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## A Voice in the Wilderness: John Paul Stevens, Election Law, and a Theory of Impartial Governance

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## A VOICE IN THE WILDERNESS: JOHN PAUL STEVENS, ELECTION LAW, AND A THEORY OF IMPARTIAL GOVERNANCE

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### ABSTRACT

*Justice John Paul Stevens retired from the Supreme Court almost a decade ago and turned ninety-eight years old in April 2018. How should we remember his legacy on the Supreme Court? This Article places his legacy within his election law jurisprudence. Specifically, Justice Stevens provided a consistent theory, which we term “impartial governance,” that has had a lasting impact on the field. This theory undergirds Justice Stevens’s creation of the important Anderson-Burdick-Crawford balancing test that federal courts use to construe the constitutionality of laws that impact the right to vote, such as voter ID laws. It is part of his important opinions on*

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\* J.D. 2017, University of Kentucky College of Law. Any opinions expressed in this Article reflect either our own opinions or that of our coauthor, not our employers’. Many thanks to Steven Barnett, Jennifer Barnett, and Lauren Erena for their support and encouragement.

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*redistricting, which are now gaining steam in the current debate over partisan gerrymandering. It animates his opinions on campaign finance law. And it explains his dissent in Bush v. Gore, arguably the most controversial case to reach the Court. Impartial governance surely stems from Justice Stevens's own personal history, where he witnessed his father deal with the criminal justice system, clerked for liberal Justice Wiley Rutledge, and served as a moderate Republican battling corrupt Chicago political machines. This Article recounts that history and highlights how it impacted his election law jurisprudence, with an Appendix summarizing each of Justice Stevens's sixty-seven election law opinions. As we reflect on his life and career, these insights into Justice Stevens's impartial governance theory of election law will help scholars, the media, and the public understand his enduring legacy.*

## TABLE OF CONTENTS

INTRODUCTION . . . . .	338
I. THICKETS AND THORNS: THE EVOLUTION OF ELECTION LAW .	346
II. LOCUSTS AND WILD HONEY: A SHORT BIOGRAPHY OF JUSTICE JOHN PAUL STEVENS. . . . .	355
III. CLEARING THE WAY: THE IMPACT OF JOHN PAUL STEVENS ON ELECTION LAW . . . . .	363
<i>A. Election Administration</i> . . . . .	365
<i>B. Legislative Districting</i> . . . . .	375
<i>C. Campaign Finance</i> . . . . .	386
<i>D. Deciding a Presidential Election</i> . . . . .	394
CONCLUSION. . . . .	402
APPENDIX: JUSTICE STEVENS'S ELECTION LAW OPINIONS . . . . .	404

## INTRODUCTION

President Gerald Ford has not posthumously convinced historians of his lasting legacy on American democracy.<sup>1</sup> After all, voters never even placed President Ford in the Oval Office. He “accidental[ly]” inherited the responsibility following an unprecedented double resignation.<sup>2</sup> Then, after a mere two years, he lost his election bid when voters handed the presidency to Jimmy Carter. “I’m a Ford not a Lincoln,” Ford humbly quipped.<sup>3</sup> Surely history would remember him as such. Yet on November 28, 1975, President Ford made one decision that has had an oft-overlooked impact on American democracy: he nominated John Paul Stevens to the United States Supreme Court.<sup>4</sup> Just as history has minimized President Ford’s political importance, legal minds have not yet settled on how best to memorialize Justice Stevens’s contributions to the Court. Ironically, then, history may best remember John Paul Stevens—the Justice nominated by the man who never even won a presidential election—through the lens of his election law jurisprudence.

Supreme Court appointments can be a president’s most lasting legacy.<sup>5</sup> In 1975, however, many commentators thought that John Paul Stevens might prove an exception. “Ford’s purpose was not to make a big splash and change the world,” Professor Jack Balkin suggested.<sup>6</sup> The nomination did not spark remarkable controversy. Beforehand, some observers believed that President Ford would copy President Richard Nixon’s precedent and nominate a candidate

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1. *E.g.*, John Robert Greene, *Gerald Ford: Impact and Legacy*, MILLER CTR. PUB. AFFAIRS, <http://millercenter.org/president/biography/ford-impact-and-legacy#contributor> [https://perma.cc/6XAY-NZR7].

2. Paul Maidment, *Gerald Ford: The Accidental President*, FORBES (Dec. 27, 2006, 2:10 PM), [http://www.forbes.com/2006/12/27/notes-on-the-news-ford-biz-cx\\_pm\\_1227ford.html](http://www.forbes.com/2006/12/27/notes-on-the-news-ford-biz-cx_pm_1227ford.html) [https://perma.cc/E97A-FYHD].

3. *Id.*

4. *When Ford Nominated John Paul Stevens*, TIME (Dec. 8, 1975), <http://content.time.com/time/magazine/article/0,9171,947575,00.html> [https://perma.cc/H9BE-VNR3].

5. *See, e.g.*, Edward White, *Presidential Appointments and the Lasting Legacy of the Federal Judiciary*, AM. CTR. FOR L. & JUST. (Aug. 11, 2016), <https://aclj.org/supreme-court/presidential-appointments-and-the-lasting-legacy-of-the-federal-judiciary> [https://perma.cc/N8SD-7ZTE].

6. Jeffrey Toobin, *After Stevens*, NEW YORKER (Mar. 22, 2010), <http://www.newyorker.com/magazine/2010/03/22/after-stevens> [https://perma.cc/HMX6-EVE2].

who would push the Court further right.<sup>7</sup> Instead, Stevens represented a “maverick.”<sup>8</sup> “There was no attempt to nominate a strong ideologue.... [Ford] wanted a straight-arrow, middle-of-the-road, normal guy, excellent lawyer—and that’s what they got in Stevens,” Balkin reflected.<sup>9</sup> Court-watchers predicted that Stevens would join Justices Lewis Powell and Byron White at the Court’s ideological center as swing votes.<sup>10</sup> The stakes of adding another centrist at that time did not seem that high. Accordingly, observers thought that Justice Stevens would play only a small role in the Court’s decision-making process.<sup>11</sup> Yet Justice Stevens found himself “in the unexpected position of shaping the [C]ourt’s liberal jurisprudence.”<sup>12</sup>

Many Supreme Court Justices have developed well-known legacies within certain legal fields. “What is a legacy? It’s planting seeds in a garden you never get to see.”<sup>13</sup> A Supreme Court Justice’s legacy is meaningful because it helps to place that Justice within the context of the history that faced the Court while the Justice served. A legacy tells us something important about how that Justice influenced legal doctrine, both while the Justice served and beyond.<sup>14</sup> Chief Justice Earl Warren oversaw a busy Court that churned out groundbreaking civil rights precedents,<sup>15</sup> while his successor Chief

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7. See *When Ford Nominated John Paul Stevens*, *supra* note 4.

8. See Stuart Taylor Jr., *Rehnquist’s Court: Tuning Out the White House*, N.Y. TIMES (Sept. 11, 1988), <http://www.nytimes.com/1988/09/11/magazine/rehnquist-s-court-tuning-out-the-white-house.html?pagewanted=all> [<https://perma.cc/88NB-JTDZ>] (quoting Justice Harry Blackmun).

9. Toobin, *supra* note 6.

10. David G. Savage, *John Paul Stevens’ Unexpectedly Liberal Legacy*, L.A. TIMES (Apr. 9, 2010), <http://articles.latimes.com/2010/apr/09/nation/la-na-stevenslegacy10-2010apr10> [<https://perma.cc/7V7V-RPN3>].

11. See Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES (Sept. 23, 2007), <http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html> [<https://perma.cc/CC93-5BTC>].

12. *Id.*

13. LIN-MANUEL MIRANDA, *The World Was Wide Enough*, on HAMILTON: AN AMERICAN MUSICAL (Atl. Records 2015).

14. See Michael J. Gerhardt, *Justice Scalia’s Legacies*, 15 FIRST AMEND. L. REV. 221, 231 (2017) (“The potential legacies, which all Supreme Court justices may try to shape, are (1) the labels or characterizations that follow them into history; (2) their writing styles; (3) their substantive impact on the Court’s jurisprudence; (4) their temperament, particularly how their fellow justices viewed them as colleagues; and (5) their methodologies or approaches to questions of constitutional law.”).

15. See Bruce Mirken, *Earl Warren, John F. Kennedy and Civil Rights*, GREENLINING INST. (Nov. 8, 2013), <http://greenlining.org/blog/2013/earl-warren-john-f-kennedy-civil-rights/>

Justice Warren Burger scaled back the Court's activism through equally seminal—albeit more conservative—opinions.<sup>16</sup> More recently, Justice Anthony Kennedy has authored every majority opinion expanding the rights of same-sex couples over the last thirty years.<sup>17</sup> Justice Antonin Scalia pioneered a school of jurisprudence on originalism that has dominated legal circles on both the left and right.<sup>18</sup>

Yet historians and legal academics alike have yet to agree on Justice John Paul Stevens's legacy.<sup>19</sup> Some have described Justice Stevens's impact as “unexpectedly liberal,” without much more.<sup>20</sup> Others have stated that, while having “[u]nquestionable [i]ntegrity,” Justice Stevens exercised “[q]uestionable [l]egal [j]udgment” during his long jurisprudential career.<sup>21</sup> One scholar looked at his prolificacy, particularly in writing dissents.<sup>22</sup> Overall, Justice Stevens has received a “[m]ixed [v]erdict.”<sup>23</sup> These disparities show that,

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[<https://perma.cc/3GDT-KYZ3>].

16. See Justin Driver, *Just How Rightward-Leaning Was the Burger Supreme Court?*, WASH. POST (June 17, 2016), [https://www.washingtonpost.com/opinions/just-how-rightward-leaning-was-the-burger-supreme-court/2016/06/17/4c722b8e-2b65-11e6-9de3-6e6e7a14000c\\_story.html?utm\\_term=.cf01d7b77c8a](https://www.washingtonpost.com/opinions/just-how-rightward-leaning-was-the-burger-supreme-court/2016/06/17/4c722b8e-2b65-11e6-9de3-6e6e7a14000c_story.html?utm_term=.cf01d7b77c8a) [<https://perma.cc/MBY5-GCFD>].

17. See Joan Biskupic, *Anthony Kennedy Legacy Again at Play in Same-Sex Marriage Case*, CNN (Dec. 5, 2017), <https://www.cnn.com/2017/12/05/politics/anthony-kennedy-supreme-court-same-sex-marriage-religious-liberty/index.html> [<https://perma.cc/K2DV-YBGL>]. *But see* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727-29, 1732 (2018) (holding, in an opinion that Justice Kennedy wrote, that the Colorado Commission's procedure in this specific case, ultimately requiring a bakery to make a cake for a same-sex wedding, violated the Free Exercise Clause).

18. See, e.g., ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 95, 101-03 (2011).

19. See Lindsay S. Dunbar & John B. Meixner, *Foreword: The Legacy of Justice John Paul Stevens*, 106 NW. U. L. REV. 409, 409 (2012) (introducing the symposium issue on Justice Stevens's legacy and noting that the articles include discussion of his “executive power jurisprudence, his interpretation of the Free Exercise and Establishment Clauses of the First Amendment, his trajectory on the Court, and finally his interpretive methods”).

20. See Savage, *supra* note 10.

21. Ilya Shapiro, *Justice Stevens' Legacy: Unquestionable Integrity, Questionable Legal Judgment*, CATO INST. (Apr. 9, 2010, 11:44 AM), <https://www.cato.org/blog/justice-stevens-legacy-unquestionable-integrity-questionable-legal-judgment> [<https://perma.cc/MY9H-EMY3>].

22. See Craig D. Rust, *The Leadership Legacy of Justice John Paul Stevens*, 2 J.L. 135, 137 (2012) (“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.”).

23. Richard A. Epstein, *The Stevens Legacy: Mixed Verdict*, FORBES (Apr. 10, 2010, 4:22 PM), <https://www.forbes.com/2010/04/10/john-paul-stevens-supreme-court-law-opinions->

almost a decade after his retirement, few scholars have noted a settled legacy for Justice Stevens.

Undoubtedly, Justice Stevens authored landmark decisions. In *FCC v. Pacifica*, a case stemming from comedian George Carlin's famous "Filthy Words" sketch, Stevens wrote the majority opinion giving the Federal Communications Commission the authority to regulate indecency over the airwaves.<sup>24</sup> He set down an important precedent for copyright law in *Sony Corp. of America v. Universal City Studios, Inc.*, the "Betamax" case.<sup>25</sup> Justice Stevens expanded the government's power to invoke its eminent domain authority in *Kelo v. City of New London*.<sup>26</sup> In perhaps the most important case for Administrative Law, he created the well-known *Chevron* two-step process for reviewing agency decisions.<sup>27</sup>

Yet, although these precedents are important in their respective areas, scholars do not generally credit Justice Stevens with an outsized role in any of these fields. But scholars *should* recognize Justice Stevens for his election law jurisprudence. In a series of cases involving the law of democracy, Justice Stevens espoused a consistent theory that greatly influenced a newly formed field. His jurisprudence deeply affected the Court's approach to election law, embracing the Court's plunge into the political thicket and even more directly inserting judges into the most controversial disputes surrounding our democracy. He ultimately trusted judges to resolve issues involving elections with disinterested impartiality, moving the judiciary deep into the political thicket. Good or bad, no one can deny the significance of this transformation. Given the increasing importance of election law cases to the operation of our democratic system, this utmost trust of judges to resolve election law disputes fairly and impartially comprises a previously unrecognized legacy.

Justice Stevens was a devotee of sovereign impartiality, or the notion that governments should serve the people with total neutrality.<sup>28</sup> Yet Justice Stevens also recognized the breathing room

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columnists-richard-a-epstein.html [https://perma.cc/KGP4-QB2Q].

24. 438 U.S. 726, 729, 738 (1978).

25. 464 U.S. 417, 454-56 (1984).

26. 545 U.S. 469, 488-90 (2005).

27. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

28. See, e.g., Diane Marie Amann, *John Paul Stevens and Equally Impartial Government*, 43 U.C. DAVIS L. REV. 885, 890 (2010) ("[Justice Stevens] worked within the ... framework of



that governments require to function properly, particularly in administering elections. Seeing these two conflicting thoughts, Justice Stevens removed election law from the world of strict scrutiny and harsh lines. Instead, he planted the jurisprudential flag squarely in the land of pragmatic realism and balancing tests, with judges playing the largest role. These two strands continue to play tug-of-war in election law cases today.

During his long tenure, Justice Stevens authored sixty-seven opinions—majority, plurality, concurring, or dissenting—dealing with the relationship between law and democracy,<sup>29</sup> surely representing more election law writing than any other Justice.<sup>30</sup> At times, the Justice's thoughts moved the field. His opinions in *Anderson v. Celebrezze*<sup>31</sup> and *Crawford v. Marion County Election Board*<sup>32</sup> set forth the test, invoked frequently, for weighing burdens on the right to vote when states administer elections. Given the ongoing litigation over voter identification laws and other election administration issues, the way Justice Stevens shaped the doctrine continues to have crucial relevance today.<sup>33</sup> The Justice also wrote fierce dissents. He opposed the Court's inaction regarding political gerrymanders,<sup>34</sup> and he deplored the diluvial impact *Citizens United v. FEC* would have on money in politics.<sup>35</sup> Justice Stevens also took great umbrage at the favoritism he believed legislators showered on the

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an equally impartial government.”)

29. See the Appendix for a summary of each case. We included all cases involving election administration, redistricting, ballot access, and campaign finance in this count. We did not include cases involving union elections or those that had only an incidental connection to the electoral system.

30. We searched the records of other Justices with long tenures on the Court—such as Justice Douglas and Justice Kennedy—but did not find as many election law opinions.

31. 460 U.S. 782, 788 (1983).

32. 553 U.S. 181, 185, 190 (2008).

33. *E.g.*, Ann E. Marimow & Rachel Weiner, *Appeals Court Upholds Virginia's Voter-ID Law*, WASH. POST (Dec. 13, 2016), [https://www.washingtonpost.com/local/public-safety/appeals-court-upholds-virginias-voter-id-law/2016/12/13/3888f46e-c150-11e6-9a51-cd56ea1c2bb7\\_story.html](https://www.washingtonpost.com/local/public-safety/appeals-court-upholds-virginias-voter-id-law/2016/12/13/3888f46e-c150-11e6-9a51-cd56ea1c2bb7_story.html) [https://perma.cc/5MN3-HCFR].

34. *E.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 323 (2004) (Stevens, J., dissenting) (concluding that political gerrymanders presented a justiciable—and pernicious—issue).

35. 558 U.S. 310, 393-94 (2010) (Stevens, J., concurring in part and dissenting in part); see *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, [https://www.opensecrets.org/outsidespending/cycle\\_tots.php](https://www.opensecrets.org/outsidespending/cycle_tots.php) [https://perma.cc/GU69-B5C4] (showing an increase in total independent expenditures since 2010).

two-party system.<sup>36</sup> Although dissents do not say what the law is, they can nonetheless gain momentum with “the shifting tides of history.”<sup>37</sup>

Justice Stevens strongly believed that American politics operated best when judges could ensure that the system served the citizens impartially. Mapmakers should draw lines fairly without regard to party politics. Congress and state governments should ensure an even electoral playing field through reasonable campaign finance restrictions. Finally, state officials must count ballots fairly and impartially. That said, state governments also needed deference to operate the electoral machine smoothly. For instance, with sufficient justification, states could enact voter identification laws to combat actual or perceived fraud.<sup>38</sup> Justice Stevens reconciled these competing ideas through his pragmatic realism. It was up to the courts, the ultimate neutral arbiters, to ensure that political actors conducted the machinery of democracy impartially.

To be sure, one might see weaknesses in Justice Stevens’s election law jurisprudence. First, he often failed to secure five votes and instead frequently wrote in dissent.<sup>39</sup> But this fact might demonstrate that he tried to remain consistent with his own theory of impartial governance, regardless of shifting Supreme Court majorities. His dissents generally came in cases in which he believed the Court had not sufficiently protected democratic (small “d”) impartiality.<sup>40</sup> Moreover, some of the seeds that Justice Stevens planted with these dissents have started to bloom.

Second, “impartial governance” might seem malleable, allowing a justice to impart his or her own views into a case. Other members

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36. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 370 (1997) (Stevens, J., dissenting).

37. See David Cole, *The Power of a Supreme Court Dissent*, WASH. POST (Oct. 29, 2015), [https://www.washingtonpost.com/opinions/the-power-of-a-supreme-court-dissent/2015/10/29/fbc80acc-66cb-11e5-8325-a42b5a459b1e\\_story.html?utm\\_term=.08868de69227](https://www.washingtonpost.com/opinions/the-power-of-a-supreme-court-dissent/2015/10/29/fbc80acc-66cb-11e5-8325-a42b5a459b1e_story.html?utm_term=.08868de69227) [https://perma.cc/ZP6A-4C3D]. In the most obvious example, John Marshall Harlan’s dissent in *Plessy v. Ferguson*, 163 U.S. 537, 554 (1896) (Harlan, J., dissenting), set the stage for *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954).

38. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203-04 (2008).

39. See Nina Totenberg, *For Decades, Stevens Molded High Court Rulings*, NPR (Apr. 9, 2010, 11:50 AM), <https://www.npr.org/templates/story/story.php?storyId=123075821> [https://perma.cc/KM7Q-M579].

40. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 323 (2004) (Stevens, J., dissenting).

of the Court also sometimes rested on seemingly amorphous concepts of fairness and justice, so one might say that Justice Stevens was not unique in this regard.<sup>41</sup> But Justice Stevens was particularly consistent and prolific in explicitly embracing this theory throughout his election law jurisprudence.<sup>42</sup> The Justice trusted judges to rule impartially—irrespective of their own political beliefs—and he believed that democracy would flourish with impartial election rules, especially if judges served as a backstop to police partisan overreaches. That is, there were multiple levels of impartiality to reach impartial governance: an impartial judiciary that would craft rules to ensure impartial elections. Through it all, Justice Stevens espoused an unwavering faith in judges to rule impartially in the most partisan, contentious cases the judiciary considers, thereby elevating the importance of the courts in securing fairness for our democratic processes. One might say, then, that Justice Stevens’s true legacy was in trusting the judiciary to foster a fair democracy.

Third, one might think that Justice Stevens’s approach has done more harm than good, especially in opening the door to increasingly strict voter identification laws and giving states too much deference to enact election rules that have a partisan effect. Surely Justice Stevens himself thought that his approach would root out this partisanship, though it required judges themselves to be impartial and to apply it scrupulously. This Article, however, takes no position on whether Justice Stevens was ultimately correct in the test that he espoused. Instead, it focuses on the significance of that test for the development of the field.

Justice Stevens left his mark on election law in a subtle way, one that “defies categorization in either traditional ‘liberal’ or ‘conservative’ terms.”<sup>43</sup> The briar-filled thicket known as election law has

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41. See Linda Greenhouse, *The Supreme Court’s Diversity Dilemma*, N.Y. TIMES (Dec. 24, 2015), <https://www.nytimes.com/2015/12/24/opinion/the-supreme-courts-diversity-dilemma.html> [<https://perma.cc/5FFK-BVL3>].

42. See Scott Lemieux, *Why Clarence Thomas’s Rulings on Race Are So Idiosyncratic*, NEW REPUBLIC (May 23, 2017), <https://newrepublic.com/article/142825/clarence-thomass-rulings-race-idiosyncratic> [<https://perma.cc/PEF9-74E6>] (describing Justice Stevens as one of the “most idiosyncratic Supreme Court justices of the last 40 years, the most likely to stake out a unique position on a particular issue”).

43. See Pamela S. Karlan, *Cousins’ Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L.J. 521, 527 (1996).

frustrated justices (and even broken a few others, literally harming their health).<sup>44</sup> Yet Justice Stevens had the tenacity to outline consistently an enduring theory of democracy. As Professor Pamela Karlan noted:

Throughout his judicial career, Justice Stevens has offered an unorthodox answer to the question of when the Constitution should apply to upset the results of the political regulation of politics. But ultimately, his resolution of the issue—that judicial intervention is proper only when the majority acts with the sole purpose of curtailing the political strength of the minority or when Congress has directed the courts to oversee state electoral processes—reflects both greater doctrinal coherence and more common sense than its prevailing competitors.<sup>45</sup>

Some of Justice Stevens’s opinions delivered prophetic fire and brimstone to the injustice that he saw in political entrenchment. Other writings granted states more deference to administer even-handed elections. Overall, however, the Justice emphatically did not show “partial[ity] to the wicked or ... deprive the righteous of justice.”<sup>46</sup> Instead, he promoted a way to secure what he viewed to be the most fair and just electoral process. He did so by crafting the pragmatic balancing tests still used today, with judges at the forefront of protecting fairness within the political process. As legal scholars continue to navigate this thorn-filled thicket, they can thank Justice Stevens for tirelessly working to “mak[e] the rough places smooth.”<sup>47</sup>

This Article explores the influence John Paul Stevens has had on election law and explains why history should remember Justice Stevens for his jurisprudence regarding the law of democracy. Part I traces the history of the Court’s election law jurisprudence. Election law has evolved greatly from the days when the Court adamantly avoided the “political thicket”<sup>48</sup> to the modern era, when the Court’s decision in a contested presidential election essentially

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44. See *More Perfect—The Political Thicket*, RADIOLAB (June 10, 2016), [http://radiolab.org/story/the\\_political\\_thicket/](http://radiolab.org/story/the_political_thicket/) [<https://perma.cc/763L-CYC2>].

