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The Interpenetration of Narrow Construction and Policy: Mr. Justice Stevens' Circuit Opinions

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THE INTERPENETRATION OF NARROW CONSTRUCTION AND POLICY: MR. JUSTICE STEVENS' CIRCUIT OPINIONS

Judicial conduct can be understood not only by examining trends within the law but also by reviewing words and actions of individual justices. An in-depth analysis of a particular justice may be the most accurate way to reconcile past and present positions while predicting future decisions.[1] As Professor Fuller stated:

> The object of research conducted along these lines would seem to be not so much to measure the influence on his decisions of the judge's personal beliefs and attitudes, but to discover what Ihering called "latent rules," that is unexpressed rules that actually govern the judicial process.[2]

Our purpose in examining Justice Stevens' opinions while he sat on the Seventh Circuit Court of Appeals is more limited. We seek only to identify those themes and concerns which permeate his opinions. Although our approach grows out of the realist school of criticism,[3] for two reasons we limit ourselves to the veneer of reality

1. Rodell, *For Every Justice, Judicial Deference is a Sometime Thing*, 50 GEO. L.J. 700, 701 (1962).

2. Fuller, *An Afterword: Science and the Judicial Process*, 79 HARV. L. REV. 1604, 1614 (1966) (footnote omitted).

3. *See* B. CARDOZO, THE GROWTH OF THE LAW 59-70 (1924); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112-15 (1921); L. FULLER, THE LAW IN QUEST OF ITSELF 53-55 (1940); Frank, *Are Judges Human?* (pts. 1-2), 80 U. PA. L. REV. 17, 223 (1931); Massaro, *"Fortascast:" Dark Clouds over President Ford's Forthcoming Supreme Court Nominations*, 34 FED. B.J. 257, 265 (1975); Pound, *The Theory of Judicial Decision* (pts. 1-3), 36 HARV. L. REV. 641, 802, 940 (1923); Shuler, *Realist Needles in a Positivist Haystack: A Study of Attitudes Operative in the Decisions of Supreme Court Justices*, 32 U. TORONTO FAC. L. REV. 1, 1-5 (1974). *See also* Steiner, *Judicial Discretion and the Concept of Law*, 35 CAMB. L.J. 135 (1976). *But cf.* Hall, *Integrative Jurisprudence*, 27 HASTINGS L.J. 779, 784-85 (1976).

Our method was rudimentary. We read all Justice (then Judge) Stevens' opinions, including per curiam decisions. Next, we classified each opinion by subject. Then we noted the presence or absence of the following factors in each decision: length of the opinion, disposition of the trial court or administrative decision, plaintiff or defendant, number of issues discussed, relative importance of the facts to the question presented, source material re-

represented by Justice Stevens' opinions: The opinions are accessible,[4] and the Justice has indicated that his prior decisions are pre-

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lied upon, votes of other judges in relation to Justice Stevens, scope of the opinion, justificatory method utilized, avoidance techniques used by Justice Stevens, importance of stare decisis, any comments on the function of the judiciary, relative deference to political institutions, importance of technique in relation to policy, Justice Stevens' concern for judicially manageable standards, any self-conscious discussion by Justice Stevens concerning the role of the judge. Finally, we placed each decision within one of four rough categories: naturalism (Mr. Justice Frankfurter was the model), realism (judges evaluate legal precepts by their contribution to the welfare of society), legal positivism (Mr. Justice Black), socio-legalism (Mr. Justice Cardozo).

We acknowledge that the schema was crude and subjective. However, independent verification of our analysis is available. This Comment was written prior to the publication by Vanderbilt University of a special student project reviewing Justice Stevens' opinions. Nevertheless, our conclusions are in substantial agreement with their work. See *Special Project, The One Hundred and First Justice: An Analysis of the Opinions of Justice John Paul Stevens, Sitting as Judge on the Seventh Circuit Court of Appeals*, 29 VAND. L. REV. 125 (1976) [hereinafter cited as *Special Project*].

4. For a complete list of decisions in which Judge Stevens participated and a brief topical description, see P. Gormley, P. Morgan, K. Ronhovde, Compilation of Reported Decisions of the 7th Circuit in which Judge John Paul Stevens Participated, Oct. 14, 1970-November 25, 1975, December 9, 1975 (The Library of Congress, Congressional Research Service), in *Nomination of John Paul Stevens to be a Justice of the Supreme Court: Hearings Before the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 85-183 (1975) [hereinafter cited as *Hearings*].

The following cases were decided by Justice Stevens subsequent to the compilation in the *Hearings*. Burton v. L.O. Smith Foundry Prod., 529 F.2d 108 (7th Cir. 1976) (per curiam) (torts); Stevenson v. Mathews, 529 F.2d 61 (7th Cir. 1976) (per curiam) (prisoners); Wroblaski v. Hampton, 528 F.2d 852 (7th Cir. 1976) (per curiam) (immigration); Feed Serv. Corp. v. Kent Foods, Inc., 528 F.2d 756, 764 (7th Cir. 1976) (Stevens, J., dissenting in part) (patent infringement); Fitzmans v. Jersey State Bank, 528 F.2d 692 (7th Cir. 1976) (per curiam) (contracts). See *Special Project* 199-209 for a list of decisions which "the compilers considered of potential interest to practitioners and scholars . . . ." *Id.* at 199 n.*.

In total, Justice Stevens participated in 542 decisions. We read the 289 opinions which Justice Stevens wrote: 161 (30%) majority, seventy (13%) per curiam, forty (7%) dissent and eighteen (3%) concurrence. Justice Stevens wrote in 53 percent of the decisions in which he participated.

In addition, we examined the following secondary source material written by the Justice: Stevens, *Mr. Justice Rutledge*, in MR. JUSTICE 318 (A. Dunham & P. Kurland eds. rev. ed. 1964); Stevens, *Exemptions from Antitrust*, 37 A.B.A. ANTITRUST L.J. 706 (1968); Stevens, *Symposium—Regulated Industries and Antitrust, Introductory Remarks*, 32 A.B.A. ANTITRUST L.J. 215 (1967); Stevens, *Antitrust and the Regulated and Exempt Industries, The Regulation of Railroads*, 19 A.B.A. SECTION ANTITRUST L. 355 (1961); Stevens, *Cost Justification*, 8 ANTITRUST BULL. 413 (1963); Stevens, *The Office of an Office*, 55 CHI. B. REC. 276 (1974); Stevens, *The Robinson-Patman Act Prohibitions*, 38 CHI. B. REC. 310 (1957); Stevens & Johnston, *Monopoly or Monopolization—A Reply to Professor Rostow*, 44 ILL. L. REV. 269 (1949); Stevens, Book Review, 28 NOTRE DAME LAW. 430 (1953); Stevens, Book Review, 27 N.Y.U. L. REV. 384 (1952).

dictive of his future conduct.[5]

Considered in isolation the opinions present a severely fragmented view of the Justice's personal approach to decisionmaking.[6] A myriad of factors constricts the expression of individual beliefs on the bench: the quality of the bar which shapes the issues,[7] a collegial court which requires the accommodation of other judgments,[8] the advocatory nature of an opinion,[9] the inability to articulate the reasons for a decision,[10] and the avoidance of personal statements. Within these restrictions, this Comment will examine Justice Stevens' approach to documentary construction and discern his attitudes toward constitutional decisionmaking.

INTRODUCTION

A detailed analysis of Justice Stevens' career as an appellate judge must be preceded by general remarks about his apparent style as a decisionwriter. Justice Stevens dislikes to be rigidly classified,[11] but his general judicial philosophy seems to be one of re-

5. *Hearings* 43.

6. Tanenhaus, *Supreme Court Attitudes Toward Federal Administrative Agencies*, 14 VAND. L. REV. 473, 483 (1961).

7. Schaefer, *Good Judges, Better Judges, Best Judges*, 44 J. AM. JUD. SOC'Y 22, 23 (1960).

8. Tanenhaus, *supra* note 6, at 480.

9. Lewis, *Systems Theory and Judicial Behavioralism*, 21 CASE W.L. REV. 361, 455, 461 (1970); Lewis, *Phase Theory and the Judicial Process*, 1 CALIF. W.L. REV. 1, 32 (1965).

10. Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 38 (1931).

11. *Hearings* 32. Even so, Justice Stevens' biography discloses his primary interest in antitrust. Born: April 20, 1920, Chicago, Illinois. Marital status: Married, wife—Elizabeth Jane Sheeren—four children. Education: 1937-41—University of Chicago, A.B. degree; Phi Beta Kappa, and 1945-47—Northwestern University, School of Law, J.D. degree, *magna cum laude*, Order of the Coif, Co-Editor *Illinois Law Review*. Military Service: 1942-45, United States Navy, Lieutenant. Experience: 1947-48—Law Clerk to Mr. Justice Wiley Rutledge, United States Supreme Court; 1948-51—1952—Associate, Poppenhusen, Johnston, Thompson & Raymond (now Jenner & Block), Chicago, Illinois; 1950—Associate Counsel, Sub-Committee on Study of Monopoly Power, United States House of Representatives; 1950-54—Lecturer on Antitrust Law, Northwestern Law School; 1954, 1955-58—Lecturer, University of Chicago Law School; 1952-70—Partner, Rothschild, Stevens, Barry & Myers (formerly Rothschild, Stevens & Barry; Rothschild, Hart, Stevens & Barry); 1970-75—United States Circuit Judge, 7th Circuit and 1975 to present—Justice, United States Supreme Court. Bar: 1949, Illinois. Memberships: Attorney General's National Committee to Study the Antitrust Laws; Chicago Bar Association: 1960-61—Chairman Antitrust

straint in the neutral[12] application of positive law or precedent to the facts before him. Justice Stevens avoids policy decisions except when interstitial[13] gaps in the law require a decision and rarely

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Law Committee; 1961-62—Chairman Committee on Candidates; 1963-65—Board of Managers; 1969—Chairman Committee on the Judiciary; 1970—Second Vice-President, Federal and American Bar Association. Counsel to the Special Commission appointed by the Supreme Court of Illinois to investigate the integrity of the judgment in *People v. Isaacs* (1969), which resulted in the resignation of two Illinois Supreme Court justices.

This biographical sketch is based on information provided by Judge Stevens' law clerk and from *Hearings* 3.

12. *See generally* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), *reprinted in* H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 4 (1961), *and* H. WECHSLER, SELECTED ESSAYS 1938-62, at 463 (1963). *But see generally* L. HAND, THE BILL OF RIGHTS 1-30 (1958).

13. Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 69 (1921). *E.g.*, Bank of Marin v. England, 385 U.S. 99, 105 (1966) (Harlan, J., dissenting). *But see* Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 3, 29 (1960).

In sum, a quick understanding of Justice Stevens may be obtained by realizing he relies upon the opinions of Mr. Justice Rutledge, Mr. Justice Frankfurter, and Mr. Justice Harlan (the younger). This conclusion is based on our notation of every justice whom Justice Stevens cited by name. *See* methodological discussion *supra* note 3.

