linda Greenhouse, Advice to the Chief Justice: To You, I’m Known as Nino, N.Y. Times, Nov. 9, 2005, available at <http://www.nytimes.com/2005/11/09/politics/09scotus.html>. Justice Stevens reports that, back when Justice Rehnquist was elevated to be the chief justice, Rehnquist suggested that his long serving colleagues continue to call him by his first name, but they “promptly and unanimously rejected that suggestion” out of tradition (171).

the senior associate justice during the Rehnquist Court; and as the object of John Roberts' advocacy before he became chief justice (8).<sup>7</sup>

### The First Twelve Chiefs

Justice Stevens' first chapter covers the tenures of the first 12 chief justices (1789–1946) in merely 30 or so Wikipedia-like pages. He singles out five chiefs who are “entitled to our highest respect”—John Jay, John Marshall, William Howard Taft, Charles Evans Hughes, and Harlan F. Stone—but he is careful not to rate the five chiefs who are the subjects of his own memoir (37). He makes an observation that has always resonated with me: the odd naming convention used to designate Supreme Court eras by the last name of the chief justice really is inaccurate and misleading (7, 245). Political scientists have the better approach to conceptualize “natural courts,” designating periods of stable membership and marking each individual appointment as the beginning point for a distinct set of collegial decision-makers.<sup>8</sup> So, for example, the so-called Roberts Court (2006–present) is better understood as being subdivided thus far into three natural courts by successive departures and appointments: (i) Roberts for Rehnquist and Alito for O'Connor in 2006; (ii) Sotomayor for Souter in 2009; and (iii) Kagan for Stevens in 2010. It also seems passing strange for a jurist who served on the Supreme Court for over 30 years to admit that he has “never understood” Chief Justice Marshall's logic in the landmark decision of *Marbury v. Madison*<sup>9</sup> that established judicial review; he and I both think that he should have figured that out back in law school (16–17).

### Chief Justice of the United States

Justice Stevens' second chapter is a ten-page, less-than-minimalist, account of the office of chief justice. Thus, this book does little to change the fact that the office of chief justice is one of the most important and most ignored aspects

7. Justice Stevens went on a book tour to promote his memoirs that included some unusual venues and some unusually candid comments from a retired Supreme Court justice. *E.g.*, Steven Colbert, Colbert Super PAC—John Paul Stevens, (Jan. 19, 2012), *available at* <http://www.colbertnation.com/the-colbert-report-videos/406409/january-19-2012/colbert-super-pac---john-paul-stevens>; Brian Lamb, Q & A with John Paul Stevens (Sept. 14, 2011), *available at* <http://www.c-spanvideo.org/program/301441-1>; Charlie Rose, An Hour with John Paul Stevens, Former Supreme Court Justice (Oct. 18, 2011), *available at* <http://www.charlieroose.com/view/interview/11948>. Frankly, I see nothing wrong with this, although I do personally disagree with some of Justice Stevens' views on particular issues and individual cases. *But see* Richard A. Epstein, Uneven Stevens, Defining Ideas (Hoover Institution Oct. 17, 2011), *available at* <http://www.hoover.org/publications/defining-ideas/article/96891> (criticizing Justice Stevens and his memoirs for displaying a “tell-all” quality and complaining about his interviews as being “disjointed and cavalier” and generally unworthy of a former justice).
8. *E.g.*, Charles Cameron, Jee-Kwang Park & Deborah Beim, Shaping Supreme Court Policy through Appointments: The Impact of a New Justice, 93 *Minn. L. Rev.* 1820 (2009). *See* U.S. Supreme Court Justices by Term (Succession Chart), Washburn University School of Law Library, *available at* <http://washburnlaw.edu/library/collections/autographs/timeline/>.
9. 5 U.S. (1 Cranch) 137 (1803).

of the Supreme Court.<sup>10</sup> What insights the reader might take away are subtle and only indirectly follow from the more substantive chapters that follow.

