UIC Law Review

Volume 54 | Issue 4 Article 1

2021

Twenty-first Century Supreme Court Retirees: Assessing the Propriety of Post-retirement Activities, 54 UIC L. Rev. 829 (2021)

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TWENTY-FIRST CENTURY SUPREME COURT RETIREES:

ASSESSING THE PROPRIETY OF POST-RETIREMENT ACTIVITIES

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I. INTRODUCTION

News stories in 2021 focused on the latest controversy over a potential retirement from the U.S. Supreme Court.[1] Many Democrats urged eighty-three-year-old Justice Stephen Breyer to retire immediately so that Democratic President Joe Biden could appoint a younger replacement.[2] Democrats feared that if Breyer were to hang on too long and the Senate's composition changed, his death would inadvertently hand Republicans an opportunity to block any Biden nominations prior to the Republicans' next period

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1. Adam Liptak, *Justice Breyer on Retirement and the Role of Politics on the Supreme Court*, N.Y. TIMES (Aug. 27, 2021), www.nytimes.com/2021/08/27/us/politics/justice-breyer-supreme-court-retirement.html [perma.cc/6HVD-LKN9].

2. Aishvarya Kavi, *Progressive Groups Step Up Calls for Justice Breyer to Retire*, N.Y. TIMES (June 16, 2021), www.nytimes.com/2021/06/16/us/politics/stephen-breyer-supreme-court-retirement.html [perma.cc/7EXR-VVVE]; Aaron Blake, *Stephen Breyer Retirement Watch Just Got a Little More Interesting*, WASH. POST (Aug. 27, 2021), www.washingtonpost.com/politics/2021/08/27/stephen-breyer-retirement-watch-just-got-little-more-interesting/ [perma.cc/JC3X-PDKK].

of controlling the White House.[3] The conversations about the uncertainty of Justice Breyer's plans focused on the oft-discussed question of *if* a justice will choose to retire and thereby affect the composition of the Court.[4] A separate, less examined issue concerns *how* justices choose to spend their time after they have retired.[5] If Justice Breyer retires, will he disappear into private life or remain publicly visible as an author, speaker, interviewee, or fill-in judge on U.S. courts of appeals?[6] Retired justices make choices about whether and how to remain active in public life and these choices often raise questions and controversies about the value, influence, and propriety of outspokenness and visibility by retired judicial officers.[7]

This article examines twenty-first century Supreme Court retirees, including the unique activism[8] of the late Justice John Paul Stevens during his retirement years from 2010 to 2019.[9] By

3. Alison Durkee, *Stephen Breyer Has No Plan to Retire Yet from Supreme Court, He Says,* FORBES (July 15, 2021), www.forbes.com/sites/alisondurkee/2021/07/15/stephen-breyer-has-no-plan-to-retire-yet-from-supreme-court-he-says/?sh=6b4de35a47c8 [perma.cc/2M9K-3ZPQ].

4. *See, e.g.,* Ross M. Stolzenberg & James Lindgren, *Retirement and Death in Office of U.S. Supreme Court Justices*, 47 DEMOGRAPHY 269 (2010) (statistical analysis of the timing of justices' departures from the Supreme Court); DAVID N. ATKINSON, LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END (1999) (historical analysis of the reasons for and timing of justices' retirements from the Supreme Court).

5. One exception to the limited attention to retired Supreme Court justices concerns those who continue to participate in appellate court decision making through ad hoc service on U.S. courts of appeals. *See* E. Jon. A. Gryskiewicz, *The Semi-Retirement of Senior Supreme Court Justices: Examining Their Service on the Courts of Appeals,* 11 SETON HALL CIR. REV. 285 (2015) (study of service on U.S. courts of appeals by retired U.S. Supreme Court justices).

6. For example, while Justice Anthony Kennedy has mostly receded into private life during retirement, other recent retirees have sought ways to remain active in public life. Jessica Gresko, *Stevens and Ex-Colleagues Took Different Paths in Retirement*, ASSOC. PRESS (July 22, 2019), www.apnews.com/article/politics-ap-top-news-courts-us-supreme-court-gun-politics-fe69f62c8c254cc6bb6299fc16081cac.

7. For example, in the aftermath of Justice Stevens's declaration in 2018 that Supreme Court nominee Brett Kavanaugh lacked the proper judicial temperament to serve on the nation's highest court, observers noted: "Current and former justices on the Supreme Court, in keeping with their traditional reluctance to engage in heated political matters for fear of compromising the [C]ourt's appearance of neutrality, generally have not weighed in on the allegations surrounding Kavanaugh." Greg Re, *Retired Justice John Paul Stevens Calls Kavanugh's Temperament Disqualifying: "Senators Should Pay Attention to This,"* FOX NEWS (Oct. 4, 2018), www.foxnews.com/politics/retired-justice-john-paul-stevens-calls-kavanaughs-temperament-disqualifying-senators-should-pay-attention-to-this [perma.cc/AW8L-N4FP].

8. Gresko, *supra* note 6. Justice Stevens was different than other twenty-first century retirees by remaining involved in public discourse about issues of law and policy that continue to be considered to the Supreme Court. *Id.*

9. Linda Greenhouse, *Supreme Court Justice John Paul Stevens, Who Led the Liberal Wing, Dies at 99*, N.Y. TIMES (July 16, 2019), www.nytimes.com/

examining the public engagement activities pursued by recently retired justices, questions can be raised about the proper role of retired judicial officers and the potential for continuing influence by Supreme Court retirees.[10]

II. TWENTY-FIRST CENTURY SUPREME COURT RETIREES: A RANGE OF PUBLIC ENGAGEMENT ACTIVITIES

The U.S. Supreme Court began the twenty-first century with an unusually stable composition in which the same nine justices served together for a decade, the longest period of compositional stability since 1823.[11] From the confirmation of President Clinton's appointee Justice Stephen Breyer in 1994[12] to the death of terminally-ill Chief Justice William Rehnquist in 2005,[13] there were no new appointments to the Supreme Court.[14] Chief Justice Rehnquist's death occurred as the Senate was to begin consideration of a replacement for Justice Sandra Day O'Connor, who had announced her retirement a few months earlier.[15] By 2021, only two justices remained from the period of stability with which the Supreme Court entered the twenty-first century: Justice Clarence Thomas, appointed by President George H.W. Bush in 1991[16] and Justice Breyer in 1994.[17] After the retirement of Justice O'Connor, three additional justices retired: Justices David Souter,[18]

2019/07/16/us/john-paul-stevens-dead.html [perma.cc/T6B6-M34X]. Justice Stevens's post-retirement activism included unusual "forays into public debates" that judicial officers might typically avoid. *Id.*

10. *Id.*

11. The justices who served together during this stable period were, by seniority, Chief Justice William Rehnquist and Justices John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, and Stephen Breyer. Christopher E Smith & Thomas R. Hensley, *Decision-Making Trends of the Rehnquist Court Era: Civil Rights and Liberties Cases*, 89 JUDICATURE 161, 165, Table 4 (2005).

12. Gwen Ifill, *The Supreme Court: President Chooses Breyer, an Appeals Judge in Boston, for Blackmun's Seat*, N.Y. TIMES (May 14, 1994), www.nytimes.com/1994/05/14/us/supreme-court-president-chooses-breyer-appeals-judge-boston-for-blackmun-s-court.html [perma.cc/4TCP-3ST2].

13. Linda Greenhouse, *Chief Justice Rehnquist Dies at 80*, N.Y. TIMES (Sept. 4, 2005), www.nytimes.com/2005/09/04/politics/chief-justice-rehnquist-dies-at-80.html [perma.cc/7GL9-M2FL].

14. Lawrence Sirovich, *A Pattern Analysis of the Second Rehnquist U.S. Supreme Court*, 100 PROC. NAT'L ACAD. SCI. 7432, 7432 (2003).

15. Greenhouse, *Chief Justice Rehnquist*, *supra* note 13.

16. CHRISTOPHER E. SMITH, CRITICAL JUDICIAL NOMINATIONS AND POLITICAL CHANGE: THE IMPACT OF CLARENCE THOMAS 47-50 (1993).

17. Ifill, *supra* note 12.

18. Nina Totenberg, *Supreme Court Justice Souter to Retire*, NAT'L PUB. RADIO (Apr. 30, 2009), www.npr.org/templates/story/story.php?storyId=103694193 [perma.cc/F9VD-HZDD].

John Paul Stevens,[19] and Anthony Kennedy;[20] and two justices passed away while in office: Justice Antonin Scalia[21] and Justice Ruth Bader Ginsburg.[22] The four twenty-first century retirees, Justices O'Connor, Souter, Stevens, and Kennedy, each made different choices about how to spend their retirement years.[23]

A. Justice Anthony Kennedy: Retirement as Retirement

A justice's ability to choose to spend their retirements as carefree retirees is made possible by way of their continuing lifetime salaries in excess of $200,000 annually,[24] plus their own savings and investments.[25] When Justice Kennedy retired from the Supreme Court in 2018, he said he wanted to spend more time with his family.[26] Indeed, one of the few published descriptions of Justice Kennedy's retirement activities said:

> Former clerks say Kennedy . . . is an enthusiastic grandparent. He's attended his grandkids' T-ball games and ballet performances. He spoke at the high school graduations of two of his grandchildren and has talked about seeing "Hamilton" on Broadway with his

19. Richard Adams, *John Paul Stevens to Retire From U.S. Supreme Court*, GUARDIAN (Apr. 9, 2010), www.theguardian.com/world/richard-adams-blog/2010/apr/09/john-paul-stevens-retire-supreme-court [perma.cc/AZ6H-NGV5].

20. Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html [perma.cc/K9P2-TLFK].

21. Terri Langford & Jordan Rudner, *Supreme Court Justice Antonin Scalia Found Dead in West Texas*, TEX. TRIB. (Feb. 13, 2016), www.texastribune.org/2016/02/13/us-supreme-court-justice-antonin-scalia-found-dead/ [perma.cc/D54R-YCPD].

22. Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NAT'L PUB. RADIO (Sept. 18, 2020), www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [perma.cc/56NC-SXY9].

23. Gresko, *supra* note 6.

24. Laurent Belsie, *John Paul Stevens: Supreme Court Retirees Keep Lifetime Pay*, CHRISTIAN SCI. MONITOR (Apr. 9, 2010), www.csmonitor.com/Business/2010/0409/John-Paul-Stevens-Supreme-Court-retirees-keep-lifetime-pay [perma.cc/AT4C-C795]; Lyle Denniston, *Justice Anthony Kennedy in Retirement: A Different Life*, CONST. DAILY (July 30, 2018), www.constitutioncenter.org/blog/justice-anthony-kennedy-in-retirement-a-different-life [perma.cc/EG55-YPF6].

25. *See* Amy Howe, *Less Travel, Plenty of Royalties for Justices in 2020*, SCOTUSBLOG (June 11, 2021), www.scotusblog.com/2021/06/less-travel-plenty-of-royalties-for-justices-in-2020/ [perma.cc/8V3F-DM2C] (The public cannot know with precision the financial worth of individual Supreme Court justices, but their annual financial disclosures reveal their opportunities for outside income).

26. Jacob Pramuk & Marty Steinberg, *Anthony Kennedy Retiring From Supreme Court*, CNBC (June 27, 2018), www.cnbc.com/2018/06/27/anthony-kennedy-retiring-from-supreme-court.html [perma.cc/L2FS-C4MB].

grandchildren.[27]

The foregoing description should not imply that Justice Kennedy has withdrawn completely from public life. He continues to give speeches about the Supreme Court and the importance of rule of law,[28] as well as teach in summer law school programs in Europe for American law students.[29] These are the same extra-judicial activities in which he engaged when he was on the bench and presumably reflect his desire to enhance understanding of the government branch to which he devoted decades of his professional life.[30] However, as of 2021, there was little evidence that Justice Kennedy sought to proactively remain involved in public life beyond the continuation of activity in public education in which he had engaged during his time on the bench.[31]

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27. Gresko, *supra* note 6.

28. *See, e.g.,* Bob Egelko, *A Retired Supreme Court Justice's Harsh Critique of Today's Public Dialogue*, SAN FRANCISCO CHRON. (Feb. 1, 2019), www.sfchronicle.com/bayarea/article/A-retired-Supreme-Court-justice-s-harsh-13581796.php [perma.cc/UHB7-MGYQ] (speech at University of California Hastings College of Law); Eric Williamson, *The Supreme Court Still Works, Says Ex-Justice Anthony Kennedy*, UVA TODAY (Nov. 16, 2018), www.news.virginia.edu/content/supreme-court-still-works-says-ex-justice-anthony-kennedy [perma.cc/EHJ3-Y9A4] (speech at University of Virginia School of Law).

29. *Pacific's McGeorge School of Law International Programs Build Confidence, Resumes*, UNIV. OF THE PACIFIC (Sept. 10, 2019), www.pacific.edu/pacific-newsroom/pacifics-mcgeorge-school-law-international-programs-build-confidence-resumes [perma.cc/53RG-HQZW].

30. *See, e.g., Inaugural Bolch Prize to Honor Justice Anthony M. Kennedy (Retired) for Efforts to Advance Rule of Law*, BOLCH JUDICIAL INST. (Feb. 26, 2019), www.judicialstudies.duke.edu/2019/02/bolch-prize-kennedy/ [perma.cc/9BB4-Q5LF] (stating

> Justice Kennedy is widely recognized for his devotion to the Constitution and his efforts to share the ideals of liberty and democracy with students and audiences around the world. He has spoken frequently of his commitment to the rule of law and the need for a judge to always be neutral and fair . . . .
>
> Through public appearances and teaching engagements, Justice Kennedy has worked to build public understanding of and appreciation for the role of an independent judiciary in a functioning democracy. He has lectured at law schools and universities in many countries, speaking about the rule of law and the connections between economic and social progress and a system of laws that protect freedom and prevent corruption. And he has helped to develop educational tools about the rule of law and the role of the judiciary for students in the United States and abroad.).

