PANEL IV: FEDERALISM

JUDICIAL OVERSIGHT IN TWO DIMENSIONS: CHARTING AREA AND INTENSITY IN THE DECISIONS OF JUSTICE STEVENS

Allison Marston Danner* and Adam Marcus Samaha**

INTRODUCTION

This Article is about the federal judiciary and its interaction with other government institutions. It examines two of many possible dimensions of judicial oversight: the total area in which courts might substitute their judgment for that of other officials, and the average intensity of judicial review within that area. But the inspiration for these options, and the subject of this Symposium, is Justice John Paul Stevens. So it seems appropriate to highlight the personal before the systematic.

(1) Justice Stevens is no enemy of Great Britain. He is, for example, obviously fond of British literature.1 But there is an English maxim that he has repeatedly condemned: “[T]he King can do no wrong.”2 His reaction to the slogan is nothing short of allergic,3 and he looks skeptically on any

---

* Associate Professor of Law, Vanderbilt Law School. Law clerk for Justice John Paul Stevens, October Term 1998.
** Assistant Professor of Law, University of Chicago Law School. Law clerk for Justice John Paul Stevens, October Term 1998. We thank Dan Farber, John Goldberg, Robert Schapiro, David Strauss, Cass Sunstein, and Adrian Vermeule for suggestions. Phillip Riblett provided valuable research assistance.


3. See, e.g., Clinton v. Jones, 520 U.S. 681, 697 n.24 (1997) (acknowledging that the President was not arguing from this maxim, then nevertheless adding “the common-law fiction that ‘[t]he king . . . is not only incapable of doing wrong, but even of thinking wrong,’ was rejected at the birth of the Republic” (emphasis omitted) (citation omitted)); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 95 (1996) (Stevens, J., dissenting); Nevada v. Hall, 440
claim of governmental immunity derived from it. In his view, government should act as agent, not principal, of the people. Public officials can, and sometimes will, violate the law by which they are bound. In such cases, individual citizens should have much the same right to file claims against the government as they would against a private party who committed a similar wrong. For Justice Stevens, law and courts protect individual liberty by providing a forum for the redress of grievances.

(2) Before his appointment to the federal bench, Stevens served as lead counsel to a special commission investigating allegations of corruption at the Illinois Supreme Court. After laborious inquiries, the commission’s work ended with a recommendation that two justices of the court resign. They did. To those familiar with the State’s reputation, there is nothing shocking about the identification of corruption in Illinois. But there is something important about the way this instance of official wrongdoing was uprooted: An eccentric gadfly, who was otherwise invisible to the political establishment, pleaded and pushed for his complaints to be heard. The lesson is that, once in a while, the conspiracy theorist is correct.

(3) Stevens clerked for Justice Wiley Rutledge, and there are some common themes in the opinions of both Justices. Working on the U.S. Supreme Court during and as the result of a massive shift in political power, Rutledge nevertheless refused to defer reflexively to executive claims of exigency. His dissent in In re Yamashita, in which the majority upheld the trial by military commission of a Japanese general in the waning days of World War II, stresses individual dignity and judicial process. Rutledge wrote, "It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men." The message is that government power, although often better left in the hands of nonjudicial officials, must not be "unbridled," and federal courts have an obligation to make sure that it is

5. See id. at 3-10 (noting Sherman Skolnick's poor but extensive litigation track record).
7. 327 U.S. 1 (1946).
8. Id. at 41-42 (Rutledge, J., dissenting); see also John M. Ferren, Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge 315 (2004) (asserting that Rutledge's highest value was "the worth—the dignity—of the individual").
9. See Yakus v. United States, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) ("There are limits to the judicial power. Congress may impose others. And in some matters Congress or the President has final say under the Constitution. But whenever the judicial power is called into play, it is responsible directly to the fundamental law . . . .")
not. For Justice Stevens, like Justice Rutledge, the federal judiciary is uniquely qualified to do so.10

These sorts of propositions—that officials should be accountable to law, that improbable citizen complaints should not be ignored, that courts should promote interests in dignity and fair process—are primary themes in Justice Stevens’s work. No one on the Court is more reluctant to forfeit the possibility of meaningful judicial review on the merits. And few Justices remain as dedicated to case-specific inquiries and careful review of the factual record. But Justice Stevens is not dogmatically committed to unrestrained second-guessing of other officials. Nor is he unconcerned with the burdens associated with wide-ranging judicial oversight. The larger picture suggests a judge making practical choices that may entail regrettable sacrifices. Those choices push the federal courts toward a large area of oversight coupled with a moderated intensity of judicial review.

Our objective is to explore this combination—a system authorizing the federal judiciary to peer into almost every corner of government, yet discouraging federal judges from prescribing every norm, procedure, and remedy. We do not present an all-told account of Justice Stevens’s jurisprudence, even in the field of public law. Instead, we identify themes within his work that are telling about him and suggestive for us.

The analysis is divided into three parts. The first part charts two dimensions of judicial oversight—area and intensity. For some, it will seem natural for the values on both dimensions to move in the same direction. No logic dictates that phenomenon, however, and we believe that Justice Stevens provides an illustration of a contrary view. The second part identifies specific examples in his decisions. As to area, we discuss his maximalist position on the territorial jurisdiction of federal courts and his extraordinary skepticism of governmental immunities. As to intensity, we select four examples where his vision of intervention is not necessarily assertive. These are *Chevron* deference to federal agencies,11 a soft public use requirement in takings cases,12 acceptance of less than fully compensatory constitutional remedies,13 and fondness for standards in free speech and equal protection cases.14 The third part briefly assesses the implications of a large-area/low-intensity system of judicial oversight. We point out the most plausible justifications for this combination, without ignoring important downsides. We close by identifying certain assumptions on which this system must depend.

---

10. *See* John Paul Stevens, *The Third Branch of Liberty*, 41 U. Miami L. Rev. 277, 291-92 (1986) (“If there is to be an impartial arbitrator in controversies between the individual and the sovereign, the members of the Third Branch are surely the best qualified to accept that responsibility.”); *see also* Daniels v. Williams, 474 U.S. 327, 337 (1986) (Stevens, J., concurring) (stating that due process “bars certain arbitrary government actions”).
I. TWO DIMENSIONS OF JUDICIAL OVERSIGHT

Courts face many choices about whether and how to intervene in the affairs of other institutions. These decision points travel under a number of doctrinal labels, including justiciability, jurisdiction, immunities, standards of review, remedies, and so on. Aggregated across cases, the selection made by a judicial system can be charted on several dimensions. We focus on two:

- *The area of judicial oversight*—meaning the extent to which courts are willing to monitor the conduct of other government officials, compared to the instances in which no judicial oversight is available.

- *The intensity of judicial review*—meaning the extent to which courts, when willing to monitor the conduct of other officials at all, are free to independently scrutinize the substance of those decisions and to substitute their own judgment on the matter.

One way to understand the difference between “area” and “intensity” is to compare the distinction between “jurisdiction” and “merits.” In ordinary civil litigation, a plaintiff complains about a defendant’s past, present, or future action or inaction, and asks for judgment on the merits of that complaint. But jurisdictional problems, whether subject matter or personal, may prevent the judiciary from evaluating anything close to the plaintiff’s core allegations. Our notion of area is a little like the jurisdiction of the federal courts: It measures the overall scope of claims, officials, and conduct within the sights of the federal judiciary. Intensity, in contrast, measures judicial assertiveness on questions of substance, procedure, and
remedy falling within the area of oversight. It is about how courts deal with
the merits of a complaint.\textsuperscript{15} These categories are not exhaustive. Other
dimensions can be usefully charted, such as the theoretical ambition, the
doctrinal territory covered, or the stare decisis strength of the average
decision.\textsuperscript{16} And we are not speaking to oversight of nongovernment
conduct. But area and intensity will illuminate something systematic about
Justice Stevens's jurisprudence, and it points out choices for the rest of the
judiciary.

