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SPECIAL PROJECT

Justice Stevens: The First Three Terms

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I. INTRODUCTION

Justice John Paul Stevens' appointment to the Supreme Court occurred during an important period of transition on the Court.[1] His ascendance from the Seventh Circuit Court of Appeals[2] contributed significantly to this transition in that it created a new majority on the Court: five Justices appointed after the retirement of Chief Justice Earl Warren.[3] During his first three Terms as a member of the Court, Justice Stevens was the Court's most prolific author, writing opinions in 136 cases, including sixty-five dissents, thirty-five concurrences, and thirty-six opinions of the Court.[4] This apportionment, along with his high level of productivity, indicates that Justice Stevens holds distinctive views, which he is not unwilling to assert. Justice Stevens thus has an opportunity to play a significant role in determining the future direction of a changing Court.

This Special Project undertakes an examination of Justice Stevens' Supreme Court opinions in an effort to identify his philosophical orientations, to evaluate the consistency of his views, and to

1. *See* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Kurland, *The New Supreme Court*, 7 J. MAR. J. PRAC. & PROC. 1 (1973); Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection*, 5 HOFSTRA L. REV. 545 (1977).

2. The United States Senate confirmed Justice Stevens' nomination to the Supreme Court in December 1975. He had served as a Court of Appeals judge since 1970. For biographical information and an extensive study of Justice Stevens' Seventh Circuit opinions, 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).

3. The new majority consists of Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and Stevens. Justices Brennan, White, Stewart, and Marshall were appointed prior to Chief Justice Warren's 1968 retirement. Justice Stevens succeeded Justice William O. Douglas, who had served since 1939. For further discussion of the symbolic importance of Justice Stevens' appointment, see Beytagh, *Mr. Justice Stevens and the Burger Court's Uncertain Trumpet*, 51 NOTRE DAME LAW. 946, 952 (1976).

4. These figures were derived from statistics compiled in *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 1, 327 (1978); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 295 (1977); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 276 (1976). Justice Brennan was the next most prolific author, with 133 opinions, while Chief Justice Burger wrote least, with only 99 opinions in the three Terms. In contrast to the 136 opinions written by Justice Stevens during his first three Terms, Justice Rehnquist authored 164 opinions in over four Terms at the beginning of his tenure. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 293 (1976).

determine the extent to which he has developed workable analytical methods. To achieve these goals, Justice Stevens' opinions are examined in three contexts: first, the area of federal-state relations, including commerce clause and supremacy clause questions; second, the individual rights area, emphasizing criminal constitutional and first amendment issues, and problems of fifth and fourteenth amendment analysis; and third, questions concerning the proper role of the Supreme Court in the constitutional scheme. Even though any vote cast by a Supreme Court Justice may illustrate a significant aspect of his ideology, this Special Project limits attention to opinions authored by Justice Stevens on the assumption that they most accurately represent his views.[5]

II. The Relationship Between Federal and State Governments

A. *Introduction*

The effective operation of a federal system of government requires a balance between the lawmaking powers of central and local government. Under the American system, the United States Constitution provides this balance. Roscoe Pound stated: "A federal polity is necessarily a legal polity. Only a constitution which is the supreme law of the land can hold the whole and the parts to their appointed spheres."[6]

Since his appointment to the Supreme Court, Justice Stevens has indicated significant concern with the balance between the powers granted to the United States government by the Constitution and those powers retained by the several states. His opinions recognize the necessity of state autonomy in affairs of local importance, while also acknowledging the need for broad federal power in matters requiring national uniformity. As a result, Justice Stevens apparently has chosen not to ally himself with the rigid states' rights advocacy of Chief Justice Burger and Justice Rehnquist,[7] nor has he

5. Although this Special Project focuses upon Justice Stevens' first three Terms, occasional reference is made to 1978 Term cases.

6. Pound, *Law and Federal Government*, in Federalism as a Democratic Process 29 (1942).

7. Chief Justice Burger and Justice Rehnquist appear to be allied in an effort to maintain state autonomy in conflicts between state and federal authority. *See, e.g.*, Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) (upholding state's use of single-factor formula in allocating the income of interstate business for state income tax purposes, despite potential duplicative taxation); Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978) (upholding state statute prohibiting petroleum refiners and producers from operating retail service stations within the state); National League of Cities v. Usery, 426 U.S. 833 (1976) (declaring unconstitutional the 1974 amendments to the Fair Labor Standards Act as applied to state government employees); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (upholding state's power, after entering marketplace as a purchaser, to discriminate against interstate commerce). For

accepted the complete pervasiveness of federal power allowed by a broad reading of the commerce clause.[8] This ideological independence has enabled Justice Stevens to become an important factor in determining the direction of the Court on questions affecting the balance of power between federal and state government.

B. The Scope of the Dormant Commerce Power

Justice Stevens' willingness to preserve some degree of autonomy for the states is most apparent in his opinions in cases considering challenges to state legislation under the "dormant" commerce clause[9] of the United States Constitution. Even in the absence of affirmative congressional action, the commerce power bars state legislation that places an undue burden on interstate commerce[10] or that discriminates against interstate goods.[11] Justice Stevens' opinions in this area, however, clearly limit the use of unexercised commerce power to invalidate state legislation.

In *Hughes v. Alexandria Scrap Corp.*[12] the Supreme Court considered the constitutionality of a Maryland statute[13] that provided a state "bounty" to licensed scrap processors for the destruction of automobiles abandoned on Maryland highways. The statute clearly discriminated against interstate commerce by requiring non-Maryland processors to submit substantial documentation of title to the abandoned automobiles in order to claim the bounty, while not requiring such documentation by Maryland processors. This discriminatory requirement impeded the flow of abandoned automobiles to non-Maryland processors who thus were able to collect fewer bounties from the state.[14] The Court upheld the statute, despite its discriminatory effect, holding that the activities of a state, which has entered the marketplace as a purchaser and not a regulator, are exempt from the traditional constraints of the dormant commerce clause. Justice Stevens, concurring in the decision, differentiated between "commerce which flourishes in a free market sys-

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a discussion of Justice Rehnquist's ideological commitment to states' rights, see Shapiro, *supra* note 4, at 294-99.

8. Justices Brennan and Marshall appear to support the broadest scope of federal power and thus constitute an opposing force to the Burger-Rehnquist alliance on issues concerning the balance of state and federal power. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976) (Brennan, J. and Marshall, J., dissenting); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (Brennan, J. and Marshall, J., dissenting).

9. U.S. CONST. art. I, § 8, cl. 3.

10. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

11. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

12. 426 U.S. 794 (1976).

13. MD. ANN. CODE art. 66 ½, §§ 5-201 to 5-210 (1970) (repealed 1977), § 11-1002.2 (1975 Supp.) (repealed 1977).

14. 426 U.S. at 803 n.13.

tem and commerce which owes its existence to a state subsidy program," stating that the restrictions of the dormant commerce clause do not apply to the latter.[15] Stevens demonstrated his concern with protecting state autonomy by urging adoption of "a common and correct interpretation of the Commerce Clause as primarily intended . . . to inhibit the several States' power to create restrictions on the free flow of goods within the national market, rather than to provide the basis for questioning a State's right to experiment with different incentives to business."[16] His concern that a state should be permitted to control the flow of its largess led Justice Stevens to agree with the majority that state-created commerce should be exempt from traditional dormant commerce clause analysis.

In addition to exempting certain state activity from the scope of the dormant commerce clause, Justice Stevens has indicated a reluctance to invalidate state legislation clearly subject to dormant commerce clause scrutiny. By requiring an especially great burden or discriminatory effect on interstate commerce before invalidating state legislation, Justice Stevens has limited further the impact of the unexercised commerce power on such legislation. In *Exxon Corp. v. Governor of Maryland,*[17] for example, Justice Stevens, writing for the Court, upheld the constitutionality of a Maryland statute that prohibited a producer or refiner of petroleum products from operating any retail service station within the state.[18] Several major petroleum refiners challenged the statute's validity under the dormant commerce clause on two grounds: first, that the statute discriminated against interstate commerce by protecting independent Maryland retailers from competition with interstate petroleum refiners, and second, that the statute, by causing three major oil refiners to stop selling in Maryland, even at the wholesale level, impermissibly burdened interstate commerce.

Justice Stevens rejected both contentions. First, Stevens stated that the fact that the burden of the statute's divestiture requirements fell solely on interstate companies did not necessitate a conclusion that the state was discriminating against interstate com-

15. *Id.* at 815 (Stevens, J., concurring).

16. *Id.* at 817.

17. 437 U.S. 117 (1978).

18. The statute provided:

> After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, or under contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.

MD. ANN. CODE art. 56, § 157E(b) (Supp. 1978).

merce.[19] He pointed to several interstate petroleum marketers that were unaffected by the statute because they did not produce or refine petroleum. Second, Justice Stevens stated that the withdrawal of several petroleum refiners from the Maryland wholesale market did not necessarily constitute an impermissible burden on interstate commerce since "there is no reason to assume that their share of the entire supply will not be promptly replaced by other interstate refiners."[20] In addition, Justice Stevens found that the injury to the consuming public resulting from the loss of high volume, low-priced retail stations operated by major oil refiners related only "to the wisdom of the statute, not to its burden on commerce."[21]

Justice Stevens has also refused to employ the dormant commerce clause analysis to impose uniformity on the states with respect to state taxation of interstate business despite his admission that such uniformity would "advance the policies that underlie the Commerce Clause."[22] Writing for the Court in *Moorman Manufacturing Co. v. Bair,*[23] Justice Stevens upheld an Iowa statute prescribing the use of a "single-factor sales formula" in apportioning an interstate corporation's income for state income tax purposes.[24] Most states utilize a three-factor formula. Even though duplicative taxation significantly burdening interstate commerce could result from use of the different formulas by the various states, Justice Stevens declined to hold that the commerce clause, in the absence of congressional action, requires the use of a uniform formula simply because a majority of the states have chosen identical formulas. According to Justice Stevens, an imposition of uniformity on the states would require a "policy decision based on political and economic considerations that vary from State to State," and the exclusion of "the interests of those States whose policies are subordinated in the quest for uniformity . . . ."[25]

Justice Stevens' reluctance to utilize the dormant commerce clause to invalidate state legislation is of great importance in determining the direction of the Supreme Court as it seeks to maintain

19. 437 U.S. at 126.

20. *Id.* at 127.

21. *Id.* at 128.

22. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 279 (1978).

23. 437 U.S. 267 (1978).

24. *Id.* at 267-81. The single-factor formula results in tax on a percentage of the corporation's income equal to the ratio of gross in-state sales to total gross sales by the corporation. The three-factor formula utilizes three ratios: property within the state to total property, payroll within the state to total payroll, and sales within the state to total sales. *Id.* at 270 n.3.

25. *Id.* at 279-80.

the balance between state and federal power. When faced with a challenge to state legislation under the dormant commerce clause, Justice Stevens consistently joins Chief Justice Burger and Justice Rehnquist in upholding state autonomy.[26] Justice Stevens' opinions in *Alexandria Scrap, Exxon,* and *Moorman* suggest that his reluctance to use the dormant commerce clause is based upon two concerns that mandate independent action by the states. The first concern is the theoretical benefit that a federal system obtains by encouraging experimentation among its various entities. In his concurrence in *Alexandria Scrap,* Justice Stevens was mindful of the necessity of such experimentation, especially in the area of state-subsidized incentives to business. The second concern is the benefit that a federal system derives from allocating to local government the accomodation of local interests and the solution of local problems. In *Moorman* Justice Stevens expressed particular concern for "political and economic considerations that vary from State to State."[27] Thus, when state legislation is subjected to a dormant commerce clause challenge, these concerns motivate Justice Stevens to rule consistently in favor of state autonomy.

C. *The Scope of the Affirmative Commerce Power*

Justice Stevens' concern for state autonomy in the dormant commerce clause cases is tempered by his recognition of the broad scope of congressional authority under the affirmative aspect of the commerce clause. This recognition establishes that Justice Stevens is cognizant of the necessity for a balance between state and federal power and has resulted in his separation from the Burger-Rehnquist states' rights alliance.

Justice Stevens' most conspicuous departure from states' rights advocacy occurred in *National League of Cities v. Usery,*[28] in which the Court declared minimum wage and maximum hour provisions established by the 1974 amendments to the Fair Labor Standards Act[29] unconstitutional as applied to state government employees performing "traditional governmental functions."[30] Justice Rehnquist, writing for the majority, expressed particular concern over the states' role as "coordinate element[s] in the system established by the Framers for governing our Federal Union."[31] Thus, the majority held that Congress was without authority under the commerce

26. *See* note 7 *supra.*
27. 437 U.S. at 279.
28. 426 U.S. 833 (1976).
29. 29 U.S.C. §§ 201-219 (1976).
30. 426 U.S. at 852.
31. *Id.* at 849.

clause to "wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system.' "[32]

Despite his "disagreement with the wisdom of [the] legislation,"[33] Justice Stevens dissented from the Court's holding, asserting that the federal government's power over the labor market is adequate to embrace state government employees.[34] Justice Stevens thus did not view the issues presented by *Usery* within the framework of state autonomy or states' rights adopted by Justice Rehnquist. Rather Justice Stevens focused solely on the scope of the affirmative grant of federal power established by the Constitution in the commerce clause. Recognition of the need for uniform national treatment of labor markets led Justice Stevens to find adequate authority for federally imposed wage and hour standards in the commerce clause, even when such provisions are applied to state government employees.

This approach again demonstrates Justice Stevens' concern for a balance between state and federal authority. In the affirmative commerce power context, unlike the dormant commerce clause cases, Justice Stevens must assess the proper scope of exercised federal power. Just as he consistently defers to state legislation affecting interstate commerce in the absence of congressional action, Justice Stevens seeks to uphold the exercise of the commerce power by Congress, even when restrictions are imposed on the activities of a "State *qua* State."[35] Justice Stevens' unwillingness to subordinate the impact of federal legislation to traditional state concerns in *Usery* indicates deference toward congressional policy decisions imposing uniformity on the states. The *Usery* dissent does not indicate whether Justice Stevens would impose any limits on congressional policy decisions regarding the need for national uniformity or whether he would consistently defer to a legislative determination that uniformity was necessary. It is certain, however, that Justice Stevens, contrary to the majority assembled by the Burger-Rehnquist alliance, is reluctant to impose state sovereignty as such a limit.

D. The Scope of Federal Legislation

Justice Stevens has recognized the plenary federal power under the commerce clause and has justified state legislation affecting

32. *Id.* at 852 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

33. *Id.* at 881.

34. *Id.* (Stevens, J., dissenting). In his concurrence in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), Stevens again stated that "the commerce power is broad enough to support federal legislation regulating the terms and conditions of state employment." 427 U.S. at 458.

35. 426 U.S. at 881.

interstate commerce in the face of dormant commerce clause challenges. Although his decisions in these two areas seem to represent a balancing of state and federal power, in neither context does Justice Stevens confront conflicting policy decisions made by the federal and state governments. In cases of direct conflict between state and federal interests arising under the supremacy clause of the United States Constitution, Justice Stevens has had more difficulty achieving a balance.

(1) Federal Preemption

Generally, the supremacy clause[36] provides that federal legislation shall supersede that of the states if the federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or touches "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[37] The determination whether a federal law is sufficiently "pervasive" or a federal interest sufficiently "dominant" to preempt state legislation necessarily requires consideration of competing state and federal interests.

In the preemption context, the weight given to state interests by Justice Stevens seems to depend upon his perception of the need for national uniformity in the area or activities regulated by the conflicting federal and state legislation.

In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*[38] the Court considered the effect of the National Labor Relations Act[39] upon state court power to enforce state trespass laws against picketing that is arguably prohibited or protected by sections 7 and 8 of the Act.[40] Normally, conduct arguably covered by the Act is subject only to the jurisdiction of the National Labor Relations Board and state courts must defer to its exclusive jurisdiction.[41] Nevertheless, Justice Stevens, writing for the Court, refused to adopt "an approach which sweeps away state-court jurisdiction

36. U.S. CONST. art. VI, cl. 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

37. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

38. 436 U.S. 180 (1978).

39. 29 U.S.C. §§ 151-169 (1976).

40. Sears sought an injunction on the state law grounds of trespass when a carpenters' union, after discovering that carpentry work in a Sears store was being done by nonunion workers, established picket lines on Sears' property.

41. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected."[42] Justice Stevens stated that in the absence of compelling congressional direction, the Court would uphold state court jurisdiction under the trespass laws because the conduct thus regulated touched "interests . . . deeply rooted in local feeling and responsibility . . . ."[43] Justice Stevens considered two factors in evaluating this preemption challenge: first, the significance of the state interest in protecting its citizens from the conduct in question, and second, the degree of risk of interference with the regulatory jurisdiction of the National Labor Relations Board entailed by the exercise of state court jurisdiction.[44] Justice Stevens' willingness to consider such factors demonstrates his concern that responsibility for solving local problems be allocated to local government unless explicit federal policy compels otherwise.

Similarly, in *Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*[45] Justice Stevens argued in dissent that state law could legitimately declare conduct to be an unfair labor practice even though it is neither protected nor prohibited by the National Labor Relations Act.[46] This dissent, coupled with the *Sears* decision, clearly indicates that Justice Stevens does not regard the Act as sufficiently pervasive, nor the federal interest in regulating labor relations sufficiently dominant, to preempt all state action in the area.

This analysis stands in marked contrast to that utilized by Justice Stevens in the antitrust area.[47] While the cases he has decided in this area do not focus on traditional preemption issues, Justice Stevens has clearly discounted the concern he expressed in the labor relations context for state control over local matters in determining the effect of the Sherman Act[48] on state legislation and judicial actions. In *Vendo Co. v. Lektro-Vend Corp.*[49] the Court

42. 436 U.S. at 188.

43. *Id.* at 195 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959)).

44. 436 U.S. at 196.

45. 427 U.S. 132 (1976).

46. *Id.* at 156-59 (Stevens, J., dissenting). The conduct complained of consisted of union refusal to work overtime during negotiations for renewal of an expired collective bargaining agreement.

47. Justice Stevens possesses considerable expertise in the antitrust area. Prior to his appointment to the Seventh Circuit, he was associate counsel to the House of Representatives subcommittee on Study of Monopoly Power, a member of the Attorney General's National Committee to Study the Antitrust Laws, and a lecturer in antitrust law at Northwestern and University of Chicago Law Schools. Special Project, *supra* note 2, at 169-70.

48. 15 U.S.C. §§ 1-7 (1976).

49. 433 U.S. 623 (1977).

reviewed a district court decision enjoining collection of an Illinois state court judgment. Petitioner had successfully sued respondent in state court for breach of certain noncompetitive covenants. Respondent alleged, in federal court, that the covenants violated the Sherman Act. The Court held that the Clayton Act,[50] which authorizes injunctive relief for Sherman Act violations, provided no exemption from the Anti-Injunction Act,[51] which prohibits a federal court from enjoining state-court proceedings unless expressly authorized by Congress. Justice Stevens, dissenting, refused to deprive "the federal courts of power to stay state-court litigation which is being prosecuted in direct violation of the Sherman Act,"[52] reasoning that the prosecution of litigation in a state court may itself constitute a form of violation of the federal statute.[53] Moreover, Justice Stevens expressly declined to "invoke principles of federalism to defeat enforcement of the 'Magna Charta of free enterprise' enacted pursuant to Congress' plenary power to regulate commerce among the States."[54]

Justice Stevens has also declined to broaden the scope of the *Parker v. Brown*[55] doctrine, which exempts states from antitrust liability under the Sherman Act. In *Cantor v. Detroit Edison Co.*,[56] Justice Stevens, writing for the majority, refused to apply *Parker* to a state-regulated private utility that was required by state law to carry on a free light bulb exchange program with its residential customers, an activity that arguably violated the Sherman Act. Justice Stevens refused to hold private conduct required by state law exempt from the provisions of the Sherman Act even in areas of the economy pervasively regulated by state agencies prior to enactment of federal antitrust legislation.

Although limited to the labor relations and antitrust contexts, the crucial factor in Justice Stevens' preemption analysis appears to be his perception whether the area regulated by Congress demands national uniformity. As *Lodge 76* suggests, Justice Stevens perceives a strong local interest in regulating certain aspects of the employer-employee relationship, thus limiting the preemptive effect of the National Labor Relations Act. In the antitrust area, on the other hand, Justice Stevens concludes that insuring free enterprise in the national economy is a vital federal interest, which nar-

50. 15 U.S.C. §§ 12-27 (1976).
51. 28 U.S.C. § 2283 (1976).
52. 433 U.S. at 647 (Stevens, J., dissenting).
53. *Id.* at 652.
54. *Id.* at 666.
55. 317 U.S. 341 (1943).
56. 428 U.S. 579 (1976).

rows the extent of permissible state regulation. Justice Stevens' perception of the need for pervasive antitrust legislation thus results in his unwillingness to subordinate this federal concern to any state interest.

(2) Sovereign Immunity

Since *McCulloch v. Maryland*[57] the supremacy clause has immunized the federal government from direct taxation by the states. This immunity, however, does not extend to taxes "indirectly" laid on the federal government unless such taxes are discriminatory. Thus, for example, a state tax imposed solely on the income of federal employees residing within a state is invalid under the supremacy clause, but the clause does not invalidate a state income tax imposed nondiscriminately on all state residents, even though federal employees are also subject to state taxation.[58]

Justice Stevens demonstrated great concern for the preservation of federal immunity from state taxation in *United States v. County of Fresno*.[59] In that case, California law authorized counties to impose an annual tax on possessory interests in improvements on tax-exempt property. The counties levied a tax on United States Forest Service employees for their possessory interests in housing supplied by the United States and located in national forests. The majority of the Court upheld the assessment, reasoning that the tax was not discriminatory since the counties imposed a similar tax on nonexempt property. Justice Stevens, dissenting alone, rejected the reasoning of the majority and found the tax to be discriminatory because the California counties imposed no tax on other types of tax-exempt property within the state. Justice Stevens described the tax as one which created "the kind of potential for friction between two sovereigns that the doctrine of constitutional immunity was intended to avoid."[60]

The sovereign immunity context, however, also has presented Justice Stevens the opportunity to express sensitivity to potential infringements upon state interests by the federal government. In *Minnesota v. Alexander*[61] the Court refused to hear an appeal of a lower court holding that dredging by the Army Corps of Engineers was exempt from state water pollution regulations. Justice Stevens, arguing vigorously for review of the lower court decision, recognized the general rule that federal agencies are immune from state regula-

57. 17 U.S. (4 Wheat.) 160 (1819).
58. *See* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939).
59. 429 U.S. 452 (1977).
60. *Id.* at 468 (Stevens, J., dissenting).
61. 430 U.S. 977 (1977).

tion,[62] but asserted that Congress had waived the immunity in section 313 of the Federal Water Pollution Control Act.[63] Justice Stevens contended that review of the issues was particularly important in light of both the damage done to Minnesota water quality by Corps of Engineers activities and the concern expressed by six other states, which filed briefs urging reversal of the lower court decision.[64]

Justice Stevens' decisions in the sovereign immunity context suggest considerable concern for the federal government's ability to operate free from interference by the states. Stevens' sole dissent in *Fresno* emphasizes his distinctive sensitivity in this area. As his *Alexander* dissent indicates, however, Justice Stevens also is willing to allow such state interference should Congress choose to waive sovereign immunity. Justice Stevens may require an express congressional waiver of immunity to overcome his apparent presumption that federal sovereignty, broadly defined, must always prevail over restrictive state legislation.

E. Conclusion

Justice Stevens' opinions addressing allocation of lawmaking powers between state and federal government suggest that he holds in high regard the federalism principles set forth in the Constitution. Utilizing the varied constitutional contexts in which balance of power issues arise, Justice Stevens manifests this concern by insuring that both state and federal interests receive due consideration. In the commerce clause context, Justice Stevens is consistently reluctant to invalidate state legislation affecting interstate commerce on dormant commerce clause grounds, thereby enabling the states to experiment in resolving problems affecting local interests. Nevertheless, Justice Stevens recognizes the plenary nature of the affirmative federal commerce power mandated by the need for national uniformity in certain matters. Thus, Justice Stevens is generally willing to accept the fact of congressional action as indicating a need for such uniformity. In the supremacy clause context, Justice Stevens demonstrates a willingness to uphold state activity based on legitimate state interests in areas in which Congress has legislated, but he has refused to subordinate important federal interests, such as antitrust legislation, to even the most significant and traditional state interests.

Most importantly, in his three Terms on the Supreme Court, Justice Stevens has maintained an ideological independence, adhering to neither a rigid states' rights philosophy nor a belief that

62. *Id.* at 978 (Stevens, J., dissenting).
63. 33 U.S.C. § 1323 (1976).
64. 430 U.S. at 980.

federal power must always prevail. This independence has resulted in decisions based on logic and reason, with a consistent and reasonable application of constitutional principles. His opinions, in turn, have contributed significantly to maintaining a balance between state and national power necessary for the successful operation of a federal system of government.

