

## “Random Recollections”

JUSTICE JOHN PAUL STEVENS\*

This evening I am not going to try to deliver a scholarly dissertation. This is the 20th lecture in a series honoring a good friend and former teacher who had a profound influence on my career. Instead of providing you with novel insights about arcane propositions of law, I merely propose to share certain personal memories with you regarding my former colleagues on the Supreme Court. But first, to confirm my disclaimer of any heavy lifting, I shall begin by recalling a conversation with Professor Nathanson about an incident that occurred shortly after he began serving as a law clerk to Justice Brandeis.

At that time the Justices did most of their work at home. Justice Brandeis had asked Nat to prepare a certain legal memorandum for him, and to deliver it at an early hour on the following morning by slipping it under the front door of his residence. Nat told me that he met the deadline, but when he started to push the memo under the door, it was silently pulled into the house. I don't recall what Nat had to say about the aftermath of that incident but I'm sure that it encouraged on-time deliveries of future memos.

When I last visited your beautiful campus in 1984, my attempt to explain how profoundly Professor Nathanson had influenced my understanding of the law included comments on why students referred to his constitutional law class as “Nate’s Mystery Hour” and how he warned us to beware of “glittering generalities.” Today, as a preface to sharing some random reminiscences about my departed colleagues, I want to mention three post-graduate incidents in which Nat played an important role in furthering my legal education.

---

\* Speech given as part of the Nathaniel L. Nathanson Memorial Lecture series at the University of San Diego School of Law on April 7, 2004.

The first was his pro bono representation of a prison inmate named Arthur La Frana, who had confessed to the murder of a theater cashier in 1937. After repeated denials of La Frana's pro se attempts to obtain a hearing in which he could challenge the voluntariness of his confession, Nat was appointed to represent him. Nat persuaded the United States Supreme Court that if La Frana's allegations of physical torture were true, his confession was involuntary and his conviction should be set aside.<sup>1</sup> The Court's order on remand led to an evidentiary hearing before an Illinois trial judge. Because Nat's extensive experience in litigation had primarily involved appellate advocacy, he asked me to handle the investigation and trial of the confession issue. The results of that work are described in an opinion of the Illinois Supreme Court that was announced in 1954 and led to La Frana's release.<sup>2</sup> What I learned from that case has no doubt had an impact on my work on the Supreme Court, where we must frequently resolve issues relating to the timeliness of post-conviction claims and the voluntariness of statements made to the police by persons in custody.

My second post-graduate incident involved work as a member of the Attorney General's National Committee to Study the Antitrust Laws, which was appointed by Herbert Brownell in 1953. I worked on a task force that prepared the first draft of the portion of the Committee's Report that dealt with exemptions from the antitrust laws. Because of Nat's national reputation as an expert in administrative law, the co-chairmen of the Committee asked him to participate in our work in an advisory capacity, and he graciously agreed to do so. The Committee hoped that we would be able to identify certain unifying principles that would lead to the endorsement of rules applicable to every statute that included an antitrust exemption. The result of our efforts, however, was not a bright-line rule or set of rules, but a recommendation to read each federal regulatory statute with great care because each provides its own solutions to the specific problems that Congress confronted.<sup>3</sup> Over the years, my recollection of Nat's comments during those working sessions have come to mind when the Court is asked to apply so-called "*Chevron* deference"<sup>4</sup> to an executive agency's decision. While my colleagues wrestle with the continuing attempt to provide more detailed guidance than is available in the *Chevron* opinion itself, I am constantly reminded

---

1. *Jennings v. Illinois*, 342 U.S. 104, 104 (1951).

2. *People v. La Frana*, 122 N.E.2d 583 (Ill. 1954).

3. Our conclusions—after extensive editing and reediting by the Committee and its staff—are summarized in Chapter VI of the Committee's final report. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 261–313 (1955).

4. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

that every regulatory statute has its own unique features. Moreover, unlike some of my colleagues I seldom regard the answer to the question whether *Chevron* applies as necessarily ending the inquiry, because a judge who is convinced that an agency misconstrued a statute always retains the option of deciding that the agency’s decision was “unreasonable.”

My third memory is of an article that Nat co-authored with one of his students at Northwestern University Law School, which was published in the Chicago Bar Record in 1977 on the subject of affirmative action.<sup>5</sup> The article was important because it so lucidly identified valid arguments on both sides of the issue, and raised the possibility that resolution of the issue may have a temporal dimension: An answer that is correct today may not be correct in years to come. It is significant that Justice O’Connor cited Nat’s article in the concluding portion of her opinion last Term in the Michigan Law School case, *Grutter v. Bollinger*.<sup>6</sup> That article displays the thoughtfulness and attention to nuance that is evident in all of Nat’s work. I have thought of him frequently during my years on the Court, and I continue to benefit from the many lessons he taught me.

