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Lyman P.Q. Johnson
Washington and Lee University School of Law, johnsonlp@wlu.edu

Jason A. Cantone
Federal Judicial Center, jcanton1@gmu.edu

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JUSTICE STEVENS AND SECURITIES LAW

Lyman Johnson[**] & *Jason A. Cantone*[+]

INTRODUCTION

Former Supreme Court Justice John Paul Stevens is famous for many things. A decorated World War II veteran, he is the final Justice to have served in that war. He is the only Supreme Court Justice appointed by a President (Gerald Ford) not elected by the American people, and he may well prove to be the last Justice confirmed by a unanimous Senate vote.[1] On the highest bench, where he served longer than any justice except William Douglas and Stephen Field, he was known as much for his 720 dissents as for the 377 opinions he authored for the Court.[2] Fierce independence is the most notable of his personality traits,[3] so much so that his 2010 biographers subtitled their work *An Independent Life*. This "maverick streak"[4] was thought by some to be so pronounced as to impede collegial consensus building around his views.[5] Others recall Stevens's important work in antitrust law, his altered views on the death penalty,[6] or his posi-

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* Robert O. Bentley Professor of Law, Washington and Lee University School of Law; Professor of Law, University of St. Thomas (Minneapolis) School of Law. The Frances Lewis Law Center at Washington and Lee University and the University of St. Thomas (Minneapolis) provided financial support for Professor Johnson's work.

+ The views expressed in this article represent those of the authors alone. Dr. Cantone's research was conducted outside of his employment, based on a data set created before his current employment, and relied entirely on information available from public sources.

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1 *See generally* BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE (2010).

2 *See Supreme Court Sluggers: John Paul Stevens, The Numbers (As of October 3, 2010)*, GREENBAG.ORG, http://www.greenbag.org/sluggers/sluggers/Stevens2010/updates/Stevens%20update%20through%20OT2009.jpg (last visited July 10, 2014).

3 *See* BARNHART & SCHLICKMAN, *supra* note 1, at 256.

4 *See id.* at 254.

5 For example, in *Bush v. Gore*, 531 U.S. 98 (2000), four justices authored separate dissents, with the senior dissenter, Stevens, unable to obtain a unified dissenting opinion; *See* BARNHART & SCHLICKMAN, *supra* note 1, at 256-60.

6 *See generally* Nina Totenberg, *Justice Stevens: An Open Mind On a Changed Court*, NPR (Dec. 19, 2010, 3:50 PM), http://www.npr.org/templates/story/story.php?storyId=130198344; Adam Liptak, *Ex Justice Criticizes Death Penalty*, N.Y. Times (Dec. 19, 2013), http://www.nytimes.com/2010/11/28/u

tions on the many contentious issues addressed by the Court during Stevens's remarkable thirty-four-and-a-half years of service.[7] And of course, his lengthy 2010 dissent in the high profile case of *Citizens United v. Federal Election Committee*[8] and his provocative 2014 book proposing several constitutional changes have drawn wide attention.[9]

But one thing Justice Stevens is not renowned for is his role in the securities law jurisprudence of the Supreme Court. Beyond the usual journal articles that address his views on discrete issues,[10] only two short pieces written in the mid-1990s even take up the former Justice's securities law views,[11] and they do so quite selectively, without addressing the last half of his tenure. Strikingly, neither a 440-page law review tribute to Stevens nor any of his biographies,[12] including that written by Stevens himself,[13] give this subject any sustained attention.

This is both odd and an unfortunate neglect of Justice Stevens's legacy in this area of law. Justice Stevens authored more securities law opinions than any justice in the history of the Supreme Court.[14] He surpassed even Justices Lewis Powell and Harry Blackmun in overall production.[15] True to

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s/28memo.html. Michael C. Dorf, *Becoming Justice Stevens: How and Why Justices Evolve*, FindLaw (Dec. 20, 2013, 4:10 PM), http://writ.lp.findlaw.com/dorf/20100421.html.

7 *Members of the Supreme Court of the United States*, SUP. CT. OF THE U.S., http://www.supremecourt.gov/about/members.pdf (last visited July 10, 2014); *List of Justices of the Supreme Court by Time in Office*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_Justices_of_the_Supreme_Court_of_the_United_States_by_time_in_office (last visited July 10, 2014).

8 558 U.S. 310 (2010) (Stevens, J., concurring and dissenting, in part).

9 JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014).

10 *See, e.g.*, Zachary D. Clopton, *Bowman Lives: The Extraterritorial Application of U.S. Criminal Law After Morrison v. National Australia Bank*, 67 N.Y.U. ANN. SURV. AM. L. 137, 178-180 (2011); David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1035 (2009). Numerous articles discuss various positions of Stevens in particular cases, just as numerous articles do so for each Justice on most subjects.

11 *See generally* Douglas M. Branson, *Prairie Populist? The Business and Securities Law Opinions of Justice John Paul Stevens*, 27 RUTGERS L.J. 605 (1996); Karl S. Okamoto, *Desperately Seeking a Stevens [Who Cares About the Federal Securities Laws]*, 27 RUTGERS L.J. 627 (1996). Each of these short articles seeks to distill from, and comment on, a judicial outlook based on a handful of Justice Stevens's securities opinions up to 1994, sixteen years before Stevens retired. The two pieces do not address Stevens's enormous overall output in the area.

12 *Symposium: The Legacy of Justice Stevens*, 106 NW. U. L. REV. 409-850 (2012); BARNHART & SCHLICKMAN, *supra* note 1. A full-text search of these publications was conducted in Google Scholar and Google Books, respectively.

13 John Paul Stevens, FIVE CHIEFS (2011). The word "securities" does not appear in this book or in the book described in *supra* note 1. The methodology described in note 12 was also used here. Justice Stevens's 2014 book—SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION—does not address securities law at all.

14 *See infra* Part III.

15 *Id.*

form as a "maverick,"[16] Stevens dissented frequently.[17] Yet, unlike other famed dissenters–such as Douglas, Brennan, and Marshall[18]–when Stevens dissented in a securities case, he almost always wrote an opinion stating why.[19] In fact, he wrote more dissenting opinions in the securities area than any other Justice.[20] And even when he agreed with a majority of the Court, he frequently wrote a separate concurring opinion. Thus, he wrote more concurring opinions in securities law cases than any other Justice.[21] With his unmistakable record of authoring the most total opinions, the most concurring opinions, and the most dissenting opinions, it is puzzling that Stevens's role in securities law has been ignored.

In this Article, we tell the overlooked story of Justice Stevens's important role in Supreme Court securities law decisions. In Part I, where we briefly highlight Stevens's career before his 1975 appointment to the Supreme Court, we observe that we can identify no evident interest in or connection to federal securities law or the securities industry, making his contributions all the more remarkable. The only foreshadowing of his prolific opinion-writing on the subject of securities law was his voluminous writing of opinions, in general, while serving on the Seventh Circuit Court of Appeals. This commitment to authoring opinions stemmed, in turn, from Stevens's unforgettable experience as general counsel to a special commission that investigated bribery on the Illinois Supreme Court in the late 1960s, as Part I relates.

Part II describes our data set and methodology. Part III then empirically assesses Justice Stevens's role in securities law from several quantitative vantage points. These include the sheer volume of his securities opinion production, in relation to other Supreme Court justices, focusing on the 40-year period (1971-2010) encompassing Justice Stevens's years of service but also reaching all the way back to the passage of the federal securities laws in the early 1930s; the parties and issues involved in, and the outcomes of, his rulings; and the alignment of justices when Stevens wrote his various types of securities opinions. Part IV examines whether Justice Stevens advanced a discernible judicial philosophy in his securities law opinions, concluding that, eventually, he assuredly did. He was very mindful of the Court's altered views on the federal securities laws, as initially championed by Justice Powell but continuing well beyond Powell's tenure, and Stevens largely disagreed with that shift, believing the Court had not only

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16 *See supra* note 4.

17 *See infra* Part III.

18 *Id.*

19 *Id.*

20 *Id.* Stevens did not dissent only in securities law cases. He dissented across a wide range of subjects. His 720 dissenting opinions on the Supreme Court far outpace the 486 of the second most active writer, Justice William Douglas. *See supra* note 2.

21 *See infra* Part III.

sharply veered course but had repeatedly failed to adhere to Congress' intent, both original and as re-enacted. He wrote not simply to express opposition, however, but also to preserve what, in his eyes, he saw as fidelity to legislative intent, his consistent reference point. As we observe in Part IV, Chief Justice Roberts recently made legislative intent the centerpiece of his analysis in an important securities case. This then is not inherently a "liberal" or "conservative" judicial approach to securities law. Importantly, Stevens's belief in preserving a minority view for future reference reflects the enduring influence of Justice Rutledge, for whom Stevens clerked, who wrote a dissent in 1948 that Stevens cited in an opinion he authored for the Court in 2004. This formative clerkship experience, then, not a career path or interest in securities law as such, helps explain Justice Stevens' prolific opinion writing, in securities law and more generally. We close with a brief Conclusion.

