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## John Paul Stevens and Equally Impartial Government

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# John Paul Stevens and Equally Impartial Government

Diane Marie Amann\*

*Justice John Paul Stevens's embrace of race-conscious measures to ensure continued diversity stands in tension with his early rejections of affirmative action programs. The contrast suggests a linear movement toward a progressive interpretation of the Constitution's equality guarantee; however, examination of Stevens's writings in biographical context reveal a more complex story. As a law clerk Stevens had urged that Justices declare segregation itself unconstitutional in 1948, six years before the Court took that step. The state's refusal to admit a qualified applicant to law school solely on account of her race represented an individualized wrong, one that bore resonance with the Depression-era experiences of Stevens's own family. Stevens would come to describe unequal treatment as a breach of the sovereign's duty to govern impartially. But the Justice did not view race-based means to remedy prior discrimination in the same light. Only after he shifted attention away from the injustices of the past and toward expectations of a just future did Stevens adjudge affirmative action as a permissible means toward an equally impartial government.*

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The year was 1948. The place, Washington, D.C. In cane chairs tucked amid the red velvet draping the chamber of the U.S. Supreme Court, clerks fresh out of law school watched as Thurgood Marshall argued that the Constitution compelled Oklahoma to let Ada Lois Sipuel study law at its flagship university.<sup>1</sup> Though not yet forty, the lead advocate for the NAACP Legal Defense and Educational Fund was well known to the Justices before whom he had first argued five years earlier.<sup>2</sup> One of the law clerks present recalled that on this day “Thurgood was respectful, forceful and persuasive — so persuasive that on the following Monday — only four days after the argument — the Court unanimously ruled in Sipuel’s favor.”<sup>3</sup> A per curiam order instructed the state that it must give Sipuel — whom the Court described as “a Negro, concededly qualified” — schooling “in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group.”<sup>4</sup>

A few weeks later, Marshall sought a writ of mandamus requiring the recalcitrant state to admit Sipuel. The law clerk quoted above urged Justice Wiley B. Rutledge, Jr., to grant the extraordinary writ. “The mandate of this Court directs the state to provide her with a legal education ‘in conformity with the equal protection clause,’ ” the clerk wrote, continuing, “I would think it possible to take judicial notice of the fact that: (a) a law school for one student cannot be equal, even if you accept the separate but equal doctrine, and (b) the doctrine of segregation is itself a violation of the Constitutional requirement.”<sup>5</sup> He

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<sup>1</sup> See John Paul Stevens, Assoc. Justice, U.S. Supreme Court, Address to the American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_08-06-05.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html) [hereinafter Stevens, Address].

<sup>2</sup> See Randall Bland, *The Making of an Advocate*, in THURGOOD MARSHALL: JUSTICE FOR ALL 22, 22 (Roger Goldman & David Gallen eds., 1992) [hereinafter MARSHALL] (writing of Marshall’s birth on July 2, 1908); *id.* at 42-87 (describing Marshall and NAACP). See generally *Adams v. United States*, 319 U.S. 312 (1943) (ruling that federal court had no jurisdiction to try Marshall’s clients). Notably, Justice Felix Frankfurter referred to Marshall by name, rather than as counsel for petitioner, when discussing the case at bar. See “F.F.,” Memorandum for the Conference, No. 325 Misc. Fisher v. Hurst et al. (Feb. 13, 1948) [hereinafter 2/13/48 Frankfurter Mem.], in William O. Douglas Papers, Manuscript Division, Library of Congress, box 170 [hereinafter Douglas Papers].

<sup>3</sup> Stevens, Address, *supra* note 1.

<sup>4</sup> *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631, 632-33 (1948) (per curiam).

<sup>5</sup> Memorandum Signed “jps,” Regarding *Fisher v. Justices of Okla. S. Ct. et al.*, at 2 [hereinafter JPS Fisher Mem.] (spacing corrected in this quotation of original), in Wiley Rutledge Papers, Manuscript Division, Library of Congress, box 157

concluded that “if there is any chance of granting any relief, I would do so.”<sup>6</sup>

The clerk’s call to declare segregation unconstitutional in 1948 astonishes. Marshall had not expressly requested such a ruling.<sup>7</sup> No Justice, nor, it appears, any other law clerk, committed that view to paper at that time.<sup>8</sup> It would not be until 1954 that the Court would hold segregation unconstitutional in *Brown v. Board of Education*.<sup>9</sup> As late as the first hearing in that case, another clerk had objected to the prospect of such a decree.<sup>10</sup> “To the argument made by Thurgood Marshall that a majority may not deprive a minority of its constitutional right,” clerk William H. Rehnquist wrote in a memorandum that drew much attention when he became a Justice decades later, “the answer must be made that while this is sound in

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[hereinafter Rutledge Papers]. Documents in this second round of litigation referred to Sipuel by her married name, Fisher; in an earlier article I made the unfortunate error of assigning to her the surname of the other litigant in the decision captioned *Fisher v. Hurst*, 333 U.S. 147 (1948). See Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 *FORDHAM L. REV.* 1569, 1589 (2006) [hereinafter Amann, *Stevens*].

<sup>6</sup> JPS *Fisher* Mem., *supra* note 5, at 3.

<sup>7</sup> See Frankfurter Mem., *supra* note 2 (admonishing Court in internal memorandum not to resolve Sipuel’s mandamus petition in manner that might “again invite discussion about the issue which Thurgood Marshall skilfully did not explicitly either accept or reject, namely is segregation constitutionally valid?”) (spelling and punctuation as in typescript original).

<sup>8</sup> Rutledge alone dissented, but on a ground far narrower than that advanced by his clerk. See *Fisher*, 333 U.S. at 151 (Rutledge, J., dissenting) (objecting that state courts had not complied with Court’s mandate). At least two clerks besides Stevens recommended grants, but on grounds less bold than Stevens put forward. See Memorandum Signed “SES,” *Fisher (nee Sipuel) v. Hurst et al.*, in Douglas Papers, *supra* note 2, box 170 (recommending in memorandum by Douglas clerk Stanley E. Sparrowe issuance of order to show cause, and limiting analysis to whether separate facility proffered was equal); Motion for Leave to File Petition for Writ of Mandamus, Petition, and Brief in Support Thereof, in Robert H. Jackson Papers, Manuscript Division, Library of Congress, box 145 (concluding in undated and unsigned memorandum “GRANT?” on ground that state judges had evaded Court’s mandate). This assessment reflects examination of the case file papers of some, but not all, of the Justices who took part in the *Sipuel* litigation.

<sup>9</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Throughout this Article “*Brown*” refers solely to this judgment and not to others issued in the course of the litigation.

<sup>10</sup> Memorandum Signed “WHR,” A Random Thought on the Segregation Cases (1952) [hereinafter WHR Mem.], reprinted in *Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh99-1067/324-325.pdf>; see *Brown v. Bd. of Educ.*, 345 U.S. 972 (1953) (ordering reargument); *Brown v. Bd. of Educ.*, 344 U.S. 1, 1 (1952) (setting argument of consolidated desegregation cases for October 1952).

theory, in the long run it is the majority who will determine what the constitutional rights of the minority are.”<sup>11</sup> In tone and content the two clerks’ memoranda could not have diverged more.

Fast forward now to 2007. In *Parents Involved in Community Schools v. Seattle School District No. 1*, members of the Court hearkened to the landmark 1954 ruling with these words: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.”<sup>12</sup> The use of *Brown* to invalidate two plans designed to prevent resegregation of public schools provoked the Court’s most senior member, Justice John Paul Stevens, to give voice to what Professor Andrew Siegel aptly has called “righteous anger.”<sup>13</sup> Stevens wrote in dissent that the principal opinion in *Seattle Schools* “fails to note that it was only black schoolchildren who were so ordered,” and thus “rewrites the history of one of this Court’s most important decisions.”<sup>14</sup> Stevens went so far as to proclaim, “It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.”<sup>15</sup>

It may not surprise that Stevens, the Justice who decried the majority’s 2007 invocation of *Brown*, is also the author of the 1948 clerk’s memorandum urging an end to lawful segregation. At first blush, Stevens’s 1948 memorandum in *Sipuel* and his 2007 dissent in *Seattle Schools* appear as two points on one straight path toward progressive interpretation of the Equal Protection Clause. In truth, however, Stevens’s equality jurisprudence has traveled a far more winding road. Between *Sipuel* and *Seattle Schools* may be found numerous judicial opinions in which Stevens rejected affirmative action programs that other Justices endorsed.<sup>16</sup> Presenting a salient

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<sup>11</sup> WHR Mem., *supra* note 10, at 2d page. The memorandum continued: “I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by ‘liberal’ colleagues, but I think *Plessy v. Ferguson* was right and should be reaffirmed.” *Id.* (spelling and punctuation as in typescript original) (referring to *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. at 495); *see infra* note 16 (describing recent scholarship regarding this memorandum).

<sup>12</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (Seattle Schools)*, 551 U.S. 701, 747 (2007) (plurality opinion) (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ.).

<sup>13</sup> Andrew Siegel, *Justice Stevens and the Seattle Schools Case: A Case Study on the Role of Righteous Anger in Constitutional Discourse*, 43 UC DAVIS L. REV. 927, 927 (2010).

<sup>14</sup> *Seattle Schools*, 551 U.S. at 799 (Stevens, J., dissenting). Put precisely, Stevens directed his objection at the opinion’s author. *See infra* text accompanying note 147.

<sup>15</sup> *Seattle Schools*, 551 U.S. at 803 (Stevens, J., dissenting).

<sup>16</sup> *See infra* text accompanying notes 96-117, 134 (discussing Stevens’s early equal protection jurisprudence).

example is the judgment in *Fullilove v. Klutznick*.<sup>17</sup> Stevens's dissent in that 1980 case underscored "our commitment to the proposition that the sovereign has a fundamental duty to govern impartially" — a "concept of equal justice under law" that is "served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment."<sup>18</sup> It then expressed opposition to the minority set-aside program under review in no uncertain terms: Stevens likened the statute by which Congress purported to make amends for the past discrimination of Americans of African and other ancestries to a law by which the Nazi-era Reichstag had authorized the ongoing persecution of German Jews.<sup>19</sup>

How is one to reconcile Justice Stevens's criticisms of affirmative action either with his 1948 call to outlaw "segregation itself" or with his 2007 claim that relying on race in order to maintain school diversity honors the desegregation legacy of *Brown*?<sup>20</sup> Put more simply, the question is this: have Stevens's views on race and the law changed? The answer is complex. It is yes, it is no, and it is maybe. The answer is yes for the reason that, at least since 1986, when he dissented in *Wygant v. Jackson Board of Education* from the majority's rebuke of preferences extended to minority schoolteachers, Stevens often has supported what are generically called affirmative action programs.<sup>21</sup> But the answer is also no, for the reason that, even after *Wygant*, Stevens at times rejected as unconstitutional some such programs.<sup>22</sup> In the end the answer is maybe, for the reason that, even as Stevens's ultimate conclusions varied, his methodology did not: even when supporting race-based classifications, Stevens worked within the same framework of an equally impartial government that led him to condemn the classification in *Fullilove*.<sup>23</sup> This Article

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<sup>17</sup> 448 U.S. 448 (1980).

<sup>18</sup> *Id.* at 533 n.2 (Stevens, J., dissenting) (quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976)).

<sup>19</sup> *Id.* at 534 n.5.

<sup>20</sup> See JPS Fisher Mem., *supra* note 5, at 2; *supra* text accompanying notes 12-15 (quoting dissent in *Seattle Schools*).

<sup>21</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313-19 (1986) (Stevens, J., dissenting); see *infra* text accompanying notes 118-34 (examining Stevens's treatment of affirmative action in *Wygant*); *infra* text accompanying note 96 (discussing terminology).

<sup>22</sup> See *infra* text accompanying notes 135-50 (discussing Stevens's later treatments of affirmative action).

<sup>23</sup> See *supra* text accompanying note 18 (quoting *Fullilove*, 448 U.S. at 533, 533 n.2 (Stevens, J., dissenting)); see *infra* text accompanying notes 203-31 (discussing use of this framework).

examines these complexities. It first sets forth certain of Stevens's life experiences, and then elaborates on his jurisprudence of equality. The Article concludes with a tentative analysis of how life experiences might have influenced Stevens's approach to the constitutional law of equality.

### I. A STORIED LIFE

The twenty-six year old who moved to Washington in September 1947 to clerk for Justice Rutledge already had led a storied life. Earlier that month, John Paul Stevens had finished his J.D. at Northwestern University School of Law in Chicago,<sup>24</sup> earning a record-high grade point average and serving as coeditor in chief of the law review.<sup>25</sup> He had spent the first part of the decade as an officer in the U.S. Navy, much of it at the Hawaii base bombed by Japanese planes on December 7, 1941. "I went to Pearl in December 1942," Stevens recalled much later, "and stayed there almost until the end of the war."<sup>26</sup> For years he and many others labored to decrypt messages the Japanese military sent, not realizing that the Americans had broken the code. Stevens was awarded a Bronze Star for his service. "I did a lot of work breaking a particular cipher," he explained. "It involved call signals. It was very technical."<sup>27</sup>

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<sup>24</sup> Stevens finished during the summer session and offered to begin working for Rutledge immediately; however, Rutledge insisted he take a week of vacation first, and so the clerkship began on September 22. See Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to Wiley Rutledge, Assoc. Justice, U.S. Supreme Court (Sept. 4, 1948) [hereinafter 9/4/48 Stevens Letter], in Rutledge Papers, *supra* note 5, box 42; Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to Wiley Rutledge, Assoc. Justice, U.S. Supreme Court (July 24, 1947), in Rutledge Papers, *supra* note 5, box 42; Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to Wiley Rutledge, Assoc. Justice, U.S. Supreme Court (July 14, 1947), in Rutledge Papers, *supra* note 5, box 42.

<sup>25</sup> See George W. Gekas, U.S. House of Representatives, Tribute to U.S. Supreme Court Associate Justice John Paul Stevens, *reprinted in* 142 CONG. REC. E1450 (daily ed. Aug. 1, 1996) (citing Stevens's academic achievement); John Paul Stevens, *Introductory Comment*, 75 NW. U. L. REV. 977, 977 (1981) (discussing his work on what was then called *Illinois Law Review*). For details on Stevens's law school career and other life experiences not mentioned here, see Amann, *Stevens*, *supra* note 5, at 1580-1600.