31. *Id.*

B. Justice David Souter: Contributions to Judging and One Subtle Outspoken Moment

Justice Souter retired in 2009 having established a record as a moderately liberal justice whose decisions differed from the hopes and expectations of many conservatives who endorsed his appointment to the Court.[32] He seized the first opportunity to leave the Court when a new president arrived who would likely appoint a replacement with moderately liberal approaches to judicial decision making. [33] Despite Souter's affiliation with the Republican Party prior to his service on the bench and his appointment to the Supreme Court by Republican President George H.W. Bush, the conservative turn of his party appeared to make Justice Souter prefer his replacement to be appointed by Democratic President, Barack Obama.[34] In retirement, Justice Souter remained actively engaged in appellate judging through his service on the U.S. Court of Appeals for the First Circuit in Boston,[35] the court on which he briefly served between his years on the New Hampshire Supreme Court and his appointment to the U.S. Supreme Court in 1990.[36] According to a study published five years after Justice Souter's retirement from the U.S. Supreme Court, "Justice Souter's First Circuit sittings have been for three court weeks each year, an average of eight to nine days total."[37] In one two-year period of his retirement, "Justice Souter had written forty-eight First Circuit opinions and participated in 113 others."[38]

In choosing to serve as an appellate judge after retirement from the Supreme Court, Justice Souter continued a practice pioneered by ten prior retired justices. Like Justice O'Connor, who also contributed to the federal judiciary in this way during her retirement, Justice Souter's continuing service was authorized by a 1937 statute[39] that permits retired justices to sit as judges in the

32. *See*, e.g., Scott P. Johnson, Justice David Souter and the First Amendment, 11 LIBERTY U. L. REV. 639, 666 (2017) ("Justice Souter's behavior of distributing justice based upon a more practical and flexible interpretation of the law earned him the respect of legal scholars, but disappointed Republicans hoping for another conservative vote in the tradition of Nixon and Reagan appointees to the Court.").

33. Totenberg, Justice Ruth Bader Ginsburg, *supra* note 22.

34. *Id*.

35. Stephen L. Wasby, *Retired Supreme Court Justices in the Courts of Appeals*, 39 J. SUP. CT. HIST. 146, 148, 156-61 (2014) (hereinafter Wasby I].

36. *See* TINSLEY E. YARBROUGH, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT 62-109 (2005) (detailed description of Justice Souter's time on New Hampshire Supreme Court and U.S. Court of Appeals for the First Circuit prior to confirmation as an Associate Justice of the U.S. Supreme Court).

37. Wasby I, *supra* note 35, at 149.

38. *Id*. at 148.

39. Retirement Act of 1937, P.L. No. 10, 75th Cong., 1st Sess. (March 1, 1937), 50 Stat. 24.

lower federal courts.[40] By 2019, Justice Souter had heard more than 400 cases as a member of First Circuit panels.[41] Justice Souter's decision to continue to serve as a federal judge permitted him to use his well-developed knowledge and experience to contribute to the work of the federal appellate court that was closest to his home in New Hampshire.[42] His willingness to serve on appellate panels has drawn Justice Souter into controversial issues[43] and thereby creates risks that he may find his decisions reviewed and overturned by his former colleagues on the U.S. Supreme Court.[44] If retired justices are concerned about their judicial legacies and reputations, they may not wish to place themselves in the position of risking reversal of appellate court decisions and the new media attention that might be drawn to such actions.[45] It seems clear that Justice Souter's motivation is based on a desire to contribute to the judiciary rather than any self-interested effort to expand his influence or enhance his reputation.[46] As described by one analyst: "Justice Souter's

40. Wasby I, *supra* note 35, at 146-47.

41. Gresko, supra note 6.

42. Stephen Wermiel, *SCOTUS for Law Students: Retired Justices*, SCOTUSBLOG (May 26, 2016), www.scotusblog.com/2016/05/scotus-for-law-students-retired-justices/ [perma.cc/AM3F-6R7F].

43. *See, e.g.*, Mark Joseph Stern, *Retired Supreme Court Justice Joins Opinion Shooting Down Trump's Attack on Sanctuary Cities*, SLATE (Mar. 25, 2020), www.slate.com/news-and-politics/2020/03/david-souter-sanctuary-cities-first-circuit.html [perma.cc/4YDE-APCA] (First Circuit panel rejects Trump administration's funding threats against sanctuary cities that disagreed with the Trump administration's immigration policies); Judy Harrison, *Families Optimistic Supreme Court Will Overturn Maine's Ban on Religious School Funding*, BANGOR DAILY NEWS (Nov. 19, 2020), www.bangordailynews.com/2020/11/19/politics/families-optimistic-supreme-court-will-overturn-maines-ban-on-religious-school-funding/ [perma.cc/JN8P-KA5E] (First Circuit panel rejects effort to invalidate Maine's ban on public funding of religious schools).

44. *See, e.g.*, Robert Barnes, *Retired Supreme Court Justices Still Judge—and Get Judge*d, WASH. POST (Mar. 10, 2013), www.washingtonpost.com/politics/retired-supreme-court-justices-still-judge--and-get-judged/2013/03/10/1b22943c-897f-11e2-8d72-dc76641cb8d4_story.html [perma.cc/V4HH-YVGX] (example of a court of appeals decision in which retired Justice O'Connor participated facing review by the U.S. Supreme Court).

45. In an analogous example, then-Justice Rehnquist attracted media attention when he presided over a trial in the role of a district court judge and then, despite actually being a Supreme Court justice, saw his district court decision overturned by the U.S. court of appeals. Irvin Molotsky, & Warren Weaver, Jr., *Washington Talk: Briefing—A Rehnquist Oddity*, N.Y.TIMES (Nov. 25, 1986), www.nytimes.com/1986/11/25/us/washington-talk-briefing-a-rehnquist-oddity.html [perma.cc/R5G3-3T5D]; *Chief Justice Has Presided Over Only One Other Trial*, DESERET NEWS (Jan. 10, 1999), www.deseret.com/1999/1/10/19426101/chief-justice-has-presided-over-only-one-other-trial [perma.cc/Z2QS-C3K4]; *Rehnquist Has Presided Over Just One Other Trial*, TAMPA BAY TIMES (Sept. 14, 2005), www.tampabay.com/archive/1998/12/31/rehnquist-has-presided-over-just-one-other-trial/ [perma.cc/Q9C6-56X6].

46. In retirement, Souter has been described as "stay[ing] out of the

opinions for the First Circuit present a picture of a judge laboring in quiet workmanlike fashion, like most Court of Appeals judges and as befits his low-key personality."[47]

A published description of Justice Souter in retirement emphasized his reclusive existence outside of his participation in judging First Circuit cases: "Off the bench, Souter has generally maintained a much lower profile . . . He has stayed out of the limelight, generally declining invitations to speak . . . "[48] One exception that led Justice Souter to speak publicly about a matter of controversy came when he was invited to give the commencement address at Harvard University in 2010.[49] Without expressly saying so, Souter's address was a critique of constitutional interpretation by textualism, originalism, and any other method that is based on claims that constitutional provisions can be interpreted in straightforward ways that exclude the intrusion of judges' values and perspectives.[50] Justice Souter highlighted the fact that provisions of the Constitution are in tension, such as the absolute language of the First Amendment and the constitutional command to protect the nation's security.[51] He implicitly asked, for example, whether the absolutist language of the First Amendment protects those who would communicate military secrets or nuclear plans to adversary nations.[52] Justice Souter was quite clear in his rejection of the "simplistic"[53] belief that judges can avoid making choices if they simply follow the original meaning of the Constitution's words

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limelight." Wermiel, *supra* note 42.

47. Wasby I, *supra* note 35, at 156.

48. Wermiel, *supra* note 42.

49. Chad M. Oldfather, *The Inconspicuous DHS: The Supreme Court, Celebrity Culture, and Justice David H. Souter*, 90 MISS. C. L. REV. 183, 210-12 (220).

50. Justice Neil Gorsuch, for example, is among those on the Supreme Court who claim that a particular method of interpretation can supply correct answers without incorporating the judicial decision maker's values and preferences:

> A judge should apply the Constitution or a congressional statute as it *is*, not as he thinks it *should be*.
>
> Rather than . . . rework the law to meet the judge's estimation of what an "evolving" or "maturing" society should look like, an originalist and a textualist will study dictionary definitions, rules of grammar, and the historical context, all to determine what the law meant to the people when their representatives adopted it. [italics in original]
>
> Neil Gorsuch, A Republic, If You Can Keep It 10 (2019).

51. *See, e.g.,* David H. Souter, *Text of David Souter's Speech*, Harvard Gazette (May 27, 2010), www.news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/ [perma.cc/ER4V-UGNY] ("[T]he Constitution contains values that may well exist in tension with each other, not harmony.").

52. *Id.* ("[T]he First Amendment was not the whole Constitution. The Constitution also granted authority to the government to provide for the security of the nation, and authority to the president to manage foreign policy and command the military.").

53. *Id.*

or intentions of the Framers.[54] According to Justice Souter, "the simplistic view of the Constitution devalues our aspirations, and . . . diminishes us. It is a view of judging that means to discourage our tenacity (our sometimes reluctant tenacity) to keep the constitutional promises the nation has made."[55] Thus, Justice Souter advocated constitutional interpretation "by relying on reason, by respecting all the words the Framers wrote, and by seeking to understand their meaning for living people."[56] Unsurprisingly, Justice Souter's speech "provoked conservatives, who saw it as an attack on textualism, and led them once more to express their regret about Souter's appointment [to the Supreme Court]."[57]

Justice Souter could have readily avoided controversy by choosing a topic aimed at protecting the legitimacy of the judicial branch or describing the operation of our constitutional governing system.[58] Indeed, Justice Souter made such educational presentations[59] for a local group he helped to organize, the New

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54. According to Justice Souter:

> The explicit terms of the Constitution, in other words, can create a conflict of approved values, and the explicit terms of the Constitution do not resolve that conflict when it arises. The guarantee of the right to publish is unconditional in its terms, and in its terms the power of the government to govern is plenary. A choice may have to be made, not because language is vague but because the Constitution embodies the desire of the American people, like most people, to have things both ways. We want order and security, and we want liberty. And we want not only liberty but equality as well. These paired desires of ours can clash, and when they do a court is forced to choose between them, between one constitutional good and another one. The court has to decide which of our approved desires has the better claim, right here, right now, and a court has to do more than read fairly when it makes this kind of choice. And choices like the ones that the justices envisioned in the Papers case make up much of what we call law.

Let me ask a rhetorical question. Should the choice and its explanation be called illegitimate law making? Can it be an act beyond the judicial power when a choice must be made and the Constitution has not made it in advance in so many words? You know my answer. So much for the notion that all of constitutional law lies there in the Constitution waiting for a judge to read it fairly. *Id.*

55. *Id*.

56. *Id*.

57. Robert Barnes, *Retired Justice David H. Souter, "the Luckiest Guy," Returns to His Books*, WASH. POST (Sept. 11, 2011), www.washingtonpost.com/politics/retired-justice-david-h-souter-the-luckiest-guy-returns-to-his-books/2011/09/10/gIQA0Iw0KK_story.html [perma.cc/W4QH-CDYY].

58. For example, Justice Kennedy's 2009 commencement address at Stanford encouraged graduates to understand the importance of rule of law for advancing freedom and democracy around the world. Anthony Kennedy, Text of Justice Kennedy's 2009 Commencement Address, STANFORD NEWS (June 14, 2009), www.news.stanford.edu/news/2009/june17/kennedy_text-061709.html [perma.cc/WN2A-R9E3].

59. Steve Benen, *Souter Warned of a Trump-Like Candidate in Prescient*

Hampshire Institute on Civics Education, that produces lesson plans and programs for teachers in New Hampshire's schools.[60]

One may view Justice Souter's choice of a commencement speech topic as a form of public education that helped to explain the challenges of interpreting the Constitution. However, this choice was timed a mere month before the legal community accurately anticipated the publication of a major debate among the Supreme Court's justices about originalist interpretation in the Court's second monumental decision[61] about the Second Amendment's "right to keep and bear arms."[62] Justice Souter's highly-publicized commencement address also served, in effect, as a "dissenting opinion" against originalist interpretation by placing into easily available online records many key ideas from which lawyers and judges could draw in the future when considering how to interpret the Constitution's provisions.[63] Viewed through the lens of this latter function, one can ascribe to this specific high-profile address and choice of topic a rare (for Justice Souter) aspiration for post-retirement influence over law and policy nationally.[64]

Remarks, MSNBC (Oct. 21, 2016), www.msnbc.com/rachel-maddow-show/souter-warned-trump-candidate-prescient-remarks-msna916691 [perma.cc/4J48-5UXH].

60. Charlotte Albright, *Ethics Institute Urges Civic Education, On and Off Campus*, DARTMOUTH NEWS (Mar. 14, 2017), www.home.dartmouth.edu/news/2017/03/ethics-institute-urges-civic-engagement-and-campus [perma.cc/VV5P-HZ3X].

