Book Review

John Paul Stevens, *The Making of a Justice: Reflections on My First 94 Years*, New York, Little, Brown and Co., 2019, pp. 549, $35.00 (hardback)

Reviewed By Stephen Wermiel*

The autobiography of Justice John Paul Stevens, published just a few months before he died, is an enticing travelogue for Supreme Court nerds. Other travelers may want to pick a different landscape.

In *The Making of a Justice: Reflections on My First 94 Years*, Stevens who died in July 2019, at age 99, spent 130 pages on his life before he joined the Supreme Court and then 394 pages describing the decisions during his thirty-four year as a Justice. Stevens was an agile writer and did as good a job as anyone can of making the narrative accessible, but it is a tough road to go from one case to another for what must be at least 150 decisions.

Along the journey there are many interesting nuggets of information and details about the Court. But Justice Stevens was not one to tie threads together from one case to another or one Court term to another. The result is that with a few exceptions, readers must find their own themes and trends and draw their own overarching conclusions. As you read, you are hungry for Stevens to connect some dots for you.

What comes through is the memoir of a true judge, a narrative in which the cases are the story. Stevens described how the cases looked to him and, often, how the dissenters saw them differently, for the most part writing dispassionately, in a matter-of-fact tone. But in a few places, Stevens went out of his way to critique decisions with which he disagreed. His choices are not always obvious.

Take *Oklahoma City v. Tuttle*,[1] not a ruling that would roll off most tongues. Stevens said of Justice William Rehnquist's plurality opinion that it "is one of the worst decisions announced during my years on the Court." (211). Rehnquist wrote that a person may not sue a city under Section 1983[2] for

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1 471 U.S. 808 (1985).

2 42 U.S.C. § 1983.

violating his constitutional rights, such as police use of excessive force, without proving that the violation was pursuant to official policy. Stevens was the sole dissenter, maintaining that an individual police officer who acted in his official duties should be liable along with the city without proof of official policy. Presumably, Stevens believed the Rehnquist opinion did substantial damage to the important civil rights remedy, but his account in the memoir does not really explain.

In another example, Stevens said "the unfortunate decision" in *Payne v. Tennessee*[3] "remains, in my judgment, one of the worst in the Court's history." (270). The Court had earlier ruled that victim impact statements were so prejudicial in death penalty cases as to be unconstitutional. The ruling was by a narrow margin, and when two members of the majority retired, Lewis Powell in 1987 and William Brennan in 1990, replaced by Anthony Kennedy and David Souter, the Court reversed direction. In an opinion by Chief Justice Rehnquist, the Court reversed its earlier rulings and allowed victim impact statements. Stevens dissented as did Thurgood Marshall in what would be his final opinion.

Stevens dubbed *District of Columbia v. Heller*[4] "the most clearly incorrect decision" of his tenure (482). Justice Antonin Scalia wrote the majority opinion finding, after more than 200 years, that the Second Amendment protects an individual right to possess guns. Stevens faulted Scalia for abandoning the precedent of *U.S. v. Miller*,[5] which limited the Second Amendment to firearms for militia members, and for ignoring the societal harm from weapons (485). Stevens disclosed that he expended considerable effort during the Court's deliberations trying to persuade Justice Kennedy, and, to a lesser extent, Justice Clarence Thomas, but to no avail. In the end, the decision was "the worst self-inflicted wound in the Court's history," Stevens wrote (485).

There are other interesting revelations, some quite timely. He was nominated by President Gerald Ford and confirmed by the Senate in late 1975. He succeeded Justice William O. Douglas, who faced an impeachment campaign in 1970 led by Ford who was then a Michigan congressman and the Republican minority leader of the House of Representatives.

The Stevens confirmation hearing in the Senate Judiciary Committee began on December 8, 1975, and spanned three days. Stevens recounted that there was a great urgency to moving the nomination along quickly. He said he was told by Sen. Charles Percy, an Illinois Republican and supporter of the nomination, that Democrats who controlled the Senate at the time had warned that if Stevens were not confirmed by the end of 1975, they would hold up the nomination in 1976 to let the next president fill the vacancy after the November 1976 presidential election (129). This is hearsay, to be sure, and the

3 501 U.S. 808 (1991).

4 554 U.S. 570 (2008).

5 307 U.S. 174 (1939).

threat did not materialize because the Senate approved the nomination on December 17, 1975, by a vote of 98-0.

The scenario described by Stevens and attributed to Sen. Percy resembles the more recent episode when the Republican-controlled Senate, after the death of Justice Scalia in February 2016, refused to consider President Barack Obama's nomination of Judge Merrick Garland to fill the vacancy. Republicans did what Percy said Democrats had threatened forty years earlier – kept the seat open for the next president. After Donald Trump was elected in November 2016, he filled the vacancy in 2017 with Justice Neil Gorsuch.