<sup>26</sup> Telephone Interview with John Paul Stevens, Assoc. Justice, U.S. Supreme Court (June 22, 2005) [hereinafter 6/22/05 Stevens Interview]. Having reported to Great Lakes Naval Station for his physical the day before the bombing at Pearl Harbor, "[e]ventually Stevens couldn't resist joking that his enlistment apparently had precipitated the war." KENNETH A. MANASTER, *ILLINOIS JUSTICE* 38 (2001).

<sup>27</sup> 6/22/05 Stevens Interview, *supra* note 26. President Franklin D. Roosevelt established the Bronze Star Medal to a service member who "on or after December 7,



There is irony in the fact that the G.I. Bill paid for much of his postwar legal education.<sup>28</sup> For Stevens had been born, on April 20, 1920, into a family whose wealth and prominence newspapers in Chicago and beyond long had chronicled.<sup>29</sup> Two generations earlier, the Stevenses had moved their dry goods business from Colchester, a downstate Illinois town named after a village northeast of London.<sup>30</sup> The Chas. A. Stevens & Bros. store in Chicago became a favorite of the elite shoppers who frequented State Street in the downtown Loop.<sup>31</sup> One brother, James W. Stevens, known as “J.W.,” established the Illinois Life Insurance Co., where one of his sons, Raymond, also came to work.<sup>32</sup> Another son, Ernest J. Stevens, managed yet another Stevens concern, the Loop’s high-end Hotel La Salle.<sup>33</sup> He did so with flair. “We intend to keep the bar open Sundays until we are convinced that we are doing wrong,” he once declared in defiance of temperance

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1941, distinguishes, or distinguished, himself by heroic or meritorious achievement or service, not involving participation in aerial flight, in connection with military or naval operations against an enemy of the United States.” Exec. Order No. 9419, 9 Fed. Reg. 1495 (Feb. 8, 1944).

<sup>28</sup> MANASTER, *supra* note 26, at 38 (writing that “G.I. Bill mostly pa[id] his way”).

<sup>29</sup> See, e.g., *Mack Denounces Business Leaders*, N.Y. TIMES, Oct. 14, 1908, at 1 (including Justice’s Great-Uncle Charles in a list of “leading Chicago business men” against whom the Democratic leader suggested boycott on account of their public support for that year’s Republican Presidential candidate, William H. Taft); *Society at Palm Beach*, N.Y. TIMES, Jan. 11, 1909, at 9 (noting that “Mr. and Mrs. Ernest J. Stevens of Chicago,” who would later give birth to John Paul Stevens, had been feted aboard New Yorker’s yacht at “one of the largest parties” of season).

<sup>30</sup> See ROBERT V. ALLEGRINI, *CHICAGO’S GRAND HOTELS: THE PALMER HOUSE HILTON, THE DRAKE, AND THE HILTON CHICAGO* 95 (2005) (discussing Colchester); *Chas. A. Stevens, Loop Merchant, Is Dead* at 73, CHI. TRIB., Dec. 25, 1932, at 6 (stating that Charles, brother of James W., had moved to Chicago in 1879); *James W. Stevens, 82, Hotel Man, Is Dead*, N.Y. TIMES, May 15, 1936, at 28 [hereinafter *James W. Stevens*] (writing of move from Colchester to Chicago, some time before 1893, by James W. Stevens, who would become Justice’s grandfather).

<sup>31</sup> See Ethel L. Payne, *Stevens Integrates on Many Levels, But Rejects the Idea of Fair Jobs Law*, CHI. DEFENDER, July 11, 1953, at 9 (describing store and linking its founding to Chicago’s 1893 World’s Fair); *State Street Rises to Retail Leadership thru Foresight of Colorful Pioneers*, CHI. TRIB., July 8, 1956, at A9 (writing that Charles A. Stevens had “received some of his training from Marshall Field” before opening his own store in 1890, and naming both among those who made State Street “the world’s busiest and most concentrated shopping area”).

<sup>32</sup> See Charles Lane, *Heartbreak Hotel*, CHI. MAG., Aug. 2006, <http://www.chicagomag.com/Chicago-Magazine/August-2006/Heartbreak-Hotel> [hereinafter Lane, *Hotel*]; *R. W. Stevens Dies from a Pistol Shot*, N.Y. TIMES, Mar. 24, 1933, at 38 [hereinafter *Pistol*]; *James W. Stevens*, *supra* note 30.

<sup>33</sup> See *Let Contract for La Salle Hotel*, CHI. TRIB., Mar. 3, 1908, at 11 (reporting that Hotel La Salle Co., on whose board Charles A., James W., and Ernest J. Stevens served, had begun work on hotel of same name).

crusaders.<sup>34</sup> As Europe spiraled into World War I, Ernest joined a business leaders' group for national defense.<sup>35</sup> At war's end, he threw a "wake" to herald the onset of Prohibition in Illinois, promising, "It will be the biggest night this town has ever known."<sup>36</sup> News stories reveled in Ernest's "war" against renegade taxi drivers, recounted how he "made hay" by challenging competitors to join him in slashing food and room prices, and reported that the "nifty madrigal" he had written was performed "in the hotel dining room and was applauded by guests."<sup>37</sup>

Less than a fortnight after the seventh birthday of John, the youngest of Ernest's four sons, the family opened the Stevens Hotel.<sup>38</sup> A photograph made at the gala shows John in a tweed jacket and plus fours, standing before a print of the hotel that is as tall as he is. Behind him, in ascending order according to height, stand his three brothers. Flanking the other side of the flower-framed print are their father and grandfather, in white tie and tails, and their grandmother and mother, in befeathered Jazz Age apparel.<sup>39</sup> The family's new hotel, which faced Lake Michigan and occupied a full city block southeast of the Loop, was the world's largest and most posh.<sup>40</sup> In its heyday, it was valued at thirty million dollars, among the world's most expensive commercial buildings.<sup>41</sup> The twenty-eight floors of the Stevens held three thousand

<sup>34</sup> *Ultimatum to Hotel Saloons Expires Today*, CHI. TRIB., May 25, 1915, at 10 (quoting Ernest J. Stevens).

<sup>35</sup> *Prepare! Prepare! Prepare! Prepare!*, CHI. TRIB., May 17, 1916, at 5.

<sup>36</sup> *J. Barleycorn's Wake, Chicago's Biggest Party*, CHI. TRIB., June 9, 1919, at 19 (quoting Ernest J. Stevens); see *Headache? Some Reasons for It*, CHI. TRIB., July 1, 1919, at 2.

<sup>37</sup> *Mine Host at the La Salle Wins Plaudits as Lyricist*, CHI. TRIB., July 20, 1919, at 12; see also *Ask Injunction of U.S. Court in Taxicab War*, CHI. TRIB., Sept. 28, 1919, at 9; *Hoyne Aid Tries to Solve Row of the Taxi Men*, CHI. TRIB., May 29, 1919, at 10; *La Salle's Price Challenge Fails to Move Rivals*, CHI. TRIB., Dec. 4, 1919, at 9.

<sup>38</sup> *Stevens Hotel Will Be Opened Tomorrow Night*, CHI. TRIB., May 1, 1927, at 8 (noting that elder Stevens announced plans for hotel early in 1922 and that construction began three years later); see Al Chase, *Greatest Hotel for Boul Mich*, CHI. TRIB., Mar. 3, 1922, at 1; *The Stevens Is Opened, a Hotel of Superlatives*, CHI. TRIB., May 3, 1927, at 5; *Work to Start on New Stevens Hotel May 1st*, CHI. TRIB., Feb. 8, 1925, at A11.

<sup>39</sup> See ALLEGRI, *supra* note 30, at 95 (publishing photograph described in text). With the grandfather was his wife, Alice Bradley Stevens, whom he had married after his 1903 divorce from John's biological grandmother, Jessie Smith Stevens, an outspoken woman who voiced unkind words for the Stevens Hotel venture. See Virginia Gardner, *Ex-Wife Clings to Old Home of the Stevens Family in Faded South Side Residential Area*, CHI. TRIB., Mar. 26, 1933, at 2.

<sup>40</sup> See ALLEGRI, *supra* note 30, at 89-108 (recounting history of Stevens); ROBERT V. ALLEGRI & GERALDINE HEMPEL DAVIS, *CHICAGO'S GRAND HOTEL: A HISTORY OF THE HILTON CHICAGO 7-19* (2002) (same); Lane, *Hotel*, *supra* note 32 (same).

<sup>41</sup> *Famous Buildings Compared with Skyscrapers in Costs*, N.Y. TIMES, Oct. 13, 1929,

rooms, as well as ballrooms and bowling lanes, a place for pets, and a Japanese tearoom for patrons.<sup>42</sup> (The city's fabled winds occasionally forced closure of the rooftop miniature golf course.)<sup>43</sup> Carved into the lobby's marble columns was the Stevens family crest. The *Chicago Daily News* photographed John and his brothers in the hotel's well-appointed children's Fairyland.<sup>44</sup> A silhouette of the boys' mother, Elizabeth Street Stevens, graced the best restaurant's best china, and fountains featuring cherubic sculptures of the boys themselves stood at the hotel's grand staircase.<sup>45</sup> The Vice President of the United States and the President of Cuba helped open the hotel.<sup>46</sup> Among the many trade and professional associations that convened there was the American Bar Association, which hosted Chief Justice Charles Evans Hughes.<sup>47</sup> Jazz Age luminaries flocked to the Stevens, so that young John met Amelia Earhart, who scolded him for being out late on a school night, and Charles Lindbergh, back from his celebrated solo flight to Paris, who gave John a dove.<sup>48</sup>

When John was twelve, his father — a Republican who that summer welcomed conventioning Democrats to his hotels<sup>49</sup> — took his

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at XX3 (placing New York's Equitable Building slightly above Stevens in value).

<sup>42</sup> ALLEGRI & DAVIS, *supra* note 40, at 16; Lane, *Hotel*, *supra* note 32.

<sup>43</sup> ALLEGRI & DAVIS, *supra* note 30, at 101 (including photograph of golfers); Interview with John Paul Stevens, Assoc. Justice, U.S. Supreme Court, in Wash., D.C. (Oct. 2, 2007) [hereinafter 10/2/07 Stevens Interview] (remarking on closure).

<sup>44</sup> See ALLEGRI & DAVIS, *supra* note 40, at 13; Charles Lane, *Finding Justice on a Small Scale*, WASH. POST, June 5, 2005, at D1, available at <http://memory.loc.gov/ammem/index.html> (including photograph numbered DN-0086303, dated 1928, and captioned, "Two young boys playing a[t] games, sitting at a small table in a playroom at the Stevens Hotel").

<sup>45</sup> 10/2/07 Stevens Interview, *supra* note 43 (recalling that china included not only his mother's silhouette but also four-line poem written by his father, who, he said, "was very devoted to his family"); see Henry J. Bohn, *The Fulfilling of a Prediction Is Realized in the Stevens*, HOTEL WORLD, May 7, 1927 (including photographs of statues of three youngest boys); Lane, *Hotel*, *supra* note 32 (mentioning china and statues); see also *Boy's Likeness Cast in Fountain*, CHI. TRIB., Mar. 8, 1914, at 2 (including photograph of similar statue, in Hotel La Salle's lobby, of eldest brother).

<sup>46</sup> ALLEGRI & DAVIS, *supra* note 40, at 17; *President Machado Welcomed in Chicago*, N.Y. TIMES, May 3, 1927, at 29.

<sup>47</sup> See *Chief Justice Hughes to Be Heard*, N.Y. TIMES, Aug. 21, 1930, at 24.

<sup>48</sup> *John Paul Stevens, Associate Justice, Supreme Court of the United States, Biographical Data*, 1992 ANN. SURV. AM. L., at lv [hereinafter *Biographical Data*] (listing birthdate); Glen Elsasser, *Say . . . Who Was That Bridge Life Master, Anyway?*, CHI. TRIB., Nov. 26, 1998, at 1. Stevens later became a private pilot. See Robert D. McFadden, *The President's Choice*, N.Y. TIMES, Nov. 29, 1975, at 1.

<sup>49</sup> F. Raymond Daniell, *Gay Crowds Swarm in Chicago Lobbies*, N.Y. TIMES, June 27, 1932, at 12 (writing that "Indiana's delegation descended upon the Stevens" day before convention opened).

youngest son to see New York Governor Franklin Delano Roosevelt accept his party's Presidential nomination.<sup>50</sup> In a few months, Roosevelt returned to Chicago, where he addressed 2,500 diners at the Stevens Hotel and took his wife Eleanor to her first professional baseball game.<sup>51</sup> That same week, young John Stevens, a South Sider who rooted for the North Side's Cubs, also ventured to Wrigley Field. He watched as slugger Babe Ruth, with two strikes against him, pointed to center field and then hit his most famous home run, putting the Yankees ahead in Game Three of the 1932 World Series.<sup>52</sup>

Two years later John had a plum job working at the Century of Progress World's Fair, a milestone in Chicago history for Sally Rand's peekaboo dance at the Streets of Paris exhibit and for much more.<sup>53</sup> Thanks to what he later termed the "unabashed policy of nepotism" of his father, who held a food concession at the fair's English Village, John spent the summer in period costume "as a strolling vendor of Banbury tarts" outside a replica of the Red Lion Inn in Colchester, England.<sup>54</sup> At his father's insistence, all the waitresses were redheads "as a mark of respect for Queen Elizabeth the First."<sup>55</sup> After work, the

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<sup>50</sup> See Jeffrey Rosen, *The Dissenter*, N.Y. TIMES MAG., Sept. 23, 2007, § 6, at 50, 54 (reporting on Justice Stevens's recollection of speech); Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to author (July 27, 2009) (on file with author) [hereinafter 7/27/09 Stevens Letter] (confirming "that I was present when FDR accepted the nomination").

<sup>51</sup> *Roosevelt Affirms Wet Plank Support*, N.Y. TIMES, Oct. 2, 1932, at 33.

<sup>52</sup> See ERIC ENDERS, 1903-2004: 100 YEARS OF THE WORLD SERIES 79 (2005) (describing game); Amann, *Stevens*, *supra* note 5, at 1580 (mentioning Stevens's attendance). Long afterward, Stevens threw the first pitch at the same ballpark. See Tom Curry, *Justice Stevens Is Key to High Court's Future*, MSNBC, Sept. 21, 2005, <http://www.msnbc.msn.com/id/9408518/> (providing photograph of event).