III. INDIVIDUAL RIGHTS

A. *The Constitutional Rights of the Accused Criminal*

(1) Analytical Approach: "Due Process" vs. "Crime Control"

In *The Limits of the Criminal Sanction*,[65] Herbert L. Packer offers a dichotomous approach to analyzing the criminal process. At the heart of Professor Packer's methodology are two models, labeled the Due Process Model and the Crime Control Model, which describe conflicting value judgments made in administering the criminal process.[66] This section of the Special Project employs Professor Packer's models to characterize Justice Stevens' opinions relating to the rights of the criminal defendant. First, the basic philosophy of each model must be summarized briefly.[67]

Stated in grossest terms, the principal concern of the Due Process Model is to guard the rights of the individual criminal defendant. The philosophy of the Due Process Model has four premises: first, the criminal process culminates in the loss of substantial liberties and the attachment of social stigma; second, the criminal process is prone to human error; third, the criminal process usually operates unequally, depending upon the financial resources of the defendant; and fourth, the morality and effectiveness of traditional criminal sanctions are dubious.[68] The Due Process Model thus demands that the criminal defendant be assured every available advantage in the criminal process, placing significant emphasis on the presumption of innocence. The chief concern of the Due Process approach is not with a defendant's factual guilt; rather, the main issue is whether proof of guilt is established in accordance with the rules governing the criminal process. Thus considerations of efficiency and the societal interest in controlling the criminal element are decidedly subordinate under the Due Process view.

In contrast to the Due Process Model, the Crime Control Model rests upon the proposition that the primary concern of the criminal

65. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

66. *Id.* at 152-54.

67. This summary only describes the basic elements of each model. For a full development of Professor Packer's mode of analysis, see *id.* at 149-73.

68. *Id.* at 163-73.

process is to discourage criminal conduct.[69] Contending that an effective criminal process is essential to maintaining an ordered society,[70] the Crime Control view places the interests of the criminal defendant secondary to those of society. Efficiency is the goal under the Crime Control approach: the success of the criminal process depends upon not only the speed with which a criminal is apprehended and convicted, but also the number of individuals who move through the process.[71] Thus a less formal and more uniform criminal process is a more efficient system: a process with fewer formalities provides fewer procedural rules offering advantages to the criminal defendant, and greater uniformity results in less regard for the unique circumstances of a case or the particular needs of a defendant.[72]

To attain maximum efficiency in the criminal process, those cases having a low probability of producing a conviction must be rejected at the earliest stage possible. Theoretically, then, under the Crime Control approach the criminal process operates upon the probability or confidence that the defendant is guilty.[73] Thus, while the Due Process Model uses procedural safeguards to prevent injustice in the criminal process, the Crime Control Model relies upon its fact-finding process to avoid erroneous conviction, giving the defendant the benefit of the doubt at the earliest stages of the criminal process.

The utility of Packer's dual model notion in analyzing Justice Stevens' opinions lies not in labeling him as either a Due Process or Crime Control advocate,[74] or as having a strong pro-defendant or pro-prosecution orientation, but in using the premises underlying the models to identify his principal concerns when the criminal process is invoked against an individual. In attempting to isolate these concerns, this section of the Special Project examines Justice Stevens' opinions[75] concerning three basic stages of the criminal process: the pretrial, trial, and post-conviction periods.

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69. *Id.* at 158.

70. *Id.*

71. *Id.* at 159.

72. *Id.*

73. *Id.* at 160-61.

74. Because the two models represent theoretical absolutes, one would hardly expect to find that Justice Stevens—or any other person—is either a Due Process or Crime Control purist; indeed, Professor Packer labels the purist a "fanatic". *Id.* at 154.

75. Of the 31 criminal cases in which Justice Stevens wrote opinions during his first three Terms on the Court, he delivered the majority opinion in only five.

(2) The Criminal Process

(a) The Pretrial Context

Collectively, Justice Stevens' opinions in cases centering upon issues arising at the pretrial stage indicate that he seeks to assure the full operation of the constitutional guarantees designed to protect the criminal defendant, even in the face of a defendant's obvious factual guilt. For example, in *Brewer v. Williams*,[76] defendant, an escaped mental patient, was convicted of murdering a minor female. Although defendant's factual guilt was beyond dispute,[77] Justice Stevens concurred in the Court's five to four decision overturning the conviction on the ground that he had been denied right to counsel.[78] Emphasizing the difficulty in deciding the case dispassionately,[79] he nonetheless concluded that in coercing evidence from defendant before he had the opportunity to consult with counsel,[80] the authorities thus deprived defendant of his right to counsel at a "critical stage."[81]

In cases raising fourth amendment search and seizure issues, Justice Stevens consistently demonstrates a sensitivity to the individual's interest in freedom from unjustified intrusions by law enforcement officers. In *Pennsylvania v. Mimms*[82] Justice Stevens dissented from a per curiam decision permitting police to search motorists stopped for routine traffic violations. Although recognizing the threat to policemen's lives in these situations, Justice Stevens asserted that the Court's decision abandoned a long-established rule requiring "individualized inquiry into the particular facts justifying every police intrusion" and authorized "the indiscriminate invasion of the liberty of every citizen stopped for a traffic violation, no matter how petty."[83] Similarly, Justice Stevens dissented in *Zurcher v. Stanford Daily*,[84] in which the Court ruled that a search warrant may be issued when probable cause exists to believe that

76. 430 U.S. 387 (1977).

77. Defendant called his attorney and confessed to the crime and later led police officers to various locations where articles of the victim's clothing, and the body itself, were found. *Id.* at 390-93.

78. *Id.* at 414-15 (Stevens, J., concurring).

79. *Id.*

80. When defendant called his attorney, the attorney advised him not to make any statements to the police until after they had had an opportunity to confer. Thereafter, the police agreed that they would not question the defendant while transporting him. During the 165 mile trip, however, the police, knowing that the defendant was strongly religious, coerced him into leading them to the evidence by delivering what was termed a "Christian burial speech." *Id.* at 391-93.

81. *Id.* at 415.

82. 434 U.S. 106 (1977).

83. *Id.* at 116, 123 (Stevens, J., dissenting).

84. 436 U.S. 547 (1978).

evidence relating to a criminal investigation may be found. He contended that the fourth amendment requires much more than merely establishing that a search may uncover evidence.[85] Arguing that the Court's ruling could subject "[c]ountless law abiding citizens"[86] to unannounced searches resulting in inspection of confidential material unrelated to the investigation,[87] he asserted that the fourth amendment "flatly prohibits"[88] issuance of a warrant without showing probable cause of either participation in a crime or a fear that evidence may be destroyed.[89]

Justice Stevens did not identify specifically any Due Process Model values in setting forth his more rigorous probable cause requirements. His dissents in *Mimms* and *Zurcher*, however, give rise to the inference that he relied intuitively upon the second premise underlying the Due Process Model: the criminal process is prone to human error.[90] In both cases, his opinions focused upon the egregious consequences to which the Court's rulings might lead—the abuse of police power that could affect seriously individuals' rights to privacy and freedom from oppression. Even though Justice Stevens emphasized the interests of the innocent victims, his standards

85. *Id.* at 577 (Stevens, J., dissenting).

86. *Id.* at 579.

87. *Id.*

88. *Id.* at 582.

89. *Id.* at 582-83. In an earlier case, United States v. Santana, 427 U.S. 38 (1976), Justice Stevens concurred in the Court's decision rejecting respondent's claim that her fourth amendment rights were violated when police, acting upon the knowledge that she was engaged in heroin trafficking, pursued her into the vestibule of her home to make a warrantless arrest. Justice Stevens based his concurrence partly upon one of the considerations he later emphasized in *Zurcher*: a substantial risk existed that the evidence—in this case, marked money—might not be in respondent's possession by the time the police obtained a warrant. *Id.* at 44-45. Although *Santana* is distinguishable from *Mimms* and *Zurcher* in that it centered upon a warrantless arrest rather than an unannounced search, the underlying motivations are identical: Justice Stevens did not allow law enforcement officers to compromise the warrants clause of the fourth amendment without an "articulable justification" for the intrusion. This position was reiterated in Michigan v. Tyler, 436 U.S. 499 (1978), in which the Court held that, when police and fire department investigators entered burned premises some three days after the fire to investigate and secure evidence of arson, such entry without a warrant violated the warrants clause of the fourth amendment. Concurring, Justice Stevens stated: "In my view, when there is no probable cause to believe a crime has been committed and when there is no special enforcement need to justify an unannounced entry, the Fourth Amendment neither requires nor sanctions an abrupt and peremptory confrontation between sovereign and citizen." *Id.* at 513-14 (Stevens, J., concurring).

These cases must be distinguished, however, from Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), in which Justice Stevens dissented from the Court's decision applying the fourth amendment protections to inspections by administrative agencies that are conducted to investigate compliance with federal statutes, in this case, OSHA. Contending that these inspections were adopted by Congress pursuant to its recognition of a federal interest in safety, Justice Stevens concluded that the Court should have deferred to congressional judgment. *Id.* at 325-39 (Stevens, J., dissenting).

90. *See* text accompanying note 68 *supra*.

would simultaneously protect those factually connected with criminal misconduct. Justice Stevens' willingness to accept the release of some factually guilty individuals in order to reduce the potential for infringement upon individual rights resulting from police error distinguishes him from the majority of the Supreme Court.

(b) The Trial Context

Consistent with his opinions in the pretrial context, Justice Stevens' opinions in cases containing issues relating to the trial process indicate that he seeks to ensure the constitutional rights of criminal defendants. For example, in *Lakeside v. Oregon*[91] Justice Stevens dissented from the Court's rejection of petitioner's claim that the trial court's instructions cautioning the jury not to draw adverse inferences from petitioner's failure to testify violated the fifth amendment prohibition of self-incrimination. Justice Stevens opened his dissent by alluding to a central Crime Control presumption: "Experience teaches us that most people formally charged with a crime are guilty . . . . Experience also justifies the inference that most people who remain silent in the face of serious accusation have something to hide and are therefore probably guilty . . . ."[92] Nonetheless, Justice Stevens endorsed the Due Process premise that the criminal process is prone to human error, stating that the purpose of the self-incrimination provision was to protect "a small minority of accused persons—those who are actually innocent—from wrongful conviction."[93] Accordingly, he concluded that the instruction, even though intended to have an ameliorative effect, violated the protection against self-incrimination.[94]

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91. 435 U.S. 333 (1978).

92. *Id.* at 342 (Stevens, J., dissenting).

93. *Id.* at 343.

94. *Id.* at 347-48. In Henderson v. Kibbe, 431 U.S. 145 (1977), Justice Stevens delivered the majority opinion upholding respondent's second degree murder conviction over his challenge that the trial judge failed to give adequate instructions regarding the causation element of the offense. Noting that respondent had a greater burden of showing unconstitutional prejudice in a collateral proceeding than on direct appeal, Justice Stevens stated that, in order to overturn the conviction, the instructions must have "so infected the entire trial that the resulting conviction violates due process." *Id.* at 154 (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Accordingly, upon reviewing the entire record and the instructions given, Justice Stevens ruled that the jury was adequately informed of the causation element. *Kibbe* thus demonstrates Justice Stevens' concern for court efficiency and the integrity of the system, but in a different context: in *Kibbe* he endorses the view that collateral proceedings place a greater burden upon the defendant. Accordingly, he identified the correct constitutional boundary and concluded that the trial judge's instruction was within it.

In Taylor v. Kentucky, 436 U.S. 478 (1978), Justice Stevens dissented from a decision overturning a conviction on the ground that defendant had the constitutional right to an instruction on the presumption of innocence if such an instruction was requested. Stating that an omission in instructing the jury may constitute reversible error if it results in the depriva-

Justice Stevens again alluded to both Crime Control and Due Process premises in dissenting from the decision in *Ludwig v. Massachusetts*,[95] which upheld the state's two-tier court system, requiring defendants to submit to a nonjury proceeding before receiving a jury trial. Conceding the Crime Control consideration that the two-tier system expedited the disposition of criminal cases,[96] Justice Stevens nevertheless indicated greater sensitivity to the third premise[97] of the Due Process Model in contending that the system imposed undue financial, as well as psychological, burdens upon defendants.[98] Noting that the two-tier system could discourage a defendant from pursuing his right to a jury trial,[99] Justice Stevens also argued that the system might prejudice jurors, since they would probably learn of the conviction or guilty plea in the previous stage.[100]

Although *Lakeside* and *Ludwig* demonstrate Justice Stevens' consistency in affording individuals the full measure of constitutional protections, those cases do not evidence a second trait that manifests itself in his opinions in cases arising in the trial context. When the issue centers upon the exercise of discretionary powers by the trial judge, Justice Stevens defers to the trial court's judgment, upholding the disputed action unless it is clearly contrary to constitutional principles. This is best exemplified in *United States v. Agurs*.[101] In *Agurs* respondent claimed that she was denied a fair trial because the prosecution failed to disclose evidence voluntarily

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tion of a constitutional guarantee, Justice Stevens argued that there is no constitutional provision requiring the instruction requested in this case, and that therefore no constitutional error had been committed. Although Justice Stevens did not expand further upon his reasoning in this very short opinion, his opinion appears to have focused on the constitutional limits of judicial power rather than on individual rights or concerns of efficiency: specifically, the role of the Court as a reviewing body should be limited to the scope afforded by the Constitution.

95. 427 U.S. 618 (1976).

96. *Id.* at 635, 637 (Stevens, J., dissenting).

97. *See* text accompanying note 68 *supra*.

98. 427 U.S. at 634-35.

99. *Id.* at 637 n.3.

100. *Id.* at 637. In Henderson v. Morgan, 426 U.S. 637 (1976), Justice Stevens delivered the majority opinion that affirmed the overturning of a second degree murder conviction. Defendant pleaded guilty at trial without understanding that second degree murder included an element of intent. The government argued that the Court should not require a "ritualistic litany of the formal legal elements" to assure the voluntariness of defendant's guilty plea, but should focus instead upon whether the substance of the charge was conveyed. *Id.* at 644. Although agreeing with this contention, Justice Stevens found, however, that even under that test, the guilty plea was defective. *Id.* Recognizing that "overwhelming evidence of guilt was available," Justice Stevens concluded: "Nevertheless, such a plea cannot support a judgment of guilt unless it was voluntary in the constitutional sense." *Id.* at 644-45 (footnote omitted). He noted that a plea cannot be voluntary if the defendant has an incomplete understanding of the charge. *Id.* at 645 n.13.

101. 427 U.S. 97 (1976).

that would have aided her defense to second degree murder charges.[102] Justice Stevens, delivering the majority opinion, rejected her claim because the evidence would have made no material contribution in the decisionmaking process. Recognizing that situations arise in which evidence is so valuable to a defendant's case that "elementary fairness" would require the prosecutor to disclose it without request,[103] Justice Stevens established a test for determining when the Constitution requires such disclosure: "[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."[104] Applying this test, Justice Stevens deferred to the judgment of the trial judge, who, convinced that respondent was guilty even after reviewing the omitted evidence, denied her motion for a new trial.[105]

Justice Stevens' *Agurs* opinion may suggest that he emphasizes Crime Control efficiency values when the issue relates to the discretionary powers of the trial judge. This broad conclusion must be tempered by acknowledging an apparent distinction between the efficiency concerns of Justice Stevens and those of the Crime Control Model. Justice Stevens recognized that the trial judge was the best-informed decisionmaker available; since he presided over the trial, he could best determine the relative value of the excluded evidence. The goal of efficiency under the Crime Control Model, on the other hand, reflects less regard for the proper allocation of decisionmaking, seeking primarily to speed the process of apprehension and conviction by reducing procedural formalities.[106]

Justice Stevens' opinions thus indicate that he has a moderate approach in cases containing issues related to criminal trial proceedings. Consistent with his opinions in the pretrial context, *Lakeside* and *Ludwig* demonstrate that he gives greater weight to Due Process Model values when the criminal process erroneously or unjustifiably compromises specific constitutional provisions designed to protect the criminal defendant. On the other hand, Justice Stevens generally defers to the trial courts' discretionary judgments. Although this deference reflects a concern for the efficiency of the criminal process—on its face a Crime Control value—Justice Stevens seems to focus primarily on allocating responsibility to the

102. Specifically, respondent contended that the prosecution suppressed the victim's prior criminal record, which would have evidenced his violent character and aided her claim of self-defense. *Id.* at 100.

103. *Id.* at 110.

104. *Id.* at 112.

105. *Id.* at 113-14. *See also* Arizona v. Washington, 434 U.S. 497 (1978). In *Arizona*, Justice Stevens again manifested his deference to the trial court in its decision to declare a mistrial. *See* text accompanying notes 117-25 *infra*.

106. *See* text accompanying notes 71-72 *supra*.

most competent decisionmaker. In *Agurs* Justice Stevens ascertained the boundaries of constitutional tolerance and satisfied himself that the trial courts' findings were within them. Accordingly, he refused to substitute his judgment for that of the trial court after determining that the trial judge was best-equipped to make the necessary judgment. Justice Stevens thus reinforces the integrity of the criminal justice system by demonstrating confidence in the decisionmaking ability of trial judges.

(c) Double Jeopardy Questions and the Post-Conviction Context

Although the judgment of guilt is perhaps the climactic moment in the criminal justice process, it certainly is not the terminal point. Significant constitutional questions may arise concerning such matters as sentencing, appeals, and double jeopardy. This subsection examines Justice Stevens' treatment of post-conviction issues in light of the values associated with the Due Process and Crime Control Models.

Justice Stevens' opinions in double jeopardy cases demonstrate consistency and a uniform emphasis on Due Process Model values. In *Jeffers v. United States*[107] Justice Stevens ignored defendant's obvious factual guilt in dissenting from the Court's decision to make an exception to the double jeopardy rule that an individual cannot be tried for a crime after conviction on a lesser included offense. The Court reasoned that since defendant demanded that the two indictments returned against him not be consolidated for trial, he could not later challenge the second trial as violating the double jeopardy clause.[108] Justice Stevens argued that the Court's ruling required defendant to inform the prosecution of the legal consequences of its acts in order to preserve a constitutional right.[109] He noted that "[e]ven the desirability of extending [defendant's] incarceration does not justify this unique decision."[110]

In *Jeffers* the majority sidestepped the general lesser included offense rule by holding defendant responsible for the consequences of his refusal to consolidate indictments for trial; because he taxed the procedural efficiency of the system—anathema to the Crime Control Model—defendant effectively waived his right to assert the double jeopardy bar. By dissenting, Justice Stevens thus indicated unwillingness to adhere to the fundamental Crime Control Model proposition that "formalities" should not prevent trial, conviction,

107. 432 U.S. 137 (1977).
108. *Id.* at 154.
109. *Id.* at 160 (Stevens, J., concurring in part, dissenting in part).
110. *Id.* (footnote omitted).

and incarceration.[111]

Similarly, in *United States v. Martin Linen Supply Co.*[112] Justice Stevens concurred in the Court's holding that judgment of acquittal entered by the trial judge pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure may not be appealed by the government under the Criminal Appeals Act.[113] Justice Stevens reviewed the legislative history of the Act and concluded that Congress did not authorize appeals from acquittals because the double jeopardy clause prohibits such appeals.[114] Turning to the issue whether an acquittal entered by the trial judge after declaring a mistrial is an acquittal for the purposes of the Act, Justice Stevens stated: "By virtue of Fed. Rule Crim. Proc. 29(c), the mistrial did not terminate the judge's power to make a decision on the merits. His ruling, in substance as well as form, was therefore an acquittal."[115] He refused to construe the Criminal Appeals Act in a manner that would compromise double jeopardy doctrine, even though the aquittal resulted from application of federal procedural rules rather than from a jury verdict. Thus *Martin Linen* further demonstrates that Justice Stevens spurns the Crime Control Model's deemphasis of "formalistic" rules to achieve the societal interest in convicting those guilty of criminal misconduct. Moreover, by finding that the trial judge retained his power to determine the merits after declaring a mistrial, Justice Stevens reiterated his confidence in, and willingness to defer to, the judgment of trial court judges.[116]

In contrast to *Jeffers* and *Martin Linen,* Justice Stevens rejected respondent's double jeopardy claim in *Arizona v. Washington.*[117] During a second trial for murder, respondent's counsel made prejudicial remarks concerning prosecution misconduct that resulted in a mistrial at the first trial. At this point, the prosecution moved for a mistrial, and the trial judge granted the motion.

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111. Interestingly, by arguing against permitting the second trial, Justice Stevens actually advocated a more efficient result than did the majority in terms of resources expended.

112. 430 U.S. 564 (1977).

113. FED. R. CRIM. P. 29(c) states in relevant part: "(c) **Motion after Discharge of Jury:** If the jury . . . is discharged without having returned a verdict, a motion for judgment of acquittal may be made . . . within 7 days after the jury is discharged . . . . If no verdict is returned the court may enter judgment of acquittal . . . ."

The Criminal Appeals Act states in relevant part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

18 U.S.C. § 3731 (1976).

114. 430 U.S. at 581 (Stevens, J., concurring).

115. *Id.* (footnote omitted).

116. *See* text accompanying notes 101-06 *supra.*

117. 434 U.S. 497 (1978).

To prevent a third trial, respondent sought and was granted a writ of habeas corpus. The Ninth Circuit affirmed, reasoning that the trial judge's failure to state in the record that there was a "manifest necessity" for mistrial or that no alternatives were available to cure the prejudicial effect of the defense counsel's remarks barred further prosecution under the double jeopardy clause. The Supreme Court reversed in a majority opinion written by Justice Stevens. He noted that retrial was not "automatically barred" by the double jeopardy clause when final judgment has not been rendered in the first trial.[118] In order to secure retrial after a declaration of mistrial, the prosecutor has the "heavy" burden of demonstrating a "manifest necessity" for seeking a mistrial over defendant's objections.[119] Justice Stevens stated that in determining whether this burden had been met, deference should be given to the trial judge's ruling;[120] since he presided over the trial, he was better equipped to gauge the impact of objectionable statements.[121] Accordingly, Justice Stevens found that the trial judge used "sound discretion" in making his ruling,[122] stating, "in these circumstances, 'the public's interest in fair trials designed to end in just judgments' must prevail over the defendant's 'valued right' to have his trial concluded before the first jury impaneled."[123] In conclusion, Justice Stevens stated that the Ninth Circuit erred in basing their decision merely upon the absence of particularized language in the trial judge's order.[124]

The *Arizona* opinion thus underscores Justice Stevens' willingness to defer to the judgment of the trial court on questions requiring the exercise of judicial discretion. Of more value, however, is Justice Stevens' assertion of the public interest in full adjudication of criminal matters. On the surface, his statement indicates that he rejects using the formalities of the criminal process as a means of evading a full and final determination of guilt or innocence—a view closely parallel to the Crime Control Model's interest in reducing formalities to achieve a greater number of convictions and thus a more effective criminal process.[125] Closer analysis tempers such a conclusion. By advocating final adjudication of criminal matters, Justice Stevens implicitly recognized that society is more receptive to an individual who left the criminal process pursuant to acquittal, rather than by means of a "technicality." Final adjudication can

118. *Id.* at 505.
119. *Id.*
120. *Id.* at 509-11.
121. *Id.* at 513-14.
122. *Id.* at 516.
123. *Id.* (footnote omitted) (quoting Wade v. Hunter, 336 U.S. 684, 689 (1948)).
124. 434 U.S. at 516.
125. *See* text accompanying notes 69-72 *supra*.

vindicate as well as condemn a defendant. Essentially, Justice Stevens' statement in *Arizona v. Washington* should be interpreted as representing his perception of what society requires of the criminal process: the goal should not necessarily be to obtain a conviction, but to provide for a complete process, which at some point resolves the crucial question of guilt or innocence.

Justice Stevens' opinions in cases relating to challenges to post-conviction procedures further exemplify his concern that the individual receive the full effect of the protections available to him. In *Gardner v. Florida*[126] he delivered the majority opinion vacating petitioner's death sentence. After petitioner's conviction for first degree murder, the trial judge imposed the death penalty, relying in part upon a presentence investigation report furnished by the Florida Parole and Probation Commission.[127] The trial judge furnished part of the report to petitioner, but retained portions that he deemed confidential.[128] Without access to the confidential portions of the report, the Florida Supreme Court upheld the sentence.[129] Stating that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion,"[130] Justice Stevens held that petitioner had been denied due process because he had no opportunity to challenge the confidential portion of the report.[131] In *Gardner* Justice Stevens thus implicitly endorsed the Due Process Model premise that the criminal process is prone to human error:[132] the confidential portions of the presentencing report may have contained erroneous or inaccurate information that might have influenced the trial judge's decision to impose the death penalty. Also, *Gardner* indicates that Justice Stevens approaches death penalty issues with particular concern. Although he did not express his own views on the morality of capital punishment, *Gardner* demonstrates that Justice Stevens is well aware of the unique and grave consequences special to this sanction.

Finally, Justice Stevens' dissent in *United States v. MacCollum*[133] offers an interesting mixture of his views on the criminal process. In *MacCollum* the Court reversed a Ninth Circuit decision entitling the indigent respondent to a free transcript so that he could attempt to prove that his counsel at trial had been ineffective.