45. Karlan, *supra* note 43, at 541.

46. *Proverbs* 18:5.

47. See NW. UNIV., REPORT OF THE JOHN EVANS STUDY COMMITTEE 23 (2014).

48. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

determined the winner.<sup>49</sup> Part II examines Justice Stevens's background, highlighting aspects of his biography that likely influenced his jurisprudence in this area. In particular, three formative events probably shaped Justice Stevens's views on law and democracy: his father's experience with the Illinois justice system, his clerkship under liberal Justice Wiley Rutledge, and his experience as a moderate Republican battling corrupt Chicago political machines. Part III argues that Justice Stevens established his legacy within election law. In particular, this Part explains how Justice Stevens's legacy centers on a pragmatic theory of impartial governance that trusts the judiciary to resolve election law disputes. Most importantly, Justice Stevens created a balancing test for courts to use when weighing the individual right to vote with a state's need to administer its elections. In addition to this extremely important development for election administration, Justice Stevens also authored significant opinions involving legislative districting, campaign finance, and the resolution of a presidential election. Overall, Justice Stevens's contributions to the nexus between law and democracy collectively establish his legacy within election law.

#### I. THICKETS AND THORNS: THE EVOLUTION OF ELECTION LAW

When scholars consider John Paul Stevens, election law may not immediately spring to mind. He wrote several high-profile decisions in a variety of fields throughout his tenure.<sup>50</sup> And when one thinks about which justices were most influential for election law, Stevens may not be the first name to come up. After all, several other giants have written extensively in the field. Early on, Justices Oliver Wendell Holmes and Felix Frankfurter argued against judicial intervention in "political" matters.<sup>51</sup> Later, Chief Justice Earl Warren and Justice William Brennan championed the federal judiciary as

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49. See generally *Bush v. Gore*, 531 U.S. 98, 110-11 (2000) (reversing the recount ordered by the Supreme Court of Florida, effectively making George W. Bush President of the United States).

50. See *Notable Case Opinions by John Paul Stevens*, BOS. GLOBE (Apr. 10, 2010), [http://archive.boston.com/news/nation/washington/articles/2010/04/10/notable\\_case\\_opinions\\_by\\_john\\_paul\\_stevens/](http://archive.boston.com/news/nation/washington/articles/2010/04/10/notable_case_opinions_by_john_paul_stevens/) [<https://perma.cc/63R8-GZE4>].

51. *E.g.*, *Colegrove*, 328 U.S. at 550, 552, 556; *Giles v. Harris*, 189 U.S. 475, 482, 488 (1903).

the defender of voting rights.<sup>52</sup> More recently, Justice Anthony Kennedy explored a First Amendment approach to partisan gerrymandering<sup>53</sup> and was otherwise thought of as the swing vote in cases involving redistricting and campaign finance.<sup>54</sup> So why should we remember Justice Stevens in this field? Election law has frustrated many justices given its obvious political overtones.<sup>55</sup> Not John Paul Stevens. Instead, Justice Stevens laid out a coherent democratic theory over his nearly thirty-five year tenure, one which can now define his legacy.

This conclusion may be ironic considering that for nearly two centuries the Supreme Court avoided “political” cases altogether.<sup>56</sup> The modern American can scarcely remember the time when law and elections didn’t mix. Headlines today prominently feature litigation over voter identification laws<sup>57</sup> and politically gerrymandered maps.<sup>58</sup> In the 2015-16 term alone, the Supreme Court heard cases about redistricting principles and the First Amendment,<sup>59</sup> the “one

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52. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533, 563, 566 (1964); *Baker v. Carr*, 369 U.S. 186, 209-10 (1962).

53. *Vieth v. Jubelirer*, 541 U.S. 267, 315-16 (2004) (Kennedy, J., concurring in the judgment).

54. See Andrew Chung, *Justice Kennedy on Hot Seat in Major Voting Rights Case*, REUTERS (Oct. 3, 2017, 10:13 AM), <https://www.reuters.com/article/us-usa-court-election/justice-kennedy-on-hot-seat-in-major-voting-rights-case-idUSKCN1C81P2> [<https://perma.cc/YB3A-NWMU>]; Colin Dwyer, *A Brief History of Anthony Kennedy’s Swing Vote—And the Landmark Cases it Swayed*, NPR (June 27, 2018, 7:00 PM), <https://www.npr.org/2018/06/27/623943443/a-brief-history-of-anthony-kennedys-swing-vote-and-the-landmark-cases-it-swayed> [<https://perma.cc/SW6P-8CBA>]. Given Justice Kennedy’s retirement, it appears that Chief Justice Roberts will now take Justice Kennedy’s place as the “swing vote” in election law and other cases.

55. For instance, during the oral argument in *Gill v. Whitford* about partisan gerrymandering, Chief Justice Roberts lamented that, if the Court ruled on the merits in the case, then the public would view the Court as choosing one political party over another. Transcript of Oral Argument at 38, *Gill v. Whitford*, 137 S. Ct. 2268 (2018) (No. 16-1161) (“[T]he intelligent man on the street is going to say that’s a bunch of baloney. It must be because the Supreme Court preferred the Democrats over the Republicans. And that’s going to come out one case after another as these cases are brought in every state.”).

56. See *Colegrove*, 328 U.S. at 556.

57. *E.g.*, Marimow & Weiner, *supra* note 33.

58. Ian Millhiser, *One of the Biggest Legal Guns in the Country is Coming for Partisan Gerrymandering*, THINKPROGRESS (Jan. 4, 2017, 5:24 PM), <https://thinkprogress.org/one-of-the-biggest-legal-guns-in-the-country-is-coming-for-partisan-gerrymandering-4e6d3a0385fe#fbpsc75m> [<https://perma.cc/8HL2-3MRH>].

59. *Shapiro v. McManus*, 136 S. Ct. 450, 453, 456 (2015).

person, one vote” doctrine,<sup>60</sup> and political corruption.<sup>61</sup> The 2016-17 term included two important cases on racial gerrymandering.<sup>62</sup> And the 2017-18 term saw redistricting cases from Texas, Maryland, and Wisconsin—years after the 2011 round of redistricting.<sup>63</sup> The sun has definitively set on the days when the Supreme Court hesitated to enter the “political thicket.”<sup>64</sup>

Yet not so long ago, the Court declined to even hear such cases. In 1903, the Court in *Giles v. Harris* kept the Supreme Court out of the “political thicket.”<sup>65</sup> An African American citizen brought suit against Alabama election officers, alleging that “the great mass of the white population intends to keep the blacks from voting.”<sup>66</sup> Despite the strength of the plaintiff’s claim that African Americans suffered significant disenfranchisement because of the new suffrage rules of the 1901 Alabama Constitution, the Court dismissed the case.<sup>67</sup> Justice Oliver Wendell Holmes wrote that “relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.”<sup>68</sup> Political questions required action from the political branches, not the judiciary.<sup>69</sup>

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60. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016).

61. *McDonnell v. United States*, 136 S. Ct. 2355, 2361-62 (2016).

62. *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794 (2017).

63. *Abbott v. Perez*, 138 S. Ct. 2305 (2018) (Texas); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (per curiam) (Maryland); *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (Wisconsin).

64. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (“Courts ought not to enter this political thicket.”).

65. 189 U.S. 475, 487-88 (1903); see also Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 297-98, 317 (2000) (discussing the importance of *Giles* in stymieing American democracy).

66. *Giles*, 189 U.S. at 482, 488.

67. *Id.* at 488.

68. *Id.*

69. *Id.* In *Marbury v. Madison*, Chief Justice Marshall famously proclaimed that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” 5 U.S. (1 Cranch) 137, 177 (1803). Yet the Chief also noted that when “the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.” *Id.* at 166. Accordingly, “[s]ometimes ... the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.” *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004). This justiciability concept is known as the “political question doctrine.” JOHN E. FINN, *CIVIL LIBERTIES AND THE BILL OF RIGHTS* 55



Justice Felix Frankfurter similarly championed this conservative ideology. Four decades after *Giles*, Illinois voters brought a claim against state government officials essentially seeking “to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation.”<sup>70</sup> The voters argued that the current Illinois districting plan featured widely disproportionate districts, resulting in diluted votes in those areas with higher population density.<sup>71</sup> Once again, the Court counseled a political—rather than legal—solution.<sup>72</sup> Writing for a plurality of the Court in *Colgrove v. Green*, Justice Frankfurter famously declared: “Courts ought not to enter this political thicket.”<sup>73</sup> After all, “[t]he Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.”<sup>74</sup> Having federal courts reorder political maps would “defeat the vital political principle which led Congress, more than a hundred years ago, to require districting.”<sup>75</sup> The judiciary best fostered democratic principles not through “affirmatively re-map[ping] ... districts so as to bring them more in conformity with the standards of fairness for a representative system” but rather through nonintervention.<sup>76</sup> In fact, Justice Frankfurter later wrote: “In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our Government be exercised with rigorous self-restraint.”<sup>77</sup> Justice Frankfurter feared that a Supreme Court engaged in political decisions would morph into a political branch—without the requisite political checks-and-

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(2006). In essence, “the political question doctrine [holds that] some questions, in their nature, are fundamentally political, and not legal, and if a question is fundamentally political ... then the court will refuse to hear that case. It will claim that it doesn’t have jurisdiction. And it will leave that question to some other aspect of the political process to settle out.” *Id.*

70. *Colegrove v. Green*, 328 U.S. 549, 552 (1946).

71. *Id.* at 550-51.

72. *Id.* at 556 (“The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.”).

73. *Id.*

74. *Id.*

75. *Id.* at 553.

76. *Id.*

77. *Am. Fed’n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 555 (1949) (Frankfurter, J., concurring).



balances. For a period, his philosophy of self-restraint in election law cases won the day.

This self-restraint disappeared, however, in *Baker v. Carr*.<sup>78</sup> This monumental redistricting case plunged the Supreme Court straight into the heart of the political briar patch. In *Baker*, several plaintiffs argued that a decades-old apportionment plan, which the State of Tennessee had not updated despite population shifts, diluted their right to vote and thus violated the Equal Protection Clause of the Fourteenth Amendment.<sup>79</sup> The lower federal court had dismissed the case for lack of subject matter jurisdiction.<sup>80</sup> It held that political law—particularly legislative redistricting—simply did not present a justiciable issue.<sup>81</sup> After all, as Justice Frankfurter noted in his dissent in this case, the Supreme Court had said as much in “a uniform course of decision established by a dozen cases.”<sup>82</sup> *Baker* did not appear any different from those cases.

Yet the Supreme Court suddenly changed course. National attitudes had shifted dramatically since *Colegrove*.<sup>83</sup> The political process repeatedly failed to redress the election-related ills that cases such as *Giles* and *Colegrove* had exposed. After all, “[e]ntrenched politicians had no incentive to alter the district lines and governors and state courts refused to intervene.”<sup>84</sup> In 1958, then-Senator John F. Kennedy assailed this failure as the “Shame of the States.”<sup>85</sup> Then, just three months before the Court heard oral argument in *Baker*, CBS aired a television broadcast that devoted significant attention to malapportionment.<sup>86</sup> Attorneys for the plaintiffs in *Baker* pressed the issue as a “voting rights case” needing judicial intervention.<sup>87</sup> “[T]here exist[s] no judicial no-man’s-land in connection with constitutional rights of individual[s under] the

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78. 369 U.S. 186, 217-18 (1962).

79. *Id.* at 187-95.

80. *Id.* at 188.

81. *Id.* at 208-09.

82. *Id.* at 266 (Frankfurter, J., dissenting).

83. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Reynolds *Reconsidered*, 67 ALA. L. REV. 485, 497 (2015).

84. *Id.* at 493.

85. John F. Kennedy, *The Shame of the States*, N.Y. TIMES MAG., May 18, 1958, at 12.

86. *Our Election Day Illusions: The Beat Majority* (CBS television broadcast Jan. 5, 1961); see also Charles & Fuentes-Rohwer, *supra* note 83, at 497 (describing the CBS special).

87. Oral Argument at 00:00:15, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 6), [http://oyez.org/cases/1960/\\_6#argument-1](http://oyez.org/cases/1960/_6#argument-1) [<https://perma.cc/JW6E-ESVG>].

Fourteenth Amendment,” they boldly proclaimed.<sup>88</sup> Federal courts offered the last—and only—hope for reform.

Enter Justice William Brennan. Justice Brennan had long viewed the federal courts as defenders of constitutional rights. Recalling Justice Brennan’s legacy upon his death, President Bill Clinton explained, “[Justice Brennan] once said the role of the Constitution is the protection of the dignity of every human being and he recognized that every individual has fundamental human rights that government cannot deny.”<sup>89</sup> Given this vision, Justice Brennan sharply disagreed with the more conservative nonintervention philosophy of Justice Frankfurter. *Baker* gave Brennan the door he needed to enforce his vision vis-à-vis political rights. Writing for six members of the Court, Justice Brennan declared that legislative apportionments presented a justiciable issue.<sup>90</sup> The Court redefined the political question doctrine through a multifaceted test.<sup>91</sup> Equal protection claims revolving around apportionment presented “[j]udicial standards ... [that were] well developed and familiar.”<sup>92</sup> Suddenly, election law was born.

Yet Justice Brennan did not entirely achieve his goals. After all, *Baker* did not precisely define the “contours of democratic politics.”<sup>93</sup>

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88. *Id.* at 00:01:05.

89. Linda Greenhouse, *William Brennan, 91, Dies; Gave Court Liberal Vision*, N.Y. TIMES (July 25, 1997), <http://www.nytimes.com/1997/07/25/us/william-brennan-91-dies-gave-court-liberal-vision.html> [<https://perma.cc/D6EE-7ZHJ>].

90. *Baker v. Carr*, 369 U.S. 186, 237 (1962).

91. *Id.* at 217. Specifically, the Court identified six factors when considering whether a question presented fell within the nonjusticiable “political question” doctrine:

- [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- [2] a lack of judicially discoverable and manageable standards for resolving it; or
- [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
- [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
- [5] an unusual need for unquestioning adherence to a political decision already made; or
- [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.*

92. *Id.* at 226.

93. Guy-Uriel E. Charles, *Democracy & Distortion*, 92 CORNELL L. REV. 601, 602 (2007).

The case simply said that courts could hear redistricting claims.<sup>94</sup> With a newly opened door, however, the Court started calibrating a malapportionment standard. First came *Gray v. Sanders*.<sup>95</sup> Democratic primary voters challenged Georgia's "county unit" electoral system as a violation of the Equal Protection Clause.<sup>96</sup> Candidates seeking statewide office competed on a county-by-county basis; winning the most counties clinched the nomination.<sup>97</sup> In *Baker's* aftermath, the Court found that Georgia's system violated the Equal Protection Clause.<sup>98</sup> Justice Douglas declared that the "conception of political equality ... can mean only one thing—one person, one vote."<sup>99</sup>

The Supreme Court had minted a new label. Now that bare-bones label needed flesh. The following year, the Court handed down a seminal decision in *Reynolds v. Sims*.<sup>100</sup> There, Alabama voters challenged the legislative apportionment map for the Alabama state legislature.<sup>101</sup> The state map had come into existence in 1901 and received only one minor amendment in 1903.<sup>102</sup> Otherwise, the apportionment had remained the same for over fifty years, even though the state's population had shifted significantly.<sup>103</sup> The Supreme Court struck down this map as unconstitutional.<sup>104</sup> The Court held that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."<sup>105</sup> Chief Justice Warren continued: "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its

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94. *Baker*, 369 U.S. at 237.

95. 372 U.S. 368 (1963).

96. *Id.* at 370.

97. *Id.* at 370-71.

98. *Id.* at 379 ("Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.").

99. *Id.* at 381.

100. 377 U.S. 533, 568 (1964) (basing its decision once again on the Equal Protection Clause).

101. *Id.* at 537-38.

102. *Id.* at 540.

103. *Id.*

104. *Id.* at 586-87.

105. *Id.* at 568.

weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.”<sup>106</sup> The Equal Protection Clause reached into the very heart of the political thicket to require even *state* legislative apportionments to meet the principle of one person, one vote.

As the immediate progeny demonstrate, *Baker* undoubtedly changed the Court’s trajectory.<sup>107</sup> Within nine months, litigation cropped up in more than thirty-five states over once-barred election issues.<sup>108</sup> The *New York Times* stated that redistricting cases “burn[ed] like a prairie fire across the nation.”<sup>109</sup> *Baker* launched a jurisprudential revolution. Chief Justice Earl Warren cited *Baker*—not *Brown v. Board of Education*<sup>110</sup> or *Miranda v. Arizona*<sup>111</sup>—as the most important decision handed down during his tenure.<sup>112</sup>

*Baker* profoundly impacted other justices, too—“so dramatic[ally] and so traumatic[ally] that [*Baker*] ‘broke’ two justices.”<sup>113</sup> Justice Charles Whittaker suffered an apparent nervous breakdown.<sup>114</sup> Colleagues and relatives recalled that Justice Whittaker felt intense pressure as the potential swing vote in the case—so much pressure, in fact, that the Justice started speaking as if dictating an opinion, going so far as to include oral punctuation in his conversations.<sup>115</sup> When the Court returned from winter recess, Justice Whittaker, without explanation, disappeared.<sup>116</sup> He never returned to the Supreme Court.<sup>117</sup>

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106. *Id.*

107. For a useful history of the evolution of the one person, one vote standard, see Derek T. Muller, *Perpetuating “One Person, One Vote” Errors*, 39 HARV. J.L. & PUB. POL’Y 371 (2016).

108. Charles & Fuentes-Rohwer, *supra* note 83, at 505 (citing Robert B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 646, 706-10 (1963) (summarizing state apportionment litigation through 1962)).

109. *Id.* (quoting Laymond Robinson, *22 States Battle on Redistricting; Fight Spurred by High Court Ruling Is Spreading Fast*, N.Y. TIMES, Aug. 6, 1962, at 23).

110. 347 U.S. 483 (1954).

111. 384 U.S. 436 (1966).

112. *More Perfect—The Political Thicket*, *supra* note 44.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* During this absence, Justice Whittaker apparently became “borderline suicidal.” *Id.* One of his children found the Justice heading upstairs so he could retrieve a shotgun. *Id.* A few days later, Justice Whittaker checked himself into a hospital. *Id.*

117. *Id.*

Justice Felix Frankfurter suffered a similar fate. He vigorously opposed the majority's decision in *Baker*.<sup>118</sup> Just two weeks after the Court announced its decision in the case, Justice Frankfurter suffered a massive stroke.<sup>119</sup> In the hospital, Justice Frankfurter attributed his deteriorated health to the Court's decision.<sup>120</sup> Like Justice Whittaker, Justice Frankfurter never recovered.<sup>121</sup> The stroke forced him into retirement.<sup>122</sup> *Baker v. Carr* was the last case Felix Frankfurter heard.<sup>123</sup> Against his vociferous objections, the Court entangled itself with the political thicket.

Despite Chief Justice Warren's lofty idealism, *Baker* did not resolve every election-related issue. *Baker* "only began the inquiry for the long-term regulation of the political thicket."<sup>124</sup> The transition from nonjusticiability to chronic litigation did not occur smoothly. In fact, some observers have criticized the Court for not developing a coherent democratic jurisprudence from the beginning.<sup>125</sup> Chief Justice Warren's vision about "equality" proved "too abstract to have real meaning."<sup>126</sup> As Professor Heather Gerken noted, "some members of the Court tried to offer a set of mediating principles to give shape and content to the emerging norm of equality."<sup>127</sup> Yet no Justice could provide a manageable theory. "Instead, the Court either relied upon incompletely theorized agreements, never articulating the mediating principles it was employing to define equality ... or [the Court] offered a minimalist theory, the narrowest possible justification for the outcome it was reaching."<sup>128</sup> As the Court methodically developed the one person, one vote theory in

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118. *Id.* After the first oral argument in *Baker*, Justice Frankfurter gave a ninety-minute speech during the ensuing judicial conference—"pulling books off the shelf ... gesticulating wildly." *Id.* During the second oral argument, Frankfurter interjected over one hundred seventy times. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Charles & Fuentes-Rohwer, *supra* note 83, at 506.

125. Charles, *supra* note 93, at 602; *see also* Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1413-14 (2002).

126. Gerken, *supra* note 125, at 1413.

127. *Id.* at 1414.

128. *Id.* at 1414-15.

malapportionment cases, other election-related issues bubbled up through the judiciary.

When Justice Stevens took his seat on the Court in 1975, election law was still relatively fresh. Then the Supreme Court started hearing cases involving virtually every aspect of elections, eventually culminating in controversies about vote-counting procedures. Over forty years later, this soil has received such significant tilling that one court quipped: “The history of election law is one of change and adaptation.”<sup>129</sup> Justice Stevens embraced that change by trusting the judiciary to resolve the disputes fairly. His opinions showed that he welcomed courts’ role in resolving election law challenges, championing impartial judges as the primary backstop to partisan overreach by the political branches. Perhaps more than any other justice during his tenure, Justice Stevens thought that the judiciary could enforce a fair, democratic system.

Justice Stevens’s approach offered something the Court lacked when it first entered the political thicket: a comprehensive democratic theory that involved judges as neutral arbiters. Justice Stevens did not shy away from a judicial role in the political thicket to ensure impartiality in the democratic process. He trusted judges not to be political when resolving political issues. This theory of impartial governance, along with his reverence for the role of judges, defines Justice Stevens’s election law jurisprudence. The importance of this theory for modern election law cases cements Justice Stevens’s significant role on the Court.

Understanding Justice Stevens’s theory of democracy requires understanding Justice Stevens himself, including the events that helped to shape his views on judicial resolution of election law issues. As described below, his upbringing and early career influenced the election law jurisprudence he would adopt as a Justice.

## II. LOCUSTS AND WILD HONEY: A SHORT BIOGRAPHY OF JUSTICE JOHN PAUL STEVENS

Justice Stevens’s background influenced his approach to law and democracy. As Professor Pamela Karlan noted, “Justice Stevens has not been afraid to undergird his decisions with his own

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129. *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1303 (E.D. Cal. 1997).

experience.”<sup>130</sup> Justice Scalia even criticized this aspect of Justice Stevens’s overall jurisprudence, writing that “[i]t is Justice Stevens’[s] experience that reigns over all.”<sup>131</sup> Justice Stevens’s upbringing surely impacted his belief in the judge as an impartial arbiter to oversee an election regime focused on impartial governance.

