

SUPREME COURT PREQUEL: JUSTICE STEVENS ON THE SEVENTH CIRCUIT

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ABSTRACT—Justice Stevens’s retirement from the U.S. Supreme Court has occasioned numerous retrospectives on his lengthy career as a Supreme Court Justice. Yet Justice Stevens’s career began on the Seventh Circuit and his voting behavior and doctrinal positions on the circuit court provide a unique window into his judicial character and the roots of his thinking on important issues that continued to preoccupy him on the Supreme Court. In this Essay, I first analyze then-Judge Stevens’s voting behavior on the court of appeals by examining the frequency with which he wrote separate opinions, as well as his voting interagreement with his colleagues on the circuit bench. I then discuss the doctrinal positions taken by Judge Stevens in several substantive areas, including substantive due process, gender discrimination, and election law, noting how those positions were often reiterated in Justice Stevens’s opinions on the Supreme Court. The Essay concludes that Judge Stevens, like Justice Stevens, was extremely independent in his voting behavior. In terms of the ideological direction of his votes, Judge Stevens’s votes did not follow a clear pattern; instead he was iconoclastic and unpredictable. Nevertheless, positions taken by Judge Stevens in several cases sounded themes and principles upon which he continued to rely even until his final term on the Supreme Court.

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“There is something about the man that suggests he is capable of holding strong views and holding them independently, if need be. And with spark.”[†]

INTRODUCTION

The retirement of Justice John Paul Stevens from the U.S. Supreme Court has resulted in a number of articles and symposia offering a retrospective on, and a celebration of, the Justice’s long career on the Court.¹ Focused as they are on Justice Stevens’s Supreme Court jurisprudence, most of these retrospectives do not reflect on Justice John Paul Stevens’s record as judge on the United States Court of Appeals for the Seventh Circuit. In this Essay, I argue that careful examination of then-Judge Stevens’s decisionmaking on the Seventh Circuit offers intriguing insights into the Justice’s judicial character and provides a useful roadmap to the development of his philosophy in several substantive areas of law. This Essay begins in Part I by describing Judge Stevens’s voting behavior on the Seventh Circuit, with a focus on his interactions and voting alignment with his brethren on that court. In Part II, I turn to several substantive areas in which Judge Stevens’s circuit court opinions are notable, either because they expressed doctrinal positions that continued to represent Justice Stevens’s views on the Supreme Court or because they demonstrate how his views have evolved over time. The Essay concludes by considering the ways in which Judge Stevens’s record on the Seventh Circuit sheds light on his judicial character and philosophy, which ultimately shaped Justice Stevens’s record on the Supreme Court.

[†] Jerald terHorst, *Justice Stevens Faces Toughest Test*, CHI. TRIB., Dec. 28, 1975, at A6.

¹ See, e.g., Erwin Chemerinsky, *The Vision of John Paul Stevens*, TRIAL, July 2010, at 48; Eugene R. Fidell, *Justice John Paul Stevens and Judicial Deference in Military Matters*, 43 U.C. DAVIS L. REV. 999 (2010); Linda Greenhouse, *Justice John Paul Stevens as Abortion-Rights Strategist*, 43 U.C. DAVIS L. REV. 749 (2010); Aram A. Schvey, *Human Rights Hero: Justice John Paul Stevens*, 36 A.B.A. SEC. INDIVIDUAL RTS. & RESPS. 25 (2009); Christopher E. Smith, *Justice John Paul Stevens and Capital Punishment*, 15 BERKELEY J. CRIM. L. 205 (2010); Editorial, *John Paul Stevens: A Judicial Role Model*, 94 JUDICATURE 4 (2010).

I. THE SEVENTH CIRCUIT: 1970–1975

Justice Stevens’s judicial service began five years prior to his confirmation as a Supreme Court Justice when he was appointed by President Richard Nixon to fill a vacancy on the Seventh Circuit.² At the time of his Seventh Circuit nomination, then-Judge Stevens was fifty years old and a partner in the Chicago firm of Rothschild, Stevens, Barry, and Myers. Judge Stevens’s confirmation to the Seventh Circuit was noncontroversial. Although appointed by President Nixon, Judge Stevens’s nomination to the circuit was championed by his former University of Chicago classmate Senator Charles Percy, viewed at the time as one of the “liberal voices” in the Republican Party.³ As a result, his selection had no clear ideological valence, nor did Judge Stevens’s record as an attorney suggest one.⁴ His confirmation hearing, scheduled with five other judges, lasted just over an hour and was described as “little more than a formality.”⁵

Judge Stevens took the oath of office for his circuit court seat on November 2, 1970 and decided his first case by December 1 of that same year.⁶ He joined a circuit court comprised of seven active judges including five Democratic and two Republican appointees, with one vacancy caused by the decision of Eisenhower appointee Latham Castle to take senior status in early 1970. In 1971, Nixon filled Castle’s seat with Judge Robert A. Sprecher, thus maintaining the 5–3 Democrat-to-Republican-appointee balance on the circuit. Judge Luther M. Swygert, a Kennedy appointee, was serving as chief judge at the time of Judge Stevens’s appointment. Other judges on the circuit in November 1970 included Kennedy appointee Roger J. Kiley; Johnson appointees Walter J. Cummings, Thomas E. Fairchild, and Otto Kerner, Jr.; and Nixon appointee Wilbur F. Pell, Jr.⁷

² Judge Stevens filled a vacancy caused by the death of Judge Elmer J. Schnackenberg on September 15, 1968. *See, e.g.*, U.S. CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, JUDICIAL CHRONOLOGY, available at http://www.lb7.uscourts.gov/Judges_Chronology.pdf; *Elmer J. Schnackenberg, On U.S. Bench in Chicago*, N.Y. TIMES, Sept. 17, 1968, at 47. Judge Schnackenberg had been appointed by President Eisenhower in a recess appointment in 1953. *See, e.g.*, RAYMAN L. SOLOMON, HISTORY OF THE SEVENTH CIRCUIT, 1891–1941, at 174, 179 (1981) (detailing the recess appointment); *5th Assistant Head Named in Post Office Department*, N.Y. TIMES, Nov. 18, 1953, at 34.

³ *Percy Praises Court Choice*, CHI. TRIB., Nov. 29, 1975, at S5.

⁴ Justice Stevens practiced antitrust law and was involved in a high-profile corruption investigation and prosecution involving Illinois State Supreme Court justices; he served as special prosecutor for the Greenberg Commission, named by the Illinois court to conduct the investigation. But far from politicizing Justice Stevens, his (unpaid) service to the Commission catapulted him to prominence in Illinois because of his vigorous prosecution of corruption in the interests of the rule of law. *See generally* KENNETH A. MANASTER, ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS (2001) (discussing the impact of the investigation and trial on Justice Stevens).

⁵ *5 Judge Choices Are Unopposed*, WASH. POST, Oct. 2, 1970, at A8.

⁶ *See United States ex rel. Mazenis v. McBee*, 435 F.2d 18 (7th Cir. 1970) (per curiam).

⁷ *See* U.S. CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, *supra* note 2.

With two prominent exceptions, this membership of active judges on the Seventh Circuit remained relatively constant until 1974. Judge Otto Kerner, Jr. took a leave of absence from the circuit in December 1971.⁸ His seat was not filled until January 1975, when Judge William J. Bauer was elevated to the circuit court by President Ford.⁹ The second change occurred in 1974, when Judge Kiley took senior status and Nixon appointed Philip W. Tone to fill Kiley's seat.¹⁰ Judge Tone had clerked for Justice Wiley Rutledge on the Supreme Court in the Term following Justice Stevens's clerkship on the Court¹¹ and was himself on President Ford's short list for the seat vacated by Justice William O. Douglas and ultimately filled by Justice Stevens.¹² Judges Tone and Stevens served together on the circuit court for only a year-and-a-half before Judge Stevens left for his Supreme Court commission on December 17, 1975.

TABLE 1: THE SEVENTH CIRCUIT, 1970–1975¹³

Circuit Judge	Appointing President	Years on Circuit	JCS Score
Cummings	Johnson	1966–1986	-0.623
Fairchild	Johnson	1966–2007	-0.498
Kerner	Johnson	1968–1971	-0.379
Kiley	Kennedy	1961–1974	-0.623
Pell	Nixon	1970–2000	0.415
Sprecher	Nixon	1971–1982	0.006
Stevens	Nixon	1970–1975	0.168
Swygert, C.J.	Kennedy	1961–1988	-0.623
Tone	Nixon	1974–1980	0.006

Table 1 provides information about the active judges on the Seventh Circuit during Judge Stevens's tenure from November 1970 to December

⁸ Judge Kerner was indicted on a number of federal charges—including bribery, mail fraud, and tax evasion—for actions taken while he was governor of Illinois and for which he was convicted following a trial in 1973. He formally resigned from the Seventh Circuit in 1974 and served three years in prison. For an in-depth examination of Kerner's career, see generally BILL BARNHART & GENE SCHLICKMAN, *KERNER: THE CONFLICT OF INTANGIBLE RIGHTS* (1999) (examining Judge Kerner's early life, career, and prosecution).

⁹ See U.S. CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, *JUDICIAL CHRONOLOGY*, *supra* note 2.

¹⁰ *See id.*

¹¹ Justice Stevens clerked for Justice Rutledge during the 1947 Term; Judge Tone clerked during the 1948 Term. SOLOMON, *supra* note 2.

¹² Lesley Oelsner, *4 Men Named in High Court Search*, N.Y. TIMES, Nov. 26, 1975, at 16.

¹³ Judge Castle took senior status on February 26, 1970; Judge William J. Bauer was appointed by President Ford in 1975 to fill the seat left by Judge Kerner's formal resignation in 1974. See U.S. CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, *JUDICIAL CHRONOLOGY*, *supra* note 2.