The impact of Justice Rutledge is derived from Justice Stevens' work as a Law Clerk for the Justice and (then) Mr. Stevens' commentary on Justice Rutledge. *See* notes 4, 11 *supra*; note 94 *infra*.

In re Chase, 468 F.2d 128 (7th Cir. 1972), affirmed a thirty-day criminal contempt sentence for defendant's failure to stand for either judge or jury. In dissent, Justice Stevens drew upon Justice Frankfurter's definition of the law:

> Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion. . . . The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 655 (1943) (Frankfurter, J., dissenting). 468 F.2d at 140 n.11.

Justice Stevens is perhaps most willing to follow the lead of Justice Harlan (the younger). In Macon v. Lash, 458 F.2d 942, 945 (7th Cir. 1972), the court held that absent an intelligent waiver or the conclusion by counsel that the case is frivolous, the state is constitutionally required to protect the petitioner's right to appeal. Rather than rely on the majority opinion's equal protection analysis in Lane v. Brown, 372 U.S. 477 (1963), Justice Stevens shifted to Justice Harlan's concurring (*id.* at 485) due process rationale.

Justice Stevens has stated he will give greater weight to opinions by Mr. Justice Holmes, Mr. Justice Brandeis, and Judge Hastings of the Seventh Circuit. *Hearings* 40, 31. But we have not discerned the same degree of ideological reliance upon these judges as upon Justices Rutledge, Frankfurter, and Harlan.

Professor Hart is the only jurisprudential scholar whom Justice Stevens has cited. *See* Morales v. Schmidt, 494 F.2d 85, 88 n.3 (7th Cir. 1974), *reh'g*, 489 F.2d 1335 (7th Cir. 1973). *Compare* H. HART, THE CONCEPT OF LAW (1961) *and* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958), *with* L. FULLER, THE MORALITY OF LAW (1969) *and* Fuller,

reaches constitutional issues. He would limit the federal judicial function[14] by deciding cases on justiciability grounds[15] or in accordance with extant precedent[16] rather than expanding the federal law. In his words:

> [I]t is the business of a judge to decide cases that come before him. From time to time, in the process of deciding cases, important decisions are made and the law takes a little different turn from time to time. But it has always been my philosophy to decide cases on the narrowest ground possible and not to reach out for constitutional questions. I think that is the tradition, that is the finest tradition of the work of the Supreme Court and I think the Court is most effective when it does it own business the best.[17]

Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 630 (1958).

14. *Hearings* 42, 50. *See* Rydell, *Mr. Justice Rehnquist and Judicial Self-Restraint*, 26 HASTINGS L.J. 875, 909 (1975). The remainder of the paragraph draws upon Mr. Rydell's definition of a judicial conservative.

Justice Stevens has expressed concern that his rate of dissent, 7 percent (*supra* note 4), might be viewed as abnormally high. He attributes the apparent abnormality to a general proclivity in the Seventh Circuit to express even the most minimal disagreement. *Hearings* 41. In fact, Justice Stevens' level of dissent is 3.9 percent higher than the average rate of dissent in the Second, Fifth, and District of Columbia Circuits but 2.4 percent lower than Chief Justice (then Judge) Burger's rate while he sat on the District of Columbia Circuit Court of Appeals. Howard, *Litigation Flow in Three United States Courts of Appeals*, 8 LAW & SOC'Y REV. 33, 40 (1973). The true significance of Justice Stevens' high rate of dissent may lie in the fact that:

> [T]he typical dissenter has been a tenacious advocate of traditional legal doctrines which were being abandoned during his tenure; consequently he adhered to precedent with far greater regularity than his non-dissenting colleagues, and his persistent attempts at turning back the doctrinal tides of his era usually met with failure. Schmidhauser, *Stare Decisis, Dissent, and the Background of the Justices of the Supreme Court of the United States*, 14 U. TORONTO L.J. 194, 209 (1962).

15. *See Hearings* 36, 54, 68-69. *But see Special Project* 190-94.

16. Oelsher, *Opinions by Stevens Hint Attitudes of Nominee to Court*, N.Y. Times, Dec. 8, 1975, § 1, at 37, col. 1. *See Hearings* 39.

In this respect Justice Stevens should satisfy Professor Wigmore's lament that an "acquaintance with *legal history* is almost totally lacking" among judges. Wigmore, *The Qualities of Current Judicial Decisions*, 9 ILL. L. REV. 529, 530 (1915). Justice Stevens rarely misses an opportunity to quote from T. MACAULAY, HISTORY OF ENGLAND: FROM THE ACCESSION OF JAMES II (10 vols. 1896). *See, e.g.*, United States v. Barrett, 505 F.2d 1091, 1115 (7th Cir.), *cert. denied*, 421 U.S. 964 (1975); Stevens, *The Office of an Office*, *supra* note 4. His historical bent has taken him as far back as Darcy v. Allein, 77 Eng. Rep. 1260 (K.B. 1602) to discover the original purpose behind "the royal prerogative" of a patent. Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579, 590 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972).

17. *Hearings* 36.

Though the general theme of his opinions is one of restraint, our analysis of Justice Stevens indicates policy preferences enter his decisions in at least two areas: cases involving either gender discrimination or prisoners' rights. Besides presenting Justice Stevens' approach to constitutional decisionmaking and documentary construction, we will reconcile his policy preferences with his avowed judicial philosophy.

Resisting the temptation to predict the impact of a new justice upon current issues of constitutional adjudication, we focus on Justice Stevens' statements concerning a judge's role in the decisionmaking process. This role can be traced through his decisions involving contracts, administrative regulations, statutes, and the Constitution. These documents, ranging from the most personal to the most public, form a hierarchy of written instruments based on consent. Because Justice Stevens defines himself as a narrow constructionist, his treatment of documents should demonstrate the extent to which he fits his self-defined role and may illuminate his treatment of the Constitution. In addition, a consideration of his due process decisions,[18] particularly those involving state action, procedural and substantive fairness, gender discrimination, and prisoners' rights, provides a representative model for analyzing his approach to constitutional decisionmaking. These cases are particularly appropriate, for the questions of law they involved were in flux while Judge Stevens sat on the Seventh Circuit Court of Appeals. Because at that time Supreme Court precedent was sparse or unclear, Judge Stevens had a certain freedom of decision.

Documentary Construction

The Constitution is a written document.[19] Thus it falls, albeit uniquely, within the class of written instruments which the judiciary must interpret. Therefore, it is appropriate to examine the manner in which Justice Stevens construes other documents: contracts, administrative regulations, and statutes. Because a substantial portion of the Court's business does not involve constitutional adjudication, reviewing Justice Stevens' non-constitutional decisions is necessary. Moreover, construction of these documents provides a control group[20] with which to contrast Justice Stevens'

18. By *due process* we mean to include cases in which equal protection claims were also present. *Compare* Hampton v. Sun Wong, 44 U.S.L.W. 4737, 4740, 4742 (U.S. June 1, 1976) (Stevens, J.), *with id.* at 4746 (Rehnquist, J., dissenting).

19. *But see* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). *See also* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

20. Admittedly constitutional adjudication significantly differs from more traditional cases. Nevertheless, it is helpful to juxtapose Justice Stevens'

process of constitutional decisionmaking. Because construction of the Constitution often goes beyond an analysis of the words found in that document, a treatment of these cases may foreshadow Justice Stevens' approach to the Constitution. To the extent the Constitution is treated merely as a super-statute, Justice Stevens' commentaries on these documents are predictive of his future constitutional interpretation.

Contracts

Justice Stevens is averse to leaving the four corners of a contract in order to derive its meaning.[21] When he does consider other sources, he tends to prefer previous explications by field specialists such as the National Labor Relations Board or by the parties to the contract. For example, in *International Minerals & Chemical Corp. v. Husky Oil Co.*,[22] the parties had failed to state whether interest was payable upon surrender of a leasehold.[23] In dissent, Justice Stevens took this failure of specification as his cue to find that the plain meaning[24] of surrender "constitute[d] payment in full"[25] and that such an interpretation comported with the underlying transaction. The threshold fact for Justice Stevens was that "[t]here is no express reference to the payment of interest, in addition to the conveyance of the property."[26] In contradistinction to Justice Stevens' analysis, the majority pointed out:

> It is also true that this contingency did not expressly state that interest would not be due and payable as in the case of the acceleration clause, where the words IMC "shall . . . credit Husky's Note account in the [principal] amount . . . plus interest" were employed.[27]

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treatment of the traditional case and the constitutional case, to provide a complete picture of his approach to problem resolution.

21. *See, e.g.*, Economy Finance Corp. v. United States, 501 F.2d 466, 483 (7th Cir. 1974) (Stevens, J., dissenting), *cert. denied*, 420 U.S. 947 (1975); Moore v. Sunbeam Corp., 459 F.2d 811, 816-17 (7th Cir. 1972). *See also Special Project* 186-88.

22. 485 F.2d 153, 161 (7th Cir. 1973) (Stevens, J., dissenting).

23. *Id.* at 162.

24. *See also* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975).

25. 485 F.2d at 162.

26. *Id.*

27. *Id.* at 157.

Having found this hole in the contract, the majority proceeded to fill it with an implied obligation, based upon secondary sources,[28] to pay interest. Characteristically, Justice Stevens hesitated to find implicit meaning in the parties' absence of expression and was reluctant to rely on secondary source material.

Administrative Regulations—Product Safety

Justice Stevens has adopted a broader standard of review[29] for administrative agencies dealing with products: The product must be demonstrably detrimental, and the results of its removal must be not only demonstrably safer but also practicable. Thus Justice Stevens does not impose a policy decision that competition must continue despite any consequences. Instead of prohibiting the product because of its deleterious effects, he demands the agency consider available practical alternatives. When an agency has shown its due consideration of these standards, Justice Stevens will uphold the agency regulation.[30]

Consistently[31] Justice Stevens has been reluctant to take a product off the market. In *Stearns Electric Paste Co. v. EPA*,[32] misuse of phosphorous paste as a rodent deterrent was proven to kill children and even some adults. Nevertheless, Justice Stevens pointed out:

> No details whatever were given as to the comparative effectiveness of the alternatives in rodent and roach control in the lower socio-economic areas or of comparative cost or difficulty of administration.[33]

His argument was that even if the product is harmful, the agency failed to weigh the comparative costs of eliminating the product.

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28. *Id.* at 159.

29. *E.g.*,

> Congress deliberately selected a broader standard for review of food additive tolerance to focus on the fairness of the evaluation so that the "[p]ersonal attitudes or preferences of administrative officials could not prevail on the basis of being supported by substantial evidence picked from the record without regard to other evidence of probative value in the record . . . ." Continental Chemiste Corp. v. Ruckelshaus, 461 F.2d 331, 341 n.37 (7th Cir. 1972).

