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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

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I. INTRODUCTION

In mid-December 1975 the United States Senate confirmed by a unanimous vote the nomination of John Paul Stevens as the one hundred and first justice to sit on the United States Supreme Court. Mr. Justice Stevens was graduated Phi Beta Kappa from the University of Chicago and attended Northwestern University Law School, where he finished first in his class. After clerking for Supreme Court Justice Wiley Rutledge, Stevens entered private practice, specializing in antitrust law. In 1970 former President Nixon appointed Stevens to the United States Court of Appeals for the Seventh Circuit, a position he held until his confirmation as an associate justice. The appointment of Mr. Justice Stevens occurs when a number of critical issues—including the death penalty, racial segregation in private schools, court-imposed "gag" orders on the press, and abortion—are before the Court. His appointment has generated much speculation about the direction in which the Court will now move. Known for placing great emphasis on the particular facts of the cases he decides, Stevens has earned a reputation as a moderate.

This acticle will examine the opinions written by Mr. Justice Stevens while he served on the Court of Appeals for the Seventh Circuit. The areas examined are constitutional, antitrust, labor, securities, federal tax, administrative, and federal jurisdictional law.* This article also will seek to reach some conclusions on Stevens' position in the several areas while he served on the Seventh Circuit and to suggest the factors he may consider important in deciding cases in the future. We hope the article will give its readers an opportunity to analyze and evaluate the existing opinions of the new associate justice and to gain some insight into the way he approaches cases. An appendix is provided that describes briefly those opinions we consider of interest.[1]

*In analyzing the decisions of Mr. Justice Stevens during his tenure on the Seventh Circuit Court of Appeals, the authors ohtained a list of opinions from LEXIS, a computer-assisted legal research system. LEXIS is a full-text legal research service. The full texts of legal documents are stored word for word, precisely as reported, in the computer's data bank. LEXIS is a service of Mead Data Central, Inc., 200 Park Avenue, New York, New York 10017.

1. The information used in the INTRODUCTION was taken from the following sources: 36 CCH SUPREME COURT BULLETIN No. 9 (December 1, 1975); N.Y. Times, Dec. 18, 1975, § 1, at 1, col. 7; Lewis, *The Stevens Nomination*, N.Y. Times, Dec. 12, 1975, at 41, col. 5; Time (magazine), Dec. 8, 1975, at 58, col. 1; N.Y. Times, Nov. 29, 1975, § 1, at 1, col. 7.

II. CONSTITUTIONAL LAW

Justice Stevens has written opinions dealing with due process, equal protection, the amount and character of state action required under the fourteenth amendment, the seventh amendment right to a jury trial, the first amendment right of expression, and the right of privacy. His opinions in each of these areas will be discussed in the order presented above. For the sake of clarity and order, the due process opinions have been subdivided into those dealing with procedural rights and those dealing with substantive rights. A discussion of several interesting opinions in the area of juvenile rights ends the section. Part II does not include discussion of opinions in criminal constitutional law. Part III covers that area.

A. Due Process

(1) Procedural Due Process

The majority of procedural due process cases that Justice Stevens considered on the Seventh Circuit focused on the pretermination procedural rights of public employees. In *Board of Regents of State Colleges v. Roth*,[2] the Supreme Court decided that a former government employee who claims the procedure of his dismissal violated the due process clause of the fourteenth amendment must first establish that the state has invaded an interest protected by the amendment. To show invasion of a property interest, the plaintiff must have a legitimate claim of entitlement to the position.[3] In the absence of a contractual right or statutory tenure no claim of entitlement exists unless the policies and practices of the employer or explicit bilateral understandings support the employee's claim. A subjective expectation that the employment will continue is insufficient.[4] To show invasion of an interest in liberty within the meaning of the amendment, the plaintiff may show that his termination violated specific Bill of Rights guarantees or the fundamental liberties emanating from them;[5] imposed a stigma on his honor, reputation, or integrity;[6] deprived him of the opportunity of

2. 408 U.S. 564 (1972).

3. *Id.* at 577.

4. Perry v. Sindermann, 408 U.S. 593, 603 (1972).

5. Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968) (certain provisions of the Bill of Rights are incorporated by the fourteenth amendment); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (the liberty guaranteed by the fourteenth amendment includes those privileges essential to the orderly pursuit of happiness).

6. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

future government employment;[7] or completely foreclosed him from further employment in his profession.[8] Unless a public employee demonstrates a deprivation of property or liberty, he has no fourteenth amendment claim to a pretermination notice or hearing.

In his first public employment termination case, *Shirck v. Thomas*,[9] Justice Stevens narrowly defined the interests in liberty and property protected by the fourteenth amendment and displayed a reluctance to expand an individual's procedural due process rights. Plaintiff, a public school teacher, claimed that the nonrenewal of her contract constituted an invasion of her liberty and property, entitling her to the procedural guarantees of the due process clause. In compliance with a state statute, the school board provided plaintiff with notice of her dismissal and a statement of reasons for it but denied her a hearing. The Seventh Circuit, Justice Stevens dissenting, held that the failure to provide a hearing constituted a violation of plaintiff's procedural due process rights.[10] In light of its recent opinion in *Roth* the Supreme Court vacated the Seventh Circuit's decision.[11] On remand, Stevens wrote the court's opinion.[12] He said that the state requirement of notice prior to dismissal did not endow plaintiff with a sufficient claim of entitlement to her employment. Since plaintiff had neither statutory tenure nor an express or implied contractual agreement, Stevens reasoned that she possessed no property interest in her position. He stated further that the school board's action deprived plaintiff of no interest in liberty because the nonrenewal did not violate an independent constitutional right, did not stigmatize her name or reputation, and did not impair her ability to gain other employment.[13] Since no constitutionally protected interest was impaired, Stevens found that the due process clause did not require that plaintiff receive a hearing before the school board.

Stevens' opinion in *Adams v. Walker*[14] also took a narrow view of the scope of protected liberty and property and demonstrated a deference to the actions of state officials. In *Adams* the governor of Illinois removed the state liquor commission chairman without a hearing. The former chairman brought suit claiming that this vio-

7. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 185 (1951).
8. Schware v. Board of Bar Examiners, 353 U.S. 232, 238 (1957).
9. 486 F.2d 691 (7th Cir. 1973), *rev'g on rehearing*, 447 F.2d 1025 (7th Cir. 1971).
10. 447 F.2d 1025, 1027 (7th Cir. 1971).
11. 408 U.S. 940 (1972).
12. 486 F.2d 691 (7th Cir. 1973).
13. *Id.* at 692-93.
14. 492 F.2d 1003 (7th Cir. 1974) (Stevens, J., concurring).

lated his right to procedural due process. The court held that plaintiff had no protected interest in his position which would entitle him to a due process hearing upon discharge. In a concurring opinion Stevens noted that under Illinois law plaintiff's six-year term could be ended at the discretion of the governor. Stevens, therefore, held that plaintiff was not deprived of any property interest. Though the stated reasons for plaintiff's dismissal were incompetence, neglect of duty, and malfeasance in office, Stevens found that they did not constitute a stigma which impaired plaintiff's interest in liberty. He based this determination on the political context in which the accusations were made and the first amendment protection of defamatory statements concerning public officials.[15] Stevens' analysis stressed that the dismissal was a policy decision by the governor. He thus concluded that any due process hearing would either be meaningless or "involve an excessive invasion by the federal judiciary into the making of policy by the State."[16]

Justice Stevens elaborated on his view of procedural due process in two additional opinions. Plaintiff in *McTaggart v. Secretary of the Air Force*[17] was afforded notice and a hearing prior to his involuntary discharge. At the hearing, however, plaintiff bore the burden of showing cause why he should not be discharged. Justice Stevens held that this did not violate plaintiff's procedural rights. *Kimbrough v. O'Neil*[18] involved a prisoner who alleged that a ring taken from him by prison officials was not returned upon his release. Stevens concurred with the court's decision to reverse the district court's dismissal of plaintiff's complaint, but postulated that deprivations of property may require lesser procedural safeguards than deprivations of liberty. Stevens stated that under the instant facts the remedy of a post-deprivation action against the prison officials in the state courts satisfied the requirements of due process.

Justice Stevens' holding in each of these cases evinces a narrow construction of the due process clause and a restrictive interpretation of the apposite Supreme Court opinions. Implicit in *Shirck* and *Adams* are a limited view of the liberty protected by the fourteenth amendment and a concomitantly expansive view of the discretion-

15. Stevens recognized that if a finding of malfeasance disqualified a law school graduate from admission to the bar, or caused a prison inmate to forfeit his good time credits, an interest in liberty would be impaired. But he concluded that when such an accusation is made in the context in which important political figures routinely use uncomplimentary language about one another, procedural due process does not apply. *Id.* at 1010.

16. *Id.*

17. 458 F.2d 1320 (7th Cir. 1972).

18. 523 F.2d 1057 (7th Cir. 1975).

ary authority and policy-making responsibilities of state officials. In *Roth* the Supreme Court expressly recognized that an interest in liberty is invaded when a public employee's "good name, reputation, honor or integrity" is at stake or when a state-imposed stigma forecloses his freedom to take advantage of other employment opportunities.[19] A liberal interpretation of *Roth* might well result in the application of this language to the summary dismissal of a nontenured teacher and to the removal of a state official for alleged malfeasance in office. Yet in both *Shirck* and *Adams*, Stevens denied that the employee's interest in liberty had been impaired sufficiently to require a due process hearing. Coupled with his narrow definition of liberty is a desire to avoid interference with the determination and the implementation of policy decisions by state and local officials. In his dissent in *Shirck I* Stevens declared that teacher-school board relations are peculiarly the concern of state policy rather than federal constitutional law.[20] Stevens recognized that a due process hearing presupposes the formulation of standards to be applied in testing the state's action. When the discretionary action of a state official in a policy-making position is involved, Stevens seems to conclude that a hearing testing the fairness of the official's action might involve an invasion by the federal judiciary of a sphere reserved for the states. Justice Stevens' limited definition of a public employee's protected interest in liberty, reinforced by the wide latitude that he gives to the policy decisions of state officials, thus results in a narrow scope for procedural due process protection. It seems likely that the policies leading him to define due process narrowly in the context of public employment would lead him to define it narrowly in other areas as well.

(2) Substantive Due Process

In its broadest sense the due process clause requires not only that state deprivation of life, liberty, or property be procedurally fair, but also that it have a rational basis. This concept of substantive due process demands that state action not be unreasonable, arbitrary, or capricious, and that the means selected have a real and substantial relation to a permissible state purpose.[21] Justice Stevens' disposition of two teacher dismissal cases and his dissent in a third disclose a narrow construction of the substantive rights created by the due process clause.

19. 408 U.S. 564, 573 (1972).
20. 447 F.2d at 1028.
21. Nebbia v. New York, 291 U.S. 502, 525 (1934).

Stevens' decision in *Jeffries v. Turkey Run Consolidated School District*[22] expanded his "protected interest" analysis to encompass claims of substantive rights under the due process clause. In *Jeffries*, plaintiff, a nontenured teacher, claimed that her right to substantive due process protected her against "arbitrary and capricious" discharge by the school board. Justice Stevens stated that the invasion of an interest in liberty or property is an absolute precondition to establishing a deprivation of substantive due process. This was the identical test applied by the Supreme Court in *Roth* to alleged deprivations of procedural due process. Stevens determined that plaintiff's lack of tenure or any claim of entitlement to her position established the absence of any property interest. Applying his *Shirck II* definition of an interest in liberty, Stevens asserted that the school board's action did not infringe plaintiff's constitutionally protected liberty. He concluded that these findings were fatal to plaintiff's claim since the constitutional right to substantive due process is no greater than the right to procedural due process.[23] *Jeffries* thus imposed the *Roth* "protected interest" requirement on claims alleging violations of substantive rights protected by the due process clause.

In *Miller v. School District No. 167*[24] Stevens applied a "magnitude of the deprivation" test, coupled with a deference to the policy decisions of local officials, in holding that dismissal from public employment based on the employee's personal appearance is not forbidden by the demands of substantive due process. Plaintiff-teacher alleged that the school board's decision to terminate his employment was based on his mode of dress and appearance. Stevens agreed with plaintiff's claim that his right to choose his personal appearance was an aspect of his interest in liberty. Noting the variety of reasons that justify governmental limitation of an individual's choice of appearance, however, Stevens rejected the contention that every state restriction of that interest is an unconstitutional deprivation. Asserting that the impairment of plaintiff's liberty was relatively minor at best, he balanced the magnitude of the deprivation against the public interest in an effective educational process and concluded that the individual deprivation was outweighed by the public interest. Stevens denied that the mere allegation that plaintiff's personal appearance was a factor in his dismissal was sufficient to require an evidentiary hearing. Stevens

22. 492 F.2d 1 (7th Cir. 1974).
23. *Id.* at 4.
24. 495 F.2d 658 (7th Cir. 1974).

stated that a review of the school board's action necessarily would require the court to determine the standards by which to test the board's decision. He concluded that the only applicable standard was an evaluation of the decision's rationality. Stevens believed that, in light of the local school board's special competence and experience, such a standard of review was too indefinite to justify substitution of the court's judgment for that of the board, at least when plaintiff alleged no denial of an independent constitutional right.[25] Stevens thus held that a teacher's interest in selecting his own mode of dress and appearance is subordinate to the overriding public interest in the educational process and the latitude needed by the school board to discharge its responsibilities effectively.

Justice Stevens' dissent in *Shirck I*[26] confirms his unwillingness to interpret substantive due process requirements in a manner that would involve the federal courts in policy-making at the state level. Rejecting the court's interpretation of the due process clause as entitling plaintiff-teacher to a pretermination hearing, Stevens emphasized that in the final analysis the due process decision in such a case would turn on the court's evaluation of the substance of the school board's administrative determination. While Stevens believed that federal judges are qualified "to evaluate procedural fairness and to interpret and apply guidelines established by others," he stated that they lacked the special competence necessary to make the kind of policy judgment implicit in this case.[27]

Justice Stevens' use of a "protected interest" analysis subjects substantive due process claims to the same scrutiny as procedural claims. A plaintiff alleging violation of either must first show an interest in property or liberty. This requirement screens out a substantial number of claims. The substantive rights that Stevens finds in the due process clause are further limited by his balancing of the magnitude of the individual deprivation against the opposing public interest and by his deference to the judgment of state officials. He fundamentally disagrees with the reasoning that "the same element—'freedom from arbitrariness'—should at once entitle a person to due process and also be a part of the process which is due."[28] An opposition to the unnecessary transfer of power from the states to the federal government is characteristic of each of these opinions. Stevens opposes any interpretation of substantive due process that

25. *Id.* at 664-68.
26. 447 F.2d at 1028.
27. *Id.* at 1029.
28. Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1, 4, n.8 (7th Cir. 1974).

would significantly enlarge the responsibility and power of the federal judiciary and lead it into unprecedented participation in local affairs.[29] The Supreme Court recently has tended to uphold state action in many areas in which the Warren Court vigorously applied federal policies.[30] Justice Stevens' philosophy seems to conform to this trend.

B. Equal Protection

In the area of equal protection, Justice Stevens' decisions reflect his belief that the state should afford evenhanded treatment to all minority groups. Stevens argues that invidious discrimination against groups because of their political affiliation or lineage is just as indefensible as racial discrimination. A second characteristic of his equal protection cases is a careful scrutiny of all the facts in determining whether a particular classification has a rational basis. These two aspects of his approach to equal protection analysis are exemplified in *Cousins v. City Council of Chicago*,[31] which deals with racial and political gerrymandering, and *Eskra v. Morton*,[32] which deals with the rights of illegitimate children.

Until *Gomillion v. Lightfoot*,[33] the apportionment of voting districts had been considered a political question beyond the purview of the Constitution. In *Gomillion*, however, the Supreme Court held that gerrymandering of voting districts according to race violated the fifteenth amendment. In *Reynolds v. Sims*,[34] the Court established the one-man-one-vote rule, holding that the equal protection clause prohibits gross legislative misapportionment. Yet the Supreme Court has held that the shuffling of voting blocs on a partisan rather than racial or ethnic basis presents a nonjusticiable political question.[35]

In *Cousins v. City Council of Chicago*[36] the Seventh Circuit declared that the equal protection clause prohibits ethnic as well as racial gerrymandering but held that manipulation of voting districts

29. Miller v. School Dist. No. 167, 495 F.2d 658, 666 (7th Cir. 1974).

30. *See, e.g.*, Miller v. California, 413 U.S. 15, 30 (1973) (respect for local community obscenity standards); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 48-50 (1973) (deference to the value of local control over public education); Mahan v. Howell, 410 U.S. 315, 328-29 (1973) (flexible standards for the apportionment of state legislatures).

31. 466 F.2d 830 (7th Cir.), *cert. denied*, 409 U.S. 893 (1972).

32. 524 F.2d 9 (7th Cir. 1975).

33. 364 U.S. 339 (1960).

34. 377 U.S. 533 (1964).

35. WMCA, Inc. v. Lorenzo, 238 F. Supp. 916 (S.D.N.Y.), *aff'd per curiam*, 382 U.S. 4 (1965).

36. 466 F.2d 830 (7th Cir.), *cert. denied*, 409 U.S. 893 (1972).

to dilute the voting strength of independents presented a nonjusticiable political question. The plaintiffs alleged that the 1970 ward boundaries established in Chicago were designed specifically to dilute the voting strength of the city's black voters, Puerto Rican voters, and voters of "independent" political registration. In dissent, Justice Stevens declared that the majority erred in judging racial and political gerrymandering by different constitutional standards. He asserted that the impact of gerrymandering on an individual's right to vote and minority group's political strength may be invidious whether the discrimination is racial or political in nature[37] and that gerrymandering according to voters' political persuasion presented a justiciable issue, not a nonjusticiable political question. As a secondary issue, Stevens concluded that in a gerrymandering case, the plaintiff must show that the legislative classification is wholly irrational. He stated that the trial judge must examine in each case the historic political boundaries, natural barriers, the compactness and contiguity of the voting districts, and whether the districts are divided equally according to population in determining whether the legislature's purpose is rational.[38]

The Supreme Court has held that wrongful death statutes denying recovery to a bastard or his parent violate the equal protection clause.[39] In the 1971 case of *Labine v. Vincent*,[40] however, the Court upheld a statute of intestate succession that denied an illegitimate child any portion of his father's estate. The Court argued that the state had a compelling interest in protecting the family unit and regulating the prompt disposition of intestate property.[41]

In *Eskra v. Morton*,[42] Justice Stevens held that the federal government may not discriminate against a bastard when it distributes the property of her intestate maternal collateral relative. In *Eskra*, the Bureau of Indian Affairs distributed the estate of plaintiff's maternal great aunt according to Wisconsin law, which prevented plaintiff, a bastard, from taking through her mother. The district court found *Labine* controlling and upheld the distribution. The Seventh Circuit, in an opinion by Stevens, reversed, indicating that the government's interest in prompt and certain determination of

37. *Id.* at 850.

38. *Id.* at 859.

39. *See* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

40. 401 U.S. 532 (1971).

41. *Id.* at 536.

42. 524 F.2d 9 (7th Cir. 1975).

property ownership varies according to whether the illegitimate child seeks to share through her father or her mother. Because establishing the identity of the illegitimate child's father generally is more difficult than identifying her mother,[43] Stevens held that classification of children according to their illegitimate status is a form of invidious discrimination.

In contrast to Stevens' inclination to define due process narrowly and to defer to the trial court's fact determination in state action cases, Justice Stevens' equal protection decisions evidence a marked willingness to declare wholly irrational, classifications sustained in the lower court. In his dissent in *Cousins*, Justice Stevens refused to defer to the majority rule that political gerrymandering is a nonjusticiable political question beyond the scope of a federal judge. Instead, Stevens boldly asserted that any court ruling which would result in holding racial gerrymandering but not political gerrymandering a violation of the equal protection clause itself constitutes invidious discrimination. Thus, *Cousins* suggests Stevens' belief that an equal protection question should turn not on the particular group discriminated against but on the rational basis of the legislative classification. By demanding that the equal protection clause afford evenhanded treatment to all minority groups, Stevens indicates his position in future decisions is likely to emphasize a rigorous questioning of legislative purpose rather than an overt concern with the suspect nature of the class discriminated against. As reflected in *Cousins* and *Eskra*, Justice Stevens believes that the equal protection clause prohibits all forms of irrational legislative classification and not just discrimination against certain historically deprived groups.

C. *State Action*

Justice Stevens' decisions in the area of state action indicate he feels that the fourteenth amendment should be limited to discriminatory actions by the state. Stevens believes that the "color of state law" requirement in 42 U.S.C. § 1983[44] means that private conduct is proscribed only when the state affirmatively supports it. Although 42 U.S.C. § 1985(3) has no express "color of state law" require-

43. *Id.* at 14.

44. 42 U.S.C. § 1983 (1970). This section of the Civil Rights Act authorizes a civil action for the deprivation of rights secured by the Constitution. It is restricted to those deprivations caused by persons acting under the color of any "statute, ordinance, regulation, custom, or usage, of any State or Territory. . . ."

ment,[45] Stevens has required a showing of state action to establish that a fourteenth amendment right has been violated. In these decisions Stevens scrutinized every allegation of state involvement in order to determine whether the state has fostered or encouraged the discriminatory activity. He has written three significant decisions in this area dealing with the actions of an electrical power company, a private university, and a real estate management company.

The Supreme Court consistently has held that section 1983 and the fifth and fourteenth amendments proscribe only state action and do not prohibit the activities of a private, nongovernmental organization.[46] In *Moose Lodge v. Irvis*[47] the Supreme Court held that the presence of state regulation of a private organization is insufficient to establish a section 1983 cause of action unless the regulation affirmatively sponsors the discriminatory activity. In *Lucas v. Wisconsin Electric Power Co.*,[48] Justice Stevens, writing the majority opinion, held that in spite of pervasive governmental regulation and the state's grant of a monopoly, a power company was not acting under "color of state law" when it discontinued plaintiff's electrical service. The plaintiff alleged that lack of a prior hearing on the disputed account violated procedural due process. Justice Stevens concluded that the regulation of public utilities and their status as tolerated monopolies do not provide the kind of state support of private conduct that will transform an issue of state regulatory policy into a section 1983 cause of action.[49]

In the majority opinion in *Cohen v. Illinois Institute of Technology*,[50] Justice Stevens held that a private university which refused to grant tenure to a faculty member because of her sex had not acted under "color of state law" within the meaning of section 1983. The plaintiff argued that the university held itself out as a public institution, received various types of state financial assistance, and submitted to extensive state regulations. But Stevens again reasoned that state involvement, by itself, will not sustain a

45. 42 U.S.C. § 1985(3) (1970) in relevant part provides:

If two or more persons in any State or Territory conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws . . . , whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages.

46. *E.g.*, Civil Rights Cases, 109 U.S. 3 (1883).

47. 407 U.S. 163 (1972).

48. 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

49. 466 F.2d at 658.

50. 524 F.2d 818 (7th Cir. 1975).

section 1983 action unless the state's support has fostered the activities challenged.[51]

Stevens' opinions in section 1985(3) suits also display this comparatively demanding test for state action. The seminal Supreme Court case under this section is *Griffin v. Breckenridge*,[52] in which the Court for the first time invoked federal jurisdiction under section 1985(3) in cases of private conspiracies aimed at depriving an individual of equal protection of the laws. In *Griffin*, several Negroes traveling interstate were assaulted by a group of local vigilantes. The Court held that a private conspiracy to deprive the plaintiffs of their thirteenth amendment rights or their right to interstate travel was actionable under section 1985(3). The Court, however, refrained from holding that all discrimination would be actionable under section 1985(3) by suggesting that a state action requirement must be met in a suit alleging fourteenth amendment violations.

