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A COMMON LAW LAWYER ON THE SUPREME COURT: THE OPINIONS OF JUSTICE STEVENS

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I. INTRODUCTION

Justice Stevens is widely viewed as "enigmatic, unpredictable, [a] maverick, a wild card, a loner."[1] And his opinions support that impression. He advocates judicial restraint, objects to decisions based on the will of the judges rather than on what the law commands,[2] but also takes the Court to task for not "appreciat[ing] the value of individual liberty."[3]

There is statistical support for the view that Justice Stevens' views are difficult to predict. A maverick judge is as likely to agree with one group of colleagues as another, rather than siding primarily with judges in one judicial camp. This tendency can be measured statistically as variation in the rate of agreement with fellow Justices: A judge who is as likely to agree with one judge as another will vote with every colleague (whether "liberal" or "conservative") in the same percentage of cases. Thus, for a maverick judge the variation in rate of agreement would be

1. B. SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE BURGER COURT 15 (1988) (quoting Greenhouse, *In the Matter of Labels, a Loner,* N.Y. Times, July 23, 1984, at A8, col. 3); *see also Blackmun Has Sharp Opinions of Colleagues,* N.Y. Times, July 18, 1988, at A10, col. 4 (Justice Blackmun) (maverick); R. SICKELS, JOHN PAUL STEVENS AND THE CONSTITUTION 1 (1988) (maverick, gadfly, and wild card).

2. Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 282-83 (1984) (dissenting) ("[C]ynics—parading under the banner of legal realism—are given a measure of credibility whenever the Court bases a decision on its own notions of sound policy, rather than on what the law commands.") (citation omitted).

Throughout this article, citation form for Supreme Court opinions according to *A Uniform System of Citation* (Blue Book) will be altered in the following respects: first, all opinions are by Justice Stevens unless otherwise indicated. Second, Stevens' authorship of majority opinions is specifically noted, to provide explicit contrast with his separate concurrences, dissents, and procedural opinions.

3. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 358 (1985) (dissenting).

zero.[4] By contrast, a predictably conservative judge will agree with fellow conservatives most of the time (e.g., eighty-five percent), but with liberal judges much less often (e.g., forty percent), thereby exhibiting considerable variation in rate of agreement. A statistical measure of variation,[5] based on *Harvard Law Review* tabulations of Supreme Court Justice voting alignments for the 1975 to 1987 Terms, reveals the dramatic finding that, except for Justice Blackmun in 1983, Justice Stevens had the least variation over this period of time of any Justice.[6]

Data indicating a tendency to agree at more or less the same rate with a wide range of Justices might be consistent with the voting alignment of an easy-to-predict middle-of-the-roader, however, as well as a maverick judge of independent mind. Other data, though, supports the view that Justice Stevens is a highly independent judge. One appropriate

4. The point is *not* that the judge is agreeable (that would produce a high rate of agreement, such as 90%, with other judges), but that the rate of agreement is the same with judges of all persuasions.

5. The Table in note 6 *infra* uses the standard deviation to measure variation. For an explanation of standard deviation, see J. MUELLER, K. SCHUESSLER & H. COSTNER, STATISTICAL REASONING IN SOCIOLOGY 156-66 (1970). The Table shows how much dispersion from an average rate of agreement each Justice shows. Wide dispersion means a high variance in rates of agreement. For example, if there are three Justices, the judge who agrees with her two colleagues in 60% and 70% of the cases shows less variation than one who agrees with one judge 55% and another 75% of the time, who in turn shows less variation than a third judge who agrees with one judge 90% and another 10% of the time.

6. *Amount of Variation Among Rates of Agreements of Supreme Court Justices—Standard Deviation*

Judge	1973-77	1978-82	1983	1984	1985	1986	1987	1988
Stevens	3.6	3.1	7.7	3.1	7.4	8.8	4.0	5.9
White	8.6	4.6	11.2	11.0	13.1	14.8	7.5	15.2
Stewart	9.1	7.8	—	—	—	—	—	—
Rehnquist	17.9	17.3	18.6	16.4	22.1	21.9	10.3	19.1
Powell	13.5	11.7	13.6	9.0	15.6	12.5	—	—
O'Connor	—	14.2	16.6	13.0	14.2	17.0	11.2	16.9
Marshall	13.9	14.7	15.0	16.4	19.0	21.4	14.3	17.0
Burger	17.1	13.4	15.9	15.4	20.7	—	—	—
Brennan	14.6	13.6	13.9	15.4	16.5	20.5	13.1	15.8
Blackmun	12.6	4.4	4.6	4.9	13.0	10.7	6.9	10.5
Douglas	13.2	—	—	—	—	—	—	—
Scalia	—	—	—	—	—	17.7	12.0	14.4
Kennedy	—	—	—	—	—	—	9.8	17.6

A less precise measure of variance looks at the extreme highs and lows. By this measure as well, Justice Stevens was less extreme than other judges. He had less variation between the top and bottom rates of agreement with other judges in all of the years in the above Tables, except for 1983, when Justice Blackmun had less variation.

Source: 1973-77, Five Year Table II(B), 92 HARV. L. REV. 338 (1978); 1978-82, Five Year Table II(B), 97 HARV. L. REV. 305 (1983); 1983, Table I(B), 98 HARV. L. REV. 308 (1984); 1984, Table I(B), 99 HARV. L. REV. 323 (1984); 1985, Table I(B), 100 HARV. L. REV. 305 (1986); 1986, Table I(B), 101 HARV. L. REV. 363 (1987); 1987, Table I(B), 102 HARV. L. REV. 351 (1988); Table I(B), 103 HARV. L. REV. 395 (1989).

measure of independence is the frequency a judge submits separate concurring and dissenting opinions. An independent judge is more likely to write separate opinions, rather than simply join colleagues without expressing a distinct point of view. During the twelve-year period for which Justice Stevens served on the Court and for which data have been compiled by the *Harvard Law Review* as of this writing,[7] Justice Stevens' total number of concurring and dissenting opinions exceeded that of any other Justice in eight of those twelve years.[8]

Although hard-to-predict and independent, Justice Stevens has a coherent judicial philosophy—that of a common law lawyer adapting his views to modern conditions. Justice Stevens' special brand of judicial restraint and creativity are defined by three interrelated principles. First, the Court should not decide cases that other institutions can decide at least as well or better. This principle requires *deference* to other decisionmakers, such as the states, lower federal courts, and the legislature. Second, the Court should decide no more than the facts of the case require. This principle calls for *deliberation* about the facts of a particular case, avoiding overly broad generalizations and summary dispositions. These two principles—deference and deliberation—constitute the formal *procedural* norms underlying Justice Stevens' judicial restraint. Third, the Court should protect *individual dignity.* This principle translates into a *substantive* commitment to a deliberative process in both judicial and nonjudicial settings, and to a creative application of constitutional principles, such as due process and equal protection.

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7. Opinions are omitted for the 1975 Term during which Justice Stevens served only part of the year.

8. The figures are:

Justice Stevens: Total concurring and dissenting opinions and rank among Justices

Term	Total	Rank
1976	44	1
1977	31	2
1978	20	6
1979	33	2
1980	42	1
1981	41	1
1982	39	1
1983	52	1
1984	42	1
1985	51	1
1986	45	1
1987	23	4
1988	36	1

HARV. L. REV. annual compilations, *supra* note 6. *See also* B. SCHWARTZ, *supra* note 1, at 15 (more dissents, often by himself, than other Justices).

Deference, deliberation, and individual dignity values are all interrelated. Judicial deference to other institutions preserves the Court's time and political capital to implement the second and third objectives—deliberation about the facts of a particular case and protection of individual dignity values. And the second principle—judicial deliberation focused on the facts of the particular case—both formally restrains the breadth of a judicial decision and implements substantive dignity values by paying genuine heed to the litigants' claims. Justice Stevens explicitly linked the frequent writing of separate opinions to dignity values when, during his confirmation hearings, he defended the practice as one that assures litigants their argnments were understood fairly.[9]

These principles and their interrelationships represent a modern adaptation of strands of thought prevalent in the common law tradition. Before the 19th century, the common law was closely associated with the protection of individual rights from the government. The common law was itself a right, in the vague but palpable sense of the "rule of law," and also was the embodiment of specific rights protecting the individual from government intrusion.[10] Common law property rights, which had not yet attained a commercial connotation, served as a bulwark against government tyranny.[11] The shift in the 19th century toward a more instrumental conception of the common law[12] did not eliminate the earlier association between the common law and individual rights. Indeed, lawyers who objected to codification of the common law often voiced their fears that common law rights would be lost.[13]

Another strand of thought characteristic of the common law tradition is judicial restraint, which means both limits on judicial authority to create law and a focus of judicial attention on the facts of the particular case. During the pre-Revolutionary period, the image of law as custom—identified but not created by courts—reinforced the image of a re-

9. *Hearings on Nomination of John Paul Stevens to be a Justice of the Supreme Court before the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. 41, 69 (1975) [hereinafter *Hearings*].

10. J. REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 23-26 (1986); *see also* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 7-8 (1977) (where common law and natural law were interchangeably defined, the common law became inseparable from the rights of individuals).

11. J. REID, *supra* note 10, at 27-33, 103-13; *see also* F. MCDONALD, NOVUS ORDO SECLORUM 12 (1985). The importance of property to liberty, defining property to include government-provided benefits, is the central point of Reich, *The New Property,* 73 YALE L.J. 733 (1964).

12. M. HORWITZ, *supra* note 10, at 1-4 & *passim*.

13. C. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 38-41, 73 (1981). Contrary strands in the debate criticized the common law as biased, secretive, and chaotic. *Id.* at 57; *see also* W. NELSON, AMERICANIZATION OF THE COMMON LAW 90 (1975) (legislatures protected liberty through exercise of popular sovereignty).

strained judiciary.[14] The early 19th century witnessed a shift towards a more instrumental view of the law and of the judicial role in adapting the law to American needs.[15] Once this task was accomplished, however, the judicial role (or at least its image) shifted back to a more modest task of fitting the facts of a particular case within a framework of the formal principles comprising the common law.[16]

Judicial restraint and the courts' role as a protector of individual rights have often conflicted. Judges were certainly not restrained when they performed their task of protecting individual rights by narrowly interpreting statutes (in derogation of the common law) and restraining the administrative state. Therefore, when judges abandoned their hostility to statutes and administrative agencies, it was easy to assume a change in the judge's institutional role to one in which the balance had shifted toward judicial restraint purged of any substantive agenda. But a more plausible view sees the change as having resulted from an altered conception of individual dignity and the institutions responsible for its protection and advancement. As legislatures and administrative agencies became vehicles for implementing this new conception of individual dignity, courts abandoned their appeal to common law principles, hitherto advanced to restrain these institutions, and instead deferred to their judgments. The substantive commitment to dignity values historically associated with the common law, however, persisted in the background and surfaced in the judicial practice to question modern legislative and administrative action.[17] Justice Stevens' brand of judicial deference fits that mold by deferring to modern decisionmakers unknown in the traditional common law but aggressively questioning their action when individual dignity values are threatened.[18]

The common law also had a particular version of factual deliberation that has undergone a modern transformation. In the recent formalist image of the common law, sticking to the facts has assured a deferential judicial role that fits cases within predetermined formal categories. The Legal Realists' charge that judicial choice survived because

14. M. HORWITZ, *supra* note 10, at 8; W. NELSON, *supra* note 13, at 19, 96; *see also* J. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 32 (1984).

15. W. NELSON, *supra* note 13, at 171-74 & *passim*. Legislatures also flexed their creative muscle in the early 19th century, rather than purporting merely to discover or elaborate common law rights. *Id.* at 90-92.

16. M. HORWITZ, *supra* note 10, at 253-66.

17. *See* Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 436 (1987) (common law courts limit the regulatory state to protect rights).

18. *See* Stevens, *Commentary*, 49 U. PITT. L. REV. 723, 726-27 (1988) (when the Constitution was adopted, judges were lawmakers in the common law tradition).

of the malleability of available doctrines[19] did not entirely undermine this image. Their charge simply made problematic the choice among available doctrines to be applied in light of determined facts. A more modern conception of the judicial role permits judges to deliberate about the ends embodied in the law as these ends are understood in the context of the particular facts before a court.[20] This self-conscious commitment to shape the law by deliberating about facts revives a theme that was important at the time of the Founding Fathers[21] and was implicit in the notion of law as custom—both immemorial and capable of adaptation to current needs.[22] Contemporary authors have tried to justify a context-specific judicial role in shaping public values building on this earlier tradition.[23] Although Justice Stevens shares this view of judicial deliberation,[24] he would not associate himself with all of the substantive values that advocates of this approach might adopt.

I am not suggesting that the relationship among the principles of deference, deliberation, and dignity values is logical or mechanical. The relationship is not mandated by some higher principle, nor are these principles linked to each other by cause and effect. Judges easily could be deferential but not deliberative about the facts of a particular case. For example, courts could generalize about deferring to agency rules rather than develop the law on a case-by-case basis. Or judges could be deliberative but not deferential, as when courts interpret statutes narrowly on a selective case-by-case basis when they are in derogation of the common law. And either a deferential/nondeliberative or nondeferential/deliberative frame of mind could be combined with a greater or lesser commitment to individual dignity values. Further variations are possible by distinguishing among the institutions to whom deference is due and among dignity values worth preserving. The relationship among

19. *See* Singer, *Legal Realism Now* (Book Review), 76 CALIF. L. REV. 465, 468-73 (1988) (reviewing L. KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986)); Note, *Relativistic Jurisprudence: Skepticism Founded on Confusion,* 61 S. CAL. L. REV. 1417, 1437-40 (1988).

20. *See* Michelman, *Foreword: Traces of Self-Government,* 100 HARV. L. REV. 4, 66-67 (1986) (judges cannot wholly defer to other legal authority; the law and its applications are their responsibility, with all applications justified in the context of the case at hand); Eskridge, *Public Values in Statutory Interpretation,* 137 U. PA. L. REV. 1007, 1007-09 (1989) (public values or norms that underlie our political community are important influences in statutory interpretation; constitutional interpretation articulates and enforces these values).

21. Sunstein, *Interest Groups in American Public Law,* 38 STAN. L. REV. 29, 31-55 (1985).

22. J. POCOCK, *supra* note 14, at 34-36. The adaptability of the common law was a major theme in the codification debate. J. CARTER, THE PROPOSED CODIFICATION OF OUR COMMON LAW 25-26 (1984); C. COOK, *supra* note 13, at 103-04.

23. *See, e.g.,* Michelman, *supra* note 20, at 4, 76 & *passim* (practical reasoning and context-specific dialogue should explain judicial norms).

24. *Cf.* Nix v. Whiteside, 475 U.S. 157, 190 (1986) (concurring in the judgment) ("a word is but the skin of a living thought [but a] 'fact' may also have a life of its own").

these values in Justice Stevens' opinions nonetheless makes sense as one might understand a work of art.[25] The pieces fit together, although not inevitably. The common theme in Justice Stevens' jurisprudence is his tendency to update and transform the traditional common law commitment to judicial deference and individual dignity values through a process of case-by-case deliberation.[26]

Justice Stevens' opinions hold special interest because of his effort to develop a modern approach to statutory interpretation, one based on a common law commitment to deliberation about the facts of the case and individual dignity. In the traditional view, statutes were considered willful intrusions into the common law. In contrast, most contemporary debate about statutes accepts the view that they are expressions of popular will, and contemporary courts generally accept democratic judgments. The more fundamental challenge of statutes to the common law, however, is that they are framed in the language of generalized rules and therefore rival decisionmaking by the common law process of case-by-case analysis. Although judges have long since made their peace with willful statutes, the problem of generalized versus case-by-case decisionmaking still disturbs the common law mind. Justice Stevens' particular contribution to statutory interpretation lies in his efforts to accommodate modern deference to the generalized interpretation of legislative language according to its plain meaning with a common law lawyer's commitment to dignity values and a keen sense of the particularity of the case to which the statute is being applied.

The rhetoric of Justice Stevens' opinions will receive more attention than seems appropriate to a generation raised on Legal Realism and economic analysis, or other models of law and the judicial process. To the modern ear, the language of an opinion often appears as a facade behind which the real decisionmaking criteria lurk. Maybe so. Justice Stevens' commitment to individual dignity certainly explains many of his opinions. But so does his rhetoric, which is eloquent on the subject of protecting individual rights. While I do not question that language is often selectively chosen to justify results not openly expressed in the judicial text, the language of an opinion is not simply a dependent variable. It can be an expression of the author's real point of view and is, in any event, the boundary within which thought is channeled and creativity is developed. Justice Stevens' own words therefore will appear with some

25. Justice Stevens referred to the "art of judging" in Young v. Community Nutrition Institute, 476 U.S. 974, 988 (1986) (dissenting).

26. Justice Stevens' commitment to a common law style of judging is reflected in his conclusion to the Fairchild lecture at the University of Wisconsin Law School, citing Cardozo's tribute to Holmes' THE COMMON LAW. Stevens, *A Judge's Use of History,* 1989 WISC. L. REV. 223, 233.

frequency to explain what he does as a judge. I will consider Justice Stevens' Supreme Court opinions in two parts.[27] Part II addresses the general question of judicial restraint and creativity by a common law judge on the Supreme Court. Part III then considers Justice Stevens' approach to statutes.

II. COMMON LAW VALUES: DEFERENCE, DELIBERATION, AND DIGNITY

It would be difficult to find a more forceful statement urging judicial restraint than the following excerpt from a dissent by Justice Stevens:

> Some students of the Court take for granted that our decisions represent the will of the judges rather than the will of the law. This dogma may be the current fashion, but I remain convinced that such remarks reflect a profound misunderstanding of the nature of our work. Unfortunately, however, cynics—parading under the banner of legal realism—are given a measure of credibility whenever the Court bases a decision on its own notions of sound policy, rather than on what the law commands.[28]

Judicial willfulness must not displace what the law commands. Although Justice Stevens admits the inevitability of "judicial legislation," he expects it to occur in "relatively rare instances" and then only "within gaps," and not going "beyond the walls of the interstices."[29] Those situations in which judges legislate should fit snugly within boundaries set by others, not boundaries created by the courts themselves.

By contrast, Justice Stevens sounds anything but restrained when he accuses the Court of "not appreciat[ing] the value of individual liberty";[30] when he asserts that "neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects";[31] and when he decides to protect a right of privacy, which includes "nonreproductive, sexual conduct that others may consider offensive or immoral."[32]

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27. The opinions cover the period from December 19, 1975, when he began serving as Supreme Court Justice, to the summer of 1989, at the end of the 1988 Term. During this period, he wrote 885 opinions, not counting six as a Circuit Judge. Of these, 127 were iu memorandum cases that were not issued with per curiam opinions.

28. Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 282-83 (1984) (disseuting); *see also* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 103 (1978) (concurring in the judgment) ("We are not statesmen; we are judges.").

29. *Trans World Airlines,* 466 U.S. at 283 n.12. *Cf.* Ralston v. Robinson, 454 U.S. 201, 229 (1981) (dissenting) (interstitial lawmaking iu some circumstances, but not in this case).

30. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 358 (1985) (dissenting); *see also* Moran v. Burbine, 475 U.S. 412, 460 (1986) (dissenting) (Court does not "appreciate the value of . . . liberty").

31. Meachum v. Fano, 427 U.S. 215, 230 (1976) (dissenting).

32. Bowers v. Hardwick, 478 U.S. 186, 218 (1986) (dissenting).

How does Justice Stevens combine judicial restraint with a creative judicial role?[33] Section A of this part discusses Justice Stevens' conception of judicial restraint and section B explains his active commitment to individual dignity. The principle that bridges these two ideas is deliberation. Thus the discussion of judicial restraint concludes with Justice Stevens' conception of judicial deliberation, and the discussion of individual dignity begins with his commitment to deliberation in nonjudicial contexts.

A. *Judicial Restraint*

Judicial restraint, as practiced by Justice Stevens, has two main attributes. First, the Supreme Court in particular, and the federal courts in general, should defer to other decisionmakers (section II.A.1.).[34] Second, courts should deliberate carefully about the facts of the case, avoiding both overly broad generalizations and summary dispositions (section II.A.2.).

1. *Deference to Other Judicial Decisionmakers.*

a. Deference by the Supreme Court. Justice Stevens urges the Court to defer to other decisionmakers by broadly interpreting the independent state ground doctrine and relying on lower federal courts as much as possible.

i. Independent state ground. The independent state ground doctrine prevents Supreme Court review of state court decisions resting on state law grounds because no federal interest is implicated in such cases. This doctrine has proved difficult to apply when state law is influenced by federal law, as in cases in which the state equal protection and due process clauses develop along lines similar to the United States Constitution.

Justice Stevens has fought a losing battle against a narrow interpretation of the independent state ground doctrine. In *South Dakota v. Neville,*[35] he argued:

> Unless we have explicit notice that a provision of a State Constitution is intended to be a mere shadow of the comparable provision in the

33. The combination of judicial restraint and creativity was observed early in Justice Stevens' Supreme Court tenure. *See* Special Project, *Justice Stevens: The First Three Terms,* 32 VAND. L. REV. 671, 734-37 (1979).

34. *Cf.* Stevens, *Legal Questions in Perspective,* 13 FLA. ST. U. L. REV. 1, 3 (1985) (expressing surprise at how often the outcome of an appeal turns on who is the proper decisionmaker rather than on what the proper decision should be); R. SICKELS, *supra* note 1, at 23-25, 29-30 (each institution should do the work to which it is best suited).

35. 459 U.S. 553 (1983) (dissenting).