I. JUSTICE STEVENS AND SECURITIES LAW PRIOR TO THE SUPREME COURT

Justice Stevens's remarkable production of Supreme Court securities law opinions invites the search for an explanation. As with all biographic efforts, we turn to his pre-Court days to aid in our quest. Given that Stevens went on the Court at age 55, he had had several decades of a rich professional life before assuming the role of Supreme Court justice. As we examine his life for clues to his prolific securities law jurisprudence, we are struck by two facts that we briefly touch on in this Part. First, sketching the outlines of his life in subpart "A" below, we see what might be called, to paraphrase Sherlock Holmes's famous remark about the dog that did not bark, the "curious incident" of the securities law jurist who "did nothing" in that area beforehand.[22] That is, the author of more securities law opinions than any other Supreme Court justice in history displayed no particular connection to or interest in securities law before going on the bench. His biography is intriguing for precisely this reason. The key to his inordinate productivity, it turns out, lies entirely outside the securities area.

Second, Stevens's five-year service on the Seventh Circuit Court of Appeals offers a different clue to his later writing. There, as described in subpart "B" below, Stevens wrote a staggering number of opinions. When he went on the Supreme Court to serve during a dramatic upsurge in that court's caseload in the securities area,[23] it was to be expected that he would

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22 ARTHUR CONAN DOYLE, *Silver Blaze*, in THE MEMOIRS OF SHERLOCK HOLMES 346-47 (1893) (Doubleday).

23 *See* Adam C. Pritchard, *Justice Lewis F. Powell, Jr. and the Counterrevolution in the Federal Securities Laws*, 52 DUKE L.J. 841, 858 (2002).

continue to speak his mind–as he did–with or without any prior securities law experience.

A. *No Earlier Evident Interest in Securities Law*

Stevens was born in Chicago on April 20, 1920, the youngest of four boys. He once told an interviewer that he "had a very happy childhood."[24] His family was wealthy and politically conservative. Stevens's grandfather and great uncle founded the Illinois Life Insurance Company, and his grandfather and father built the lavish Stevens Hotel (now the Chicago Hilton and Towers), the largest hotel in the world when it opened in 1927.[25]

The family suffered severe financial and personal misfortune, however. The downfall of the Stevens dynasty occurred in the depths of the Depression, eventually resulting in the loss of the family's hotels, a criminal conviction (later reversed) of Stevens's father, and his uncle's suicide. Despite these family reversals, Stevens attended the University of Chicago[26], where he excelled academically (being admitted to Phi Beta Kappa) and socially.[27] After earning his undergraduate degree, he entered graduate studies in literature at the same school.[28]

With U.S. participation in World War II looming, Stevens completed a Navy correspondence course in cryptography and applied for a commission on December 6, 1941, an uncanny one day before the attack on Pearl Harbor.[29] His nearly four years of work as a naval communication traffic analyst and cryptographer earned him the Bronze Star and the Legion of Merit.[30]

Returning to civilian life, Stevens did not resume his studies in literature, but enrolled in law school at Northwestern University.[31] It was in writing an unsigned comment on antitrust law for Northwestern's flagship law review that Stevens began a life-long interest in that area. After graduating first in his law school class, *magna cum laude*, Stevens began a Supreme Court clerkship with Justice Wiley Blount Rutledge, who had an abiding influence on Stevens' thinking.[32] In that 1947-1948 term the Court heard thirty-six civil rights and civil liberties cases. In Stevens' majority opinion in the 2004 case, *Rasul v. Bush*,[33] a landmark habeas corpus case

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24 Jeffrey Rosen, *The Dissenter: Justice John Paul Stevens*, N.Y. TIMES, Sept. 23, 2007, at F54.

25 *See* BARNHART & SCHLICKMAN, *supra* note 1, at 24-26.

26 *See id.* at 32-33.

27 *See id.* at 36-37.

28 *Id.* at 41-42.

29 *Id.* at 43.

30 *Id.* at 51.

31 *Id.* at 52.

32 *See id.* at 62.

33 542 U.S. 466 (2004).

involving terrorism detainees at the Guantanamo Bay Naval Station, he cited Justice Rutledge's 1948 dissent in *Ahrens v. Clark*,[34] although the dissent was not mentioned in any brief for the case. Stevens' thinking about the enduring power of a well-written dissent could not have been made clearer.

His clerkship ended, Stevens turned down an offer to teach at Yale Law School and, instead, he returned to Chicago and began practicing law.[35] He worked under antitrust specialist Edward R. Johnston, and the two wrote a 1949 law review article on monopoly enforcement, Stevens' second scholarly writing on the subject of antitrust law.[36]

In 1951, Stevens returned to Washington to take a position as staff lawyer to the House Judiciary Committee's Subcommittee on the Study of Monopoly Power.[37] It was through work on Judiciary Chairman Emanuel Celler's antitrust investigation of major league baseball that Stevens combined his abiding love of that sport—an ardent Cubs fan[38]—with his interests in antitrust law and the Commerce Clause.[39] After his brief stint in government service, Stevens again returned to Chicago to what seemed likely to be a career in antitrust law.[40]

Stevens's star rose in Illinois political circles in the late 1960s due to his work on the Greenberg Commission, which investigated alleged improprieties by two Illinois Supreme Court justices, and his work for the Chicago Bar Association in its investigation of Judge Julius J. Hoffman following the Chicago Seven trial. It is here that we find one key to Stevens's later prolific opinion writing. Serving as general counsel to the Greenberg Commission that investigated alleged bribery at the Illinois Supreme Court—which led to the resignation of two justices—Stevens learned that a third, innocent justice had originally written a dissent from the bribe-induced decision.[41] But this justice had decided not to publish it in the interest of maintaining collegiality.[42] This discovery made an indelible impact on Stevens, who thought the dissent should have been published to inform the public.[43] Decades later, he recalled the incident and explained

34 335 U.S. 188 (1948).

35 *See* BARNHART & SCHLICKMAN, *supra* note 1, at 79-80.

36 *See id.* at 81-83.

37 *See id.* at 89.

38 *See* Rosen, *supra* note 24, at F54. When he was twelve years old, Stevens attended Game three of the 1932 World Series at Wrigley Field and he has the baseball hit by Babe Ruth in his famous "called shot" homerun.

39 *See* BARNHART & SCHLICKMAN, *supra* note 1, at 88-92.

40 *Id.* at 93.

41 Rosen *supra* note 24, at F55.

42 *Id.*

43 *Id.*

why he believes writing dissents is important, saying "I just feel I have an obligation to expose my views to the public."[44]

In February 1970, advisers to Senator Charles Percy, a University of Chicago classmate of Stevens, presented a list of names of those recommended to fill a Seventh Circuit judicial seat vacant since 1968. Though Stevens initially balked at going on the bench, President Nixon nominated Stevens to that court in September of 1970, and he was confirmed by the Senate by a vote of 98–0. While serving on the Seventh Circuit Court of Appeals, Stevens continued to show the civil liberties sympathies developed during his clerkship with Justice Rutledge. In summations of his work, however, commenters most often used such restrained terms as "moderate," "centrist," "balanced," "generally conservative" and "careful craftsmanship."[45]

B. *The Seventh Circuit; Prolific Writer of Opinions Generally*

Notwithstanding the lack of any obvious prior interest in or connection to securities law, one hint of his eventual role as a productive writer of securities opinions emerged while Stevens served on the Seventh Circuit Court of Appeals. During his tenure on that court—from 1970 through 1975—he participated in 542 decisions and authored a remarkable 289 opinions of various sorts.[46] Forty-seven of those cases dealt with securities law. Stevens wrote for the court in fourteen of these, dissented in five, and concurred in one.[47]

That inordinate productivity did not falter with Stevens's December 19, 1975 appointment to the Supreme Court. In just his first three terms, when he might be expected as a young justice to be cautiously feeling his way, Stevens wrote more opinions than any other justice. He authored an astonishing thirty-six opinions for the Court, thirty-five concurrences, and sixty-five dissents in that three year period. It was evident from the start that Stevens was going to state his views. This was to be expected in the antitrust area, his specialty in practice.[48] However, this productivity also carried over into the securities law area in both his Court of Appeals opinions and, as will be shown below, his Supreme Court opinions. This all came about with no obvious earlier personal or professional interest in it. Stevens's background was thus quite different than that of his colleague

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44 *Id.*

45 *See* BARNHART & SCHLICKMAN, *supra* note 1, at 167.

46 *See* BARNHART & SCHLICKMAN, *supra* note 1, at 167.

47 Derived from results of Westlaw Classic search: "United States Court of Appeals, Seventh Circuit" & DA (AFT 1969 & BEF 1976) & Stevens & securities.

48 During his service on the Supreme Court, Justice Stevens wrote 15 majority opinions, 6 concurring opinions, and 14 dissenting opinions in antitrust cases.