Justice Stevens' majority opinion in *Dombrowski v. Dowling*[53] held that arbitrary discrimination of a real estate management company against attorneys engaged in criminal practice did not deprive plaintiff of equal protection under section 1985(3) because there was no state action in the challenged activity.[54] Plaintiff maintained that he was refused office space in defendant's building because his clientele were largely Negro or Latin-American. Although Stevens agreed with *Griffin* that private conspiracies are actionable under section 1985(3), he asserted that only three categories of rights have been identified as protected under section 1985(3): black citizens' thirteenth amendment rights; an individual's right to interstate travel; and rights protected by the fourteenth amendment. In fourteenth amendment cases, however, Stevens maintained that section 1985(3) requires a showing of state action. Addressing the section 1985(3) count of the plaintiff's complaint in *Cohen v. Illinois Institute of Technology*,[55] Justice Stevens held that the court's reasoning in *Dombrowski* applied to plaintiff's charge of a private conspiracy to deprive women of faculty appointments. Thus *Cohen* affirms Stevens' holding in *Dombrowski* that section 1985(3) requires proof of state action in a suit alleging a fourteenth amendment violation.

Stevens' "state action" decisions reveal his strong belief that the fifth and fourteenth amendments prohibit only state initiated

51. *Id.* at 824-26.
52. 403 U.S. 88 (1971).
53. 459 F.2d 190 (1972).
54. *Id.* at 196.
55. 524 F.2d 818 (7th Cir. 1975).

or state supported discrimination. Stevens fears that any less strict approach will blur a crucial distinction between state and private conduct, allowing all tortious, conspiratorial interferences with the rights of others to become federal issues. Stevens is convinced that this is not the purpose of the fifth and fourteenth amendments. In accord with the Supreme Court's holding in *Moose Lodge*, Stevens believes that the plaintiff must show that somehow the state's action encouraged or supported the discriminatory activity. Finally, all three state action cases demonstrate Justice Stevens' case-by-case evaluation of the facts in ascertaining whether the plaintiff has proved a sufficient level of state action.

D. Right to Jury Trial

In 1959, the Supreme Court's decision in *Beacon Theatres, Inc. v. Westover*[56] established a strong federal policy favoring the seventh amendment right to trial by jury.[57] In *Beacon* the Court held that when legal and equitable claims both are present, the order of trial must be arranged to try the legal issues to a jury before the court rules on the purely equitable issues.[58] Three years later in *Dairy Queen, Inc. v. Wood*[59] the Court extended the right to a jury trial to all legal issues, even those incidental to a primarily equitable claim. The redefining of a legal claim in *Ross v. Bernhard*[60] was the culmination of this line of cases. Refusing to limit the determination of whether a claim is legal or equitable to the traditional historical test,[61] the Court required a jury trial if (1) the type of remedy sought was traditionally awarded by a jury and (2) the nature of the dispute presented no obstacle to the practical abilities and limitations of juries.[62] When these two considerations indicate that a claim is legal in nature, a constitutional right to trial by jury arises even though such a claim was historically the exclusive province of equity.

The application of this line of cases to litigation arising under

56. 359 U.S. 500 (1959).

57. The seventh amendment provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

58. 359 U.S. at 508.

59. 369 U.S. 469 (1962).

60. 396 U.S. 531 (1970).

61. Under the traditional historical test the courts interpreted the seventh amendment to preserve the substance of the right to jury trial that existed under English common law in 1791 when the amendment was adopted. Actions at law and in equity, for jury purposes, were frozen categorically as of 1791. Unless a particular type of action existed at that time and was deemed a suit at common law, no right to a jury trial could exist.

62. 396 U.S. at 538.

the civil rights legislation of the 1960's has produced conflicting results. Title VII of the Civil Rights Act of 1964[63] has been construed to provide an essentially equitable remedy.[64] When litigation appeared under the Fair Housing Act of 1968 (Title VIII of the Civil Rights Act),[65] however, the federal district courts split regarding the legal or equitable nature of the claims.[66] In *Rogers v. Loether*[67] Justice Stevens subjected the arguments favoring denial of jury trial in housing discrimination suits to rigorous judicial scrutiny and rejected them.[68] In that case plaintiff, a black woman, sued defendant-landlord under Title VIII for racial discrimination in the renting of an apartment. She requested compensatory and punitive damages and an injunction to restrain the landlord from renting to anyone else. Stevens held that the action was in the nature of a suit at common law and that defendant was entitled to a jury trial. Noting that the proceeding was judicial in character rather than administrative or statutory and that the remedy of compensatory and punitive damages is the relief most typical of a legal claim, he found that the remedy sought was appropriate for jury determination and that the dispute presented no obstacle to the practical abilities and limitations of juries. Stevens, therefore, concluded that the claim satisfied the test enunciated in *Ross v. Bernhard* and was essentially legal in nature.[69] Under the *Beacon* and *Dairy Queen* cases, he found that the legal claim had to be tried to a jury even though the request for injunctive relief presented an equitable issue. Finally, Justice Stevens distinguished Title VII actions. He reasoned that an award of back pay is equitable because it places the plaintiff in the situation that would have existed had the statute not

63. 42 U.S.C. § 2000e (1970) (prohibiting employment discrimination).

64. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

65. 42 U.S.C. § 3612 (1970).

66. Three district courts have held that the discretionary language of the prescribed relief, the limitation upon punitive damages, and the similarity to Title VII suits demonstrate that a Title VIII claim is equitable in nature. Marr v. Rife, 363 F. Supp. 1362 (S.D. Ohio 1973); Cauley v. Smith, 347 F. Supp. 114 (E.D. Va. 1972); Rogers v. Loether, 312 F. Supp. 1008 (E.D. Wisc. 1972). On the other hand two district courts have ruled that Title VIII actions in which the plaintiff requests actual or punitive damages are traditionally legal in character, and thus the defendant's demand for jury trial must be granted. Kelly v. Armbrust, 351 F. Supp. 869 (D.N.D. 1972); Kastner v. Brackett, 326 F. Supp. 1151 (D. Nev. 1971).

67. 467 F.2d 1110 (7th Cir. 1972), *aff'd sub nom.* Curtis v. Loether, 415 U.S. 189 (1974).

68. The arguments advanced for denying the right to trial by jury in Title VIII actions include (1) that the nature of the claim is essentially equitable, (2) that the action is analogous to Title VII suits, in which the right to jury trial has been denied, (3) that such a right is not expressed in the statutory scheme from which the cause of action derives, (4) that analogous legislation indicates that no right to jury trial was intended by Congress, and (5) that the public and social policies against jury trials are overriding.

69. 467 F.2d at 1118.

been violated, while compensatory damages in a Title VIII action constitute payment for the losses suffered by plaintiff as a result of defendant's breach of duty and cannot properly be termed restitutionary.[70]

Justice Stevens' analysis in *Rogers v. Loether* reflects an expansive interpretation of the seventh amendment and a refusal to allow considerations of social policy to infringe on the right to trial by jury. His construction of the statutory language in a manner favorable to jury trial and his belief in the adaptability of the common law to the adjudication of new legal rights are supported by *Beacon, Dairy Queen,* and *Ross*. Stevens recognized that the social policy considerations behind civil rights legislation probably favor denial of the right to trial by jury. His conclusion that these are insufficient to overcome the clear command of the seventh amendment indicates a fundamental faith in the jury trial.

E. First Amendment Rights

While on the Seventh Circuit, Justice Stevens wrote five opinions concerning first amendment freedom of speech and expression. The fact situations of these cases are highly diverse. Common to each, however, is an attempt both to protect "the exchange of information and ideas in the intellectual marketplace" and to give effect to the competing interests of society.

In *Morales v. Schmidt*,[71] Stevens considered the conflict between prisoners' first amendment rights and society's interest in their rehabilitation and control. The federal courts have adopted inconsistent approaches to whether and to what extent prison regulations may restrict first amendment rights such as freedom of speech. These range from a hands-off posture[72] to the requirement that the regulations be justified by a compelling state interest.[73] In *Morales* prison officials had prohibited an inmate from corresponding with his sister-in-law because he was the father of her illegitimate child. The officials alleged that the ban was necessary to the inmate's rehabilitation. The prisoner sought to enjoin this interference with his freedom of communication. The district court's deci-

70. *Id.* at 1121-22. Justice Stevens' decision was upheld by the Supreme Court in an opinion relying heavily on Stevens' characterization of the remedy sought as traditionally legal relief, his analogy to tort actions recognized at common law, and his distinction hetween Title VII and Title VIII cases. 415 U.S. 189 (1974).

71. 489 F.2d 1335 (7th Cir. 1973), *rev'd en banc*, 494 F.2d 85 (7th Cir. 1974).

72. McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964).

73. Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968).

sion for plaintiff was reversed by the Seventh Circuit.[74] Justice Stevens dissented, asserting that state action which places a prior restraint on a prisoner's freedom of expression requires close judicial scrutiny. Stevens declared that a person's incarceration does not completely extinguish his first amendment rights, but added that the fact of conviction is a sufficient basis for some limitation. Closely examining the facts, Stevens found that the decision to prohibit plaintiff's communication with his sister-in-law was an *ad hoc* determination and not the implementation of a preformulated standard. He stated that therefore the strong presumption of regularity normally supporting a state official's exercise of discretionary authority did not apply. Stevens declared that the risks of error inherent in *ad hoc* infringements of first amendment rights require the courts to employ a strict standard of judicial review.[75]

On rehearing en banc the Seventh Circuit reversed its original decision.[76] In a concurring opinion, Justice Stevens agreed with the court that state restriction of a prisoner's first amendment rights is impermissible unless "related both reasonably and necessarily to the advancement of a justifiable purpose of imprisonment."[77] Stevens added, however, that satisfaction of this test would not necessarily justify every prior restraint. He urged that the application of the standard be limited to prison rules regulating mail and similar matters and stressed the state's heavy burden of justification when it acts on an *ad hoc* basis. He added that a vague or general regulation allowing prison officials wide discretion is tantamount to no rule at all. Thus Stevens would also subject broad rules to a strict standard of review.[78]

In *Herzbrun v. Milwaukee County*[79] Justice Stevens stated that the freedom of speech does not extend to harmful conduct if the conduct is not even arguably communicative. Plaintiffs in *Herzbrun* were welfare department employees who, in a dispute with management, physically interfered with the conduct of the department's

74. The court held that prison mail censorship is permissible when the state's action bears a rational relationship to or is reasonably necessary for advancement of a justifiable state purpose. 489 F.2d at 1343.

75. *Id.* at 1347-49 (Stevens, J., dissenting).

76. 494 F.2d 85 (7th Cir. 1974).

77. *Id.* at 87.

78. Subsequent to *Morales*, the Supreme Court in *Procunier v. Martinez* required that prison mail regulations "further an important or substantial governmental interest unrelated to the suppression of expression" and be "no greater than is necessary or essential to the protection of . . . [that] interest." 416 U.S. 396, 413 (1974).

79. 504 F.2d 1189 (1974).

business by disrupting telephone communications. Upon their discharge under a civil service rule the employees brought suit, claiming that the rule was overbroad and violated the guarantees of the first amendment. The court held that the rule was not unconstitutionally overbroad. Justice Stevens concurred in the court's decision but questioned plaintiffs' standing to invoke the first amendment since their conduct was not even arguably communicative.[80] He argued that the claim of overbreadth cannot be raised when the statute does not discourage the free interchange of information and ideas. Although he was willing to permit unprotected speech to go unpunished to avoid inhibiting protected speech, Stevens refused to invalidate completely a rule prohibiting harmful nonexpressive conduct on the ground that it purported to regulate speech or expressive conduct. He urged that a finding of overbreadth should bar enforcement of the rule only when it is applied against speech and expressive conduct.[81]

Stevens considered the constitutional right of a male high school student to wear long hair in *Arnold v. Carpenter*[82] and concluded that this freedom is tempered by society's interest in observing certain traditions and in subjecting children to parental control. The Seventh Circuit previously had characterized the length of one's hair as either a form of symbolic speech protected by the first amendment or a ninth amendment right retained by the people.[83] In *Arnold* a majority of the student body had approved a dress code that permitted exemption if the student's parents gave written approval. The court declared that the failure of his parents to sign a consent form could not justify the denial of the student's constitutional right to determine his own hair length and held the *Arnold* dress code unconstitutional. In a dissenting opinion, Justice Stevens urged that the consent provision sufficiently protected the student's interest in individual expression.[84] Stevens argued that a child has no constitutional right to wear long hair in opposition to the wishes of parents and teachers. If they agree to compel observance of a given form of tradition, regardless of rationality, then the child must obey, Stevens said.[85] Since a student's parents could excuse him from compliance with the dress code, Justice Stevens found no

80. *Id.* at 1197.

81. *Id.* at 1198.

82. 459 U.S. 939 (7th Cir. 1972) (Stevens, J., dissenting). For further discussion of this case see notes 97-102 *infra* and accompanying text.

83. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

84. 459 F.2d at 944-46.

85. *Id.* at 944.

threat to freedom of speech and expression or to any other fundamental constitutional value.[86]

Justice Stevens' first amendment opinions evince a willingness to balance the constitutional right of free speech with competing interests of society. In *Morales* he recognized the value of rehabilitation and effective prison administration and rejected the "compelling state interest" standard for reviewing prison mail regulations. In *Herzbrun* he emphasized society's interest in prohibiting conduct disruptive of state offices. In *Arnold* he stressed the values of parental control of children and observance of tradition. Stevens assigns varying degrees of importance to different forms of expression; as the conduct becomes less communicative or expressive, he accords greater weight to competing values. Justice Stevens' approach stresses that freedom of speech is a fundamental right but recognizes that its exercise must be compatible with the preservation of other essential values.

F. Right of Privacy

The constitutional right of privacy first recognized in *Griswold v. Connecticut*[87] has been extended during the past decade to encompass sexual intimacy, procreation, parenthood, child rearing, the family, and the home.[88] In *Fitzgerald v. Porter Memorial Hospital*,[89] Justice Stevens considered whether a public hospital's exclusion of an expectant father from the delivery room during birth violated his and his wife's right of marital privacy. The couple was

86. The fifth case in which Justice Stevens considered a first amendment issue is Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974). Plaintiff, a lawyer representing a murder victim's family in a civil action for damages, claimed that a magazine article reporting on the murder trial contained defamatory statements. Stevens followed the rule of Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), that a defamatory statement about a private individual, but involving an event of public concern, is protected by the first amendment unless the publication was made with knowledge that the statement was false or with reckless disregard as to its truth. Finding no knowledge or reckless disregard of falsity by the publisher, he held for the defendant. On appeal, however, the Supreme Court reversed itself and held that *Rosenbloom* was no longer binding on the states.

87. 381 U.S. 479 (1965).

88. *See* Roe v. Wade, 410 U.S. 113 and Doe v. Bolton, 410 U.S. 179 (1973) (woman has right to abortion in certain circumstances); Stanley v. Illinois, 405 U.S. 645 (1972) (unmarried father has custodial rights to his child); Eisenstadt v. Baird, 405 U.S. 438 (1972) (unmarried persons have right to use contraceptives); Loving v. Virginia, 388 U.S. 1 (1967) (black and white persons have right to marry); Buckley v. Coyle Pub. School Sys., 476 F.2d 92 (10th Cir. 1973) (pregnant teacher has right to continue working); Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968) (married couple has right to engage in deviant sexual activity); Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972) (married high school student has right to participate in extracurricular activities). *See also*, Comment, *The Constitutional Right of Privacy: An Examination*, 69 Nw. U.L. Rev. 263, 264-77 (1974).

89. 523 F.2d 716 (7th Cir. 1975).

trained in the LaMaze method of childbirth[90] and their personal physician consented to the husband's presence in the delivery room. Stevens held that the right of marital privacy does not include the right of either spouse to have the husband present at childbirth when the hospital has adopted a rule requiring his exclusion.[91] His opinion expresses a reluctance even to characterize such cases as right of privacy cases. He would limit the privacy concept to cases involving the individual's interest in protection from unwarranted public attention, comment, or exploitation and would exclude cases concerning fundamental personal, familial, and procreative rights. He prefers to view previous authority as upholding the individual's right to make certain unusually important decisions involving basic values and affecting his or his family's destiny.[92] Stevens felt that in *Fitzgerald* plaintiffs' decision regarding the husband's presence during childbirth did not attain this level of significance.[93] He declared that the decision to bear or not to bear a child is of substantially greater magnitude than the choice of method for the delivery. Stevens manifested a reluctance to substitute the court's judgment for the professional judgment of the hospital staff and noted that a verdict for plaintiffs would be inconsistent with the exclusion of relatives from other medical procedures.

In *Fitzgerald* Justice Stevens recognizes the right of privacy regarding decisions on substantive matters of health care, such as contraception and abortion, but he declines to extend the right to procedural matters involving specific medical practices and techniques. His development of this substantive-procedural dichotomy focuses on the magnitude of the deprivation as the determinative factor. Stevens' magnitude test limits the protection afforded by the right of privacy to fundamental matters of conscience dignified by history and tradition. His conclusion that obstetrical procedure does not attain this level of significance is a rejection of Justice Douglas' statement that the right of privacy includes the right to choose one's personal physician and to have that physician apply his own

90. The LaMaze method involves a prenatal training program that enables the couple to function as a team during delivery, with the husband supplying physical and emotional support to his wife. *Id.* at 716 n.2.

91. *Id.* at 721.

92. "In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325." Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

93. Stevens emphasized the differing opinions within the medical profession on the advisability of the husband's presence during delivery. 523 F.2d at 721.

professional standards.[94] Although Justice Stevens' differentiation between substance and procedure reflects an innovative analysis, his characterization of the instant plaintiffs' claim as merely a choice of procedural technique displays a lack of sensitivity to the psychological and emotional importance of the moment of childbirth to both mother and father. This analysis seems to equate impairment of procedural choices with deprivations of small magnitude. Stevens thus suggests a means for limiting all aspects of the protection afforded by the right of privacy.

G. *Constitutional Rights of Juveniles*

The Supreme Court's holding in *In re Gault* that juvenile court proceedings must measure up to the essentials of due process and fair treatment[95] spawned a series of lower court opinions that moved toward the extension of due process guarantees to juveniles and more closely examined statutory procedures concerning juveniles.[96] The opinions of Justice Stevens take a pragmatic balancing approach in this area. He seeks to insure procedural fairness in juvenile proceedings, yet he sometimes takes a paternalistic attitude when considering rules prescribed for juvenile conduct.

Stevens' first comment on the substance of juvenile rights came in his dissenting opinion in *Arnold v. Carpenter*,[97] discussed also in Part E, above. The majority opinion enjoined enforcement of a high school dress code that a committee of students, teachers, and administrators had formulated and a majority of the students regulated had adopted.[98] Stevens took the view that parents and teachers are necessarily partners in the process of requiring the young to conform to the manners of their elders: "[T]o the extent that parents and teachers stand together, a child has no enforceable constitutional right to do his own thing."[99] Stevens felt, however, that a parent's support of his child's attempts at nonconformity are enti-

94. Doe v. Bolton, 410 U.S. 179, 219-20 (1973) (Douglas, J., concurring).

95. *In re* Gault, 387 U.S. 1, 30 (1967). *See also* Kent v. United States, 383 U.S. 541, 562 (1966).

96. *See, e.g.*, S. DAVIS, RIGHTS OF JUVENILES 177 (1974).

97. 459 F.2d 939 (7th Cir. 1972). For a discussion of this case in the context of the first amendment see notes 82-86 *supra* and accompanying text.

98. The Seventh Circuit, in earlier decisions, had recognized that "[t]he right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution." Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970). Defendants sought to uphold the instant dress code on the strength of its adoption by a majority of the students.

99. 459 F.2d at 944.

tled to respect, and that the instant dress code accommodated the parent's interest: "I find nothing offensive in a dress code which requires conformity unless excused by a child's parents."[100] And he expressed indignance that the case was even before the court:

> I would not open the federal courts to a parent who, by simply giving the school administrators appropriate evidence of his consent, has available an adequate remedy to protect his child's interest in nonconformity or in a particular mode of appearance.[101]

While Stevens took a paternalistic attitude[102] toward the *Arnold* dress code and refused to characterize the issue as one of major constitutional dimension, he carefully scrutinized cases involving the actual physical liberty of juveniles and applied a classical "due process," "equal protection" analysis to them. His majority opinion in *Vann v. Scott*[103] squarely addressed the question of juvenile rights in delinquency proceedings. Plaintiffs in that case were juveniles who had run away from families or foster homes more than once and who were therefore subject to classification as "delinquents" under Illinois law.[104] Under the law "delinquents" could be committed to the Illinois Department of Corrections unless commitment was not in the best interest of the minor and the public. Plaintiffs argued that the classification of runaways as delinquents violated the equal protection clause and that punishing runaways in the same way as juvenile felons constituted cruel and unusual punishment.

Stevens denied the equal protection attack, stating that although classification as a delinquent might stigmatize a runaway in the same way as those guilty of serious crime, a rational basis for the classification existed because runaways might need the same kind of rehabilitative treatment as youths guilty of serious crimes. Stevens found, however, that some aspects of the correctional detention constituted cruel and unusual punishment of runaway "delinquents." Citing *In re Gault*,[105] he repudiated the state attorney general's assertion that a minor child had only a right to a responsible adult custodian and no right to liberty. Stevens further stated:

> [w]hatever differences of opinion there might be in specific cases, we think the law is clear that a state may not act arbitrarily with children merely

100. *Id.* at 945.

101. *Id.*

102. "Just as the majority must learn to tolerate the nonconformist, so must he learn to tolerate the transient customs of his elders." *Id.*

103. 467 F.2d 1235 (7th Cir. 1972).

104. The classification came by way of an adjudicatory hearing, no aspect of which was challenged on constitutional grounds by plaintiffs. *Id.* at 1239.

105. 387 U.S. 1 (1967).

> because they are children. And while a parent, as legal custodian of his child, may be able to restrict his child's liberty with impunity . . ., it does not follow that a state has the same unfettered rights as a parent merely because it becomes legal custodian of the child. The state, even when acting in a "private" capacity, is always subject to the limitations of the Fourteenth Amendment.[106]

Justice Stevens' next opportunity to consider the matter of juvenile rights arose in *United States ex rel. Wilson v. Coughlin*.[107] Four juveniles confined to the Illinois Industrial School for Boys sought release on equal protection grounds because they had already been confined for longer than the maximum sentence authorized by law for adults convicted of similar offenses. Stevens noted that Illinois law permitted incarceration of a juvenile delinquent until his twenty-first birthday unless he demonstrated that an earlier release would serve his best interest. Stevens then denied the equal protection claim, stating that the potential difference between maximum length of sentence for a juvenile offender and that for an adult convicted of the same offense does not invalidate the statutory distinction between adults and juveniles since offsetting benefits generally result in favored treatment for the youthful offender.[108]

United States ex rel. Bombacino v. Bensinger[109] is Justice Stevens' most recent opinion on the matter of juvenile rights. The question presented was whether a state statute violates due process by permitting a juvenile court judge to transfer juveniles from his court to a court of ordinary jurisdiction without an evidentiary hearing or a statement of reasons. Stevens stated that neither *Kent v. United States*[110] nor fundamental fairness required the prosecutor to show probable cause that the youth had committed a criminal offense because the grand jury had to find probable cause in order to issue an indictment and that procedure adequately protected the youthful offender's rights.[111] Regarding the absence of the juvenile judge's statement of reasons for the transfer, Stevens stated that the need for such a statement in any procedural contest must be evaluated in light of the function such a statement would perform. In other contexts—denial of parole or denial of a Selective Service

106. 467 F.2d at 1240 n.15.