Before moving to concrete examples, we should discuss a few
complications. Our two dimensions are meaningfully related. "Area"
choices are gateways to "intensity" choices. If a controversy falls outside
the chosen area of judicial oversight, there is no issue about the character of
judicial review thereafter. Indeed, if we set the system-wide area value to
zero, the intensity number is never relevant. In this sense, area is logically
prior to intensity. In addition, government victories after merits-based
judicial review can, as a functional matter, punch holes in the area of
judicial oversight by restricting the availability of legal recourse in future
cases. This effect is most serious when courts are in the habit of issuing
broad pronouncements on substantive law, and when the force of stare
decisis is powerful. But none of this is sufficient to eliminate the
area/intensity distinction. In our world, and perhaps especially with regard
to constitutional law, respect for precedent is often a moderated policy,\textsuperscript{17}
and even Supreme Court opinions can be drafted to have little effect beyond
the instant case.\textsuperscript{18}

Of potentially greater significance, the values on our axes might be
positively correlated. Less-intense forms of judicial review might naturally
accompany a small-area judiciary. This would make judges more like
"servile agents" than independent operators, locating them near point 1
on our chart. Similarly, a large-area judiciary might come with assertive court
oversight, placing judges closer to the "aggressive principals" situated
beyond point 2. In fact, many prominent justices can be plotted near points
1 and 2. Justices William Brennan and William O. Douglas were reluctant

\textsuperscript{15} Accordingly, qualified immunity from damages fits better on the intensity axis, even
though "immunity" is usually a matter of area. Under the standard test for qualified
immunity, courts compare official conduct with substantive law, albeit using a forgiving
violated clearly established statutory or constitutional rights of which a reasonable person
would have known).

\textsuperscript{16} \textit{See} Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme
Court 17, 21 tbls.1.1, 1.2 (1999) (using categories of narrow/wide, shallow/deep,
minimal/nonminimal, and strong stare decisis/weak stare decisis); Frederick Schauer, \textit{Justice

\textsuperscript{17} \textit{See}, e.g., Lawrence v. Texas, 539 U.S. 558, 577-78 (2003); Patterson v. McLean
justices might ignore Court precedent yet stick to their own prior conclusions. If so, it would
be more important for us that Court decisions be drafted narrowly, and subsequently read
that way.

to sacrifice federal judicial jurisdiction, while their exercise of constitutional judicial review was relatively independent and assertive. Justices Felix Frankfurter and the second Justice Harlan often ended up toward the other end of both axes. Even worse for our chosen dimensions, perhaps any correlation is more than coincidental. The normative arguments that drive choices on area might work equally well for intensity. Imagining this connection is not difficult. Trust in the judiciary’s relative detachment from ordinary politics fits comfortably with minimal concern about court competence—and both propositions might justify a relatively broad judicial purview (large area) coupled with probing judicial inquiry and independent judgment on substantive, procedural, and remedial rules (high intensity). If the judicial system’s scores on the area and intensity axes are empirically and normatively correlated, then our two dimensions start to collapse into one another.¹⁹

Yet area and intensity are distinct in important ways. Judges are not compelled by any unbendable law of nature to place themselves on the slope running from the northwest to the southeast corner on our chart. And the other options are more intriguing. Courts might intervene rarely but then aggressively, or often but with deference. In other words, a judiciary might focus its field of oversight to a small territory, in which its scrutiny is assisted by the brightest klieg lights and exercised with highly independent judgment (i.e., point 3 and beyond).²⁰ Or it might push the boundaries of its attention to the furthest reaches of government operations, while dimming its searchlights and looking only for obvious improprieties (i.e., point 4 and further). Each combination is associated with certain trade-offs. It might be perfectly pragmatic, if not theoretically elegant, to move the federal judiciary toward points 3 or 4. Courts have limited resources; perhaps both area and intensity require resource expenditures, and one may be appropriately exchanged for the other.²¹ This trade can be accomplished, moreover, without shoving judges into the outer reaches of judicial behavior exemplified by the “quixotic taskmaster” or “backseat driver.” Judicial intervention need not be irrationally rare while unmercifully harsh, or constantly pestering while largely ineffectual.

In the next section, we explain ways in which Justice Stevens departs from the intuitive slope. Admittedly, his opinions provide counterexamples, many or all of which reflect overriding normative commitments. For instance, Justice Stevens prefers a relatively large federal habeas jurisdiction along with relatively independent review on the

---

¹⁹. Note also that judicial decision making takes place even “when” a matter is outside the area of oversight. Somebody has to delineate the area and decide which matters fall within and outside it. Even if judges want someone else to tell them the answer to these “who decides” questions, the very decision to defer involves judicial judgment. Cf. Louis Michael Seidman, The Secret Life of the Political Question Doctrine, 37 J. Marshall L. Rev. 441, 444-65 (2004) (dissecting versions of the political question doctrine).

²⁰. Justices Hugo Black and Antonin Scalia might fall closest to point 3.

merits, which allows federal judges to enforce strong norms of disclosure against local prosecutors. Justice Stevens’s type is no more pure than anyone else’s. Yet the trend in his opinions helps us to think more clearly about the judiciary and its relation to other institutions.

II. JUSTICE STEVENS LEAVES THE SLOPE

A. The Area of Judicial Oversight

No justice is more committed than Stevens to maintaining a large area for judicial oversight. Sometimes the area he defends is physical territory, as with habeas jurisdiction over detainees at Camp Delta on Guantánamo Bay. On other occasions the "area" at issue is figurative, as with various forms of governmental immunity. Either way, there is a theme: Some type of judicial oversight is usually indispensable because people given government power are capable of wrongdoing and, in Justice Stevens’s view, the risk of serious official misconduct should be minimized by the availability of a vigilant judiciary.

1. Jurisdictional Territory

The best example of the Stevens position is recent. In response to the terrorist attacks of September 11, 2001, Congress authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons." After its military attack on Al Qaeda and the organization’s supporters in Afghanistan, the United States decided to house hundreds of foreign detainees at the U.S. naval station at Guantánamo Bay, Cuba.

At the time, it was not at all clear that federal courts would exercise jurisdiction if habeas applications were filed on behalf of these noncitizens. In the 1950 case of Johnson v. Eisentrager, the Court denied habeas to a group of German citizens who had been captured, tried by military


commission for war crimes, and incarcerated abroad. In *Rasul v. Bush*, the government accordingly contended that Article III courts had no business on Guantánamo, and the lower courts had dismissed the habeas applications at issue. Detention of noncitizens on (technically) foreign territory as part of a congressionally authorized military campaign against an ongoing terrorist threat was, at least arguably, a matter of executive discretion and beyond federal jurisdiction.

The Supreme Court saw it differently. Without adjudicating the claims for relief, Justice Stevens, writing for a majority of the Court, refused to relinquish habeas jurisdiction. Stevens disposed rather summarily of the *Eisentrager* precedent and instead stressed the little-known case of *Ahrens v. Clark*. Decided in 1948 over the dissent of Justice Rutledge, *Ahrens* held that the District Court for the District of Columbia lacked jurisdiction over the habeas petitions of German citizens detained at Ellis Island, because the petitioners did not reside within the district court's territorial jurisdiction. Between 1948 and the 2004 decision in *Rasul*, however, the Court relaxed the strict territorial rule announced in *Ahrens*. Justice Stevens used that movement to undercut both *Ahrens* and *Eisentrager*. He reasoned that the latter was concerned only with a constitutional right to habeas access, partly because *Ahrens* led judges to assume no statutory grant of habeas jurisdiction in those circumstances. But Justice Stevens considered the *Ahrens* premise cracked, which helped him escape the holding in *Eisentrager*.