1975.¹⁴ Because of Kerner's leave of absence in late 1971, Democrats enjoyed a de facto majority of one judge throughout most of the period. To further elucidate the ideological composition of the circuit, Table 1 also lists the Judicial Common Space (JCS) scores assigned to the individual judges.¹⁵ JCS scores are widely used in empirical studies of the federal courts.¹⁶ Based on an empirical model derived by Keith Poole,¹⁷ the scores represent judges' ideological predispositions as measured by the ideological scores of their appointing president or of the home-state senator of the president's party.¹⁸ Ideological preferences range from -1 to +1; increasing values on this variable indicate increasingly extreme conservative preferences.¹⁹ Although the zero point on this scale has no inherent meaning, it generally separates liberal judges from conservative judges.

Note that, according to the JCS scores, Judge Stevens was the second most conservative judge on the Seventh Circuit, but this estimate probably reflects a more conservative score for him than is appropriate. In November 1970, two Republican Senators served Illinois. The first was Senator Charles Percy, Judge Stevens's University of Chicago classmate.²⁰ The second was Senator Ralph Tyler Smith, who was far more conservative

¹⁴ See *id.*

¹⁵ For a database of JCS scores for circuit court judges serving between 1953 and 2006, see *Lee Epstein*, U. S. CAL., <http://epstein.usc.edu/research/JCS.html> (last visited June 12, 2012) (follow links for the data).

¹⁶ See, e.g., *Lee Epstein et al., The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007); *Micheal W. Giles et al., Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001); *Pauline T. Kim, Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319 (2009).

¹⁷ See KEITH T. POOLE & HOWARD ROSENTHAL, *IDEOLOGY & CONGRESS* (2d rev'd ed. 2007) (analyzing data using NOMINATE common space scaling to represent ideological predispositions of presidents, representatives, and senators); see also VOTEVIEW.COM, <http://www.voteview.com> (last visited June 12, 2012) (providing data gathered through the various research projects of Keith Poole and Howard Rosenthal).

¹⁸ Judicial Common Space scores reflect a mathematical transformation of the Giles, Hettinger and Peppers scores, explained as follows in a recent text:

In light of presidential prerogatives in the appointment process, Giles and his colleagues assign each judge appointed to the circuit bench in the absence of senatorial courtesy the Poole ideology score corresponding to his or her appointing president. However, for those judges appointed when there was one home-state senator of the president's party, Giles, Hettinger, and Peppers give those judges the Poole ideology score corresponding to that home-state senator. When both home-state senators were of the president's party, the corresponding ideology score for the judge is equal to the average Poole score of the two senators.

VIRGINIA A. HETTINGER ET AL., *JUDGING ON A COLLEGIAL COURT* 50–51 (2006); see also *Epstein et al., supra* note 16 (utilizing JCS data for positive political theory analysis); *Giles et al., supra* note 16, at 626–27 (describing a study of the politics of selection to the lower courts that involves consideration of the role of senators and senatorial preferences).

¹⁹ E.g., *Epstein et al., supra* note 16, at 307; *Giles et al., supra* note 16, at 631.

²⁰ See *supra* note 3 and accompanying text.

than Percy.²¹ Judge Stevens's JCS score—reflecting the average between Percy and Smith's ideology scores—does not fairly reflect reality to the extent that Percy was primarily responsible for Judge Stevens's appointment.²² Indeed, on the whole, Percy was remarkably nonpartisan in his support for judicial candidates, even adopting a unique merit system of selection based on a “novel policy of selecting professionally recommended lawyers and state appellate court judges who were not associated with his election campaigns.”²³ Thus it is likely that the JCS scores improperly characterize Judge Stevens as the second most conservative member of the Seventh Circuit. In fact, as explained below, he was probably closer to the center and was perhaps even the median member of the circuit during his tenure.

Judge Stevens's confirmation to the Seventh Circuit thus did little to change the partisan balance on the court. The political dynamics of his appointment indicated that ideologically he was likely to vote closer to the center than to the hard right. Moreover, he joined a circuit whose active membership remained fairly constant throughout his tenure and that held a strong reputation as a leader in the protection of civil rights and liberties.²⁴ Contemporary commentary on the Seventh Circuit's constitutional jurisprudence highlighted decisions rendered during Judge Stevens's term on the circuit as evidence that the judges on the Seventh Circuit were vigilant in protecting civil rights. They point to cases from the early 1970s as proof of the court's pro-civil rights credentials, particularly in the areas of free expression and racial discrimination.²⁵ Indeed, the circuit's liberal reputation continued throughout Judge Stevens's tenure.²⁶ Judge Stevens's early judicial experiences therefore took place on a court whose judges championed constitutional and civil liberties and rendered decisions that reflected an expansive interpretation of those rights.

²¹ See Adam Clymer, *Charles H. Percy, Illinois Senator Who Clashed With Nixon, Is Dead at 91*, N.Y. TIMES, Sept. 18, 2011, at A26 (“Mr. Percy became closely identified with the more liberal wing of the party known as Rockefeller Republicans.”); Seth S. King, *Illinois Speaker Succeeds Dirksen*, N.Y. TIMES, Sept. 18, 1969, at 1.

²² See *Percy Praises Court Choice*, *supra* note 3 (noting that Senator Percy had originally recommended Justice Stevens for his position on the Seventh Circuit).

²³ Tom Littlewood, *How Sen. Percy Exercises Prerogative in Nominating Judgeship Candidates*, ILL. ISSUES, Apr. 1976, at 31, 31.

²⁴ Gregory A. Adamski & Stephen B. Engelman, *Civil Rights and Civil Liberties*, 52 CHI.-KENT L. REV. 246, 246 (1975) (“[T]he Seventh Circuit has long maintained a laudable reputation for its receptiveness to civil rights and civil liberties claims.”).

²⁵ See, e.g., Howard Eglit et al., *Civil Rights and Civil Liberties*, 51 CHI.-KENT L. REV. 337, 338 (1974) (concluding that the Seventh Circuit “vigorously adheres to the primacy of the right of free speech” and “a willingness to move to the outer edges of the law, if that movement was necessary or desirable to eradicate racial discrimination”).

²⁶ See *id.* (drawing generalizations based on an analysis of Seventh Circuit decisions).

II. VOTING AND OPINION WRITING ON THE CIRCUIT

Table 2 sets forth the frequencies associated with Judge Stevens’s various forms of decisionmaking at the court of appeals. While on the Seventh Circuit, Judge Stevens participated in more than 100 cases per year. He wrote 165 majority opinions and over 60 concurring and dissenting opinions—thus producing a yearly average of about 45 opinions.²⁷ As is apparent from Table 2, Stevens frequently wrote separate concurring and dissenting opinions, with sixty-two dissenting and concurring opinions published from December 1970 to the time of his departure in late 1975.

TABLE 2: JUSTICE STEVENS’S ACTIVITIES ON THE SEVENTH CIRCUIT

Activity	Frequency
Case Participations	587
Three-Judge District Courts	5
En Banc Participations	15
Majority Opinions	165
Concurring Opinions	21
Dissenting Opinions	36
Dissenting and Concurring in Part	5

In his final years on the Supreme Court, Justice Stevens became the most frequent dissenter on the Court, “fil[ing] more dissents and separate opinions than any of his colleagues.”²⁸ The data presented in Table 2 suggest that Judge Stevens’s proclivity to dissent emerged during his career on the Seventh Circuit. But to fully evaluate Judge Stevens’s record as a dissenter or separate opinion writer on the circuit court, one must compare his record to his fellow judges’ voting behavior during the same period. To provide that comparative baseline, Table 3 sets forth data on the separate opinion-writing (or opinion-joining) behavior of the other active Seventh Circuit judges serving from 1971 through 1975.²⁹

²⁷ These data were gathered from Westlaw by searching for “pa(stevens)” in the Seventh Circuit database, for the years 1970–1975. Each case was coded to reflect the type of participation and vote for each judge on each panel (i.e., whether the judge voted with the majority or separately and whether the judge wrote an opinion). The list of cases was then cross-checked against the list of cases provided by Green Bag as part of its “Sluggers” series. *Sluggers: Cards & Stats*, GREEN BAG, http://www.greenbag.org/sluggers/sluggers/2010_stevens/Stevens_Statistics_-_Final.xlsx (last visited June 12, 2012). The numbers were analyzed in the various tables herein using Stata 10. Documentation on file with the author.

²⁸ Jeffrey Rosen, *The Dissenter*, N.Y. TIMES MAG., Sept. 23, 2007, at 50.

²⁹ See *infra* note 32.

TABLE 3: SEPARATE OPINION WRITING ON THE SEVENTH CIRCUIT, 1971–1975³⁰

Active Judge	Dissent Rate in All Circuit Cases (Judge not MOW) 1971–1975 (% , ratio)	Number of Dissents and Concurring Opinions Written or Joined, 1971–1975 (D/C)	Number of Separate Opinions Written or Joined, 1971–1975	Judge Stevens Dissents from Judge's Majority Opinion (% , ratio)	Judge Dissents from Judge Stevens's Majority Opinion (% , ratio)
Column	(1)	(2)	(3)	(4)	(5)
Stevens	9.85 (41/416)	41/26	62	**	**
Cummings	2.79 (10/358)	10/6	15	8.82 (3/34)	0.00 (0/34)
Fairchild	8.25 (28/339)	28/27	52	12.00 (3/25)	6.06 (2/33)
<i>Kerner</i> (1971–1972)	1.86 (2/107)	2/3	4	33.33 (2/6)	0.00 (0/8)
<i>Kiley</i> (1971–1974)	3.05 (9/295)	9/16	24	17.39 (4/23)	2.86 (1/35)
Pell	14.72 (58/394)	58/17	68	12.96 (7/54)	8.70 (4/46)
Sprecher	3.81 (14/367)	14/4	15	16.67 (7/41)	11.11 (4/36)
Swygert	10.11 (44/435)	44/21	60	23.35 (8/34)	18.92 (7/37)
<i>Tone</i> (1974–1975)	3.12 (3/96)	3/3	6	0.00 (0/10)	0.00 (0/10)
Dissent Rate	**	**	**	14.59 (33/250) ³¹	7.43 (18/242)

Column (1) provides statistics regarding these judges' dissent rates in all cases decided during the relevant period. The dissent rates in Column (1) were calculated as the ratio of the number of dissents (and dissents in part) to the number of case participations in which the judge did not write the

³⁰ All judges listed served during the entire period except Judge Tone (1974–1975) and Judge Kiley (1971–1974). Judge Kerner was indicted and tried for bribery in 1972. Judge Bauer was appointed in 1975 but participated in only one case with Judge Stevens. Data in Columns (1), (2), and (3) were gathered from Westlaw. Column (5) includes dissents and concurrences in part.