> Federal Constitution, it is presumptuous—if not paternalistic—for this Court to make that assumption on its own. . . . [W]e cannot simply *presume* that the highest court of the sovereign State will modify its interpretation of its own law whenever we interpret comparable federal law differently. . . . If a state-court judgment is premised on an adequate state ground, that ground must be presumed independent unless the state court suggests otherwise.[36]

In *Michigan v. Long,*[37] the Supreme Court adopted the opposite presumption from that advocated by Justice Stevens. The Court established a presumption that state court decisions were based on cognate federal doctrine, rather than on an independent state ground, absent a "plain statement" by the state court to the contrary.[38] In dissent, Justice Stevens expressed bafflement at the majority's suggestion that presuming state law dependence on federal law showed "[r]espect for the independence of state courts . . . ."[39] And in *Delaware v. Van Arsdall,* Justice Stevens argued that the Court's presumption against an independent state ground was an "inevitable intrusion upon the prerogatives of state courts that can only provide a potential source of friction and thereby threaten to undermine the respect on which we must depend for the faithful and conscientious application of this Court's expositions of federal law."[40]

Justice Stevens' approach to the independent state ground doctrine took an unconventional turn in *Minnesota v. Clover Leaf Creamery Co.*[41] In *Clover Leaf,* the state court had held that a state statute banning certain plastic but not paperboard containers failed the minimum rationality test of the fourteenth amendment of the Federal Constitution. Justice Stevens saw only a state court's reevaluation of legislative facts about the fit between legislative means and ends that differed from the state legislature's judgment. All that was at stake, therefore, was an allocation of power within the state between the legislature and the courts, a matter solely of concern to the state. He characterized the majority's position as

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36. *Id.* at 568-69. Justice Stevens especially objected to the Court's apparent desire to "do its part in curtailing the 'carnage caused by drunk drivers.' " *Id.* at 566; *see also* Montana v. Jackson, 460 U.S. 1030, 1032 (1983) (dissenting from grant of cert.) (judgment rested on adequate independent state grounds and therefore Court was without jurisdiction to vacate the judgment).

37. 463 U.S. 1032 (1983) (O'Connor, J., majority).

38. *Id.* at 1040-41.

39. *Id.* at 1072 (dissenting) (quoting *Long,* 463 U.S. at 1040). In Pennsylvania v. Finley, 481 U.S. 551, 571 (1987) (dissenting), Justice Stevens would have narrowly construed the *Michigan v. Long* "plain statement" requirement: "It is denigrating enough to require the justices of the fifty State Supreme Courts to include such a statement in their decisions, without demanding the same of the 716 state appellate judges or all 20,000 state-court judges who decide cases that could conceivably be reviewed by this Court."

40. 475 U.S. 673, 699 (1986) (dissenting).

41. 449 U.S. 456 (1981) (dissenting).

"a newly discovered principle of federal constitutional law,"[42] stating that he knew "of nothing in the Federal Constitution that prohibits a State from giving lawmaking power to its courts."[43] This is one example from a large number of cases in which Justice Stevens has urged the Court to let state courts decide state law issues.[44]

ii. Relying on lower federal courts. The decisions of lower federal courts are another source of law to which Justice Stevens would defer. His credo, expressing faith in the courts of appeals, is set forth in *Watt v. Alaska*:

> The federal judicial system is undergoing profound changes. Among the most significant is the increase in the importance of our courts of appeals. Today they are in truth the courts of last resort for almost all federal litigation. . . . The quality of work done by the courts of appeals merits the esteem of the entire Nation, but, unfortunately, is not nearly as well or as widely recognized as it should be. Indeed, I believe that if we accorded those dedicated appellate judges the deference that their work merits, we would be better able to resist the temptation to grant certiorari for no reason other than a tentative prediction that our review of a case may produce an answer different from theirs. In my opinion, that is not a sufficient reason for granting certiorari.[45]

Deference to lower federal courts is implemented by two doctrines: limiting grants of certiorari and deferring to the expertise of lower federal courts.

In numerous cases Justice Stevens argues for a denial of certiorari, either because the issues are regional (rather than national) or they concern harmless error. For example in *Watt*,[46] Justice Stevens concluded

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42. *Id.* at 477.

43. *Id.* at 479; *see also* City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 246-47 (1983) (concurring in the judgment).

44. Pennsylvania v. Goldhammer, 474 U.S. 28, 32 (1985) (dissenting) (deny certiorari because presume state court decided on state law grounds); Florida v. Rodriguez, 469 U.S. 1, 7 (1984) (dissenting) (error-correcting role varies depending on whether the Court reviews federal or state courts); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 970 (1984) (concurring) (state court can violate federal standing requirements; if it does, federal court should refuse to decide the case); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 294-95 (1983) (majority) (same); Orr v. Orr, 440 U.S. 268, 284-85 (1979) (concurring) (Court should not decide or order state to decide state law issue); City of Boston v. Anderson, 439 U.S. 951 (1978) (dissenting) (Court should not reverse on state law ground); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 583 (1977) (dissenting) (remand to state court to see whether there is an independent state ground).

45. 451 U.S. 259, 275 (1981) (concurring); *cf.* United States v. Young, 470 U.S. 1, 37 (1985) (dissenting) ("a due respect for the work of our circuit judges . . . warrants the conclusion that they have already done exactly what Justice Brennan would have them do again"); United States v. Hasting, 461 U.S. 499, 517 (1983) (concurring in judgment) ("insult to the Court of Appeals to imply, as the Court does today, that it cannot be trusted with a task that would normally be conducted on remand"); Stanton v. Stanton, 429 U.S. 501, 504-05 (1977) (dissenting in part) (expressing general sympathy for reversed lower court judges).

46. 451 U.S. at 273 (concurring).

that the court of appeals should "provide the final answer to the unique question of statutory construction," which did not involve a conflict among the circuits but only an issue of regional interest (specifically, the allocation of oil and gas lease revenues from wildlife refuges to political units in Alaska).[47] He noted especially that the Court's "expressions of concern about the overburdened federal judiciary will ring with a hollow echo" as long as it "creates unnecessary work for itself in this manner."[48]

Harmless error analysis is also more appropriately left to lower courts by denying certiorari. "If we have time to grant certiorari for the sole purpose of correcting a highly technical and totally harmless error," Justice Stevens has stated, "one might reasonably (but incorrectly) infer that we have more than enough time to dispatch our more important business."[49]

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47. *Id.* at 274; *see also* Watt v. Western Nuclear, Inc., 462 U.S. 36, 73 (1983) (dissenting) ("considerable importance in the semiarid lands of the West, but it is of much less importance to the rest of the Nation"); *cf.* Connecticut v. Barrett, 479 U.S. 523, 536 (1987) (dissenting) (nonrecurring issue); Anderson v. Harless, 459 U.S. 4, 12 (1982) (dissenting) (issue too local for Court's attention).

48. *Watt v. Alaska,* 451 U.S. at 274.

49. Great W. Sugar Co. v. Nelson, 442 U.S. 92, 94 (1979) (dissenting); *see also* United States v. Lane, 474 U.S. 438, 476 (1986) (concurring in part and dissenting in part) (mail fraud case in which defendants had been misjoined: "Undertaking a harmless-error analysis is perhaps the least useful function that this Court can perform. . . . For that reason, a decision that a harmless-error inquiry is required should lead us to a remand to the Court of Appeals, which is in a far better position than we are to study the complete trial record with care."); Central Trust Co. v. Official Creditors' Comm. of Geiger Enters., 454 U.S. 354, 363 (1982) (dissenting from grant of cert. and vacation of court of appeals decision) (debtor who had filed under old Bankruptcy Act should be permitted to obtain a dismissal for purposes of refiling under Bankruptcy Reform Act of 1978; to deny such consolidation "is to impose unnecessary work on busy federal judges"); Alabama v. Pugh, 438 U.S. 781, 782-83 (1978) (dissenting from grant of cert. in part and reversal in part) (In a suit to eliminate alleged cruel and unusual punishment in Alabama's prison system the majority granted certiorari and held, on eleventh amendment ground, that the State, absent consent to suit, must be struck from the list of defendants. Justice Stevens dissented on the grounds that the majority "did not question the propriety of the injunctive relief," and striking the State from the defendants amounted to a correction of harmless error.). Other cases in which Justice Stevens would have denied certiorari and deferred to lower courts include: Alabama v. Davis, 446 U.S. 903, 904 (1980) (disseuting from grant of cert. and vacation of judgment of court of appeals) (Court granted certiorari, vacated judgment of court of appeals and directed that court to remand with instructions to vacate the order denying the petition for habeas corpus. Justice Stevens dissented on the ground that the district court already had dismissed the petition for a writ of habeas corpus, "[t]hus, there is no particular justification for this Court's intervention."); School Dist. v. United States, 433 U.S. 667, 671 (1977) (dissenting from grant of cert. and vacation of judgment of court of appeals) (court of appeals cannot properly do anything on remand except reaffirm its judgment on well settled principles in its prior case law); Estelle v. Gamble, 429 U.S. 97, 115 (1976) (dissenting) (The district court dismissed a state prisoner's pro se complaint and the court of appeals reversed and remanded. The state's petition for certiorari was granted and the Court found the prisoner's complaint was insufficient to state a cause of action. Justice Stevens would have denied certiorari because "the Court seldom takes a case merely to reaffirm settled law."); United States Dep't of Justice v. Provenzano, 469 U.S. 14, 16 (1984) (dissenting) (After certiorari was granted, the Act at issue was amended so as to render the issue moot. The cases were vacated and remanded because the cases presented issues not affected by the amendment. Justice Stevens dissented and stated that "the new Act does not provide a basis for

Deference to the expertise of lower federal courts is another way the Supreme Court can rely on other decisionmakers. A frequent justification for Justice Stevens' holdings, analogous to denying certiorari when the issues are regional, is the familiarity lower courts have of local conditions. For example, Justice Stevens argued that "[t]he courts of appeals are better qualified to decide questions of state law than is this Court," because the judges "formerly practiced" there and "confront state-law issues on a regular basis."[50] And the court of appeals "is more familiar with Maine's natural resources and with its legislation than we are,"[51] which justifies deferring to their conclusion that the state violated the interstate commerce clause. Similar claims are often made about the knowledgeability of federal district courts.[52]

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vacating the judgment."); Burrell v. McCray, 426 U.S. 471, 472-73 (1976) (concurring on dismissal of grant of cert.) (case was properly dismissed on the grounds that "the state of the law applicable to the facts disclosed by this record is sufficiently clear that the dismissal of the writ is a permissible exercise").

50. California State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9, 13 (1985) (dissenting).

51. Maine v. Taylor, 477 U.S. 131, 153 (1986) (dissenting); *see also* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 696 (1986) (dissenting) ("defer to the views of the district and circuit judges who are in a much better position to evaluate this speech than we are"); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 827 (1976) (dissenting) ("Court of Appeals sitting in Denver is just as able to evaluate as are we"); *cf.* Liljeberg v. Health Servs. Acquisition Corp., 108 S. Ct. 2194, 2203 (1988) (majority) ("the Court of Appeals is in a better position to evaluate the significance of a violation than is this Court"); McClesky v. Kemp, 481 U.S. 279, 367 (1987) (dissenting) ("[o]rderly procedure requires that the Court of Appeals address this issue before we actually decide the question"); Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 444 (1985) (dissenting) ("I am more confident of the ability of the various Courts of Appeals to evaluate the problem of disqualification motions and supervise the local bench and bar than I am of the accuracy of our own more distant perspective.").

52. United States v. Taylor, 108 S. Ct. 2413, 2424 (1988) (dissenting) (district judges are in a better position to decide to dismiss with or without prejudice); Richardson v. Marsh, 481 U.S. 200, 220 (1987) (dissenting) ("Moreover, a great many experienced and competent trial judges throughout the Nation are fully capable of managing cases and supervising counsel in order to avoid the problems that seem insurmountable to appellate judges who are sometimes distracted by illogical distinctions and irrelevant statistics."); Thornburg v. Gingles, 478 U.S. 30, 107 (1986) (concurring in part and dissenting in part) ("I cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters . . . less opportunity than white voters to elect representatives of their choice"); Webb v. Board of Educ., 471 U.S. 234, 244 (1985) (majority) (defer to district court decision on attorneys' fees); Karcher v. Daggett, 466 U.S. 910, 910 (1984) (concurring) (broad discretion in district court to shape remedies); Douglas Oil Co. v. Petrol Stops N.W., 441 U.S. 211, 236 (1979) (dissenting) (give trial judge latitude).

State court expertise also warrants reliance. *See* California v. Beheler, 463 U.S. 1121, 1127 (1983) (dissenting) ("[state] courts are far better equipped than this Court to make the kind of factual study that must precede such a determination"); Illinois v. Gates, 462 U.S. 213, 294 (1983) (dissenting) ("In a fact-bound inquiry of this sort, the judgment of three levels of state courts, all of which are better able to evaluate the probable reliability of anonymous informants in Bloomingdale, Illinois, than we are, should be entitled to at least a presumption of accuracy.").

b. Deference by federal courts in general. The federal courts generally and, by inference the Supreme Court, should also limit their role by applying the "passive virtues," such as mootness and ripeness, by refusing to interpret federal law to displace state policy, and by relying on agency interpretations.

i. Nonjusticiability. Justice Stevens frequently warns his colleagues against neglecting the doctrines of nonjusticiability. In *United States v. Sharpe,* he found the issue moot and observed that "[c]haracteristically, [mootness] is a matter the Court simply ignores."[53] Justice Stevens is wary of the Court deciding hypothetical and moot questions simply because they are "interesting."[54] Similarly, he believes the Court should not address unripe issues "whenever we are persuaded by reasons of expediency to engage in the business of giving legal advice."[55]

ii. Interpreting federal law. Federal law also should be interpreted to prevent the federal courts from expanding their role. This objective is obviously served when the statute deals with federal court jurisdiction. In *Merrell Dow Pharmaceuticals, Inc. v. Thompson,*[56] Justice Stevens wrote that a federal statute that did not create a federal remedy did not support federal question jurisdiction merely because a state incorporated federal policy into its own legal standards. No federal interest was at stake in such cases. In Justice Stevens' view, it would

> flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction . . . solely because the violation of the federal statute is said to be a

53. 470 U.S. 675, 725 n.16 (1985) (dissenting) (Respondents were convicted of federal drug offenses. The court of appeals reversed even though the respondents had escaped from prison and were fugitives. Justice Stevens stated that "[a]s fugitives, these litigants should not be accorded standing to advance their claim on appeal.").

54. Bowen v. Roy, 476 U.S. 693, 723 (1986) (concurring in part and concurring in the result) ("No matter how interesting, or how clear their answers may appear to be, however, I would not address the hypothetieal questions . . . because they are not properly presented by the record in this case.").

55. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 103 (1978) (concurring in the judgment); *see also* Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 633 (1986) (concurring in the judgment) (not ripe); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986) (majority) (not ripe); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 623 (1982) (dissenting) ("hypothetical, and, at best, premature"); *cf.* Bender v. Williamsport Area School Dist., 475 U.S. 534, 536 (1986) (majority) (individual school board member lacked standing); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 613 (1985) (concurring in the judgment) (no legal basis for claiming harm from action of EPA); O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 787 (1980) (majority) (elderly residents were not deprived of a protectable interest when nursing home decertified).

56. 478 U.S. 804, 812 (1986) (majority).

> "rebuttable presumption" or a "proximate cause" under state law, rather than a federal action under federal law.[57]

The interpretation of substantive federal law to defer to state policy also limits the role of federal courts. The link between deciding not to federalize an issue and reducing the burden on the federal courts is explicitly made by Justice Stevens in the following case that involved a prior hearing claim under the due process clause: "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies . . ."; and "ultimate control of state personnel relationships is, and will remain, with the States."[58]

Justice Stevens avoids federalizing issues by giving restrictive interpretations to both the Constitution and federal statutes that might preempt state law. Interpreting the Constitution and statutes to defer to state policy directly limits the power of all branches of the federal government, and also indirectly restrains federal judicial power by minimizing the situations in which there is a federal interest for federal courts to vindicate.

For example, Justice Stevens advocates interpreting the full faith and credit clause of the United States Constitution narrowly, to avoid making a federal issue out of a state choice-of-law rule:

> [T]he fact that the choice-of-law decision may be unsound as matter of conflicts law does not necessarily implicate the federal concerns embodied in the Full Faith and Credit Clause. . . . [T]he Clause should not invalidate a state court's choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State.[59]

And in *Phillips Petroleum Co. v. Shutts,* Justice Stevens argues that "the Court's opinion [should] not be read as a decision to constitutionalize novel state-court developments in the common law whenever a litigant can claim that another State connected to the litigation 'most likely' would reach a different result."[60]

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57. *Id.*; *cf.* United Ass'n of Journeyman v. Local 334, 452 U.S. 615, 639 n.13 (1981) (dissenting) (jurisdictional statute does not create federal common law; majority's opinion is "a striking example of the easy way in which this Court enlarges the power of the Federal Government—and the Federal Judiciary in particular—at the expense of the States").

58. Bishop v. Wood, 426 U.S. 341, 349, 350 n.14 (1976) (majority).

59. Allstate Ins. Co. v. Hague, 449 U.S. 302, 323 (1981) (concurring in the judgment) (legal issue is whether to stack uninsured motorist coverage on three vehicles to cover accident involving one vehicle; parties were Wisconsin residents at the time of the accident, but decedent worked in Minnesota and defendant moved to Minnesota after the accident).

60. 472 U.S. 797, 845 (1985) (concurring in part and dissenting in part) (issue involved paying interest to class on "suspense" royalties); *see also* Nevada v. Hall, 440 U.S. 410 (1979) (majority). *Hall* involved a suit by a California resident against the State of Nevada in a California court. Nevada claimed sovereign immunity. Justice Stevens wrote for the majority that neither full faith

Justice Stevens adopts a similarly restrained stance in interstate commerce clause cases. For example, in *Moorman Manufacturing Co. v. Bair,*[61] a state used a one-factor formula for measuring the tax base of an interstate business. Justice Stevens refused to find a national policy favoring uniform tax rules. In response to the argument that the one-factor formula departed from the three-factor formula used by a majority of states, he denied any national interest in subordinating the interests of one state.[62]

Justice Stevens is also reluctant to find a federal interest in the relationship of federal statutes to state law. He therefore rejected the view that state law was "borrowed" by the federal law as "a sensible form of 'interstitial law making,' " and instead argued that state law should be applied "because [the courts] were directed to do so by the Congress of the United States [in the Rules of Decision Act]."[63]

This perspective on the relationship of federal statutes to state law carries with full force over to the cases involving potential federal statutory preemption of state eligibility rules for unemployment compensation. Two cases had opposite substantive effects: In one state law allowed, and in the other it prohibited, eligibility.[64] Justice Stevens also has rejected preemption of state by federal law in numerous other cases.[65]

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and credit nor constitutional structure required California to apply Nevada immunity law. Finding a federal interest in this case would, in his view, have been a "real intrusion on the sovereignty of the States." *Id.* at 426-27.

61. 437 U.S. 267, 278-80 (1978) (majority).

62. *See* Goldberg v. Sweet, 109 S. Ct. 582, 593 (1989) (concurring in part and concurring in the judgment) (state tax does not discriminate against interstate commerce because overtaxation of outgoing telephone calls is compensated for by undertaxation of incoming calls); *cf.* California Bd. of Equalization v. Sierra Summit, Inc., 109 S. Ct. 2228 (1989) (majority) (intergovernmental immunity doctrine does not prohibit state taxation of private parties with whom the United States does business, even though economic burden falls ou the United States, absent discrimination); Davis v. Michigan Dep't of Treasury, 109 S. Ct. 1500, 1509-12 (1989) (dissenting) (intergovernmental immunity doctrine not violated by exempting retired state employees from tax, when all other retirees, including federal employees, are taxed).

63. DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 172-73 (1983) (dissenting). *But cf.* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 256-57 (1985) (concurring in the judgment in part and dissenting in part) (recognizing the need to apply federal law when federal policy so requires).

64. *Compare* New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 527 (1979) (plurality) (strikers eligible) *with* Baker v. General Motors Corp., 478 U.S. 621, 638 (1986) (majority) (ineligible if employees finance strike).

65. *See* Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698 (1989) (majority) (state tax not preempted); Boyle v. United Technologies Corp., 108 S. Ct. 2510, 2528 (1988) (dissenting) (objecting to the Court's invocation of "unique federal interest" to preempt state tort law, thereby giving tort immunity to federal contractors); Lingle v. Norge Div. of Magic Chef, Inc., 108 S. Ct. 1877, 1885 (1988) (majority) (state tort remedy not preempted by federal labor law); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 222 (1987) (dissenting) (state prohibition of gambling on Indian reservation not preempted); Ridgway v. Ridgway, 454 U.S. 46, 71-72 (1981) (dis-

iii. Relying on agencies. Another example of federal court deference appeared in Justice Stevens' majority opinion in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council.*[66] Justice Stevens' opinion adopted what one commentator called "a strong formulation of the concept of deference" to administrative agencies—one that "generat[ed] a powerful new image of the appropriate functions of court and agency in the administrative state."[67] According to Justice Stevens, where Congress has not "directly addressed the precise question at issue" and "did not actually have an intent regarding the [litigated issue]," the reviewing court should defer to the agency's decision, as long as it represents a reasonable policy choice.[68] By confining judicial rejection of agency interpretations to cases in which specific legislative intent contradicts the agency, judicial power is significantly curtailed.[69]

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senting) (federal law dealing with insurance for members of Armed Forces does not preempt state law creating constructive trust for insured's minor children); *see also* Southland Corp. v. Keating, 465 U.S. 1, 17 (1984) (concurring in part and dissenting in part) ("I am nevertheless troubled by one aspect of the case [preemption] that seems to trouble none of my colleagues"); *cf.* Landreth Timber Co. v. Landreth, 471 U.S. 681, 700 n.2 (1985) (dissenting) (federal securities law should not be applied to the purchase of 100% ownership, in part because inferring a federal cause of action would "displace state authority"); Howe v. Smith, 452 U.S. 473, 489 n.4 (1981) (concurring in the judgment) (Court should not interpret a statute to shift power from the states to the federal government; "in itself this case is not terribly important, but it is another example of the easy way in which the Executive Branch and this Court cooperate in the continuing transfer of governmental responsibility from the States to the federal sovereign"); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 157 (1980) (dissenting) (state tax not preempted).

Where the federal statute clearly preempts state law, however, there is no leeway to interpret the law to prevent preemption. *See* National League of Cities v. Usery, 426 U.S. 833, 880-81 (1976) (dissenting) (Constitution does not prevent federal law from requiring states to pay minimum wage); Stevens, *supra* note 18, at 725-26. Federal agency rate regulations also preempt state law, where there is a clear conflict between state and federal agencies and prior case precedent preempting state law is indistinguishable. *See* Mississippi Power & Light Co. v. Mississippi *ex. rel.* Moore, 108 S. Ct. 2428, 2439-42 (1988) (majority) (a state may not use its jurisdiction over retail rates to circumvent Federal Energy Regulation Commission (FERC) rate-setting between a nuclear power producer and a wholesaler power company purchaser; FERC determination of reasonable rates preempts inquiry by the Mississippi Public Service Commission).

66. 467 U.S. 837, 837 (1984) (Environmental Protection Agency regulation allowing states to adopt a "plant wide" definition of "stationary source" as used in the Clean Air Act Amendment was permissible construction of the statute).

67. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State,* 89 COLUM. L. REV. 452, 457 (1989).