61. Almost exactly one month after Souter's commencement address, the Supreme Court issued a 5-4 decision, with both the majority and dissenting opinions debating originalist interpretation, concerning the incorporation of the Second Amendment for application to state and local laws. McDonald v. City of Chicago, 561 U.S. 742 (2010). Legal observers could accurately anticipate this originalist debate because the Court's prior Second Amendment decision, also a hotly-contested 5-4 decision but one in which Souter participated, presented the high court's most significant and substantive debate about the original meaning of a constitutional provision. Cite. In that 2008 case, both Justice Scalia's majority opinion and Justice Stevens's dissent used originalism to advocate diametrically-opposed conclusions about the existence of a constitutional right for individuals to own and keep handguns in their homes. District of Columbia v. Heller, 554 U.S. 570 (2008).

62. U.S. CONST. amend II.

63. One scholar described several reasons for dissenting opinions, including "the dissenting opinion may be an appeal to a future Court. Indeed, in several instances a dissenting view on an issue later became the Court's majority opinion." LAWRENCE BAUM, THE SUPREME COURT 128 (4th ed. 1992).

64. During his service on the Supreme Court, Justice Souter wrote notable dissenting opinions, *see, e.g.*, Adam D. Chandler, *Slow and Steady: David Souter's Life in the Law*, 120 YALE L. J. ONLINE 37 (2010) (description of Souter's dissenting opinion in District Attorney's Office v. Osborne, 557 U.S. 52 (2009)), but was not known for seeking visibility in public debates after he retired. *See supra* notes 47-48 and accompanying text (observers' characterizations of Justice Souter's quiet, steady contributions to the U.S. Court of Appeals for the First Circuit).

C. Justice Sandra Day O'Connor: Public Engagement Across a Range of Activity

Justice O'Connor announced her retirement from the Supreme Court in 2005 amid news reports that she needed to help care for her husband who was suffering from Alzheimer's disease.[65] She remained on the Court until her replacement, Justice Samuel Alito, was confirmed by the Senate in January 2006.[66] Justice O'Connor engaged in an array of public engagement activities during her retirement. These activities began when she departed from the Court in early 2006 and continued through her withdrawal from public life upon announcing her diagnosis with dementia in 2018.[67]

Justice O'Connor served regularly as a judge on panels that heard cases in the U.S. courts of appeals.[68] Unlike Justice Souter, who served exclusively at the First Circuit's Boston courthouse near his home in New Hampshire,[69] Justice O'Connor traveled around the country to provide assistance in various circuits.[70] Among the court of appeals cases that she heard, two stand out as cases interpreting and applying an influential Supreme Court precedent for which she was the original author.[71]

In its 1987 decision in *Turner v. Safley*,[72] the Supreme Court was deeply divided[73] on the question of whether the First Amendment protected the rights of imprisoned people to marry while in prison without permission of corrections officials and to correspond with imprisoned people in other institutions.[74] Justice

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65. *Retired Justice O'Connor's Husband Dies*, SEATTLE TIMES (Nov. 11, 2009), www.seattletimes.com/seattle-news/politics/retired-justice-oconnors-husband-dies/ [perma.cc/PKX5-R4Y2].

66. *Alito Sworn In As Supreme Court Justice*, NBC NEWS (Jan. 31, 2006), www.nbcnews.com/id/wbna11111624 [perma.cc/PVQ4-686Z].

67. Bill Chappell & Nina Totenberg, Sandra Day O'Connor Says She Has Dementia, Withdraws from Public Life, NAT'L PUB. RADIO (Oct. 23, 2018), www.npr.org/2018/10/23/659816933/sandra-day-oconnor-says-she-has-dementia-withdraws-from-public-life [perma.cc/YJC2-JUY6].

68. A study covering the five-year period from 2007 to 2012 found that Justice O'Connor "authored twenty-six opinions for the courts on which she sat plus one dissent, and she participated in another 118 cases." Wasby I, *supra* note 35, at 148.

69. *Id*. at 152.

70. *Id*.

71. *See* CHRISTOPHER E. SMITH, THE SUPREME COURT AND THE DEVELOPMENT OF LAW: THROUGH THE PRISM OF PRISONERS' RIGHTS 124-25 (2016) [hereinafter SMITH I] (description of Justice O'Connor's role in using her post-retirement service on court of appeals panels to clarify the meaning of an earlier opinion she wrote as an Associate Justice on the U.S. Supreme Court).

72. Turner v. Safley, 482 U.S. 78, 81-82, 100 (1987).

73. SMITH I, *supra* note 71, at 113.

74. David L. Hudson, Jr., *Turner v. Safley: High Drama, Enduring Precedent*, FREEDOM FORUM INST. (May 1, 2008), www.freedomforuminstitute.org/2008/05/01/turner-v-safley-high-drama-

O'Connor, who sat between four justices who would support recognition of both rights and four justices who originally rejected both rights, concluded that the right to marry was protected, but the right to correspond was not.[75] She wrote the majority opinion that created a four-part test for evaluating these First Amendment rights claims,[76] a test that was criticized for being overly-deferential to officials' claims about potential threats to order and security within corrections institutions.[77]

The deferential, rights-denying, four-part test in *Turner* was created by Justice O'Connor to address prisoners' claims about rights to marriage and correspondence with other imprisoned people,[78] but the divided Court immediately applied the test to deny a First Amendment free exercise of religion claim in another case.[79] Through extending the application of Justice O'Connor's test to other rights, the Court inevitably raised questions about whether and how the deferential approach might apply to various rights claims by imprisoned people.[80] Other justices claimed that Justice O'Connor's four-part test was generally applicable to deny rights claims by imprisoned people.[81] However, just prior to her retirement from the Court, Justice O'Connor had the opportunity to gain majority support for rejecting the applicability of her *Turner* test to an equal protection claim about racial segregation inside a California prison.[82] In the two post-retirement court of appeals

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enduring-precedent/ [perma.cc/8P29-PKCW].

75. SMITH I, *supra* note 71, at 113. Under Justice O'Connor's analysis, the prohibition on prisoner-to-prisoner correspondence was justified by corrections officials' concerns about security but the limitation on marriages could not be justified by security concerns. *Id*. at 114-15.

76. *Id*. at 115.

77. In his dissenting opinion in Turner, Justice Stevens wrote:

> But if the standard can be satisfied by nothing more than a "logical connection" between the regulation and any legitimate penological concern perceived by a cautious warden, it is virtually meaningless. Application of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation. Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners; and security is logically furthered by a total ban on inmate communication, not only with other inmates but also with outsiders wo conceivably might be interested in arranging an attack within the prison or an escape from it. Thus, I dissent from Part II of the Court's opinion.

Turner, 482 U.S. at 100-01 (Stevens, J., dissenting).

78. SMITH I, *supra* note 71, at 112-16.

79. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349-52 (1987) (majority opinion by Chief Justice Rehnquist applied Justice O'Connor's *Turner* test to reject free exercise of religion claim by Muslim prisoners).

80. SMITH I, *supra* note 71, at 119.

81. *Id*. at 119-20.

82. Johnson v. California, 543 U.S. 499, 510 (2005).

cases, she had additional opportunities to communicate her views about the intended limits of the deferential test she created in *Turner*.[83]

In one case,[84] the state of Iowa had delegated the institutional operation and programs at one prison to a religious organization that only provided services to Christian prisoners.[85] An outside group challenged this arrangement as a violation of the First Amendment Establishment Clause,[86] The defenders of the program argued, in part, that Justice O'Connor's *Turner* test should apply to Establishment Clause claims and thereby require judicial deference to decisions by corrections officials.[87] The three-member Eighth Circuit U.S. Court of Appeals panel, including Justice O'Connor, announced that the *Turner* test did not apply to such claims.[88]

In the second case,[89] a Muslim prisoner claimed a free exercise right to grow a one-eighth-inch period to comply with his religion's required practices.[90] Prison officials prohibited him from doing so.[91] Although his case was governed by the rights-protective Religious Land Use and Institutionalized Persons Act,[92] the Fourth Circuit U.S. Court of Appeals panel, including Justice O'Connor, explicitly rejected the trial judge's *Turner*-type deference to the safety and security claims of the prison officials.[93] Although the case did not directly concern the use of Justice O'Connor's *Turner* test, it effectively communicated her rejection of efforts by Supreme Court justices and other judges to apply *Turner*-type reflexive deference to prison officials as a means to deny rights claims by imprisoned people.[94]

Justice O'Connor, by participating in court of appeals decisions, was able to respond to efforts aimed at expanding the reach of her *Turner* doctrine by communicating, even in retirement, her views about the appropriate limits of her influential majority opinion.[95]Justice O'Connor and other Supreme Court justices do not

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83. Americans United for Separation of Church and State v. Prison Fellowship Ministries, 509 F.3d 406, 426 (8th Cir. 2007); Couch v. Jabe, 679 F.3d 197, 201 (4th Cir. 2012); *see* SMITH I, *supra* note 71, at 124-25 (description of Justice O'Connor's role in court of appeals decisions that raised discussion of the *Turner* test-type rationales that she created in 1987).

84. *Americans United*, 509 F.3d at 413-16.

85. SMITH I, *supra* note 71, at 124.

86. *Americans United*, 509 F.3d at 419-20.

87. SMITH I, *supra* note 71 at 125.

88. *Id.*

89. *Couch*, 679 F.3d at 199-200.

90. SMITH I, *supra* note 71, at 125.

91. *Couch*, 679 F.3d at 199.

92. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, et seq (2021).

93. SMITH I, *supra* note 71, at 125.

94. *Id.*

95. *Id.* at 124.

own and control the legal tests they create as majority opinion authors.[96] By putting forth language to guide the analysis of legal issues, an author of an opinion creates opportunities for other judicial officers to apply that language in ways that the original author did not envision or intend.[97] Indeed, language created for rights-expanding purposes can ultimately be used in other judicial decisions for rights-contracting decisions with which the original opinion author strongly disagrees.[98]

Unlike Justice Souter, Justice O'Connor did not focus her public engagement activities in retirement exclusively on judicial decision making in appellate cases. While Justice Souter helped to develop a New Hampshire-focused program to enhance civics education in schools,[99] Justice O'Connor founded a national organization, called iCivics,[100] that provides educational materials and learning games for students throughout the country.[101] Both Justices O'Connor and Souter expressed profound concerns about the threat to democracy if citizens do not have a proper understanding of their governing system and their essential roles in that system as engaged citizens and voters.[102] However, Justice O'Connor's leadership role in seeking to assert influence on this topic was more ambitious and assertive than Justice Souter's because she created an organization to serve the entire nation[103] and, as publicly acknowledged by Justice Souter, she was the one who persuaded him to become involved in this important cause in

96. *See* Christopher E. Smith, *The Malleability of Constitutional Doctrine and Its Ironic Impact on Prisoners' Rights*, 11 BOSTON U. PUB. INT. L. J. 73, 74-75 (2001) (examples of Justice Antonin Scalia using language from Justice Thurgood Marshall's rights-expanding majority opinions in order to diminish rights for imprisoned people).

97. *Id.* at 87, 90.

98. *Id.* at 95.

99. Albright, *supra* note 60.

100. *See who we are*, ICIVICS, www.icivics.org/about [perma.cc/8GX3-UVJN] (last visited Nov. 5, 2021) (description of the civic education organization founded by Justice O'Connor).

101. Alexander Heffner, *Former Supreme Court Justice Sandra Day O'Connor on the Importance of Civics Education*, WASH. POST (Apr. 12, 2012), www.washingtonpost.com/lifestyle/magazine/former-supreme-court-justice-sandra-day-oconnor-on-the-importance-of-civics-education/2012/04/10/gIQA8aUnCT_story.html [perma.cc/QJY6-ZUTQ].

102. For example, Justice O'Connor said, "If we don't take every generation of young people and make sure they understand that they are an essential part of government, we won't survive". *Id.* Justice Souter said, "An ignorant people can never remain a free people. Democracy cannot survive too much ignorance." Ryan Lessard, *Former Justice Souter Warns About the State of Civics Education*, N.H. PUB. RADIO (Sept. 14, 2012), www.nhpr.org/nh-news/2012-09-14/former-justice-souter-warns-about-the-state-of-civics-education [perma.cc/L9WK-M4W3].

103. Justice O'Connor's iCivics program "is used in all 50 states and an estimated 55,000 classrooms." Heffner, *supra* note 101.

his home state.[104]

Justice O'Connor served on the ten-member Iraq Study Group, a bipartisan, blue-ribbon commission comprised primarily of former members of Congress and cabinet secretaries.[105] The Iraq Study Group was created in March 2006 by the United States Institute of Peace at the urging of Congress to make recommendations about future American actions while military efforts progressed.[106] The Study Group met with dozens of experts and made a four-day trip to Iraq[107] before issuing a report that urged the withdrawal of U.S. combat forces and direct negotiations with adversarial countries, Iran and Syria, that border Iraq.[108] It is very unusual for former Supreme Court justices to have formal roles in foreign policy organizations whose focus is broader than encouraging the rule of law and promoting constitutional democracy.[109]

The two foregoing public engagement initiatives can be characterized broadly as public service, with one intended to restore a decline in civic knowledge[110] and the other evincing a willingness

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104. At a joint appearance with Justice O'Connor at the John F. Kennedy Presidential Library and Museum, Justice Souter said, "Well, yes. She got me into this. Really, she did. I didn't have any particular sense of what was going on in civics teaching in the United States." *A Conversation with Justices Souter and O'Connor*, JOHN F. KENNEDY PRES. LIBR. & MUSEUM (Dec. 13, 2010), www.jfklibrary.org/events-and-awards/forums/2010-12-13-justices-sandra-day-oconnor-and-david-souter [perma.cc/8ECN-GUS7].