³¹ This number does not equal the total number of “dissenting opinions” and “dissenting and concurring in part” provided in Table 2—forty-one opinions—because it includes only dissents from these eight judges. Table 2 includes decisions in which Judge Stevens also dissented from the opinions of other senior or visiting judges.

majority opinion.³² These ratios indicate that Judge Stevens's dissent rate of close to 10% was among the highest on the circuit at that time, but he was not the most frequent dissenter.³³ Both Judges Pell and Swygert shared Judge Stevens's propensity to dissent, but Pell clearly led the group with a dissent rate of nearly 15%. Further information regarding these judges' dissenting votes is provided in Columns (2) and (3), which set forth the raw number of dissents and concurrences (and the dissents and concurrences in part) written by each judge over the five-year period.³⁴

Again, these raw numbers indicate that Judge Pell exceeded Judge Stevens as the most frequent dissenter during the period of stable court membership from 1971 through 1975. Judge Swygert was not far behind Judge Pell. In comparison, other judges were far less willing to dissent. Even though Judge Cummings served throughout the entire five-year period, he was clearly disinclined to dissent from his brethren's majority opinions (see Column (1)); the same conclusion holds for Judges Sprecher and Kiley. Judge Fairchild wrote separate opinions more often than these two judges, but apparently his preference was to concur rather than dissent in many cases—note that his ratio of dissents to concurrences is fairly balanced. Too few observations exist to draw any firm conclusions about Judges Kerner or Tone.³⁵

While Judge Stevens may not have been the most frequent dissenter during his time on the Seventh Circuit, his opinion-writing behavior reflected his independence in other ways. When cases are decided en banc, circuit judges often have the opportunity to join a dissent or concurrence written by a fellow judge. Of the sixty-two separate opinions written by Judge Stevens, none involved a situation in which he joined other Seventh Circuit judges in dissent from an en banc decision. Indeed, in all seven en

³² Data to calculate these dissent rates were gathered from Westlaw using the PA and LE fields, limited to the years 1971 through 1975, to search for cases in which the judges participated but did not write the majority opinion. To identify the cases in which the judge wrote a majority opinion, the following Westlaw search was employed: (“*judgename*, circuit judge (dissenting)” or “*judgename*, circuit judge (concurring)” or *dis(judgename)* or *con(judgename)* and *da(aft 1970) & da(bef 1976)*). The list of cases thus produced was then evaluated to determine whether it was appropriate to include in the numerator. Thus, the dissent rate in Column (1) was calculated using as the denominator the number of opinions in which the judge was not the majority opinion writer (rather than all case participations) to enable comparison to the other statistics in Table 3.

³³ Some of the dissent rates in Table 4 are high indeed, especially at the courts of appeals (where unanimity tends to be the norm, *see* DONALD R. SONGER ET AL., *CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS* 107 (2000)). But around this time, the Seventh Circuit had one of the highest dissent rates among the federal circuit courts. *See* Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 493 tbl.2 (1975) (showing the Seventh Circuit with the second highest dissent rate from 1965 through 1971, after the D.C. Circuit).

³⁴ The two numbers in Column (2) do not equate to the figure in Column (3) because of overlap between concurrences and dissents in part.

³⁵ As is clear from Table 3, Judges Kerner and Tone decided many fewer cases than other judges during the five-year period.

banc decisions in which Judge Stevens concurred or dissented, he wrote independent opinions that were often joined by one or two of his colleagues.³⁶ In two of his fifteen en banc participations, Judge Stevens wrote the majority opinion.³⁷ Thus, in 60% of the cases Judge Stevens heard en banc, he either wrote the majority opinion or a separate opinion explaining his unique rationale or conflicting judgment. Although the number of en banc observations is small, Judge Stevens's activity in en banc cases provides a preview of his eventual behavior on the Supreme Court—particularly with respect to his propensity to express himself independently.³⁸

Table 3 also provides information regarding the dissenting behavior of judges on the Seventh Circuit on all panels on which Judge Stevens participated.³⁹ A comparison of Columns (4) and (5) indicates that Judge Stevens was far more likely to dissent from his colleagues' majority opinions than they were to dissent from his opinions. In fact, the dissent rate from Judge Stevens's opinions is about half that of Judge Stevens's own dissent rate. For all active judges except Judges Tone and Cummings, Judge Stevens's dissent rate was higher than his overall dissent rate of 9.85%. Judge Stevens was therefore *more likely* to dissent from opinions written by his fellow active judges on the circuit than from opinions written by senior or visiting judges.

As for other active judges' choices to dissent from Judge Stevens's majority opinions, the picture looks much different. Most judges appear to have deferred to Judge Stevens's opinions, with the exception of Judge Sprecher and, most prominently, Judge Swygert. This is a curious finding, given that, in the en banc decisions, Judge Swygert often joined Judge Stevens's separate opinions.⁴⁰

Differences between the percentages in Columns (1) and (5) reflect the degree to which the judge was more deferential to Judge Stevens than was typical in all cases. Again, when Judge Stevens authored the majority opinion, most judges dissented less frequently. In some cases, the difference

³⁶ See *Drexler v. Sw. Dubois Sch. Corp.*, 504 F.2d 836, 840 (7th Cir. 1974) (en banc) (Stevens, J., concurring); *United States v. Rosciano*, 499 F.2d 173, 175 (7th Cir. 1974) (en banc) (Stevens, J., joined by Swygert, C.J. & Sprecher, J., dissenting) (per curiam); *Morales v. Schmidt*, 494 F.2d 85, 87 (7th Cir. 1974) (en banc) (Stevens, J., joined by Swygert, C.J. & Kiley, J., concurring); *Wood v. Dennis*, 489 F.2d 849, 857 (7th Cir. 1973) (en banc) (Stevens, J., concurring in the result); *United States v. Silvern*, 484 F.2d 879, 885 (7th Cir. 1973) (en banc) (Stevens, J., concurring); *United States v. Ponto*, 454 F.2d 657, 665 (7th Cir. 1971) (en banc) (Stevens, J., joined by Cummings & Sprecher, J.J., dissenting); *Groppi v. Leslie*, 436 F.2d 331, 332 (7th Cir. 1971) (en banc) (Stevens, J., joined by Swygert, C.J. & Kiley, J., dissenting), *rev'd*, 404 U.S. 496 (1972).

³⁷ *United States v. Staszczuk*, 517 F.2d 53 (7th Cir. 1975) (en banc); *Lucas v. Wis. Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972) (en banc).

³⁸ See Rosen, *supra* note 28 (describing Justice Stevens as the "great dissenter").

³⁹ For an explanation of how these data were gathered, see *supra* note 27.

⁴⁰ See *supra* note 36 and accompanying text.

is dramatic: Judge Pell, for instance, has an overall dissent rate of almost 15% but dissented from opinions written by Judge Stevens only 8.7% of the time. Clearly, to the extent that these judges dissented, they were often dissenting from majority opinions written by judges other than Judge Stevens. On the other hand, Judges Sprecher and Swygert were more likely to dissent from Judge Stevens's majority opinions than they were to dissent from other judges' opinions. With the exception of Sprecher and Swygert, therefore, judges on the Seventh Circuit were more likely to join Judge Stevens's majority opinions.⁴¹

It is only possible to speculate about the reasons for this trend. First, as a centrist, Judge Stevens may have taken moderate positions that satisfied judges both on his left and on his right—although in the case of Swygert, one of the most liberal judges on the circuit, this approach may not have been successful. Second, Judge Stevens may have accommodated potential dissenters via compromise.⁴² Finally, Judge Stevens may also have written such careful, thorough opinions that his colleagues found them persuasive. This final explanation finds some support in commentary about his record on the Seventh Circuit made at the time he was nominated to the Supreme Court. According to these observers, Stevens was a judge “esteemed for his judicial restraint” and for his careful readings of Supreme Court precedents that did not expand Court holdings beyond narrow boundaries.⁴³

The data in Table 3 provide some information about decisionmaking dynamics on the Seventh Circuit during Judge Stevens's tenure, but they do not paint a complete picture of interagreement between Judge Stevens and his colleagues on the circuit bench. To provide a more comprehensive measure of such interagreement, I first computed the number of cases in which the named judge: (1) dissented (in whole or in part) from a majority opinion authored by Judge Stevens, (2) wrote a majority opinion from which Judge Stevens dissented (in whole or in part), or (3) voted for the opposite party in an en banc decision. This number then formed the numerator in a disagreement ratio, with the denominator representing the number of cases in which Judge Stevens participated with the named judge. For one judge in particular (Judge Kerner), the number of shared participations is sufficiently small as to render the ratio less reliable as a true indicator of agreement. The figures provided in Table 4 suggest that Judge Stevens was most likely to disagree with Judge Kerner, followed by Judges Swygert, Pell, and Kiley. In contrast, Judges Cummings and Tone were least likely to disagree with Judge Stevens.