68. *Chevron,* 467 U.S. at 843-45.

69. There has been some disagreement over exactly how much deference *Chevron* requires, specifically on the question of how much effort the judge must initially expend to determine legislative intent. Farina, *supra* note 67, at 460 n.42 (querying whether court should first use traditional tools of interpretation); *id.* at 462 n.51 (asking if court should first determine if there is plain meaning which precludes reliance on agency interpretation). Concerning Justice Stevens' view, whatever others may think of his *Chevron* opinion, see *infra* text accompanying notes 158-64.

> able without exacting scrutiny of the facts of the case .... As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand.[75]

Similarly, Justice Stevens questions the imposition of penalties on lawyers for frivolous claims because such penalties could dampen their contribution to the incremental case-by-case deliberative process by which the law develops.[76]

Realistic consideration of the facts of a case is always a critical part of Justice Stevens' analysis. In deciding whether the Comptroller General possesses too much legislative power, Justice Stevens relied on the power actually exercised by the Comptroller General rather than focusing on the dormant congressional power of removal.[77] And the special historical circumstances surrounding the legislation affecting President Nixon determined whether the statute was a bill of attainder.[78] Even the Supreme Court's own rules about the size of filed documents must be subject to exceptions because "[n]o set of procedural rules can anticipate every problem that may arise in litigation."[79]

Justice Stevens' commitment to case-by-case deliberation makes him suspicious of judicial generalities, the best known example of which is his insistence that there is a single equal protection clause and not a variety of multi-tiered standards:[80]

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75. Atchison, T. & S.F. Ry. Co. v. Buell, 480 U.S. 557, 568-70 (1987) (majority); *see also* United States v. Kozminski, 108 S. Ct. 2751, 2772 (1988) (concurring in the judgment) (statutory definition of "involuntary servitude" should be defined by "common-law tradition of case-by-case adjudication"); Clements v. Fashing, 457 U.S. 957, 975 (1982) (concurring in part and concurring in the judgment) ("[a]s in so many areas of the law, it is important to consider each case individually"); *cf.* City of St. Louis v. Praprotnik, 485 U.S. 112, 167 (1988) (dissenting) ("poor judicial practice[ ] to use this case as a bulldozer to reshape 'a legal landscape whose contours are in a state of evolving definition and uncertainty' ") *See also* Stevens, *supra* note 26, at 235 (original intent is the beginning, not the end, of a dispassionate attempt to understand any rule of law).

76. Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1071-72 (1985) (concurring).

77. Bowsher v. Synar, 478 U.S. 714, 738, 750 (1986) (concurring in the judgment).

78. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 486 (1977) (concurring).

79. Professional Positioners, Inc. v. T.P. Laboratories, Inc., 466 U.S. 967, 967-68 (1984) (dissenting).

80. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 451-52 (1985) (concurring) (arguing that the Court's decisional process cannot be adequately explained by applying the three or two-tiered standard of review); Craig v. Boren, 429 U.S. 190, 212 (1976) (concurring) ("[T]he two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion."); *see also* Karcher v. Daggett, 462 U.S. 725, 749 (1983) (concurring) ("There is only one equal Protection Clause."). *See generally* Note, *Justice Stevens' Equal Protection Jurisprudence,* 100 HARV. L. REV. 1146, 1162-64 (1987) (arguing that Justice Stevens' relevance inquiry, which requires examining historical circumstances contributing to differences among groups, may serve as a more effective remedy to discrimination than the two-tiered analysis).

> In cases presenting issues under the Equal Protection Clause, the Court often plunges directly into a discussion of the "level of scrutiny" that will be used to review state action that affects different classes of persons differently. Unfortunately that analysis may do more to obfuscate than to clarify the inquiry. This case suggests that a better starting point may be a careful identification of the character of the federal interest that is implicated by the State's discriminatory classification.[81]

He makes a similar point about the "standards of review" under due process: "This is not a case where it is particularly helpful to begin by determining the 'proper' standard of review, as if the result of that preliminary activity would somehow lighten the Court's duty to decide this case."[82]

Justice Stevens also makes similar objections to adopting other catch phrases in constitutional adjudication, such as "compelling state interest" and "least restrictive means,"[83] "public forum"[84] and "commercial speech"[85] and, more generally, Justice Stevens faults courts for treating statements in prior cases with the same respect accorded to general rules.[86] He argues that "[t]he primary responsibility for line-drawing . . . is vested in the legislature . . . . Any difficulty courts may encounter [in distinguishing between two cases] simply reflects that the factual predicate to these cases is itself complicated."[87] Rejection of judicial

81. Clements v. Fashing, 457 U.S. 957, 973 (1982) (concurring in part and concurring in the judgment).

82. Turner v. Safley, 482 U.S. 78, 102 (1987) (concurring in part and dissenting in part).

83. Eu v. San Francisco County Democratic Central Comm., 109 S. Ct. 1013, 1026 (1989) (concurring).

84. Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788, 833 (1985) (dissenting) (skeptical of "public fora" category, as with multi-tiered equal protection).

85. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 81 (1983) (concurring in judgment) (commercial speech too rigid a category; danger that rigid categorization will suppress speech).

86. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 29 (1986) (dissenting) (criticizing majority for taking its "own verbal formulation seriously"); *cf.* United States v. DiFrancesco, 449 U.S. 117, 154 (1980) (dissenting) ("wooden extrapolation from a rationale").

87. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 109 S. Ct. 2994, 3017 (1989) (concurring in the judgment).

generality was also urged by him in numerous other opinions,[88] as well as in law review articles.[89]

In Justice Stevens' view, limits on generality cannot be carried so far that they violate equal protection concerns. A judge must frame a decision with an eye towards how it will affect others: An opinion has a "forward-looking function which reaches far beyond the cause in hand . . . cast[ing] its shadow before . . . [and] serv[ing] as a steadying factor which aids reckonability."[90] Within that constraint, however, the scope

88. Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 2695 (1989) (majority) (meaning of "actual malice" and "reckless disregard" given content through case-by-case adjudication, not readily captured in "one infallible definition"); Societe Nationale Industrielle Aerospatiala v. United States Dist. Court, 482 U.S. 522, 543-44 (1987) (majority) (refusing to adopt new rule which would require the application of Hague Convention procedures with regard to evidence gathering whenever available); United States v. Salerno, 481 U.S. 739, 767-68 (1987) (dissenting) (unwilling to decide that preventive detention is never proper during a crisis); Town of Newton v. Rumery, 480 U.S. 386, 417 (1987) (dissenting) ("because this is the first case of this kind that the Court has reviewed, I am hesitant to adopt an absolute rule invalidating all such agreements"); Nix v. Whiteside, 475 U.S. 157, 190-91 (1986) (concurring in the judgment) (refusing to generalize about what should be done if lawyer thinks client testimony is perjured); Heckler v. Community Health Servs., 467 U.S. 51, 60-61 (1984) (majority) (refusing to say that the government is never estopped); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 778, 795-96 (1984) (dissenting) (decide whether parent-subsidiary conspiracy on case-by-case basis); Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (majority) (no "litmus-paper test" for deciding constitutional issue; "analytical process that parallels its work in ordinary litigation"); Community Communications Co. v. City of Boulder, 455 U.S. 40, 60 (1983) (concurring) ("general language of the Sherman Act [given concrete meaning] by a process of case-by-case adjudication"); NCAA v. Board of Regents, 468 U.S. 85, 100 (1984) (majority) (no per se rule establishing that horizontal price fixing and output limitation are anti-competitive); Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 76 (1978) (concurring) (some extraterritoriality effects might be bad); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 617 (1976) (concurring in the judgment) (judge can protect defendant without gagging press in this case, but not necessarily in all cases); *see also* Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2797 (1988) (concurring in the judgment) (too many variables to justify fresh interpretation of prior cases without focusing on particular facts); Young v. Community Nutrition Inst., 476 U.S. 974, 988 (1986) (dissenting) (objecting to "a reasoning so formulaic that it trivializes the art of judging"); Southland Corp. v. Keating, 465 U.S. 1, 20 (1984) (concurring in part and dissenting in part) (court should not engage in "sterile generalization" when analyzing the scope of the Arbitration Act); United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 72 (1981) (concurring in part and dissenting in part) (majority should limit its reasoning to the narrow question presented); Wainwright v. Sykes, 433 U.S. 72, 95-96 (1977) (concurring) (language of test less important than the factors considered).

Sometimes judicial restraint by avoiding judicial generality conflicts with judicial restraint by deferring to other decisionmakers. In Arizona v. Maricopa County Medical Society, 457 U.S. 332, 354 (1982) (majority), Justice Stevens argued that by "articulating [per se antitrust] rules of law with some clarity and by adhering to rules that are justified in their general application . . . we enhance the legislative prerogative to amend the law."

89. Stevens, *Judicial Restraint,* 22 SAN DIEGO L. REV. 437, 447-48 (1985) ("glittering generality"); Stevens, *Some Thoughts About a General Rule,* 21 ARIZ. L. REV. 599, 604-05 (1979) (general rule fragile); *see also* Stevens, *Mr. Justice Roberts,* in MR. JUSTICE 319, 324, 330-34 (P. Kurland & A. Dunham eds. 1964) (faculty of judgment, not logical application of unbending principle).

90. County of Los Angeles v. Kling, 474 U.S. 936, 940 n.6 (1985) (dissenting) (quoting K. LLEWELLYN, THE COMMON LAW TRADITION 26 (1960)).

of the decision should be narrowed so that it draws as much sustenance as possible from the particularities of the litigated issue.

Closely related to the problem of overly broad generality is Justice Stevens' objection to the Court deciding hypothetical cases. "Speculation about hypothetical cases illuminates the discussion in a classroom, but it is evidence and historical fact that provide the most illumination in a courtroom."[91] In a typically common law fashion, he is wary of discussing hypothetical cases that pose "interesting and potentially difficult philosophical puzzles" but do not have "any significant relationship to real world decisions."[92] He argnes that a lack of restraint in going "beyond what is necessary to decide the case . . . encourage[s] the perception that [the Court] is pursuing its own notions of wise social policy, rather than adhering to its judicial role."[93]

Justice Stevens frequently objects to the Court deciding an issue not specified in the grant of certiorari.[94] In *Berkemer v. McCarty,* he observed that the Court was "reaching out to decide a question not passed upon below and unnecessary to the judgment" because the "answer to the question upon which we granted review is so clear under our settled precedents that the majority—its appetite for deciding constitutional questions only whetted—is driven to serve up a more delectable issue to satiate it."[95]

91. Brown Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 586 (1986) (dissenting); *see also* International Paper Co. v. Ouellette, 479 U.S. 481, 509 (1987) (concurring in part and dissenting in part) ("partially advisory"); Superintendent v. Hill, 472 U.S. 445, 462 (1985) (concurring in part and dissenting in part) (criticizing majority for placing "a higher value on the rendition of a volunteered advisory opinion than on the virtues of judicial restraint"); New Jersey v. T.L.O., 469 U.S. 325, 371 (1985) (concurring in part and dissenting in part) ("Court has unnecessarily and inappropriately reached out to decide a constitutional question"); Wainwright v. Witt, 469 U.S. 412, 436 (1985) (concurring in the judgment) ("unnecessary" to consider much of what majority did consider in rendering opinion); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 590 (1984) (concurring in the judgment) ("Court's discussion . . . is wholly advisory"); Oregon v. Kennedy, 456 U.S. 667, 681 (1982) (concurring in the judgment) ("exercise in law-making . . . wholly unnecessary"); Herweg v. Ray, 455 U.S. 265, 279 (1982) (concurring in part) (Court made "unnecessary" observation); Andrus v. Idaho, 445 U.S. 715, 732 (1980) (dissenting) (resolution of issue is "of no immediate consequence" to parties).

92. United States v. Kozminski, 108 S. Ct. 2751, 2772 (1988) (concurring in the judgment).

93. United States v. Leon, 468 U.S. 897, 963 (1984) (concurring in the judgment in part and dissenting in part); *cf.* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) (majority) (Justice Holmes' advisory opinion is "uncharacteristic").

94. Colorado v. Connelly, 479 U.S. 157, 173-74 (1986) (concurring in the judgment in part and dissenting in part) ("I dissent from the Court's disposition of the question that was not presented by the certiorari petition."); Irving Indep. School Dist. v. Tatro, 468 U.S. 883, 896 (1984) (concurring in part and dissenting in part) (award of attorney's fees not in grant of certiorari and therefore should not have been reversed); Burch v. Louisiana, 441 U.S. 130, 139 (1979) (concurring) (Court cannot decide what is not "fairly subsumed within the question presented by the petition for certiorari").

95. 468 U.S. 420, 445-46 (1984) (concurring in part and concurring in the judgment).

This reluctance to decide issues not contained in the petition for certiorari is apparently a source of contention within the Court. In *Batson v. Kentucky,*[96] Justice Stevens' willingness to decide an issue *not* raised in the petition was commented on specifically by Chief Justice Burger[97] and drew a pointed response from Justice Stevens. His response explained that the usual concerns about judicial restraint were inapplicable because the defending party, not the Court, had injected the issue into the case, and the issue had been fully argued.[98]

Avoiding over broad generalizations focuses a judge's attention on the facts of the particular case. Avoiding summary disposition is equally important, because it assures that the attention paid to the facts will be meaningful. Summary dispositions increase the risk of mistake,[99] and weaken judicial discipline and accountability.[100] Justice Stevens therefore rejects a suggestion that briefs on the merits must be filed before deciding cases summarily because that practice would "regularize and expand" summary decisions.[101]

B. *Dignity Goals*

Justice Stevens' practice of judicial restraint coexists with a deep commitment to individual dignity values. This section examines his conception of individual dignity and how courts should protect and nurture it. Section 1 explains how deliberation itself has substantive value, by

96. 476 U.S. 79, 108 (1986) (concurring).

97. *Id.* at 115 & nn.1 & 2 (Burger, C.J., dissenting).

98. *Id.* at 108-11. Justice Stevens' self-consciousness about explaining judicial restraint also appears in Novack Investment Co. v. Setser, 454 U.S. 1064, 1064 (1981) (concurring) (explaining why denial of certiorari appropriate), and New York v. Uplinger, 467 U.S. 246, 249-51 (1984) (concurring) (explaining why he agreed with dismissal of writ of certiorari after oral argument).

99. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 152-53 (1984) (dissenting from grant of cert. and summary vacation of lower court's judgment) ("Whenever this Court acts summarily, there is an increased risk that it will make a mistake. Without the benefit of full briefs and oral argument, an important issue may escape our attention."); *see also* Idaho Dep't of Employment v. Smith, 434 U.S. 100, 104 (1977) (dissenting in part) (risk of error from summary decision); Brennan v. Armstrong, 433 U.S. 672, 674-75 (1977) (dissenting) ("hasty action will unfortunately lead to unnecessary work by already overburdened Circuit Judges").

100. County of Los Angeles v. Kling, 474 U.S. 936, 940 (1985) (dissenting). In the same vein, he objects to the secrecy of unpublished court of appeals opinions. *Id.* at 938; *cf.* Virginia v. American Booksellers Ass'n, 484 U.S. 383, 398 (1988) (concurring in part and dissenting in part) ("A matter as important as the constitutionality of a state statute should not be decided on the basis of an advocate's concession during oral argument"); FTC v. Standard Oil Co., 449 U.S. 232, 249 (1980) (concurring in judgment) ("The disposition of a novel and important question of federal jurisdiction in a footnote will lend support to the notion that federal courts have a 'carte blanche' authorizing judicial supervision of almost everything that the Executive Branch of Government may do."); Mandel v. Bradley, 432 U.S. 173, 181-82 n.* (1977) (dissenting) (a question not ruled on or brought to attention of the court is not precedent); Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality) (judge's decision in death case must "be, and appear to be, based on reason rather than caprice or emotion").

101. Wyrick v. Fields, 459 U.S. 42, 49 (1982) (concurring).

assuring respectful judgment about the claims made by participants in the deliberative process. Individual dignity is thereby nurtured in nonjudicial as well as judicial settings. Section 2 describes the content of Justice Stevens' conception of individual dignity and how judicial restraint serves individual dignity values.

1. *Political Deliberation.* The capacity for deliberation is not a judicial monopoly. Its root meaning—weighing matters[102] to make judgments—embodies an ideal of rationality that Justice Stevens equates with the rule of law, and contrasts with such alternative frames of mind as "caprice,"[103] "emotion,"[104] "expression of the community's outrage,"[105] and "subjective reactions."[106] Both government and private deliberative rationality are therefore objectives that the law encourages in a wide variety of contexts, although with different shades of meaning and intensity.[107]

For example, Justice Stevens believes that nonjudicial governmental action through referenda cannot threaten individual property rights as "government by caprice," but instead should be based "on the merits by reference to articulable rules."[108] The value of rational deliberation also extends to private decisionmaking. The first amendment implements this

102. OXFORD ENGLISH DICTIONARY 413-14 (2d ed. 1989) (from the Latin *libra,* a balance, a pair of scales, and *deliberare,* to weigh well).

103. *Gardner,* 430 U.S. at 358 (plurality) (judicial decision in death case must "be, and appear to be, based on reason rather than caprice or emotion"); City of Eastlake v. Forest City Enters., 426 U.S. 668, 690, 692-93 (1976) (dissenting) (public referenda about the use of a person's property should not impose "government by caprice," but instead should be based "on the merits by reference to articulable rules").

104. *Gardner,* 430 U.S. at 358.

105. Spaziano v. Florida, 468 U.S. 447, 469 (1984) (concurring in part and dissenting in part) ("a rule of law as judges normally understand such rules" is contrasted with "an expression of the community's outrage" by a jury in passing a death sentence).

106. Smith v. United States, 431 U.S. 291, 316 (1977) (dissenting) (objecting to "guilt or innocence of a criminal defendant in an obscenity trial [being] determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law").

107. In view of Justice Stevens' commitment to the rule of law and rationality, especially in death penalty cases (*Gardner,* 430 U.S. at 358), an explanation is required for why the death penalty *must* be conditioned on the jury's "expression of outrage." *Spaziano,* 468 U.S. at 469. Justice Stevens probably expects the twelve jurors to deliberate hedged by procedural safeguards about what behavior deserves their outrage. *See, e.g.,* Franklin v. Lynaugh, 108 S. Ct. 2320, 2336 (1988) (dissenting) (stating that jury must be given the authority to hear and must be allowed to give independent weight to evidence based upon "the defendant's character or record or the circumstances of the evidence proferred"). But that explanation is only partially satisfying. Why is the result still described, without approbation, as an expression of outrage, rather than rational deliberation? Death may indeed be different, to be imposed only if the community is willing to take responsibility by indulging an emotion that would normally be banished from legal decisions and then only if such primal rage can survive the deliberative safeguards erected by the law.

108. City of Eastlake v. Forest City Enters., 426 U.S. 668, 690, 692-93 (1976) (dissenting).

principle by prohibiting state action that discourages private deliberation.[109] The importance of private deliberation can also *justify* state action, as when the state promotes discussion between parent and child about abortion, even though the child's abortion decision itself must be accepted.[110] And inadequacies in the private deliberation process, involving imbalances in language facility or financial resources, may result in interpreting a treaty to favor a disadvantaged party,[111] or finding that contractual waivers of rights violate due process.[112] Although there is also a legitimate teaching role for the government to play in the private deliberative process, it must act rationally. Symbolic government action, for example, is a permissible form of teaching, but not if it "irrational[ly] and perverse[ly]" harms the person being taught.[113]

The law's primary concern with rationality in the nonjudicial context, however, focuses on legislative and administrative decisionmaking.

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109. Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 2695 (1989) (majority) ("profound national commitment to the free exchange of ideas, as enshrined in the first amendment"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 582-83 (1980) (concurring) (a "watershed case" because the Court squarely held that acquisition of newsworthy matter is protected under the first amendment, even though it protected the most powerful voices in the community); Houchins v. KQED, Inc., 438 U.S. 1, 31-32 (1978) (dissenting) (state interference with press access to jail is questionable because access promotes an informed citizenry). Justice Stevens' commitment to deliberation can be traced to his student days, where he authored an article objecting to a peace march as not conducive to "constructive interchange of thought." R. SICKELS, *supra* note 1, at 184 n.87 (quoting *Peace Strikes Are Silly,* DAILY MAROON, Apr. 18, 1940, at 4).

110. Justice Stevens would have permitted parental notice before an abortion because it is a "procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision." H.L. v. Matheson, 450 U.S. 398, 424 (1981) (concurring). *See also* Planned Parenthood v. Danforth, 428 U.S. 52, 104 (1976) (concurring in part and dissenting in part) (advice and moral support of a parent "helping a pregnant distressed child to make and implement a correct decision"); *cf.* McCoy v. Court of Appeals, Dist. 1, 108 S. Ct. 1895, 1904 (1988) (majority) (state can require a lawyer appointed for an indigent accused criminal to explain to the court why an appeal is not meritorious, in part because preparation of a written explanation might uncover arguments favoring the accused).

111. *Compare* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667 n.10 (1979) (majority) (in the 1900s Indians did not understand English well; Treaty interpreted in their favor) *with* Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 793, 772 (1985) (majority) (Indians understood English well and had lawyer; Treaty therefore can be interpreted adversely to Indians).

112. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 487-90 (1985) (dissenting) (waiver of objection to jurisdiction in contract was violation of Due Process clause when provision was boilerplate insisted on by dominant financial party).

113. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 715 (1977) (concurring in part and concurring in the judgment) (footnotes omitted):

> [The State's] central argument is that the statute has the important *symbolic* effect of communicating disapproval of sexual activity by minors. In essence, therefore, the statute is defended as a form of propaganda, rather than a regulation of behavior.
>
> Although the State may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate. The propaganda technique used in this case significantly increases the risk of unwanted pregnancy and venereal disease. It is as though

As the remainder of this section explains, Justice Stevens would impose higher rationality standards on legislatures and agencies than conventional doctrine requires.

a. Legislative rationality. Rationality, in its most fully developed form, and as advocated by Justice Stevens, is concerned with substantive ends as well as means:

> [I] have always asked myself whether I could find a "rational basis" for the classification at issue. The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a *legitimate* public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational"—for me at least—includes elements of *legitimacy* and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.[114]

Legislative rationality also has a procedural side to it: "For just as procedural safeguards are necessary to guarantee impartial decisionmaking in the judicial process, so can they play a vital part in preserving the impartial character of the legislative process."[115]

The central procedural norm is participation, which imposes greater demands on legislatures, in Justice Stevens' view, than traditional doctrine requires. The traditional view is that the "Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy."[116] But Justice Stevens dissented in a case applying that principle, stating that the first amendment prohibited giving "only one speaker a realistic opportunity to present its views to

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a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets.