105. *Iraq Study Group Fact Sheet*, U.S. INST. OF PEACE (Dec. 20, 2006), www.usip.org/publications/2006/12/iraq-study-group-fact-sheet [perma.cc/K8AZ-HHLH] [hereinafter *Iraq Study* I].

106. *Id.*

107. *Iraq Study Group*, U.S. INST. OF PEACE. www.usip.org/programs/iraq-study-group [perma.cc/Q79X-KV7Q] (last visited Nov. 5, 2021) [hereinafter *Iraq Study* II].

108. David E. Sanger, *Panel Calls for New Approach to Iraq*, N.Y. TIMES (Dec. 6, 2006), www.nytimes.com/2006/12/06/world/middleeast/06cnd-iraq.html [perma.cc/6MHK-Q58M].

109. For example, Justice William O. Douglas was extraordinarily unusual for a Supreme Court justice by traveling to many countries and writing books about comparative government and foreign policy. BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS, 306-07, 336-38 (2003) By contrast, retired Chief Justice Warren Burger's service as chairperson on the bicentennial commission to plan celebrations of the U.S. Constitution's 200th anniversary was more typical of formal law-focused public engagement by retired justices. James H. Rubin, *Burger's Bicentennial Commission Troubled from the Start*, ASSOC. PRESS (June 23, 1986), www.apnews.com/article/82073cc727d4c628bfe910c2161589f0 [perma.cc/G95A-MC36].

110. At one forum, Justice O'Connor spoke in terms of restoring civic education:

> Anyway, we had a lot of civics in my day. I guess I thought that was what schools were supposed to do, and I was stunned to learn that half the states no longer make civics and government a requirement for high school any longer. We had a lot of concern about what young people were

to serve on a deliberative body tasked with examining an issue of national importance.[111] By contrast, a third effort in retirement by Justice O'Connor was explicitly intended to reform the justice system nationally.[112] Justice O'Connor helped create a national organization dedicated to ending the election of state judges and pushing states to move to a merit selection process for appointed judges.[113] The Institute for the Advancement of the American Legal System (IAALS) at the University of Denver released a report entitled *The O'Connor Judicial Selection Plan* in 2014 with Justice O'Connor credited as the author.[114] The plan relied on judicial nominating commissions within each state to evaluate judicial candidates' qualifications and make recommendations to governors, followed by gubernatorial appointments, and subsequently, retention elections in which voters can periodically decide whether these appointed judges remain in office.[115] The O'Connor Plan was modeled on "merit selection" processes for judicial selection already in operation in several states.[116] The primary concerns that the O'Connor Plan sought to address by eliminating the election of judges were: voters' ignorance about judicial candidates, inadequate examination of candidates' qualifications, and, especially, the role of political parties and campaign fundraising in creating risks of bias and conflicts of interest in the judiciary.[117]

This initiative by Justice O'Connor was an explicit effort to assert influence on the judicial system after her retirement by directing that influence toward strengthening the third branch of government.[118] Overall, Justice O'Connor was involved in an array of public engagement activities, but all were consistent with traditional ideals of American judges as nonpartisan public servants seeking to advance democracy and justice.[119] By contrast,

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learning.

A Conversation, *supra* note 104.

111. *Iraq Study I*, *supra* note 105.

112. John Schwartz, *Effort Begun to End Voting for Judges*, N.Y. TIMES (Dec. 23, 2009), www.nytimes.com/2009/12/24/us/24judges.html [perma.cc/7GLU-KVB7].

113. *Id.*

114. Sandra Day O'Connor, *The O'Connor Judicial Selection Plan*, IAALS 1-18 (2014), www.iaals.du.edu/sites/default/files/documents/publications/oconnor_plan.pdf [perma.cc/6QYG-37JT].

115. *Id.* at 12-15.

116. CHRISTOPHER P. BANKS & DAVID M. O'BRIEN, THE JUDICIAL PROCESS: LAW, COURTS, AND JUDICIAL POLITICS 151-53 (2nd ed. 2021).

117. ROBERT A. CARP, KENNETH L. MANNING, LISA M. HOLMES & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 110-14 (11th ed. 2020).

118. As described by the IAALS, the O'Connor Plan seeks "to encourage highly qualified individuals to apply for judgeships, assure that the best judicial candidates are selected and retained, and engender support for the judiciary from the other two branches of government." O'Connor, *supra* note 114.

119. As presented in one generic description of American judges, "the judge is supposed to embody justice . . . [T]he judge's black robe and gavel symbolize

as will be discussed in the next section, Justice John Paul Stevens's proactive efforts were directed at influencing very specific aspects of law and policy.[120]

D. John Paul Stevens: Continuing Dissent Through Advocacy of Doctrinal Change

Justice John Paul Stevens retired from the U.S. Supreme Court in 2010 at age ninety after thirty-five years of service on the high court.[121] Throughout most of his Supreme Court career, Stevens maintained a relatively low public profile, such as not giving his first television interview until January 2007 following the death of former President Gerald Ford, the man who appointed him to the Court.[122] After that interview, Stevens sat more frequently for interviews, especially after his retirement.[123] According to an interviewer who spoke with Stevens in 2007:

> He had a longstanding policy, he said, of not granting extended interviews. But he indicated he was now ready to talk publicly about his life and legacy, as well as the newly divided [C]ourt.[124]

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impartiality. Both within and outside the courthouse the judge is supposed to act according to a well-defined role. Judges are expected to make careful, consistent decisions that uphold the ideal of equal justice for all citizens." GEORGE F. COLE ET AL., CRIMINAL JUSTICE IN AMERICA (10th ed. forthcoming 2022) (manuscript at 226) (on file with author).

120. *See, e.g.*, JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014) [hereinafter STEVENS I] (A book written by Justice Stevens detailing how he would change the U.S. Constitution and Bill of Rights to alter current legal doctrines affecting such issues as campaign finance, capital punishment, and gun control).

121. Adams, *supra* note 19.

122. Jan Crawford Greenburg, *Exclusive: Supreme Court Justice Stevens Remembers President Ford*, ABC NEWS (Jan. 15, 2007), www.abcnews.go.com/Nightline/story?id=2765753&page=1 [perma.cc/V2PL-YD4C].

123. *See, e.g.*, Nina Totenberg, *Justice Stevens: An Open Mind on a Changed Court*, NAT'L PUB. RADIO (Oct. 4, 2010), www.npr.org/templates/story/story.php?storyId=130198344 [perma.cc/7UFF-B4VW] (interview in which Justice Stevens reviewed his career and commented on controversial issues such as capital punishment); Scott Pelley, *Supreme Court Justice John Paul Stevens: The "60 Minutes" Interview* (2010), CBS NEWS (July 16, 2019), www.cbsnews.com/news/supreme-court-justice-john-paul-stevens-the-60-minutes-interview-2019-07-16/ [perma.cc/7K44-RQZS] (interview in which Justice Stevens criticized the Supreme Court's endorsement of corporate campaign contributions); Bill Barnhart, *A Conversation with John Paul Stevens*, ATL. (Apr. 28, 2011), www.theatlantic.com/national/archive/2011/04/a-conversation-with-john-paul-stevens/237984/ [perma.cc/5G25-BU7Q] (interview in which Justice Stevens criticized Supreme Court justices' tendency to use oral arguments to make their own points rather than seek information).

124. Jeffrey Rosen*, The Dissenter, John Paul Stevens*, N.Y. TIMES (Sept. 23, 2007), www.nytimes.com/2007/09/23/magazine/23stevens-t.html [perma.cc/EFZ6-33EC].

Was Stevens concerned about his place in history as his retirement approached?[125] Was he spurred to speak out by the recognition that an archconservative, Justice Samuel Alito, had been appointed in 2006 to replace the more centrist Justice O'Connor, thereby tilting the Court further away from Justice Stevens's preferred positions on matters of constitutional rights?[126] It is impossible to answer these questions with certainty.[127] What is clear, however, is that Justice Stevens became more willing to publicly criticize the Supreme Court majority and its decisions, and this willingness to criticize blossomed in striking ways during his retirement years (2010-2019).[128] Moreover, as one scholar observed about Justice Scalia, an especially outspoken justice during his service on the Supreme Court, "Scalia may seek to shape attitudes about legal issues within the public and the legal community, ultimately helping to win judicial support for the policies he favors."[129] Justice Stevens's post-retirement efforts to make publicly known his views about the need to change important legal doctrine appeared to reflect the very same desire.[130]

It is not unusual for Supreme Court justices to write books during their time on the bench, including works on history,[131] judicial interpretation of law[132], and autobiography.[133] Justice Stevens did not write any books during his service as a judicial officer, but then produced three books during the nine years of his

125. *See, e.g.*, LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 42, 66, 100, 169 (2006) (analysis of the statements and behavior of Supreme Court justices and other judges through the lens of their potential desire to please different audiences, including the general public and legal academics whose analyses may help to define judges' reputations).

126. Tom Donnelly & Brianne Gorod, *None to the Right of Samuel Alito, Atl.* (Jan. 30, 2016), www.theatlantic.com/politics/archive/2016/01/none-to-the-right-of-samuel-alito/431946/ [perma.cc/T4U3-NWHT].

127. *See* BAUM, *supra* note 125, at 3 (after describing statements and actions by Supreme Court justices, the author noted that "[t]he motivations of the Supreme Court justices…do not have a straightforward explanation.").

128. *See, e.g.*, STEVENS I, *supra* note 120, at 11-13 (presenting proposals for amending the U.S. Constitution and Bill of Rights in order to change legal doctrine).

129. BAUM, *supra* note 125, at 3.

130. *See* STEVENS I, *supra* note 120, at 11-13 (presenting proposals for amending the U.S. Constitution and Bill of Rights in order to change legal doctrine).

131.WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS (1988); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JACKSON (1999).

132. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

133. SANDRA DAY O'CONNOR & H. ALAN DAY, LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST (2003); CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2008); SONIA SOTOMAYOR, MY BELOVED WORLD (2013)

retirement as a nonagenarian.[134] One of these books, *Six Amendments: How and Why We Should Change the Constitution*, is devoted to Justice Stevens's normative arguments about legal doctrines that should change.[135] Yet, the other two books, a memoir structured around his recollections of the five chief justices he knew and an autobiography, also advanced his retirement project of advocating legal change by criticizing specific Supreme Court decisions and legal doctrines.[136]

In *Six Amendments*, Justice Stevens proposed changes to the wording of the Constitution that would, in his view, correct significant errors produced through the Supreme Court's misinterpretation of the Constitution.[137] The proposals in *Six Amendments* do not cover all of the legal doctrines that Justice Stevens criticized during his retirement,[138] but they do address several that he considered to be in most dire need of revision. In particular, the book advocated:

> Altering the "Supremacy Clause" in Article VI[139] in order to specifically include an obligation for state public officials, in addition to state judges, to follow federal law[140] and thereby

134. JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR (2011) [hereinafter STEVENS II]; STEVENS I, *supra* note 120; JOHN PAUL STEVENS, THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS (2019) [hereinafter STEVENS III].

135. STEVENS I, *supra* note 120.

136. In *Five Chiefs: A Memoir*, for example, Justice Stevens commented on a decision concerning sovereign immunity with which he strongly disagreed: "Because I firmly believe that the Court's opinion in *Seminole Tribe* [of Florida v. Florida, 517 U.S. 44 (1996)] will one day be ranked with the majority opinion in the *Lochner* [v. New York, 198 U.S. 45 (2005)] case as among the Court's most unfortunate, the debate between [Justice] Scalia and [Chief Justice] Roberts is a significant reminder of the need to reexamine the precedent." STEVENS II, *supra* note 134, at 246-47. In *The Making of a Justice*, for example, he referred to the five-member majority's conclusion that the Second Amendment provides a personal constitutional right for individuals to own and keep guns in their homes as "the worst self-inflicted wound in the Court's history." STEVENS III, *supra* note 134, at 485.

137. *See infra* notes 140-156 and accompanying text.

138. When the Supreme Court invalidated regulations produced by the Environmental Protection Agency under the Clear Air Act in Michigan v. Environmental Protection Agency, 576 U.S. 743 (2015), Justice Stevens called the decision "truly mind-boggling" and added: "Such a free-wheeling statutory decision can do even more harm—both to the public health and to the Court itself—than misinterpretations of the Constitution." John Paul Stevens, *Address to American Bar Association Section of Litigation International Human Rights Award Luncheon*, SUPREME COURT (July 31, 2015), www.supremecourt.gov/publicinfo/speeches/JPS_Speech_ABA_Section_of_Litigation_International_Human_Rights_Award_Luncheon_07-31-15.pdf [perma.cc/5E3T-T29W].