### Fred Vinson

Justice Stevens' chapter on Chief Justice Vinson begins with the story about how two law professors at Northwestern University—Willard Pedrick and Willard Wirtz—had arranged for two law students at the school to clerk at the Supreme Court, one for two-years with Chief Justice Vinson and another for one year with Justice Wiley Rutledge. John Paul Stevens and a classmate tossed a coin. Stevens won and elected the one year clerkship (57-59).<sup>11</sup> His decision to pick Rutledge over Vinson is borne out in this chapter about Chief Justice Vinson. He manifests the typical law clerk's hagiography towards his own justice—a *leitmotif* of the book. In contrast, he demonstrates a restrained sense of respect for Vinson, more for Vinson the man and his accomplishments before being appointed and less for the time Vinson spent in the center chair. Justice Stevens reminds us that he was a Republican,<sup>12</sup> but admits liking President Truman personally (59), yet he still bears a grudge against Truman for announcing the appointment of Sherman Minton too soon after his mentor Wiley Rutledge's sudden death (60). His ranking of Tom Clark as "the strongest of the four Supreme Court appointments that Truman made" damns Clark with faint praise (60). Recall that Truman's other picks for associate justices were Harold Burton and Sherman Minton. That ranking likewise is what we might call "feint praise" for Truman's other nominee—Fred Vinson was the last chief justice of the United States appointed by a Democrat. All of them since have been appointed by Republican presidents. Indeed, the author candidly admits that he "was not an especial admirer" of Vinson (65). Supreme Court aficionados will appreciate how Justice Stevens pays attention to the traditions inside the marble palace. For example, sometime between his clerkship and when he joined the Court in 1975, the old practice was abandoned in conference for the justices to go around the table to state their views of cases in order of seniority and then to reverse the order and go around the table to vote in order of juniority. Stevens believes that the current practice of going around the table one time, to discuss and vote in order of seniority, negates the influence of the more junior justices (74). A few personal John Paul Stevens stories round out the chapter, for example: getting to know

10. See generally Symposium, The Chief Justice and the Institutional Judiciary, 154 U. Pa. L. Rev. 1323 (2006). See also P.G. Fish, The Office of Chief Justice (White Miller Burkett Ctr. of Pub. Affairs 1984).

11. See Laura Krugman Ray, Clerk and Justice: The Ties that Bind John Paul Stevens and Wiley B. Rutledge, 41 Conn. L. Rev. 211 (2008).

12. When he was asked in 2007 whether he was still a Republican, however, he declined comment. Jeffrey Rosen, The Dissenter, Justice John Paul Stevens, N.Y. Times, Sept. 23, 2007, available at <http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html?pagewanted=all>.

a young Byron White, then a fellow clerk and later a fellow justice (61-62),<sup>13</sup> and getting clobbered at tennis by the sexagenarian Justice Hugo Black (75).

### Earl Warren

Justice Stevens' chapter on Chief Justice Warren sounds the familiar theme of how the modern paradigm of constitutional decision-making was transformed under the leadership of that "Super Chief" (83).<sup>14</sup> He endorses the Warren Report on the Kennedy assassination (92). He recounts his "one and only oral argument before the Supreme Court" in an antitrust case he lost but still feels he should have won (93).<sup>15</sup> He admits that his confidence in Warren was somewhat shaken, however, when he was working on a Seventh Circuit opinion and discovered that Warren had copied several paragraphs from the Solicitor General's brief into the opinion for the Court without any attribution (97).<sup>16</sup> This may reveal more about Justice Stevens' judicial methods and personal principles than Earl Warren's. It could have been the sin of some law clerk. And even if it was Warren's own plagiarism, there is a long standing, albeit shadowy, practice of that kind of judicial plagiarism that dates back to the days of John Marshall borrowing from Daniel Webster.<sup>17</sup> The author's disapproval must come from the same place inside him that generates his admirable expectation for himself that he should write the first draft of his own opinions. Justice Stevens generally gives Earl Warren "high marks" for his constitutional jurisprudence; he gives him a failing grade, with the benefit of hindsight, for the "mistake" of the "all deliberate speed" formula<sup>18</sup> for equitable relief desegregating the public schools under the Equal Protection Clause (98-100).

In what amounts to an "advisory opinion" on a "political/nonjusticiable issue" delivered out of chambers by a solitary retired justice, Justice Stevens declares President Eisenhower's recess appointment of Earl Warren to have been a violation of the Constitution (84-86). The justice is consistent, however, to disapprove of recess appointments throughout history, going back

13. Justice Stevens is justifiably proud to be a member of that select club who were struck by Supreme Court lightning twice in their legal careers, i.e., law clerks who later became justices (61): Byron White (Chief Justice Fred M. Vinson); William H. Rehnquist (Justice Robert H. Jackson); John Paul Stevens (Justice Wiley B. Rutledge); Stephen Breyer (Justice Arthur J. Goldberg); and Elena Kagan (Justice Thurgood Marshall).
14. That was Justice Brennan's affectionate nickname for Chief Justice Warren. Bernard Schwartz, *Super Chief—Earl Warren and His Supreme Court—a Judicial Biography* vii (NYU Press 1983) ("To those who served with him, Earl Warren will always be the Super Chief—William J. Brennan, Jr.").
15. *United States v. Borden Co.*, 370 U.S. 460 (1962).
16. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).
17. See Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 *Geo. J. Legal Ethics* 237 (2008); James S. Dursht, Note, *Judicial Plagiarism: It may be Fair Use but is it Ethical?*, 18 *Cardozo L. Rev.* 1253 (1996).
18. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

to George Washington's appointment of John Rutledge, the asterisk chief justice (14). While recess appointments in the executive branch continue and continue to be controversial, Justice Stevens' issue with them may be moot, as well, because in the contemporary *realpolitik* no president is likely to try that again for a Supreme Court appointment in the long foreseeable future.