⁴¹ See *supra* text accompanying tbl.3.

⁴² As we will see from his dissenting opinion in *Arnold v. Carpenter*, 459 F.2d 939 (7th Cir. 1972), discussed *infra* note 58 and accompanying text, Judge Stevens expressed a preference for accommodation over confrontation as a means to resolve conflict.

⁴³ Glen Elsasser, *Ford Nominates Judge in Chicago to Supreme Court*, CHI. TRIB., Nov. 29, 1975, at 1.

TABLE 4: VOTING DISAGREEMENT STATISTICS

Active Judge	Disagreement with Judge Stevens (% , N)	Percent Liberal in Votes on Judge Stevens's Panels
Cummings	7.4 (10/135)	37.78
Fairchild	9.4 (10/106)	42.45
Kerner	23.8 (5/21)	33.33
Kiley	12.0 (13/108)	45.37
Pell	12.5 (23/183)	37.16
Sprecher	9.9 (14/141)	41.13
Swygert	15.27 (22/144)	45.14
Tone	2.5 (1/40)	32.50

What might explain these variations? To be sure, these disagreement scores depend in part on the judges' individual propensity to express disagreement with their colleagues' majority opinions. Judges vary in their willingness to dissent, with some less likely to do so on grounds of collegiality or for other reasons.⁴⁴ It is certainly possible that Cummings and Fairchild valued consensual decisionmaking more highly and thus chose to dissent less often. In the case of Judge Cummings, his belief that the court should "speak with one voice whenever possible" has been documented elsewhere.⁴⁵

Another explanation involves judges' policy preferences: scholars frequently focus on ideology to explain deviations from unanimity in circuit court decisionmaking.⁴⁶ To assess whether such ideological patterns help explain agreement among judges on the Seventh Circuit, each judge's vote in all cases in which Judge Stevens participated was coded to determine its ideological direction using conventional methods developed by political scientists and following the directionality coding scheme used in connection

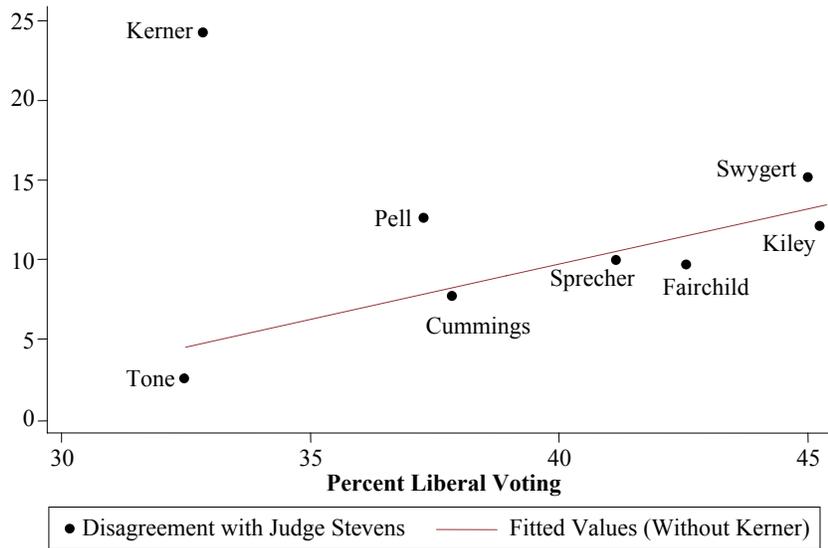
⁴⁴ See, e.g., HETTINGER ET AL., *supra* note 18, at 52, 66, 71 (showing that certain institutional roles, such as the role of chief judge, are associated with a reduced probability of dissent, perhaps because of concerns over collegiality).

⁴⁵ Chi. Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 743 (1994) (noting that Judge Cummings dissents and concurs very sparingly in interests of promoting consensus).

⁴⁶ See, e.g., HETTINGER ET AL., *supra* note 18, at 48–51 (explaining the importance of ideology as an explanatory variable for dissenting behavior); Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 114–16 (2011) (explaining the role of ideological attitudes in separate opinion writing by circuit judges); Goldman, *supra* note 33, at 494 (suggesting that the political party of a circuit judge is the strongest indicator of voting in nonunanimous cases); Virginia A. Hettinger et al., *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123, 134–35 (2004) (noting the strength of attitudinal over strategic accounts of dissenting behavior).

with the U.S. Court of Appeals Database.⁴⁷ The percent of liberal votes is included in Table 4; the relationship between liberal voting and agreement with Judge Stevens is graphically represented in Figure 1.⁴⁸

FIGURE 1: DISAGREEMENT WITH JUDGE STEVENS AND LIBERAL VOTING PERCENTAGES ON THE SEVENTH CIRCUIT, 1971–1975⁴⁹



The fitted line in Figure 1 indicates a possible relationship between a judge's propensity to vote for a liberal outcome and rates of disagreement with Judge Stevens, but that relationship is not a particularly strong one. Without Tone—who, like Kerner, voted in a limited number of cases—the fitted line would be essentially flat. Indeed, Judge Stevens himself had a 39% liberal voting record and his dissenting votes were even more liberal. Of his forty-one dissenting opinions, nineteen (or 46%) were classified as reflecting a preference for a liberal outcome.⁵⁰ Judge Stevens thus appears to have been a moderate member of the circuit, perhaps less likely to agree with the more extreme liberal positions taken by his colleagues, but nevertheless willing to embrace liberal outcomes quite often in dissent. The

⁴⁷ See *U.S. Court of Appeals Database Project*, W. MICH. U., <http://www.wmich.edu/nsf-coa> (last visited June 12, 2012). 5% of the votes could not be reliably coded as either liberal or conservative because the issue areas did not fall into categories that enabled them to be coded under the protocol used in the U.S. Court of Appeals Database or because of crosscutting issues that rendered reliable coding impossible.

⁴⁸ For information about the data collection process to identify these cases, see *supra* note 27.

⁴⁹ Because Judge Kerner had so few recorded votes, his data point was not used to produce the fitted regression line in Figure 1.

⁵⁰ See *supra* note 47 and accompanying text.

portrait of his voting behavior on the circuit is thus of an iconoclast—neither predictably liberal nor conservative.

The voting data provided in this Part illuminate a few patterns. First, Judge Stevens's career on the Seventh Circuit was marked by a willingness to dissent and, in the case of en banc dissents or concurrences, a possible reluctance to join others' separate opinions. Indeed, as noted above, in his en banc participations, Judge Stevens wrote his own opinion (either as majority opinion writer, in concurrence, or in dissent) in nine of fifteen cases.⁵¹ Judge Stevens was clearly a judge who felt comfortable expressing his own views independent of his colleagues. At the same time, the quantitative data suggest that many of his colleagues found Judge Stevens's views quite persuasive when he wrote majority opinions, with the particular exception of the very liberal Judge Swygert. But again, the evidence is not clear that liberalism was the defining difference between those with whom Judge Stevens agreed and those with whom he did not. Judge Stevens also dissented frequently from decisions by Nixon appointees Sprecher and Pell. In short, Judge Stevens's opinion writing evidenced considerable intellectual independence, while his voting behavior on the circuit court was ideologically unpredictable.

III. JUDGE STEVENS'S SEVENTH CIRCUIT JURISPRUDENCE

At the time of Judge Stevens's nomination to the Supreme Court, observers noted that he did not conform to a clear ideological mold. For example, Robert Boyd of the *Chicago Tribune* wrote, "If confirmed by the Senate, Stevens seems destined to join the right-center of the court lineup—somewhere between Chief Justice Warren Burger and Justice William Rehnquist on the conservative end of the bench and the outnumbered liberals, Justices William Brennan and Thurgood Marshall, at the other end."⁵² Law Professor Philip Kurland predicted that Judge Stevens would be where Justices Byron White and Lewis Powell were then ideologically positioned on the Court.⁵³ A *Chicago Tribune* editorial similarly concluded that Judge Stevens's reputation was "not engraved in stone as either a liberal or a conservative."⁵⁴

Judge Stevens's Seventh Circuit opinions reveal that he took some positions that seem surprisingly conservative—especially given our current perspective on Justice Stevens after his thirty-five years of decisionmaking on the Supreme Court. To some extent, of course, his decisions on the

⁵¹ See *supra* text accompanying notes 36–37.

⁵² Robert S. Boyd, *Judge Stevens—His Views on Law*, CHI. TRIB., Nov. 30, 1975, at 6.

⁵³ *Ford's Nominee to High Court Called Moderate*, IND. EVENING GAZETTE, Dec. 1, 1975, at 6 ("Asked where he thinks Stevens would fit politically on the high court [law professor Philip] Kurland said: 'I think you're going to find him with [Justices Byron] White and [Lewis] Powell.'" (second and third alterations in original)).

⁵⁴ Editorial, *Judge Stevens' Nomination*, CHI. TRIB., Dec. 1, 1975, at 2.

circuit court were shaped by current events and by the salient legal issues of the time and thus may seem somewhat outdated to our modern sensibilities. For example, Judge Stevens decided several cases involving the regulation of hair length and facial hair in public schools, problems that have receded from public concern today but that nevertheless raised highly relevant issues of personal freedom in the 1960s and 1970s.⁵⁵ Other decisions, however, retain their current relevance. As discussed below, Justice Stevens repeatedly cited his 1972 dissenting opinion in *Cousins v. City Council of Chicago*⁵⁶ to explain his approach to claims of political or racial gerrymandering at the Supreme Court. The discussion below highlights Judge Stevens's decisionmaking in three substantive areas of note: substantive due process, gender discrimination, and election law. I then turn to some overarching themes relating to the consequences of legal rules and institutional competence that emerge from these opinions.