139. STEVENS I, *supra* note 120, at 15-31.

140. Justice Stevens argued that "[t]he Constitution should be amended by adding the four words 'and other public officials' to the Supremacy Clause of in Article VI." *Id.* at 31.

undo the Supreme Court's decision in *Printz v. United States*.[141]

Creating a new anti-gerrymandering amendment[142] requiring that legislative districts be drawn using "neutral criteria" and stating explicitly that "[t]he interest in enhancing or preserving the political power of a party in control of the state government is not such a neutral criterion."[143]

Creating a new constitutional amendment to authorize Congress and states to impose limits on campaign contributions[144] and thereby undo the Supreme Court decisions in *Buckley v. Valeo*[145] and *Citizens United v. Federal Election Commission*.[146] The latter decision, permitting unlimited campaign expenditures by corporations, was described as "a giant step in the wrong direction" by Justice Stevens.[147]

Creating a new constitutional amendment to remove sovereign immunity protection for states and state officials who violate federal laws or the U.S. Constitution.[148] Justice Stevens described as "injustices"[149] those instances in which state officials can assert a defense that is not available to other defendants: "It does not make sense to provide a police officer employed by the state of New York with a defense to a claim that he violated a suspect's constitutional rights that is not available to an officer employed by the city of New York."[150] He was especially critical of a series of Supreme Court decisions endorsing and expanding sovereign immunity that he regarded as wrongly decided.[151]

Revising the final words of the Eighth Amendment to read "nor cruel and unusual punishments such as the death penalty inflicted"[152] to reflect the culmination of his three-decade intellectual journey from endorsing the legality of capital punishment[153] to

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141. *See generally* Printz v. United States, 521 U.S. 898 (1997) (local law enforcement officials cannot be required by federal law to conduct background checks on gun purchasers).

142. STEVENS I, *supra* note 120, at 33-55.

143. *Id*. at 55.

144. *Id*. at 79.

145. Buckley v. Valeo, 424 U.S. 1, 143 (1976) (limitations on campaign expenditures violate the First Amendment).

146. Citizens United v. Federal Election Commission, 130 S.Ct. 876, 897-900 (2010) (corporation and unions permitted to make unlimited campaign expenditures).

147. STEVENS I, *supra* note 120, at 78.

148. *Id*. at 81-106.

149. *Id.* at 106.

150. *Id*.

151. *See id*. at 98-105 (Edelman v. Jordan, 415 U.S. 651 (1974); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Alden v. Maine, 527 U.S. 706 (1999) (Supreme Court decisions criticized by Justice Stevens for providing overly broad governmental immunity against lawsuits).

152. *Id*. at 123.

153. Justice Stevens later expressed regret for one of his votes in the 1976 cases that revived the death penalty after the moratorium on executions

concluding it should be unconstitutional.[154]

Adding words to the Second Amendment to clarify that the "right of the people to keep and bear Arms" would apply only when those people "were serving in the Militia,"[155] consistent with his dissenting opinion in the Supreme Court's seminal decision on gun rights, *District of Columbia v. Heller*.[156]

The *Six Amendments* book presented Justice Stevens's proposals and supporting arguments for changing the Constitution in order to undo Supreme Court interpretations with which he disagreed.[157] However, Justice Stevens pressed his points about the need for changes in specific legal doctrines in other writings,[158] interviews,[159] and speeches.[160] For example, Justice Stevens wrote an article in *The Atlantic* entitled, "The Supreme Court's Worst Decision of My Tenure,"[161] that explained his conclusion that the Court's interpretation of the Second Amendment in *District of Columbia v. Heller*[162] was wrongly decided. In discussing the same decision in an interview, Justice Stevens used strong language in saying, "So I think that interpreting the Second Amendment to

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imposed by *Furman v. Georgia*, 408 U.S. 238 (1972): " . . . if I had carefully stated the facts in *Jurek v. Texas*[, 428 U.S. 262 (1976)], I might well have changed my vote in that case." STEVENS III, *supra* note 134, at 143.

154. *See* Christopher E. Smith, *Justice John Paul Stevens and Capital Punishment*, 15 BERKELEY J. CRIM. L. 205, 249-60 (2010); Linda Greenhouse, *After 32-Year Journey, Justice Stevens Renounces Capital Punishment*, N.Y. TIMES (Apr. 18, 2008), www.nytimes.com/2008/04/18/world/americas/18iht-18memo.12124092.html [perma.cc/G9D7-UAY9] (descriptions of the evolution of Justice Stevens's views on the constitutionality of capital punishment).

155. STEVENS I, *supra* note 120, at 132.

156. District of Columbia v. Heller, 128 S.Ct. 2783, 2822-47 (2008) (Stevens, J., dissenting).

157. *See supra* notes 137-56 and accompanying text (description of Justice Stevens's book Six Amendments).

158. *See* John Paul Stevens, *Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html [perma.cc/BKE3-QSDL] (strongly argued opinion-editorial urging repeal of the Second Amendment).

159. *See, e.g.*, Nina Totenberg, *Retired Justice John Paul Stevens Talks History, His New Book and Ping Pong*, NAT'L PUB. RADIO (May 10, 2019), www.npr.org/2019/05/10/717596511/justice-john-paul-stevens-talks-history-his-new-book-and-pingpong [perma.cc/GFH4-ZEDZ] ("I think some of [Supreme Court's] decisions really are quite wrong and are quite contrary to the public interest.").

160. *See, e.g.*, John Paul Stevens, *Originalism and History*, Address at University Georgia Law Symposium, Athens, GA (Nov. 6, 2013), www.supremecourt.gov/publicinfo/speeches/JPS%20Speech(Georgia)_11-06-2013.pdf [perma.cc/M5QY-82BH], ("I am more troubled, however, by the majority's failure to apply the rule against racial gerrymanders to political gerrymanders. Tolerating that invidious practice cannot be justified . . . ").

161. John Paul Stevens, *The Supreme Court's Worst Decision of My Tenure*, ATL. (May 14, 2019), www.theatlantic.com/ideas/archive/2019/05/john-paul-stevens-court-failed-gun-control/587272/ [perma.cc/6BUV-D7LT].

162. *Heller*, 128 S.Ct. at 2817-22.

protect the individual right to own firearms is really just absurd . . . ."[163] He used similarly strong language in criticizing other Supreme Court decisions, such as *Bush v. Gore*[164] that stopped the Florida vote recount in 2000 and effectively gave the disputed presidential election victory to George W. Bush:

> [T]he majority opinion in Bush against Gore is even worse than I thought it was at the time. I read it over more carefully working on the book. I found that the opinion is internally inconsistent as well as just not making any sense.[165]

He also took his advocacy directly to the legislative branch by testifying before a U.S. Senate committee in 2014 about the Supreme Court's great mistake in protecting corporate campaign contributions as a form of free speech[166] in *Citizens United v. Federal Election Commission*.[167] These are merely a few examples that demonstrate how Justice Stevens dedicated his public engagement during his retirement years to criticizing Supreme Court decisions with which he disagreed and advocated for change in legal doctrines that he regarded as improper or harmful.[168]

Justice Stevens's outspokenness in retirement crossed the usual line of judicial propriety when he stated publicly that he thought President Donald Trump's Supreme Court nominee to replace Justice Kennedy, Judge Brett Kavanaugh, was unfit to serve on the high court.[169] In his book *Six Amendments*, Stevens had high praise for a court of appeals opinion authored by future Justice Kavanaugh concerning campaign finance law and even put then Judge Kavanaugh's photo in the book;[170] the lone lower court judge

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163. Kate Shaw, *Ask the Author: Interview with Justice John Paul Stevens*, SCOTUSBLOG (June 12, 2019), www.scotusblog.com/2019/06/ask-the-author-interview-with-justice-john-paul-stevens/ [perma.cc/G5DK-8EAB].

164. Bush v. Gore, 531 U.S. 98, 110 (2000).

165. Shaw, *supra* note 163.

166. Daniel Rothberg, *Retired Justice John Paul Stevens Tells Congress "Money Is Not Speech*," L.A. TIMES (Apr. 30, 2014), www.latimes.com/nation/politics/politicsnow/la-pn-supreme-court-stevens-congress-money-speech-20140430-story.html [perma.cc/PM5B-UQ2Y].

167. *Citizens United*, 130 S.Ct. at 913.

168. In his discussions of the Court's recognition of an individual right to gun ownership under the Second Amendment, for example, Justice Stevens criticized what he saw as faulty originalist reasoning that led to the majority's conclusion. Stevens, *The Supreme Court's Worst Decision, supra* note 161. But he also emphasized the tragic human consequences for widespread firearms violence in the United States. John Paul Stevens, *The Five Extra Words That Can Fix the Second Amendment*, WASH. POST (Apr. 11, 2014), www.washingtonpost.com/opinions/the-five-extra-words-that-can-fix-the-second-amendment/2014/04/11/f8a19578-b8fa-11e3-96ae-f2c36d2b1245_story.html [perma.cc/49SC-EVP4].

169. Adam Liptak, *Retired Justice John Paul Stevens Says Kavanaugh Is Not Fit for Supreme Court*, N.Y. TIMES (Oct. 4, 2018), www.nytimes.com/2018/10/04/us/politics/john-paul-stevens-brett-kavanaugh.html [perma.cc/ZR6G-RU8A].

170. STEVENS I, *supra* note 120, at 69-70.

so acknowledged alongside the photos of ten Supreme Court justices whose opinions Justice Stevens praised.[171] Justice Stevens said he changed his view about Justice Kavanaugh's ability to be sufficiently unbiased and nonpartisan because of Justice Kavanaugh's partisan statements during Senate confirmation hearings.[172] Women had accused Justice Kavanaugh of sexual misconduct during his student days,[173] yet Justice Kavanaugh attempted to deflect those accusations by labeling opposition to his nomination as purely political action by left-wingers and Trump critics.[174] As one commentator observed about Justice Stevens:

> His remarks are still an extraordinary step for a Supreme Court justice to take, even in retirement. Though the justices often disagree with one another in private, they typically maintain a united front in public and virtually never offer even indirect criticism of colleagues on the record.[175]

Given that, during his retirement, Justice Stevens openly criticized the reasoning and conclusions of his former colleagues on the Supreme Court,[176] it is perhaps unsurprising that he would also criticize a Supreme Court nominee's statements that he found to be biased and inappropriate.[177]

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171. *Id.* at unnumbered pages sitting between text pages 88-89 that display photos of Justices Thurgood Marshall, Harry Blackmun, Felix Frankfurter, William Brennan, Lewis Powell, Byron White, Ruth Bader Ginsburg, David Souter, and Stephen Breyer, in addition to Chief Justice John Marshall and then-Judge Kavanaugh.

172. Matt Ford, *Retired Justice John Paul Stevens: Brett Kavanaugh Isn't Qualified for the Supreme Court*, NEW REPUBLIC (Oct. 4, 2018), newrepublic.com/article/151568/retired-justice-john-paul-stevens-brett-kavanaugh-isnt-qualified-supreme-court [perma.cc/ZQ3G-RE3Z].

173. Mark Oliver, *What Every Witness to Brett Kavanaugh's Alleged Assaults Has Said*, KSL NEWS RADIO (Sept. 27, 2018), www.kslnewsradio.com/1891897/brett-kavanaugh-witnesses/ [perma.cc/7GJ3-JAHF].

174. *See* Liptak, *supra* note 169 (In Kavanaugh's words, "This whole two-week effort has been a calculated and orchestrated political hit . . . fueled with apparent pent-up anger about President Trump and the 2016 election, fear that has been unfairly stoked about my judicial record, revenge on behalf of the Clintons and millions of dollars in money from outside left-wing opposition groups.").

175. Ford, *supra* note 172.

176. For example, Justice Stevens specifically criticized Justice Scalia's reasoning and conclusions in Justice Stevens's many public critiques of the Court's Second Amendment jurisprudence. *See* Stevens, *The Supreme Court's Worst Decision, supra* note 161 (criticizing the Supreme Court's interpretation of the Second Amendment); Shaw, *supra* note 163 (discussing the reasoning of Chief Justice Roberts concerning the death penalty).

177. Liptak, *supra* note 169.

III. ASSESSING THE PROPRIETY OF POST-RETIREMENT ACTIVITIES

In a speech in September 2021, Justice Amy Coney Barrett highlighted judges' aversion to being viewed as politically-motivated decision makers.[178] She sought to portray judges as decision makers guided by principle and removed from the influences of politics by declaring that the Supreme Court "is not comprised by a bunch of partisan hacks."[179] Although the context[180] and timing[181] of her statement were rich with irony, she accurately

178. Martin Pengelly & Joan E. Greve, *Amy Coney Barrett Claims Supreme Court "Not Comprised of Partisan Hacks*," GUARDIAN (Sept. 13, 2021), www.theguardian.com/us-news/2021/sep/13/amy-coney-barrett-supreme-court-not-partisan-hacks-abortion [perma.cc/42RU-VRAM].

179. *Id*.

180. Justice Barrett made her statement at the University of Louisville's McConnell Center while accompanied by Kentucky Senator Mitch McConnell, the individual most responsible in recent years for using naked partisanship to shape the composition of the Supreme Court. *Id*. Republican Senate leader McConnell refused to permit the U.S. Senate to consider Democratic President Barack Obama's Supreme Court nominee in 2016. *See* Brendan Williams, *Contempt of Courts? President Trump's Tranformation of the Judiciary*, DENVER L. REV. FORUM (Oct. 27, 2020), www.denverlawreview.org/dlr-online-article/contempt-of-courts-president-trumps-transformation-of-the-judiciary [perma.cc/K5DK-NUWU] ("McConnell had 'described his 2016 move to block Garland . . . as one of his proudest moments.'"). He blocked the nomination based on the dishonest claim of an existing principle providing that no Supreme Court justices should be confirmed during a presidential election year because the Senate needed to wait to see the electorate's preference for which party should next control the White House and Supreme Court nominations. Russell Wheeler, *McConnell's Fabricated History to Justify a 2020 Supreme Court Vote*, BROOKINGS INST. (Sept. 24, 2020), www.brookings.edu/blog/fixgov/2020/09/24/mcconnells-fabricated-history-to-justify-a-2020-supreme-court-vote/ [perma.cc/WTG3-C9MJ]; Jason Silverstein, *Here's What Mitch McConnell Said About Not Filing [sic] a Supreme Court Vacancy in an Election Year*, CBS NEWS (Sept. 19, 2020), www.cbsnews.com/news/mitch-mcconnell-supreme-court-vacancy-election-year-senate [perma.cc/32GY-92PK]. As a result, the Supreme Court seat left vacant by the unexpected death of Justice Antonin Scalia was held open for nearly a year and Republican President Donald Trump was able to fill a seat that otherwise would have been filed by President Obama. Lori A. Ringhand & Paul M. Collins, Jr., *Neil Gorsuch and the Ginsburg Rules*, 93 GA. L. REV. 475, 475-76 (2018). When Justice Ruth Bader Ginsburg passed away during presidential election year 2020, McConnell ignored the purported principle that guided his decision in 2016 and rushed to confirm President Trump's nominee, Justice Barrett, just days before Trump lost the presidential election to Democratic President Joe Biden. Carl Hulse, *Democrats' Anger Over Barrett Could Have Big Consequences in the Senate*, N.Y. TIMES (Oct. 16, 2020), www.nytimes.com/2020/10/16/us/amy-coney-barrett-senate.html [perma.cc/74G9-P8ZB].