In another somewhat timely observation, Justice Stevens observed that when Chief Justice Rehnquist presided over the Senate impeachment trial of President Bill Clinton in 1998, it did not affect the work of the Supreme Court. And Stevens added that from his memory of conversations at the time, he believed Rehnquist "enjoyed his role" (337).

The memoir reveals much about the relationships Justice Stevens had with other members of the Court, sometimes by his own description and sometimes by omission. Given the richness of his praise for many of his colleagues, either when they were appointed or when they retired, it is clear by omission that he did not have a close relationship with either Justice William Brennan, who retired in 1990 after almost thirty-four years on the Court, or Justice Thurgood Marshall, who left the Court in 1991 after twenty-four years. While Stevens praised a number of Brennan opinions throughout different chapters, he simply noted "Brennan's last year as an active justice," without further comment (259). As to Marshall, he noted that his resignation and replacement by Justice Thomas "resulted in the most important change in the Court's jurisprudence that took place during my tenure" (273). Stevens had relatively little to say, as well, about the retirement of Justice Harry Blackmun in 1993 after twenty-three years, noting President Clinton's praise for him (300) at a news conference and Blackmun's own defense of *Roe v. Wade*[6] to the media.

Those very sparse passages stand in marked contrast to many others. He noted that when Justice Lewis Powell told his colleagues he was retiring in 1987, it was "an announcement that we all regretted and which produced a few tears from Sandra," a reference to Justice Sandra Day O'Connor (233). Elsewhere, Stevens had high praise for his relationships with Justice Potter Stewart (186), Justice O'Connor (186), Justice Byron White (289), Justice Stephen Breyer (301), Justice David Souter (499), and Justice Sonia Sotomayor (500).

Because Stevens is modest about big picture perspectives in the memoir, he does not address one of the more fascinating questions about his tenure. It is safe to assume that President Ford wished to nominate a relatively conservative justice, but over time, Stevens became a reliable vote in the Court's liberal wing. In interviews in his last years on the bench, Stevens was often asked whether he had changed by becoming more liberal. In one such interview, he gave his typical response. "I don't think that my votes represent a change in my own

6 410 U.S. 113 (1973).

thinking," he told the New York Times. "I'm just disagreeing with changes that the others are making."[7] There is no discussion of this very interesting take on his own tenure in the book; this feels like a missed opportunity to have explained why he felt this way.

There are a few minor miscues in the memoir. They could be easily forgiven. If I make it into my 90's and have half the memory Stevens did at that age, I'll consider myself lucky. Still, he describes how his fourth term on the Court began shortly before Jimmy Carter bested Gerald Ford in 1978 (165). Of course, Carter beat Ford in 1976 as Stevens was in his first full term on the Court. Even more nitpicky, he situated *City of Boerne v. Flores*[8] in San Diego rather than San Antonio (319). In *Elk Grove Unified School District v. Newdow*,[9] Stevens said he persuaded five other justices to join him in finding that atheist Michael Newdow had no standing to assert First Amendment establishment clause claims on behalf of his minor daughter over recitation of the Pledge of Allegiance (417). But Justice Stevens only persuaded four others, apparently forgetting that Justice Scalia recused after making intemperate remarks about the case in a speech. The vote in the case was the Stevens five to dismiss the case and three others, Rehnquist, O'Connor and Thomas, concurring in the judgment but reaching the merits and finding no First Amendment problem with the Pledge of Allegiance.

An occasional recollection might pit his perspective on an issue against those of other justices. For example, in a couple of places, Justice Stevens patted himself on the back for suggesting expansion of the Court's accepted rationales for the use of race in affirmative action from just remedying past discrimination to promoting diversity (259, 399). His claimed influence might surprise other justices like Brennan in *Metro Broadcasting v. Federal Communications Commission*[10] or O'Connor in *Grutter v. Bollinger*.[11]

There are other highlights from the recollections of Justice Stevens, which he refreshed by asking his former law clerks to send him their recollections from their terms.

-- Stevens, in an odd sort of boast, was "convinced that I have had better success in selecting clerks than any of my colleagues" (336). No doubt his many former law clerks would agree. But some might also have to confess that it is a strange claim to make.

-- When he first joined the Court, as the last one to speak at the closed-door conferences of the justices, he liked to say "I agree with Bill," leaving his colleagues briefly in suspense about whether he meant "Bill" Brennan or "Bill" Rehnquist (140).

7 Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. Times Mag. (Sept. 23, 2007).

8 521 U.S. 507 (1997).

9 542 U.S. 1 (2004).

10 497 U.S. 547 (1990).

11 539 U.S. 306 (2003).

-- Justice Stevens said he was the one who pointed out to Chief Justice Warren Burger the inconvenience to Justice O'Connor, who, as the first woman on the Court, had to walk back to her chambers to use the restroom because the facilities where the justices were meeting were male-only.