The effort expended by Justice Stevens to distinguish precedent indicates a preference for maximum habeas jurisdiction, and the logic suggests a tribute by Stevens to his former boss. In 1956, Stevens published an essay on Justice Rutledge which opened with an analysis of the *Ahrens* dissent. Stevens quoted a passage questioning the government’s freedom to escape the reach of judicial review through strategic decision making.

[M]ay the jailers stand in defiance of federal judicial power, and plead either the accident of the locus of detention outside the court’s territorial limitations, or their own astuteness in so selecting the place, to nullify judicial competence?

---

25. See *id.* at 777-81.
27. See *id.* at 472-73.
28. See *id.* at 480.
29. 335 U.S. 188 (1948).
30. See *id.* at 192-93.
31. See *Rasul*, 542 U.S. at 477.
32. He did not reach the question whether the constitutional rule announced in *Eisentrager* was still good law. See *id.* at 479.
Although Rutledge lost battles in *Ahrens* and *Yamashita*, fifty years later his former clerk used Rutledge’s arguments to maximize the reach of federal habeas jurisdiction.

*Rasul*’s importance is easy to overstate. Beyond a cryptic footnote, the majority said nothing of substance about the merits of the detainee claims. Nor is it certain that any detainee will ever receive habeas relief. In this vein, consider Justice Stevens’s earlier opinion for the Court in *Sale v. Haitian Centers Council*. That decision rejected challenges to an executive policy of turning back Haitian boats that were illegally transporting passengers to the U.S., without first determining whether the passengers qualified as refugees. Justice Stevens held the policy permissible under federal statute and international treaty. “Although the human crisis is compelling,” he concluded, “there is no solution to be found in a judicial remedy.” *Sale* underscores our conviction that Justice Stevens’s dedication to area is not a precommitment on the intensity of judicial review. Relief was withheld on the merits, but the Haitians got a full hearing on the legality of executive policy.

Equally important, however, a commitment to reach the merits can have ex ante effects. Practical consequences might follow the simple assertion of habeas jurisdiction, at least if there is any credible threat of judicial condemnation. Indeed, there are indications that the opportunity for merits-based review on habeas has affected executive branch decisions. The Department of Defense announced an annual administrative review process for Guantánamo detainees shortly before the Supreme Court handed down *Rasul*, and it formed Combatant Status Review Tribunals shortly afterward. Military officials have started charging and trying a few detainees before military commissions for offenses under the laws of war.

---

37. The United States had detained the intercepted Haitians at Guantánamo Bay, until those facilities became overcrowded. *See id.* at 163.
42. *See Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) (rejecting challenges to these tribunals), cert. granted, 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No. 05b-184).*
And some detainees recently have been released to other countries. In late November 2005, moreover, the government lodged criminal charges in federal court against Jose Padilla, a U.S. citizen who had been captured in the U.S. but held in military custody as an “enemy combatant.” The shift occurred shortly before the deadline for responding to Padilla’s petition for certiorari on his habeas application. One can disagree with the government’s course of action in these instances, or the Court’s decision in Rasul, without disagreeing that judicial oversight affects official behavior.

2. Governmental Immunities

Justice Stevens’s reluctance to limit the area of judicial review evidenced in Rasul is echoed in a series of opinions that he has written addressing various governmental claims to immunity. In these cases, Justice Stevens often rebuffs claims that federal courts do not have any authority to consider the merits of complaints lodged by private parties.

a. Foreign Sovereign Immunity

Justice Stevens’s most important opinion on the subject of foreign sovereign immunity is Austria v. Altmann. The case involved a dispute over the legal status of six Gustav Klimt paintings owned by an Austrian Jewish family in the 1930s and currently in the possession of the Austrian National Gallery. The plaintiff in the case, Maria Altmann, alleged that the paintings had been wrongfully and secretly appropriated from the family in the 1940s. Altmann, however, did not learn of the facts surrounding the unlawful seizure of the artwork until 1998. Then living in Los Angeles, Altmann filed suit against Austria and its national museum in California state court. The question faced by the Supreme Court was whether the Foreign Sovereign Immunities Act of 1976 (“FSIA”) permitted a suit based on wrongdoing that occurred in 1948.

For much of their history, U.S. courts deferred absolutely to executive branch decisions on whether foreign sovereigns should receive immunity in our courts. Until 1952 (the period in which the wrongdoing alleged in Altmann occurred), the Executive Branch routinely granted requests from foreign sovereigns for immunity in U.S. courts. From 1952 to 1976, the Executive decided on a case-by-case basis whether to “suggest” that immunity be granted, and its suggestions would determine whether the suit would be dismissed by the court on that basis. In 1976, Congress enacted

47. See Altmann, 541 U.S. at 696.
the FSIA, in part to relieve diplomatic pressure on the State Department. The statute provided standards that would govern the immunity inquiry and be applied by the judiciary. In Altman, the Executive feared the flood of litigation and diplomatic controversy that might result if the FSIA were applied retroactively and asked the Court to find the statute inapplicable to Altman's case.

Justice Stevens wrote the opinion for the Court. He rejected the position advanced by the Executive and concluded that the FSIA does apply to pre-1976 conduct. In order to reach this holding, Justice Stevens first had to overcome the presumption announced in Landgraf v. USI Film Products—an opinion he authored—that statutes do not operate retroactively. Stevens found that the test set out in Landgraf, although "seemingly comprehensive," did not provide a "clear answer" to the FSIA. Drawing on the international legal roots of foreign sovereign immunity, Stevens acknowledged that "[t]hroughout history, courts have resolved questions of foreign sovereign immunity by deferring to the decisions of the political branches . . . on whether to take jurisdiction." His reference to multiple "political branches" provided a clue that Stevens would not find it necessary to defer to the executive's position in the case. Stevens reasoned that the language of the FSIA itself, and not the brief filed by the President in Altman, constituted the "most recent such decision" from one of the political branches. He rebuffed the suggestion that the executive's position should be privileged:

The issue now before us, to which the Brief for United States as Amicus Curiae is addressed, concerns interpretation of the FSIA's reach—a pure question of statutory construction . . . well within the province of the Judiciary. While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference.

