THE LEADERSHIP LEGACY OF JUSTICE JOHN PAUL STEVENS

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What defines Justice John Paul Stevens's tenure as one of the longest serving members of the federal judiciary in the history of the United States? Legacies of Supreme Court justices are sometimes shaped by landmark decisions, and Justice Stevens has produced many, such as his opinion in *Chevron v. Natural Resources Defense Council*,[1] the most cited decision in the Court's history.[2] In other cases, a justice might be better remembered for his or her personal characteristics or ideology.[3] And in the months since Justice Stevens's retirement, commentators have praised his reputation as a consensus-builder[4] and leader of the

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[1] 467 U.S. 837 (1984).

[2] Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 CHI. L. REV. 823, 823 (2006).

[3] Of course, all of these scenarios presuppose that the members of the public can identify a given justice at all. According to one study, only 8% of Americans could name John Paul Stevens as a U.S. Supreme Court Justice, which tied for the third lowest name recognition of any of the justices that finished the 2009 Term together. *Two-Thirds of Americans Can't Name Any U.S. Supreme Court Justices, Says New FindLaw.com Survey*, PR Newswire, June 1, 2010, *available at* www.prnewswire.com/news-releases/two-thirds-of-americans-cant-name-any-us-supreme-court-justices-says-new-findlawcom-survey-95298909.html.

[4] Joan Biskupic, *Justice Stevens to retire from Supreme Court*, USA TODAY, Apr. 12,

Court's liberal bloc.[5]

However, from a quantitative standpoint, something else stands out immediately when one considers Justice Stevens's legacy – the sheer, record-breaking number of dissents[6] he has authored. The 720 dissents he authored during his tenure on the Court[7] are more than any other justice in history; indeed, his output is roughly fifty percent greater than that of the second most prolific justice, Justice William O. Douglas (with 486).[8] Moreover, even when Stevens agreed with his colleagues, he often insisted on writing separately. Thus, one who simply looked at his opinion authorship statistics in a vacuum might get the impression that Stevens was one of the most disagreeable people to ever don a black robe.[9] Such, of course, is not Stevens's reputation – he is widely regarded as being cordial and professional with both his peers and those appearing before him.[10]

So what do the statistics tell us about Justice Stevens's legacy? This essay proposes that these statistics shed a unique light on the type of leadership he exhibited on the Court during his nearly thirty-five terms there. His leadership had very little in common with

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2010, *available at* www.usatoday.com/news/washington/judicial/2010-04-09-justice-stevens-retire_N.htm.

[5] Robert Barnes, *After years as justice, John Paul Stevens wants what's 'best for the court'*, WASH. POST, April 4, 2010, *available at* www.washingtonpost.com/wp-dyn/content/article/2010/04/03/AR2010040301693.html.

[6] Ross E. Davies et al., *Supreme Court Sluggers: John Paul Stevens is No Stephen J. Field*, 13 GREEN BAG 2D 465, 479-80 (2010), *available at* www.greenbag.org/v13n4/v13n4_davies_rust_aft.pdf.

[7] The complete set of statistics collected for Justice Stevens can be found on the website for the academic journal the *Green Bag*. *See* Green Bag trading cards, www.greenbag.org/sluggers/sluggers_cards_and_stats.html. Unless otherwise noted, the statistics referenced in this essay can all be found at this location on the *Green Bag*'s website.

[8] LEE EPSTEIN et al., THE SUPREME COURT COMPENDIUM 635 (4th ed. 2007).

[9] In Justice Stevens' early years on the Court, his habit of writing separate opinions did not exactly endear him to the other justices on the Court. *See* BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 201 (2010).

[10] *See* Pamela Harris, *The importance of Stevens' good manners*, SCOTUSBLOG (Apr. 26, 2010, 3:32 PM), www.scotusblog.com/2010/04/the-importance-of-stevens-good-manners/.

the unifying, consensus-building approaches exhibited by prominent justices such as Chief Justice John Marshall, or aspired to by current Chief Justice John Roberts.[11] Instead, Stevens led by example, prolifically recording his own thoughts on the law and allowing them to influence generations of jurists and scholars, though his position may not have won the day or even garnered much support among his colleagues, initially.

Part I of this essay briefly describes what one can learn from Justice Stevens's opinion authorship statistics and discusses the process of compiling that data. Part II analyzes those statistics in the context of Stevens's reputation as a leader and a consensus-builder and argues that this label does not neatly fit his judicial style. Finally, Part III notes that while his opinion authorship statistics may not indicate that Stevens had any particularly powerful ability (or inclination) to unify all of his colleagues to join his opinion in any given case, his citation statistics, which show that Stevens was cited by name in well over 10,000 federal court opinions during the course of his career, indicate that his opinions were profoundly influential to others within the federal judiciary.

I. THE DATA

Distilling a judge's work into numerical form based on the number and type of opinions that judge or justice authored, of course, tells one little to nothing of the substantive nuances of that jurist's view of the law. The raw numbers do not reveal (directly, at least) that Justice Breyer believes in a living Constitution, while Justice Scalia believes in a "dead Constitution."[12] However, statistics reveal patterns which illustrate the jurist's general temperament and style in a way that an analysis of individual opinions might not.