The Supreme Court that I joined in 1975 was divided five-to-four in a significant respect. It included five members who were at least six feet tall and a minority of relatively short justices. The fact that Potter Stewart and I were both in that minority is only one of the many reasons why we became such good friends immediately after I arrived. My opinion that he probably had the keenest intellect of any judge with whom I have served may be attributable, in part, to the fact that while I was on the Court of Appeals, in every case in which the Supreme Court ruled on an issue that I confronted as a circuit judge, Potter reached the same conclusion that I had. His opinion for the Court in *Roudebush v. Hartke*<sup>7</sup> was particularly gratifying because it reversed a three-judge district court order from which I had dissented. The order had enjoined a recount in an election to the United States Senate “based on a finding that a recount would increase the probability of election fraud and accidental destruction of ballots.”<sup>8</sup> Potter’s opinion simply rejected that finding.

Potter had an unusually deep bass voice. On occasion, during oral

---

5. Nathaniel L. Nathanson & Casimir J. Bartnik, *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, 58 CHIC. BAR REC. 282 (May–June 1977).

6. 539 U.S. 306, 342–43 (2003).

7. 405 U.S. 15 (1972).

8. *Id.* at 26.

argument he would whisper rather candid comments about the quality of counsel's performance that were intended to be heard only by his neighbor on the bench but, as I remember them, practically reverberated throughout the courtroom. Potter also is the Justice who told me that John Harlan had asked him to make sure to preserve the tradition of making at least one oral announcement of a dissenting opinion each Term. It was shortly after Byron White and I advised Justice Scalia of that tradition that he delivered his first, and probably most notable, oral dissent in the independent counsel case.<sup>9</sup>

In our conferences Potter displayed an extraordinary ability to state the issues, and his appraisal of each one, succinctly and accurately. He was a gifted writer and wrote many important, well reasoned opinions, but he is probably best remembered for his candid confession of his inability to define obscenity coupled with his confident assertion that he knew it when he saw it.<sup>10</sup> Because that terse comment is at the opposite end of the spectrum from the statement of a black-letter rule, it illustrates the difference between the exercise of judgment, on the one hand, and the crafting of legislative rules, on the other. The comment in his separate opinion in *Furman v. Georgia*—which I remember him telling me was written on a weekend shortly before the case was announced—to the effect that the imposition of the death penalty is as arbitrary as being struck by lightning, reflects a similar exercise of judgment.<sup>11</sup>

Potter Stewart was the first of my colleagues to retire. He left office on July 3rd, 1981. As was true of all but one of those who followed him, he surprised his brethren by announcing his decision to do so on the last day of a Term. It was five years later, at the end of the October 1985 Term, that Warren Burger informed us that he was retiring from his position as Chief Justice in order to have more time to contribute to the bicentennial celebration of the Constitution. The Chief's avid interest in the history of our country and of the Court was surely a factor that led to that decision and to his work in creating the Supreme Court Historical Society, and the office of the Curator of the Court. He was, however, a truly modern administrator. He came up with the idea to color-code the briefs, and to require parties to print the question presented on the first page. And he is primarily responsible for the introduction of the word-processors and computer technology that replaced the out-dated hot lead print shop that had often delayed our adjournment for several days at the end of June or early in July. The Chief also literally changed the shape of the Court, by ordering our carpenter to cut the Bench into three sections and move each

---

9. *Morrison v. Olson*, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

10. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

11. *Furman v. Georgia*, 408 U.S. 238, 309 (1972).

of the two ends far enough forward to enable the two junior justices to see one another. He was a graceful and courteous presiding officer in Court Sessions. On rare occasions he even allowed a lawyer whose time had been consumed by vigorous and competitive questioning from the Bench, to take two or three extra minutes to complete sentences that had been somewhat rudely interrupted.

Among his hobbies was a knowledge of fine wines. Before I arrived, he introduced the custom of celebrating each Justice’s birthday with a toast at lunch, followed by a hearty rendition of “Happy Birthday to whomever.” We still follow that custom, and I must say that Clarence Thomas has significantly improved the quality of our singing.