Although applying the FSIA to pre-1976 conduct has potentially sweeping ramifications, Stevens characterized the holding as narrow. In particular, he noted that the executive's view in individual cases was relevant to judicial determinations. Altman evokes several classic themes of Justice Stevens's writings on immunity. Most notably, he determined that the sovereign did not have immunity, which required him both to find his own opinion in Landgraf "unclear" and to reject the views of the executive on a question with a close bearing on foreign affairs. As Justice Anthony Kennedy observed in dissent, the decision to apply the FSIA may lead to the very problems the

48. See Landgraf v. USI Film Products, 511 U.S. 244 (1994).
49. Altman, 541 U.S. at 677.
50. Id. at 696 (internal quotation omitted).
51. Id.
52. Id. at 701 (internal quotation omitted). Contrast Justice Stevens's support for Chevron deference in other situations, discussed infra Part II.B.1.
53. See Altman, 541 U.S. at 701.
54. See id.
Act was designed to remedy—pressure by foreign states on the executive to make “suggestions” of immunity. What the Altman decision opened up, however, was the possibility that Maria Altman and other similarly situated plaintiffs would have the merits of their claims adjudicated. And although Altman won her case in the Supreme Court, Stevens’s opinion suggested that she might not ultimately prevail on her claim. Furthermore, he emphasized the importance of case-by-case determinations by the executive and judiciary about whether the foreign policy implications of a suit should ultimately outweigh the plaintiff’s claim for relief. Justice Stevens’s opinion indicated a general confidence in the judiciary to resolve the application of sovereign immunity in future cases, despite the political consequences such suits may have.

b. Federal Sovereign Immunity

Justice Stevens has been equally unwilling to condone sovereign immunity in suits against the United States. In Smith v. United States, for example, Justice Stevens was the lone dissenter from the majority’s decision that the waiver of immunity in the Federal Tort Claims Act did not apply to the sovereignless region of Antarctica. He chided the majority that “[m]ajestic legislation like the Federal Tort Claims Act should be read with the vision of the judge, enlightened by an interest in justice, not through the opaque green eyeshade of the cloistered bookkeeper.” Stevens declared that “the international community includes sovereignless places but no places where there is no rule of law.” For his final salvo in Smith, Stevens quoted Lincoln’s first State of the Union message: “It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.”

Justice Stevens also dissented from the majority’s finding of governmental immunity in United States v. Nordic Village. Nordic Village was an Ohio business that entered Chapter 11. Its creditors subsequently sought to recover from the United States money unlawfully taken from the company’s corporate account by one of the company’s officers and paid to the IRS to fulfill his individual tax liability. The question faced by the Supreme Court was whether the relevant provision of the Bankruptcy Code waived the United States’ immunity from suit for money damages. Justice Antonin Scalia, writing for seven members of the Court, found that it did not. Scalia asserted that waivers of governmental

55. Id. at 733-34 (Kennedy, J., dissenting).
56. See id. at 701-02 (majority opinion).
58. Id. at 217 (Stevens, J., dissenting).
59. Id. at 216-217.
60. Id.
62. See id. at 30-31.
immunity must be "unequivocally expressed" and described the statutory language as ambiguous. Justice Stevens responded with a broadside against sovereign immunity, calling it a "persistent threat to the impartial administration of justice." He declared that "[t]he injustice that the Court condones today demonstrates that it is time to reexamine the wisdom of the judge-made rules that drive its decision." In Stevens's view, the Court had committed a double indignity against justice, both by adhering to a judicially created rule that gave the sovereign special status to defeat claims of wrongdoing and by requiring a clear statement if the government chose not to avail itself of that privilege.

One other Stevens dissent is worth noting. In 1986, the Court considered whether the text of the 1928 Flood Control Act precluded tort recovery against the federal government. The case, *United States v. James*, involved two sets of plaintiffs who had drowned while boating on reservoirs created pursuant to flood control projects. In both accidents, the government was found to be negligent. The majority held that the Flood Control Act's preservation of federal sovereign immunity for "any damage from or by floods or flood waters" included injuries both to people and to real property. Justice Stevens dissented. Relying on the legislative history, Stevens argued that limiting the term "damage" to injuries to property was more consistent with congressional intent.

Stevens ended his opinion with an unusually outraged condemnation of the Court's conclusion.

It defies belief—and ascribes to the Members of Congress a perverse, even barbaric, intent—to think that they spent days debating the measure of extraconstitutional compensation they would provide riparian landowners but intended—without a single word of dissent—to condemn the widows, orphans, and injured victims of negligent operation of flood control projects to an irrational exclusion from the protection of the subsequently enacted Tort Claims Act.

While one can imagine several reasons why Congress might have enacted legislation that favored riparian landowners over widows and orphans, it is not an intent that Justice Stevens would accept without clear evidence (even perhaps a clear statement) to the contrary.

64. *Nordic Vill.*, 503 U.S. at 33 (citations omitted).
65. *Id.* at 37.
66. *Id.* at 43.
67. *Id.* at 39 (Stevens, J., dissenting); see also *Lane v. Pena*, 518 U.S. 187, 212 (1996) (Stevens J., dissenting).
68. In an earlier opinion, Stevens had written for a unanimous Court that statutory waivers of governmental immunity should be "liberally construe[d]." *Franchise Tax Bd. of Cal. v. United States Postal Serv.*, 467 U.S. 512, 517, 520 (1984).
72. *Id.* at 619-20 (Stevens, J., dissenting).
73. *Id.* at 620.
c. State Sovereign Immunity

The fight over state sovereign immunity gets the attention of commentators, but now we can see that Justice Stevens's position here is essentially no different than for other instances of governmental immunity. He consistently resists such defenses: "[A]ll Governments should generally be accountable for their illegal conduct." With regard to U.S. states, then, his view is nearly Wilsonian. Immunizing these governments from citizen complaint and judicial redress would be, at most, tolerated by the Federal Constitution. At the same time, Justice Stevens does not take the ultimate stance that sovereign immunity is unconstitutional. He accepts a clear-statement requirement for abrogation of that immunity by federal statute, and he would deny Congress authority to extend federal judicial power contrary to the dictates of the Eleventh Amendment's text. But his anti-immunity leanings are otherwise quite obvious.

State sovereign immunity has an extensive scholarly following, so we need only a brief restatement for our purposes. The Eleventh Amendment's plain text is, and maybe always has been, irrelevant to the Court's sovereign immunity doctrine. The Amendment prohibits federal courts from entertaining a suit, in law or equity, commenced or prosecuted by a citizen of State A (and some others) against State B. It is an intelligible rule, even if it looks like bad policy. There are, of course, interpretive ambiguities. Somewhat creative readings trim the Amendment's boundaries so as to permit suits on federal questions, and perhaps the text should not reach Supreme Court appellate jurisdiction over state courts in any case. Yet the federal judicial doctrine of state sovereign immunity is not really concerned with that snippet of text. For a long time, the doctrine

---


76. James, not Woodrow. See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 457 (1793) (opinion of Wilson, J.) (denying that Georgia was "sovereign" with respect to Union purposes); James Wilson, *Pennsylvania Ratifying Convention, in 1 The Founders' Constitution* 265 (Philip B. Kurland & Ralph Lerner eds., 1987) (Dec. 1-11, 1787) ("[T]he sovereignty resides in the people.").


81. See Seminole Tribe, 517 U.S. at 114 (Souter, J., dissenting); see also Pennsylvania v. Union Gas Co., 491 U.S. 1, 31 (1989) (Scalia, J., dissenting).

has accomplished both less and more than even creative interpretations of the Amendment suggest.

For example, nobody seems to care about states consenting their way into federal court on claims filed by out-of-staters. Federal courts also protect states beyond the Amendment’s plain text. The nineteenth century was not over before the Supreme Court barred a federal suit against a state filed by a citizen of that state. In fact, the rule now reaches beyond adjudication in federal courts. There are handy routes around all of this doctrine. But the substitutes are not always perfect, and so the debate on the Court has been whether Congress may abrogate state sovereign immunity from private suits for compensatory damages, without purchasing state consent. A majority of the current Court, including Justice Sandra Day O’Connor, usually says no. And they support their conclusions with some founding-era promises plus a general respect for states and their treasuries.