Justice Stevens seemingly has what my students call a "man-crush" on Warren (90).<sup>19</sup> Justice Stevens certainly is entitled to his own opinion of Earl Warren, but he is not entitled to his own historical facts about the man. Here I will endeavor to set the record straight and correct the Oliver-Stone-like anecdote Stevens tells about how Warren resigned from the American Bar Association because Warren was embarrassed by the pompous reaction at the 1957 annual meeting in England, when Warren wore a brown suit instead of a morning coat and striped trousers to address the assembly (90). Maybe that happened. But that was not the reason Warren quit the ABA. With all due respect, Justice Stevens should know better or he should have checked his facts better. Chief Justice Warren discussed in considerable detail the sequence of events which led him to resign from the ABA in his own memoirs.<sup>20</sup> Chief Justice Warren was invited to lead the American delegation to London for a joint celebration of the common law and the rule of law with the English bench and bar. When he got over there, the ABA released a committee report that attracted considerable press coverage on "Communist Tactics, Strategy, and Objectives." Chief Justice Warren complained at length in his memoirs that he felt sucker-punched:

It told little about those matters; rather, it was a diatribe against the Supreme Court of the United States, charging it with aiding the Communist cause in fifteen recent cases. It listed the allegedly pro-Red cases, giving biased outlines of their facts and the Court's holdings, then arguing that they gave great joy and comfort to the Communists. Finally, it recommended that Congress enact legislation to protect the nation from the effect of these sinister Supreme Court decisions.<sup>21</sup>

Warren was "badgered by reporters" to respond to that Red-baiting report, but he took the high road and declined to comment.<sup>22</sup> A second related ABA

19. "Earl Warren . . . was also a tall, handsome man . . ." (90).

20. Earl Warren, *The Memoirs of Chief Justice Earl Warren* 321-32 (Doubleday 1977).

21. *Id.* at 322.

22. *Id.* at 323. Chief Justice Warren also seems to indirectly dispel the brown-suit explanation for his resignation:

After that, I was more or less a pariah and several snide articles concerning me appeared in the press. They were of no importance to anyone else, and are not worthy of repetition here, but were designed to show that I was not only discredited by the Bar of the United States but was myself annoyed by the customs of England. This last insinuation was positively untrue. I was cordially treated by the English people, from Her Majesty the Queen and Sir Winston Churchill to the rank and file of the British Bar.

committee report formally disapproved of another line of Supreme Court decisions and recommended that the U.S. district courts be empowered to imprison for contempt any person who refused to respond to inquiries of the House Un-American Activities Committee.<sup>23</sup> Upon further reflection on the trip back to the United States, Chief Justice Warren concluded, in his own words: “I could no longer be a member of an organization of the legal profession which would ask me to lead fifteen thousand of its members overseas on a goodwill mission and then deliberately and trickily contrive to discredit the Supreme Court which I headed.”<sup>24</sup> Warren promptly sent a letter of resignation.<sup>25</sup> This sorry incident of Red-baiting and court-bashing was not the ABA’s finest hour.<sup>26</sup> Again, with all due respect, my scholarly hope is that my review will catch up with this book and overtake its mistaken version of a not unimportant incident when the chief justice of the United States resigned from the American Bar Association over a matter of high principle and out of his sense of duty to the Supreme Court and the Constitution. It wasn’t about wearing white shoes after Labor Day.

### Warren Burger

Justice Stevens agrees with the conventional wisdom that Warren E. Burger’s leadership to “improve[ ] the administration of justice within and beyond the

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*Id.* at 323–24. Perhaps, Justice Stevens was remembering some of the negative news coverage as a contemporary newspaper reader to come up with his brown-suit anecdote.

23. Chief Justice Warren believed that “[t]he combination of these reports did much disservice to the Supreme Court, both at home and throughout the world.” *Id.* at 324.
24. *Id.* at 325.
25. The resignation letter is reproduced in Chief Justice Warren’s memoirs and reads, in part:

This [attack on the Court], as I am sure must have been anticipated, was the most widely publicized action of the Convention. It conveyed the thought to the world that in the unanimous opinion of the American Bar, the Supreme Court of the United States is advancing the cause of Communism, is unworthy of its heritage and, therefore must be thwarted by the other Branches of Government. If that is the opinion of the Association, it is, of course, its right to say so. Moreover, it would be its duty to say so. But the Chief Justice, who is part and parcel of the Court, and who bears his share of responsibility for its actions, should never be put in a position where he can be represented as either subscribing to the condemnation of being too timid to say even a single word in defense.

*Id.* at 326–27.

26. The denouement of his resignation came the next year, when Chief Justice Warren agreed to appear at the 1958 annual convention, “to establish that [his] resignation was not a matter of personal pique.” *Id.* at 328. However, he was dismayed when, at a dinner he attended with four other justices, the chief justice of the Michigan Supreme Court gave a vitriolic speech castigating the U.S. Supreme Court. Adding insult to injury, a functionary of the ABA announced to the press that Warren’s membership had been dropped for “non-payment of dues.” *Id.* at 328–29. It took until 1970 for a subsequent ABA president to officially and formally correct the record. *Id.* at 330.