As Chief Justice, Warren Burger wrote many important opinions for the Court. My two favorites are *Tennessee Valley Authority v. Hill*,<sup>12</sup> the snail darter case, which contains both an elegant statement about the importance of the rule of law and a careful examination of relevant legislative history, and *Reed v. Reed*,<sup>13</sup> the ground-breaking decision that repudiated outmoded stereotypical thinking about the proper role of women in our society. The *Reed* opinion conveyed its central message without needing to construct either a two-tiered or three-tiered method of analyzing Equal Protection issues. As his decision to join my separate opinion in the *Cleburne*<sup>14</sup> case demonstrated, the Chief and I shared the view that a proper interpretation of the rational basis requirement will produce a more reliable and more consistent definition of the sovereign’s duty to govern impartially than an attempt to cram every case into the appropriate tier in a judicially-crafted hierarchy.

After announcing our opinions on the final decision day at the end of each Term, we hold a brief conference to dispose of loose ends, such as certiorari petitions that have been held pending the disposition of argued cases. It was at that Conference at the end of June in 1987, that Lewis Powell informed us of his decision to retire. Lewis had been my neighbor on the Bench throughout my tenure—we had both moved from the left wing to the right wing when Potter Stewart retired, and back to the left when Warren Burger had stepped down. Although Lewis’ career in private practice outdistanced mine by hundreds of miles, there were parallels in our pre-judicial histories that made us especially close. We were both

---

12. 437 U.S. 153 (1978).

13. 404 U.S. 71 (1971).

14. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 451–55 (1985) (Stevens, J., concurring).

engaged in intelligence work in World War II, we shared the view that trial work can improve the quality of a lawyer's judgment, and we agreed that bar associations play an important role in maintaining the quality and the independence of the legal profession.

We had numerous conversations about our respective experiences but, with two exceptions that I recall, we did not discuss cases before they were argued. The first exception was the series of cases argued in the 1975 term involving the constitutionality of capital punishment in which we were both convinced that the mandatory death penalty was invalid.<sup>15</sup> The second was the *Wygant* case involving a Michigan school board's decision to retain minority faculty members rather than more senior white teachers when it became necessary to reduce the size of the faculty.<sup>16</sup> As I was leaving his office after a conversation on an unrelated subject, we both remarked on the fact that our next affirmative action argument was in an "easy case." It was only later that we both learned that we thought it easy for opposite reasons. He wrote the plurality opinion holding that the policy was unconstitutional, and I dissented arguing that in cases of this kind we should focus on the future rather than the past.

In part because we disagreed from time to time, and in part because I had so much respect for his judgment, I always was especially gratified to learn that Lewis agreed with my views. On one occasion, it was only after the case had been decided that he came to agree with me. He did not join my criticism of political gerrymandering in *Karcher v. Daggett*,<sup>17</sup> the New Jersey case, but he endorsed and improved on that opinion a few years later when he dissented in *Davis v. Bandemer*,<sup>18</sup> a case involving political gerrymandering in Indiana.

My fond memories of Lewis are too numerous to describe, but three characteristics stand out: he was an exceptionally wise man; he was a true gentleman; and he fervidly loved his country.

At our final conference of the 1989 Term Bill Brennan told us that his doctor had advised him to retire and he had decided to do so. Bill was easily the most gregarious, friendly and outgoing member of the Court. During my first year on the Court I happened to tell him that I was not going to accept an invitation to attend the Grid Iron Club Dinner—the annual off-the-record affair at which members of the press roast the President and other political leaders—because I did not have the white-tie-and-tails that the invitation mandated. He simply overruled me. He insisted that I had to attend at least the first such dinner during my tenure

---

15. See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

16. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

17. 462 U.S. 725, 744–65 (1983) (Stevens, J., concurring).

18. 478 U.S. 109, 161–85 (1986) (Powell, J., concurring in part and dissenting in part).

and that there was no merit to my excuse because I could fit into his set of tails, and promptly delivered them to me. The fit was not exactly perfect, but I accepted and have been eternally grateful for a generous act that made it possible for me to spend an evening with the still-gorgeous and charming Ginger Rogers as my dinner partner.

Years later, during the interval between the death of Bill’s first wife, Marge, and his marriage to Mary, Bill had dinner with Maryan and me in our apartment in Arlington on several occasions. He would ride home with me and, after dinner, one of the Court’s police officers would drive him home. My route takes me over the 14th Street Bridge, where the competition between lane-changing drivers during rush hour is occasionally fairly intense. Because I have always believed that an offense is the best defense in such situations, at least one of those trips made such an indelible impression on Bill—as I later learned from one of the officers who often drove Bill to work—that thereafter he insisted that they use the Memorial Street Bridge rather than the 14th whenever he was in the car.