Justice Stevens’s contrary view is not surprising in light of his other work in the immunity field. It is difficult enough for him to accept statutorily grounded or common-law derived immunities. He may abide by the idea as a hangover from 1787, a sub-constitutional doctrine not entirely abolished by ratification. However, the notion that an elected United States Congress cannot abrogate this immunity by otherwise valid legislation is almost comically inconsistent with Justice Stevens’s philosophy. It constitutionally entrenches a rule nearly opposite his view: Complaints against governments raised by private parties should be adjudicated on the merits as often as possible. Terminating a case based on the governmental status of the defendant is not even close to that goal. Whatever dignitary interests states have, in his view they are nothing compared to that of private individuals who believe they have been harmed by government wrongdoing. All the more so when a national political institution, which may incorporate the interests and arguments of states, has endorsed such litigation. Even though it is far from clear that the majority has

83. See Seminole Tribe, 517 U.S. at 82 & n.9, 83 (Stevens, J., dissenting) (pointing to the problem); Martha A. Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515, 516 n.8, 524-25, 543 (1978). The Amendment says nothing about consent, and issues of Article III’s scope could be jurisdictional matters that courts must address sua sponte.

84. See Hans v. Louisiana, 134 U.S. 1 (1890).


87. See, e.g., Fed. Mar. Comm’n, 535 U.S. at 760 (“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”); The Federalist No. 84, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (focusing on debt-collection claims).

88. Accord Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 466 (1793) (Wilson, J.) (“Causes and not parties to causes, are weighed by justice, in her equal scales: On the former solely, her attention is fixed: To the latter, she is, as she is painted, blind.” (emphasis omitted)).
accomplished anything very meaningful with its state sovereign immunity decisions, Justice Stevens and three others continue to dissent.89

d. Absolute Official Immunity

Occasionally, courts grant government officials “absolute immunity” from lawsuits for compensatory damages. The legitimate objectives of certain offices, the argument goes, are so important or sensitive to litigation that courts should refrain from awarding damages to private parties.90 The rules of absolute immunity are not as self-executing as their title suggests, however. For instance, once the courts determine which officers are entitled to the protection, they might demand that the alleged misconduct be closely connected to the defendant’s official duties.91 In any event, the concept is similar to that of other immunities we have reviewed.

Justice Stevens occasionally supports absolute immunity. He is willing to protect not only judges,92 but also the President under certain conditions. Thus he joined the majority in Nixon v. Fitzgerald,93 granting a former President immunity from civil damages claims premised on his official conduct while in office.94 But Justice Stevens is much better known for rejecting a more recent claim of presidential immunity, and his position in that case fits easily into his general anti-immunity views.

The judgment in Clinton v. Jones95 was unanimous, but Justice Stevens wrote the opinion of the Court and has shouldered some of the subsequent criticism. The case was a marquee dispute, so we offer only a brief recap. Paula Jones alleged that President Clinton sexually propositioned her while he was governor of Arkansas and she was a state employee. But Clinton was President by the time her lawsuit was filed, and he accordingly demanded temporary immunity from suit. Nobody on the Court was willing to give it to him. For eight Justices, Stevens declared that the Court


94. See id. at 748 & n.27, 749 (reserving the question whether Congress may abrogate this immunity).

95. 520 U.S. at 681.
had "never suggested that the President, or any other official, has an
immunity that extends beyond the scope of any action taken in an official
capacity."96 Although the stakes of the case were much higher than those
in his other immunity decisions, its outcome merely confirms Justice
Stevens's reluctance to place any claims of governmental wrongdoing
beyond the reach of judicial process.

Clinton also follows a theme expressed in Altmann and Rasul. As with
all claims for official immunity, probably the best arguments are structural
and functional, not formal or historical. As defendant, President Clinton
stressed the unique demands of his office within the constitutional design.97
The President is singular and special. It would not have been surprising had
the federal judiciary at least postponed consideration of Jones's suit and the
attendant burdens of modern litigation. Justice Stevens's response, aside
from precedent,98 rested on faith in federal judges. He reasoned that a
conscientious district judge could avoid serious interference with execution
of the President's duties—without forfeiting the ability of a private party to
receive immediate and ongoing attention from the judiciary.99

In retrospect and looking only at this controversy, the Court's optimism
might have been misplaced.100 We are more interested in what the decision
represents: a willingness to trust an individual judicial officer to fairly and
efficiently manage an inquiry into the conduct of our highest government
officers. It is perfectly consistent with Justice Stevens's dedication to the
widest feasible area of oversight for official misconduct.

B. The Intensity of Judicial Review

However large the area of judicial oversight, its intensity need not
increase accordingly. For Justice Stevens at least, the two variables are not
entirely dependent. What follows is a short collection of relatively
restrained instances of judicial review in public law. The first example
involves judicial review of federal agency decisions, the second arises from
takings claims, the third addresses remedies for the violation of
constitutional norms, and the fourth comes from substantive constitutional
law.

1. Chevron Deference

A leading example of low-intensity judicial review involves the
relationship between courts and federal agencies. The best known judicial
decision in administrative law, Chevron U.S.A. Inc. v. Natural Resources

96. See id. at 694.
97. See id. at 697.
98. See id. at 704-05.
99. See id. at 707-08 (holding that the District Court had abused its discretion in
deferring trial until after the completion of the President's term of office).
100. President Clinton must bear some responsibility for his subsequent deposition
testimony, which helped prime a truly distracting impeachment proceeding.
Defense Council, Inc.,\textsuperscript{101} was written by Justice Stevens in 1984. Since then, it has been cited in more than 8000 judicial opinions.\textsuperscript{102} One might debate the meaning and empirical significance of the decision, and whether it was intended to be a break from past practice or simply a focal point for understanding a position already staked out in the federal courts. For our purposes, these details are insignificant. What matters is the general message of the case Justice Stevens authored, and the large number of important executive decisions that could come within its reach.

Justice Stevens made quite clear that federal courts sometimes are obligated to restrain their independent judgment, even on questions of statutory interpretation, in the face of reasonable judgments by federal administrative agencies. “When a court reviews an agency’s construction of the statute which it administers,” he wrote, the judiciary first looks for unambiguous congressional intent.\textsuperscript{103} But when there is none,

the court does not simply impose its own construction on the statute . . . .

Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.\textsuperscript{104}

The justification for such deference is rooted in several ideas. It comes from practical concerns about institutional competence, a democratic commitment to enhancing the legitimacy of policy judgments, and a realist’s acknowledgment that statutory interpretation can involve such policy decisions. Each idea favors judicial modesty. Courts will often lack desirable technical expertise and political accountability if they take on public policy choices—choices that are often unavoidable in the sensible implementation of federal statutes.\textsuperscript{105}

Chevron’s step two is therefore an instance of restraint along the second dimension of judicial oversight. True enough, courts have not fully retreated. They are not forfeiting jurisdiction to double-check the work of federal bureaucracies; and judges who see clarity in most statutory provisions can often abide by Chevron and yet reject agency conclusions. But a lighter judicial touch is directed when an agency makes debatable choices that are not plainly inconsistent with congressional intent. Even within the area of judicial oversight and even when dealing with the familiar material of the United States Code, courts may defer to the decisions of other officials.

\textsuperscript{101} 467 U.S. 837 (1984).
\textsuperscript{102} This is according to a KeyCite list drawn from the Westlaw database on September 17, 2005. Although now sufficiently entrenched to be passed over, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), had a long head start and is still at only 3000 judicial citations.
\textsuperscript{103} Chevron, 467 U.S. at 842-43.
\textsuperscript{104} Id. at 843 (footnotes omitted).
\textsuperscript{105} See id. at 843 & n.11, 844-45; see also id. at 865 (“Judges are not experts in the field, and are not part of either political branch of the Government.”).
In recent years, the Court has produced uncertainty about the domain in which *Chevron* is supposed to operate.\textsuperscript{106} It is not always clear what types of executive decisions even qualify for *Chevron*-style deference, and which might receive less-respectful review.\textsuperscript{107} Nor has Justice Stevens dedicated himself to the broadest, cleanest conceivable application of *Chevron* deference. There is little chance he would defer to the Department of Justice on a question of federal criminal law, for example. But on other questions and under other statutory schemes, like the environmental policy choices involved in *Chevron* itself,\textsuperscript{108} he remains willing to suspend independent judicial judgment.