Compare Hampton v. Sun Wong, 44 U.S.L.W. 4737 (U.S. June 1, 1976 (Stevens, J.), *with* Mathews v. Diaz, 44 U.S.L.W. 4748 (U.S. June 1, 1976). *See also* Comment, *Vapor Recovery: Last Gasp of the Clean Air Act?*, 13 SAN DIEGO L. REV. 354, 372 (1976); text accompanying note 75 *infra*.

30. *See* United States v. Ewig Bros. Co., 502 F.2d 715 (7th Cir. 1974), *cert. denied*, 420 U.S. 945 (1975). *See also Special Project* 182-90.

31. H & H Tire Co. v. United States Dep't of Transp., 471 F.2d 350, 356 (7th Cir. 1972) (Stevens, J., concurring); Continental Chemiste Corp. v. Ruckelshaus, 461 F.2d 331 (7th Cir. 1972); Stearns Elec. Paste Co. v. EPA, 461 F.2d 293 (7th Cir. 1972).

32. 461 F.2d 293 (7th Cir. 1972). *See also Special Project* 182-83.

33. *Id.* at 298 n.10.

Similarly, in *H & H Tire Co. v. United States Department of Transportation*,[34] Justice Stevens concurred in a result which precluded the imposition of stricter standards on retreaded tires:

> Although I recognize that safety is the "overriding consideration in the issuance of standards" under this Act[35] the statute requires respondent to consider whether a proposed standard is "reasonable, practicable and appropriate" before it is prescribed. In my opinion this duty has not been discharged until respondent has at least identified some of the costs associated with the proposal and determined that these costs are overridden by reasonably predictable benefits.[36]

If these administrative standards were acts of Congress, the decisions could easily be characterized as *Lochner*izing[37] because of their emphasis on freedom of choice.[38] In fact, one commentator criticized *H & H Tire* as an example of "the potential pitfalls" of "judicial activism" when the "complex questions of the needs of safety" are "second-guessed by the courts."[39]

In sum, with an administrative regulation, as opposed to a contract, Justice Stevens enforces two policy considerations external to the document: He seeks to encourage competition,[40] and he de-

34. 471 F.2d 350 (7th Cir. 1972).

35. National Traffic & Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 *et seq.* (1970).

36. 471 F.2d at 356-57 (footnotes omitted).

37. Lochner v. New York, 198 U.S. 45 (1905). *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 42 (1972).

38. *See* H & H Tire Co. v. United States Dep't of Transp., 471 F.2d 350, 356 (7th Cir. 1972) (Stevens, J., concurring).

39. Morgan, *Seventh Circuit Review—Administrative Law*, 50 CHI.-KENT L. REV. 214, 216 (1973).

40. *Cf.* Avnet, Inc. v. FTC, 511 F.2d 70 (7th Cir.), *cert. denied*, 96 S. Ct. 56 (1975) (Clayton Act violation); CONOCO v. Witco Chemical Corp., 484 F.2d 777 (7th Cir. 1973) (patent infringement); Continental Coatings Corp. v. Metco, Inc., 464 F.2d 1375 (7th Cir. 1972) (patent infringement); Stevens, *Symposium—Regulated Industries and Antitrust, Introductory Remarks, supra* note 4, at 244. *But cf.* Sanders v. John Nuveen & Co., 524 F.2d 1064 (7th Cir. 1975), *vacated*, 44 U.S.L.W. 3592 (U.S. Apr. 20, 1976) (underwriter of short term commercial paper held liable for failure to investigate the issuer despite reliance on fraudulently prepared financial statements); Eason v. General Motors Acceptance Corp., 490 F.2d 654 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974) (Burger, C.J., Douglas, and White, JJ., would have granted certiorari. Powell, J., took no part in the decision.), *overruled*, Blue Chip Stamps v. Manor Drug Stores, 427 U.S. 723 (1975). *Eason* held the rule of Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952) (plaintiff

sires to ensure the availability of practical alternatives.[41]

Statutes

Statutory construction[42] is the paradigm[43] of documentary construction. Following a traditional approach to construction problems, Justice Stevens looks to the basic purpose of the legislation,[44] then to the legislative intent with respect to the specific act,[45] and finally to the structure of the entire statute.[46] These factors provide the framework through which Justice Stevens approaches the specific section or phrase in question. For guidance he relies upon a fairly well-defined hierarchy of counselors: Supreme Court opinions,[47] statements by the bill's major proponents,[48] the historical context in which the bill was enacted,[49] congressional failure to state a proposition which one would expect to find in the act had Congress so intended,[50] the alternative construction most consistent

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in a rule 10b-5 action [17 C.F.R. 240.10b-5 (1975)] must be either a purchaser or seller of a security) was no longer applicable. *See* text accompanying notes 91-94 *infra*.

41. For a further elaboration of the external construction theory, *see* text accompanying notes 79-80 *infra*. *Accord, Special Project* 169, 189-90.

42. *See generally* Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1 (1965); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATHOLIC U.L. REV. 401 (1968); Comment, *Statutory Construction—The Role of the Court*, 71 W. VA. L. REV. 382 (1969).

43. For a further exposition of our use of the terms *paradigm, normal* (text accompanying notes 79-80 *infra*) and *exemplar* (text accompanying notes 154-55 *infra*), see T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970); Masterman, *The Nature of a Paradigm*, in CRITICISM AND THE GROWTH OF KNOWLEDGE (I. Lakatos & A. Musgrave rev. ed. 1972). *E.g.*, Lines v. Frederick, 400 U.S. 18, 21 (1970) (Harlan, J., dissenting).

44. *See, e.g.*, Corning Glass Works v. FTC, 509 F.2d 293, 299 (7th Cir. 1975); United States v. Altobella, 442 F.2d 310 (7th Cir. 1971).

45. *See* Protectoseal Co. v. Barancik, 484 F.2d 585, 588-89 (7th Cir. 1973).

46. *See* Hodgson v. Lodge 851, AFL-CIO, 454 F.2d 545, 557 (7th Cir. 1971) (Stevens, J., dissenting). *See also Special Project* 164-82.

47. *See, e.g.*, Fisons Ltd. v. United States, 458 F.2d 1241 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972), *overruled*, Tidewater Oil Co. v. United States, 409 U.S. 151 (1972); United States v. Merle A. Patnode Co., 457 F.2d 116 (7th Cir. 1972).

48. *See, e.g.*, Moore v. Sunbeam Corp., 459 F.2d 811, 825 n.35, 826 n.37 (7th Cir. 1972); Associated Gen. Contractors v. Illinois Confer. of Teamsters, 454 F.2d 1324, 1328 (7th Cir. 1972). For Justice Stevens' use of committee reports *compare* Kelly v. Commissioner, 440 F.2d 307, 310, *with* Brennan v. Chicago Bridge & Iron Co., 514 F.2d 1082 (7th Cir. 1975) (per curiam) *and* Kronenberger v. NLRB, 496 F.2d 18, 19 (7th Cir. 1974).

49. *See* Blew v. Richardson, 484 F.2d 889 (7th Cir. 1973).

50. United States v. Zemater, 501 F.2d 540, 544-45 (7th Cir. 1974) (per curiam).

with the act's purpose,[51] and administrative regulations.[52]

Two examples from the field of labor law aptly evince Justice Stevens' approach to statutory construction. *Associated General Contractors v. Illinois Conference of Teamsters*[53] presented the question of whether the district court could enjoin a strike to preserve its jurisdiction over the underlying dispute. Justice Stevens relied on three critical factors in holding that the district court did not have the power to enjoin the strike. First, the dispute was "squarely covered"[54] by the Norris-LaGuardia Act,[55] whose purpose was to curtail the judiciary's "participation in determining the merits of the issues arising between unions and employers."[56] Second, Justice Stevens relied on the Supreme Court's construction of the Norris-LaGuardia Act in *Boys Markets, Inc. v. Retail Clerks Local 770*:[57]

> [T]he Norris-LaGuardia Act does not bar the granting of injunctive relief in . . . the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure. .

Therefore, the third and determinative factor for Justice Stevens was that "[t]he union had not agreed to compulsory arbitration. On the contrary, it had expressly reserved the right to 'economic recourse' in the event of a deadlock."[58]

In other words, in terms of the original model, Justice Stevens derived the basic purpose of the Norris-LaGuardia Act from its historical context and the Supreme Court opinion in *Boys Markets*. In applying this purpose, Justice Stevens found, as required by *Boys Markets*, that the contractual language was controlling.[59]

51. *See, e.g.*, Brennan v. Chicago Bridge & Iron Co., 514 F.2d 1082, 1084 (7th Cir. 1975) (per curiam); McTaggart v. Secretary of the Air Force, 458 F.2d 1320, 1322-23 (7th Cir. 1972).
52. Blew v. Richardson, 484 F.2d 889, 893 (7th Cir. 1973).
53. 454 F.2d 1324 (7th Cir. 1972).
54. *Id.* at 1328.
55. 29 U.S.C. § 104 (1970).
56. *Id.*
57. 398 U.S. 235, 253 (1970). *See generally* Axelrod, *The Application of the* Boys Markets *Decision in the Federal Courts*, 16 B.C. IND. & COM. L. REV. 893 (1975); Gould, *On Labor Injunctions, Unions, and the Judges: The* Boys Markets *Case*, in THE SUPREME COURT REVIEW 215 (P. Kurland ed. 1970).
58. 454 F.2d at 1329.
59. *See also* text accompanying notes 21-28 *supra; Special Project* 175-77.

Hodgson v. Lodge 851, AFL-CIO[60] is a fascinating case because Justice Stevens opens his dissent by stating that "[t]his case involves a narrow issue of statutory construction"[61] and concludes eleven pages later by saying that:

> [I]f in the day-to-day business of government the Executive is permitted to substitute his ideas of expedience for policy determinations unambiguously expressed by Congress, larger issues will routinely be decided without regard to our basic constitutional scheme.[62]

The Secretary of Labor must institute suit within sixty days[63] in order to require a new union election based on union violations of the Labor-Management Reporting and Disclosure Act.[64] The issue in *Hodgson* was whether the Secretary was justified under the Act in relying upon the union's waiver of this time limitation. Narrowly construing the statute, Justice Stevens would have required the Secretary to file within sixty days. Irrespective of the substantive outcome,[65] his analysis of the statute is a model to emulate. His method is only summarized here.

First, Justice Stevens noted that the alternative remedies within the structure of the Act[66] were in the union member's control. Therefore, he concluded that with respect to the particular section in question (where the Secretary retained "unique"[67] control over the available remedy) "the repeated use of mandatory language"[68] must be given full effect. Next, Justice Stevens buttressed his analysis by examining the section's[69] purpose and its legislative history.[70] He copiously detailed the "changes in form" of the section

60. 454 F.2d 545 (7th Cir. 1971). *See generally* Hopson, *Judicial Review of the Secretary of Labor's Decision Not to Sue to Set Aside a Union Election under Title IV of the LMRDA*, 18 WAYNE L. REV. 1281 (1972); Rauh, *LMRDA—Enforce it or Repeal it*, 5 GA. L. REV. 643 (1971) (details the Department of Labor's inaction while Messrs. Boyle and Yablonski fought for control of the UMW).