Yet Justice Stevens’s personal history defies easy categorization. “I’m not big on labels,” he noted upon his retirement.<sup>132</sup> Jeffrey Toobin aptly remarked: “Respected by his colleagues, if not really known to them, Stevens always stood apart.”<sup>133</sup> Similarly, Professor Cass Sunstein reflected that “[m]odest and eclectic, [Justice Stevens] could not be pigeonholed, and he displayed a consistent openness to both facts and arguments.”<sup>134</sup> His maverick style hailed from a lifetime of accumulated paradoxes. The Justice came from a Republican home that revered Warren G. Harding and deeply mistrusted Franklin D. Roosevelt.<sup>135</sup> He waged war in Chicago against

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130. Pamela Karlan, *The Partisan of the Nonpartisan*, SCOTUSBLOG (May 14, 2010, 12:05 PM), <http://www.scotusblog.com/2010/05/the-partisan-of-the-nonpartisan/> [<https://perma.cc/CB76-LZE3>]. As Professor Karlan points out, Justice Stevens’s own history infiltrated several of his notable decisions, “whether it was learning to drive on narrow back roads (consider his dissent in *Scott v. Harris* (2007)), or surviving Prohibition (consider his dissents in *Morse v. Frederick* (2007) and *Granholm v. Heald* (2005)).” *Id.*

131. *Baze v. Rees*, 553 U.S. 35, 93 (2008) (Scalia, J., concurring in the judgment).

132. Rosen, *supra* note 11.

133. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 6 (2008).

134. Cass R. Sunstein, *The Refounding Father*, N.Y. REV. BOOKS (June 5, 2014), <http://www.nybooks.com/articles/2014/06/05/justice-stevens-refounding-father/> [<https://perma.cc/3UCZ-YC3S>] (reviewing JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* (2014)).

135. Rosen, *supra* note 11. “Warren G. Harding, an Ohio Republican, was the [twenty-ninth] President of the United States.” Frank Freidel & Hugh Sidey, *The Presidents of the United States of America: Warren G. Harding*, WHITE HOUSE (2006), <https://www.whitehouse.gov/about-the-white-house/presidents/warren-g-harding> [<https://perma.cc/66Y3-LLB5>]. President Harding served two scandal-ridden years before dying in office. *See id.* Franklin Delano Roosevelt, on the other hand, was a New York Democrat who served as the thirty-second President of the United States. Frank Freidel & Hugh Sidey, *The Presidents of the United States of America: Franklin D. Roosevelt*, WHITE HOUSE (2006), <https://www.whitehouse.gov/about-the-white-house/presidents/franklin-d-roosevelt> [<https://perma.cc/7TH9-TDUM>]. President Roosevelt served an unprecedented twelve years. *See id.* His administration oversaw, among other notable events, recovery from the Great Depression and American involvement in the Second World War. *See id.* Scholars generally rank President Roosevelt as one of the nation’s top three presidents, while President Harding usually finds himself ranked within the bottom five. *See, e.g., Presidential Historians Survey 2017*, C-SPAN (2017), <https://www.c-span.org/presidentsurvey2017/?page=overall> [<https://perma.cc/5NM8-95GL>].



the corrupt Daley machine, yet he did so arm-in-arm with “good-government Democrats.”<sup>136</sup> Justice Stevens received his appointment from a moderate Republican—and then spent a nearly thirty-five-year odyssey that ultimately found him leading the Court’s left-wing jurisprudence.<sup>137</sup> No wonder scholars have struggled to define Justice Stevens’s legacy. Even his election law jurisprudence embodies this paradoxical theme.

John Paul Stevens was born on April 20, 1920.<sup>138</sup> Born into a moderately wealthy and conservative Chicago home, Stevens enjoyed a thoroughly bourgeois upbringing.<sup>139</sup> His grandfather, James Stevens, made a fortune after taking control of the Illinois Life Insurance Company.<sup>140</sup> With these funds, James Stevens built the lavish Stevens Hotel, the largest hotel in the world at the time.<sup>141</sup> James’s son (and John’s father) Ernest eventually took over management of the Stevens Hotel.<sup>142</sup> Ernest would leave the family’s three-story Hyde Park home every morning at 4:00 AM to manage the family hotel.<sup>143</sup> At night, he would read classic literature to his four children, including John.<sup>144</sup> The Roaring Twenties greatly expanded the Chicago skyline, further rewarding the Stevens’s family hotel business.<sup>145</sup> The hotel boasted famous guests such as Charles Lindbergh and Amelia Earhart, both met by a young John.<sup>146</sup> Life initially glittered grandly for him.

Yet this comfortable environment did not inoculate Stevens from tragedy. The Great Depression ravaged the family business.<sup>147</sup> The Illinois Life Insurance Company accused the elder Stevens men of

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136. Rosen, *supra* note 11.

137. *See id.*; *see also* Adam Liptak, *Justice Stevens Is Off the Bench But Not Out of Opinions*, N.Y. TIMES (May 30, 2011), <https://www.nytimes.com/2011/05/31/us/31bar.html> [<https://perma.cc/D9YC-B3GJ>].

138. BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 22 (2010).

139. *Id.* at 23-24.

140. *Id.* at 24-25.

141. *Id.* at 25-26.

142. *Id.* at 26.

143. *Id.* at 23, 28.

144. *Id.* at 22, 28.

145. *See id.* at 25.

146. *Id.* at 27.

147. *See id.* at 31.



diverting insurance funds illegally into the sinking hotels.<sup>148</sup> A grand jury indicted his father on charges of embezzlement.<sup>149</sup> Stevens's father lamented that "[w]e are the unhappy victims of the [D]epression and ... we are now being held up to the public gaze as horrible examples—formally indicted as conspirators and embezzlers."<sup>150</sup> A jury later convicted the elder Stevens.<sup>151</sup> The event devastated young "Johnny," who adored his father.<sup>152</sup> But the Illinois Supreme Court later overturned the conviction.<sup>153</sup> Significantly, the court exonerated Stevens's father because "[t]here is here no evidence of fraudulent intent. We are of the opinion that the record does not justify the verdict of guilty."<sup>154</sup> That is, the actual evidence in the record mattered the most in the elder Stevens's exoneration—a fact not lost on the future Justice Stevens. Undoubtedly, the entire episode deeply impacted Stevens's understanding of the judicial system. "Of course, I respected the decision, but I was pretty young at the time—though I remember the words 'not a scintilla of evidence,'" the Justice later reflected.<sup>155</sup>

In fact, John went into law himself. He first studied English at the University of Chicago.<sup>156</sup> Then, in 1945, after a brief stint in the Navy, John enrolled at Northwestern University School of Law.<sup>157</sup> There "John" became "John Paul."<sup>158</sup> "I had a professor who said that every lawyer should have something unique about them," Justice Stevens noted.<sup>159</sup> "Some people sign their names in green ink, some people did other things. I had this very boring name. Who can remember 'John Stevens'? So I added my middle name."<sup>160</sup>

Newly minted John Paul brought his formidable intellect to bear in record-shattering ways. The future Justice graduated first in his law school class in 1947 with the highest grade point average ever

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148. *Id.*

149. *People v. Stevens*, 193 N.E. 154, 155 (Ill. 1934).

150. BARNHART & SCHLICKMAN, *supra* note 138, at 32.

151. *Stevens*, 193 N.E. at 158.

152. *Cf.* BARNHART & SCHLICKMAN, *supra* note 138, at 27, 32.

153. *Stevens*, 193 N.E. at 160.

154. *Id.*

155. Toobin, *supra* note 6.

156. BARNHART & SCHLICKMAN, *supra* note 138, at 41-42, 52.

157. *Id.* at 43, 52-53.

158. Toobin, *supra* note 6.

159. *Id.*

160. *Id.*

recorded in the school's history.<sup>161</sup> John Paul also served as co-editor-in-chief of the *Northwestern University Law Review*.<sup>162</sup> Prominent faculty members soon connected John Paul with United States Supreme Court Justice Wiley Rutledge.<sup>163</sup> In a telephone call with the Justice, the faculty warned that John Paul "came from a family of Republican businessmen" and was "politically quite conservative."<sup>164</sup> Justice Rutledge quipped back: "I think that's something I can take care of, don't you?"<sup>165</sup>

Naturally, John Paul's clerkship significantly shaped his legal career. Observers have described John Paul Stevens as Wiley Rutledge's jurisprudential heir.<sup>166</sup> As Justice Stevens himself later reflected, Justice Rutledge believed in "wide discretion to judges ... and to administrative agencies."<sup>167</sup> This discretion-based jurisprudence appeared in Justice Stevens's writings as well, notably in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>168</sup> Echoes also sounded in Justice Stevens's approach to election law, where he afforded significant latitude to the States in administering elections and to judges in remaining impartial in these partisan cases.

Following his clerkship, John Paul returned to Chicago, where he worked as an antitrust lawyer.<sup>169</sup> Justice Stevens's experiences in Chicago undoubtedly contributed to his election law jurisprudence. In fact, one commentator noted that "the grittier experience of living and practicing law in a city known for greased palms and political machines[] made Stevens the justice he is."<sup>170</sup> Like most Chicagoans, John Paul "had no trouble viewing nearly every public

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161. Rosen, *supra* note 11.

162. BARNHART & SCHLICKMAN, *supra* note 138, at 55.

163. *Id.* at 62. Allegedly, the faculty had two Supreme Court connections, one with Chief Justice Fred Vinson and the other with Justice Wiley Rutledge. *Id.* A coin flip between Northwestern's top students matched John Paul Stevens with Justice Rutledge. *Id.*

164. *Id.* at 63.

165. *Id.*

166. Norman Dorsen, *John Paul Stevens*, 1992/1993 ANN. SURV. AM. L. xxv, xxviii.

167. John Paul Stevens, *Mr. Justice Rutledge*, in MR. JUSTICE 177, 187 (Allison Dunham & Philip B. Kurland eds., 1956).

168. 467 U.S. 837, 862 (1984).

169. Rosen, *supra* note 11.

170. Stephanie Francis Ward, *A Man of Moderation: The Last Justice of the 'Greatest Generation,' Gentlemanly John Paul Stevens, Says Farewell*, A.B.A. J. 49, 51 (May 2010).

phenomenon in his hometown through the lens of local politics.”<sup>171</sup> When Pablo Picasso donated a rather cryptic steel statue to Chicago, John Paul Stevens wrote:

[The statue] is unquestionably an imaginative and dramatic representation of an elephant. What could possibly amuse its creator more than to persuade our wonderful mayor that the Civic Center should be decorated with a world-famous statue of an elephant? Only a truly great artist could work such a miracle of presenting a 162-ton Republican totem to decorate the front yard of the Democratic organization of Mayor Richard J. Daley.<sup>172</sup>

Despite this good-humored jab at the Chicago machine, however, John Paul Stevens remained largely aloof from politics.<sup>173</sup>

Politics did not remain aloof from Stevens, however. Living in Chicago as a moderate Republican was not an easy task. A former Justice Stevens clerk—Lawrence Rosenthal—noted that “[w]hen [Stevens] was growing up in Chicago, politics were dominated by the corrupt Democrat machine.”<sup>174</sup> Rosenthal also added: “[I]f you believed in good government and were a reformer—a particular kind of reformer who wanted to clean the stables—you were a Republican in Chicago.”<sup>175</sup>

This clean, apolitical image ended up putting John Paul Stevens in the spotlight. In 1969, Illinois witnessed the downfall of two justices from the Illinois Supreme Court.<sup>176</sup> Just two years earlier, Associate Justice Ray Klingbiel announced the unanimous opinion of the court in *People v. Isaacs*.<sup>177</sup> The court affirmed the dismissal of a multi-count public corruption indictment against Theodore Isaacs.<sup>178</sup> Yet Mr. Isaacs did not disappear from public scrutiny; in fact, he soon found himself connected to a new scandal involving

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171. BARNHART & SCHLICKMAN, *supra* note 138, at 131.

172. *Id.* (internal quotations omitted).

173. KENNETH A. MANASTER, *ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS* 37 (2001).

174. Ward, *supra* note 170, at 51.

175. *Id.*

176. MANASTER, *supra* note 173, at xiv.

177. 226 N.E.2d 38, 41, 54 (Ill. 1967).

178. *Id.* at 54.

none other than Justice Klingbiel.<sup>179</sup> A prominent figure in local Democratic politics, Isaacs served as one founder of the Civic Center Bank & Trust Company.<sup>180</sup> Muckrakers in Chicago suspected the bank of functioning as a laundering hub for local politicians.<sup>181</sup> As the muckrakers delved deeper into the issue, their subsequent investigation revealed two telling shareholders in the bank: grandchildren of Justice Klingbiel.<sup>182</sup> The Illinois Supreme Court appointed a special commission to investigate the brewing scandal, with Frank Greenberg, head of the Chicago Bar Association, serving as chairman.<sup>183</sup> Greenberg asked John Paul Stevens if he would serve as essentially special prosecutor in the case.<sup>184</sup>

Despite having no prosecutorial experience, Stevens agreed.<sup>185</sup> In many ways, Stevens embodied the perfect choice. He tried antitrust cases almost exclusively in federal courts, giving him the necessary distance from possible retaliation at the state level.<sup>186</sup> His apolitical image also drove home the idea that “[h]e didn’t have an ax to grind.”<sup>187</sup> Stevens gave himself vigorously to the task. During his investigation, Stevens discovered the mirage underlying the unanimity in *Isaacs*.<sup>188</sup> Two justices had disagreed with the majority yet “smothered their dissents” under pressure.<sup>189</sup>

The subsequent inquiry found that Justice Klingbiel had acted improperly, and Stevens’s investigation also turned up another shocking stockholder in the Civic Center Bank: Illinois Supreme Court Chief Justice Solfisburg.<sup>190</sup> At the time, Chief Justice Solfisburg stood as a rising star in the Illinois judiciary.<sup>191</sup> When Chief Justice Earl Warren of the United States Supreme Court announced his impending retirement, Solfisburg met with Senator Everett

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179. MANASTER, *supra* note 173, at 4.

180. *Id.* at 7, 9.

181. *Id.* at 3-4.

182. *Id.* at 4.

183. *Id.* at 25.

184. *Id.* at 37.

185. *Cf. id.*

186. Ward, *supra* note 170, at 54.

187. *Id.* (quoting Judge William J. Bauer of the Seventh Circuit Court of Appeals).

188. Douglas A. Hedin, 71 HENNEPIN LAW. 16, 23 (2002) (reviewing MANASTER, *supra* note 173).

189. *Id.*

190. MANASTER, *supra* note 173, at 106-07, 228.

191. *Id.* at 57.

Dirksen about filling the vacancy.<sup>192</sup> Senator Dirksen eventually passed the recommendation up to Richard Nixon's Attorney General, John Mitchell.<sup>193</sup> At that time, another seat had opened when Justice Abe Fortas resigned amidst his own scandal.<sup>194</sup> Roy Solfisburg seemed destined to take a seat on the nation's High Court.

That all came crashing down after John Paul Stevens's investigation linked Solfisburg with the potential wrongdoing in *Isaacs*.<sup>195</sup> The special commission eventually released a report, noting: "The integrity of the judgment in the *Isaacs* case is affected by what we have found to be the appearance of impropriety on the part of two of the Justices, Solfisburg and Klingbiel, who participated in the decision."<sup>196</sup> The report ominously concluded: "The Commission believes that such [judicial] confidence can best be restored by the prompt resignation of the two Justices."<sup>197</sup> No longer did Chief Justice Solfisburg entertain hopes that he would replace the disgraced Justice Abe Fortas, let alone the venerable Chief Justice Earl Warren; in fact, both Solfisburg and Klingbiel resigned their seats on the Illinois Supreme Court.<sup>198</sup>

Yet the fall of one Supreme Court contender produced another. Stevens had not intended on using his role in the investigation "as a public steppingstone."<sup>199</sup> Nonetheless, the experience widened his reputation. After the investigation, Senator Charles H. Percy—a former classmate at the University of Chicago—brought Stevens's name to the Nixon White House.<sup>200</sup> In 1970, President Nixon nominated John Paul Stevens for the Seventh Circuit Court of Appeals.<sup>201</sup>

Following the judicial scandals of the late 1960s, as well as the national upheaval surrounding the Watergate crisis, John Paul

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192. *See id.* at 57-59.

193. *Id.* at 59.

194. Andrew Glass, *Abe Fortas Resigns from Supreme Court May 15, 1969*, POLITICO (May 15, 2008, 04:12 AM), <http://www.politico.com/story/2008/05/abe-fortas-resigns-from-supreme-court-may-15-1969-010346> [<https://perma.cc/9ZD2-HJVW>].

195. MANASTER, *supra* note 173, at 107.

196. *Id.* at 228.

197. *Id.* at 229.

198. *See id.* at 239.

199. *See* Ward, *supra* note 170, at 54 (quoting Judge William J. Bauer of the Seventh Circuit Court of Appeals).

200. *Id.* at 55; *see also* MANASTER, *supra* note 173, at 265.

201. *See* Rosen, *supra* note 11.

Stevens represented a judge who emanated judicial integrity and could restore public confidence in the judiciary. It was little surprise that President Ford would nominate Judge Stevens to become Justice Stevens just five years later.<sup>202</sup> Stevens sailed through Senate confirmation with no controversy.<sup>203</sup>

John Paul Stevens lived a rich life that equipped him with a unique perspective on democracy. Stevens grew up in a city long known for “bare-knuckled partisanship dominated by machine politics and tainted by episodic outright irregularity.”<sup>204</sup> Ironically, the very year that Justice Stevens took his seat, the Supreme Court found itself navigating another current in election law: regulating campaign finance.<sup>205</sup> Although Justice Stevens did not participate in the seminal *Buckley v. Valeo* decision,<sup>206</sup> he shaped the confluence of law and democracy for the next three and a half decades.

### III. CLEARING THE WAY: THE IMPACT OF JOHN PAUL STEVENS ON ELECTION LAW

John Paul Stevens came onto the scene fourteen years after the Court plunged into the political thicket in *Baker v. Carr*.<sup>207</sup> The Court had decided other seminal election law cases since *Baker*, including *Reynolds v. Sims*, an important opinion that set out the one person, one vote standard.<sup>208</sup> Yet election law still presented fresh issues for the young Justice. Essentially, Justice Stevens’s view of an impartial government demanded that the courts act when majorities attempted to entrench themselves. For Justice Stevens, the Court’s non-intervention period represented a stark failure in the democratic process. The political branches were “manifestly unable to solve the problem of [inequality],” requiring judicial intervention.<sup>209</sup> The Court had entered the political thicket. There was no turning back. Instead, for Justice Stevens, the Courts’ role was to ensure fairness and impartiality in the democratic process.

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202. *Id.*

203. *See id.* The Senate confirmed Stevens 98-0. *Id.*

204. *See* Karlan, *supra* note 130.

205. *See* *Buckley v. Valeo*, 424 U.S. 1, 6 (1976).

206. *Id.* at 144.

207. *See* 369 U.S. 186 (1962).

208. 377 U.S. 533, 568 (1964).

209. *District of Columbia v. Heller*, 554 U.S. 570, 680 n.39 (2008) (Stevens, J., dissenting).

Amidst all these thorns and thistles, Justice Stevens attempted to enunciate a clear vision about how the Court should resolve election law cases. In a concurring opinion early in his career on the Supreme Court, Justice Stevens laid out a democratic theory that would pervade his entire election law jurisprudence. Justice Stevens stated:

The Equal Protection Clause requires every State to govern impartially. When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection.<sup>210</sup>

This impartial governance theory undergirded Justice Stevens's views across election law. From gerrymandering to campaign finance, voter identification laws to vote-counting procedures, Justice Stevens imagined one clear standard: our American democracy worked best when the government heeded the duty to rule impartially. Judges could act as neutral arbiters to ensure impartiality remained consistent throughout the electoral process. That standard now stands as John Paul Stevens's enduring legacy.

Detailing all of Justice Stevens's opinions on election law would require many pages. Instead, this Part focuses on Justice Stevens's major contributions vis-à-vis his impartial governance legacy. First, this Part explains how Justice Stevens essentially created a sub-field regarding election administration by setting out a balancing test for analyzing voter identification and similar nuts-and-bolts issues, marking Justice Stevens's most important contribution to election law. That balancing test, which trusts judges to make the "hard judgments"<sup>211</sup> in these cases to ensure impartiality, shapes today's judicial fights over many aspects of the democratic process.

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210. *Karcher v. Daggett*, 462 U.S. 725, 748 (1983) (Stevens, J., concurring) (citations omitted).

211. *Anderson v. Celebrezze*, 460 U.S. 780, 790 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).



Second, this Part examines Justice Stevens's views on legislative redistricting. In particular, this Part analyzes Justice Stevens's crusade against gerrymandering and the continuing impact his views have had on jurisprudence in this field—especially the role his approach may play in today's partisan gerrymandering fights.

Third, this Part looks at Justice Stevens's position on campaign finance. Although Jeffrey Toobin called these views Justice Stevens's "[s]wan [s]ong,"<sup>212</sup> his dissenting voice has nonetheless inspired at least one federal court to champion the relationship between campaign finance and an impartial government.

Finally, this Part shows how Justice Stevens trusted judges even in one of the most controversial cases to reach the Court, *Bush v. Gore*,<sup>213</sup> which essentially decided the 2000 presidential election. Throughout, Justice Stevens showed a reverence for judges to ensure impartial governance.

Justice Brennan once quipped that he could not "pretend to know exactly why Justice Stevens has chosen so often to explain why his colleagues were marching in the wrong direction."<sup>214</sup> Even Justice Stevens himself acknowledged his own prolificacy, stating, "I do clutter up the U.S. Reports with more separate writing than most lawyers have either time or inclination to read."<sup>215</sup> Election law provides no exception. In each distinctive area, Justice Stevens wrote extensively. His opinions—whether writing for the Court, in a separate concurrence, or even in dissent—have shaped the law of democracy. In particular, Justice Stevens persistently outlined an impartial governance theory of election law. This vision should stand as the Chicagoan's legacy.

#### A. *Election Administration*

Justice Stevens's views have been front and center when it comes to election administration, which includes the nuts-and-bolts of casting a ballot. Justice Stevens penned two of the opinions in the critical trilogy that created the doctrine known as "*Anderson-*

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212. JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 182 (2012).

213. 531 U.S. 98 (2000).

214. MANASTER, *supra* note 173, at 273.

215. John Paul Stevens, *Introduction to id.* xii.



*Burdick-Crawford*—or “ABC”—balancing that lower courts now use on a regular basis.<sup>216</sup> This test gives deference to states to run their elections, while trusting judges to evaluate the state’s interest in the law as compared to the burdens that the law imposes on individual voters.<sup>217</sup> Indeed, for better or worse—and there is a lot to both champion and criticize in this approach<sup>218</sup>—Justice Stevens’s creation of this test still impacts crucial litigation involving the law of democracy during every election cycle. Some observers fault Justice Stevens for ratcheting down the level of scrutiny used to review voting rules, thus giving states more leeway to enact laws with a partisan intent under the guise of election integrity or the need for breathing room to administer elections.<sup>219</sup> One of us has argued previously that the Supreme Court has given undue deference to states in how they run their elections.<sup>220</sup> Our goal here, however, is not necessarily to criticize Justice Stevens’s approach; instead, we simply highlight how critical his approach has been for the judicial development of this area.