126. 430 U.S. 349 (1977).
127. *Id.* at 353.
128. *Id.*
129. *Id.* at 354.
130. *Id.* at 358.
131. *Id.* at 362.
132. *See* text accompanying note 68 *supra*.
133. 426 U.S. 317 (1976).

The Court held that respondent was not constitutionally entitled to a free transcript to facilitate his habeas corpus claim and that 28 U.S.C. § 753(f) allowed the district judge to refuse to furnish a free transcript if he found the claim frivolous.[134] In dissent, Justice Stevens questioned the ability of a district judge to resolve the frivolity issue accurately without the aid of a transcript.[135] Moreover, he contended that since some district judges routinely order transcripts while others do not, the adequacy of review of a defendant's claim depends upon the "fortuitous circumstance" of which judge is assigned to hear the case.[136] Justice Stevens bolstered his argument by stating that a ruling in respondent's favor would improve the efficiency of the system, as prosecutors would then routinely order transcripts at the conclusion of a criminal proceeding, thereby avoiding delay in disposing of post-conviction challenges.[137] In *MacCollum* federal law allocated the determination of the frivolity of petitioner's collateral attack on his conviction[138] to the federal district courts. By advocating that transcripts be provided, Justice Stevens sought to assure that the district judges had sufficient information to make this determination accurately. Thus, in an effort to maintain the viability of post-conviction remedies, Justice Stevens simultaneously sought to strengthen the integrity and credibility of the post-conviction criminal decisionmaking process.[139] Moreover, Justice Stevens' efficiency concern in *MacCollum* is again distinguishable from that of the Crime Control Model. While the Crime Control Model favors swift justice and maximization of convictions, Justice Stevens' attempt to eliminate delay by providing transcripts simultaneously benefits the individual challenging his conviction.

(3) Conclusion

As indicated at the beginning of this section of the Special Project, categorizing Justice Stevens as an advocate of either the Due Process or Crime Control Model would not be accurate or fruitful.[140] Justice Stevens' opinions do indicate, however, a sensitivity to the values underlying the Due Process Model. In each stage of the

134. 28 U.S.C. § 753(f) (1976) states in relevant part:

> Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States . . . if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal.

135. 426 U.S. at 336-37 (Stevens, J., dissenting).

136. *Id.* at 337.

137. *Id.* at 338.

138. *See* Henderson v. Kibbe, 431 U.S. 145 (1977).

139. *See* text accompanying note 106 *supra*.

140. *See* note 74 *supra*.

criminal justice process, he requires close adherence to procedural rules and demands that the individual be assured the full operation of every available constitutional protection. When these protections are compromised, Justice Stevens is willing to overlook the obvious factual guilt of a particular defendant to achieve the necessary prophylactic effect.

Nevertheless, his consistently strong pro-individual rights orientation must be viewed in the context of his equally significant concern that the criminal justice system operate in an efficient manner. Although the efficiency of the system is a significant aspect of the Crime Control Model, Justice Stevens' efficiency concern does not reflect a propensity to reduce the formality of the process in order to speed and to increase the number of apprehensions and convictions. Justice Stevens strives to improve the efficiency of the process by deferring to the judgment of the best-informed decisionmaker—generally the trial court—on questions of fact and discretion. Moreover, he seeks to assure that the designated decisionmaker has sufficient information to make an accurate judgment. Thus his concern for the efficiency of the criminal process does not operate to the particular benefit of either the individual or the state; instead, Justice Stevens endeavors to enhance the integrity and credibility of the system itself.

B. First Amendment Rights

During his first three Terms on the Court, Justice Stevens wrote fourteen opinions relating to the various provisions of the first amendment. Seven of these dealt with obscenity, two each with free press and free speech, and three with the establishment clause. Throughout this broad range of cases, Justice Stevens' opinions reveal a profound concern that the provisions of the first amendment be strictly construed, lest they suffer gradual erosion through limitations and exceptions. Justice Stevens' literal interpretation of the first amendment thus reflects his consistently strong pro-individual rights posture.

(1) Free Expression

The crucial factor in Justice Stevens' analysis of challenges to governmental attempts to regulate obscenity is the nature of the regulation. Generally, if a case arises in the context of a criminal prosecution he can be expected to vote for reversal of the conviction, usually in a dissent from the majority's affirmance. On the other hand, his opinions reveal a willingness to confer constitutional legitimacy on noncriminal methods of regulation, and in such cases, he often writes for the majority. Justice Stevens does not hide his per-

sonal distaste for the subject matter of the material regulated in these cases;[141] he simply doubts the wisdom and fairness of using criminal penalties to control expression at least arguably entitled to constitutional protection.[142]

Justice Stevens set forth his major objections to the use of criminal sanctions to regulate obscenity in *Ward v. Illinois.*[143] In *Ward* the majority affirmed a conviction under a state law prohibiting the distribution of obscene material, finding that the statute met the requirements established in *Miller v. California.*[144] Justice Stevens' dissent argued that the statute was not sufficiently specific to comport with *Miller,* even in view of his general objection to "the inherent vagueness of the obscenity concept."[145] His specific disagreement with the definition of obscenity set out in *Miller* focused on his fear that because geographic boundaries are not easily defined, the "community standard" may be adjusted to fit the needs of the prosecutor. In addition, he urged that in order to avoid the unfair vagueness of most obscenity statutes, the Court should require that the laws contain an exhaustive list describing prohibited conduct.[146]

Justice Stevens' criticism of the lack of a uniform standard defining what is obscene was also evident in *Smith v. United*

141. "However distasteful these materials are to some of us, they are nevertheless a form of communication and entertainment acceptable to a substantial segment of society . . . ." Marks v. United States, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part, dissenting in part). Justice Stevens has no reservations about expressing his distaste: "But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976). *See also* FCC v. Pacifica Foundation, 98 S.Ct. 3026 (1978). Not unexpectedly, other members of the Court have criticized these statements. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 86 (1976) (Stewart, J., dissenting).

142. "In my judgment, the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of the First Amendment." Smith v. United States, 431 U.S. 291, 316 (1977) (Stevens, J., dissenting). Although Justice Stevens appears determined to dissent from the Court's approval of criminal penalties in obscenity cases, he also seems resigned to the fact that the other Justices will not join him: "If the Court were prepared to re-examine this area of the law, I would vote to reverse this conviction with instructions to dismiss the indictment . . . . But my views are not now the law." Pinkus v. United States, 436 U.S. 293, 305 (1978) (Stevens, J., concurring).

143. 431 U.S. 767 (1977).

144. 413 U.S. 15 (1973).

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24.

145. 431 U.S. at 782 (Stevens, J., dissenting).

146. *See id.* at 781-82.

States,[147] in which the Court affirmed defendant's conviction under a federal statute prohibiting the use of the mails to transport obscene material.[148] Justice Stevens' dissent maintained that vague laws and uncertain standards, and jury instructions based upon them, are effectively unreviewable by an appellate court.[149] Similarly, in *Marks v. United States,*[150] defendant was convicted of transporting obscene material in interstate commerce.[151] Again, Justice Stevens voted for reversal of the conviction because the "intolerably vague" constitutional standards made evenhanded enforcement of the law a virtual impossibility.[152]

Thus Justice Stevens' dissents in these criminal cases consistently cite the lack of a uniformly administered national standard as the principal reason for questioning the suitability of using criminal prosecutions to regulate the distribution of erotic material.[153] His concern is that the vagueness of the laws under which prosecutions are initiated and the absence of definite standards for the determination of what is obscene combine to give the prosecutor an unfair advantage[154] and fail to give sufficient notice of prohibited forms of expression and content.[155] Justice Stevens thus evinces a reluctance to allow local prosecutors and juries to delineate the parameters of constitutionally protected expression when potential criminal sanctions threaten an individual's liberty.

Justice Stevens' view that criminal prosecutions are an inappropriate method of abating what is essentially a public nuisance "entitled to at least a modicum of First Amendment protection"[156]

147. 431 U.S. 291 (1977).

148. Defendant was indicted for violating 18 U.S.C. § 1461 (1976), which provided for a fine and/or imprisonment of anyone who uses the mails to deliver any "obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device or substance . . . ."

149. 431 U.S. at 315-16 (1977) (Stevens, J., dissenting). "How, for example, can an appellate court intelligently determine whether a jury has properly identified the relevant community standards?" Marks v. United States, 430 U.S. 188, 198 n.* (1977) (Stevens, J., concurring in part, dissenting in part). *See also* Splawn v. California, 431 U.S. 595, 602 (1977) (Stevens, J., dissenting).

150. 430 U.S. 188 (1977).

151. Defendants were charged with transporting obscene materials in violation of 18 U.S.C. § 1465 (1976) and with conspiring to transport such materials in violation of 18 U.S.C. § 371 (1976).

152. 430 U.S. at 198. The Court overturned the conviction, holding that the due process clause of the fifth amendment precludes retroactive application of obscenity standards that were enunciated after defendant's indictment. *Id.* at 196. Justice Stevens concurred with the holding, but objected to the remand for a new trial. *Id.* at 197.

153. *See, e.g.,* Smith v. United States, 431 U.S. 291, 313 (1977) (Stevens, J., dissenting).

154. *See, e.g., id.* at 314-15.

155. *See, e.g.,* Ward v. Illinois, 431 U.S. 767, 780-81 (1977) (Stevens, J., dissenting).

156. Smith v. United States, 431 U.S. 291, 312 (1977) (Stevens, J., dissenting). *See also id.* at 316; Marks v. United States, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part, dissenting in part).

is consistent with his preference for controlling obscenity through civil proceedings. In *Smith* he explicitly recognized this crucial distinction: "Nuisances such as . . . erotic displays in a residential area may be abated under appropriately flexible civil standards even though the First Amendment provides a shield against criminal prosecution."[157] Thus, in *Young v. American Mini Theatres, Inc.*[158] and *FCC v. Pacifica Foundation,*[159] Justice Stevens' opinions for the majority sustained the constitutionality of noncriminal laws and proceedings aimed at the regulation of obscenity. In *Young* Justice Stevens upheld a zoning ordinance that specified the location of adult theatres on the basis of the content of the films shown:[160]

> Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures.[161]

In *Pacifica Foundation* Justice Stevens upheld a Federal Communications Commission finding that a certain radio program was indecent and not suitable for broadcast.[162] He specifically pointed out that the Commission had expressed the opinion that patently offensive language should be regulated by principles analogous to those found in the law of nuisance, which "generally speaks to channeling behavior more than actually prohibiting it."[163]

Justice Stevens is clearly more comfortable with controls on obscenity that do not include the possibility of incarceration. His opinions indicate that while he will not countenance laws that threaten the loss of personal liberty, he will tolerate less repressive measures aimed at controlling the publication and distribution of objectionable materials. Thus Justice Stevens' concern with vagueness disappears in the context of a civil proceeding, perhaps because procedural due process considerations of adequate notice are less

157. 431 U.S. at 318 (footnote omitted).

158. 427 U.S. 50 (1976).

159. 98 S.Ct. 3026 (1978).

160. The ordinance required that adult theatres be dispersed. Specifically, it provided that an adult theatre could not be located within 1000 feet of any two other regulated uses or within 500 feet of a residential area. 427 U.S. at 52.

161. *Id.* at 71-72 (footnote omitted).

162. The Commission had issued a Declaratory Order characterizing a monologue by comedian George Carlin as "patently offensive," though not necessarily obscene. The Commission banned broadcast of the monologue under 18 U.S.C. § 1464 (1976), which prohibits the use of "any obscene, indecent, or profane language by means of radio communication." 98 S.Ct. at 3030-31.

163. *Id.* at 3031 (emphasis omitted).

urgent outside the criminal law.[164] In *Splawn v. California*[165] Justice Stevens stated: "Under any sensible regulatory scheme, truthful description of subject matter that is pleasing to some and offensive to others ought to be encouraged, not punished. I would not send [the defendant] to jail for telling the truth about his shabby business."[166]

Outside of the obscenity context, the two opinions written by Justice Stevens in the area of free speech examined restrictions placed on inmates by prison officials. In *Procunier v. Navarette*,[167] the Court reinstated summary judgment in favor of defendant officials on plaintiff inmate's 42 U.S.C. § 1983 action challenging defendants' interference with his outside correspondence.[168] The majority ruled that the officials were immune from a section 1983 action unless they knew or should have known that their actions would violate the prisoner's constitutional rights.[169] Justice Stevens dissented on factual grounds, asserting that defendants were not entitled to summary judgment on the question of immunity from section 1983 actions because they had not established a good faith defense.[170]

In *Jones v. North Carolina Prisoners' Labor Union*[171] a union of prison inmates challenged, as violative of their first amendment rights, certain regulations of the state Department of Corrections that prohibited inmates from soliciting others for membership, barred their meetings, and banned the distribution of union publications. The Court upheld the restrictions as reasonable, stating that "an inmate does not retain those First Amendment rights that are 'inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.' "[172] Justice Stevens agreed that the restrictions on meetings and publications were permissible but argued that the restriction on solicitation was unconstitutional because the department's regulation was too broadly worded.[173]

Thus Justice Stevens' objections to the vagueness of obscenity

164. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 58-61 (1976). *See also* Smith v. Goguen, 415 U.S. 566 (1974).

165. 431 U.S. 595 (1977).

166. *Id.* at 604 (footnotes omitted) (Stevens, J., dissenting).

167. 434 U.S. 555 (1978).

168. Specifically, the prisoner charged the officials with failure to mail his correspondence to outsiders, including letters to legal assistance groups, law students, the news media, other inmates, and personal friends. *Id.* at 557.

169. *Id.* at 561-62.

170. *Id.* at 570-74 (Stevens, J., dissenting).

171. 433 U.S. 119 (1977).

172. *Id.* at 129.

173. *Id.* at 138-39 (Stevens, J., concurring in part, dissenting in part).

laws apply with equal force when a vague or overbroad restriction threatens the free flow of information not appealing to prurient interests. Moreover, the *Jones* dissent indicates the relative strength of Justice Stevens' commitment to individual rights in that he found the range of first amendment rights retained by prisoners to be broader than that described by the majority of the Court.[174]

(2) Free Press

Justice Stevens' two opinions in the area of free press address the efforts of the press to interview prisoners and the conflict between the first amendment right of free press and the sixth amendment right of fair trial. In *Houchins v. KQED, Inc.*,[175] the Court upheld a sheriff's refusal to allow reporters to inspect a portion of a county jail in which an inmate had committed suicide against the reporters' challenge that the refusal violated their first amendment rights. Relying on its holding in *Pell v. Procunier*,[176] the Court ruled that "the media has no right, special of access to the Alameda County Jail different from or greater than that accorded the public generally."[177] In his dissent, Justice Stevens urged that application of the *Pell* principle be limited to situations in which the public had alternative access to adequate information.[178] Otherwise, he maintained, the public is denied necessary information about public institutions, and the process of self-governance, which depends so heavily upon an enlightened populace, is stripped of its substance.[179] In *Nebraska Press Association v. Stuart*[180] the Court struck down a trial court's "gag order," which had enjoined the press from publishing accounts of confessions, admissions, or other facts strongly implicating defendant in a murder trial, as an impermissible prior restraint.[181] The majority recognized the difficulty in resolving a conflict between the right of free press and defendant's right to a fair trial: "if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to re-

174. While sitting on the Seventh Circuit Court of Appeals, Justice Stevens expressed a view of prisoners' first amendment rights consistent with that of his *Jones* dissent. *See* Morales v. Schmidt, 489 F.2d 1335 (1973), *affirmed on rehearing en banc*, 494 F.2d 85 (7th Cir. 1974). *See also* Special Project, *supra* note 2, at 141-43.

175. 98 S.Ct. 2588 (1978).

176. 417 U.S. 817 (1974). In that case, the Court rejected claims by inmates and newsmen that a state regulation barring face-to-face interviews violated their first amendment rights, holding that newsmen have "no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Id.* at 834.

177. 98 S.Ct. at 2597.

178. *Id.* at 2607 (Stevens, J., dissenting).

179. *Id.* at 2606.

180. 427 U.S. 539 (1976).

181. *Id.* at 570.

solve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution . . . ."[182] Justice Stevens' concurrence stated only that he subscribed to the separate opinion of Justice Brennan,[183] who agreed that a prior restraint on the press is a constitutionally impermissible method of enforcing the right to a fair trial, especially if alternative means exist for relieving the tension between the first and sixth amendments.[184] In the absence of a prior restraint, however, Justice Brennan concluded that an unavoidable encroachment upon the right of free press may be permitted.[185]

Thus, although the evidence is not extensive, Justice Stevens seems to attach great importance to the unique role of the press as a provider of essential information. He seems willing to balance the right of free press only against other constitutional guarantees, and to subordinate it to other rights only when absolutely necessary.

(3) The Establishment Clause

Justice Stevens' interpretation of the establishment clause is unquestionably his most literal in the first amendment area. Both opinions he has written on the subject exhibit an extremely narrow view of constitutionally permissible public aid to sectarian schools. In *Wolman v. Walter*[186] the Court reviewed a school system that used public funds to provide six different types of aid to private religious schools. The majority held that two of the six forms of assistance were impermissible because of the relative ease with which they could be converted into purely sectarian use.[187] Justice Stevens concurred in this finding, but would have struck down any direct or indirect aid to sectarian schools' educational programs, which he found to be "at heart . . . religious."[188] The rigor of his establishment clause position required that he reject the three-pronged establishment test[189] developed by the Court in recent

182. *Id.* at 561.

183. *Id.* at 617 (Stevens, J., concurring).

184. *Id.* at 572-73 (Brennan, J., concurring).

185. *Id.* at 612.

186. 433 U.S. 229 (1977).

187. *Id.* at 254. The approved forms of aid included secular textbooks, standardized tests, speech and hearing diagnostic services, and guidance counseling to private school pupils. Those forms of aid not allowed were the instructional materials and field trip transportation.

188. *Id.* at 265 (Stevens, J., concurring in part, dissenting in part). Justice Stevens would have upheld the financing of diagnostic and therapeutic services, though with "some misgivings," because he felt those aspects of the program could be "administered in a constitutional manner." *Id.* at 265-66. Thus, his view of the establishment clause, though strict, is not absolute.

189. The establishment test now used by the Court, set out first in Lemon v. Kurtzman,

school subsidy cases.[190] Under Justice Stevens' analysis, "a state subsidy of sectarian schools is invalid regardless of the form it takes."[191]

This literal reading of the establishment clause also appears in Stevens' dissent in *Roemer v. Board of Public Works*[192] in which public aid in the form of noncategorical grants to eligible colleges was challenged. The majority rejected the challenge on the grounds that since the colleges were not pervasively sectarian and the money was limited to nonsectarian use, the aid did not result in excessive entanglement between church and state.[193] Justice Stevens dissented, agreeing with Justice Brennan that such general subsidies tend to promote the type of interdependence between religion and the state that the first amendment was designed to prevent.[194] Further, he stressed "the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it."[195]

Thus, Justice Stevens' insistence that the establishment clause be strictly construed is consistent with his pro-individual rights orientation because he believes that the entanglement of church and state resulting from public aid to parochial schools might in the long run harm the individual beneficiaries of the assistance. In *Wolman,* Justice Stevens summarized his criticism of the majority's establishment clause position by observing: "What should be a 'high and impregnable' wall between church and state, has been reduced to a ' "blurred, indistinct, and variable barrier . . . ." ' "[196]

(4) Conclusion

Justice Stevens' first amendment opinions reveal a decidedly pro-individual rights stance. This orientation is most evident in his refusal to sanction criminal prosecutions and the attendant threat to personal liberty as a means of controlling obscenity. Concurrently, the absence of a threat to individual liberty explains his

403 U.S. 602 (1971), requires that a law have a "secular legislative purpose," that its principal or primary effect neither advance nor inhibit religion, and that it not foster an "excessive government entanglement" with religion. *Id.* at 612-13. *See also* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 772-73 (1973).

190. 433 U.S. at 265 (Stevens, J., concurring in part, dissenting in part).

191. *Id.*

192. 426 U.S. 736 (1976).

193. *Id.* at 762, 764. The holding is clearly based on the majority's assumption that absolute hermetic separation of church and state is practically impossible. *Id.* at 745-46.

194. *Id.* at 775 (Stevens, J., dissenting); *see id.* at 770.

195. *Id.* at 775. He continued: "The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith." *Id.*

196. 433 U.S. at 266 (Stevens, J., concurring in part, dissenting in part).

willingness to allow noncriminal regulation of obscenity. Moreover, he finds that noncriminal controls have an indirect and less severe effect on the individual's right of expression. Justice Stevens' free press opinions indicate his recognition that the function of the press is the enlightenment of the public and that an unimpeded flow of information often protects the public interest. His unwillingness to restrict the right of the press to gather and disseminate information is thus based, in part at least, on the adverse effect such a restriction would have on the recipients and their right to be informed. Finally, his establishment clause opinions reveal a characteristic reluctance to allow even seemingly insignificant abrogations of the amendment's provisions, again because of their essential role in the protection of individual rights from government infringement.

C. *Equal Protection Analytical Method*

The preceding two sections of the Special Project provide insight into Justice Stevens' consistently strong pro-individual rights philosophy. This section seeks to shift the emphasis away from Justice Stevens' substantive individual rights orientation, to an examination of his analytical methods in this broad area, particularly in terms of the fifth and fourteenth amendments. In applying these amendments in the individual rights context, the Supreme Court has developed three basic analytical frameworks: substantive due process, procedural due process, and equal protection. Because one of the most important issues presently facing the courts, reverse discrimination, raises fundamental equal protection questions, the primary focus of the following discussion will be upon Justice Stevens' equal protection opinions.

In *Regents of the University of California v. Bakke*,[197] the principal reverse discrimination case of the 1977 Term, Justice Stevens wrote a dissenting opinion[198] in which he found a constitutional holding on the issue unnecessary because adequate statutory grounds existed to decide the case.[199] Justice Stevens found that the

197. 98 S.Ct. 2733 (1978).

198. Chief Justice Burger and Justices Stewart and Rehnquist joined the Stevens opinion. *Id.* at 2809.

199. *Id.* at 2810-11. In making this determination, Justice Stevens relied upon Spector Motor Co. v. McLaughlin, 323 U.S. 101 (1944). In *Spector* the characterization of a tax imposed upon out-of-state business corporations by the State of Connecticut was at issue. The district court had held that no constitutional issue existed because the tax was on the franchise of carrying on intrastate commerce in Connecticut. *Id.* at 102. The court of appeals, however, held that the tax was imposed on corporations engaged in interstate commerce exclusively; consequently, the commerce clause was implicated. *Id.* at 102-03. The Supreme Court held that this characterization was a matter of state law, which, until interpreted by a state court, should not be subjected to scrutiny. Writing for the Court, Justice Frankfurter said: "If there is one doctrine more deeply rooted than any other in the process of constitu-

University, an entity receiving federal financial assistance, had violated section 601 of Title VI of the Civil Rights Act of 1964[200] by excluding respondent from its medical program because of his race.[201] Justice Stevens stated that only the validity of the special admissions program[202] as it related to respondent's application was at issue, not the validity of the program generally.[203] Stevens also stated that whether race may be used as a factor in admissions was not an issue before the Court; consequently, he found any discussion of that issue inappropriate.[204]

Contrary to the position taken by Justice Stevens, Justices Powell[205] and Brennan[206] agreed that the standard of illegal discrimination under Title VI was coterminous with the constitutional standard set forth in the equal protection clause of the fourteenth amendment.[207] Although both Justices Powell and Brennan used equal protection analysis in considering *Bakke,* they differed in their application of this analysis. Justice Powell, using a "strict scrutiny" standard,[208] found that the medical school's special ad-

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tional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Id.* at 105.

200. 42 U.S.C. § 2000d (1976). Section 601 provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

201. 98 S.Ct. at 2815. Respondent was a white male.

202. The Medical School of the University of California at Davis maintained two admissions programs. Under the regular admissions program, applicants competed for 84 places. Under the special admissions program, minority applicants were competing for 100 places, while nonminority applicants were competing for only 84. *See id.* at 2739-42.

203. *Id.* at 2809-10 & n.3.

204. *Id.* at 2810.

205. Justice Powell's opinion expressed the judgment of the Court.

206. Justice Brennan, joined by Justices Marshall, White, and Blackmun, concurred in part and dissented in part.

207. 98 S.Ct. at 2747, 2768.