<sup>53</sup> 10/2/07 Stevens Interview, *supra* note 43; see CHERYL R. GANZ, THE 1933 CHICAGO WORLD'S FAIR: A CENTURY OF PROGRESS 9-11 (2008) (recounting importance of titillating acts like Rand's fan dance to fair's success); John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 15 (1992) [hereinafter Stevens, *Progress*] (noting that "enormously successful" fair "brought fame to a nude dancer named Sally Rand"). See generally ROBERT W. RYDELL, WORLD OF FAIRS: THE CENTURY-OF-PROGRESS EXPOSITIONS (1993) (describing Chicago fair and its success). The wonderment surrounding the fair was captured decades later in the play, DAVID MAMET, THE WATER ENGINE (1977), that another Chicago native wrote about a dreamy but doomed amateur inventor.

<sup>54</sup> John Paul Stevens, *Section 43(A) of the Shakespeare Canon of Statutory Construction: The Beverly W. Pattishall Inaugural Lecture in Trademark Law*, 1 J. MARSHALL REV. INTELL. PROP. L. 179, 179-80 (2002) [hereinafter Stevens, *Section 43(A)*] (recalling not so much the taste of the tarts as the "extremely heavy" weight of the trays they filled); English Village, Century of Progress Collection (Chicago Public Library).

<sup>55</sup> Stevens, *Section 43(A)*, *supra* note 54, at 180 (remarking that rule was "a

teenager could be found rapt before the stage of the Village's replica Globe Theatre, where *Macbeth*, *Julius Caesar*, and other works by William Shakespeare played in repertory.<sup>56</sup>

The diversion was much needed, for the times had hit the family hard. Even before the Stevens Hotel opened, Prohibition had been siphoning money away from legitimate establishments and into the thousands of illegal speakeasies scattered throughout Chicago.<sup>57</sup> Just two years after the opening came the Stock Market Crash of '29 and the Great Depression. People without jobs could scarcely afford luxury, and the Stevens Hotel lost as much as \$1.75 million in a single year.<sup>58</sup> A few weeks before John saw FDR at the 1932 Democratic National Convention, both the Stevens and the La Salle hotels had been declared insolvent and handed over to a court-appointed receiver.<sup>59</sup> State and federal inquiries were launched, and in January 1933, a cousin's grand jury testimony led the State of Illinois to charge John's father, uncle, and grandfather with embezzling money from

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flagrantly discriminatory condition of employment").

<sup>56</sup> 10/2/07 Stevens Interview, *supra* note 43; Playbill, Century of Progress Collection (Chicago Public Library). Thus began a lifelong study of the playwright. See Amann, *Stevens*, *supra* note 5, at 1571, 1571 n.14; Stevens, *Progress*, *supra* note 53, at 14 (calling Shakespeare "the greatest author of all time"); Jess Bravin, *Justice Stevens Renders an Opinion on Who Wrote Shakespeare's Plays — It Wasn't the Bard of Avon He Says*; "Evidence Is Beyond a Reasonable Doubt," WALL ST. J., Apr. 18, 2009, at A1.

<sup>57</sup> NATHAN MILLER, NEW WORLD COMING: THE 1920S AND THE MAKING OF MODERN AMERICA 302 (2003) (citing estimates of 10,000 or more Chicago speakeasies); 10/2/07 Stevens Interview, *supra* note 43. A decade after holding a wet "wake" at the Hotel La Salle, Ernest J. Stevens tried to ban soft drinks lest he be liable for violating Prohibition should a guest use them to mix cocktails; however, "law-abiding" guests rebelled. *Hotel Rescinds Ban on Ginger Ale in Room*, N.Y. TIMES, May 26, 1929, at 25; see *supra* text accompanying note 36. His son would mention this era decades later in *Granholt v. Heald*, 544 U.S. 460, 496 (2005) (Stevens, J., dissenting) (describing his "understanding (and recollection) of the historical context" of amendment that ended Prohibition, time when "millions of Americans" did not consider "alcohol . . . an ordinary article of commerce," but rather "condemned the use of the 'demon rum'").

<sup>58</sup> See *Stevens Hotel Co.*, WALL ST. J., May 30, 1932, at 3 (reporting net loss of \$1,759,971 in 1931, more than \$700,000 greater than previous year); *Stevens Hotel Co.*, WALL ST. J., Nov. 24, 1933, at 6; *Stevens Hotel Co.*, WALL ST. J., Apr. 9, 1930, at 5 (reporting losses of nearly \$1 million in 1928, and about half that in 1929). It turned a profit after it entered receivership — in 1933, the first year of the Century of Progress World's Fair. See description *supra* text accompanying notes 52-55 and *infra* text accompanying note 71.

<sup>59</sup> *Receiver Named for Stevens and La Salle Hotels*, CHI. TRIB., June 4, 1932, at 3. The department store owned by the family since the 1800s had endured a similar fate earlier in the year. *C. A. Stevens & Bros. Go into Receivership*, N.Y. TIMES, Jan. 30, 1932, at 29; see also *Charles A. Stevens*, N.Y. TIMES, Dec. 25, 1932 (reporting on death later that year of store's founder, the Justice's great-uncle).

their insurance company in an unsuccessful attempt to keep the hotels afloat.<sup>60</sup> A banner on the front page of the *Chicago Daily Tribune* blared Ernest's arrest.<sup>61</sup> The back page featured two photos: in one, Ernest is walking down the steps of his home in the custody of two taller, fedora-topped detectives; in another, he is being booked at the downtown police bureau.<sup>62</sup> Though Ernest was freed on bond, he and his family would not be free of the case for years.

Scarcely two weeks after media publication of the Stevens's address, gunmen dressed as police pushed their way into the home and demanded money from Ernest, Elizabeth, and the Stevens boys.<sup>63</sup> The robbers cut the telephone wires and ransacked the house.<sup>64</sup> At one point they lined the entire family up against a wall and said they would "mow" everyone down "if you don't tell us where the money is."<sup>65</sup> Finding a combination safe in John's bedroom, they forced him to unlock it. He did. As Stevens later recalled, the safe held "cash (which they took) and some gold pieces that were concealed in my diary (which they did not take)."<sup>66</sup>

In the months that followed, John's grandfather, the formidable J.W., was felled by a stroke, and his Uncle Raymond, reportedly "despondent over his financial troubles and the grave illness of his father," committed suicide.<sup>67</sup> John's father thus stood trial alone, and after five hours of deliberation on October 14, 1933, jurors found Ernest J. Stevens guilty of embezzling \$1,308,463.<sup>68</sup> He remained on

<sup>60</sup> See 3 in *Illinois Life Indicted in Crash*, N.Y. TIMES, Jan. 31, 1933, at 14 (reporting that among those who testified before grand jury was "Bert J. Stookey, former director of the insurance company and a nephew of James W. Stevens").

<sup>61</sup> *Hold E.J. Stevens for Fraud*, CHI. TRIB., Jan. 28, 1933, at 1 [hereinafter *Hold*]; see *Ask Indictment Tomorrow of 3 Stevenses*, CHI. TRIB., Jan. 29, 1933, at 1.

<sup>62</sup> See *Hold*, *supra* note 61 (publishing photos captioned "E. J. Stevens Arrested on Warrant Charging Fraud Conspiracy" and "Insurance Company Official Booked and Released on \$10,000 Bond").

<sup>63</sup> See *E. J. Stevens Family Robbed in Chicago*, N.Y. TIMES, Feb. 15, 1933, at 7 [hereinafter *Robbed*] (indicating that robbery had occurred on the previous Saturday, Feb. 11); see also *Hold*, *supra* note 61 (stating address in second paragraph of lead article on page one).

<sup>64</sup> *Robbed*, *supra* note 63; 10/2/07 Stevens Interview, *supra* note 43.

<sup>65</sup> 10/2/07 Stevens Interview, *supra* note 43 (quoting robber).

<sup>66</sup> 7/27/09 Stevens Letter, *supra* note 50; 10/2/07 Stevens Interview, *supra* note 43; see Lane, *Hotel*, *supra* note 32.

<sup>67</sup> *Pistol*, *supra* note 32; see R. W. Stevens *Ends Own Life*, CHI. TRIB., Mar. 24, 1933, at 1. The grandfather would die three years later. *James W. Stevens*, *supra* note 30.

<sup>68</sup> *E. J. Stevens Found Guilty of Theft*, N.Y. TIMES, Oct. 15, 1933, at 30; *Jury Convicts Ernest J. Stevens*, CHI. TRIB., Oct. 15, 1933, at 1. Ernest's testimony in his own defense had failed to sway jurors in his favor. *Stevens Paints Rosy Business Vision for Jury*, CHI. TRIB., Oct. 13, 1933, at 1.

bail pending appeal of his conviction and sentence of one to ten years in prison.<sup>69</sup> The next October, a seven-page judgment of the Illinois Supreme Court fully and unanimously exonerated John's father.<sup>70</sup> "We are not commending the loans to the hotel company as sound investment," the opinion stated, and then continued: "It is a far cry from a mistake in investment made in good faith to a felonious, fraudulent investment made for the purpose of converting the funds of the lender to the use of the accused. There is here no evidence of fraudulent intent."<sup>71</sup> Therefore, the state's seven justices concluded, "We are of the opinion that the record does not justify the verdict of guilty."<sup>72</sup> Later that month, the Century of Progress World's Fair, and with it Ernest J. Stevens's Red Lion Inn, closed for the last time.<sup>73</sup>

Throughout the family turmoil of his teen years, John applied himself to his studies. Moving from the University of Chicago Laboratory School to the university itself, he listened as two professors, the renowned scholars Mortimer Adler and Robert Hutchins, debated whether the United States should come to the aid of England in its fight against Nazi Germany.<sup>74</sup> He was graduated Phi Beta Kappa and began postgraduate work in English. At a dean's urging, Stevens took up the study of cryptography; that learning led him away from the study of literature, toward a global armed conflict, and eventually, into a career in the law.<sup>75</sup>

The career continues. In 2009 Stevens completed his thirty-third full Term. He is the second-oldest Justice ever to serve on the Supreme Court.<sup>76</sup> He had begun a half-decade of service as a federal appellate judge in Chicago in 1970, one year after leading a special corruption investigation that forced the resignation of two Justices of the Illinois

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<sup>69</sup> *E. J. Stevens Sentenced*, N.Y. TIMES, Nov. 28, 1933, at 5.

<sup>70</sup> *People v. Stevens*, 193 N.E. 154 (Ill. 1934). The decision was rendered on October 22, 1934; the reversal of conviction became final on December 13 of the same year, when the Illinois Supreme Court denied the state's petition for rehearing. *Id.* at 154.

<sup>71</sup> *Id.* at 160.

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

<sup>73</sup> *See Great Fair Will End Tonight*, CHI. TRIB., Oct. 31, 1934, at 1.

<sup>74</sup> *See John Paul Stevens, Learning on the Job*, 74 FORDHAM L. REV. 1561, 1561 (2006) [hereinafter Stevens, *Learning*].

<sup>75</sup> *See MANASTER, supra* note 26, at 38; *Biographical Data, supra* note 48, at lv.

<sup>76</sup> *Family and Dignitaries See Stevens Join Court*, N.Y. TIMES, Dec. 20, 1975, at 25 (describing swearing-in ceremony from day before); Mark Sherman, *Another Justice Sits out Another Case*, FOXNEWS.COM, Apr. 23, 2008, [http://www.usatoday.com/news/washington/2008-04-23-1641911495\\_x.htm](http://www.usatoday.com/news/washington/2008-04-23-1641911495_x.htm) (naming Oliver Wendell Holmes, Jr., who "was 56 days shy of his 91st birthday when he retired," the oldest).

Supreme Court.<sup>77</sup> That high-profile assignment capped twenty-two years in the practice, most of them as a name partner in the litigation firm of Rothschild, Stevens, Barry & Myers.<sup>78</sup> Cases included a successful constitutional challenge to a state-imposed divorce delay, a tort suit filed for an injured college football star, and a pro bono victory on behalf of a defendant convicted of murder.<sup>79</sup> Stevens earned a reputation for antitrust expertise: he argued one antitrust case before the U.S. Supreme Court, taught antitrust as an adjunct law professor at Northwestern and Chicago, analyzed antitrust in professional baseball for a congressional subcommittee, and was a member of the Attorney General's National Committee to Study the Antitrust Laws.<sup>80</sup> Stevens's own law studies had sparked his interest in the subject; indeed, Stanley L. Temko, Stevens's co-clerk in the Rutledge chambers, distinctly remembered the delight Stevens took in his work on an antitrust case during his year as a Supreme Court clerk.<sup>81</sup>

Antitrust was by no means the only issue on the docket for October Term 1947, however. National security questions loomed large as the end of World War II gave way to the birth of the Cold War.<sup>82</sup> Scrutiny

<sup>77</sup> 2 *Illinoisans O.K.'d as Judges by Senate*, CHI. TRIB., Oct. 9, 1970, at 8. The inquiry and its aftermath are detailed in MANASTER, *supra* note 26.

<sup>78</sup> See Amann, *Stevens*, *supra* note 5, at 1592-93 (describing Stevens's post-clerkship position as associate in Chicago firm now called Jenner & Block); *People and Events*, CHI. TRIB., July 18, 1952, at B7 (announcing opening of firm).

<sup>79</sup> See Johnson Kanady, *Rules Divorce "Cooling Off" Law Invalid*, CHI. TRIB., Mar. 18, 1954, at 7 (reporting on *People ex rel. Christiansen v. Connell*, 118 N.E.2d 262 (Ill. App. Ct. 1954)); *William O'Connor of Notre Dame Sues All-Star Sponsors*, CHI. TRIB., Aug. 2, 1949, at A4; *infra* text accompanying notes 209-13 (discussing *People v. La Frana*, 122 N.E.2d 583, 583 (Ill. 1954)).

<sup>80</sup> See *United States v. Borden Co.*, 370 U.S. 460, 460 (1962) (naming Stevens as advocate for respondent Bowman Dairy Co. in unsuccessful effort to persuade Court to affirm dismissal below of federal antitrust action); *Biographical Data*, *supra* note 48, at lv; McFadden, *supra* note 48; see also John Paul Stevens, *Random Recollections*, 42 SAN DIEGO L. REV. 269, 270 (2005) [hereinafter Stevens, *Random*] (recalling 1953 antitrust committee); John Paul Stevens, *Tom Fairchild: Friend and Colleague*, 2007 WIS. L. REV. 43, 43 n.2 (referring to work on 1952 subcommittee).

<sup>81</sup> Interview with Stanley L. Temko, Esq. in Wash., D.C. (Oct. 1, 2007) [hereinafter 10/1/07 Temko Interview].

