

## JOHN PAUL STEVENS, ORIGINALIST

*Diane Marie Amann*

**ABSTRACT**—Commentators, including the author of a recent book on the Supreme Court, often attempt to give each Justice a methodological label, such as “practitioner of judicial restraint,” “legal realist,” “pragmatist,” or “originalist.” This Essay first demonstrates that none of the first three labels applies without fail to Justice John Paul Stevens; consequently, it explores the extent to which Justice Stevens’s jurisprudence paid heed to the fourth method, “originalism.” It looks in particular at Justice Stevens’s opinions in recent cases involving firearms, national security, and capital punishment. Somewhat at odds with conventional wisdom, the Essay reveals Justice Stevens as a kind of originalist—as a Justice duty-bound to identify and enforce principles, such as liberty and fairness, that the Framers embedded in the Constitution. To do so, Justice Stevens has practiced a fifth methodology, one that synthesizes many sources and interpretive techniques in an effort to reach a decision that serves a contemporary understanding of justice.

**AUTHOR**—Emily and Ernest Woodruff Chair in International Law, University of Georgia School of Law, Athens, Georgia; October Term 1988 law clerk for Justice John Paul Stevens. A version of this Essay was presented as part of a panel on “Justice Stevens’s Methods of Interpretation” at the May 12, 2011, symposium of the *Northwestern University Law Review* entitled “The Legacy of Justice Stevens.” Justice Stevens once served as Co-Editor-in-Chief of the *Northwestern University Law Review*, and I, years later, served as a Note and Comment Editor. Thanks to *Law Review* editors Lindsay Dunbar and Matthew Underwood for their assistance. This Essay is dedicated to my colleague Floyd F. Feeney, the Homer G. and Ann Berryhill Professor of Law for International Legal and Communication Studies at the University of California Davis School of Law, in recognition of his long support of my scholarly pursuits, and to the many professors at Northwestern University School of Law who placed my career in law on a path of promise.

INTRODUCTION.....	744
I. ORIGINALISM AS AN ARCHETYPE.....	745
II. JUSTICE STEVENS AND ORIGINALISM.....	745
III. JUSTICE STEVENS, JUSTICE SCALIA, AND THE SUBSTANCE OF LIBERTY.....	745
CONCLUSION.....	745

## INTRODUCTION

Much attention has been paid to a four-in-one judicial biography with a catchy name, *Scorpions*.<sup>1</sup> As promised by its subtitle, *The Battles and Triumphs of FDR's Great Supreme Court Justices*, the book focuses on rivalries among its subjects: Justices Hugo Black, Felix Frankfurter, William O. Douglas, and Robert H. Jackson. Retold, for example, is the near mutiny that ensued when Justice Jackson, on leave to serve as Chief Prosecutor in a Nuremberg trial that other Justices condemned, pressed in vain to become the Chief Justice of the United States. Upon such familiar fabric, the author of *Scorpions*, Harvard Law Professor Noah Feldman, embroiders lesser known anecdotes: for instance, the curious fact that another Nuremberg veteran, secretary Elsie Douglas, was the sole witness to the terminal attacks that felled both Justice Jackson and Justice Frankfurter.

*Scorpions* provides an elliptical frame of reference for discussing the topic of this Essay, Justice John Paul Stevens's methods of interpretation. This is because of two omissions, one obvious and one less so. Glaring is Feldman's decision to omit much mention at all of the other four men whom President Franklin D. Roosevelt put on the U.S. Supreme Court—among them Justice Wiley B. Rutledge, Jr., an early and influential mentor to Justice Stevens.<sup>2</sup> The second omission pertains to Feldman's decision to confine the discussion of legal philosophies largely to his subjects' lifetimes. Scarcely explored are linkages between the intellectual struggles of mid-twentieth-century Justices and those of their twenty-first-century successors—including Justice Stevens and a colleague with whom he

---

<sup>1</sup> NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* (2010). For a description of the incidents described in the remainder of this paragraph, see *id.* at 292–302, 403–05, 419.

<sup>2</sup> See *id.* at 511 (indicating in the index that Justice Rutledge receives mention only five times). A very recent publication by Justice Stevens made clear the significance of his October Term 1947 clerkship with Justice Rutledge. See JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 37, 54–55, 58–61, 64–77, 86, 135, 175, 187–89 (2011) (discussing Justice Rutledge). For older yet similar indications, see John Paul Stevens, *Mr. Justice Rutledge* [hereinafter Stevens, *Rutledge*], in MR. JUSTICE 319 (Allison Dunham & Philip B. Kurland eds., rev. & enlarged ed. 1964); John Paul Stevens, *What I Did This Summer*, CBA REC., Oct. 2004, at 34, 34 [hereinafter Stevens, *Summer*] (discussing his reading of JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* (2004), the definitive Justice Rutledge biography).

frequently sparred, Justice Antonin Scalia.<sup>3</sup> Given their relevance to the understanding of Justice Stevens's methods of interpretation, both *Scorpions* omissions will be discussed in turn.

With regard to the first and most obvious of these ellipses: A couple of FDR Justices seem particularly ill served by relegation to the ranks of the "not great." One is Justice Frank Murphy.<sup>4</sup> Even ignoring this Michigander's long career of public service before joining the bench, his nine years on the Court merit respect. In dozens of opinions, Justice Murphy spoke out for Americans disadvantaged by governmental action, and he did so with an empathy alien to the irascible Justice Douglas, Feldman's preferred champion of an expansive rights doctrine.<sup>5</sup> Consider *Korematsu v. United States*, the 1944 case involving a native-born American of Japanese heritage who had suffered criminal conviction for defying government-mandated exclusion.<sup>6</sup> Justice Murphy refused to defer to a military order that, as he saw it, "falls into the ugly abyss of racism."<sup>7</sup> That refusal ran counter to the positions of all but two other Justices and to the vast weight of public opinion in that time of World War II.<sup>8</sup> Yet today Justice Murphy's short dissent bears marks of candor and greatness lacking in Justice Black's majority opinion (which Justice Douglas joined), in Justice Frankfurter's concurrence, and even in Justice Jackson's dissent.

Similarly ill served by *Scorpions* is Justice Rutledge, with whom Justice Murphy frequently voted.<sup>9</sup> Like Justice Murphy, Justice Rutledge

---

<sup>3</sup> See *infra* text accompanying notes 84–124 (recounting the Scalia–Stevens debate over methodology).

<sup>4</sup> See generally SIDNEY FINE, FRANK MURPHY: THE DETROIT YEARS (1975) (relating Justice Murphy's early career as a lawyer and judge in Michigan); SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS (1984) (describing Justice Murphy's career in the federal Executive and Judicial Branches); J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY (1968) (recounting Justice Murphy's lifework).

<sup>5</sup> Compare FELDMAN, *supra* note 1, at 430 (referring to "Douglas's increasingly difficult personality"), with C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937–1947, at 259 (1948) (stating that Justice Murphy was "willing to go considerably farther than any other member of the Court" in heeding "claims for individual rights and freedom from governmental infringement on personal liberties," a fact evidenced in Justice Murphy's "votes to strike down all limitations on free speech, press, assembly, or religion," and on his "meticulous observance of the rights of defendants in criminal cases, even when they are Japanese generals").

<sup>6</sup> 323 U.S. 214, 215–16 (1944).

<sup>7</sup> *Id.* at 233 (Murphy, J., dissenting).

<sup>8</sup> See *id.* at 215–24 (Black, J., joined by Stone, C.J., & Reed, Frankfurter, Douglas & Rutledge, JJ.) (sustaining conviction); *id.* at 224–25 (Frankfurter, J., concurring); *id.* at 225–33 (Roberts, J., dissenting); *id.* at 233–42 (Murphy, J., dissenting); *id.* at 242–48 (Jackson, J., dissenting); see also *infra* text accompanying note 16 (describing, with relation to another case, public letters protesting an opinion favorable to a Japanese litigant).

<sup>9</sup> PRITCHETT, *supra* note 5, at 131, 141, 162, 259–60 (placing Justice Rutledge "closer to Murphy," especially in "individual liberty" cases, "than any other member of the Court"); STEVENS, *supra* note 2, at 65 (describing Justice Rutledge and Justice Murphy as allies on the Court).

died in 1949, still in his fifties and still in office.<sup>10</sup> Both were men of middle America whose opinions evinced concern for the plight of individuals caught up in the apparatus of the state.<sup>11</sup> Justice Rutledge had broken from Justice Murphy and voted against the defendant in *Korematsu*.<sup>12</sup> But a milestone of Justice Rutledge's six-year tenure occurred when he objected to the hasty conviction and death sentence issued by a military commission in another World War II case, *In re Yamashita*.<sup>13</sup> Stating that if the captured Japanese general was "guilty of the atrocities" charged he deserved "no possible sympathy," Justice Rutledge nonetheless proclaimed himself "forced to speak."<sup>14</sup> He continued:

[M]y concern is that we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guaranties, the nation fought to keep; that our system of military justice shall not alone among all our forms of judging be above or beyond the fundamental law or the control of Congress within its orbit of authority; and that this Court shall not fail in its part under the Constitution to see that these things do not happen.<sup>15</sup>

Justice Murphy alone agreed with this opinion, for which Justice Rutledge received letters deriding him for ruling in favor of a "Jap."<sup>16</sup> Yet six decades later it played a great role in a landmark judgment: in *Hamdan v. Rumsfeld*, the Court drew upon Justice Rutledge's *Yamashita* dissent to invalidate military commissions established by presidential fiat in the wake of the terrorist attacks of September 11, 2001.<sup>17</sup> Using words resonant of the

---

<sup>10</sup> See FERREN, *supra* note 2, at 416–17 (writing of Rutledge's death); HOWARD, *supra* note 4, at 467 (describing Justice Murphy's death); STEVENS, *supra* note 2, at 60–61 (relating circumstances of Justice Rutledge's death and his own reaction to it).