181. A week prior to her speech, Justice Barrett was among five justices who—without oral argument and deliberation on the issue—permitted a Texas law to be implemented that effectively interferes with and restricts women's constitutional right of choice for abortion under long-established, still-existing precedents in Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood v.

described the perception of judges that would provide a worst-case scenario for maintaining the legitimacy and image of the modern judiciary.[182] In Americans' idealized vision of the judicial role, judges embody impartiality, fairness, and equal application of the law in their statements and behavior.[183] American judges are also viewed as the guardians of constitutional democracy who are responsible for ensuring that democratic processes are maintained[184] and governing institutions are functioning properly within their constitutionally established scope of authority.[185] Do retired U.S. Supreme Court justices remain obligated to fulfill these idealized conceptions of a judge's role?[186] Are there actions or

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Casey, 505 U.S. 833 (1992). Whole Women's Health v. Jackson, 594 U.S. ___ (Sept. 1, 2021). The dissenting justices, including Chief Justice John Roberts, objected to permitting the law to be implemented notwithstanding the majority's acknowledgement there could be future litigation on the issue. Nina Totenberg, *Supreme Court Upholds Texas Abortion Law, For Now*, NAT'L PUB. RADIO (Sept. 2, 2021), www.npr.org/2021/09/02/1033048958/supreme-court-upholds-new-texas-abortion-law-for-now [perma.cc/J4WW-A9LA]. The decision was one of several in which the Court's conservatives used the Court's "shadow docket"-- emergency orders granted without full arguments and deliberation-- to preserve Republican policy preferences affecting COVID restrictions, immigration, protection for renters, and abortion rights. Jamelle Bouie, *In the Dead of the Night, the Supreme Court Proved It Has Too Much Power*, N.Y. TIMES (Sept. 3, 2021), www.nytimes.com/2021/09/03/opinion/texas-roe-supreme-court.html [perma.cc/V4A3-CHH6].

182. By contrast, Americans in the nineteenth- and early twentieth-centuries were accustomed to thinking of judges as coming from and motivated by the world of partisan politics. Rachel Shelden, *The Supreme Court Used to Be Openly Political. It Traded Partisanship for Power*., WASH. POST (Sept. 25, 2020), www.washingtonpost.com/outlook/supreme-court-politics-history/2020/09/25/b9fefcee-fe7f-11ea-9ceb-061d646d9c67_story.html [perma.cc/U4SB-RBKF]. In contemporary times, "[p]otential justices often try to obscure their ideologies and play up their apolitical qualifications — most famously when Roberts insisted in his 2005 confirmation hearing that justices are mere 'umpires' calling 'balls and strikes.'" *Id*.

183. COLE ET AL., *supra* note 119, at 226.

184. *See e.g*., Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236, 245 (1983) (In considering proper decisions under the responsibility of judges, "these involve freedom of expression, the franchise, conduct of elections, and the nature of representation. Such decisions do not directly affect substantive policies. Rather they relate to citizens' opportunities for input into the policymaking system. The high Court has made many such decisions upholding, widening, and equalizing these opportunities in the past half century.").

185. During the first decades of the U.S. Supreme Court's existence, for example, many of its most important decisions defined the respective powers and roles of the states and the branches of the federal government. CHRISTOPHER E. SMITH, COURTS, POLITICS & THE JUDICIAL PROCESS 247 (2nd ed. 1997) [hereinafter SMITH, COURTS].

186. Judicial decision makers must comply with a federal statute that says: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455 (2021). Thus, retired Supreme Court justices' obligations may vary depending on whether they continue to serve as judicial

statements by retired justices that should be regarded as improper?[187]

A. The Familiar Retirement Activities of Justices Kennedy, Souter, and O'Connor

Scholars focus on judges' premier goal of maintaining the judiciary's image as the "non-political" branch of government by using symbols, such as black robes and formal procedures,[188] and employing legalistic language that obscures underlying values in decision making.[189] Justice Thomas, for example, emphasized these themes in a major address at Notre Dame Law School in 2021 that intended to reinforce the judiciary's distinctive role and separation from politics.[190] Notwithstanding abundant research-based evidence that decision making by Supreme Court justices is generally driven by their values and policy preferences rather than idealized adherence to principles of law,[191] the judiciary's power, in

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decision makers for cases argued in the U.S. courts of appeals. *Id*.

187. Occasionally, active Supreme Court justices make public statements that they subsequently recognize should not have been made, such as when Justice Scalia recused himself from a case challenging recitations of the Pledge of Allegiance in public schools Linda Greenhouse, *Justices Take Case on Pledge of Allegiance's Reference to God*, N.Y. TIMES (Oct. 14, 2003), www.nytimes.com/2003/10/14/national/justices-take-case-on-pledge-of-allegiances-reference-to-god.html [perma.cc/65M9-HEYN]. His recusal was presumed to be motivated by public attention to a speech in gave expressing a favorable view of he challenged language. *Id*. During the 2016 presidential election, Justice Ginsburg publicly stated that she regretted having made publicized statements that were highly critical of candidate Donald Trump. Michael D. Shear, *Ruth Bader Ginsburg Expresses Regret for Criticizing Donald Trump*, N.Y. TIMES (July 14, 2016), www.nytimes.com/2016/07/15/us/politics/ruth-bader-ginsburg-donald-trump.html [perma.cc/6B83-HP7Z].

188. SMITH, COURTS, *supra* note 185, at 5-6.

189. *Id*. at 6.

190. Sara Burnett, *Clarence Thomas Criticizes Judges for Veering Into Politics*, WASH. POST (Sept. 16, 2021), www.washingtonpost.com/politics/clarence-thomas-criticizes-judges-for-veering-into-politics/2021/09/16/57ef3840-1740-11ec-a019-cb193b28aa73_story.html [perma.cc/ELG8-REXJ].

191. *See, e.g*., James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7, 32 ("Judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do."); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 1 (1993) ("As we demonstrate, the legal model serves only to cloak—to conceal—the motivations that cause the justices to decide as they do. As an alternative, we present an attitudinal model, based on the political attitudes and values of the justices, that does explain why the justices vote as they do."); LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 40 (1997) ("[T]he patterns of votes disclosed by dimensional studies seem more consistent with attitudes about public policy than with other possible explanations. In this important respect, these studies support the conclusion that policy goals are

large part, derives from its image as a non-political branch of government.[192] Thus, justices seek to protect that image.[193] The retirement activities of Justice Kennedy fit readily within the boundaries of accepted practice for former judges who seek to maintain the judiciary's image.[194] By limiting his activities to speeches and law school teaching about rule of law, democracy, and the role of the Supreme Court,[195] Justice Kennedy's retirement activities continued his contribution to public education and maintenance of the judiciary's legitimacy in the eyes of the public.[196]

Justice Souter's retirement activities consist primarily of a reduced workload doing the very same tasks of appellate judging that occupied him during his career on the Supreme Court, but merely doing them at a different level of the federal court system.[197] By serving as an active judicial officer during retirement, Justice Souter accepted a continuing obligation to avoid statements that would call into question his objectivity about issues he might decide[198] or otherwise violate expectations about judicial officers' need to show proper restraint in making public comments.[199] His two notable activities outside of continuing service on the First Circuit U.S. Court of Appeals, the Harvard commencement address[200] and the New Hampshire schools' civic education

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important bases for Supreme Court behavior.").

192. *See* DANIEL M. SHEA ET AL., LIVING DEMOCRACY: 2018 ELECTIONS AND UPDATE EDITION 304 (2020):

> Despite courts lacking the power of the "purse" or "sword," the physical imagery of courts, as well as the dress and language associated with judges, helps convey the message that the judicial branch is powerful and different from other branches of government. . . . These elements encourage public acceptance of the courts' legitimate power and help to gain citizens' compliance with judicial decisions. *Id.*

193. Pengelly & Greve, *supra* note 178; Burnett, *supra* note 190.

194. *See supra* notes 26-31 and accompanying text (description of Justice Kennedy's retirement activities).

195. *Id.*

196. Justice Kennedy's retirement speeches are a continuation of his educational addresses to various audiences about democracy, rule of law, and related topics while he served as an associate justice on the Supreme Court. *See, e.g.,* Andrew Cohen, *The (Almost) Lost Speech of Justice Anthony Kennedy*, ATL. (July 31, 2013), www.theatlantic.com/national/archive/2013/07/the-almost-lost-speech-of-justice-anthony-kennedy/278094/ [perma.cc/HJW9-76NK], (Justice Kennedy "was so earnest and eloquent in sharing his views about the history of the Declaration of Independence, the Constitution, and the Bill of Rights. In an age where judges often lament the public's dwindling knowledge about basic civics, Justice Kennedy lectured to his audience like a friendly college professor. There can be no doubt that the crowd learned from him-- and that you would have, too.").

197. *See supra* notes 35-47 and accompanying text (description of Justice Souter's post-retirement service on the U.S. court of appeals).

198. Greenhouse, *supra* note 187.

199. Shear, *supra* note 187.

200. *See supra* notes 49-57 and accompanying text (description of Justice Souter's Harvard commencement address).

project,[201] were both consistent with public education activities undertaken by Supreme Court justices to strengthen democracy and increase understanding of the courts.[202]

Justice O'Connor's retirement activities fit within the same realm of traditional judicial behavior as Justice Souter's, albeit with more proactive national visibility by serving on U.S. courts of appeals throughout the country[203] and by initiating national civic education and judicial reform projects.[204] Justice O'Connor's participation in the Iraq Study Group concerning an issue of national importance outside of the realm of judicial expertise was very unusual but not unprecedented.[205] Justice O'Connor was retired at the time of her service on the Iraq Study Group.[206] Thus, she did not experience the tensions about maintaining a proper judicial role previously felt by both Chief Justice Earl Warren and Justice Robert Jackson when they shifted their attention temporarily to, respectively, chairing the commission to investigate the assassination of President John F. Kennedy and serving as the prosecutor at the post-World War II Nuremburg trials of Nazi leaders.[207]

B. Justice Stevens: The Overtly Activist Retiree

The activities of these three twenty-first century Supreme Court retirees fit within the boundaries of traditional judicial

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201. *See supra* notes 59-60 and accompanying text (description of Justice Souter's involvement with civic education in New Hampshire).

202. *See supra* notes 28-31, 101-04 and accompanying text (descriptions of civic education activities of Justices Souter and O'Connor).

203. *See supra* notes 68-98 and accompanying text (description of Justice O'Connor's post-retirement service on U.S. courts of appeals).

204. *See supra* notes 101-04, 112-17 and accompanying text (description of Justice O'Connor's civic education and judicial reform activities).

205. Supreme Court justices typically devote themselves their work at the court and service on committees within the federal judiciary. *See* STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 67-69 (4th ed. 1993) [hereinafter WASBY II] (describing the chief justice's role as chairperson of the Judicial Conference). They also frequently have speaking engagements and brief stints as law school instructors. *See supra* notes 28-31, 195-96 and accompanying text (description of Justice Kennedy's post-retirement teaching and public speaking activities). The few notable exceptions to these practices include Chief Justice Earl Warren's service chairing the commission that investigated the assassination of President John F. Kennedy, and Justice Robert Jackson's service as prosecutor at the Nuremburg trials of Nazi officials after World War II. ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 414-29 (1997).

206. Justice O'Connor retired from the Supreme Court in January 2006 and the Iraq Study Group was appointed in March 2006. *See supra* notes 65, 105-08 and accompanying text (description of the timing of Justice O'Connor's retirement and her service on the Iraq Study Group).

207. CRAY, *supra* note 205, at 414-29.

roles[208] or, in the case of Justice O'Connor and the Iraq Study Group, have an arguable precedent in the involvement of prior justices in non-judicial projects of major national importance.[209] In contrast, Justice Stevens's post-retirement advocacy for changes in legal doctrine and criticism of existing Supreme Court precedents stand out as unusual and raise questions about whether there is anything improper about these retirement activities.[210] Upon retirement, should a justice bow out of the public conversation about specific legal doctrines or is it proper to continue, in effect, in the role of a vocal dissenter hoping to influence future developments in law?[211]

It is worth noting that the uniqueness of Stevens's post-retirement outspokenness is accentuated by the lack of similar activities by the other three twenty-first century retirees.[212] By continuing to serve as sitting judicial officers in the U.S. courts of appeals, two of those retirees, Justices Souter and O'Connor, consciously chose to preclude themselves from using speeches and books to publicize their critical commentary about existing Supreme Court precedents.[213] As active judicial officers, they were obligated guard their images as neutral decision makers and defenders of the judiciary's legitimacy.[214] In contrast, upon retirement from the Supreme Court, Justice Stevens separated himself from service as an active judicial officer and therefore did not need to convey an image of neutrality and objectivity to maintain public confidence in

208. *See supra* notes 194-204 and accompanying text (descriptions of traditional retirement activities of Justices Kennedy, Souter, and O'Connor).