Court” was Burger’s “signal contribution to American law” (116).<sup>27</sup> He also credits Burger for authoring a handful of landmark opinions for the Court.<sup>28</sup> Indeed, he deems *United States v. Nixon*<sup>29</sup>—the decision requiring Richard Nixon to comply with a *subpoena duces tecum* to produce the tape recordings which ultimately led to Nixon’s resignation of the presidency—as being the most important opinion of Burger’s tenure as chief justice: “It may well have done more to inspire the confidence in the work of judges that is the true backbone of the rule of law than any other decision in the history of the Court” (114). He believes that Chief Justice Burger’s “contributions to the law . . . have not been fully appreciated” (142). However, he does provide a familiar critique of how Burger was not proficient at presiding at conferences (154). Unlike nefarious critics such as Woodward and Armstrong<sup>30</sup> who have accused Burger of being Machiavellian, Justice Stevens attributes it to Burger’s lack of preparedness and relative lack of ability; relatively speaking, Stevens rates both Chief Justice Rehnquist and Chief Justice Roberts as more able presiders (154).

Justice Stevens’ account of his own confirmation to the Burger Court fills the reader with nostalgia for the historical period “B.R.B.”—Before Robert Bork.<sup>31</sup> There was a preliminary round of courtesy visits with leading senators (128). Instead of late night vetting sessions in the White House, Justice Blackmun casually and collegially offered him a copy of Blackmun’s Senate hearings to help him prep for his hearings (129). He admitted that he opposed the Equal Rights Amendment and was not politically castrated on C-SPAN (131). There was a classic good-old-boy moment when a senator invited him back to the senator’s office while a witness harangued at great length against his nomination (133). He was not asked a single question about abortion (143).<sup>32</sup> That it was a different era is further evidenced by the fact that he does

27. For example, think of Chief Justice Burger’s involvement with the Federal Judicial Center, the National Center for State Courts, the Judicial Conference of the United States, the Supreme Court Historical Society and his efforts to improve the Supreme Court Rules and to introduce modern technologies at the Supreme Court (116, 151 & 153).
28. His list includes: *United States v. Nixon*, 418 U.S. 683 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Reed v. Reed*, 404 U.S. 71 (1971); and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). He also singles out for special praise the opinions Chief Justice Burger authored in *Lockett v. Ohio*, 438 U.S. 586 (1978) on the death penalty and *TVA v. Hill*, 437 U.S. 153 (1978) that decided the fate of the snail darter.
29. 418 U.S. 683 (1974).
30. Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (Simon & Schuster 1979). Publicly, Chief Justice Burger denied ever reading that account. One afternoon, a fellow staffer and I were waiting in his chambers to meet with Chief Justice Burger and my curious colleague pulled out a copy of that book that was hidden behind a shelf of books. It was heavily marked up with angry lines drawn through parts and screaming marginal notes in the unmistakable hand of Warren Burger. I hollered at him to put it back before we were caught like a couple of school boys, and he did.
31. Thomas E. Baker, *Bob Borks Amerika*, 44 *UCLA L. Rev.* 1185, 1187–88 (1997).
32. Stevens goes on record to state his belief of Clarence Thomas’ confirmation testimony that Thomas had not debated the issue of abortion to a conclusive personal opinion prior to his



not even mention the one-sidedness of the Senate confirmation vote, which was 98-0, perhaps out of a sense of humility. Those were the days before the Senate hearings on a Supreme Court nomination became a televised populist constitutional lyceum.<sup>33</sup> I leave to the reader whether the Constitution and the country are better or worse off now.<sup>34</sup>

Justice Stevens provides some glimpses behind the red curtains, including some traditions that have survived beyond their origin, e.g., spittoons used

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own nomination (143).

33. Justice Scalia believes that the members of the Supreme Court are partly to blame for this development:

As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But . . . if, as I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the “liberties” protected by the Constitution are, as the Court says, undefined and unbounded, then the people should demonstrate, to protest that we do not implement their values instead of ours. Not only that, but confirmation hearings for new Justices should deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 1000-01 (1992) (Scalia, J. dissenting). Popular constitutionalism has become popular—pun intended—among legal academics. *E.g.*, Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus & Giroux 2009). Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford Univ. Press 2004); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton Univ. Press 1999). *See generally* Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 *Wis. L. Rev.* 159 (2012); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 *Colum. L. Rev.* 2047 (2010).

34. Former President Gerald Ford seconded his nomination of Justice Stevens in a letter congratulating the justice on having served 30 years:

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 Justice John Paul Stevens to the U.S. Supreme Court. I endorse his constitutional views . . . I include as well my special admiration for his charming wit and sense of humor . . . He has served his nation well, at all times carrying out his judicial duties with dignity, intellect and without partisan political concerns. Justice Stevens has made me, and our fellow citizens, proud of my three decade old decision to appoint him to the Supreme Court. I wish him long life, good health and many more years on the bench.