See also New Jersey v. T.L.O., 469 U.S. 325, 386 (1985) (concurring in part and dissenting in part) (allowing search of student's purse teaches "a curious moral for the Nation's youth").

114. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 452 (1985) (concurring) (emphasis added) (footnotes deleted) (concluding that requiring annual special use permit for group home for mildly retarded not rationally based); *see also* Kadrmas v. Dickinson Schools, 108 S. Ct. 2481, 2494 (1988) (dissenting) (quoting a related passage of *Cleburne*) (Court allowed special fee for busing to stand despite apparently discriminatory effect on poorer students and school districts).

Justice Stevens believes that majorities are not likely to hurt themselves. Attorney General v. Soto-Lopez, 476 U.S. 898, 916 (1986) (dissenting) ("[i]n a democracy the majority will seldom treat itself unfairly"); *cf.* Personnel Admin. v. Feeney, 442 U.S. 256, 281 (1979) (concurring) (enough males are hurt by a classification favoring veterans to refute charge of sex bias). His optimism about programs helping a small group is not entirely consistent with his concern about legislative deliberation, because it pays too little attention to the ability of a small group to capture control of legislation. It undoubtedly reflects another strain in his opinions, that politics must generally be trusted. *See* Rogers v. Lodge, 458 U.S. 613, 648-49 (1982) (dissenting) (the possibility of some discriminatory intent by legislators to achieve political advantage must be tolerated).

115. Fullilove v. Klutznick, 448 U.S. 448, 549 (1980) (dissenting).

116. Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 283 (1984) (O'Connor, J., majority).

state officials . . . by reference to the identity of the speaker," rather than the time, place and means of communication.[117]

The substantive and procedural requirements for legislative rationality merge for Justice Stevens in his distinctive conception of vicarious judicial participation. Legislative rationality depends on identifying legitimate legislative goals by hypothesizing what a "rational member of th[e] disadvantaged class" would approve.[118] For example, the handicapped might accept driving limits but not limits on where they may live.[119] The court, in effect, "participates" on behalf of the disadvantaged group in the legislative process. Vicarious judicial "participation" is not, however, a matter of replicating "interests" that might be demanded by the group. The group's wishes must be "rational"—a requirement that implies limits to the goals the law will recognize. Just as legislative rationality must be tested against a substantive judicial conception of legitimacy,[120] so the substantive concerns of the rational member of the disadvantaged group are passed through a judicial filter.

Justice Stevens extensively develops these norms in his approach to the equal protection clause. Legislation must be impartial,[121] which at the very least means freedom from traditional bias. The evil of traditional bias lies in the thoughtless application of unexamined points of view to the disadvantaged group. But not every tradition on which legislation is based can be reexamined whenever the legislature acts. Moreover, some of these traditions are desirable.[122] Objections to traditional bias therefore imply a substantive choice between "legitimate" and "illegitimate" biases, a choice that is already implicated in Justice Stevens' view that rationality includes notions of legitimacy.[123] The overarching substantive criterion that identifies situations requiring more thoughtful legislative attention is the requirement of "equal respect."[124] Justice Stevens has applied this requirement to conclude that, on the

117. *Id.* at 300-01 ("The Minnesota statute places a significant restraint on [free competition of ideas] by regulating the communication that may take place between the government and those governed.").

118. *City of Cleburne,* 473 U.S. at 455 n.12.

119. *Id.* at 454.

120. *Id.*

121. Fullilove v. Klutznick, 448 U.S. 448, 533, 548 (1980) (dissenting); Karcher v. Daggett, 462 U.S. 725, 748 (1983) (concurring); Craig v. Boren, 429 U.S. 190, 211 (1976) (concurring); *see also* Dobbert v. Florida, 432 U.S. 282, 307-08 (1977) (dissenting) (ex post facto clause concerned not only with fair notice, but with bad motive, provides protection against "improperly motivated or capricious legislation," ensuring that "the sovereign will govern impartially").

122. *See, e.g.,* Hudson v. Palmer, 468 U.S. 517, 557 (1984) (concurring in part and dissenting in part) ("diguity and intrinsic worth of every individual" is an ethical tradition to be followed).

123. *See supra* text accompanying note 114.

124. *See infra* notes 165-66 and accompanying text.

facts of the particular case, disfavoring the mentally retarded,[125] burdening illegitimates,[126] harming the poor,[127] and classifying on the basis of race[128] and sex (including anti-male bias)[129] violate the government's duty to govern impartially.

Justice Stevens' argument that there is only one equal protection clause[130] follows from his view that government can inflict harm only as a result of a thoughtful legislative process. There are no mechanical formulae for simplifying the judicial task of deciding whether legislative action is rational—that is, legitimate. Therefore, irrational legislative behavior that affects groups not traditionally considered "suspect" classes might be struck down, whereas rational legislative behavior that deals with "suspect" groups might be upheld. A racial classification that is well thought out, for example, can be sustained.[131] And discrimination based on sex can be upheld if it is based on reasoned distinctions grounded in fact and not on traditional bias.[132] By contrast, the poor,

125. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 454 (1985) (concurring) (arguing that an "impartial lawmaker" could rationally vote to give the mentally retarded special treatment under certain circumstances, but in the instant case the mentally retarded did not receive impartial treatment).

126. Mathews v. Lucas, 427 U.S. 495, 523 (1976) (dissenting) ("tradition of thinking of illegitimates as less deserving persons than legitimates").

127. In Zablocki v. Redhail, 434 U.S. 374, 406 (1978) (concurring in the judgment), the State prohibited marriage without court approval by someone with a support obligation unless he could show that support was being provided. Although marriage was not immune from evenhanded regulation, a provision that the "rich may marry and the poor may not" is "totally unprecedented, as well as inconsistent with our tradition of administering justice equally to the rich and to the poor." *Id.* at 404 (footnote omitted).

128. Fullilove v. Klutznick, 448 U.S. 448, 548-49 (1980) (dissenting) (although the Due Process Clause may not contain an absolute prohibition against statutory classification based on race, it does act as a procedural safeguard "preserving the impartial character of the legislative process").

129. Michael M. v. Superior Court, 450 U.S. 464, 501 (1981) (dissenting) (statutory rape law applying only to males reflects "traditional attitudes towards male-female relationships" by making males more guilty); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 154 (1980) (concurring in the judgment); Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (concurring in the judgment) ("accidental byproduct of a traditional way of thinking about females"); Craig v. Boren, 429 U.S. 190, 212 (1976) (concurring) ("remnant of the now almost universally rejected tradition of discriminating against males in this age bracket").

130. *See supra* notes 80-81 and accompanying text.

131. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 314 (1986) (dissenting) ("race is not always irrelevant to sound governmental decisionmaking"; classification in this case served a valid public purpose, and given its narrow breath, should be upheld); *see also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 584-86 (1979) (majority) (the statistics in the case fail to prove that the Transit Authority violated Title VII by prohibiting its employees from using methadone).

132. Lehr v. Robertson, 463 U.S. 248 (1983) (majority) (biological father status not enough to establish rights to child when there is no personal or financial relationship); Caban v. Mohammed, 441 U.S. 380, 403 (1979) (dissenting) (goes "beyond a merely reflexive rejection of gender-based distinctions" to uphold burden on noncustodial father; consent by noncustodial father to adoption is not required); *cf.* Personnel Adm'r v. Feeney, 442 U.S. 256, 281 (1979) (concurring) (enough males are hurt by classification favoring veterans to refute class bias).

although not traditionally a suspect classification, might be the object of irrational and therefore impermissible legislative bias.[133]

Justice Stevens takes a similarly flexible approach, combining procedural and substantive standards, in reviewing legislative rationality under the due process clause. Although he is sensitive to claims that "fundamental" interests have been improperly infringed upon,[134] he does not warp his review of legislative behavior with a predetermined judgment about the " 'proper' standard of review."[135] Family relationships, for example, are often regulated by the government[136] and a predisposition to call them "fundamental" only clouds an analysis of the rationality of specific government action. In *Moore v. City of East Cleveland,* Justice Stevens refused to concur in the majority's substantive due process analysis,[137] which posited a fundamental interest in family living arrangements.[138] But that did not mean that the government had imposed "a permissible restriction on appellant's right to use her own property as she sees fit."[139] Linking this property right to common law rights predating the adoption of the Constitution,[140] Justice Stevens concluded that the government "failed totally to explain the need for a rule which would allow a homeowner to have two grandchildren live with her if they are brothers, but not if they are cousins."[141] The state had therefore deprived appellants of property without due process of law and without just compensation.

133. Zablocki v. Redhail, 434 U.S. 374, 406 (1978) (concurring in the judgment) (statute prohibiting marriage without court approval by individual with support obligation is an example of irrational "legislative discrimination between the rich and poor"). In Kadrmas v. Dickinson Public Schools, 108 S. Ct. 2481, 2495 (1988) (dissenting), the Court dealt with a state law allowing unreorganized but not reorganized school districts to charge school bus fees. The discrimination was meant to encourage reorganization by allaying the voters' concern about school bus fees. Justice Stevens argued that, once a school district voted against reorganization, permitting it to charge bus fees was unconstitutionally irrational. In his view, there was no further reason to "place an obstacle in the paths of poor children seeking an education," once the school district decided whether or not to reorganize. *Id.*

134. *See, e.g.,* Moore v. City of E. Cleveland, 431 U.S. 494, 520 (1977) (concurring in the judgment) (Ordinance which excludes an "owner's relatives from the group of persons who may occupy his residence on a permanent basis," offends a fundamental right, "that of an owner to decide who may reside on his or her property . . . .").

135. Turner v. Safley, 482 U.S. 78, 112-15 (1987) (concurring in part and dissenting in part) (reviewing state action limiting prisoners right to marry and communicate by mail). The majority had adopted conventional "fundamental interest" analysis to protect the right to marry. *Id.* at 94-97.

136. *Zablocki,* 434 U.S. at 403-04.

137. 431 U.S. 494, 520 (1977) (concurring in the judgment).

138. *Id.* at 499.

139. *Id.* at 513.

140. *Id.*

141. *Id.* at 520.

Justice Stevens' concern with the legislature's "fail[ure] totally to explain the need for a rule"[142] rests on a higher standard of legislative rationality than the traditional due process standard. According to Justice Stevens, an accideutal malfunction of the legislative process violates due process, whether or not the interest involved is traditionally considered "fundamental." For example, in a case involving access to government benefits for Indians, Justice Stevens found there had been a deprivation of property without due process of law because there was "a legislative *accident,* perhaps caused by nothing more than the unfortunate fact that Congress is too busy to do all of its work as carefully as it should."[143] But where the legislature appears to struggle with "intractable economic, social, and even philosophical problems" of welfare,[144] Justice Stevens finds the result "rational."[145]

To determine whether or not the legislative process is sufficiently thoughtful to satisfy due process standards, Justice Stevens is willing to hypothesize a legislative purpose, but not with the same degree of judicial deference traditionally associated with minimum rationality analysis. In *United States Railroad Retirement Board v. Fritz,*[146] for example, he commented negatively on the Court's acceptance of whatever purpose the government might concoct to justify the statute as rational. Justice Stevens believed that something more than a "conceivable" or "plausible" explanation was needed to support a claim that legislation distin-

142. *Id; see also* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 189 (1979) (concurring in part and concurring in the judgment) ("[Statute dealing with ballot access] is either a product of a malfunction of the legislative process or merely a by-product of this Court's decision in [another case]"; statute is "impartial" and therefore does not violate Equal Protection, because it does not classify voters on a basis such as religion, but it does cause a deprivation of liberty without "due process of lawmaking," because it is not based on a "rational predicate.").

143. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 97 (1977) (dissenting). Justice Stevens admitted that the legislature followed its own procedures, but still found the legislative "accident" objectionable. Although it was "improbable," he was "not prepared to say that if Congress had actually reviewed the status of the Kansas Delawares, it might not have found some principled basis for treating them differently from other Delawares." *Id.*; *see also* Hodel v. Irving, 481 U.S. 704, 720 (1987) (concurring in the judgment) (the "abruptness and lack of explanation" for including an escheat provision in a bill depriving Indians of property deprived them of due process).

144. Bowen v. Gilliard, 483 U.S. 587, 609 (1987) (majority) (quoting Dandridge v. Williams, 397 U.S., 471, 487 (1970) (Stewart, J.)).

145. Schweiker v. Hogan, 457 U.S. 569, 591 (1982) (majority) (medically needy can be ineligible for medical benefits even though they are worse off after medical expenses than some eligible cash welfare recipients; eligibility for a needs-based program based on gross income levels was rational; Congress was "aware" of the effects of the Medicaid rule); *Gilliard,* 483 U.S. at 609 (child support attributed to entire family to measure need was rational).

Legislative deliberation also may prevent the court from going behind the plain meaning of a statute. *See* Alexander v. Fioto, 430 U.S. 634, 637, 640 (1977) (majority) ("It is difficult to believe that language this clear could be the product of a drafting error." The "statutory exclusion is unquestionably the product of a deliberate and rational choice . . . .").

146. 449 U.S. 166, 180 (1980) (concurring in the judgment).

guishing among workers eligible for dual Social Security and Railroad Retirement benefits was rational. Because "[a]ctual purpose is sometimes unknown," however, the Court could hypothesize a legitimate purpose that it could "reasonably presume . . . motivated an impartial legislature."[147] The requirement that the hypothesized legislative purpose be "legitimate," "reasonable," and "impartial" obviously depends on a more exacting substantive judicial standard than would be imposed by a court willing to accept virtually any legislative purpose proposed by a litigant. Justice Stevens' due process analysis, like his approach to equal protection, is thus a blend of substantive reasonableness and procedural thoughtfulness.

b. Agency rationality. Justice Stevens is more suspicious of agencies than of legislatures: "[T]he 'presumption of regularity afforded an agency in fulfilling its statutory mandate' is not equivalent to 'the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause.' "[148] Judicial review of agency action is therefore presumptively available.[149]

The origin of Justice Stevens' concern about agency rationality is undoubtedly a fear that politically insulated administrators, hidden from public view, can wield great and unrestrained power over individuals with the potential for abuse. Thus, it counts strongly against an agency if that agency appears to use its power as a lever to achieve something outside the scope of its authority.[150] This perspective is consistent with

147. *Id.* at 180-81. A judicial search for actual legislative purpose might give courts too much power to impose their own policy preferences. Rogers v. Lodge, 458 U.S. 613, 643 (1982) (dissenting).

It goes without saying that traditional bias cannot justify interference with liberty. *See* Bowers v. Hardwick, 478 U.S. 186, 219 (1986) (dissenting) ("habitual dislike" for homosexuals cannot support state action violating their liberty interests); Carey v. Population Servs. Int'l, 431 U.S. 678, 715 (1977) (concurring in part and concurring in the judgment) ("irrational and perverse" to symbolically object to contraceptives by prohibiting their advertising and thereby inflicting harm on those who would buy them; deprivation of liberty without due process of law).

148. Bowen v. American Hosp. Ass'n, 476 U.S. 610, 626-27 (1986) (plurality); *see also id.* at 627 ("need to vest administrative agencies with ample power . . . carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision").

149. United States v. Fausto, 484 U.S. 439, 461 (1988) (dissenting) (strong presumption favoring judicial review of administrative action); ICC v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270, 287 (1987) (concurring in the judgment) (should review agency action); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986) (majority) (strong presumption of judicial review of agency action); *cf.* Heckler v. Ringer, 466 U.S. 602, 631-37 (1984) (concurring in the judgment in part and dissenting in part) (should review denial of Medicare); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 511 (1982) (dissenting) (at least one *de novo* trial required). *But see* Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 454 (1979) (majority) (court lacks power to review agency decision not to investigate).

150. Board of Governors of the Fed. Reserve Sys. v. First Lincolnwood Corp., 439 U.S. 234, 254 (1978) (dissenting) ("approval power is a sort of lever that [the agency] may use to bend the will of

Justice Stevens' view that it is always improper to subject the individual to arbitrary government action, whether or not the interests affected are traditionally viewed as "fundamental."

The rationality standard applicable to agencies therefore is stricter than that applicable to legislatures. Agencies must demonstrate more affirmatively than a legislature that they have followed a rational decisionmaking process, both in sticking to ends authorized by others and in explaining how adopted rules serve those ends. Thus, an agency deprives someone of liberty without due process by failing to link its action to a goal within the grant of agency authority;[151] by failing to give adequate consideration to relevant factors;[152] by not explaining the connection between the facts found and choices made;[153] and by failing to make the findings necessary to justify its action.[154]

An agency's failure to follow its own procedural rules also counts against the Court's deference to an agency's position,[155] except when it would discourage the agency's formulation of internal procedural rules,

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independent bank owners and managers"); United States v. Chesapeake & O. Ry., 426 U.S. 500, 524 (1976) (dissenting) (fear that agency will "work its will in the form of conditional approvals"); *cf.* FCC v. League of Women Voters, 468 U.S. 364, 408, 417 (1984) (dissenting) (legitimate to prohibit public subsidies of partisan points of view because political "strings" attached to money threatens the recipient's independence; "[t]he court jester who mocks the King must choose his words with great care"); Community Television v. Gottfried, 459 U.S. 498, 508-12 (1983) (majority) (FCC should not be able to force protection for handicapped; outside of its area of competence); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 645 (1980) (plurality) ("In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view" of the statute.).

151. Hampton v. Mow Sun Wong, 426 U.S. 88, 114-17 (1976) (majority); *cf. Gottfried,* 459 U.S. at 508-09 (FCC should not be able to force licensees to protect the hearing impaired).

152. Schweiker v. Gray Panthers, 453 U.S. 34, 56 (1981) (dissenting) (arguing that the Secretary of Health and Human Services failed to give adequate consideration to relevant factors in determining when the income of one spouse may be "deemed" available to the other for the purpose of establishing eligibility for Medicaid benefits).

153. Bowen v. American Hosp. Ass'n, 470 U.S. 610, 626 (1986) (plurality) ("It is an axiom of administrative law that an agency's explanation of the basis for its decision must include 'a rational connection between the facts found and the choice made.' "); United States v. Swank, 451 U.S. 571, 585-86 (1981) (majority) (government "has not 'suggested any rational basis for linking the right to a depletion deduction to the period of time that the taxpayer operates a mine' ").

154. *Industrial Union Dep't, AFL-CIO,* 448 U.S. at 642-59 (OSHA failed to make sufficient findings which would justify a standard reducing exposure to airborne benzene).

155. Lyng v. Payne, 476 U.S. 926, 951 (1986) (dissenting) (Agriculture Department did not follow its own rules); *see also* United States v. Von Neumann, 474 U.S. 242, 253 (1986) (concurring in the judgment) (Congress intends agency to act in a "regular and fundamentally fair way" and with "reasonable diligence"); Hillsboro Nat'l Bank v. Commissioner, 460 U.S. 370, 416 (1983) (concurring in the judgment in part and dissenting in part) ("orderly, certain, and consistent interpretation" in tax matters is important because tax involves capital investment); Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980) (majority) ("strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law").

which are the best protection against arbitrary action.[156] The importance of regularity in agency behavior is evident in Justice Stevens' view that consistent agency interpretation of its own regulations is entitled to even more weight than agency interpretation of a statute.[157]

Suspicion about an agency's deliberative process helps to explain Justice Stevens' retraction of some of the broader implications of his opinion in *Chevron,*[158] which had established a broad principle of deference to agency rules. In his later opinion in *Cardoza-Fonseca,* Justice Stevens argued that where "[t]he question . . . is a pure question of statutory construction for the court to decide," judicial deference to the agency is *inappropriate.*[159] In deciding this "pure question," he "employ[ed] traditional tools of statutory construction," and reached his own conclusion about the statute's meaning; he was careful, though, to distinguish "pure interpretation" from cases in which the agency fills gaps left by the legislature.[160] This qualification of the *Chevron* decision was not casually arrived at, but was maintained in the face of an explicit challenge by Justice Scalia to a more restrictive view of judicial deference to administrative rules in *Cardoza-Fonseca.*[161] In retrospect, Justice Stevens' statements in *Chevron,* emphasizing the "detailed and reasoned" agency decisionmaking process and the "technical and complex" nature of the regulatory scheme,[162] may better reflect his own more cautious

156. United States v. Caceres, 440 U.S. 741, 756 (1979) (majority):

> In the long run, it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration of the kind displayed by this record, than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form.

See also Community Television v. Gottfried, 459 U.S. 498, 511 (1983) (majority) (rulemaking better than license renewal procedure).

157. Jewett v. Commissioner, 455 U.S. 305, 318 (1982) (majority) ("The Commissioner's interpretation of the Regulation has been consistent . . . and is entitled to respect."); *cf.* Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835, 1850 (1989) (majority) (agency interpretation of own regulation controlling because not " 'plainly erroneous or inconsistent' ").

158. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (majority). *See supra* text accompanying notes 67-69.

159. Immigration and Naturalization Serv. v Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (majority) (asylum application under § 208(a) of the Immigration and Nationality Act not governed by the "clear probability" standard under § 243(h) of the Act).

160. *Id.* at 446.

161. *Id.* at 452-55 (Scalia, J., concurring in the judgment).

162. 467 U.S. at 865; *see also* Pittston Coal Group v. Sebben, 109 S. Ct. 414, 438 (1988) (dissenting) (judicial deference to the agency is more justified when the issue is more technical).

view of judicial deference to agency interpretation,[163] rather than the super-deferential approach that many have attributed to *Chevron.*[164]

2. *Individual Dignity.*

The requirement that legislatures and admimstrative agencies deliberate thoughtfully is one aspect of the broader substantive requirement that individual dignity be respected. This section elaborates further on the substantive content of Justice Stevens' commitment to individual dignity and the relationship between judicial restraint and dignity values.

a. Substantive content. Justice Stevens explains his conception of individual dignity in a quotation from Ronald Dworkin:

> Mill saw independence as a further dimension of equality; he argued that an individual's independence is threatened, not simply by a polit-

163. Justice Stevens often holds that agency regulations exceed statutory authority. *See, e.g.,* Young v. Community Nutrition Inst., 476 U.S. 974, 984 (1986) (dissenting) (ambiguity in statutory language should not be invented to justify deference to agency); Local 82, Furniture and Piano Moving, Furniture Store Drivers v. Crowley, 467 U.S. 526, 558 (1984) (dissenting) (the legislative history of the statute removes the Secretary of Labor as a protector of union interests); Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 406 (1984) (dissenting) (plain language precludes agency decision); Public Serv. Comm'n v. Mid-Louisiana Gas Co., 463 U.S. 319, 342 (1983) (majority) (agency position inconsistent with "history, structure, and basic philosophy" of statute); Commissioner v. Standard Life & Accident Ins. Co., 433 U.S. 148, 161 (1977) (majority) (taxpayer position is firmly anchored in the text; Treasury regulation improper).