107. 472 F.2d 100 (7th Cir. 1973).

108. *Id.* at 102-03.

109. 498 F.2d 875 (7th Cir.), *cert. denied*, 419 U.S. 1019 (1974).

110. 383 U.S. 541 (1966) (holding that a juvenile court in the District of Columbia could not waive jurisdiction over a minor charged with a criminal offense without first granting the minor a hearing and that the basic requirements of due process and fairness must be satisfied in such proceeding).

111. "Due process is, of course, a flexible concept; the procedural safeguards which are required differ in different circumstances. . . ." 498 F.2d at 878 n.12.

classification, for example—such a statement may serve as a basis for appeal. That function was not served here, Stevens reasoned, because no right to appeal existed. Further, the youth's representation by competent counsel made such a statement less necessary. Finally, although Stevens acknowledged that a statement of reasons might reduce the risks of arbitrariness, he refused to find such a statement constitutionally required.

Justice Stevens' opinions in juvenile law reflect both his pragmatism and evenhandedness in resolving questions of competing societal interests. He has demonstrated that he will deal firmly yet fairly with juvenile offenders, and while he is quick to defend the constitutional rights of juveniles as a broad principle, he seems content in the specific case to show great deference to the state's interests in regulating juvenile behavior as *parens patriae*. Stevens' dissent in *Arnold* most plainly illustrates his pragmatism; Stevens complained that unaccommodating parents of a nonconformist youth should not be allowed in federal court when minimal effort by the parents could exempt their son from compliance with the challenged school dress code. In *Vann*, Stevens denied an equal protection claim that runaways should not be classified as delinquents in the same way as juvenile felons, reasoning that the runaways would benefit from state rehabilitation programs. Stevens balanced the costs and benefits to a juvenile of incarceration for a longer period than his adult counterpart charged with the same offense and concluded that the juvenile's best interests would be served by continued state supervision. The holding in *Bensinger* represents a classic balancing approach: Stevens held that a juvenile judge is neither required to hold an evidentiary hearing nor give a statement of reasons for his decision to transfer a juvenile to a court of ordinary jurisdiction; Stevens reasoned that other procedures properly preserved the interests asserted by the plaintiff.

In sum, Stevens' opinions in the area of juvenile rights reveal that his conclusions of constitutional law are grounded in practical considerations which are the result of a fair-minded balancing approach. He demonstrates his paternalism in the view that the state often knows best how to fulfill the needs and protect the interests of misguided youths, and for that reason shows great deference to the interests of the state in performing its role as *parens patriae*. He unambiguously asserts, however, that a juvenile has due process rights which are protected by the Constitution and will not grant unfettered discretion to governmental authorities to "act arbitrarily with children merely because they are children."[112]

112. Vann v. Scott, 467 F.2d 1235, 1240 n.15 (7th Cir. 1972).

III. Criminal Constitutional Law

In the area of criminal constitutional law, Justice Stevens has written interesting opinions on the reasonableness of searches and seizures, the requirement of standing to challenge searches and seizures, fifth amendment confessions, the sixth amendment right to counsel, the due process rights of prisoners, and pretrial identification procedures. As the reader will discover, Justice Stevens' approach in these cases is hard to define. Continuing themes include the Justice's emphasis on the facts of the particular case, his general readiness to defer on questions of fact to the fact finder, and his use of a balancing test to determine whether the interest of the defendant is sufficiently important to outweigh that of the government. The opinions will be discussed in the order stated above.

A. Searches and Seizures

In appraising the reasonableness of a search and seizure, Justice Stevens' decisions reflect a balancing of the individual's expectation of privacy, the government's ability to anticipate and avoid the search and seizure, and the social interest that the search was intended to vindicate. The result of this balancing test is that Justice Stevens' fourth amendment cases evidence a strict examination of all the circumstances that might justify the government's invasion of the defendant's privacy. Justice Stevens has used this balancing approach in fourth amendment cases dealing with warrantless searches, a prisoner's fourth amendment rights, and consent searches.

The Supreme Court has consistently held that a search warrant is not required in certain "exigent circumstances." Under *Chimel v. California*,[113] warrantless searches incident to an arrest are permissible if limited to the defendant's person and the area within his immediate control.[114] In *Warden v. Hayden*[115] the Court held that a police officer's reasonable belief that his life or the lives of others are in danger constitutes exigent circumstances justifying a warrantless search.[116] *Ker v. California*[117] excused police officers from a California notice-demand statute if they reasonably believed that entry without notice would prevent the destruction of evidence.

In *United States v. Rosselli*,[118] Justice Stevens, writing for the

113. 395 U.S. 752 (1969).
114. *Id.* at 760.
115. 387 U.S. 294 (1967).
116. *Id.* at 298-99.
117. 374 U.S. 23 (1963).
118. 506 F.2d 627 (7th Cir. 1974).

majority, used a test stricter than the "reasonable belief of emergency" rationale and required the government to explain why it had neither attempted to obtain a warrant nor placed the defendant's apartment under surveillance.[119] In *Rosselli*, government agents having probable cause to believe that the defendant possessed a large quantity of marijuana proceeded to defendant's apartment. After the agents knocked on the apartment door, they heard a scuffling movement inside. The agents, upon hearing the noise, kicked in the door and entered. The government agents testified that they believed the defendant was about to destroy the evidence. Justice Stevens answered that the necessity of making an immediate search must be examined " . . . during the entire period after they [the police officers] had a right to obtain a warrant and not merely from the moment when they knocked at the front door."[120] Reasoning that the possibility of the destruction of evidence was foreseeable, Justice Stevens found that the government did not meet its burden of anticipating and avoiding the need to rely on an emergency justification.[121] Stevens added that the emergency involved no risk of danger to the lives of the officers or others and that society's interest in the destruction of the contraband would have been vindicated even without the warrantless entry.

In *Bonner v. Coughlin*,[122] Justice Stevens stated that incarceration does not necessarily strip a person of all constitutional protection. In that case, the Seventh Circuit held that a prisoner is entitled to prove an alleged taking of property constituted an unreasonable search and seizure. Bonner alleged that prison guards seized a copy of his trial transcript while conducting an authorized institutional shakedown. The district court held that Bonner had no right to relief against the guards because their reliance on a valid prison regulation established a good faith defense. In the Seventh Circuit's majority opinion, Stevens rejected the proposition that the fourth amendment does not apply to searches of a prisoner and his cell, but recognized that random shakedowns pursuant to administrative regulations may be reasonable within the meaning of the amendment because a prisoner does not share the same fourth amendment rights enjoyed by the unincarcerated members of society.[123] The case

119. *Id.* at 630.

120. *Id.*

121. *Id.* at 631.

122. 517 F.2d 1311 (7th Cir. 1975).

123. Justice Stevens rejected Bonner's argument that the prison regulation authorizing routine institutional shakedowns was unconstitutional on its face. Stevens asserted that the Court need not find the statute unconstitutional on its face because Bonner had stated a specific fourth amendment claim regarding the seizure of his trial transcript. *Id.* at 1314-15.

was remanded to the district court to afford the prisoner an opportunity to litigate the "reasonableness" of the seizure. In dicta, Stevens agreed that prisoners have the right to enjoy substantial religious freedom, to be free from invidious discrimination based on race, and to claim the protection of the due process clause.[124]

In *United States v. Dichiarinte*,[125] the Seventh Circuit recognized that a consent search is constitutional if the consent was voluntarily given,[126] but held that the government had exceeded the bounds of defendant's consent. Defendant contended that the police exceeded the scope of his consent to search his apartment, arguing that he had only consented to a search for narcotics. In the search, the police found personal papers that were instrumental in convicting defendant on tax evasion charges. After two evidentiary hearings, the trial court determined that defendant had consented to an unlimited search of his entire apartment. Justice Stevens dissented, arguing that the majority erred in retrying the fact question before the court. In light of the two evidentiary hearings held by the district court judge, Stevens maintained that the appeals court should defer to the district court's fact determination.

The three cases discussed above clearly indicate Justice Stevens' tendency to scrutinize carefully all of the circumstances in a search and seizure case before deciding whether the government's actions were reasonable. Stevens has rejected the application of narrow rules in examining fourth amendment cases and has preferred to balance the defendant's interest in privacy against the government's needs in a criminal investigation and society's interest in the object of the search. In *Rosselli*, Justice Stevens refused to apply a blanket emergency justification for warrantless searches. Instead, he used a balancing test to find that it was not reasonable to sanction the particular warrantless search in question. Likewise, in *Bonner*, Justice Stevens rejected the strict rule that a prisoner has no fourth amendment rights. He recognized the obvious need for surveillance and control in the prison context and balanced that need against the prisoner's interest in privacy. By deferring to the original fact finder in *Dichiarinte*, Justice Stevens maintained his position that fourth amendment cases should be decided through a careful case-by-case analysis of all the facts. In the same manner that he balanced the competing interests in *Rosselli* and *Bonner*, Justice Stevens looked to see which testimony the district court

124. *See* Cruz v. Beto, 405 U.S. 319 (1972); Haines v. Kerner, 404 U.S. 519 (1972); Lee v. Washington, 390 U.S. 333 (1968).

125. 445 F.2d 126 (7th Cir. 1971).

126. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

judge deemed credible and which he did not. This strong expression of deference to the trial judge's factual determinations reinforces the conclusion that in the fourth amendment area Justice Stevens is committed to a case-by-case analysis of both facts and competing policies.

B. Standing to Raise Fourth Amendment Claims

While on the Seventh Circuit, Justice Stevens considered whether a defendant charged with a possessory crime has "automatic" standing to seek suppression of evidence unlawfully seized. Although standing to contest the reasonableness of a search and seizure generally does not exist unless the challenging party owns or has some other interest in the property searched,[127] the Supreme Court has held that a defendant charged with a possessory offense has standing to challenge the seizure of the contraband without showing that the search or seizure violated any personal right of privacy. In *United States v. Jeffers*,[128] the Court held with little discussion that a defendant charged with possession of narcotics had standing to suppress drugs unlawfully seized although he lacked a property interest in the premises searched. Elaborating on this rule in *Jones v. United States*,[129] the Court held that a defendant charged with possession is not required to make a preliminary showing of an interest in the contraband in order to establish standing to contest its unlawful seizure. The Court limited the *Jones* case in *Brown v. United States*,[130] which held that a defendant had no automatic standing to contest a search and seizure when the possessory offense charged did not include as an essential element possession of the seized evidence at the time of the contested search and seizure.

Justice Stevens propounded a unique approach to the problem of standing in *United States v. Lisk*.[131] In *Lisk*, defendant was indicted for possession of a bomb on September 25, 1972. On that date, while retaining a proprietary interest in the bomb, defendant placed it in the trunk of an automobile owned by a third party. On September 30, police illegally searched the car and seized the bomb. Defendant sought to prevent admission of the bomb at trial, and the district court held he had automatic standing under *Jones* to object

127. *See, e.g.*, Agnello v. United States, 269 U.S. 20 (1925) (affirming the conviction of codefendants whose fourth amendment rights were not violated).

128. 342 U.S. 48 (1951).

129. 362 U.S. 257 (1960).

130. 411 U.S. 223 (1973).

131. 522 F.2d 228 (7th Cir. 1975).

to the seizure. The Seventh Circuit, in an opinion by Justice Stevens, held the doctrine of automatic standing under *Brown* inapplicable because the government did not base its case on defendant's possession of the bomb at the time of the search and seizure.[132] The court held further that ownership of the bomb conferred standing on defendant to object only to the seizure and not to the search. Because defendant had no standing to contest the search, Stevens reasoned, the seizure was analogous to seizure of evidence under the plain view rule and therefore was lawful. On petition for rehearing Stevens rejected defendant's contention that under *Jeffers* an interest in the seized property confers standing to challenge the search, and he suggested two other possible bases for the *Jeffers* holding: first, that Jeffers' interest in the premises as a regular invitee was sufficient to challenge the search and, second, that the search was "directed at" Jeffers.[133]

At a minimum, *Lisk* indicates that Justice Stevens is apt to scrutinize carefully the problem of standing to contest fourth amendment violations. The Supreme Court recently has suggested willingness to reexamine the area of automatic standing.[134] Although the defendant usually has an interest in both the property seized and the premises searched, splitting search and seizure in the area of automatic standing may make considerable sense, since in those cases the defendant's property is seized but his privacy is not invaded. The distinction, if adopted by the Supreme Court, will eliminate standing to raise fourth amendment claims for the defendant inadvertently incriminated by the unlawful search of another's property.

C. *The Fifth Amendment and Miranda*

Justice Stevens' decisions in the area of rights guaranteed by the fifth amendment and *Miranda v. Arizona*[135] evidence an attempt to balance the defendant's privilege against self-incrimination against the needs inherent in a particular government procedure. Justice Stevens agrees with Justice Rehnquist's position in *Michigan v. Tucker* that the procedural safeguards in *Miranda* are not themselves rights protected by the Constitution but are only recommended measures to protect one's privilege against self-

132. *Id.* at 230 n.2.

133. Stevens considered and distinguished language in both *Jones* and *Brown* which suggested that an interest in seized property alone conveys standing. *Id.* at 233 n.5.

134. In *Brown* the Supreme Court expressed doubt in the continuing vitality of the concept of automatic standing. 411 U.S. at 229.

135. 384 U.S. 436 (1966).

incrimination.[136] Justice Stevens' decisions also reflect his belief that *Miranda*'s teachings must be applied on a case-by-case basis. In that context Stevens has considered the problem of defining custody, whether the harmless error doctrine may apply in a proper case, and whether failure to give notice to defendant's counsel violates *Miranda*.

While *Miranda v. Arizona* requires that a defendant be advised of certain enumerated rights before interrogation,[137] this requirement obtains only in a custodial situation. *Miranda* defines custodial interrogation as "questioning initiated by law enforcement officials after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[138] Justice Stevens, writing for the majority in *United States v. Oliver*,[139] held that the defendant was entitled to *Miranda* warnings before an interview with Internal Revenue agents investigating a possible criminal violation of the tax laws.[140] The defendant had been the object of a tax investigation for several months when Internal Revenue agents interviewed him in their offices. Prior to any questioning, the government agents advised the suspect that he was not in physical custody and that he did not have to answer any incriminating questions.[141] Later, the government predicated its case on certain statements made by defendant in the interview. Justice Stevens noted that the statement read to the suspect by the agents was clearly inadequate if *Miranda* applied. Adopting the "deprivation of freedom of action test" used in *Miranda*, Justice Stevens decided that the application of *Miranda* turned on more than the presence of physical custody.[142] Thus Stevens required the giving of *Miranda* warnings if the practical result of the interrogation is to create in the suspect's mind a compulsion to make disclosures and if the investigation has focused on the suspect for the purpose of securing a conviction.

Justice Stevens has also considered the applicability of the harmless error doctrine to admission of evidence obtained in violation of *Miranda*. The Supreme Court in *Chapman v. California*[143]

136. Michigan v. Tucker, 417 U.S. 433, 444 (1974).

137. The Court in *Miranda* laid down certain procedural rules to safeguard the privilege against self-incrimination. These procedures must be adhered to in absence of ". . . other procedures which are at least as effective in apprising accused persons of their right of silence. . . ." *Id.* at 467.

138. *Id.* at 444.

139. 505 F.2d 301 (7th Cir. 1974).

140. *Id.* at 304.

141. *Id.* at 303 n.5.

142. *Id.* at 304-05.

143. 386 U.S. 18 (1967).

applied a harmless error standard to incriminating statements obtained in violation of the *Miranda* guidelines and used in the case in chief. The Court held that the introduction of illegally seized evidence was prejudicial and not harmless error if a reasonable possibility exists that the evidence contributed in any way to the conviction. In *Harrington v. California*,[144] however, the Supreme Court held that the evidence pointing to the petitioner's guilt was so "overwhelming" that even though a reasonable possibility existed that the illegally obtained evidence contributed to the conviction, the error was harmless.[145] In *United States v. Matos*,[146] the Seventh Circuit applied the *Chapman* test in holding that the admission of certain evidence violated the defendant's fifth amendment rights and constituted reversible error. The district court had admitted testimony that after his apprehension the defendant indicated a desire not to make a statement. The majority in *Matos* decided they could not reasonably conclude that the improper testimony did not contribute to Matos' conviction and reversed. In dissent, Justice Stevens maintained that the improper testimony was merely cumulative and that the error was harmless in light of repeated testimony that the defendant remained silent at times he would have spoken had he intended to return the stolen goods. Stevens candidly stated that he was not declaring that no juror could have entertained a reasonable doubt as to the defendant's guilt had the improper comment not been admitted.[147] Instead, he argued that in the context of all the evidence before the court the questioned testimony was relatively unimportant and, therefore, harmless.

Finally, Justice Stevens has considered whether interrogation of a defendant without first giving notice to his counsel violates the defendant's constitutional rights. If government agents know a defendant is represented by an attorney, obtaining testimonial evidence from the defendant without notice either to his attorney or himself has been held to violate the defendant's privilege against self-incrimination.[148] Some question existed after *Massiah v. United States*[149] whether the fifth amendment required notice to defendant's attorney before a statement of any kind could be elicited from the defendant. The majority of federal courts have taken the position that the police may question a prisoner known to be represented

144. 395 U.S. 250 (1969).
145. *Id.* at 254.
146. 444 F.2d 1071 (7th Cir. 1971).
147. *Id.* at 1077.
148. Massiah v. United States, 377 U.S. 201 (1964).
149. *Id.*

by counsel without notifying his lawyer of their presence so long as the prisoner deliberately and knowledgeably waives counsel's assistance.[150]

In *United States v. Springer*,[151] the Seventh Circuit decided that interrogation of a defendant without notice to his lawyer does not violate the fifth amendment if the defendant voluntarily foregoes the assistance of counsel. Two agents of the prosecutor visited the defendant in his prison cell without notice to the defense counsel and elicited a written confession to pending federal bank robbery and conspiracy charges. In a curt dissenting opinion, Justice Stevens stated that he considered the prosecutor's action unethical and a violation of the defendant's right to procedural due process.

Justice Stevens' *Miranda* decisions indicate a case-by-case balancing of the defendant's privilege against self-incrimination against other evidence in the case and the government's need for a particular procedure. In *Oliver*, Stevens balanced the nature of the government's inquiry and the defendant's understanding of his obligation to respond against the practical effect of compelling the defendant to make certain disclosures. A comprehensive analysis of the facts resulted in Justice Stevens' holding that *Miranda* warnings may be required even when the defendant is not in physical custody. In *Matos*, this same case-by-case determination is evident in Stevens' consideration of the impact of improper testimony in the context of all the evidence. Concluding that the error was harmless, Stevens refused to apply the strict *Chapman* rule and instead weighed the effect of the improper testimony against the effect of other overwhelming evidence pointing to the defendant's guilt. Finally, in *Springer*, Stevens measured the value of the prosecutor's questionable conduct against the defendant's privilege against self-incrimination and concluded that prosecutorial interrogation without notice to defense counsel is unethical and violates due process. Thus, as in the fourth amendment area, Justice Stevens examines in detail all policy considerations in a case and weighs them before determining whether a particular procedure violates the defendant's rights under *Miranda*.

D. Right to Counsel

Justice Stevens considered two types of right to counsel problems while on the Seventh Circuit: whether the right to counsel

150. *See* United States v. Vasquez, 476 F.2d 730 (5th Cir.), *cert. denied*, 414 U.S. 836 (1973); Coughlan v. United States, 391 F.2d 371 (9th Cir.), *cert. denied*, 393 U.S. 870 (1968).

151. 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972).

attaches at a particular stage of a criminal proceeding and whether assistance of counsel is effective within the meaning of the sixth amendment. In *Mempa v. Rhay*[152] the Supreme Court held that deferred sentencing at a probation revocation hearing is a "critical stage" affording defendant a right to counsel. The Seventh Circuit considered the applicability of *Mempa* to a parole release hearing in *Ganz v. Bensinger*.[153]

In *Ganz*, an indigent prisoner claimed a right to counsel at a parole release hearing,[154] urging that the hearing was the practical equivalent of sentencing and a "critical stage" in the proceedings because it actually determined the amount of time served. Announcing the opinion of the court, Justice Stevens agreed that the hearing was in a sense critical but rejected plaintiff's claim because the hearing was not a stage of a criminal prosecution. Stevens distinguished *Mempa v. Rhay*, holding that the right to counsel at a hearing determining the length of imprisonment is limited to hearings of a judicial nature.

Decisions on whether a criminal defendant has received effective assistance of counsel are peculiarly fact based, making generalization difficult. In *Nichols v. Gagnon*,[155] appointed counsel advised the appellate court by letter that he could find no merit to the appeal of his client's conviction and detailed possible points of error in the letter, demonstrating their insufficiency. Stevens found that defendant was not denied effective assistance of counsel. Stevens rejected the idea that effective assistance requires appointed counsel to brief every arguably appealable issue along with his request to withdraw.[156] In *Macon v. Lash*,[157] petitioner lost his right to appeal a murder conviction because appointed counsel failed to file a timely motion for a new trial. Writing for the court, Stevens held

152. 389 U.S. 128 (1967).

153. 480 F.2d 88 (7th Cir. 1973).

154. Plaintiff also claimed a right to counsel under the due process and equal protection clauses of the fourteenth amendment. Stevens summarily rejected the due process argument, citing Gagnon v. Scarpelli, 411 U.S. 778 (1973) (no right to counsel at a probation revocation hearing). Plaintiff's equal protection argument, based on the nonindigent's right to retain counsel at a parole release hearing, was also rejected. Stevens observed that lack of counsel does not necessarily bar the indigent's opportunity to obtain parole. *See also* Kirby v. Illinois, 406 U.S. 682 (1972) (holding that pre-indictment identification is not a stage of criminal prosecution).

155. 454 F.2d 467 (7th Cir. 1971).

156. Appellant argued that since nonindigents could retain counsel to argue even meritless appeals, appointed counsel should provide the same quantity of representation. Stevens observed: "Every defendant does not have the constitutional right to be represented by Clarence Darrow. Perfect equality between indigents and nonindigents . . . is impossible to achieve." *Id.* at 472.

157. 458 F.2d 942 (7th Cir. 1972).

that "petitioner's right to appeal could not be forfeited by the critical error of inexperienced court-appointed counsel . . . ."[158] Finally, in *Wimberley v. Laird*,[159] Stevens held that the failure of trial counsel to argue the defense of insanity in a murder trial or to offer other mitigating evidence did not constitute a denial of effective assistance because counsel's failure to raise the defense could be construed as a trial tactic.

Conclusions based on such a limited amount of material are, of necessity, limited. The *Ganz* case indicates a disinclination to extend the right to counsel beyond its present boundaries. In the effective assistance cases, Stevens seems reluctant to interfere with tactical decisions at trial but does not permit forfeiture of important rights by minimally qualified counsel.

E. Due Process Rights of Prisoners

In *United States ex rel. Miller v. Twomey*,[160] Justice Stevens, writing for the majority, considered the relationship between the due process requirements of *Morrissey v. Brewer*[161] and certain aspects of internal prison administration. In *Morrissey*, a parole revocation case, the Supreme Court held that one "condemned to suffer a grievous loss" of any interest "within the contemplation of the 'liberty or property' language of the Fourteenth Amendment" is entitled to some measure of due process.[162] Appellants in *Miller* argued that some safeguards of procedural due process are required before statutory "good time" credits may be revoked[163] or punitive segregation imposed.[164] Although persuaded that *Morrissey* stands for the broad principle that "liberty protected by the due process clause may—indeed must to some extent—coexist with legal custody pursuant to conviction,"[165] Stevens maintained that procedural safeguards attach only when the disciplinary actions taken by prison officials inflict a "grievous loss" on the prisoner. Stevens then

158. *Id.* at 950.