Adam Liptak, *The End of an Era, for Court and Nation*, *N.Y. Times*, Apr. 9, 2010, *available at* <http://www.nytimes.com/2010/04/10/us/politics/10judge.html?pagewanted=all>.

as wastebaskets (118). Traditions are everywhere inside the marble palace. Rules of seniority, for example, determine the order the justices speak at conference, the way they line up to go on the bench, the arrangement of their water goblets, who comes on the phone first, and so on. He chimes in on the importance of oral argument, noting that it is “the first time the justices speak with one another concerning the merits of the case” (118) and “the one time when lawyers and judges labor together . . . albeit not always collaboratively” to decide the case (119). He admits to the guilty pleasure of being amused by “Nino Scalia’s wonderfully spontaneous sense of humor” in asides during arguments (118). His own mischievousness comes across in his favorite way of announcing his vote at conference, typically after Justices *William* Brennan and *William* Rehnquist had taken opposite sides, by announcing with the timing of a comedian: “I agree with Bill . . .” (141). He accounts for the fact that he declined to join the cert pool because he believed he could screen petitions for *certiorari* faster and more accurately than the law clerks one year out of law school (139). He extracted a commitment from David Souter to take him to the woodshed if, as he grew older, his work began to decline (123). The irony of their illusory contract, of course, was that Souter saw fit to retire from the Court ahead of him and left him to his own devices. He also reveals some principles of his writing philosophy. For example, he operated with a presumption to publish his separate views to better serve the Court and the public (156). Indeed, statistics bear out that individualist philosophy: Justice Stevens holds the record for the largest number of dissenting opinions, approaching twice the number of the second place Justice Douglas.<sup>35</sup> Furthermore, Stevens’ memoirs are further evidence of this contrarian streak to reaffirm his ongoing disagreement in cases like *Michigan v. Long*,<sup>36</sup> in which he originally registered his critical views in his 1983 dissenting opinion (160).

### William Rehnquist

Justice Stevens gives Chief Justice Rehnquist high marks for being “a totally impartial presiding officer” at conferences (171) and praises him for his “efficiency and impartiality” at oral arguments (172). Rehnquist was a punctilious timekeeper. What was said about his model chief justice—Charles Evans Hughes (31–32)—could also be said of Rehnquist: he was capable of stopping a lawyer for being out of time in the middle of the word “if”<sup>37</sup>—even

35. Remarkably, he wrote 720 dissents and Douglas wrote 486; coincidentally, both served over 30 years and occupied the same chair. Craig D. Rust, *The Leadership Legacy of Justice John Paul Stevens*, 1 J. Legal Metrics 135 (2012).

36. 463 U.S. 1032 (1983).

37. According to the biographer of Charles Evans Hughes:

[The Chief Justice] held each speaker to exactly his allotted time. It is said, with some exaggeration, that once he called time on a leader of the New York Bar in the middle of the word “if.” When John W. Davis asked how much time remained and Hughes snapped, “exactly one minute and a half,” counsel suavely replied, “I present the court with one minute and a half.”

when the lawyer was a U.S. Senator, as Arlen Specter experienced to his lasting chagrin (173). However, Stevens repeats his sharp disapproval of how Rehnquist regularly reminded lawyers to refer to him as “Chief Justice” and to the others as “Justice Last Name” rather than “judge,” as if this was a quirk unworthy of a chief justice (173).<sup>38</sup> And Stevens still cannot abide Chief Justice Rehnquist’s affectation—in the face of his colleagues’ unanimous disapproval of the fashion—to add four gold stripes to his robe (173). Would that Stevens had the grace and humor of Justice O’Connor to just let that one go.<sup>39</sup> I always took that gesture to be the opposite of a man who took himself too seriously, i.e., to borrow inspiration from the Lord Chancellor character in *Iolanthe*, one of his favorite operettas by Gilbert and Sullivan.<sup>40</sup> In any event, the stark contrast between the down-to-earth Rehnquist and his predecessor helped to make Rehnquist popular with his colleagues. He was someone who enjoyed gambling for modest stakes and group singing; he was a considerate person who got along with people; he had a well-developed sense of humor off the bench (175–78). In a very decent gesture, Stevens defends Rehnquist posthumously against the press charges that have haunted Rehnquist from his temporary addiction to prescribed pain medication. Stevens insists he “never thought there was any impact on [Rehnquist’s] ability to work efficiently” (178). That episode and the adverse press coverage bothered Rehnquist deeply and I am sure he would have appreciated that Stevens stuck up for him.<sup>41</sup>

The commonplace Latinism is that the chief justice is “*primus inter pares*” or “first among equals.” With considerable insight and experience, Justice Stevens insists that “it is as the equal of other members of the Court—in deciding cases—that [Rehnquist] had his greatest impact” (179). This is in sharp contrast to the lesser intellectual impact Chief Justice Burger had on Supreme Court jurisprudence. In this regard, the “Rehnquist Court” was very much the Rehnquist Court. Stevens and Rehnquist both understood the importance of the deep structure of the Constitution—“*real constitutional law.*”<sup>42</sup> As often as

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Merlo J. Pusey, Vol. II, Charles Evans Hughes 665 (MacMillin & Co. Ltd. 1951).