The Court used to apply strict scrutiny review to regulations of the fundamental right to vote. For instance, in *Harper v. Virginia Board of Elections*, the Court struck down a state poll tax because it burdened the “fundamental” right to vote without an accompanying compelling state interest.<sup>221</sup> Similarly, in *Kramer v. Union Free School District No. 15*, the Court discussed voting using the familiar fundamental rights framework.<sup>222</sup>

Yet over time, the Court has backed away from strict scrutiny. Justice Stevens initiated this move. In *Anderson v. Celebrezze*, the Justice recognized voting as a fundamental right, while also

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216. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 185 (2008) (controlling opinion authored by Justice Stevens); *Celebrezze*, 460 U.S. at 782 (same); see also Joshua A. Douglas, *The History of Voter ID Laws and the Story of Crawford v. Marion County Election Board*, in *ELECTION LAW STORIES* 490 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

217. Douglas, *supra* note 216, at 490.

218. See generally Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. 553 (2015).

219. *Id.* at 555 (“The Court’s broad deference to state voting rules is concerning for two main reasons. First, it is doctrinally inconsistent with the structure of the United States Constitution. Second, it is alarming given the increasing number of restrictive and partisan-laden voting laws states are enacting.”).

220. *Id.*

221. 383 U.S. 663, 670 (1966).

222. 395 U.S. 621, 622 (1969).

acknowledging that states need significant leeway to administer an election.<sup>223</sup> “[A]s a practical matter,” Justice Stevens wrote, “there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”<sup>224</sup> Because states have important regulatory interests in ensuring fairness and equality, Justice Stevens elided the more rigid strict scrutiny test from *Harper* and created a balancing test instead.<sup>225</sup> When state laws burden the right to vote, Justice Stevens announced, courts “must first consider the character and magnitude of the asserted injury.”<sup>226</sup> Second, courts “must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.”<sup>227</sup> After identifying both the burdens on a voter and the State’s regulatory interests, the courts must then weigh the two categories against each other.<sup>228</sup>

The *Anderson* test gave courts significant discretion to depart from strict scrutiny by imposing less rigid review to a state’s election rules. As a result, states received more deference in administering elections. That deference widened further in *Burdick v. Takushi*.<sup>229</sup> The Court explicitly stated what Justice Stevens had only implied in *Anderson*: not every burden on voting requires strict scrutiny.<sup>230</sup> Instead, “when [voting] rights are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’ But when a state election law imposes only ‘reasonable, nondiscriminatory restrictions’ ... ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.”<sup>231</sup> *Burdick* thus added a threshold question: Is the State *severely* restricting the right to vote via the challenged regulation?<sup>232</sup> If so, then the courts should apply the normal strict

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223. 460 U.S. 780, 788 (1983).

224. *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

225. *See id.* at 788-89.

226. *Id.* at 789.

227. *Id.*

228. *Id.*

229. 504 U.S. 428 (1992).

230. *Id.* at 433-34.

231. *Id.* at 434 (citations omitted).

232. *Id.*; *see also* *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring in judgment) (“Thus, the first step is to decide whether a challenged law severely burdens the right to vote.”).

scrutiny test.<sup>233</sup> But if not, courts must engage in the less-strict balancing test that Justice Stevens described in *Anderson*.<sup>234</sup>

Interestingly, Justice Stevens joined Justice Kennedy's dissent in *Burdick*.<sup>235</sup> Yet Justice Kennedy explicitly approved the majority's refinement of the *Anderson* test: "I agree as well with the careful statement the Court gives of the test to be applied in this case to determine if the right to vote has been constricted."<sup>236</sup> Justice Kennedy merely disagreed with the majority's application of the test to the specific facts in *Burdick*.<sup>237</sup>

If Justice Stevens disagreed with the gloss that *Burdick* placed upon the *Anderson* test, he could have done so in *Crawford v. Marion County Election Board*, the third seminal decision in this trilogy.<sup>238</sup> The case provides a test specifically for construing voter identification laws, a major battleground over the last decade, though doctrinally the test applies to any election administration issue.<sup>239</sup> Justice Stevens invoked—with some modification—the test from *Anderson* and *Burdick*.<sup>240</sup> In *Crawford*, Justice Stevens's plurality *started* with the proffered reasons for the government regulation.<sup>241</sup> That is, Justice Stevens reversed the order that he originally used in *Anderson* to compare the burdens on the voter with the state's interest. Under *Crawford*, the court should initially analyze the state's important regulatory interests and then compare those interests to the severity of the burden on an individual's right to vote.<sup>242</sup> Such a starting point in the analysis suggests that the states continue to receive significant deference in election administration.

*Crawford* has served as the lynchpin for subsequent cases involving voter identification laws. In fact, federal courts have cited *Crawford* more than two hundred times in the first decade since the

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233. *Burdick*, 504 U.S. at 434.

234. *Id.*

235. *Id.* at 442.

236. *Id.* at 445.

237. *Id.* at 446 (Kennedy, J., dissenting) ("I submit the conclusion must be that the write-in ban deprives some voters of any substantial voice in selecting candidates for the entire range of offices at issue in a particular election.").

238. 553 U.S. 181 (2008).

239. *See id.* at 185-86, 189-91.

240. *Id.* at 189-90.

241. *Id.* at 191.

242. *Id.*

decision.<sup>243</sup> Most of these cases invoke the “ABC” balancing test that Justice Stevens formulated in *Anderson* and used again in *Crawford*.

The Seventh Circuit’s case law over voter ID shows how courts have wrestled with how to apply the *Crawford* balancing test. In 2011, Wisconsin Governor Scott Walker signed into law a new strict voter identification measure.<sup>244</sup> The law requires a voter to show a valid, non-expired photo identification to vote.<sup>245</sup> Shortly thereafter, litigation wound through both the state and federal courts. Initially, both the Wisconsin Supreme Court<sup>246</sup> and the Seventh Circuit<sup>247</sup> upheld the voter identification procedure. Both opinions relied heavily on *Crawford*. In *Frank v. Walker (Frank I)*, for instance, the Seventh Circuit reversed an injunction against Wisconsin’s voter identification law.<sup>248</sup> The district court found the burdens in *Frank I* more significant than those presented in *Crawford*, but Judge Frank H. Easterbrook disagreed.<sup>249</sup> The Seventh Circuit concluded that “*Crawford* requires us to reject a constitutional challenge to Wisconsin’s statute.”<sup>250</sup> Yet this result, although espousing conformity with *Crawford*, seemed at odds with Justice Stevens’s theory of democratic impartiality because the evidence was clearer in Wisconsin that the law would prevent certain valid voters from participating in an election.<sup>251</sup> After all, opponents accused Wisconsin Republicans of adopting the law specifically to disenfranchise minority voters who typically did not vote Republican.<sup>252</sup> This fact

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243. Citing references for *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), WESTLAW NEXT, <http://next.westlaw.com> (follow “Citing References” hyperlink; then click “Cases” tab; then check “Federal” box) (showing that more than 200 federal courts have cited *Crawford* in the ten years since the Court issued its opinion in that case).

244. Reuters, *Wisconsin Voter ID Law Signed by Scott Walker*, HUFFINGTON POST (May 25, 2011, 5:05 PM), [http://www.huffingtonpost.com/2011/05/25/wisconsin-voter-id-law-scott-walker\\_n\\_867090.html](http://www.huffingtonpost.com/2011/05/25/wisconsin-voter-id-law-scott-walker_n_867090.html) [<https://perma.cc/77WU-4KRT>].

245. *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 851 N.W.2d 302, 305 (Wis. 2014).

246. *Id.*

247. *Frank v. Walker*, 768 F.3d 744, 745 (7th Cir. 2014) [hereinafter *Frank I*].

248. *Id.*

249. *Id.* at 745-46 (“Wisconsin’s law differs from Indiana’s, but not in ways that matter under the analysis in *Crawford*.”).

250. *Id.* at 751.

251. *Id.* at 746.

252. Michael Wines, *Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/some-republicans->

shows the malleability of Justice Stevens's test—while perhaps useful to give states breathing room to run their elections, some may validly claim that it does not sufficiently protect the fundamental right to vote.

After the Seventh Circuit refused to hear the case en banc on an evenly divided vote<sup>253</sup>—prompting a fiery dissent from Judge Richard Posner that had echoes of Justice Stevens's theory of impartial governance<sup>254</sup>—the court faced the matter once again, this time after the plaintiffs brought better evidence of the burdens the law would impose.<sup>255</sup> Importantly, the plaintiffs pressed an as-applied challenge, arguing that even if the law might be valid in the abstract, the evidence demonstrated the law's unconstitutionality as applied to the plaintiffs, who would suffer unique burdens in obtaining a compliant identification.<sup>256</sup> Indeed, Justice Stevens himself had rejected a facial challenge in *Crawford* but left the door open to an as-applied challenge if plaintiffs could produce better evidence of the burdens the law would impose.<sup>257</sup> This time, Judge Easterbrook—again writing for the panel—sided with the plaintiffs.<sup>258</sup> The plaintiffs in *Frank II* had presented identifiable burdens that, under the *Crawford* test, outweighed the government's proffered interest in combating fraud.<sup>259</sup> Moreover, the Seventh Circuit focused on the as-applied nature of the plaintiffs' challenge,<sup>260</sup> which is consistent with Justice Stevens's impartial governance theory of determining whether a law will actually produce unfairness in the election process. "The right to vote is personal," Easterbrook wrote, "and is not defeated by the fact that 99% of other people can secure the necessary credentials easily."<sup>261</sup> Further, "[p]laintiffs now accept the propriety of requiring photo ID from persons who already have or can get it with reasonable effort, while endeavoring to protect the

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acknowledge-leveraging-voter-id-laws-for-political-gain.html [https://perma.cc/YD5F-XL32].

253. *Frank v. Walker*, 773 F.3d 783, 783 (7th Cir. 2014).

254. *Id.* (Posner, J., dissenting).

255. *Frank v. Walker*, 819 F.3d 384, 385-87 (7th Cir. 2016) [hereinafter *Frank II*].

256. *Id.* at 386.

257. See Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635, 650 (2009).

258. *Frank II*, 819 F.3d at 385, 388.

259. *Id.* at 385-86.

260. See *id.* at 386-87.

261. *Id.* at 386.

voting rights of those who encounter high hurdles.”<sup>262</sup> This balancing, Judge Easterbrook concluded, “is compatible with *Crawford*.”<sup>263</sup> Like Judge Posner had done in his dissent from the denial to hear *Frank I* en banc,<sup>264</sup> (which signaled his evolving understanding given that he had written the Seventh Circuit’s *Crawford* opinion upholding the Indiana law<sup>265</sup>), Judge Easterbrook now recognized the impartial governance theory undergirding *Crawford*.<sup>266</sup> When the record evidence presented facts impugning an election system’s impartiality because it harmed certain voters, and when the plaintiffs brought an as-applied challenge using that evidence, then the result could be different even using the same balancing test. Because the plaintiffs in *Frank II* had demonstrated cognizable burdens—burdens that implicated the impartiality of Wisconsin’s government—the judiciary had an obligation to correct the error.

The Seventh Circuit’s approach apparently tracks Justice Stevens’s own thoughts. Although he authored *Crawford*, the Justice has had mixed feelings about the case post-retirement.<sup>267</sup> Justice Stevens stated that he felt *Crawford* reached the correct result, albeit producing an “unfortunate decision.”<sup>268</sup> When asked whether he would reach the same conclusion in 2016 as he did in 2008, the Justice ultimately said: “That’s a tough question. I really don’t know for sure.”<sup>269</sup> In a post-retirement conversation with Justice Elena Kagan, Justice Stevens commented:

I learned a lot of things outside the record that made me very concerned about that statute.... So I had the question: Should I rely on my own research or what’s in the record? And I thought in that case I had a duty to confine myself to what the record did prove, and I thought it did not prove the plaintiffs’ case.<sup>270</sup>

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262. *Id.*

263. *Id.* at 387.

264. *Frank I*, 773 F.3d 783, 783-84 (7th Cir. 2014).

265. *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 950, 954 (7th Cir. 2007).

266. *Frank II*, 819 F.3d at 386-87.

267. Robert Barnes, *Stevens Says Supreme Court Decision on Voter ID Was Correct, but Maybe Not Right*, WASH. POST (May 15, 2016), [https://www.washingtonpost.com/politics/courts\\_law/stevens-says-supreme-court-decision-on-voter-id-was-correct-but-maybe-not-right/2016/05/15/9683c51c-193f-11e6-9e16-2e5a123aac62\\_story.html](https://www.washingtonpost.com/politics/courts_law/stevens-says-supreme-court-decision-on-voter-id-was-correct-but-maybe-not-right/2016/05/15/9683c51c-193f-11e6-9e16-2e5a123aac62_story.html) [https://perma.cc/7C99-B7YL].

268. *Id.*

269. *Id.*

270. *Id.*

Perhaps Justice Stevens considered his father's experience with the judiciary when deciding *Crawford*. "A totally unjust conviction, I can assure you," Justice Stevens later told the *New York Times* about his father.<sup>271</sup> "There is not a scintilla of evidence of any concealment or fraud attempted."<sup>272</sup> Evidence mattered for Justice Stevens. Unlike the dissenting justices in *Crawford*, he did not want to look beyond the record. With his father's conviction,<sup>273</sup> Justice Stevens had witnessed the injustice that occurs when factors other than the evidence in the record inform a judicial decision.

Other courts also have recognized the difficult—though Justice Stevens would likely say vital—judicial task that *Crawford* presents. In *Veasey v. Abbott*, for instance, the Fifth Circuit (sitting en banc) struck down Texas's voter identification law.<sup>274</sup> The court acknowledged that *Crawford*'s test seemed to favor a state's regulatory interests: "*Crawford* clearly established that states have strong interests in preventing voter fraud and increasing voter confidence by safeguarding the integrity of elections. We do not deny that the State in this case may pursue those interests, nor that they are strong and valid interests."<sup>275</sup> Yet *Crawford* did not provide a "preventing voter fraud" talisman the State could blankly invoke.<sup>276</sup> As the court concluded, "that acknowledgement [that the State possesses strong interests in preventing voter fraud and increasing voter confidence] does not address the additional as-applied challenges Plaintiffs make in this case."<sup>277</sup> The plaintiffs had presented actual evidence on the burdens of the law and documented actual harm to voters, implicating an impartial governance problem for Texas's elections.<sup>278</sup>

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271. Rosen, *supra* note 11.

272. *Id.* (quoting *People v. Stevens*, 193 N.E. 154, 160 (Ill. 1934)).

273. *See* *People v. Stevens*, 193 N.E. 154, 158 (Ill. 1934).

274. 830 F.3d 216, 272 (5th Cir. 2016) (en banc). Although the Fifth Circuit heavily discussed *Crawford* in *Veasey*, the court did not find the voter identification law in Texas constitutionally infirm under the "ABC" balancing standard. *Id.* at 248-49, 272. Rather, the court held that the voter identification law violated Section 2 of the Voting Rights Act. *Id.* at 272.

275. *Id.* at 249 (citation omitted).

276. *See id.* at 248 n.39.

277. *Id.* at 249.

278. *See id.* The Fifth Circuit subsequently upheld Texas's newer version of its voter ID law once the legislature modified it to comply with the prior Fifth Circuit decision. *See Veasey v.*



Justice Stevens's *Crawford* opinion, though only a plurality, has animated some observers and frustrated others. Conservatives may applaud the decision while liberals may lament it because the case left the door open to stricter voter identification laws. Justice Stevens surely believed, at least when he wrote the opinion, that his pragmatic approach best furthered impartial elections, regardless of any partisan effect. Of course, he may have been wrong in the *application* of his test given the evidence that voter identification laws root out hardly any voter fraud while actually disenfranchising various groups of voters.<sup>279</sup> He somehow seemed blind to what many have suggested was the clear partisan intent behind Indiana's law,<sup>280</sup> perhaps because he was particularly attuned to election fraud given his upbringing as a Republican in Chicago. But regardless of its application in that case, the test still endures. Thus, as a descriptive matter, his approach for election administration cases has been influential, though we can certainly debate whether that influence has been positive or negative for how our elections operate today.

The overall "ABC" balancing test represents an important tenet in Justice Stevens's legacy. When the Justice formulated the doctrine, he no doubt thought that deference would best serve the ideals of impartial governance. After all, the initial case—*Anderson*—centered around providing a fair ballot access process for independent candidates outside of the two-party system.<sup>281</sup> And even in *Crawford*, Justice Stevens hesitated to venture beyond the record;<sup>282</sup> impartial decision-makers such as himself simply must apply the law to the facts presented. Again, that supposed virtue may also serve as a valid criticism of the decision given what many see as a judicial failure to root out the effects of strict voter identification laws and other partisan-laden voting rules.<sup>283</sup> Indeed, Justice

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Abbott, 888 F.3d 792, 797, 804 (5th Cir. 2018).

279. See, e.g., Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV. 185, 186 (2009).

280. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) ("Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.").

281. See *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

282. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 202 (2008).

283. Douglas, *supra* note 216, at 594.



Stevens would likely balk at upholding most voter identification laws under his own test today. Many people believe that voter identification laws stem in part from an insidious motivation of entrenchment and partisan manipulation of electoral outcomes.<sup>284</sup> Entrenchment stands in stark contrast to impartiality. Most lower courts, such as the Seventh Circuit in *Frank*, have understood the ABC balancing test to encompass Justice Stevens's underlying theory about democratic impartiality, even if the courts have not said so explicitly.<sup>285</sup> This application of the balancing test for election administration cases demonstrates the importance of recognizing Justice Stevens's legacy as infusing election law with a theory of impartial governance. Even where mechanized tests apply, courts keenly recognize the spirit lurking behind the rule. As an analyst with the Brennan Center for Justice explained:

Justice Stevens cannot plausibly be cited today for the proposition that ... oppressive new voting laws are justifiable by virtue of some form of voter fraud that ... officials have never been able to prove.... He likely had no idea when he voted in 2008 to uphold that Indiana voter identification law that officials of one party would use it to try to restrict the voting rights of members of the other party.<sup>286</sup>

After growing up as a Republican in Mayor Daley's Chicago, Justice Stevens may have been particularly attuned to the concerns of voter fraud. He likely had strong views on this issue given the widespread speculation that Mayor Daley's Democratic machine stuffed ballot boxes in Chicago in the 1960 presidential election to help John F. Kennedy win Illinois.<sup>287</sup> Perhaps, then, he was not as concerned in *Crawford* about the lack of explicit evidence of voter fraud. Yet even so, he still expounded upon a test in *Crawford* that,

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284. See, e.g., Zoltan L. Hajnal et al., *Do Voter Identification Laws Suppress Minority Voting? Yes. We Did the Research.*, WASH. POST (Feb. 15, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/do-voter-identification-laws-suppress-minority-voting-yes-we-did-the-research/> [<https://perma.cc/6HNV-2KQS>]; Wines, *supra* note 252.

285. See *Frank II*, 819 F.3d 384, 386-87 (7th Cir. 2016).

286. Andrew Cohen, *The Truth About Justice Stevens and the Voting Rights Act*, BRENNAN CTR. FOR JUST. (Oct. 11, 2013), <https://www.brennancenter.org/analysis/truth-about-justice-stevens-and-voting-rights-act> [<https://perma.cc/5SNV-DRAX>].

287. See EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 220-24 (2016).

when applied faithfully, can help to prevent partisan operatives from manipulating election rules, allowing an impartial judiciary to ensure a continued impartial election system.

The *Anderson-Burdick-Crawford* balancing test applies to more than just voter identification laws. Courts use it to analyze many aspects of the electoral process, including challenges to voter registration requirements, cutbacks in early voting, and ballot access rules, among others.<sup>288</sup> Courts invoke the test anytime an individual voter claims that a state election rule is infringing on the right to vote. Accordingly, Justice Stevens's creation of this test has had a significant impact on much of the law of democracy. Given the implications of this approach for how our elections operate, this balancing test serves as one of Justice Stevens's most significant contributions on the Court.

### *B. Legislative Districting*

In 1812, Massachusetts Governor Elbridge Gerry signed into law a controversial redistricting plan.<sup>289</sup> The new map produced a few oddly shaped districts that clearly favored Governor Gerry's own Democratic-Republican Party.<sup>290</sup> In fact, some observers thought that one of the contorted districts even resembled a salamander.<sup>291</sup> The press had a field day with the governor's ham-handed approach. The Boston-based *Centinel* published a political cartoon satirizing the new map as resembling a dragon-like monster.<sup>292</sup> The *Boston Gazette* penned a new portmanteau for the phenomenon, combining the governor's name with the pareidolic creature the district

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288. See, e.g., *Obama for Am. v. Husted*, 697 F.3d 423, 429-30 (6th Cir. 2012).

289. Robert Draper, *The League of Dangerous Mapmakers*, ATLANTIC (Oct. 2012), <https://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/> [<https://perma.cc/TQC8-T3GW>].

290. See *id.*

291. *Id.*

292. See Renard Sexton & Dan Berman, *Breaking News: U.S. and U.K. Redistricting Processes Equally Boneheaded*, FIVETHIRTYEIGHT (Mar. 12, 2010, 11:30 AM), <https://fivethirtyeight.com/features/us-and-uk-redistricting-processes/> [<https://perma.cc/2U9A-JQK9>].

supposedly represented.<sup>293</sup> Ever since, “gerrymandering” has plagued American politics.<sup>294</sup>

Legislative line-drawing first pulled the Supreme Court into the political thicket in *Baker v. Carr*.<sup>295</sup> Yet the doctrine has expanded beyond the “one person, one vote” standard from *Reynolds v. Sims*<sup>296</sup> to include other potential cartographic concerns. Two issues in particular have resulted in constant litigation. First, racial gerrymandering has plagued the line-drawing process in some places.<sup>297</sup> Racial gerrymandering occurs when legislators create districts using race-conscious criteria. For example, racial gerrymandering exists when “[a] reapportionment plan ... includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin.”<sup>298</sup> The Supreme Court has stated that such maps “bear[] an uncomfortable resemblance to political apartheid.”<sup>299</sup> Accordingly, the Court held that districts gerrymandered along racial lines—even those intended to benefit a minority race—violate the Equal Protection Clause.<sup>300</sup> Absent a smoking gun statement proving discriminatory intent, the Court found that litigants could demonstrate a racial gerrymander by showing that a redistricting plan is “so highly irregular that, on its face, it rationally cannot be understood as

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293. See Catie Edmonson, *The Gerry Behind Gerrymandering*, BOS. GLOBE (June 22, 2017), <https://www.bostonglobe.com/metro/2017/06/22/the-gerry-behind-gerrymandering/QUbhL72qv6TuM3Kklg6REM/story.html> [https://perma.cc/LNJ7-L69Y].