<sup>82</sup> Amann, *Stevens*, *supra* note 5, at 1586-99 (discussing national security and Rutledge period); see also Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 113-76 (2006) (providing further analysis, with particular reference to JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* (2004)); Laura Krugman Ray, *Clerk and Justice: The Ties that Bind John Paul Stevens and Wiley B. Rutledge*, 41 CONN. L. REV. 211, 233, 243-46, 257-60 (2008). See generally Joseph T. Thai, *The Law Clerk Who Wrote Rasul v. Bush: John Paul Stevens's Influence from World War II to the War on Terror*, 92 VA. L. REV. 501 (2006).



of how states administered criminal justice continued.<sup>83</sup> In point of fact, the Court gave close scrutiny to many aspects of life in postwar America. One of the Rutledge clerks' first assignments involved the case of J.D. and Ethel Shelley, a Missouri couple against whom white neighbors had invoked a private covenant barring "people of the Negro or Mongolian Race."<sup>84</sup> "Rutledge very much wanted to be sure he could participate. But he had a restrictive covenant on his house," Stevens recalled. "He must have felt the decision might have gone the other way."<sup>85</sup> Stevens and his co-clerk thus were dispatched to the local records office to find a way for Rutledge to sit on the case; in the end, Rutledge joined two others in recusal but the remainder of the Court ruled unanimously for the Shelleys.<sup>86</sup> Another case that animated Rutledge involved Fred Oyama, a California-born boy whom the state sought to deprive of farmland just because of his Japanese ancestry.<sup>87</sup> Rutledge joined a concurrence that said the state's action did "violence to the high ideals of the Constitution of the United States and the Charter of the United Nations," stood as "an unhappy facsimile, a disheartening reminder, of the racial policy pursued by those forces of evil whose destruction recently necessitated a devastating war," and thus constituted "racism in one of its most malignant forms."<sup>88</sup> Also in this line was the case of Ada Lois Sipuel, the young woman who the Court said could not be excluded from Oklahoma's public law school just because of her African ancestry.<sup>89</sup>

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<sup>83</sup> See, e.g., *Marino v. Ragen*, 332 U.S. 561 (1947) (per curiam) (reversing murder conviction on account of Illinois's flawed postconviction relief process). For further discussion, see *In re Oliver*, 333 U.S. 257, 258, 278 (1948) (reversing contempt conviction summarily imposed by Michigan judge acting as "one-man grand jury"); Amann, *Stevens*, *supra* note 5, at 1590-93.

<sup>84</sup> *Shelley v. Kraemer*, 334 U.S. 1, 5 (1948) (quoting covenant); see LORENZO JOHNSTON GREENE ET AL., *MISSOURI'S BLACK HERITAGE* 163-65 (rev. ed. 1993) (discussing Shelleys).

<sup>85</sup> Interview with John Paul Stevens, Assoc. Justice, U.S. Supreme Court, in Wash., D.C. (Mar. 29, 2007) [hereinafter 3/29/07 Stevens Interview].

<sup>86</sup> *Id.*; see *Shelley*, 334 U.S. at 23 (noting that Justice Rutledge, along with Justices Stanley Reed and Robert H. Jackson, did not participate); see also *Hurd v. Hodge*, 334 U.S. 24, 35 (1948) (same in companion case involving District of Columbia). Rutledge's legacy in the matter is mixed; as Stevens's co-clerk pointed out, the Justice had purchased a home with such a covenant even though unencumbered housing could be had in other neighborhoods. 10/1/07 Temko Interview, *supra* note 81.

<sup>87</sup> *Oyama v. California*, 332 U.S. 633 (1948).

<sup>88</sup> *Id.* at 673 (Murphy, J., concurring, joined by Rutledge, J.); see *id.* at 640 (majority opinion) (Vinson, C.J.) (holding that state's application of its Alien Land Law deprived petitioner, a child born in the United States to Japanese citizens, "of the equal protection of California's laws and of his privileges as an American citizen").

<sup>89</sup> See *supra* text accompanying notes 1-9 (discussing *Sipuel* litigation).

Matters like these demanded careful consideration of the Constitution's equality principle — a principle that one clerk, John Paul Stevens, would consider anew as a member of the Court.

## II. A JURISPRUDENCE OF EQUALITY

To detail every one of Stevens's judicial opinions on equality would consume volumes, and this Article attempts nothing of the sort. Nor does it try to replicate more comprehensive studies of Justice Stevens's treatment of the Equal Protection Clause.<sup>90</sup> Rather, in this Part, this Article discusses a select few opinions in order to track what Stevens once called a “tortuous” path of jurisprudence respecting equality.<sup>91</sup>

By the time John Paul Stevens arrived at the Supreme Court in 1975, the rule against de jure racial segregation was entrenched. Expounding on a view like that which Stevens advanced confidentially in his 1948 clerk's memorandum,<sup>92</sup> the Court in 1954 had unanimously proclaimed that all state-mandated segregation is “inherently unequal,” in violation not only of the Equal Protection Clause of the Fourteenth Amendment, but also of the equal protection component subsumed within the Due Process Clause of the Fifth Amendment.<sup>93</sup>

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<sup>90</sup> E.g., Daniel A. Farber, *Backward-Looking Laws and Equal Protection: The Case of Black Reparations*, 74 *FORDHAM L. REV.* 2271 (2006); James E. Fleming, “*There Is Only One Equal Protection Clause*”: *An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 *FORDHAM L. REV.* 2301 (2006); Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 *FORDHAM L. REV.* 2393 (2006); Siegel, *supra* note 13, at 929-37; Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 *HARV. L. REV.* 1146 (1987).

<sup>91</sup> *Wygant v. Bd. of Educ.*, 476 U.S. 267, 314 n.7 (Stevens, J., dissenting). As did Stevens's reference, the path followed in this Article primarily concerns affirmative action programs; for reasons of space, the Article does not explore Justice Stevens's treatment of equality, race, and the law in areas such as criminal justice, one example of which may be found in *McCleskey v. Kemp*, 481 U.S. 279, 366-67 (1987) (Stevens, J., joined by Blackmun, J.). Nor does it examine in any depth treatment of groups other than African Americans, an omission made particularly obvious by the 2009 arrival of Sonia Sotomayor as the Court's first Latina Justice. See Jeff Bleich et al., *Justice John Paul Stevens: A Maverick, Liberal, Libertarian, Conservative Statesmen on the Court*, *OR. ST. B. BULL.*, Oct. 2007, at 26 (writing “that the ‘Stevens standard’” respecting the Equal Protection Clause “has proven to be very sensitive to claims of discrimination as the role of women in society has changed”); David G. Savage, *Sotomayor Is Sworn in as a Justice*, *L.A. TIMES*, Aug. 9, 2009, at 3; John Paul Stevens, *Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida, August 3, 1996*, 2 *ST. JOHN'S J. LEGAL COMMENT.* 21, 23-24 (1996) (touching on his jurisprudence respecting women).

<sup>92</sup> *JPS Fisher Mem.*, *supra* note 5.

<sup>93</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (interpreting, in case challenging state-governed public schools, U.S. CONST. amend. XIV (“nor shall any

Although communities across the country continued to resist the consequent order to desegregate with “all deliberate speed,”<sup>94</sup> the Court itself remained in agreement that desegregation must be dismantled, even by measures as controversial as the busing of children to achieve integration of schools once subjected to de jure segregation.<sup>95</sup>

#### A. Fullilove v. Klutznick

There was no agreement, however, on what some called “affirmative action” and others called “reverse discrimination,”<sup>96</sup> that is, on measures aimed at giving minorities access to sectors from which they were excluded even in the absence of state-mandated segregation. A salient example involved a 1978 challenge to race-based admissions quotas then used at the University of California, Davis, School of Medicine.<sup>97</sup> Rather than broach whether the Constitution forbade such quotas, Stevens and three other Justices had preferred to rest their decision on statutory grounds.<sup>98</sup> Thus, it was not until the 1980 case of *Fullilove v. Klutznick* that all nine Justices squarely confronted the constitutionality of affirmative action.<sup>99</sup>

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State . . . deny to any person within its jurisdiction the equal protection of the laws”), to require express overruling of approval of de jure segregation of “equal but separate” facilities in *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896) (quoting Louisiana statute under review)); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (stating in companion case to *Brown* that “the concepts of equal protection and due process . . . are not mutually exclusive,” and holding that segregation of federally governed schools in Washington, D.C., violated U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law”)).

<sup>94</sup> *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955). On resistance, see generally Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641 (1997); Michael J. Klarman, *Brown at 50*, 90 VA. L. REV. 1613 (2004); Kevin M. Kruse, *The Paradox of Massive Resistance: Political Conformity and Chaos in the Aftermath of Brown v. Board of Education*, 48 ST. LOUIS U. L.J. 1009 (2004).

<sup>95</sup> See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30 (1971) (approving busing remedy in unanimous decision).

<sup>96</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 413 (1978) (Stevens, J., concurring in judgment in part and dissenting in part) (referring disjunctively to both terms).

<sup>97</sup> *Bakke*, 438 U.S. at 265.

<sup>98</sup> See *id.* at 408-21 (Stevens, J., concurring in judgment in part and dissenting in part, joined by Burger, C.J., Stewart & Rehnquist, JJ.). The rest of the Court divided on how to interpret the Constitution in the instant case. See *id.* at 269-324 (majority opinion) (Powell, J.); *id.* at 324-408 (Brennan, J., concurring in judgment in part and dissenting in part, joined by White, Marshall & Blackmun, JJ.).

<sup>99</sup> *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

H. Earl Fullilove, a white man from New York, and other contractors had objected to a 1977 statute requiring state and local governments to set aside ten percent of four billion dollars in federal public works funds for “minority business enterprises,” firms in which at least fifty-one percent of stock was held by “citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.”<sup>100</sup> A fractured majority of the Court concluded that the Constitution permitted Congress “to accomplish the objective of remedying the present effects of past discrimination” by such means.<sup>101</sup> Three Justices disagreed. The dissent of Justices Potter Stewart and William H. Rehnquist declared, “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>102</sup> Thus having seized the mantle of the Justice whose lone opposition to a separate-but-equal law in 1896 was vindicated by the full Court in 1954, they posited a doctrine of equality according to which Congress’s race-conscious set-aside statute was no different from the race-based separate-but-equal statutes that the Court had outlawed in *Brown*.<sup>103</sup>

Stevens’s solo dissent in *Fullilove* started with a quite different framing of the provision, as a gift of “monopoly privileges in a \$400 million market for a class of investors defined solely by racial characteristics.”<sup>104</sup> A sovereign’s monopoly grant typically spawned “high prices and shoddy workmanship” as well as “animosity and discontent,” and the program under review invited those problems, he

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<sup>100</sup> Public Works Employment Act of 1977, § 1093(f)(2), Pub. L. 95-28, 91 Stat. 116 (codified at 42 U.S.C. § 6705(f)(2) (Supp. II 1976)), *quoted in Fullilove*, 448 U.S. at 453-54; *see* TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 157 (2004) (describing petitioner Fullilove).

<sup>101</sup> *Fullilove*, 448 U.S. at 470 (plurality opinion) (Burger, C.J., joined by White & Powell, JJ.); *see id.* at 495-517 (Powell, J., concurring) (agreeing with judgment but calling for clearer standard of review). Three Justices agreed “that the consideration of race is relevant to remedying the continuing effects of past racial discrimination,” but argued that something less than the strictest level of scrutiny ought to apply. *Id.* at 517-22 (Marshall, J., concurring in judgment, joined by Brennan & Blackmun, JJ.).

<sup>102</sup> *Id.* at 522 (Stewart, J., dissenting, joined by Rehnquist, J.) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

<sup>103</sup> *See id.* at 523-33 (Stewart, J., dissenting, joined by Rehnquist, J.).

<sup>104</sup> *Id.* at 532 (Stevens, J., dissenting). On the Justice’s penchant for writing separately, *see* Amann, *Stevens, supra* note 5, at 1575 (referring to experience as special investigator into Illinois Supreme Court corruption); *see also* Justice John Paul Stevens, Assoc. Justice, U.S. Supreme Court, Remarks at the Ninth Circuit Judicial Conference, Honolulu, Haw. (July 19, 2007) (recalling same investigation, and stating that “I think the public is entitled to know when the Court is not unanimous and when there are arguments for the other side,” so that “if I don’t agree with the majority, I think I have an obligation to explain that I don’t agree and explain why”).

wrote.<sup>105</sup> Stevens had entertained the Stewart-Rehnquist notion of “color-blindness” when interpreting a civil rights statute two years earlier.<sup>106</sup> But in *Fullilove* he parted company with those other dissenters on this point; he stated that he was “not convinced” that the Constitution absolutely forbids classifications based on race.<sup>107</sup> Recalling an account of “tragic class-based discrimination” given by Thurgood Marshall, a member of the Court since 1967, Stevens wrote, “I assume that the wrong” done to African Americans “would constitutionally justify an appropriate classwide recovery.”<sup>108</sup> In Stevens’s view, however, the instant program did not provide a properly tailored remedy for past discrimination.<sup>109</sup> Nor did it help with “facilitating and encouraging the participation by minority business enterprises in the economy,” an interest Stevens deemed “unquestionably legitimate.”<sup>110</sup>

Even as he allowed in *Fullilove* that some race-conscious programs might be permissible, Stevens evinced much discomfort. He found similarity between the basing of grants on race, a trait acquired at birth, and the bestowing of “titles of nobility,” the latter expressly prohibited by the Constitution.<sup>111</sup> At risk were both the promise that all are “‘created equal’ in the eyes of the law” and “our commitment to the proposition that the sovereign has a fundamental duty to govern impartially.”<sup>112</sup> Race-based classifications not only are irrational, but also may harm “the entire body politic,” Stevens warned.<sup>113</sup> “If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship

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<sup>105</sup> *Fullilove*, 448 U.S. at 532-33, 545 (Stevens, J., dissenting).

<sup>106</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 415-16, 415 n.16, 416 n.19 (1978) (Stevens, J., concurring in judgment in part and dissenting in part, joined by Burger, C.J., Stewart & Rehnquist, JJ.) (identifying mentions of “colorblind” purpose in legislative history, including one that embraced declaration in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

<sup>107</sup> *Fullilove*, 448 U.S. at 548 (Stevens, J., dissenting).