<sup>11</sup> See *supra* notes 4–5 and accompanying text (regarding Justice Murphy); see also Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 *FORDHAM L. REV.* 1569, 1586–89 (2006) (setting forth a synopsis of Justice Rutledge's background and views).

<sup>12</sup> See *supra* notes 6–8. Despite some speculation that Justice Rutledge may have come to rue his vote in *Korematsu*, no researcher has uncovered firm evidence of this theory. See, e.g., Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 *WASH. U. L. REV.* 99, 129–40 (2006) (finding in the historical record indications that Justice Rutledge voted reluctantly with the government); Laura Krugman Ray, *Clerk and Justice: The Ties That Bind John Paul Stevens and Wiley B. Rutledge*, 41 *CONN. L. REV.* 211, 227 (2008) ("Although Rutledge lived for almost five years after *Korematsu*, his biographer has found no evidence that he ever expressed regret." (citing FERREN, *supra* note 2, at 255–59)).

<sup>13</sup> 327 U.S. 1, 41–81 (1946) (Rutledge, J., dissenting); see FERREN, *supra* note 2, at 1–9, 301–23 (analyzing the significance of Justice Rutledge's dissent in *Yamashita*).

<sup>14</sup> *Yamashita*, 327 U.S. at 41–42 (Rutledge, J., dissenting).

<sup>15</sup> *Id.* at 42. The syntax was not uncharacteristic of Justice Rutledge's writing. See FERREN, *supra* note 2, at 347 (writing that Justice Rutledge's penchant for long opinions made other Justices "reluctant to direct major opinions" to him).

<sup>16</sup> Amann, *supra* note 11, at 1597 (quoting Wiley Rutledge Papers, Box 137, available at Manuscript Division, Library of Congress, Washington, D.C.) (internal quotation marks omitted); see *Yamashita*, 327 U.S. at 81 (Rutledge, J., joined by Murphy, J., dissenting).

<sup>17</sup> 548 U.S. 557, 617–20 (2006) (discussing Justice Rutledge's "unusually long and vociferous critique" of the trial procedures tolerated in *Yamashita* and stating that this criticism gave rise to military

passage just quoted, the Court in *Hamdan* assumed that the defendant was, as charged, “a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity.”<sup>18</sup> It wrote nonetheless that “in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”<sup>19</sup>

The author of the Court’s opinion in *Hamdan* is, of course, Justice Stevens, Justice Rutledge’s former law clerk.<sup>20</sup> Justice Stevens began working for Justice Rutledge immediately after his graduation summa cum laude from Northwestern University School of Law.<sup>21</sup> He was not part of Justice Rutledge’s chambers when *Yamashita* was issued; indeed, a year and a half had lapsed by the time Justice Stevens arrived in Washington. But the effect of the case on Justice Stevens, who had earned a Bronze Star while serving as a naval officer during the war, was evident as early as 1956.<sup>22</sup> In an essay that year, Justice Stevens approvingly cited the dissent in *Yamashita* as proof of Justice Rutledge’s insistence that even as the United States dominates the global arena, it must adhere to the “greatest traditions of administering justice.”<sup>23</sup> Based on these writings and others, as well as my own interviews with the Justice, I have no doubt that Justice

---

justice reforms that compelled the Court in *Hamdan* to strike President George W. Bush’s plan to try suspected members of al-Qaeda in military commissions).

<sup>18</sup> *Id.* at 635.

<sup>19</sup> *Id.* (capitalized here as it was in the slip opinion, indicative of Justice Stevens’s own emphasis).

<sup>20</sup> See *id.* at 558 (identifying Justice Stevens as author); see also *supra* note 2 and accompanying text (discussing Justice Rutledge clerkship).

<sup>21</sup> Details on Justice Stevens’s World War II service, law studies, and Justice Rutledge clerkship may be found in, for example, BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 43–68, 70–84 (2010); Diane Marie Amann, *John Paul Stevens and Equally Impartial Government*, 43 U.C. DAVIS L. REV. 885, 887–89, 891–901 (2010); Amann, *supra* note 11, at 1580–92.

<sup>22</sup> See BARNHART & SCHLICKMAN, *supra* note 21, at 51 (noting Justice Stevens’s receipt of the Bronze Star). I am among numerous commentators who have traced this Rutledge-to-Stevens trajectory regarding not only military commissions but also other matters; for example, Rutledge’s dissent from the sanctioning of post-World War II enemy alien detention in *Ahrens v. Clark*, 335 U.S. 188 (1948), and from the Court’s holding in *Rasul v. Bush*, 542 U.S. 466, 484 (2004), that federal law permitted noncitizen aliens held at the U.S. naval base at Guantánamo Bay, Cuba to seek habeas relief. See, e.g., Amann, *supra* note 11, at 1577–78, 1591, 1595–96; Diane Marie Amann, *Punish or Surveil*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 873, 894 n.105, 894–95 (2007) (describing the *Ahrens*–to–*Rasul* jurisprudential arc); Ray, *supra* note 12, at 211, 224–26, 233, 243–47, 257–59, 262–63; see also Amann, *supra* note 21, at 885, 887, 891, 899–900, 917 (linking Justice Rutledge and Justice Stevens with respect to due process and equal protection).

<sup>23</sup> Stevens, *Rutledge*, *supra* note 2, at 331 (quoting *In re Yamashita*, 327 U.S. 1, 43 (1946) (Rutledge, J., dissenting)).

Stevens bestows upon his mentor the mantle of greatness that *Scorpions* withholds.<sup>24</sup>

Despite the obvious ellipsis just discussed, a less apparent one renders Feldman's book valuable to the instant exploration of Justice Stevens's jurisprudence. For although publicity upon the 2010 release of *Scorpions* tended to emphasize the personality conflicts that the book chronicles, constitutional scholars will appreciate far more its explication of judicial restraint, pragmatism, legal realism, and originalism. Feldman posits Justices Frankfurter, Jackson, Douglas, and Black as the respective catalysts.

Notably, the FDR Justices here deemed ill served, Justice Murphy and Justice Stevens's mentor, Justice Rutledge, are not amenable to such categorization. Neither appeared wedded to any of Feldman's four methods. As indicated by catchphrases—"justice tempered with Murphy," and Justice Rutledge as the "Conscience of the Court"<sup>25</sup>—the two seemed concerned less with form and more with substance. Often they injected a dose of judgment, of values-based, experience-informed convictions, into their decisions. One wonders where, if pressed, Feldman would place them.

Even as to the four Justices whom Feldman judges great, the framework at times appears forced. Two of the chosen Justices, Justices Black and Douglas, saw cases the same way—indeed, saw them the same as the ignored Justices, Justices Murphy and Rutledge—notwithstanding the assertion that Justices Black and Douglas adhered to decidedly different methodologies. "Those four guys always voted together," as Professor Floyd F. Feeney, a former law clerk to Justice Black, put it.<sup>26</sup> Moreover, each of the chosen Justices strayed at times from the archetypal path attributed to him. But these sorts of discrepancies are to be expected in any attempt at categorization and do not diminish the utility of the *Scorpions* framework as a tool for analyzing more recent applications of these four methods of interpretation.

Which of the four methods applies to Justice Stevens? Commentators who attempted to label Justice Stevens during his three-decade tenure

---

<sup>24</sup> See *supra* note 10 (referring to Justice Rutledge and Justice Stevens). Notably, Justice Stevens himself would withdraw that mantle from Justice Jackson, one of Feldman's four chosen Justices. See STEVENS, *supra* note 2, at 169 (writing that Jackson's dissent in *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948)—in which the majority ruled in favor of a victim of racial discrimination—coupled with Justice Jackson's "decision to leave the Court to act as a prosecutor in the Nuremberg trials prevent me from ranking him among our greatest justices").

<sup>25</sup> See FERREN, *supra* note 2 (discussing Justice Rutledge); WILLIAM M. WIECEK, 12 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 331 (2006) (internal quotation marks omitted) (discussing Justice Murphy).

<sup>26</sup> Interview with Floyd F. Feeney, in Davis, Cal. (May 10, 2011) (regarding his clerkship for Justice Black in October Term 1961).

frequently opted for a version of “pragmatism.”<sup>27</sup> In Justice Stevens’s last fifteen Terms on the bench, during which he served as senior Associate Justice,<sup>28</sup> commentary shifted to monikers more akin to “legal realism.”<sup>29</sup> The Justice himself often embraced “judicial restraint” as a watchword.<sup>30</sup> No one of these three labels could encompass the Justice’s entire jurisprudence, however.

“Judicial restraint” fails utterly to describe Justice Stevens’s judgment in *Hamdan*,<sup>31</sup> to cite one example. That seventy-three-page writing targeted not just one deficiency in the President’s plan for military commissions, nor even just the several grounds for which Justice Stevens had secured a Court majority; to the contrary, Justice Stevens’s principal opinion in *Hamdan* also addressed a couple complaints with which only a plurality agreed.<sup>32</sup> And though at times he invoked the doctrine of judicial restraint to explain decisions rendered as a matter of law despite personal disagreement as a matter of policy—such as the medical marijuana case<sup>33</sup>—one cannot

---

<sup>27</sup> See, e.g., Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 157, 157 (Earl M. Maltz ed., 2003); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 240 (1999); Norman Dorsen, *John Paul Stevens*, 1992/1993 ANN. SURV. AM. L. xxv, xxvi; Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens’s Free Speech Jurisprudence*, 74 FORDHAM L. REV. 2201, 2201 (2006); Ray, *supra* note 12, at 249.