159. 472 F.2d 923 (7th Cir. 1973).

160. 479 F.2d 701 (7th Cir. 1973). For further discussion of this case see notes 326-30 *infra* and accompanying text.

161. 408 U.S. 471 (1972).

162. *Id.* at 481.

163. Good time credit systems may reduce the maximum sentence served or accelerate the parole eligibility date based on the prisoner's "good behavior."

164. One of the cases consolidated on appeal concerned liability of prison officials for failing to segregate a dangerous prisoner from plaintiff and will not be discussed in text. 479 F.2d at 719-21.

165. 479 F.2d at 712.

found that revocation of good time credits[166] and punitive segregation[167] constitute grievous losses. Having determined, however, that *Morrissey* mandates some measure of due process, Stevens pared down the six procedural safeguards required by *Morrissey* for parole revocation[168] to three requirements for good time revocation and punitive segregation: advance written notice; an opportunity to be heard and to present witnesses; and an impartial decision maker. Stevens deferred to state prison officials to determine the applicability of other *Morrissey* safeguards.

As the dissent points out, this is a restrictive application of *Morrissey*.[169] Stevens cautiously limited constitutional change in this area of criminal procedure. Since he did not state any reasons for restriction of *Morrissey* other than deference to the expertise of prison officials, one may surmise that Justice Stevens will not favor extension of additional procedural rights to prisoners in post conviction proceedings.

F. Pretrial Identification Procedures

In *United States ex rel. Kirby v. Sturges*,[170] Justice Stevens held that admission of evidence derived from a showup identification does not violate due process if the identification is reliable. Petitioner contended that the due process clause requires per se exclusion of evidence derived from an unnecessarily suggestive identification procedure[171] and, alternatively, that the police station showup

166. One appellant had lost a total of 21 months of good time credits through disciplinary proceedings.

167. Stevens found that punitive segregation was a substantial deprivation of liberty compared with normal prison status.

168. The *Morrissey* Court held that minimal requirements of due process in parole revocation include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . . ; (e) a "neutral and detached" hearing body . . . ; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

408 U.S. at 489.

169. 479 F.2d at 721 (Swygert, C.J., dissenting in part).

170. 510 F.2d 397 (7th Cir. 1975). In a limited grant of certiorari the Supreme Court in Kirby v. Illinois, 406 U.S. 682 (1972), considered Kirby's sixth amendment challenge to the pre-indictment showup, holding that the right to counsel does not attach prior to the initiation of criminal proceedings.

171. The Supreme Court in *Neil v. Biggers* considered whether such a per se exclusionary rule should be adopted to deter police from using a less reliable procedure but did not reach the question since the confrontation in *Biggers* took place before *Stovall v. Denno* and put police on notice of the new weight to be given suggestive procedures. 409 U.S. 188, 198-99 (1972).

in question deprived him of due process of law.[172] Deciding both issues against petitioner, Stevens affirmed the denial of a writ of habeas corpus.

Although Stevens found that a per se exclusionary rule for suggestive procedures would be desirable for a number of reasons and quoted dicta in *Biggers* suggesting that the Supreme Court might favor its adoption,[173] he held that such a rule could not be imposed on the states through the due process clause of the fourteenth amendment. Stevens noted that the Supreme Court twice had held that admitting evidence of a showup did not necessarily violate requirements of due process.[174] Assuming that trial judges could distinguish an unconstitutional identification procedure by applying the totality of the circumstances standard set out by the Supreme Court,[175] Stevens found that the only basis for a per se exclusionary rule—deterrence of undesirable police conduct—did not give the court the constitutional power to impose the rule on states in the Seventh Circuit.

Stevens next considered whether the totality of the circumstances in the instant case disclosed a deprivation of due process. Stevens isolated three factors that determine whether an identification procedure violates due process: suggestiveness; lack of justification; and reliability. Applying the factors to the instant case, Stevens recognized that the showup procedure was inherently suggestive and that the police had offered no justification for the use of this procedure rather than the less suggestive lineup. Stevens, however, found that these two facts do not deprive the defendant of due process if the identification is reliable,[176] and he concluded that the identification in the instant case was sufficiently reliable.

In *Kirby*, Justice Stevens conservatively construed the consti-

172. The Court in *Kirby v. Illinois* reaffirmed the validity of a due process attack on suggestive identification procedures but reserved the question of "whether there might have been a deprivation of due process in the particularized circumstances of this case . . . for inquiry in a federal habeas corpus proceeding." 406 U.S. at 691 n.8.

173. The Court noted:

> The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, and would not be based on the assumption that in every instance the admission of evidence of such a confrontation offends due process.

Neil v. Biggers, 409 U.S. 188, 199 (1972).

174. 409 U.S. 188 (1972); Stovall v. Denno, 388 U.S. 293 (1967).

175. 409 U.S. 188, 199-200 (1972).

176. In *Biggers*, the Supreme Court held that although the showup was gratuitously suggestive, defendant bad not been deprived of due process since the identification was reliable. The Court listed a number of factors useful in evaluating reliability, which were used by Justice Stevens in the instant case. 510 F.2d at 404.

tutional power to impose a new type of exclusionary rule on the states under the due process clause. It is worth noting that Stevens emphasized the deterrent value of such a rule without mention of any argument concerning judicial integrity, long a factor cited by the Supreme Court in support of the exclusionary rule for fourth amendment violations.[177] It is possible that Justice Stevens will continue to follow this analysis in considering the exclusion of evidence under the fourth and fifth amendments. Stevens adhered to the approach of the *Biggers* decision in his disposition of Kirby's claim of a specific due process violation. Although resolution of the issue therefore turned on the reliability of the identification under the particular facts, the holding itself may have some predictive value since the identification was not clearly reliable or unreliable. *Kirby* indicates that Justice Stevens will uphold a due process attack on showup identifications only in the egregious case.

G. Double Jeopardy

While Justice Stevens was on the Seventh Circuit he participated in several cases presenting difficult questions of double jeopardy. Under the greater weight of authority, jeopardy attaches in a jury trial when the jury has been impaneled and sworn[178] and in a nonjury trial when the court begins to hear evidence.[179] It is well settled that an acquittal cannot be appealed without putting the defendant twice in jeopardy, even though the acquittal is not followed by any judgment.[180]

In *United States v. Ponto*,[181] Stevens disagreed with the holding of the majority that the dismissal of an indictment operated as an acquittal on the merits, barring a government appeal. Defendant was indicted for failure to submit to induction into the Armed Services. The majority reasoned that the district court's dismissal of the indictment based on defendant's objections to the local board's classification procedure was an evaluation of an affirmative defense on the merits and should therefore have the effect of an acquittal. Justice Stevens urged that the double jeopardy clause did not apply because the preliminary proceedings had not been considered by either party as part of the trial and because no jury had been waived

177. *See* Mapp v. Ohio, 367 U.S. 643 (1961). *But cf.* United States v. Calandra, 414 U.S. 338 (1974).

178. Downum v. United States, 372 U.S. 734 (1963).

179. McCarthy v. Zerbst, 85 F.2d 640 (10th Cir.), *cert. denied*, 299 U.S. 610 (1936).

180. United States v. Sisson, 399 U.S. 267, 289-90 (1970).

181. 454 F.2d 647 (7th Cir.), *rehearing en banc*, 454 F.2d 657 (7th Cir. 1971).

or impaneled.[182]

In *United States v. Walker*,[183] Justice Stevens, writing for the majority, considered again whether dismissal of an indictment operated as an acquittal that would bar a government appeal under the double jeopardy clause. The district court dismissed an indictment charging the defendant with transportation of a firearm in interstate commerce[184] after discovery disclosed that the prior transportation in commerce was unrelated to defendant's possession. Stevens distinguished *Ponto*, noting that dismissal in the instant case was based on an inaccurate charge and not on an affirmative defense as in *Ponto*, and concluded that the dismissal did not operate as an acquittal on the merits.

In *United States v. Haygood*,[185] Stevens again considered whether jeopardy could attach prior to trial. In sentencing appellant on the first of two related charges pending before different district judges, the judge in the first case considered and relied on the pending charge in the second. Appellant contended that the double jeopardy clause barred further prosecution of the second case. Holding that the judge's consideration of the pending charge did not place appellant in jeopardy, Stevens maintained:

> Appellant's claim that procedural error was nevertheless committed is supported by the policies which undergird the constitutional protection against double jeopardy. . . . The constitutional protection is intended to forestall such unfairness and to give a defendant the right to one final disposition of pending charge.[186]

The court disposed of the case on the ground that defendant had failed to make timely objection to this procedural error.

Haygood lends support to the hypothesis that Justice Stevens is not unsympathetic to the policies and problems of double jeopardy claims. *Ponto* and *Walker*, however, indicate that Stevens is disinclined to extend the protections of double jeopardy unless jeopardy has attached in the traditional sense—impaneling of a jury or hearing of the evidence in a nonjury trial.

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182. Stevens supported his argument by reference to the Federal Rules of Criminal Procedure, which do not provide for the entry of a judgment of acquittal until "after the evidence on either side is closed." FED. R. CRIM. P. 29.

183. 489 F.2d 1353 (7th Cir. 1973), *cert. denied*, 415 U.S. 982 (1974).

184. Title VII, Omnibus Crime Control and Safe Streets Act of 1968, § 1202(a), 18-App. U.S.C. § 1202(a) (1970).

185. 502 F.2d 166 (7th Cir. 1974).

186. *Id.* at 169.

IV. Federal Statutory Law

The Supreme Court devotes a major portion of its time to deciding cases arising under federal statutory law. The diversity and complexity of these cases are so well recognized that commentary is perhaps superfluous. Justice Stevens has not written a large number of opinions in any single statutory area. He has written on the subjects of securities law, antitrust law, federal tax law, Title VII of the Civil Rights Act of 1964, labor law, and the award of attorney fees. In most of these areas, with a notable exception in securities law, he has not considered particularly novel or difficult questions. Nevertheless, his opinions do lend insight to the ways in which he approaches construction of statutes. His opinions will be discussed in the order stated above.

A. Securities Law

Justice Stevens' Seventh Circuit opinions[187] in the area of federal securities law involve many of the most frequently litigated securities issues, including the scope of an underwriter's liability under Rule 10b-5, the definition of a security, liability for short swing profits under section 16(b), and standing under Rule 10b-5 (a pre-*Blue Chip*[188] case). The Supreme Court has stressed that in analyzing alleged securities law violations courts should concentrate on the substance rather than the form of the transaction.[189] Justice Stevens has used this approach to fashion remedies that take into consideration the character of the parties, the degree of the injury sustained, the nature of the specific transaction, and legislative and judicial policies.

In *Sanders v. John Nuveen & Co.*[190] Stevens appears to extend substantially an underwriter's liability under Rule 10b-5 for the fraud of his issuer. Nuveen[191] entered the commercial paper business in 1968 by acquiring a broker who represented forty issuers, one of which was Winter & Hirsch, Inc. (WH). Nuveen reviewed WH's semiannual financial statements, which the certified public ac-

187. Of the seven opinions available, Justice Stevens wrote the majority opinion in five, dissented in one, and concurred in one.

188. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), approved the rule of Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), *cert. denied* 343 U.S. 956 (1952), that plaintiff must be a purchaser or a seller of securities to initiate an action under section 10(b) and Rule 10b-5.

189. *See* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

190. 524 F.2d 1064 (7th Cir. 1975).

191. Nuveen operated 17 branch offices in various locations throughout the United States. It dealt primarily in tax exempt securities.

counting firm of Liber, Bleiweis & Company prepared, and it employed a credit analyst to spend a day at WH's offices examining receivables and collection procedures. Since this investigation exposed no problems, Nuveen began underwriting and selling WH commercial paper.[192] Some months later, Nuveen[193] again reviewed WH's latest certified financial statements and received on inquiry either neutral or favorable credit reports from ten banks who had extended credit to WH. In 1970 two lenders insisted that a firm other than Liber, Bleiweis audit WH. The new accountants discovered that WH had not filed federal income tax returns for 1969, that they could not reconcile the general ledger with the net worth statement prepared by Liber, Bleiweis, that assets were overstated by $14 million and liabilities understated by $1.75 million, and that WH and Liber, Bleiweis had falsified records for ten years to conceal WH's hopeless insolvency. Nuveen immediately stopped selling WH paper.[194] Three weeks later, the plaintiff initiated this class action alleging that Nuveen[195] had violated its duty as an underwriter under the federal securities laws by selling WH commercial paper without having first made a reasonable investigation of the issuer.[196]

Authoring the Seventh Circuit opinion, Justice Stevens affirmed the lower court's conclusion that Nuveen had violated section 10(b) of the Securities Exchange Act and Rule 10b-5. Stevens stated that the standard for liability under Rule 10b-5 could be phrased differently in different circumstances[197] and expressly refused to decide whether a generally applicable standard of culpability in Rule 10b-5 cases exists. He emphasized Nuveen's status as an underwriter in determining the nature of Nuveen's duty to his customers to investigate:

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192. The paper sold by Nuveen, including WH notes, was rated "Desirable"—the second highest category—by a subsidiary of Standard and Poor. Between September 1968 and February 1970, when WH defaulted, Nuveen purchased and sold substantially all of WH's commercial paper.

193. By this time Investors Syndicate of America, Inc., a wholly owned subsidiary of Investors Diversified Services, had acquired all of Nuveen's stock. The senior vice-president of the parent became a Nuveen director and assumed responsibility for the commercial paper operation.

194. The face amount of the commercial paper outstanding at the time of default was $1,661,500, represented by 56 notes held by 44 firms or individuals.

195. Investors Diversified Services, Inc. and Investors Syndicate of America, Inc. are defendants involved as "controlling persons" whose liability under § 20 of the Securities Exchange Act, 15 U.S.C. § 78t (1970), occurs only if Nuveen is first held liable.

196. The complaint as amended asserted claims under §§ 12(2) and 17 of the Securities Act of 1933, §§ 10(b) and 20 of the Securities Exchange Act of 1934, and Rule 10b-5 of the Securities and Exchange Commission.

197. 524 F.2d at 1069.

> An underwriter's relationship with the issuer gives the underwriter access to facts that are not equally available to members of the public who must rely on published information. And the relationship between the underwriter and its customers implicitly involves a favorable recommendation of the issued security. Because the public relies on the integrity, independence and expertise of the underwriter, the underwriter's participation significantly enhances the marketability of the security. And since the underwriter is unquestionably aware of the nature of the public's reliance . . . the mere fact that he has underwritten it is an implied representation that he has met the standards of his profession in his investigation of the issuer. (footnotes omitted)[198]

Stevens distinguished the duty of the underwriter from that of the broker-dealer, stating that unlike the broker-dealer the underwriter may not rely on published data in recommending a security.[199] He said the underwriter must go further to satisfy his duty to investigate because he alone has the intimate relationship with the issuer upon which the investor relies. Stevens stated that the fraud probably would have been discovered if Nuveen had examined WH's federal tax returns, corporate minute books, or accounting work papers and held that investigation of these documents was a part of the underwriter's obligation to investigate.[200]

No other case has been unearthed by the author that would require an underwriter of commercial paper to investigate either tax returns or accounting work papers of the issuer in addition to the investigation Nuveen conducted. Stevens held that the underwriter must investigate these documents to have a "reasonable basis for concluding that the issue is sound."[201] This requirement of a reasonable basis apparently establishes a negligence standard of culpability under Rule 10b-5 for an underwriter in the Seventh Circuit,[202] but the practical consequences of the extent of the investigation required may be that the underwriter in effect becomes a guarantor. When this apparent negligence standard of culpability is coupled

198. *Id.* at 1069-70. Apparently, credit reports on issues of commercial paper were prepared by Nuveen and given to customers.

Stevens' view is that an underwriter's duty to conduct a reasonable investigation is the same under the standards of § 11 of the Securities Act of 1933 and Rule 10b-5. 524 F.2d at 1070 n.18.

199. Nuveen argued that its duty of disclosure encompasses only " 'facts which he knows and those which are reasonably ascertainable.' " 524 F.2d at 1070.

200. In Sanders v. John Nuveen & Co., 463 F.2d 1075 (7th Cir.), *cert. denied*, 409 U.S. 1009 (1972) the WH commercial paper was found to be a "security" within the meaning of Securities Exchange Act of 1934.

201. 524 F.2d at 1071.

202. The Seventb Circuit's position on the standard of culpability required in a private Rule 10b-5 action, although unclear for some time, appears to be headed in the direction of imposing a negligence standard. Dasho v. Susquehanna Corp., 461 F.2d 11 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972); Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972); Kohler v. Kobler Co., 319 F.2d 634 (7tb Cir. 1963).

with the extent of investigation required, an onerous duty is imposed on underwriters that seems practically and economically unrealistic to execute.

An equally interesting example of Justice Stevens' willingness to observe the particular transaction as a whole occurs in his dissenting opinion in *Alberto-Culver Co. v. Scherk*.[203] In that case, Alberto-Culver, an American company that manufactures cosmetics, decided to acquire three foreign business entities[204] owned by Fritz Scherk, a German citizen. Following extensive negotiations in Europe and the United States, a contract signed in Vienna provided that Alberto-Culver would receive Scherk's assets, including certain trademarks, in exchange for cash and promissory notes.[205] An arbitration clause stated that the International Chamber of Commerce in Paris would arbitrate any controversy arising out of the agreement.[206] Alberto-Culver later discovered that the acquired trademarks were encumbered, and it sued for damages under Rule 10b-5,[207] alleging that Scherk had made fraudulent representations concerning the trademarks. Scherk sought to stay the action and to arbitrate as agreed in the contract. Holding for Alberto-Culver, the district court cited *Wilko v. Swan*,[208] which held that a purchaser could not waive the protection of the Securities Act of 1933[209] by agreeing to arbitrate disputes. In a 2-1 decision, the Seventh Circuit affirmed, Justice Stevens dissenting.[210]

Relying primarily on *The Bremen v. Zapata Off-Shore Co.*,[211] Stevens argued for enforcement of the arbitration clause. He reasoned that Congress did not intend the Securities Exchange Act of 1934 to obstruct acquisitions of foreigu businesses and that strong policies support the settlement of disputes by arbitration in international business disputes.[212] Stevens argued that the main purpose of

203. 484 F.2d 611 (7th Cir. 1973) (Stevens, J., dissenting), *rev'd*, 417 U.S. 506 (1974). The American Arbitration Association was granted permission to participate in oral argument, 416 U.S. 954 (1974), and to submit an amicus curiae brief, 415 U.S. 987 (1974). The Supreme Court reversed on the merits, 417 U.S. 506 (1974), upholding the parties' arbitration clause.

204. The entities, organized under the laws of Germany and Liechtenstein, were engaged in the manufacture of cosmetics and in the licensing of trademarks for their products.

205. The promissory notes were held to be "securities" subject to the Securities Act.

206. The contract further provided that the laws of Illinois would govern the agreement, its interpretation, and its performance.

207. Alberto-Culver first had tendered back to Scherk the assets acquired, but Scherk had refused the tender.

208. 346 U.S. 427 (1953).

209. *See* Securities Act of 1933, § 14, 15 U.S.C. § 77n (1970).

210. 484 F.2d 611, 615 (7th Cir. 1973).

211. 407 U.S. 1 (1972).

212. 484 F.2d at 616.

the securities acts is to protect unsophisticated investors. Based on this premise, he distinguished *Wilko* because the plaintiff there was unsophisticated. He emphasized that Alberto-Culver and Scherk were equally sophisticated parties who entered into a negotiated transaction and that the circumstances justified both an audit or verification of the property exchanged and the establishment of means to resolve possible disputes. Stevens further reasoned that obstacles to waiving the benefits of the 1934 Act should be reduced to the extent that an investment decision is made independent of the protection of the Act. Turning finally to the anti-waiver provisions of the securities acts, Stevens found that section 29(a)[213] of the 1934 Act did not negate the arbitration clause because enforcement of the arbitration provision resulted in a waiver only of plaintiff's right to sue under section 27 of the Act and not of the defendant's obligation to comply with the 1934 Act. Secondly, Stevens held section 14[214] of the 1933 Act inapplicable because *Wilko* established, primarily on policy grounds, that the plaintiff is prohibited from waiving his right to sue only prior to the time that the dispute arises. Finding no other statutory barrier, Stevens concluded that the dispute between Alberto-Culver and Scherk over trademark deficiencies was precisely the kind of dispute that should be resolved by arbitration. Upon hearing *Alberto-Culver*,[215] the Supreme Court reversed and upheld the arbitration provisions, relying on the Arbitration Act of 1925[216] and policies similar to those expressed by Stevens.

Justice Stevens' emphasis on the economic and legal consequences of his decisions also can be seen in *Eason v. General Motors Acceptance Corp.*[217] In that Rule 10b-5 action Stevens rejected the narrow *Birnbaum* rule[218] in favor of the following test for standing: "whether the plaintiffs were members of the class for whose special benefit Rule 10b-5 was adopted."[219] Stevens reasoned that *Birnbaum's* purchaser-seller limitation was inconsistent with the overriding requirement that " 'form should be disregarded for sub-

213. "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." 15 U.S.C. § 78cc(a) (1970).

214. "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subtitle or of the rules and regulations of the Commission shall be void." 15 U.S.C. § 77n (1970).

215. 417 U.S. 506 (1974).

216. 9 U.S.C. § 1 (1970).

217. 490 F.2d 654 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

218. Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

219. 490 F.2d at 658.

stance and the emphasis should be on economic reality' "[220] in construing the 1934 Act. It might be short-sighted to assume that the Supreme Court's affirmance of the narrow *Birnbaum* rule in *Blue Chip Stamps v. Manor Drug Stores*[221] forecloses Stevens' reasoning in *Eason*. Although the Court in *Blue Chip* had the opportunity to overrule *Superintendent of Insurance v. Bankers Life & Casualty Co.*,[222] it did not do so, and the factual situation in *Eason* is somewhat analogous to that in *Banker's Life*.

Viewed in the aggregate, these cases show that Justice Stevens will be likely to apply an analysis in securities cases stressing the policies of the relevant statutes and the economic consequences of the Court's holding. In *Alberto-Culver* he stressed the economic consequences of the decision, observing that "[a]n excessively paternalistic attitude toward American overseas investment will inevitably make American capital less attractive to foreign firms."[223] He further observed that price or acceptability of the transaction in the international marketplace may depend on the ability to agree upon a neutral forum.[224] Similarly, in *Eason* Stevens extended the protection of Rule 10b-5 to a class of injured plaintiffs who might otherwise go uncompensated.[225] In many factual situations Stevens' approach seems likely to result in an expansion of the perimeter of liability both with respect to the number of possible plaintiffs and defendants, as in *Eason*, and with respect to the scope of liability of any one defendant, as in *Nuveen*.[226]

B. Antitrust

Justice Stevens is known for his experience in the area of antitrust law. His activities prior to his appointment to the Seventh

220. *Id.* at 659. Compare *Eason* with Milnarik v. M-S Commodities, Inc., 457 F.2d 274 (7th Cir.), *cert. denied*, 409 U.S. 887 (1972) in which Justice Stevens, applying the *Howey* test to a discretionary commodities futures trading account with a broker, found a lack of commonality and thus no investment contract.

221. 421 U.S. 723 (1975); *see* note 188 *supra*.

222. 404 U.S. 6 (1971). Stevens relied on this case in *Eason*.

223. 484 F.2d at 616.

224. *Id.* at 617.

225. Compare *Eason* with *Milnarik*, in which Stevens found that a discretionary commodity futures trading contract with a broker was not an "investment contract" under *Howey*, even though similar contracts were held with other customers. *See* note 220 *supra*.