A. Substantive Due Process

Judge Stevens grappled with substantive due process in two separate contexts—the first involving liberties claimed by students and employees in public schools and the second involving the right to privacy. In the school cases, *Arnold v. Carpenter*⁵⁷ and *Miller v. School District No. 167*,⁵⁸ Judge Stevens's opinions exhibit sensitivity to the value of nonconformity but ultimately conclude that schools deserve considerable deference in the development of rules governing student and teacher conduct. In the privacy case, Judge Stevens struggled to define what he labeled the “so-called right to privacy,” again holding in favor of institutional prerogatives over individual rights. These cases thus cast a somewhat conservative shadow while at the same time including rhetoric that reflects Justice Stevens's appreciation for the competing interests at stake. Indeed, Justice Stevens later relied on two of these opinions in advocating more liberal outcomes at the Supreme Court.

In two cases decided in 1972 and 1974, Judge Stevens addressed the question of student or teacher freedom to wear long hair. In *Arnold v. Carpenter*, Stevens dissented from an opinion by Judge Kiley, which held that the hair provision of a school dress code was unconstitutional, even though the code (1) included an option for parents to provide written permission for their children to wear long hair and (2) was adopted by a majority vote of the students themselves.⁵⁹ According to Judge Kiley, the parental consent provision neither independently cured the code's

⁵⁵ *Miller v. Sch. Dist. No. 167*, 495 F.2d 658 (7th Cir. 1974); *Arnold v. Carpenter*, 459 F.2d 939 (7th Cir. 1972).

⁵⁶ 466 F.2d 830, 847 (7th Cir. 1972) (Stevens, J., dissenting).

⁵⁷ 459 F.2d at 939.

⁵⁸ 495 F.2d at 658.

⁵⁹ *Arnold*, 459 F.2d at 940–41.

constitutional defect nor eliminated the parent's right to sue on the son's behalf.⁶⁰ Kiley concluded that the parent might have purposely withheld the permission required under the code so as "not to chill his son's dissent from conforming to the requirements of the code."⁶¹ Judge Stevens disagreed, arguing that the consent provision obviated the need for "judicial participation in the process of social change."⁶² For Judge Stevens, parental support for a child's nonconformity could be adequately accommodated by providing the consent required under the code. Because a child has no independent right to remain unwashed or unshorn without parental consent outside of school, the child should have no right to do so at school.⁶³ He argued that accommodation, rather than confrontation, is the appropriate method to resolve social disputes because the latter only promotes intolerance: "Just as the majority must learn to tolerate the nonconformist, so must he learn to tolerate the transient customs of his elders."⁶⁴

Judge Stevens was also unwilling to allow federal court interference in the case of *Miller v. School District No. 167*.⁶⁵ In *Miller*, an untenured mathematics teacher sought judicial review of the school district's decision to terminate his employment, which he claimed was improperly "motivated by disapproval of his beard and his sideburns."⁶⁶ As in *Arnold*, Judge Stevens refused to recognize an unfettered liberty interest in one's appearance. And in fact, he argued that even if a liberty interest in appearance existed, it was of minor significance in "our constitutional constellation."⁶⁷

Judge Stevens's willingness to weigh the significance of the liberty interest in *Miller*, and find it wanting, was later rebuked by Chief Judge Fairchild in *Pence v. Rosenquist*.⁶⁸ In *Pence*, a school bus driver was fired

⁶⁰ *Id.* at 943–44.

⁶¹ *Id.*

⁶² *Id.* at 945 (Stevens, J., dissenting).

⁶³ *Id.*

⁶⁴ *Id.* In 1986, Justice Stevens cited his *Arnold* dissent in his dissenting opinion in *Bethel School District No. 403 v. Fraser* for the proposition that schools, rather than students, "must prescribe the rules of conduct in an educational institution." 478 U.S. 675, 692 (1986) (Stevens, J., dissenting). But unlike in *Arnold*, in *Fraser*, Justice Stevens concluded that the school had failed to make clear that the student's speech at issue could be subject to punitive consequences. *Id.* at 693. In *Arnold*, the student was clearly on notice regarding the school-imposed standard, 459 F.2d at 940–41 (Stevens, J., dissenting) (explaining that the "code was adopted by a majority of the students" and "[p]arents were given written notice" of the requirements), but in *Fraser*, Justice Stevens argued, the student was not, 478 U.S. at 693–96 (Stevens, J., dissenting). In the latter case, therefore, Justice Stevens voted to uphold the challenge to the school's decision to discipline the student for his "speech." *Fraser*, 478 U.S. at 696 (Stevens, J., dissenting).

⁶⁵ 495 F.2d 658 (7th Cir. 1974).

⁶⁶ *Id.* at 659.

⁶⁷ *Id.* at 664 (internal quotation mark omitted).

⁶⁸ 573 F.2d 395 (7th Cir. 1978). Judge Fairchild's opinion was joined by Judge Wood; Judge Pell dissented in part.

for wearing a mustache and the district court invoked *Miller* to grant summary judgment to the school district on grounds that choices in style of appearance received only limited constitutional protection.⁶⁹ “With all respect,” Chief Judge Fairchild wrote in reversing the district court, the *Miller* principle was “too sweeping” because it held “categorically” that personal appearance “[was] not significant enough to raise a constitutional issue” in the context of public employment.⁷⁰ Judge Pell, on the other hand, read *Miller* more narrowly as holding only that federal courts should not enter the business of determining the rationality or irrationality of restrictions on a public employee’s liberty interest in personal appearance.⁷¹

In both *Miller* and *Arnold*, one senses Judge Stevens’s concern that federal courts should not be involved in the regulation of student or employee hairstyle, which he viewed as a constitutional interest that was “not of the first magnitude.”⁷² We cannot know exactly how Justice Stevens would have treated regulations of personal appearance if faced with the issue when he served on the Supreme Court. The three cases that arrived at the Court in 1976 involving liberty interests in personal appearance were decided without Justice Stevens’s participation.⁷³ In those cases, the Court upheld personal appearance regulations in public employment because they rationally furthered legitimate governmental interests⁷⁴—an outcome it seems likely that Justice Stevens would have endorsed.⁷⁵ And it seems unlikely that Justice Stevens would have agreed with the dissenters in the leading Supreme Court case who asserted that, “[i]n taking control over a citizen’s personal appearance, the government forces him to sacrifice substantial elements of his integrity and identity as well.”⁷⁶ For Justice Stevens, federal judges should exercise caution before imposing their own views of educational policy on school administrators who must make

⁶⁹ *Id.* at 397, 399.

⁷⁰ *Id.* at 399.

⁷¹ *Id.* at 400 (Pell, J., concurring in part and dissenting in part) (distinguishing *Pence* because it did not require such balancing).

⁷² *Miller*, 495 F.2d at 665.

⁷³ This conclusion is based on a search of cases citing the lead Supreme Court opinion involving liberty interests in personal appearances, *Kelley v. Johnson*, 425 U.S. 238 (1976). The search revealed a total of two cases decided during the 1970s that cited *Kelley*.

⁷⁴ See *Quinn v. Muscare*, 425 U.S. 560 (1976) (per curiam) (dismissing certiorari as improvidently granted but noting outcome in *Kelley*); *Kirwan v. Romano*, 425 U.S. 929 (1976) (mem.) (vacating and remanding in light of *Kelley*); *Kelley*, 425 U.S. at 238 (holding restriction on policeman’s garb and appearance sufficiently rational under Fourteenth Amendment).

⁷⁵ Indeed, Judge Stevens sounded an irritated note in his *Miller* opinion when he observed that “those who choose not to conform to tradition in matters of appearance must anticipate . . . [that] other people may elect not to associate with them.” 495 F.2d at 665 n.29.

⁷⁶ *Kelley*, 425 U.S. at 251 (Marshall, J., dissenting).

localized judgments about factors that enhance the learning environment.⁷⁷ That school boards are locally elected also appeared to bolster his determination to exercise judicial restraint.⁷⁸

Perhaps Judge Stevens's most interesting substantive due process case involves the right to privacy. *Fitzgerald v. Porter Memorial Hospital* presented the question of whether a public hospital had the right to deny fathers access to the delivery room.⁷⁹ The plaintiffs claimed that such access was protected by, in Judge Stevens's words, the "so-called right of marital privacy."⁸⁰ As in the cases concerning hair length, Judge Stevens focused on the magnitude of the interest or right infringed by the hospital regulation forbidding fathers entry to the delivery room. In comparison to the right to choose to give birth, the right to determine "where, by whom, or by what method [the child] shall be delivered" was of a lesser magnitude.⁸¹ Given the less weighty constitutional interest, Judge Stevens chose to defer to the judgment of hospital officials and physicians who believed that admitting fathers could compromise sanitation in the delivery room.⁸² As with public school educational policies, hospital delivery room regulations were better left to hospital administrators and physicians with the necessary expertise: "[T]his is a classic example of the kind of situation in which individual hospitals should be permitted to make individual choices, rather than having an inflexible rule imposed upon all hospitals in the nation by federal judicial decision."⁸³ Judge Stevens's humility about his own expertise in medical affairs, in combination with his acute sensitivity to the power wielded by the federal judiciary, led him to rule against the plaintiffs.⁸⁴ At the same time, however, Judge Stevens recognized that certain interests that

⁷⁷ See also *Jeffries v. Turkey Run Consol. Sch. Dist.*, 492 F.2d 1, 4–5 (7th Cir. 1974) (emphasizing that school boards are in a better position to determine what policies are related to educational objectives than are federal judges).