<sup>28</sup> See Keith Perine & Seth Stern, *Justice Stevens To Retire Later This Year*, CQ TODAY, Apr. 9, 2010, available at 2010 WLNR 7704539 (noting, in a story reporting the Justice’s resignation effective mid-2010, that Justice Stevens assumed this seniority post when Justice Harry A. Blackmun retired in 1994).

<sup>29</sup> See, e.g., Farnsworth, *supra* note 27, at 173. The notion of Justice Stevens as a “realist” in the vein of Justice Douglas—as a Justice whose decisions reflect an ideological predilection—may be found in references like “Stevens, the most liberal member of the court,” Charles Lane, *High Court Rejects Detainee Tribunals*, WASH. POST, June 30, 2006, at A1, and “leader of the court’s liberal wing,” Jerry Markon, *Two Justices Clash over Race and Death Penalty*, WASH. POST, Oct. 21, 2008, at A10. Shedding far less favorable light was the contention that in *Hamdan* Justice Stevens led a majority that “ignored or creatively misread” case law and “catered to the legal academy” in a manner that worked to “to forge a grand new role for the courts.” John Yoo, Op-Ed., *Congress to Courts: “Get Out of the War on Terror,”* WALL. ST. J., Oct. 19, 2006, at A18.

<sup>30</sup> See, e.g., John Paul Stevens, *Judicial Restraint*, 22 SAN DIEGO L. REV. 437, 437 (1985); John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 182 (1982); see also John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 37 (1992) (citing favorably the judicial restraint doctrine articulated by Justice Louis Brandeis). Toward the end of his tenure on the Court, Stevens similarly said that he considered himself a “moderate conservative.” Amann, *supra* note 21, at 923 & n.233 (quoting *Nightline: The Silent Justice* (ABC television broadcast Jan. 3, 2007), available at <http://abcnews.go.com/Nightline/video/supreme-court-justice-john-paul-stevens-2766752>). He thus echoed a label given to him at the time of his nomination to the Court in 1975. See Jeff Bleich, Daniel Powell, Aimee Feinberg & Michelle Friedland, *Justice John Paul Stevens: A Maverick, Liberal, Libertarian, Conservative Statesman on the Court*, OR. ST. B. BULL., Oct. 2007, at 26, 27.

<sup>31</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>32</sup> See *id.* at 566–635 (Stevens, J.); see also Amann, *supra* note 22, at 893–900, 910–13, 921–24 (analyzing both majority and plurality aspects of Justice Stevens’s opinion).

<sup>33</sup> *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (Stevens, J.) (acknowledging that “[t]he case is made difficult by” the ailing plaintiffs’ “strong arguments that they will suffer irreparable harm

imagine Justice Stevens restraining himself in a way that endorsed a result he considered fundamentally unfair. Yet that is a charge that Feldman, in *Scorpions*, ultimately levies against his archetype of restraint, Justice Frankfurter.<sup>34</sup> As for “legal realism,” if that term signifies a tendency to follow gut feeling, to render decisions unmoored from text, history, and other interpretive pillars—if, in short, it refers to Justice Douglas at his worst<sup>35</sup>—the term bears little relevance to Justice Stevens’s method of decision making. “Pragmatism” likewise falls short, if that term is understood to confine a judge to apply an incremental, practice-driven approach to all issues. Study of Justice Stevens’s lifework reveals a constitutional jurisprudence grounded in values of liberty and equality shaped not through executive branch experience or self-schooling, as with Justice Jackson,<sup>36</sup> but rather through formal study, under the tutelage of top Chicago intellectuals, of the Western canon of literature and philosophy.<sup>37</sup>

The inadequacy of any one of those labels invites consideration of the fourth method—the one that precious few commentators have associated with Justice Stevens.<sup>38</sup> It is, of course, “originalism.”

---

because . . . marijuana does have valid therapeutic purposes,” yet holding that the federal government enjoyed the power to ban marijuana for such purposes even in the face of a contrary state law). Justice Stevens likewise cited his decision to dissent from the Court’s overruling of a century-old interpretation of antitrust law in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), in spite of his agreement with the majority’s “policy” result. Interview by participants at Ninth Circuit Judicial Conference with Justice John Paul Stevens, in Honolulu, Haw. (July 19, 2007), available at <http://www.c-spanvideo.org/program/200035-2>.

<sup>34</sup> See FELDMAN, *supra* note 1, at 231–34, 347–48, 383–84, 418–19 (describing how Frankfurter adhered to judicial restraint even when circumstances changed so that the methodology, which once had produced liberal outcomes and a prized liberal reputation, led to conservative conclusions and a concomitant change in Justice Frankfurter’s reputation).

<sup>35</sup> *Id.* at 429–30 (summarizing Justice Douglas’s checkered legacy by writing that the Justice’s “resistance to the strictures of conventional morality in his own life made it look as though his undisciplined search for personal freedom was driving his constitutional thought”). Justice Stevens himself criticized Justice Douglas’s methodology, in what Justice Stevens termed “one of the most important cases decided” by the Warren Court, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the Constitution protects married persons against a criminal ban on contraceptives), as “unfortunately . . . imaginative,” “infamous,” and possessing “virtual incoherence.” STEVENS, *supra* note 2, at 106–08; see also Jess Bravin, *Justice Stevens Grades His Predecessor*, WALL ST. J. L. BLOG (Jan. 12, 2012, 3:35 PM), <http://blogs.wsj.com/law/2012/01/12/justice-stevens-grades-his-predecessor> (quoting Justice Stevens’s comments, in an interview, that Justice Douglas’s opinion in *Griswold* was “terrible,” and that some of Douglas’s opinions “revealed the fact that it had been done rapidly” (internal quotation mark omitted)).

<sup>36</sup> FELDMAN, *supra* note 1, at 42–44, 363–65 (discussing Justice Jackson’s education and the significance of his executive experience).

<sup>37</sup> For a discussion on the relation of Justice Stevens’s education to the values that infused his jurisprudence, see generally Amann, *supra* note 21; Amann, *supra* note 11.

<sup>38</sup> An exception is an essay in which a former Justice Stevens clerk noted that in *EEOC v. Wyoming*, 460 U.S. 226 (1983), a Tenth Amendment case, the Justice had “first addressed the framers of the Constitution, though not in the service of a cramped vision of ‘original intent.’” Carol F. Lee, *Justice Stevens: An Independent Voice*, 1992/1993 ANN. SURV. AM. L. xlv, xlvi.



To write as this Essay does of “John Paul Stevens, Originalist” is to break from conventional wisdom. That scholarship is correct in registering the Justice’s deep objections to the brand of originalism that professes first to find precise meaning in historical sources and then to bind judges to this meaning notwithstanding the consequences. Toward the first contention, Justice Stevens often has directed wry disbelief.<sup>39</sup> Toward the second contention, Justice Stevens has brooked no amusement, and it is for this reason that few would think of him as an originalist. But that is where conventional wisdom and this Essay part company. The jump to the conclusion that there is little to say about Justice Stevens and originalism pretermits the extent to which Justice Stevens has done battle upon originalism’s own field of combat.<sup>40</sup>

After sketching Justice Stevens’s position with respect to originalism, this Essay will examine its application with particular attention to two gun-rights cases—one, the last opinion Justice Stevens filed before completing one of the longest ever terms of service on the Court.<sup>41</sup> Reflecting on Feldman’s *Scorpions* four-methods framework in light of Justice Stevens’s jurisprudence, the Essay concludes by identifying a fifth interpretive methodology, which some have called “eclectic” but which Justice Stevens perhaps might prefer to call synthetic.<sup>42</sup> Justice Stevens’s technique begins with flexible exploration of all the others, selects those useful to the matter at hand, and then proceeds to a decision that is not only comprehensive in its analysis, but also just in its application.<sup>43</sup>

### I. ORIGINALISM AS AN ARCHETYPE

Stated as stark archetype for purposes of analysis, originalism comprises two essential elements: first, that a judge may find in historical sources precisely what drafters meant when they chose a certain term; and second, that this precise meaning must be applied to the case at bar even if

---

<sup>39</sup> Examples surfaced in Justice Stevens’s 2011 book. Quoting a circa-1787 provision that requires the President to be a U.S. citizen “at the time of the Adoption of this Constitution,” Justice Stevens declared himself “confident that the framers did not expect us to adopt a literal interpretation of those words.” STEVENS, *supra* note 2, at 41 (quoting U.S. CONST. art. II, § 1). At another juncture, he expressed disapproval that Justice Clarence “Thomas’s repeated emphasis on historical analysis seems to assume that we should view the Union as perfect at the beginning and subject to improvement only by following the cumbersome process of amending the Constitution.” *Id.* at 187–88.

<sup>40</sup> See *infra* text accompanying notes 54–79.

<sup>41</sup> See *infra* text accompanying notes 80–84, 92–107. On his retirement—which fell on the day after the Court issued *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010)—Justice Stevens had served nearly thirty-five years, making him the third longest serving Justice. See *A Bow Tie Goodbye for Stevens*, HOUS. CHRON., June 29, 2010, at A2.

<sup>42</sup> Compare *infra* note 128 (citing and quoting commentators who use the term “eclectic”), with *McDonald*, 130 S. Ct. at 3118 (Stevens, J., dissenting) (stating that his “method seeks to synthesize” case law rather than to rely only on an originalist approach).