294. Emily Barasch, *The Twisted History of Gerrymandering in American Politics*, ATLANTIC (Sept. 19, 2012), <https://www.theatlantic.com/politics/archive/2012/09/the-twisted-history-of-gerrymandering-in-american-politics/262369/> [https://perma.cc/E5GS-9XQ3]. Gerrymandering, however, predated even Governor Gerry. See *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004) (“Political gerrymanders are not new to the American scene. One scholar traces them back to the Colony of Pennsylvania at the beginning of the 18th century, where several counties conspired to minimize the political power of the city of Philadelphia by refusing to allow it to merge or expand into surrounding jurisdictions, and denying it additional representatives.”); Anthony J. Gaughan, *To End Gerrymandering: The Canadian Model for Reforming the Congressional Redistricting Process in the United States*, 41 CAP. U. L. REV. 999, 1017 (2013) (“Gerry did not invent the practice. Politically-motivated redistricting dates back to colonial Pennsylvania.”).

295. 369 U.S. 186, 187-88 (1962).

296. 377 U.S. 533, 558 (1964).

297. *Shaw v. Reno*, 509 U.S. 630, 633-34 (1993).

298. *Id.* at 647.

299. *Id.*

300. *Id.* at 657-58.

anything other than an effort to segregate ... voters on the basis of race.”<sup>301</sup> In a follow-up opinion, the Court explained that a state violates equal protection when race is the “predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”<sup>302</sup>

Second, mapmakers have drawn boundaries based on political lines—“packing” some districts with same-party voters and “cracking” other districts populated by the opposing party.<sup>303</sup> The majority party will thus pool allies together in a stronghold district and split the opposing party into diluted districts.<sup>304</sup> As Professor Dan Tokaji noted, “if elections are when voters choose their leaders, redistricting is when leaders choose their voters.”<sup>305</sup> Politicians generally draw lines that protect incumbents and their own political parties.<sup>306</sup> Unlike racial gerrymanders, however, the Supreme Court has not yet reached a decisive solution on partisan gerrymanders. The Court has taken up the issue several times without crafting a judicially manageable test to evaluate when the practice violates the Constitution.<sup>307</sup> Litigation now swirls in the lower federal and state courts, searching for a definitive standard and solution to partisan gerrymandering.<sup>308</sup>

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301. *Id.* at 646-47 (internal quotations omitted).

302. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Justice Stevens dissented in this case, arguing that the white voters who brought the claim did not suffer any cognizable injuries. *Id.* at 932 (Stevens, J., dissenting). “I do not see how a districting plan that favors a politically weak group can violate equal protection.” *Id.*; *see also Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (holding that a state cannot justify a racial gerrymander by saying it was trying to achieve a partisan advantage where race and party closely correlate).

303. *Whitford v. Gill*, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016); EDWARD B. FOLEY ET AL., *ELECTION LAW AND LITIGATION: THE JUDICIAL REGULATION OF POLITICS* 162 (2014).

304. *See FOLEY ET AL.*, *supra* note 303, at 162.

305. DANIEL TOKAJI, *ELECTION LAW IN A NUTSHELL* 77 (2016).

306. FOLEY ET AL., *supra* note 303, at 162.

307. *See, e.g., Gill v. Whitford*, 138 S. Ct. 1916, 1933-34 (2018); *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004); *Davis v. Bandemer*, 478 U.S. 109, 143 (1986).

308. *See, e.g., Whitford*, 218 F. Supp. 3d at 927 (“Although the proposition is not settled in Supreme Court jurisprudence, we hold ... that state legislatures cannot, consistent with the Equal Protection Clause, adopt a districting plan that is intended to, and does in fact, entrench a political party in power over the decennial period.”). In *Whitford*, Democratic plaintiffs in Wisconsin alleged that the Republican-controlled state legislature enacted an unconstitutional partisan gerrymander. *Id.* at 843. A three-judge district panel agreed with the plaintiffs’ claims, using an “efficiency gap” analysis developed by law professor Nicholas Stephanopoulos and political scientist Eric McGhee, Research Fellow at the Public Policy Institute of California. *Id.* at 910-27; *see also* ERIC PETRY, *HOW THE EFFICIENCY GAP WORKS*,

Justice Stevens's jurisprudence on gerrymandering reflects his attitude toward equal protection generally. The Equal Protection Clause protects *individuals*. And the Supreme Court had already stated that American politicians represent people, not trees or rocks—and certainly not majoritarian self-interest.<sup>309</sup> If gerrymandering produced unequal representation, then the federal courts had an obligation to intervene. The Equal Protection Clause protects American citizens no matter what cloak the gerrymander wears. “Every gerrymander, indeed possibly every redistricting, is at once ‘political,’ and therefore immune, and ‘discriminatory,’ and therefore vulnerable.”<sup>310</sup> The label simply did not matter for Justice Stevens. After all, for him, there was only “one Equal Protection Clause.”<sup>311</sup> As Justice Stevens wrote:

The difference between constitutional and unconstitutional gerrymanders has nothing to do with whether they are based on assumptions about the groups they affect, but whether their purpose is to enhance the power of the group in control of the districting process at the expense of any minority group, and thereby to strengthen the unequal distribution of electoral power.<sup>312</sup>

This “one Equal Protection Clause” offered all Americans an impartial governance.

Yet if the line-drawing actually *fostered* better-proportioned representation—especially to help minorities—then the Justice had a more sympathetic attitude, whether the challenge to a map came under the Equal Protection Clause or the Voting Rights Act (“VRA”).

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BRENNAN CTR. FOR JUST., [https://www.brennancenter.org/sites/default/files/legal-work/How\\_the\\_Efficiency\\_Gap\\_Standard\\_Works.pdf](https://www.brennancenter.org/sites/default/files/legal-work/How_the_Efficiency_Gap_Standard_Works.pdf) [<https://perma.cc/R8NC-VEDBJ>] (explaining the efficiency gap). The Supreme Court, however, essentially rejected the basis for the efficiency gap standard by ruling that a plaintiff does not have standing to bring a statewide claim. See *Gill*, 138 S. Ct. at 1931.

309. See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“Legislators represent people, not trees or acres.”).

310. *Cousins v. City Council*, 466 F.2d 830, 847 (7th Cir. 1972) (Stevens, J., dissenting).

311. *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) (“There is only one Equal Protection Clause.... It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.”); see also Note, *Justice Stevens's Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1146 n.3 (1987).

312. *Shaw v. Reno*, 509 U.S. 630, 678 (1993) (Stevens, J., dissenting).

For Justice Stevens, the Equal Protection Clause requires the government to serve all citizens, especially the weak. If a racial gerrymander benefited the racial minority, Justice Stevens saw the practice as embodying, not violating, the Equal Protection Clause.<sup>313</sup> Accordingly, “[t]he duty to govern impartially is abused when a group with power over the electoral process defines electoral boundaries solely to enhance its own political strength at the expense of any weaker group.”<sup>314</sup> Regarding race, this postulate means that the majority could conceivably create districts along racial lines to boost the representative power of underrepresented populations.<sup>315</sup>

In particular, Justice Stevens believed that courts should defer to a law that specifically intends to benefit minorities, such as the VRA.<sup>316</sup> Early in his career on the Court, Justice Stevens argued that the Court should ignore subjective intent and instead focus on objective factors to determine whether a map suffered from unlawful minority vote dilution under the VRA.<sup>317</sup> As time progressed, Justice Stevens adopted an expansive view of the VRA in the name of deference to the legislative process. The Justice thought that the Court should interpret the Act “in a manner that provides the broadest possible scope in combating racial discrimination.”<sup>318</sup> He developed “workable” tests that generally furthered the interests of the disenfranchised minority.<sup>319</sup> At one point, Justice Scalia decried Justice Stevens’s efforts by noting that “the Voting Rights Act ... is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination.”<sup>320</sup> Overall, Justice Stevens’s views on the VRA show that his impartial governance theory applies to both Equal Protection Clause and VRA redistricting cases.<sup>321</sup>

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313. *Id.* at 677-79.

314. *Id.* at 677-78.

315. *Id.* at 678 (“That duty, however, is not violated when the majority acts to facilitate the election of a member of a group that lacks such power because it remains underrepresented in the state legislature.”).

316. See Karlan, *supra* note 43, at 535-37.

317. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 637 (1982) (Stevens, J., dissenting).

318. See *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (internal quotations omitted); see also *Holder v. Hall*, 512 U.S. 874, 957-58 (1994) (Stevens, J., writing separately).

319. See *Presley v. Etowah Cty. Comm’n*, 502 U.S. 491, 523-24 (1992) (Stevens, J., dissenting).

320. *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting).

321. In *Shelby County v. Holder*, decided after Justice Stevens retired, the Court struck



In a post-retirement speech, Stevens remarked: “I do not understand why a law designed to make different groups more equal should violate the duty to govern impartially.”<sup>322</sup> As a result, Justice Stevens has been “less friendly to claims of racial ... gerrymandering” when the white majority asserts that the legislature improperly considered race to ensure adequate representation for the racial minority.<sup>323</sup>

When it came to partisan gerrymanders, Justice Stevens was even more adamant that the Court should use the Equal Protection Clause to ensure impartial governance, especially for such a political act as drawing district lines.<sup>324</sup> Justice Stevens criticized the Court for its refusal to adopt any test whatsoever for partisan gerrymanders, especially given that it had crafted a judicially manageable test for racial gerrymandering.<sup>325</sup> In his mind, “so-called ‘racial gerrymandering’ and ‘political gerrymandering’ must be judged by the same constitutional standard.”<sup>326</sup> The Court’s bifurcation

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down portions of the VRA as, among other things, incompatible with the constitutional prerogative of state sovereignty. 133 S. Ct. 2612, 2623-24, 2631 (2013) (“Not only do States retain sovereignty under the Constitution, there is also a fundamental principle of *equal* sovereignty among the States.... The Voting Rights Act sharply departs from these basic principles.”) (citations and quotations omitted). In an interview, Justice Stevens criticized the majority in *Shelby County* for relying on equal sovereignty of the states while ignoring “the fact that Article I, Section 2 of the Constitution created a serious inequality among the states [in the Three-Fifths Clause].” Andrew Cohen, *John Paul Stevens on the Supreme Court’s Voting-Rights Decision*, ATLANTIC (July 20, 2013), <https://www.theatlantic.com/national/archive/2013/07/john-paul-stevens-on-the-supreme-courts-voting-rights-decision/277962/> [<https://perma.cc/YK7E-L8ZU>]. Given his impartial governance theory, Justice Stevens naturally objected because he feared that striking down this portion of the VRA would make it easier for certain states with a history of discrimination *not* to govern impartially. Stevens concluded by quoting Justice Scalia in another context: “This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today’s opinion aggrandizes the latter, with the predictable consequence of diminishing the former.” *Id.* (quoting *United States v. Windsor*, 570 U.S. 744, 778 (2013) (Scalia, J., dissenting)). Justice Stevens essentially used this quotation to drive home his impartial governance theory regarding the VRA. He saw judicial activism in the majority’s *Shelby County* opinion, which “gravely undercuts the Court’s eternal concerns about appearing impartial.” *Id.*

322. Justice John Paul Stevens (Ret.), *Originalism and History*, 48 GA. L. REV. 691, 702 (2014).

323. Karlan, *supra* note 43, at 522.

324. *Vieth v. Jubelirer*, 541 U.S. 267, 317-18 (2004) (Stevens, J., dissenting).

325. *Id.* at 341.

326. *Cousins v. City Council*, 466 F.2d 830, 848 (7th Cir. 1972) (Stevens, J., dissenting).



offended his “one Equal Protection Clause” sensibilities.<sup>327</sup> Additionally, Justice Stevens balked at the Court’s inability to articulate how partisan gerrymanders effectuated a harm just as much as racial gerrymanders.<sup>328</sup> Ever since his days on the Seventh Circuit, then-Judge Stevens considered political gerrymandering as pernicious as racial gerrymandering.<sup>329</sup> “[G]errymanders,” Justice Stevens wrote, “effect a constitutional wrong when they disrupt the representational norms that ordinarily tether elected officials to their constituencies as a whole.”<sup>330</sup> Justice Stevens believed that a blatantly political gerrymander diluted democratic representation.<sup>331</sup> When a gerrymander entrenched political majorities, suddenly cartographers, not voters, decided elections. Accordingly, politicians would no longer feel beholden to their constituencies. Instead, these politicians could simply redistrict such that they faced no electoral pressure. As Justice Stevens later wrote: “[I]n addition to the possibility that a representative may believe her job is only to represent the interests of a dominant constituency, a representative may feel more beholden to the cartographers who drew her district than to the constituents who live there.”<sup>332</sup> A political gerrymander threatened impartial governance just as much as a racial one. Given such a democratic distortion, political gerrymanders presented a problem that the judiciary should not hesitate to correct. For Justice Stevens, “there can be no total sanctuaries in the political thicket.”<sup>333</sup>

Justice Stevens’s dissenting opinion in *Vieth v. Jubelirer* best captures his thoughts on political gerrymanders<sup>334</sup>—and it may well influence today’s partisan gerrymandering cases. That case considered the Pennsylvania General Assembly’s new legislative map in response to the 2000 census.<sup>335</sup> Plaintiffs, registered Democrats,

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327. See *Craig v. Boren*, 429 U.S. 190, 211-12 (Stevens, J., concurring).

328. *Vieth*, 541 U.S. at 329-31, 341.

329. *Cousins*, 466 F.2d at 848; see also Stefanie A. Lindquist, *Supreme Court Prequel: Justice Stevens on the Seventh Circuit*, 106 NW. U. L. REV. 715, 739 (2012).

330. *Vieth*, 541 U.S. at 329.

331. *Id.* at 331-32.

332. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 470 (2006) (Stevens, J., concurring in part and dissenting in part).

333. *Karcher v. Daggett*, 462 U.S. 725, 751 (1983) (Stevens, J., concurring).

334. See *Vieth*, 541 U.S. at 317.

335. *Id.* at 272 (majority opinion).

challenged the Republican-created map as violating the Equal Protection Clause.<sup>336</sup> These Democrats accused the Republican state legislature of ignoring traditional redistricting principles, including “the preservation of local government boundaries,” and instead creating a map with “meandering and irregular” districts “solely for the sake of partisan advantage.”<sup>337</sup> Because of this gerrymander, the Democratic plaintiffs claimed they experienced severe vote dilution.<sup>338</sup>

The Court had faced a similar claim in *Davis v. Bandemer*.<sup>339</sup> There, Indiana Democratic voters filed a lawsuit against several state officials “alleging that the 1981 reapportionment plans constituted a political gerrymander intended to disadvantage Democrats.”<sup>340</sup> The Democrats brought the claim against the Republican legislature under the Equal Protection Clause.<sup>341</sup> A fractured Court found political gerrymanders justiciable but failed to reach a consensus on much else.<sup>342</sup> Justice White’s plurality opinion held that plaintiffs alleging partisan gerrymandering are “required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”<sup>343</sup> Justice Stevens joined Justice Powell’s separate opinion on the proper standard to use.<sup>344</sup> Relying heavily on Justice Stevens’s concurrence in a previous one person, one vote case,<sup>345</sup> Justice Powell thought that more traditional principles should govern partisan gerrymanders.<sup>346</sup> Namely, Justice Powell stated that courts should evaluate partisan gerrymanders based on “the shapes of voting districts and adherence to established political subdivision boundaries.”<sup>347</sup> Additionally, “[o]ther relevant considerations include the nature of the legislative procedures by which the apportionment

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336. *Id.*

337. *Id.* at 272-73.

338. *Id.* at 273, 297.

339. 478 U.S. 109, 113 (1986) (plurality opinion).

340. *Id.* at 115.

341. *Id.*

342. *Id.* at 113, 143-44, 161.

343. *Id.* at 127.

344. *Id.* at 161-62 (Powell, J., concurring in part and dissenting in part).

345. *Id.* at 165-66 (citing *Karcher v. Daggett*, 462 U.S. 725, 755-59 (1983) (Stevens, J., concurring)).

346. *Id.* at 173.

347. *Id.*

law was adopted and legislative history reflecting contemporaneous legislative goals.<sup>348</sup> The squabble between these two sides on the search for a standard set three justices ill at ease. Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, argued that political gerrymanders presented a nonjusticiable issue precisely because the Court was unable to formulate a judicially manageable standard that gained the assent of a majority.<sup>349</sup> Thus, although a majority concluded that partisan gerrymandering claims could proceed, the Court did not provide an identifiable standard moving forward.

*Vieth* reopened the wound, with no prettier results. Once again the Court splintered and failed to provide an overarching theory. Writing for a four-justice plurality, Justice Scalia categorically found that political gerrymanders presented nonjusticiable issues.<sup>350</sup> He concluded "that neither Article I, § 2, nor the Equal Protection Clause, nor ... Article I, § 4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting."<sup>351</sup> By contrast, although Justice Kennedy agreed that *this* case under *these* theories proved nonjusticiable, he refused to shut the door decisively on judicial review of *all* political gerrymanders.<sup>352</sup> Maybe, he suggested, a manageable standard would arise from the First Amendment (a stance Justice Scalia decried as "never-say-never" jurisprudence).<sup>353</sup>

Justice Stevens sharply disagreed with the plurality's refusal to entertain the claim.<sup>354</sup> "The concept of equal justice under law requires the State to govern impartially," Justice Stevens wrote.<sup>355</sup> For Justice Stevens, political gerrymanders violated this core concept.

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348. *Id.*

349. *Id.* at 144, 147-48 (O'Connor, J., concurring in the judgment).

350. *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (plurality opinion).

351. *Id.*

352. *Id.* at 308-10 (Kennedy, J., concurring in the judgment) ("Our willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims makes it particularly difficult to justify a categorical refusal to entertain claims against this other type of gerrymandering.").

353. *Id.* at 314; *id.* at 303 (plurality opinion) ("The only cases Justice Kennedy cites in defense of his never-say-never approach are *Baker v. Carr* and *Bandemer*.").

354. *Id.* at 317 (Stevens, J., dissenting) ("[I]t would be contrary to precedent and profoundly unwise to foreclose all judicial review of similar claims that might be advanced in the future.").

355. *Id.*

To him, impartiality mandated maps that had partisan neutrality just as much as racial neutrality: “In my view, the same standards should apply to claims of political gerrymandering, for the essence of a gerrymander is the same regardless of whether the group is identified as political or racial.”<sup>356</sup> In fact, Justice Stevens argued that the racial dilution cases should inform how the Court approaches political gerrymanders.<sup>357</sup> For instance, invoking the racial gerrymandering cases, Justice Stevens explained that “a district’s peculiar shape might be a symptom of an illicit purpose in the line-drawing process.”<sup>358</sup> Justice Stevens trusted that a neutral judiciary could import the standard into partisan gerrymandering cases. Even though Justice Stevens, early in his career, experienced the judiciary’s underbrush in the Illinois Supreme Court corruption scandal,<sup>359</sup> his confidence in judges never wavered. Justice Stevens thought that federal judges could readily craft manageable judicial standards to root out improper partisan gerrymandering. “[S]everal standards for identifying impermissible partisan influence are available to judges who have the will to enforce them,” he wrote.<sup>360</sup>

The Justice’s thoughts on the subject also stem from his attitudes toward the two-party system and political entrenchment. Inoculating political gerrymanders from the federal courts would only entrench the two-party system even more. Justice Stevens vehemently opposed this idea. “It demeans the strength of the two-party system to assume that the major parties need to rely on laws that discriminate against independent voters and minor parties in order to preserve their positions of power,” Justice Stevens wrote in another context.<sup>361</sup> In fact, “we have struck down state elections laws specifically because they give ‘the two old, established parties a decided advantage over any new parties struggling for existence.’”<sup>362</sup>

Perhaps most importantly for today’s partisan gerrymandering cases, Justice Stevens espoused a district-by-district approach to the issue, suggesting that plaintiffs could prevail once they showed

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356. *Id.* at 335.

357. *Id.* at 326-27, 335-41.

358. *Id.* at 321.

359. MANASTER, *supra* note 173, at 37.

360. *Vieth*, 541 U.S. at 341.

361. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 381 (1997) (Stevens, J., dissenting).

362. *Id.* at 379 (quoting *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)).

that politics were the predominant consideration behind their *own* district lines.<sup>363</sup> This contrasts with a theory of partisan gerrymandering that challenges the statewide map as a whole.<sup>364</sup> Over a decade after Justice Stevens espoused this theory, the Court unanimously embraced it in 2018, ruling in a challenge to Wisconsin's map that the plaintiffs lacked standing because they brought only a statewide claim and lived in districts that themselves did not suffer blatant partisan gerrymandering.<sup>365</sup> The Court held that partisan gerrymandering is a district-specific claim, and that plaintiffs must live in the district to have standing and must litigate the claim on a district-specific basis.<sup>366</sup> Thus, the Court eventually vindicated Justice Stevens's views on the mechanics of a partisan gerrymandering claim.

Retirement has not silenced the Justice's opinion on gerrymanders. In a post-retirement interview, Justice Stevens stated that his views on gerrymandering go "back to the fundamental equal protection principle that government has the duty to be impartial."<sup>367</sup> "Nowadays," he continued, "the political parties acknowledge that they are deliberately trying to gerrymander the districts in a way that will help the majority.... That's outrageously unconstitutional in my judgment."<sup>368</sup> Furthermore, Justice Stevens recently called for a constitutional amendment banning the practice altogether.<sup>369</sup> The Justice even proposed his own language:

Districts represented by members of Congress, or by members of any state legislative body, shall be compact and composed of contiguous territory. The state shall have the burden of justifying any departures from this requirement by reference to neutral criteria such as natural, political, or historic boundaries or demographic changes. The interest in enhancing or preserving

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363. *Vieth*, 541 U.S. at 328-31 (Stevens, J., dissenting).

364. *See, e.g., Whitford v. Gill*, 218 F. Supp. 3d 837, 843 (W.D. Wis. 2016) (three-judge court) (striking down Wisconsin's map under the efficiency gap, a statewide claim).

365. *See Gill v. Whitford*, 138 S. Ct. 1916, 1929-31, 1933-34 (2018).

366. *See id.*

367. Kali Borkoski, *An Interview with Justice Stevens*, SCOTUSBLOG (Nov. 3, 2011, 3:10 PM), <http://www.scotusblog.com/2011/11/an-interview-with-justice-stevens/> [<https://perma.cc/3TYG-7E3C>].

368. *Id.*

369. JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* 54-55 (2014).

the political power of the party in control of the state government is not such a neutral criterion.<sup>370</sup>

Several decades after espousing an impartial governance theory as applied to partisan gerrymandering and focusing on the district-specific nature of the harm—first in *Davis* and again in *Vieth*—Justice Stevens’s overarching jurisprudential standard has started to gain traction. Although Justice Kennedy most vociferously promoted a First Amendment approach to partisan gerrymanders,<sup>371</sup> Justice Stevens also invoked the First Amendment as a potential standard, and his underlying impartiality rationale has endured.<sup>372</sup> That theory, along with his now-vindicated district-specific approach, could have a major influence in today’s biggest gerrymandering disputes.