38. Devotees of Rehnquist and devotees of Stevens quarreled amongst themselves about the details of these incidents. I side with the former group who accuse the latter group of exaggeration. Compare Ross E. Davies, *Obi-Wan Stevens vs. Darth Rehnquist*, 13 *Greenbag* 2d 263 (2010), with Jeffrey L. Fisher, *Justice Stevens and the Judge/Justice Story*, 14 *Greenbag* 2d 53 (2010).
39. Sandra Day O’Connor, *In Memoriam: William H. Rehnquist*, 119 *Harv. L. Rev.* 3 (2005).
40. Linda Greenhouse, who cannot be accused of being a big fan of Rehnquist, thinks I might be on to something with my take on the stripes: “I always took this gesture as a flight of fancy rather than a show of pomposity, but the subject remains open to debate.” Linda Greenhouse, *How Not to be Chief Justice: the Apprenticeship of William H. Rehnquist*, 154 *U. Pa. L. Rev.* 1365, 1368 (2006).
41. I remember being at an off-the-record meeting with Rehnquist and reporters, soon after he became chief justice, when he was asked if he would be more forthcoming about issues of health for himself and his colleagues. He responded angrily to compare reporters to “vultures” and I remember thinking to myself, “so much for schmoozing with the press.”
42. Who am I to disagree with Professor Scalia?

the two jurists agreed on issues of separation of powers (179),<sup>43</sup> they profoundly disagreed on issues of federalism (194).<sup>44</sup> Justice Stevens highlights their “differences of opinions.” He identifies the retirement of Thurgood Marshall and the appointment of Clarence Thomas as “the most significant judicial event of Bill Rehnquist’s tenure as chief justice” (186) because it made possible a series of five to four decisions that consequently went the other way (187). He tells the story how he and Justice Breyer exchanged some holiday cheer at the Court’s annual Christmas party in December 2000 and both matter-of-factly agreed that the pending application for review in the *Bush v. Gore*<sup>45</sup> case was frivolous (198–200). I wasn’t at the party, but I remember predicting that the Court would not take the case because it was a political question, i.e., the Constitution assigns the task of resolving presidential elections to the Congress<sup>46</sup> and the Supreme Court had stayed out of it the last time my home state of Florida could not get its electoral college act together in the Hayes–Tilden election of 1876. Despite their immediate importance to that election, one wonders whether that set of opinions is worth the paper they are printed on. The opinion for the Court declared that its holding was constitutionally *sui generis*<sup>47</sup> and, as Justice Stevens is careful to point out, the justices have never ever cited it again in *U.S. Reports* (200). I think their notable lack of respect ought to give lower court judges pause before they rely on that decision, but it does not always have that signal effect.<sup>48</sup>

Justice Stevens reveals a wide stubborn streak by frequently adhering to a position he took in a case to express in his memoirs his continuing disapproval

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I am pleased to open this Symposium, which draws attention to the important role of structure in the Constitution. In the days when I taught constitutional law, the University of Chicago Law School had two constitutional courses. One . . . focused primarily upon the guarantees of the Bill of Rights. The other . . . focused upon the structural provisions of the Constitution, principally the separation of powers and federalism. That was the course I taught—and I used to refer to it as *real* constitutional law. The distinctive function of a constitution, after all, is to constitute the political organs, the governing structure of a state.

Antonin Scalia, Symposium Foreword: The Importance of Structure in Constitutional Interpretation, 83 *Notre Dame L. Rev.* 1417, 1417 (2008) (emphasis in the original).

43. *E.g.*, *Clinton v. Jones*, 520 U.S. 681 (1997); *Morrison v. Olson*, 487 U.S. 654 (1988).
44. *E.g.*, *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).
45. 531 U.S. 98 (2000).
46. U.S. Const. art. II, § 1 & amend. XII.
47. “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” 531 U.S. at 109.
48. Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 *Stan. L. Rev.* 1 (2007); Chad W. Flanders, *Bush v. Gore as Precedent*, Yale Student Scholarship Papers (2007), available at [http://digitalcommons.law.yale.edu/student\\_papers/36](http://digitalcommons.law.yale.edu/student_papers/36).