209. CRAY, *supra* note 205, at 414-29.

210. *See supra* notes 134-68 and accompanying text (description of Justice Stevens's post-retirement advocacy for changes in legal doctrines)..

211. Obviously, Justice Stevens was especially visible and vocal in his advocacy by virtue of writing a book entirely about his proposals for changing doctrine by altering the Constitution. *See supra* notes 135-57 and accompanying text (description of Justice Stevens's book *Six Amendments*). He also demonstrated this advocacy by testifying before a Senate committee about the need for a constitutional amendment concerning campaign finance. Rothberg, *supra* note 166.

212. For example, neither Justice Kennedy nor Justice Souter advocated changes in legal doctrines in their post-retirement activities. *See supra* notes 27-31, 48-56 and accompanying text (descriptions of retirement activities of Justices Kennedy and Souter).

213. *See supra* notes 35-48, 68-98 and accompanying text (descriptions of the post-retirement services of Justices Souter and O'Connor on U.S. courts of appeals panels).

214. In one judicial opinion, Justice Ginsburg described judges' responsibilities and the importance of active judicial decision makers reassuring the public about their neutrality: "Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide 'individual cases and controversies' on individual records . . . neutrally applying legal principles . . . " Republican Party of Minnesota v. White, 536 U.S. 765, 803-04 (Ginsburg., J. dissenting).

his ability to make fair decisions in legal cases.[215] He freed himself from role-defined constraints that would limit his ability to be outspoken about matters of public controversy.[216] Because so many retired justices either continue to serve as active judicial officers[217] or are in such poor health that they survive for only a limited time after retirement,[218] the uniqueness of Justice Stevens's post-retirement activities[219] does not, in itself, indicate whether there is anything improper about the advocacy role that he assumed. His health and vigor in his nineties[220] simply enabled him to work productively in ways that others of similar age are not physically

215. For example, as a retiree, Justice Stevens spoke in partisan terms that active judges would always avoid by publicly stating that he would not vote for President Donald Trump. Eli Watkins, *Retired Justice John Paul Stevens Says He Hopes Trump "Won't Do Too Much Damage" to the Courts,"* CNN (May 14, 2019), www.cnn.com/2019/05/14/politics/john-paul-stevens/index.html [perma.cc/W46K-XYXC]. By contrast, Canon 5 of the Code of Conduct for United States Judges prohibits federal judicial officers from endorsing or opposing candidates for political office. Code Of Conduct For United State Judges (effective March 2019). The Code does not apply specifically to U.S. Supreme Court justices, but it embodies general principles of judicial behavior that active Supreme Court justices seek to fulfill in order to protect the judiciary's image. *Id*.

216. *Id.*

217. Wasby I*, supra* note 35, at 146-65.

218. For example, Justice Thurgood Marshall passed away eighteen months after he announced his retirement. Linda Greenhouse, *Thurgood Marshall, Civil Rights Hero, Dies at 84*, N.Y. TIMES (Jan. 25, 1993), www.nytimes.com/1993/01/25/us/thurgood-marshall-civil-rights-hero-dies-at-84.html [perma.cc/8TGC-JUAH]. Justice William Brennan retired at age eighty-four and "had been in failing health for several years" before his death at age ninety-one. Linda Greenhouse, *William Brennan, 91, Dies; Gave Court Liberal Vision*, N.Y. TIMES (July 25, 1997), www.nytimes.com/1997/07/25/us/william-brennan-91-dies-gave-court-liberal-vision.html [perma.cc/F2TF-SD4X].

219. *See, e.g.,* Shira A. Scheindlin, "*If* Roe v. Wade *Is Overturned, We Should Worry About the Rule of Law*, GUARDIAN (May 21, 2019), www.theguardian.com/commentisfree/2019/may/21/trump-abortion-roe-v-wade-supreme-court-judges [https://perma.cc/XPJ2-MD8E] (former U.S. district judge criticized U.S. Supreme Court's apparent turn toward overruling precedent).

220. Even at age ninety-nine, Justice Stevens was extraordinarily physically active:

> Stevens has always been physically active—and competitive. He used to arrive at the Supreme Court some days still dressed in his tennis clothes and literally jumping up and down if he had won his early morning contest. He said that these days he can no longer get around the tennis court safely, but he can stand at the tennis table and play a decent game of Ping-Pong. One or two days a week he also plays nine holes of golf. "I don't hit the ball very far," he says, "but at least I can hit it." And he swims in the ocean (he does the crawl), though he admits ruefully that he makes it in and out of the waves with the aid of neighbors. Oh yes, and he plays bridge several days a week, too.

Totenberg, *Retired Justice Stevens Talks*, *supra* note 159.

able to do.[221]

In considering whether Justice Stevens's post-retirement advocacy should be regarded as controversial, it is instructive to consider how it compares to the behavior of justices while they are serving on the Supreme Court.[222] In recent years, sitting Supreme Court justices have expressed very strong, stark criticisms of their colleagues' decisions, such as Justice Breyer's public statement in 2021 describing the 5-to-4 decision[223] leaving a Texas anti-abortion statute active pending further litigation as "very, very, very wrong."[224] Justice Sotomayor's dissenting opinion in the same case was even more striking:

> The Court's order is stunning. Presented with an application to enjoin a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand.[225]

Similarly strong language has been used by other justices in dissenting opinions concerning a variety of issues.[226] If sharp criticism and doctrinal advocacy are accepted components of sitting justices' roles,[227] is there any reason to consider a continuation of such statements after retirement to be questionable or improper?

Given the similarity between Justice Stevens's retirement advocacy and other justices' strongly critical statements about legal doctrine in dissenting opinions, his activities in retirement should be viewed as a direct continuation of his performance and role on the Supreme Court.[228] Justice Stevens was the Supreme Court's

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221. *See* Greenhouse, *Thurgood Marshall*, *supra* note 218; Greenhouse, *William Brennan*, *supra* note 218 (description of physical declines of Justices Marshall and Brennan that limited their ability to engage in post-retirement activities).

222. Supreme Court justices regularly write dissenting opinions which express disagreement with doctrinal developments and case outcomes while advocating changes in the law through future judicial decisions or remedial legislative action. WASBY II, *supra* note 205, at 238-39.

223. Whole Women's Health v. Jackson, 141 S. Ct. 2494, 2498 (Sotomayor, J., dissenting).

224. Adela Suliman, *Justice Breyer Calls Supreme Court Decision on Texas Abortion Law "Very, Very, Very Wrong*," WASH. POST (Sept. 10, 2021), www.washingtonpost.com/politics/2021/09/10/breyer-texas-abortion/ [perma.cc/B8B3-XMTG].

225. *Whole Women's Health*, 141 S. Ct. at 2498 (Sotomayor, J., dissenting).

226. *See, e.g.*, Joan Biskupic, *John Roberts Dissents Alone and Doesn't Hold Back*, CNN (Mar. 8, 2021), www.cnn.com/2021/03/08/politics/john-roberts-lone-dissent-uzuegbunam-supreme-court/index.html [perma.cc/J39E-ELBD] ("The Court sees no problem with turning judges into advice columnists").

227. *See supra* notes 222-26 and accompanying text (description of sharp dissenting opinions written by Supreme Court justices).

228. For example, Justice Stevens stood out among modern justices by writing many memorable dissenting opinions advocating increased constitutional rights protection for criminal suspects and defendants. *See, e.g.*, Christopher E. Smith, *The Roles of John Paul Stevens in Criminal Justice Cases*, 39 SUFFOLK L. REV. 719, 736-39 (2006) (listing important dissenting by

"Great Dissenter"[229]: "The 720 dissents [Justice Stevens] authored during his tenure on the Court are more than any other justice in history; indeed, his output is roughly fifty percent greater than that of the second most prolific [dissenting] justice, Justice William O. Douglas (with 486)."[230] Dissenting opinions can be written to pursue a variety of purposes, including "speaking to future lawyers and judges" who may become positioned to change legal doctrine.[231] A key element of Justice Stevens's place in history stems from the effort he made to explain his views through these opinions:

> By devoting so much energy to explaining his viewpoints in these opinions, Stevens placed before the legal community, including future federal jurists, a wealth of thought-provoking reasoning that may potentially shape lawyers' arguments and judges' decisions in the decades ahead.[232]

As characterized by one scholar, "dissents are indeed potential majority opinions of the future."[233] Moreover, scholars have credited Justice Stevens's dissents with fostering change in sentencing law and the role of the jury during his time on the Court.[234] Justice Stevens experienced success in affecting legal analysis[235] and doctrinal change through dissenting opinions. As one commentator discovered through the systematic study of citations by federal judges:

Stevens concerning Sixth Amendment rights).

229. CHRISTOPHER E. SMITH, JOHN PAUL STEVENS: DEFENDER OF RIGHTS IN CRIMINAL JUSTICE 245-50 (2015) [hereinafter SMITH II].

230. Craig Rust, *The Leadership Legacy of Justice John Paul Stevens*, 1 J. LEGAL METRICS 135, 136 (2012).

231. WASBY II, *supra* note 205, at 239.

232. SMITH II, *supra* note 229, at 246.

233. WASBY II, *supra* note 205, at 239. For example, Justice Stone's dissenting opinion in Minersville School District v. Gobitis, 310 U.S. 586, 601-07 (1940) (Stone, J., dissenting), effectively became the majority decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641-42 (1943), when the Court reversed course on compulsory flag salute rules in schools, even for children with religious objections. Similarly, Justice Murphy's arguments in dissent in Wolf v. Colorado, 338 U.S. 25, 41-47 (1949) (Murphy, J., dissenting), provided the basis for the majority opinion in Mapp v. Ohio, 367 U.S. 643, 657-60 (1961), that imposed the exclusionary rule on searches by state and local police. In another example, Justice Stevens's dissenting opinion in Bowers v. Hardwick, 478 U.S. 186, 214-20 (1986) (Stevens, J., dissenting), provided he basis for the majority's reasoning in Lawrence v. Texas, 539 U.S. 558, 575-78 (2003), when the Supreme Court invalidated criminal statutes imposing punishment on same-sex couples for their private, consensual, non-commercial sexual behavior. Indeed, Justice Kennedy's majority opinion in *Lawrence* said forthrightly, "Justice Stevens' analysis, in our view, should have been controlling in Bowers and should control here." *Id*. at 578.

234. Rory Little, *Transcript of Remarks: Excerpts from The Future of American Sentencing: A National Roundtable on Blakely*, 2 OHIO ST. J. CRIM. L. 619, 630 (2005). *See also* SMITH II, *supra* note 229, at 247 (describing Stevens's dissent that led to change in sentencing law).

235. Rust, *supra* note 230, at 152.

> [I]t is apparent from the number of federal jurists who specifically cited Justice Stevens's work, even when they were under no compulsion to do so, that Stevens was a highly successful intellectual leader of the federal judiciary overall. The sheer volume of cases that he influenced, even when he was not directly involved, is an impressive testament to his skill as a judge.[236]

Why then would Justice Stevens stop using dissenting views as advocacy for doctrinal change during retirement, especially because data shows that lower court judges noticed his writing and cited him by name in thousands of opinions?[237]

By contrast, Justice Stevens's declaration that future Justice Kavanaugh was unfit for service on the Supreme Court based on then Judge Kavanaugh's polemical partisan statements and emotional outbursts during confirmation hearings[238] was truly extraordinary.[239] A sitting justice would presumably avoid publicly labeling a potential colleague as a biased partisan.[240] Such avoidance would seek to avoid visible involvement in the politics of judicial appointments[241] and reduce the risk for potentially poisonous interactions and strained relationships within the Court.[242] As a former active judicial officer, however, Justice Stevens did not bear the same risk of difficult interactions with a potential future justice with whom he would never work on the Court.[243] Justice Stevens's extensive post-retirement advocacy

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236. *Id.*

237. *Id.* at 150.

However, even if one removes all of the Supreme Court opinions from the study, federal district and circuit court still cited Stevens by name in 9,818 opinions through the end of the 2009 term. The judges authoring these opinions were very rarely in a position where such a citation was absolutely necessary; after all, if they were citing a controlling majority opinion of the Court, there would be no need to refer to Stevens individually. Even if the judge cited one of Stevens's separate opinions in a disapproving fashion, Stevens still influenced the debate by forcing that judge to respond to his thoughts on that particular area of the law. Thus, these citation numbers demonstrate Stevens's profound impact on the thought processes of a generation of federal jurists. *Id.*

238. Liptak, *supra* note 169.

239. Ford, *supra* note 174.

240. *Id.*

241. Justices have been known to work behind the scenes to influence the choice of nominees to the Court, such as Chief Justice Warren Burger's quiet efforts to convince the Reagan administration to choose Sandra Day O'Connor as the first woman justice. JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 72-73 (2005).

242. In earlier eras, the Supreme Court was affected by brusque interactions and feuds between individual justices, such as those between Justices Felix Frankfurter and Justice William O. Douglas and between Justices Hugo Black and Robert Jackson. H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 177-86 (1981).