Take, for example, *Boumediene v. Bush*.[13] Commentators cite this particular case as a prime example of Justice Stevens's consensus-

[11] M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 283-84 (2007).

[12] Interview with Justice Antonin Scalia with NPR (April 28, 2008), *available at* www.npr.org/templates/story/story.php?storyId=90011526.

[13] 553 U.S. 723 (2008).

building approach, reasoning that Stevens decided to assign the responsibility of authoring the Court's opinion to Justice Kennedy, knowing that Kennedy would be less likely that he would withdraw his support for Stevens's position if Kennedy could control the scope of the opinion.[14] Assuming this is true, Justice Stevens certainly deserves credit for exhibiting leadership skills through his savvy use of the Court's internal procedures in that particular case. However, this type of anecdotal evidence carries the risk of losing sight of the forest for the trees. Justice Stevens spent almost forty years on the federal bench; his legacy as a jurist deserves to be tested by a more comprehensive methodology, a more robust, quantitative model.

Testing these types of theories in a quantitative fashion is one of the primary aims of the research underlying this essay. For example, the total number of opinions written by a judge might demonstrate that judge's "productivity" on the bench. Specific outcomes, such as the number of majority opinions written, the number of unanimous majority opinions, and the number of concurrences, provide further data on how successful a judge was in persuading others that he had provided the correct basis for ruling on a case. Additionally, the number of times a judge has been cited specifically by name[15] by one

[14] *See, e.g.*, Jonathan H. Adler, *The Kennedy Court Comes of Age*, THE VOLOKH CONSPIRACY (Apr. 10, 2010, 9:38 AM), volokh.com/2010/04/10/the-kennedy-court-comes-of-age/.

[15] The citation counts compiled as part of the *Green Bag*'s research into Stevens's career underlying this Essay focused on the number of times Stevens was cited by name, rather than merely how many times a majority opinion penned for the Court by Stevens was cited. For example, a general citation to *Chevron* would not count, but a textual reference to Stevens as the author of *Chevron* would. After all, all federal courts, particularly at the district and circuit court levels, are compelled to cite certain precedents when faced with a situation directly governed by those precedents. Judges in these situations may not agree with the legal rule established by the opinion they are citing, but they generally do not have the discretion (or, in the case of the Supreme Court, the inclination to overrule precedent) to disregard that opinion. Therefore, a citation to a Supreme Court majority opinion may not reflect the persuasiveness of that opinion, but rather the dutiful observance of the constraints that bind that jurist. This is not to imply that Justice Stevens would not fare well in a study analyzing the number of citations to

of his fellow Article III appointed brethren may serve as a proxy for how influential the judge has been over his career.[16]

The compilation of this data on a term-by-term basis allows one to identify the opinion writing tendencies and trends of a given member of the Court. With respect to this essay, it allows one to measure how effective Justice Stevens was in his ability to persuade other members of the court to subscribe to his view of the law. Rather than relying on anecdotal accounts for proof of Justice Stevens's strategic prowess in obtaining votes to support his position in any particular case, the statistics provide a more reliable view of Stevens's success in this regard throughout his career.

The process by which this data was collected has been described in painstaking detail elsewhere.[17] In short, the citation data was collected by extensively searching through online legal databases such Westlaw for any specific mention of Stevens. The opinion authorship data was pulled from the opinion tracking data collected by the researchers who maintain the Supreme Court Database.[18]

II.
JUSTICE STEVENS AS A UNIFIER & CONSENSUS BUILDER

Following Stevens's retirement from the Supreme Court, commentators naturally sought to summarize his tenure. The popu-

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one of his opinions for the Court. In fact, Stevens's opinion in *Chevron* is "the most cited case in modern public law." Miles & Sunstein, *supra* note 2.

[16] Citation counts have been used for a variety of purposes in the past, such as for measuring a judge's "greatness" or "insignificance," fitness to be appointed to the Supreme Court, and the influence of the judge within a particular jurisdiction. Stephen J. Choi & G. Mitu Gulati, *Ranking Judges According to Citation Bias (As a Means to Reduce Bias)*, 82 NOTRE DAME L. REV. 1279, 1284-85 (2007).

[17] *See* Davies et al., *supra* note 6 (discussing which statistics we collected for Justice Stevens and how we collected them); *see also* Ross E. Davies & Craig D. Rust, *Supreme Court Sluggers*, 13 GREEN BAG 2D 215, 219-23 (2010) (discussing the same process used for collecting data for the Chief Justice John Roberts trading card).

[18] The Supreme Court Database, scdb.wustl.edu/. A spreadsheet detailing all of the statistics used in this article is also available on the *Green Bag*'s website. *See supra*, note 7.

lar narrative went something like this: While Justice Stevens was initially regarded as idiosyncratic or a "maverick" during his early years on the Supreme Court, he transformed into a coalition builder and leader of the Court's liberal wing over the last fifteen years of his tenure.[19] This essay argues that the former characterization of Stevens's career is supported by the statistics. The latter is not.