In some eases, however, he defers to agency decisions. Many of these decisions are majority decisions, where the judge writing the opinion might be expected to include a variety of points of view, some of which are not central to his own judicial philosophy. *See, e.g.,* Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851, 1865 (1989) (majority) ("Even if another decision maker might have reached a contrary result," decision by Army Corps of Engineers was not " 'a clear error of judgment.' "); Massachusetts v. Morash, 109 S. Ct. 1668, 1676 (1989) (majority) ("It is sufficient . . . that the Secretary's determination . . . constitutes a reasonable construction of the statute."); Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135, 137 (1987) (majority) ("The Agency's interpretation, . . . is deserving of substantial deference . . . ."); Connecticut Dep't of Income Maintenance v. Heckler, 471 U.S. 524, 537-38 (1985) (majority) (deferring to Secretary of Health and Human Services on definition of "institution or mental diseases"); Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46, 56 (1981) (majority) ("The Board's determination . . . is entitled to the greatest deference."); Knebel v. Hein, 429 U.S. 288, 296 (1977) (majority) ("We conclude that the federal regulations defining income were reasonably adopted by the Secretary in the performance of his statutory duty . . . ."); Bayside Enters. v. NLRB, 429 U.S. 298, 302 (1977) (majority) ("This conclusion by the Board is one we must respect . . . .");.

Justice Stevens also deferred to agency decisions in two dissents, but in both eases he affirmed the agency's decision to infer a private remedy, which is a position Justice Stevens generally favors, *See infra* note 338; Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 643 (1983) (dissenting) ("The presumption of validity must be at least as strong when a regulation does not seek to control the conduct of independent private parties, but merely defines the terms on which someone may seek federal money."); Piper v. Chris-Craft Indus., 430 U.S. 1, 64 (1977) (dissenting) (private remedy is necessary to follow Congress's intent); *see also* Pittston Coal Group v. Sebben, 109 S. Ct. 414, 438 (1988) (dissenting) (the more technical the issue, the more judicial deference to the agency).

164. *See* Farina, *supra* note 67, at 457.

> ical process that denies him equal voice, but by political decisions that deny him equal respect. Laws . . . that constrain one man, on the sole ground that he is incompetent to decide what is right for himself, are profoundly insulting to him. They . . . deny him the independence to which he is entitled. Mill insisted on the political importance of these moral concepts of dignity, personality, and insult. It was these complex ideas, not the simpler idea of license, that he tried to make available for political theory.[165]

This statement reaffirms that the procedural right to participate is part of a broader substantive claim to equal respect—a claim that is not sharply distinguished from a claim to independence. Deprivation of equal respect *is* a deprivation of liberty.[166]

Equal respect, of course, requires impartial treatment. Impartiality and prohibition of bias,[167] according to the prior discussion, is therefore integral to Justice Stevens' concern for individual dignity. A distinctive feature of his view of equal respect is a special concern about unequal treatment of the rich and the poor. This concern led Justice Stevens to conclude that equal protection principles prohibit a state legislature from preventing marriage by a poor person who did not support his children;[168] a state law allowing unreorganized—but not reorganized—school districts to charge school bus fees was unconstitutional because, once a school district voted against reorganization, there was no further reason "to place an obstacle in the paths of poor children seeking an education";[169] and a statute should be interpreted to avoid the "cruel irony" that a law meant to help the needy elderly would "protect from administrative absolutism only those wealthy enough to be able to afford an operation and then seek reimbursement."[170] Favoritism for the rich can be equally offensive. Thus, enforcement of an eleven billion dollar lien by Texas did not violate due process, since "deal[ing] equally with

165. Hewitt v. Helms, 459 U.S. 460, 485 (1983) (dissenting) (citing R. DWORKIN, TAKING RIGHTS SERIOUSLY 263 (1977)).

166. Stevens, *supra* note 73, at 284.

167. *See supra* text accompanying notes 121-29.

168. Zablocki v. Redhail, 434 U.S. 374, 406 (1978) (concurring in the judgment).

169. Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481, 2495 (1988) (dissenting).

170. Heckler v. Ringer, 466 U.S. 602, 630 (1984) (concurring in the judgment in part and dissenting in part); *see also* Mallard v. United States Dist. Ct., 109 S. Ct. 1814, 1824 (1989) (dissenting) (lawyer's duty to assist the poor is an ancient tradition); Mississippi Band of Choctaw Indians v. Holyfield, 109 S. Ct. 1597, 1616 (1989) (dissenting) (only wealthy custodial parents can afford to establish off-reservation domicile); Sorenson v. Secretary of the Treasury, 475 U.S. 851, 866 (1986) (dissenting) ("class of persons that Congress intended to benefit by creating the 'Earned Income Credit' Program in 1975 is composed entirely of low-income families"); *cf.* McNally v. United States, 483 U.S. 350, 377 (1987) (dissenting) (expressing "lingering questions about why a Court that has not been particularly receptive to the rights of criminal defendants in recent years has acted so dramatically to protect the elite class of powerful individuals who will benefit from this decision").

the rich and the poor does not admit of a special exemption for multibillion-dollar corporations or transactions."[171]

Dworkin's quotation from Mill[172] also links the idea of equal respect, as it is usually implemented through the equal protection clause, with the right to independence, usually analyzed as a due process liberty right. Justice Stevens chides his colleagues for not appreciating the value of liberty, as noted above.[173] Liberty is a right not traceable to specific legal texts or government decisions: "[N]either the Bill of Rights nor the laws of the sovereign States create the liberty which the Due Process Clause protects."[174] He also rejects the monetarization of liberty values: "The issue is one of fundamental fairness, not of weighing pecuniary costs against the societal benefits . . . . For the value of protecting our liberty from deprivation by the State without due process of law is priceless."[175]

Justice Stevens' conception of liberty is both expansive and evolving.[176] It includes a right to privacy in choice of life style, which includes the choice to engage in homosexual relationships.[177] Privacy values also should be protected by adapting the fourth amendment prohibition against unreasonable searches to new situations, such as searches of students[178] and motor homes.[179] And Justice Stevens' conception of the fifth amendment right to avoid self-incrimination is explicitly linked to individual dignity. He therefore would distinguish (as the Court's majority would not) between an impermissible government demand for the combination to a safe and a permissible demand for a key, on the theory that compelling the defendant to use his mind to provide a combination

171. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 34 (1987) (concurring in the judgment).

172. *See supra* note 165 and accompanying text.

173. *See supra* text accompanying note 3.

174. Meachum v. Fano, 427 U.S. 215, 230 (1976) (dissenting); *see also* Bell v. Wolfish, 441 U.S. 520, 580-81 (1979) (dissenting).

175. Lassiter v. Department of Social Servs., 452 U.S. 18, 60 (1981) (dissenting); *see also* Moran v. Burbine, 475 U.S. 412, 466 (1986) (dissenting) (rejecting cost-benefit analysis in case concerning right of criminal accused to legal assistance); Ingraham v. Wright, 430 U.S. 651, 701 (1977) (dissenting) (monetary damages less likely to compensate for loss of liberty than property).

176. Stevens, *supra* note 18, at 727-28; *cf.* Thompson v. Oklahoma, 108 S. Ct. 2687, 2691 (1988) (plurality) (evolving standards of decency define what is cruel and unusual punishment in the context of the death penalty).

177. Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (dissenting); *see also* Michael H. v. Gerald D., 109 S. Ct. 2333, 2347 (1989) (concurring in the judgment) (natural father has constitutionally protected right in relationship with child, even though mother married to and cohabited with another at time of conception and birth); City of Dallas v. Stanglin, 109 S. Ct. 1591, 1597 (1989) (concurring in the judgment) (opportunity to make friends and enjoy the company of others is an aspect of liberty protected by the fourteenth amendment, rather than first amendment right of association).

178. New Jersey v. T.L.O., 469 U.S. 325, 373 (1985) (concurring in part and dissenting in part).

179. California v. Carney, 471 U.S. 386, 407 (1985) (dissenting).

that might incriminate him "invade[s] the dignity of the human mind."[180]

Justice Stevens also finds liberty interests in situations in which others might assume that they had been completely lost, as in the case of prisoners, whom he views as a classic case of a vulnerable, discrete, and insular minority:

> By telling prisoners that no aspect of their individuality, from a photo of a child to a letter from a wife, is entitled to constitutional protection, the Court breaks with the ethical tradition that I had thought was enshrined forever in our jurisprudence.[181]

Justice Stevens also has dissented in favor of prisoners in cases involving transfers between prisons,[182] administrative segregation,[183] first amendment rights,[184] and rights to communicate and marry,[185] thereby fulfilling the expectations of those inmates who had written in support of his nomination.[186]

Justice Stevens is especially alert to government deprivation of individual liberty through the manipulation of criteria designed to protect liberty interests. As a result, fifth amendment protections apply to involuntary commitments of "sexually dangerous persons" because they are "virtually identical to [proceedings] for prosecution of sex-related crimes";[187] they also apply to a civil penalty that is really a "criminal sanction."[188] Similarly, attempts to avoid the *Miranda* warnings

180. Doe v. United States, 108 S. Ct. 2341, 2352 n.1 (1988) (dissenting). The difference between "forced execution of this document differs from the forced production of physical evidence just as human beings differ from other animals." *Id.* at 2352.

181. Hudson v. Palmer, 468 U.S. 517, 558 (1984) (concurring in part and dissenting in part).

182. Meachum v. Fano, 427 U.S. 215, 229 (1976) (dissenting).

183. Hewitt v. Helms, 459 U.S. 460, 479 (1983) (dissenting).

184. Thornburgh v. Abbott, 109 S. Ct. 1874, 1885 (1989) (concurring in part and dissenting in part).

185. Turner v. Safley, 482 U.S. 78, 99 (1987) (concurring in part and dissenting in part).

186. *Hearings, supra* note 9, at 15. A concern for prisoners is also apparent in Justice Stevens' approach to the retroactivity of new judicial decisions in habeas corpus cases. He agrees with the majority that new law should not be retroactively applied except when it excludes behavior from the reach of the criminal law or involves fundamental fairness. Teague v. Lane, 109 S. Ct. 1060, 1080 (1989) (concurring in part and concurring in the judgment). But he defines the permissible reach of the criminal law more narrowly than the majority, Penry v. Lynaugh, 109 S. Ct. 2934, 2983 (1989) (concurring in part and dissenting in part), and the concept of fundamental fairness for purposes of permitting retroactive application of new judicial law more broadly than the plurality, *Teague,* 109 S. Ct. at 1080-81 (fundamental fairness not limited to accuracy-impairing procedures). He also rejects the majority's view that the issue of retroactivity should be decided before a new rule is announced. *Id.* at 1079-80 n.2. The Court undoubtedly would play a greater role in protecting prisoners if the decision to adopt a new rule preceded a judgment on retroactivity.

187. Allen v. Illinois, 478 U.S. 364, 375 (1986) (dissenting).

188. United States v. Ward, 448 U.S. 242, 257 (1980) (dissenting) (arguing that a monetary penalty imposed pursuant to Federal Water Pollution Control Act was a criminal sanction).

through a narrow definition of "interrogation" will not be tolerated.[189] Fourth amendment search warrant requirements must not be circumvented by application of the "independent source" doctrine to allow the use of evidence rediscovered during a legal search following prior illegal discovery.[190] Rules governing a criminal trial must not be restructured to weaken constitutional protections: the government's burden of proof must not be diluted by redefining the elements of the crime,[191] and safeguards in sentencing procedures must be observed to prevent prejudice in the determination of guilt.[192]

Justice Stevens differs, however, from some of his "liberal" colleagues, such as Justices Brennan and Marshall, in the extent to which he would have the Court second-guess administrative determinations affecting liberty interests. The central problem for Justice Stevens is to prevent thoughtless government decisions—to deter policemen, not to punish them.[193] Justice Stevens is thus content to rely on well-designed procedures, absent evidence of official bad faith,[194] for adequate protection. Consider the following search warrant decisions: When a search warrant was properly obtained for one apartment, although it mistakenly covered a second apartment, the search of the second apartment did not violate the fourth amendment since "the officers' conduct and the limits of the search were based on the information available as the search proceeded";[195] when a "neutral and detached magistrate" had issued a search warrant, it was permissible to detain the residents and to search

189. Rhode Island v. Innis, 446 U.S. 291, 309 (1980) (dissenting) ("absolute right to have any type of interrogation cease until an attorney was present"); *see also* Arizona v. Mauro, 481 U.S. 520, 531 (1987) (dissenting) ("powerful psychological ploy" by police); Oregon v. Elstad, 470 U.S. 298, 365 (1985) (dissenting) (fifth amendment is "one of the core constitutional rights" protecting citizens from "tyranny"); *cf.* Patterson v. Illinois, 108 S. Ct. 2389, 2403-04 (1988) (dissenting) (waiver of *Miranda* rights does not mean the prosecution can violate the sixth amendment right to counsel by interviewing an indicted accused).

190. Murray v. United States, 108 S. Ct. 2529, 2540 (1988) (dissenting).

191. McMillan v. Pennsylvania, 477 U.S. 79, 102 (1986) (dissenting) (demeans reasonable doubt standard if it could be avoided by making prohibited conduct not an element of the crime).

192. Marshall v. Lonberger, 459 U.S. 422, 456-57 (1983) (dissenting) (unfairly merge sentence and guilt determination); *see also* Ralston v. Robinson, 454 U.S. 201, 229 (1981) (dissenting) (interpret statute so as not to permit increase of sentence); *cf.* Jones v. United States, 463 U.S. 354, 387 (1983) (dissenting) (when accused pleads not guilty by reason of insanity, the government must prove by clear and convincing evidence that incarceration beyond maximum prison sentence is justified); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 468 (1981) (dissenting) (commutation of sentence proceedings).

193. Dunaway v. New York, 442 U.S. 200, 220-21 (1979) (concurring).

194. United States v. Caceres, 440 U.S. 741, 755-56 (1979) (majority) (Court should not apply exclusionary rule when procedures allow Executive to sanction agency for violating electronic surveillance regulations); *see also* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 865 (1984) (majority) ("detailed and reasoned" agency decision).

195. Maryland v. Garrison, 480 U.S. 79, 87 (1987) (majority) (there must be "some latitude for honest mistakes").

them as incidental to the search of the premises;[196] and meaningless, watered-down requirements for regulatory search warrants are a costly formality that should not be required.[197]

Justice Stevens' emphasis on liberty does not require that property interests be neglected. Liberty requires treatment with equal respect, which demands that individual rights in general must be protected from arbitrary harm. Consequently, Justice Stevens believes that the common law right to control one's own property can be interfered with only if the legislature has an adequate justification.[198] A delay in the hearing after seizure of property violates due process.[199] And a statute was interpreted to prevent agency action from depriving appellees of their livelihood by legislative accident.[200] In the same vein, *stare decisis* is also important to Justice Stevens because consistency supports "settled expectations" and public confidence in the stability of the "rules of law."[201]

Justice Stevens also has concerns about private as well as government concentrations of power. He views antitrust laws as the "Magna Carta of free enterprise."[202] The exemption from federal antitrust laws for state action therefore should be narrowly construed.[203] By contrast, he defines "state action" expansively to require a pre-seizure hearing when private creditors seize property from debtors.[204] The common theme in these two state action cases is to prevent private deprivation of

196. Michigan v. Summers, 452 U.S. 692, 701 (1981) (majority).

197. Marshall v. Barlow's, Inc., 436 U.S. 307, 328 (1978) (dissenting) ("[W]e should not dilute the requirements of the Warrant Clause in an effort to force every kind of governmental intrusion . . . into a judicially developed, warrant-preference scheme.").

198. Moore v. City of E. Cleveland, 431 U.S. 494, 513, 520 (1977) (concurring in the judgment).

199. United States v. $8,850, 461 U.S. 555, 570 (1983) (dissenting) ("[A] rule that allows the Government to dispossess a citizen of her property for more than 18 months . . . without a hearing is a flagrant violation of the Fifth Amendment.")

200. United States v. Locke, 471 U.S. 84, 117-18 (1985) (dissenting) ("[T]he choice of the language . . . is . . . at best 'the consequence of a legislative *accident* . . . .' In my view, Congress actually intended to authorize an annual filing at any time prior to the close of business on December 31st . . . .").

201. Stevens, *The Life Span of a Judge-Made Rule,* 58 N.Y.U. L. REV. 1, 9 (1983).

202. Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 666 (1977) (dissenting) (allowing federal injunction against state courts). Justice Stevens had been an antitrust specialist before becoming a judge. *Hearings, supra* note 9, at 4-5; *see also* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 126-27 (1978) (dissenting) (violates due process clause to allow private party to get injunction to stop private competition without review by the government).

203. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 80 (1985) (dissenting) (activity is not exempt state action); Hoover v. Ronwin, 466 U.S. 558, 600 (1984) (dissenting) (exempting lawyers would create a "gaping hole in the fabric of antitrust law"); Cantor v. Detroit Edison Co., 428 U.S. 579, 597-98 (1976) (majority) (activity is not exempt state action). *But cf.* Square D. Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) (majority) (federal regulatory scheme creates exception to antitrust laws; prior decision interpreting statute followed).

204. Flagg Bros. v. Brooks, 436 U.S. 149, 171-72 (1978) (dissenting). *But cf.* NCAA v. Tarkanian, 109 S. Ct. 454, 462-65 (1988) (majority) (state university adoption of NCAA rules does

property, without concern for adopting a consistent definition of state action.

Lawyers have a special role to play in protecting the individual from arbitrary government action and in giving the individual confidence that such protection has been provided.[205] Justice Stevens objects when the Court disallows a criminal defendant's waiver of his lawyer's conflict of interest, and he chides the majority for its "apparent unawareness of the function of the independent lawyer as guardian of our freedom."[206] He also would extend the right of free counsel to cases involving a termination of parental rights.[207] And two of the cases—one was a criminal proceeding[208] and the other civil[209]—in which Justice Stevens castigates his

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not constitute state action); United States v. Jacobsen, 466 U.S. 109, 115-18 (1984) (majority) (private search does not implicate fourth amendment concerns).

205. Stevens, *supra* note 73, at 285-86; *Hearings, supra* note 9, at 78 ("could not overemphasize the importance of the lawyer's role in the adversary process and it is unquestionably a matter of major importance in all litigation"). *But see* Perry v. Leeke, 109 S. Ct. 594, 602 (1989) (majority) (trial judge has discretion to forbid lawyer from consulting with client-defendant during 15-minute recess between client's direct testimony and cross-examination); McCoy v. Court of Appeals, 108 S. Ct. 1895, 1903-04 (1988) (majority) (loyalty to the client does not forbid state from requiring appointed lawyer for an accused to explain why an appeal would be frivolous).

206. Wheat v. United States, 108 S. Ct. 1692, 1704 (1988) (dissenting) (quoting his dissent in Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 371 (1985)); *see also* Murray v. Giarratano, 109 S. Ct. 2765, 2773 (1989) (dissenting) (indigent prisoners have right to appointed counsel in state post-conviction proceedings in death cases); Mallard v. United States Dist. Ct., 109 S. Ct. 1814, 1824 (1989) (dissenting) (interprets statute allowing court to "request" lawyer to help the poor as requiring lawyer to accept assignment); Penson v. Ohio, 109 S. Ct. 346, 350 (1988) (majority) (state errs in procedure used to allow withdrawal from first appeal by defense counsel for indigent criminal defendant on grounds that appeal was meritless); Leis v. Flynt, 439 U.S. 438, 452-53 (1979) (dissenting) (*pro hac vice* petition implicates lawyer's responsibility for administering justice).

207. Lassiter v. Department of Social Servs., 452 U.S. 18, 59-60 (1981) (dissenting).

208. Moran v. Burbine, 475 U.S. 412, 467 (1986) (dissenting) (police interfered with attorney-client relationship, which is of "central importance to the administration of justice," by telling lawyer falsely that there was no intent to question the accused); *cf.* Gilmore v. Armontrout, 109 S. Ct. 3205, 3206 (1989) (dissenting) (objects to shortening time for counsel to prepare in capital case); Patterson v. Illinois, 108 S. Ct. 2389, 2403-04 (1988) (dissenting) (prosecutor communication with indicted defendant violates sixth amendment right to counsel, even though *Miranda* rights waived); Branti v. Finkel, 445 U.S. 507, 519 (1980) (majority) (public defender job cannot be contingent on party membership because lawyer must serve individual clients, not partisan political interest); Brewer v. Williams, 430 U.S. 387, 415 (1977) (concurring) ("the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen"; the State cannot dishonor its promises to lawyer for the accused); Gardner v. Florida, 430 U.S. 349, 362 (1977) (plurality) (violates due process of law not to tell defendant or counsel of contents of presentence report).

209. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985) (dissenting) (statute limiting the fee that can be paid a lawyer representing a veteran before the Veterans Administration is an infringement on individual liberty); *see also* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 443-44 (1985) (concurring) (disqualification of lawyer is appealable before final judgment in civil litigation because it is the only effective way to protect right to choose lawyer).

colleagues for not appreciating the value of liberty involved the right to counsel.

Justice Stevens' grounding of liberty and equality in a conception of individual dignity has two important implications that help to explain why he sometimes differs from his more "liberal" colleagues. First, the individual is not free simply to do what she wants: There are also correlative responsibilities. For example, the fifth amendment may protect the accused's right to silence, but it does not forbid the state from impeaching the defendant by referring to his silence[210] or limiting the public jobs available to someone who claims the privilege against self-incrimination.[211] Even a death sentence, which demands the ultimate in responsibility from a citizen, may be imposed as an act of retribution if a jury expresses community outrage.[212]

Perhaps the most striking example of liberty qualified by a correlative responsibility is Justice Stevens' refusal to include flag burning within protected first amendment speech.[213] "If [the] ideas of [liberty and equality] are worth fighting for [, then] . . . it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration."[214]

The second implication is that the government threatens dignity not only by direct deprivations and insults, but also by paternalistic behavior. In procedural due process cases, as a result, Justice Stevens objects to the "paternalistic predicate," which requires more notice than an intelligent person should require.[215] He worries about a decision that would create a "permanent constitutional shield" for Blacks since it "underestimates the resourcefulness, the wisdom, and the demonstrated capacity of [their]

210. Doyle v. Ohio, 426 U.S. 610, 620 (1976) (dissenting). In Wainright v. Greenfield, 474 U.S. 284 (1986) (majority), however, he wrote for the Court in a case following *Doyle.*

211. Lefkowitz v. Cunningham, 431 U.S. 801, 810-12 (1977) (dissenting); *see also* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1422 (1989) (concurring in part and concurring in the judgment) (public interest in determining cause of serious railroad accidents justifies regulations on drug and alcohol testing); Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660, 672 (1988) (majority) (a state can condition unemployment insurance on the employee not being dismissed for illegal use of peyote drug); *cf.* Pillsbury Co. v. Conboy, 459 U.S. 248, 282-83 (1983) (dissenting) (answers can be compelled because they are derived from immunized testimony).