61. 454 F.2d at 554.

62. *Id.* at 565 (footnote omitted).

63. 29 U.S.C. § 482(b) (1970).

64. *Id.* § 401 *et seq.* The waiver would usually be executed by the union officials whose conduct was under attack.

65. Obviously, the majority decided contra to Justice Stevens and so did Hodgson v. International Printing Pressmen, 440 F.2d 1113 (6th Cir.), *cert. denied*, 404 U.S. 828 (1971).

66. 454 F.2d at 555-56 (7th Cir. 1971).

67. *Id.* at 556.

68. *Id.* at 557, 563-64.

69. *Id.* at 557 ("to ensure prompt vindication of a meritorious claim for the benefit of the dissident members as well as the general public"). Justice Stevens argued that the Act should not be interpreted merely as a statute of limitations.

70. *Id.* at 557-61.

and the "comments of interested" legislators.[71] Finally, Justice Stevens rebutted the arguments put forth by the Secretary.[72] Specifically, he concluded that the estoppel theory was inappropriate because "it permits the Secretary to disguise his general practice in the clothing of an exceptional case."[73] Congressional acquiescence in a course of administrative conduct did not constitute a ratification of the procedure.[74] The Secretary's policy of negotiation should not mitigate the congressional command to file suit within sixty days.[75]

As discussed above, Justice Stevens encountered a similar problem in *International Minerals & Chemical Corp. v. Husky Oil Co.*,[76] a case concerning contractual interpretation. Under the 1958 draft the Secretary would have been required to respond within sixty days, but the statute as finally enacted left this requirement unclear.[77] The *Hodgson* majority filled this hole with policy considerations enunciated by commentators.[78] In contrast, Justice Stevens argued that the "language change" from the draft to the statute was a mere convenience of expression, not a shift of policy.[79]

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71. *Id.* at 557.
72. *Id.* at 561-64.
73. *Id.* at 561.
74. Congress does not sit as a singleminded watchdog ready to bark out a clarifying amendment at every departure from its command. It is more like a slumbering army; when aroused it has power to march where it will. One who desires to direct its attention to a specific problem must not only have a strong reason to do so, but also must be willing to risk the consequences of unanticipated action. An interpretation of a provision in the controversial and integrated statute which finally emerged from the legislative process in 1959 cannot fairly be predicated on unexplained inaction by different Congresses in subsequent years. *Id.* at 562.

See also Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13 (1974).

75. *Compare* Justice Stevens' belief that "[t]he lessons of history teach us that the dedication of the eager new administrator may eventually be replaced by the malaise of the bureaucrat who acts no faster and no more often than is absolutely necessary," 454 F.2d at 564 (footnote omitted), *with* the high standard of review he applies to administrative regulations, text accompanying notes 29-41 *supra*.
76. 485 F.2d 153 (7th Cir. 1973) (Stevens, J., dissenting). *See* text accompanying notes 21-28 *supra*.
77. Hodgson v. Lodge 851, AFL-CIO, 454 F.2d 545, 550-51 (7th Cir. 1971).
78. *Id.* at 552, *citing* Note, *The Election Labyrinth: An Inquiry into Title IV of the LMRDA*, 43 N.Y.U. L. REV. 336, 365, 375 (1968).
79. 454 F.2d at 559.

In terms of the original model, Justice Stevens examined the structure of the entire statute and then reviewed legislative intent with respect to the particular section in order to derive its meaning. He drew support for his interpretation from the major proponents of the act and from the historical context in which it was passed. His conclusion was influenced, as with his reading of contracts, by his overall reluctance to infer meaning from absence.

The previous examples of normal statutory construction may be characterized as internal issues of interpretation: The debate on the court concerns what Congress intended by the words Congress spoke. In contrast, external problems of construction begin with one of two alternative premises: either the court has no idea what Congress intended and thus must establish its own policy; or the court knows exactly what Congress intended but must decide for itself the appropriate reach of congressional intent, *e.g.*, the scope of a statute based on the commerce clause.[80]

An example of external construction based upon a congressional failure to speak is *United States v. McGarr*.[81] The question was whether the Comprehensive Drug Abuse Prevention and Control Act[82] repealed the parole ineligibility provisions of the Narcotic Drug Import and Export Act.[83] Justice Stevens argued that although the penalty provisions of the Narcotic Drug Act remained, the repeal of the parole ineligibility section would merely remove "a procedural bar to the application of the independently existing provisions for suspended sentence, probation and parole which apply to most offenses."[84]

This opinion reflects a policy decision by Justice Stevens which is external to the statute. Because he is hesitant to expand federal criminal jurisdiction,[85] he applies a *Rewis-Bass*[86] leniency rule to

80. U.S. CONST. art. I, § 8.

81. 461 F.2d 1 (7th Cir. 1972) (per curiam), *overruled*, Warden v. Marrero, 417 U.S. 653 (1974). Justice Stevens argued that although he would prefer to follow congressional policy, he could not "attribute to Congress the intent to reach [an] absurd result . . . ." 461 F.2d at 4. Only Mr. Justice Blackmun, joined by Mr. Justice Douglas and Mr. Justice Marshall, followed Justice Stevens' line of analysis. 417 U.S. at 667, 669. *See generally* Bradley v. United States, 410 U.S. 605 (1973); Gates v. United States, 515 F.2d 73 (7th Cir. 1975); United States v. Lopez, 475 F.2d 537 (7th Cir.), *cert. denied*, 414 U.S. 839 (1973).

82. 21 U.S.C. § 801 *et seq.* (1970).

83. Act of Nov. 8, 1966, Pub. L. No. 89-793, § 501, 80 Stat. 1449. The Act itself has also been repealed. Narcotic Drugs Import and Export Act (July 18, 1956) ch. 629, § 105, 70 Stat. 570, *repealed*, 21 U.S.C. 174 (1970).

84. 461 F.2d at 4-5 (footnote omitted).

85. *Hearings* 29, *supra* note 4.

86. United States v. Bass, 404 U.S. 336 (1971); Rewis v. United States, 401 U.S. 808 (1971).

statutory construction. In other words, absent a clear statement of congressional intent, he will not presume Congress intended to expand the reach of federal criminal jurisdiction[87] and thereby alter the relationship between federal and state prosecution.[88]

Although the precise point was not present in *McGarr*, Justice Stevens echoed a similar theme: "[W]hen Congress does expressly repeal a statute, we should not read a savings clause so broadly that it encompasses much more than is necessary to achieve its general purpose . . . ."[89]

Statutes with a Constitutional Predicate

External construction is also necessary when Congress passes a statute specifically based on the text of the Constitution. Though congressional intent may be clear, a judge must nevertheless independently ascertain the proper meaning of the constitutional clause in question.[90] We will examine two examples of this form of external construction.

In *United States v. Staszcuk*,[91] the question was how far the federal statute prohibiting interstate robbery or extortion[92] should extend into the traditionally local regulation of criminal activity. Be-

87. Even if preemption does not occur and mutual jurisdiction is retained, the significance of the state's jurisdiction is decreased when another crime also becomes a federal offense. *See generally* Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271 (1973).

88. United States v. Walker, 489 F.2d 1353, 1355 (7th Cir. 1973), *cert. denied*, 415 U.S. 982 (1974). *See also* Barrett v. United States, 96 S. Ct. 498, 504 (1976).

89. 461 F.2d at 4.

90. United States v. Nixon, 418 U.S. 683 (1974); Powell v. McCormack, 395 U.S. 486 (1969); Cooper v. Aaron, 358 U.S. 1 (1958); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *But cf.* Oregon v. Mitchell, 400 U.S. 112 (1970).

91. 517 F.2d 53 (7th Cir.) (en banc), *cert. denied*, 96 S. Ct. 65 (1975) (Stevens, J., wrote the majority opinion joined by Fairchild, C.J., Cummings, Tone, and Bauer, JJ.; Sprecher, J., dissented on the basis of his panel opinion. 502 F.2d 875 (7th Cir. 1974). Swygert, J., concurred with Judge Sprecher's dissent and also dissented on a *voir dire* issue. Pell, J., also filed a dissenting opinion.). *See* Recent Case, *Constitutional Law—interstate commerce—extortion—federal criminal jurisdiction under Hobbs Act satisfied by showing potential effect on commerce*, 28 VAND. L. REV. 1348 (1975). *See also Special Project* 194.

92. The Hobbs Act, 18 U.S.C. § 1951(a) (1970).

cause the jurisdictional reach of the statute was co-extensive with that of the commerce clause,[93] Justice Stevens had to determine the appropriate boundaries of the clause before interpreting the Act. In doing so, he looked to the policy behind the commerce clause.

> The primary purpose of the Commerce Clause was to secure freedom of trade, to break down the barriers to its free flow, and to curtail the rising volume of restraints upon commerce that the Articles of Confederation were inadequate to control. A statute which has a purpose which so unambiguously parallels the fundamental purpose of its constitutional predicate must receive an expansive construction.[94]

Justice Stevens has also used the technique of external construction to arrive at a less expansive result. For example, in *Kimbrough v. O'Neill*,[95] detention personnel refused to return a prisoner's diamond ring. The question was whether the plaintiff could state a federal claim for conversion under section 1983 of the Civil Rights Act.[96] Because section 1983 provides a civil remedy for violations of the fourteenth amendment[97] due process clause, Justice Stevens again had to construe the Constitution in order to interpret a statute. Initially he presented a narrow textual analysis of the due process clause by pointing out that the words of the clause establish a tripartite standard: (1) property, life, or liberty must be involved; (2) state action is required; and (3) the deprivation must be without due process of law.[98] Although retention of the prisoner's ring was sufficient state infringement to raise the issue, Justice Stevens held the possibility of recovery via a state-based tort action precluded the conclusion that the ring was retained without due process of law.[99] The critical factor for Justice Stevens was

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93. "[C]ommerce means . . . all . . . commerce over which the United States has jurisdiction." *Id.* § 1951(b)(3).

94. 517 F.2d at 58. Although Justice Stevens usually relies upon precedent, here he based his entire argument upon Justice Rutledge's analysis of the commerce clause in W. RUTLEDGE, A DECLARATION OF LEGAL FAITH 25-26 (1947), demonstrating again the significant impact Justice Rutledge had upon Justice Stevens' approach to the law. *See* notes 4, 11, 13 *supra.*

95. 523 F.2d 1057 (7th Cir. 1975), *reh'g granted, id.*

96. 42 U.S.C. § 1983 (1970).