208. In deciding that a strict scrutiny standard was proper, Justice Powell had to resolve a fundamental equal protection issue raised by the contrary positions of the University and respondent. The University contended that the strict scrutiny standard was only justified when a classification disadvantaged a discrete and insular minority, traditionally discriminated against by the majoritarian political process. *Id.* at 2747. Respondent, however, argued that the level of judicial scrutiny did not depend upon membership in such a group. *Id.* In short, the University argued that the composition of the class of litigant challenging the constitutionality of a classification determines the standard of review, while respondent argued that the nature of the classification itself determines the standard of review. Citing Shelley v. Kraemer, 334 U.S. 1 (1948), for the proposition that fourteenth amendment rights are personal rights, Justice Powell agreed with respondent. 98 S.Ct. at 2748. To Justice Powell, any racial or ethnic classification is "inherently suspect" and consequently requires the "most exacting judicial examination." *Id.* at 2749. Justice Powell stated that when a classification touches "upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Id.* at 2753.

missions program would violate the equal protection clause of the fourteenth amendment; consequently, he affirmed the California Supreme Court's judgment that the program violated the fourteenth amendment.[209] Justice Brennan, on the other hand, using a less exacting standard of review, found that the special admissions program did not violate Title VI because it would not violate the equal protection clause of the fourteenth amendment.[210]

Justice Stevens' resolution of *Bakke* left unclear how he would address and resolve a reverse racial discrimination problem on constitutional grounds. Justice Stevens' Supreme Court opinions do not indicate clearly that he also would have invalidated the preferential admissions program under equal protection. In *Bakke* itself, Justice Stevens suggested that the standard by which to judge a program's validity under section 601 differs from the standard applicable under the equal protection clause of the fourteenth amendment, stating: "The statutory prohibition against discrimination in federally funded projects contained in § 601 is more than a simple para-

209. In applying strict scrutiny, Justice Powell found that the consideration of race in the special admissions program was justified by the state's compelling interest in maintaining academic freedom and diversity in the student body. He concluded, however, that the quota adopted for minority admissions was not the least restrictive means of achieving the legitimate goal. *Id.* at 2761-64. The Court thus did not hold that any consideration of the race of an applicant was impermissible; only the particular system used by Davis was invalid. Whether Justice Powell held that the special admissions program violated the equal protection clause of the fourteenth amendment is unclear. *See id.* at 2764.

210. Justice Brennan apparently accepted the University's position that strict scrutiny was inappropriate because respondent did not belong to a class that possessed the traditional characteristics of suspectness. *Id.* at 2782-83. Justice Brennan, however, stated that simply because "this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational-basis standard of review . . . ." *Id.* at 2783. Analogizing to the reverse sex discrimination cases, *e.g.*, Craig v. Boren, 427 U.S. 190 (1977), Justice Brennan noted that a racial classification with a benign purpose must further important governmental objectives and must be substantially related to those objectives. 98 S.Ct. at 2784. As the following quotation indicates, the Brennan standard is difficult to pinpoint:

> In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable bases that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus our review under the Fourteenth Amendment should be strict—not " 'strict' in theory and fatal in fact," because it is stigma that causes fatality—but strict and searching nonetheless.

Id. at 2785 (footnotes omitted).

211. *Id.* at 2813. Justice Stevens added: "We are dealing with a distinct statutory prohibition, enacted at a particular time with particular concerns in mind; neither its language nor any prior interpretation suggests that its place in the Civil Rights Act, won after long debate, is simply that of a constitutional appendage." *Id.* at 2814 (footnote omitted).

phrasing of what the Fifth or Fourteenth Amendment would require."[211] Furthermore, in *General Electric v. Gilbert*,[212] Justice Stevens, criticizing the Court for extending equal protection standards into the Title VII area, argued that "the plaintiffs' burden of proving a prima facie violation of [the equal protection clause] is significantly heavier than the burden of proving a prima facie violation of a statutory prohibition against discrimination . . . ."[213] Consequently, a conclusion that Justice Stevens would find that a preferential admissions program violates equal protection does not follow necessarily from his determination that the program violated section 601 of the Civil Rights Act of 1964. The following discussion attempts to ascertain first, whether Justice Stevens would adopt either of the approaches suggested by Justices Powell and Brennan in *Bakke*, or a different analysis, if compelled to consider the reverse racial discrimination question in constitutional terms, and second, why he avoided using equal protection analysis in *Bakke*.

Mathews v. Diaz,[214] one of Justice Stevens' first cases as a Supreme Court Justice, considered a fifth amendment equal protection challenge of a federal statute that permitted aliens to participate in a federal medical insurance program only if they had resided in the United States for a five-year period and had become permanent residents.[215] After recognizing that the political branches of the federal government traditionally have been responsible for controlling immigration and naturalization,[216] Justice Stevens stated that "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."[217] According to Justice Stevens, to satisfy this "narrow" standard, those challenging a line that Congress has drawn must advance "principled reasoning" that simultaneously invalidates Congress' line and justifies another.[218] Justice Stevens viewed the challengers' failure to advance this principled reasoning as an invitation for the Court to substitute its judgment for that of Congress.[219] Refusing to question Congress' judgment in this manner, Justice Stevens upheld the constitutionality of the classification.[220]

212. 429 U.S. 125 (1976).
213. *Id.* at 160.
214. 426 U.S. 67 (1976). Justice Stevens wrote the opinion for a unanimous Court.
215. 42 U.S.C. § 1395o(2) (1970 & Supp. IV 1975).
216. 426 U.S. at 81.
217. *Id.* at 81-82 (footnote omitted).
218. *Id.* at 82.
219. *Id.* at 84.
220. *See id.*

In *Hampton v. Mow Sun Wong*[221] Stevens applied an analysis that differed from the one employed in *Diaz.*[222] In *Mow Sun Wong* aliens challenged under the fifth amendment the constitutionality of a Civil Service Commission regulation that barred noncitizens from federal employment.[223] Justice Stevens noted that the regulation detrimentally affected a discrete group of persons who already suffered disadvantages greater than the remainder of the community.[224] In describing the impact of the regulation, Justice Stevens stated:

> The added disadvantage resulting from the enforcement of the rule—ineligibility for employment in a major sector of the economy—is of sufficient significance to be characterized as a deprivation of an interest in liberty. Indeed, we deal with a rule which deprives a discrete class of persons of an interest in liberty on a wholesale basis. By reason of the Fifth Amendment, such a deprivation must be accompanied by due process. It follows that *some judicial scrutiny* of the deprivation is mandated by the Constitution.[225]

The challengers had argued that traditional equal protection analysis justified a holding that invalidated the regulation.[226] Justice Stevens, however, after recognizing the equal protection component of the fifth amendment, stated that it was "not necessary to resolve respondents' substantive claim, if a narrower inquiry discloses that essential procedures have not been followed."[227] According to Justice Stevens, the federal government is competent to assert successfully that certain national interests justify a discriminatory rule, which, if asserted by a state, would be insufficient to satisfy the requirements of fourteenth amendment equal protection.[228] When the government offered national interests to support the regulation challenged in *Mow Sun Wong,*[229] Justice Stevens

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221. 426 U.S. 88 (1976).

222. Justice Stevens authored the opinion of the Court.

223. 5 C.F.R. § 338.101 (1976).

224. 426 U.S. at 102.

225. *Id.* at 102-03 (emphasis added) (footnote omitted).

226. *Id.* at 103.

227. *Id.*

228. Justice Stevens explained:

> The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment. Although both Amendments require the same type of analysis, the Court of Appeals correctly stated that the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.

Id. at 100 (citation omitted) (footnote omitted).

In Foley v. Connelie, 98 S.Ct. 1067 (1978), Justice Stevens dissented from the majority's holding that a New York statute that excluded aliens from employment as state troopers did not violate the fourteenth amendment. *Id.* at 1076.

229. The government claimed that the regulation furthered the national interest in

rather than addressing the sufficiency of the government's arguments, shifted the focus of his analysis from equal protection to a "narrower inquiry" by stating that "due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest."[230] Assuming that the reasons asserted by the government would justify the rule barring federal employment of aliens if it had been created by Congress or the President,[231] Justice Stevens nonetheless found that the Civil Service Commission was competent to assert only the justification of administrative convenience.[232] This justification was inadequate, he concluded, because nothing indicated that administrative convenience was the actual purpose of the regulation.[233] Furthermore, administrative convenience could not justify such a wholesale deprivation of a liberty interest.[234] Consequently, Justice Stevens agreed with the challengers that the regulation was invalid, but not on the traditional equal protection grounds they asserted.[235]

In *Mathews v. Lucas*,[236] the Court faced a classification that treated illegitimate children less favorably than legitimate children.[237] Although the majority recognized that the statute was illogical and unjust, it held that the classification did not violate the fifth amendment.[238] In dissent,[239] Justice Stevens criticized the majority

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three ways. First, the rule enhanced the President's power in negotiating treaties because he could offer jobs to aliens in exchange for similar concessions from foreign governments. Second, the rule provided an incentive for aliens to become citizens. Third, certain sensitive employment positions required citizenship, and the broad exclusion avoided job classification problems. The government also noted that the exclusionary rule was consistent with international law and the customs of other countries and that it had been the practice in the United States for over 100 years. 426 U.S. at 104.

230. *Id.* at 103.

231. *Id.* at 116.

232. Justice Stevens noted that the Civil Service Commission's responsibility is promoting efficiency in the federal civil service, not the conduct of foreign affairs. *Id.* at 114.

233. Justice Stevens stated: "There is nothing in the record before us . . . to indicate that the Commission actually made any considered evaluation of the relative desirability of a simple exclusionary rule on the one hand, or the value to the service of enlarging the pool of eligible employees on the other." *Id.* at 115.

234. *Id.* at 115-16.

235. *Id.* at 116-17.

236. 427 U.S. 495 (1976).

237. The case considered the constitutionality of § 402(d)(3) of the Social Security Act. 42 U.S.C. § 402(d)(3) (1970 & Supp. IV 1975). Under the Act, a person who is under 18 years of age and who is dependent upon a person fully insured under the Act is entitled to receive survivor's benefits upon the death of the insured person. Section 402(d)(3), which defines dependency, presumes that a legitimate child is dependent. An illegitimate child, however, is considered dependent only if: (1) the decedent had married the other parent; (2) the decedent had acknowledged in writing that the child was his; (3) a court had decreed that the child was the decedent's; or (4) a court had ordered the decedent to support the child. *See* 427 U.S. at 499.

238. *See* 427 U.S. at 516.

239. Justices Brennan and Marshall joined in the Stevens dissent.

by asserting his belief that "an admittedly illogical and unjust result should not be accepted without both a better explanation and also something more than a 'possibly rational' basis."[240] Because illegitimates have been a traditionally disfavored class in our society, Justice Stevens contended that "the Court should be especially vigilant in examining any classification which involves illegitimacy."[241] Justice Stevens argued for enhanced scrutiny of traditional classifications because of his fear that legislators draw lines on the basis of habit, not analysis. This "stereotyped reaction," according to Justice Stevens, may have no rational relationship to the purpose for which a classification was established.[242] To Justice Stevens the statute was invalid because, contrary to the government's position, administrative convenience was not the rationale for the classification; rather, the classification was the result of a tradition of considering illegitimates as undeserving persons.[243]

Justice Stevens' opinions in *Diaz, Mow Sun Wong,* and *Lucas* indicate dissatisfication with the standards of review used in the traditional two-tiered equal protection analysis. In *Diaz,* an equal protection case, Justice Stevens did not rely upon equal protection cases to establish the proper standard of review, focusing instead upon a case considering the justiciability of a political question.[244] Also, in *Diaz* Stevens did not use traditional equal protection terminology to describe the deferential standard he applied. Although apparently utilizing a "rational basis" standard, he did not refer to it in such language. The indications in the *Diaz* opinion that Justice Stevens is uncomfortable with equal protection analysis are amplified by the approach he adopted in *Mow Sun Wong,* in which he avoided what was clearly an equal protection claim by deciding the case on due process grounds. In *Lucas* Justice Stevens further manifested this discomfort by again failing to use traditional equal protection terminology. Referring to the majority's "rational basis" test

240. 427 U.S. at 519-20. The classification was illogical because legitimacy has no relation to one's ability to contribute to society. It was unjust because legal burdens should bear some relationship to individual responsibility. *Id.* at 518-19.

241. *Id.* at 520.

242. Justice Stevens explained:

> For a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.

Id. at 520-21 (footnote omitted).

243. *Id.* at 523.

244. Baker v. Carr, 369 U.S. 186 (1962).

as a "possibly rational" standard, he characterized his own standard as "especially vigilant." Significantly, Justice Stevens chose not to use classic articulations such as "suspect classification" or "compelling state interest."

Justice Stevens' growing dissatisfaction with traditional equal protection became explicit in his concurrence in *Craig v. Boren*,[245] in which he stated:

> There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.
>
> I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms.[246]

According to Justice Stevens, the traditional equal protection analysis is not a rational way to decide cases. He claims that only one equal protection standard exists, despite the Court's continuing espousal of the two-tiered analysis. Justice Stevens contends that general attempts to describe the single standard are not as valuable as specific explanations for individual holdings.

Since *Boren*, Justice Stevens' equal protection opinions[247] have included no language attempting to describe the proper standard of review. Unlike his opinions in *Diaz*, *Mow Sun Wong*, and *Lucas*, he no longer uses phrases such as "narrow standard of review," "some scrutiny," or "especially vigilant" to describe his level of scrutiny. Instead, Justice Stevens simply states whether the classification is valid and then explains why in a detailed manner. Because Justice Stevens now believes that attempting to articulate the appropriate equal protection standard of review is futile, the nature and rigor of his equal protection analysis can be gleaned only by examining his most recent equal protection opinions. *Craig v. Boren* and *Califano v. Goldfarb* are particularly indicative of his present approach; moreover, they are reverse sex discrimination cases.

In *Boren* Justice Stevens concurred with the majority's invalidation of an Oklahoma statute forbidding the sale of beer to males

245. 429 U.S. 190 (1977).

246. *Id.* at 211-12.

247. *See* Idaho Dep't of Employment v. Smith, 434 U.S. 100 (1977); Califano v. Jobst, 434 U.S. 47 (1977); Mandel v. Bradley, 432 U.S. 173 (1977); Alexander v. Fioto, 430 U.S. 634 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977); Knebel v. Hein, 429 U.S. 288 (1976).

between the ages of eighteen and twenty-one.[248] Justice Stevens found the statute unconstitutional for several reasons. First, he objected to the classification as being based upon an accident of birth.[249] Second, the classification was "a mere remnant of the now almost universally rejected tradition of discrimination against males in this age bracket."[250] Third, Justice Stevens observed that to the extent the classification attempted to distinguish physically between males and females, it was "perverse."[251]

Despite these objections to the classification, Justice Stevens was willing to consider the state's argument that the promotion of traffic safety justified the statute. Although acknowledging that the classification was not completely irrational,[252] Justice Stevens found the traffic safety justification unacceptable. Citing the statute's de minimis effect on traffic safety, Justice Stevens found it difficult to believe that this was the actual purpose of the classification.[253] Moreover, Justice Stevens noted the absence of legislative history indicating that traffic safety was the actual justification.[254] Although admitting that he was not sure what motivated the classification, Justice Stevens stated that he "would not be surprised if it represented nothing more than the perpetuation of a stereotyped attitude about the relative maturity of the members of the two sexes in this age bracket."[255] Finally, he objected to the inherent unfairness of the statute.[256]

In *Califano v. Goldfarb*[257] Justice Stevens concurred with the majority's invalidation of a provision of the Social Security Act that treated widows more favorably than widowers.[258] Justice Stevens

248. The Oklahoma law prohibited the sale of 3.2% beer to females under age 18 and to males under age 21. OKLA. STAT. tit. 37, §§ 241, 245 (1958 & Supp. 1976).

249. 429 U.S. at 212.

250. *Id.* (footnote omitted).

251. *Id.* at 212-13. In a footnote Justice Stevens explained that the heavier weight of males gave them greater capacity to consume alcohol without diminishing their driving ability. *Id.* at 213 n.4.

252. Evidence demonstrated that in this age bracket more males drove than females and also more males drank. *Id.* at 213.

253. *Id.* Justice Stevens observed that the statute prohibited only the sale of 3.2% beer to males under age 21, not the consumption of 3.2% beer by males under age 21. He also noted that 3.2% beer is not a very intoxicating beverage. *Id.*

254. *Id.* at 213 n.5.

255. *Id.*

256. The record demonstrated that only two percent of the males in this age bracket violated laws related to alcohol consumption. According to Justice Stevens, despite an arguable, slight deterrent effect on the two percent, or on the 98 percent, "an insult to all the young men of the State [could not] be justified by visiting the sins of the 2% on the 98%." *Id.* at 214.

257. 430 U.S. 199 (1977).

258. Under § 402(f)(1)(D) of the Social Security Act, 42 U.S.C. § 402(f)(1)(D) (1970 & Supp. V 1975), to receive survivors' benefits, a widower had to demonstrate that, prior to his

began by noting that the classification was not invidious because it did not imply that males were inferior.[259] Furthermore, the classification neither hindered a large class because of the conduct of a few,[260] nor burdened an already disadvantaged discrete minority.[261] Justice Stevens, however, was sensitive to the statute's different treatment of similarly situated persons solely because they were not of the same sex.[262]

The federal government attempted to justify the discrimination against widowers by asserting that it was necessary for administrative convenience. After comparing the administrative savings to the cost of payments to widows who would not receive payments if they had to prove dependency,[263] Justice Stevens concluded that administrative savings could not have been the actual rationale.[264] The government also attempted to justify the discrimination by arguing that its purpose was to redress the effects of the tradition of discrimination against females. Justice Stevens observed, however, that the nondependent widows who benefited from the discrimination were the females least likely to need assistance in overcoming the effects of prior discrimination.[265] Therefore, Justice Stevens cited "[r]espect for the legislative process"[266] in concluding that the statutory classification did not have this benign purpose. At this point, he theorized on the origin of the classification:

> It is fair to infer that habit, rather than analysis . . . , made it seem acceptable to equate the terms "widow" and "dependent surviving spouse." That kind of automatic reflex is far different from either a legislative decision to favor females in order to compensate for past wrongs, or a legislative decision that

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spouse's death, at least one-half of his support came from his spouse. Widows received benefits without such demonstration.

259. 430 U.S. at 218. In this regard, Justice Stevens contrasted the present case from Mathews v. Lucas. *See* notes 236-42 *supra* and accompanying text.

260. 430 U.S. at 218. Justice Stevens contrasted this situation to Craig v. Boren, in which the acts of a small percentage of the male population resulted in a deprivation to the vast majority. *See* notes 245-56 *supra* and accompanying text.

261. 430 U.S. at 218. Justice Stevens contrasted the widowers in *Goldfarb* to the aliens in *Mow Sun Wong*. *See* notes 221-35 *supra* and accompanying text.

262. 430 U.S. at 219.

263. Only about 10 percent of the women in the relevant age bracket were nondependent; consequently, the rule expedited 90 percent of the applications. Justice Stevens admitted that this resulted in significant administrative savings. He estimated, however, that the payments to the nondependent women amounted to approximately 750 million dollars per year. He concluded: "It is inconceivable that Congress would have authorized such large expenditures for an administrative purpose without the benefit of any cost analysis, or indeed, without even discussing the problem." *Id.* at 220.

264. *Id.*

265. According to Justice Stevens, these women had been successful enough in the job market to become independent from their husbands. *Id.* at 221.

266. *Id.*

> the administrative savings exceed the cost of extending benefits to nondependent widows.[267]

Justice Stevens concluded by stating that the disparate treatment of widows and widowers could not be justified by accident.[268] In a footnote, Justice Stevens suggested that the statute might have been upheld if it had been supported by an "actual, considered legislative choice," but he reserved the question until such a choice was made.[269]

Although Justice Stevens now refuses to articulate a standard of review, *Boren* and *Goldfarb* make evident certain characteristics of Justice Stevens' equal protection analysis. His scrutiny concentrates on ascertaining the actual legislative purpose for creating a classification. Justice Stevens thus is unwilling to accept justifications that are conjured up only to defend a statute in litigation. Related to his inquiry into actual legislative motivation is Justice Stevens' concern with classifications that are invidious, those based upon immutable characteristics, and those burdening an already disadvantaged discrete minority. Traditionally, the Court has considered these factors in determining the appropriate standard of review to apply in equal protection analysis. According to Justice Stevens' interpretation of traditional equal protection analysis, however, there is only one standard of review; consequently, in his analysis, these factors do not serve their traditional function. They are important to Justice Stevens, however, because they aid in making the crucial determination whether a classification is the result of an actual legislative judgment. For Justice Stevens, "traditional classifications," such as those based upon sex, race, or legitimacy, are often "accidents," "stereotyped reactions," or "automatic reflexes"—as distinguished from deliberate legislative consideration—that often have no rational basis. Thus the principal concern in Justice Stevens' equal protection analysis is finding an actual legislative purpose. If he finds none, the classification is invalid; if an actual legislative purpose is evident, he generally defers to it.[270] By deciding an equal protection case in this manner, arguably Justice Stevens does not substitute his judgment for that of the legisla-

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267. *Id.* at 222. Justice Stevens continued:

> I am therefore persuaded that this discrimination against a group of males is merely the accidental byproduct of a traditional way of thinking about females . . . . In my judgment, something more than an accident is necessary to justify the disparate treatment of persons who have as strong a claim to equal treatment as do similarly situated surviving spouses.

Id. at 223.

268. *Id.*

269. *Id.* at 223 n.9.

270. *See* Califano v. Jobst, 434 U.S. 47 (1977); Alexander v. Fioto, 430 U.S. 634 (1977); Knebel v. Hein, 429 U.S. 288 (1976).

ture because if no actual purpose exists, legislative judgment was never exercised.

In *Boren* and *Goldfarb,* deciding that no actual legislative judgment existed enabled Justice Stevens to avoid the fundamental issue in reverse discrimination, the extent to which the state's interest in reducing the effects of past discrimination outweighs the individual's interest in being free from present discrimination. He characterized the statutes as "accidents" or "stereotyped reactions." In *Bakke* the special admissions program clearly was the result of an actual judgment by the medical school faculty. Consequently, had Justice Stevens applied his equal protection analysis in *Bakke,* he would have been unable to characterize the special admissions program as an "accident." By emphasizing the *legislative* nature of the required actual judgment, however, Justice Stevens could have challenged the medical school faculty's competence to establish a special admissions program[271] and thus could have held that the program violated the equal protection clause. This reasoning would have produced a result identical to his statutory holding in *Bakke.*[272] Nevertheless, deciding the case in this manner again avoids resolving the fundamental issue in reverse discrimination. Avoiding this balancing is the only way that Justice Stevens could decide *Bakke* consistently with his statutory holding because Justice Stevens' equal protection opinions suggest that he has been unable to develop an analysis capable of resolving this fundamental issue.

As noted earlier, in *Bakke* Justice Stevens claimed that a constitutional resolution was unnecessary because adequate statutory grounds existed to decide the controversy.[273] Review of Justice Stevens' equal protection opinions, however, reveals another, perhaps the principal, reason for his statutory holding: he is dissatisfied and uncomfortable with traditional equal protection analysis, and has not developed a satisfactory analysis of his own.

IV. THE ROLE OF THE COURT

A. *Introduction*

Since his ascendance to the Supreme Court three Terms ago Justice Stevens has written several opinions reflecting a keen aware-

271. Justice Powell did this in *Bakke.* He stated: "[I]solated segments of our vast governmental structures are not competent to make [decisions regarding which minority groups deserve favorable treatment], at least in the absence of legislative mandates and legislatively determined criteria." 98 S.Ct. 2733, 2758-59. Justice Stevens has questioned the competence of federal agencies to assert certain justifications for regulations. *See* note 232 *supra* and accompanying text.

272. *See* text accompanying notes 200-01 *supra.*

273. *See* notes 198-99 *supra* and accompanying text. *See also* Part IV(D) *infra.*

ness of the unique roles that the judiciary in general and the Supreme Court in particular play in the constitutional and political framework of the United States. Although the Court rarely confronts these issues directly in the resolution of a primary legal conflict, Justice Stevens has demonstrated a proclivity toward amplifying the less obvious, secondary issues that frequently can be reduced to a single, fundamental problem—what is the proper role of the Court?

Questions concerning the Court's proper role arise in various contexts; besides calling for the resolution of a specific legal debate, virtually every justiciable controversy invites the Court to assess the impact of its immediate decision on other actors in the political process—coordinate federal branches, the states and their political subdivisions, and future litigants. Moreover, a particular Justice's treatment of these seemingly ancillary issues frequently is the only formal indication of his constitutional perspective. Consequently, this section analyzes a number of Justice Stevens' opinions in which he elaborates on the Court's constitutional and political role. The number of opinions is relatively small, and Justice Stevens' relevant discussion in them is frequently terse, but some consistent trends are discernible.

Many of the issues discussed in this section traverse those covered elsewhere in this Special Project. The primary objective here, however, is to ascertain Justice Stevens' perception of the constitutional and political significance of the Bench on which he sits, rather than the substantive content of his constitutional doctrine. In order to achieve that objective, three principal topics will be examined. First, the discussion centers on Justice Stevens' willingness to exercise the Court's discretionary review power. His high standards for granting certiorari, his narrow view of mootness, and his ardent criticism of his colleagues for rendering written dissents to denials of certiorari are included under this heading. Second, the inquiry focuses on Justice Stevens' willingness to defer to the judgment of coordinate federal branches, state legislatures and courts, and lower federal courts. The specific topics include his liberal deference to congressional policymaking, his more restricted but still liberal deference to administrative agencies, his narrow view of the abstention doctrine, and his clear respect for the judgment of federal trial and appellate courts. Third, this section analyzes a number of miscellaneous issues that reflect upon Justice Stevens' preference for an adjudicatory rather than a policymaking judicial branch. These issues include his view of the jurisdictional power of the Court, his relatively narrow view of standing and the stay power of the Court, his preference for statutory rather than constitutional resolution

whenever possible, his view of the role of precedent, his perception of the Court's constitutional power as compared to that of the executive and legislative branches, and his overriding concern for judicial economy.