⁷⁸ Justice Stevens's deference to local decisions rendered by elected officials was also evident in *Kelo v. City of New London*, 545 U.S. 469 (2005) (declining to second-guess elected city government's judgments about its redevelopment plan); see also JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 356 (First Anchor Books 2008) (2007) ("Stevens styled his opinion [in *Kelo*] as an exercise in judicial restraint, as he deferred to the local elected officials about what constituted a public use."); John Paul Stevens, *Learning on the Job*, 74 *FORDHAM L. REV.* 1561, 1566 (2006) (noting that *Kelo* represented deference to state legislative and administrative bodies).

⁷⁹ 523 F.2d 716, 717 (7th Cir. 1975). For an insightful discussion of Justice Stevens's view of the right to privacy as originally enunciated in *Fitzgerald*, see Jamal Greene, *The So-Called Right to Privacy*, 43 *U.C. DAVIS L. REV.* 715 (2010).

⁸⁰ *Fitzgerald*, 523 F.2d at 721.

⁸¹ *Id.*

⁸² *Id.* at 721–22.

⁸³ *Id.* at 722.

⁸⁴ Judge Stevens's argument did not persuade Judge Sprecher, who, in dissent, recognized that, while the right to delivery room access did not rise to the magnitude of abortion, neither did the hospital's institutional interest in limiting access to a birth equate to the state's interest in the life of an unborn child. *Id.* at 723–24 (Sprecher, J., dissenting).

are central to individual liberty and personal conscience deserved protection under the “so-called” right to privacy. Judge Stevens wrote in *Fitzgerald* that the right to privacy described by the Supreme Court “brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen’s right to decide how he will live his own life intolerable.”⁸⁵

Although *Fitzgerald* produced an outcome that denied the constitutional claim, Justice Stevens subsequently cited language from his *Fitzgerald* opinion to support several cases of expanded civil liberties. Thus, in *Washington v. Glucksberg*,⁸⁶ Justice Stevens’s concurring opinion invoked passages from *Fitzgerald* to emphasize a narrow reading of the majority opinion denying a facial challenge to a statute outlawing physician-assisted suicide. In particular, Justice Stevens cited his “origins of the American heritage of freedom” language to underscore his conviction that challenges to the law’s intrusion on personal autonomy might succeed in compelling circumstances.⁸⁷ Similarly, in *Bowers v. Hardwick*,⁸⁸ Justice Stevens’s dissent cited *Fitzgerald* in support of his argument that the right to privacy is best viewed as rooted in liberty interests protected by the Due Process Clause. Those liberty interests, as Stevens argued, “surely embrace[] the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.”⁸⁹ Yet again, Stevens quoted *Fitzgerald* in explaining his approach to substantive due process and incorporation in *Thornburgh v. American College of Obstetricians and Gynecologists*,⁹⁰ as well as in the gun control case, *McDonald v. City of Chicago*.⁹¹ Clearly, Justice Stevens’s expression of his early views on the substantive content of the Due Process Clause continued to represent his perspective for the next thirty years and, as one scholar has argued, was a position that ultimately influenced the evolution of the Court’s privacy doctrine.⁹²

B. Gender Discrimination

Justice Stevens’s Senate confirmation hearings for a seat on the Supreme Court produced few political fireworks, and he was confirmed by a unanimous vote.⁹³ But one interest group did challenge Judge Stevens’s

⁸⁵ *Id.* at 720 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

⁸⁶ 521 U.S. 702 (1997).

⁸⁷ *Id.* at 744–45 (Stevens, J., concurring in the judgment).

⁸⁸ 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁸⁹ *Id.* at 217–18 (Stevens, J., dissenting).

⁹⁰ 476 U.S. 747, 781 & n.11 (1986) (Stevens, J., concurring), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁹¹ 130 S. Ct. 3020, 3092 (2010) (Stevens, J. dissenting).

⁹² See Greene, *supra* note 79, at 732–34 (describing Justice Stevens’s influence on the development of constitutional privacy doctrine).

⁹³ Lesley Oelsner, *Senate Confirms Stevens, 98 to 0*, N.Y. TIMES, Dec. 18, 1975, at 1.

record with considerable vehemence: the National Organization of Women (NOW). During her Senate testimony, NOW President Karen DeCrow criticized Stevens for having failed to sufficiently protect women's rights while serving on the circuit court.⁹⁴ She lamented:

The NOW board is profoundly shocked that President Ford is not able to see the significance not only of not appointing a woman to the bench but of appointing a man who is so against women's rights that he does not even understand the issues of civil rights for women in 1975.⁹⁵

In part, DeCrow's objection to Judge Stevens stemmed from her dismay that Ford had not appointed a woman to the Court. But several of Judge Stevens's decisions also offered cause for concern to organizations promoting women's rights.

One Title VII case in particular drew heightened attention from women's groups at the time of Judge Stevens's nomination.⁹⁶ In *Sprogis v. United Air Lines, Inc.*, Judge Stevens served on a panel that evaluated the constitutionality of United Air Lines's (United) no-marriage policy for stewardesses.⁹⁷ Judge Cummings's majority opinion held that the policy violated Title VII and was not justified as a bona fide occupational qualification. Because the rule applied only to female stewardesses and not to male airline employees and because customers' preferences for single stewardesses was not a valid reason for the rule, the majority (Judges Cummings and Kerner) held the rule unlawful.⁹⁸ In dissent, Judge Stevens focused on the odd circumstances accompanying the case: only females

⁹⁴ Arthur Siddon, *Stevens Shuns a Stand on ERA, Death Penalty*, CHI. TRIB., Dec. 9, 1975, at 1.

⁹⁵ *Id.* (internal quotation marks omitted).

⁹⁶ See *Nomination of John Paul Stevens to Be a Justice of the Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 94th Cong. 81–82 (1975) (statement of Margaret Drachler, Representative, NOW) [hereinafter *Nomination of John Paul Stevens Hearing*]; John P. MacKenzie, *Women Denounce Stevens*, WASH. POST, Dec. 10, 1975, at A2; Linda Mathews, *Stevens Criticized by Women's Group*, L.A. TIMES, Dec. 4, 1975, at B4; *NOW Leader is "Saddened" Woman Wasn't Put on Court*, N.Y. TIMES, Dec. 1, 1975, at 20.

⁹⁷ 444 F.2d 1194, 1196 (7th Cir. 1971). In addition to *Sprogis*, NOW representative Margaret Drachler also complained about Judge Stevens's dissenting opinion in *Rose v. Bridgeport Brass Co.*, 487 F.2d 804, 812–14 (7th Cir. 1973) (Stevens, J., dissenting in part). *Nomination of John Paul Stevens Hearing*, *supra* note 96, at 79–80. In *Bridgeport Brass*, Judge Stevens dissented in part from a majority opinion written by Chief Judge Swygert. The case considered whether an employer had demonstrated that no issue of material fact existed regarding a job reclassification that disadvantaged a female employee. 487 F.2d at 804. Chief Judge Swygert concluded that the record on summary judgment failed to preclude the possibility that the reclassification was not justified by business necessity. *Id.* at 808–09. Justice Stevens, on the other hand, thought the record sufficient to demonstrate that the company's decision to reclassify the plaintiff's position was justified by economic efficiency. *Id.* at 813–14 (Stevens, J., dissenting).

⁹⁸ *Sprogis*, 444 F.2d at 1198.

were employed as stewardesses at United.⁹⁹ As a result, it was impossible for the plaintiff to prove “but for” causation with respect to United’s decision to terminate her employment when she married. As Judge Stevens argued, “A simple test for identifying a prima facie case of discrimination because of sex is whether the evidence shows treatment of a person in a manner which but for that person’s sex would be different.”¹⁰⁰ Judge Stevens recognized that the majority applied a different test, one focused on stereotyped attitudes toward women. While agreeing with that test as a matter of policy, he could find no justification for it in the statute.¹⁰¹

Whether because of a changed perspective on gender discrimination under Title VII or for some other reason, however, Justice Stevens later took a more expansive position when the issue of gender stereotyping reached the Supreme Court. In *City of Los Angeles Department of Water & Power v. Manhart*, Justice Stevens, writing for the Court majority, cited to Judge Cummings’s *Sprogis* opinion to support the statement that “[i]t is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males and females.”¹⁰² For one commentator, Judge Stevens’s “early insistence on a readily parsed approach [in his *Sprogis* dissent] suggests how hesitant careful judges are to take on open-ended questions like just how irrational and significant an impediment is.”¹⁰³ And perhaps it is notable that *Sprogis* itself was decided in Judge Stevens’s first year as judge on the Seventh Circuit; his restrained approach (albeit in dissent) to statutory interpretation may have reflected a hesitancy to interpret a statute in light of its broad purposes. In any event, his later apparent repudiation of the narrow position enunciated in his *Sprogis* dissent suggests that Judge Stevens’s decisionmaking on the circuit court did not provide a perfect roadmap for his subsequent positions on the Supreme Court. In certain cases, and as Justice Stevens himself has readily admitted, positions he initially held were altered over time as a result of his “learning on the job.”¹⁰⁴

⁹⁹ *Id.* at 1203 (Stevens, J., dissenting). United did employ forty-eight stewards in that year, but they served only on certain long-distance flights and the plaintiff in *Sprogis* was unqualified for that service for reasons unrelated to sex. *Id.* at 1202–03.

¹⁰⁰ *Id.* at 1205. Judge Stevens’s position was adopted by the Fifth Circuit in *Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892, 894 (5th Cir. 1977).

¹⁰¹ *Sprogis*, 444 F.2d at 1205 (Stevens, J., dissenting) (“[T]he majority’s view may not only be contemporary but also wise.”). In a footnote, however, Stevens also speculated that the policy could be unwise if, by removing the marriage requirement, the enlarged female applicant pool depressed wage levels for female workers. *Id.* at 1205 n.21. This observation seems odd, however, to the extent that it provides support for irrational or stereotypical policies simply because they sustain female wage levels, even if only for the segment of the female population meeting the irrational criteria.