Justice Lewis Powell, who moved onto the bench from a very active securities and corporate law practice,[49] and of Justice William Douglas, whom Stevens succeeded.[50]

II. METHODOLOGY

The study's main objective is to analyze Justice Stevens's role in federal securities cases and to explore how his opinion output and views in this specific area compare to his colleagues, including Justice Powell. As described further below, the database used in this study was created by the authors to answer a variety of empirical questions about federal securities cases decided by the U.S. Supreme Court and was previously used in our exploration of how the addition of female justices to the U.S. Supreme Court affected securities law decisions.[51] This part outlines the variables we explored in our investigation of Justice Stevens's and his colleagues' decisions in securities cases. For the sake of clarity, we invite interested readers to review our prior work for discussion of the additional variables included in the database.[52]

A. *The Database*

The database includes eighty-six federal securities cases decided by the Supreme Court between October 1971 and June 2010. This period includes all securities cases decided by the Supreme Court during Justice Stevens's (1975-2010) and Justice Powell's (1972-1987) respective tenures.[53]

To identify cases that met our restrictions, we first searched the Westlaw Supreme Court Database for all cases decided by the Supreme Court between October 1971 and June 2010 that were coded as "Securities

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[49] The story of Justice Powell's important role in modern securities law has been compellingly told by Professor Adam Pritchard. *See* Pritchard, *supra* note 23. For a study covering cases in securities law through 1984, *see* Alfred F. Conard, *Securities Regulation in the Burger Court*, 56 U. COL. L. REV. 183 (1985).

[50] Douglas served on the Securities and Exchange Commission before being elevated to the Supreme Court by President Franklin D. Roosevelt in 1939. *See Justices, William O. Douglas*, OYEZ, http://www.oyez.org/justices/william_o_douglas (last visited Jan. 10, 2016).

[51] Lyman Johnson, Michelle Harner & Jason A. Cantone, *Gender and Securities Law in the Supreme Court*, 33 WOMEN'S RTS. L. REP. 1, 11-14 (2011). The methodology section described herein is a focused, light revision of the methodology section in the 2011 article, the first to use the database.

[52] *See generally id.* (previous work displays additional variables).

[53] The original database sought cases between October 1971 and June 2010 to span a period beginning before the appointment of the first female justice through the date when the search was run (June 2010). For the purposes of this empirical examination, no additional cases needed to be added to this period of time.

Regulation" or included the Securities Act of 1933 (Securities Act), the Securities Exchange Act of 1934 (Exchange Act), or the Investment Company Act of 1940 in the case headnotes. We then searched the U.S. Supreme Court Database for all cases decided by the Court between October 1971 and June 2010 that were coded as "Securities Regulation." In this second search, we also reviewed other cases coded as "Economic Activity" cases to confirm the identification of all securities cases. We removed three cases because they did not involve securities law issues. Later, we received the benefit of gaining access to Professor Adam Pritchard's database of all Supreme Court securities decisions, against which we verified the accuracy of our database.

B. *Study Design*

As described in our earlier work, we devoted several months to creating, testing, and refining the coding scheme and codebook for the cases.[54] The original database included twenty primary variables for analysis, with multiple sub-variables to explore the role of justice gender in securities cases before the Supreme Court. The variables described the parties, history of the case, legal issues presented, the holding (what, for whom, and whether sanctions were involved), and the votes of the justices including whether any dissents or concurring opinions were written and, if so, by whom and joined by whom. For this study of Stevens, we created a new database, removing variables focused on gender and aspects not explored in the prior study, and used the original data to create new variables related to the justices in this study (e.g., whether Justice Stevens authored an opinion in the case).

Before starting the initial study, we performed rigorous inter-rater reliability checks between the five coders and did not stop multiple iterations of this process until we achieved at least 90% agreement on the coding of each variable (with almost all variables reaching an agreement of 100%). During the coding period, each coder worked independently on a subset of the cases. After brief cleaning of the data, we finalized the database.

In the time between the initial study and the current one, a new, independent coder examined each of the cases, searching for any errors. The authors resolved all identified discrepancies with the original database and the new coder's work. This inspection to the coding resulted in the removal of two cases that did not meet the subject matter requirements for this study. Thus, this study of Stevens's opinions examines eighty-six cases. There were also minor corrections and the addition of a new category for opinions that were partial concurrences and partial dissents.

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[54] *See* Johnson et al., *supra* note 51, at appendix A (for a description of each variable and sub-variable and available from authors upon request).

The following section includes our analyses of majority opinions, dissenting opinions, and concurring opinions authored or joined by Justice Stevens. We also compare his opinion production to certain of his fellow justices, and we examine whether there were any notable differences in the parties, legal issues presented, or outcomes in cases where Justice Stevens authored or joined the majority opinion, dissent, or a concurrence. The analyses provided below offer only a partial look at the possible uses of the rich database.[55] We anticipate future articles further exploring the data to better understand the ongoing evolution of federal securities law jurisprudence, the role of particular justices, and individual case factors such as the parties involved and the legal issues presented.

III. A NUMERICAL ANALYSIS OF JUSTICE STEVENS'S SECURITIES OPINIONS

A. *The Numbers*

During his tenure from 1975 to 2010, Justice Stevens wrote more securities law opinions—twenty-nine—than any other Justice in our 1971-2010 data set. In fact, he wrote more securities opinions than any justice in the entire history of the Supreme Court.[56] Given that Stevens participated in sixty-five securities cases, his twenty-nine opinions means he wrote in almost 45% of those cases. His extensive involvement in this type of case was approximately that of other long-serving justices such as Blackmun, White, Rehnquist, Marshall, and Brennan, who participated in, respectively, sixty-nine, sixty-six, sixty-six, sixty-six, and sixty-two securities law cases. Yet Stevens authored far more opinions than any of these justices. His output of twenty-nine opinions was significantly more than the twenty penned by Blackmun, and far surpassed the seventeen opinions of Justice Powell, the fourteen written by Brennan, the twelve by Marshall, the eleven authored by White, and the mere six of long-serving Justice, later Chief Justice, Rehnquist. Rehnquist, even as Chief Justice, took little interest in writing securities opinions even though, very early in his tenure, he authored the landmark decision in *Blue Chip Stamps v. Manor Drug Stores.*[57]

The breakdown of Stevens's opinions shows that he wrote seven majority opinions, eight concurrences, and fourteen dissenting opinions (including eleven dissents in whole and three opinions in which he dissented in part). With respect to majority opinions, he trailed only the reform-

[55] For a general overview of cases, see our earlier work. Johnson, et al., *supra* note 51.

[56] This number includes majority opinions, dissents, concurring opinions, and opinions concurring in part and dissenting in part.

[57] 421 U.S. 723, 725-55 (1975). As noted in Part IV, *infra*, although Stevens did not participate in the *Blue Chip Stamps* case, he thought it was wrongly decided.

minded Powell,[58] who authored thirteen, and Marshall who wrote eight. Stevens wrote more majority opinions than Blackmun, who wrote six, and more than the five written by Justices White and Brennan and the four written by Rehnquist. Stevens's eight concurring opinions led all other justices, with even Powell trailing behind. Blackmun wrote seven concurrences, Brennan and Powell each wrote three, White wrote only one, and neither Marshall nor Rehnquist wrote any. Taking his majority and concurring opinions together, Stevens wrote an opinion on the prevailing side fifteen times, more often than any justice except Powell's sixteen such opinions.

It is with respect to dissenting opinions, however, that Stevens stands so stunningly apart. To begin with, Stevens dissented, in whole or in part, in seventeen of the sixty-five securities law cases he participated in. Only Brennan dissented in more, at twenty-one.[59] Marshall dissented in fourteen decisions, and Blackmun in twelve. Justice Douglas, whom Stevens succeeded on the bench in 1975, served only during the first four of the years in our forty-year data set, but he dissented in a remarkable eleven cases in that brief period, even though, prior to 1971 and quite surprisingly, he dissented only once in a securities case in over thirty-five years of service to that date. And, strikingly, six of the seven dissenting opinions authored by Douglas were also in that brief four-year period. The relatively small securities opinion production by Justice Douglas seems astonishing given that he was an expert in securities law and the longest serving justice of all time.[60] Still, it should be recalled that, prior to the decade of the 1970s, the Supreme Court decided relatively few securities cases,[61] a pattern it reverted to in the 1990s.[62] With specific respect to dissenting opinions, Stevens clearly continued that maverick, if late-appearing, attribute of his predecessor, Justice Douglas.

But Stevens did not simply dissent, though he has been termed the "Court's leading dissenter."[63] He wrote—and far more than other justices, even as the number of dissenting opinions issued by the Supreme Court

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58 *See* Pritchard, *supra* note 23.

59 Justice Brennan was appointed to the Supreme Court on October 15, 1956 and he served until July 20, 1990.

60 *See supra* note 50 ("William O. Douglas holds the record for the longest continuous service on the nation's most powerful Court: 36 years and 7 months."). Professors Adam Pritchard and Robert Thompson have noted that, notwithstanding Justice Douglas' many recusals due to his SEC service, he "was not an active participant in securities cases,... [and] most of his opinions show up in the last four years of his tenure,..." Adam Pritchard & Robert Thompson, *Securities Law and the New Deal Justices*, 95 VA. L. REV. 841, 917-919 (2009). They conclude that Justice Douglas "had little impact on the Court's securities jurisprudence for his entire career." Id. at 919.