226. In Mueller v. Korholz, 449 F.2d 82 (7th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972), Stevens' substance-over-form approach resulted in a finding that the defendant-director had not realized any profit in a transaction challenged in an action to recover "short-swing" profits under § 16(b) of the Securities Exchange Act of 1934. In *Mueller*, Stevens rejected as unrealistic the Second Circuit's harsh appraisal method that attempts to " 'squeeze out all possible profit.' " *Id.* at 87.

Circuit have included the following positions: associate counsel to the House of Representatives subcommittee on Study of Monopoly Power; member of the Attorney General's National Committee to Study the Antitrust Laws; lecturer on antitrust law, Northwestern and University of Chicago Law Schools.[227] While sitting on the bench, however, Justice Stevens has reviewed few decisions in the area. This may be attributable to his short term on the bench, as well as to the Expediting Act of 1903,[228] which, prior to amendment in 1975, provided for direct appeal of government-instituted civil actions under the Sherman Act to the Supreme Court. Consequently, an attempt to analyze Stevens' judicial posture toward the control of private economic power would be inappropriate. Some tentative conclusions, however, can be made as to the manner in which he decides antitrust cases.

Justice Stevens brings to the Supreme Court a practical approach to the economic issues that form the policy bases for antitrust decisions. In order to accomplish the goal of eliminating unreasonable restraints on trade, courts necessarily must examine the economic effects of challenged business practices. Stevens displayed a pragmatic, effect-oriented approach in fashioning relief in *Protectoseal Co. v. Barancik*,[229] a suit brought under section 8 of the Clayton Act.[230] In addition to dissolving an interlock[231] of two competing corporations, he enjoined defendant from voting his shares in elections of the board of directors. Although the statute expressly prohibits only direct interlocks, the relief granted more effectively guards against an individual's exerting influence simultaneously over competing corporations.[232] By prohibiting the creation of an

227. 2 WHO'S WHO IN AMERICA 2959 (38th ed. 1974).

228. 15 U.S.C. §29 (1970), *as amended*, 15 U.S.C.A. § 29 (Supp. I, 1975).

229. 484 F.2d 585 (7th Cir. 1973).

230. 15 U.S.C. § 19 (1970).

231. An interlock is created when an individual is simultaneously:

> . . . [a] director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, . . . if such corporations are or shall have heen theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

15 U.S.C. §19 (1970).

232. A direct interlock, as proscribed by the statute, involves actual membership on the boards of directors of two competing corporations. An indirect interlock, which the statute does not outlaw expressly, occurs when a member of the board of one corporation exercises his power to hand-pick a director on the competitor's board. The ultimate anticompetitive effect would be the saine for both direct and indirect interlocks. *See* Kramer, *Interlocking Directorships and the Clayton Act after 35 Years*, 59 YALE L.J. 1266 (1950).

indirect interlock, Stevens implemented the policy, if not the language, of section 8. He took a similarly pragmatic approach in *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*[233] In that case Stevens' majority opinion held that a violation of the Patent Office's confiict of interest rules by a business defendant justified a finding of an attempt to monopolize because such abuse, if unchecked, would result in an extension of a protected monopoly.

The assessment of Stevens' approach as pragmatic is buttressed by his heavy reliance on factual considerations. In *Avnet, Inc. v. FTC*,[234] the Commission had ordered defendant to divest an acquired subsidiary. Stevens extensively examined the product market definition propounded by the FTC.[235] In doing so he displayed an ability to manage large accumulations of data while remaining aware of the economic impact the challenged conduct would have. His fact-oriented analysis in determining the propriety of uses of economic power in society may be a continuing characteristic of his judicial career.

Justice Stevens displays a strictly ordered concept of the federal system. The analysis in *Corning Glass Works v. FTC*[236] suggests his outlook on the division of powers between state and federal government. In construing the McGuire Act[237] as solely a grant of regulatory autonomy to the states, rather than an indication of federal approval of resale price maintenance, Stevens exhibits reluctance to condone federal encroachment on matters traditionally left to the states. His perception of the balance between the legislative and judicial functions is demonstrated in *Mullis v. Arco Petroleum Corp.*[238] While recognizing considerations that favor prohibiting refiners from terminating their distributors during shortages, Stevens declined to carry out such a policy by narrowly interpreting the relevant market in a monopolization action brought by a distributor. He emphasized that the implementation of such a policy was traditionally a legislative function and that the Sherman Act re-

233. 452 F.2d 579 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972).

234. 511 F.2d 70 (7th Cir.), *cert. denied*, 96 S. Ct. 56 (1975).

235. In reviewing the determination, Stevens included these factual considerations: defendant's conception of the submarket as separate and distinct; wide price differentiation between the products sought to be included in a wider market definition; lack of price responsiveness between the products; and functional differences in the manner of the products' use after sale by the manufacturer.

236. 509 F.2d 293 (7th Cir. 1975).

237. 15 U.S.C. § 45(a)(2)-(6) (1970), repealed effective Mar. 13, 1976, Pub. L. No. 94-145, 89 Stat. 801.

238. 502 F.2d 290 (7th Cir. 1974).

quired the courts to eliminate, not to implement, extra-legislative regulation.

Stevens seems to utilize a fact-oriented, pragmatic approach in reaching his decisions, and he appears reluctant to exercise judicial power in a manner that infringes upon the traditional boundaries of the federal system. These conclusions seem to be in accord with analysis of his decision-making in other areas of the law. Although the cases add little to knowledge of Stevens' posture in antitrust cases, his experience in the field indicates that he should be an important figure in future Supreme Court antitrust decisions.

C. *Federal Taxation*

The several decisions in which Justice Stevens has addressed provisions of the Internal Revenue Code uniformly evidence a dedication to implementing federal tax policy strictly according to the expressed intent of Congress. Stevens' reasoning in *L.C. Thomsen & Sons, Inc. v. United States*[239] presents a prime example. The issue before the court involved a corporation's treatment of life insurance proceeds received from a policy it had taken out on the life of its sole distributor. Relying upon section 101, the taxpayer excluded the proceeds from its gross income. The Service disallowed the exclusion because the insurance had been purchased to guarantee collectibility of the distributor's indebtedness to the taxpayer, and the taxpayer was now writing off the indebtedness as uncollectible.[240] The Service argued that the court should construe the statute to prevent the taxpayer from receiving the "double benefit" of both a bad debt deduction and an exclusion of the insurance proceeds. The court, however, held for the taxpayer. Unpersuaded by the apparent inequity of the situation, Stevens stated:

> Perhaps . . . if Congress were squarely faced with the policy question whether on facts like these some adjustment—possibly a *pro tanto* inclusion of a portion of the proceeds in gross income—would be appropriate, it might authorize that result. But on this appeal we may only decide the issue before us on the basis of the statute as now written.[241]

Likewise, Stevens' powerful dissent in *Economy Finance Corp. v. United States*[242] emphasizes his refusal to substitute his judgment for that of Congress. The issue presented was whether the taxpayer

239. 484 F.2d 954 (7th Cir. 1973).

240. At the time of his death the distributor owed the taxpayer $48,053.97. The total death benefit amounted to $50,444.92. *Id.*

241. *Id.* at 955.

242. 501 F.2d 466 (7th Cir. 1974).

corporation was a "life insurance company" for tax purposes.[243] Justice Stevens was convinced that the majority, in denying that status to the taxpayer, applied a stiffer test than that set forth in the statute.[244] Stevens acknowledged that Congress may have been a bit too liberal in its definition of a "life insurance company" and that Congress may have acted unwisely in giving preferential tax treatment to life insurance companies at all. Yet the taxpayer had more than satisfied the letter of the statute.[245] Stevens stressed that the test Congress had specified—a test clear and unambiguous on its face—must control.

Only when Congress has not clearly indicated its intent has Justice Stevens looked beyond the form of the transaction to the purpose of the statute and the economic reality of the situation. *Kelly v. Commissioner*,[246] construing the section 213 medical expense deduction, is most enlightening in this respect. The taxpayer there underwent an emergency operation while away from home on business. Following his operation, but before he was sufficiently recovered to return home, the taxpayer was removed from the hospital to a nearby hotel where he continued to receive medical care.[247] At issue was the deduction for food and lodging expenses incurred at the hotel. Relying upon its regulations,[248] the Service denied the deduction. The Service argued that the statutory provision had been significantly amended by the Internal Revenue Code of 1954 with the express legislative purpose of excluding deduction "of any meals and lodging while away from home receiving medical treatment."[249] Justice Stevens, however, allowed the deduction. He noted that the deduction for food and lodging expense incident to medical treatment did not contravene the language of the statute itself. Rather, looking to the complete legislative history, Stevens concluded that Congress intended the amended definition of medical care to prevent vacation costs from being disguised as medical ex-

243. INT. REV. CODE OF 1954, § 801(a).

244. The majority determined that each company's life insurance reserves were less than 50% of its total reserves (the test for a "life insurance company" under section 801(a)) because the total reserves should have included a reserve for unearned premiums on health and accident insurance written by the reinsured parties. Stevens disagreed, reasoning that inclusion of reserves for unearned premiums is not required by the statute.

245. 501 F.2d at 485.

246. 440 F.2d 307 (7th Cir. 1971).

247. The taxpayer was requested to vacate the hospital before complete convalescence because the hospital needed the room. *Id.* at 307-08.

248. Treas. Reg. § 1.213-1(e)(1)(v) (1968).

249. 440 F.2d at 310. The Commissioner cited H.R. REP. No. 1337, 83d Cong., 2d Sess. 30 (1954), and S. REP. No. 1622.

penses—not to deny relief from the burden of legitimate medical expenses.[250] Citing experience and logic, Stevens held that the Service's contrary regulations must be read in this historical context.[251] Moreover, Stevens found in the instant case not the slightest suggestion of abuse of the statutory deduction. The costs incurred placed a real burden upon the taxpayer and were certainly the type of medical expense contemplated by Congress.

Indeed, an emphasis on what Congress contemplated is the common thread of justification running through all of Stevens' tax decisions. When that intent is clearly indicated in the letter of the statute, Stevens' attitude is one of strict statutory construction, regardless of what the "more equitable result" might be.[252] Only when the statute fails to address a specific issue, or is ambiguous on its face, has Justice Stevens been willing to entertain policy considerations.[253] Even then, *Kelly* indicates that the only relevant inquiry is what policy Congress intended to implement. In short, Justice Stevens is acutely aware of the bounds of appellate review, and his federal tax decisions, which adhere strictly to the statutory framework provided by Congress, exhibit his narrow view of those bounds.

D. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964[254] states that it shall

250. 440 F.2d at 308-09. Stevens looked to the Senate hearings before the Committee on Finance on the Internal Revenue Code of 1954. *Id.*

251. 440 F.2d at 311-12. Stevens was subtly rejecting the Commissioner's contention that "*experience*, not *logic*, is the basis of the law; and experience has led to Treasury Regulation § 1.213-1(e)(1)(v) . . . ." *Id.* at 308. (emphasis supplied).

252. *See* Mason v. United States, 513 F.2d 25 (7th Cir. 1975) (Stevens found a valid charitable gift in the difference between the value of property transferred and the fair market value of a note taken in consideration; moreover, Stevens held the tax benefit rule not applicable to the receipt of payments on the note—the value of the gift was determined as of the date of the gift and the subsequent repayment of the face value of the note was contemplated in valuing the note as of that date); Hart Metal Prod. Corp. v. Commissioner, 437 F.2d 946 (7th Cir. 1971) (Construing adjustments to taxpayer's income in determining "personal holding company" status under § 543, Stevens rejected taxpayer's argument that tax deficiencies should be deducted in the year assessed; Stevens read the statute to forbid deduction of contested tax deficiencies until the dispute is settled and the obligation becomes fixed).

253. *See* note 244 *supra* and accompanying text.

254. Section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1970). Section 703 in relevant part provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

be unlawful for an employer to discriminate in the hiring or firing of an individual because of the individual's sex. The Seventh Circuit decided in *Sprogis v. United Air Lines, Inc.*[255] that United's no-marriage rule for female flight cabin attendants discriminated against the plaintiff because of her sex. In dissent, Justice Stevens maintained that the discrimination was not directed against female as opposed to male employees because no male was eligible for the job of fiight cabin attendant. At the time of plaintiff's discharge, only females could be hired as flight cabin attendants and the no-marriage rule was merely an additional qualification for the job.[256] Plaintiff argued, however, that a prima facie case of sex discimination was established because United permitted its male employees to marry while requiring its female flight cabin attendants to remain unmarried. The majority accepted this argument, stressing that in prohibiting sex discrimination in the hiring and firing of employees, Congress intended to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[257]

In his dissent, Justice Stevens proposed a "but for" test for deciding whether an individual has been discriminated against because of sex. Rejecting the majority's rationale that any impediment derived from a stereotyped attitude toward females is sufficient to establish sex discrimination, Stevens argued that the plaintiff must show that "but for" her sex she would have been treated differently.

Stevens' dissent in *Sprogis* indicates that in future Title VII sex discrimination cases he is likely to scrutinize strictly the question of differential treatment by applying the objective "but for" test. *Sprogis* also reveals Justice Stevens' inclination to interpret the language of a statute objectively by applying its common sense meaning and refusing to embellish the statute with his speculation as to Congress' intent.

E. Labor Law

Justice Stevens has not written extensively in the area of labor law, and consequently a full scale analysis of his position in this area is premature. Nevertheless, one may draw some inferences about his attitudes in the area from his opinions, many of which are in dissent.

In *Moore v. Sunbeam Corp.*,[258] plaintiff was discharged from

255. 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).
256. *Id.* at 1203.
257. *Id.* at 1198.
258. 459 F.2d 811 (7th Cir. 1972).

employment after he individually demonstrated against alleged racial discrimination. The collective bargaining agreement under which plaintiff was employed contained no-strike and arbitration clauses. Plaintiff charged that the employer committed an unfair labor practice by interfering with his right to engage in concerted activity[259] and that his union breached its duty of fair representation.[260] Plaintiff appealed from unfavorable decisions by the National Labor Relations Board and the district court.[261] Justice Stevens found that the existence of an unfair labor practice depended on whether the no-strike clause of the contract prohibited plaintiff's one-man demonstration, and he deferred to the expertise of the Board in construing the clause. Stevens also dismissed plaintiff's claim against the union for breach of the duty of fair representation because plaintiff had failed to establish that the union's refusal to take his grievances to arbitration was wrongful.[262]

In *Louis-Allis v. NLRB*,[263] a majority of the Seventh Circuit deferred to the judgment of the National Labor Relations Board and refused to set aside certification of a union, although the union distributed misleading literature on the eve of the election. Dissenting strongly, Stevens wrote, "I consider the deception sufficiently gross to justify strong measures. . . . In my opinion, administrative approval of such fraud does not merit the label 'expertise.' "[264]

In *NLRB v. Bachrodt Chevrolet*,[265] a majority of the Seventh Circuit held that a successor employer committed an unfair labor practice by unilaterally changing working conditions after his obligation to bargain had matured.[266] Stevens dissented. The controversy concerned whether the employer had clearly indicated a plan to retain all of the predecessor's employees by distributing job applications prior to the turnover date. Although generally an employer has no duty to bargain over initial terms of employment, the Supreme Court in *NLRB v. Burns International Security Serv-*

259. National Labor Relations Act § 8(a)(1), 29 U.S.C. § 157 (1970) [hereinafter referred to as the NLRA].

260. Labor Management Relations Act, Title III, § 301(a), 29 U.S.C. § 141 (1970).

261. Cases were consolidated for appeal along with dismissal of plaintiff's separate action in the district court for violation of the Civil Rights Act of 1964.

262. *See* Vaca v. Sipes, 386 U.S. 171 (1967).

263. 463 F.2d 512 (7th Cir. 1972). For further discussion of this case see notes 331-32 *infra* and accompanying text.

264. *Id.* at 520 (Stevens, J., dissenting).

265. 468 F.2d 963 (7th Cir.), *vacated*, 411 U.S. 912 (1972)(remanding to NLRB for further consideration in light of recent successor employer decisions). On remand, the Board held that the employer had unilaterally changed working conditions after the obligation to bargain arose.

266. *See* NLRA § 8(a)(5), 29 U.S.C. § 158 (1970).

ice, Inc.[267] said that a successor employer who clearly plans to retain all of the employees in a bargaining unit should "consult with" their bargaining representative before fixing terms.[268] Stevens urged that this exception be construed very narrowly and strongly emphasized the freedom of the employer in an ordinary purchase transaction to set initial terms of employment.

In *NLRB v. Caravelle Wood Products, Inc.*,[269] the Seventh Circuit considered the procedure the NLRB should use to determine whether to include employees related to management in a bargaining unit. The court held that the Board had not abused its discretion by excluding family members because of insufficient "community of interest" with the bargaining unit. In his concurring opinion, Stevens pointed out that excluding relatives of management because of lack of a "community of interest" may be the de facto equivalent of excluding them because of potential opposition to a union. Exclusion on this basis, he said, involves possible conflict with a recent Supreme Court decision referring to the NLRA as "wholly neutral" in requiring respect for those who oppose a union as well as for those who favor one.[270]

The number of Justice Stevens' labor law opinions is not large.[271] Since his dissents in labor cases are roughly double the number of his majority opinions, it might be more appropriate to comment on what his position is not rather than what it is. The following statements, therefore, are mere observations, not conclusions. First, while *Sunbeam* demonstrates that Stevens is generally willing to defer to the Board in its traditional areas of expertise, his dissent in *Louis-Allis* makes clear that he will disregard the Board's judgment when he thinks the facts require it. Secondly, *Bachrodt* and *Caravelle* when read together suggest a promanagement bias. In *Bachrodt* Stevens disagreed with the Board and two colleagues in his view of the facts and urged a very conservative interpretation of the *Burns* exception to the general freedom of an employer to set initial terms of employment. In *Caravelle*, Stevens went out of his way to point out that the NLRA is neutral toward those who oppose unions. Finally, the dearth of his writing on labor law may indicate that Justice Stevens has yet to develop a judicial attitude in many of its areas.

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267. 406 U.S. 272 (1972).
268. *Id.* at 294-95.
269. 504 F.2d 1181 (7th Cir. 1974).
270. NLRB v. Savair Mfg. Co., 414 U.S. 270, 278 (1973).
271. *See* Appendix, Labor Law.

F. Attorney Fees

Justice Stevens' opinions[272] dealing with the award of attorney fees suggest that he concurs with the Supreme Court's approach to this topic in *Alyeska Pipeline Service Co. v. Wilderness Society*.[273] In that 1975 case, certain environmental groups[274] sought attorney fees incurred in a successful suit to prevent the Secretary of the Interior from issuing permits for the construction of the trans-Alaska pipeline. The Supreme Court refused to adopt a "private attorney general" theory to support the appellate court's award and reversed on the ground that Congress had not authorized an exception to the general American rule prohibiting such an award.[275] Refusing to discuss the merits of the American rule, the Court concluded that it is the role of Congress, and not the courts, to change such a deep-rooted practice.[276]

Two of Stevens' opinions, one prior to and one after *Alyeska Pipeline*, indicate that he concurs in this approach. In the 1973 case of *Associated General Contractors v. Illinois Conference of Teamsters*,[277] Stevens rejected the Third Circuit's position[278] and concluded that section 7 of the Norris-LaGuardia Act[279] did not authorize the recovery of expenses in excess of an injunction bond. In *Associated General* the union had successfully appealed the issuance of an anti-strike injunction and was seeking to recover costs

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272. Seven of Stevens' opinions deal with the topic of attorney fees. These cases are: Tryforos v. Icarian Dev. Co., 518 F.2d 1258 (7th Cir. 1975); Allen v. W.H. Brady Co., 508 F.2d 64 (7th Cir. 1974); Cousins v. City Council, 503 F.2d 912 (7th Cir. 1974) (Stevens, J., concurring); Associated Gen. Cont. v. Teamsters, 486 F.2d 972 (7th Cir. 1973); Protectoseal Co. v. Barancik, 484 F.2d 585 (7th Cir. 1973); Strassheim Co. v. Gold Medal Folding Furn. Co., 477 F.2d 818 (7th Cir. 1973); Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972).

273. 421 U.S. 240 (1975).

274. The plaintiffs were the Wilderness Society, the Environmental Defense Fund, Inc., and Friends of the Earth.

275. 421 U.S. at 259. The Court noted that an award of attorney fees is required under the antitrust laws, 15 U.S.C. § 15 (1970); the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970); the Truth-in-Lending Act, 15 U.S.C. § 1640 (a) (1970); and the Merchant Marine Act of 1936, 46 U.S.C. § 1227 (1970). *See generally, e.g.*, 35 U.S.C. § 285 (1970) (attorney fees in patent litigation); Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b)(1970).

276. The Court concluded:

> But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals.

95 S.Ct. at 1628.

277. 486 F.2d 972 (7th Cir. 1973).

278. United States Steel Corp. v. UMW, 456 F.2d 483 (3d Cir.), *cert. denied*, 408 U.S. 923 (1972). Stevens did not comment on the Supreme Court's denial of certiorari.

279. 29 U.S.C. § 107(e) (1970).

(including attorney fees) in excess of the pre-injunction bond. In rejecting this claim, Stevens stressed that the statute did not expressly authorize any recovery in excess of the bond amount, noted that recognition of the claim would depart from well settled practice, and concluded that such a departure requires a specific, unambiguous expression of congressional intent.[280]

Stevens' recent opinion in *Tryforos v. Icarian Development Co.*[281] supports the conclusion that he accepts both the rationale and the decision of the Court in *Alyeska Pipeline*. *Tryforos* was a shareholder derivative action brought in federal court under diversity of citizenship jurisdiction. The lower court dismissed the action with prejudice and awarded the defendants attorney fees.[282] Stevens reversed the award of attorney fees, relying on dictum in *Alyeska Pipeline*[283] that federal courts must apply state law in awarding attorney fees in a diversity action. Stevens noted that the cases defendant relied on to support the power of the federal courts to award attorney fees were not diversity cases.[284] Since he found no state statute that specifically allowed the award, Stevens disallowed the grant. Both his general judicial approach in *Associated General* and his willing acceptance of dictum in *Alyeska Pipeline* as an accurate reflection of the current law support the conclusion that Stevens considers the Supreme Court's approach correct. Therefore it appears unlikely, absent specific statutory authorization, that Stevens would liberalize law governing the award of attorney fees.

Even when an award is authorized by statutes, Stevens has closely scrutinized it. In *Protectoseal Company v. Barancik*[285] a company sought the resignation of a director because it feared his position, involving an indirect interlock, violated section 8 of the Clayton Act.[286] The company sought attorney fees, but Stevens interpreted the Act as limiting recovery of fees to cases in which the plaintiff showed pecuniary injury. Since Protectoseal had failed to show such injury, Stevens denied the award. Prior case law supports his conclusion,[287] but Stevens did not rely on prior law. Instead he

280. 486 F.2d at 975.

281. 518 F.2d 1258 (7th Cir. 1975).

282. 49 F.R.D. 1 (N.D. Ill. 1970).

283. 95 S.Ct. at 1622-23 n.31.

284. Stevens concluded that the result in Trust Co. v. National Sur. Corp., 177 F.2d 816 (7th Cir. 1949) which likewise refused to authorize attorney fees in a similar fact setting was not overruled by Hall v. Cole, 412 U.S. 1 (1973); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); or Vaughan v. Atkinson, 369 U.S. 527 (1962) since none of these cases was a diversity case.

285. 484 F.2d 585 (7th Cir. 1973).

286. 15 U.S.C. § 19 (1970).

