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Stevens Applied Common Sense

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As much as we like to pretend otherwise, the truth is that Supreme Court justices make law. They have no choice. The Constitution simply cries out for interpretation.

Does free speech mean that you can falsely yell “fire” in a crowded theater? Does religious freedom mean that you can perform human sacrifices? Does equal protection mean that men and women must always be treated the same? The text doesn’t answer these questions. Someone must fill in the gaps.

Those who say otherwise — that judges are simply umpires calling balls and strikes — are being disingenuous. The law is not some “brooding omnipresence in the sky,” as Justice Oliver Wendell Holmes recognized a century ago, and judges are not prophets revealing divine truths. “The life of the law,” Holmes candidly admitted, is not “logic” but “experience.”

Justice John Paul Stevens, who retires from the Supreme Court this summer after serving 35 years, epitomizes a wisdom born of experience. His opinions are not exercises in abstract theory or semantic wordplay. They are pragmatic assessments of fact and law with a focus on the real-world impact of decisions.

In the affirmative-action context, for instance, Justice Stevens refused to follow his colleagues who simplistically equated racial preferences helping minorities with historic Jim Crow discrimination. Common sense told him that a policy to “perpetuate a caste system” is not morally equivalent to a policy to “eradicate racial subordination.” Those who think otherwise, he said, don’t know the difference between a “No Trespassing” sign and a welcome mat.

Justice Stevens’ pragmatism similarly led him to reject the argument that Guantanamo detainees could not challenge their detentions. Other justices said that courts had no jurisdiction because the detainees were outside the United States. But Justice Stevens found this distinction nonsensical. After all, he noted, under its lease with Cuba, the United States has “complete jurisdiction and control” over Guantanamo and can exercise this right indefinitely.

This common-sense approach reappeared in last month’s decision concerning a Latin cross that Congress designated as a national World War I memorial.

Justice Anthony Kennedy characterized the cross as a secular symbol of sacrifice and suggested that it might not violate separation of church and state. But Justice Stevens readily saw the illogic of this position: “Making a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the war memorial sectarian.” Certainly, he thought, Congress could find a symbol that would honor our nation’s veterans regardless of their creed.

Justice Stevens’ no-nonsense approach has not always led him to “liberal” results. In the First Amendment context, in particular, he has refused to accept the conventional wisdom that judges should not vary constitutional protection depending upon a speech’s perceived value.

Thus, he readily agreed that government could regulate the location of adult movie theaters because the speech shown in those theaters was of little value. As he put it, “few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”

He similarly chose to dissent when the court held that flag burning was protected speech. The national flag, he said, symbolizes the ideals of liberty and equality, ideals that we have fought for throughout our history. Surely, he reasoned, a “flag that uniquely symbolizes” these ideals must be “worthy of protection from unnecessary desecration.”

Justice Stevens’ practical approach to free-speech rights enabled him to see the error in the court’s recent decision that gives corporations a First Amendment right to spend freely on political campaigns. He said the majority had rejected “the common sense of the American people,” which had always recognized “a need to prevent corporations from undermining self-government.”

He sternly warned that “a democracy cannot function effectively when its constituent members believe laws are being bought and sold.”

And, as Justice Stevens has rightly observed, “it is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.”

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