A. The Early Years

After spending a period of time in private practice, John Paul Stevens joined the Seventh Circuit in late 1970. Then-Judge Stevens wasted no time in establishing that he was an independent thinker, dissenting twelve times in his first term[20] on the bench, which represented a dissent rate of over 13 percent.[21] By comparison, Judge Stevens wrote twenty-seven majority opinions, representing about 30 percent[22] of the cases he participated in during that first Term.

Over the next several years, Stevens wrote fewer dissents and a

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[19] *See, e.g.*, Barnes, *supra* note 5; Jess Bravin, *Stevens Evolved From Court Loner to Liberal Wing's Leader*, WALL ST. J., June 30, 2010, *available at* online.wsj.com/article/SB10001424052748703374104575337264290709470.html; Greg Stohr, *Justice Stevens, Court's `Great Liberal Voice,' Stepping Down*, BLOOMBERG, Apr. 9, 2010, *available at* www.bloomberg.com/news/2010-04-09/john-paul-stevens-to-retire-as-u-s-supreme-court-s-great-liberal-voice-.html.

[20] The Circuit Courts of Appeals do not divide each session into terms as the Supreme Court does. For the purposes of tracking year by year results, however, this Essay divides each year into terms as is the practice of the Supreme Court; namely, each year or term begins on the first Monday in October, and runs until the first Monday in the following October. *See* A Brief Overview of the Supreme Court, www.supremecourt.gov/about/briefoverview.aspx.

[21] For the purposes of this Essay, the dissent rate constitutes the number of dissenting opinions a justice authored, divided by the total number of other types of opinions he wrote and joined (including per curiam decisions). This and other ratios used in this article were calculated using the numbers compiled for the Justice Stevens trading card, see *supra* note 7, and are listed by Term in Appendices A & B.

[22] The majority rate is calculated by dividing the number of majority opinions a judge or justice authored by the total number of other types of opinions he wrote or merely joined (including per curiam decisions). These totals can be found in Appendices A & B.

greater number of concurring opinions. During his entire tenure on the Seventh Circuit, spanning a little more than five years and parts of six terms, Stevens wrote a total of forty-one dissenting opinions, representing a dissent rate of approximately 7 percent. Stevens also penned twenty-two concurring opinions and 164 majority opinions, and joined more than 350 others.[23] By comparison, Chief Justice John G. Roberts wrote three dissents, three concurring opinions, and forty-three majority opinions in his roughly two terms on the D.C. Circuit. Then-Judge Roberts's dissent rate was a mere 1.5 percent.[24]

Upon his ascension to the Supreme Court, Stevens dramatically increased his dissent rate. During his first (partial[25]) term on the Court in 1975, Stevens wrote nineteen dissents, representing a dissent rate just shy of 20 percent. During his first full term on the Court, Stevens added twenty-nine dissents, which equated to a dissent rate of over 16 percent, more than double his average during his Seventh Circuit tenure. Thus, from the outset, Stevens made it very clear that he would not defer to the opinions of the other justices on the Court simply because they were senior to him.

Also noteworthy are the number of concurring opinions that Justice Stevens wrote during his early years on the Court. A concurring opinion indicates that the author agrees with the majority's ruling – but not with (at least parts of) the majority's reasoning. For example, a justice will often use a concurring opinion to express his disa-

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[23] Interestingly, an article profiling Stevens in the *New York Times* after President Ford nominated Stevens to the Supreme Court evaluated eleven opinions that Stevens had written while on the Seventh Circuit; six of these were dissents. This pre-nomination focus on his dissents, in retrospect, was prophetic, given that Stevens would go on to write the most dissents in Supreme Court history.

[24] This Essay often uses Chief Justice Roberts as a point of comparison for Justice Stevens, both because Roberts has expressed a dramatically different opinion on the value of dissent and separate opinion authorship than Stevens, and because the same opinion authorship data has been collected for both Roberts and Stevens. *See supra*, note 7.

[25] *See* Biographies of Current Justices of the Supreme Court, *available at* www.supremecourt.gov/about/biographies.aspx (noting that Stevens took his seat on the Court on December 19, 1975).

greement with the method of analysis employed by the majority, even if it led the majority to the same conclusion as the author. Thus, ironically, a concurring opinion may express as much hostility toward the majority's position as a dissent.

By this measure, Stevens also embodied his reputation as a "maverick." During the 1975 and 1976 terms, Stevens wrote twelve and seventeen concurring opinions, respectively. This amounts to a concurrence rate of over 12 percent during the 1975 term, and nearly 10 percent during 1976. These rates represent a sharp uptick from the 3.75 percent concurrence rate posted by Stevens while on the Seventh Circuit. In fact, during his entire tenure on the Supreme Court, his concurrence rate only dipped below 4 percent once, during the 2001 term. It is one thing to refuse to join an opinion reaching a result that one disagrees with, even as a junior justice; it seems slightly more brazen to refuse to defer to the reasoning employed by a senior justice who agrees regarding the ultimate ruling. Stevens, of course, did both.