287. *See, e.g.*, Byram Concretanks, Inc. v. Warren Concrete Products Co., 374 F.2d 649

emphasized that the relevant injunctive provision in the Clayton Act did not specifically authorize the award of attorney fees.[288] While it is hazardous to read too much into one opinion, the language in this case is consistent with his attitude in *Associated General.*

Finally, three Stevens opinions deal with the award of attorney fees under 35 U.S.C. § 285[289] in patent infringement actions. The statute allows awards in "exceptional cases," and traditionally the courts have emphasized that only the unusual case will qualify.[290] Stevens' opinions indicate that he requires overwhelming facts to invoke the permissive statutory language. Illustrative of the type of fact situation that Stevens deems to meet the statutory requirement is *Strassheim Co. v. Gold Medal Folding Furniture.*[291] In that case the defendant company marketed its product more than one year prior to the acquisition of the patent[292] and misfiled the documents that proved the product had been marketed during that time. Because of the misfiling, a trial court erroneously held the patent valid, and a second trial was necessary. While accepting the trial court's conclusion that no actual fraud existed in the case, Stevens held it to be an "exceptional case" under the statute and awarded attorney fees. Stevens found that the patentee and its attorney demonstrated an exceptional lack of diligence in initially filing the patent without checking on the possibility of unpatentability due to prior use for more than one year.[293]

(3d Cir. 1967); Decorative Stone Co., v. Building Trade Council, 23 F.2d 426 (2d Cir.), *cert. denied*, 277 U.S. 594 (1928).

288. Stevens noted:

> Plaintiff has not proven any pecuniary injury . . . under § 4 of the Clayton Act. That section authorized the recovery of a reasonable attorney's fee, but there is no such express authorization in § 16, the section under which this action was brought. We believe this case should be treated in the customary manner; plaintiff should accept the normal burden of compensating its own counsel.

484 F.2d at 589.

289. 35 U.S.C. § 285 (1970) reads: "The court in exceptional cases may award reasonable attorney fees to the prevailing party."

290. *See, e.g.*, Larchmont Engineering, Inc. v. Toggenburg Ski Center, Inc., 444 F.2d 490 (2d Cir. 1971); Uniflow Mfg. Co. v. King-Seeley Thermos Co., 428 F.2d 335 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972).

291. 477 F.2d 818 (7th Cir. 1973).

292. A patent will be denied if an invention was described in a printed publication or offered for sale more than one year prior to the date of the patent application. 35 U.S.C. § 102 (1970).

293. Stevens stated:

> This case is truly exceptional because the record unambiguously demonstrates that the defendant's "exceptional oversight" with respect to "critically important information" . . . resulted in an erroneous judgment and put plaintiff to legal expenses that would

The recent case of *Allen v. W.H. Brady Co.*[294] demonstrates Stevens' willingness to scrutinize closely the facts of a case to determine whether they meet the statutory requirements for an award of fees. In that case Stevens concluded that a prior patent covered the subject matter of the patent in dispute and that therefore the patent was invalid.[295] While finding that the patent was invalid, Stevens found no indication that the patentee had sought to prevent disclosure of relevant facts to the patent office or that any official misconduct occurred in the issuance of the patent. Therefore he concluded that an award of attorney fees was not justified. Thus the patent cases indicate that Stevens will stress the restrictive wording of the statutory authorization in determining whether an award is appropriate.

Stevens' approach to the question of attorney fees is characterized by its restraint. Absent specific and unambigious legislative authorization, he is unlikely to support an award of attorney fees. With legislative authorization he is likely to demand strict compliance with the statute. This does not indicate an anti-bar attitude.[296]

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otherwise have been unnecessary.

477 F.2d at 824 n.9. Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579 (7th Cir. 1971), is another case in which the fact settings supported an award of attorney fees. In *Giddings*, the patentee hired the patent examiner after the award of the initial patent and had the former examiner actively assist on two patent reissue proceedings. In awarding attorney fees Stevens stressed the paramount importance of protecting the integrity of, and the public confidence in, the Patent Office.

294. 508 F.2d 64 (7th Cir. 1974).

295. The case revolved around the validity of three patents. The patents all dealt with the development of a device to alert excavating crews of the presence of underground cables. The first patent described the warning device in general terms. The second patent developed a specific process to implement this general concept. In an interference proceeding the first patentee was awarded priority to the specific device. A third patent resulted from work independent from the second patentee but which produced a nearly identical product. A patent was issued to the third individual after a different patent examiner concluded that the first patent did not cover this specific process. The third patentee did not cite, in his application, the second patent. *Id.* at 67.

296. For instance in the only two attorney malpractice cases considered by Stevens, he found for the attorney in each instance. Anastos v. M.J.D.M. Truck Rentals, Inc., 521 F.2d 1301 (7th Cir. 1975); Walker v. Kruse, 484 F.2d 802 (7th Cir. 1973). Although the facts in each case seemed to mandate the result, Stevens' opinion in *Walker* evidenced a willingness to consider solutions favorable to attorneys, in special problems facing the bar. In *Walker* an individual hrought a malpractice action against his court appointed counsel. In dismissing the complaint Stevens articulated:

> Moreover, there are strong reasons of policy which might persuade the Illinois courts to hold that a lawyer, who has been appointed to serve without compensation in the defense of an indigent citizen accused of crime, should be immune from malpractice liability. Requiring such lawyers to defend charges such as this can only make it more difficult for the Bar to discharge its professional responsibilities which have recently been so greatly enlarged by the Supreme Court's holding in *Argersinger v. Hamlin.*

Id. at 804.

Rather it is in keeping with his overall view of the function of courts. In this area Stevens is reluctant to move onto untested ground. Nevertheless, his opinions are logically developed, and if they give little evidence of dramatic new directions, they at least have the virtue of consistency.

V. ADMINISTRATIVE LAW

In the area of administrative law, the attitude of an individual judge often has significant impact. Since administrative agencies fit comfortably into none of the three traditional areas of governmental power,[297] the judiciary often must determine whether an agency's actions comply with the language of its particular enabling statute and whether the actions fall within the limits of administrative discretion.[298] The difficulty and diversity of these questions frequently result in disagreement within the judiciary itself concerning its role as the final agency overseer.[299] Thus a strong position by Justice Stevens here might well carry more impact than one in other areas. Hopefully past decisions written by Stevens will indicate his attitude toward some issues of administrative law.[300]

A. Judicial Mandates Concerning Required Agency Procedure

Several Seventh Circuit decisions in which Justice Stevens authored either the majority or dissenting opinions involved the following issues: (1) the amount of agency discretion allowable under the particular enabling statute involved; (2) the quality of the administrative record that must be presented for review; and (3) the extent to which informal statements bind an agency in later administrative actions. Stevens' position on these issues will be discussed in the order stated above.

(1) Agency Action in Light of Delegated Authority

In *Stearns Electric Paste Co. v. Environmental Protection Agency*,[301] petitioner, a manufacturer of phosphorous paste for home

297. *See* G. ROBINSON & E. GELLHORN, THE ADMINISTRATIVE PROCESS 26 (1974).

298. *See* Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293 (1972).

299. *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.07 (1958) (attributing at least part of the problem to the elusive articulation of the standard of judicial review of agency decisions).

300. Certainly it would he misleading to suggest that a consideration of any small group of cases could result in an adequate characterization of a jurist's philosophy in an area. Nonetheless, evidence of certain attitudes, approaches, and preferences may appear.

301. 461 F.2d 293 (7th Cir. 1972).

use as a rat and roach poison, appealed from the Environmental Protection Agency's cancellation of the registration of the product. Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the EPA may cancel the registration of poisons if it finds the labels to be false or misleading.[302] While the agency allegedly based its decision on a determination that consumers might be misled by the labels of the product, Justice Stevens' majority opinion concluded that the agency in fact had cancelled the registration because it believed that the product was simply too dangerous for home use. The issue thus became whether the statute allowed the EPA to cancel a registration because it felt the product was "too dangerous."[303] Stevens found that this reason for cancellation exceeded the agency's delegated authority. He therefore set aside the cancellation order, stating: "After developing and articulating standards consistent with the authority delegated by FIFRA for determining when a label inadequately avoids the danger of harmful misuse, respondent may again propose cancellation . . . ."[304] Justice Stevens also considered the limitations of the EPA's delegated authority under FIFRA in *Continental Chemiste Corp. v. Ruckelshaus*.[305] In that case, the EPA cancelled the registration of appellant's insecticide smoke device under an agency rule that required cancellation when use of a poison in compliance with label directions would cause exposed food to become "adulterated" under the Food, Drug and Cosmetic Act (FDCA).[306] Although use of appellant's product would damage exposed food, the label stated that one should not use the device near exposed food. With Justice Stevens writing the opinion, the Seventh Circuit set aside the cancellation order because the agency's "per se" adulterated approach exceeded its statutory authority to cancel registrations:[307] the administrative blending of FDCA standards into the FIFRA cancellation proceedings was unauthorized by either statute.[308]

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302. 7 U.S.C. § 135b(c) (1970) authorizes the Administator of the Environmental Protection Agency to cancel the registration of any poison found to be misbranded under the FIFRA standards.

303. 461 F.2d at 297.

304. *Id.* at 311. In a subsequent Eighth Circuit decision affirming a registration cancellation on substantial evidence grounds, *Stearns* was cited only for a basic burden-of-proof allocation statement. Southern Nat'l Mfg. Co. v. Environmental Protection Agency, 470 F.2d 194, 196 (8th Cir. 1972).

305. 461 F.2d 331 (7th Cir. 1972).

306. 21 U.S.C. §§ 321(s), 342(a)(2), 346, 346a, 348 (1970).

307. The court suggested that the standards were intended to serve different purposes—FDCA generally applied to new and untested products, while the FIFRA safeguards were aimed at the adequacy of the labelling. 461 F.2d at 341.

308. *Id.* at 341-42.

Justice Stevens also would have refused to permit agency discretion when the limits of the statutory mandate appeared clear in *Hodgson v. Lodge 851, IAM.*[309] The district court in *Hodgson* had dismissed a complaint brought by the Secretary of Labor against a union because the Secretary had waited longer than the statutory sixty-day period before filing suit.[310] A majority of the Seventh Circuit held that the union had voluntarily waived the statutory bar and allowed the action to proceed. Justice Stevens in a lengthy dissent argued that the dismissal should be affirmed.[311] Emphasizing the express language of the statute and its legislative history, Stevens rejected the Secretary's argument for greater discretion in cases of union recalcitrance and unimportant administrative error, and concluded that the Secretary must act within the time prescribed.

Another FDCA decision written by Justice Stevens indicates, however, that when an agency applies standards reasonably consistent with statutorily granted authority, he will uphold its ruling even though a far-reaching economic effect on the parties involved may result. In *United States v. Ewig Brothers Co.*,[312] the FDA had determined that DDT and dieldrin residues present in smoked chubs were "food additives" under the FDCA and that the fish therefore were adulterated and unmarketable under the statute.[313] Stevens' opinion upheld the administrative ruling. Acknowledging that the tests used might be imprecise, the court nevertheless permitted the agency to use them because they were the best yet devised and because the enforcement guidelines must have contemplated their use.[314] Thus, while expressing in *Stearns* and *Continental Chemiste* an intent to scrutinize closely agency actions in light of the relevant enabling statute, Justice Stevens displayed in *Ewig Brothers* a willingness to allow implementation of reasonable although imperfect experimental data as a basis for administrative action under a properly developed standard.

(2) Quality of the Record Developed for Review

Under section 8(b) of the Federal Administrative Procedure

309. 454 F.2d 545 (7th Cir. 1972).

310. 29 U.S.C. § 482(b) (1970).

311. 454 F.2d at 554-65.

312. 502 F.2d 715 (7th Cir. 1974), *cert. denied*, 420 U.S. 945 (1975). The informal rulemaking aspects of the case will be discussed at text accompanying notes 321-23 *infra*.

313. In Justice Stevens' words, "[a] somewhat more disturbing way to state the same question is whether all of the fish in the Great Lakes are 'adulterated' as a matter of statutory definition." *Id.* at 717.

314. *Id.* at 725.

Act,[315] every adjudicatory decision by a federal agency must be accompanied by a record presenting findings, conclusions, and the reasons therefor concerning the issues decided. An agency decision accompanied by an insufficient record is subject to remand on that ground.[316] In *Papercraft Corporation v. FTC*,[317] Justice Stevens chided the FTC for failing to present a record from which the court could formulate the agency's underlying rationale. The primary issue was the propriety of an FTC divestiture order issued against Papercraft under section 7 of the Clayton Act.[318] One paragraph of the order restricted the sale of Papercraft products to specific customers for a three-year period because the agency thought this necessary to assure survival of the divested business.[319] Stevens found that the record inadequately demonstrated the need for the provision and deleted it, stating: "Other divestiture orders have included special provisions designed to insure the survival of the divested business, but in each such instance the supporting findings demonstrated the need . . . . Such findings are essential . . . ."[320]

(3) Binding Effect of Informal Agency Statements

The appropriate role of the judiciary in reviewing informal agency determinations has prompted much debate.[321] While no opinion by Justice Stevens casts much light on his attitude towards such actions generally, the *Ewig Brothers* case does discuss the effect that informal agency statements should have upon future actions by the agency itself. Noting that the DDT tolerance limit used by the government had appeared as an "interim enforcement guideline" in an agency press release, Stevens acknowledged that the gnideline might be viewed as having no binding effect. The opinion gave the guideline the force of a rule, however, because the language of the release and the government's treatment of it indicated that the guideline was meant to function as a generally applicable rule.[322] While Stevens recognized that agency enforcement based on infor-

315. 5 U.S.C. § 557(c) (1970).

316. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), is probably the case most often cited for this general proposition. *See* G. ROBINSON & E. GELLHORN, *supra* note 297, at 226-29.

317. 472 F.2d 927 (7th Cir. 1973).

318. 15 U.S.C. § 18 (1970).

319. For a fuller explanation of the remedial order's substance, see 472 F.2d at 931 & nn.10 & 11.

320. *Id.* at 931-32.

321. *See, e.g.*, Sofaer, *supra* note 298; Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

322. 502 F.2d 715, 724-25 (7th Cir. 1974), *cert. denied*, 420 U.S. 945 (1975).

mal rules was not uniformly approved,[323] he stated that the guideline should bind the agency just as a formal rule promulgated in full compliance with the Administrative Procedure Act would. Whether this language implies that Justice Stevens generally views the informal rulemaking procedure as an acceptable practice is conjectural. Justice Stevens, however, did refrain from criticizing the practice when given the opportunity.

B. Judicial Acknowledgment of Legislative Prerogative

In many instances the issue on appeal of an administrative decision is the extent of the agency's latitude to make substantive determinations rather than the limits of its power under an interpretation of its enabling statute. Such cases give rise to a separate, more flexible species of judicial review. Seventh Circuit cases of this type in which Justice Stevens has figured appear in the following areas: (1) the proper deference to be given administrative expertise; (2) the kind of agency infraction that may be excused as "harmless error"; and (3) the proper interpretation of the "substantial evidence" standard of review.

(1) Deference to Administrative Expertise

In the *Papercraft* case, a Stevens majority opinion rejected an administrative expertise argument.[324] After examining the novel remedial order proposed by the FTC, the opinion distinguished cases in which agency familiarity with the effects of a violation justified deference to the administrative sanction imposed, and stated: "[W]hen . . . [the agency] selects an untried and blunt instrument which will certainly cause some impairment of statutory objectives, we require a more careful exposition of its justification before we will sanction it as a proper remedial tool."[325] The *Papercraft* opinion properly exhibited concern that the administrative remedy advanced could cause exactly the type of problem that the antitrust statutes were intended to prevent, but interestingly the court flatly invalidated the special FTC order rather than remanding the case for a fuller explanation of the agency's justification.

Another Stevens opinion provides a different perspective on

323. *Id.* at 725 n.34.

324. The following cases utilizing an FTC expertise rationale were cited by the court: FTC v. Mandel Bros., Inc., 359 U.S. 385 (1959); FTC v. National Lead Co., 352 U.S. 419 (1957); FTC v. Ruberoid Co., 343 U.S. 470 (1952). 472 F.2d at 933 n.17.

325. 472 F.2d at 933.

judicial deference to agency expertise. In *United States ex rel. Miller v. Twomey*,[326] the court considered six separate charges that officials of the Wisconsin Department of Corrections had violated prisoners' constitutional rights to due process in prison disciplinary proceedings. At the district court level, four of the charges had been dismissed. Reviewing the principles presented in *Morrissey v. Brewer*,[327] Justice Stevens remanded five cases for the fashioning of appropriate relief and affirmed the dismissal of one complaint. Stevens emphasized, however, that prison personnel need a wide range of discretion and remarked: "This does not mean, however, that every decision by prison officials should be subject to judicial review. . . . [I]t is abundantly clear that a myriad of problems of prison administration must remain beyond the scope of proper judicial concern."[328] The Stevens majority in *Twomey*[329] appears to permit more administrative discretion in the corrections area than it might tolerate had a statutorily created federal agency been challenged.[330]

Justice Stevens' dissent in *Louis-Allis Co. v. NLRB*[331] demonstrates his hesitancy to affirm agency actions solely on the ground of administrative expertise. In that case the employer claimed that an NLRB election certification was invalid because the union improperly had procured votes through misleading propaganda and that the Regional Director had abused his discretion by overruling the employer's objections without an evidentiary hearing. The Seventh Circuit majority found that the employer's objection required

326. 479 F.2d 701 (1973), *cert. denied*, 414 U.S. 1146 (1974). For a discussion of this case in the context of due process rights of prisoners see notes 160-69 *supra* and accompanying text.

327. 408 U.S. 471 (1972).

328. 479 F.2d at 713. The details of the *Twomey* due process claims are not necessary to a discussion of the administrative expertise aspects of the decision.

329. In fact, the *Twomey* majority appeared to choose a middle course concerning the specific charges before it. While finding that there had been a violation of due process rights, the court was unwilling to fashion the remedies it believed necessary. Writing in dissent, Judge Swygert argued that the Stevens majority was much too hesitant in returning the case for further proceedings and likely would accomplish little else but another appeal to the Seventh Circuit. *Id.* at 723-24.

330. In Encyclopaedia Britannica v. FTC, 517 F.2d 1013 (7th Cir. 1975), Justice Stevens sitting alone denied an eleventh hour request for an injunction against the FTC on Freedom of Information Act grounds. Admitting some uncertainty concerning the merits of the movant's claim, he denied the motion, stating:

> In sum, I am persuaded that the presumption that the Commission will deal fairly with the litigants before it heavily outweighs the likelihood of irreparable injury which may result from denial of the pending motion.

Id. at 1015.

331. 463 F.2d 512 (7th Cir. 1972). For a discussion of this case in the context of labor law see notes 263-64 *supra* and accompanying text.

no hearing because it raised no substantial issue of fact. Indicating his belief that the employer had exposed union deception, Stevens dissented, stating that administrative approval of union fraud did not merit the label expertise.[332] Thus aside from the *Twomey* decision in the corrections area, Stevens' opinions reveal a reluctance to defer to administrative expertise in a close case absent a showing that the agency action fully is justified on the record.

(2) Harmless Error at Preliminary Stages

If the full range of available administrative procedure provides adequate protection to the individual, courts often will find minor procedural shortcomings in a preliminary stage to be harmless error.[333] Justice Stevens' opinion in *Lucas v. Wisconsin Electric Power Co.*[334] includes a discussion of this administrative harmless error doctrine. In *Lucas*, a class of consumers challenged the regulations under which the electric company could terminate customer service. A company official made the initial termination decision after reviewing overdue bills. He then sent a notice of impending termination to the customer. Plaintiffs claimed that they were entitled to a full hearing, including reference of the contested billing to an impartial arbiter, prior to the severance of service.[335]

Stevens considered the pretermination hearing issue in the context of the full procedure available to the customer. Since the state usually had to adjudicate the amount due from the terminated customer, an eventual full judicial hearing was assured. Concerning the propriety of the company's initial decision-making process, Stevens stated that a less strict standard of review applied to tentative agency decisions, even if they have an immediate and significant effect on a litigant's use or ownership rights. The court found that the company had met the requirements of procedural due process because the initial termination entailed a determination that a reasonable possibility existed of obtaining a judgment against the delinquent customer.[336] Finding that the power company's self-

332. *Id.* at 520. The Seventh Circuit subsequently cited *Louis-Allis* in NLRB v. Visual Educom, Inc., 486 F.2d 639, 643 (7th Cir. 1973), another decision upholding an *ex parte* investigation of the NLRB Regional Director on an administrative expertise argument.

333. *See* Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969); Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 HARV. L. REV. 865 (1963).

334. 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973). *Wisconsin Electric* most often is cited for its primary holding that public utility customer service terminations are not equivalent to "state action." *See* Limuel v. Southern Union Gas Co., 378 F. Supp. 964 (W.D. Tex. 1974).

335. 466 F.2d at 651-52.

336. *Id.* at 650.

interest in maintaining customer goodwill probably would protect individuals from the threat of frivolous terminations, Justice Stevens ruled that "[t]he possibility of an occasional error at a preliminary stage of a procedure which is routinely fair does not invalidate the entire procedure."[337]

(3) Administrative Orders under the Substantial Evidence Rule

In *Stark v. Weinberger*,[338] the plaintiff had appealed an agency denial of a request for social security disability benefits. The trial court affirmed the administrative denial on the ground that substantial support for it existed in the record.[339] Closely examining the record presented for review, Justice Stevens' majority opinion acknowledged the narrow scope of review; nonetheless, the decision asserted that the court need not accept blindly the agency findings, but could review all the evidence in the record.[340] Stevens was impressed by the amount of uncontroverted medical testimony introduced at the initial hearing in support of plaintiff's claim, and he ruled that the agency had failed to provide substantial evidence supporting the denial of benefits. Noting that a remand would be costly for both parties, that it entailed another potential series of federal court appeals, and that the amount in controversy was relatively small, the Stevens opinion, with Judge Pell vigorously dissenting,[341] reversed and ordered plaintiff's claim paid.[342]

C. *Conclusion*

The few administrative law opinions by Justice Stevens demonstrate his familiarity with the structure and purpose of administrative schemes and show his willingness to delve into statutory background and to analyze legislative intent when it is asserted that an agency has abused its discretion. Justice Stevens does not view a court as a rubber stamp for agency determinations, but carefully

337. *Id.* at 652.

338. 497 F.2d 1092 (7th Cir. 1974).

339. The substantial evidence standard appears in 42 U.S.C. § 405(g) (1970) and received exhaustive explication in Universal Camera Corp. v. NLRB, 340 U.S. 474, 477-87 (1951).

340. In support of tbis view, Justice Stevens cited Byrd v. Richardson, 362 F. Supp. 957, 959 (D.S.C. 1973). 497 F.2d at 1099 n.14.

341. Judge Pell in dissent vigorously argued that a proper interpretation of the substantial evidence doctrine required affirmance. He found that the Stevens' majority had engaged in independent fact-finding instead of detached review of the record, and that even under the majority's interpretation of the agency's evidence as unconvincing, the court should have remanded for further proceedings instead of simply overturning the result on the basis of the written record. 497 F.2d at 1102-03.

342. *Id.* at 1101.

scrutinizes actions in light of the relevant statute and basic principles of administrative law. In the *Stearns* and *Continental Chemiste* cases, he found that the agency overstepped its statutory mandate. In *Ewig Brothers* he allowed the agency to apply an informal rule, but cautioned that the rule, though informal, would limit future agency action unless a change in policy was similarly publicized. The *Papercraft* decision chided the FTC for failure to preserve an adequate record of administrative proceedings, while in *Hodgson* Stevens' dissent condemned the use of an administrative expertise justification when the action involved noncompliance with a statutory mandate. At a minimum these cases indicate that Justice Stevens does not favor a "hands-off" judicial attitude when agency action is challenged.