61 *See* Pritchard, *supra* note 23, at 864. We thank Professor Adam Pritchard for making this point, a point confirmed by his data on all Supreme Court securities decisions.

62 *Id.*

63 Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 157, 157 (Earl M. Maltz ed. 2003).

dramatically rose during the last half of the twentieth century.[64] As noted earlier,[65] Stevens wrote because he believed he had a duty to tell the public what he believed in deciding a case. In fact, he wrote an opinion in fourteen of the seventeen cases in which he dissented, a remarkable 82%. By way of contrast, Brennan, although dissenting in twenty-one cases, wrote only six dissenting opinions (27%), while Blackmun, who dissented in twelve cases, wrote seven dissenting opinions (58%), and White wrote five dissents and Marshall wrote four. Powell wrote only one dissenting opinion. Here too, Stevens continued Douglas's later tradition of not simply dissenting but stating why he did so.[66] During this transformative era in Supreme Court securities jurisprudence, Stevens, perhaps recalling Justice Rutledge's dissents from his clerkship days, almost invariably stated why he disagreed with the Court's direction.[67]

Of Stevens's fourteen dissenting opinions, eleven were dissents in whole, while three were dissents in part. Whenever he dissented in part, another Justice joined him. The sole justice joining him differed in each of the partial dissents; there was no uniform coalition. In ten of his eleven dissents in whole, he authored the only dissent and was joined by at least one justice in five of those opinions. Thus, in eight of the fourteen dissenting opinions, he wrote for others as well, while in six he spoke only for himself.

We note one other aspect of Stevens's remarkable securities law output, to provide greater perspective. The latter two decades of his Supreme Court tenure (1990-2010) corresponded with a dramatic decline in the number of securities cases decided by the Supreme Court. From 1971 to 1979, the Court decided thirty-six such cases, and from 1980 to 1989, it decided twenty-four cases. However, from 1990 to 1999, that number plummeted to twelve, and from 2000 to 2010, it was a mere fourteen. Moreover, startlingly, no securities decisions at all were handed down in the three-year stretch of 1998, 1999, and 2000, or in 2003. Professor Adam Pritchard has rightly observed that the caseload in the 1970s and 1980s was an upsurge from past practice and was largely attributable to the presence and influence of Justice Powell,[68] a former securities lawyer. After 1987, when Powell retired, there were far fewer securities cases for any justice to write in. Consequently, Stevens's production of twenty-nine opinions is, in that light, all the more remarkable. Notably, he wrote fourteen opinions—

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64 LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 250-55 (Lee Epstein et. al. trans. CQ Press 5th ed. 2012).

65 Rosen, *supra* note 24, at F55.

66 *See supra* notes 59-61 and accompanying text.

67 *See supra* notes 32-34 and accompanying text. We elaborate on Stevens' views in *infra* Part IV.

68 Pritchard, *supra* note 23, at 920.

more than half of the twenty-six cases decided during the two decades ending in 2010. And showing an unflagging interest and energy, just as he wrote a securities opinion in his very first year on the Supreme Court (1976), he wrote two in his final year (2010).[69]

B. *The Outcomes*

We here highlight—from a quantitative vantage point[70]—certain striking features of the securities opinions in which Justice Stevens wrote or participated. Specifically, we identify noteworthy aspects of his involvement based on the areas of legal issue, parties involved, the holding, and alignment of the justices. To provide helpful context, we report our findings on these areas for both the sixty-five securities cases in which Justice Stevens participated and the eighty-six securities cases during the forty-year period of 1971-2010, recalling that Stevens served from 1975-2010.

1. Legal Issue

Overall, the Securities Exchange Act of 1934 (Exchange Act) was at issue in 73% of all eighty-six securities cases decided over the 1971-2010 period. For our analysis, we differentiated cases where the Exchange Act was the only issue presented from cases where the Exchange Act was one of at least two issues presented. More than 53% of the securities cases in that period involved only the Exchange Act. In contrast, only 6% of the cases involved only the Securities Act of 1933 (Securities Act). An additional 13% of cases involved both the Exchange Act and the Securities Act. Combined, cases involving only the Exchange Act and cases involving both the Exchange Act and Securities Act comprised about two-thirds of the securities cases decided from 1971 to 2010.

Of the sixty-five securities cases in which Stevens took part, the Exchange Act was at issue in 71% of the cases. While this number is a bit lower than in the overall 1971-2010 period, the Exchange Act was at issue in 86% of the fourteen dissents that Stevens authored, including in all three of the cases where he authored an opinion concurring in part and dissenting in part. When that statute was involved during his tenure and he disagreed with the Court, Stevens almost always wrote.

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69 Merck & Co. v. Reynolds, 559 U.S. 633, 655 (2010) (Stevens, J., concurring); Morrison v. National Australia Bank Ltd., 561 U.S. 247, 274 (2010) (Stevens, J., concurring); Radzanower v. Touche Ross & Co., 426 U.S. 148, 158 (1976) (Stevens, J., dissenting). In *Morrison*, although Stevens concurred in the result, he stated that he "dissents" yet again from the Court's "continuing campaign to render the private cause of action under § 10(b) toothless." 561 U.S. at 286.

70 Part IV *infra* provides a more qualitative assessment of Justice Stevens' views in the securities opinions he authored.

2. Parties

The government was the lead Petitioner in 14% of all cases over the forty-year period and in 11% of cases when Stevens took part in the decision. This increased slightly to almost 16% of the cases when Stevens was in the majority, but not the majority opinion author. However, when Stevens wrote the majority opinion, the government was the lead Petitioner in 29% of the cases, about two and half times the frequency of the government's position in that role in cases in which Stevens took part in the decision. Interestingly, in every case when the government was the lead Petitioner during the forty-year period, Stevens either wrote the majority opinion, was in the majority but not the author, or took no part in the decision. Stevens never wrote or took part in a dissent or concurrence in a securities case when the government was the lead Petitioner. Although an institutional investor was the lead Petitioner in only 3% of the total cases from 1971-2010 (5% of the Stevens sample), it is of note that Stevens wrote a dissent or partial dissent in each of these three cases.

Similarly, when Stevens authored the majority opinion, the government was the lead Respondent in 29% of those cases, more than double the rate in which the government was the lead Respondent in the Stevens cases (14%) or in the total forty-year case sample (13%). By contrast, in none of his fourteen dissenting opinions was the government the lead Respondent (or Petitioner). In short, when Stevens wrote for the Court, the government was far more likely to be a party than when he did not write, whereas when he wrote a dissenting opinion the government was never the lead Petitioner or Respondent.

3. Holdings

100% of the Stevens-authored majority opinions held for the Petitioner even though, across the total case sample and the Stevens sample, the Court held for the Petitioner in 60% of the cases. This compares to the finding that the Court held for the Petitioner in 53% of the cases when Stevens was in the majority (but did not author the majority opinion). Of the seven cases where Stevens wrote the majority opinion, the Court reversed in four cases, reversed and remanded in two cases, and vacated and remanded in one case. The Court affirmed the lower court's opinion (in full or in part) in none of the cases with a Stevens-authored majority opinion. This is despite the finding that affirming the lower court was the most common outcome (in 32% of the total cases and in 29% of the Stevens cases), with the Court affirming in part in an additional 5% of each case sample.

When Stevens wrote a dissent, however, the Court held for the Petitioner in only half of the cases—much closer to the rate of 53% in the cases where Stevens took part in the decision. When Stevens wrote a full dissent-

ing opinion, the Court found for the Petitioner 45% of the time (and for the Respondent 55% of the time); when Stevens wrote a dissent in part, the Court found for the Petitioner 67% of the time (and for the Respondent 33% of the time). Both numbers are notably lower than the 100% rate of holding for the Petitioner in cases where Stevens wrote the majority opinion. In short, Stevens only wrote the majority opinion when the Court found for the Petitioner, but he wrote a dissent more in line with the overall holding average across the forty-year time span and across the cases where Stevens took part in the decision.

As to imposing sanctions, overall the Court declined to impose sanctions in 44% of all cases over the forty-year period (37% of the Stevens cases), and left open the possibility of sanctions in only 34% of all cases over that period (42% of the Stevens cases).[71] When Stevens was in the majority, however, the Court declined to impose sanctions in only 28% of the cases and the possibility of sanctions rises to 49% of the cases. Even more striking, when Stevens authors the majority opinion, the Court's declining to impose sanctions remains stable at 29%, but the possibility of sanctions rises to 57%. Looking to the cases in which Stevens took part in the decision, Stevens either was in the majority or wrote a concurrence for all six opinions where the Court imposed sanctions (monetary or nonmonetary).

When Stevens wrote the dissent, the Court declined to impose sanctions in 64% of those cases, leaving open the possibility of sanctions in 27% of the cases (and not discussing sanctions in 9% of the cases). However, while it might appear that Stevens generally dissented when the Court declined to impose sanctions, it is important to examine the cases as a whole. Across the Stevens cases, Stevens authored the majority opinion in 8%, the dissent in 33%, and a concurrence in 17% of the cases when the Court declined to impose sanctions. However, Stevens joined or wrote a majority opinion or concurrence in 67% of the cases where the Court declined to impose sanctions. Thus, it is not that Stevens dissented whenever the Court declined to impose sanctions, although he did do so in 33% of those decisions. When he did dissent, however, he wrote the dissenting opinion every time. Thus, Stevens appears to have preferred a sanctions outcome for securities law wrongdoing when he was in the majority, and when the Court declined to impose sanctions and he dissented, he was the one to write the dissenting opinion.