2. Public-Use Takings

*Chevron* deference is not far removed from the Stevens approach to a now-controversial aspect of constitutional property rights. In takings cases, Justice Stevens is regularly deferential to political outcomes, and perhaps especially so when compensation for property owners is assured. This leaning was on display last Term in *Kelo v. City of New London*.\textsuperscript{109} Pursuant to an economic development plan, the City sought to take by eminent domain privately owned homes and other property. Ultimately, not all of the property in question would be occupied by the City or the general public, however. Some of it was slotted for use by private commercial interests. Nine unwilling sellers therefore complained that the City would not be taking their property for any “public use,”\textsuperscript{110} as required by judicial precedent that locates takings restrictions within the Fourteenth Amendment.\textsuperscript{111}

Justice Stevens, writing for a five-member majority, refused to replace the policy judgment of the City’s officials. They had concluded that the development would benefit the municipality in general, they were willing to pay for the property involved, and the federal judiciary was not in the best position to assess long-term, cross-cutting, and dynamic economic impact of the plan and the alternatives. Justice Stevens stressed that past Courts had consistently interpreted the public use demand leniently, “reflecting our longstanding policy of deference to legislative judgments in this field.”\textsuperscript{112}


\textsuperscript{108} See *Chevron*, 467 U.S. at 865-66.

\textsuperscript{109} 125 S. Ct. 2655 (2005).

\textsuperscript{110} See id. at 2658-60.

\textsuperscript{111} See, e.g., Dolan v. City of Tigard, 512 U.S. 374, 383 (1994); id. at 405-06 (Stevens, J., dissenting).

\textsuperscript{112} *Kelo*, 125 S. Ct. at 2663.
Acknowledging official abuse was possible, Stevens nevertheless refused to draft a prophylactic rule to replace case-specific review.\textsuperscript{113}

\textit{Kelo} might say as much about precedent as Justice Stevens’s preferences. In large measure, the Court had already marked a path away from high-intensity review of public use determinations\textsuperscript{114}—whether or not the general public was aware of it. Justice Stevens’s opinion is still notable in light of his subsequent public comments. Two months later, he indicated his personal opinion that the City’s aggressive use of its takings authority was probably misguided.\textsuperscript{115} Yet he also concluded that judicial restraint, rather than judicial regulation, was the better course: “[T]ime and time again judges who truly believe in judicial restraint have avoided the powerful temptation to impose their views of sound economic theory on the policy choices of local legislators.”\textsuperscript{116} At least where private party compensation is assured, Justice Stevens believes his role in public use disputes is largely restricted to checking whether municipalities like New London aim at legitimate goals and make considered decisions—not whether they make wise ones.\textsuperscript{117}

3. Constitutional Remedies

Consider, too, Justice Stevens’s approach to constitutional remedies. This is an area in which constitutional text says little. The Federal Constitution offers few explicit instructions on how private parties might enforce its guarantees. Historical sources of original meaning typically say even less. So when claimants demand judicial redress for constitutional wrongs, the results are likely to be determined with a relatively large measure of court judgment. That judgment could be exercised independently, without reference to the interests and efforts of other institutions. On certain questions—like exclusionary rules,\textsuperscript{118} \textit{Miranda}

\textsuperscript{113} See id. at 2667 (“[T]he hypothetical cases posited by petitioners can be confronted if and when they arise.”).
\textsuperscript{115} See Justice John Paul Stevens, Judicial Predilections, Address to the Clark County Bar Association, Las Vegas, Nevada 10 (Aug. 18, 2005) (transcript on file with authors) (“[M]y own view is that the allocation of economic resources that result from the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials.”).
\textsuperscript{116} Id. at 10-11.
\textsuperscript{117} Accord Nat’l League of Cities v. Usery, 426 U.S. 833, 881 (1976) (Stevens, J., dissenting) (indicating his objections to minimum wage laws as a matter of economic policy but denying a judicial role in killing them with constitutional law), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); see \textit{Kelo}, 125 S. Ct. at 2667 n.19, 2668.
warnings, and damages remedies for privacy violations by federal officials—some critics believe this is just what has happened.

There is another side to Supreme Court decisions in this field, however. In a more collaborative spirit, federal courts sometimes accept congressional or executive solutions to remedial questions. Modern cases are especially reluctant to authorize damages remedies for constitutional violations when another branch of government has addressed the matter. At least when other officials have carefully designed a comprehensive system for mediating the demands of efficient administration, deterrence, and compensation, the courts will probably refrain from dramatic intervention.

Justice Stevens’s opinion for the Court in *Bush v. Lucas* is emblematic of this approach. It represents a compromise on the intensity of judicial review without sacrificing much area. The plaintiff was a federal employee who had recovered back pay through an administrative review process on a speech-retaliation claim. He then sought additional relief from the judiciary for uncompensated injuries, and his claims were rejected in light of the existing administrative remedy. But the simple presence of an administrative alternative was insufficient to preclude judicial oversight. Those remedies were checked for constitutional adequacy. Although one might quibble with the judgment in that particular case, judgment was undeniably exercised.

One plausible understanding of these cases involves our distinction between area and intensity. Such decisions retain court authority to police boundaries imposed on other officials by the Constitution. Yet those boundaries are left wide or flexible enough for those officials to exercise considerable discretion. They understand that courts will not close their eyes to subsequent complaints, but their judgments are accorded meaningful respect.

---

123. 462 U.S. at 367.
124. See id. at 371, 372 & nn.8-9, 373 (referring to plaintiff’s complaints about the absence of a jury trial and uncompensated emotional injury, dignitary interests, and attorneys’ fees, plus the lack of punitive damages under the administrative scheme).
125. See id. at 368, 378 n.14; see also Chilicky, 487 U.S. at 425 (concluding that Congress did not fail to provide “meaningful safeguards or remedies”).
4. Speech and Equal Protection

No one would characterize Justice Stevens as shy about using the First and Fourteenth Amendments against other branches and levels of government. Overall, he is as conscientious and perhaps as assertive as anyone else now serving on the Court. And yet there are critical spaces where Justice Stevens strongly prefers doctrinal flexibility. Even on questions of speech regulation and legal equality, which are so deeply important to the Justice and the Nation, he is not willing to use one opinion to flatly dictate outcomes in all future cases.