and disagreement with a colleague or a majority holding.<sup>49</sup> He does not shrink from defending some of his majority opinions from criticisms, as well. For example, he defends *Clinton v. Jones*,<sup>50</sup> and in particular this feckless observation: “If the past is any indicator, it seems unlikely that a deluge of such litigation will engulf the Presidency. As for the case at hand, if properly managed by the District Court, it appears highly unlikely to occupy any substantial amount of petitioner’s time.”<sup>51</sup> When I teach that case, my in-class wisecrack is to mutter about the apparent flaw in his crystal ball. Apparently, the Justice feels as if he has been unfairly criticized: “While I am not aware of any significant scholarly criticism of the legal analysis in my opinion, numerous commentators have rather enthusiastically suggested that only the village idiot could have authored one statement that I made” (183). He still insists that there was the likelihood of a pretrial disposition and that impeachment was “unforeseen” (184). But he did not have to make that prediction and it was a profoundly and dramatically inaccurate dictum. So I will continue to point it out to my law students as a howler of a mistake, because that is how predictions are judged—by whether or not they come true.<sup>52</sup>

### John Roberts, Jr.

Justice Stevens’ chapter on Chief Justice Roberts begins with some chummy details about Roberts’ childhood, his participation in high school sports, and his legal career as a law clerk for Chief Justice Rehnquist and later as a stellar advocate before the Supreme Court (203–06). Stevens concludes with his seal of approval that Roberts was a “superb lawyer” who was an “obvious first choice” for President Bush to appoint to a vacancy on the Court (206)—an opinion he says was vindicated when Roberts declined to decorate his robes with gold stripes (208). Stevens climbs onto his separation-of-powers soap box to disapprove of White House swearing-in ceremonies of Supreme Court nominees. After being offended at Anthony Kennedy’s swearing in at the Reagan White House, Stevens purposely boycotted the White House ceremonies held by Presidents Bush and Clinton for David Souter, Clarence Thomas, Ruth Ginsburg, and Stephen Breyer (206–07). Rather than risk that his refusal be misinterpreted as disapproval of the nominee, however, Stevens went to the White House to swear in John Roberts as part of his duties as Senior Associate Justice (208). Stevens gives comparable props to Roberts for his decision to attend the State of the Union address the next year after the “Not True!” lip-reading kerfuffle between Justice Alito and President Obama

49. In sobering contrast, he confesses error to admit that his own most mistaken vote was in the 1976 death penalty cases that were decided his first year on the Court (214–16). See *Jurek v. Texas*, 428 U.S. 262 (1976).

50. 520 U.S. 681 (1997).

51. *Id.* at 702.

52. “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.” *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

triggered by the President's regrettable dig at the Supreme Court over the campaign finance decision (208)<sup>53</sup>. Roberts is praised for being "well-prepared, fair and effective" and for maintaining the "appropriate impartiality" and as one of the best all time "spokesm[en] for the Court in nonjudicial functions" (210). Stevens registers a *feng shui* objection with how Chief Justice Roberts rearranged the furniture in the conference room in a way Stevens believes will interfere with the *qi* of the Court (212-13). Focusing on the First Amendment, Justice Stevens wrings his hands over some of Chief Justice Roberts' votes and opinions with which he disagrees (218-21)<sup>54</sup>. He also seems to go out of his way to encourage Roberts to be more independent of the conservative justices, as well as the influence of Roberts' old boss, Chief Justice Rehnquist (222). The reader comes away with the impression that Justice Stevens believes that John Roberts already is destined to be ranked highly among those who have occupied the center chair.

### Second Among Equals

Justice Stevens' book is the first time I recall anyone writing at any length and with any seriousness or care about the first chair to the right of the chief justice—the place of the most senior associate justice, for whom he coins the phrase "second among equals" (231).<sup>55</sup> Stevens' own tenure in this position began in 1994 with the retirement of Harry Blackmun and ended with his retirement in favor of Antonin Scalia (245). Apparently, Justice Stevens took those duties very seriously: to sometimes substitute for the chief justice and to assign opinion-writing responsibility when he was in the majority and the chief justice was in dissent (231). He reveals that he was standing by on the platform of the second inauguration of President George W. Bush, but Chief Justice Rehnquist left his cancer sickbed to show up at the last minute to administer the oath of office (233). He later swore in Vice President Biden and remarks on the various emotions he felt over the years as a witness at those historic events (233-34). Revealingly and expectedly, he admits: "My most significant memory about making assignments of majority opinions when the

53. *Citizens United v. FEC*, 130 S. Ct. 876 (2010). Justice Stevens cannot seem to let go of that case and controversy. He wrote a 90-page dissent and read from it at length from the bench. Indeed, the Justice's ongoing grudge over that decision may have something psychologically to do with the fact that he decided to retire after struggling with the announcement of his dissent. Bill Barnhart, A Conversation with John Paul Stevens, *The Atlantic*, Apr. 28, 2011, available at <http://www.theatlantic.com/national/archive/2011/04/a-conversation-with-john-paul-stevens/237984/>. Then he gave a speech in 2012, after he retired, in which he quoted President Obama's sharp criticisms of the Supreme Court so approvingly that I have to admit it made me mildly uncomfortable to read. See Adam Liptak, Former Justice Stevens Portrays Court as Inconsistent After *Citizens United*, *N.Y. Times*, May 30, 2012, available at <http://thecaucus.blogs.nytimes.com/2012/05/30/former-justice-stevens-portrays-court-as-inconsistent-after-citizens-united/>. See also *supra* note 7.