Although he recognized the need for some deference to administrative expertise and the existence of the harmless error doctrine in *Twomey* and *Wisconsin Electric*, Stevens carefully limited the holdings to the specific facts involved. No widespread endorsement of agency discretion appears in either opinion. Further, the brief *Louis-Allen* dissent suggests that Justice Stevens is acutely aware of the judicial tendency to accept an administrative expertise justification to prevent scrutiny of possible agency abuses of discretion. The *Stark* opinion arguably presents an expansive view of the reviewer's role. Although the decision acknowledged that the scope of review must be narrow, the court in effect re-examined the plaintiff's evidence and found it to outweigh that asserted as the basis for the agency's decision.

Justice Stevens may develop a reputation as an activist concerning administrative review during his tenure on the Supreme Court. He is capable of painstaking statutory analysis and wary of potential abuse of discretion by agencies. Justice Stevens has been quick to invalidate administrative decisions not justified by the record presented, and on occasion may appear to "re-try" the case on the basis of the written evidence in the record. Justice Stevens' viewpoints may form the crucial wedge in future Supreme Court cases in the administrative law field.

VI. FEDERAL JURISDICTION

When faced with a question of federal jurisdiction, Justice Stevens tends to find jurisdiction whenever it arguably exists. Principles of comity and federalism temper his broad view of federal judicial power, but Justice Stevens clearly favors the existence and retention of jurisdiction when these notions do not conflict with its exercise.

Justice Stevens demonstrated a willingness to avoid the statutory proscription of a federal injunction against state proceedings in *Barancik v. Investors Funding Corp.*[343] That case raised the question whether a federal action to enjoin state court suits filed before any state proceeding was pending must be dismissed under the federal anti-injunction statute when a state suit subsequently is filed before a decision in the federal action. The anti-injunction statute provides that no federal court may enjoin a pending state proceeding except (1) when the injunction is expressly authorized by act of Congress, (2) when it is needed to protect or effectuate a judgment, or (3) when necessary in aid of the federal court's jurisdiction.[344] The Supreme Court in *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*[345] held that these three exceptions are the only exceptions to the statute's general prohibition. Justice Stevens could have dismissed the action by strictly applying the statute with its three enumerated exceptions. He declined to do that. Instead, he said that "the applicability of the statute may be avoided by the timing of defendants' resort to the state forum."[346] By determining the question as of the time the federal court's power was invoked, not at some later time, Justice Stevens determined that the anti-injunction statute did not apply. The injunctive action had been brought to preserve the status quo while the court considered the controverted jurisdictional issues of the case, a reason not clearly within the enumerated exceptions to the anti-injunction statute. Nevertheless, Justice Stevens found that reason, together with the timing factor, sufficient to avoid the statutory proscription.[347]

In reaching the result of this case, Justice Stevens evinced a reluctance to permit the ouster of federal jurisdiction to enjoin a state action by the subsequent filing of a state proceeding, even if the injunction is not literally in aid of the court's jurisdiction. Thus, Justice Stevens professed to adhere to the strict reading of the anti-injunction statute mandated by *Atlantic Coast Line Railroad*,[348] while declining to apply the statute in a situation that does not clearly meet one of the three enumerated exceptions to its applicability. Justice Stevens alluded to a perceived congressional purpose to "avoid subordinating the exercise of federal judicial power to the will of one of the litigants."[349] This jealous guarding of the power of

343. 489 F.2d 953 (7th Cir. 1973).
344. 28 U.S.C. § 2283 (1970).
345. 398 U.S. 281 (1970).
346. 489 F.2d at 936.
347. *Id.* at 937.
348. 398 U.S. 281 (1970).
349. 489 F.2d at 938.

federal courts, tempered by considerations of comity,[350] is a continuing theme in Justice Stevens' decisions on jurisdictional issues.

In *Carson v. Allied News Co.*,[351] Justice Stevens indicated a willingness in the appropriate case to depart from established authority and recognize in a federal appellate court the power under 28 U.S.C. § 1653 to strike nondiverse parties in order to preserve diversity jurisdiction in the action.[352] Stevens' discussion of this topic was dictum in the instant decision because the case did not present the issue in a context appropriate for its determination. Nevertheless, the dictum clearly shows that Justice Stevens prefers to retain jurisdiction when it arguably exists. Here the jurisdiction in question was that of an appellate court, but the effect of recognizing that court's power to dismiss nondiverse parties is to limit challenges to federal diversity jurisdiction in general.

Justice Stevens considered a political question attack on federal jurisdiction in *Illinois State Employees Union, Council 34 v. Lewis*.[353] In that case plaintiffs[354] brought a first amendment claim, alleging that they had been discharged from state positions because they refused to change their political affiliation or support partisan political activities. Defendant, the Secretary of State of Illinois, contended that the controversy was "political" and therefore nonjusticiable.[355] Building on the rationale of *Baker v. Carr*,[356] Justice Stevens determined that the issue was justiciable and held that an employee's discharge from employment because of political allegiance violates the first amendment right of free association. Justice Stevens reasoned that when a discharge is motivated by considera-

350. Justice Stevens suggested in his opinion that this case might be one in which the district court in its discretion should decline to enjoin the state action by considering principles of equity, comity, and federalism, apart from the anti-injunction statute. That issue was not before the Seventh Circuit, however. 489 F.2d at 938.

351. 511 F.2d 22 (7th Cir. 1975).

352. 28 U.S.C. § 1653 (1970) provides in part: "Defective allegations upon jurisdiction may be amended, upon terms, in the appellate courts." The question to be considered in the "appropriate case" is whether an amendment striking a nondiverse party is an amendment of a jurisdictional allegation within the meaning of § 1653. *See* 511 F.2d at 24 n.4.

353. 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973).

354. Plaintiffs held non-civil service positions as building employees, clerical workers and license examiners.

355. Defendant further contended that federal judges may not impose a civil service system on the State of Illinois and that a tradition of uninterrupted acceptance of the "patronage system" may not be overcome by judicial fiat.

356. 369 U.S. 186 (1962). In *Baker v. Carr* the Supreme Court identified several factors indicative of a nonjusticiable political question including: whether the question had been decided or would be decided by a branch of government coequal with the Supreme Court; the risk of embarrassment to the government abroad or of grave disturbance at home; and the absence of judicially manageable standards. 369 U.S. at 226.

tions of race, religion, or constitutionally protected conduct, the state's action is subject to federal judicial review under the fourteenth amendment. Although he noted that state interests may justify curtailing the political activities of some public employees, Stevens concluded, "[n]o state interest could justify a requirement that an employee falsely swear allegiance to an offensive religious or political faith, or a requirement that he actively work for, or speak out in favor of, a political cause he deemed obnoxious. The basic rights of citizenship survive acceptance of public employment."[357]

Justice Stevens' position has been rejected by the Second Circuit and the Supreme Court of Pennsylvania, which refused to consider the constitutionality of a discharge for political reasons.[358] Justice Stevens likewise could have avoided this difficult case by finding it nonjusticiable. Instead he considered the merits of plaintiff's contentions in determining the jurisdictional question, since only by so doing could the political question issue be resolved. This demonstrates a noteworthy willingness to take hard cases and a reluctance to use the federal courts' limited jurisdiction as a shield.

A case not directly related to federal jurisdiction, but nevertheless indicative of Justice Stevens' flexible approach to procedural matters, is *Jimenez v. Weinberger*,[359] which deals with the timing of the certification of a plaintiff class. In that case defendant Secretary of Health, Education and Welfare appealed from a district court order directing him to pay benefits to individuals who were certified as members of a plaintiff class after a decision and appeal on the merits of the underlying claim.[360] The Secretary contended that the district court was without power to certify the class after a decision on the merits. Rejecting defendant's position, Justice Stevens held that delay in certification does not conclusively deprive the district court of the power to certify the class even though Federal Rule of Civil Procedure 23 requires certification "as soon as practicable." While recognizing that the class ordinarily must be promptly certified, Stevens explained that Rule 23 contemplates flexibility in its enforcement and therefore authorizes later certifica-

357. 473 F.2d 561, 572 (7th Cir. 1972).

358. Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971); American Fed. of State Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971).

359. 523 F.2d 689 (7th Cir. 1975).

360. The original plaintiffs, illegitimate children born after onset of their father's disability, sought both individual and class relief for insurance benefits denied illegitimates under the Social Security Act. A three-judge court upheld the challenged provision without considering the class action issue. Jiminez v. Richardson, 353 F. Supp. 1356 (N.D. Ill. 1973). On appeal, the United States Supreme Court, in Jiminez v. Weinberger, 417 U.S. 628 (1974), reversed and remanded without reference to the class action issue. The district court subsequently granted relief to plaintiffs and other similarly situated applicants.

tion when the situation warrants it.

Under the facts in the instant case, Justice Stevens reasoned that greater harm would result from permitting the government to avoid its obligation to pay disability benefits because of a procedural error committed by the district court than from allowing individuals to become parties to the judgment long after their positions as plaintiffs should have been established. Stevens further concluded that notwithstanding the district court's failure to certify the class, the court acquired jurisdiction of the class action when the complaint was filed and that therefore the claims of the class were not barred by the statute of limitations. Thus, the unusual event of class certification after a decision and appeal on the merits was upheld by Justice Stevens. Again, this is evidence of a hesitancy to limit a federal court's jurisdiction to decide the issues before it.

The final case to be considered in this section is *United States v. Staszcuk*.[361] That case raised the issue of the "affecting commerce" jurisdictional requirement of the Hobbs Act.[362] Justice Stevens found jurisdiction even though no acts actually affecting commerce had occurred because, had the plan of defendant been carried out, commerce would have been affected. By upholding criminal jursidiction whenever a realistic probability exists that the consummated extortion or robbery would have affected interstate commerce, Justice Stevens' decision extends the power of the federal courts to the hearing of cases involving the traditionally local crimes of extortion and robbery. Arguably, this exceeds the scope of jurisdiction Congress intended to confer in the Act.[363] The case thus serves as another example of Justice Stevens' broad interpretation of federal jurisdiction, an interpretation that in some cases apparently confiicts with statutes and precedent.

As the above cases suggest, Justice Stevens appears to favor recognizing federal jurisdiction in close cases and retaining jurisdiction once it is invoked. The tendency may be tempered by notions of comity and federalism, but not so tempered as to prevent a departure from traditional views. If Justice Stevens continues this approach while sitting on the Supreme Court, where more discretion to take or refuse cases exists, he may provide a new voice in favor of hearing hard cases and opposed to excessive use of the jurisdictional shield.

361. 517 F.2d 53 (7th Cir.), *cert. denied*, 96 S.Ct. 65 (1975), *commented on in* 28 VAND. L. REV. 1348 (1975).

362. 18 U.S.C. § 1951 (1970).

363. *See* 28 VAND. L. REV. 1348, 1360 (1975).

VII. CONCLUSION

This section is perhaps erroneously captioned, for Justice Stevens is beginning, not ending, his most influential years on the bench. Nevertheless, one who peruses the Seventh Circuit opinions of the Justice does find in them consistencies and continuing themes.

In the area of constitutional law, Justice Stevens gives short shrift to private interests he considers of small magnitude, such as the interest of a high school student in wearing his hair long[364] or the interest of a couple in the husband's presence at childbirth.[365] When rights he considers basic are at issue, however, he tends to scrutinize government action more closely. For example, in *Vann v. Scott*,[366] he carefully considered the state's duty to give juvenile delinquents proper rehabilitative care, and in *Cousins v. City Council of Chicago*[367] he would have struck down a gerrymandering scheme based on the political persuasion of the voters. He looks particularly closely at the procedure followed by the government in depriving a citizen of liberty or property,[368] but when proper procedure has been followed and the state has an arguably legitimate interest in its action, he tends to uphold the state's action.[369] While he is a conservative judge in the sense that he gives the states latitude to develop their own solutions to problems on the boundaries of constitutional law, Justice Stevens is not afraid to strike out boldly to preserve from state encroachment what he considers an important right. For example, in *Illinois State Employees Union, Council 34 v. Lewis*[370] he refused to label a firing for partisan political reasons a political question. Rejecting this jurisdictional escape route (chosen by the Second Circuit in a similar case),[371] he forthrightly considered the problem and found that such activity violated the first amendment.

How does Justice Stevens define a constitutional right? For him, individual rights exist within the context of competing state interests and policies. He looks closely at the interest the individual asserts and then balances it against the state's interest. Thus in the *Lisk* case,[372] he looked at an illegal search and seizure in two steps

364. Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972).
365. Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716 (7th Cir. 1975).
366. 467 F.2d 1235 (7th Cir. 1972).
367. 466 F.2d 830 (7th Cir.) (Stevens, J., dissenting), *cert. denied*, 409 U.S. 893 (1972).
368. *See, e.g.*, Morales v. Schmidt, 489 F.2d 1335 (1973) (Stevens, J., dissenting), *rev'd en banc*, 494 F.2d 85 (7th Cir. 1974).
369. *See* Vann v. Scott, 467 F.2d 1235 (7th Cir. 1972).
370. 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973).
371. Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971).
372. United States v. Lisk, 522 F.2d 228 (7th Cir. 1975).

and found that the defendant had no standing to contest the search because his interest in privacy was not invaded and that the seizure itself was reasonable. His emphasis on defining the particular individual interest asserted is particularly evident in the due process area, where he looks meticulously for an interest in property or liberty that has been invaded before addressing the question of lack of due process.[373] One consequence of this approach is a narrow definition of those interests of constitutional dimension.[374] In all, Justice Stevens acts with restraint in considering questions of contitutional scope and gives the states latitude to try varying solutions to such questions. This restraint appears to stem primarily from a conservative view of the judiciary's proper role in our government and may not reflect the Justice's own thoughts on what the "good" or "right" answer would be to any particular dispute between the state and an individual.

In the hodgepodge of areas discussed under the federal statutory law heading, the Justice's methodology at least can be discerned. He looks first to the statute in question;[375] if he feels the statutory language clearly answers the issue raised, he ends his inquiry there; when he finds room for interpretation, he looks both at the legislative policy behind the act and at the economic effect he considers desirable before he reaches a resolution.[376] While the Justice is known for his expertise in antitrust law, the cases he has decided provided little opportunity for him to display it. In the securities area, his finding of liability in the *Nuveen* case[377] and standing in *Eason v. General Motors Acceptance Corp.*[378] suggests a readiness to come to the aid of the investor and to extend liability under Rule 10b-5 even beyond its present bounds. The Justice's labor law opinions give little insight into his views in that area, though the reader may wish to consider the preponderance of his votes in favor of management.[379]

The remaining areas discussed, administrative law and federal jurisdiction, are areas in which Justice Stevens has struck a generally expansive posture. In administrative law, he is an activist. He looks to the statutory basis for agency action, and if he finds it

373. *See, e.g.*, Shirck v. Thomas, 486 F.2d 691 (7th Cir. 1973), *rev'g on rehearing*, 447 F.2d 1025 (7th Cir. 1971).

374. *See, e.g.*, notes 2-30 and accompanying text.

375. L. C. Thomsen & Sons, Inc. v. United States, 484 F.2d 954 (7th Cir. 1973).

376. Alherto-Culver Co. v. Scherk, 484 F.2d 611 (7th Cir. 1973) (Stevens, J., dissenting), *rev'd*, 417 U.S. 506 (1974).

377. Sanders v. John Nuveen & Co., 524 F.2d 1064 (7th Cir. 1975).

378. 490 F.2d 654 (7th Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

379. *See* notes 258-71 *supra* and accompanying text.

wanting, he is not reluctant to strike down the action.[380] He acknowledges that in some areas an agency may have expertise he lacks,[381] but in general he appears ready to rethink agency actions himself, and to overrule them if he thinks them incorrect and he has an arguable basis for reversal. He takes a similarly activist position toward federal jurisdictional problems. While he often considers it improper to give a federal directive to state officials, he jealously guards the power to decide whether to issue such a directive. Thus in *Barancik*[382] he narrowly construed a statute limiting the court's injunctive power, and in the *Lewis* case[383] he refused to use a "political question" rationale to avoid a difficult first amendment problem.

In sum, Justice Stevens construes the power of the federal judiciary broadly. In constitutional areas, he generally wields this power with restraint and tends to defer to reasonable determinations by state officials and courts. In areas of statutory law, he looks first to the statute itself and then if necessary to the underlying policies. He seems always to have one eye on the practical and economic effects his construction of a statute will have. In every area, it is difficult to sum up his approach, for he tends to follow a case-by-case analysis, exhaustively considering the factual background of the case, its procedural posture, and the varying policies and authorities involved. In individual opinions, however, his clear reasoning and structural soundness enable the reader to discern readily his holding and his views. We hope this project has given the reader insight into

380. Stearns Elec. Paste Co. v. Environmental Protection Agency, 461 F.2d 293 (7th Cir. 1972).

381. *See* United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); Papercraft Corp. v. FTC, 472 F.2d 927 (7th Cir. 1973).

382. Barancik v. Investors Funding Corp., 489 F.2d 933 (7th Cir. 1973).

383. Illinois State Employees Union, Council 34 v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973).

Justice Stevens' first years on the bench. We look forward to the further articulation of his judicial positions that the years and opinions ahead should bring.

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APPENDIX*

I. CONSTITUTIONAL LAW

A. Due Process

Adams v. Walker, 492 F.2d 1003 (7th Cir. 1974) (Stevens, J., concurring) (state official who could be removed at the governor's discretion had no property interest in his position entitling him to a due process hearing upon discharge; due process hearing would involve an excessive invasion of state policy-making by the federal judiciary).

Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975) (post-indictment hearing provided by state judicial machinery is sufficient to satisfy demands of due process regarding taking of prisoner's property by prison guards).

Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975) (the due process clause of the fifth amendment prohibits the federal government from making irrational and discriminatory choices regarding the distribution of property by intestate succession).

Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1 (7th Cir. 1974) (due process clause did not protect teacher against arbitrary and capricious discharge because no interest in liberty or property was impaired).

Groppi v. Leslie, 436 F.2d 331 (7th Cir. 1971) (judicial power of summary punishment for direct contempt is constitutionally exercisable by the legislative branch) (Stevens, J., dissenting: state legislature cannot convict and sentence individual for contempt without prior notice or opportunity to be heard).

Horvath v. City of Chicago, 510 F.2d 594 (7th Cir. 1975) (claim by massage parlor operators that nuisance ordinance was unconstitutionally vague and did not give fair notice that such conduct was proscribed failed to provide a proper basis for federal interference with state civil litigation that would presumably eliminate ambiguity).

Illinois State Employees Union Council 34 v. Lewis, 473 F.2d 561 (7th Cir. 1972) (the fourteenth amendment prohibits a state from discharging a non-policy-making state employee because he refused to transfer his political allegiance from one party to another).

Kimbrough v. O'Neil, 523 F.2d 1057 (7th Cir. 1975) (Stevens, J., concurring) (prisoner's allegation that ring taken by prison officials was not returned upon his release stated a claim for relief under 1871 Civil Rights Act as well as a claim for tortious conversion under Illinois law; post-deprivation remedy provided by state against the culpable agents satisfied procedural due process).

McTaggart v. Secretary of the Air Force, 458 F.2d 1320 (7th Cir. 1972) (requirement that public employee show cause at pretermination hearing why he should not be dismissed does not violate due process).

Miller v. School Dist. No. 167, 495 F.2d 658 (7th Cir. 1974) (school board's decision to terminate teacher's employment allegedly based on his mode of appearance did not violate due process).

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* The appendix does not list all of Justice Stevens' opinions while sitting on the Seventh Circuit. Only those the compilers considered of potential interest to practitioners and scholars are included.

Shirck v. Thomas, 486 F.2d 691 (7th Cir. 1973), *rev'g on rehearing,* 447 F.2d 1025 (7th Cir. 1971) (state requirement of notice of termination did not give nontenured teacher a property interest in her position, nor was the stigma imposed on teacher sufficient to impair her interest in liberty).

Shirck v. Thomas, 447 F.2d 1025 (7th Cir. 1971), *rev'd on rehearing,* 486 F.2d 691 (7th Cir. 1973) (teacher whose contract was not renewed at end of her probationary period was entitled to a statement of reasons and pretermination hearing) (Stevens, J., dissenting: federal courts lack the competence necessary to make the kind of policy judgment that this case implicitly authorizes).

B. Equal Protection

Cousins v. City Council, 466 F.2d 830 (7th Cir.), *cert. denied,* 409 U.S. 893 (1972) (Stevens, J., dissenting) (racial and political gerrymandering according to political persuasion presents justiciable issue and should be judged by same standard as gerrymandering according to race).

Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975) (federal government may not discriminate against illegitimate Indian child in distributing intestate property left by collateral heir).

Chase v. United States, 468 F.2d 141 (7th Cir. 1972) (record contained no basis for conclusion that there was systematic exclusion of young adults from jury service).

C. State Action

Cohen v. Illinois Iust. of Tech., No. 74-1930 (7th Cir., October 28, 1975) (private university's discriminatory hiring practices regarding females not actionable under 42 U.S.C. §§ 1983 or 1985(3) (1970) because no state action existed).

Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972) (discrimination by corporate landlord against lawyers engaged in criminal practice did not operate to deprive plaintiff of equal protection of laws under 42 U.S.C. § 1985(3) (1970) because no state action existed).

Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied,* 409 U.S. 1114 (1973) (power company's discontinuance of service without prior hearing did not violate procedural due process because no state action existed).

D. Right to Jury Trial

Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972), *aff'd sub. nom.,* **Curtis v. Loether,** 415 U.S. 189 (1974) (litigant in action brought pursuant to Title VIII of Civil Rights Act has right to trial by jury).

E. First Amendment Rights

Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972) (high school hair regulation ruled unconstitutional though it was approved by a majority of students and permitted exemption by parental consent) (Stevens, J., dissenting: no constitutional right impaired).

Buford v. Southeast Duhois County School Corp., 472 F.2d 890 (7th Cir. 1973) (school board's transfer of Protestant students to a formerly Catholic school in a predominantly Catholic area does not violate the establishment clause of the

first amendment, provided that certain changes are made to relieve the school of its parochial atmosphere).

Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974) (defamatory statement dealing with a matter of significant public interest protected by the first amendment in the absence of evidence that publisher had knowledge of its falsity or acted with reckless disregard of its truth).

Hanover Twp. Fed. of Teachers, Local 1954 v. Hanover Community School Corp., 457 F.2d 456 (7th Cir. 1972) (economic activities of a union or other association are not protected by the first amendment and may be prohibited or protected as a matter of legislative policy).

Herzbrun v. Milwaukee County, 504 F.2d 1189 (7th Cir. 1974) (disruptive conduct of state employees was not symbolic speech or protected expression, and the rule under which they were discharged was not unconstitutionally overbroad) (Stevens, J., concurring: plaintiffs did not have standing to invoke first amendment since their conduct was not even arguably communicative).

Morales v. Schmidt, 494 F.2d 85 (7th Cir. 1974) (state may not infringe prisoner's right of communication unless the restriction is related both reasonably and necessarily to the advancement of a justifiable purpose of imprisonment) (Stevens, J., concurring: state did not meet its burden of justifying ad hoc determination because it did not consider less drastic alternatives).

Morales v. Schmidt, 489 F.2d 1335 (7th Cir. 1973), *rev'd en banc*, 494 F.2d 85 (7th Cir. 1974) (prison mail censorship bearing rational relationship to or reasonably necessary for advancement of justifiable state purpose is constitutional) (Stevens, J., dissenting: state ad hoc action placing a prior restraint on a prisoner's freedom of expression requires the closest judicial scrutiny).

F. Right of Privacy

Fitzgerald v. Porter Mem. Hosp., 523 F.2d 716 (7th Cir. 1975) (the right of marital privacy does not include the right of spouse to have husband present in the delivery room of a public hospital that has, for medical reasons, adopted a rule requiring his exclusion).