<sup>108</sup> *Id.* at 537 (citing *Bakke*, 438 U.S. at 387 (opinion of Marshall, J.)); see Juan Williams, *Marshall’s Law*, in MARSHALL, *supra* note 2, at 140, 154-55 (describing circumstances of Marshall’s 1967 elevation to Supreme Court).

<sup>109</sup> *Fullilove*, 448 U.S. at 537-39 (Stevens, J., dissenting); see *id.* at 544 (“At best, the preference for minority business enterprises is a crude and inadequate response to the evils that flow from discriminatory lending practices.”).

<sup>110</sup> *Id.* at 542-43.

<sup>111</sup> *Id.* at 533, 533 n.1 (citing U.S. CONST., art. I, § 9, cl. 8).

<sup>112</sup> *Id.* at 533 (quoting Declaration of Independence).

<sup>113</sup> *Id.* at 533-34.

Law,” he wrote, and then quoted at length references to blood and race in that Nazi statute’s definitions of who in Germany was a Jew.<sup>114</sup>

Having summoned that loathsome antecedent, Stevens next attacked the definition of who in the United States was entitled to the set-aside grant. Congress had not keyed eligibility to geography or other criteria, he noted, so that someone whose group likely had not suffered discrimination in a particular area — say, “a citizen of Eskimo ancestry . . . in Miami” — nonetheless could benefit.<sup>115</sup> In the legislative history, Stevens found no explanation of how eligible groups came to be included, how all groups came to share equally notwithstanding their different histories, or how one-tenth rather than any other fraction of total funds came to be allotted.<sup>116</sup> What he did find was evidence of “political patronage,” that is, “that there is a group of legislators in Congress identified as the ‘Black Caucus’” which contended that “their constituents were entitled to ‘a piece of the action.’”<sup>117</sup>

#### B. *Wygant v. Jackson Board of Education*

Even as the judgment in *Fullilove* issued in 1980, a new dispute was taking shape. The next year, the school board in Jackson, Michigan, faced with a need to reduce its work force, laid off teachers according to a formula that gave some preference to minority over seniority status.<sup>118</sup> Pink-slipped kindergarten teacher Wendy Wygant and seven others sued.<sup>119</sup> Another fractured majority decided this challenge to affirmative action; however, in this 1986 judgment the Court agreed with the white petitioners and held that that the formula violated the Equal Protection Clause.<sup>120</sup> The principal opinion criticized both of

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<sup>114</sup> *Id.* at 534 n.5 (quoting First Regulation to Reichs Citizenship Law of Nov. 14, 1935, translated in 4 NAZI CONSPIRACY AND AGGRESSION, Doc. No. 1417-PS, at 8-9 (1946)).

<sup>115</sup> *Id.* at 546; see also *id.* at 537 (Stevens, J., dissenting) (“Quite obviously, the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians.”).

<sup>116</sup> *Id.* at 535-36.

<sup>117</sup> *Id.* at 541-42.

<sup>118</sup> See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 270-72 (1986) (detailing prior litigation over formula adopted, “because of racial tension,” in 1972 collective bargaining agreement).

<sup>119</sup> ANDERSON, *supra* note 100, at 190 (describing petitioner Wygant).

<sup>120</sup> *Wygant*, 476 U.S. at 269-84 (plurality opinion) (Powell, J., joined by Burger, C.J., and O’Connor, J.) (concluding that layoff provision was not tailored narrowly enough); *id.* at 284-94 (O’Connor, J., concurring in part in judgment) (arriving at similar conclusion by somewhat different analysis); *id.* at 294-95 (White, J.,

the interests the school board asserted: the first, that of “providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination,” was judged “too amorphous”; and the second, “to remedy prior discrimination,” was said to fail for lack of “sufficient evidence to justify the conclusion that there has been prior discrimination.”<sup>121</sup> Yet in the end, the validity of either interest mattered little because the means chosen — laying off senior, nonminority teachers in order to keep less senior, minority teachers — could never satisfy the Constitution.<sup>122</sup> The principal opinion stated, “Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.”<sup>123</sup> In so doing, it directly quoted Stevens’s dissent in *Fullilove*.

Stevens, however, reached a different result. He too quoted his dissent in *Fullilove*, reiterating that the Court has “a special obligation” to ensure that race-conscious classifications both served “a valid public purpose” that “transcends the harm,” and were the product of “procedural safeguards” that “play a vital part in preserving the impartial character of the legislative process.”<sup>124</sup> Yet in *Wygant*, unlike in *Fullilove*, Stevens concluded that the program met these requirements.<sup>125</sup> In *Wygant* he did restate the view that in many situations — in awarding child custody, for example — governmental consideration of race is “utterly irrational” and even “pernicious.”<sup>126</sup> But he stressed that this need not always be so.<sup>127</sup> The layoff formula

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concurring in judgment) (rejecting notion that any program endeavoring to “maintain a certain proportion of minority teachers” by discharging nonminorities ever could be constitutional).

<sup>121</sup> *Id.* at 275-77 (plurality opinion).

<sup>122</sup> *Id.* at 278 (stating that “we need not consider the question” of sufficiency of evidence because “the layoff provision was not a legally appropriate means of achieving even a compelling purpose”).

<sup>123</sup> *Id.* at 280 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

<sup>124</sup> *Id.* at 314, 317 n.10 (Stevens, J., dissenting) (quoting *Fullilove*, 448 U.S. at 548-49 (Stevens, J., dissenting)).

<sup>125</sup> See *id.* at 315-19. Three other Justices agreed that school officials had acted constitutionally. *Id.* at 295-312 (Marshall, J., dissenting, joined by Brennan & Blackmun, JJ.).

<sup>126</sup> *Id.* at 313-14 n.6, 317, 317 n.9 (Stevens, J., dissenting) (quoting *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring in judgment) (“utterly irrational”), and citing *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding, in litigation further discussed *infra* note 239, that effects of racial discrimination could not justify depriving white divorcée living with African-American man custody of her daughter)); see *Fullilove*, 448 U.S. at 537 (Stevens, J. dissenting) (“pernicious”).

<sup>127</sup> See *Wygant*, 476 U.S. at 314, 314 n.7 (Stevens, J., dissenting).

under review was valid, Stevens wrote, regardless of whether the school board had discriminated in the past.<sup>128</sup> What mattered was the future: whether the board “has a legitimate interest in employing more black teachers in the future,” that is, whether the layoff formula “advances the public interest in educating children for the future.”<sup>129</sup> For Stevens, the answer was clear:

[O]ne of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous “melting pot” do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only “skin deep”; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.<sup>130</sup>

Stevens advanced two reasons why the “grave loss” Wygant and other laid-off teachers had suffered did not render the formula unconstitutional.<sup>131</sup> First, the formula was the product of a procedurally fair bargaining process between the school board and the union that represented all teachers.<sup>132</sup> Second, the harm to the white petitioners was based on economic conditions and the desire “to preserve the newly integrated character of the faculty,” and not “on any lack of respect for their race, or on blind habit and stereotype.”<sup>133</sup> That the formula aimed to include — to assure a cross-section of groups in the faculty — was pivotal. No less than if a police chief “in a city with a recent history of racial unrest” decided “that an integrated police force could develop a better relationship with the community and thereby do a more effective job,” the decision of the school board to maintain an integrated teaching staff was “consistent with the principle that all men are created equal,” Stevens wrote.<sup>134</sup>

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<sup>128</sup> See *id.* at 313 (declining to “as[k] whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past”).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 315.

<sup>131</sup> See *id.* at 318.

<sup>132</sup> *Id.* at 317-18.

<sup>133</sup> *Id.* at 319.

<sup>134</sup> *Id.* at 314, 316; see *id.* at 316-17 (positing difference between “inclusionary” and “exclusionary” measures).



## C. Adarand Constructors, Inc. v. Peña

Stevens's subsequent applications of that principle varied. Three years after expressing approval in *Wygant* for a layoff formula advantaging minority teachers, Stevens joined a Court majority that struck as unlawful racial discrimination a city plan reserving thirty percent of contract dollars for minority contractors.<sup>135</sup> Then, the following year, he joined a majority that upheld a federal program designed to achieve what Stevens termed the "future benefit" of promoting diversity by reserving some broadcast licenses for minority firms.<sup>136</sup> Five years later, in his 1995 dissent in *Adarand Constructors, Inc. v. Peña*, Stevens professed to welcome a majority's embrace of the "skepticism" he had voiced in *Fullilove*, even as he rejected its use of his earlier opinion in order to establish strict scrutiny as the single standard for reviewing race-conscious programs.<sup>137</sup> Averring that the federal affirmative action program in *Adarand Constructors* was constitutional, Stevens took the majority to task for equating "a decision by the majority to impose a special burden on the members of a minority race" with one "to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority."<sup>138</sup> In his mind the two were patently different:

Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional

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<sup>135</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511-18 (1989) (Stevens, J., concurring in part and in judgment).

<sup>136</sup> *Metro Broad. v. FCC*, 497 U.S. 547, 601 (1990). Stevens further endorsed a colleague's statement, which he had not joined when it was written, that promoting diversity in professional schools was a valid public reason for engaging in affirmative action. See *id.* at 602, 602 n.6 (Stevens, J., concurring) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-19 (1978) (opinion of Powell, J.)). The endorsement presaged Stevens's vote in favor of a race-conscious admissions program at the University of Michigan. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (approving law school plan aimed at attaining diverse student body); cf. *Gratz v. Bollinger*, 539 U.S. 244, 282-91 (2003) (Stevens, J., dissenting, joined by Souter, J.) (arguing that Court should have dismissed challenge to university's undergraduate admissions plan for lack of standing).

<sup>137</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 242 (1995) (Stevens, J., dissenting, joined by Ginsburg, J.).

<sup>138</sup> *Id.* at 243; see *id.* at 259-64 (explaining reasons for concluding program was constitutional).

obligation to “govern impartially” should ignore this distinction.<sup>139</sup>

Stevens would emphasize that distinction again a dozen years later.

D. *Parents Involved in Community Schools v. Seattle School District No. 1*

As in *Brown*, the matter here called *Seattle Schools* in fact concerned more than one of America’s public school districts: at issue were pupil-assignment plans designed to avoid resegregation in two systems, Seattle, Washington, and Louisville, Kentucky.<sup>140</sup> The mother of Joshua Ryan McDonald had sued after school officials refused to let the boy attend kindergarten a mile from his Louisville home, out of fear of “‘an adverse effect on desegregation compliance’” in his assigned school ten miles away.<sup>141</sup> Young Joshua’s plight drew the Court’s attention. “The district concedes it denied his request under the guidelines, which is to say, on the basis of Joshua’s race,” Justice Anthony M. Kennedy wrote in a partial concurrence explaining why he considered both systems’ plans unconstitutional.<sup>142</sup> Although the principal opinion also discussed Joshua, Kennedy declined to join a portion of it that he called “inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection Clause.”<sup>143</sup> Thus did Kennedy retreat from this passage by Chief Justice John G. Roberts, Jr.:

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy

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<sup>139</sup> *Id.* at 243 (quoting but omitting citation to *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976)).

<sup>140</sup> *Seattle Schools*, 551 U.S. 701, 709-11 (2007) (including in caption companion suit against Louisville’s Jefferson County Board of Education); see *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (applying in additional companion case holding in *Brown* to federally run schools); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (listing consolidated cases from several states’ school systems).

<sup>141</sup> *Seattle Schools*, 551 U.S. at 717 (majority opinion) (Roberts, C.J.) (quoting record below). As a case that “illustrated” the complaint of the organization that had brought suit in Seattle, the principal opinion likewise told of dyslexic and hyperactive ninth-grader Andy Meeks, who had been denied assignment to the high school his mother believed best-suited to his needs. *Id.* at 713-14.

<sup>142</sup> *Id.* at 784 (Kennedy, J., concurring in part and in judgment).

<sup>143</sup> *Id.* at 782-83 (Kennedy, J., concurring in part and in judgment); see *id.* at 717, 717 n.8, 719-20 (majority opinion) (Roberts, C.J.) (mentioning Joshua); *id.* at 728 (plurality opinion) (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ.) (same).

burden of demonstrating that we should allow this once again even for very different reasons. . . . The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.<sup>144</sup>

In dissent Stevens deployed words more pointed than those in Kennedy's delicate sidestep. Stevens criticized the use of strict scrutiny to invalidate programs that in his view furthered "the public interest in educating children for the *future*," in a setting by which "children of *all* races benefit from integrated classrooms and playgrounds."<sup>145</sup> Such usage effected "a wooden reading of the Equal Protection Clause," he wrote.<sup>146</sup> Stevens directed even harsher words at the passage just quoted. The first sentence "reminds me of Anatole France's observation: '[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread,'" he wrote.<sup>147</sup> Stevens then attacked the passage's author, to whom he had administered the oath following Rehnquist's death in 2005, for relying on the judgment in *Brown*:

THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, THE CHIEF JUSTICE rewrites the history of one of this Court's most important decisions.<sup>148</sup>

To underscore the depth of his concern, Stevens repeated a charge Roberts had levied earlier that Term to object to the Court's reversal, through an opinion by Stevens, of a Texas death sentence: "It is a familiar adage that history is written by the victors."<sup>149</sup> Stevens went so

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<sup>144</sup> *Id.* at 747-48 (omitting citation to *Brown II*, 349 U.S. 294, 300-01 (1955)).

<sup>145</sup> *Id.* at 799-800, 799 nn. 3-4 (Stevens, J., dissenting) (quoting and citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313, 316 (1986) (Stevens, J., dissenting)). Stevens joined "in its entirety" a lengthy dissent, which he termed "eloquent and unanswerable," yet found it "appropriate to add these words." *Id.* at 798 (Stevens, J., dissenting) (referring to *id.* at 803-69 (Breyer, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.)).

<sup>146</sup> *Id.* at 800.

<sup>147</sup> *Id.* at 799 (Stevens, J., dissenting) (quoting ANATOLE FRANCE, *LE LYS ROUGE* (THE RED LILY) 95 (Winifred Stephens trans., 6th ed. 1922)).

<sup>148</sup> *Id.*; see Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASH. POST, Sept. 30, 2005, at A1; Linda Greenhouse, *Chief Justice Rehnquist Dies at 80*, N.Y. TIMES, Sept. 4, 2005, at A1; cf. Warren Richey, *The Quiet Ascent of Justice Stevens*, CHRISTIAN SCI. MONITOR, July 9, 2004, at 1 (offering account of Stevens's role on Court in years immediately preceding Rehnquist's passing).