### C. Campaign Finance

Unlike in election administration—where he created the main test—or legislative districting—where his approach to partisan gerrymandering is just now starting to gain steam—Justice Stevens had a more modest influence on the world of campaign finance. Indeed, Justice Stevens’s most significant and well-known contribution came in dissent. Yet his approach has helped to frame the debate and spark vigorous opposition. And much like in the other areas of the law of democracy, he stayed consistent in grounding his approach in a theory of impartial governance.

*Citizens United v. FEC* represents the Supreme Court’s most controversial opinion on campaign finance to date.<sup>373</sup> The case has

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370. *Id.* at 55.

371. Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 NW. U. L. REV. 655, 682 (2017) (“Justice Kennedy, for instance, has written in the context of partisan gerrymandering that ‘First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.’” (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment))); see also Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 ELECTION L.J. 288, 293 (2014); Daniel P. Tokaji, *Voting is Association*, 43 FLA. ST. U. L. REV. 763, 790-91 (2016).

372. *Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004) (plurality opinion) (“Justice Stevens relies on *First Amendment* cases to suggest that politically discriminatory gerrymanders are subject to strict scrutiny under the *Equal Protection Clause*.”).

373. See Gabrielle Levy, *How Citizens United Has Changed Politics in 5 Years*, U.S. NEWS & WORLD REP. (Jan. 21, 2015, 12:26 PM), <https://www.usnews.com/news/articles/2015/01/21/5->

produced numerous scholarly articles,<sup>374</sup> heated political rhetoric,<sup>375</sup> and even a notoriously tense exchange between Justice Samuel Alito and President Barack Obama during the President's State of the Union address shortly after the decision came down.<sup>376</sup> No wonder the case produced the longest opinion ever penned by even the prolific John Paul Stevens.<sup>377</sup>

Yet before he knew defeat, Justice Stevens knew victory: by writing a majority opinion upholding various campaign finance regulations and, more importantly, crafting a theory of impartial governance for the government's ability to regulate money in politics.

In 2002, Senators John McCain and Russ Feingold successfully engineered the passage of the Bipartisan Campaign Reform Act (McCain-Feingold).<sup>378</sup> McCain-Feingold addressed the increased role of "soft money" in political campaigns.<sup>379</sup> "Soft money" included donations directly to national political parties that the party would use for get-out-the-vote and other party-building efforts, but in reality benefited specific candidates.<sup>380</sup> Congress found that these soft money donations were effectively circumventing the contribution limits the Court had upheld in its seminal decision in *Buckley v. Valeo*.<sup>381</sup> If a person wanted to give money outside of the contribution limits to his or her preferred candidate, the donor could simply

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years-later-citizens-united-has-remade-us-politics [https://perma.cc/8LTP-FFEV].

374. See Robert G. Boatright & Molly Brigid Flynn, *The Poverty of "Corruption": On Reframing the Debate on Money in Politics*, 9 ALBANY GOV'T L. REV. 341, 342-43 (2016); Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 417-18 (2013).

375. See, e.g., Benjamin Oreskes, *Clinton Pledges Constitutional Amendment to Overturn Citizens United Ruling*, POLITICO (July 16, 2016, 1:28 PM), <http://www.politico.com/story/2016/07/hillary-clinton-citizens-united-225658> [https://perma.cc/V55G-63N2].

376. See Robert Barnes, *Reactions Split on Obama's Remark, Alito's Response at State of the Union*, WASH. POST (Jan. 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012802893.html> [https://perma.cc/7ZQC-C8JT].

377. See *Citizens United v. FEC*, 558 U.S. 310, 393 (2010) (Stevens, J., concurring in part and dissenting in part); Jeffrey Toobin, *Money Unlimited*, NEW YORKER (May 21, 2012), <http://www.newyorker.com/magazine/2012/05/21/money-unlimited> [https://perma.cc/U2QG-4QH8].

378. The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002).

379. See *Major Provisions of the Bipartisan Campaign Reform Act of 2002*, FED. ELEC. COMM'N, [http://www.fec.gov/press/bkgnd/bcra\\_overview.shtml](http://www.fec.gov/press/bkgnd/bcra_overview.shtml) [https://perma.cc/R6U2-MKU5].

380. See *McConnell v. FEC*, 540 U.S. 93, 122-26 (2003) (joint opinion of Stevens and O'Connor, JJ.), *overruled by Citizens United*, 558 U.S. 310.

381. See *id.* at 126; *Buckley v. Valeo*, 424 U.S. 1, 23-38 (1976) (per curiam) (upholding as constitutional various Federal Election Campaign Act provisions limiting contributions to campaigns).



donate the money to a political party committee, knowing the committee would spend it to help the candidate. McCain-Feingold also targeted the rise of issue advocacy advertising. For instance, the bill contained provisions that prevented corporations from issuing “electioneering communications”—defined as any communication “expressly advocating the election or defeat of particular candidates”—within thirty days of a primary/caucus or sixty days of a general election.<sup>382</sup>

Then-Senate Majority Whip Mitch McConnell led a constitutional attack on McCain-Feingold, using the language from *Buckley* to argue that the law unconstitutionally infringed free speech.<sup>383</sup> In a joint opinion by Justices Stevens and O’Connor, the Supreme Court turned back the assault.<sup>384</sup> “Money, like water, will always find an outlet,” they wrote.<sup>385</sup> Accordingly, Congress had taken necessary remedial steps to prevent “both ... actual corruption ... and ... the appearance of corruption.”<sup>386</sup> More importantly, Justice Stevens espoused a broad view of corruption that Congress could act to prevent. More than just quid pro quo exchanges, Justice Stevens worried that large donations could lead to ingratiation and undue access for the donor. As he and Justice O’Connor wrote, “[i]t is not only plausible, but likely, that candidates would feel grateful for such [soft money] donations [to national political parties] and that donors would seek to exploit that gratitude.”<sup>387</sup> Justice Stevens believed that a member of Congress would feel certain obligations to a wealthy donor who gave to the national party knowing that the party would use this soft money to help the candidate during the election. Corporations or other large entities also should not be able to use their larger megaphones to influence a campaign soon before Election Day. This viewpoint is consistent with how Justice Stevens formulated his impartial governance theory of democracy. For Justice Stevens, wealthy donors should not have better access to a Congress member’s ear, regardless of whether the corruption (or its appearance) came from direct quid pro quo exchanges or a broader

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382. *McConnell*, 540 U.S. at 189-90 (citing 2 U.S.C. § 434(f)(3)(A)(i) (2012)).

383. *See id.* at 134.

384. *Id.* at 114, 223-24.

385. *Id.* at 224.

386. *Id.* at 136 (quoting *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982)).

387. *Id.* at 145.

understanding of undue access.<sup>388</sup> Similarly, he thought that corporations—much like the majority that draws legislative districts—should not have an outsized voice in a political campaign.

Samuel Alito replaced Sandra Day O'Connor on the Court in 2006.<sup>389</sup> A few years later, in *Citizens United*, the Justices revisited the “electioneering communication” issue it had faced in *McConnell*; this time, without his *McConnell* coauthor on the Court, Justice Stevens found himself in dissent.<sup>390</sup>

During the 2008 election, a corporation known as Citizens United wanted to broadcast a film called *Hillary: The Movie*. The film directly attacked Hillary Clinton, a presidential candidate in the 2008 Democratic primaries. The Bipartisan Campaign Reform Act, however, would classify *Hillary: The Movie* as an “electioneering communication,” which the law would prohibit during the election windows.<sup>391</sup> Citizens United filed suit against the Federal Election Commission in federal court, at first arguing narrowly that the movie should not fall within the statutory definition of “electioneering communication” and then, at the Supreme Court’s prompting, arguing that the law was facially invalid. After two oral arguments, the Supreme Court issued a broad opinion that struck down this part of McCain-Feingold and the *McConnell* precedent upholding it.<sup>392</sup> Justice Kennedy, writing for the majority, stated:

The Government has “muffle[d] the voices that best represent the most significant segments of the economy.” And “the electorate [has been] deprived of information, knowledge and opinion vital to its function.” By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.<sup>393</sup>

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388. *Id.* at 150-52, 223-24.

389. David Stout, *Alito is Sworn in as Justice After 58-42 Vote to Confirm Him*, N.Y. TIMES (Jan. 31, 2006), <http://www.nytimes.com/2006/01/31/politics/politicsspecial1/alito-is-sworn-in-as-justice-after-5842-vote-to.html> [<https://perma.cc/A7BA-4UW7>].

390. *Citizens United v. FEC*, 558 U.S. 310, 393 (2010) (Stevens, J., concurring in part and dissenting in part).

391. See The Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002); Toobin, *supra* note 377.

392. *Id.* at 354 (2010) (majority opinion) (citations omitted).

393. *Id.* at 354 (majority opinion) (alterations in original) (citations omitted).

Justice Stevens watched with consternation as his approach in *McConnell* burned. “Today’s decision is backwards in many senses,” Justice Stevens asserted in his lengthy dissent.<sup>394</sup> He accused the majority of elevating a personal “agenda over the litigants’ submissions.”<sup>395</sup> “[F]ive Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”<sup>396</sup> Seeing the storm clouds on the horizon in an earlier case, Justice Stevens had warned that using the First Amendment to invalidate campaign finance laws would resemble the substantive due process doctrines that conservatives abhorred.<sup>397</sup> That day had now come. The liberal Justice who professed opposition to judicial activism balked at what he perceived was an immense overreach.<sup>398</sup> The Court, he said, should have decided simply whether *Hillary: The Movie* fell within McCain-Feingold’s “electioneering communication” provision and left it at that.

Even beyond the Court’s judicial overreach, however, Justice Stevens had problems with what he saw as the Court’s blithe obfuscation of individuals and corporations—especially because it conflicted with his theory of impartial governance. McCain-Feingold regulated only “electioneering communications” funded via corporations or other entities. Yet “[t]he Framers ... took it as a given that corporations could be comprehensively regulated in the service of the public welfare.”<sup>399</sup> Thus, “[a]t bottom, the Court’s opinion is ... a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining

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394. *Id.* at 478 (Stevens, J., concurring in part and dissenting in part).

395. *Id.*

396. *Id.* at 398.

397. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398-99 (2000) (Stevens, J., concurring) (“Money is property; it is not speech.... The right to use one’s own money to hire gladiators, or to fund ‘speech by proxy,’ certainly merits significant constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases.”).

398. See Toobin, *supra* note 377 (“In some ways, Stevens’s greatest objections were procedural.... [I]t was especially galling that the Court converted *Citizens United* from a narrow dispute ... to an assault on a century of federal laws and precedents. To Stevens, it was the purest kind of judicial activism.”).

399. *Citizens United*, 558 U.S. at 428 (Stevens, J., concurring in part and dissenting in part).

self-government since the founding.”<sup>400</sup> For Justice Stevens, the government’s interest in preventing corruption justified limits on corporate contributions and expenditures. That is because undue influence of the wealthy would necessarily come at the expense of the less privileged, undermining an impartial governance notion of democratic participation.

Of course, Justice Stevens was in dissent, so his views have not taken hold as binding precedent. But his dissent inspired at least one court. In *Stop This Insanity, Inc. v. FEC*, Judge Beryl A. Howell of the United States District Court for the District of Columbia tracked Justice Stevens’s thought process in *Citizens United*.<sup>401</sup> Judge Howell determined that the government could limit contributions to certain political advocacy groups; these groups not only engaged in traditional political advocacy, but also made direct contributions to candidates.<sup>402</sup> Judge Howell found that the government had a significantly important anticorruption interest to impose such restrictions:

To conclude that a “hybrid” PAC’s direct contributions to (and attendant coordination with) candidates and parties do not infect, or appear to infect, all of its operations in the political arena is naïve and simply out of touch with the American public’s clear disillusionment with the massive amounts of private money that have dominated the political system, particularly since *Citizens United*.<sup>403</sup>

Judge Howell cited Justice Stevens’s dissent in *Citizens United* several times to justify this approach.<sup>404</sup> “As Justice Stevens noted in his piercing dissent,” Judge Howell wrote, “laws such as [the FECA] do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other.”<sup>405</sup> Ultimately, “[a] democracy cannot function effectively when its constituent members believe laws are being

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400. *Id.* at 479.

401. *See* 902 F. Supp. 2d 23, 26, 47-48 (D.D.C. 2012).

402. *Id.* at 40.

403. *Id.* at 44 (footnote omitted) (citing *Citizens United*, 558 U.S. at 452-53 (Stevens, J., dissenting)).

404. *Id.* at 40, 44, 47-48.

405. *Id.* at 47-48 (alterations in original) (quoting *Citizens United*, 558 U.S. at 473).

bought and sold.”<sup>406</sup> Such an idea disrupted a theory of impartial governance because it cut against the notion that representatives will do as their constituents—and not just as their wealthy donors—will want.

As with partisan gerrymanders, retirement has not stopped Justice Stevens’s crusade against campaign finance deregulation. He proposed a constitutional amendment that would solve the pernicious problems he perceives in this area:

Neither the First Amendment nor any other provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office, or their supporters, may spend in election campaigns.<sup>407</sup>

Both the *Stop This Insanity* opinion and his proposed constitutional amendment nicely encapsulate Justice Stevens’s thoughts in this area. First, Justice Stevens never followed the logic in *Buckley* that money represented speech. As he wrote in another campaign finance case:

Money is property; it is not speech. Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.<sup>408</sup>

If money represents property rather than speech, then the government naturally has wider latitude to prescribe restrictions on campaign expenditures.<sup>409</sup> An impartial government, for Justice Stevens, does not bend toward those with more money but rather

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406. *Id.* at 44 (quoting *Citizens United* 558 U.S. at 453).

407. STEVENS, *supra* note 369, at 79.

408. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (footnote omitted).

409. *Cf. Kelo v. City of New London*, 545 U.S. 469, 488-89 (2005) (“[W]e also decline to second-guess the City’s determinations as to what lands it needs to acquire in order to effectuate the project.”).

sets clear boundaries that equally benefit the impoverished and the wealthy.

Second, the Justice considered elections “a species of debate between two adversaries.”<sup>410</sup> Accordingly, equalizing time and money between two candidates made perfect sense to him. Otherwise, Justice Stevens wrote, an appellate procedure rule equalizing the time between two oral advocates would also run afoul of the First Amendment.<sup>411</sup> If courts can impose valid limits on that speech, then restrictions on campaign contributions easily follow suit. For Justice Stevens, these kinds of campaign finance limits are the only way to ensure that our representative democracy is an impartial one.<sup>412</sup>

An impartial governance theory of campaign finance requires a roughly equal playing field among both candidates and donors. For Justice Stevens, no one should have better access to the ears of a legislator, at least not because of campaign expenditures that helped that representative win and stay in office. Candidates themselves should compete on a mostly equal playing field. He believed that we can have a strong democratic system only if the government is allowed to ensure that elections are fair and that legislation is not the result of undue influence from donors. Even the appearance of this impropriety harms the ideals of impartial governance because the general public will think that money, and not the best ideas and policy positions, is winning the day. Justice Stevens’s overarching principle of impartial governance meant that the Court should uphold laws that limit this improper influence, much in the same way that this same theory forbids drawing unfair lines in the redistricting context that improperly favor the ruling class. None of this is to say that Justice Stevens was necessarily correct in his

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410. JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 138 (2011).

411. *Id.*

412. *See id.* Although Justice Stevens was in dissent in *Citizens United*, the experiences of other Western democracies track his views. Both Great Britain and Canada have strict campaign spending limits. *See* RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 121-22 (2016). One study showed that Canada, with its strict spending limits, has had far higher rates of incumbent turnover in its House of Commons than the U.S. House of Representatives has experienced during the same time period. *See* Anthony J. Gaughan, *The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 *OHIO ST. L.J.* 791, 836 (2016).

analysis, but only that he espoused a consistent theory to explain why he believed the government could regulate money in politics.

Justice Stevens's theory for campaign finance is also consistent with his analysis for other areas of the law of democracy: judges should police election laws that fail to ensure impartiality in the democratic process. But courts should defer to legislatures when they enact rules that foster greater competition, dislodge entrenchment, or help the political minority. That approach to campaign finance has not won the day with the current Supreme Court. Yet Justice Stevens's writing in this area has helped to frame that debate—itsself an important contribution to election law over the past several decades.

Moreover, Justice Stevens's views have influenced the *public* debate. “Overturn[] *Citizens United*” became a rallying cry for 2016 Democratic presidential candidates Hillary Clinton and Bernie Sanders, with both of them suggesting that they would appoint Supreme Court justices who would reverse the decision.<sup>413</sup> Grass-roots organizations have cropped up with their sole goal of minimizing the influence of large moneyed interests in elections.<sup>414</sup> Campaign finance reformers have sought ways to reduce the cost of running a campaign.<sup>415</sup> These movements implicitly derive their message from Justice Stevens's theory of impartial governance.

#### *D. Deciding a Presidential Election*

The fictional Chicago bartender Mr. Dooley once observed: “no matther whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns.”<sup>416</sup> In December 2000, however, the

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413. Peter Overby, *Presidential Candidates Pledge to Undo 'Citizens United.' But Can They?*, NPR (Feb. 14, 2016, 6:00 AM), <https://www.npr.org/2016/02/14/466668949/presidential-candidates-pledge-to-undo-citizens-united-but-can-they> [https://perma.cc/M6GQ-BWGU].

414. Peter Overby, *Once Ruled by Washington Insiders, Campaign Finance Reform Goes Grass Roots*, NPR (Apr. 4, 2016, 4:28 PM), <https://www.npr.org/2016/04/04/473005036/once-ruled-by-washington-insiders-campaign-finance-reform-goes-grassroots> [https://perma.cc/L7ZU-5WXL].

415. See Steven Hill, *How to Minimize Money's Role in Politics*, 95 NAT'L CIVIC REV. 17, 17 (2006).

416. FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901), *quoted in* Pamela S. Karlan, *The Partisan of Nonpartisanship: Justice Stevens and the Law of Democracy*, 74 FORDHAM L. REV. 2187, 2187 (2006).



Supreme Court flipped this aphorism upside down: With *Bush v. Gore*, “the election returns followed the Supreme Court.”<sup>417</sup> Ever since *Baker v. Carr*, many observers predicted that it was only a matter of time before the Supreme Court arbitrated a national election.<sup>418</sup> That finally happened in 2000 in *Bush v. Gore*.<sup>419</sup> Justice Stevens led the Court’s response for the liberal wing of the Court, and in doing so, he focused on the role of a judge to remain impartial even in the most partisan of disputes.<sup>420</sup> Given that he was in dissent, Justice Stevens’s approach obviously did not have much real-world impact. But just like in *Citizens United*, his opinion showed the consistency by which he strived for an impartial governance theory to election law, with impartial judges at the forefront.

Even before that dispute, Justice Stevens’s own history on the Seventh Circuit foreshadowed his approach to the questions surrounding a post-election contest. In *Hartke v. Roudebush*, a special three-judge district court, which included then-Judge Stevens of the Seventh Circuit, considered whether to prevent Indiana from recounting a disputed U.S. Senate race.<sup>421</sup> Although two judges agreed with the winning candidate to stop the recount, stating that an election contest was permissible only in the U.S. Senate itself, Judge Stevens dissented.<sup>422</sup> He believed that state election officials and the state judiciary could impartially resolve any questions over the recount without usurping the Senate’s ultimate role in determining election contests.<sup>423</sup> As Judge Stevens wrote in his dissent,

[T]he exercise of “judgment” by state election officials at various stages of the counting and recounting of ballots does not invade the Senate’s power to make the final judgment on the outcome. The evidence establishes without contradiction that the Indiana recount procedures have integrity, that the original ballots and

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417. Karlan, *supra* note 416, at 2187.

418. See, e.g., FOLEY, *supra* note 287, at 233-34; Nelson Lund, *From Baker v. Carr to Bush v. Gore, and Back*, 62 CASE W. RES. L. REV. 947, 947 (2012).

419. 531 U.S. 98 (2000).

420. *Id.* at 128-29 (Stevens, J., dissenting).

421. *Hartke v. Roudebush*, 321 F. Supp. 1370, 1370-72 (S.D. Ind. 1970) (three-judge court), *rev’d*, 405 U.S. 15 (1972).

422. *Id.* at 1373, 1376; *id.* at 1378 (Stevens, J., dissenting).

423. *Id.* at 1378.

other records are carefully preserved for future study, that an adequate record of what transpires during a recount is maintained, and that any judgment as to whether or not certain categories of ballots (or even individual ballots) should be counted, may be reviewed subsequently by the body having the power finally to resolve an election contest.<sup>424</sup>

Moreover, the Indiana courts could adequately resolve any disputes over these procedures.<sup>425</sup> Impartial election officials and impartial judges were the best solution to potential partisan overreach in a close election. The Supreme Court agreed with Judge Stevens and reversed the decision.<sup>426</sup>

Twenty-eight years later and thirty-eight years after the Supreme Court originally entered the political thicket through *Baker v. Carr*, Justice Stevens and his colleagues faced a similar dilemma, but this time it involved the higher-stakes, near-constitutional crisis surrounding the 2000 presidential election.<sup>427</sup> Justice Stevens's position remained the same: the federal judiciary should trust state judges to implement the election procedures fairly.<sup>428</sup> Yet once again he found himself in dissent.<sup>429</sup>

The controversy started innocently enough. Even before polls opened on November 7, 2000, politicians predicted a tight race between Texas Governor George W. Bush and Vice President Al Gore.<sup>430</sup> When polls closed, commentators declared Florida—and thus the outcome of the entire election—“too close to call.”<sup>431</sup> Then, the networks deigned George W. Bush the winner in Florida by a slim margin, thereby giving him the presidency.<sup>432</sup>

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424. *Id.*

425. *Id.* (“Nor has there been any suggestion that the Indiana judiciary is not perfectly capable of handling Indiana litigation without assistance or interference from a federal district court.”).

426. *Roudebush v. Hartke*, 405 U.S. 15, 23, 26 (1972).

427. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

428. *Id.* at 123-24 (Stevens, J., dissenting).

429. *Id.* at 123.

430. Richard L. Berke & Janet Elder, *The 2000 Campaign: The Polls; Poll Shows Either Candidate Within Reach of Victory*, N.Y. TIMES (Nov. 6, 2000), <http://www.nytimes.com/2000/11/06/us/the-2000-campaign-the-polls-poll-shows-either-candidate-within-reach-of-victory.html> [https://perma.cc/H7R6-4826].

431. FOLEY ET AL., *supra* note 303, at 719.

432. See Jeffrey Toobin, *Precedent and Prologue*, NEW YORKER (Dec. 6, 2010), <http://www.newyorker.com/magazine/2010/12/06/precedent-and-prologue> [https://perma.cc/KHN4-FHZL].