212. Spaziano v. Florida, 468 U.S. 447, 469-70, 480 (1984) (dissenting); *see also supra* notes 103-07 and acompanying text.

213. Texas v. Johnson, 109 S. Ct. 2533, 2555-57 (1989) (dissenting).

214. *Id.* at 2557.

215. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 22, 26 (1978) (dissenting) ("trivializes" due process of law to require notice in this case); *cf.* Gardebring v. Jenkins, 108 S. Ct. 1306, 1315 (1988) (majority) (requirements of notice to AFDC families not violated; "it is not irrational to assume that most needy families will realize that the receipt of a large lump sum may affect their future eligibility").

leaders."[216] And he rejects the majority's paternalism in denying a criminal accused the right to waive conflicts of interest in choosing his lawyer.[217]

b. Judicial restraint and individual dignity. Justice Stevens' open-ended and evolving conception of individual dignity cannot be characterized as restrained. This conception of individual dignity thus may appear to conflict with his commitment to judicial restraint. The appearance, however, is misleading. Justice Stevens adheres to judicial restraint since it is instrumental in protecting individual dignity values, but he also qualifies judicial restraint to implement those values.

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216. Rogers v. Lodge, 458 U.S. 613 653 (1982) (dissenting); *see also* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 733-34 (1989) (concurring in part and concurring in judgment) (same); Fullilove v. Klutznick, 448 U.S. 448, 552-54 (1980) (dissenting) (stigmatizing effect of race-conscious legislation); *cf.* Meese v. Keene, 481 U.S. 465, 480 (1987) (majority) (political propaganda label required by the government is allowed because we can trust individuals to distinguish truth and falsity).

217. Wheat v. United States, 108 S. Ct. 1692, 1704 (1988) (dissenting). Anti-paternalism also may explain why Justice Stevens is not only deeply concerned about proteeting the right to counsel, *see supra* notes 205-09 and accompanying text, but also willing to rely on the lawyer to handle the case, even to the point of "wounding" the client, Taylor v. Illinois, 108 S. Ct. 646, 656-57 (1988) (majority) (can exclude pro-defendant testimony when accused's lawyer improperly failed to identify a witness in response to a request by the prosecutor; not unfair to hold defendant responsible for lawyer misconduct). It is up to the client to keep control of the lawyer. *See* Carter v. Kentucky, 450 U.S. 288, 307 (1981) (concurring) (lawyer and defendant decide if they want jury instruction); United States v. Agurs, 427 U.S. 97, 106, 111 (1976) (majority) (prosecutor does not routinely have to give information which the lawyer has not requested). Rejecting judicial paternalism, however, accepts the risk of counsel's paternalism to the client. *See* Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?,* 86 COLUM. L. REV. 9, 34-35 (1986).

Another explanation for relying on the lawyer, even when she makes mistakes, is that counsel is another institution, like the states and lower courts, whose decisions must be relied on, without too much second-guessing by reviewing courts. *See supra* section II.A.1. Justice Stevens often speaks of lawyers as though they were an independent institution. In his view, the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. Brewer v. Williams, 430 U.S. 387, 415 (1977) (concurring) (defendant's right to counsel violated by officer's interrogation contrary to agreement with defendant's attorney); *see also Taylor,* 108 S. Ct. at 657 (failure to hold client responsible for lawyer's misconduct would undercut the heart of the attorney-client relationship); Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1070-71 (1985) (concurring) (lawyer's participation encourages incremental development of the law); New Jersey v. T.L.O., 468 U.S. 1214, 1216 (1984) (dissenting) (should rely on lawyer to frame issues in certiorari petition); Leis v. Flynt, 439 U.S. 438, 452-53 (1979) (dissenting) (responsibility of lawyer for administering justice); *cf.* McCoy v. Court of Appeals, 108 S. Ct. 1895, 1900-01 (1988) (majority) (loyalty to the client does not forbid state from requiring appointed lawyer for an accused to explain why an appeal would be frivolous); Wheat v. United States, 108 S. Ct. 1692, 1704 (1988) (dissenting) (conflict of interest waived on advice of counsel).

Reliance on lawyers may explain why Justice Stevens views ineffective assistancc of counsel as the "exceptional case." *Taylor,* 108 S. Ct. at 657; *see also* Burger v. Kemp, 483 U.S. 776, 798 (1987) (majority) (lawyer whose partner represents coindictee not per se ineffeetive counsel).

The central idea that reconciles judicial restraint with a commitment to individual dignity is that of comparative judicial competence[218] in which the federal courts' primary task is to secure individual rights:

> But we must not forget that a central purpose of our written Constitution, and more specifically of its unique creation of a life-tenured federal judiciary, was to ensure that certain rights are firmly secured *against* possible oppression by Federal or State Governments. . . . [T]he Court must be ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor.[219]

Thus, Justice Stevens objects to creating the "unfortunate impression that the Court is more interested in upholding the power of the State than in vindicating individual rights."[220]

Justice Stevens explicitly connects judicial restraint and individual rights in cases involving the Court's deference to state courts by applying the independent state ground doctrine, denying certiorari, and avoiding summary dispositions. For example, in *Michigan v. Long,* he objected to the Court's refusal to apply the independent state ground doctrine by comparing review of a state court decision *protecting* a liberty interest to the Court's concern with a decision by the Finnish government to turn an American citizen loose since the Finnish Constitution parallels the U.S. Constitution.[221] In *New Jersey v. T.L.O.,* he supported his argument that certiorari had been improvidently granted by observing that "[o]f late, the Court has acquired a voracious appetite for judicial activism in its Fourth Amendment jurisprudence, at least when it comes to restricting the constitutional rights of the citizen."[222] And in *Florida v. Meyers,* he noted (with dismay) nineteen cases of summary disposition, "including this one" in which the Court summarily reversed state court

218. *See* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

219. Florida v. Meyers, 466 U.S. 380, 385, 387 (1984) (dissenting).

220. Idaho Dep't of Employment v. Smith, 434 U.S. 100, 105 (1977) (dissenting in part); *see also* Michigan v. Long, 463 U.S. 1032, 1068 (1983) (dissenting) ("I believe that in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard.").

221. 463 U.S. 1032, 1068 (1983) (dissenting); *see also* Oregon v. Kennedy, 456 U.S. 667, 681 (1982) (concurring in the judgment) ("This exercise in lawmaking is objectionable because it is wholly unnecessary and because it compromises an important protection provided by the Double Jeopardy Clause.").

222. 468 U.S. 1214, 1215 (1984) (dissenting); *see also Idaho Dep't of Employment,* 434 U.S. at 104 (should deny certiorari when state court provides fourteenth amendment protection for benefit claim; "[w]e are much too busy to correct every error"); Pennsylvania v. Bruder, 109 S. Ct. 205, 208 (1988) (dissenting) (bad use of scarce resources to grant certiorari when state's highest court refuses to hear a case involving alleged error in defendant's favor).

decisions that had provided greater protection of individual rights than the Court allowed.[223]

In *Delaware v. Van Arsdell,*[224] Justice Stevens observed not merely a fortuitous connection between deferring to lower state courts and protection of individual rights, but also a systematic reduction in such protection when the Supreme Court failed to construe the independent state ground doctrine broadly:

> The jurisdictional presumption that the Court applies—and extends—today harbors a hidden selection bias that in turn reveals a disturbing conception of this Court's role. Because a state ground can only support a judgment *consistent* with a federal claim, the Court's jurisdictional presumption [against an independent state ground] operates to expand this Court's review of state remedies that over-compensate for violations of federal constitutional rights.[225]

Judicial restraint also indirectly advances individual rights by limiting the Court's workload so it can concentrate on cases in which individual dignity values are threatened. This indirect effect is achieved in three ways. First, there is more time for judicial attention to cases involving individual rights.[226] Second, an unhurried judiciary better implements the case-by-case deliberative process, which itself serves an important dignity value.[227] Excessive workload threatens this process by increasing

223. 466 U.S. 380, 386 (1984) (dissenting). In Patton v. Yount, 467 U.S. 1025, 1053 n.8 (1984) (dissenting), the Court reached twenty. *Cf.* Coleman v. Balkcom, 451 U.S. 949, 950 (1981) (concurring) (federal court should not expedite death sentence, which serves state policy; the federal interest is protecting the constitutional rights of persons sentenced to death).

224. 475 U.S. 673 (1986) (dissenting).

225. *Id.* at 694-95; *cf.* Evans v. Jeff D., 475 U.S. 717, 736-37 (1986) (majority) (allowing waiver of attorneys fees in settlement of civil rights litigation reduces judicial workload, which in turn helps civil rights litigants).

226. *Cf.* Martin v. Wilks, 109 S. Ct. 2180, 2195-96 (1989) (dissenting) (broad allowance of collateral review leads to abundance of vexatious litigation); Wrenn v. Benson, 109 S. Ct. 1629, 1631-32 (1989) (dissenting) (judicial time is conserved if Court routinely denies frivolous petitions rather than first deciding whether petitioner can proceed *in forma pauperis*); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 322 (1987) (dissenting) ("One thing is certain. The Court's decision today will generate a great deal of litigation."); South Carolina v. Regan, 465 U.S. 367, 419 (1984) (concurring in part and dissenting in part) (dismiss complaint in original jurisdiction because claim by State was frivolous; unwise use of scarce resources); Bergman v. Burton, 456 U.S. 952, 955 (1982) (dissenting) (the workload burden "disserves the interest of busy federal judges as well as the interest of deserving litigants"); Board of Trustees v. Sweeney, 439 U.S. 24, 26 (1978) (dissenting) (remand "imposes an additional burden on circuit judges who—more than any other segment of the federal judiciary—are struggling desperately to keep afloat in the flood of federal litigation"); Liles v. Oregon, 425 U.S. 963, 964 (1976) (concurring) ("In the interest of conserving scarce law library space, I shall not repeat this explanation [for denying certiorari to the state court] every time I cast such a vote.").

227. *See supra* notes 70-101 and accompanying text.

delegation of work to the judge's staff, thereby detracting from judicial deliberation.[228]

Third, every difficult case that the Court decides threatens to reduce the political capital on which the Court relies for acceptance of its conclusions in individual rights cases.[229] The courts must be prepared to make unpopular decisions,[230] according to Justice Stevens, but "whenever we are persuaded by reasons of expediency to engage in the business of giving legal advice, we chip away a part of the foundation of our independence and our strength."[231] Moreover,"intrusion upon the prerogatives of state courts . . . can only provide a potential source of friction and thereby threaten to undermine the respect on which we must depend for faithful and conscientious application of this Court's expositions of the federal law."[232]

The primacy of individual dignity values also shines forth in the cases qualifying the application of judicial restraint doctrines. Justice Stevens' attitude towards general rules illustrates this point. Usually he advocates proceeding deliberately on a case-by-case basis.[233] In some contexts, however, a general rule offers better protection from improper government behavior. A clear rule concerning church-state separation,

228. Jackson v. Virginia, 443 U.S. 307, 337, 338-39 (1979) (concurring in the judgment) ("[The burdens on federal judges] are already so heavy that they are delegating to staff assistants more and more work that we once expected judges to perform"; "[t]he addition of a significant volume of pointless labor can only impair the quality of justice . . . ."); *see also* Jones, *Justice Stevens' Proposal to Establish a Sub-Supreme Court,* 20 HARV. J. ON LEGIS. 201, 205 (1983) ("Justice Stevens recently proposed the creation of a new court designed to reduce the Supreme Court's caseload and to improve the quality of its output"); *Hearings, supra* note 9, at 48-49 (more federal judges are needed to meet the increased caseload).

229. *See* J. CHOPER, *supra* note 218, at 129-70 (discussion of problems associated with Court's invalidation of actions by political bodies).

230. Stevens, *Reflections on the Removal of Sitting Judges,* 13 STETSON L. REV. 215, 217 (1984).

231. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 103 (1978) (concurring in the judgment).

232. Delaware v. Van Arsdall, 475 U.S. 673, 699 (1986) (dissenting); *see also* Patterson v. McLean Credit Union, 485 U.S. 617, 622 (1988) (dissenting) (reconsideration of an issue without request by the parties or Solicitor General "must also have a detrimental and enduring impact on the public's perception of the Court as an impartial adjudicator of cases and controversies"); United States v. Leon, 468 U.S. 897, 963 (1984) (concurring in judgment and dissenting in part) (deciding more than the Court must encourages the perception that the Court is pursuing its own "notions of wise social policy, rather than adhering to its judicial role").

The appearance of justice is so important that a judge must retroactively disqualify himself, even though he was unaware of the disqualifying conflict of interest when he decided the case. Liljeberg v. Health Servs. Acquisition Corp., 108 S. Ct. 2194, 2202 (1988) (majority) (public confidence in the integrity of the judicial process is so important that the judge's *scienter* is not necessary for disqualification; it is sufficient that "impartiality might reasonably be questioned"); *cf.* Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality) (decision must "be, and appear to be, based on reason rather than caprice or emotion"). *See generally Hearings, supra* note 9, at 31-32 (strict recusal policy).

233. *See supra* section II.A.2.

for example, is desirable to prevent government entanglement.[234] Administrative discretion also may be controlled most effectively by a clear rule.[235] This is true not only in the administration of the criminal law,[236] but also in civil litigation such as tax cases. For example, Justice Stevens argued that "[t]he value of certain and predictable rules of law is often underestimated. Particularly in the field of taxation, there is a strong interest in enabling taxpayers to predict the legal consequences of their proposed actions . . . ."[237] And general rules sometimes may be useful to contain judicial discretion in constitutional cases involving voting rights.[238]

Justice Stevens explicitly chooses between clear rules and vague standards on the basis of their impact on substantive first amendment concerns. Sometimes he adheres to the more conventional view that vague rules are undesirable because they promote self-censorship.[239] But a vague standard is preferred to a clear rule when the vague rule "obviously interferes less with the interest in free expression than does an ab-

234. Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (dissenting) ("Rather than continuing with the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in [another case], I would resurrect the 'high and impregnable' wall between church and state constructed by the Framers of the First Amendment.")

Similar concern for containing government choice about religion prompted Justice Stevens' concurrence in Goldman v. Weinberger, 475 U.S. 503, 513 (1986) (concurring) (permitting prohibition of yarmulke by military keeps government from distinguishing among Jews, Sikhs and Rastafarians); *see also* Wolman v. Walter, 433 U.S. 229, 266 (1977) (concurring in part and dissenting in part) (stating that "[w]hat should be a 'high and impregnable' wall between church and state, has been reduced to a 'blurred, indistinct and variable barrier' ").

235. *See supra* notes 155-57 and accompanying text.

236. *See, e.g.,* Arizona v. Roberson, 108 S. Ct. 2093, 2098 (1988) (majority) (extolling virtues of a "bright-line" rule like *Miranda* so that police and prosecutors know what to do); Greer v. Miller, 483 U.S. 756, 767 (1987) (concurring in the judgment) (if the prosecutor cannot call attention to post-*Miranda* silence, it is better to have a "clearly defined rule").

237. Commissioner v. Fink, 483 U.S. 89, 101 (1987) (dissenting); *cf.* United States v. Caceres, 440 U.S. 741, 756 (1979) (majority) (stating that complete, yet occasionally erroneous rules "like those contained in the IRS Manual" are better than no rules or rules "framed in a mere precatory form").

238. *See* Rogers v. Lodge, 458 U.S. 613, 643 (1982) (dissenting) ("constitutional adjudication that is premised on a case-by-case appraisal of the subjective intent of local decisionmakers cannot possibly satisfy the requirement of impartial administration of the law"); *cf.* United States v. Leon, 468 U.S. 897, 962 (1984) (concurring in the judgment in part and dissenting in part) ("Judges, more than most, should understand the value of adherence to settled procedures" in deciding what the courts should decide.)

Clear judicial rules also may encourage legislative responsibility by clarifying the law. *See Fink,* 483 U.S. at 104 (stating that if Congress understands that judicial interpretation will be consistent, Congress will more closely scrutinize work product); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 354 (1982) (majority) ("By articulating the rules of law with some clarity, . . . we enhance the legislative prerogative to amend the law.").

239. Marks v. United States, 430 U.S. 188, 198 (1977) (concurring in part and dissenting in part) ("[T]he present constitutional standards [for obscenity] are so intolerably vague that evenhanded enforcement of the law is a virtual impossibility.").

stract, advance ruling that the film is simply unprotected whenever it contains a lewd scene, no matter how brief."[240]

Justice Stevens' inclination to defer to the states[241] also will be qualified when individual rights are at stake. Application of the *Younger* abstention doctrine, for example, is inappropriate when the state violates procedural due process.[242] And although deference to the states by narrow interpretation of the full faith and credit clause is appropriate,[243] the concerns implicated by the due process clause should be clearly distinguished from full faith and credit[244] and applied to disallow "a choice-of-law decision [which is] totally arbitrary or . . . fundamentally unfair to either litigant."[245] Similarly, nonjusticiability doctrines[246] are applied with an awareness of their impact on individual rights. For example, Justice Stevens dissented from the Court's denial of standing in cases involving the establishment clause and race discrimination.[247] He also

240. New York v. Ferber, 458 U.S. 747, 780 (1982) (concurring in the judgment); *see also* United States Dep't of Justice v. Reporters Comm. for Freedom of Press, 109 S. Ct. 1468, 1483-85 (1989) (majority) (bright line rule adopted to protect privacy interest).

241. *See supra* text accompanying notes 34-44.

242. Judice v. Vail, 430 U.S. 327, 340-41 (1977) (concurring in judgment) (federal court abstention inappropriate in case involving New York procedures designed to discover assets of delinquent judgment debtors); Moore v. Sims, 442 U.S. 415, 436 (1979) (dissenting) (federal court abstention inappropriate in case involving state's child-abuse legislation); Trainor v. Hernandez, 431 U.S. 434, 469-70 (1977) (dissenting) (abstention inappropriate in case involving Illinois Attachment Act). *See also* Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (concurring in the judgment) (Delaware violates due process clause by obtaining jurisdiction in a certain manner).

243. *See supra* text accompanying notes 59-60.

244. Allstate Ins. Co. v. Hague, 449 U.S. 302, 320-22 (1981) (concurring in the judgment) (distinguishing Full Faith and Credit Clause requirement to apply Wisconsin law and due process prevention of Minnesota law application). *See generally* Shreve, *Interest Analysis in Constitutional Law*, 48 OHIO ST. L. REV. 51, 55 n.27 (1987) (criticizing the Court for treating full faith and credit and due process clauses as if "they imposed the same constraints on the forum court").

245. *Allstate Ins. Co.*, 449 U.S. at 326.

Similarly, the Interstate Commerce Clause does not require uniformity among states, *see supra* text accompanying notes 61-62, but discrimination against interstate commerce is forbidden; Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 247 (1987) (majority) (state tax exemption discriminates against interstate commerce); Sporhase v. Nebraska, 458 U.S. 941, 957-58 (1982) (majority) (a Nebraska statute which permitted use of Nebraska water in Colorado only if Colorado permitted use of Colorado water in Nebraska was a violation of the Interstate Commerce Clause because Nebraska could not justify the discrimination); Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 674-78 (1981) (dissenting) (equal protection clause violated by California tax retaliating against Ohio corporations; the tax was in effect a hostage-taking to force Ohio to change its discriminatory policies towards California).

246. *See supra* text accompanying notes 53-55.

247. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 513 (1982) (dissenting) (religion); Allen v. Wright, 468 U.S. 737, 783 (1984) (dissenting) (race); *cf.* Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3079-85 (1989) (concurring in part and dissenting in part) (plaintiffs have standing to challenge state definition of "conception" as violation of establishment clause).

dissented from the Court's finding of mootness in several cases involving liberty interests.[248]

Judicial restraint, for Justice Stevens, is therefore instrumental in protecting individual dignity. Such restraint is not justified on the basis of overarching federalism or the separation of powers theory, but instead reflects the judiciary's central role in preserving and advancing individual rights.

C. *Summary*

Justice Stevens' core concern is individual dignity, which embraces both equal treatment and liberty. Both these concepts deal with relationships—with how people are treated—which explains why impartiality and case-by-case deliberation are such important values and why paternalism should be avoided. Formal categories that deflect the Court from thinking carefully about the facts of the particular case should be avoided. Justice Stevens therefore believes that people whose interests are not traditionally labeled "fundamental" may deserve protection if the government treats them thoughtlessly, and "fundamental interests" can be restricted if the government acts reasonably.

Judicial restraint implements principles of comparative judicial competence. The Court's primary concern is the protection of individual dignity. Deference to the decisionmaker directly implements dignity values by allowing decisions that protect those values to stand. It also indirectly serves those values by saving the Court's time and political capital for the politically sensitive task of protecting individual dignity values.

Finally, Justice Stevens' commitment to individual dignity appeals to the courts' grand tradition of protecting individual dignity.[249] This tradition rests on common law sources that predate the Constitution.[250] Like all appeals to tradition, however, Justice Stevens' appeal faces sev-

248. Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 73 (1983) (dissenting) (university's voluntary cessation of illegal act does not moot challenge to federal cut off of funds based on sex discrimination); Vitek v. Jones, 436 U.S. 407, 410-11 (1978) (dissenting) (parole practices); Scott v. Kentucky Parole Bd., 429 U.S. 60, 60 (1976) (dissenting) (same); *see also* Burke v. Barnes, 479 U.S. 361, 365 (1987) (dissenting) (pocket veto challenge was not moot); EPA v. Brown, 431 U.S. 99, 104 (1977) (dissenting) (case not moot unless agency rescinds regulation); *cf.* Bellotti v. Connally, 460 U.S. 1057, 1057 (1983) (dissenting) (finding substantial federal question involving first amendment values concerning election procedures); Flynt v. Ohio, 451 U.S. 619, 623 (1981) (dissenting) (claim that prosecution of publication was based on hostility is a reviewable final judgment because it "seriously erode[s] federal policy"); Doe v. Delaware, 450 U.S. 382, 392-96 (1981) (dissenting) (litigation about parental rights is ripe).