Another way to evaluate the accuracy of the characterization of Stevens's early years on the Court as "idiosyncratic" is to combine Stevens's dissent and concurrence rates into a "separate opinion" rate. This statistic represents the rough percentage of cases in which Justice Stevens felt compelled to document his view of the case because it differed (to some degree) with that of the majority. In this way, one can see the true extent of Stevens's refusal to defer to the opinions of other justices, or put another way, the low value he appeared to place upon consensus.[26] During Stevens's tenure on the

[26] This is not to suggest that deferral and a desire to achieve conformity are necessarily admirable traits. This essay expresses no opinion on that normative question, and certainly does not suggest a judge should sign onto a wrongly decided opinion simply so the Court can present a united front to the public. However, this lack of deference is noteworthy in the sense that one might expect a newcomer to any job to survey his new professional landscape and "settle in" before pointing out the flaws of his or her peers, particularly if that person intended to take on a leadership role within that group later on. Thus, Stevens' approach during his early years on the Court appears at to run counter to what one might intuitively expect to see from one who intends on eventually establishing a leadership role in his or her new environment.

Seventh Circuit, his separate opinion rate averaged 10.7 percent. During the Supreme Court's 1975 term this tripled to nearly 32 percent. Certainly, Stevens's disagreement with the majority in some respect in almost one-third of the Court's cases in his first term validates the commonly held belief that he started off as something of a "maverick," unafraid to express his opinions even when they failed to garner the support of four other justices on the Court.

B. The "Transformation"

While the statistics support the general characterization of Justice Stevens's early years as an "idiosyncratic maverick," they are inconsistent with the assertion that he transformed into a liberal leader and consensus builder during the latter half of his tenure on the bench. The commonly accepted narrative explains that after liberal icons such as Justices William Brennan and Thurgood Marshall retired, Stevens stepped in and filled a vacuum of leadership on the Court's left-leaning wing.[27] Indeed, with six justices retiring from the Court between 1986 and 1994, one would expect that any transformation in Stevens's leadership style would begin to manifest itself during these years, or at least very shortly thereafter. For example, one would expect a leader of the Court and a consensus builder to write more majority opinions, perhaps even unanimous ones, and fewer concurrences and dissents as that justice exercises a greater degree of influence amongst his or her peers. The statistics demonstrate, however, Stevens's continued penchant for frequently publishing his disagreements with the majority's view.[28]

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[27] Stohr, *supra* note 19.

[28] An intangible quality such as leadership is generally tough to quantify in any profession, let alone within an institution like the Supreme Court, which conducts its deliberations behind closed doors and out of the public view. A justice could potentially "lead" in a variety of ways, such as unifying the court behind a majority opinion, or by using his or her seniority to assign the responsibility for writing a majority opinion to another justice who would otherwise be on the fence regarding an issue, as is sometimes speculated to have been the case in *Boumediene*. *See, e.g.*, *supra* Part I. Even a dissent in a 5-4 decision could be viewed as an exercise of leadership ability, particularly when that dissent obtains the votes of all the dis-

To illustrate, Justice Brennan retired in 1990, and Justice Marshall retired just prior to the beginning of the 1991 term. Yet between the 1990 and 1991 terms, Stevens's dissent rate dropped less than 0.7 percent (he authored only one less dissent in the 1991 term). And during the same period, his concurrence rate jumped from 4.7 percent to 9.5 percent. Accordingly, his separate opinion rate increased from 23.6 percent to 27.8 percent. But his majority rate[29] dipped from over 11 percent to 9.5 percent. Significantly, in each category Stevens was simply being Stevens – none of his 1991 opinion rates deviated appreciably from his Supreme Court career averages in those categories.[30]

In 1994, Justice Blackmun retired and Stevens assumed the position as the senior member of the Court's liberal bloc.[31] Yet Stevens's majority opinion rate dropped between the 1993 and 1994 terms, while his dissent rate jumped nearly 7 percent from 1993 and 1994. His dissent rate continued to climb the next year, reaching a career high 27.5 percent in 1995. During the 1996 and 1997 terms, he returned to levels in line with his career norms. However, his dissent rate again spiked above 25 percent in both 1998 and

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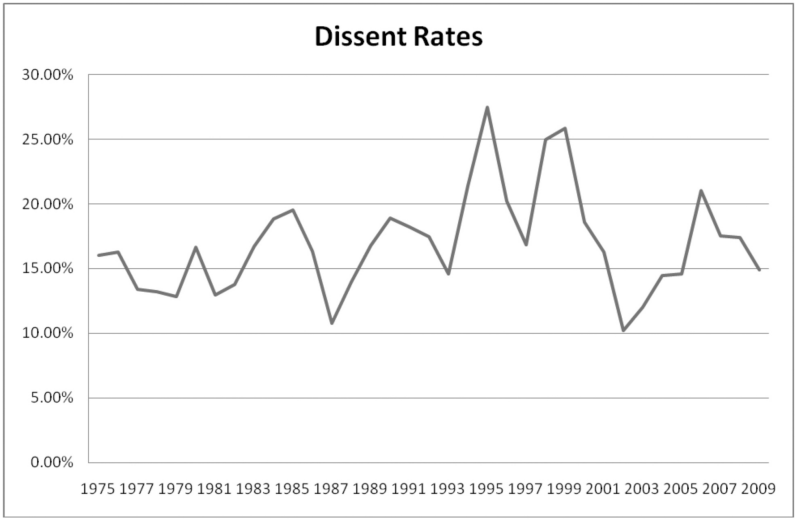
senting justices in the case. Not all of these factors can be accounted for by tracking the number and types of opinions written by a justice. In particular, statistically tracking a justice's influence according to how persuasively that justice used his or her seniority to strategically assign is certainly outside the scope of this Essay, though others have attempted to do so. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 390-94 (2002). However, the opinion tracking data we have compiled can give us a general idea of what type of leadership role Justice Stevens filled on the court, both on a year-by-year and macro level.