¹⁰² 435 U.S. 702, 707 & n.13 (1978).

¹⁰³ Seth Kupferberg, *Civil Rights Law and Breaking Down Patterns of Segregation: The Case of Nepotism*, 16 HOFSTRA LAB. & EMP. L.J. 355, 379 (1999).

¹⁰⁴ Stevens, *supra* note 78, at 1567.

Two state-action cases also raised red flags for leaders in the women's movement.¹⁰⁵ Judge Stevens concluded that insufficient state action existed for female plaintiffs to bring their discrimination claims in both *Cohen v. Illinois Institute of Technology*¹⁰⁶ and *Doe v. Bellin Memorial Hospital*.¹⁰⁷ In *Cohen*, Judge Stevens wrote the majority opinion for a unanimous panel affirming the district court's dismissal of a faculty member's claim that she was denied a promotion and ultimately terminated because of her gender.¹⁰⁸ The sticky issue in the case involved whether the Illinois Institute of Technology (IIT) was a state actor for purposes of certain civil rights statutes (§ 1983 and § 1985).¹⁰⁹ IIT received very modest financial support from the state and otherwise had no substantial connections to state government beyond compliance with state educational regulations. For these reasons, the panel held that insufficient state action existed to support the plaintiff's claims.¹¹⁰ Nan Aron, President of the Women's Legal Defense Fund, disputed Judge Stevens's resolution of the state action issue in her statement to Congress during his confirmation hearings in 1975.¹¹¹ The *Cohen* decision hardly constituted convincing evidence, however, that Judge Stevens was hostile to gender discrimination claims. His decision was joined by liberal Judge Swygert and affirmed the decision of the district court below. Motions for reconsideration by the panel and an en banc rehearing were unsuccessful.¹¹² Judge Stevens's majority opinion—carefully crafted and embedded with detailed attention to other circuits' precedents and to those of the Supreme Court—was thus apparently viewed as persuasive by Judge Stevens's more liberal colleagues even on a court with a sustained reputation for expansive civil rights decisions.

Finally, although Judge Stevens's confirmation hearing followed on the heels of *Roe v. Wade*, no Senator asked the nominee a question about

¹⁰⁵ *Nomination of John Paul Stevens Hearing*, *supra* note 96, at 80–81.

¹⁰⁶ 524 F.2d 818 (7th Cir. 1975).

¹⁰⁷ 479 F.2d 756 (7th Cir. 1973). Women's rights advocates also identified *Dyer v. Blair*, 390 F. Supp. 1287 (N.D. Ill. 1974), as a decision reflecting Judge Stevens's hostility to gender equality. *Nomination of John Paul Stevens Hearing*, *supra* note 96, at 81. In *Dyer*, a three-judge district court presided over by Judge Stevens addressed the question of whether the Illinois House of Representatives could adopt a rule requiring a three-fifths majority vote to ratify a federal constitutional amendment. 390 F. Supp. at 1288 (considering the question with respect to the Equal Rights Amendment). Stevens and his district court colleagues determined the matter nonjusticiable because it was not yet ripe for review: the state assembly had yet to vote on the amendment at the time the case was filed. *Id.* at 1290.

¹⁰⁸ 524 F.2d at 821–22.

¹⁰⁹ *Id.* at 824–25.

¹¹⁰ *Id.* at 827. Because the facts in dispute arose prior to the congressional enactment making Title VII applicable to educational institutions, the plaintiff's claim could not be sustained under that statute. *Id.* at 822.

¹¹¹ See *Nomination of John Paul Stevens Hearing*, *supra* note 96, at 227 (statement of Nan Aron, President, Women's Legal Defense Fund).

¹¹² *Cohen*, 524 F.2d at 830.

his position on abortion.¹¹³ Nevertheless, he had decided one case involving abortion that drew attention from advocates of women's rights: *Doe v. Bellin Memorial Hospital*.¹¹⁴ *Bellin Memorial Hospital* did not involve the right to terminate a pregnancy per se, but rather involved the question of whether a private hospital could deny a doctor's right to perform an abortion in a suit to enforce that right under § 1983. The plaintiffs argued that receipt of Hill–Burton funds was conditional on compliance with the Fourteenth Amendment and that the private hospital qualified as a state actor for purposes of the Fourteenth Amendment under a § 1983 claim.¹¹⁵ As in *Cohen*, Judge Stevens, joined by Judges Kiley and Pell, concluded that while the hospital's receipt of federal funds was conditional on its compliance with certain regulations, those conditions did not pertain to the performance or nonperformance of abortions.¹¹⁶ Nor did receipt of those funds allow the court to conclude that the hospital acted “under color of state law” without evidence of greater “affirmative support” for the hospital's policy regarding abortions.¹¹⁷

Stevens's decision reversed a preliminary injunction entered by the district court and arguably conflicted with an influential decision by the Fourth Circuit, *Simkins v. Moses H. Cone Memorial Hospital*, which concluded that receipt of Hill–Burton funds qualified the hospital as a state actor for purposes of a race discrimination suit brought by black doctors.¹¹⁸ On those bases, one might conclude that his decision (even though joined by the more liberal Judge Kiley) created an appropriate cause for concern by advocates of women's rights. But that conclusion is premature. Indeed, the Fourth Circuit overruled *Simkins* after the Supreme Court's 1974

¹¹³ For a discussion, see Linda Greenhouse, *One Man, Two Courts*, N.Y. TIMES, Apr. 11, 2010, at WK11.

¹¹⁴ 479 F.2d 756 (7th Cir. 1973).

¹¹⁵ *Id.* at 757, 759–61. The Hill–Burton Act was enacted in 1946 to provide federal funds that enabled states to modernize their hospital systems. Hospital Survey and Construction Act, Pub. L. No. 79-725, § 601, 60 Stat. 1041 (1946) (codified as amended at 42 U.S.C. § 291 (2006)).

¹¹⁶ *Bellin Mem'l Hosp.*, 479 F.2d at 761.

¹¹⁷ *Id.* at 761–62 (citing *Lucas v. Wis. Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972)).

¹¹⁸ 323 F.2d 959, 960–61, 967 (4th Cir. 1963). *Simkins* is credited for prompting Congress to amend the Civil Rights Act. *See, e.g.*, *Cannon v. Univ. of Chi.*, 441 U.S. 677, 711 n.48 (1979) (“Although it has been suggested that the state-action doctrine in *Simkins* is overbroad, there is no denying that the Title VI Congress assumed and approved the availability of private suits against many private recipients of federal funds.” (citation omitted)); 110 CONG. REC. 6544 (1964) (statement of Sen. Humphrey) (“The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. In many instances the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. This is clearly so wherever Federal funds go to a State agency which engages in racial discrimination. It may also be so where Federal funds go to support private, segregated institutions, under the decision in *Simkins v. Moses H. Cone Memorial Hospital*. In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation.” (citation omitted)).

decision in *Jackson v. Metropolitan Edison Co.*,¹¹⁹ concluding that *Jackson* did not permit such a broad interpretation of the Hill–Burton Act.¹²⁰ And other circuits had lined up in concert with the *Bellin Memorial Hospital* decision over time. Indeed, the Fourth Circuit was the only court to find that receipt of Hill–Burton funds transformed a private hospital into a public one for purposes of constitutional claims.¹²¹ Ultimately, Judge Stevens’s approach was vindicated by all circuit courts that addressed the issue and by Supreme Court precedent. Thus the decision hardly represented a radically conservative decision, even at the time it was rendered.¹²²

C. Election Law

Judge Stevens decided several cases involving election and political disputes during his time at the Seventh Circuit, but two are particularly notable because of their eventual influence upon his decisionmaking on the Supreme Court: *Cousins v. City Council of Chicago*,¹²³ and *Hartke v. Roudebush*.¹²⁴

Perhaps most prominently in the *Cousins* case, Judge Stevens dissented in a race- and partisan-gerrymandering case brought by blacks, Puerto Ricans, and independent voters. The plaintiffs claimed vote dilution (through district cracking and packing) in the drawing of council districts in Chicago.¹²⁵ In evaluating the constitutionality of the districting scheme, the majority focused on the legislature’s subjective intent.¹²⁶ Because the plaintiffs had produced evidence to indicate racial intent, the majority remanded for a new trial on the issue of race discrimination, but concluded that the partisan-gerrymandering claims were nonjusticiable.¹²⁷

¹¹⁹ 419 U.S. 345 (1974) (holding that the Pennsylvania Utility Commission was not sufficiently connected with Pennsylvania to constitute a state action concerning the company’s termination of petitioner’s electricity because the utility corporation was privately owned and operated).

¹²⁰ *Modaber v. Culpeper Mem’l Hosp., Inc.*, 674 F.2d 1023, 1025–26 (4th Cir. 1982).

¹²¹ See *Taylor v. St. Vincent’s Hosp.*, 424 U.S. 948, 948–49 (1976) (White, J., dissenting from denial of certiorari) (describing circuit conflict involving *Simkins*).

¹²² Review of the decision reflects the careful attention Judge Stevens paid to detail, as it referred to arguments made in an amicus brief in a relevant Supreme Court opinion to explain how the Court’s decisions impliedly supported his conclusion in *Bellin Memorial Hospital*. See 479 F.2d at 760.

¹²³ 466 F.2d 830 (7th Cir. 1972).

¹²⁴ 321 F. Supp. 1370 (S.D. Ind. 1970), *rev’d*, 405 U.S. 15 (1972).