249. Hudson v. Palmer, 468 U.S. 517, 557-58 (1984) (concurring and dissenting) ("dignity and intrinsic worth of every individual" are part of an "ethical tradition that I had thought was enshrined forever in our jurisprudence"); Stevens, *Commentary*, *supra* note 18, at 727.

250. *See supra* text accompanying notes 140 & 174.

eral problems. Some traditions do not deserve deference (such as racial bias);[251] the content of some traditions change, as in the case of applying privacy notions to sexual practices;[252] and some traditions simply die out.[253] It is always difficult to know what traditions to follow. Still, traditions may carry a presumptive validity,[254] perhaps for the same reason that Justice Stevens defers to other decisionmakers. Judges cannot remake society easily and still have the time and political capital to do what is most important.

III. STATUTES IN A COMMON LAW WORLD

How does the common law lawyer approach statutory interpretation, deferring to what the legislature has done but, at the same time, paying close attention to the facts of the particular case and protecting individual dignity? One approach would be to abandon the common-law frame-of-mind, acknowledging that statutory interpretation is something special. According to this view of statutes, the facts of a particular case would be subordinated to the plain meaning of the statutory language. In this view, individual dignity would have no special claim on the judge who applies a statute, unless the legislature has delegated a common-law power to the court or constitutional infirmities exist. The statute *is* what it says, and that is the judge's only concern when interpreting its meaning.

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251. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 367 (1985) (dissenting) (citations omitted):

> The fact that [a statute] has been on the books since 1864 does not, in my opinion, add any force at all to the presumption of validity. Surely the age of the *de jure* segregation at issue in *Brown v. Board of Education,* or the age of the gerrymandered voting districts at issue in *Baker v. Carr,* provided no legitimate support for those rules.

252. Bowers v. Hardwick, 478 U.S. 186, 214-16 (1986) (dissenting) ("traditional view that sodomy is an immoral kind of conduct, regardless of the persons who engage in it," is not constitutionally enforceable).

253. *Cf.* Ruckelshaus v. Sierra Club, 463 U.S. 680, 701 n.11 (1983) (dissenting) (American practice of litigants bearing their own legal costs is subject to certain exceptions, even when the litigant is unsuccessful).

New facts also may render an old rule inconsistent with a tradition that persists. In Walters v. National Association of Radiation Survivors, 473 U.S. 305, 365, 367 (1985) (dissenting), a $10 limit on counsel fees was reasonable at the time of the Civil War, when it was adopted, but "time has brought changes in the value of the dollar, in the character of the legal profession, in agency procedures, and in the ability of the veteran to proceed without the assistance of counsel." Therefore, "the passage of time . . . has effectively eroded the one legitimate justification that formerly made the legislation rational." *Id.* at 367.

254. *See, e.g.,* Mallard v. United States Dist. Court., 109 S. Ct. 1814, 1824 (1989) (dissenting) (historical tradition of legislative assistance to the poor); City of Mobile v. Bolden, 446 U.S. 55, 92 (1980) (concurring in the judgment) (allowing electoral practices that might hurt minorities; thousands of political units follow practice); FCC v. Pacifica Found., 438 U.S. 726, 747 (1978) (plurality) (permitting regulation of offensive language).

Justice Stevens, acting in his role as a judge, is unwilling to relegate the common-law lawyer to such a marginal role. He adopts an approach to statutory interpretation that defers to legislative language, yet also shows concern for case-by-case adjudication and individual dignity. The way in which he achieves that accommodation is the subject of the remainder of this Article. Section A explains why statutory interpretation is a special problem for a common law lawyer like Justice Stevens: The common law lawyer's instinct for case-by-case deliberation runs counter to a tendency to defer to the plain meaning of statutory generalizations. Section B discusses how Justice Stevens defers to legislation, preferring to rely on legislative competence and on the plain meaning of statutory language. Section C deals with his less-than-deferential reconstruction of legislative intent, which draws him away from the plain meaning of the statutory language to focus on the facts of a specific case and his concern for individual dignity.

A. *Deference to Plain Meaning Versus Reconstruction of Legislative Intent*

Statutes present a serious problem to a common law lawyer. Rather than advancing a case-by-case development of the law, as the common law does, statutes provide general principles of law.[255] Moreover, unlike a judicial opinion, statutory language is not separable into a holding applicable to a particular case and generalized dictum.[256]

Historically, there were additional reasons explaining why common law lawyers objected to statutes. In general, statutes advanced controversial political reforms.[257] Lawyers also held an idealized image of judicial rationality and a negative image of the quality of legislation.[258]

255. Private bills, providing relief for specific individuals from the unintended effects of legislation, are an exception, and are viewed as such. *See* Note, *Private Bills in Congress,* 79 HARV. L. REV. 1684, 1684 (1966).

256. United States v. Perryman, 100 U.S. 235, 238 (1879) (Waite, C.J.) (statute could not be broadened to include a black defendant when language explicitly covered only "white persons"). Significantly, statutes which were part of the common law could be interpreted as though they were common law principles, capable of flexible application to new facts. Bogardus v. Trinity Church, 4 Paige Ch. 178, 198-99 (N.Y. 1833) (statutory law of England became part of New York common law when it was introduced into the colony of New York).

The distinction between rigid general statutory rules and flexible case-by-case adjudication was an important theme in the 19th century debates about codification. Common law lawyers argued that statutory codes could not adjust to unforeseen facts. *See* C. COOK, *supra* note 13, at 103-04.

257. Pound, *Common Law and Legislation,* 21 HARV. L. REV. 383, 387 (1908) (lack of judicial sympathy for social and legal reforms).

258. *Id.* at 383-84 ("It is fashionable to point out the deficiencies of legislation .... It is fashionable to preach the superiority of judge-made law"); Fordham & Leach, *Interpretation of Statutes in Derogation of the Common Law,* 3 VAND. L. REV. 438, 441 (1950) (English judges of Cobe's generation were encouraged to control statutes by "refusing to extend their application at the expense of

These historical objections are less significant today: statutory reform is politically more popular, and judicial rationality is viewed more skeptically. Further, contemporary legislatures are more technically proficient than their predecessors.[259] Although many of the historical concerns about legislation have faded, an ineradicable difference between statutory generality and case-by-case common law decisionmaking persists. This distinction is the central problem that a common law lawyer confronts in the modern world of legislative initiative.[260]

For a deferential judge, the distinction between the common law and statutes creates a tension that did not appear in our prior discussion of judicial restraint. In the earlier discussion, judicial restraint was characterized by both deference to another decisionmaker *and* limiting the decision to the facts of the particular case.[261] Judicial restraint in statutory interpretation, however, leads the judge to defer to the plain meaning of the statute's general language, without worrying too much about how the legislature would apply the statute to the particular case. Deference to the plain meaning of a statute implements judicial restraint because the plain meaning is the interpretation most easily reached. By contrast, when a judge tries to guess how the legislature would apply a statute to the facts of a particular case, she is drawn into time-consuming and controversial speculation about legislative intent. Deference to plain meaning therefore minimizes the judicial workload and reduces the risk of allowing judicial values to intrude into the decision. At the same time, however, this more restrained approach conflicts with the common law lawyer's instinct to focus on the facts of a particular case.[262]

The difference between judicial deference to plain meaning and the search for how legislative intent would apply in a particular case is often papered over by the suggestion that both approaches are informed by the same evidence. The plain (or common, or ordinary) meaning of language

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common law principles."); Patterson, *Historical and Evolutionary Theories of Law,* 51 COL. L. REV. 681, 695-98 (1951) (lawyers were well aware of errors in legislation and thought of case law as a natural, rational, and "organic" growth); Stone, *The Common Law in the United States,* 50 HARV. L. REV. 4, 12-14 (1936) (common opinion that "the common law was a complete and perfect system" and that statute making lacked in quantity and quality).

259. *See generally* Note, *The State of State Legislatures: An Overview,* 11 HOFSTRA L. REV. 1185 (1983).

260. The rigidity of statutes as compared to the common law can be exaggerated. Statutory generalizations can adjust to new facts if they contain delegations to courts or agencies to develop the law, either by incorporating common law language, adopting flexible open-ended terms, or by explicit delegation language. *See, e.g.,* Easterbrook, *Statutes' Domains,* 50 U. CHI. L. REV. 533, 544 (1983) (statute can plainly hand court the power to create and revise a form of common law).

261. *See supra* section II.A.

262. *See supra* notes 73-75 and accompanying text.

is considered the best evidence of legislative intent,[263] and a statute's context illuminates both the meaning of the language and the intent of the legislature. This convergence of the two approaches to statutory interpretation is shattered, however, by the role context plays in reconstruction of legislative intent and the unsettling effect it has on the judicial role.

Context is an open-ended concept that includes an ever-widening circle of material—the shared conceptions of how particular words are used at the time a statute is passed, the historical mischief animating (or prompting) the passage of a law, legislative intent to solve a specific problem, more general purposes underlying the statute, and, finally, the background considerations (such as traditional social and political values) affecting the legislature's action.[264] The plain meaning of statutory language can usually be determined, if it exists, by considering only the way in which language was used when the statute was passed and, perhaps, the historical mischief at which the statute was aimed.[265] But reconstructing legislative intent cannot privilege any of the particular elements that constitute context. All context is potentially important for a judge trying to recreate how legislative intent applies to a case. Not only must a judge consider the broader elements of context that are less important when the plain meaning of the statutory language is the critical issue, but he also must adopt a less restrained approach to statutory interpretation. Judicial restraint is more difficult because the significance of broader elements of context for statutory meaning is very uncertain; the more evidence there is of statutory meaning the more choice the judge has; and the meaning indicated by context may conflict with the plain meaning of the statutory language. The two approaches to statutory interpretation—deference to plain meaning and reconstruction of legislative intent—therefore should be understood as divergent approaches with different implications for the judicial role.

Equating judicial deference to the plain meaning of statutory language with judicial restraint is subject to two important caveats. First, the decision to defer to plain meaning is not necessarily based on a deferential frame-of-mind. Some commentators favor judicial deference for

263. *See, e.g.*, Board of Governors of the Fed. Reserve Sys. v. Dimension Financial Corp., 474 U.S. 361, 373 (1986) (Burger, C.J., majority) (since statute by its language applied to "banks," institutions that were "functionally equivalent to banks" but not banks per se could not be regulated by the statute).

264. *See generally* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 103-36 (1975).

265. This approach to determining plain meaning was adopted by both majority and dissent in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), although they disagreed on what meaning was plain. *Compare id.* at 420 *with id.* at 452-76 (Harlan, J., dissenting).

political reasons—such as allowing individual reliance on plain meaning[266] or furthering 19th century liberal views of limited government.[267] Second, deference to language may be a vehicle for the most aggressive judicial approach to statutes, as when judges update old law in light of contemporary policy by applying the contemporary, rather than historical, meaning of statutory language.[268] These activist justifications for judicial restraint nonetheless may lead to a restrained approach to the statute's text if they lead uniformly to deference to plain meaning rather than selective application in furtherance of political objectives. With these two qualifications, judicial restraint in the form of deference to plain meaning is a coherent conception of the judicial role. Its tension with the judge's inclination to reconstruct legislative intent in particular cases must be resolved.

Most judges try to have it both ways. They usually defer to language, except when legislative intent points more or less strongly in another direction. The differences among judges stems from what they consider as evidence of legislative intent and how strong that evidence must be before the language is subverted. The remainder of this essay explains Justice Stevens' resolution of these issues.

Justice Stevens is a particularly good judge for a study of statutory interpretation because of his concern with statutes. Out of the 369 Court opinions issued from the time he came to the Court on December 19, 1975, until the end of the 1988 Term that deal with a statutory issue, Justice Stevens wrote either a dissent or a separate concurrence in 240 decisions (over half).[269] Of these 240, 90 were *solo* dissents.[270] The large number of cases involving statutes in which Justice Stevens wrote separate opinions and solo dissents is consistent with the overall impression that he takes statutes more seriously than any of his colleagues.[271] The most dramatic impressionistic support for this conclusion is Justice Stevens' authorship of four substantive dissents in statutory interpretation

266. R. DICKERSON, *supra* note 264, at 10-11; Popkin, *The Collaborative Model of Statutory Interpretation,* 61 S. CAL. L. REV. 541, 595 (1988).

267. Easterbrook, *supra* note 260, at 549-50; *see also* Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model,* 86 COLUM. L. REV. 223 (1986) (sticking to plain meaning raises cost of private interest legislation).

268. *See* Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation,* 85 MICH. L. REV. 672, 675 (1987); *cf.* Braschi v. Stahl Assoc., 543 N.E.2d 49, 53-54 (N.Y. 1989) ("family" includes gay couple).

269. This excludes 127 opinions in memorandum cases and six opinions as a circuit judge. The statutory decisions include thirty three cases where constitutional issues were also present, twelve cases interpreting federal procedural rules, and six cases interpreting treaties.

270. These include cases where Justice Stevens dissented in part and concurred in part.

271. *See* B. SCHWARTZ, *supra* note 1, at 15 (commenting on how many dissents, especially solo dissents, Justice Stevens writes).

cases that attracted only a per curiam majority opinion.[272] One of these was a solo dissent in a tax case,[273] a substantive area of the law that the Court is "innate[ly] reluctan[t] to review."[274]

B. *Judicial Deference and the Plain Meaning of Statutory Language*

Justice Stevens is as concerned with unrestrained judging in statutory interpretation as with lack of judicial restraint in other areas of the law. He is wary of judicial statesmanship in statutory interpretation,[275] by which a court works out sensible solutions to problems that would be better addressed by the legislature. Thus, he objected to the majority's adoption of a "wise" rule masquerading in the guise of statutory interpretation, a rule that required specific intent by the defendant to support a criminal but not a civil violation of a statute: "No matter how wise the new rule that the Court adopts today may be, I believe it is an amendment only Congress may enact."[276] In the same vein, he could not understand how a statute that was silent about private remedies could support an injunctive, but not a monetary, remedy.[277] According to Justice Stevens' view, working out solutions to difficult problems that are unsupported by the statutory language is not a judicial function. Such judicial restraint in dealing with statutes is also implicit in Justice Stevens' acceptance of the "gap filler" rhetoric of statutory interpretation, which posits that courts fill statutory gaps left or created by the legislature.[278] He distinguishes sharply between "filling a gap left by Congress'

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272. Central Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc., 454 U.S. 354, 360 (1982) (dissenting) (differing with majority on the interpretation of languages in Bankruptcy Reform Act of 1978); Chardon v. Fernandez, 454 U.S. 6, 10 (1981) (dissenting) (applicable statute of limitations should run from date of actual termination of employment and not from the earlier date of notice of intention to terminate); HCSC-Laundry v. United States, 450 U.S. 1, 8 (1981) (dissenting) (differing with majority on the interpretation of language in Internal Revenue Code of 1954, § 501); Diamond Nat'l Corp. v. State Bd. of Equalization, 425 U.S. 268, 268 (1976) (dissenting) (state court's interpretation of the statute should be given deference in defining legal obligations of the parties).

273. *HCSC-Laundry,* 450 U.S. at 8.

274. Commissioner v. Asphalt Prods. Co., 482 U.S. 117, 123 (1987) (Blackmun, J., concurring in part and dissenting in part).

275. *Cf.* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 103 (1978) (concurring in the judgment) ("We are not statesmen; we are judges.").

276. United States v. United States Gypsum Co., 438 U.S. 422, 474 (1978) (concurring in part and dissenting in part); *cf.* Vance v. Terrazas, 444 U.S. 252, 273 n.1 (1980) (concurring in part and dissenting in part) (Court "reforms" statute to require specific intent to relinquish citizenship when individual takes an oath of allegiance to another country).

277. Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 636 (1983) (dissenting) (majority reaches "novel conclusion").

278. *See supra* note 29 and accompanying text; *see also* Commissioner v. Fink, 483 U.S. 89, 104 (1987) (dissenting) (inevitable that Congress will leave "open spaces" that courts are implicitly au-

silence and rewriting rules that Congress has affirmatively and specifically enacted."[279]

Justice Stevens' deferential approach to statutes manifests itself in two ways that will be addressed in the next section. First, he has a well-developed sense of the comparative competence of courts and legislatures. Second, he prefers to rely on the plain meaning of statutory language.

1. *Comparative Competence.*

Justice Stevens' sensitivity to the comparative competence of courts and other institutions[280] means that courts should avoid overburdening themselves with work they cannot do well and that legislative responsibility should be enhanced. Judicial restraint in statutory interpretation does not rest on separation of powers concerns, but on a more pragmatic foundation.

Judicial workload concerns are, as always, a persistent theme. *Stare decisis* in statutory interpretation is an especially attractive doctrine because it reduces the judge's workload:

> The doctrine of *stare decisis* is not a straitjacket that forecloses re-examination of outmoded rules. The doctrine does, however, provide busy judges with a valid reason for refusing to remeasure a delicate balance that has tipped in the same direction every time the conflicting interests have been weighed."[281]

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thorized to fill); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 268 (1987) (concurring in part and dissenting in part) ("Gaps in the law must, of course, be filled by judicial construction.").

279. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978) (majority).

280. *See supra* note 218 and accompanying text.

281. Rose v. Mitchell, 443 U.S. 545, 594 (1979) (dissenting in part); *see also Fink,* 483 U.S. at 104 (dissenting) (citing Cardozo's observation that the "labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case"); *Shearson/Am. Express, Inc.,* 482 U.S. at 258 (concurring in part and dissenting in part) (*stare decisis* in statutory interpretation serves "the compelling need to preserve the courts' limited resources"); Stevens, *supra* note 201, at 2. *See generally* Marshall, *Let Congress Do It: The Case for an Absolute Rule of Statutory Stare Decisis,* 88 MICH. L. REV. 177 (1989).

JUSTICE STEVENS ADHERED TO *stare decisis* despite substantive disagreement with the interpretation of a statute in Johnson v. Transp. Agency, 480 U.S. 616, 644 (1987) (concurring) (following *Weber*); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 293 (1987) (concurring in part and concurring in the judgment) (same); City of Rome v. United States, 446 U.S. 156, 191 (1980) (concurring) (following *Sheffield*); Dougherty County v. White, 439 U.S. 32, 47 (1978) (concurring) (same).

Prior dictum and distinguishable prior holdings, however, do not require application of *stare decisis. See* Perry v. Thomas, 482 U.S. 483, 493 (1987) (dissenting) ("Since none of our prior holdings is on point, the doctrine of *stare decisis* is not controlling."); City of Oklahoma City v. Tuttle, 471 U.S. 808, 842 (1985) (dissenting) (citing Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 709 n.6 (1978) (Powell, J.)) (Court owes "less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations"); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 304 (1987) (dissenting) (free to reexamine limitations on sovereign immunity issue because

According to this doctrine, the Court even should avoid reviewing prior judicial interpretations of a statute when the decision is by a lower court rather than the Supreme Court: "Even if it is a consensus of lower federal-court decisions, rather than a decision by this Court, that has provided the answer to a question left open or ambiguous in the original text of the statute, there is really no need for this Court to revisit the issue."[282]

Beyond a concern about workload, however, Justice Stevens understands that courts are simply not very good at handling many issues. He refers to the "chancellor's clumsy foot" as an argument against a particular judicial interpretation of a statute.[283] And he insists, "When judges are asked to embark on a lawmaking venture, I believe they should carefully consider whether they, or a legislative body, are better equipped to perform the task at hand."[284] He clearly prefers that Congress take responsibility for the political, empirical, and technological issues presented by many cases of statutory interpretation.[285]

Adherence to *stare decisis* in cases interpreting statutes not only reduces judicial workload, but also enhances legislative responsibility by "encourag[ing Congress] to give close scrutiny to judicial interpretations of its work product."[286] Judges "should structure our principles of statu-

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Court has expanded immunity beyond prior cases); Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 575 (1983) (dissenting) (stating that the majority acknowledges that the question presented was reserved, but not directly answered, by an earlier decision); McDaniel v. Sanchez, 452 U.S. 130, 139-46 (1981) (majority).

282. *Fink*, 483 U.S. at 104; *cf.* McNally v. United States, 483 U.S. 350, 376 (1987) (dissenting) (Court should not reject longstanding, consistent interpretation of a federal statute by federal and state courts). *See supra* text accompanying notes 45-52.

283. Weinberger v. Romero-Barcelo, 456 U.S. 305, 335 (1982) (dissenting); *cf.* Manson v. Brathwaite, 432 U.S. 98, 118 (1977) (concurring) (rulemaking better performed by legislature than "clumsy judicial fiat").

284. Boyle v. United Technologies Corp., 108 S. Ct. 2510, 2528 (1988) (dissenting) (denying cause of action against government contractors).

285. Bush v. Lucas, 462 U.S. 367, 389 (1983) (majority) ("Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431, 456 (1984) (majority) (Congress "never contemplated such a calculus of interests"; "may well be that Congress will take a fresh look at this new technology"); Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 551 (1983) (majority) ("The Legislative Branch of the Federal Government is far better equipped than we are to perform a comprehensive economic analysis and to fashion the proper general rule."); Cannon v. University of Chicago, 441 U.S. 677, 717 (1979) (majority) ("far better course is for [Congress] to specify [whether there is a private cause of action] when it creates those rights"); Ferri v. Ackerman, 444 U.S. 193, 205 (1979) (majority) ("empirical data" needed to decide whether appointed counsel are reluctant to take cases if they are not granted immunity); *see generally* Jones, *supra* note 228, at 216 (1983) (discussing a standing congressional committee to clarify and correct legislation).

286. *Fink*, 483 U.S. at 104; *see also* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 354 (1982) (majority) ("By articulating the rules of law with some clarity and by adhering to rules

tory construction to invite continuing congressional oversight of the interpretive process."[287] Rhetorically, Justice Stevens often states that cases interpreting a statute become part of the statute,[288] but that view makes sense only as a technique for encouraging legislative review of prior interpretations, not as an inference about legislative intent.