When we examine both sanctions decisions and whether the parties were corporations or individuals, Stevens's dissents paint an interesting picture. Overall, the Court was more likely to decline to impose sanctions on a Respondent corporation (60%) than it was in general (44%) or when the Respondent was an individual (35%). Stevens dissented in five of the

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[71] In addition, the Court imposed monetary sanctions in only 5% of the cases; imposed other nonmonetary sanctions in 4% of the cases and did not discuss sanctions in 14% of the cases.

eighteen cases when the Court declined to impose sanctions against a corporate Respondent. He wrote the dissent in all five of these cases.

In contrast, in the thirteen cases where the Court declined to impose sanctions on an individual Respondent, Stevens dissented only once—and he wrote the dissent in that case. Also, he dissented in four cases where the Court left open the possibility of sanctions against an individual Respondent, writing the dissent in three of these cases. This suggests that Stevens may have been more favorable toward sanctioning corporate Respondents than individual Respondents, compared to his colleagues on the Court.

4. The Alignment of Justices

Table 1 below isolates the number of Justices (ranging from four to nine) in the majority for all securities opinions in the entire forty-year period and displays where Stevens votes and where he writes, in that context.

Not all categories are separated (e.g., the one case when Justice Stevens is in the concurrence, but did not author the concurrence is included in the "Stevens in majority" column) and others are double counted (e.g., "Stevens majority author" is a sub-set of "Stevens in majority"). Thus, the columns do not add up to the overall number of cases examined.

Number of Justices in the Majority	Number of cases (% of cases in the named sample)							
	Overall sample	Stevens sample	Stevens in majority [72]	Stevens in dissent [73]	Full author Sample	Stevens majority author	Stevens concur author	Stevens dissent Author[73]
4	1 (1%)	–	–	–	–	–	–	–
5	14 (16%)	10 (15%)	3 (8%)	6 (35%)	6 (21%)	1(14%)	1 (13%)	4 (29%)
6	23 (27%)	14 (22%)	9 (23%)	3 (18%)	7 (24%)	3 (43%)	2 (25%)	2 (14%)
7	10 (12%)	9 (14%)	6 (15%)	2 (12%)	3 (10%)	–	1 (13%)	2 (14%)
8	22 (26%)	17 (26%)	9 (23%)	5 (29%)	9 (31%)	1 (14%)	2 (25%)	5 (36%)
9	16 (19%)	15 (23%)	13 (33%)	1 (7%)[73]	4 (14%)	2 (29%)	2 (25%)	1 (7%)[73]
Total	86	65	40	17	29	7	8	14

Table 1. Number of Justices in the Majority in the Sample Cases (by Case Set)[72, 73]

The alignment of judges in the Stevens sample does not significantly differ from the alignment across the forty-year period. However, the Court

72 The majority category includes the one case where Justice Stevens joined the concurrence, but not the eight cases where Justice Stevens authored the concurrence or the three cases where Justice Stevens concurs in part and dissents in part.

73 The dissent categories include cases where Justice Stevens dissents in part.

was almost five times more likely to be unanimous (and more than four times less likely to be split 5-4) if Stevens was in the majority, indicating that he was a key to achieving that outcome. As shown in Table 1, the Court was unanimous in 33% of the opinions with Stevens in the majority, but unanimous in only 7% of the cases with Stevens in (partial) dissent. When Stevens authored the majority opinion, unanimity existed in only two of the seven opinions, suggesting he was frequently at odds with one or more justices even when he wrote for the majority. His dissenting opinions reveal a mix of speaking for others more than may commonly be appreciated while also, true to reputation, revealing a go-it-alone streak. This is seen in all three partial dissents he authored, where another Justice joined him. In the eleven dissents in whole he authored, he alone wrote a dissenting opinion in ten of those cases, but other justices joined him in five of those opinions. Thus, in eight of his fourteen dissenting opinions, he wrote for others as well, while in six opinions he spoke only for himself. More so than any other Justice during this period, he was willing to write a dissent, even if no other Justice would join him.

IV. DID JUSTICE STEVENS HAVE A DISCERNIBLE PHILOSOPHY IN SECURITIES CASES?

The above quantitative analysis of Stevens's securities law opinions provides an instructive "big picture" perspective on his work in this area. But, only by examining Stevens's opinions themselves can we more clearly understand *why* he reached the outcomes he did and how he saw the Court's lawmaking role in the securities law area, particularly given the dramatic changes that took place during his tenure on the Court. We also believe that examining a justice's actual opinions in an area can provide more nuance and help paint a fuller picture of judicial philosophy than relying solely on various numerical "scores" of justices. For example, a recent study observes that certain conservative justices, such as Justices Powell, Rehnquist, Roberts, and Alito, are "pro-business" as measured against their overall Segal-Cover score, whereas Stevens is slightly liberal by that measure.[74] But, using that same measure, well-known liberal Justices Marshall and Brennan also are fairly pro-business,[75] even though they frequently dissented from the Court's securities decisions. And measured by a justice's votes in business law cases as against his average Martin-Quinn score, all of the just-named justices—Powell, Rehnquist, Roberts, Alito, Stevens, Marshall, and Brennan—are, to varying degrees, pro-business.[76]

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[74] *See* Johannes W. Fedderke & Marco Ventoruzzo, *Do Conservative Justices Favor Wall Street? Ideology And The Supreme Court's Securities Regulation Decisions*, 67 FLA. L. REV. 1211 (2015).

[75] *Id.* at Figure 10.

[76] *Id.* at Figure 11.

Yet, of course, the last three justices frequently disagreed with the Court's securities decisions. Thus, we believe various aggregate measures, while helpful, must be used very cautiously and should be augmented by close examination of individual justice's voting behavior and written opinions.

In this Part, we identify not only Stevens's positions in various cases, but also seek to discern the key elements and recurring themes of Stevens's securities law jurisprudence. As we elaborate on below, Stevens's opinions defy categorization on some simplistic "results-oriented" or supposed ideological basis. Our analysis reveals, not unexpectedly, a justice who took seriously his responsibility to reach his own decisions—while stating why—and who did so by unyielding fidelity to what he considered to be the governing legal principles.

Our analysis also reveals Justice Stevens was mindful of—and openly lamented on occasion—the fact that his understanding of those principles frequently differed from that of a majority of his colleagues. He believed, however, that it was the Court, not him, that had, over the span of several decades (1971-2010), significantly changed legal course in this area. In an important sense, Stevens wrote "against" that movement—a movement in large part led by Justice Powell until 1987, but continuing long after as well—and also to preserve an alternative and, to Stevens, a superior approach to deciding securities law cases. Again, the important memory of Justice Rutledge's enduring dissents may have loomed large in his mind. A recent and ironic example in this regard is that the Court, in a June 2014 opinion authored by Chief Justice Roberts that refused to overturn an earlier precedent,[77] invoked—without citing Stevens—one of Stevens's mainstay rationales for disagreeing with his colleagues in the majority: disturbing earlier Court precedent is generally best left to Congress.

A. *Early Writing in Securities*

Professor Dennis Hutchinson once observed that, early on, Stevens had "no vision and [was] not interested in playing the game."[78] In the securities law area, this comment does not ring true. Stevens wrote a securities law opinion within the first few months on the Court, even though he had joined mid-term.[79] He dissented—alone. In his first securities law opinion, Stevens, as would prove to be characteristic, devoted several pages to history, language, and statutory purpose as he carefully sought to reconcile the narrow venue provision of the National Bank Act with the venue provision of the Exchange Act, preferring the latter. By this opinion, Stevens sig-

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[77] Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2411-13 (2014).

[78] Charles Lane, *With Longevity on Court, Stevens' Center-Left Influence Has Grown*, WASH. POST, Feb. 21, 2006, at A1.