B. The Exercise of the Court's Discretionary Review Power

(1) When Should the Court Grant Certiorari?

Whether to grant certiorari is the most frequent decision made by a Supreme Court Justice.[274] The reasons for granting or denying certiorari in a given case provide a valuable insight into the constitutional process: the Court's willingness to hear a case frequently is as important as its ultimate resolution of the issues in the case. Historically the Court has been extremely selective in exercising its discretionary review power, granting certiorari in only one of ten cases.[275] Although the most evident reason for selective review is that consideration of all cases would be unmanageable if not impossible, other factors undoubtedly affect the decision—the significance of the issues presented, potential political repercussion, or the likelihood that the court below committed error, among others. Analyzing the standards by which a Justice determines whether to grant certiorari is important, since the type of case he chooses to hear and his reasons for doing so indicate the role in which he views himself and the Court.

In *Idaho Department of Employment v. Smith*[276] Justice Stevens dissented from the Court's reversal of the Idaho Supreme Court,[277] arguing that the Court should not have granted certiorari. Pointing out that the state court had held the state statute violated the federal Constitution, he properly categorized the case as one for discretionary, not mandatory, review.[278] Moreover, in his view the

274. The Court currently reviews over 3000 petitions for writs of certiorari annually. *See* Singleton v. Commissioner, 99 S.Ct. 335, 338 n.2 (1978) (opinion of Stevens, J.).

275. This past term the Court exercised its discretionary review power on 323 occasions, denying certiorari in well over 3000 cases. *Id.*

276. 434 U.S. 100 (1977).

277. Plaintiff challenged an Idaho statute that allowed persons attending night school but not those attending daytime school to collect unemployment compensation, contending that the classification denied daytime students equal protection of the laws under the fourteenth amendment. Although plaintiff prevailed before the Idaho Supreme Court, the United States Supreme Court upheld the state statute, citing the traditional deference given to state legislatures in the area of social welfare and economics. The majority also pointed out that the classes in the instant case were rational because daytime employment is more plentiful than nighttime work so that daytime school imposes a greater restriction on finding employment. *Id.* at 101.

278. Referring to 28 U.S.C. § 1257 (1976), Justice Stevens stated:

> In defining the jurisdiction of this Court to review the final judgments rendered by

case did not warrant the exercise of discretionary review: "Since this decision does not create a conflict and does not involve a question of national importance, it is inappropriate to grant certiorari and order full briefing and oral argument."[279] Even though Justice Stevens acknowledged that the state court *erroneously* used the fourteenth amendment to provide plaintiff with more protection than the federal Constitution required, he still contended that certiorari should not have been granted:

> I do not believe that error is a sufficient justification for the exercise of this Court's discretionary jurisdiction. We are much too busy to correct every error that is called to our attention in the thousands of certiorari petitions that are filed each year. Whenever we attempt to do so summarily, we court the danger of either committing error ourselves or of confusing rather than clarifying the law . . . . Moreover, this Court's random and spasmodic efforts to correct errors summarily may create the unfortunate impression that the Court is more interested in upholding the power of the State than in vindicating individual rights.[280]

Justice Stevens has voiced the same objection on subsequent occasions. Calling the majority's disposition of the case "cavalier," he elaborated on his standard for granting certiorari in *Oregon State Penitentiary v. Hammer*:[281]

> In my judgment, even assuming that the Oregon Supreme Court has extended greater procedural protection to Oregon residents than the Federal Constitution requires, there is no need for this Court to address those issues until a conflict with the Oregon holding has developed on a national level. But if my judgment in this respect is incorrect, and enlightenment on a nationwide basis is indeed appropriate, surely the Court should provide something more edifying than a cryptic reference to a case as wide of the mark as *Dixon v. Love*. This summary treatment of a carefully reasoned decision of the highest court of the State of Oregon fails to accord proper respect to that tribunal and gives no guidance whatsoever for further proceedings in this litigation.[282]

The dissent in *Hammer* seems less directed at judicial economy or

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> the highest court of a State, Congress has sharply differentiated between cases in which the state court has rejected a federal claim and those in which the federal claim has been vindicated. In the former category our jurisdiction is mandatory; in the latter, it is discretionary.

Id. at 103 (footnote omitted) (Stevens, J., dissenting).

279. *Id.* at 104.

280. *Id.* at 104-05.

281. 434 U.S. 945 (1977). The Court granted certiorari, vacated the judgment below, and remanded the case for reconsideration in light of Dixon v. Love, 431 U.S. 105 (1977). In *Hammer* the Oregon Supreme Court had held that a post-termination hearing for discharged, tenured state employees violated the procedural due process requirements of the fourteenth amendment. Justice Stevens criticized the Court's summary disposition following the grant of certiorari, saying "[s]ince *Dixon v. Love* sheds no light on the issues decided by the Oregon Supreme Court, the Court's disposition of this petition can only be characterized as cavalier." 434 U.S. at 945 (citation omitted) (Stevens, J., dissenting).

282. *Id.* at 946-47. For further discussion of the concern over misuse of summary disposition, see Brennan v. Armstrong, 433 U.S. 672 (1977) (Stevens, J., dissenting).

the deemphasis of probable error, since the *Hammer* state court did not so clearly fail to follow federal constitutional law as did the court in *Smith.* Instead, Justice Stevens' main concern in *Hammer,* as in *Smith,* was that the issue presented was neither of national importance nor in conflict among the state or federal courts. In addition, both cases reflect that Justice Stevens disfavors granting certiorari when the Court plans to do no more than summarily resolve or remand the case without appropriate analysis or direction to the lower court. The apparent rationale is that no treatment of the case is better than potentially misleading or erroneous treatment, particularly if the decision whether to exercise discretionary review is close at the outset.

Justice Stevens has not always been consistent, however, in articulating his standards for granting certiorari. In *Minnesota v. Alexander*[283] the majority of the Court dismissed the appeal[284] for want of jurisdiction and treated the petition as one for writ of certiorari, which was denied. In dissent, Justice Stevens suggested that appeal *may* have been the proper avenue to the Court, but, without deciding that appeal *was* proper, he went on to argue that "[t]he case deserves plenary review because of its practical importance and because of the likelihood that error has been committed."[285]

Since the Court treated the petition as one for writ of certiorari, and since Justice Stevens did not conclude that appeal was proper, this statement reveals two inconsistencies. First, he used likelihood of error as a basis for exercising the Court's discretionary review power, while in *Idaho Department of Employment v. Smith* he expressly stated that error is an insufficient basis for granting certiorari.[286] Second, he viewed *Alexander* as a case of *practical* importance, not one of *national* importance, and did not contend that there was a conflict among the lower courts on the issues presented in *Alexander.*[287] Even if Justice Stevens intended to make no distinction between a case of practical importance and one of national importance for purposes of granting or denying certiorari, no obvious standard exists for determining that an exemption from state water pollution regulations[288] merits the Court's attention while improper delineation of the bounds of equal protection and proce-

283. 430 U.S. 977 (1977).

284. The appeal was from the Eighth Circuit, which had held that dredging by the Army Corps of Engineers was exempt from state water pollution regulations. Appeal was sought under 28 U.S.C. § 1254(2) (1976), which applies if a federal court of appeals holds a state statute invalid as repugnant to the Constitution, treaties, or laws of the United States.

285. 430 U.S. at 977-78 (Stevens, J., dissenting).

286. *See* notes 277-80 *supra* and accompanying text.

287. *See* text accompanying note 279 *supra.*

288. *See* note 284 *supra.*

dural due process do not.[289]

Such inconsistencies suggest that the articulated standards, other than judicial economy, are not the sole or even principal bases on which Justice Stevens decides whether to exercise discretionary review. An analysis of the substantive issues in *Smith, Hammer,* and *Alexander* suggests that Justice Stevens may be looking beyond such matters as national importance or probable error to the substantive result he desires in the case. For example, in all three cases the lower court ruled against the interest of the state. In *Alexander* the lower court was a federal court, and the party in favor of whom that court ruled was the federal government. In *Smith* and *Hammer,* on the other hand, the lower court was a state court whose decision was in favor of individual rights. In the latter two cases, Justice Stevens would have allowed the pro-individual rights result to stand by denying certiorari, whereas in *Alexander* he would have granted certiorari in order to uphold the state's power to regulate the activities of a federal agency.[290] Perhaps Justice Stevens' treatment of discretionary review reflects his intuitive reaction to the subject matter of a particular case, thus manifesting less directly his general views toward individual rights[291] and federal-state relations.[292]

One of the first cases in which Justice Stevens participated as a member of the Court, *Liles v. Oregon,*[293] confirms that judicial economy is a major concern of the Justice in exercising discretionary review.[294] In *Liles* Justice Stevens concurred in the denial of certiorari even though he disagreed with the substantive result,[295] conceding that to grant certiorari in case after case only to have precedent with which he disagreed reaffirmed would be "pointless."[296] This statement initially seems to contradict the earlier analysis that suggested Justice Stevens may exercise discretionary review according

289. *See* notes 277 & 281 *supra.*

290. Justice Stevens went on to assess the merits of the case in *Alexander,* arguing that immunity from state pollution laws for the Army Corps of Engineers was waived by Congress in § 313 of the Federal Water Pollution Control Act, 33 U.S.C. § 1323 (1976). *See* text accompanying notes 49-54 *supra.*

291. *See* Part III *supra.*

292. *See* Part II *supra.*

293. 425 U.S. 963 (1976).

294. *See also* Brennan v. Armstrong, 433 U.S. 672 (1977) (Stevens, J., dissenting); School Dist. of Omaha v. United States, 433 U.S. 667 (1977) (Stevens, J., dissenting).

295. *Liles* was an obscenity case arising after the Court decided Miller v. California, 413 U.S. 15 (1973). Although Justice Stevens disagrees strongly with the local mores standard established by the Court in *Miller,* he voted to deny certiorari in *Liles* because *Miller* was controlling and a majority of the Court still support *Miller.* 425 U.S. at 964 (Stevens, J., concurring). *See* Part III(B)(1) *supra.*

296. 425 U.S. at 964.

to his views on the substantive issue.[297] On closer examination, however, his approach in *Liles* is consistent with that analysis. Given his recognition that he is in a clear minority among the Court on a particular issue, voting to deny certiorari is the most expedient long-term approach for altering the substantive law. Voting to grant certiorari, which requires the votes of only four Justices, simply would make more difficult the future goal of overruling the disagreeable precedent, since each certiorari grant would increase the weight of precedent. Denials of certiorari, on the other hand, have no precedential value.[298] Thus, when a new majority develops, only the single authority would need to be overruled.

Finally, Justice Stevens has expressed a relatively limited view of mootness. In *Scott v. Kentucky Parole Board*[299] he dissented from the Court's per curiam remand and refusal to decide whether constitutional safeguards of procedural due process apply to parole release hearings.[300] Arguing that the question was an important one, Justice Stevens cited the vast number of parole release decisions made annually, the importance of those decisions to the potential parolee, and the extensive litigation and split in the federal courts over the question.[301] Justice Stevens would therefore have granted certiorari and resolved the case on its merits:

> Although I have no doubt that the mootness issue will be correctly decided after the proceedings on remand have run their course, the remand is nevertheless unfortunate. As dispositions in each of the last three years demonstrate, the underlying issue is one that is capable of repetition, yet review is repeatedly evaded. Delay in deciding the merits will affect not only these litigants, but also other pending litigation and parole procedures in every jurisdiction in the country. A suggestion of mootness which this Court can readily decide should not be permitted to have such farreaching consequences.[302]

In addition to the express concern for the waste of judicial resources and the delay to the litigants caused by the majority's treatment of the mootness issue, Justice Stevens' pro-individual rights orienta-

297. *See* text accompanying note 290 *supra.*

298. *See* Part IV(B)(2) *infra.*

299. 429 U.S. 60 (1976).

300. Justice Stevens contended that subsequent granting of parole did not moot the former inmate's argument that denial of parole or imposition of parole conditions had the kind of impact on a liberty interest that must be preceded by due process. *Id.* at 61 (Stevens, J., dissenting).

301. *Id.* at 61 n.1. Even though the inmate had been released on parole since filing suit, Justice Stevens pointed out that as a parolee, he remained subject to "significant restraints that might not have been imposed if he had received the kind of hearing that he claims the Constitution requires." *Id.* at 63.

302. *Id.* at 63-64 (footnote omitted). *See also* Vitek v. Miller, 436 U.S. 407 (1978) (Stevens, J., dissenting); Environmental Protection Agency v. Brown, 431 U.S. 99 (1977) (Stevens, J., dissenting).

tion may partially explain his narrow view of mootness in this setting.[303]

(2) How Should the Court Treat Denials of Certiorari?

During the 1977 Term Justice Stevens began an ardent campaign to persuade his fellow Justices to terminate the practice of explaining or criticizing denials of certiorari, whether by the Court or by dissenting members of the Court. In *Illinois v. Gray*[304] the Court denied certiorari to the Illinois Supreme Court because "the judgment below rests on an adequate state ground."[305] Citing three additional instances in which the Court recently had explained denials of certiorari,[306] Justice Stevens dissented from this explanation because it was "inconsistent with the rule that such denials have no precedential value."[307] Similarly, in *Huffman v. Florida*[308] he criticized two dissenting Justices whose opinion suggested the basis on which certiorari had been denied by the Court.[309] Supporting the Court's denial of certiorari, Justice Stevens stated that:

> in making this observation I do not presume to explain the reasons for the Court's action; I write only to identify this as one of the many cases in which a persuasive dissent may create the unwarranted impression that the Court has acted arbitrarily in denying a petition for certiorari.[310]

This attack reached a peak early in the 1978 Term as Justice Stevens devoted an elaborate opinion in *Singleton v. Commissioner*[311] to explaining his strict position on denials of certiorari. Relying primarily on a similar criticism launched by Justice Frankfurter nearly thirty years ago,[312] Justice Stevens reasoned that

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303. *See* text accompanying note 290 *supra*; Part III *supra*.

304. 435 U.S. 1013 (1978).

305. *Id.*

306. Illinois v. Pendleton, 435 U.S. 956 (1978); Michigan v. Allensworth, 435 U.S. 933 (1978); Illinois v. Garlick, 434 U.S. 988 (1977).

307. 435 U.S. at 1013 (Stevens, J., dissenting in part).

308. 435 U.S. 1014 (1978).

309. The Court gave no explanation for its denial of certiorari in this case, but Justices Marshall and Brennan in dissent implied that the Court erroneously denied certiorari on the basis of adequate state grounds. *Id.*

310. 435 U.S. at 1018 (Opinion of Stevens, J.).

311. 99 S.Ct. 335, 337 (1978) (Opinion of Stevens, J.).

312. Maryland v. Baltimore Radio Show Inc., 338 U.S. 912, 917-19 (1950) (Opinion of Frankfurter, J.). Justice Frankfurter's statement also provides insight into the many reasons for denying certiorari:

> The sole significance of such denial of a petition for writ of certiorari need not be elucidated to those versed in the Court's procedures. It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter "of sound judicial discretion." A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the

the Court is too busy to explain denials of certiorari on a regular basis, and that even if the Court had sufficient time, the practice would be inappropriate since denials of certiorari have no precedential value.[313] Moreover, he argued that dissenting opinions to denials of certiorari are potentially misleading, pointing out that:

> Since the Court provides no explanation of the reasons for denying certiorari, the dissenter's arguments in favor of a grant are not answered and therefore typically appear to be more persuasive than most other opinions. Moreover, since they often omit any reference to valid reasons for denying certiorari, they tend to imply that the Court has been unfaithful to its responsibilities or has implicitly reached a decision on the merits when, in fact, there is no basis for such an inference.[314]

While the substance of Justice Stevens' complaint is harmonious with the traditional view of the proper approach to denials of certiorari, his criticism seems to transcend mere judicial economy and the role of such opinions as precedent. Since the focus of his complaint is not that the Justices exchange differences in the discretionary review process, but rather that such exchanges are published,[315] characterizing his admonition as "Let's Be More Judges

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same result. This is especially true of petitions for review on writ of certiorari to a State court. Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a State court of last resort; the decision may be supportable as a matter of State law, not subject to review by this Court, even though the State court also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

99 S.Ct. at 337 (quoting 338 U.S. at 917-18).

313. Justice Stevens stated that:

> One characteristic of all opinions dissenting from the denial of certiorari is manifest. They are totally unnecessary. They are examples of the purest forms of dicta, since they have even less legal significance than the orders of the entire Court which, as Mr. Justice Frankfurter reiterated again and again, have no precedential significance at all.

Id. at 338.

314. *Id.* at 338-39.

315. For example, Justice Stevens stated in *Singleton* that the more beneficial effect of written statements of reasons over oral contribution at Conference

> merely justifies the writing and circulating of these memoranda within the Court; it does not explain why a dissent which has not accomplished its primary mission should be published.
>
> . . . .
>
> The traditional view, which I happen to share, is that confidentiality makes a valuable contribution to the full and frank exchange of views during the decisional process; such confidentiality is especially valuable in the exercise of the kind of discretion that must be employed in processing the thousands of certiorari petitions that are reviewed each year. In my judgment, the importance of preserving the tradition of confidentiality outweighs the minimal educational value of these opinions.

Id. at 339.

and Less Politicians"[316] is appropriate. This view is consistent with his apparently dominant perception of the Court as an adjudicatory rather than a policymaking body.[317]

On at least one occasion,[318] however, Justice Stevens has violated his own rule. In *Minnesota v. Alexander*[319] he dissented from the Court's denial of certiorari and reached the merits of the case. Although he suggested that appeal, rather than certiorari, may have been appropriate, without expressly finding that appeal was proper he impliedly relied on the Court's discretionary review power. Thus his dissent was equally inappropriate in view of the standards he set forth in *Singleton.*

C. *Deference to Other Governmental Entities*

The Supreme Court is only one of several constitutional entities that have responsibility for carrying out the political and adjudicatory processes of government. Since the Supreme Court, however, is the ultimate arbiter of the law under the Constitution,[320] it always has played a central role in both our political and legal history. Consequently, the degree of deference that the Court gives to the other governmental entities is a primary measure of the role the Court fills in the constitutional framework. Justice Stevens' opinions reflect a relatively strong tendency to defer to the various legislative entities, particularly when he perceives that an issue is more appropriate for political policymaking than for judicial adjudication. Furthermore, when the adjudicatory process has been invoked, he generally treats lower court opinions with substantial respect, rarely reevaluating factual findings and overruling legal conclusions only when error is great. This willingness to defer, even when the Court undoubtedly has the constitutional *power* to act, demonstrates that the newest Justice has not been subsumed by the tremendous authority possessed by the Court in our constitutional system.

(1) Legislative Branches

Justice Stevens frequently allows great deference to Congress[321] and openly criticizes the Court for substituting its judgment for that

316. NAT'L L.J., Nov. 13, 1978, at 21, col. 1.

317. *See* Part IV(D) *infra.*

318. *See also* Liles v. Oregon, 425 U.S. 963 (1976) (Stevens, J., concurring). Presumably his criticism of dissents to denials of certiorari is equally applicable to concurrences that elaborate on the denial.

319. 430 U.S. 977 (1977) (Stevens, J., dissenting). *See also* text accompanying notes 283-89 *supra.*

320. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

321. *See, e.g.*, Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978).

of the coordinate legislative body.[322] Asked to review the validity of Environmental Protection Agency regulations, for example, he stated "[t]he question . . . is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for *these* regulations."[323] The decision to defer apparently depends on whether Justice Stevens characterizes an issue as a policy question, rather than an adjudicatory matter, and the range of matters that fall within the former category is unusually large. When reviewing the validity of a federal statute that denied full Medicare assistance to aliens,[324] Justice Stevens responded that decisions regarding the relationship between the United States and aliens are "committed to the political branches"[325] of the federal government:

> Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. This very case illustrates the need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication . . . . Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.[326]

Although his willingness to defer to state legislatures is less expansive, particularly when individual rights are at issue,[327] Justice Stevens acknowledges the constitutional authority of the states to fashion procedural and substantive laws in a manner considered most effective by the states:

> [T]he arguments in favor of fashioning new rules to minimize the danger of convicting the innocent on the basis of unreliable eyewitness testimony carry substantial force. Nevertheless, . . . I am persuaded that this rulemaking function can be performed "more effectively by the legislative process than by a somewhat clumsy judicial fiat," . . . and that the Federal Constitution does not foreclose experimentation by the States in the development of such rules.[328]

(2) Executive Branch

Justice Stevens is somewhat less deferential in scrutinizing the

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322. *See, e.g.*, Marshall v. Barlow's Inc., 436 U.S. 307 (1978).

323. E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 138 (1977) (emphasis added).

324. Mathews v. Diaz, 426 U.S. 67 (1976). Plaintiff challenged 42 U.S.C. § 1395o(2)(B) (Supp. V 1975), which denied supplemental Medicare assistance to aliens unless they had been United States residents for at least five years. *See* text accompanying notes 214-20 *supra*.

325. 426 U.S. at 81.

326. *Id.* at 81-82.

327. *See* Part III *supra*.

328. Manson v. Brathwaite, 432 U.S. 98, 117-18 (1977) (Stevens, J., concurring).

judgment of administrative agencies than in considering legislative enactments, but his opinions still demonstrate considerable latitude when dealing with matters within the expertise of the particular agency.[329] In *Bayside Enterprises, Inc. v. NLRB*[330] he argued that "regardless of how we might have resolved the question as an initial matter, the appropriate weight which must be given to the judgment of the agency whose special duty is to apply this broad statutory language to varying fact patterns requires enforcement of the Board's order."[331] He similarly has criticized the Court for its failure to show such deference for other administrative decisions, faulting the Court for invalidating Environmental Protection Agency regulations and stating "[t]his is the kind of consequence a court risks when it substitutes its reading of a complex statute for that of the Administrator charged with the responsibility of enforcing it."[332]

(3) Other Judicial Entities

Justice Stevens' treatment of lower court decisions evidences a great respect for the judgment of other members of both the state and federal judiciaries. In particular, his opinions demonstrate a strong tendency to defer to the judgment of federal court of appeals and district court judges. A number of factors probably contribute to this inclination—the desire to avoid duplicative judicial effort, which arises from his general concern for judicial economy, his recognition that lower court judges (especially trial judges) are better able to resolve certain disputes because of their familiarity with the factual aspects of a case; and the continuing impact of his own recent experience as a court of appeals judge. For example, in *Colorado River Water Conservation District v. United States*[333] Justice Stevens dissented from the Court's reversal of the court of appeals decision to abstain from asserting federal jurisdiction,[334] stating:

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329. For an analysis of Justice Stevens' earlier opinions as a court of appeals judge, see Special Project, *supra* note 2, at 186. The cases considered here demonstrate considerably more deference to administrative agencies than did his court of appeals opinions.

330. 429 U.S. 298 (1977).

331. *Id.* at 304.

332. Adamo Wrecking Co. v. United States, 434 U.S. 275, 306 (1978) (Stevens, J., dissenting). For additional examples of Justice Stevens' deference toward administrative decisions, see E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977), and Mathews v. Diaz, 426 U.S. 67 (1976).

333. 424 U.S. 800 (1976).

334. The United States filed suit in federal court while an action was pending in Colorado state court. Disagreeing with the Court's position on the abstention doctrine, Justice Stevens stated that:

> I find the holding that the United States may not litigate a federal claim in a federal court having jurisdiction thereof particularly anomalous. I could not join such a disposi-

> [E]ven on the Court's assumption that this case should be decided by balancing the factors weighing for and against the exercise of federal jurisdiction, I believe we should defer to the judgment of the Court of Appeals rather than evaluate those factors in the first instance ourselves . . . . Facts such as the number of parties, the distance between the courthouse and the water in dispute, and the character of the Colorado proceedings are matters which the Court of Appeals sitting in Denver is just as able to evaluate as are we.[335]

This decision not only is consistent with his anti-abstention position,[336] but also indicates Justice Stevens' view that the role of the Supreme Court is to resolve more vital, substantive issues. Justice Stevens' special concern for the workload of lower federal court judges is evident in *Brennan v. Armstrong*,[337] in which he disagreed with the Court's summary remand[338] of the Milwaukee remedial school desegregation plan that was developed after considerable work by the lower courts:

> These cases certainly provide no justification for vacating the judgment affirming the District Court's conclusion that the petitioners have violated the Constitution. This Court's hasty action will unfortunately lead to unnecessary work by already overburdened Circuit Judges, who have given this case far more study than this Court had time to give it. Nevertheless, it is quite clear that after respectful reconsideration the Court of Appeals remains free to reenter its original judgment.[339]

Justice Stevens also has deferred to lower federal courts on matters of law when the lower court is better acquainted with controlling precedent. Writing for the Court in *Bishop v. Wood*,[340] he deferred to the federal district judge's interpretation of North Carolina law when the state court had not construed the ordinance in question.[341] Recognizing that the federal district judge sitting in North Carolina was more familiar with that state's law, he stated that "[i]n comparable circumstances, this Court has accepted the interpretation of state law in which the District Court and the Court

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tion unless commanded to do so by an unambiguous statutory mandate or by some other clearly identifiable and applicable rule of law.