<sup>43</sup> See *infra* text accompanying notes 128–38.

that would lead to a result obviously out of step with contemporary context. To quote Professor Andrew Koppelman's succinct description, the archetype imagines "an originalism that purges adjudication of discretion and the vagaries of political change."<sup>44</sup>

Originalism of this sort has surfaced in jurisprudential battles since the onset of the so-called Reagan Revolution, a movement that still figures in U.S. political society.<sup>45</sup> The Court's most senior champion of originalism, Justice Scalia, recently grounded the method in the structure of the United States' 1787 charter, "a decision that the society has made that in order to take certain actions, you need the extraordinary effort that it takes to amend the Constitution."<sup>46</sup> Iterating oft-stated concerns, Justice Scalia decried the ascription of "evolving meaning" to constitutional provisions "so that they have whatever meaning the current society thinks they ought to have"; such a practice, he maintained, limits a judge by little more than the subjective nostrum: "To thine own self be true."<sup>47</sup> Particularly in the initial decades of its most recent resurgence, originalism often was invoked to stave off a litigant's bid for Supreme Court articulation of the existence or scope of a claimed right.<sup>48</sup> To the extent that it constrains rather than expands rights, this originalism is labeled "conservative"; even, at times, "crabbed."<sup>49</sup> Notably, it represents a type not to be associated with Justice Black, whom Feldman called "the inventor of originalism."<sup>50</sup> The originalist methodology

---

<sup>44</sup> Andrew Koppelman, *Why Jack Balkin Is Disgusting*, 27 CONST. COMMENT. 177, 179 (2010); see *infra* text accompanying note 46 (quoting Justice Scalia's recent statement of an originalist stance). Multiple strands compose the methodology known as originalism. Much as Feldman does in *Scorpions*, see *supra* text accompanying notes 26, 34, this Essay opts for a stark archetype in order to establish a point of comparison with originalist traditions and Justice Stevens's approach to the concept.

<sup>45</sup> See Diane Marie Amann, *International Law and Rehnquist-Era Reversals*, 94 GEO. L.J. 1319, 1346 (2006) (stating that on certain issues "the last chapters of the Rehnquist Court narrative, no less than those of the Reagan Revolution, have not yet been written").

<sup>46</sup> *The Originalist*, CAL. LAW., Jan. 2011, at 33, 33 (quoting Justice Scalia in an interview with Professor Calvin Massey). A more junior Justice particularly committed to this methodology is, of course, Justice Clarence Thomas. See Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 360 n.21, 388 (2011).

<sup>47</sup> *The Originalist*, *supra* note 46 (internal quotation marks omitted).

<sup>48</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (Rehnquist, J.) (relying on interpretation of "this Nation's history" to decline to enunciate the substantive due process right to assisted suicide). But see *infra* text accompanying notes 85, 87-89, 92-107 (discussing firearms cases where a Court majority enunciated a personal right under the Second Amendment and then held it applicable against the states by means of the Due Process Clause of the Fourteenth Amendment).

<sup>49</sup> John Paul Stevens, *Judicial Activism: Ensuring the Powers and Freedoms Conceived by the Framers for Today's World*, CBA REC., Oct. 2002, at 25, 33 ("A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty." (quoting *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J., concurring))). Justice Stevens referred to *Ollman* as "an unusually eloquent opinion" by Judge Bork. *Id.*

<sup>50</sup> FELDMAN, *supra* note 1, at 145. In truth, the methodology predates Justice Black. Justice Stevens himself opened one speech critical of originalism by referring to a lamented nineteenth-century effort:

that Justice Black espoused was, as Feldman put it, “liberal in its orientation, and radical in its implications.”<sup>51</sup> A prime example is a 1947 dissent in which Justice Black set forth, in text and appendix, historical sources said to prove that by dint of the Fourteenth Amendment, the entire Bill of Rights constrained state as well as federal actors.<sup>52</sup> Feldman deserves credit for underscoring, by the simple fact of presenting jurisprudential outcomes of the past century and leaving his reader to contrast them with those of this new century, that no method predetermines either a “conservative” or a “liberal” result.<sup>53</sup> Opinions by Justice Stevens, as the next sections will show, exemplified that reminder.

## II. JUSTICE STEVENS AND ORIGINALISM

On July 9, 1985, the man whom President Ronald Reagan had chosen to lead the Department of Justice in his second term delivered a memorable address to the American Bar Association.<sup>54</sup> In seriatim fashion, Attorney

---

“Chief Justice Taney’s opinion in the Dred Scott case faithfully applied the original intent of the Framers.” Justice John Paul Stevens, Keynote Address at the Seventh Annual John Paul Stevens Award Luncheon (Sept. 14, 2006) [hereinafter Stevens, Keynote Address] (citing *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (Taney, C.J.) (holding in part that the Framers never intended that slaves and their descendants could become U.S. citizens)), in John Paul Stevens, *Canons to the Left, Canons to the Right*, CBA REC., Nov. 2006, at 54, 54 [hereinafter Stevens, *Canons*], available at <http://www.c-spanvideo.org/program/195473-1>.

<sup>51</sup> FELDMAN, *supra* note 1, at 146; accord Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 NW. U. L. REV. 663, 664 (2009) (placing Justice Black “in the pantheon of liberal originalism”); Mark V. Tushnet, *Comment*, 47 MD. L. REV. 147, 151 (1987) (“Justice Black was a straightforward liberal originalist.”).

<sup>52</sup> *Adams v. California*, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting, joined by Douglas, J., dissenting). Justice Douglas joined the dissent in full. *Id.* at 92. Justices Murphy and Rutledge expressed “substantial agreement” with Justice Black’s originalist exegesis, although they dissented separately to express the opinion that the Due Process Clause also extended to unenumerated violations of “fundamental standards.” *Id.* at 123–24 (Murphy, J., joined by Rutledge, J., dissenting). Justice Stevens has expressed his own disapproval of Justice Black’s “imprison[ing] the concept of liberty in eighteenth century legal forms.” John Paul Stevens, “*Cheers!*” *A Tribute to Justice Byron R. White*, 1994 B.Y.U. L. REV. 209, 212–13 (venturing this opinion in favorable description of Justice White’s attitude toward the case, on which Justice White worked as a clerk for Chief Justice Fred Vinson); see also STEVENS, *supra* note 2, at 109 (writing with disapproval that Justice Black “firmly believed that the liberty protected by the Fourteenth Amendment did not extend an inch beyond the Bill of Rights”).

<sup>53</sup> In so doing, Feldman swims with an early twenty-first century current of constitutional theory. In 2007, a longtime critic of originalism proclaimed his conversion to it—as a means to justify abortion precedents traditionally understood to defy originalist justification. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 298–99 (2007). This prompted two traditional originalists to “welcome” the opportunity for “cross-party, cross-ideological consensus . . . that we are reaching correct answers,” even as they questioned Balkin’s application. John O. McGinnis & Michael Rappaport, *Original Interpretive Principles As the Core of Originalism*, 24 CONST. COMMENT. 371, 381–82 (2007).

<sup>54</sup> Edwin Meese III, *Speech Before the American Bar Association* (July 9, 1985), in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION I (Federalist Soc’y ed., reprinted ed. 2005). By a 63-to-31 vote, the Senate confirmed Meese in February 1985—a year after his nomination by Reagan, in

General Edwin Meese III criticized Supreme Court opinions that he termed “neither simply liberal nor simply conservative,” “neither simply activist nor simply restrained,” “neither simply principled nor simply partisan”; in short, he averred, Justices “continued to roam at large in a veritable constitutional forest.”<sup>55</sup> Meese blamed the six-decades-old doctrine of selective incorporation, by which the Court had held the Bill of Rights applicable to states despite the Framers’ understanding that it applied only to the national government.<sup>56</sup> To fence in the Court’s discretion, Meese urged adoption of a single standard—“a Jurisprudence of Original Intention” that would obligate judges to be guided solely by what the Framers had meant when they selected the words of the Constitution.<sup>57</sup> Quoting an 1824 letter by *The Federalist* author James Madison, Meese concluded:

It is our belief that only “the sense in which the Constitution was accepted and ratified by the nation,” and only the sense in which laws were drafted and passed provide a solid foundation for adjudication. Any other standard suffers the defect of pouring new meaning into old words, thus creating new powers and new rights totally at odds with the logic of our Constitution and its commitment to the rule of law.<sup>58</sup>

Soon after, before a different bar group, Justice John Paul Stevens posed a rejoinder.<sup>59</sup> Meese’s “concentration on the original intention of the Framers of the Bill of Rights overlooks the importance of subsequent events in the development of our law,” Justice Stevens said; namely, the Civil War and Reconstruction Amendments of the nineteenth century, as well as the jurisprudence of the twentieth century.<sup>60</sup> A master bridge player,<sup>61</sup> Justice Stevens countered Meese’s Madison-quote card with one of his own. Justice Stevens thus repeated a passage from an 1819 letter by Madison:

It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter . . . and that it might

---

whose first term Meese had served as counselor to the President. See Leslie Maitland Werner, *Senate Approves Meese to Become Attorney General*, N.Y. TIMES, Feb. 24, 1985, at 1.

<sup>55</sup> Meese, *supra* note 54, at 3.

<sup>56</sup> *Id.* at 8. At issue was the Due Process Clause, U.S. CONST. amend. XIV.

<sup>57</sup> Meese, *supra* note 54, at 9–10.

<sup>58</sup> *Id.* at 10. Though not so cited in Meese’s speech, the internally quoted phrase appears in Letter from James Madison to Henry Lee (June 25, 1824), in 9 THE WRITINGS OF JAMES MADISON 190, 191 (Gaillard Hunt ed., 1910). See Edward Mead Earle, *Introduction* to THE FEDERALIST v, ix–x (Edward Mead Earle ed., 1961) (describing Madison as among the three *Federalist* authors who wrote under the pseudonym “Publius”).