Yet both sides discovered significant problems in the ballot-casting and counting process. Apparently, many elderly voters in Palm Beach County, Florida accidentally voted for Pat Buchanan instead of Al Gore because of the so-called “butterfly ballot,” which listed candidates close together on both sides of a central punch card and therefore confused voters.<sup>433</sup> But there was no legal remedy for this confusion. More significantly, election machines did not register many ballots because the “chads” that voters were supposed to punch out to indicate their choice either did not become completely dislodged (“hanging chads”) or had barely been dislodged in the first place (“dimpled chads”). Litigation naturally ensued. The Florida state courts, interpreting Florida election law, ordered a manual recount of all “undervotes” and “overvotes.”<sup>434</sup> “Undervotes” included ballots with no Presidential preference—namely, the “hanging” and “dimpled” chads—while “overvotes” constituted those ballots where the machine indicated more than one candidate marked for president. The Florida Supreme Court provided only one standard for the recount: the “clear indication of the intent of the voter.”<sup>435</sup>

Rapid developments followed. The day after the Florida Supreme Court ordered the recount, the United States Supreme Court issued an emergency stay blocking the recount from going forward.<sup>436</sup> Two days later, the Court heard oral argument on the merits.<sup>437</sup> George W. Bush’s legal team argued that the Florida Supreme Court’s vague “clear intent of the voter” standard violated the Equal Protection Clause.<sup>438</sup> “Intent of the voter,” Bush claimed, was too ephemeral for a statewide recount; thus, votes would not be equally counted.<sup>439</sup> The Supreme Court agreed.<sup>440</sup> In an opinion handed down the very next day, the Supreme Court permanently halted

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433. FOLEY ET AL., *supra* note 303, at 720.

434. *Gore v. Harris*, 772 So. 2d 1243, 1247, 1262 (Fla. 2000).

435. *Id.* at 1257.

436. *Bush v. Gore*, 531 U.S. 1046, 1046 (2000) (issuing the stay on Dec. 9, 2000).

437. See Linda Greenhouse, *Bush v. Gore is Now in Hands of Supreme Court*, N.Y. TIMES (Dec. 11, 2000), <http://www.nytimes.com/2000/12/11/us/contesting-the-vote-the-overview-bush-v-gore-is-now-in-hands-of-supreme-court.html> [<https://perma.cc/C9QK-7QWF>].

438. Oral Argument at 00:19:52, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949), <https://www.oyez.org/cases/2000/00-949> [<https://perma.cc/55LP-JPTF>] (“You say the intent of the voter is not good enough.” (statement of Breyer, J.)).

439. See *id.* at 21:04.

440. *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam).

the recount.<sup>441</sup> The Court found that the state could not conduct a constitutionally valid recount in time to meet Florida's statutory deadline for certifying presidential electors.<sup>442</sup> By a five-four vote, the Supreme Court ended the controversy, essentially deciding the election in favor of George W. Bush.

Justice Stevens dissented.<sup>443</sup> Despite his opposition to judicial non-intervention in general, Justice Stevens took umbrage with the Court meddling in the state courts' post-election procedures. The Florida Supreme Court already "did what courts do—it decided the case before it in light of the legislature's intent to leave no legally cast vote uncounted."<sup>444</sup> The United States Supreme Court had no business interfering with a state-based issue that "does not even raise a colorable federal question."<sup>445</sup> In fact, for Justice Stevens, the entire majority opinion reeked of judicial activism and inappropriate bench legislation given that the state courts had already passed upon the issues. "On questions of state law, we have consistently respected the opinions of the highest courts of the States," he wrote.<sup>446</sup> Justice Stevens believed that the Court should have done so in *Bush v. Gore* as well.

Accordingly, Justice Stevens professed complete faith in state court judges to oversee the ballot-counting process. Justice Stevens blatantly assumed "that the members of [the Florida Supreme Court] and the judges who would have carried out its mandate are impartial."<sup>447</sup> "It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law," Justice Stevens wrote.<sup>448</sup> For him, *Bush v. Gore* damaged this confidence. "The endorsement of that [lack of confidence] by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land," he concluded.<sup>449</sup>

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441. *Id.* at 110-11.

442. *See id.* at 110.

443. *See id.* at 123 (Stevens, J. dissenting).

444. *Id.* at 128 (footnote omitted).

445. *Id.*

446. *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Stevens, J., dissenting) (order for stay).

447. *Bush*, 531 U.S. at 128 (Stevens, J., dissenting).

448. *Id.*

449. *Id.*

Placing confidence in state judges to resolve this case furthered Justice Stevens's view of impartial governance because it left the decision to those who were closest to the dispute and the evidence, and to whom he believed would be truly impartial. Of course, Justice Stevens's experience with the corrupt Illinois judicial system gave him ample reason to distrust state judges.<sup>450</sup> During his investigation of two Illinois Supreme Court justices, he witnessed just how untrustworthy state court judges—particularly *elected* state judges—could prove in practice.<sup>451</sup> Yet Justice Stevens had unflagging faith in the judicial system as a whole. At a young age, Justice Stevens saw appellate judges do what an emotionally-charged jury could not: decide an issue involving his father's criminal conviction based upon facts and evidence.<sup>452</sup> As Jeffrey Toobin noted, the exoneration of Ernest Stevens left “[an] influence ... greater than Stevens acknowledges. His jurisprudence is distinguished by his confidence in the ability of judges to resolve difficult issues.”<sup>453</sup> Justice Stevens certainly witnessed corrupt and partial judges but, more importantly, he also saw the social value in ultimately trusting the judiciary to do the right thing. Former Justice Stevens clerk Deborah Pearlstein wrote: “Whether you take the examples from [Justice Stevens’s] personal life, or the litany of cases he’s heard in decades on the bench, his reliance on and confidence in judges to find out the truth was pretty unswerving.”<sup>454</sup>

Justice Stevens's dissent in *Bush v. Gore* grappled with how best to resolve a highly partisan dispute so as to achieve, as much as possible, impartial governance. He expressed concern at the possible arbitrary—and subjective—vote counting process. “Admittedly,” he stated, “the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns.”<sup>455</sup> However, Justice Stevens found his concerns alleviated “by the fact that a single *impartial* magistrate will ultimately adjudicate all objections arising from the recount

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450. See *supra* Part II.

451. See *supra* text accompanying notes 176-98.

452. See Toobin, *supra* note 6; see also *supra* notes 149-55 and accompanying text.

453. Toobin, *supra* note 6.

454. *Id.*

455. *Bush v. Gore*, 531 U.S. 98, 126 (2000) (Stevens, J., dissenting).

process.”<sup>456</sup> Judges decided cases impartially, almost as an ontological fact; an experience with a few bad apples did not poison Justice Stevens’s perception. Justice Stevens insisted that “we have consistently respected the opinions of the highest courts of the States.”<sup>457</sup> In the end, the Justice found confidence in the judiciary more important than any previous incompetence he had witnessed in the state courts. He concluded, “Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”<sup>458</sup>

Accordingly, Justice Stevens thought that the U.S. Supreme Court did not need to resolve the dispute because the Florida Supreme Court had already settled the matter. The Justice could find no evidence of partiality in the state court’s decision. Thus, involvement at the federal court level suspiciously resembled a blatantly partisan tactic to achieve a different result, rather than a reasoned measure to ensure impartial democratic governance. To those who might say that Justice Stevens’s vote itself was partisan in favoring Gore, Justice Stevens would likely retort that his dissent embodied an impartial governance theory that permeated his election law jurisprudence. Reversing the Florida Supreme Court, which did what courts regularly do, was to Justice Stevens the partisan act that impugned impartial governance.

For Justice Stevens, the Supreme Court’s capitulation in such partisan parlor games severely damaged the impartial governance theory on two levels. First, the Court unnecessarily cast a shadow over the impartiality of state judges. Second—and more damningly—resolving the dispute in *Bush v. Gore* at the federal level damaged the Supreme Court’s own impartial bona fides. Even twelve years later, disgruntled observers still argued that the Court “stole” the election in George W. Bush’s favor.<sup>459</sup> Even more telling,

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456. *Id.* (emphasis added).

457. *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Stevens, J., dissenting) (order for stay).

458. *Bush*, 531 U.S. at 128-29.

459. See, e.g., Jonathan Chait, *Yes, Bush v. Gore Did Steal the Election*, N.Y. MAG. (June 25, 2012, 12:41 PM), <http://nymag.com/daily/intelligencer/2012/06/yes-bush-v-gore-did-steal-the-election.html> [<https://perma.cc/L2B3-K79G>].

however, is how the Court itself has used the case since it came down. As Jeffrey Toobin noted:

Momentous Supreme Court cases tend to move quickly into the slipstream of the Court's history. In the first ten years after *Brown v. Board of Education* ... the Justices cited the case more than twenty-five times. In the ten years after *Roe v. Wade* ... there were more than sixty-five references to that landmark.... Over [a] decade [later], the Justices have provided a verdict of sorts on *Bush v. Gore* by the number of times they have cited it: zero.<sup>460</sup>

Of course, *Bush v. Gore* was, in many ways, *sui generis*, so it may not be all that surprising that the Court has not relied on it again. Yet the very nature of the case as a one-off decision to decide an election underscores one of Justice Stevens's main points: the Court suffered reputational harms by not staying out of the dispute, as the public saw the case as political and inconsistent with impartial governance. Thus, although Justice Stevens's decision itself in *Bush v. Gore* did not necessarily have a major impact, his approach in the case showed how he consistently trusted impartial judges to serve as neutral arbiters in the most partisan of situations. It is this theory of impartial governance that animated Justice Stevens's time on the Court.

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Election law scholars have found it difficult to reconcile the various strands of the doctrine. Is there a consistent judicial approach to election administration, redistricting, campaign finance, or even resolving a post-election dispute? Although he might not have said so explicitly, Justice Stevens saw a way: through a theory of impartial governance that placed faith in judges to uphold the ideals of a fair democratic process.

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460. Toobin, *supra* note 432. Since Toobin's writing, Justice Thomas cited *Bush v. Gore* in a dissenting opinion, albeit for a routine proposition. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2268-69 n.2 (2013) (Thomas, J., dissenting). But otherwise the Court has not cited the case.



As part of an impartial governance theory, Justice Stevens strongly opposed political entrenchment. Entrenchment, for him, stands directly against the ideal of an impartial government. Justice Stevens envisioned a robust democracy with strong competition on every wing. “[A] central theme of our jurisprudence,” he wrote, is “that the entire electorate ... will benefit from robust competition in ideas and governmental policies that ‘is at the core of our electoral process.’”<sup>461</sup> In particular, Justice Stevens opposed laws that entrenched the two-party system. The paradoxical liberal Republican found himself increasingly displaced as his own party grew more and more conservative. The Justice skeptically scrutinized laws that benefited the two-party system, especially when minor parties suffered as a result.<sup>462</sup> For Justice Stevens, governing officials had a duty not to entrench their own views but instead to govern impartially, even if doing so risked electoral defeat.

To uphold impartial governance, Justice Stevens promoted an unflagging confidence in the judiciary. As former Justice Stevens clerk Andrew Siegel notes, “[t]he glue holding together [Justice Stevens’s decision-making process] is judicial judgment.”<sup>463</sup> Former Justice Stevens clerk Deborah Pearlstein agreed: “Generally, he respects the heck out of the profession of which he’s a member.”<sup>464</sup> This strand from Justice Stevens’s opinions led Jeffrey Toobin to conclude that Justice Stevens’s “jurisprudence is distinguished by his confidence in the ability of judges to resolve difficult issues.”<sup>465</sup> Nowhere do more fundamentally difficult issues appear than in election law, which gives the judiciary a unique role in shaping American democracy in an impartial manner.

## CONCLUSION

Election law has grown into one of the most controversial areas in the American legal system. Justice John Paul Stevens—who was

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461. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 382 (1997) (Stevens, J., dissenting) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 802 (1983)).

462. As he wrote, “[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment.” *Anderson*, 460 U.S. at 793-94.

463. Toobin, *supra* note 6.

464. *Id.*

465. *Id.*

particularly prolific on this topic and crafted the crucial test for election administration and the right to vote that is still used today—had a significant impact on the field. Justice Stevens’s approach to judicial review of the law of democracy, when applied properly to focus on rooting out partisanship in election rules, can help to reconcile the difficult conundrums that all election law cases present: the clash of rights between individual voters and the state to regulate elections; the ability of the legislature to draw district lines while not aggrandizing its power or unduly favoring the majority; the need for First Amendment space to spend money in elections while allowing governments to regulate campaign finance to promote fairness. Justice Stevens approached election law with one idea in mind: Governments should rule impartially. A democracy functioned best when the government neither favored nor disfavored groups and when the governing officials advanced the interests of the governed rather than their own. As historians consider this storied jurist’s legacy, election law, the impartial governance theory, and a trust in the judiciary to ensure fairness should stand out.

APPENDIX: JUSTICE STEVENS'S ELECTION LAW OPINIONS<sup>466</sup>

Case Name	Justice Stevens's Disposition	Court's Holding	Justice Stevens's Views
Bradley v. Lunding, 424 U.S. 1309 (1976)	Order for the Court as Circuit Justice	An Illinois regulation that "prescribes a lottery system for breaking ties resulting from the simultaneous filing of petitions for nomination to elective office" features no infirmities.	The regulation offered an equal chance of receiving a favorable or unfavorable placement on the ballot. Accordingly, Justice Stevens found "insufficient indication of unfairness or irreparable injury to warrant the issuance of a stay against enforcement of the judgment of the Supreme Court of Illinois."
Mandel v. Bradley, 432 U.S. 173 (1977)	Dissenting	Prior summary affirmance in a similar case should not be construed as supporting the proposition that early filing dates are unconstitutionally burdensome on an independent candidate's access to the ballot.	Justice Stevens thought that the early filing date unfairly discriminated against independent candidates by requiring that these candidates make the decision to run for office much sooner than members of national political parties.

466. This list reflects all Supreme Court cases involving election administration, redistricting, ballot access, and campaign finance in which Justice Stevens wrote an opinion. We did not include cases involving union elections or that had only an incidental connection to the electoral system.

<p>United States v. Bd. of Comm'rs, 435 U.S. 110 (1978)</p>	<p>Dissenting</p>	<p>The Voting Rights Act requires that all entities having power over any aspects of the electoral process within designated jurisdictions obtain prior federal approval before changing voting practices or procedures.</p>	<p>The Voting Rights Act only covers designated States and their “political subdivisions.” Here, the city in question does not qualify as a “political subdivision” under the plain language of the statute. Nor does the city qualify as “the State,” because Congress intended to exclude “purely local matters” from the Act’s ambit.</p>
<p>Dougherty Cty. Bd. of Educ. v. White, 439 U.S. 32 (1978)</p>	<p>Majority (concurring)</p>	<p>The board of education qualified as a “political subdivision” under § 5 of the Voting Rights Act, and the rules governing leave for employee candidates constituted a “standard, practice, or procedure” requiring federal preclearance.</p>	<p>In a brief concurrence, Justice Stevens reiterated his views from <i>United States v. Board of Commissioners of Sheffield</i> that the Court had read the Voting Rights Act too broadly. Nonetheless, given <i>stare decisis</i>, Justice Stevens joined the Court’s opinion.</p>

<p>Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978)</p>	<p>Majority (concurring)</p>	<p>Residents of an unincorporated community do not have a right to participate in the political processes of a city merely because the State subjects these residents to the city's jurisdiction.</p>	<p>Justice Stevens agreed with the majority, though he wrote separately to emphasize "that this holding does not make all exercises of extraterritorial authority by a municipality immune from attack" under the Constitution. The present attack failed because the extraterritorial residents did not have a relationship with the city such that they would have an "equally effective" voice in the city's political processes as residents of the municipality.</p>
<p>Ill. State Bd. of Elecs. v. Socialist Workers Party, 440 U.S. 173 (1979)</p>	<p>Separate opinion (concurring in part and concurring in the judgment)</p>	<p>A state statute requiring independent candidates and new political parties to obtain more than 25,000 signatures from one particular metropolitan area to be placed on the statewide ballot violates the Equal Protection Clause.</p>	<p>Justice Stevens thought the State had a valid interest in limiting access to the ballot to "serious candidates," and he did not think rules differentiating between political offices violated the Equal Protection Clause. "The constitutional requirement that [the State] govern impartially would be implicated by a rule that discriminates, for example, between Socialists and Republicans or between Catholics and Protestants. But I question whether it has any application to rules prescribing different qualifications for different political offices."</p>

<p>Marchioro v. Chaney, 442 U.S. 191 (1979)</p>	<p>Majority (author)</p>	<p>A state statute requiring each major political party to have a State Committee consisting of two persons from each county did not violate the parties' associational rights under the First Amendment.</p>	<p>“The State’s interest in ensuring that [the process of selecting and electing candidates] is conducted in a fair and orderly fashion is unquestionably legitimate; ‘as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.’”</p>
<p>City of Rome v. United States, 446 U.S. 156 (1980)</p>	<p>Majority (concurring)</p>	<p>The Voting Rights Act does not provide a “bail out” measure for municipalities or localities if the entire State falls within the preclearance system. Congress validly enacted a statewide remedy under § 2 of the Fifteenth Amendment even absent an express discriminatory purpose.</p>	<p>Congress could validly impose a statewide remedy. Imposing a statewide remedy gave Congress the authority to regulate municipalities that had no history of discriminatory practices.</p>

<p>City of Mobile v. Bolden, 446 U.S. 55 (1980)</p>	<p>Majority (concurring in the judgment)</p>	<p>Concerning multimember legislative districts, facially neutral actions are unconstitutional only if motivated by discriminatory purposes.</p>	<p>“[A] political decision that is supported by valid and articulable justifications cannot be invalid simply because some participants in the decisionmaking process were motivated by a purpose to disadvantage a minority group.”</p>
<p>McDaniel v. Sanchez, 452 U.S. 130 (1981)</p>	<p>Majority (author)</p>	<p>A reapportionment plan submitted by a local legislative body of a jurisdiction covered by the Voting Rights Act in a response to a judicial determination that the existing apportionment of its electoral districts is unconstitutional must comply with the preclearance requirement of § 5 of the Act.</p>	<p>“The preclearance procedure is designed to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process. The federal interest in preventing local jurisdictions from making changes that adversely affect the rights of minority voters is the same whether a change is required to remedy a constitutional violation or is merely the product of a community’s perception of the desirability of responding to new social patterns.”</p>



<p>FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981)</p>	<p>Majority (concurring in the judgment)</p>	<p>The Federal Election Campaign Act does not foreclose a state committee of a political party from designating the national senatorial campaign committee of that party as its agent for making expenditures allowed by the Act, and, accordingly, the FEC acted within its proper authority when it determined to permit such agency agreements.</p>	<p>“[I]t would appear to me to follow almost automatically that the NRSC may act as an agent for the state committees in spending the amounts that state committees are authorized to spend ... since state committees are largely controlled by the state candidates that they serve.”</p>
<p>Clements v. Fashing, 457 U.S. 957 (1982)</p>	<p>Separate opinion (concurring in part and concurring in the judgment)</p>	<p>A provision in a state constitution that renders an officeholder ineligible for the state legislature if his current term will not expire until after the legislative term to which he aspires (“resign-or-run”) does not violate the Equal Protection Clause.</p>	<p>Justice Stevens would not start the Court’s analysis with the appropriate level of scrutiny. Instead, Justice Stevens suggests that “a better starting point may be a careful identification of the character of the federal interest in equality that is implicated by the State’s discriminatory classification.”</p>

<p>Rogers v. Lodge, 458 U.S. 613 (1982)</p>	<p>Dissent</p>	<p>At-large election system employed by the county impermissibly dilutes the voting strength of African Americans.</p>	<p>While agreeing with the Court substantively, Justice Stevens nevertheless “believe[d] the Court err[ed] by holding the structure of the local governmental unit unconstitutional without identifying an acceptable, judicially manageable standard for adjudicating cases of this kind.... [C]onstitutional adjudication that is premised on a case-by-case appraisal of the subjective intent of local decisionmakers cannot possibly satisfy the requirement of impartial administration of the law that is embodied in the Equal Protection Clause of the Fourteenth Amendment.”</p>
<p>Anderson v. Celebrezze, 460 U.S. 780 (1983)</p>	<p>Majority (author)</p>	<p>Ohio’s early filing deadline for candidates burdened independent-minded candidates without a sufficiently weighty state justification.</p>	<p>When state laws burden the right to vote, courts must first “consider the character and magnitude of the asserted injury.” Then, courts must “identify and evaluate the precise interests put forward by the State as justifications for the burdens imposed by its rule.” Finally, the courts must then weigh the two categories against each other.</p>

<p>Karcher v. Daggett, 462 U.S. 725 (1983)</p>	<p>Majority (concurring)</p>	<p>Redistricting disparities that “were not the result of a good-faith effort to achieve population equality” violate the Fourteenth Amendment even when the disparities are only marginal.</p>	<p>Redistricting plans that feature any deviation from equality without a sufficient compelling state justification cannot stand. In this concurrence, Justice Stevens first expressed his hostility to partisan gerrymandering and how such plans are not justified under the one person, one vote principle.</p>
<p>McCain v. Lybrand, 465 U.S. 236 (1984)</p>	<p>Majority (author)</p>	<p>Preclearance of a covered jurisdiction through the United States Attorney General under the Voting Rights Act requires unambiguity. Making the Attorney General aware of an electoral change is not sufficient.</p>	<p>“The preclearance process is by design a stringent one; it is predicated on the congressional finding that there is a risk that covered jurisdictions may attempt to circumvent the protections afforded by the Act ... submissions under the alternative preclearance method ... should be carefully construed to protect the remedial aims of the Act.”</p>

<p>Miss. Republican Exec. Comm. v. Brooks, 469 U.S. 1002 (1984)</p>	<p>Majority (concurring)</p>	<p>Summary affirmance.</p>	<p>Justice Stevens wrote separately to address Justice Rehnquist's dissent. Namely, Justice Stevens thought that Justice Rehnquist's dissent did not fairly categorize the questions presented in the parties' briefs. Additionally, Justice Stevens felt that the District Court had adequately considered the totality of the circumstances regarding vote dilution.</p>
<p>FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985)</p>	<p>Separate opinion (concurring in part and dissenting in part)</p>	<p>The Presidential Election Campaign Fund gave exclusive standing to the Federal Election Commission. Nonetheless, the portion of the Act that prohibited independent "political committees" from expending more than \$1,000 to further a candidate's election violates the First Amendment.</p>	<p>Justice Stevens concurred with the majority concerning the unconstitutionality of the Act's prohibition on independent expenditures. He dissented on the grounds that the Court had no need to decide the standing issue.</p>

<p>Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986)</p>	<p>Dissenting</p>	<p>A state's closed primary system impermissibly interfered with a political party's First Amendment right to define its own associational boundaries. Further, a party rule permitting unaffiliated voters to participate in primary elections does not violate the Qualifications Clause.</p>	<p>The plain language of the Qualifications Clause requires that voters in federal elections "shall have" the qualifications of voters in elections to the state legislature. Because state law allowed only affiliated voters to vote in primary elections for the state legislature, the plain language of the Qualifications Clause thus required that only affiliated voters could vote in primary elections for federal offices.</p>
<p>Thornburg v. Gingles, 478 U.S. 30 (1986)</p>	<p>Separate opinion (concurring in part and dissenting in part)</p>	<p>Plaintiffs claiming impermissible vote dilution must demonstrate that "electoral devices" resulted in unequal access to the electoral process.</p>	<p>Justice Stevens would have deferred more to the District Court's findings: "I cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in [a particular district] to have less opportunity than white voters to elect representatives of their choice."</p>