Id. at 826 (Stevens, J., dissenting).

335. *Id.* at 827.

336. *See* text accompanying notes 344-48 *infra*.

337. 433 U.S. 672 (1977).

338. The district court and the Seventh Circuit ordered development of the remedial desegregation plan for Milwaukee public schools. The lower courts ordered the plan, however, before Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977), in which the Court set forth new criteria for drafting desegregation plans. Justice Stevens' primary dispute with the Court in *Brennan* was that *Dayton* applied to remedies, while the Seventh Circuit had decided only the issue of liability.

339. 433 U.S. at 674-75 (Stevens, J., dissenting).

340. 426 U.S. 341 (1976).

341. Plaintiff, a policeman terminated without a hearing to determine the sufficiency of cause for discharge, argued that since a city ordinance classified him as a "permanent employee," he had a property interest in continued employment and hence was entitled to the fourteenth amendment guarantee of procedural due process. *Id.*

of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion."[342] Justice Stevens consistently has emphasized such deference to federal trial courts, acknowledging the trial judge's superior first-hand knowledge of the facts of the case as revealed during trial.[343]

In one area, however, Justice Stevens generally has been unwilling to defer to other judicial authority. Although he accords equal deference to state court decisions in most instances,[344] he has a narrow view of the abstention doctrine, thus refusing to defer to state courts when federal jurisdiction also exists.[345] In two cases his narrow view of abstention at least partially can be explained by his pro-individual rights orientation.[346] The more likely explanation for this anti-abstention position, however, is his underlying federal-state relations philosophy. Although Justice Stevens limits the dormant commerce power and usually upholds state regulation of commerce when the federal government has not acted, he has a broad view of preemption and the scope of the affirmative commerce power once Congress has decided to act.[347] His analogous view of federal-state relations in the judicial branch dictates deference to state courts so long as no federal jurisdiction is invoked, but once concurrent jurisdiction exists, he gives the federal judicial proceeding precedence. Thus abstention only rarely is appropriate.[348] Justice Stevens has not articulated this philosophy in the abstention area, but his treatment of federal-state relations in *Vendo Co. v. Lektro-Vend Corp.*[349] supports the commerce clause analogy. Argu-

342. *Id.* at 346. *See also* Codd v. Velger, 429 U.S. 624 (1977) (Stevens, J., dissenting). For an opinion in which Justice Stevens' personal familiarity with the lower appellate court experience is particularly evident, see Stanton v. Stanton, 429 U.S. 501 (1977) (Stevens, J., dissenting in part).

343. *E.g.*, Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (Stevens, J., dissenting); United States v. Lovasco, 431 U.S. 783, 798-99 (1977) (Stevens, J., dissenting); Henderson v. Kibbe, 431 U.S. 145 (1977).

344. *E.g.*, Arizona v. Washington, 434 U.S. 497 (1978); Puyallup Tribe, Inc. v. Department of Game of Wash., 433 U.S. 165 (1977); Diamond Nat'l Corp. v. State Bd. of Equalization, 425 U.S. 268 (1976) (Stevens, J., dissenting). *See also* Part II(B) *supra.*

345. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434 (1977) (Stevens, J., dissenting); Juidice v. Vail, 430 U.S. 327 (1977) (Stevens, J., concurring); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (Stevens, J., dissenting).

346. *See* Part III *supra.* In *Trainor* plaintiff welfare recipients filed suit in federal court challenging a state attachment statute as violative of the due process clause of the fourteenth amendment, and in *Juidice* plaintiffs brought a class action suit under 42 U.S.C. § 1983 to enjoin enforcement of state court contempt judgments against them.

347. *See* Part II *supra.*

348. For example, in *Trainor* Justice Stevens said, "[t]here should be no abstention unless the state procedure affords a plain, speedy, and efficient remedy for the federal wrong . . . ." 431 U.S. at 469 n.15.

349. 433 U.S. 623 (1977) (Stevens, J., dissenting). The issue in *Vendo Co.* was whether the federal anti-injunction statute deprived the federal courts of power to stay state-court

ing that antitrust enforcement is of sufficient *national* interest to outweigh interference with the state's judicial machinery, he stated:

> When principles of federalism are invoked to defend a violation of the Sherman Act, one is inevitably reminded of the fundamental issue that was resolved only a few years before the anti-injunction statute was passed. Perhaps more than any other provision in the Constitution, it was the Commerce Clause that transformed the ineffective coalition created by the Articles of Confederation into a great nation.[350]

D. The Court's Role in Policymaking and Adjudicating

A genuine concern for efficiency in the federal judiciary runs throughout Justice Stevens' opinions as a Supreme Court Justice.[351] An equally strong theme, yet one that is not so clearly expressed in the opinions, is his preference for a Supreme Court that is an adjudicating rather than a policymaking entity. His disapproval of dissents to certiorari denials[352] is one manifestation of this view of the Court. His espousal of relatively limited federal jurisdiction,[353] Supreme Court jurisdiction,[354] and stay power[355] further demonstrate this theme, since those decisions effectively narrow the range of matters resolved by the Court to those that truly should be considered "justiciable" controversies.[356]

Justice Stevens does not consider the Court to be a "political branch" of government.[357] Without openly espousing an apolitical role for the Court,[358] Justice Stevens' opinions at least reflect a cal-

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litigation that was being prosecuted in direct violation of the Sherman Act. *See* text accompanying notes 49-54, 290 *supra*.

350. 433 U.S. at 665. *See also id.* at 666 n.39.

351. For examples in addition to those discussed earlier in this section, see Justice Stevens' reliance on judicial economy as a basis for his decisions in Hazelwood School Dist. v. United States, 433 U.S. 299, 318-19 (1977) (Stevens, J., dissenting); Estelle v. Gamble, 429 U.S. 97, 113-14 (1976) (Stevens, J., dissenting); and Bishop v. Wood, 426 U.S. 341, 349-50 (1976).

352. *See* Part IV(B)(2) *supra*.

353. *See* Duke Power Co. v. Carolina Environmental Study Group, Inc., 98 S.Ct. 2620 (1978) (Stevens, J., concurring).

354. *See, e.g.*, Gardner v. Westinghouse Broadcasting Co., 98 S.Ct. 2451 (1978); Sanabria v. United States, 98 S.Ct. 2170 (1978) (Stevens, J., concurring); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (Stevens, J., dissenting).

355. *See* Gilmore v. Utah, 429 U.S. 1012 (1976) (Stevens, J., concurring); Bradley v. Lunding, 424 U.S. 1309 (1976); Enomoto v. Spain, 424 U.S. 951 (1976) (Stevens, J., dissenting).

356. That these decisions support the inference that Justice Stevens prefers an adjudicatory Court can be seen by considering the converse. A Justice who favored judicial activism and who sought to expand the Court's role into the policymaking arena undoubtedly would favor an expanded view of jurisdiction in order to widen the impact of his policy-oriented decisions. Justice Stevens' decisions therefore demonstrate the exercise of judicial restraint, as opposed to judicial activism.

357. *See* text accompanying notes 325-26 *supra*.

358. Although the Supreme Court plays a unique role in the constitutional scheme, at least partially removed from the day-to-day workings of the Government's political machi-

culated effort to lead the Court away from its political tendencies and toward pure judicial resolution of legal disputes. For example, whenever possible, he bases a decision on statutory rather than constitutional grounds.[359] Statutory analysis provides the Justice with specific language and legislative history, which contain predetermined political judgments, thus reducing the tendency toward policymaking by the Court.[360] Justice Stevens' reliance on statutory law in *Regents of the University of California v. Bakke*,[361] given the public clamor for a constitutional resolution of the reverse discrimination issue, shows the degree to which he follows the rule of statutory decisionmaking.

Other opinions, however, indicate that Justice Stevens recognizes the actual tension between the Court's policymaking and adjudicating roles. In *Runyon v. McCrary*[362] he addressed this issue in the context of determining the proper role of precedent. Admitting that a clear line of authority controlled in the case, and that he believed that precedent to have been wrongly decided, he expressed the dilemma as follows:

> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, and its progeny have unequivocally held that §1 of the Civil Rights Act of 1866 prohibits private racial discrimination. There is no doubt in my mind that that construction of the statute would have amazed the legislators who voted for it. Both its language and the historical setting in which it was enacted convince me that Congress intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own, and convey property, and to litigate and give evidence. Moreover, since the legislative history discloses an intent not to outlaw segregated public schools at that time, it is quite unrealistic to assume that Congress intended the broader result of prohibiting segregated private schools. Were we writing on a clean slate, I would therefore vote to reverse.
>
> But *Jones* has been decided and is now an important part of the fabric of our law. . . . I am persuaded, therefore, that we must either apply the rationale of *Jones* or overrule that decision.[363]

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nery, vestiges of the "political" aspects of the constitutional democracy remain. Even at the outset the Court was viewed as a political body: "[T]he Supreme Court of the United States is the sole tribunal of the Nation . . . . It may even be affirmed that, although its constitution is essentially judicial, its prerogatives are almost entirely political. Its sole object is to enforce the execution of the laws of the Union." A. DeTocqueville, 1 Democracy in America 150 (P. Bradley ed. 1956). Whether the Court's motives are political, decisions such as Brown v. Board of Education, 347 U.S. 483 (1954), unquestionably have decisive political impact.

359. *E.g.*, United States v. Chesapeake & Ohio Ry., 426 U.S. 500 (1976) (Stevens, J., dissenting); Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976) (Stevens, J., dissenting).

360. When the Court relies on the Constitution alone, resolution of the case must depend on the Court's assessment of more factors, frequently including contemporary societal needs and occasionally extending to policies inherent in the constitutional structure itself. Although the Court also may manipulate legislative language and history, the more specific provisions of a statute limit the Court's ability to fashion the law out of less than whole fabric.

361. 98 S.Ct. 2733 (1978) (Stevens, J., concurring in part, dissenting in part). *See* Part III(C) *supra*.

362. 427 U.S. 160 (1976).

363. *Id.* at 189-90 (footnotes omitted) (Stevens, J., concurring).

Justice Stevens found two reasons for overruling *Jones*—his firm conviction that the case had been wrongly decided, and his view that reliance upon it had not been so extensive as to foreclose the Court from overruling it. Nevertheless, he found the interest in stability and orderly development of the law[364] and the progress of national policy toward eliminating racial segregation in society[365] sufficient to justify its affirmance. Such reliance on national policy, *as perceived by the Court,* contradicts Justice Stevens' customary avoidance of a policymaking role and constitutes an uncharacteristic flirtation with judicial activism.

Justice Stevens' most interesting treatment of the relative roles of policymaking and adjudication occurred in *City of Eastlake v. Forest City Enterprises.*[366] In *Eastlake* a real estate developer challenged a state constitutional provision that left the power of referendum to the people with respect to all questions a municipality was authorized to control by local legislation. A city charter provision, enacted pursuant to this clause in the state constitution, required a fifty-five percent referendum approval of all zoning variances.[367] After having his zoning variance request denied by such a referendum, plaintiff contended that the state constitutional provision was an unconstitutional delegation of legislative power to the people. The Court rejected plaintiff's argument, pointing out that allowing a referendum is not a delegation of power, but instead direct participation in the legislative process through the purest form of voter democracy.

Justice Stevens dissented, arguing in essence that the town meeting process of decisionmaking denied procedural due process to persons seeking zoning variances.[368] Characterizing the referendum process as a *legislative* activity, he contended that determination of individual zoning variances is usually regarded as an exercise of *judicial* authority.[369] Thus, although appropriate for enacting comprehensive zoning plans, he considered the referendum process inadequate for resolving individual requests for amendments to the comprehensive plan. A referendum, moreover, was a "manifestly

364. *Id.* at 190-91.

365. Justice Stevens stated that overruling should occur only when social mores have changed, and that in this case they had changed in favor of *Jones* rather than against it. *Id.* This analysis overlooks the possibility that *Jones* may have been the impetus causing social mores to change. If so, then the Court that decided *Jones* engaged in essentially a policymaking, rather than an adjudicating, function.

366. 426 U.S. 668 (1976).

367. The city charter also required the party seeking the variance, in this case the developer, to pay the expenses of the referendum. *Id.*

368. *Id.* at 680 (Stevens, J., dissenting).

369. *Id.* at 684.

unreasonable"[370] and fundamentally unfair method of handling the adjudicatory process of zoning changes.[371] Because majority sentiment is subject to "caprice," rather than following articulable standards, Justice Stevens concluded that the provision did not meet the requirements of procedural due process.[372]

This analysis is interesting in two respects. First, Justice Stevens' treatment of the legislating-adjudicating dichotomy sheds new light on his view of the Court's role in the constitutional scheme. On the one hand, his analysis is consistent with his continuing admonition that the judiciary is the adjudicatory actor and the legislature is the policymaking actor in the constitutional scheme. On the other hand, though, his characterization of the *Eastlake* referendum process as an adjudicatory procedure threatens those values his philosophy of a self-restraining, adjudicatory Court is designed to protect. By expanding the range of activities that fall within the adjudicatory function, and consequently reducing those that fall into the legislative function, Justice Stevens has achieved the same result that policymaking by the Court would produce. The procedural due process argument in *Eastlake* merely achieves indirectly what a political Court accomplishes forthright—judicial intervention into the policymaking function of the legislature.

Second, Justice Stevens' characterization of *Eastlake* as a procedural due process case seems to miss the real concern underlying his dissent. Given his primary concern that real estate developers who seek zoning variances will always be refused by the voters in

370. *Id.* at 692.

371. *Id.* at 694. Justice Stevens stated that:

> The essence of fair procedure is that the interested parties be given a reasonable opportunity to have their dispute resolved on the merits by reference to articulable rules. If a dispute involves only the conflicting rights of private litigants, it is elementary that the decisionmaker must be impartial and qualified to understand and to apply the controlling rules.
>
> I have no doubt about the validity of the initiative or the referendum as an appropriate method of deciding questions of community policy. I think it is equally clear that the popular vote is not an acceptable method of adjudicating the rights of individual litigants. The problem presented by this case is unique, because it may involve a three-sided controversy, in which there is at least potential conflict between the rights of the property owner and the rights of his neighbors, and also potential conflict with the public interest in preserving the city's basic zoning plan. If the latter aspect of the controversy were predominant, the referendum would be an acceptable procedure . . . . I think the case should be treated as one in which it is essential that the private property owner be given a fair opportunity to have his claim determined on its merits.

Id. at 692-94 (footnote omitted).

372. *Id.* at 690, 694. Parts of Justice Stevens' opinion arguably intimate that he treated the issue as one of substantive due process. Given the dominant view that such zoning provisions do not violate substantive due process, however, it seems more likely that he relied on procedural due process.

the referendum process, no matter how legitimate their requests,[373] the constitutional challenge should be framed in equal protection terms. A more appropriate characterization of Justice Stevens' objection would be that persons who seek zoning changes need protection from the majoritarian political process—in this context, therefore, developers seeking zoning variances are a suspect class. As a result, the judicial process should exercise greater scrutiny to insure that the disadvantaged group receives fair treatment by the majority. This goal, however, is one that the equal protection clause and not the due process clause is designed to achieve.[374]

Justice Stevens' activist stance in *Runyon* and *Eastlake* clearly is inconsistent with his preference for an adjudicatory rather than a policymaking Court. Since the number of decisions demonstrating the tendency toward judicial restraint far exceeds these two breaks with that trend, *Runyon* and *Eastlake* logically might be considered insignificant deviations in which Justice Stevens' concern for a particular aspect of the case caused him to disregard temporarily his traditional adjudicatory perspective. The appearance of another decision in which he advocates judicial activism, however, suggests that exceptions such as *Runyon* and *Eastlake* rapidly are becoming the rule. Early in the 1979 Term, in *New Motor Vehicle Board v. Orrin W. Fox Co.*,[375] Justice Stevens again displayed the procedural due process bias that appeared in *Eastlake*.[376] Despite the Court's proper deference to the state economic regulation under substantive due process analysis,[377] Justice Stevens constructed a procedural

373. *See id.* at 689.

374. The procedural inadequacy of resolution by direct voter participation is difficult to discern, since such a procedure is the last vestige of pure democracy. For example, a jury, which constitutes merely a sampling of the plebiscite that may or may not be representative of the local community, decides the guilt or innocence of persons accused of crimes. In the absence of the sixth amendment guarantee to a jury trial, would resolution of the guilt or innocence of a criminally accused by direct democracy, whereby *all* the accused's peers cast their vote, violate procedural due process?

If, however, there is reason to believe that the majoritarian political group regularly persecutes a distinct minority, a constitutional issue arises—but the appropriate claim is denial of equal protection, not denial of procedural due process. Moreover, characterization of *Eastlake* as a substantive due process case is inappropriate, since no one argued that plaintiff's property right cannot be diminished. Instead, Justice Stevens' concern was with *how* the interference occurred. The distinction put forth by Justice Stevens between affecting individual rights and societal rights in general simply is not supportable when one recognizes that each piece of legislation is no more than the adjudication of individual rights by the legislature.

A possible explanation for Justice Stevens' unwillingness to characterize *Eastlake* as an equal protection problem is his discomfort with the traditional equal protection analysis. *See* Part III(C) *supra.*

375. 99 S.Ct. 403 (1978).

376. *Id.* at 414-21 (Stevens, J., dissenting). *See also* Part III(C) *supra.*

377. Plaintiff challenged a California statute that required automobile manufacturers

due process argument that allowed him to conclude that the state statute was unconstitutional.[378] As in *Eastlake,* no procedural due process issue arose in *New Motor Vehicle Board.*[379] The effect of Justice Stevens' procedural due process holding, therefore, would be to allow judicial intervention into the substantive due process aspects of economic regulation, an endeavor that consistently has been discredited.[380] The unanswered question is how adamant Justice Stevens will be in this apparent ideological shift from his dominant attitude of judicial restraint toward judicial activism. Should it continue, this trend is destined to conflict directly with Justice Stevens' equally adamant stance in favor of restraint when exercising the Court's discretionary review power.[381]

V. CONCLUSION

This Special Project has not attempted to discern Justice Stevens' views in specific substantive areas, except to the extent that they indicate his philosophical orientations in the three spheres of constitutional adjudication discussed: federal-state relations, individual rights, and the role of the Supreme Court. Thus, many subjects, in particular problems of statutory interpretation and fifth and fourteenth amendment due process questions, have been left unexplored.[382]

Perhaps the most striking aspect of Justice Stevens' first three Terms on the Court is his frequent articulation of highly refined views on the role of the Supreme Court in the constitutional scheme. Justice Stevens is particularly vocal in his disagreements with his senior colleagues on the proper scope of the Court's discretionary review powers, repeatedly criticizing explanations of and dissents to certiorari denials, and advocating grants of certiorari only to resolve

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to obtain approval of a state board before opening or relocating a retail dealership within the market area of an existing franchisee if the existing retail dealer objected to the new dealer's presence. The statute authorized the board to notify the manufacturer that it must obtain state approval upon the filing of a complaint by the existing dealer, but contained no requirement that the board hold a hearing *before* notifying the manufacturer. The Court recognized that the statute itself had curtailed the manufacturer's right to franchise at will. Consequently, the issue was whether the restraint of that liberty was substantively permissible. Following established law in the area of economic regulation, the Court concluded that requiring approval by the state was proper. *Id.* at 406-11.

378. Justice Stevens seized upon the absence of a prior hearing requirement before the manufacturer was notified that board approval was necessary. *Id.* at 414-18.

379. Justice Brennan's majority opinion succinctly and accurately analyzed the substantive due process question and amply demonstrated that no procedural issue arose from the facts of the case. *Id.* at 409-11.

380. *E.g.,* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

381. *See* Parts IV(B)(1)-(2) *supra.*

382. Justice Stevens' Supreme Court opinions are catalogued according to subject matter in the Appendix to this Special Project.

issues of national importance. Justice Stevens also exhibits a pervasive willingness to defer to the judgments of other governmental entities. In the criminal context, he displays confidence in the decisionmaking capabilities of trial courts by consistently deferring to trial judge determinations on discretionary matters. Moreover, Justice Stevens' opinions in both affirmative and dormant commerce clause cases reveal a tendency to defer to legislative judgments. When Congress chooses to regulate in a certain area, he normally defers to the underlying policy choice by finding the need for national uniformity preemptive of conflicting state provisions. On the other hand, in the dormant commerce clause context, he interprets the fact of congressional inactivity as a strong indication that the matter is appropriate for regulation by local legislative bodies. Thus, by refusing to substitute his judgment for that of legislative decisionmakers and trial judges, and by restricting the scope of discretionary review, Justice Stevens on the surface advocates a nonactivist, nonpolicymaking, essentially adjudicatory role for the Supreme Court.

In cases of conflict between government and individuals, Justice Stevens consistently exhibits a strong pro-individual rights orientation. His opinions in the criminal context indicate a sensitivity to "Due Process"[383] considerations: his concern for the efficiency of the criminal justice system is directed not toward speedy processing and a high conviction rate, but toward assuring that the judgment of the most competent decisionmaker prevails. Justice Stevens is willing to disregard obvious factual guilt in order to achieve the necessary prophylactic effect. His first amendment opinions also reflect his basic pro-individual rights position. His reading of the establishment clause is more strict than that of any other Justice in that he countenances no public aid to sectarian education. This rigid interpretation stems partially from Justice Stevens' apprehension that any state assistance to parochial education would compromise the schools' religious goals, thus impairing the religious freedom of those who choose to attend them. In contrast to this strict reading of the first amendment in the religious establishment area, Justice Stevens distinguishes criminal and noncriminal methods in determining the constitutionality of attempts to regulate the dissemination of sexually oriented materials. Although he is unwilling to allow a person to be penalized criminally for the possession or distribution of objectionable materials, he normally finds that noncriminal regulatory schemes comport with the first amendment. Thus, even though Justice Stevens does not advocate unfettered

383. *See* Part III(A)(1) *supra.*

free expression, he refuses to tolerate controls that potentially intrude upon an individual's freedom in the form of criminal sanctions.

Even though Justice Stevens has consistently expressed sensitivity to government infringements upon individual liberties, inadequacies exist among his individual rights analyses. In the first amendment context, he has criticized the obscenity standard set forth in *Miller v. California,*[384] citing the vagueness of the *Miller* standard as a principal reason for his refusal to approve criminal means of regulating obscenity. Nevertheless, Justice Stevens has not yet suggested an alternative standard. This void is particularly disturbing since he is willing to permit noncriminal regulation of sexually oriented matter. Moreover, Justice Stevens has frequently voiced dissatisfaction with traditional two-tier equal protection analysis, viewing it as an artificial, result-oriented construct. Again, despite his consistent refusals to articulate or employ traditional standards, Justice Stevens has not proffered a workable substitute.

Justice Stevens' dissents in *City of Eastlake v. Forest City Enterprises*[385] and *New Motor Vehicle Board v. Orrin W. Fox Co.*[386] illustrate the danger inherent in his failure to articulate constitutional standards. Justice Stevens' intuitive concern in *Eastlake*—that persons seeking zoning changes require judicial protection from the majoritarian political process—can only be characterized as an equal protection problem. Yet Justice Stevens utilized a procedural due process argument, perhaps reflecting not only his recognition that traditional equal protection analysis would have afforded insufficient protection, but also his recognition that he has no adequate alternative analysis. Use of the procedural due process argument, however, cast Justice Stevens into the precise policymaking role that he has consistently repudiated[387]—he might have avoided contradicting his philosophy of the role of the Court as an adjudicatory body by employing a viable equal protection analysis.

To the extent that opinions such as Justice Stevens' dissents in *Eastlake* and *New Motor Vehicle Board* in fact result from his yet unsolidified constitutional analytical framework, the shortcoming can be corrected, assuming that he develops a more structured analysis before *Eastlake* and *New Motor Vehicle Board* become the rule rather than the exception. Another possible explanation exists, however, that is substantially more significant from a constitutional perspective. These dissents suggest that Justice Stevens may be a

384. 413 U.S. 15 (1973). *See* Part III(B)(1) *supra.*
385. 426 U.S. 668 (1976) (Stevens, J., dissenting).
386. 99 S.Ct. 403 (1978) (Stevens, J., dissenting).
387. *See* Part IV(D) *supra.*

judicial activist, despite the express disclaimers contained in many of his opinions. For example, Justice Stevens' frequent reliance on deferring to other decisionmakers may be no more than an easy and obfuscatory manner of achieving the substantive result he desires. In addition, when achieving the desired result logically seems impossible given present constitutional doctrine, Justice Stevens seems willing to assume an interventionist posture. Moreover, this intervention to achieve a preferred result is characterized by a willingness to construct unorthodox analyses.[388] If this alternative explanation is correct, Justice Stevens' actual philosophical stance is that of a classic judicial activist. Despite his voluminous opinion-writing in his first three Terms, however, the evidence still is insufficient to accept conclusively either of the two proferred explanations. Due to the crucial importance of stability in constitutional adjudication, which is achieved through consistent, sound analysis and not through reflexive activist reaction, one hopes the first explanation—the search for an adequate analytical framework—will prove correct.