243. Justice Stevens was ninety-eight years old and had been retired for eight years when he made his critical comments about Kavanaugh in 2018. Liptak, *supra* note 169.

concerning legal doctrine presumably reflected a heartfelt commitment to see constitutional law fulfill its most beneficial purposes for the nation, including the avoidance of needless gun deaths and prevention of American voters' preferences being distorted by unlimited corporate campaign expenditures.[244] Arguably, his critical comments about Justice Kavanaugh reflected a parallel heartfelt commitment to placing thoughtful justices on the Court who had no appearance of overt partisan biases.[245]

IV. CONCLUSION

Advances in medical care and knowledge about health behavior have extended life expectancy,[246] especially for Americans with higher levels of education and income,[247] thus creating increased possibilities for Supreme Court justices to have longer retirements than their twentieth-century predecessors.[248] As

244. Indeed, Justice Stevens most consistently and strongly criticized the precedents which limited governmental authority to regulate firearms ownership in *Heller* and enabled corporate money to flood campaigns and elections in *Citizens United* because he saw these decisions as, respectively, contributing to dire threats to public safety and democracy. *Heller*, 128 S.Ct. at 2844, n. 38 (Stevens, J., dissenting); *Citizens United,* 130 S.Ct. at 930 (Stevens, J., dissenting). He highlighted school shootings and the thousands of deaths annually from firearms in proposing changes to the Second Amendment, STEVENS I, *supra* note 120, at 125, 129, 133. Justice Stevens spoke about the lack of campaign finance regulations as a threat to American democracy's ability to reflect the preferences of the American people:

> "[T]he majority's rationale in *Citizens United* would protect not only the foreign shareholders of corporate donors to [American] political campaigns but also foreign corporate donors themselves. Moreover, there is abundant evidence that nonresidents frequently contribute substantial sums to candidates for the Senate or for Congress. That practice obviously tends to undermine the ability of residents to choose their own representatives.

STEVENS III, *supra* note 134, at 501-02.

245. After Justice Kavanaugh's confirmation, news reports identified more information that called into question the completeness of investigations in his background, his truthfulness in prior judicial confirmation hearings, and his active engagement in partisan matters about which he had denied any knowledge. Jackie Calmes, *The Senate Knew About Kavanaugh's Partisan History. It Confirmed Him Anyway,* WASH. POST (Sept. 16, 2021), www.washingtonpost.com/outlook/brett-kavanaugh-gop-court/2021/09/15/d7ad45e8-15bc-11ec-a5e5-ceecb895922f_story.html [perma.cc/LN3G-ZM3A].

246. Scott Weiner, *What's in a Number? Looking at Life Expectancy in the U.S.,* HARV. HEALTH PUBL'G (Feb. 7, 2020), www.health.harvard.edu/blog/whats-in-a-number-looking-at-life-expectancy-in-the-us-2020020718871 [perma.cc/PD3W-42PX].

247. Gopal K. Singh & Hyunjung Lee, *Marked Disparities in Life Expectancy by Education, Poverty Level, Occupation, and Housing Tenure in the United States, 1997-2014,* 10 INT. J. MATERNAL CHILD HEALTH & AIDS 7-18 (2021).

248. Sometimes, justices continue to serve on the Court into their eighties

prominent public figures, retired justices must make choices about whether and how to use their status and public visibility during their retirement years.[249] The four twenty-first century Supreme Court retirees provide contrasting examples of choices available for retired justices to remain engaged in public life.[250] Two of these justices, Souter and O'Connor, continued the tradition of contributing to the judiciary's work as visiting judges on U.S. courts of appeals.[251] The same two justices, plus Justice Kennedy, also made efforts through speeches and projects to advance public education about constitutional democracy, rule of law, and other democracy-reinforcing topics.[252] These activities are consistent with the work conducted by sitting Supreme Court justices[253] and therefore have little reason to raise questions about whether these retired justices have crossed the boundaries of propriety associated with traditional judicial roles.[254]

By contrast, the less common activities of retired justices, evident in Justice O'Connor's service on the Iraq Study Group[255] and Justice Stevens's strong and persistent advocacy for undoing Supreme Court precedents with which he disagreed,[256] stand out as

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(or beyond) and only retire when they perceive their health to require it, such as Justice Stevens at age ninety. Eli Watkins, *Retired Justice [Stevens] Says He Decided to Retire After Suffering "Mini-Stroke" During Dissent*, CNN (Nov. 26, 2018), www.cnn.com/2018/11/26/politics/john-paul-stevens-mini-stroke-citizens-united/index.html [perma.cc/PD3W-42PX]. In such cases, their retirements are not likely to be extended by advances in life expectancy. *Id.* However, sometimes justices retire for other reasons, such as Justice Souter at age 69 not enjoying life and work at the Supreme Court. *See* Kermit Roosevelt, *Justice Cincinnatus: David Souter—A Dying Breed, the Yankee Republican*, SLATE (May 1, 2009), www.slate.com/news-and-politics/2009/05/david-souter-leaves-the-supreme-court-with-honor.html [perma.cc/2GR9-B8LC]. In that case, they create possibilities for very long retirements after service on the Court. ATKINSON, *supra* note 4, at 133-36.

249. For examples, Justice Kennedy and Stevens made very different choices about how to use their visibility in advancing public education and democracy-reinforcing goals. *See supra* notes 28-31, 134-68 and accompanying text (contrasting descriptions of the post-retirement activities of Justices Kennedy and Stevens).

250. *Id.*

251. WASBY I, *supra* note 35, 146-65.

252. *See supra* notes 28-31, 49-60, 100-04, 112-17 and accompanying text (descriptions of the public education activities of Justices Kennedy, Souter, and O'Connor).

253. Obviously, sitting justices focus their time on appellate decision making, but they also frequently act as public speakers and authors to expound on topics related to constitutional law and American democracy. Nina Totenberg, *Antonin Scalia's Less Well-Known Legacy: His Speeches,* NAT'L PUB. RADIO (Oct. 2, 2017), www.npr.org/2017/10/02/554478768/scalia-s-less-well-known-legacy-his-speeches [perma.cc/4DSW-VU3B]; STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 73-87 (2010).

254. *Id.*

255. *See supra* notes 105-09 and accompanying text (description of Justice O'Connor's service on the Iraq Study Group).

256. *See supra* 135-68 and accompanying text (description of Justice

unusual and invite analysis for their propriety. Yet, despite the less common nature of these forms of public engagement, they arguably remain within the realm of known judicial roles. In O'Connor's case, there are precedents for Supreme Court justices' involvement in non-judicial matters of national importance, as embodied in the Warren Commission that investigated President Kennedy's assassination and Justice Jackson's work as a Nuremberg prosecutor.[257] With respect to Justice Stevens, his advocacy for doctrinal change can be seen as merely a visible continuation of his work as an outspoken justice who dissented in many cases, just as sitting justices regularly issue strong dissents when they disagree with legal precedents.[258]

How should Justice Stevens's critical comment about then-nominee Justice Kavanaugh be viewed, given it was highly unusual for any justice, sitting or retired, to make a pronouncement about the fitness for office of a Supreme Court nominee?[259] In making this comment as a retiree rather than a sitting justice, Stevens avoided the risks attendant to facing the prospect of working with a new colleague whom one has alienated or offended.[260] Moreover, Stevens was presumably motivated by a desire to preserve the institution he served for thirty-five years by calling attention to overtly partisan and emotional confirmation hearing statements by a nominee whom he had previously praised.[261] By appearing to step into a political controversy, Stevens's statement was surprising, but not actually as unique as it might appear, given that sitting justices have made public comments critical of Congress[262] and the president when they believed they were defending the institution of the Court.[263] Both

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Stevens's advocacy of legal change).

257. *See supra* note 205-07 and accompanying text (description of non-judicial public service activity by Chief Justice Warren and Justice Jackson).

258. *See supra* notes 222-32 and accompanying text (description of role of dissenting opinions and Justice Stevens's record as a prolific dissenter).

259. *See supra* notes 169-74 and accompanying text (description of Justice Stevens's criticism of Judge Kavanaugh as a nominee for the Supreme Court).

260. *See supra* notes 240-43 and accompanying text (description of Justice Stevens's reduced risk of conflict with justices due to his status as a retiree).

261. *Id.*

262. For example, in a public speech Justice Alito criticized a brief filed by Democratic senators in a gun-rights case. Todd Ruger, *Justice Alito Speech Leads to Rare [C]ourt-Congress Dialogue,* ROLL CALL (Nov. 13, 2020), www.rollcall.com/2020/11/13/justice-alito-speech-leads-to-rare-court-congress-dialogue/ [perma.cc/C4SE-6PPE].

263. Chief Justice Roberts criticized Preident Trump's characterization of judges' decisions as reflecting the biased preferences of the president who appointed those judges. Robert Barnes, *Rebuking Trump's Criticism of "Obama Judge," Chief Justice Roberts Defends Judiciary as "Independent,"* WASH. POST (Nov. 21, 2018), www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html [perma.cc/FV4R-8GX3].

Chief Justice Roberts[264] and Justice Alito,[265] for example, have made such statements in recent years through which they placed themselves into political controversies. When retired justices engage in activities that are consistent with those of sitting justices, even when those activities are controversial or unusual, it would be difficult to claim that those activities have exceeded the boundaries of judicial propriety.

Lurking within this examination of twenty-first century Supreme Court retirees is the question of whether expectations about judicial propriety should even be applied to retirees who no longer act as judicial decision makers on U.S. courts of appeals panels.[266] By declining to serve as an active judicial officer, Justice Stevens could speak, in effect, as "Citizen Stevens" with greater freedom to bluntly and clearly defend the image of the judiciary, as he did in criticizing then-nominee Kavanaugh, [267] without being a representative of the judiciary or cautiously guarding a conception of the judicial role while speaking.[268] Future Supreme Court retirees may face challenges in conceptualizing and prioritizing their obligations to the dual goals of maintaining a judicial image[269] and advancing public education about the preservation of democracy[270] because these two obligations can be in tension. In an era in which many Americans soak up conspiracy theories and false information through social media and overtly-biased news services,[271] might retirees feel an increasing obligation to correct

264. *Id.*

265. Ruger, *supra* note 262.

266. *See* COLE ET AL., *supra* note 119 and accompanying text (description of the general image and behavior expected of American judges).

267. *See supra* notes 238-43 (description of controversy over Justice Stevens's criticism of future Justice Kavanaugh).

268. News reports about Stevens's comments regarding Kavanaugh frequently noted that such statements are highly unusual coming from either sitting or former justices. *See, e.g., In Rare Move, Retired Supreme Court Justice John [Paul] Stevens Says Kavanaugh Shouldn't Be Confirmed*, SAN DIEGO UNION-TRIB. (Oct. 4, 2018), www.sandiegouniontribune.com/news/us-politics/ny-news-supreme-court-justice-stevens-kavanaugh-confirmed-20181004-story.html [perma.cc/F3RD-NQ3A], ("Former and current justices typically avoid commenting publicly on contemporaneous events in order to maintain the high court's separation from everyday politics.").

269. Justice Kennedy, for example, declined to comment about the Kavanaugh nomination, presumably as a component of maintaining the traditional role of avoiding comments about political controversies. Eli Rosenberg, *Anthony Kennedy's Response to the Bitter Fight Over His Supreme Court Seat? No Comment,* WASH. POST (Sept. 28, 2018), www.washingtonpost.com/politics/2018/09/29/anthony-kennedys-response-bitter-fight-over-his-supreme-court-seat-no-comment/ [perma.cc/D7MG-ULCJ].

270. *See supra* notes 28-31 and accompanying text (description of Justice Kennedy's post-retirement public education activities).

271. Joel Rose, *"More Dangerous and More Widespread": Conspiracy Theories Spread Faster Than Ever*, NAT'L PUB. RADIO (Mar. 2, 2021), www.npr.org/2021/03/02/971289977/through-the-looking-glass-conspiracy-theories-spread-faster-and-wider-than-ever [perma.cc/FNV8-S96U].

public misperceptions about the American constitutional governing system, even if providing such information could necessarily be regarded as wading into political controversies?[272] Despite drawing attention to involving himself in a political controversy, Chief Justice Roberts felt compelled to speak out as a still-serving judicial officer to refute false information spread by President Trump about judges' motivations in making decisions.[273] Justice Stevens, in retirement, felt a similar compulsion to point out issues related to President Trump's efforts to avoid legal obligations.[274] In a changing political environment and increasingly polarized society, retired justices' decisions about public engagement activities may change, too.

272. For example, Chief Justice Roberts felt obligated to refute President Trump's inaccurate statements implying that judges' decisions are determined by the president who appointed them. Barnes, *supra* note 263. Social science research can identify some connections between prior political affiliation and judicial decision making, but actual judicial behavior varies by judge and is not neatly attributable to partisanship across issues. *See* Gibson, *supra* note 191, at 32 (overview of social science research on personal, social, and societal factors affecting judicial decision making). Justices Stevens and Souter, for example, were Republicans who were appointed to the Supreme Court by Republican presidents, yet they turned out to be among the most liberal justices of the twenty-first century. MARCIA COYLE, THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION 20, 297-99 (2013).

273. Barnes, *supra* note 263.

274. Dominique Mosbergen, *Trump, Kavanaugh, Guns: John Paul Stevens Spoke His Mind*, HUFFINGTON POST (July 17, 2019), www.huffpost.com/entry/john-paul-stevens-retirement-political-statements-controversy_n_5d2e9398e4b02fd71ddc43d3 [perma.cc/VR7G-USRR], ("The president is exercising powers that do not really belong to him. I mean, he has to comply with subpoenas and things like that").