-- He was "perplexed" by the decision of Chief Justice Burger to step down from lifetime tenure on the Court for the "temporary assignment" to run the Constitution Bicentennial Commission (225).

-- Stevens thought Robert Bork was "the most persuasive solicitor general" during his tenure on the Court (234). Bork was nominated and then defeated in 1987 for the Supreme Court seat vacated by Justice Powell. Stevens considered him "eminently qualified" and wrote, "one of the unfortunate consequences of the Bork hearings is that we will never know what kind of justice he would have been . . . ."

-- *Kelo v. City of New London*[12] was "the most unpopular opinion that I wrote during my more than thirty-four years on the Supreme Court," Stevens wrote (431). His majority opinion upheld the constitutional authority of government officials to seize private property for the purpose of economic development. This enraged large numbers of property owners throughout the nation. Defending his ruling, Stevens maintained that "the unpopularity of the decision tells us nothing about either its wisdom or its fidelity to the rule of law" (436).

-- Justice Stevens said his decision in *Chevron U.S.A. Inc., v. Natural Resources Defense Council*[13] was his "most frequently cited opinion" as a justice (202). The Court ruled that a federal agency is entitled to deference from the courts when the agency is interpreting an ambiguous statute that it administers in a way that is a permissible reading of the law. The vote in the case was 6-0. Stevens noted that among the four justices who voted to hear the case, White, Rehnquist, Powell and O'Connor, two eventually recused – Rehnquist and O'Connor (Marshall also recused) (202). In the end, Stevens noted, of the six justices who agreed on the majority opinion, there were only two who had voted to hear the case (203). He also said a visit he paid to Brennan's chambers to try to persuade him to join *Chevron* was the only time he went to see another justice for that purpose (203). He would surely be disappointed to learn that *Chevron* was overruled in June 2024 by a 6-3 conservative Court majority.

-- He described a couple of occasions on which he had a Court opinion to write but could not hold on to the majority. One was a criminal procedure case, *Montejo v. Louisiana,*[14] in which Stevens assigned himself the opinion as the senior justice in the majority when Chief Justice Roberts was apparently in dissent. After circulating his opinion, Stevens garnered only three other votes and surrendered the majority position to Justice Scalia. This happened again

12 545 U.S. 469 (2005).

13 467 U.S. 837 (1984).

14 556 U.S. 778 (2009).

in his very last days on the bench. In a patent case, *Bilski v. Kappos,*[15] Roberts assigned the opinion to Stevens, but his draft came up one vote short, and the decision was reassigned to Kennedy.

-- On the other hand, Justice Stevens flipped the Court his way in *Sony Corp. of America v. Universal City Studios, Inc.,*[16] a case in which the Court ruled that the Sony Betamax, one of the first devices used to record programs from the airwaves, was not subject to liability for copyright infringement (200). The case was argued in January 1983, and the initial outcome was to hold Sony liable for copyright infringement. Justice Blackmun wrote a draft majority opinion and Stevens a draft dissent. Because it was late in the Court term, the case was set to be reargued in October 1983. After the reargument, Justice O'Connor changed sides, giving Justice Stevens the majority opinion (201). Stevens wrote, "Few, if any, of my opinions for the Court have been as gratifying as the result in that case" (201).

-- Stevens also noted that when Justice O'Connor retired and was replaced by Samuel Alito in 2006, the outcome of three cases changed (456).Three cases were first argued and decided with O'Connor on the bench but were reargued when Alito joined. The original majority opinions became dissents in *Garcetti v. Ceballos,*[17] *Kansas v. Marsh,*[18] and *Hudson v. Michigan*[19] (456).

-- The discussion of *Kansas v. Marsh*[20] is one of several places in which Justice Stevens noted his evolution to the view that the death penalty could not be administered in a constitutional manner. The majority upheld a Kansas capital sentencing law, which Stevens said "enhances the danger of making an uncorrectable mistake" (458). In one of the book's more passionate moments, Stevens said that when the Court upheld a new generation of death penalty laws in 1976[21], "None of us seriously considered the magnitude of the risk of error in capital cases. It is now perfectly clear that it is a risk that no civilized society should tolerate" (458). In an earlier discussion, Stevens faulted himself in his first death penalty case, Jurek v. Texas,[22] for not examining the facts more carefully (143). Had he done so, as his law clerk urged him to, he said he might have switched and voted to invalidate the Texas capital law. "I have lived to regret my failure to do so," he wrote (143).

15 561 U.S. 593 (2010).

16 464 U.S. 417 (1984).

17 547 U.S. 410 (2006).

18 547 U.S. 586 (2006).

19 548 U.S. 163 (2006).