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388. An interesting analogy can be drawn between Justice Stevens' procedural due process approach in *Eastlake* and *New Motor Vehicle Board* and the "conclusive presumption" equal protection analysis formulated by Justice Potter Stewart. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973). In the conclusive presumption cases Justice Stewart transformed classic equal protection cases into procedural due process cases whereas Justice Stevens has generated procedural due process cases from nonprocedural issues. In both instances the obvious purpose was to achieve greater judicial scrutiny than traditional constitutional doctrine would allow.

APPENDIX*

I. THE RELATIONSHIP BETWEEN THE FEDERAL AND STATE GOVERNMENTS

A. The Dormant Commerce Clause

Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978). Justice Stevens, writing for the Court, rejected a due process challenge to a state's "single-factor" sales formula for apportioning an interstate corporation's income for state income tax purposes, stating that the tax formula had a rational basis; moreover, he rejected a commerce clause challenge that alleged differing state taxation formulas unduly burdened interstate commerce.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978). Justice Stevens, writing for the Court, upheld, over substantive due process and commerce clause challenges, a state statute that prohibited oil producers or refiners from operating retail service stations.

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). The Court upheld a Maryland abandoned car statute allegedly favoring residents over nonresidents against a commerce clause challenge. Justice Stevens concurred, arguing both that the state could not have been interfering with commerce when its efforts were the source of the commerce and that a state may experiment with ways to encourage local industry.

B. The Affirmative Commerce Clause

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The Court rejected an eleventh amendment challenge to provisions making states liable for damages and attorney's fees for unlawful employment discrimination. Justice Stevens concurred, contending that while the state's eleventh amendment argument should be rejected since the money damages would not come directly out of the state treasury, the commerce clause was sufficient to support legislation regulating terms and conditions of state employment.

National League of Cities v. Usery, 426 U.S. 833 (1976). The Court held amendments to Fair Labor Standards Act applying minimum wage and maximum hour provisions to almost all state employees unconstitutional insofar as those provisions would operate to directly displace the states' ability to structure employee-employer relationships in areas of traditional government functions. Justice Stevens dissented, finding it inconsistent to uphold statutes applying employment discrimination provisions, taxes, safety regulations, and environmental protection provisions to states but not to allow the Fair Labor Standards Act to do so.

C. The Scope of Federal Legislation

(1) Federal Preemption

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978). Justice Stevens, writing for the Court, limited preemption of state labor proceedings by the National Labor Relations Act to those controversies that were identical to what could have been presented to the National Labor Relations Board.

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). The Court determined that federal legislation preempted a state regulation requiring special safety features on larger tankers

* This Appendix includes all cases in which Justice Stevens wrote opinions during his first three Terms on the Supreme Court. The entries do not purport to state specific holdings. The intention is only to indicate and contrast the broad areas of concern addressed by the Court and by Justice Stevens. The subject matter divisions are entirely arbitrary and artificial: when a case overlapped two or more areas, it was placed in the category in which it was discussed principally in text. Finally, the cases are arranged in reverse chronological order within each heading.

using state ports, while simultaneously upholding special tug pilotage requirements that applied only to tankers lacking these features. Justice Stevens dissented, stating that if a state could not impose the safety features, it could not impose special restrictions when these features were lacking.

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977). The Court held that section 16 of the Clayton Act, which authorizes federal injunctive relief against antitrust violations, is not an "expressly authorized" exception to the Anti-Injunction Act, which prohibits federal courts from enjoining state court proceedings unless expressly authorized by federal statute. Justice Stevens dissented, arguing that section 16 of the Clayton Act should be construed broadly in order to give effect to the overall policies of the antitrust laws.

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). Justice Stevens, writing for the majority, held that a state's approval of a tariff program is not sufficient state participation to exempt the program from the federal antitrust laws.

Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976). The Court found that federal labor law preempted state law when the conduct in question arguably was covered by the National Labor Relations Act and when the conduct consisted of peaceful economic weapons in support of bargaining demands. Justice Stevens' dissent argued that federal labor law should preempt state law only when the conduct was arguably covered by the National Labor Relations Act.

(2) Sovereign Immunity

Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977). Justice Stevens, writing for the majority, upheld over an assertion of tribal sovereign immunity, a state statute that regulated Indian fishing on the reservation.

Minnesota v. Alexander, 430 U.S. 977 (1977). The Court denied certiorari and let stand a court of appeals ruling that the Army Corps of Engineers was exempt from state water pollution regulations. Justice Stevens dissented on the grounds that the Federal Water Pollution Control Act possibly constituted a congressional waiver of the Army Corps of Engineers' immunity from state water pollution regulation.

United States v. County of Fresno, 429 U.S. 452 (1977). The Court held that a state-imposed use tax on federal employees living in tax exempt federally owned housing did not violate the supremacy clause since the property was in the possession of a private citizen. Justice Stevens dissented on the grounds that the state use tax discriminated between federal employees residing on federal property and a private tenant residing on comparable non-tax exempt property.

II. The Constitutional Rights of the Accused Criminal

A. The Pretrial Context

(1) Search and Seizure

Zurcher v. Stanford Daily, 436 U.S. 547 (1978). The Court held that the newspaper's first amendment rights were not violated when police, pursuant to a warrant, searched the premises for photographs of demonstrators who had allegedly assualted police. Justice Stevens, dissenting, found a violation of the fourth amendment probable cause requirement since the subject of the search was not involved in any wrongdoing and would not destroy the evidence.

Michigan v. Tyler, 436 U.S. 499 (1978). The Court held that official entries to investigate the cause of a fire after it has been extinguished and the firefighters have left the premises must adhere to the warrant procedures of the fourth amendment. Justice Stevens, concurring in the judgment, nevertheless rejected the Court's suggestion that an "administrative search warrant" could satisfy fourth amendment requirements when no showing of probable cause could be made.

Pennsylvania v. Mimms, 434 U.S. 106 (1977). The Court held that a body search by a police officer following an order to get out of a car was permissible under the fourth amendment. Justice Stevens dissented, objecting to the low standard of justification required for searches and seizures and arguing that the fourth amendment requires inquiry into the particular facts of a case.

United States v. Ramsey, 431 U.S. 606 (1977). The Court upheld a mail search pursuant to a federal statute that applied the "border search" exception to the fourth amendment's warrant requirement as to the opening of international mail. Justice Stevens dissented, arguing that the statute did not authorize the challenged search.

United States v. Donovan, 429 U.S. 413 (1977). The Court held that evidence procured by wiretap need not be suppressed when the government unintentionally failed to identify to the judge issuing the warrant the names of every person committing the offense. Justice Stevens, concurring in part and dissenting in part, found that the government had failed to comply with the congressional desire to eliminate abusive wiretapping procedures.

(2) *Miranda* Warnings

Wainwright v. Sykes, 433 U.S. 72 (1977). The Court held that absent a showing of cause for noncompliance and a showing of actual prejudice, federal habeas corpus review of *Miranda* claims was barred by a defendant's failure to make timely objection under a Florida "contemporaneous objection" rule that required motions to suppress evidence to be made before trial. Justice Stevens concurred, emphasizing that no precise definition of the "cause for noncompliance and actual prejudice" exception to the contemporaneous objection rule should be set forth, but instead, that the showing necessary to overcome an asserted waiver should depend on the character of the constitutional right involved and the circumstances of the individual case.

United States v. Jacobs, 429 U.S. 909 (1976). Justice Stevens, concurring in the Court's memorandum order to remand, held that a grand jury witness may be prosecuted for perjury even though the prosecutor failed to give the witness adequate warnings.

Oregon v. Mathiason, 429 U.S. 492 (1977). The Court held that a parolee who voluntarily came to a police station and confessed was not in custody or deprived of freedom so as to be entitled to a *Miranda* warning. Justice Stevens dissented on the grounds that the confessor was a parolee and therefore technically in legal custody of the police.

United States v. Santana, 427 U.S. 38 (1976). The Court upheld a warrantless arrest, finding that a doorway is a public place for purposes of the fourteenth amendment. Justice Stevens pointed out in concurrence that the police had sufficient information to get a warrant, therefore failure to do so was either a justifiable decision or, if not, harmless.

Doyle v. Ohio, 426 U.S. 610 (1976). The Court held that the use of evidence of petitioner's silence for purposes of impeachment after he was given a *Miranda* warning violated the due process requirements of the fourteenth amendment. Justice Stevens dissented, contending that since silence can be used for impeachment in the absence of a *Miranda* warning, no reason for a different rule exists when the warning was given.

(3) Right to Counsel

Brewer v. Williams, 430 U.S. 387 (1977). The Court found that an arrested murder suspect was deprived of his constitutional right to counsel when police officers obtained incriminating remarks from the accused after having promised the accused's lawyer not to interrogate the accused until counsel had spoken with him. Justice Stevens concurred on the grounds that the accused was deprived of counsel during a "critical stage" of his prosecution.

B. The Trial Context

Taylor v. Kentucky, 436 U.S. 478 (1978). The Court found a denial of due process when a

state court judge refused to instruct the jury on the presumption of defendant's innocence after the prosecutor's closing argument suggested that the status of defendant was an indication of guilt. Justice Stevens, dissenting, differentiated between instructions that were constitutionally defective and those that were merely improper.

Lakeside v. Oregon, 435 U.S. 333 (1978). The Court upheld defendant's conviction after he had objected to the trial judge calling attention to his failure to testify by issuing a cautionary instruction that the jury was to ignore this fact. Justice Stevens, dissenting, emphasized the individual's right to determine instructions, and the fact that the waiver of a cautionary instruction was less significant than the waiver of fifth amendment protection that is presently permitted.

Lefkowitz v. Cunningham, 431 U.S. 801 (1977). The Court struck down as violative of the fifth amendment privilege against self-incrimination a New York statute that terminated the party office of any political party officer subpoenaed by a grand jury to testify concerning the conduct of his office and who refused to testify or to waive immunity against subsequent criminal prosecution. Justice Stevens dissented, arguing that the state's legitimate interest in preventing corruption justified the imposition of the "waiver" condition to officials holding high public offices.

Henderson v. Kibbe, 431 U.S. 145 (1977). Justice Stevens, writing for the majority, found that a trial judge's inadvertent failure to instruct the jury on causation in a second degree murder trial was not constitutional error.

Ludwig v. Massachusetts, 427 U.S. 618 (1976). The Court upheld a state statute providing two tiers of courts for certain crimes, the first of which did not allow a jury trial, but the second of which provided de novo review. Justice Stevens dissented, arguing that the law impermissibly burdened the right to trial by jury absent the state's giving a reason for the procedure, especially since the jury may be aware of the prior conviction.

United States v. Agurs, 427 U.S. 97 (1976). Writing for the Court, Justice Stevens found that the prosecution's failure to tender the victim's criminal record to defense counsel did not deprive the defendant of a fair trial under the fifth amendment since the record was not requested by the defense and because it gave rise to no inference of perjury.

Henderson v. Morgan, 426 U.S. 637 (1976). Writing for the majority, Justice Stevens held that defendant's plea of guilty to a charge of second degree murder was involuntary when defendant was not given adequate notice of the elements of the offense.

Goldberg v. United States, 425 U.S. 94 (1976). The Court held that a government writing subject to production under the Jencks Act is not made nonproducible because the government interviewed the witness and wrote the statement. Justice Stevens concurred in order to point out the difference between a producible statement and work product.

C. The Post-Conviction Context

(1) The Double Jeopardy Clause

Arizona v. Washington, 434 U.S. 497 (1978). Justice Stevens, writing for the majority, held that the exercise of sound discretion by a trial judge in granting a prosecution motion for a mistrial satisfied the standard of necessity required to avoid a valid double jeopardy plea.

Jeffers v. United States, 432 U.S. 137 (1977). A plurality of the Court held that a defendant convicted of a lesser included offense had waived his double jeopardy objection to subsequent prosecution for the greater offense by opposing the government's motion in the first trial for consolidation of the indictments. Justice Stevens dissented, arguing that the finding of a waiver was not justified because of the procedural circumstances under which the defendant had opposed the government's motion for consolidation.

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). The Court held that the double jeopardy clause precludes retrial following a judgment of acquittal under Rule 29(c)

of the Federal Rules of Criminal Procedure. Justice Stevens concurred on the grounds that although the Criminal Appeals Act provides the government with authority to appeal dismissals, the government is without authority to appeal acquittals.

(2) Appeals, Sentencing, and Punishment

Hutto v. Finney, 98 S.Ct. 2565 (1978). Justice Stevens, writing for the Court, held that conditions in a state prison constituted cruel and unusual punishment, upheld remedial measures that limited punitive isolation to thirty days, and awarded attorney's fees to plaintiff inmates following bad faith conduct by state officials.

Dobbert v. Florida, 432 U.S. 282 (1977). The Court rejected ex post facto and equal protection challenges to a Florida death penalty statute. Justice Stevens dissented, arguing that since there was no constitutional Florida statute that imposed the death penalty at the time the offense in question was committed, the ex post facto clause was violated.

Gardner v. Florida, 430 U.S. 349 (1977). Justice Stevens, writing for the majority, found that a state judge's imposition of the death penalty based upon a confidential report that the accused had no opportunity to deny or explain deprived the accused of due process of law.

United States v. MacCollom, 426 U.S. 317 (1976). The Court held that provision of a free transcript prior to a motion for vacation of the judgment by a person convicted of a federal crime was not required by the Constitution. Justice Stevens dissented, finding that fairness required that a transcript be granted to all indigent appellants, particularly since a transcript must be granted if the defendant enters a motion for appeal.

III. First Amendment

A. Free Expression

FCC v. Pacifica Foundation, 98 S.Ct. 3026 (1978). Justice Stevens, writing for the Court, upheld a Federal Communications Commission order that found a radio broadcast indecent under 5 U.S.C. section 554(e). The opinion focused primarily on a statutory interpretation of the term "indecent," which was deemed not limited only to language having a prurient appeal. Justice Stevens peripherally addressed first amendment freedom of speech protection, which he said did not prohibit all regulation of speech content, particularly in broadcasting.

Pinkus v. United States, 436 U.S. 293 (1978). The Court included sensitive or deviant persons, but excluded children, from its definition of the community by whose standards obscenity was to be judged. Justice Stevens concurred, pointing out his disagreements with obscenity law that were detailed in his earlier dissents.

Ballew v. Georgia, 435 U.S. 223 (1978). The Court held that a jury of fewer than six persons was unconstitutional under the sixth and fourteenth amendments. Justice Stevens, concurring, stated that he adhered to his earlier views expressed in Marks v. United States, 430 U.S. 188 (1977), wherein he stated that the existing constitutional standards that apply to criminal prosecutions were so intolerably vague as to make evenhanded enforcement of the law virtually impossible.

Procunier v. Navarette, 434 U.S. 555 (1978). The Court upheld summary judgment against an inmate's claims that state officials violated his constitutional rights and 42 U.S.C. sections 1983 and 1985 by negligently interfering with his outgoing mail. Justice Stevens dissented on the ground that the record did not foreclose the possibility that plaintiff could disprove defendants' good faith defenses.

Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977). The Court rejected inmates' first amendment and equal protection challenges to North Carolina Department of Correction regulations that prohibited inmates from soliciting other inmates to join a prisoners' union, barred the union's meetings, and prevented delivery of bulk mailings of union publications from outside sources. Justice Stevens concurred in the Court's opinion regarding

the union meeting and bulk mailing claims, but dissented in part, arguing that the nonsolicitation regulations were broader than the Court's definition of a legitimately prohibited activity and should have, to that extent, been invalidated.

Ward v. Illinois, 431 U.S. 767 (1977). The Court rejected vagueness and overbreadth challenges to an Illinois obscenity statute. Justice Stevens dissented on the ground that the statute in question failed the fair notice requirement of Miller v. California, 413 U.S. 15 (1973).

Splawn v. California, 431 U.S. 595 (1977). The Court rejected first amendment and ex post facto challenges to a California obscenity conviction. Justice Stevens dissented from the Court's disposition of the first amendment issue on the grounds that under the challenged jury instructions it was possible that the conviction rested solely on a truthful, nonoffensive description of nonobscene matter, and from the Court's disposition of the ex post facto challenge on the grounds that defendant had the right to rely on California case law retroactively reversed by the California legislature after the acts for which he was prosecuted had been committed.

Smith v. United States, 431 U.S. 291 (1977). The Court upheld petitioner's conviction for mailing obscene materials in violation of a federal statute. Justice Stevens dissented on the grounds that the obscenity standards were too vague to provide the basis for criminal prosecution.

Abood v. Detroit Board of Education, 431 U.S. 209 (1977). The Court held that a Michigan statute that authorized union representation of local government employees and required all employees represented by a union, whether or not union members, to pay union dues could not, under the first amendment, be applied to require contributions to support an ideological cause as a condition of public employment. Justice Stevens concurred, noting that the Court's opinion did not reject the argument that no fee whatsoever could be exacted from nonunion public employees without first establishing a procedure that would avoid any risk that their funds would be used, even temporarily, to finance ideological activities unrelated to collective bargaining.

Marks v. United States, 430 U.S. 188 (1977). The Court held that the due process clause precluded retroactive application of obscenity standards to defendant's alleged misconduct and remanded the case for a new trial. Justice Stevens, concurring in part and dissenting in part, disagreed with the majority's remand for new trial, finding that this criminal prosecution was based on unconstitutionally vague obscenity standards.

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). Writing for the Court, Justice Stevens rejected the vagueness challenge to an "anti-skid row" zoning ordinance, stating that plaintiffs did not seek a waiver under the allegedly vague provision and that the ordinance could be narrowed by state courts.

B. Free Press

Houchins v. KQED, Inc., 98 S.Ct. 2588 (1978). The Court held that the first amendment did not give the press a right of access to controlled government information. Justice Stevens, dissenting, stated that first amendment protection extends not only to the dissemination, but to the receipt and gathering of information.

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976). The Court held that absent a showing that less drastic alternatives would not suffice, a pretrial gag order violates the first amendment right of free press. Justice Stevens concurred, indicating that prior restraints on freedom of the press are an impermissible method of ensuring a fair trial.

C. Establishment Clause

Wolman v. Walter, 433 U.S. 229 (1977). The Court upheld, against an establishment clause challenge, portions of an Ohio statute that authorized state aid to sectarian school pupils in

the form of loans of secular textbooks, standardized educational testing services, and various health services; the Court, however, struck down portions of the statute that authorized the state to provide sectarian school pupils with loans of secular instructional materials other than textbooks and with field trip services. Justice Stevens dissented in part, arguing that only those portions of the statute authorizing public health services were constitutional.

Roemer v. Board of Public Works, 426 U.S. 736 (1976). The Court rejected an establishment clause challenge to the use of state funds for church-related higher education. Justice Stevens' dissent emphasized that a state subsidy may tempt the school to compromise its religious mission.

IV. Individual Rights Protections Under the Fifth and Fourteenth Amendments

A. Equal Protection

Regents of the University of California v. Bakke, 98 S.Ct. 2733 (1978). The Court held that the university's preferential minority admissions program violated Title VI of the Civil Rights Act of 1964, which incorporated equal protection as the standard of discrimination. Justice Stevens, concurring in part and dissenting in part, refused to address the constitutional issue on the ground that the plain wording of Title VI precluded all forms of racial discrimination.

Foley v. Connelie, 435 U.S. 291 (1978). The Court rejected an equal protection challenge to a state statute that prevented aliens from being policemen, stating that strict scrutiny was inapplicable since the position involved the formulation, execution or review of public policy. Justice Stevens, dissenting, stated that police work did not qualify for this strict scrutiny exemption, and that the Court's opinion was inconsistent with precedent.

Zablocki v. Redhail, 434 U.S. 374 (1978). The Court sustained an equal protection challenge to a Wisconsin statute that prohibited noncustodial parents under court order to support their minor children from marrying without a judicial finding that support obligations had been met. Justice Stevens, concurring in the judgment, wrote to distinguish Califano v. Jobst, 434 U.S. 47 (1977), under which a congressional decision to terminate disability payments upon marriage was held to be rational under the fifth amendment.

Califano v. Jobst, 434 U.S. 47 (1977). Justice Stevens, writing for the Court, found a congressional decision to terminate certain disability payments upon marriage rational under the fifth amendment.

Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977). The Court vacated a judgment of the court of appeals that imposed a "systemwide" remedy in a school desegregation case and remanded the case for a determination whether local school officials intended to and did in fact discriminate against minority pupils. Justice Stevens, concurring, emphasized that a finding of intent to discriminate depends primarily on objective evidence of the effects of school officials' actions.

Mandel v. Bradley, 432 U.S. 173 (1977) (per curiam). The Court vacated the judgment of a three-judge district court, which held that an early filing deadline for independent political candidates was per se an unconstitutional burden on the candidates' right of access to the ballot. Justice Stevens dissented, arguing that the state had offered no justification for the early filing requirement, which discriminated against independents by forcing them to make the decision to run earlier than members of political parties.

Califano v. Goldfarb, 430 U.S. 199 (1977). The Court concluded that a Social Security Act provision that required a widower to prove that one-half of his support came from his wife violated the due process clause because the provision afforded female workers less protection for their surviving spouses than was provided to male employees. Justice Stevens, concurring, held that the gender-based distinction in the Social Security Act illegally discriminated against males.

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977). The Court rejected an excluded Indian tribe's equal protection and due process challenge to a statute that authorized a monetary distribution to certain Indian tribes as a redress for the government's breach of treaty. Justice Stevens dissented on the grounds that the exclusion of the aggrieved Indian tribe was unjust and arbitrary.

Stanton v. Stanton, 429 U.S. 501 (1977). The Court held that a state court's finding that an age of majority statute was constitutional with respect to females did not fully comply with the Supreme Court's mandate to eliminate gender-based discrimination in the age of majority statute. Justice Stevens dissented on the grounds that the result of the state court determination was consistent with the Supreme Court mandate.

Knebel v. Hein, 429 U.S. 288 (1977). Justice Stevens, writing for the Court, upheld federal and state regulations that disallowed, for purposes of computing the income of food stamp recipients, deductions for transportation expenses in connection with a job training program.

Craig v. Boren, 429 U.S. 190 (1976). The Court invalidated a state law which prohibited beer sales to males under age twenty-one and to females under age eighteen under an equal protection challenge. Justice Stevens, concurring, held that the classification was objectionable because it was based purely on an accident of birth.

Norton v. Mathews, 427 U.S. 524 (1976). The Court upheld a statute creating a presumption of dependency only for some illegitimate children for purposes of determining eligibility for Social Security survivor's benefits. Justice Stevens dissented for the reasons offered in Mathews v. Lucas, 427 U.S. 495 (1976).

Mathews v. Lucas, 427 U.S. 495 (1976). The Court upheld a Social Security provision that did not extend survivor's benefits to illegitimate children, finding no reason to impose strict scrutiny. Justice Stevens dissented, viewing the classification as one based on administrative convenience (thus not sufficient under a rational basis analysis) and considering illegitimates a traditionally disfavored class.

Washington v. Davis, 426 U.S. 229 (1976). The Court rejected application of the Title VII "disparate impact" test to a claim of discrimination based on the fifth amendment, requiring a finding of "purposeful discrimination." Justice Stevens concurrred in the result, finding that while the discriminatory purpose required by fifth amendment cases could be shown by objective as well as subjective evidence, there was no such evidence in this case.

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). Writing for the majority, Justice Stevens held that the Civil Service Commission may not bar lawfully admitted resident aliens from employment in federal civil service without showing some national interest justifying such discrimination.

Mathews v. Diaz, 426 U.S. 67 (1976). Writing for a unanimous Court, Justice Stevens held that Congress may discriminate among aliens by requiring five years of continuous residency for eligibility for Medicare benefits; although protected by the due process clause, aliens do not enjoy all the rights of citizens.

B. Procedural Due Process

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978). The Court held that a public utility failed to meet due process requirements in terminating plaintiff's utility service, which, under state law, was deemed a statutory property entitlement. Justice Stevens, dissenting, found no constitutional defect in the method of termination.

Dixon v. Love, 431 U.S. 105 (1977). The Court upheld against a due process challenge an Illinois statute that authorized the revocation of drivers licenses without a pretermination hearing. Justice Stevens, concurring, noted that the Court had not rejected the constitutional analysis of the district court.

Shaffer v. Heitner, 433 U.S. 186 (1977). The Court held that the exercise by a state court of quasi in rem jurisdiction was subject to the "minimum contacts" standard of due process set forth in International Shoe Co. v. Washington, 326 U.S. 310 (1945). Because of uncertainty as to the reach of the Court's opinion and fear that the Court had decided more than was necessary to dispose of the case, Justice Stevens concurred only in the judgment.