97. U.S. CONST. amend. XIV, § 1.

98. Kimbrough v. O'Neill, 523 F.2d 1057, 1064 (7th Cir. 1975) (Stevens, J., concurring).

99. *Id.* at 1066. Justice Stevens often turns to state-based tort actions as alternative remedies. *See* text accompanying notes 119-30 *infra.* It is interesting to note, however, that he is equally willing to cite then Chief Judge Cardozo's majority opinion or Judge Andrew's dissent in Palsgraf v. Long Island R.R., 248 N.Y. 339, 347, 162 N.E. 99, 101 (1928). *Compare* Eason v. General Motors Acceptance Corp., 490 F.2d 654, 657 n.9 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974) (Burger, C.J., Douglas and White, J.J., would have granted certiorari. Powell, J., took no part in the decision.),

not the text of the act but rather the external policy rationale of avoiding overcrowded dockets by refusing to hear such de minimis claims in federal courts.[100]

Thus in *Staszcuk*, Justice Stevens, looking to the policy behind the commerce clause, read the words with a greater scope that resulted in an expansive reading of the text.[101] In *Kimbrough*, he invoked policy considerations external to the purpose of either section 1983 or its constitutional predicate and concluded that a narrow reading of the text was appropriate.

In sum, Justice Stevens is usually faithful to his credo of narrow construction. Nevertheless, four policy preferences seem to influence his decisions: Administrative regulations must reflect a consideration of practical alternatives; federal criminal jurisdiction should not be expanded; free trade among the several states should be protected; and the federal courts should be hesitant to expand their jurisdiction over de minimis constitutional issues.[102]

CONSTITUTIONAL ADJUDICATION

Justice Stevens tends to avoid decisions which take an expansive view of constitutional rights. This inclination is particularly evident in his due process decisions under either the fourteenth amendment or the Civil Rights Act.[103] Before he will grant relief, a petitioner must overcome three obstacles inherent in the Justice's model: First, state action is necessary for the due process clause to become operative. Justice Stevens' reasoning makes it difficult to overcome this initial requirement when a private party, acting with

overruled, Blue Chip Stamps v. Manor Drug Stores, 427 U.S. 723 (1975), *with* Kiess v. Eason, 442 F.2d 712, 722, 722 n.16 (1971).

100. *See* 523 F.2d at 1066.

101. Justice Stevens did express concern about the expansion of federal criminal jurisdiction. United States v. Staszcuk, 517 F.2d 53, 55 (7th Cir. 1975). *Accord, Special Project* 171.

102. The reader may have noticed an apparent contradiction in the text. On the one hand, Justice Stevens seeks to limit the reach of federal criminal jurisdiction (*see* text accompanying notes 85-89 *supra*); and on the other hand, he has expanded federal criminal jurisdiction to provide greater protection for commerce (*see* text accompanying notes 91-94 *supra*). While the dichotomy is real, we believe this merely represents Justice Stevens' hierarchy of values. In other words, although it is important to limit federal criminal jurisdiction, it is more important to protect free trade.

103. 42 U.S.C. § 1981 *et seq.* (1970).

the state's aid, is guilty of the criticized conduct.[104] Second, if state action is conspicuous, Justice Stevens struggles to show that any alternative remedies available to the aggrieved party satisfy the procedural fairness requirement of the fourteenth amendment.[105] Finally, even if no other remedies are available, the petitioner, in order to recover, must demonstrate that a deprivation of a fourteenth amendment property right[106] has occurred.

104. The Supreme Court has slowly expanded the concept of state action to include situations in which either the state and a private party were acting in concert or the private party was acting with the aid of the state. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (private restaurant in a publicly owned building refused to serve a Black patron). Under Chief Justice Burger, however, the Supreme Court appears to have halted this trend. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (electric company terminated service to customer without notice or hearing); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (private club discriminated even though it had obtained one of a limited number of state liquor licenses).

105. *See, e.g.*, Kimbrough v. O'Neill, 523 F.2d 1057, 1062 (7th Cir. 1975) (Stevens, J., concurring), *reh'g granted, id.* at 1057; Horvath v. Chicago, 510 F.2d 594 (7th Cir. 1975); Christman v. Hanrahan, 500 F.2d 65 (7th Cir.), *cert. denied*, 419 U.S. 1050 (1974); Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972) (Stevens, J., dissenting); Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

106. In order to come within the purview of the fourteenth amendment, an action must deprive someone of "life, liberty, or property." Clearly, property rights do not have to be in tangible objects. A person may have a "property" right in his or her good name or reputation. The question is which property rights should be protected. Although the fourteenth amendment also protects "life" and "liberty," the most serious claims raised in Justice Stevens' due process opinions relate to the protection of "property" or "interests in property."

In Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971), and Shirck v. Thomas, 447 F.2d 1025 (7th Cir. 1971), Judge Fairchild decided that the "career interests" of recently terminated untenured public teachers should be protected. He held that the teacher in each case should have been given a statement of reasons for dismissal and the opportunity to be heard. Indeed, the Supreme Court has upheld a similar requirement when it was alleged that the termination was due to the exercise of constitutionally protected rights. Perry v. Sindermann, 408 U.S. 593, 598 (1972). The Court, however, has decided that the range of interests protected by the due process clause of the fourteenth amendment was not unlimited. Thus, in reversing Judge Fairchild in both *Roth* and *Shirck* (and upholding Judge Stevens' dissent in *Shirck*), the Court held that failure to rehire a publicly employed teacher does not violate an interest in liberty or property protected by procedural due process unless there was a suggestion that the nonretained teacher engaged in some impropriety. Board of Regents v. Roth, 408 U.S. 564, 570-75 (1972); Shirck v. Thomas, 408 U.S. 940 (1972). *See* Kallen, *The* Roth *Decision: Does the Nontenured Teacher Have a Constitutional Right to a Hearing Before Nonrenewal?*, 61 ILL. B.J. 464 (1973); Schulman, *Employment of Nontenured Faculty: Some Implications of* Roth *and* Sindermann, 51 DENVER L.J. 215 (1974); Comment, Board of Regents of State Colleges v. Roth: *Procedural Due Process and the Rights of Nontenured Teachers*, 3 N.Y.U. REV. L. & SOC. CHANGE 179 (1973). *See also* Miller v. School Dist. No. 167, 495 F.2d 658, 662-63 (7th Cir. 1974).

State Action

When private action involves some form of government intrusion, constitutional constraints may apply. Typically, government action may be involved if a private individual or institution receives aid, authority, or judicial enforcement of private rights.[107] For Justice Stevens, the key to a state action analysis is to ascertain that level of government involvement sufficient to engage the protections of the fourteenth amendment.[108]

Dismissal of an untenured professor from a private university,[109] refusal of a private hospital to allow use of its facilities for abortions,[110] and refusal of a public utility to grant a pretermination hearing[111] are cases in which Justice Stevens has been disinclined to apply fourteenth amendment constraints to the actions of private parties. Both the university and the hospital were regulated by and received substantial aid from the state.[112] Moreover, if the federal and state funds had not been allocated to the hospital, they could have been used to construct public facilities which could not discriminate against women seeking abortions.[113] Nevertheless, according to Justice Stevens, the level of governmental involvement was not sufficient to constitute state action. First, the petitioners

107. *See* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974); Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974).

108. This is not to imply that Justice Stevens' views are unique. Rather, they represent the prevailing view today. While speaking of all the connections between the state and the private discriminating restaurant, Justice Clark stated:

> Addition of all these activities, obligations and responsibilities of the [State], the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the fourteenth amendment to condemn. Burton v. Wilmington Parking Authority, 365 U.S. 715, 724 (1961).

See also Weise v. Syracuse Univ., 522 F.2d 397, 406-07 (2d Cir. 1975).

109. Cohen v. Illinois Inst. of Tech., 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1683 (1976).

110. Doe v. Bellin Memorial Hosp., 479 F.2d 756 (7th Cir. 1973).

111. Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

112. Cohen v. Illinois Inst. of Tech., 524 F.2d 818, 825-26 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1683 (1976); Doe v. Bellin Memorial Hosp., 479 F.2d 756, 761 (7th Cir. 1973).

113. Doe v. Bellin Memorial Hosp., 479 F.2d 756, 762 (7th Cir. 1973).

failed to show[114] that the amount of money received transformed these institutions into public entities for constitutional purposes.[115] Second, the petitioners failed to show that the public funds furthered the specific policies under attack.[116] Coinciding with the views of other circuits,[117] his analysis emphasized that private institutions, although in part publicly funded, may exercise the same right to discriminate which they would have absent any state involvement.[118]

Remedial Alternatives

The alleged denial of due process by a public utility raises a more perplexing problem. In *Lucas v. Wisconsin Electric Power Co.*,[119] Justice Stevens concluded that the utility, though a state regulated monopoly,[120] was not acting under color of state law. Because of the role of the Wisconsin Public Service Commission, he had obvious difficulty deciding the state was not involved.[121] Assuming a state's failure to act may in certain situations violate due process,[122] the determining factor is whether the aggrieved party has

114. In *Cohen*, Justice Stevens both upheld the dismissal of the aggrieved professor's complaint and denied her further discovery procedures. In effect, Justice Stevens held that there was no possible way she could prove her claim. Cohen v. Illinois Inst. of Tech., 524 F.2d 818, 825 n.18, 827 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1683 (1976).

115. *Id.* at 825.

116. *Id.* at 825-26; Doe v. Bellin Memorial Hosp., 479 F.2d 756, 761 (7th Cir. 1973).

117. *See, e.g.*, Browns v. Mitchell, 409 F.2d 593, 596 (10th Cir. 1969); Grossner v. Trustees of Colum. Univ., 287 F. Supp. 535, 547-48 (S.D.N.Y. 1968). It is not clear how a general grant to an institution does not specifically support every activity of that institution. *See* Griffin v. County School Bd., 377 U.S. 218 (1964).

118. An undercurrent in Justice Stevens' opinion in *Doe* was that Ms. Doe had the burden of finding a hospital which would allow their facilities to be used for abortions. Similarly, in *Cohen*, he expressed regret that the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1970), were modified too late to help Ms. Cohen. *Compare* Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 255, *with* 42 U.S.C. § 2000e-1 (Supp. II, 1972). Justice Stevens appears to be satisfied that should Ms. Cohen be discriminated against in the future, she will have a remedy. Cohen v. Illinois Inst. of Tech., 524 F.2d 818, 822 (7th Cir. 1975). *See also Special Project* 136-39.

119. 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973). *See also Special Project* 188-89.

120. Since *Lucas* the Supreme Court has gone further in limiting the procedural safeguards against improper termination of service by a utility company. For Justice Stevens, a critical point was that the power company gave the plaintiff five days notice before termination. *Id.* at 653. Mr. Justice Rehnquist, speaking for the majority in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), found that notice of termination was unnecessary.

121. 466 F.2d at 646.