[29] For the purposes of this Essay, Stevens' "majority opinions" include all opinions in which Stevens was able to command a majority of votes for at least part of the opinion. It does not include plurality opinions, where Stevens may have written the opinion of the court, but it did not attract the votes necessary to be included as a majority opinion.

[30] Over the course of his Supreme Court career, Stevens averaged a 16.6% dissenting opinion rate, a 9% concurring opinion rate, a 25.6% separate opinion rate, and an 8.4% majority opinion rate.

[31] The same nine justices would then preside over the Court until the death of Chief Justice Rehnquist in 2005.

1999. In fact, of the six terms of Stevens's career in which he averaged a dissent rate of over 20 percent, five of those came between 1994-1999, the period in which Stevens ostensibly took on a leadership and consensus building role within the Court.



Even Stevens's relatively steady "majority opinion" rates during this period do not tell the whole story. Although his majority rate between 1994-1999 dropped by only 1 percent compared to his rate during the previous six terms (from 1988-1993), six of his "majority opinions" were actually mere "majority in part" opinions in which he convinced a majority of the court to join only *part* of his opinion. Thus, in 12.5 percent of the cases in which he ostensibly wrote the majority opinion between 1994 and 1999, Stevens was unable to convince four other justices to join his opinion in its entirety. In contrast, in the eighteen previous terms (from 1975-1993), Stevens had written only three such "majority in part" opinions, accounting for a mere 1.2 percent of his total majority opinions.

These increases in Stevens's dissent rates, and decreases in majority rates, were not limited to the late 1990's. If one splits his career into two segments, the "maverick" period from his arrival on

the Court in 1975 until Justice Blackmun retired prior to the 1994 term, and the "leadership" period from the 1994 term until his retirement following the 2009 term, the same results manifest themselves. Stevens's dissent rate during the 1975-1993 period was 15.7 percent; from 1994-2009, it was 18.5 percent. Stevens's majority rate between 1975-1993 was 8.8 percent; from 1994-2009, it was 8.5 percent, (although the drop is more significant if the majority-in-part decisions are subtracted from the totals (8.7 percent to 7.7 percent)).[32]

Despite the statistics' suggestion that Stevens did not assume a greater leadership role in the second half of his career as a justice, one might argue that because the newly appointed justices were generally more conservative than their predecessors, the group of liberals that Stevens led was forced into a minority or dissenting position in more cases. To the extent that Stevens's leadership credentials rest on his ability to get Justices Breyer, Souter, and Ginsburg to join these concurrences and dissents, Stevens demonstrated some aptitude for doing so. In fact, one study of the 1986-1998 Terms found that Justices Breyer and Ginsburg were more likely to join a concurrence or dissent written by Justice Stevens than any other Justice.[33]

However, a few pieces of information emerge from that same study which weaken the argument that Stevens acted as a coalition or consensus builder with regard to the remaining justices on the

[32] Counting a majority in part decision with the rest of the majority opinions can be misleading. A powerful example is the Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), in which Justice Stevens wrote for a majority of the justices in striking down the mandatory Federal Sentencing Guidelines in the first part of the opinion. However, Justice Stevens lost Justice Ginsburg's critical vote in describing what the appropriate remedy for the Sixth Amendment violation should be. The difference between Justice Stevens' proposal and that of Justice Breyer (which was adopted by five justices) was stark and has had profound effects on the operation of the federal criminal justice system. *Id.* at 246-47 (describing the differences between Stevens' proposal and Breyer's adopted solution).

[33] *See* SEGAL & SPAETH, *supra* note 28, at 400. Justice Souter voted most often to join concurrences and dissents written by Justice Ginsburg, although Justice Stevens ranked second in this regard. *Id.*

Court. First, Stevens was actually substantially less successful in attracting the votes of Justices Breyer, Souter, and Ginsburg in his special opinions than he had been in obtaining the support of Justices Blackmun, Brennan, and Marshall, members of the outgoing liberal bloc.[34] Second, Stevens clearly lost the battle with his intellectual rival Justice Antonin Scalia for the votes of critical moderate Justices O'Connor and Kennedy during this period, at least when writing these special opinions.[35] Justice O'Connor joined a special opinion written by Scalia in 10.6% of her opportunities to do so, compared to only 5.3% for Stevens; Kennedy joined Scalia's opinions in 17.1% of his opportunities, compared to a mere 2.3% for Stevens.[36] Most importantly, Stevens also received the lowest average number of votes for his concurrences and dissents than *any other justice* during the 1986-1998 Terms.[37] Thus, Stevens's ability to attract liberal votes actually appears to have *decreased* during this period, and he showed less ability to find support from members of the Court at large for his special opinions than any of the other thirteen justices in the study.