Ingraham v. Wright, 430 U.S. 651 (1977). The Court held that procedural due process safeguards were unnecessary prior to the administration of disciplinary corporal punishment at a public school. Justice Stevens dissented on the grounds that post-deprivation remedies were insufficient when there was an invasion of an individual's interest in freedom from bodily harm.

Moody v. Daggett, 429 U.S. 78 (1976). The Court found that a federal parolee imprisoned for a crime committed while on parole was not entitled to a parole revocation hearing immediately upon issuance of a parole violator warrant. Justice Stevens dissented on the grounds that an immediate hearing on the parole violator warrant was an essential element of procedural fairness because such a hearing might have affected the length of the parolee's confinement.

Montanye v. Haymes, 427 U.S. 236 (1976). The Court held that a prisoner was not entitled to a hearing prior to transfer from one institution to another. Justice Stevens' dissent cited the prisoner's allegation that he was being transferred because he circulated a petition and rendered legal services to other inmates in finding a hearing justified.

Meachum v. Fano, 427 U.S. 215 (1976). The Court found no due process protections for a prisoner being transferred from one institution to another. Justice Stevens dissented, stating that law is not the source of liberty and finding a prisoner's liberty interest deserving of constitutional protection.

C. Substantive Due Process

Carey v. Population Services International, 431 U.S. 678 (1977). The Court held unconstitutional a New York statute that prohibited distribution of contraceptives to persons under age sixteen, distribution of contraceptives by anyone other than a licensed pharmacist, and advertisement of contraceptives by anyone. Justice Stevens concurred in the Court's opinion regarding prohibition of contraceptive advertising and prohibition of distribution of contraceptives by anyone other than a licensed pharmacist, and concurred in the judgment regarding prohibition of distribution of contraceptives to persons under age sixteen on the ground that denial of contraceptives to such persons deprived them of liberty without due process of law because it exposed them to risks of pregnancy and disease.

Moore v. City of East Cleveland, 431 U.S. 494 (1977). The Court concluded that a city ordinance that limited occupancy of single unit dwellings to certain enumerated persons violated the due process clause of the fourteenth amendment. Justice Stevens, concurring, found that because the ordinance intruded upon the rights of the owner to choose who lives on his property, the ordinance constituted an unconstitutional taking of property without due process or just compensation.

Alexander v. Fioto, 430 U.S. 634 (1977). Justice Stevens, writing for the Court, rejected a fifth amendment due process challenge to a federal statute that denied retirement pay to national guardsmen unless they had served in active duty during World War II.

Whalen v. Roe, 429 U.S. 589 (1977). Justice Stevens, writing for the Court, held that a statute that required physicians to identify patients using certain drugs in order to record their names in a centralized computer file did not violate the patient's constitutional right of privacy.

Planned Parenthood v. Danforth, 428 U.S. 52 (1976). The Court, examining Missouri's abortion statute, held that the provisions requiring spousal consent and parental consent for unmarried women under eighteen were unconstitutional. Justice Stevens, concurring in part

and dissenting in part, found that the parental consent requirement was constitutional because of the state's interest in the welfare of its young citizens.

D. *State Action*

Flagg Bros. v. Brooks, 436 U.S. 149 (1978). The Court found no state action for fourteenth amendment purposes to sustain defendant's challenge of the nonconsensual self-help eviction remedies contained in Uniform Commercial Code section 7-210. Justice Stevens, dissenting, stated that the enactment of the statute was sufficient state action.

V. The Role of the Court

A. *The Exercise of the Court's Discretionary Review Power*

Vitek v. Jones, 436 U.S. 407 (1978) (per curiam). The Court vacated as moot a challenge to a state statute authorizing the transfer of a nonconsenting state prisoner to a mental hospital upon a finding of need by a physician or psychologist because defendant had since consented to the medical treatment. Justice Stevens dissented, stating that consent did not moot the procedural challenge.

Huffman v. Florida, 435 U.S. 1014 (1978). Justice Stevens, concurring in the Court's denial of certiorari, objected to a Justice's dissent on the grounds that it created an unwarranted assumption that the denial was arbitrary.

Illinois v. Gray, 435 U.S. 1013 (1978). Justice Stevens, concurring in the Court's opinion denying certiorari, objected to the Court's practice of explaining its denials on the grounds that certiorari denials lack precedential value.

National Socialist Party v. Village of Skokie, 434 U.S. 1327 (1977). Justice Stevens, sitting in his capacity as Circuit Justice, denied an application for a stay of an Illinois trial court's injunction prohibiting Nazis from displaying the swastika during a demonstration.

Oregon State Penitentiary v. Hammer, 434 U.S. 945 (1977). The Court vacated a judgment of the Oregon Supreme Court, which held that termination of a state employee without a pretermination hearing violated procedural due process, and remanded the case for reconsideration in light of Dixon v. Love, 431 U.S. 105 (1977). Justice Stevens dissented on the grounds that certiorari should have been denied, arguing that when a state court extends greater procedural protection than the federal constitution requires, the Court should deny review until a conflict develops on the national level.

Idaho Department of Employment v. Smith, 434 U.S. 100 (1977). The Court rejected an equal protection challenge to an Idaho statute that granted unemployment benefits to night students and denied them to day students. Justice Stevens dissented, stating that certiorari should have been denied since the question was not of national importance.

Brennan v. Armstrong, 433 U.S. 672 (1977) (per curiam). The Court again vacated judgment and remanded for reconsideration in light of intervening decisions a case involving the adequacy of a remedial school desegregation plan. Justice Stevens dissented on the ground that certiorari should have been denied because the court of appeals had correctly construed one of the intervening decisions and had not decided the issue affected by the other intervening decision.

School District of Omaha v. United States, 433 U.S. 667 (1977) (per curiam). The Court vacated judgment and remanded for reconsideration in light of intervening decisions a case involving the adequacy of a remedial school desegregation plan. Justice Stevens dissented on the ground that certiorari should have been denied because the court of appeals' disposition of the case satisfied the requirements of the intervening decisions.

Environmental Protection Agency v. Brown, 431 U.S. 99 (1977) (per curiam). The Court refused to review a lower court judgment that invalidated certain Environmental Protection Agency regulations in which the Environmental Protection Agency had announced its inten-

tion to modify the regulations. Justice Stevens dissented on the grounds that the issue was not moot until the Environmental Protection Agency actually rescinded or modified the regulation.

Scott v. Kentucky Parole Board, 429 U.S. 60 (1976) (per curiam). The Court remanded for consideration of mootness a case involving a procedural due process challenge to a denial of parole. Justice Stevens dissented, arguing that even though the petitioner had been paroled shortly before certiorari was granted, the case was not moot because of petitioner's claim that less restrictive parole conditions might have been imposed had a fair hearing been held on his original application.

Singleton v. Wulff, 428 U.S. 106 (1976). The Court upheld standing for doctors challenging a state law that excluded abortions from purposes for which the poor may obtain Medicaid benefits, holding, *inter alia,* that doctors could assert rights of patients. Justice Stevens concurred, expressing doubt as to standing based on the rights of a patient.

Burrell v. McCray, 426 U.S. 471 (1976). Justice Stevens concurred in the dismissal of certiorari finding that dismissal was not objectionable since the state of the law was sufficiently clear, particularly in view of the change of opinion of one of the Justices who had initially voted to accept certiorari.

Liles v. Oregon, 425 U.S. 963 (1976). Concurring in the denial of certiorari, Justice Stevens stated that a grant of certiorari would have been a waste of time, since the Court would not depart from its holding in Miller v. California, 413 U.S. 15 (1973), which presented the same issues.

Bucolo v. Adkins, 424 U.S. 641 (1976). Despite the prosecutor's decision not to reopen an obscenity prosecution, the Court granted a writ requesting that the record of the Florida Supreme Court affirmation of defendant's conviction be vacated and expunged following remand by the United States Supreme Court. Dissenting, Justice Stevens found no need for the writ since there was no further prosecution.

B. Deference to Other Governmental Entities

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978). Justice Stevens, writing for the Court, disallowed damages for "loss of society" that are generally available in maritime wrongful death actions on the grounds that federal enabling legislation limited survivor's recovery to "pecuniary loss."

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). The Court held that a warrantless search by OSHA officials violated the fourth amendment. Justice Stevens dissented, on the grounds that industry subject to close regulation was excepted from the fourth amendment's warrant requirement, and that even should a warrant be required, the Court should prohibit ex parte proceedings without a showing of probable cause.

Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). The Court, after engaging in a detailed first amendment analysis, denied a broadcast company's request to market copies of the Watergate tapes while the various defendants' appeals were pending. Justice Stevens, dissenting, viewed the issue as one solely within the discretion of the trial court.

Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978). The Court sustained the dismissal of an indictment under the Clean Air Act, holding that the Environmental Protection Agency regulation that defendant had allegedly violated was not an "emission standard" within the meaning of the Act. Justice Stevens dissented, objecting to a statutory construction that would restrict the Environmental Protection Agency's regulatory authority.

Manson v. Brathwaite, 432 U.S. 98 (1977). The Court rejected a due process challenge to a state criminal conviction based in part on pretrial identification evidence obtained by an unnecessary and suggestive police procedure. Justice Stevens concurred on the ground that the identification satisfied the appropriate tests of reliability.

United States v. Lovasco, 431 U.S. 783 (1977). The Court rejected a due process challenge to a criminal indictment based on an eighteen-month preindictment delay. Justice Stevens dissented on the ground that the record failed to support the Court's conclusion that the government's delay was justified.

Trainor v. Hernandez, 431 U.S. 434 (1977). The Court held that interference by a federal court with an ongoing civil enforcement action in state court was improper unless state remedies for the aggrieved party's due process claim were inadequate. Justice Stevens dissented on the grounds that when state action patently and flagrantly violated the Constitution, federal courts need not defer to state courts.

Juidice v. Vail, 430 U.S. 327 (1977). The Court held that a federal court could not properly entertain a section 1983 action that interfered with a state's contempt process when the aggrieved parties had the opportunity to pursue their federal claims in state court. Justice Stevens, concurring, found that the state proceeding in this case satisfied the requirements of the due process clause.

E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977). Justice Stevens, writing for the Court, upheld Environmental Protection Agency regulations that imposed industry-wide limitations on water pollution.

Codd v. Velger, 429 U.S. 624 (1977). The Court rejected the due process claim of a policeman dismissed without a hearing when information in the policeman's personnel file indicated a history of suicide attempts. Justice Stevens dissented, holding that a hearing must be provided regardless of the apparent justification for the policeman's dismissal.

Bayside Enterprises v. NLRB, 429 U.S. 298 (1977). Justice Stevens, writing for the Court, upheld the National Labor Relations Board's determination that truck drivers in the poultry industry were not subject to the National Labor Relations Act since they were not agricultural laborers.

Bishop v. Wood, 426 U.S. 341 (1976). Justice Stevens, writing for the majority, upheld the district court's interpretation of state law that a policeman serves at the will of the city and so has no property interest in his job entitling him to a pretermination hearing.

Arizona v. New Mexico, 425 U.S. 794 (1976) (per curiam). The Court denied a motion for leave to file a complaint challenging the constitutionality of a state tax on the generation of electricity, stating that a pending suit in state court provided an adequate forum. In concurrence, Justice Stevens pointed out that Arizona failed to allege that the New Mexico tax affected electric rates in Arizona, thus making the complaint insufficient.

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). The Court held that the failure of the Republic of Cuba to return funds mistakenly paid by Dunhill was not an "act of state" by Cuba which would preclude a judgment against the country. Justice Stevens agreed with the Court's "act of state" rationale, but failed to base his concurrence on the Court's subsequent discussion of sovereign immunity.

Diamond National Corp. v. State Board of Equalization, 425 U.S. 268 (1976). The Court reversed a state court decision holding that the burdens of state and local sales taxes fall upon national banks, exempt from taxation under federal law, as purchasers. Justice Stevens' dissent contended that while the Court is not bound by state supreme court decisions, it must accept state interpretation of the obligations of parties under a state statute.

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). The Court held that while the doctrine of abstention did not apply to a case dealing with water rights, considerations of judicial administration called for deference to the state courts in this case. Justice Stevens dissented, arguing that the United States should have access to the courts in this type case, and that the weighing of factors of judicial administration should be left to the courts of appeals.

C. The Court's Role in Policymaking and Adjudicating

Duke Power Co. v. Carolina Environmental Study Group, Inc., 98 S.Ct. 2620 (1978). The Court held that the Price-Anderson Act liability limitation on nuclear accidents violated neither fifth amendment due process nor equal protection concerns. Justice Stevens, concurring, stated there was no federal jurisdiction because plaintiff environmental group lacked standing.

Gardner v. Westinghouse Broadcasting Co., 98 S.Ct. 2451 (1978). Justice Stevens, writing for the Court, declined review of a district court's refusal to certify a plaintiff's class action thereby refusing to expand the scope of 28 U.S.C. section 1292(a)(1), which limits interlocutory appeals from orders denying injunctions to those situations in which irreparable injury is probable.

Sanabria v. United States, 437 U.S. 54 (1978). The Court denied the government's request for a retrial after defendant was acquitted of a gambling charge. Justice Stevens, concurring, concluded that the Court lacked jurisdiction for the appeal.

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). The Court reversed a judgment of the Ohio Supreme Court, which had held that the first amendment immunized the news media from damage actions for broadcasting a performer's act without his consent. Justice Stevens dissented, arguing that because the state court's opinion could be read as resting either solely on independent state grounds or solely on federal constitutional grounds, the case should be remanded for clarification.

Gilmore v. Utah, 429 U.S. 1012 (1976). Finding that a convicted murderer made a knowing and intelligent waiver of all federal rights, the Court dissolved the stay of execution of his death sentence. Justice Stevens, concurring, found that in the absence of a proper litigant the Court had no power to further stay the execution.

Estelle v. Gamble, 429 U.S. 97 (1976). The Court dismissed a state inmate's section 1983 claim alleging that he was subjected to cruel and unusual punishment because of inadequate treatment of a back injury while in prison. Justice Stevens, dissenting, urged that a pro se complaint be liberally construed and that the Court inquire further into the type of medical treatment the inmate received.

Runyon v. McCrary, 427 U.S. 160 (1976). The Court held that 42 U.S.C. section 1981 prohibited private, commercially operated, nonsectarian schools from denying admission to prospective students because they were black. Justice Stevens concurred, finding that while the holding was not justified by the legislative history of section 1981, the Court must follow the relevant authority to ensure stability and orderly development of the law.

City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976). The Court held that a referendum was not an unlawful delegation of power by the state legislature and that its use regarding a zoning change did not violate due process. Justice Stevens dissented, finding that since there were no articulable standards to which a referendum decision could be held, it is an arbitrary method of adjudicating the rights of individuals and so is inappropriate for that purpose.

United States v. Chesapeake & Ohio Ry., 426 U.S. 500 (1976). The Court upheld an Interstate Commerce Commission requirement that carriers use revenues from an increase in a tariff for the purposes claimed in support of the increase. Justice Stevens' dissent argued that the power to require such action was not given the Interstate Commerce Commission by Congress.

Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976). The Court resolved an apparent conflict between venue provisions of the National Bank Act and the Securities Exchange Act in favor of the more specific provisions of the National Bank Act. In dissent, Justice Stevens found the language of the National Bank Act to be permissive rather than mandatory; further, he argued that the rule announced by the Court favoring specificity would as easily support the primacy of the Securities Exchange Act.

Bradley v. Lunding, 424 U.S. 1309 (1976). Sitting as Circuit Justice, Justice Stevens denied a request for a stay of judgment because petitioners did not demonstrate sufficient probability of irreparable injury.

Enomoto v. Spain, 424 U.S. 951 (1976). The Court granted a stay of judgment entered by a district court. Justice Stevens dissented, arguing that petitioners did not demonstrate that irreparable damage would be caused by the judgment.

VI. Statutory Interpretation

A. Antitrust Laws

United States v. United States Gypsum Co., 98 S.Ct. 2864 (1978). The Court held that intent was an essential element of criminal, but not civil price-fixing under section one of the Sherman Act. Justice Stevens, concurring in part and dissenting in part, rejected both the Court's intent criteria and intent analysis as creating an unprecedented distinction between criminal and civil antitrust enforcement that could adversely affect civil enforcement.

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978). Justice Stevens, writing for the Court, declared that a professional association's ethical canon that prohibited competitive bidding violated section one of the Sherman Act.

United States Steel Corp. v. Fortner Enterprises, 429 U.S. 610 (1977). Justice Stevens, writing for the Court, held that the "uniqueness" of the tying product by itself did not establish sufficient economic power necessary to prove an illegal tying arrangement under section one of the Sherman Act.

B. Civil Rights Laws

(1) Title VII of the Civil Rights Act of 1964

City of Los Angeles v. Manhart, 435 U.S. 702 (1978). Justice Stevens, writing for the Court, invalidated a pension fund provision that required women to make larger contributions based on their longer life expectancy on the grounds that it violated Title VII of the Civil Rights Act of 1964.

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). The Court held that denial of accumulated seniority to female employees returning from pregnancy leave violated Title VII of the Civil Rights Act of 1964. Justice Stevens concurred in the judgment "on the understanding that as the law now stands, although some discrimination against pregnancy—as compared with other physical disabilities—is permissible, discrimination against . . . formerly pregnant employees is not."

Hazelwood School District v. United States, 433 U.S. 299 (1977). The Court vacated and remanded for further proceedings a judgment of the court of appeals, which had found local school officials engaging in teacher employment discrimination in violation of Title VII of the Civil Rights Act of 1964. Justice Stevens dissented, arguing that the judgment should have been affirmed because defendant school officials had offered virtually no evidence to rebut the government's prima facie case.

United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977). Justice Stevens, writing for the majority, found that an employer did not commit a continuing violation of Title VII of the Civil Rights Act of 1964 by refusing to credit seniority dating back to the original employment to a rehired employee who had failed to file a timely Title VII claim following his termination.

General Electric Co. v. Gilbert, 429 U.S. 125 (1976). The Court held that the exclusion of pregnancy-related disabilities from a corporation's sickness and accident benefits plan did not violate Title VII of the Civil Rights Act of 1964. Justice Stevens dissented on the grounds that exclusion of pregnancy-related disabilities from the plan by definition discriminated on the basis of sex.

Brown v. GSA, 425 U.S. 820 (1976). The Court held that section 717 of the Civil Rights Act of 1964 is the exclusive remedy for discrimination in federal employment. Justice Stevens dissented, finding that the legislative history clearly indicated that Congress did not intend the Act to be an exclusive remedy.

(2) Miscellaneous Provisions

Monell v. Department of Social Services, 436 U.S. 658 (1978). The Court overruled prior case law and held that municipalities were "persons" for purposes of 42 U.S.C. section 1983. Justice Stevens, concurring, deemed a portion of the Court's opinion only advisory.

United States v. Board of Commissioners, 435 U.S. 110 (1978). The Court concluded that Sheffield was a "political subdivision" for purposes of compliance with voting rights legislation that required political subdivisions to obtain prior federal approval before altering voting qualifications. Justice Stevens, dissenting, construed the voting rights statute narrowly because of its infringement on traditional state sovereignty.

C. Internal Revenue Code

First Federal Savings & Loan Association v. Tax Commission, 437 U.S. 255 (1978). Justice Stevens, writing for the Court, upheld a state tax on federal savings and loan associations that was not applied to credit unions, based on an interpretation of the term "similar" in federal legislation restricting state taxation of federal savings and loans to those taxes imposed equally on similar local institutions.

Frank Lyon Co. v. United States, 435 U.S. 561 (1978). The Court validated a sale and leaseback arrangement that allowed depreciation by the lessor and rent deduction by the lessee. Justice Stevens dissented, stating that under the realities of the arrangement, the deductions should have been disallowed since the "lessee" was, for all intents and purposes, the actual owner.

Commissioner v. Standard Life & Accident Insurance Co., 433 U.S. 148 (1977). Justice Stevens, writing for the majority, held that the "net valuation" portion of unpaid life insurance premiums, but not the "loading" portion of such premiums, must be included in a life insurance company's assets, gross premium income, and reserves in computing its federal income tax liability.

United States v. Foster Lumber Co., 429 U.S. 32 (1976). The Court held that "taxable income" within the meaning of I.R.C. section 172 (carryback and carryforward of net operating losses) included capital gains as well as ordinary income. Justice Stevens, concurring, noted that although he would have preferred as a matter of policy the result favored by the dissent, the statute did not support such a construction.

Don E. Williams Co. v. Commissioner, 429 U.S. 569 (1977). The Court disallowed an accrual-basis corporate taxpayer's deductions under I.R.C. section 404(a) for promissory demand notes contributed to a qualified employees' profit-sharing plan. Justice Stevens, concurring, noted that the majority's construction of I.R.C. section 404(a) best served the statutory purpose of protecting the integrity of pension plans.

D. Securities Laws

Sante Fe Industries v. Green, 430 U.S. 462 (1977). The Court held that a short-form merger carried out pursuant to state statute was neither deceptive nor manipulative and therefore minority shareholders had no cause of action under Rule 10b-5. Justice Stevens, concurring in part and dissenting in part, expressed his disapproval of the majority's refusal to recognize any fiduciary duty owed by controlling shareholders to minority shareholders under Rule 10b-5.

Piper v. Chris-Craft Industries, 430 U.S. 1 (1977). The Court held that a tender offeror, suing as a takeover bidder, did not have standing to bring an action for damages under either

section 14(e) of the Securities Exchange Act of 1934 or Rule 10b-6 of the Securities and Exchange Commission. Justice Stevens dissented, arguing that the tender offeror, because it was a shareholder, was within the class protected by section 14(e).

E. Miscellaneous Federal Provisions

Parker v. Flook, 98 S.Ct. 2522 (1978). Justice Stevens, writing for the Court, held that a patent application in which the only novel feature was the use of a mathematical formula did not present patentable subject matter under section 101 of the Patent Act.

Coopers & Lybrand v. Livesay, 98 S.Ct. 2454 (1978). Justice Stevens, writing for the Court, stated that an appeal from a class decertification as a "final decision" under 28 U.S.C. section 1291, pursuant to the "death knell" doctrine, had no jurisdictional basis because the "death knell" doctrine was a legislative, not a judicial concept that would frustrate the administration of justice.

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978). The Court held that the Freedom of Information Act did not give an employer access to prehearing testimony obtained by the National Labor Relations Board in an unfair labor practices investigation. Justice Stevens, concurring, interpreted the term "interference" in section 7 of the Act to exempt such testimony from disclosure because of potential interference with enforcement proceedings.

California v. Southland Royalty Co., 436 U.S. 519 (1978). The Court ruled that the Federal Power Commission acted within its statutory powers in requiring Federal Power Commission approval before termination of the flow of gas from a field subject to a certificate of unlimited duration. Justice Stevens, dissenting, construed the enabling statute more narrowly than did the Court.

J.W. Bateson Co. v. United States, 434 U.S. 586 (1978). The Court held that employees of a subcontractor once removed from the prime contractor were not protected by the Miller Act since they did not have a direct contractual relationship with either the prime contractor or a "subcontractor" within the meaning of the Act. Justice Stevens, dissenting, argued that the Court's narrow interpretation of "subcontractor" was contrary to the intent of Congress.

Nixon v. Administrator of General Services, 433 U.S. 425 (1977). The Court upheld the Presidential Recordings and Materials Preservation Act against former President Nixon's claims that the Act was unconstitutional in that it violated the separation of powers principle, the bill of attainder clause, and Nixon's own privacy interests and first amendment associational rights. Justice Stevens, concurring, stated that special legislation directed only at one former President normally would violate the bill of attainder clause, but that former President Nixon's resignation from office and acceptance of a pardon for offenses committed while in office placed him in a different class from all other Presidents.

Third National Bank v. Impac Limited, 432 U.S. 312 (1977). Justice Stevens, writing for the Court, found that Congress, in enacting a statute prohibiting attachments, injunctions, or executions from being issued against a national bank before final judgment in a state court action, intended only to prohibit state judicial action having the effect of seizing the bank's property prior to final judgment.

Swain v. Pressley, 430 U.S. 372 (1977). Justice Stevens, writing for the majority, held that the United States District Court for the District of Columbia could not entertain a habeas corpus application of a petitioner sentenced by a local District of Columbia court.

Chase Manhattan Bank v. Sailboat Apartment Corp., 429 U.S. 911 (1976). The Court remanded the case for determination of whether there was a waiver of the venue provision of the National Bank Act. Justice Stevens dissented on the grounds that the state court had already rejected the claim of improper venue on the basis of waiver.

Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976). The Court held that a federal court could not enjoin a sympathy strike pending the arbitrator's decision as to

whether the strike was forbidden by the no-strike clause in the collective bargaining contract. Justice Stevens dissented on the grounds that a sympathy strike, clearly in violation of the contract, should be enjoinable because the employer would be threatened with irreparable injury.

Oil Workers v. Mobil Oil Co., 426 U.S. 407 (1976). The Court held that the Texas right to work law did not extend to seamen whose situs of employment was not in Texas. Justice Stevens concurred, joining the majority opinion except to the extent, if any, that it suggested that federal policy enunciated in the National Labor Relations Act favors union or agency shops.