<sup>59</sup> Justice John Paul Stevens, *Speech Before the Federal Bar Association* (Oct. 23, 1985), in THE GREAT DEBATE, *supra* note 54, at 27.

<sup>60</sup> *Id.* at 28.

<sup>61</sup> See Glen Elsasser, *Who Was That Bridge Life Master, Anyway*, CHI. TRIB., Nov. 26, 1998, at 1.

require a regular course of practice to liquidate and settle the meaning of some of them.<sup>62</sup>

Justice Stevens allowed that he might have failed to grasp the import of Attorney General Meese's speech—and that very uncertainty highlighted the hazard of any “effort to identify the precise messages that equally articulate lawyers were attempting to convey almost two hundred years ago,” he said.<sup>63</sup> Compounding this hazard, Justice Stevens added, were the breadth and diversity of the eighteenth-century collectivity whose debates produced the Constitution.<sup>64</sup>

Commentators have paid due note to the very public Meese–Stevens skirmish of 1985.<sup>65</sup> More muted and less noted was a second skirmish the following year. In a lecture at the University of Miami, Justice Stevens expounded on the term “liberty.”<sup>66</sup> He began by quoting the constitutional provisions in which the term appears.<sup>67</sup> Next, Justice Stevens, with a relish that one might expect from a Shakespearean scholar,<sup>68</sup> brought to light

---

<sup>62</sup> Stevens, *supra* note 59, at 28–29 (omission in original) (quoting H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 939–41 (1985) (quoting Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 145 (Philadelphia, J.B. Lippincott & Co. 1865))).

<sup>63</sup> *Id.* at 29. The tongue-in-cheek way that Justice Stevens made his point was characteristic; his amusement at the rigid-originalist notion that meaning may be fixed likewise surfaced in other writings. *E.g.*, Stevens, *Summer*, *supra* note 2, at 33–34 (having cited an essay that labeled Justices as “Bigfoot,” remarking that as U.S. officials, “two of our most esteemed Framers,” Hamilton and Madison, “did not agree with each other about what the Constitution had to say about then current issues of national concern,” a fact that “suggests that it may be unwise for Bigfoot to place exclusive reliance on the ‘original intent’ of the Framers when confronting novel constitutional questions today”); Justice John Paul Stevens, Address at the State Bar of Michigan 64th Annual Meeting, in “Charlie’s Rule,” 78 MICH. B.J., Dec. 1999, at 1402, 1402 (recalling an interpreter who rendered the two-minute reply of a Japanese-speaking witness as the word “No,” and adding, “I have often wondered whether his interpretation was based on his analysis of original intent or plain language” (internal quotation marks omitted)).

<sup>64</sup> Stevens, *supra* note 59, at 29–30 (proceeding to demonstrate that at least one member of that collectivity, Thomas Paine, espoused views about church and state that comported with those in *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Stevens, J.), a school-prayer judgment skewered in Meese, *supra* note 54, at 7–9).

<sup>65</sup> *See, e.g.*, Stanley H. Friedelbaum, *Justice William J. Brennan, Jr.: Policy-Making in the Judicial Thicket*, in THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 100, 121 (Charles M. Lamb & Stephen C. Halpern eds., 1991); JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 156–57 (2005); Norman Dorsen, *How American Judges Interpret the Bill of Rights*, 11 CONST. COMMENT. 379, 383 & nn.20–21 (1994); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 681 (2009); Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521, 521 n.2 (1989); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1864 n.12 (1987).

<sup>66</sup> John Paul Stevens, *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277, 277 (1986).

<sup>67</sup> *Id.* at 277–78 & nn.2–3 (quoting U.S. CONST. pmbl., amends. V, XIV, § 1).

<sup>68</sup> Justice Stevens often affirmed his affinity for the Bard, born from viewing plays in a replica Globe Theatre at the Century of Progress World’s Fair and nurtured through graduate studies in English

facets of the concept found in the writings of thinkers like Aristotle, Plato, John Locke, John Stuart Mill, Paul Freund, and Mortimer Adler; of statesmen like Thomas Jefferson and Abraham Lincoln; and of judges like Justices Louis Brandeis, Robert Jackson, and Lewis Powell.<sup>69</sup> On this foundation Justice Stevens posited “liberty” as an individual freedom to act—a freedom susceptible to governmental regulation as long as that constraint is “just” in a substantive as well as a procedural sense.<sup>70</sup> He bolstered his formulation with discussion of landmark decisions in which the Court had struck as violative of due process an array of governmental bans on interracial schooling, interracial marriage, extended-family households, and the sale of contraceptives.<sup>71</sup>

Only at this juncture—quite near the end of his speech—did Justice Stevens acknowledge what he characterized as the originalist argument “that the judges who decided those cases accepted a responsibility that the Framers of the Constitution did not intend to delegate to them.”<sup>72</sup> Justice Stevens’s response to this argument relied on multiple sources. He warned of the danger of applying “the ideas of a thinker of another day into the specific controversies of our time.”<sup>73</sup> He reminded his audience that the Framers “were practitioners and students of the common law,” accustomed to case-by-case analysis and not to the rules-bounded discipline of the civil law.<sup>74</sup> Finally, quoting Madison’s 1819 acceptance of the need to “settle the meaning” of constitutional terms that provoked “difficulties and differences of opinion,” as well as Alexander Hamilton’s *Federalist No. 78*, Justice Stevens identified “the probable intent of the Framers” to give to “future generations of judges” the power and duty to check majoritarian abuses of individual liberty.<sup>75</sup>

Justice Stevens’s speech manifested both a defense and a demonstration of a deliberative method quite unlike Meesian originalism. In it Justice Stevens quoted the text under review and found it open to a variety of meanings. Then, refusing any singular constraint, he construed

---

at the University of Chicago. See Amann, *supra* note 21, at 895–96 & nn.53–56; Amann, *supra* note 11, at 1571 & n.14.

<sup>69</sup> Stevens, *supra* note 66, at 278–83, 286–90, 293.

<sup>70</sup> *Id.* at 281 (“The maximization of our circumstantial freedom to do as we please is the great and real good conferred upon human beings by just laws, effectively enforced.” (quoting MORTIMER J. ADLER, *SIX GREAT IDEAS* 147–48 (1981)) (internal quotation marks omitted)); see *id.* at 282–85 (delineating procedural and substantive aspects of liberty).

<sup>71</sup> *Id.* at 284–89 (discussing, inter alia, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), *Loving v. Virginia*, 388 U.S. 1 (1967), *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

<sup>72</sup> *Id.* at 290.

<sup>73</sup> *Id.* (quoting Paul Freund, *Mr. Justice Brandeis*, in *MR. JUSTICE*, *supra* note 2, at 177, 193).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 291 & nn.60–61 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton); Letter from James Madison to Judge Spencer Roane, *supra* note 62).

the text by consulting multiple intellectual sources—some, like Locke, who surely influenced the Framers’ choices, and others, like Adler, whom the Framers in turn influenced. Justice Stevens accorded great value to the work of the Court since its establishment the same year the Constitution took effect—including the Court’s mid-twentieth-century articulations of unenumerated rights. Finally, Justice Stevens considered the Framers’ intent. Admitting the risk of error inherent in any such inquiry, he found in the Framers’ writings an anticipation that the meaning of the Constitution would evolve, and also an intention that judges should ensure that it evolved in a just, nonarbitrary manner.

In greater detail than before, Justice Stevens thus confronted core postulates that Meese had articulated; specifically, the notions that original intent could and should enjoy exclusive sway in constitutional decisionmaking, and that recent expansions of rights ran contrary to that intent.<sup>76</sup> Justice Stevens delivered his critique at a watershed moment in the Court’s history; that is, on November 20, 1986, two months after Reagan and Meese had succeeded in placing Justice Scalia on the Court.<sup>77</sup> Though then-Judge Scalia had downplayed the constitutional interpretation issue during his confirmation hearings, as a Justice he would become the premier advocate for originalism.<sup>78</sup> On this question he and Justice Stevens would spar for a quarter of a century, through to the last opinion that Justice Stevens filed from the bench.<sup>79</sup>

### III. JUSTICE STEVENS, JUSTICE SCALIA, AND THE SUBSTANCE OF LIBERTY

The Court’s Grand Chamber was partly full on the morning of June 28, 2010.<sup>80</sup> Some who might otherwise have attended the last day of October Term 2009 no doubt were in the line down the street, awaiting the Senate Judiciary Committee hearings on President Barack Obama’s second

---

<sup>76</sup> See *supra* text accompanying notes 54–58 (discussing Meese’s speech); cf. *Panel on Originalism and Unenumerated Constitutional Rights*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 113, 119 (Steven G. Calabresi ed., 2007) (remarks of Walter Dellinger) (interpreting Meese’s speech to have meant “that it was simply illegitimate” to apply provisions of the Bill of Rights against the states, and that to do so was “to apply and enforce unenumerated rights”).

<sup>77</sup> See Stevens, *supra* note 66, at 277 n.\* (stating date of speech); David G. Savage, *Rehnquist Sworn in As Chief Justice: Scalia Also Takes Oath; Reagan Urges “Judicial Restraint,”* L.A. TIMES, Sept. 27, 1986, at 2 (reporting date and circumstances of Justice Scalia’s swearing in).