Finally, the sheer volume of dissents and separate opinions that Stevens wrote throughout his career also appears to undercut the argument that Stevens acted as a great unifier of the justices at any point. During Stevens's tenure on the Court, he wrote a staggering 720 dissents. According to the *Supreme Court Compendium*, Stevens wrote 234 more dissents than the second most prolific dissenter in Court history, Justice William O. Douglas, penned in his 36 years of judicial service.[38] Justice Scalia, famous for his high profile and sharply worded dissents (often targeted at Stevens), only wrote 208

[34] *Id.* Justices Blackmun, Brennan, and Marshall joined Stevens' special opinions in 19%, 14%, and 18.9% of their opportunities to do so during the terms analyzed by the study, respectively. Justices Breyer, Ginsburg, and Souter joined Stevens' special opinions in 14.6%, 17.1%, and 10.5% of their opportunities, respectively. *Id.*

[35] "Special opinions," as used by the study, are the combined number of concurrences and dissents written by a particular justice. *See id.*

[36] *Id.*

[37] *Id.* at 396-97.

[38] EPSTEIN ET AL., *supra* note 8.

dissents[39] between the 1986 and 2009 terms.[40]

So what does all of this mean? The popular narrative of Justice Stevens's career would have you believe that Stevens's changed from a lone wolf among the justices, into a consensus-building leader of the Court's liberal wing after the retirement of several renowned liberal justices in the mid-1990's. The numbers, however, show that Justice Stevens wrote less for the majority, and wrote separately more often, after he ascended to this supposed leadership position. In fact, for his career, Stevens wrote separately in a historically unprecedented number of cases, even during his later years when he was an alleged liberal consensus builder.

That is not to say that Stevens in no way took on a greater leadership role on the Court during the latter part of his career. These statistics certainly cannot account for all of the Court's internal dynamics and behind the scenes maneuvering. However, these numbers do suggest that, at the very least, Stevens's opinion writing behavior did not reflect the type of change that one would instinctively expect to see given the commonly recited history of his career on the Court.

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[39] Supreme Court Database Analysis, scdb.wustl.edu/analysisCaseListing.php?sid=1101-POTLUCK-3903 (search conducted Mar. 10, 2011).

[40] Again, this essay certainly does not mean to imply that the expression of dissent is inherently antithetical to the exhibition of great leadership skill. Justice Ginsburg has commented that dissents often have great practical value to the justices in the opinion drafting process by exposing glaring weaknesses in an early draft of a majority opinion. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010). In the same article, however, Justice Ginsburg cites with approval Justice Brandeis's view on dissents (as related by John P. Frank), which was that "random dissents . . . weaken the institutional impact of the Court and handicap it in the doing of its fundamental job. Dissents . . . need to be saved for major matters if the Court is not to appear indecisive and quarrelsome." *Id.* at 7-8 (citing John P. Frank, Book Review, 10 J. LEGAL EDUC. 401, 404 (1958)). Applying Brandeis's theory on the appropriate role of dissenting opinions, Stevens' penchant for dissenting in every case with which he disagrees with the outcome or reasoning, *see* BARNHART & SCHLICKMAN *supra* note 9 at 165, would appear to diminish the stature of the Court, and detract from the quality of whatever type of leadership Stevens brought to the table.

III.
STEVENS AS AN INTELLECTUAL LEADER

While Stevens's opinion writing statistics are not entirely consistent from what one would expect of a consensus-building leader on the Court, his jurisprudence nonetheless profoundly and quantifiably affected the American legal landscape. Stevens's biggest impact did necessarily not come from building voting coalitions and swaying swing voters on the Court; instead, the best evidence supporting Stevens's leadership legacy is found in the number of citations to his opinions by federal judges throughout the country. From that perspective and on a national scale, Stevens undoubtedly acted as an intellectual leader while serving as a justice.

This research underlying this essay focused on the number of times Justice Stevens was referred to specifically by name, either in the text of an opinion or as part of a citation within that opinion.[41] By this measure, Stevens was been individually cited by name in a staggering 10,858 federal court opinions[42] during his career up until his retirement in 2010. On average, federal judges individually referenced Stevens in 271 different opinions per term during his tenure. This equates to more than 5.5 citations per each opinion ever penned by Stevens.[43]

Those who have read several of Stevens's opinions are perhaps familiar with his tendency to frequently cite opinions he had written in the past, even when those opinions were dissents or did not oth-

[41] *See supra* Part I (describing how the citation statistics were collected). Certain categories of specific citations by name were not counted. For example, if Stevens wrote a majority opinion in a case from which Justice Scalia dissented, and Scalia referred to Stevens' opinion in that case while doing so, this would not count toward Stevens' citation statistics. The idea was to measure the influence of Justice Stevens' opinion in future cases, and not to catalogue the internal disagreements within the court over the result in any one particular case. Similarly, multiple citations in a single opinion only counted as one citation for the purposes of our study.

[42] This total includes Supreme Court opinions.