122. For example, the state may have an affirmative duty to protect

other adequate remedies.[123] For Justice Stevens, the fact that plaintiff had several informal[124] and formal[125] remedies against the power company indicated procedural safeguards were adequate.[126] The "adequate alternative remedy" theory also appears in cases involving the invalidation of a high school dress code[127] and the refusal to rule on the vagueness of a state law.[128] In both situations the plaintiff had the option of following an established procedure rather than seeking a ruling of unconstitutionality.[129] Justice Stevens' policy finally provoked a sharp comment from a colleague.

"fundamental" rights. *Cf.* Public Util. Comm. v. Pollak, 343 U.S. 451, 463-64 (1952).

123. 466 F.2d at 648.

124. The record in *Lucas* shows that most disputes were settled by a company representative or through the offices of the Wisconsin Public Service Commission. *Id.*

125. Justice Stevens maintains that the plaintiff has three formal remedies. He may seek emergency relief in the state courts, pay the disputed amount and sue for a refund, or sue in tort for any actual damages caused by a wrongful termination by the power company. *Id.* at 648-49. Forcing the customer to initiate these expensive remedies does not take into account the relative economic and psychological inequalities of the two sides.

126. *See generally* Note, *Fourteenth Amendment Due Process in Terminations of Utility Service For Nonpayment*, 86 HARV. L. REV. 1477 (1973); Note, *Constitutional Safeguards for Public Utility Customers: Power to the People*, 48 N.Y.U. L. REV. 493 (1973); Comment, *Light a Candle and Call an Attorney—the Utility Shutoff Cases*, 58 IND. L. REV. 1161 (1973).

127. In Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972), the court invalidated the dress code on constitutional grounds. Justice Stevens dissented because the plaintiff had the alternative of exempting himself from the dress code by bringing his parents to school to verify their approval of his long hair. *Id.* at 945.

128. In Horvath v. Chicago, 510 F.2d 594 (7th Cir. 1975), the plaintiff complained that a state statute was unconstitutionally vague. Justice Stevens used a novel argument based on the fact that the plaintiff was also pursuing state remedies. He held that federal involvement was unjustified because: (1) if the state court finds for the plaintiff, he has an adequate state remedy; and (2) if the state court finds against the plaintiff, the statute is no longer vague as to him.

129. This specie of argument demonstrates again Justice Frankfurter's ideological relationship to Justice Stevens. *Compare*:

> [F]rankfurter, while scorning the sledge-hammer word "unconstitutional," has, more than any other Justice, used the stiletto of statutory interpretation to cut effective regulation to a minimum, often below what Congress clearly intended; the supplementary device of using narrow interpretation explicitly to avoid a constitutional issue is also a Frankfurter favorite; in either case, the result is the same . . . . Rodell, *supra* note 1, at 705,

with text accompanying note 17 *supra*. *See* note 13 *supra*.

> In my opinion, the claim of vagueness of a statutory provision is a proper question for a federal court to decide in a civil case given the fact that the plaintiff has standing (using that term broadly) to assert the challenge with respect to his own conduct. If one in attempting to protect a property interest from state interference can arguably assert that his conduct is not included within the prohibitory terms of a vague statute, he ought not have to await the finality of a state proceeding against him before asserting his constitutional right to procedural due process. To require him to do so is an impermissible form of abstention. Indeed, as I read the last paragraphs of Judge Stevens' opinion, I discern a theme of abstention which I, for myself, wish to disavow.[130]

Fourteenth Amendment Property

In an opinion uncharacteristically brief and biting,[131] Justice Stevens expressed concern that an expansive reading of the due process clause would create excessive power in the federal judiciary.[132] To him the problem is that the due process clause cannot both define the substantive right to be protected and prescribe the necessary procedural safeguards. Justice Stevens' rejection of substantive due process rights can best be explained in his own words.

> Some years ago courageous and wise federal judges foresaw the potential harm that might flow from arbitrary actions by state government. On the assumption that the due process clause was more than a guarantee of fair procedure, they found a basis for substituting their views of sound policy for the "arbitrary" decisions of state officials. Whether or not their policy judgments were correct, their expansive interpretation of the due process clause was fundamentally erroneous.[133]

Justice Stevens believes it is the function of the states, not the federal judiciary, to provide relief from arbitrary governmental action.[134]

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130. 510 F.2d at 597 (Swygert, J., concurring).

131. Shirck v. Thomas, 447 F.2d 1025 (7th Cir. 1971) (Stevens, J., dissenting), *vacated*, 408 U.S. 940 (1971).

132. 447 F.2d at 1028. *See also* Bishop v. Wood, No. 74-1303 (U.S. June 10, 1976), in L.A. Times, June 11, 1976, § 1, at 1, cols. 5-6, & 8 at 21, col. 6.

133. *Id.* at 1028-29.

134. In our opinion, the questions whether a nontenured teacher, whose contract is not renewed, has any right to a statement of reasons or to judicial review of the adequacy or accuracy of such a statement are matters of state law, not federal constitutional law. There are sound policy reasons to support either a statutory requirement, or an administrative practice, that a complete and accurate written statement of the reasons for such an important decision be promptly delivered to the teacher. But since, by hypothesis, no constitutionally protected property or liberty interest of the teacher is impaired by the Board's action, she has no federally protected right to a fair hearing or to a fair statement of reasons. The fact that a state, or a School Board, may voluntarily communicate more information to her, or receive more information from her, than the Constitution requires, is not in itself sufficient to create a federal

For Justice Stevens a dismissal of a claim based on violation of due process is not actually a ruling on the merits. Although he often acknowledges existence of the injustice he is unwilling to read the Constitution so broadly as to grant a federal claim for relief. Thus, if the property or interest in property sought to be protected is not guaranteed by another clause of the Constitution, he believes that no federally enforceable claim should exist.[135]

Gender Discrimination: An Exception

Title VII of the Civil Rights Act of 1964[136] explicitly gives jurisdiction to the federal court to decide cases based on gender discrimination.[137] Thus the policy decisions reflected in Justice Stevens' gender discrimination opinions cannot be cloaked in the previously mentioned shroud of judicial abstention. In *Sprogis v. United Air Lines*,[138] an airline stewardess was discharged for violating

right that does not otherwise exist. Jeffries v. Turkey Run Consolidated School Dist., 492 F.2d 1, 3 (7th Cir. 1974).

But see Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975) (fifth amendment due process). In *Eskra* Justice Stevens invalidated a Wisconsin statute (illegitimate children cannot inherit through their mother's estate) when the distributor is the United States. *Id.* *Compare* Hampton v. Sun Wong, 44 U.S.L.W. 4737, 4741 (U.S. June 1, 1976) ("[T]he Due Process Clause of the Fifth Amendment . . . has a substantive as well as a procedural aspect."), *with id.* at 4740 n.17. *See also Special Project* 131-34.

135. Here Justice Stevens' views appear to parallel Mr. Justice Black's concern that flexible standards of constitutional adjudication lead to unpredictable results. *See* Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 717 (1963).

There would be a federal claim, however, if the protested action interfered with a constitutionally protected right. Jeffries v. Turkey Run Consolidated School Dist., 492 F.2d 1, 3 (7th Cir. 1974).

> For it is familiar doctrine that a State cannot discriminate among its citizens on the basis of their race or, for example, their exercise of rights protected by the First Amendment. . . . [T]he standards for implementing the concept of substantive due process are found elsewhere in the Constitution, and not merely in the Fourteenth Amendment itself. Kimbrough v. O'Neill, 523 F.2d 1057, 1064 (7th Cir. 1975), *reh'g granted, id.* at 1057.

136. 42 U.S.C. § 2000e *et seq.* (1970).

137. It shall be unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin. . . . *Id.* § 2000e-2(a)(1).

See generally Johnston, *Sex Discrimination and the Supreme Court, 1975*, 23 U.C.L.A. L. REV. 235 (1975); Lombard, *Sex: A Classification in Search of Strict Scrutiny*, 21 WAYNE L. REV. 1355 (1975); *Special Project* 174-75.

138. 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

United's no-marriage rule. The majority held that because male stewards[139] were under no such restraint, United was discriminating against its stewardesses on the basis of their sex.[140] In dissent Justice Stevens argued that a literal reading of the Civil Rights Act of 1964 would result in the conclusion that men are discriminated against because they are ineligible for those jobs held by stewardesses.[141] He describes such a result as anomalous. A *reductio ad absurdum* analysis of Justice Stevens' position leads to the conclusion that discrimination against one sex is permissible so long as discrimination of a different kind exists against the other.[142]

Two years later Justice Stevens again dissented. In *Rose v. Bridgeport Brass Co.*,[143] the majority reversed a summary judgment against a woman employee who alleged gender discrimination as evidenced by a drastic change in the female-male employee ratio.[144] Justice Stevens maintained that the summary judgment should be upheld because the woman had not demonstrated the employer's actions were motivated by an intent to discriminate against female employees.[145] The Supreme Court, however, has held that such a

139. Apparently, the male "flight cabin attendants" on overseas flights had essentially the same duties as stewardesses on regular flights. 444 F.2d at 1199.

140. *Id.*

141. Justice Stevens' argument was that, except for certain flights, males were not eligible for the jobs held by stewardesses. Because until 1966 no male was eligible for the job held by Ms. Sprogis, there were no males similarly situated who were not discriminated against by the no-marriage rule. *Id.* at 1203 (Stevens, J., dissenting).

142. *Id.* at 1202. The Supreme Court rejected this line of argument when applied to racial discrimination. Loving v. Virginia, 388 U.S. 1, 8 (1966).

143. 487 F.2d 804 (7th Cir. 1973).

144. *Id.* at 809.

145. *Id.* at 813 (Stevens, J., dissenting). While voting to uphold a summary judgment against the woman, Justice Stevens stated:

> The three factors discussed so far include no evidence that any of the actions taken by the company were motivated by an intent to discriminate against the plaintiff or against female employees. Support for the discrimination charge is predicated entirely on the fact that the operating changes resulted in a change in the relative number of females employed in the department and employed as blanking press operators. *Id.*

Discriminatory motivation, however, has been held unnecessary. The courts are in agreement that if the result is discriminatory, there is a triable issue as to whether the practice has ". . . a manifest relationship to the employment in question." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). *See* Harper v. T.W.A., 525 F.2d 409 (8th Cir. 1975); Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975), *rev'd*, 44 U.S.L.W. 4789 (U.S. June 7, 1976) (Stevens, J., concurred separately, *id.* at 4800, "the line between discriminatory purpose and discriminatory impact is not nearly as bright . . . ."); Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975); NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974); *cert. denied*, 421 U.S. 910 (1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Bridgeport Guardians v. Members of Bridgeport Civ. Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973); Brito v. Zia Co., 478 F.2d 1200 (10th Cir. 1973);

demonstration is unnecessary in the application of Title VII to racial discrimination.[146] Justice Stevens seemed to fear a rejection of the motivational requirement would eventually force the conclusion that a member of the disfavored sex would be entitled to a trial whenever a one-to-one employment ratio is absent.[147]

A possible reason for Justice Stevens' position may be found in his statements during his confirmation hearings. At one point he explained that he would apply the same standards in cases involving the rights of women as in those involving the rights of Blacks.[148] The next day, however, he acknowledged he might apply a different standard of review in gender discrimination cases.[149] When pressed by Senator Kennedy, Justice Stevens stated that he was more concerned about racial discrimination than about gender discrimination.[150] In other words, as with contracts and statutes, Justice Stevens returns to the primacy of the text. Whereas there is a textual reference to racial equality, sexual equality is yet to be accorded that level of constitutional dignity.[151] Thus Justice Stevens' less stringent standard of review as applied to gender discrimination is another manifestaion of this narrow approach to documentary construction.