[79] Radzanower v. Touche Ross & Co., 426 U.S. 148, 158 (1976) (Stevens, J., dissenting).

naled what Justice Potter Stewart later would say about him: "[H]e's really John Paul Jones—'I have not yet begun to write.'"[80]

During the Court's next term, Stevens again dissented and wrote an opinion—this time joined by Justice Brennan—in a major Exchange Act case.[81] Drawing on the recently decided case of *Cort v. Ash*,[82] a decision curtailing implied private causes of action, the Court held that an unsuccessful tender offer bidder had no claim against target company management or the successful bidder under § 14(e) of the Exchange Act,[83] or Rule 10b-6.[84] Stevens observed, however, that the unsuccessful bidder was also a shareholder in the target company and, in that capacity, should have a claim against the fraudster bidder.[85]

This opinion also sent a signal, namely, that Stevens fully intended to be an engaged jurist in the arcane world of securities law, notwithstanding no professional background in the area. He also began staking out his view on the remedial aspect of these laws. In his *Piper* dissent, Stevens took an expansive view of remedies under the Exchange Act, a recurring hallmark of his writing. Moreover, he made it clear to the very end of his long tenure on the Court that he regarded *Cort v. Ash*, relied on in *Piper*, as a mistaken decision carrying ongoing adverse consequences for the proper remedying of securities offenses.[86] Thirty-three years after *Cort*, Stevens wrote lamentingly that it was a "law-changing opinion . . ."[87]

During that same 1976 term, Stevens concurred in the important case of *Santa Fe Industries, Inc. v. Green*,[88] just one month after the *Piper* decision. The majority held that a shareholder who objected to being "squeezed out" of his minority position pursuant to a short-form merger under Delaware's corporate statute[89] could not thereby bring an action under § 10(b) of the Exchange Act or Rule 10b-5.[90]

Unlike Justice Brennan, who dissented in *Santa Fe* and who had joined Stevens's prior dissent in *Piper*, Stevens concurred in an opinion joined by Justice Blackmun.[91] Stevens agreed with the majority in *Santa Fe* that no deceptive or manipulative conduct—essential to a Rule 10b-5 claim—had been alleged and therefore he concurred in the Court's judg-

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80 Lane, *supra* note 78, at A1.

81 Piper v. Chris-Craft Ind., Inc., 430 U.S. 1, 53 (1977) (Stevens, J., dissenting).

82 422 U.S. 66 (1975).

83 15 U.S.C. § 78n(e) (2015).

84 17 C.F.R. § 240.10b-6 (1964, Supp. 1966).

85 *See id.* at 59.

86 Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 178 (Stevens, J., dissenting).

87 *Id.*

88 430 U.S. 462 (1977).

89 DEL. CODE ANN. § 253 (2012).

90 430 U.S. at 474.

91 *Id.* at 480.

ment.[92] But he emphasized that he did not join in Part IV of the majority opinion, with its very broad discussion of policy and the supposed risk of "federalizing" state corporate law, a central and enduring portion of that opinion. Stevens objected to that Part, he noted,[93] because he thought there was a "danger" that it would be read as extending both *Piper* and *Blue Chip Stamps v. Manor Drug Stores*,[94] two decisions that Stevens adamantly believed "were incorrectly decided."[95]

As in *Piper*, and striking a theme that would recur in his securities opinions, Stevens's concurrence in *Santa Fe* displayed his twin aims of adhering to the plain language of the Exchange Act while cautioning that the Act should not, as a remedial matter, be read restrictively. In just his second term on the Court, Stevens seemed to have a strong, prescient inkling of where, during this important transitional era, the Court was headed in curbing securities law remedies, a direction he would, over the years, continually resist. His opinion in *Santa Fe* made it clear as well, and early on, that it should not be assumed he would align with liberal-leaning Justice Brennan on securities law cases. Those two justices frequently parted on securities cases, even during Justice Powell's transformative heyday on the Court.[96] It was, after all, Justice Brennan who wrote the opinion in *Cort v. Ash*,[97] much disliked by Stevens as being a wrong turn that has hobbled investor protection ever since.

B. *Not Simplistically Pro-Investor*

To say that Justice Stevens thought, for a variety of reasons, that the remedial provisions of the federal securities laws should be read broadly is not to say he reflexively favored plaintiff-investors. In the first securities opinion Stevens wrote for the Court,[98] the Court unanimously held that a district court's determination that an action may not be maintained as a class action pursuant to Rule 23 is not a "final decision" that is immediately

92 *Id.* at 480-81.

93 *Id.* at 481.

94 421 U.S. 723 (1975).

95 430 U.S. at 480-81.

96 As to Justice Powell's important role in altering securities law, *see* Pritchard, *supra* note 23. Although some studies suggest, as in Powell's case with securities law, that conservative judges since the 1960s have been inclined toward overruling what they regard as "liberal" precedents, it was recognized liberal Justice Brennan who wrote the majority opinion in *Cort*, not Powell. *See, e.g.*, Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONSTITUTIONAL COMMENTARY 43 (2007); Jeffrey A. Segal & Robert M. Howard, *How Supreme Court Justices Respond to Litigant Requests to Overturn Precedents*, 85 JUDICATURE 148, 156-57 (2001).

97 422 U.S. 66 (1975).

98 Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

appealable.[99] The result was a major hurdle to the maintenance of class actions where certification is denied, and it subsequently served to underscore the importance of the certification stage in securities litigation.[100]

And Justice Stevens took what can be characterized as not only an "anti" investor position but also a cramped, and downright puzzling, reading of the Exchange Act in two important companion cases in 1985.[101] The Court, with only Stevens in dissent, held in *Landreth* that the sale of all of the stock in a closely held corporation involved the sale of a "security" even if the buyers themselves intended to operate the business.[102] This holding squelched the budding "sale of business" doctrine, whereunder a sale of corporate stock would not be considered a "security" sale if the purchaser actively ran the business. Under that doctrine, such a transaction was, in substance, merely the sale of a "business" that, only in form, was dressed in the guise of a securities transaction. The companion *Gould* decision, again with only Stevens in dissent, held that the sale of 50% of the stock in a closely held corporation likewise involved the sale of a security.[103] Both opinions were authored by Justice Powell who, although candidly acknowledging some wavering in how the Court had earlier reasoned in cases defining "securities,"[104] saw common stock as the quintessential security.[105]

Justice Stevens dissented in both cases. He did not dispute Powell's view of common stock as being a "security." Instead, he dissented on the quite basic ground that the federal securities laws simply are inapplicable unless a security is traded in a public market, or unless an investor is not in a position to negotiate contractual protection, such as robust warranties and representations, or is unable to insist on access to inside information.[106] Acknowledging the imprecise contours of the federal securities laws, but once again looking to legislative history and policy for guidance, Stevens concluded that Congress simply did not intend to regulate nonpublic securities via the federal securities laws.[107] That position was apparently uniquely held by Stevens, it never gained traction, and of course it would altogether

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99 *Id.*

100 Class certification in securities litigation remains important and contentious after the Supreme Court recently refused to overrule *Basic v. Levinson*, 485 U.S. 224 (1988). Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014). *See* Todd Henderson & Adam Pritchard, *Halliburton Will Raise Cost Of Securities Class Actions*, LAW360, (July 2, 2014), http://www.law360.com/articles/552839/halliburton-will-raise-cost-of-securities-class-actions.

101 Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985); Gould v. Ruefenacht, 471 U.S. 701 (1985).

102 471 U.S. 681 (1985).

103 471 U.S. 701 (1985).

104 471 U.S. at 688.

105 *Id.* at 694.

106 Justice Stevens' dissent, applicable to both *Landreth* and *Gould*, is found at 471 U.S. 681 (1985).

107 *Id.*

eliminate Rule 10b-5 litigation involving closely held companies, thereby stripping investors of a potent legal theory.[108] Stevens' dissents in these two cases clearly establish that he did not regard preservation of federal remedies for defrauded investors to be in and of itself a sufficient touchstone by which he would interpret the securities laws. Stevens certainly believed in a broad reading of the remedial provisions of those laws, but only where Congress so intended.

In addition, in 2006 Justice Stevens himself authored the "anti-investor" decision in *Merrill Lynch v. Dabit.*[109] The Court there ruled that a state law securities claim brought in federal court on diversity grounds was preempted by the Securities Litigation Uniform Standards Act (SLUSA), even though it was brought by an investor who "held" stock, rather than one who bought or sold stock. Stevens, although ruling against the investor, nonetheless took the opportunity to write that the *Blue Chip Stamps* decision he disliked—limiting Rule 10b-5 claims to "purchasers" and "sellers"—was, properly understood, just a standing case, not one going to the scope of the underlying action.[110] He cited for a properly broad reading of the Rule's "in connection with" language the 2002 opinion for the Court he wrote in *SEC v. Zandford.*[111] Thus, although believing himself bound by Congressional intent as expressed in SLUSA, and therefore holding against the investor in *Dabit*, Stevens, in doing so, sought to preserve as best he could the underlying breadth of Rule 10b-5 for use more generally. This was consistent with his overall approach of reading the remedial provisions of federal securities law broadly, while still being constrained by his understanding of Congress' intent.

C. *Views on Congressional and Judicial Roles in Making Securities Law*

The most striking thread running through Justice Stevens's securities law opinions is his steadfast position on the proper relationship between Congress and the Court in lawmaking. It is his view on this subject, which he believed had been steadily and dramatically altered by the Court over the course of his tenure, that undergirded much of his most spirited writing in this area.

An early procedural ruling in the first of three hostile takeover cases decided by the Court provides an example, as well as revealing Stevens's

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[108] In Gustafson v. Alloyd, 513 U.S. 561 (1995), the Court ruled that § 12(a)(2) of the Securities Act did not cover private resale transactions but the Court has never ruled that Rule 10b-5 does not cover such transactions. Not surprisingly, given his views in *Landreth* and *Gould*, Stevens agreed with the holding in *Gustafson*.

[109] 547 U.S. 71 (2006).

[110] *Id.* at 77.