<sup>78</sup> See Stuart Taylor Jr., *Scalia Returns Soft Answers to Senators*, N.Y. TIMES, Aug. 6, 1986, at A13 (reporting that at his confirmation hearing “Scalia seemed to suggest only partial agreement” with Meese’s original intent philosophy); see also *The Originalist*, *supra* note 46 (stating that after twenty-four years on the Court, Justice Scalia was “known for his sharp wit as well as his originalist approach”).

<sup>79</sup> Space constraints preclude full treatment of the Scalia–Stevens debate on originalism; the opinions discussed in the next section encapsulate this exchange.

<sup>80</sup> The events described in this paragraph are based on my own notes of the Court session, which I witnessed.

nominee to the Court.<sup>81</sup> Some of the women and men in the Court's gallery sported bow ties in tribute to the senior Associate Justice, whose own signature red bow tie perched above his black silk robe. First called was Case No. 08-1521, *McDonald v. City of Chicago*. Justice Samuel A. Alito, Jr. announced the Court's ruling that the individual's right to possess a handgun, enunciated just two years earlier, limited state as well as federal governmental power.<sup>82</sup> After outlining the treatise on selective incorporation contained in his own opinion for the Court, Justice Alito ceded the microphone to Justice Stephen G. Breyer, who delivered a lengthy oral dissent on behalf of himself and two other Justices.<sup>83</sup> His oral summary drew laughter: "The opinion is in three parts. It is not short." When Justice Breyer finished, the Court moved on to other business.

It thus fell to readers of the full 119-page judgment to witness yet another round in a decades-long contest over methodology between Justice Stevens, whose retirement would take effect the next day, and Justice Scalia, who would succeed him as senior Associate Justice. Each had remained silent when *McDonald* was announced. Yet each had filed separately, and fittingly, no other Justice had joined either opinion.<sup>84</sup>

Both Justice Scalia and Justice Stevens had occupied rather different corners in the opening round of their bout respecting firearms regulation: in the 2008 case of *District of Columbia v. Heller*, Justice Scalia had written on behalf of a five-member majority; Justice Stevens, on behalf of all four dissenters.<sup>85</sup> Justice Scalia's sixty-four-page decision examined the text of the Second Amendment<sup>86</sup> and similar provisions in contemporaneous state constitutions, subsequent interpretations, and the few Court precedents available. It then held, for the first time in the Amendment's 217-year

---

<sup>81</sup> See Mark Arsenault, *Justices Must Respect Laws, Kagan Tells Senators*, BOSTON GLOBE, June 29, 2010, at A2 (describing confirmation hearing).

<sup>82</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036–42 (2010) (Alito, J.) (extending the holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008), to state and local governments).

<sup>83</sup> See *id.* at 3120–38 (Breyer, J., joined by Ginsburg & Sotomayor, JJ., dissenting).

<sup>84</sup> See *id.* at 3050–58 (Scalia, J., concurring); *id.* at 3088–3120 (Stevens, J., dissenting). Justice Stevens long before had shed the labels attached to him early in his career: "enigmatic, unpredictable, maverick, a wild card, a loner." Linda Greenhouse, *In the Matter of Labels, a Loner*, N.Y. TIMES, July 23, 1984, at A8. Still, he remained committed throughout his career to explicating the reasons underlying his decision—even if no other Justice agreed with them. See John Paul Stevens, *Foreword to KENNETH A. MANASTER, ILLINOIS JUSTICE ix, xii* (2001) (explaining how the judicial-corruption investigation he led while still a practicing attorney influenced his decision to "clutter up the U.S. Reports with more separate writing than most lawyers have either time or inclination to read").

<sup>85</sup> *Heller*, 554 U.S. at 573–636 (Scalia, J.); *id.* at 636–80 (Stevens, J., joined by Souter, Breyer & Ginsburg, JJ., dissenting).

<sup>86</sup> U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").



history, that the Constitution guarantees an individual right to possess a firearm.<sup>87</sup> Justice Scalia stressed a duty to implement the Framers' intent:

[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.<sup>88</sup>

Justice Stevens issued no such notice of extinction. Rather, he argued that his own forty-six-page examination of text, history, usage, and purpose kept faith with the Framers' intent:

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. . . . [T]here is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.<sup>89</sup>

In short, two different Justices had found in the same text and history very different answers.<sup>90</sup> Their mutual unhappiness at the outcome was

---

<sup>87</sup> *Heller*, 554 U.S. at 572–636. The holding relied directly on the Second Amendment because the District of Columbia is a federal entity.

<sup>88</sup> *Id.* at 636.

<sup>89</sup> *Id.* at 637 (Stevens, J., dissenting). He concluded in a similar vein:

The Court properly disclaims any interest in evaluating the wisdom of the specific policy choice challenged in this case, but it fails to pay heed to a far more important policy choice—the choice made by the Framers themselves. The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun-control policy. Absent compelling evidence that is nowhere to be found in the Court's opinion, I could not possibly conclude that the Framers made such a choice.

*Id.* at 680.

<sup>90</sup> This waging of methodological combat in originalism's own arena followed others, including some opinions written by Justice David H. Souter, Justice Stevens's frequent ally on the Court. *See, e.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 880–81 (2005) (Souter, J., joined by Stevens, O'Connor, Ginsburg & Breyer, JJ.) (affirming an order requiring the removal of the Ten Commandments displayed in the county courthouse, and asserting that “[e]ven on originalist critiques of existing precedent” there is “common ground in the interpretation of a Constitution ‘intended to endure for ages to come,’” so interpretation of the Religion Clauses of the First Amendment must attend to current American diversity of faiths (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819))); *Alden v. Maine*, 527 U.S. 706, 763 (1999) (Souter, J., joined by Stevens, Breyer & Ginsburg, JJ., dissenting) (probing the “Hamiltonian formulation” on states' sovereign immunity and other old U.S. and English sources in arriving at a result contrary to that of Court's majority); *see also infra* note 109.

apparent, both in the fact that each read excerpts of his own *Heller* opinion from the bench and in what one reporter termed the “caustic and dismissive language” in those opinions.<sup>91</sup>

The contest resumed two years later, when the Court invalidated a firearms ordinance from Justice Stevens’s hometown of Chicago.<sup>92</sup> Again Justice Scalia voted with the majority and Justice Stevens with the dissent; this time, however, their dispute over constitutional meaning played out in two solo opinions. Justice Stevens argued in *McDonald* that recognition of a Second Amendment right did not compel its enforcement against state and local governments via the Due Process Clause of the Fourteenth Amendment. The question was not whether to apply the judge-made superstructure of selective incorporation, Justice Stevens wrote, rather, it was how to enforce the “liberty clause,” that portion of the Due Process Clause that forbids government to “deprive any person of . . . liberty . . . without due process of law.”<sup>93</sup> By references to decades of case law and centuries of legal thought, the Justice defended the substantive due process doctrine that the Constitution protects certain deprivations of liberty even in the absence of procedural faults.<sup>94</sup>

As to the precise question at hand, Justice Stevens admitted that historical sources offered “a principled basis for holding that petitioners have a constitutional right to possess a usable firearm in the home.”<sup>95</sup> Nevertheless, he wrote: “The idea that deadly weapons pose a distinctive threat to the social order—and that reasonable restrictions on their usage therefore impose an acceptable burden on one’s personal liberty—is as old

---

<sup>91</sup> See Robert Barnes, *Justices Reject D.C. Ban on Handgun Ownership*, WASH. POST, June 27, 2008, at A1.

<sup>92</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010); see Amann, *supra* note 21, at 892–99 (describing Justice Stevens’s birth, upbringing, education, and years of law practice in Chicago). As were Justices Rutledge and Murphy, see *supra* text accompanying note 11, Justice Stevens too is a man of middle America. See Rosemary Simota Thompson, *Justice John Paul Stevens: Chicago’s Native Son*, CBA REC., Sept. 2010, at 30, 35 (quoting Bill Barnhart as stating that “Justice Stevens as a Chicagoan from a midwestern entrepreneurial family brought to the Court a modest, matter-of-fact, feet on the ground practicality,” and adding that Justice Stevens possessed the “midwestern sensibility to question abstract doctrine and the trappings of power” (internal quotation mark omitted)).

<sup>93</sup> *McDonald*, 130 S. Ct. at 3090–92 (Stevens, J., dissenting) (quoting U.S. CONST. amend. XIV, § 1) (internal quotation marks omitted). Without overtly tying it to his own position in *McDonald*, Justice Stevens made a related point in his book: reviewing a 1937 judgment that “only the particular amendments that ‘have been found to be implicit in the concept of ordered liberty’” constrained an act by a state official, Justice Stevens added that the Court “has never incorporated them all en masse.” STEVENS, *supra* note 2, at 33–34 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.)).

<sup>94</sup> See *McDonald*, 130 S. Ct. at 3090–95 & 3090 n.5 (Stevens, J., dissenting) (citing multiple judicial opinions and thinkers ranging from Edward Coke to Laurence Tribe).