Prisoners' Rights

Prisoners' rights has been an expanding field since 1968.[152] Jus-

United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972).

146. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

147. Rose v. Bridgeport Brass Co., 487 F.2d 804, 814 (7th Cir. 1973) (Stevens, J., dissenting). What is so odd about Justice Stevens' treatment of *Griggs* is that he is usually scrupulous about following the dictates of the Supreme Court. He is always careful to distinguish the views of individual justices to avoid citing an opinion as controlling if a majority has not formed around the particular issue. *See, e.g.*, United States v. Oliver, 505 F.2d 301 (7th Cir. 1974); Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974). *See also* Comment, *The Law of Libel—Constitutional Privilege and The Private Individual: Round Two*, 12 SAN DIEGO L. REV. 455 (1975).

148. *Hearings* 34, *supra* note 4.

149. *Id.* at 57.

150. *Id.* at 16.

151. *See* U.S. CONST. amends. XIII, XIV, XV.

This is not to suggest that racial and sexual equality are substitutable as X and Y in an algebraic formula of equal protection. *See* Keynote address by Professor Ginsburg, "Realizing the Equality Principle" (6th National Conference on Women and the Law), *as cited in*, G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 771 n.2 (9th ed. 1975).

152. The leading case is Johnson v. Avery, 393 U.S. 483 (1969). *See* Wolf

tice Stevens is proud of his contributions[153] and has demonstrated a marked sensitivity to the tragedy of the United States correctional system.[154] We do not portend to review the entire field; rather we will use this area as an exemplar of how Justice Stevens implements a policy decision.

For Justice Stevens the tension between the constitutional rights of prisoners, the need for prison security, and the discretion which must be allowed prison officials is an intense reality. Justice Stevens' twenty-eight[155] opinions relating to prisoners' rights dem-

v. McDonnell, 418 U.S. 539 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); Wilwording v. Svenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1968); Cooper v. Pate, 378 U.S. 546 (1964). *See generally* Bailey, *The Realities of Prisoners' Cases under 42 U.S.C. § 1983: A Statistical Survey in the Northern District of Illinois*, 6 LOYOLA-CHI. U.L.J. 527 (1975); Note, *The Fourteenth Amendment and Prisons: A New Look at Due Process for Prisoners*, 26 HASTINGS L.J. 1277 (1975); Comment, *Due Process at In-Prison Disciplinary Proceedings*, 50 CHI.-KENT L. REV. 498 (1973); Comment, *Due Process Clause held applicable to the revocation of statutory good time credits and punitive segregation in interprison administrative actions*, 7 IND. L. REV. 601 (1974); Comment, *New Barrier to Federal Court Review: The Habeas Corpus Exhaustion Requirement as Applied to Prisoners' Conditions of Confinement*, 9 NEW ENGLAND L. REV. 615 (1974); Comment, *A Giant Step Backwards: The Supreme Court Speaks Out on Prisoners' First Amendment Rights*, 70 NW. U.L. REV. 352 (1975).

153. *See Hearings* 15, 73. Justice Rutledge was also concerned about the plight of prisoners. *See* Stevens, *Mr. Justice Rutledge*, *supra* note 4, at 327-34. *See also* United States v. MacCollom, No. 74-1487 (U.S. June 10, 1976) (Stevens, J. dissenting), in L.A. Times, June 11, 1976, § 1, at 1, cols. 5-6, & 8, at 21, col. 6.

154. Justice Stevens quoted the following passage with approval:

> It is, for the most part, a policy of isolation and punishment accompanied by the rhetoric of rehabilitation, which results in the chronic underfinancing, inadequate staffing, deflected sexuality, and general lack of resources and poverty of imagination that characterizes our prisons and jails. H. Mattick, The Prosaic Sources of Prison Violence 2, *cited in* Morales v. Schmidt, 489 F.2d 1335, 1349 n.15 (7th Cir. 1973), *reh'g*, 494 F.2d 85 (7th Cir. 1974). *But cf. Special Project* 159-60.

155. Kimbrough v. O'Neill, 523 F.2d 1057, 1062 (7th Cir. 1975) (Stevens, J., concurring), *reh'g granted, id.* at 1057; Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975); United States *ex rel.* Kirby v. Sturges, 510 F.2d 397 (7th Cir.), *cert. denied*, 421 U.S. 1016 (1975) (Douglas, J., would have granted certiorari); Chapman v. Kleindienst, 507 F.2d 1246 (7th Cir. 1974) (per curiam); Mueller v. Turcott, 501 F.2d 1016 (7th Cir. 1974) (participated); United States v. Rosciano, 499 F.2d 166, 173 (7th Cir. 1974) (en banc) (Stevens, J., dissenting); Peters v. Gray, 494 F.2d 327 (7th Cir. 1974) (per curiam); Morales v. Schmidt, 494 F.2d 85, 87 (7th Cir. 1974) (Stevens, J., concurring); Thomas v. Pate, 493 F.2d 151 (7th Cir. 1974) (participated); Haines v. Kerner, 492 F.2d 937 (7th Cir. 1974) (per curiam); Morales v. Schmidt, 489 F.2d 1335, 1344 (7th Cir. 1973) (Stevens, J., dissenting), *reh'g*, 494 F.2d 85 (7th Cir. 1974) (en banc); Knell v. Bensinger, 489 F.2d 1014 (7th Cir. 1973) (per curiam); Shead v. Quatsoe, 486 F.2d 694 (7th Cir. 1973) (per curiam); Walker v. Kruse, 484 F.2d 802 (7th Cir. 1973); United States *ex rel.* Allum v. Twomey, 484 F.2d 740 (7th Cir. 1973); Ganz

onstrate that although he is uncertain about the appropriate relief, he believes some action should be taken. He has adopted a go-slow[156] attitude while seeking the advice of prison officials.[157] The best way to comprehend his position is to examine a hypothetical prisoner and then to demonstrate how Justice Stevens has circumscribed the implementation of his policy preference.

Before the prisoner arrives in federal court, available state remedies must be exhausted.[158] Once in court, pro se litigants will receive deferential treatment,[159] but if an attorney is appointed, the attorney's opinion will be given great weight.[160] If Justice Stevens reaches the merits, he will limit himself to the individual case in granting relief or will establish minimum procedural safeguards.[161]

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v. Bensinger, 480 F.2d 88 (7th Cir. 1973); United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir.), *cert. denied*, 414 U.S. 1146 (1973); United States *ex rel.* Montgomery v. Illinois, 473 F.2d 1382 (7th Cir. 1973) (per curiam); Wimberly v. Laird, 472 F.2d 923 (7th Cir.), *cert. denied*, 413 U.S. 921 (1973); United States *ex rel.* Wilson v. Coughlin, 472 F.2d (7th Cir. 1973); United States *ex rel.* Kendzierski v. Brantley, 447 F.2d 806 (7th Cir. 1971); Nickols v. Gagnon, 454 F.2d 467 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972); Davis v. United States, 446 F.2d 847 (7th Cir. 1971) (per curiam); United States v. McGarthy, 445 F.2d 587 (7th Cir. 1971); Harris v. Pate, 440 F.2d 315 (7th Cir. 1971); United States v. Reid, 437 F.2d 1166 (7th Cir. 1971). Unless otherwise indicated, Justice Stevens wrote the majority opinion in each of the above decisions.

156. United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 719 n.37 (7th Cir.), *cert. denied*, 414 U.S. 1146 (1973).

157. *Id.* at 718.

158. *See* Kimbrough v. O'Neill, 523 F.2d 1057 (7th Cir. 1975). Justice Stevens' equivocation on this point is characterized by the following statement:

> This is not to suggest that the plaintiff in a [42 U.S.C.] § 1983 action must exhaust his state remedies before seeking federal relief. Rather, it seems to us that the availability of an adequate state remedy for a simple property damage claim avoids any constitutional violation. Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975).

In concurrence, Chief Judge Fairchild thought that "[t]he availability of a state remedy in damages [was] irrelevant . . . ." *Id.* at 1321.

159. Macon v. Lash, 458 F.2d 942, 949 (7th Cir. 1972). *But cf.* Kenner v. Commissioner, 445 F.2d 19, 24 (7th Cir. 1971) (Stevens, J., dissenting) (taxation).

160. Justice Stevens is concerned that if attorneys for indigent defendants are overburdened, the bar will fail to provide enough lawyers to represent indigents. *See* Walker v. Kruse, 484 F.2d 802, 804-05 (7th Cir. 1973); United States *ex rel.* Allum v. Twomey, 484 F.2d 740, 744 (7th Cir. 1973); Nickols v. Gagnon, 454 F.2d 467, 472 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972). *Accord, Special Project* 181 n.296. *But cf.* Comulada v. Pickett, 455 F.2d 230, 232 (7th Cir. 1972) (per curiam).

161. *See* text accompanying note 17 *supra*. The statement is not pre-

Limited relief is critical in understanding Justice Stevens. He is uncomfortable granting prospective relief from future injury on the basis of broad, ill-defined policies. For example, in *Morales v. Schmidt*,[162] the court rejected a prisoners' first amendment[163] objection to a partial ban on his letter writing privileges. In dissent, Justice Stevens stressed the ad hoc nature of the provisions as ground for reversal:

> In my opinion, any action which abridges First Amendment rights bears a heavier burden of justification if it implements an *ad hoc* determination rather than a preformulated standard. Guidelines which evidence awareness of the conflicting considerations that should influence particular decisions are presumptively valid.[164]

Morales is characteristic of Justice Stevens' prisoners' rights decisions requiring the creation of procedural safeguards.

Justice Stevens is comfortable with a procedural due process analysis. He has embraced the Supreme Court's description of

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cisely accurate because when Justice Stevens must confront a broad procedural question, he tends to enunciate minimal safeguards and then allow case-by-case adjudication to work out the details. *See, e.g.*, Bonner v. Coughlin, 517 F.2d 1311, 1316-17 (7th Cir. 1975); United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 718-19 (7th Cir.), *cert. denied*, 414 U.S. 1146 (1973).

Again, the idea has its origins in the thought of Justice Rutledge:

> The majority had adopted a rigid jurisdictional rule—even rejecting the government's offer to waive its objection to jurisdiction—partly because a contrary rule, if applied mechanically, would have unfortunate consequences. In Rutledge's view, both extreme positions could be avoided by placing greater reliance on the judgment of judges. Stevens, *Mr. Justice Rutledge*, *supra* note 4, at 329.