A nice example is his treatment of "content-based" regulation of speech. Justice Stevens understands that the First Amendment’s protection for “the freedom of” speech cannot be both sensible and utterly content neutral.127 The judiciary, by whatever means necessary, will permit regulation of perjury, fraud, conspiracy to commit murder, contracts, and much other conduct that works with words.128 Beyond the obvious cases, Justice Stevens often resists formulas that constrain judicial discretion in the instant, and unforeseen, case. In his words, “the attempt to craft black-letter or bright-line rules of First Amendment law often produces unworkable and unsatisfactory results, especially when an exclusive focus on rules of general application obfuscates the specific facts at issue and interests at stake in a given case.”129

There is a parallel strain in his writings on equal protection. His declaration in Craig v. Boren130 that the Constitution has “only one Equal Protection Clause” was more than a truism.131 The point of his concurring opinion was that two or three tiers of judicial scrutiny were too confining.132 On one hand, this suggests equal protection doctrine should be spread out, perhaps to any group or individual disproportionately burdened by any form of state action. Yet whatever spreading is implied by the opinion comes with reluctance to categorically prohibit government line drawing. Justice Stevens indicated that a loosely specified standard is appropriate in equal protection cases, permitting courts to consider normative and empirical arguments from all sides.133 This suggests that

---

127. See generally R.A.V. v. City of St. Paul, 505 U.S. 377, 420 (1992) (Stevens, J., concurring) (“[O]ur decisions demonstrate that content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment.”)
130. 429 U.S. 190, 211 (1976) (Stevens, J., concurring).
133. See Craig, 429 U.S. at 213-14 (Stevens, J., concurring) (reviewing empirical evidence but ultimately rejecting the State’s justification for a gender distinction in its alcohol regulation).
many claims cannot be quickly rejected with the make-believe version of rational basis review. Judicial review would have to stay meaningful. But equally rigid upper tiers of judicial scrutiny would fall as well. Maybe consciously, Justice Stevens's approach would authorize officials to make novel arguments to support difficult decisions on complicated problems.

There is more to the story, of course. It is not as if the only normative commitment in play is a preference for flexible standards—along with the uncertainty and cost shifting to future adjudicators that tends to accompany them. In First Amendment cases, Justice Stevens is comfortable developing a rough hierarchy of speech value, at least to evaluate softer forms of regulation. Political speech or speech on matters of "public concern" sits at the top; sexually explicit communication ranks further down the scale. And no government attorney can like her chances defending regulation that uses public ignorance as the instrument of otherwise legitimate policy goals. In equal protection cases, moreover, normative commitments are needed to test whether "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." Justice Stevens, for his part, is profoundly concerned with state action that perpetuates caste status and subordination, but he is more willing to permit race-conscious state action that pushes in the opposite direction. His unwillingness to subscribe to a strong color-blindness norm is not simply a fondness for flexible judicial standards over flat rules. It is also an aversion to rules with a particular content.

The qualifications should not overrun the general lesson, though. Despite his preference for a large area of judicial oversight, and even with respect to crucial constitutional values, Justice Stevens is willing to leave constitutional argument relatively open. More private claims get a judicial hearing but court consideration will not guarantee government losses.

III. ON LARGE AREAS AND LOW INTENSITIES

Justice Stevens is not located at any of the extreme corners on our chart. He does not endorse federal judicial oversight for every place, person, and conduct that might evince wrongful government action or inaction. Nor is he systematically deferential to official justifications. Sometimes the


136. Cleburne, 473 U.S. at 452 (Stevens, J., concurring).

courthouse doors should remain closed, and sometimes the government bears an insurmountable burden of persuasion. Yet in essential respects, Justice Stevens has worked to maximize the area of judicial oversight while tempering the intensity of judicial review when exercised.

We are now in a better position to evaluate the trade-offs associated with this combination. The foregoing provides an understanding of the choice sets and some specific illustrations. The question is clearly too deep and complicated to provide a wholly satisfying judgment in this space (and maybe anywhere). So in these closing pages we offer a structured analysis and provisional assessments.

A. Upsides

A principal virtue of maximizing the area of oversight is that officials are less able to substitute one form of wrongdoing for another. When the judiciary refuses to insulate a particular officer, or location, or class of decision, there is no easy way to evade detection by a quick change of standard operating procedure. The idea is familiar from the law enforcement field. Habitually running intense police patrols through the same neighborhoods might simply push illegal conduct into other locations. Even if these geographic substitutes are not perfect for lawbreakers, they might be sufficient to eliminate any crime-control effect from the targeted patrols. And if the system of surveillance and response is dynamic in this way, it is irrelevant whether government officials had perfect information about the geographic distribution of law violations at the outset.

The same principle applies to courts monitoring other government officials. Announcing, for example, that Guantánamo Bay is an "Article III-free zone"138 opens a tempting space for executive action. Similarly, taking fewer categories of officials or official action off the table might enhance the beneficial deterrent effect of (expected) judicial oversight. Conscientious or at least conventionally rational officials should then more often consider judicial preferences before taking action. If those legal preferences accord with the best understanding of existing law, or are otherwise socially desirable, so too might be the effect on official behavior. There certainly are drawbacks to spreading oversight so broadly, and one can always debate the substantive law and remedies that the federal judiciary should enforce. Whatever the countervailing arguments, however, maximizing oversight area can minimize evasive substitutions and boost deterrence.

It is worth remembering the line we have tried to draw between area and intensity. The former involves considerations that are relatively disconnected from the merits of the claimant's allegations. They include questions such as territorial jurisdiction, immunities affixed to the position of a government official or the identity of an institution, along with other

litigation roadblocks that we have not detailed. There are convincing justifications for such hurdles; no sensible adjudicatory system is free of procedure that is uncongenial to some litigants. Moreover, opponents of government conduct do not always have clean hands, and hearing them out racks up costs for everyone else. On the other hand, for many people the utilitarian or moral weight of our two dimensions is not equal. Intensity is all about the substance of private grievances against tax-paid government officials. Area involves questions that many people regard as technicalities or worse—whether alleged wrongdoers are insulated from judicial action by their location, or their title, or something else relatively unresponsive to the pleas of a private claimant. We need not take a position on these impulses to see their influence.

The model also might be attractive to those interested in showing respect to individuals who suffer from official misconduct. For Justice Stevens, this seems to be a priority. Granted, his position on constitutional remedies stops short of full compensation, at least when a complex administrative regime is created to manage repeated claims. In addition, low-intensity judicial review counsels against judges taking on responsibility for wholesale system design or the administration of other institutions. The model is more modest than that. But potential victims are receiving an important benefit in exchange. Looking at the problem systematically, the large area of judicial oversight promoted by Justice Stevens increases the opportunity for individual private claimants to get a meaningful hearing in a relatively independent Article III tribunal. In individual cases, claimants may leave unhappy and perhaps empty-handed. Yet concentrating too hard on such disappointment overlooks the potential for a sensible and workable system of judicial oversight. The gadfly with an atypically serious complaint will receive judicial attention, if not an assured victory or even perfect compensation.

Trade-offs like these are touched on by the institutional design literature, particularly its attention to error costs and decision costs. For example, insistence on all-things-considered standards for merits determinations pushes off costs of decisions to lower courts and future cases. But doing so relieves the burden of constructing a good rule with limited information. Along with a commitment to a large territory of oversight, flexible standards are a method for judges to learn before boxing themselves in. This flexibility might make sense with respect to official conduct. These actors are often relatively well-informed repeat players. They might be difficult to deter with ordinary civil remedies, but they also might have

139. These include issues of justiciability (ripeness, mootness, standing), the political questions doctrine, federal abstention, limitations on personal jurisdiction and subject matter jurisdiction, exhaustion of administrative remedies, limitations periods, and res judicata.


greater respect (or fear) for judicial disapproval. If one assumes these officials ordinarily act in good faith, but sometimes take advantage when given the opportunity, a resource-constrained judiciary might reasonably choose to maximize its area while moderating its review.

B. Reservations

The large-area/low-intensity model is desirable only if its compromises make sense, and they are open to serious objection. Most important, the model imposes several kinds of costs on many kinds of actors. For the courts, their doors are almost always open. They are often prevented from closing cases using shortcuts unrelated to the merits. Advocates of the passive virtues may be concerned that the large-area model forces courts to confront the merits of the cases too often, precluding some techniques of judicial avoidance. Nor is adjudication necessarily simplified by more restrained forms of judicial review. Good examples are Chevron deference and a preference for standards in constitutional law. Nonjudicial officers might prevail more often under these approaches, but the rules of decision require significant judicial effort nevertheless.