<sup>95</sup> *Id.* at 3107 (Stevens, J., dissenting); see also *id.* at 3105–07 (Stevens, J., dissenting) (grounding this “principled basis” in the structure of the Constitution, Blackstone’s *Commentaries*, and state and federal case law).

as the Republic.”<sup>96</sup> Justice Stevens concluded that relevant sources—including history and practice since the Republic’s founding, ancient British philosophers, contemporary urban context, and experience in democracies as varied as England and Japan—militated in favor of sustaining the city’s gun control law.<sup>97</sup>

Earlier in his opinion, Justice Stevens had made passing reference to original intent: first, he contended that due process encompasses substantive deprivations of liberty; then, he preempted originalist objection by remarking that he had “yet to see a persuasive argument that the Framers of the Fourteenth Amendment thought otherwise.”<sup>98</sup> He proceeded to advance an understanding of Framers’ intent that eschewed what Stevens dubbed the majority’s “rigid historical methodology.”<sup>99</sup> Instead, Justice Stevens reaffirmed the stance he had staked out in his 1986 Miami speech, that the Framers intended judges of the future to consider the needs of their own times in order properly to construe the word “liberty”:

Its dynamism provides a central means through which the Framers enabled the Constitution to endure for ages to come, a central example of how they wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live. The task of giving concrete meaning to the term “liberty” . . . was a part of the work assigned to future generations. The judge who would outsource the interpretation of “liberty” to historical sentiment has turned his back on a task the Constitution assigned to him and drained the document of its intended vitality.<sup>100</sup>

All this drove Justice Scalia to apoplexy. “I write separately,” his concurrence explained, “only to respond to some aspects of Justice Stevens’ dissent.”<sup>101</sup> He took issue with Justice Stevens’s focus on “liberty”; in Justice Scalia’s words, his “renaming of the Due Process Clause.”<sup>102</sup> Justice Scalia professed to find no explanation for Justice Stevens’s articulation of

<sup>96</sup> *Id.* at 3108.

<sup>97</sup> *Id.* at 3107–16 (discussing inter alia Lockean social contract theory, an amicus brief by historians, twentieth-century U.S. precedents, and the “outlier” status of the United States vis-à-vis England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand).

<sup>98</sup> *Id.* at 3090 & n.5 (citing Stevens, *supra* note 66, at 290).

<sup>99</sup> *Id.* at 3098.

<sup>100</sup> *Id.* at 3099 (internal citations and quotation marks omitted) (including quotations to writings not only by Stevens himself, but also by Chief Justices John Marshall and William H. Rehnquist); *cf.* STEVENS, *supra* note 2, at 224 (noting that since “[t]ime works changes,” a constitutional “principle, to be vital, must be capable of wider application than the mischief which gave it birth” (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910) (McKenna, J.))).

<sup>101</sup> *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring).

<sup>102</sup> *Id.* at 3051 n.1. Although “liberty clause” entered the *U.S. Reports* with Justice Stevens’s opinion in *McDonald*, an electronic search of Westlaw’s JLR database on September 11, 2011 turned up seventy-nine law review articles that had used the term before issuance of that opinion. The terms of the search were: “liberty clause” /50 “due process” & da(bef june 2010).

which rights substantive due process protects and which it does not, except for Justice Stevens's own subjective beliefs.<sup>103</sup> Describing Justice Stevens's preference for contextual analysis over bright-line rules as a "notion that the absence of a coherent theory of the Due Process Clause will somehow curtail judicial caprice," Justice Scalia insisted: "Indeterminacy means opportunity for courts to impose whatever rule they like; it is the problem, not the solution."<sup>104</sup> He scoffed at Justice Stevens's claim that the Framers intended future judges to use all methods and consult all sources at their disposal.<sup>105</sup> Justice Scalia posited a Framers' intent that judges should acknowledge only those rights "established by a constitutional history formed by democratic decisions;" all other claims "are left to be democratically adopted or rejected by the people, with the assurance that their decision is not subject to judicial revision."<sup>106</sup> Conceding that historical inquiry is difficult and entails the exercise of discretion, Justice Scalia nonetheless deemed it "the *best means available* in an imperfect world."<sup>107</sup>

Those last sentences distill to its essence the Scalia–Stevens dispute. A declaration by Justice Stevens that any one method is better than all others in all contexts is unimaginable, for a willing embrace of all potentially useful approaches pervades his jurisprudence. By no means would Justice Stevens ignore the Framers' intent in the course of seeking the meaning of a constitutional term; in his view, however, consideration of that factor and no others entails an unacceptable risk of error. Justices typically lack training in historical inquiry, and even accurate investigation likely will uncover no single intention underlying a collective policy choice.<sup>108</sup> As a Justice, Justice Stevens demonstrated these uncertainties by performing the methodology of originalism yet arriving at results contrary to those of the Court's professed originalists; in so doing, he challenged a fundamental tenet of originalism.<sup>109</sup>

---

<sup>103</sup> *Id.* at 3051 (contending that "certitude" stemmed from the fact that Stevens "deeply believes" that the Second Amendment right did not merit protection).

<sup>104</sup> *Id.* at 3052 (emphasis omitted).

<sup>105</sup> *Id.* at 3051 ("The subjective nature of Justice Stevens' standard is also apparent from his claim that it is the courts' prerogative—indeed their *duty*—to update the Due Process Clause so that it encompasses new freedoms the Framers were too narrow-minded to imagine.").

<sup>106</sup> *Id.* at 3058.

<sup>107</sup> *Id.* at 3057–58.

<sup>108</sup> See Stevens, Keynote Address, *supra* note 50, at 54 (mentioning judges' lack of competence in this area, and further citing instances of disagreement between two of the Constitution's Framers, Hamilton and Madison).

<sup>109</sup> Cf. *Text of Justice David Souter's Speech*, HARVARD GAZETTE (May 27, 2010), <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech> (stating, in a speech by a Justice Stevens ally on the Court, that "[i]f we cannot share every intellectual assumption that formed the minds of those who framed the charter, we can still address the constitutional uncertainties the way they must have envisioned, by relying on reason, by respecting all the words the Framers wrote, by facing facts, and by seeking to understand their meaning for living people").

Justice Stevens would not subscribe to the democracy-versus-judiciary binary implicit in Justice Scalia's framing of original intent, either. Exemplary is the quintet of post-September 11 cases in which Justice Stevens participated as senior Associate Justice.<sup>110</sup> Considered as a whole, Justice Stevens's votes in those cases attested to his belief that judicial review is an integral component of the democratic system established by the Constitution. Thus he wrote in his 2011 book: "In our democracy, issues of policy are determined by majority vote; it is the business of legislators and executives to be popular."<sup>111</sup> Quite to the contrary, "judges have an overriding duty to be impartial and to be indifferent to popularity."<sup>112</sup> Justice Stevens underscored the entrenchment of this duty in Anglo-American constitutionalism by quoting "an essential attribute of judicial office" promulgated by the seventeenth-century jurist Matthew Hale: "That I not be solicitous of what men will say or think, so long as I keep myself exactly according to the rules of justice."<sup>113</sup> Surely informing Justice Stevens's application of those principles in the post-September 11 cases was his clerkship with Justice Rutledge, a Justice "forced to speak" against perceived injustice in *Yamashita*, a long ago military-commissions case.<sup>114</sup> One hears echo in Justice Stevens's own last words in his 2006 military-commissions judgment, *Hamdan*, that "the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."<sup>115</sup> Justice Stevens traced this interrelation of judicial oversight and democracy to a place Justice Scalia professed not to see it; namely, to the Constitution and to Framers' expressed vision of future need to "settle the meaning" of disputed terms.<sup>116</sup> Far from agreeing to eighteenth-century restrictions on judgment asserted by the originalist understanding often promoted by Justice Scalia,

---

<sup>110</sup> See *Boumediene v. Bush*, 553 U.S. 723, 796–98 (2008) (holding, in the majority opinion that Justice Stevens joined, that the Constitution enables noncitizens detained at the U.S. military base at Guantánamo Bay to seek habeas relief in U.S. courts); *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006) (Stevens, J.) (invalidating on numerous legal grounds the President's plan for Guantánamo military commissions); *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) (concluding, in a decision from which Justice Stevens and three other Justices dissented, that a citizen detained as an enemy combatant had filed his habeas petition incorrectly); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (Stevens, J.) (extending, as a matter of statutory interpretation, the privilege of habeas litigation to Guantánamo detainees); *Hamdi v. Rumsfeld*, 542 U.S. 507, 553–54 (2004) (ruling, in a judgment from which Justice Stevens joined Justice Scalia in dissent, that the Executive could continue indefinitely to detain a U.S. citizen without charges).

<sup>111</sup> STEVENS, *supra* note 2, at 125.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* Justice Stevens did not cite his source; however, this rule is ascribed to Hale, in much the same phrasing, in 1 JOHN LORD CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* 548 (London, John Murray 1849).

<sup>114</sup> *In re Yamashita*, 327 U.S. 1, 42 (1946) (Rutledge, J., dissenting).

<sup>115</sup> *Hamdan*, 548 U.S. at 635 (capitalized as in slip opinion, for reason stated *supra* note 19); see also *supra* text accompanying note 19 (quoting this passage at greater length).

<sup>116</sup> See Letter from James Madison to Judge Spencer Roane, *supra* note 62, at 145.

as a Justice, Justice Stevens understood himself constrained by the Framers' intent from imposing outcomes obviously unfair in contemporary contexts.

Another case that exposed the Scalia–Stevens divergence pertained to execution by lethal injection.<sup>117</sup> In that 2008 matter, *Baze v. Rees*, Justice Scalia gave an account of the Framers' intent according to which “the death penalty is a permissible legislative choice.”<sup>118</sup> Justice Scalia proceeded to endorse a constitutional test concerned only with eighteenth-century understandings; namely, “whether the challenged method inherently inflicts significantly more pain than traditional modes of execution such as hanging and the firing squad.”<sup>119</sup> Justice Stevens's opinion, in contrast, adjudged that exclusive adherence to the Framers' intent no longer was a just means of assessing the death penalty.<sup>120</sup> His opinion touched not at all on what was acceptable in 1787—an inquiry that had mattered to Justice Stevens in 1976, when he cast an essential vote to revive capital punishment.<sup>121</sup> What mattered by 2008 was whether the contemporary administration of capital punishment satisfied the principle that the 1976 decision had derived from the relevant constitutional text.<sup>122</sup> Experience led Justice Stevens to conclude this principle no longer was served. He wrote that “the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes,” rendering it “patently excessive and cruel and unusual punishment in violation of the Eighth Amendment.”<sup>123</sup> Although that conclusion did not rest on originalist inquiry, in Justice Stevens's mind it served an overarching original intent—as he had put it in a speech not long before, the

---

<sup>117</sup> *Baze v. Rees*, 553 U.S. 35 (2008).