<sup>149</sup> *Seattle Schools*, 551 U.S. at 799 (Stevens, J., dissenting) (quoting *Brewer v.*

far as to declare that “no Member of the Court that I joined in 1975” — including, of course, the recently departed Rehnquist — “would have agreed with today’s decision.”<sup>150</sup>

### III. A NARRATIVE OF EQUALLY IMPARTIAL GOVERNMENT

The Court that Stevens joined in 1975 had sustained a withering attack not long before. Accompanying an article entitled “The Supreme Court: The Last Plantation” was a drawing of a portico framed by Doric columns.<sup>151</sup> All about were fan-wielding guards, a window washer, a gardener, a carpenter, a washerwoman, and, at the bottom of a staircase, messengers. All black, they served the men posing on the porch: nine Justices, each clad in the white linen suit of what then was called a Southern gentleman. At the center of the besuited group was Chief Justice Warren E. Burger, a mint julep poised on his lap. Behind him stood Thurgood Marshall: the first African-American Justice seemed complacent as he held a lighted cigar at a jaunty angle.<sup>152</sup> Inside appeared a photograph of Justice Harry A. Blackmun accepting “an assist from the court’s robing attendant,” an African-American man who looked no younger than the Justice he served.<sup>153</sup> In six tabloid pages, author Nina Totenberg, to this day a Court reporter,<sup>154</sup> delivered a scathing critique of race relations. Totenberg reported that all the Court’s secretaries were white, and that “next term will see the second black law clerk in the court’s history.”<sup>155</sup> She laid blame on Justice William O. Douglas for the firings of a black laborer who dated Douglas’s white law clerk and of a black messenger who refused to serve at Douglas’s house party.<sup>156</sup> An attorney told her that employees had little recourse, not only because

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Quarterman, 127 S. Ct. 1706, 1720 (2007) (Roberts, C.J., dissenting)).

<sup>150</sup> *Id.* at 803.

<sup>151</sup> See Nina Totenberg, *The Supreme Court: The Last Plantation*, NEW TIMES, July 26, 1974, at 26 (including drawing described in text).

<sup>152</sup> See *id.* at 27.

<sup>153</sup> *Id.* at 29.

<sup>154</sup> See Biography of Nina Totenberg, NPR, <http://www.npr.org/templates/story/story.php?storyId=2101289> (last visited July 1, 2009) (stating that National Public Radio hired Totenberg in 1975 — a year after publication of the article described in the text — and that she has covered the Court for NPR ever since).

<sup>155</sup> Totenberg, *supra* note 151, at 30.

<sup>156</sup> *Id.* at 26, 28. The dating couple, whose story also is told in BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 243-44 (1979), later married. Totenberg, *supra* note 151, at 28 (reporting further that “Frankfurter called” the messenger and “begged him not to press the case,” and that the messenger was reinstated as an employee of “the marshal’s office, with his salary reduced one notch”).

civil rights statutes did not cover the Court, but also because, as he put it, “It’s very scary to go after the chief justice through the judicial system.”<sup>157</sup> Totenberg quoted an unnamed “white court employee” who said: “I was really shocked when I came here. The way this place is run reminds you of an Atlanta plantation in the 19th century.”<sup>158</sup> She wrote too of a “well-educated black messenger” who, when refused a promotion in 1971, was told that the position to which he aspired “was a white man’s job”; he said: “Those words that are on this building — ‘equal justice under the law,’ they don’t apply to us here inside. The justices are liberal with everyone else, but not here in their own backyard.”<sup>159</sup>

#### A. To the Court

It was to that “backyard” that John Paul Stevens, who would go on to write of “equal justice under law,” arrived to replace Douglas.<sup>160</sup> Stevens hired a young woman who had been working on the staff of another Chicago judge.<sup>161</sup> Nellie A. Pitts thus became the first African American to serve as a Justice’s chief secretary; indeed, she was one of the first African-American women to hold a position at the Court much higher than that of seamstress.<sup>162</sup>

The Court in fact had proved “liberal” on the issue of public school desegregation. Most of Stevens’s new colleagues had been part of the unanimous Court that in 1970 approved busing as a means of desegregation.<sup>163</sup> Of the Justices subsequently appointed by Richard M. Nixon, a President opposed to busing,<sup>164</sup> even Rehnquist would allow

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<sup>157</sup> Totenberg, *supra* note 151, at 28 (quoting Robert Wallace, member of Washington Lawyers Committee for Civil Rights Under Law); *see id.* (noting that the Court “is exempt from the Civil Service Act” and “the Civil Rights Act of 1964”). Unlike this quotation, much in Totenberg’s article was anonymous and anecdotal, a deficiency that she attributed to official stonewalling. *See id.*

<sup>158</sup> *Id.* at 26.

<sup>159</sup> *Id.*

<sup>160</sup> *See supra* text accompanying note 18 (quoting Stevens’s invocation of “equal justice under law”); *see also* McFadden, *supra* note 48 (reporting on President Gerald R. Ford’s choice of Stevens to succeed Douglas).

<sup>161</sup> Interview with Nellie A. Pitts in Virginia Beach, Va. (Apr. 8, 2008) [hereinafter 4/8/08 Pitts Interview].

<sup>162</sup> *See* Totenberg, *supra* note 151, at 30. Pitts, who would work as Stevens’s chief secretary until her retirement in 2006, recalled that by the time she arrived another African-American woman, Emily Potter, was working as an assistant secretary in Justice Marshall’s chambers. 4/8/08 Pitts Interview, *supra* note 161.

<sup>163</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

<sup>164</sup> *See* James M. Naughton, *Nixon Disavows H.E.W. Proposal on School Busing*, N.Y.

that the Constitution permitted such a measure.<sup>165</sup> But agreement broke down as litigation moved beyond de jure segregation in education to other sectors and to less overt forms of discrimination.<sup>166</sup> The Court agreed not at all on whether and to what extent the law permitted the government to give minorities preference in academia or in employment.<sup>167</sup> Its members the products of a profession that included almost no persons of color,<sup>168</sup> the Court on the whole remained conservative with regard to issues of race.

The newest arrival was, of course, a product of that same profession. Stevens had been a leader in his bar association when Nixon tapped him in 1970 to become a federal appellate judge.<sup>169</sup> At the time Stevens had studied law, schools like Northwestern admitted few African-American students.<sup>170</sup> When he had worked at the Supreme Court, all

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TIMES, Aug. 4, 1971, at 1.

<sup>165</sup> *Bustop, Inc. v. L.A. Bd. of Educ.*, 439 U.S. 1380, 1383 (1978) (opinion in chambers) (Rehnquist, J.), *quoted in Seattle Schools*, 551 U.S. 701, 824 (2007) (Breyer, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.), and *discussed id.* at 802-03 (Stevens, J., dissenting). Although this Article treats Rehnquist's views on school desegregation only in relation to those of Stevens, deserving mention is recent scholarship such as Brad Snyder, *What Would Justice Holmes Do (WWJHD)?: Rehnquist's Plessy Memo, Majoritarianism, and Parents Involved*, 69 OHIO ST. L.J. 873 (2008), which aligns Rehnquist's analysis in his 1952 clerk's memorandum, not with the majority, but rather with the dissenters in *Seattle Schools*. See *supra* notes 10-11 and accompanying text.

<sup>166</sup> See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973) (splintering on question of whether segregation in Denver public schools was intentional); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (dividing 7-2 on whether Constitution reaches discrimination in housing when practiced by private individuals).

<sup>167</sup> The judgment in *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (per curiam), indicated fissures that would become apparent in later decisions, discussed *supra* text accompanying notes 96-150. Among those in *DeFunis* who voted against dismissing as moot the underlying challenge to affirmative action was Douglas, who filed a long opinion insisting that such programs violate the Constitution. *Id.* at 320-48 (Douglas, J., dissenting). All other Justices, including the other three dissenters, kept silent. See *id.* at 348-50 (Brennan, J., dissenting, joined by Douglas, White & Marshall, JJ.).

<sup>168</sup> Statistics for this period indicate that in 1982 — seven years after Stevens joined the Court — nonminorities received more than 90 percent of all J.D. degrees, while African Americans earned 4.2 percent, Hispanics 2.3 percent, and Asians 1.3 percent. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *DIVERSITY IN LAW FIRMS 12-14* (2003), available at <http://www.eeoc.gov/stats/reports/diversitylaw/lawfirms.pdf> [hereinafter EEOC].

<sup>169</sup> See MANASTER, *supra* note 26, at 37 (describing Stevens's Chicago Bar Association activities); John Paul Stevens, *Bar Association Defends Post Conviction Act*, CHI. TRIB., Oct. 18, 1952, at 11 (publishing letter Stevens wrote on behalf of Association's Public Information Committee).

<sup>170</sup> See FLORENCE HAMLISH LEVINSON, *HAROLD WASHINGTON: A POLITICAL BIOGRAPHY* 67-71 (1983) (stating that Washington had been the only African American in

law clerks were white men, and though lawyers like Thurgood Marshall could argue before the Court, they could not eat in the cafeteria.<sup>171</sup> At the time of his Supreme Court appointment, Stevens lived in the nearly all-white suburb of Burr Ridge;<sup>172</sup> his Chicago practice, like his occasional forays into public service, had focused largely on corporate matters.<sup>173</sup> As Stevens himself recalled much later, he had little acquaintance with African-American attorneys.<sup>174</sup>

Although whites and blacks have populated Chicago since its founding, the city long has been one of America's most segregated.<sup>175</sup> When Stevens was a boy, the South Side included many African-American neighborhoods, some like the one described in the contemporaneous novel *Native Son*.<sup>176</sup> Stevens's own South Side neighborhood of Hyde Park stood apart as an enclave of whites living next to the University of Chicago.<sup>177</sup> The future Justice attended the university's Laboratory School, then all white, and the servants at the boy's home were of Scandinavian descent.<sup>178</sup> Matters were much the same in the commercial center where the Stevens family had made its fortune. On the margins of downtown, Chicago's post-World War I population boom had given rise to places where people of different races mixed openly.<sup>179</sup> Within the Loop, however, establishments

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Northwestern's Class of 1952).

<sup>171</sup> Interview with Judge Louis H. Pollak in Phila., Pa. (Jan. 4, 2008) [hereinafter 1/4/08 Pollak Interview] (recalling treatment of African-American attorneys in October Term 1948, when Pollak succeeded Stevens as Rutledge's clerk); see Green, *supra* note 82, at 138, 138 n.167 (writing of discrimination in Capitol cafeteria); Rosen, *supra* note 50, at 6 (reproducing photograph of Spring Term 1948 law clerks).

<sup>172</sup> McFadden, *supra* note 48; see BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION, VOL. I: CHARACTERISTICS OF THE POPULATION, PT. 15, ILLINOIS, SEC. 1 (1973), available at [http://www2.census.gov/prod2/decennial/documents/1970a\\_ill-01.pdf](http://www2.census.gov/prod2/decennial/documents/1970a_ill-01.pdf) (stating that in 1970, 1,637 persons lived in Burr Ridge, all but ten of whom were white).

<sup>173</sup> See *supra* text accompanying notes 78-80 (discussing this work).

<sup>174</sup> 10/2/07 Stevens Interview, *supra* note 43.

<sup>175</sup> See David M. Cutler et al., *The Rise and Decline of the American Ghetto*, 107 J. POL. ECON. 455, 457 (1999) (stating that for a hundred years Chicago has ranked among the top five most segregated U.S. cities); see also RYDELL, *supra* note 53, at 166 (noting that "Jean Baptiste Point DuSable, a black Frenchman," was "Chicago's first settler").

<sup>176</sup> RICHARD WRIGHT, *NATIVE SON* (Perennial Library 1986) (1940).

<sup>177</sup> 10/2/07 Stevens Interview, *supra* note 43.

<sup>178</sup> *Id.*

<sup>179</sup> See Scott Newman, *Chicago's Loop in the Early Twentieth Century*, JAZZ AGE CHICAGO: URBAN LEISURE FROM 1893 TO 1945, Aug. 1, 1998, <http://chicago.urban-history.org/int/intro04.shtml>.

employed and catered to whites.<sup>180</sup> Separation was not imposed by law. Crossing the unwritten line nonetheless carried social consequences, as vividly depicted in *Passing*, a 1929 novel that opens with a chance meeting between two women with African ancestry, each presenting herself as white in order to be served in the restaurant of an elegant Chicago hotel.<sup>181</sup> Conflict erupted on occasion. In the 1930s, the NAACP complained about how African Americans fared at the Century of Progress World's Fair.<sup>182</sup> Deadly race riots had roiled Chicago in 1919, less than a year before Stevens's birth.<sup>183</sup> Unrest likewise was evident in the decade before Stevens became a judge: Reverend Martin Luther King, Jr., waged a contested campaign for fair housing in Chicago;<sup>184</sup> a predawn police raid on a Chicago apartment left two Black Panthers dead and four wounded;<sup>185</sup> and Chicago Democratic Convention riots occurred against the backdrop of the hotel the Stevens family had built.<sup>186</sup> Stevens himself appears to have made no public comment on the events of the Sixties, with the exception of a wry letter about a controversial new work of art.<sup>187</sup>

<sup>180</sup> 10/2/07 Stevens Interview, *supra* note 43 (recalling no African Americans who worked at the Stevens Hotel, and adding that "in the '30s jobs were scarce"); see Newman, *supra* note 179; cf. Payne, *supra* note 31 (dating stepped-up hiring of African Americans by the Chas. A. Stevens department store to World War II).

<sup>181</sup> NELLA LARSEN, *PASSING* (Penguin Books 1997) (1929). Larsen placed the scene in a hotel modeled after the Drake, *id.* at 13 n.2, a competitor of the Stevens; both hotels now are owned by the Hilton Co. See ALLEGRINI, *supra* note 30, at 82, 109.

<sup>182</sup> See RYDELL, *supra* note 53, at 165-71 (describing how initial enthusiasm of African-American leaders gave way to concern respecting the lack of jobs for African Americans, the absence of exhibits to African Americans, and refusals to serve African-American fairgoers).

<sup>183</sup> See THE CHICAGO COMMISSION ON RACE RELATIONS, *THE NEGRO IN CHICAGO: A STUDY OF RACE RELATIONS AND A RACE RIOT* (1922) (describing 1919 riots, in report of later-appointed inquiry commission).

<sup>184</sup> See ALEXANDER POLIKOFF, *WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO 40-47* (Nw. Univ. Press 2006) (describing King's 1966 Chicago campaign).