The commitment is more troubling when engineered by the Supreme Court alone. That body will not always feel the consequences. Although narrower Supreme Court decisions inhibit precedent-loving Justices from saving time on subsequent cases, the Court’s appellate jurisdiction is almost totally discretionary. Lower federal courts cannot dispose of their docket by denying petitions for certiorari. They might respond by shirking their court-imposed obligations, or trying to circumvent them with alternative legal tools, like increasing opportunities for dismissal and summary judgment. But now the large-area/low-intensity model is not really operating.

Even if courts have the resources to reach the merits in the bulk of public law cases, we should be concerned about their competence. Deferential

142. See Schaffer ex rel. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005) (Stevens, J., concurring) (“[W]e should presume that public school officials are properly performing their difficult responsibilities under this important statute.”)

143. See generally Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics ch. 4 (1962). This characterization assumes that precedent exerts substantial effects on future decisions.

144. See 28 U.S.C. §§ 1254(1), 1257 (2000). Which is hardly to say that Justice Stevens stops short of extreme vigilance and conscientious discharge of his duties. Quite the contrary. For just one set of examples, consider his several, solo, fact-bound dissents in qualified immunity cases. See Brosseau v. Haugen, 125 S. Ct. 596, 603 (2004) (Stevens, J., dissenting); Wilson v. Layne, 526 U.S. 603, 620 (1999) (Stevens, J., concurring in part and dissenting in part); Hunter v. Bryant, 502 U.S. 224, 234 (1991) (Stevens, J., dissenting); see also Ferren, supra note 8, at 345 (asserting that Justice Rutledge, who cared deeply about individual litigants, “would not put his back [to] the record”).

145. But cf. Komesar, supra note 21, at 250-51 (asserting that “only a small percentage of governmental action receives serious judicial review”); id. at 128 (pointing out that litigation costs and uneven distribution of stakes skew judicial ability to get at certain social
review might provide comfort, but not every district and state court is equipped to adjudicate the variety of challenges implied by the model. These courts can be overseen in turn by the Supreme Court, of course. Yet now error costs are being reduced by even greater decision costs (in the form of appellate review). Finally, the Supreme Court itself may err, and in more than one direction. Suppose the Court uses a strong rule of deference to review a large area of conduct. Its deference might produce unjustified ratification of official action, misleading casual observers into a false sense of security and perhaps insulating political officials from full responsibility for their decisions.146

The burdens do not end there. Outside federal courthouses, government officials might incorporate their predictions about judicial reaction into an enormous number of decisions. Even so, they might still be called on to justify themselves by dissatisfied private parties. All this inhibits decisive executive action and freewheeling legislative choice. Such conduct comes with its own dangers, to be sure, and deterrence generated by uncertainty is not always bad. The central problem with the large-area/low-intensity combination is that its attractive features do not clearly outpace its unavoidable burdens, once all legitimate interests are accounted for.

If conventional legal logic plainly dictated this combination, it could be justified on rule-of-law grounds. But that is unlikely. Although some restrictions on the area of oversight are the product of judicial creativity,147 the model itself depends on contestable legal judgments. There is no clause in the Constitution explicitly mandating deference to political judgments about constitutional remedies, for instance, or favoring standards over rules in adjudication of speech clause claims.

C. Assumptions

Is the large-area/low-intensity combination better than the alternatives? Because a satisfying assessment of the model could be buried in empirical uncertainty, we can instead offer some assumptions on which it makes sense.

First is a strong worry about the abuse of government authority. Perhaps officials will regularly violate law if assured that no court will intervene—but they will abide by judicial orders to the contrary. In this spirit, Justice Stevens has, for instance, suggested that inroads into the doctrine of sovereign immunity in seventeenth-century England were made to protect

problems). Komesar might underestimate the force of a small set of cases on a government that ordinarily supports the federal judiciary as a sensible dispute resolution mechanism.

146. Compare Dennis v. United States, 341 U.S. 494, 510-11 (1951) (plurality opinion of Vinson, C.J.) (apparently performing a risk assessment for an internationally led communist overthrow of the government), with id. at 568-70 (Jackson, J., concurring) (blanching at the idea).

liberty from the threat of an unfettered executive. At the same time, he surely expects other officials to heed court orders. If you assume a pervasive risk of officials departing from their duties as faithful agents of the public, and yet respect for the judiciary as a dispute resolution mechanism, there might be reason to increase the area of judicial oversight.

Second, the upside of judicial oversight must be adequate to overcome increased decision costs, the risks of judicial error, and the threat to vigorous democratic politics. Aside from remedying the misconduct of other officers, there could be something acute in the injury to private interests when allegations of official wrongdoing are not taken seriously. Maybe the refusal of any independent arbiter to seriously consider a grievance against the state is often no less distressing than the challenged government action. Accordingly, in Justice Stevens’s opinions the dignity of the individual vindicated by the judicial process emerges as a value worthy of independent respect and judicial protection. On this assumption, judicial review delivers important benefits even when it is exercised with deference to other institutions. Moreover, such deference can ameliorate problems of judicial incompetence and democratic insulation.

Third and related, it could be that the process of serious judicial attention is prized by judges and citizens more generally. It is not difficult to picture the satisfaction, on both sides of the bench, when an initially implausible complaint is worked over and then vindicated. In any event, courts might focus on the most serious injuries, such as deprivations of physical liberty. And those restraints might be sufficiently unique that government officials will have difficulty achieving the same result by other means. That would make judicial oversight effectual and highly valued. Indeed, oversight with deference can fit with a viable sense of federal judicial duty. These positions are not dislocated from politics, but they are relatively insulated from partisan pressure. Refusing to shutter their view of official conduct, while refraining from self-indulgence, federal courts might gently push the rest of the government away from gratuitous private harm. This understanding of the judicial office elevates the role of the courts in taming official misconduct, without relying on unelected judges to run the government or misusing their authority to undercut democratic accountability.

We now are back to where we started. The premises on which large-area/low-intensity review makes the best sense are those so strongly suggested by the decisions of Justice Stevens—that government officials will misbehave if their discretion is unchained but will take seriously judicial preferences when oversight is maintained, that even the unlikely complainant deserves respect and some sort of hearing, and that the federal judiciary bears special responsibility for ensuring reasoned state action.

148. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 142 n.21 (1984) (Stevens, J., dissenting) (“Courts did not wish to confront the King’s immunity from suit directly; nevertheless they found the threat to liberty posed by permitting the sovereign’s abuses to go unremedied to be intolerable.”).
especially when physical liberty is at stake. Each premise may be fairly contested. But the bets Justice Stevens has made line up with the system of oversight indicated by his judicial opinions. His decisions not only aggregate to the model of oversight we have examined, they also suggest the values that can justify it.

CONCLUSION

The federal judiciary’s relationship with other government officials can be constructed in many different ways. Two of the dimensions by which that relationship is defined are the area of judicial oversight and the intensity of judicial review within that territory. Justice Stevens helps demonstrate that the values on these two axes need not move together. Courts might exchange intensity for area. Doing so enhances the judiciary’s ability to vindicate the unlikely claim of an injured citizen, without pretending to dominate other institutions. In any event, the dimensions of area and intensity help us think more clearly about the options. For that, and much more, we have Justice Stevens to thank.