54. *E.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Citizens United v. FEC*, *supra* note 53.

55. I am not sure why, but John Nance Garner's quotation comes to mind: "The Vice Presidency isn't worth a pitcher of warm spit." Fred R. Shapiro, ed., *The Yale Book of Quotations* 300 (Yale Univ. Press 2006).

chief was in dissent is one of satisfaction with a result that I believed to be just” (235).<sup>56</sup> Stevens floats the theory that Chief Justice Burger exhibited a tendency to keep opinions for himself in decisions in favor of the press and to assign Byron White to write opinions against the press in the apparent hope of garnering approval and deflecting disapproval in the popular press (236). He endorses the conventional wisdom that assigning the opinion to the justice in the majority whose vote on the merits of the case is the most tenuous usually has the effect of reaffirming the writer’s vote; furthermore, if the writer switches sides in a closely decided case, the practice is efficient because that justice will be in a position to write for the newly-formed majority (236–37).<sup>57</sup> Indeed, in this vulgar age<sup>58</sup> of yelling-not-talking heads on cable TV and vitriolic bloggers on the Internet, it was reassuring for me to read Justice Stevens’ personal testimony, worth quoting here: “I have no memory of any member of the Court raising his or her voice during any conference over which I presided or showing any disrespect for a colleague during our discussions” (244). I myself have always discounted those seemingly insulting footnotes in opinions that shed more heat than light on the issues, which I suspect frequently are the work of loyal law clerks writing as surrogates or the result of the June end-of-the-term workload crunch. SCOTUS watchers too often make too much of those digressions. There is a critical distinction between mocking an argument and mocking the person making the argument and I try to resist the political correctness that tries to collapse the difference, sometimes to the chagrin of my own faculty colleagues.

### Conclusion

Justice Stevens self-consciously wrote this book about this quintet of chief justices “to share memories of these men and their work” with the hope to “improve public understanding” of the Supreme Court (6). As this review suggests, I believe Justice Stevens succeeds in his stated goal. Any book written by a Supreme Court justice might be added to the book shelf of someone like me who teaches and writes about the Supreme Court.<sup>59</sup> As a student of the Supreme Court, I found these memoirs overall to be a reassuring account

56. He goes on, speaking like a true judge: “A dissenting judge is never happy, because it is obvious that either the majority has come to the wrong conclusion or his own reasoning is flawed” (235).

57. He singles out three cases when his designation of a writing justice resulted in important majority opinions. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Blakely v. Washington*, 542 U.S. 296 (2004); *Romer v. Evans*, 517 U.S. 620 (1996).

58. The best stylist currently on the Court, who at times is also the most obnoxious writer among the justices, once proclaimed: “We indeed live in a vulgar age.” *Lee v. Weisman*, 505 U.S. 577, 637 (1992) (Scalia, J., dissenting).

59. Ronald Collins has compiled a valuable bibliography of 350 books written by members of the high court. Ronald Collins, 350 books by Supreme Court Justices, SCOTUSblog.com, Mar. 12, 2012, available at <http://www.scotusblog.com/2012/03/351-books-by-supreme-court-justices/>.

of the man and the institution he served so long and so faithfully.<sup>60</sup> It is a welcome addition to my bookshelf.<sup>61</sup>

60. *But see* Supreme Court Favorability Reaches New Low, Pew Research Center for the People & the Press, May 1, 2012, available at <http://www.people-press.org/2012/05/01/supreme-court-favorability-reaches-new-low/?src=prc-headline> (Barely over half (52 percent) of Americans hold a favorable opinion of the Supreme Court).
61. P.S. This is the place for me to reveal the make-believe title of my book about the Supreme Court: “My Two Chiefs—A Never-To-Be-Written Memoir.” Candor, not immodesty, compels me to reveal that between 1985 and 1987 I served as Judicial Fellow in the Office of the Administrative Assistant to Chief Justice Burger and later I served as the Acting Administrative Assistant to Chief Justice Rehnquist. (In 2008, Congress changed the title of the position to “Counselor to the Chief Justice.” 28 U.S.C. § 677.) *See supra* notes 30 and 41. Having known both men and having observed them up close and personally, I will simply comment that I think Justice Stevens’ assessments of them were overly favorable of Burger and overly critical of Rehnquist—at least relatively speaking. To say more about the former would compromise my claim of loyalty; to say more about the latter would compromise my claim of objectivity. Madame Cornuel’s famous observation comes to mind: “No man is a hero to his valet.” Shapiro, *supra* note 55, at 175.