[43] This number is based on our study's conclusion that Stevens wrote 1,965 opinions while a member of the federal judiciary. *See supra* note 7; *see also* Davies et al., *supra* note 6, at 475-79 (describing how these statistics were collected).

erwise represent the view of the Court. Regardless of Stevens's rationale for citing his previous separate opinions in this manner,[44] one might legitimately be concerned that this self-citation inflated these citation statistics. However, even if one removes all of the Supreme Court opinions from the study, federal district and circuit court still cited Stevens by name in 9,818 opinions through the end of the 2009 term. The judges authoring these opinions were very rarely in a position where such a citation was absolutely necessary; after all, if they were citing a controlling majority opinion of the Court, there would be no need to refer to Stevens individually.[45] Even if the judge cited one of Stevens's separate opinions in a disapproving fashion, Stevens still influenced the debate by forcing that judge to respond to his thoughts on that particular area of the law. Thus, these citation numbers demonstrate Stevens's profound impact on the thought processes of a generation of federal jurists.[46]

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[44] One former Stevens clerk recalls that Stevens frequently quoted himself in order to demonstrate that he has been consistent in his reasoning over the course of his career. Richard Brust, *Practical Meaning: As the Court Shifted Right, Stevens Kept His Place*, A.B.A. J., Apr. 9, 2010, *available at* www.abajournal.com/news/article/practical_meaning_as_the_court_shifted_right_stevens_kept_his_place.

[45] The Bluebook, a commonly used citation formatting system, only requires a reference to the author of the opinion when that author is writing separately, not for the court. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.6.1., at 91 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

[46] Stevens's policy of frequently dissenting may have in fact been calculated to produce these results. In a 2008 interview, Justice Scalia explained why he chose to frequently dissent: "Who do you think I'm writing my dissents for? I'm writing for the next generation and for law students. You know, read this and see if you want to go down that road." Later in the interview, Scalia opined that:

> [O]ne of the reasons this Supreme Court is so prominent – compared to the Supreme courts of other countries – is because of the dissent. The dissent combined with the case law system is the way the law is taught. You don't have to write a commentary, and the professor doesn't have to pick apart the opinion. You get both sides just from the U.S. report. So it's somewhat of a self-contained academy here . . . .

Dan Slater, *Law Blog Chats With Scalia, Part II: 'Master of the Dissent'*, WALL STREET JOURNAL, May 30, 2008, *available at* blogs.wsj.com/law/2008/05/30/law-blog-chats-with-scalia-part-ii-master-of-the-dissent/. In a similar vein, Stevens's dissents may have been crafted not to persuade his colleagues or to express his frus-

While the Part II.B detailed the reasons why Stevens may not have morphed into a consensus-building leader of the Court in the mid-1990's, there is some evidence that Stevens became more influential throughout the judiciary as a whole as he aged. Stevens's citation numbers were generally fairly consistent between his first full term in 1976 (177 citations) and 2003 (263 citations). However, in 2004, his citation count skyrocketed to 500, and peaked at 563 in 2006. The likely cause of this spike is Stevens's opinions in the seminal criminal sentencing case *United States v. Booker*, 543 U.S. 220 (2005), in which Stevens wrote both a portion of the majority opinion and a strongly worded dissent. The numerous opinions penned by the justices in that case have virtually necessitated that any citation to that opinion also refer to the opinion's author for clarity's sake. Nevertheless, perhaps this late career increase in publicity (as measured by the jump in citations) drove the perception that Stevens had in fact changed from an idiosyncratic maverick into an intellectual among liberal members of the federal judiciary, even though he did not appear to exert greater influence on the other eight justices on the Supreme Court.

It is perhaps worth wondering whether we will see the nomination of another Supreme Court justice that inspires a similar number of citations in the future, given today's highly politicized confirmation process. While on the Seventh Circuit before being nominated to the Court, Stevens received 59 citations by name, which of course pales in comparison to the thousands he received after he joined the Supreme Court. However, this is still an impressive number for a circuit court judge. By comparison, Chief Justice Roberts was only cited once by name during his over two years on the D.C. Circuit. It is possible that the same type of bold rulings, or use of creative reasoning, from a circuit court judge that generates cita-

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tration with their decisions, but with the long run goal of influencing the debate on the subjects of those opinions, both in the legal academy and in the lower federal courts. *Cf.* Orin Kerr, *When Scalia Dissents*, THE VOLOKH CONSPIRACY (Mar. 10, 2010, 1:20 AM), volokh.com/2011/03/10/when-scalia-dissents/ (positing that this is Scalia's ultimate goal when he issues his characteristic sharply worded dissents).

tions may also provide ammunition for those feverishly opposed to that judge's elevation to the nation's highest court. Further, it seems reasonable to assume that, once a member of the Supreme Court, a justice is unlikely to suddenly abandon his or her long-practiced, demure, "confirmable" style in favor of the highly quotable styles of justices such as Stevens or Scalia. For example, Chief Justice Roberts was cited only 60 times by name during the 2009 Term, his fourth full term on the Court. In Stevens's fourth full term, he was cited 216 times.

Regardless, it is apparent from the number of federal jurists who specifically cited Justice Stevens's work, even when they were under no compulsion to do so, that Stevens was a highly successful intellectual leader of the federal judiciary overall. The sheer volume of cases that he influenced, even when he was not directly involved, is an impressive testament to his skill as a judge.