20 *Id.*

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

22 *Id.*

-- He praised the decision in *Planned Parenthood v. Casey*[23], not simply because it preserved the right to abortion, but because it based that right on liberty rather than privacy (282). He felt this was a more solid ground on which to situate the abortion right. He confirmed that he and Justice Blackmun, the author of *Roe v. Wade,*[24] fully expected *Roe* to be overruled in *Casey*, until they were surprised by the jointly written opinion from Justices O'Connor, Kennedy and Souter that reaffirmed the basic right to abortion. Stevens said he persuaded O'Connor, Kennedy and Souter to reorganize their opinion so that he and Blackmun could join critical portions to create a majority to reaffirm the right to abortion (282). Of course, the expectation that *Roe* might be overruled came to fruition some thirty years later in *Dobbs v. Jackson Women's Health Organization*.[25]

-- On another subject of great recent import, Justice Stevens was frustrated by the unwillingness of his colleagues to adopt a standard for reviewing the constitutionality of political gerrymandering (412). In discussing *Vieth v. Jubelirer*[26] in the memoir, he argued that there was no reason why political gerrymandering could not be judged in the same way as racial gerrymandering. In his view, the burden would be on a state to provide a non-partisan reason for the odd shape of a legislative district, just as a state must demonstrate a non-racial reason for district lines that are bizarrely drawn (413). He said he was "puzzled" at his failure to persuade his colleagues of this view. But fail to persuade he did, and slightly more than two weeks before he died, his former Court decided in *Rucho v. Common Cause*[27] that political gerrymandering cases are political questions that may not be decided in the federal courts.

-- In two places, Justice Stevens stood by decisions he made upholding laws that he described as ill-advised. In *Gonzalez v. Raich,*[28] he upheld application of federal drug law to prevent California from permitting local growth of marijuana for medical purposes. While he had no doubt that the federal law was within the power of Congress, he said he "was firmly convinced that the federal prohibition was a tragic example of a stupid law. . ." (430). In *Crawford v. Marion County Election Board,*[29] he upheld an Indiana requirement that voters present a government-issued photo identification, such as a driver's license, at the polls (478). Despite his view that the law was legal, Stevens said in the memoir, "the opinion was difficult to write because I thought the statute was an example of particularly unwise partisan legislation that did not really serve the public interest" (479).

23 505 U.S. 833 (1992).

24 410 U.S. 113 (1973).

25 597 U.S. 215 (2022).

26 541 U.S. 267 (2004).

27 588 U.S. 584 (2019).

28 545 U.S. 1 (2005).

29 553 U.S. 181 (2008).

-- His "most significant majority opinion," Stevens wrote, was likely *Apprendi v. New Jersey,*[30] which held that any fact in a criminal case that might increase the possible maximum sentence had to be decided by a jury beyond a reasonable doubt and could not simply be found by a judge (358).

There are some fascinating moments in life before the Supreme Court for Stevens. He served in the Navy in World War II, deciphering encrypted Japanese radio communications in Washington, D.C., and then later at Pearl Harbor in Hawaii. While Navy personnel made important intercepts of Japanese communications during this period, Stevens is cryptic about what role he played, other than in helping to identify a mistaken Japanese call sign and correcting the erroneous assumption that there was a dramatic buildup at a Japanese naval base in Truk (45).

Stevens noted that he earned more as a law clerk to Supreme Court Justice Wiley Rutledge in 1947 than he earned as a lawyer in private practice (68). And he remarked that when he was sworn in to the Illinois bar, his law firm did not pay him for the day he spent traveling to Springfield, Illinois for the ceremony (70).

It is notable that when Stevens discussed his appointment to the U.S. Court of Appeals for the Seventh Circuit in 1970, he made no mention of President Richard Nixon, who nominated him (107-109).

Baseball figured prominently in two places in the story of Justice Stevens. In neither was he analogizing Supreme Court justices to umpires who call balls and strikes.[31] In the first, Stevens described his memory of attending game three of the World Series on October 1, 1932, between the New York Yankees and the Chicago Cubs at Wrigley Field in Chicago. President Franklin Delano Roosevelt threw out the first pitch, but the twelve-year-old Stevens had no memory of that. Instead what he remembered vividly was Yankee slugger Babe Ruth pointing to the center field bleachers in the fifth inning and then hitting a home run to that same location in the famous "called shot" (17-18).

The first pitch that stuck with him was one he threw out himself. On September 14, 2005, Stevens threw out the first pitch at Wrigley Field in a game between the Cincinnati Reds and Chicago Cubs (450-451).

"That," Stevens wrote, "was unquestionably the high point of my career."

30 530 U.S. 466 (2000).

31 *See* David G. Savage, *Roberts Sees Role as Judicial "Umpire,"* L.A. Times (Sept. 13, 2005) (describing statement made by Judge John Roberts at his confirmation hearing to be chief justice).