G. Constitutional Rights of Juveniles

Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972) (Stevens, J., dissenting) (a high school dress code that a committee of students, teachers and administrators had formulated and a majority of the students regnlated had adopted did not violate a student's constitutional rights to regulate the length and style of his hair when the code allowed a student's parents to give written consent for the child's noncompliance).

United States *ex rel.* Bomhacino v. Bensinger, 498 F.2d 875 (7th Cir. 1974) (a juvenile court judge is not required either to provide an evidentiary hearing or to give a statement of reasons in deciding whether to transfer a juvenile from his court to a court of ordinary jurisdiction).

Coughlin v. United States *ex rel.* Wilson, 472 F.2d 100 (7th Cir. 1973) (the potential difference between maximum length of sentence for a juvenile offender and that for an adult convicted of the same offense is not a violation of the equal protection clause).

Vann v. Scott, 467 F.2d 1235 (7th Cir. 1972) (a statute that classifies runaway youths as delinquents in the same way as juvenile felons does not violate the equal protection clause; punishment of runaways in the same way as juvenile felons, however, may constitute cruel and unusual punishment in violation of the eighth amendment).

II. CRIMINAL CONSTITUTIONAL LAW

A. Fourth Amendment Protections

Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975) (prisoner entitled to prove that an alleged taking of property in random shakedowns was unreasonable search and seizure).

Dichiarinte v. United States, 445 F.2d 126 (7th Cir. 1971) (Stevens, J., dissenting) (would defer to district court judge's holding that the police had not exceeded bounds of consent search).

United States v. Fairchild, 526 F.2d 185 (7th Cir. 1975) (declined to decide whether warrantless arrest violates fourth amendment).

Kahn v. United States, 471 F.2d 191 (7th Cir. 1972) (Stevens, J., concurring in part and dissenting in part) (telephone conversations between husband and wife with respect to ongoing violations of state gambling laws admissible under Title III of the Omnibus Crime Control Act.).

Lee v. United States, 448 F.2d 604 (7th Cir.), *cert. denied,* 404 U.S. 853 (1971) (technical error in search warrant description does not void warrant).

United States v. Lisk, 522 F.2d 228 (7th Cir. 1975) (defendant, whose conviction for possession of a firearm was based on evidence resulting from an unlawful search and seizure, had standing to contest the seizure but not the search).

Ramsey v. United States, 503 F.2d 524 (7th Cir. 1974), *cert. denied,* 420 U.S. 932 (1975) (Title III of Omnibus Crime Control Act not unconstitutional on its face).

United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974) (warrantless search not justified by police officer's belief that defendant was about to destroy evidence).

B. Fifth Amendment Confessions

Mates v. United States, 444 F.2d 1071 (7th Cir. 1971) (Stevens, J., dissenting) (admission of statement obtained in violation of defendant's fifth amendment right deemed harmless error).

Oliver v. United States, 505 F.2d 301 (1974) (defendant entitled to *Miranda* warnings in noncustodial interrogation by Internal Revenue agents).

Springer v. United States, 460 F.2d 1344 (7th Cir.), *cert. denied,* 409 U.S. 873 (1972) (Stevens, J., dissenting) (interrogation of defendant without notice to counsel violates procedural due process).

C. Right to Counsel

Ganz v. Bensinger, 480 F.2d 88 (7th Cir. 1973) (no constitutional right to counsel at at a parole release hearing).

Nickols v. Gagnon, 454 F.2d 467 (7th Cir.), *cert. denied,* 408 U.S. 925 (1971) (defendant received effective assistance of counsel although counsel informed the appellate court that he could find no merit in appeal).

Jeffers v. United States, 520 F.2d 1256 (7th Cir. 1975) (defendant adequately represented although counsel alleged a conflict of interest and attempted to withdraw).

Wimberley v. Laird, 472 F.2d 923 (7th Cir. 1973) (failure of trial counsel to raise a defense was a trial tactic and did not constitute ineffective assistance of counsel).

Macon v. Lash, 458 F.2d 942 (7th Cir. 1972) (petitioner's right to appeal not foreclosed by appointed counsel's failure to file a timely motion for new trial).

Wright v. Ingold, 445 F.2d 109 (7th Cir. 1971) (no constitutional right to have counsel at a draft board hearing).

D. Due Process Rights of Prisoners

United States *ex rel.* **Miller v. Twomey,** 479 F.2d 701 (7th Cir. 1973) (a prisoner's right to due process includes notice, hearing, and an impartial decision maker before revocation of good time credits and an imposition of punitive segregation).

E. Pretrial Identification Procedures

Holmes v. United States, 452 F.2d 249 (7th Cir. 1971), *cert. denied,* 405 U.S. 1016 (1972) (pre-indictment photo identification was not so suggestive as to deprive defendant of due process).

Sturges v. United States *ex rel.* **Kirby,** 510 F.2d 397 (7th Cir. 1975) (defendant's due process was not violated by showup; due process clause does not require per se exclusionary rule be applied to suggestive pretrial identification procedures).

F. Double Jeopardy

Clay v. United States, 481 F.2d 133 (7th Cir.), *cert. denied,* 414 U.S. 1009 (1973) (government appeal of dismissal of case for eight-month delay not barred by double jeopardy clause).

Cullen v. United States, 454 F.2d 386 (7th Cir. 1971) (offense of willfully destroying public records is not included within the offense of knowing interference with the administration of selective service laws).

Fleming v. United States, 504 F.2d 1045 (7th Cir. 1974) (defendant could not be convicted on separate charges for the same offense).

Haygood v. United States, 502 F.2d 166 (7th Cir.), *cert. denied,* 419 U.S. 1114 (1974) (jeopardy does not attach in pretrial use of pending charge for sentencing in a related charge).

Hunter v. United States, 478 F.2d 1019 (7th Cir.), *cert. denied,* 414 U.S. 857 (1973) (under the "Wharton Rule" defendants could not be convicted for both the crime and conspiracy to commit the crime).

Ponto v. United States, 454 F.2d 647 (7th Cir.) *rehearing en banc,* 454 F.2d 657 (1971) (Stevens, J., dissenting) (dismissal of indictment based on facts not set out in indictment does not operate as an acquittal for purposes of double jeopardy).

G. Other Decisions on Criminal Law

Booker v. United States, 480 F.2d 1310 (7th Cir. 1973) (judge committed error by refusing to question jurors on possible racial prejudice).

Brewbaker v. United States, 454 F.2d 1360 (7th Cir. 1972) (defendant not entrapped into making sale of cocaine).

Clay v. United States, 481 F.2d 133 (7th Cir.), *cert. denied,* 414 U.S. 1009 (1973) (eight-month delay hetween arrest and indictment did not justify dismissal of the case).

Springer v. United States, 460 F.2d 1344 (7th Cir. 1972) (Stevens, J., dissenting) (visits to defendant in custody by agents of prosecutor without notice to appointed counsel violated due process).

United States *ex rel.* **Allum v. Twomey,** 484 F.2d 740 (7th Cir. 1973) (Waiver of an objection to evidence on constitutional grounds does not require defendant's full knowledge and participation with defense attorney).

Willis v. United States, 515 F.2d 798 (7th Cir. 1975) (an indictment is not insufficient for failure to charge felonious intent where intent is implicit in crime charged).

IV. STATUTORY LAW

A. Securities Law

(1) Federal Securities Law

Alberto-Culver v. Scherk, 484 F.2d 611 (7th Cir. 1973), *rev'd,* 417 U.S. 506 (1974) (Stevens, J., dissenting) (Seventh Circuit refused to stay Rule 10b-5 action by American transferee company against German transferor, holding arbitration provision void under the Securities Exchange Act).

Dasho v. Susquebanna Corp., 461 F.2d 11 (7th Cir.), *cert. denied,* 408 U.S. 925 (1972) (Ross v. Bernhard, 396 U.S. 531 (1970), retroactively applied; plaintiff shareholders in derivative actions entitled to jury trial).

Eason v. General Motors Acceptance Corp., 490 F.2d 654 (7th Cir. 1973), *cert. denied,* 416 U.S. 960 (1974) (shareholders of a corporation that purchased a business from defendant and who individually guaranteed certain liabilities assumed by the corporation had standing to sue under Rule 10b-5).

Milnarik v. M-S Commodities, Inc., 457 F.2d 274 (7th Cir.), *cert. denied,* 409 U.S. 887 (1972) (a discretionary trading contract not an "investment contract" subject to registration because the "element of commonality" under the *Howey* test was absent, even though the defendant broker had entered into similar contracts with other customers).

Mueller v. Korholz, 449 F.2d 82 (7th Cir. 1971), *cert. denied,* 405 U.S. 922 (1972) (lower court's finding that director received no profits within the meaning of section 16(b) affirmed).

Sanders v. John Nuveen & Co., Inc., 524 F.2d 1064 (7th Cir. 1975) (an underwriter of short term commercial paper has a duty to make reasonable inquiries into the financial condition of the issuer, including requesting tax returns, corporate minute books and accounting work papers).

(2) Blue Sky Law

Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975) (fifth amendment due process precluded the federal government from discriminating, on the basis of a state statute, against the plaintiff on the presumption that her great aunt, a Chippewa Indian named Florence Blue Sky Vessel, would have disinherited her because she was born out of wedlock).

Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972) (Stevens, J., concurring) (the three-year statute of limitations of Illinois securities law applied, rather than the five-year limit covering actions for fraud since the former better effectuated the policy of the federal statutes in protecting the "uninformed, the ignorant and the gullible").

B. Antitrust Law

Avnet, Inc. v. FTC, 511 F.2d 70 (7th Cir.), *cert. denied*, 44 U.S.L.W. 3202 (Oct. 6, 1975) (facts support FTC's narrow definition of relevant product market).

Corning Glass Works v. FTC, 509 F.2d 293 (7th Cir. 1975) (manufacturer prohibited from imposing customer restrictions on wholesalers in free trade states who deal with retailers in signer-only states).

Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972) (employee's confiict of interest in securing reissue of patent with intent to expand coverage of patent claims constitutes predatory practice in finding of attempt to monopolize).

Mullis v. Arco Petroleum Corp., 502 F.2d 290 (7th Cir. 1974) (relevant product market for antitrust purposes not narrowed by limited availability of alternate supplies to terminated petroleum distributor where limitations are due to government regulation during period of shortage).

Panther Pumps & Equip. Co., v. Hydrocraft, Inc., 468 F.2d 225 (7th Cir. 1972), *cert. denied*, 411 U.S. 965 (1973) (inclusion of no-contest clauses in patent licensing agreements is not misuse for purposes of barring the holder's infringement claim against non-licensee).

Protoctoseal Co. v. Barancik, 484 F.2d 585 (7th Cir. 1973) (summary judgment enjoining director of competing corporation from holding simultaneous directorship on plaintiff's board affirmed on showing of statutory minimum net worth of either corporation, horizontal market relationship, and capability of the corporations to combine to violate antitrust law).

C. Federal Taxation

(1) General

Economy Fin. Corp. v. United Statos, 501 F.2d 466 (7th Cir. 1974) (Code § 801(a): taxpayer corporations failed to qualify as "life insurance companies" for tax purposes when tbeir life insurance reserves were less than half of their total reserves) (Stevens, J., dissenting: regardless of the wisdom of granting favorable tax treatment to life insurance companies, the corporation had satisfied the letter of the statute).

Hart Metal Prod. Corp. v. Commissioner, 437 F.2d 946 (7th Cir. 1971) (multiple issues involving Code §§ 1001 and 1212, 269, 543 and 545(b)(1)).

Kelly v. Commissioner, 440 F.2d 307 (7th Cir. 1971) (Code § 213: hotel expense for food and lodging incurred while in need of medical treatment and unable to remain in hospital, held properly deductible as medical expense).

Kenner v. Commissioner, 445 F.2d 19 (7th Cir. 1971) (Code § 7453: hest evidence rule improperly applied; taxpayer's oral proof not automatically excluded merely because documentary proof is available in pro se defense) (Stevens, J., dissenting: defendant had history of flouting the procedural rules of court and therefore those rules need not have been relaxed simply because he persisted in appearing pro se).

Mason v. United States, 513 F.2d 25 (7th Cir. 1975) (Code §§ 111, 170, and 1232: bargain sale to charity constituted a gift; the value determined at the time of transfer).

Patrick v. United States, 36 Am. Fed. Tax R.2d 75-6209 (7th Cir. 1975) (taxpayer's suit to enjoin collection of wagering taxes denied when taxpayer failed to show that government had no chance of establishing its claim).

Standard Oil Co. (Indiana) v. Commissioner, 465 F.2d 246 (7th Cir. 1972) (Code § 611: taxpayer's economic interest in gas formations survived lease and rendered proceeds received ordinary income subject to depletion).

L.C. Thomsen & Sons, Inc. v. United States, 484 F.2d 954 (7th Cir. 1973) (Code § 101: life insurance proceeds received by corporate taxpayer upon the death of its sole distributor were properly excluded from income although the proceeds approximately equaled in value the uncollectible indebtedness of distributor).

(2) Tax Fraud

Barrett v. United States, 505 F.2d 1091 (7th Cir.), *cert. denied,* 421 U.S. 964 (1975) (Code §§ 7201 and 7122: grant of immunity from prosecution to accomplice in tax evasion in exchange for testimony ruled not unlawful) (Stevens, J., dissenting: although evidence of guilt strong, improper and prejudicial conduct at trial warranted new trial).

Cleveland v. United States, 477 F.2d 310 (7th Cir. 1973) (Code § 7203: lower court erred in refusing to allow production of special agent's report under the Jencks Act, 18 U.S.C. § 3500 (1970), as it related to the subject matter of the agent's testimony).

Dichiarinte v. United States, 445 F.2d 126 (7th Cir. 1971) (Code § 7201: taxpayer's conviction reversed because trial court admitted evidence ohtained in search going beyond the scope of taxpayer's consent) (Stevens, J., dissenting: the record supports the lower court's holding that the defendant fully consented to the search).

McCarthy v. United States, 445 F.2d 587 (7th Cir. 1971) (Code § 7201: evidence of a 38-year-old felony conviction improperly admitted at taxpayer's trial).

Oliver v. United States, 505 F.2d 301 (7th Cir. 1974) (Code § 7201: failure to give taxpayer warnings of his rights to counsel and to remain silent tainted confession though taxpayer not in physical custody).

Shaheen v. United States, 445 F.2d 6 (7th Cir. 1971) (Code § 7402: writ preventing taxpayer's departure from the United States quashed when government failed to sustain burden of showing that taxpayer would transfer his assets abroad or fail to reappear).

D. Title VII of the Civil Rights Act of 1964

Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971) (Stevens, J., dissenting) (United's no-marriage rule for female flight cabin attendants not discriminatory on basis of sex).

E. Labor Law

Bachrodt Chevrolet Co. v. NLRB, 468 F.2d 963 (7th Cir.), *vacated*, 411 U.S. 912 (1972) (successor employer's obligation to bargain preceded unilateral change in working conditions) (Stevens, J., dissenting: employer was free to set initial terms of employment).

Braswell Motor Freight Lines v. NLRB, 486 F.2d 743 (7th Cir. 1973) (Stevens, J., dissenting) (alleged unfair labor practices were not sufficiently related to other charges brought to support two Board complaints).

Caravelle Wood Prod., Inc. v. NLRB, 504 F.2d 1181 (7th Cir. 1974) (the NLRB did not abuse its discretion by excluding family of management from bargaining unit for insufficient "community of interest") (Stevens, J., concurring, noted possible conflict between the majority decision and the NLRA's neutrality toward those who oppose unions).

Colonial Manor v. NLRB, 69 CCH Lab. Cas. ¶ 13,007 (7th Cir. 1972) (following strike, economic striker entitled to reinstatement until he obtained substantially equivalent employment elsewhere).

Duncan Foundry v. NLRB, 458 F.2d 933 (7th Cir. 1972) (overall reduction of business because of a strike did not necessarily eliminate jobs of strikers, disqualifying them from voting in a representation election).

Engineers Local 150 v. Flair Builders, 64 CCH Lab. Cas. ¶ 11,479 (7th Cir. 1971) (Stevens, J., dissenting: the defense of laches is not appropriate in a suit to compel arbitration).

Hodgson v. Lodge 851, IAM, 454 F.2d 545 (7th Cir. 1971) (Secretary of Labor acted in compliance with § 402(b) of LMRDA although he delayed commencement of litigation for more than 60 days).

Louis-Allis Co. v. NLRB, 463 F.2d 512 (7th Cir. 1972) (Stevens, J., dissenting: misleading information distributed by union required the setting aside of a subsequent election).

Mobil Oil Corp. v. NLRB, 482 F.2d 842 (7th Cir. 1973) (employees do not have a statutory right to representation at fact-finding interviews conducted by management during an investigation of suspected theft of company property).

Roselyn Bakeries, Inc. v. NLRB, 471 F.2d 165 (7th Cir. 1972) (Stevens, J., dissenting: references by employer to lockouts were not an implied threat to discourage union organization).

Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972) (deferred to NLRB's finding that plaintiff was discharged from employment for breach of collective bargaining agreement; union did not breach duty of fair representation).

Whitney Stores v. NLRB, 68 CCH Lab. Cas. ¶ 12,579 (1972) (Stevens, J., dissenting: board exceeded its discretion in giving controlling importance to the prior organization in a unit determination).

Wood v. Dennis, 489 F.2d 849 (7th Cir. 1973) (a union officer may not be dismissed from office for exercising rights guaranteed by LMRDA) (Stevens, J., concurring: the definition of discipline in § 609 is not broader than in § 101(a)(5)).

F. Attorney Fees

Allen v. Brady, 508 F.2d 64 (7th Cir. 1974) (the invalidity of a second patent for

lack of invention and proof that the holder of the valid patent purchased a license from assignee of second patent holder did not demonstrate such a lack of candor that an award of attorney fees was justified).

Associated Gen. Cont. v. Teamster, 486 F.2d 972 (7th Cir. 1972) (a union can recover costs and expenses for an erroneous issuance of an injunction up to, but not in excess of, the injunction bond).

Cousins v. City Council, 503 F.2d 912 (7th Cir.), *cert. denied,* 420 U.S. 992 (1974) (Stevens, J., concurring: in an action challenging a redistricting ordinance as racially discriminatory, the denial of an application for attorney fees was not an abuse of discretion).

Kearney & Trecker Corp. v. Gidding & Lewis, Inc., 452 F.2d 579 (7th Cir.), *cert. denied,* 405 U.S. 1066 (1971) (when plaintiff's infringement action failed because of its deceptive intention and defendant had performed significant public service in exposing the potential impact of defective patent reissues, the defendant was entitled to recover attorney fees).

Protectoseal Co. v. Barancik, 484 F.2d 585 (7th Cir. 1973) (recovery of attorney fees in an action brought under § 8 of the Clayton Act is unjustified since the Act requires proof of pecuniary injury).

Strassheim v. Gold Medal Folding Furn., 477 F.2d 818 (7th Cir. 1973) (when a defendant patentee applied for a patent without investigating the possibility of prior use for greater than one year and misfiled corporate documents that frnstrated discovery, the statutory requirement of an "exceptional care" for the award of attorney fees was met, and a showing of actual fraud is not necessary).

Tryforos v. Icarian Devel. Co., 518 F.2d 1258 (7th Cir. 1975) (in a diversity action, the award of attorney fees to a defendant upon dismissal of the suit is determined by state law).

V. ADMINISTRATIVE LAW

Continental Chemiste Corp. v. Ruckelshaus, 461 F.2d 331 (7th Cir. 1972) (cancellation of poison registration set aside on ground that Environmental Protection Agency improperly applied Food, Drug, and Cosmetic Act standards under a Federal Insecticide, Fungicide, and Rodenticide Act provision).

Encyclopaedia Britannica, Inc. v. FTC, 517 F.2d 1013 (7th Cir. 1975) (motion for injunction pending appeal denied; FTC may proceed with hearing notwithstanding plaintiff's Freedom of Information Act claim).

United States v. Ewig Bros. Co., 502 F.2d 715 (7th Cir. 1974), *cert. denied,* 421 U.S. 945 (1975) (DDT and dieldrin residues found in smoked chubs held food additives making fish adulterated and unmarketable under Food, Drug, and Cosmetic Act).

Hodgson v. Lodge 851, IAM, 454 F.2d 645 (7th Cir. 1971) (union held to have voluntarily waived statutory time bar to action by Secretary of Labor through letter agreeing not to assert any limitation under Labor-Management Reporting and Disclosure Act) (Stevens, J., dissenting: Secretary of Labor either must comply with time to file provision of Labor-Management Reporting and Disclosure Act or forego action against union).

Louis-Allen Co. v. NLRB, 463 F.2d 512 (7th Cir. 1972) (letter written by union suggesting that it had won contested election and thus certain laid-off employees would be terminated held not a "material misrepresentation of fact" sufficient

to set aside election) (Stevens, J., dissenting: administrative expertise rationale should not be used as an excuse for fraudulent labor practices).

Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7tb Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973) (Public Service Commission service termination regulations held not to be action under color of state law, and no full hearing required prior to termination of customer service thereunder).

United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973) (prisoners denied due process of law where "good-time" credits revoked and prolonged isolation ordered in prison disciplinary proceeding without advance written notice to prisoner or opportunity to be heard or present witnesses).

Papercraft Corp. v. FTC, 472 F.2d 927 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974) (Federal Trade Commission divestiture order held improper to extent that it required novel remedial actions without sufficient agency justification).

Stark v. Weinberger, 497 F.2d 1092 (7th Cir. 1974) (evidence favoring claimant's application for social security benefits held sufficient to reverse denial of benefits by social security administrator).

Stearns Elec. Paste Co. v. EPA, 461 F.2d 293 (7th Cir. 1972) (cancellation of poison registration set aside on ground that Environmental Protection Agency exceeded its authority under Federal Insecticide, Fungicide, and Rodenticide Act).

VI. FEDERAL JURISDICTION

Barancik v. Investors Funding Corp., 489 F.2d 933 (7th Cir. 1973) (the federal anti-injunction statute, 28 U.S.C. § 2283 (1970), does not apply to state actions commenced after a motion for injunctive relief is filed in federal court).

Carson v. Allied News Co., 511 F.2d 72 (7th Cir. 1975) (although denying plaintiff's motion to amend the pleadings in the appellate court by striking nondiverse parties, Justice Stevens noted in dictum that in appropriate cases, 28 U.S.C. § 1653 might be read to give the appellate court jurisdiction to strike nondiverse parties and thereby perfect diversity jurisdiction).

Fisons Ltd. v. United States, 458 F.2d 124 (7tb Cir. 1972) (court may review interlocutory order in a civil antitrust action).

Illinois State Employees Union, Council 34 v. Lewis, 473 F.2d 561 (7th Cir. 1972) (discharge of government employees for allegedly partisan political reasons presented a first amendment controversy and not a nonjusticiable political question).

Schreiber v. Lugar, 518 F.2d 1099 (7th Cir. 1975) (aggregation of claims to satisfy the statutory jurisdictional amount impermissible in a taxpayer's class action to enjoin construction of an indoor sports arena).

United States v. Staszcuk, 517 F.2d 53 (7th Cir.), *cert. denied*, 96 S. Ct. 65 (1975) (a realistic probability that commerce will be affected satisfies the "in commerce" requirement for federal jurisdiction under the Hobbs Act).

Timing v. Weinberger, 523 F.2d 689 (7th Cir. 1975) (delay in making class certification, though contrary to the mandate of Fed. R. Civ. P. 28 to act as soon as possible, did not deprive the district court of the power to certify the class after a Supreme Court decision on the merits).