[111] 535 U.S. 813 (2002).

shrewd use of judicial precedent with which he had initially disagreed.[112] Citing *Radzanower*[113] as authority—a decision he alone had dissented from[114]—Stevens, writing for the Court, held that § 27 of the Exchange Act did not support venue in Texas for an action brought by a tender offer bidder against Idaho officials for enforcing Idaho's anti-takeover statute.[115] Remedially, this outcome was "anti-bidder," unlike Stevens's earlier dissent in *Piper*, which would have authorized private bidder claims, and unlike his subsequent two pro-bidder votes against state anti-takeover statutes on Commerce Clause grounds.[116] But the opinion demonstrated that Stevens sought to give primacy in his rulings to legislative intent, with earlier precedent—even that with which he disagreed—being a constraining and sometimes strategic aid to achieving that end.

Stevens turned, as he often did in his opinion writing, to legislative history—as well as the statutory text itself—in later concurring that the demand requirement of Civil Procedure Rule 23.1 did not apply to an action by an investment company shareholder under § 36(b) of the Investment Company Act alleging excessive investment advisor fees.[117] Beyond noting that Rule 23.1 did not create a derivative right—addressing as it did, only the pleading of such a claim—Stevens extensively surveyed the legislative history of § 36(b) and found no support for imposing a demand requirement.[118]

This turn to history in quest of Congress' intent—and not confining himself to a statute's or rule's text—became a Stevens trademark in numerous opinions he wrote in the securities law area.[119] In the term immediately after the *Fox* case, for example, Stevens sought, to no avail, to argue that legislative history showed no congressional intent to regulate nonpublic

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112 LeRoy v. Great Western United Corp., 443 U.S. 173 (1979).

113 *See supra* note 79 and accompanying text.

114 *Id.*

115 443 U.S. at 180-81.

116 CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) (Stevens, J., dissenting); Edgar v. MITE Corp., 457 U.S. 624 (1982) (Stevens, J., concurring in part). It is worth noting that Stevens and Powell agreed in *Edgar v. MITE* that the Illinois Act challenged there was not preempted by the Williams Act, and Powell expressly agreed even with the key part of Stevens' phrasing on this point. 457 U.S. at 647, 655. They parted company in *CTS*, however.

117 Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (1984).

118 *Id.* at 545 (Stevens, J., concurring).

119 Although a recent study suggests that liberal justices use the interpretive technique of examining legislative history more often than conservative justices, we make two observations with specific regard to Justice Stevens in this respect. First, he paid close attention to the text of a rule or statute as well, but where that was not conclusive, he turned to legislative history, or he did so to support the textual reading. Second, as pointed out in *supra* notes 99-106 and accompanying text, Stevens looked to history even where doing so led him to an "anti-investor" conclusion, not to reach some ex ante preferred policy outcome. *See* David Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1739 (2010).

securities.[120] Adopting Stevens's view in this regard would substantially reduce remedies for defrauded investors in nonpublic securities, but, on principle, Stevens faithfully followed where he thought the legislative trail led. That same term, he more successfully drew on his customary detailed look at legislative history in writing for a unanimous Court.[121] The Court ruled that a convicted fraudster could publish a newsletter of general circulation that offered no personal investment advice, because of an exclusion under the Investment Adviser's Act that Stevens painstakingly reviewed.[122]

In several high-profile cases, Stevens's use of legal history took a different and significant turn. He argued, in essence, that longstanding, "settled" judicial interpretations of the federal securities laws should be altered, if at all, only by the Legislative branch, not the Judicial.[123] Thus, when in *Shearson/American Express v. McMahon* the Court held that § 10(b) claims are arbitrable, Stevens, along with Justices Blackmun, Brennan, and Marshall, dissented, but he wrote separately from the other dissenters. Stevens stated that his disagreement with the majority was on the narrow but critical basis that such a dramatic departure in how securities law disputes had long been resolved should be undertaken by Congress, not the Court.[124]

Stevens elaborated on his view of the respective roles of the Court and Congress in lawmaking when, two years later, he dissented from the Court's holding—and overturning of a 36-year precedent[125]—that Securities Act claims also can be arbitrated.[126] Stevens fully acknowledged that there were respectable policy and textual arguments favoring the Court's reconciliation of the Federal Arbitration Act and the remedial provisions of the Securities Act.[127] But in an opinion joined this time by Justices Blackmun, Brennan, and Marshall, Stevens first scolded the Court of Appeals for what he called an "indefensible brand of judicial activism" in not treating *Wilko v. Swan* as controlling precedent.[128] He then rebuked the Court's majority for not leaving intact a judicial interpretation of an act of Congress that had been settled for many years.[129] Given that for several decades Congress itself had not acted to legislatively change that interpretation, the Court,

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120 *See supra* notes 101-05 and accompanying text.

121 Lowe v. S.E.C., 472 U.S. 181 (1985).

122 *Id.*

123 *See, e.g.*, Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (Stevens, J., concurring in part and dissenting in part).

124 *Id.*

125 Wilko v. Swan, 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

126 Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (Stevens, J., dissenting).

127 *Id.* at 487.

128 *Id.* at 486.

129 *Id.* at 487.

Stevens argued, should respect that quiescence as the settled and authoritative "work product" of Congress.[130]

Interestingly, in June 2014, the Supreme Court refused to overrule a key securities law decision from 16 years earlier that one party, joined by many amici, contended had been wrongly decided.[131] In declining to do so, Chief Justice Roberts, writing for the Court, responded that doing so required "special justification"—absent at bar, he declared—because it was for Congress to decide whether the Court had gotten it wrong.[132] Although Stevens's writings were not cited, the reasoning of this 2014 decision was quite similar to that employed by Justice Stevens in his dissent 25 years earlier.

Repeatedly, Stevens anchored his securities opinions on this approach to judging as he witnessed the Court's dramatic transformation of the securities law landscape during the 1980s and 1990s. Concurring in *Reves v. Ernst & Young*,[133] that promissory notes are not per se "securities" under the Exchange Act, Stevens emphasized that the "settled construction" given to the definition of "note" by the SEC and Courts of Appeal should not be disturbed unless Congress so decides.[134] He later repeated this philosophy in dissenting from the Court's abrupt change to the longstanding Rule 10b-5 statute of limitation.[135] But here, Stevens added a new dimension that better grounded his conviction that the Court was rapidly re-writing federal securities law all by itself.

In dissenting from the Court's adoption of a uniform federal statute of limitations period for 10b-5 claims, Stevens noted that because the Court had long borrowed limitations periods from the forum state, it was for Congress, not the Court, to decide whether to alter that settled principle.[136] Moreover, seeking to resist what he saw as the continued whittling-back of Rule 10b-5 as a robust remedy, Stevens offered a new interpretation of the implied private remedy under this Rule.[137] He argued that the first district court opinion recognizing an implied private cause of action under Rule 10b-5 in 1946 was not really "new law."[138] This is because, Stevens asserted, in 1946, as in the early 1930s when the federal securities laws were enacted, it was a "well-settled rule" of federal law to imply a private claim when a violation of a statute causes damage to one for whose benefit the

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[130] *Id.* at 486.

[131] Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014).

[132] *Id.* at 2407, 2413.

[133] 494 U.S. 56 (1990).

[134] 494 U.S. at 74 (Stevens, J., concurring).

[135] Lampf v. Gilbertson, 501 U.S. 350, 366 (1991) (Stevens, J., dissenting).

[136] Again, this is exactly the reasoning of the Court in refusing in 2014 to overrule an earlier precedent. *See supra* notes 131-32 and accompanying text.

[137] 501 U.S. at 366-69 (Stevens, J., dissenting).

[138] *Id.* at 366-67 (citing *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946)).

statute was adopted.[139] In short, he contended that the Court's majority, in overturning precedent in the 1980s and 1990s, was single-handedly revamping securities law jurisprudence, quite apart from Congress, the proper body for doing so.

When the Supreme Court three years later eliminated a private claim for aiding and abetting a Rule 10b-5 violation,[140] Stevens again dissented on the basis that the Court was wrongly disturbing a settled construction of the Exchange Act that only Congress should, if at all, modify.[141] He believed that the eleven Circuit Courts that had long recognized private claims for aiding and abetting were closer to the legal climate of the 1930s when these landmark laws had been enacted.[142] As such, their interpretation should prevail, subject only to congressional action.[143] Citing his concurrence in *Reves*, and noticeably upping the fervor of his judicial distress, Stevens also cautioned the Court not to "lop off rights" that had been "recognized for decades."[144]

Stevens's position that Congress, not the Supreme Court, rightly had the chief role in designing federal securities law was evident again when he dissented the following year from a decision striking down an act of Congress on separation of powers grounds.[145] After *Lampf* had abruptly shortened the statute of limitations for Rule 10b-5 claims,[146] many such pending claims were dismissed as untimely.[147] Congress quickly enacted a new provision—§ 27A(b) of the Exchange Act—that reinstated any such claim dismissed as untimely due to *Lampf*.[148] Stevens strenuously argued that Congress was acting within its proper constitutional sphere in providing a limitations rule for those Rule 10b-5 actions pending prior to *Lampf*.[149] He wrote at length as to why Justice Scalia, writing for the majority, had badly misread the Supreme Court precedent that had fully respected Congress's later treatment of final judgments so as to serve remedial purposes.[150]

Stevens's belief in preserving a robust private remedies approach to securities regulation,, as designed by Congress,, is seen as well in his dissent in *Virginia Bankshares, Inc. v. Sandberg*,[151] an important 1991 Ex-

139 *Id.* at 366.