Bill’s contribution to the work of the Court is legendary. I think I remember him saying that *Goldberg v. Kelly*,<sup>19</sup> was his favorite opinion, but I would rank three others as even more significant: *Baker v. Carr*<sup>20</sup> replaced Justice Frankfurter’s political thicket metaphor with a smooth road to our one-person one vote cases; *New York Times v. Sullivan*<sup>21</sup> constitutionalized a major part of our defamation law; and his plurality opinion in *Elrod v. Burns*<sup>22</sup> took aim at the patronage system. My partiality to *Elrod* is probably based on its endorsement of the most controversial majority opinion that I wrote as a court of appeals judge.<sup>23</sup>

On the last day of the 1990 Term, Thurgood Marshall expressed his vehement disagreement with the majority’s decision to allow the prosecution to use victim impact evidence in the penalty phase of capital cases.<sup>24</sup> He was particularly upset by the fact that the new majority on the Court had decided to overrule an opinion that Lewis Powell had announced only four years earlier.<sup>25</sup> We then came off the bench for our final conference of the term and he told us that he had decided to retire.

I had first seen Thurgood in action when I was a law clerk during the

---

19. 397 U.S. 254 (1970).

20. 369 U.S. 186 (1962).

21. 376 U.S. 254 (1964).

22. 427 U.S. 347 (1976).

23. See *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972).

24. *Payne v. Tennessee*, 501 U.S. 808 (1991) (Marshall, J., dissenting).

25. *Booth v. Maryland*, 482 U.S. 496 (1987).

1947 Term. His oral argument in *Sipuel v. Board of Regents of the University of Oklahoma*<sup>26</sup> persuaded the Court to enter a unanimous order in the following week requiring the all-white University of Oklahoma School of Law to admit an African-American applicant. I also heard his argument in *Shelley v. Kraemer*,<sup>27</sup> the restrictive covenant case. He was an excellent advocate. Responding to a barrage of questions from Justice Frankfurter, he displayed a rare combination of respect for his interrogator and firm confidence in his interpretation of earlier case law. It was only later that I learned about his amazing career as a trial lawyer who participated in case after case in the hostile environment that prevailed in courthouses throughout the South in those days.

I first met Thurgood at a meeting in Chicago when he was the Circuit Justice for the Seventh Circuit. In answer to a question about the personal relationships among members of the Court, he described them as extremely cordial. Remembering a contrary impression that I had formed during my year as a law clerk, I remember thinking that he might not have been entirely candid. After joining the Court, I learned how wrong I was. Not only did I find that his statement had been completely accurate, but I also acquired a first hand appreciation and understanding of a truly great man's character and candor. Thurgood possessed in full measure the most important virtue that every successful trial lawyer absolutely needs. His word was good.

Thurgood's contributions to our conference discussions of argued cases were especially valuable for many reasons, three of which I shall briefly mention. First, was his vast repertoire of humorous stories: he seemed to have a joke for every occasion. Unlike most raconteurs, however, he never told us the same story twice. Second, he had a remarkable ability to see both sides of issues that involve conflicts between state authority and individual rights. Insights derived from his work as a defense lawyer and a leader in the civil rights movement were balanced against insights derived from his experience representing the government during his tenure as Solicitor General, and perhaps of greater importance, by his intimate knowledge of the risks faced by police officers in the line of duty. He was extremely proud of his son John who served as a Virginia State Trooper, and frequently spoke about him. Finally, the breadth of Thurgood's work as a trial lawyer gave him a special perspective in many cases: time after time he would recall an actual experience that was both interesting and directly relevant to the issue we were discussing. Thurgood's view that we should do away with peremptory challenges, which he expressed in his

---

26. 332 U.S. 631 (1948) (per curiam).

27. 334 U.S. 1 (1948).

separate opinion in *Batson v. Kentucky*,<sup>28</sup> was especially persuasive given his vast experience at the trial level. Indeed, although at the beginning of my career I viewed the arbitrary right to exclude potential jurors as a fundamental procedural protection, I ultimately came to agree with Thurgood that the costs of peremptory challenges likely outweigh the benefits.<sup>29</sup>

My wife, Maryan, always thought of Thurgood as a special friend. She and Thurgood shared a great sense of humor—in fact, their relationship started with a joke. Maryan is a sun-worshiper who is especially beautiful after long hours on the Florida beach. When she first met Thurgood, he complimented her on her tan, but warned her that his would always be better. Maryan and I were particularly proud of the fact that we were invited to attend the special party that some of Thurgood’s oldest friends hosted to celebrate his eightieth birthday. I liked to think that we were included because Thurgood thought well of my work on the Court. After reflecting about Maryan’s friendship with both Thurgood and his lovely wife, Cissy, however, I have concluded that the credit was really hers.