<sup>185</sup> See John Kifner, *Police in Chicago Slay 2 Panthers*, N.Y. TIMES, Dec. 5, 1969, at 1. Stevens was among those proposed to lead an inquiry into the raid. *U.S. Opposes Plea for Data of Panther Raid Jury*, CHI. TRIB., June 17, 1970, at 10. Nothing came of this, however; by then Stevens was a candidate for a federal judgeship. See Aldo Beckman, *Percy Backs Lawyer for U.S. Court*, CHI. TRIB., Apr. 11, 1970, at 2.

<sup>186</sup> See ALLEGRINI & DAVIS, *supra* note 40, at 42-45; see also Philo Hutcheson, *Democratic National Convention of 1968, Violence at*, in *ENCYCLOPEDIA OF AMERICAN RACE RIOTS* (Walter C. Rucker & James N. Upton eds., 2007) (relating 1968 protests to civil rights movement).

<sup>187</sup> John Paul Stevens, *Picasso's Contribution*, CHI. TRIB., Aug. 21, 1967, at 20 (congratulating sculptor Pablo Picasso for persuading "our wonderful mayor," Democrat Richard J. Daley, to place in city's center "a world-famous statue of an



As a Justice, Stevens early on took issue with what he termed “the legality of ‘reverse discrimination’ or ‘affirmative action’ programs.”<sup>188</sup> In a case that he would have resolved on statutory grounds, Stevens identified the issue as how one such program operated to deny a seat in medical school to an identified white man, assertedly qualified.<sup>189</sup> He first reached the question of constitutionality in 1980 in *Fullilove*; there, he applied a market analysis, proclaimed the program lacking in particulars, and dismissed it as “political patronage.”<sup>190</sup> Stevens further saw, in any “serious” categorization of individuals according to race, the risk of a slide toward the evils of Nazism.<sup>191</sup> It may be tempting to dismiss these pronouncements as what was to be expected from a conservative Republican appointee or, perhaps, as the maverick utterances of someone expert in antitrust but not antidiscrimination law. Yet any such dismissal is too simplistic, and not only because of Stevens’s suggestion in *Fullilove* that the Constitution may permit reparations for African Americans.<sup>192</sup>

As Stevens came of age he was well aware of discrimination against one particular group — persons of Jewish ancestry. The assertion that all members of that group were inferior was a core tenet of the Axis Powers against whom Stevens helped to fight as a Navy codebreaker in World War II. The baselessness of the assertion was apparent, for Stevens’s studies had introduced him to many eminent Jews, including Mortimer Adler at Chicago and Nathaniel Nathanson at Northwestern.<sup>193</sup> This issue of discrimination had surfaced in popular culture, moreover, with the 1947 publication of *Gentleman’s Agreement* and the Hollywood release of a film depicting that novel about anti-

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elephant”).

<sup>188</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 413 (1978) (Stevens, J., concurring in judgment in part and dissenting in part).

<sup>189</sup> *Id.* at 408.

<sup>190</sup> *Supra* notes 96-117 and accompanying text (discussing *Fullilove v. Klutznick*, 448 U.S. 448, 532-33, 536-39, 541-43, 545-47 (1980) (Stevens, J., dissenting)).

<sup>191</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 533-35, 541-42 (1980) (Stevens, J., dissenting).

<sup>192</sup> *See id.* at 537 (Stevens, J., dissenting); Farber, *supra* note 90, at 2272-74, 2288-95 (analyzing Stevens’s reference to reparations).

<sup>193</sup> *See* Stevens, *Random*, *supra* note 80, at 269-70 (repeating Nathanson’s anecdote about clerking for Justice Louis Brandeis); *see also* CLIFF SLOAN & DAVID MCKEAN, *THE GREAT DECISION* 177 (2009) (relating interview in which Stevens told authors that during “his first few months in law school,” he examined *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), “from every conceivable angle in a constitutional law class taught by the man who would be his mentor, Professor Nathaniel Nathanson”); *supra* text accompanying note 74 (discussing Adler); *infra* text accompanying note 203 (same); *infra* note 212 (mentioning Nathanson).

Jewish prejudice among elites in New York and Connecticut.<sup>194</sup> That same year Stevens began his clerkship, alongside his Jewish co-clerk.<sup>195</sup> The next year he wrote Rutledge that he had accepted a job offer from a law firm, adding, “[C]ontrary to the practice of most of the successful outfits in Chicago, there are several Jews in the organization.”<sup>196</sup> The firm that Stevens cofounded in 1952 comprised a Protestant, a Catholic, and a Jew.<sup>197</sup> Stevens’s sensitivity to the history of the Jewish people, evident in *Fullilove* and elsewhere,<sup>198</sup> offered a prism through which the Justice could consider discrimination against other groups.

The charge of patronage that Stevens levied in *Fullilove* likewise had its source in personal experience. After all, he had grown up Republican in a city run by a Democratic machine.<sup>199</sup> Stevens’s stint as an aide to a Congressional subcommittee, moreover, had impressed upon him the role that bargaining plays in legislative action.<sup>200</sup> His investigation of the Illinois Supreme Court had laid bare corruption of a presumably incorruptible public institution.<sup>201</sup> The patronage allegation in *Fullilove* thus reflected Stevens’s acute awareness that at times government officials succumb to improper enticements; as he put it, that “the sovereign” may breach its “fundamental duty to govern impartially.”<sup>202</sup>

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<sup>194</sup> LAURA Z. HOBSON, *GENTLEMAN’S AGREEMENT* (1947); *GENTLEMAN’S AGREEMENT* (Fox Studio Classics 1947).

<sup>195</sup> 10/1/07 Temko Interview, *supra* note 81.

<sup>196</sup> 9/4/48 Stevens Letter, *supra* note 24.

<sup>197</sup> MANASTER, *supra* note 26, at 39.

<sup>198</sup> Eugene R. Fidell, *Justice John Paul Stevens and Judicial Deference in Military Matters*, 43 UC DAVIS L. REV. 999, 1006-10 (2010) (considering Justice Stevens’s comment about anti-Semitism in the *Weinberger* case).

<sup>199</sup> See Stevens, *Learning*, *supra* note 74, at 1562-63 (reviewing patronage cases on which he sat as judge); *supra* text accompanying notes 28-73 (describing Stevens’s childhood). See generally MIKE ROYKO, *BOSS: RICHARD J. DALEY OF CHICAGO* (1971) (giving account of Chicago’s Democratic machine).

<sup>200</sup> Interview with John Paul Stevens, Assoc. Justice, U.S. Supreme Court, in Wash., D.C. (Mar. 30, 2006) [hereinafter 3/30/06 Stevens Interview] (describing how, through work on organized baseball inquiry mentioned *supra* text accompanying note 79, “I got to learn about the interaction between members of the committee,” and allowing that “[i]n 80% of their work partisanship didn’t play a part”).

<sup>201</sup> See *supra* text accompanying note 75.

<sup>202</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 533 n.1 (1980) (Stevens, J., dissenting).

B. *Equally Impartial Government*

The term “equally impartial government” denotes a concept that Stevens has invoked both in judicial opinions and in speeches; in so doing, he has linked the Equal Protection Clause to the substantive guarantee of “liberty” to be found in the Due Process Clause.<sup>203</sup> In a 1986 lecture that drew upon the work of Mortimer Adler and John Stuart Mill, Stevens spoke of a person’s liberty interest “in not being treated less favorably than the average member of society unless there is an acceptable justification for such treatment.”<sup>204</sup> He named two ways this liberty may be invaded: when the “person is branded as a ‘felon’ ” without proper hearing, and when “he is treated less favorably than the majority of his peers simply because his skin is not of the same color as theirs.”<sup>205</sup> That the examples tended to blend equal protection and due process concepts was not unintentional. Stevens recalled that certain precedents often considered as dealing exclusively with equal protection in fact also rest on due process grounds.<sup>206</sup> Among these was the sweeping result in *Brown*, which depended in part on the Court’s determination in a companion case that schoolchildren segregated by federal actors in the District of Columbia suffered “an arbitrary deprivation of their liberty in violation of the Due Process Clause.”<sup>207</sup> Stevens concluded:

Thus the Court has made it perfectly clear that a burden on the individual interest in equal respect and equal treatment may constitute an arbitrary deprivation of liberty without any inquiry into the procedures that accompanied the deprivation. One of the elements of liberty is the right to be respected as a human being.<sup>208</sup>

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<sup>203</sup> See, e.g., *id.* at 533, 533 n.2 (Stevens, J., dissenting); see also *supra* note 92 (quoting clauses).

<sup>204</sup> John Paul Stevens, *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277, 283 (1986) (publishing Nov. 1986 lecture, University of Miami School of Law) [hereinafter Stevens, *Liberty*]; see *id.* at 278-83 (discussing MORTIMER J. ADLER, SIX GREAT IDEAS (Macmillan Publ’g 1981) and JOHN STUART MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (R. McCallum ed., 1946) (1859)).

<sup>205</sup> Stevens, *Liberty*, *supra* note 204, at 283-84.

<sup>206</sup> *Id.* at 284 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating antimiscegenation statute on due process as well as equal protection grounds)).

<sup>207</sup> *Id.* (quoting *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)). The ruling was necessary, that is, because unlike the Fourteenth Amendment, the Fifth Amendment, which constrains federal officials, makes no explicit mention of equal protection. See *supra* note 93 (quoting amendments).

<sup>208</sup> Stevens, *Liberty*, *supra* note 204, at 284.

This formulation is noteworthy for its elision of individuality and equality, in such a way that although race is one reason that a person's fundamental rights may be violated, it is not the only one. It suggests an understanding of the state's duty under the Constitution that has some roots in two experiences of Stevens that had nothing to do with race.

One experience recalled by this formulation is Stevens's pro bono representation of a convicted murderer.<sup>209</sup> The defendant had claimed that the conviction was the result of an illegally obtained confession; specifically, that Chicago police had "hit him repeatedly with his fists and with a night stick," then handcuffed and blindfolded him, put a rope "in between the handcuffs," hanged him from a door, and struck him "until he lapsed into unconsciousness."<sup>210</sup> This continued, he said, until he gave police the confession they demanded.<sup>211</sup> Stevens recalled years later that he had been dubious upon his first visit to Joliet state prison to interview the client whom he had been appointed to represent in postconviction proceedings. "I said, 'Wasn't — It must have been terribly painful,' assuming the pain would have been on his wrists," Stevens recounted. "He replied that the pain was all in his arms and shoulders and I thought, 'Gee, this guy's telling the truth. He convinced me. That increased my diligence in going after the case.' " In a decision to which Stevens since has referred, the Illinois Supreme Court reversed his client's sixteen-year-old conviction.<sup>212</sup>

The second experience to which Stevens's formulation hearkens is, of course, the criminal case that his family endured just as he entered his teen years.<sup>213</sup> Though a child born into a world of privilege, Stevens must have felt immense distress during this first real engagement with government. His family lost the grand hotel where the boy had been treated like a Jazz Age prince. His grandfather was the victim of a stroke, his uncle a suicide. Detectives arrested his father at the family home; this, like all subsequent events, served as

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<sup>209</sup> *People v. La Frana*, 122 N.E.2d 583 (Ill. 1954). Another such example may be *Marino v. Ragen*, 332 U.S. 561 (1947), which raised a challenge to Illinois postconviction proceedings on which Stevens worked as a Rutledge clerk and thereafter, in other, similar cases, as an attorney in Chicago. See Amann, *Stevens*, *supra* note 5, at 1589-93, 1598 (describing Stevens's role respecting *Marino* and related cases).

<sup>210</sup> *La Frana*, 122 N.E.2d at 585.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 587; see *Chavez v. Martinez*, 538 U.S. 760, 788 n.2 (2003) (Stevens, J., concurring in part and dissenting in part) (citing *La Frana*, 122 N.E.2d at 586-87); *Oregon v. Elstad*, 470 U.S. 298, 366 n.5 (1985) (Stevens, J., dissenting) (same); Stevens, *Random*, *supra* note 80, at 270 (discussing *La Frana*).

<sup>213</sup> See *supra* text accompanying notes 28-73 (detailing family history).

fodder for newspapers in Chicago and beyond. In a robbery inspired by that publicity, gunmen dressed as police forced the boy, then still twelve, to open the safe containing his diary. The happenstance arrival of a neighbor prompted the robbers to leave, thus ending an incident that decades later Justice Stevens narrated with a slow sigh.<sup>214</sup> When he was a boy of twelve, that unsolved crime coupled with the unwarranted prosecution of his father no doubt embodied a very real failure to protect by the government.

### C. *Interpreting Impartiality*

Whether termed impartiality or equality, Stevens's conceptualization is susceptible to different interpretations. Throughout much of U.S. history, some have advanced a formalist interpretation of equality, by which government may not consider race in any manner or for any reason. Often invoked, as it was by other dissenters in *Fullilove*, is the 1896 characterization of the Constitution as "color-blind."<sup>215</sup> Stevens had considered the formalist interpretation early in his judicial career, but in *Fullilove* in 1980 he made clear that it had "not convinced" him.<sup>216</sup> Six years later in *Wygant*, he articulated a substantive interpretation that he had found convincing.<sup>217</sup> Since then, Stevens has written with consistency that the sovereign fulfills its duty of impartiality when it considers race in service of a "future benefit," such as maintaining an integrated faculty or police force, encouraging diversity in communications, or preparing schoolchildren to live in an integrated world.<sup>218</sup> The approach requires a judge to determine

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<sup>214</sup> 10/2/07 Stevens Interview, *supra* note 43 (recalling that the robbers "actually said they'd take it out on the kids"); see *Robbed*, *supra* note 63 (stating that Stevens's father had not reported the robbery because of threats made against his children).

<sup>215</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 522-23 (1980) (Stewart, J., dissenting, joined by Rehnquist, J.) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)); see also, e.g., *Seattle Schools*, 551 U.S. 791, 731 n.14 (2007) (plurality opinion) (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ.) (quoting *Plessy* dissent).

<sup>216</sup> *Fullilove*, 448 U.S. at 548 (Stevens, J., dissenting).

<sup>217</sup> See *supra* text accompanying notes 118-34 (discussing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313-19 (1986) (Stevens, J., dissenting)).