140 Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).

141 511 U.S. at 192-201 (Stevens, J., dissenting).

142 *Id.* at 193.

143 *Id.* at 198.

144 511 U.S. at 201.

145 Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

146 Lampf v. Gilbertson, 501 U.S. 350, 364 (1991).

147 Lyman Johnson, *Securities Fraud and the Mirage of Repose*, 1992 WIS. L. REV. 607, 612 (1992).

148 *See id.* at 610-11 n.6.

149 Plaut, 514 U.S. at 261.

150 *Id.* at 260-65.

151 501 U.S. 1083 (1991).

change Act decision distinguished by the Court in the context of § 11 of the Securities Act during its October 2014 term.[152] In the § 11 context, the Court held that if a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and those facts conflict with what a reasonable investor would understand, then the omission creates liability.[153] In *Virginia Bankshares*, Stevens had disagreed with the majority's view that no causation could be shown in a Rule 14a-9 claim under the Exchange Act where the wrongdoer controlled enough stock to solely determine the outcome of a shareholder vote.[154] Stevens, noting that the jury in the case had found the merger at issue to be unfair, believed that whether or not a proxy solicitation was required by law or by a company's bylaws was irrelevant because, when corporate management does in fact solicit proxies, an action lies under Rule 14a-9 for making false or misleading statements.[155] The 2015 *Omnicare* decision preserved a remedy for investors with respect to opinion statements with material omissions, precisely the remedy-preserving outcome Stevens long advocated.

In two of his last securities opinions, Stevens's lament at the Court's altered treatment of private claims under Rule 10b-5 was even more pronounced. In the 2008 decision of *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*,[156] Stevens dissented from the Court's ruling on the "reliance" element under Rule 10b-5.[157] He repeated his criticism of the 1994 *Central Bank* decision,[158] describing it as "a precedent for judicial policymaking decisions in this area of law."[159] And he derided "the Court's continuing campaign to render the cause of action under § 10(b) toothless,"[160] along with its "mistaken hostility to the private cause of action."[161] He again grounded this position on his reasoning in *Lampf*, that during the era when the federal securities laws had been enacted, it was judicial practice to imply private claims; thus, Congress had authorized a private claim under Rule 10b-5 that the Court had wrongly curtailed.[162] Stevens's disagreement with the Court went, quite fundamentally, to the question of which branch of the federal government—Congress or the Court—should be making these kinds of changes.

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152 *See, e.g.*, Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318 (2015).

153 *Id.*

154 501 U.S. at 1110 (Stevens, J., dissenting).

155 *Id.* at 1112.

156 552 U.S. 148 (2008).

157 552 U.S. at 167 (Stevens, J., dissenting).

158 Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).

159 552 U.S. at 175.

160 *Id.*

161 *Id.*

162 *Id.*

Stevens reiterated this strongly held position in his final securities opinion.[163] He concurred in the Court's holding that Rule 10b-5 did not apply to foreign plaintiffs suing foreign and U.S. defendants for misconduct occurring on foreign stock exchanges.[164] He agreed too that the majority's "transactional test" was plausible, but he stressed that the Court should not abandon its prior approaches to jurisdiction.[165] In a summing up of his distress at the long, confining arc of the Court's jurisprudential turn in the Rule 10b-5 area, Stevens stated that while he agreed with the result in the *Morrison* case, he "dissents" yet again from the Court's "continuing campaign to render the private cause of action under § 10(b) toothless."[166] Here Stevens, although concurring in the result, nonetheless manages to register in his last securities opinion a strong "dissent" on the larger, years-long trajectory of case outcomes.

D. *Summary*

Justice Stevens wrote a large number of securities law opinions. But he wrote a large number of opinions of many sorts. As noted earlier,[167] he believed that he had a duty to write. At the same time, it should be remembered that he frequently did *not* write in many cases, including in some high-profile securities law cases. These include *United States v. O'Hagan*,[168] *Dirks v. S.E.C.*,[169] *Basic Inc. v. Levinson*,[170] *TSC Industries, Inc. v. Northway, Inc.*,[171] and *CTS Corp. v. Dynamics Corp. of America*.[172] Where he thought a colleague's opinion for the Court adequately captured his views, he saw no reason to write unnecessarily. And while he refrained from writing a dissent in only three cases where he dissented from the outcome, when he thought another justice sufficiently captured his dissenting views, he also did not write—as was the case in *CTS*—where he joined in Justice White's Commerce Clause analysis.[173] And although he frequently concurred in the Court's securities law decisions but nonetheless wrote—more so than any other justice in history—in all of the high-profile cases above where he thought the majority got it right, he saw no need to state his

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163 Morrison v. National Australia Bank Ltd., 561 U.S. 247, 274 (2010) (Stevens, J., concurring).

164 *Id.* at 280.

165 *Id.* at 269-70.

166 *Id.* at 286 (citing his dissent in *Stoneridge*).

167 *See supra* note 44 and accompanying text.

168 521 U.S. 642 (1997).

169 463 U.S. 646 (1983).

170 485 U.S. 224 (1988).

171 426 U.S. 438 (1976).

172 481 U.S. 69 (1987).

173 481 U.S. at 99-102.

views. Thus, Stevens did not write securities law opinions just to write. He wrote when he believed one or more essential points were not being made.

Beyond the substantial numerical contribution made by Stevens to the Supreme Court's body of securities law opinions, this Part has described the key elements of his thinking in this area. At the risk of oversimplifying, two themes stand out. First, Stevens believed that over the course of his lengthy service on the Court, the Court had significantly encroached into what should have remained the legislative domain of Congress. Second, Stevens believed that the federal securities laws, including particularly, §10(b) of the Exchange Act and Rule 10b-5, were intended by Congress to provide robust private remedies for investors in public companies, but that the Court had sharply and wrongly curtailed these avenues for private relief.

Stevens himself, in reflecting on his career, did not consider himself to be an activist on the Court;[174] rather, he believed himself to be a "judicial conservative."[175] Given the transformation he witnessed (and resisted) in securities laws over the period of his service,[176] in his mind, he sought to "conserve" the state of law as it had been[177]—or at least leave it to Congress to alter it, not the Court.

Although Chief Justice Roberts is generally considered to be a more conservative justice than Stevens, he too seeks to "conserve" an existing legal environment.[178] Importantly, however, the securities law environment that Roberts wishes to conserve is the one Stevens sternly resisted, in favor of conserving the securities law world prior to the early and mid-1970s. Many justices, notably Powell and Rehnquist but others also, who are regarded as conservative in judicial philosophy,[179] were key actors in effectuating the very changes Justice Stevens bemoaned and Chief Justice Roberts seeks now to conserve. As observed by Professor John Coates in his recent study on securities law decisions by the Roberts Court, we are "likely *not* to see . . . wholesale reversals of existing doctrines, . . ."[180] The Roberts Court jurisprudence in this area, overall, "does not mark a significant departure from prior Supreme Courts."[181] The judicial activism of an earlier era is now the conservatism of a later one.

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174 Rosen, *supra* note 24 at 52.

175 *Id.*

176 Pritchard, *supra* note 23.

177 In assessing the first few years of securities law decisions of the Court under Chief Justice Roberts, Professor Adam Pritchard found a preference for conserving the legal status quo as well. Adam C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105 (2011).

178 *See supra* notes 131-32 and accompanying text. *See* John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, 57 ARIZ. L. REV. 1, 3 (securities cases decided under the Roberts court "are generally preservative and modest in their effects . . .").

179 *See* Fedderke & Ventoruzzo, *supra* note 71, at 39-40.

180 *See* Coates, *supra* note 178, at 34 (emphasis in original).

181 *Id.*

CONCLUSION

Justice Stevens was, in general, a prolific writer of opinions, a fact widely recognized. But, more specifically, he was the most prolific writer of securities law opinions in the history of the Supreme Court, a fact nowhere recognized. He wrote more total securities opinions, more concurring opinions, and more dissenting opinions than any other justice. Using various measures, we offer a novel quantitative analysis of his opinion production. However, we also offer a qualitative assessment of his securities writings. We do so because he wrote during the transformative era of the late twentieth century, and to paint an accurate portrait of Justice Stevens one must take—as he did—a historical view of legal change.

Justice Stevens wrote not just to explain but to remember. He sought to preserve for the corpus of Supreme Court securities law a view of that law—and the Court's proper role in fashioning it—that Stevens thought had been, wrongly, abandoned. As a jurist who once cited in his opinion for the Court a dissent from 56 years before,[182] Justice Stevens took the long view of legal shifts. Securities law changed dramatically during his tenure on the Court. His opinions, as a historical matter, chronicle many particulars of that change, but they also set forth, as a jurisprudential matter, an approach to lawmaking that should be remembered.

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[182] *See supra* notes 33-35 and accompanying text.