I first met Byron White at Pearl Harbor during World War II. The incident was memorable for me because he had achieved national fame as a football great. My immediate impression, which was confirmed years later, was that he was the kind of person that I would want as a friend. As I was to learn later, he performed with true heroism when the aircraft carrier on which he was serving was attacked by Kamikaze pilots. The fact that he was a genuine war hero, as well as an all-American athlete, a Rhodes Scholar, and a nice guy, certainly qualified him to serve as a law clerk to Chief Justice Vinson during the 1946 Term.

The duties of the Chief’s clerks at that time included the preparation of memos that were circulated to the entire court making recommendations for the disposition of *in forma pauperis* cases, most of which were habeas corpus petitions that were denied because the applicant had not exhausted his state remedies. I read a number of those memos during my clerkship in the following term, having been cautioned by my boss, Justice Rutledge, to examine them with particular care because he felt that the Vinson Chambers might overlook a meritorious claim. I don’t remember any flaws in the memos that were signed “BRW.”

---

28. *Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (arguing in favor of “eliminating peremptory challenges entirely in criminal cases”).

29. See Justice John Paul Stevens, *Foreword: Introduction to the Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 907 (2003).

Our paths crossed shortly after Byron began his service as Deputy Attorney General during the Kennedy administration. He asked me if I would be interested in serving as the head of the antitrust division, but I never had to give him a definite answer because Bobby Kennedy had other plans. Years later when I arrived at the Court, Byron welcomed me with genuine enthusiasm. We immediately formed a true friendship that never diminished. Among our mutual interests was the game of golf, which Byron loved. On Monday mornings when he inquired about my weekend game, rather than embarrassing me by asking what I shot, he would usually ask me how many pars I had. The question had the special virtue of reminding us that it is far more important to remember one's good shots than to dwell on the inevitable bad ones.

During my first term Byron taught me the important lesson that there is a big difference between receiving an assignment to write a majority opinion and actually delivering such an opinion. I was assigned the opinion in the *Buffalo Forge* case<sup>30</sup> and congratulated myself when my circulating draft garnered an unexpected vote. My enthusiasm came to an abrupt halt, however, when two Justices who had voted with me at Conference were persuaded by Byron's dissent. In the few days remaining at the end of the Term, he converted his dissent into a Court opinion holding that the Norris-LaGuardia Act barred the district court from enjoining a sympathy strike, and I had to rewrite the opening and closing paragraphs of what had become an inappropriately long dissenting opinion. That sort of switch has happened far more often than most court-watchers realize.

As would be expected of a great athlete, Byron was a team player, having expertise in all aspects of the Court's work. His contributions in cases on our original docket, and in the processing of certiorari petitions, revealed the same thorough and careful preparation that characterized his work on the most interesting and controversial argued cases. There were occasions when he disagreed with the majority, but decided to file what he called a "graveyard dissent"—in other words, he would refrain from the publication of his contrary view. He wrote a famous dissent in the *Miranda* case,<sup>31</sup> but ultimately accepted it as the law and wrote the opinion in *Edwards v. Arizona*<sup>32</sup> that expanded on *Miranda*'s holding. Although he had written the opinion in *Swain v. Alabama*<sup>33</sup> in 1965, Byron joined Lewis Powell's opinion in 1986 in *Batson v. Kentucky*<sup>34</sup> that virtually overruled *Swain*.

My opinion for the Court in the *Chevron* case has been cited more

---

30. *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976).

31. *Miranda v. Arizona*, 384 U.S. 436 (1966).

32. 451 U.S. 477 (1981).

33. 380 U.S. 202 (1965).

34. 476 U.S. 79 (1986).

frequently than any other opinion that I have written. I have always been grateful to Byron for asking me to write it. He was the assigning Justice because his two seniors, Warren Burger and Billy Brennan, had voted to affirm at the Conference following oral argument. I am sure that it was my thorough analysis of the facts, rather than any comment on the deference to be accorded to the agency, that persuaded both of them to switch sides and give me a unanimous Court. The opinion has been the subject of more scholarly comment than it really deserves, but the fact that only six Justices participated in the decision of the case is usually overlooked. It is because the only Justices other than myself who are still serving both disqualified themselves (as did Thurgood Marshall) that I feel free to identify the assigning Justice in the case.