<p>Meyer v. Grant, 486 U.S. 414 (1988)</p>	<p>Majority (author)</p>	<p>A statute that penalizes a person who pays someone to circulate ballot petitions does not survive exacting scrutiny under the First Amendment.</p>	<p>“Legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment. That principle applies equally to the discussion of political policy generally or advocacy of the passage or defeat of legislation.”</p>
<p>Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214 (1989)</p>	<p>Majority (concurring)</p>	<p>Complex state laws that governed the internal affairs of political parties, including a ban on the political parties’ ability to endorse primary candidates, violated the parties’ free associational rights under the First Amendment.</p>	<p>Echoing an earlier opinion of Justice Blackmun, Justice Stevens expressed his discomfort with “tests [with] such easy phrases as ‘compelling [state] interest’ and ‘least drastic [or restrictive] means.’”</p>

<p>Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990)</p>	<p>Majority (concurring)</p>	<p>A state statute prohibiting corporations from making independent expenditures in support of political candidates from their general treasuries was narrowly tailored because the act did not impose an absolute ban on all forms of corporate political spending.</p>	<p>Justice Stevens wrote separately to express his view that the distinction between contributions and independent expenditures should have little weight when applied to corporations. For Justice Stevens, the danger of either the fact or even the appearance of quid pro quo corruption justified limits on corporate expenditures and contributions.</p>
<p>Chisom v. Roemer, 501 U.S. 380 (1991)</p>	<p>Majority (author)</p>	<p>State supreme court elections fall within the ambit of § 2 of the Voting Rights Act.</p>	<p>Justice Stevens provides some insight into his view on judges, stating that “ideally public opinion should be irrelevant to the judge’s role because the judge is so often called upon to disregard, or even to defy, popular sentiment.” He quotes a publication from his pre-Court years: “Financing a campaign, soliciting votes, and attempting to establish charisma or name identification are, at the very least, unseemly for judicial candidates because it is the business of judges to be indifferent to popularity.”</p>



<p>Hous. Lawyer's Ass'n v. Att'y Gen. of Texas, 501 U.S. 419 (1991)</p>	<p>Majority (author)</p>	<p>The vote dilution provisions in § 2 of the Voting Rights Act applies to the election of state trial judges.</p>	<p>"It is equally clear, in our opinion, that the coverage of the Act encompasses the election of executive officers and trial judges whose responsibilities are exercised independently in an area coextensive with the districts from which they are elected."</p>
<p>McCormick v. United States, 500 U.S. 257 (1991)</p>	<p>Dissenting</p>	<p>Quid pro quo is necessary for a conviction under the Hobbs Act when an official receives campaign contributions, regardless of that contribution's legitimacy.</p>	<p>Justice Stevens thought using the language of quid pro quo confused the issue. For Stevens, the crime occurs when the official accepts the money, regardless of whether that official later supports the legislation in question.</p>
<p>Renne v. Geary, 501 U.S. 312 (1991)</p>	<p>Majority (concurring)</p>	<p>A challenge against a statute barring political parties from endorsing candidates for nonpartisan offices did not present a ripe case or controversy.</p>	<p>Justice Stevens agreed with the majority. In addition to the ripeness issue, Justice Stevens also felt perturbed at "whether a facial overbreadth challenge may be construed to have been made [here]" and whether the injury in question was even redressable.</p>

<p>Burson v. Freeman, 504 U.S. 191 (1992)</p>	<p>Dissenting</p>	<p>A state statute prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place survives strict scrutiny.</p>	<p>Unlike the majority, Justice Stevens did not find that the state had a sufficiently compelling justification in enacting the buffer zone. “We have never regarded tradition as a proxy for necessity where necessity must be demonstrated. To the contrary, our election-law jurisprudence is rich with examples of traditions that, though longstanding, were later held to be unnecessary.”</p>
<p>Presley v. Etowah Cty. Comm’n, 502 U.S. 491 (1992)</p>	<p>Dissenting</p>	<p>Section 5 of the Voting Rights Act does not cover changes other than changes in the rules governing voting.</p>	<p>Justice Stevens felt that the Court had historically construed § 5 to cover the reallocation of decision-making authority. Responding to the majority’s fears of opening Pandora’s box with wide coverage, Justice Stevens proposed a new test based on the facts of the case: “I would hold that the reallocation of decisionmaking authority of an elective office that is taken (1) after the victory of a black candidate, and (2) after the entry of a consent decree designed to give black voters an opportunity to have representation on an elective body, is covered by § 5.”</p>

<p>United States Dep't of Comm. v. Montana, 503 U.S. 442 (1992)</p>	<p>Majority (author)</p>	<p>First, Congress's apportionment of congressional districts among the states presents a justiciable issue. Second, a federal statute requiring "method of equal proportions" to determine representation did not violate the constitutional requirement of apportionment according to "respective numbers."</p>	<p>"[A]lthough common sense supports a test requiring a good faith effort to achieve precise mathematical equality <i>within</i> each State, the constraints imposed by Article I, § 2 itself make that goal illusory for the Nation as a whole."</p>
<p>Shaw v. Reno, 509 U.S. 630 (1993)</p>	<p>Dissenting</p>	<p>A redistricting scheme violates the Fourteenth Amendment if it is "so bizarre on its face that it is unexplainable on grounds other than race"—even if the scheme benefits racial minorities.</p>	<p>Justice Stevens dissented because he thought that a racial gerrymander did not violate the Constitution when the State was attempting to enhance the strength of a minority. "I believe that the Equal Protection Clause is violated when the State creates the kind of uncouth district boundaries ... for the sole purpose of making it more difficult for members of a minority group to win an election."</p>

<p>FEC v. NRA Political Victory Fund, 513 U.S. 88 (1994)</p>	<p>Dissenting</p>	<p>The Federal Election Committee may not independently file a petition for certiorari with the Supreme Court, and the Solicitor General's after-the-fact authorization of the filing did not relate back so as to make the filing timely.</p>	<p>Against the backdrop of the Watergate scandal's history, Justice Stevens thought that the Court should read the Federal Election Commission's powers broadly. Congress empowered the Commission to "appeal" cases, and Justice Stevens thought that this language encompassed more than the narrow reading of mandatory appeals only.</p>
<p>Holder v. Hall, 512 U.S. 874 (1994)</p>	<p>Separate opinion</p>	<p>The plurality stated that, where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, the voting practice cannot be challenged as dilutive under § 2 of the Voting Rights Act.</p>	<p>Justice Stevens wrote separately to respond to Justice Thomas who, in a separate opinion from the plurality, suggested that the terms "standard, practice, or procedure" in the Voting Rights Act should be restricted to only practices that affect ballot access. Justice Stevens noted that the Court had consistently construed the Voting Rights Act broadly, and Congress, aware of the expansive construction, had repeatedly reauthorized the Act.</p>

<p>McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)</p>	<p>Majority (author)</p>	<p>A state statute prohibiting the distribution of anonymous political campaign literature does not survive exacting scrutiny under the First Amendment.</p>	<p>“Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.”</p>
<p>Miller v. Johnson, 515 U. S. 900 (1995).</p>	<p>Dissenting</p>	<p>A redistricting map violates the Equal Protection Clause when race was the “predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”</p>	<p>Justice Stevens believed that the plaintiffs, white voters, did not have standing to bring the claim because they suffered no cognizable injury in a map that served the interest of promoting minority representation. “I do not see how a districting plan that favors a politically weak group can violate equal protection. The Constitution does not mandate any form of proportional representation, but it certainly permits a State to adopt a policy that promotes fair representation of different groups.”</p>
<p>United States Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)</p>	<p>Majority (author)</p>	<p>States may not impose qualifications for federal office beyond those established by the Constitution.</p>	<p>“[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.”</p>

U.S. v. Hays, 515 U.S. 737 (1995)	Majority (concurring in the judgment)	Plaintiffs lack standing to challenge a redistricting map; plaintiffs cannot demonstrate a personalized injury. Racial gerrymandering claims cannot simply be brought by “anybody in the State.”	Although Justice Stevens agreed that the plaintiffs lacked standing, he did so on separate grounds. Unlike the majority, which focused on the injury component, Justice Stevens stated that the plaintiffs lacked standing because they had failed to allege and prove vote dilution.
Colo. Republican Fed. Camp. Comm. v. FEC, 518 U.S. 604 (1996)	Dissenting	Limits on expenditures made by a political party without consultation with the candidate violate the parties’ rights under the First Amendment.	“In my opinion, all money spent by a political party to secure the election of its candidate for the office of United States Senator should be considered a ‘contribution’ to his or her campaign.”
Morse v. Republican Party of Va., 517 U.S. 186 (1996)	Plurality (author)	A fee imposed on delegates to a political party convention impermissibly undercut delegates’ influence on the field of candidates whose names appeared on the ballot and thus weakened the effectiveness of votes cast in the general election.	Justice Stevens found that the fee imposed during the primary process fell within § 5 of the Voting Rights Act. Because the party did not seek preclearance, imposition of the fee violated the Act.

<p>Shaw v. Hunt, 517 U.S. 899 (1996)</p>	<p>Dissenting</p>	<p>Voters who live in an allegedly gerrymandered district have standing to challenge that district, while voters who did not reside in that district and lacked evidence that they were assigned to their district on the basis of race lacked standing.</p>	<p>“A majority’s attempt to enable the minority to participate more effectively in the process of democratic government should not be viewed with the same hostility that is appropriate for oppressive and exclusionary abuses of political power.”</p>
<p>Bush v. Vera, 517 U.S. 952 (1996)</p>	<p>Dissenting</p>	<p>Substantial evidence demonstrated that race led to the neglect of traditional districting criteria, and the districts exhibited a level of racial manipulation in violation of the Fourteenth Amendment.</p>	<p>“By minimizing the critical role that political motives played in the creation of these districts, I fear that the Court may inadvertently encourage this more objectionable use of power in the redistricting process. Legislatures and elected representatives have a responsibility to behave in a way that incorporates the elements of legitimacy and neutrality that must always characterize the performance of the sovereign’s duty to govern impartially.... If any lines ... are worth straightening, it is those that were twisted to exclude, not those altered to include.”</p>



<p>Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997)</p>	<p>Dissenting</p>	<p>State laws prohibiting candidates from appearing on the ballot as a candidate for two political parties (antifusion laws) are sufficiently justified by the state's interest in ballot integrity and political stability.</p>	<p>Stability of the two-party system does not qualify as a sufficient state interest. Rather, "a central theme of our jurisprudence [is] that the entire electorate ... will benefit from robust competition in ideas and governmental policies that 'is at the core of our electoral process.'"</p>
<p>Reno v. Bossier Par. Sch. Bd., 520 U.S. 471 (1997)</p>	<p>Primarily a dissent (concurring in part and dissenting in part)</p>	<p>Under the Voting Rights Act, vote dilution alone is not sufficient to prevent preclearance under § 5. However, vote dilution may demonstrate an intent to retrogress minority voting strength, which would constitute grounds to deny preclearance.</p>	<p>Justice Stevens would have found that vote dilution violating § 2 of the Voting Rights Act would constitute grounds to deny preclearance per se under § 5.</p>

<p>Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998)</p>	<p>Dissenting</p>	<p>A political debate broadcast constitutes a nonpublic forum, meaning candidates can be excluded in a reasonable, viewpoint-neutral way. Generating no appreciable public interest is valid grounds to exclude such a candidate.</p>	<p>Justice Stevens did not dispute the majority's view that a broadcast company does not have an obligation to allow every candidate access to a debate. In this particular case, however, Justice Stevens found the broadcast company's decision unreasonably ad hoc and done in a manner to entrench the two major political parties.</p>
<p>Dep't of Commerce v. U.S. House of Reps., 525 U.S. 316 (1999)</p>	<p>Dissenting</p>	<p>Voters demonstrated sufficient injury for standing to sue the Department of Commerce, seeking an injunction against statistical sampling for the upcoming decennial census.</p>	<p>Although Justice Stevens agreed with the majority on the standing issue, he disagreed with the majority's conclusion on the use of statistical sampling. The Census Act, to Justice Stevens, unambiguously authorized the Secretary of Commerce to use sampling procedures.</p>
<p>Hunt v. Cromartie, 526 U.S. 541 (1999)</p>	<p>Majority (concurring)</p>	<p>Genuine issues about whether a state legislature drew a redistricting plan with impermissible racial motives precludes summary judgment.</p>	<p>In his concurrence, Justice Stevens reiterated his views that an "uncouth" shape provides strong evidence that either political or racial factors motivated the map's architects.</p>

<p>Rice v. Cayetano, 528 U.S. 495 (2000)</p>	<p>Dissenting</p>	<p>An electoral provision predicated the franchise on ancestry constitutes an impermissible racial definition under the Fifteenth Amendment.</p>	<p>Justice Stevens drew parallels with the Court's treatment of Indians, wherein the Court has allowed Congress to single out Indians as part of Congress's plenary authority. That authority should also extend to "native Hawaiians" as defined by the statute in question.</p>
<p>Cal. Democratic Party v. Jones, 530 U.S. 567 (2000)</p>	<p>Dissenting</p>	<p>A state law providing for blanket primary elections impermissibly violates political parties' associational rights under the First Amendment.</p>	<p>"A State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty. This case is about the State of California's power to decide who may vote in an election conducted, and paid for, by the State."</p>
<p>Bush v. Gore, 531 U.S. 98 (2000)</p>	<p>Dissenting</p>	<p>In a statewide vote recount, "clear intent of the voter" is an insufficient standard, in violation of the Equal Protection Clause, to recount votes.</p>	<p>Although "clear intent of the voter" is vague, Justice Stevens nonetheless professed confidence in state judges to make the judgment calls inherent to impartial governance. The Supreme Court should not have intervened in an internal state matter.</p>

<p>Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000)</p>	<p>Majority (concurring)</p>	<p>State statute limiting contributions to various political offices is narrowly tailored, even though the limits imposed were lower than those in <i>Buckley v. Valeo</i>.</p>	<p>Justice Stevens agreed with the majority. He wrote separately to specifically address the issues raised by Justice Kennedy in dissent. Kennedy suggested that the Court review its entire constitutional framework for campaign finance. In response, Justice Stevens stated: "Money is property; it is not speech." Government can impose modest regulations on property. Accordingly, using the First Amendment as a vehicle to strike down campaign finance laws would be no different than the Court's substantive due process decisions.</p>
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<p>Cook v. Gralike, 531 U.S. 510 (2001)</p>	<p>Majority (author)</p>	<p>A requirement that candidates who refused to support a term limit provision have that noted on the ballot was unconstitutional. The States may regulate the incidents of elections to the federal Congress only within the exclusive delegation of power under the Elections Clause, and a state law favoring candidates willing to support particular policy points does not fall within this delegation.</p>	<p>Justice Stevens reiterated the views he set out in <i>United States Term Limits, Inc. v. Thornton</i>: dictating an electoral outcome does not qualify as a procedural mechanism authorized by the Elections Clause.</p>
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<p>Republican Party of Minn. v. White, 536 U.S. 765 (2002)</p>	<p>Dissenting</p>	<p>A state law preventing judicial candidates from announcing views on disputed political and legal issues violates the First Amendment. The prohibition was not narrowly tailored to serve impartiality in the traditional sense, where impartiality meant open-mindedness.</p>	<p>“By obscuring the fundamental distinction between campaigns for the judiciary and the political branches, and by failing to recognize the difference between statements made in articles or opinions and those made on the campaign trail, the Court defies any sensible notion of the judicial office and the importance of impartiality in that context.”</p>
<p>Branch v. Smith, 538 U.S. 254 (2003)</p>	<p>Separate opinion (concurring in part and concurring in the judgment)</p>	<p>Absent evidence that a State will fail timely to perform its congressional redistricting duty, federal courts must neither affirmatively obstruct state redistricting nor permit federal litigation to impede it.</p>	<p>Justice Stevens believed that Congress had implicitly banned at-large elections, and, as such, had preempted the state from statutorily authorizing at-large elections.</p>

<p>McConnell v. FEC, 540 U.S. 93 (2003)</p>	<p>Majority (opinion coauthor)</p>	<p>The “soft money” ban in the Bipartisan Campaign Reform Act does not violate the First Amendment. Similar prohibitions on the source, content, and timing of political advertisements do not run afoul of the Constitution.</p>	<p>In a joint opinion with Justice O’Connor, Justice Stevens expressed the view that “money, like water, always finds an outlet.” Accordingly, the government has a compelling interest in taking measures to combat “both the actual corruption threatened by large financial contributions and ... the appearance of corruption.”</p>
<p>Vieth v. Jubelirer, 541 U.S. 267, 317 (2004)</p>	<p>Dissenting</p>	<p>There are presently no judicially manageable standards to adjudicate claims of partisan gerrymandering.</p>	<p>“In my view, the same standards should apply to claims of political gerrymandering, for the essence of a gerrymander is the same regardless of whether the group is identified as political or racial.”</p>
<p>Cox v. Larios, 542 U.S. 947 (2004)</p>	<p>Majority (concurring)</p>	<p>The Supreme Court summarily affirmed a judgment holding that Georgia’s state redistricting plan violated the one person, one vote principle by deliberately favoring rural and inner city interests.</p>	<p>Justice Stevens wrote a separate concurring opinion to note his view that providing a standard for partisan gerrymanders in <i>Vieth v. Jubelirer</i> would have made the case stronger. “Drawing district lines that have no neutral justification in order to place two incumbents of the opposite party in the same district is probative of ... impermissible intent.”</p>



<p>Spencer v. Pugh, 543 U.S. 1301 (2004)</p>	<p>Order for the Court as Circuit Justice</p>	<p>Sitting as Circuit Justice to review an Election Eve petition to prevent the Ohio Republican Party from sending challengers to the polls, Justice Stevens denied the request.</p>	<p>“Practical considerations, such as the difficulty of digesting all of the relevant filings and cases, and the challenge of properly reviewing all of the parties’ submissions as a full Court in the limited timeframe available, weigh heavily against granting the extraordinary type of relief requested here. Moreover, I have faith that the elected officials and numerous election volunteers on the ground will carry out their responsibilities in a way that will enable qualified voters to cast their ballots.”</p>
<p>Clingman v. Beaver, 544 U.S. 581 (2005)</p>	<p>Dissenting</p>	<p>A semiclosed primary system (open only to party members and independent voters) only minimally burdens voters’ associational rights; the state has sufficient justifications in preserving political parties, enhancing parties’ electioneering and party-building efforts, and guarding against party raiding.</p>	<p>“States do not have a valid interest in manipulating the outcome of elections, in protecting the major parties from competition, or in stunting the growth of new parties.”</p>

<p>League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006)</p>	<p>Separate opinion (concurring in part and dissenting in part)</p>	<p>The state's redistricting plan did not violate the Constitution, but part of the plan violated the Voting Rights Act. One district had been redrawn in such a way as to deny Latino voters as a group the opportunity to elect a candidate of their choosing, thereby violating the Voting Rights Act.</p>	<p>Justice Stevens agreed that one district had been drawn in such a way as to violate the principles of racial gerrymandering. However, he would have found the entire plan invalid as a partisan gerrymander, reiterating his position in <i>Vieth v. Jubelirer</i>.</p>
<p>Randall v. Sorrell, 548 U.S. 230 (2006)</p>	<p>Dissenting</p>	<p>A state statute restricting campaign expenditure amounts cannot place substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates electoral chances, or on the ability of individual citizens to volunteer their time to campaigns.</p>	<p>"I am convinced that <i>Buckley's</i> holding on expenditure limits is wrong, and that the time has come to overrule it." Because the plurality relied largely on <i>Buckley</i>, Justice Stevens rejected the plurality's argument.</p>

<p>Purcell v. Gonzalez, 549 U.S. 1 (2006)</p>	<p>Majority (concurring)</p>	<p>In a challenge to a state voter identification law, the Ninth Circuit did not appropriately defer to the District Court's findings; the election should proceed without an injunction on the voter identification law.</p>	<p>"At least two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements. Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation."</p>
<p>Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008)</p>	<p>Plurality (author)</p>	<p>The slight burden imposed on voters by the state's photo identification requirement does not outweigh the state's legitimate interest in combating voter fraud.</p>	<p>Justice Stevens largely deferred to the state, crediting the state's strong interests in combating voter fraud as compared to the more minimal burdens, according to the record, that the voter identification law imposed on individual voters.</p>

<p>Riley v. Kennedy, 553 U.S. 406 (2008)</p>	<p>Dissenting</p>	<p>To determine whether an election practice constitutes a “change” requiring preclearance under the Voting Rights Act, the practice must be compared with the covered jurisdiction’s “baseline”—the most recent practice both precleared and “in force or effect.” A challenge to a law under the state judicial system prevented the law from being “in force or effect.”</p>	<p>The Supreme Court must give the Voting Rights Act the broadest possible scope. Accordingly, even a state court decision altering a voting procedure requires preclearance under the Act.</p>
<p>N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196 (2008)</p>	<p>Majority (concurring)</p>	<p>A political party’s associational rights do not confer any associational right on individual candidates. Candidates do not have an associational right to have a degree of influence over a political party or to a “fair shot” at the party’s nomination.</p>	<p>Justice Stevens agreed with the majority. He wrote separately merely to quote former Justice Thurgood Marshall: “The Constitution does not prohibit legislatures from enacting stupid laws.” While the challenged primary system passed constitutional muster, Justice Stevens reflected that the Court’s opinion should not be misread as endorsement of the electoral system.</p>

<p>Davis v. FEC, 554 U.S. 724 (2008)</p>	<p>Primarily a dissent (concurring in part and dissenting in part)</p>	<p>The “Millionaire’s Amendment” to the Bipartisan Campaign Reform Act, which raised contribution limits for candidates running against self-funded candidates, violated the First Amendment.</p>	<p>Justice Stevens thought the Millionaire’s Amendment did not impose any burdens on speech and actually generated <i>more</i> speech by raising contribution limitations. “[W]e have long recognized the strength of an independent governmental interest in reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results.” The Millionaire’s Amendment validly achieved those goals.</p>
<p>Citizens United v. FEC, 558 U.S. 310 (2010)</p>	<p>Primarily a dissent (concurring in part and dissenting in part)</p>	<p>Under the First Amendment corporate funding of independent political broadcasts in candidate elections cannot be limited.</p>	<p>Essentially, Justice Stevens did not find that corporations represented individuals with the same protections under the First Amendment. Accordingly, the government has a compelling interest in limiting corporations’ expenditures in the election process.</p>
<p>Doe v. Reed, 561 U.S. 186 (2010)</p>	<p>Separate opinion (concurring in part and concurring in the judgment)</p>	<p>The disclosure requirements of the Public Records Act are sufficiently related to a State’s interest in protecting the integrity of the electoral process to survive exacting scrutiny under the First Amendment.</p>	<p>Given the State’s more-than-adequate justification in disclosing the information and the insubstantial burdens imposed on voters, Justice Stevens said: “This is not a hard case.”</p>