<sup>118</sup> *Id.* at 87 (Scalia, J., concurring in the judgment). At issue was U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

<sup>119</sup> *Baze*, 553 U.S. at 106 (Thomas, J., joined by Scalia, J., concurring in the judgment).

<sup>120</sup> *Id.* at 71–87 (Stevens, J., concurring in the judgment).

<sup>121</sup> See *Gregg v. Georgia*, 428 U.S. 153, 169–71 (1976) (Stewart, Powell & Stevens, JJ.) (centering the conclusion that capital punishment is not invariably unconstitutional on an analysis of original intent).

<sup>122</sup> *Baze*, 553 U.S. at 78 (Stevens, J., concurring) (setting out as the guiding principle the proposition “that unless a criminal sanction serves a legitimate penological function, it constitutes ‘gratuitous infliction of suffering’ in violation of the Eighth Amendment” (quoting *Gregg*, 428 U.S. at 183)).

<sup>123</sup> *Id.* at 86 (Stevens, J., concurring in judgment) (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring) (internal quotation marks omitted)); cf. STEVENS, *supra* note 2, at 221 (praising an opinion by Chief Justice John G. Roberts, Jr., that, as Justice Stevens put it, “rejects a narrow interpretation of the Eighth Amendment—and, more important, the kind of reliance on ‘original intent’ as a method of interpreting the Constitution—that Chief Justice Rehnquist and Justice Scalia espoused” (citing *Graham v. Florida*, 130 S. Ct. 2011, 2036 (2010) (Roberts, C.J., concurring) (agreeing that sentencing a juvenile offender to life without parole for a nonhomicide death was an unconstitutionally cruel and unusual punishment, yet disagreeing with the reasoning by which majority reached that conclusion))).

intention “that powers and freedoms specified by the Framers would be effective in today’s world.”<sup>124</sup>

#### CONCLUSION

Even if Justice John Paul Stevens would welcome categorical identification with a single method—and he would not—his jurisprudence never would fit within the stringent form of originalism posited in this Essay. Justice Stevens is not exclusively an originalist any more than he is exclusively a pragmatist, a legal realist, or a practitioner of judicial restraint.<sup>125</sup> Justice Stevens long has harbored skepticism that research could pinpoint the meaning that a writer held in mind as she penned a word;<sup>126</sup> deeper still has been his doubt that it is possible to fix meaning to a term adopted through a collective drafting process. As for the proposition that meaning thus divined must be applied even if the result would be plainly absurd or unfair, Justice Stevens’s skepticism has known no bottom. That is not to say that Justice Stevens has found no use for historical inquiry into meaning. Such inquiry remains a touchstone. It is not a talisman, however; neither the lessons of history nor of any other source may be seen to coerce an unfair result. “Historical analysis is usually relevant and interesting,” Justice Stevens wrote recently, “but it is only one of many guides to sound adjudication.”<sup>127</sup> Originalism thus is seen as one technique among many, to be used to the extent it aids understanding in a particular case.

Justice Stevens’s jurisprudence belongs in a fifth interpretive category, one espousing a flexible and synthetic exploration of options. This category of constitutional interpretation—some have called it “eclectic”<sup>128</sup>—long has

---

<sup>124</sup> John Paul Stevens, *Judicial Activism: Ensuring the Powers and Freedoms Conceived by the Framers for Today’s World*, CBA REC., Oct. 2002, at 25, 33; *see id.* at 26 (praising certain mid-twentieth-century decisions that, he said, “protected an interest in individual liberty that seems more important today than it may have seemed in 1789”); *see also* Amann, *supra* note 11, at 1547, 1580, 1601 n.184 (discussing Justice Stevens’s support of the theory that constitutional meaning evolves over time).

<sup>125</sup> In truth, the jurisprudence of few Justices may be shoehorned into any one category, *see supra* text accompanying notes 25–27; this Essay has demonstrated that Justice Stevens’s jurisprudence particularly eludes such categorization.

<sup>126</sup> *See* STEVENS, *supra* note 2, at 225–26 (stressing that “judges are merely amateur historians” whose “interpretations of past events, like their interpretations of legislative history, are often debatable and sometimes simply wrong”).

<sup>127</sup> *Id.* at 226.

<sup>128</sup> *See, e.g.,* Green, *supra* note 12, at 163 (stating that in *Hamdan* Justice Stevens filled “statutory gaps . . . with more eclectic material”); Greene, *supra* note 65, at 687 (referring to the “eclectic mix of purpose and precedent” in Justice Stevens’s dissent in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and asserting that Justice Stevens should have shown “more forcefully” that in adopting this methodology he was “hewing to” Court tradition); Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2358 (2006) (describing Justice Stevens’s “eclectic and free-form methodology”); *cf.* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 421 (1994) (referring to Justice Stevens, in a cast less admiring than those of others cited in this footnote, as an “eclectic liberal”).

been used by many jurists, including some who served in the mid-twentieth-century era depicted in Professor Feldman's 2010 book, *Scorpions*.<sup>129</sup> This fifth methodology finds its tether not by kowtowing to a single technique, but rather by coupling diverse techniques, selected for the task at hand from a relatively small set of options, with a reasoned explanation of the analysis undertaken.<sup>130</sup> The Justice employed this two-step procedure in the many opinions in which he produced extensive text and equally extensive footnotes.<sup>131</sup> Justice Stevens has stressed that detail helps to ensure "open disclosure" of judicial thinking; indeed, critical of any member of the Court who reluctantly joined a majority rather than filing a dissent, he argued that "the institution and the public are better served by an accurate disclosure of the views of all of the justices in every argued case."<sup>132</sup> Dissents are to be welcomed, both because they may provoke the majority to "clarify and strengthen the Court's reasoning" and because they "demonstrate to the public that the dissenter's views were carefully considered before they were rejected," Justice Stevens has contended.<sup>133</sup> Footnotes, meanwhile, present "an opportunity to communicate facts or arguments that, while important to the reader, are superfluous to the main text."<sup>134</sup> For practitioners of this fifth methodology—at times, Justice Murphy and Justice Rutledge, and throughout his career, Justice Stevens—constitutional interpretation simply must accommodate a contemporary sense of justice.

Justice Stevens's adherence to an eclectic, or synthetic,<sup>135</sup> methodology at times carried a sting worthy of Feldman's scorpions. The most recent example occurred in the Scalia–Stevens exchange in the firearms cases,

---

<sup>129</sup> See *supra* text accompanying notes 1–15 (discussing Professor Feldman's multifold biography of the FDR-appointed Court).

<sup>130</sup> Cf. Diane Marie Amann, *Impartiality Deficit and International Criminal Judging*, in ATROCITIES AND INTERNATIONAL ACCOUNTABILITY: BEYOND TRANSITIONAL JUSTICE 208, 214–15 (Edel Hughes, William A. Schabas & Ramesh Thakur eds., 2007) (describing, with particular reference to the Rome Statute of the International Criminal Court, art. 74(5), July 17, 1998, 2187 U.N.T.S. 90, the significance in international law of reasoned explanations as means to enhanced judicial transparency); Amann, *supra* note 45, at 1341–42 & n.143 (explicating a criterion of "reasoned explanation" as a means to constrain U.S. judicial consultation of foreign sources).

<sup>131</sup> See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3088–3120 (2010) (Stevens, J., dissenting) (setting forth objections in a solo opinion spanning thirty-two pages and nearly as many footnotes). For additional discussion of this case, see *supra* text accompanying notes 82–84, 92–107.

<sup>132</sup> Stevens, *supra* note 84, at xii (first quotation); STEVENS, *supra* note 2, at 156 (second quotation).

<sup>133</sup> STEVENS, *supra* note 2, at 100 (second-guessing Chief Justice Earl Warren's push for a unanimous invalidation of de jure school segregation in *Brown v. Board of Education*, 347 U.S. 483 (1954)).

<sup>134</sup> John Paul Stevens, *A Personal History of the Law Review*, 100 NW. U. L. REV. 25, 25 (2006) (attributing this insight to his law dean at Northwestern, Leon Green). As evidence of footnotes' jurisprudential potential, Justice Stevens pointed, in a footnote, to *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). *Id.* at 25 n.3.

<sup>135</sup> See *supra* notes 42–43 and accompanying text (discussing these descriptors).



*Heller* and *McDonald*.<sup>136</sup> In the latter judgment, filed on Justice Stevens's final day as a Justice, the very last thing that Justice Scalia wrote was this: "It is Justice Stevens' approach, not the Court's, that puts democracy in peril."<sup>137</sup> This was Justice Stevens's retort:

My method seeks to synthesize dozens of cases on which the American people have relied for decades. Justice Scalia's method seeks to vaporize them. So I am left to wonder, which of us is the more faithful to this Nation's constitutional history? And which of us is more faithful to the values and commitments of the American people, as they stand today?<sup>138</sup>

These are questions that each of us is left to answer.

---

<sup>136</sup> See *supra* text accompanying notes 82–89, 92–107 (discussing cases).

<sup>137</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3058 (2010) (Scalia, J., concurring).

<sup>138</sup> *Id.* at 3118 (Stevens, J., dissenting).