See notes 11, 13 *supra*.

This type of solution, narrow right accompanied by case law development, is characteristic of Justice Stevens' approach to problems. *See* Eason v. General Motors Acceptance Corp., 490 F.2d 654, 670 n.29 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974) (Burger, C.J., Douglas & White, J.J., would have granted certiorari. Powell, J. took no part in the decision.), *overruled*, Blue Chip Stamps v. Manor Drug Stores, 427 U.S. 723 (1975). Although this type of decision provides the litigants with an adequate solution, it would provide inadequate guidance to the lower courts if Justice Stevens continues this policy on the Supreme Court. *See* Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1026 (1972). *See also* Liles v. Oregon, 44 U.S.L.W. 3623 (U.S. May 4, 1976) (Stevens, J., concurring in the denial of certiorari).

162. 489 F.2d 1335, 1344 (7th Cir. 1973) (Stevens, J., dissenting) (rational relationship standard applied to prisoner's correspondence), *reh'g en banc*, 494 F.2d 85, 87 (7th Cir. 1974) (Stevens, J., concurring) (reasonably and necessarily related to the advancement of some justifiable purpose of imprisonment standard), *rev'g*, 340 F. Supp. 544 (W.D. Wisc. 1972) (compelling state interest standard).

163. U.S. CONST. amend. I. *See also Special Project* 141-44.

164. 489 F.2d at 1348 (footnote omitted).

"fundamental fairness" as the "touchstone of due process."[165] In *United States ex rel. Miller v. Twomey*,[166] he required that "until the rule-making process has been given an opportunity to develop more fully" the intraprison disciplinary action must meet the "bare minimum" of procedural due process.[167] Although this opinion was criticized by the dissent for its "cautious" attitude,[168] it is typical of Justice Stevens. Rather than demanding the "full panoply"[169] of constitutional safeguards, Justice Stevens merely required minimum procedures and left the rest to the prison administrators.

Justice Stevens believes the judiciary uniquely qualified to decide questions of procedural fairness.[170] This belief may explain why

165. *See* Shead v. Quatsoe, 486 F.2d 694, 695 (7th Cir. 1973) (per curiam), *citing*, Morrissey v. Brewer, 408 U.S. 471 (1972).

166. 479 F.2d 701 (7th Cir.), *cert. denied*, 414 U.S. 1146 (1973). *See also Special Project* 187.

167. 479 F.2d at 716.

168. *Id.* at 722-23.

169. *Id.* at 713.

170. This idea is uniquely important because it is one of the two foci of Justice Stevens' jurisprudence.

The idea originates with Justice Rutledge. He stated that:

> Facts are primarily within the jury's function. Hence it must be given wide latitude, or trial by jury becomes trial by court. But the jury is not absolute in the realm of fact. Like judges, jurors have weaknesses of emotion and judgment. Unlike judges, they seldom have a background of decision experience against which to check them. Our tradition supplies this through judicial controls . . . . Christie v. Callahan, 124 F.2d 825, 827 (D.C. Cir. 1941).

Justice Stevens embraced this idea with the observation that:

> Significantly, Rutledge identified the judges' "background of decision experience" as the faculty differentiating judges from jurors. He had great faith in wisdom born of experience and mistrusted untried statements of general principles. Stevens, *Mr. Justice Rutledge, supra* note 4, at 330.

But Justice Stevens would not fully develop the idea until Shirck v. Thomas, 447 F.2d 1025 (7th Cir. 1971), which held the nonretention of a nontenured teacher required a due process hearing. *See* text accompanying notes 131-33 *supra*. In dissent, Justice Stevens enunciated one of his rationales for limiting the judicial function:

> In final analysis the "due process" decision will not turn on any question of fair procedure but on a judge's evaluation of the substance of the administrative determination. I believe *judges are qualified by experience and training to evaluate procedural fairness and to interpret and apply guidelines established by others;* I do not believe they have any special competence to make the kind of policy judgment that this case implicitly authorizes. The assumption that they do invites the reaction that was produced by decisions such as Lochner v. New York, 198 U.S. 45 [1905]. *Id.* at 1029 (emphasis added).

In other words, what began with Justice Rutledge as a narrow limitation,

he has aggressively sought to protect the procedural rights of prisoners while at the same time he limits the federal class based remedies available to women. When an individual prisoner appears at the appellate level, Justice Stevens takes two courses of action. He first establishes minimum procedural safeguards and then limits his subsequent review to a determination of whether the administrative action is arbitrary. In contrast to this two-tier approach to prisoners, Justice Stevens must confront the substantive question of whether discrimination against women is present. Unlike with intraprison disciplinary actions, the court cannot create procedural rights under which some agency can adjudicate the particular issues of a case. Thus, because Justice Stevens cannot limit women's rights to procedure, as he can with prisoners', he has refused to grant any relief.[171]

Conclusion

According to Justice Stevens,[172] the use of force in a democracy must be legitimatized through the consensus formation process of political rulemaking. Because the judiciary does not derive its power from the democratic process, it should limit its policy formation role.

Even so, there is one area—procedural fairness—in which the judiciary is especially qualified to play a more aggressive role. A history of decisionmaking experience and legal training inculcates within the judiciary the traditions of fair play. Justice Stevens demands strict compliance with not only the letter but also the spirit

but cf. Rescue Army v. Municipal Court, 331 U.S. 549 (1947) (Rutledge, J.), on the primacy of the jury's fact-finding responsibility (U.S. CONST. amend. VII) has become for Justice Stevens a limitation on the policy formulation role of the judiciary. *See also* notes 4, 11, 13, 94, 153, 161 *supra.*

171. With all due respect to the Justice, we hazard a criticism of his technique of narrow construction. In the gender discrimination and prisoners' rights cases Justice Stevens' technique of constitutional adjudication was substantially similar; only the context changed. Therefore, we believe these two lines of cases can be reconciled only by assuming unstated premises which Justice Stevens has not articulated in his decisions. Whatever those premises are, we believe more forthright, if not more "principled," decisions would be rendered if these premises were articulated. *See generally* Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172, 189, 197 (1891). *Compare* Bishop v. Wood, No. 74-1303 (U.S. June 10, 1976) (5-4) (Stevens, J., writing for the majority) (no due process termination hearing for public employees), in L.A. Times, June 11, 1976, § 1, at 1, cols. 5-6, & 8, at 21, col. 6, *with* United States v. MacCollom, No. 74-1487 (5-4) (Stevens, J., dissenting) (trial transcripts for prisoners), in L.A. Times, June 11, 1976, § 1, at 1, cols. 5-6, & 8, at 21, col. 6.

172. *See* notes 13, 17, 74, 75, 129, 133, 134, 164 and accompanying text *supra.*

of procedural safeguards. When these procedural requirements are satisfied, Justice Stevens believes the judiciary duty bound to follow the substantive result reached by a political institution which represents a consensual decision.

Justice Stevens' view of a judge's role allows us to unify his somewhat disparate opinions. The consensual intent of the parties, whether contractual, statutory, or constitutional, is usually controlling. Administrative agencies are subject to a higher standard of review because they represent a secondary level of consensus formation. Until the consensus formation process has accorded sexual equality the same constitutional consideration as racial equality, it will not receive similarly solicitous treatment.[173] Although Justice Stevens will not review substantive decisions made by prison administrators,[174] he does demand that those officials follow procedures calculated to insure minimal standards of fairness.

In sum, Justice Stevens, in the tradition of Mr. Justice Powell, will probably assume a centrist position on the Court. The present Court majority "trust[s] institutions and officials."[175] Therefore the Court, though reluctant to enunciate "prophylactic rules," is ready to grant relief in the particular case.[176] Similarly Justice Stevens stated that the Court cannot be "a roving commission to reform all the sins of the executive" but rather that it should grant relief when the "perversion" of an agency function results in individual injury.[177]

Future decisions will determine whether Justice Stevens' views of a limited judicial role continue.

AFTERWORD

As this Comment goes to press, Justice Stevens' first two Supreme Court dissents lend credence to the themes identified in this article.

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173. As of this writing the Equal Rights Amendment, proposed U.S. CONST. amend. XXVII, fell four short of the required thirty-eight ratifying state legislatures. G. GUNTHER, *supra* note 151, at ciii n.t.

174. *See* United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 711-21 (7th Cir.), *cert. denied*, 414 U.S. 1146 (1973).

175. *Symposium, The Burger Court and the Constitution*, 11 COLUM. J.L. & SOC. PROB. 35, 57 (1974) (Dean Paulsen speaking).

176. *Id.*

177. *Hearings* 30.

In a dissent joined by Mr. Justice Rehnquist, Justice Stevens thought the existence of an adequate state remedy and the absence of actual[178] injury precluded federal intervention.[179] In the second opinion, this time joined by Mr. Justice Brennan and Mr. Justice Marshall, Justice Stevens continued to require minimum procedural safeguards for prisoners.[180]

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178. *Compare Hearings* 15 ("symbolic" value of the Equal Rights Amendment), *with* note 179 *infra.*

179. Bucolo v. Adkins, 96 S. Ct. 1086 (1976). The problem in *Bucolo* was a complex procedural issue. The Court had previously reversed petitioners' obscenity convictions in Florida. Bucolo v. Florida, 421 U.S. 927 (1975). On remand, the Florida Supreme Court sent the case to the trial court for further proceeding. Bucolo v. State, 316 So. 2d 551 (Fla. 1975). Then the State Attorney General *nolle prossed* the charges. At this point, the petitioners requested the Court to issue a writ of mandamus to the Florida Supreme Court. In a per curiam opinion, the Court granted leave to file a petition mandamus the Florida Supreme Court but declined to issue the extraordinary writ after explaining Florida's error.

For the Court the determinative factor was

> that nothing in the state court record, as it now stands, recognizes that the State was foreclosed by this Court's decision from seeking to convict petitioners of obscenity violations. We are unable to dismiss as insignificant petitioner's plaint that the judgment of the Supreme Court of Florida, as it now stands, obscures this Court's favorable adjudication on the merits—an adjudication which requires full recognition by the state courts in order effectively to dispel any opprobrium resulting from the accusation of obscenity. 96 S. Ct. at 1087-88.

In contrast, Justice Stevens argued that because "no matter what we do, there will be no further proceeding in the underlying litigation," it was improper to grant leave to file. *Id.* at 1088.

180. Enomoto v. Spain, 96 S. Ct. 1424 (1976). The Court stayed, pending further appeal, the effect of a federal district court decision requiring California corrections officials to hold hearings before placing unruly prisoners in isolation. In contrast, Justice Stevens was "not persuaded that the applicants ha[d] demonstrated a sufficient threat of irreparable injury to justify the exercise of this Court's power to issue an extraordinary writ . . . ." *Id.*