After Byron retired in the spring of 1993, Harry Blackmun became the senior associate justice. Whenever the Chief Justice was in dissent, Harry would be responsible for the assignment of the Court opinion, assuming of course that he was in the majority. It is my recollection that he always showed me the courtesy of asking me for my thoughts before he actually made any such assignments. Harry was a sensitive and thoughtful human being. He had a degree in mathematics and resolutely refused to join any opinion that made the common mistake of using the term “parameter” as a synonym for “perimeter.” Harry was meticulous about all his work, frequently checking citations himself. Whenever we agreed that an opinion was ready to be announced, we would check with Harry to make sure that it did not include any citations to cases that had not yet been released. One almost never caught Harry in a mistake of any kind, so I took special pleasure in calling his attention to our first meeting.

When I was on the Court of Appeals I owned a single-engine Cessna 172 and often made brief flights on weekends. When I learned that Harry was going to make a commencement talk at a college in an Indiana town with a municipal airport, I decided to fly there and introduce myself to the new Justice. When I met him, I explained that I was a recent appointee to the Seventh Circuit. He could not have been nicer to me. Indeed, after he returned to Washington he took the time to write me a friendly letter commenting on our meeting. The letter, however, was addressed to Judge Robert Sprecher, who had just joined our court. Because Harry had understandably assumed that he had been accosted by the most junior judge on the Seventh Circuit, he made a rare but entirely forgivable mistake.

Harry and I both had Illinois roots and shared the perennial frustration of

being ardent Cub fans. Although Harry was a “work-a-holic,” he found time for cultural pursuits. In the summer he and Norval Morris regularly presided over a scholarly seminar at the Aspen Institute in Aspen, Colorado. Harry’s repeated attendance at the Aspen music festival explains his leadership in establishing the delightful musicale that is now an annual spring event at the Court. He was even able to persuade acclaimed violinist Robert McDuffie to perform (with his 3.5 million dollar Stradivarius) at the musicale on several occasions. Harry also was one of the three judges in the moot court argument at American University in which the authorship of the Shakespeare canon was debated. Bill Brennan presided and I was the third member of the court. Although we held that the claim advanced by Edward de Vere, the 17th Earl of Oxford, had not met the “beyond a reasonable doubt” standard of proof, in later years both Harry and I had second thoughts about the issue.<sup>35</sup> If he were able to vote today, I am quite sure that he would conclude, as I would, that the evidence supporting the Oxfordian claim is stronger than the evidence supporting the claim of the man from Stratford.

Harry’s most important opinion was, of course, *Roe v. Wade*,<sup>36</sup> which he wrote before I joined the Court. The bitter critics of that opinion have generally treated Harry as a sort of special villain, solely responsible for what they regard as a tragic misinterpretation of the Constitution. Presumably it was one of those critics who fired a bullet through the window of Harry’s apartment in Virginia. In placing all the blame on Harry, they conveniently overlook the fact that his opinion spoke for seven Justices. Notwithstanding the “wealth of legal scholarship” in that opinion—which prompted one of the two dissenters to acknowledge that “the opinion thus commands my respect”<sup>37</sup>—it is not at the head of the list of Blackmun opinions that I admire. Ironically, given my firm belief in the importance of the doctrine of stare decisis, it is his opinion in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>38</sup> that occupies that spot. Not only did *Garcia* overrule *National League of Cities v. Usery*,<sup>39</sup> but the opinion candidly referred to the fact that Harry had provided the crucial fifth vote in that case. After explaining why the built-in restraints in the federal system adequately ensure that laws imposing undue burdens on the States will not be enacted, Harry quoted a paragraph that was written by Justice Frankfurter when I was in law school. Because that paragraph might well have been written by Professor Nathanson, I shall conclude by reading it to you:

---

35. See Justice John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373 (1992).

36. 410 U.S. 113 (1973).

37. *Id.* at 171 (Rehnquist, J., dissenting).

38. 469 U.S. 528 (1985).

39. 426 U.S. 833 (1976).

“The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for reasoned disposition of the kind of controversy now before the Court.”<sup>40</sup>

Thank you for your attention.

---

40. *Garcia*, 469 U.S. at 556 (quoting *New York v. United States*, 326 U.S. 572, 583 (1946)).