¹²⁵ *Cousins*, 446 F.2d at 832–33. “Packing” involves the concentration of voters from the opposition party into a single district to reduce their influence in other districts; “cracking” involves distributing opposition party voters across multiple districts to ensure that they have no controlling influence in any district. See *Vieth v. Jubelirer*, 541 U.S. 267, 343 (2004) (Souter, J., dissenting) (“The choice to draw a district line one way, not another, always carries some consequence for politics The spectrum of opportunity runs from cracking a group into impotent fractions, to packing its members into one district for the sake of marginalizing them in another.”); *Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993) (explaining how “packing” works).

¹²⁶ *Cousins*, 446 F.2d at 834–37.

¹²⁷ *Id.* at 841–45.

In a detailed dissent with extensive discussion of his rationale, Judge Stevens presented his approach to gerrymandering claims that eschewed the intent analysis pursued by the majority. Rather than focusing on evidence of discriminatory intent, Judge Stevens suggested that the appropriate course would be to evaluate more objective factors indicating whether traditional districting criteria—including compactness and contiguity—were used to draw the challenged districts.¹²⁸ Where district boundaries created grotesque shapes, and where those shapes or patterns could be explained only through reference to discriminatory purposes, “the absence of a permissible basis for the classification could be established by proof.”¹²⁹ This standard applied equally to racial and partisan gerrymandering claims, making Judge Stevens both more hostile to race cases and more responsive to those challenging partisan gerrymanders.

The continuing significance of the ideas expressed in *Cousins* throughout Justice Stevens’s later career cannot be underestimated.¹³⁰ Following *Cousins*, Justice Stevens relied on his dissent in that case to bolster positions taken in twelve later cases—one on the Seventh Circuit and eleven on the Supreme Court.¹³¹ Time and again, Justice Stevens cited to *Cousins* in support of his position that racial- and political-gerrymandering claims should be treated alike under the Constitution, that partisan gerrymanders are justiciable under his objective approach, and that

¹²⁸ *Id.* at 859–60 (Stevens, J., dissenting).

¹²⁹ *Id.*

¹³⁰ For a thorough discussion of Justice Stevens’s *Cousins* dissent and its significance to Justice Stevens’s jurisprudence in vote dilution cases, see Pamela S. Karlan, *Cousins’ Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L.J. 521 (1996).

¹³¹ *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 474 (2006) (Stevens, J., concurring in part and dissenting in part) (finding a district drawn to disadvantage politically salient group violates Constitution); *Vieth v. Jubelirer*, 541 U.S. 267, 336 (2004) (Stevens, J., dissenting) (arguing that race is no different than other political considerations in the districting process); *Shaw v. Hunt*, 517 U.S. 899, 918 (1996) (Stevens, J., dissenting) (finding that favoring minorities is not a basis for a constitutional claim); *Miller v. Johnson*, 515 U.S. 900, 933 (1995) (Stevens, J., dissenting) (writing that racial minorities should receive “neither more nor less protection than other groups”); *Shaw v. Reno*, 509 U.S. 630, 677–78 & n.1 (1993) (Stevens, J. dissenting) (arguing that favoring minorities in certain circumstances does not give rise to a constitutional claim); *Holland v. Illinois*, 493 U.S. 474, 512 (1990) (Stevens, J., dissenting) (arguing that, in a jury context, one cannot assume members of a racial group will always vote alike); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 516 n.9 (1989) (Stevens, J., concurring in part and concurring in the judgment) (finding that racial patronage, like partisan patronage, “is no more defensible than” political or racial gerrymandering); *Davis v. Bandemer*, 478 U.S. 109, 164–65 (1986) (Powell, J., joined by Stevens, J., concurring in part and dissenting in part) (joining Justice Powell who agreed with the majority opinion that partisan gerrymandering is justiciable); *Karcher v. Daggett*, 462 U.S. 725, 744 (1983) (Stevens, J., concurring) (describing political gerrymandering as one “species” of unconstitutional vote dilution); *Rogers v. Lodge*, 458 U.S. 613, 647 & n.30 (1982) (Stevens, J., dissenting) (questioning inquiry into legislative motives); *City of Mobile v. Bolden*, 446 U.S. 55, 86 (1980) (Stevens, J., concurring in the judgment) (finding the constitutional standard to be the same for racial and political gerrymandering); *Ill. State Emps. Union, Council 34 v. Lewis*, 473 F.2d 561, 568 n.14 (7th Cir. 1972).

gerrymanders favoring a minority do not give rise to any constitutional claim. The *Cousins* dissent also reflected Justice Stevens's persistent view regarding the impropriety of assuming that members of racial minorities share the same political views or support the same candidates. Indeed, the *Cousins* dissent explains Justice Stevens's later dissents from decisions in which the Court granted standing to white plaintiffs challenging districts drawn to advantage black voters: for Justice Stevens, the idea that the white plaintiffs could have suffered some form of expressive injury under those circumstances reinforced these racial stereotypes. Thus, the legacy of *Cousins* demonstrates that Justice Stevens's principled approach to equal protection was clearly rooted in his Seventh Circuit experience.

Another decision that Stevens rendered during his time on the circuit bench had an enduring impact on his later judgment in cases involving electoral politics: *Hartke v. Roudebush*.¹³² In addition to his service on circuit panels, Judge Stevens also participated in five three-judge district court panels. One of these three-judge panels decided *Roudebush* within two months of Judge Stevens's swearing in at the Seventh Circuit. The case involved an action by a successful senatorial candidate to enjoin the continued operation of a recount commission appointed by an Indiana superior court. The majority enjoined the recount on grounds that it interfered "with the Constitutional prerogatives of the United States Senate" to determine the qualifications of its own members.¹³³ Judge Stevens dissented on grounds that federal court interference was inappropriate before the state judiciary—including the Indiana Supreme Court, which had the opportunity to review the state and federal law issues—and that the parties should seek review by the Supreme Court.¹³⁴ Judge Stevens's dissent ultimately prevailed on appellate review by the Supreme Court,¹³⁵ and Justice Stevens later cited this decision in reference to the position he took in *Bush v. Gore*¹³⁶ during a 2007 interview.¹³⁷

¹³² See 321 F. Supp. 1370 (S.D. Ind. 1970), *rev'd*, 405 U.S. 15 (1972).

¹³³ *Id.* at 1377.

¹³⁴ *Id.* at 1378 (Stevens, J., dissenting) (holding that Indiana courts are "perfectly capable of handling Indiana litigation without assistance or interference from a federal district court").

¹³⁵ See *Roudebush v. Hartke*, 405 U.S. 15 (1972).

¹³⁶ 531 U.S. 98 (2000).

¹³⁷ See Rosen, *supra* note 28. Rosen noted that, in *Roudebush*, "Stevens dissented, insisting that the recount procedures were perfectly fair and that the state judges should be trusted to handle the litigation honestly, without having their impartiality questioned by interference from federal courts." *Id.* When Rosen asked Justice Stevens why he mentioned the *Roudebush* case, Justice Stevens remarked that he "had it very much in mind when [he] wrote *Bush* against *Gore*." *Id.* (internal quotation mark omitted).

CONCLUSION

A prequel is defined as “a work (as a novel or a play) whose story precedes that of an earlier work”;¹³⁸ it is a “film or book about an earlier stage of a story or a character’s life, released because the later part of it has already been successful.”¹³⁹ Few would dispute the notion that Justice Stevens’s record on the Supreme Court reflects the work of a highly successful jurist. But the seeds of that success were planted in the Justice’s prequel on the Seventh Circuit, where then-Judge Stevens developed his orientation toward decisionmaking and collegiality, as well as his positions on certain statutory or constitutional issues that he was to later follow on the Court.

What does Justice Stevens’s time on the Seventh Circuit reveal? First, it is important to note that at the time Judge Stevens served, the Seventh Circuit had a reputation as a court that was unusually vigilant in the protection of civil rights and liberties.¹⁴⁰ Although we have no direct evidence that his interaction with Democratic appointees on the Seventh Circuit influenced Justice Stevens ideologically, it is certainly possible that his respect for his more liberal colleagues on the circuit caused him to be open to alternative viewpoints and ideas.

Second, Justice Stevens’s reputation on the Supreme Court is one of independence.¹⁴¹ But clearly Justice Stevens’s propensity to dissent began on the Seventh Circuit, where he was among the most frequent dissenters on the court.

But while Judge Stevens dissented relatively often from opinions written by other active Seventh Circuit judges, they, correspondingly, dissented less often from his majority opinions. At the Supreme Court, Justice Stevens is known for “building majorities by courting his fellow justices . . . [through] intellectual rather than personal” methods of persuasion.¹⁴² The data presented here indicate that Judge Stevens was successful at persuading his colleagues at the Seventh Circuit well before he did so as a Supreme Court Justice.

Finally, Judge Stevens’s opinions at the Seventh Circuit reveal interesting clues and roadmaps in some cases to positions he would later take at the Supreme Court. Among the themes sounded in Judge Stevens’s circuit opinions, one finds evidence of his interest in institutional competence and local democracy, in a unified approach to equal protection, and in a careful approach to statutory interpretation. Yet while these early

¹³⁸ *Prequel*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/prequel> (last visited June 12, 2012).

¹³⁹ *Prequel*, DICTIONARY.COM, <http://dictionary.reference.com/browse/prequel> (last visited June 12, 2012).

¹⁴⁰ Adamski & Engelman, *supra* note 24.

¹⁴¹ See Rosen, *supra* note 28.

¹⁴² *Id.*

cases reveal the origins of several of the Justice's later stances in particular substantive areas, at least one case analyzed here demonstrated that the Justice was not rigid in his attachment to earlier decisions but was instead willing to adapt and change over time.¹⁴³ Justice Stevens did, indeed, "learn on the job"—but that learning process clearly began during his time at the Seventh Circuit.

¹⁴³ See text accompanying *supra* notes 96–104 (discussing Justice Stevens's apparent repudiation of his earlier dissent in *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971)).