CONCLUSION

The conventional wisdom that Justice Stevens changed from a highly idiosyncratic, maverick justice into a unifying, consensus building leader of the Supreme Court does not find much support in his opinion writing statistics. Those statistics demonstrate that Stevens was a highly individualistic judge both on the Seventh Circuit and throughout his career on the Court. Justice Stevens may have gained more visibility as his seniority increased and the Court's overall ideology shifted in a conservative direction during his tenure, but Stevens was always one to speak his mind, and there is no indication that he would have stopped doing so had the Court remained more consistently liberal throughout his service.

But, one may demonstrate leadership in other ways besides being a consensus builder in the mold of legendary Chief Justice Marshall; one can be an intellectual leader, and Stevens influence in this regard cannot be denied. Justice Stevens's prolific writing had a profound impact on the federal judiciary, as evidenced by the sheer number of times his words were cited by others in the nation's judicial system. Asserting that Stevens suddenly developed this leadership ability in the latter part of his career on the Supreme Court

does not do this aspect of his legacy justice; the data shows that Stevens has always been an influential figure in the American legal system, dating back to his time on the Seventh Circuit. Perhaps this latter characterization of Justice Stevens's legacy is at once both more accurate and more flattering than that which has been frequently attributed to him in the days following his retirement.

APPENDIX A

Court	Term	Dissent Rate	Concurrence Rate	Separate Opinion Rate	Majority Rate
7th Cir.	1970	0.1333	0.0222	0.1556	0.3000
7th Cir.	1971	0.0880	0.0160	0.1040	0.2960
7th Cir.	1972	0.0625	0.0268	0.0893	0.3125
7th Cir.	1973	0.0660	0.0566	0.1226	0.1698
7th Cir.	1974	0.0088	0.0619	0.0708	0.3363
7th Cir.	1975	0.0750	0.0500	0.1250	0.2250
7th Cir.	1976	0.0000	0.0000	0.0000	0.0000
Totals		0.0698	0.0375	0.1073	0.2794

APPENDIX B

Court	Term	Dissent Rate	Concurrence Rate	Separate Opinion Rate	Majority Rate
S. Ct.	1975	0.1959	0.1237	0.3196	0.0722
S. Ct.	1976	0.1638	0.0960	0.2599	0.0791
S. Ct.	1977	0.1342	0.0738	0.2081	0.0940
S. Ct.	1978	0.1321	0.0755	0.2075	0.0881
S. Ct.	1979	0.1282	0.0897	0.2179	0.0833
S. Ct.	1980	0.1667	0.1200	0.2867	0.0800
S. Ct.	1981	0.1299	0.0960	0.2260	0.0734
S. Ct.	1982	0.1379	0.0805	0.2184	0.0862
S. Ct.	1983	0.1675	0.1257	0.2932	0.0838
S. Ct.	1984	0.1882	0.0588	0.2471	0.0941
S. Ct.	1985	0.1955	0.0894	0.2849	0.0894
S. Ct.	1986	0.1637	0.1053	0.2690	0.0936
S. Ct.	1987	0.1078	0.0479	0.1557	0.1078

Court	Term	Dissent Rate	Concurrence Rate	Separate Opinion Rate	Majority Rate
S. Ct.	1988	0.1395	0.0872	0.2267	0.0872
S. Ct.	1989	0.1677	0.1226	0.2903	0.0645
S. Ct.	1990	0.1890	0.0472	0.2362	0.1102
S. Ct.	1991	0.1825	0.0952	0.2778	0.0952
S. Ct.	1992	0.1750	0.0917	0.2667	0.0917
S. Ct.	1993	0.1458	0.1146	0.2604	0.1146
S. Ct.	1994	0.2143	0.0612	0.2755	0.0918
S. Ct.	1995	0.2747	0.0659	0.3407	0.0769
S. Ct.	1996	0.2020	0.0505	0.2525	0.1010
S. Ct.	1997	0.1683	0.1089	0.2772	0.0594
S. Ct.	1998	0.2500	0.0938	0.3438	0.0938
S. Ct.	1999	0.2584	0.0899	0.3483	0.0787
S. Ct.	2000	0.1860	0.0581	0.2442	0.1047
S. Ct.	2001	0.1628	0.0349	0.1977	0.0930
S. Ct.	2002	0.1023	0.1364	0.2386	0.0909
S. Ct.	2003	0.1205	0.1084	0.2289	0.0843
S. Ct.	2004	0.1446	0.1084	0.2530	0.0843
S. Ct.	2005	0.1461	0.0787	0.2247	0.0787
S. Ct.	2006	0.2105	0.1184	0.3289	0.0921
S. Ct.	2007	0.1757	0.0946	0.2703	0.0676
S. Ct.	2008	0.1744	0.0581	0.2326	0.0930
S. Ct.	2009	0.1489	0.1383	0.2872	0.0638
Totals (S. Ct.)		0.1662	0.0898	0.2560	0.0870
Career Totals (all courts)		0.1547	0.0836	0.2383	0.1100

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