<sup>218</sup> *Metro Broad. v. FCC*, 497 U.S. 547, 601 (1990) (Stevens, J., concurring) (writing favorably of "future benefit" in communications); see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) (linking affirmative action plan to duty to govern impartially); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 314-15 (1986) (Stevens, J., dissenting) (referring to faculty and police force); *Seattle Schools*, 551 U.S. at 799-800, 799 nn.3-4 (Stevens, J., dissenting) (referring to schoolchildren); cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511-12 (1989) (Stevens, J., concurring in part and concurring in judgment) (explaining his rejection

whether a program looks backward, excluding improperly on the basis of irrational stereotype, or looks forward, aiming properly to include more groups in a sector of society.<sup>219</sup> The approach dovetails, moreover, with another that is central to Stevens's jurisprudence: his opposition to reliance on judge-created levels of scrutiny to decide claims arising under the Constitution's equal protection guarantee. "There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases," Stevens declared in objecting to application of middle-tier scrutiny in a 1976 sex discrimination case.<sup>220</sup> He has maintained that view since.<sup>221</sup> In two respects, therefore, Stevens has preferred the difficult exercise of judgment over the mechanical ease of formalism. In point of fact, Stevens's criticism of formalist approaches to equality became more pointed over time, such that in 2007 he conjured a literary classic to expose the emptiness of suggesting that a privileged group suffers the same deprivation to the same extent as its unprivileged counterpart.<sup>222</sup> Embrace of substantive equality goals similarly was evident in his use of metaphors like "engine of oppression" to describe discrimination.<sup>223</sup> Stevens's rhetoric changed as did the society in which he lived and worked.

From the start, Stevens's staff at the Court included African Americans; in addition, his work there put him in close proximity to Thurgood Marshall, whom he had seen argue *Sipuel* in 1948, and later

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of affirmative action program in part because it did not focus on "probable impact on the future").

<sup>219</sup> See *supra* text accompanying notes 132-33.

<sup>220</sup> *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring); see *id.* at 197 (majority opinion) (Brennan, J.) (stating in a passage of the opinion that four Justices joined in full, but about which two concurring Justices expressed hesitation, "that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

<sup>221</sup> See, e.g., *Seattle Schools*, 551 U.S. at 800 (Stevens, J., dissenting); *Adarand Constructors*, 515 U.S. at 246 (Stevens, J., dissenting). For space reasons this Article does not examine fully Stevens's position on this matter, which is treated in each of the articles cited *supra* note 90.

<sup>222</sup> *Supra* text accompanying note 144 (quoting *Seattle Schools*, 551 U.S. at 800 (Stevens, J., dissenting)); see Diane Marie Amann, *Way-Faring Justice*, INTLAWGRRLS, June 29, 2007, <http://intlwgrrls.blogspot.com/2007/06/way-faring-justice.html> (analyzing this reference).

<sup>223</sup> *Adarand Constructors*, 515 U.S. at 243 (Stevens, J., dissenting); see *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 663 n.4 (1989) (Stevens, J., dissenting) (finding in salmon industry "aspects of a plantation economy").

to Clarence Thomas.<sup>224</sup> In October Term 1984 — the Term before he approved the affirmative action program at issue in *Wygant* — Stevens employed Howard University law graduate James E. McCollum, Jr., as his first African-American law clerk.<sup>225</sup> Many members of underrepresented groups subsequently clerked for the Justice.<sup>226</sup> Outside the Court, even though numbers overall remained low,<sup>227</sup> minorities increasingly gained positions of prominence. Harold Washington, the only African American in the Northwestern law class that was graduated five years after Stevens, had become the first black mayor of Chicago.<sup>228</sup> Among the African Americans serving in the Cabinet were Transportation Secretary William T. Coleman, Jr., who had begun a Supreme Court clerkship just as Stevens finished his own; Health and Human Services Secretary Patricia Roberts Harris; and Secretary of State Colin Powell.<sup>229</sup> And when *Seattle Schools* was decided, the junior Senator from Illinois was Barack Obama, like Stevens a Hyde Parker who had taught law part-time at the University of Chicago; in 2009, of course, Obama became the first African-American President of the United States.<sup>230</sup> A long and winding path thus lay between Stevens's derision of the Congressional Black Caucus

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<sup>224</sup> See *supra* text accompanying notes 1-7; see also Linda Greenhouse, *Thomas Sworn in as 106th Justice*, N.Y. TIMES, Oct. 24, 1991, at A18. It was in this period too, of course, that women first joined the Court. See Adam Liptak, *The Waves Minority Justices Always Make*, N.Y. TIMES, May 30, 2009, at WK1.

<sup>225</sup> 4/8/08 Pitts Interview, *supra* note 161. Like Justice Marshall, McCollum earned his J.D. degree at Howard University School of Law. *Id.*

<sup>226</sup> Two of Stevens's other African-American clerks took part in this symposium. Jamal Greene, *The So-Called Right to Privacy*, 43 UC DAVIS L. REV. 715 (2010); Teresa W. Roseborough, *Remarks of Ms. Teresa Wynn Roseborough*, 43 UC DAVIS L. REV. 939 (2010) (transcribed remarks); see also Bleich et al., *supra* note 91 (stating that Stevens's choices of law clerks "ensured that his chambers reflect the increasing number of women entering the legal field, and evolving notions of gender parity").

<sup>227</sup> Statistics indicate that in 2003 about 80 percent of all J.D. degrees were awarded to whites. See EEOC, *supra* note 168, at 12-14. The percentage of minorities receiving J.D.s more than doubled between 1982 and 2003 — from 7.8 to 19.4 percent of the total. See *id.* Specifically, African Americans received 7.2 percent; Hispanics, 5.7 percent; and Asians, 6.5 percent of the J.D.s awarded in 2003. See *id.*

<sup>228</sup> See LEVINSOHN, *supra* note 170, at 66-70.

<sup>229</sup> Gerald M. Boyd, *Patricia R. Harris, Carter Aide, Dies*, N.Y. TIMES, Mar. 24, 1985, at 36; Alison Mitchell, *Senate Confirms 7 Cabinet Members at Once*, N.Y. TIMES, Jan. 21, 2001, § 1, at 14; *Notes on People; Coleman Confirmed for Cabinet*, N.Y. TIMES, Mar. 4, 1975, at 30; 1/4/08 Pollak Interview, *supra* note 171 (recalling that Coleman, Court's first African-American law clerk, began to work for Frankfurter about same time that Pollak succeeded Stevens as Rutledge clerk).

<sup>230</sup> Peter Baker, *Obama Takes Oath, and Nation in Crisis Embraces the Moment*, N.Y. TIMES, Jan. 21, 2009, at A1. Just before Obama was sworn in, Stevens administered the oath of office to Vice President Joseph R. Biden, Jr. *Id.*

in 1980 and his observation in 2007 that “children of *all* races benefit from integrated classrooms and playgrounds.”<sup>231</sup>

#### CONCLUSION

The life of Justice John Paul Stevens has been marked by change, in society and in his own jurisprudence. At times Stevens has rebuffed this claim. Not long ago a television reporter asked the Justice routinely dubbed a leading liberal how he would describe himself.<sup>232</sup> With a bit of a chuckle, Stevens repeated the label given him upon his nomination to the Court in 1975: “As a moderate conservative. I don’t really think I’ve changed. I think there’ve been a lot of changes in the Court.”<sup>233</sup> In a speech delivered right after he had administered the oath of office to Chief Justice Roberts, however, Stevens said “that learning on the bench has been one of the most important and rewarding aspects of my own experience over the last thirty-five years.”<sup>234</sup> He attributed his own jurisprudence on affirmative action to just such learning — learning that, as he put it, “justifications based on past sins may be less persuasive than those predicated on anticipated future benefits.”<sup>235</sup> The speech acknowledged many of the changes in Stevens’s equality jurisprudence that this Article has both charted and endeavored to explain.

It would be incorrect to infer that Stevens’s jurisprudence in this area has moved in a linear fashion, from the hostility of early opinions

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<sup>231</sup> *Seattle Schools*, 551 U.S. 701, 800, 800 n.3 (2007) (Stevens, J., dissenting); see *Fullilove v. Klutznick*, 448 U.S. 448, 541-42 (1980) (Stevens, J., dissenting). Taking into account statute-grounded decisions, the path began with Stevens’s 1978 rejection of a medical school admissions program in *Regents of University of California v. Bakke*, 438 U.S. 265, 408-21 (1978) (Stevens, J., concurring in judgment in part and dissenting in part), and continues through his vote in favor of a firefighter selection program in *Ricci v. DeStefano*, 129 S. Ct. 2689, 2689-2710 (2009) (Ginsburg, J., dissenting, joined by Stevens, Breyer & Souter, JJ.).

<sup>232</sup> See Charles Lane, *High Court Rejects Detainee Tribunals*, WASH. POST, June 30, 2006, at A1 (writing of “Stevens, the most liberal member of the court”); Jerry Markon, *Two Justices Clash over Race and Death Penalty*, WASH. POST, Oct. 21, 2008, at A10 (calling Stevens “a leader of the court’s liberal wing”).

<sup>233</sup> *Nightline: The Silent Justice* (ABC television broadcast Jan. 3, 2007), available at <http://abcnews.go.com/Video/playerIndex?id=2766752> (showing Stevens speaking to reporter Jan Crawford Greenburg); see McFadden, *supra* note 48 (writing in story about Stevens’s 1975 nomination that he “is regarded as a moderate conservative with nominally Republican credentials but little background or interest in politics”).

<sup>234</sup> Stevens, *Learning*, *supra* note 74, at 1567; see Babington & Baker, *supra* note 148 (reporting on swearing-in).

<sup>235</sup> Stevens, *Learning*, *supra* note 74, at 1565.



like *Fullilove* to the embrace in later ones like *Seattle Schools*.<sup>236</sup> For as a law clerk in 1948, Stevens had suggested the Court “take judicial notice” in the case of Ada Lois Sipuel that “the doctrine of segregation is itself a violation of the Constitutional requirement.”<sup>237</sup> In this writing six years before *Brown*, Stevens evinced an understanding of equality that was precocious, even astounding.<sup>238</sup> Justice Stevens later demurred, “That was the common view of all the law clerks.”<sup>239</sup> This well may be true, but no other clerk appears to have advanced the unconstitutionality of segregation itself as a reason for voting in Sipuel’s favor.<sup>240</sup> Nor has Stevens backed off the urgency in his call to search for “any chance of granting any relief” to Sipuel.<sup>241</sup> He has gone so far as to cite two cases that Term — *Sipuel* and the restrictive covenant cases — as examples of “judicial activism” with which “I now agree.”<sup>242</sup> Recently, moreover, Stevens criticized the Court that decided *Brown* for not having required immediate desegregation: “I’ve always thought that one of the sad things was the ‘all deliberate speed’ remedy in the second case.”<sup>243</sup>

How to square these statements with Stevens’s first opinions on affirmative action? Given that no one proceeds through life with perfect consistency, it might be better to dodge the question, perhaps by relegating desegregation and affirmative action to separate categories. Yet the artificiality of such a separation is apparent in a case like *Seattle Schools*, in which Justices relied on affirmative action precedents in order to analyze efforts to avoid resegregation.<sup>244</sup> Some

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<sup>236</sup> See *supra* text accompanying notes 96-148 (discussing these opinions).

<sup>237</sup> JPS Fisher Mem., *supra* note 5, at 2.

<sup>238</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (adopting this view, not by judicial notice, but rather after two rounds of briefing and argument).

<sup>239</sup> 3/30/06 Stevens Interview, *supra* note 200.

<sup>240</sup> See 1/4/08 Pollak Interview, *supra* note 171 (stating that when Pollak clerked for Rutledge following Term, most clerks favored Court’s movements toward school desegregation); *supra* note 8.

<sup>241</sup> JPS Fisher Mem., *supra* note 5, at 3.

<sup>242</sup> John Paul Stevens, *Judicial Activism: Ensuring the Powers and Freedoms Conceived by the Framers for Today’s World*, 16 CHI. B. ASS’N REC., Oct. 2002, at 25, 26-27 (referring to both cases without citation); see *supra* text accompanying notes 1-9, 83-85 (discussing cases mentioned); cf. Stevens, *Learning*, *supra* note 74, at 1564 (declaring himself “proud” of his lone vote, in *Palmore v. Sidoti*, 460 U.S. 1018 (1983), to stay ruling below against white divorcée who sought to retain custody of her child notwithstanding her interracial relationship).

<sup>243</sup> 3/30/06 Stevens Interview, *supra* note 200 (quoting *Brown II*, 349 U.S. 294, 300-01 (1955), discussed *supra* text accompanying note 93, and adding that Court may have erred in acting as “statesmen instead of judges”).

<sup>244</sup> *Supra* text accompanying notes 140-50 (discussing *Seattle Schools*, 551 U.S. 701

tentative responses thus seem worthwhile. Surely critical in *Sipuel* were certain facts. A named individual had applied to study law, and even though the state conceded her qualifications, the only door it opened to her was “a law school for one person.”<sup>245</sup> As a child, Stevens had watched his father — indeed, his family — endure injustice at the hands of the state.<sup>246</sup> Clerk Stevens not only had just completed an enviable law school career, but also was conscious of discrimination that Jews had suffered in the profession notwithstanding their qualifications.<sup>247</sup> Patently, the state’s offer to *Sipuel* was so unjust as to require an immediate and meaningful remedy. “It wasn’t a difficult issue,” Stevens recalled. “It just seemed like just such an obvious violation.”<sup>248</sup> As a Justice, Stevens would come to emphasize the “concept of equal justice under law,” that is, the constitutional duty of the state “to govern impartially.”<sup>249</sup> It is easy to see the state’s treatment of Ada Lois *Sipuel* as a violation of that duty. Less obvious, at least to Stevens in his early years on the Court, were large-scale programs said to benefit unnamed members of minority groups rather than named individuals, and to do so in order to make amends for unspecified wrongs. Eventually he put to one side inquiry into the injustices of the past and looked instead to a more just future. That achieved, Stevens judged affirmative action among those measures that the Constitution allows an equally impartial government.

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(2007)).

<sup>245</sup> *JPS Fisher Mem.*, *supra* note 5, at 2; *see Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631, 632 (1948) (per curiam) (describing applicant as “concededly qualified”); *cf. Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 408 (1978) (Stevens, J., concurring in judgment in part and dissenting in part) (stressing that rights of named individual were at stake in course of ruling in his favor).

<sup>246</sup> *See supra* text accompanying notes 57-72.

<sup>247</sup> *See supra* text accompanying notes 25, 190-96.

<sup>248</sup> 3/30/06 Stevens Interview, *supra* note 200.

<sup>249</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 533 (1980) (Stevens, J., dissenting); *see supra* text accompanying notes 204-24 (discussing Stevens’s theory).