The argument for deferring to congressional competence to resolve interpretive issues depends on congressional awareness of a problem, and it is therefore not surprising to find Justice Stevens frequently observing that the legislature is aware of an issue:

> [I]f Congress had intended to forbid any further contributions to the New Jersey Spill Fund—*the existence of which it was acutely aware*—it surely could have expressed that intent in less ambiguous language than is found in § 114(c). Indeed, if that had been its purpose, I would expect it to be revealed either in a committee report or in some unequivocal comment during the debates on the legislation.[289]

Although the rhetoric of congressional awareness is often presented as an argument about legislative intent, the evidence that the legislature had the intent attributed to it is usually weak. It is more likely that legislative awareness itself is a reason for judicial deference to the status quo so that the issue is left to legislative resolution. Thus, even when the legislature seems to have intended a common law power to survive passage of legislation, Justice Stevens sometimes refers to legislative awareness to justify judicial restraint.[290] And the independent significance of

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that are justified in their general application, however, we enhance the legislative prerogative to amend the law.").

287. *Fink*, 483 U.S. at 104; *see also* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 109 S. Ct. 1917, 1923 (1989) (dissenting) (application of *stare decisis* to decision which Congress let stand for three and a half decades depends more on the judge's "view about the respective lawmaking responsibilities of Congress and this Court than on conflicting policy interests").

288. Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261, 2269 (1989) (concurring) ("[I]t is the Court's construction of the statute—rather than the views of an individual Justice—that becomes a part of the law."); Pittsburgh & L.E.R.R. Co. v. Railway Labor Executives' Ass'n, 109 S. Ct. 2584, 2601 (1989) (concurring in part and dissenting in part).

289. Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 546 (1988) (majority); Exxon Corp. v. Hunt, 475 U.S. 355, 382 (1986) (dissenting) (emphasis added); *see also* Nachman Corp. v. Pension Benefit Guarantee Corp., 446 U.S. 359, 385 (1980) (majority) ("In light of the careful attention paid to when various provisions were to be effective, Congress surely would have made explicit any intent to limit this important provision to a mere transitionary role.").

290. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-26 (1978) (majority) (common law power to allow loss of society damages did not survive specific reference to pecuniary damages in statute).

The same argument explains why judges say that the legislature did not intend additional provisions to be read into a statute which is already cluttered with detail. The mere existence of statutory detail, though presented as evidence of legislative intent, is better understood as demonstrating congressional awareness of an issue, thereby supporting judicial deference. *See, e.g.*, Northwest Airlines v. Transport Workers Union of Am., 451 U.S. 77, 97 (1981) (majority) ("The presumption that a

legislative awareness is obvious when the interpretation to which Justice Stevens defers is issued *after* adoption of the statute.[291] Legislative awareness of a later interpretation sheds no light on prior legislative intent[292] and can justify judicial deference only if awareness itself justifies judicial restraint.

2. *Plain Meaning.*

The easiest way for a judge to exercise restraint when interpreting a statute is to defer to the plain meaning of statutory language.[293] Justice Stevens' comments on *Tennessee Valley Authority v. Hill*[294] link deference to statutory language to "respect for the law."[295] The case involved a statute that protected endangered species from adverse government action. The statutory language appeared to prohibit building a dam that endangered the near-extinct snail darter. Despite the dramatic economic impact of stopping construction of an almost-completed dam, the Court adhered to the language of the statutory prohibition over Justice Powell's dissent that the result was absurd.[296] Justice Stevens made the following comment about the Court's decision, which he characterized as deferring to the "flat ban" contained in a clear statutory "command":[297] "The decision in *TVA v. Hill* did not depend on any peculiar or unique statutory language. Nor did it rest on any special interest in snail darters.

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remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme . . . ."). *But see* Brown v. General Servs. Admin., 425 U.S. 820, 839 (1976) (dissenting) ("The burden of persuading us that we should interpolate such an important provision [denying a private remedy in a civil rights case] into a complex, carefully drafted statute is a heavy one.").

291. Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115, 2132 (1989) (dissenting) (Congress frequently revisits statutory scheme which majority overturns); Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 43 & n.4 (1987) (dissenting) ("Congress has not seen fit to amend the statute in light of [prior] decisions," though it has amended the statute "on at least four occasions."); Square D. Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 424 (1986) (majority) ("careful, intense, and sustained congressional attention" to the area of the law previously interpreted); FCC v. Midwest Video Corp., 440 U.S. 689, 713-14 (1979) (dissenting) ("Since Congress has not seen fit to modify the scope of the statute as construed," Congress also explicitly left issue to agency in analogous situations.); *cf.* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 784 (1984) (dissenting) (an interpreted "rule that Congress did not revise at any point in the last four decades").

292. *See generally* Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence,* 57 IND. L.J. 515 (1982) ("[I]t is crucial that we resist the temptation to treat *either* text *or* silence as mere *evidence* of unenacted *ideas* of *desires* on the part of others."). The Court has repeatedly warned that the use of *post*-enactment history can be dangerous.

293. *See supra* text accompanying notes 261-68.

294. 437 U.S. 153 (1978) (Burger, C.J.). The Tennessee Valley Authority v. Hill case has become something of a litmus test for modern judges willing to search beyond the plain statutory language. *See* R. DWORKIN, LAW'S EMPIRE 20-23 (1986).

295. Weinberger v. Romero-Barcelo, 456 U.S. 305, 335 (1982) (dissenting).

296. *T.V.A.,* 437 U.S. at 196 (Powell, J., dissenting).

297. *Romero-Barcelo,* 456 U.S. at 331-32 (dissenting).

The decision reflected a profound *respect for the law* and the proper allocation of lawmaking responsibilities in our Government."[298]

Justice Stevens backs up his reliance on the plain meaning with frequent references to the most "natural,"[299] "normal,"[300] or "readily apparent"[301] reading of the text. Similarly, "[i]n constrning a federal statute it is appropriate to assume that the *ordinary* meaning of the language that Congress employed 'accurately expresses the legislative purpose.' "[302] He characterizes his own deference to statutory language as a "rather old-fashioned and simple approach to the statute"[303]—a "straightforward approach."[304] In response to a charge that his interpre-

298. *Id.* at 334-35 (emphasis added).

299. ICC v. Texas, 479 U.S. 450, 456-57 (1987) (majority) (arguing that the more natural reading of the statute does not suggest that a rail carrier can be regarded as a "motor carrier"); United States v. Generix Drug Corp., 460 U.S. 453, 459 (1983) (majority) (natural readings are corroborated by other sections of a statute); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 418 (1978) (concurring in the judgment in part and dissenting in part) (insisting that it is "crystal clear" that the "natural meaning" of title VI is to prohibit affirmative action).

300. Kosak v. United States, 465 U.S. 848, 862 (1984) (dissenting).

301. Young v. Community Nutrition Inst., 476 U.S. 974, 984 (1986) (dissenting).

302. Mills Music, Inc. v. Snyder, 469 U.S. 153, 164 (1985) (majority) (emphasis added); *cf.* McLaughlin v. Richland Shoe Co., 108 S. Ct. 1677, 1681 (1988) (majority) ("common usage").

303. City of Oklahoma City v. Tuttle, 471 U.S. 808, 844 (1985) (dissenting); *see also* Equal Employment Opportunity Comm'n v. Associated Dry Goods Corp., 449 U.S. 590, 606 (1981) (dissenting) (referring to the Court's "unusual construction of rather plain statutory language").

304. Ruckelshaus v. Sierra Club, 463 U.S. 680, 700 (1983) (dissenting) ("language of § 307(f) is straightforward"); Roadway Express, Inc. v. Piper, 447 U.S. 752, 770 (1980) (concurring in part and dissenting in part) ("rather straightforward approach to the statutory language"); Mohasco Corp. v. Silver, 447 U.S. 807, 818 (1980) (majority) ("straightforward"); *see also* United States v. Foster Lumber Co., 429 U.S. 32, 49 (1976) (concurring) ("the statutory language seems rather plain"); United Cal. Bank v. United States, 439 U.S. 180, 207 (1978) (dissenting) ("[T]he statutory language is plain and unambiguous.").

Justice Stevens is also committed to the constitutional text. He frequently refers to the clear or plain language of the Constitution. Tashjian v. Republican Party, 479 U.S. 208, 230 (1986) (dissenting) ("If we respect the plain language of Article I, § 2 of the Constitution and the Seventeenth Amendment . . . we must answer [the] question in the negative."); United States v. Leon, 468 U.S. 897, 960 (1984) (concurring in the judgment in part and dissenting in part) ("It is appropriate to begin with the plain language of the Fourth Amendment . . . ."); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 287 (1984) (dissenting) ("The question is not one of 'deference,' nor one of 'central purposes'. . . . The question is whether the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution. It plainly is."); Jenkins v. Anderson, 447 U.S. 231, 244 (1980) (concurring in the judgment) ("[I]n determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment.") (footnotes omitted); Marshall v. Barlow's, Inc., 436 U.S. 307, 327 (1978) (dissenting) ("The Court's approach disregards the plain language of the Warrant Clause and is unfaithful to the balance struck by the Framers of the Fourth Amendment.").

tation of a statute is a "semantic quibble," he stated that "[p]roper deference to the powers of Congress requires exactly that result."[305]

By contrast, too quick an appeal to the statute's general purpose, cut loose from statutory language, can lead the Court astray. This may occur because of the risk that personal policy preferences will intrude into the decision[306] or because the court is unfaithful to a legislative compromise.[307] Justice Stevens states: "If th[e] question could be answered solely by reference to the Act's broad remedial purposes, it might be an easy one. But on the basis of the statute as written, the question is not nearly as simple as the Court implies."[308]

Justice Stevens frequently focuses his opinion on careful attention to the statute's language.[309] He chides his colleagues for not following the

305. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 750 (1985) (dissenting); *see also* Young v. Community Nutrition Inst., 476 U.S. 974, 988 (1986) (dissenting) ("The task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference.").

306. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 865 (1984) (majority) ("Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences."); *cf.* Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226, 250 (1983) (concurring) (personal policy views on minimum wage and forced age retirement irrelevant to decision).

307. Equal Employment Opportunity Comm'n v. Commercial Office Prod. Co., 108 S. Ct. 1666, 1677 (1988) (dissenting) (objects to Court not following *Mohasco*); Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268, 281 (1980) (majority) (statutory compromise is both pro-employee and pro-employer); *Mohasco Corp.*, 447 U.S. at 818-20, 826 (compromise after cloture petition).

308. United States v. Board of Comm'rs, 435 U.S. 110, 140 (1978) (dissenting); *see also* United States v. John Doe, Inc. I, 481 U.S. 102, 109 (1987) (majority) ("Because we decide this case based on our reading of the Rule's plain language, there is no need to address the parties' arguments [about the threatened values of grand jury privacy] . . . ."); General Elec. Co. v. Gilbert, 429 U.S. 125, 162 (1976) (dissenting) ("[W]ithout reaching the questions of motive, administrative expertise, and policy, which Mr. Justice Brennan so persuasively exposes, or the question of effect to which Mr. Justice Stewart and Mr. Justice Blackmun refer, I conclude that the language of the statute plainly requires the result which the Courts of Appeals have reached unanimously.").

Of course, general statutory purposes and other policies can be relied on when the language provides no guidance at all. *See* Evans v. Jeff D., 475 U.S. 717, 728 (1986) (majority) (attorneys fees can be waived in settlement of civil rights case); Norfolk & W. Ry. v. Liepelt, 444 U.S. 490, 498 (1980) (majority) (tell jury about tax exemption for Federal Employers' Liability Act awards); Frank Lyon Co. v. United States, 435 U.S. 561, 585 (1978) (dissenting) (transaction was a second mortgage for tax purposes); *see also* Andrus v. Utah, 446 U.S. 500, 520 (1980) (majority) (state receives land of equal value in exchange for land taken by federal government).

309. *See* Bowen v. Massachusetts, 108 S. Ct. 2722, 2731-33 (1988) (majority) (the meaning of "money" in "money damages" refers to compensatory damages, not equitable relief); United States Indus./Fed. Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, 455 U.S. 608, 615 (1982) (majority) (court of appeals misapplied the term "injury" as used in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 920(a)); NLRB v. Amax Coal Co., 453 U.S. 322, 343 (1981) (dissenting) ("representative" is the statutory term, not "trustee," as the majority opinion keeps saying).

"customary" practice of beginning an analysis with the text.[310] When he disagrees with another judge's use of statutory purpose to interpret a statute, he anchors his decision in particular statutory language.[311] And when he disagrees with decisions that rely on plain meaning, he often states that the meaning is not so plain.[312]

Justice Stevens also worries more than most judges about the problems raised by deference to the plain meaning of language. He self-consciously focuses on the common historical understanding of the words at the time the statute was adopted.[313] He worries about an often-neglected question arising from reliance on the plain meaning: to what audience is the meaning plain. Statutes can have different audiences; in *Mohasco Corp. v. Silver,* he hypothesized *both* a lay audience and one

310. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 573 (1983) (dissenting) ("Although it is customary for the Court to begin its analysis of questions of statutory construction by examining the text of the relevant statute, one may search in vain for any textual support for the Court's holding today."); *see also* Secretary of the Interior v. California, 464 U.S. 312, 345 (1984) (dissenting) ("first note . . . the plain language of [the Act]"); Director, Office of Workers' Compensation Programs v. Perini N. River Assocs., 459 U.S. 297, 342 (1983) (dissenting) ("The Court should begin its analysis with the language of the statute itself.").

311. Heckler v. Ringer, 466 U.S. 602, 631, 642 (1984) (concurring in the judgment in part and dissenting in part) ("A careful reading of the plain language of the relevant statutes indicates that the statutory scheme does not preclude jurisdiction"; Court's majority decision stems in part from concern with flooding the courts.); American Tobacco Co. v. Patterson, 456 U.S. 63, 87, 89 (1982) (dissenting) (plan must be "bona fide"; Court's majority view based on "assumption that if the *Griggs* standard were applied to the adoption of a post-Act seniority system, most post-Act systems would be unlawful").

312. Schiavone v. Fortune, 477 U.S. 21, 30 (1986) (dissenting) ("changing the party against whom a claim is asserted" is the language of the rule to be interpreted before applying a four-part test); Badaracco v. Commissioner, 464 U.S. 386, 401-02 (1984) (dissenting) ("The plain language of § 6501(c)(1) of the Internal Revenue Code conveys a different message to me than it does to the Court."); Kosak v. United States, 465 U.S. 848, 862 (1984) (dissenting) (The government's interpretation of the Act is not the meaning that " 'first springs' to my mind."); Bifulco v. United States, 447 U.S. 381, 403 (1980) (dissenting) ("statutory language conveys quite a different meaning to me"); Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 161 (1980) (concurring in part and dissenting in part) (majority result not "compelled by the plain language of the statute"); *cf.* United States v. American Bar Endowment, 477 U.S. 105, 123 (1986) (dissenting) (Justice Stevens uses legislative purpose, which is to prevent unfair competition, to determine that there is no "trade or business"); *Id.* at 111 (the Court thought that "trade or business" literally described the activity of the tax-exempt organization).

313. McNally v. United States, 483 U.S. 350, 370 (1987) (dissenting) (definition of "fraud" at the time statute adopted); United States v. James, 478 U.S. 597, 615-16 (1986) (dissenting) ("damage" is term in statute, not "damages," as the majority implies); United States v. Ramsey, 431 U.S. 606, 629-30 (1977) (dissenting) (meaning of "envelope" when statute adopted is not same as contemporary meaning); *cf.* Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 460 U.S. 150, 174 (1983) (dissenting) ("[M]ore accurately reflects the understanding of the Congress that enacted the statute and the lawyers and businessmen who have lived with the statute on a day-to-day basis for almost half a century."). *But see* Roadway Express, Inc. v. Piper, 447 U.S. 752, 770 (1980) (concurring in part and dissenting in part) ("costs" includes attorneys fees, even though provision for attorneys fees post-dates adoption of the "costs" statute). The majority relied heavily on contemporary context, in which attorneys fees were not "costs." *Id.* at 759.

which reads the statute "carefully," and found that the statute produced the same result in either case.[314]

To Justice Stevens, deference to plain meaning includes an examination of surrounding language—the "internal context." He rejects a "blue pencil" interpretation, which ignores adjacent text.[315] Further, he does not believe that the plain meaning of a word is a black box that completely contains the meaning of the language. Plain meaning is always potentially contextual—plain with respect to the choices presented to the Court, but leaving other issues to be decided in another case.[316]

C. *Judicial Reconstruction of Legislative Intent*

1. *The Ultimate Appeal to Legislative Intent.*

Despite his emphasis on plain meaning, Justice Stevens' ultimate criterion for determining statutory meaning is legislative intent, explicitly linked to case-by-case consideration of the facts of a case:

> In final analysis, any question of statutory construction requires the judge to decide *how the legislature intended its enactment to apply to the case at hand.* The language of the statute is usually sufficient to answer that question, but "the reports are full of cases" in which the will of the legislature is not reflected in a literal reading of the words it has chosen. In my opinion this is such a case.[317]

A preference for legislative intent over plain meaning is often noted by Justice Stevens. He rejected the "Court's reading of the statutory language [which] is faithful to its grammar," but does not "actually reflect[ ] the intent of Congress,"[318] for the important issue is to determine "whether [the Court's] conclusion could reasonably be thought to represent the will of Congress."[319] These statements qualify Justice Stevens' assertion that "it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.' "[320] Such an assumption is not *always* appropriate because leg-

314. 447 U.S. 807, 825 (1980) (majority).

315. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 (1985) (majority); *see also* United States v. Morton, 467 U.S. 822, 828 (1984) (majority) (relying on surrounding language to interpret one word).

316. Leroy v. Great W. United Corp., 443 U.S. 173, 184-85 (1979) (majority) ("plain language" does not bear the meaning ascribed by court of appeals, but may or may not include a particular interpretation not now before the Court).

317. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 577 (1982) (dissenting) (emphasis added); *see also* United Cal. Bank v. United States, 439 U.S. 180, 211 (1978) (dissenting) ("Occasionally there will be clear manifestations of a contrary intent that justify a nonliteral reading, but surely this is not such a case.").

318. Sorenson v. Secretary of the Treasury, 475 U.S. 851, 867 (1986) (dissenting).

319. *Oceanic Contractors, Inc.*, 458 U.S. at 590; *cf.* United States v. Albertini, 472 U.S. 657, 696 (1985) (dissenting) ("common sense" tempers a "starkly literal" interpretation).

320. Mills Music, Inc. v. Snyder, 469 U.S. 153, 164 (1985) (majority).

islative intent, as reconstructed by the Court, has the potential to unsettle plain meaning.[321]

Justice Stevens' view of legislative history as being capable of displacing plain meaning confirms the priority of legislative intent. He states: "I would, of course, agree that if there were legislative history plainly identifying a contrary congressional intent, that history should be given effect."[322] Language is always vulnerable to being undermined by the legislative intent expressed in legislative history.[323]

When drafting an opinion, Justice Stevens will examine both the language and the legislative history of a statute, and often finds that the legislative history is consistent with the plain meaning.[324] This approach is similar to the common judicial practice of relying on a variety of evidence of statutory meaning to avoid theoretical disputes over which meaning has priority. Moreover, he shares the view of many judges that legislative history is sometimes unreliable. For example, legislative his-

321. Similar reasoning explains why Justice Stevens resolves conflict between plain meaning, as probably understood by the statute's audience, and a legislative definition that is at odds with the apparent meaning, in favor of the legislative definition. Legislative intent prevails, *see* Meese v. Keene, 481 U.S. 465, 477 (1987) (majority) (follow "broad, neutral" statutory definition rather than "pejorative" meaning of political propaganda); Jacksonville Bulk Terminals, Inc. v. International Longshoreman's Ass'n, 457 U.S. 702, 727, 730 (1982) (dissenting) (joining in Chief Justice Burger's statement that "common sense meaning of a term is not controlling when Congress has provided . . . an explicit definition"); *cf.* Jewett v. Commissioner, 455 U.S. 305, 311-12 (1982) (majority) (text and history of regulation prevail over laymen's understanding of regulation).

322. Kosak v. United States, 465 U.S. 848, 863 (1984) (dissenting); *see also* Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Comm'n, 462 U.S. 669, 678-79 (1983) (majority) (the legislative history revealed an intent to overrule the reasoning and not just the holding of a prior case dealing with disability benefits for male dependents of pregnant females; the dissent, *id.* at 687, asserted that Justice Stevens was not following the statute's language); *cf.* United States v. Weber Aircraft Co., 465 U.S. 792, 802 (1984) (majority) ("[T]he legislative history of Exemption 5 does not contain the kind of compelling evidence of congressional intent that would be necessary to persuade us to look beyond the plain statutory language.").

323. It follows, for Justice Stevens, that if the language is not plain, legislative history can be considered. *See, e.g.*, McDaniel v. Sanchez, 452 U.S. 130, 147 (1981) (majority) (The Court looked to a Committee Report on point; there was "sufficient ambiguity in the statutory language to make it appropriate to turn to legislative history for guidance.").

324. Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268, 275 (1980) (majority) ("The legislative history of the Act is entirely consistent with the conclusion that it was intended to mean what it says."); Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 108 S. Ct. 830, 835-36 (1988) (majority) (language and legislative history agree); *see also* Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (majority) (plain language and history agree); United States v. James, 478 U.S. 597, 618 (1986) (dissenting) (legislative history consistent with interpretation of language); Ruckelshaus v. Sierra Club, 463 U.S. 680, 703 (1983) (dissenting) (language and legislative history agree); Illinois v. Abbot & Assocs., 460 U.S. 557, 568-69 (1983) (majority) (language and legislative history agree); Mohasco Corp. v. Silver, 447 U.S. 807, 822 (1980) (majority) (plain meaning and legislative history agree).

tory is often unclear[325] and not well edited.[326] But checking up on the legislative intent expressed in legislative history is much more than a rhetorical after-thought. In *Immigration & Naturalization Service v. Cardoza-Fonseca,* Justice Stevens reasserted his view that legislative history can displace plain meaning,[327] a position taken in the face of Justice Scalia's explicit challenge. Justice Scalia's concurrence stated that clear language must prevail over legislative history (absent "patent absurdity")[328] because the Court should be "interpret[ing] laws rather than reconstruct[ing the] legislators' intentions."[329]

2. *When To Pierce the Linguistic Veil.*

a. The uncertain standard. When will Justice Stevens look beyond the statutory language? When, as Justice Scalia describes it, should the judge "reconstruct [the] legislators' intention"?[330] A few out-of-context statements indicating that legislative intent can trump plain meaning do not adequately convey how Justice Stevens strikes the balance between text and reconstructed intent. He will only reject plain meaning in the "appropriate" case.

There is a traditional standard for rejecting plain meaning known as the Golden Rule, which permits the judge to disregard the text to prevent patent absurdity.[331] Justice Stevens would not, however, limit re-

325. Immigration and Naturalization Serv. v. Stevic, 467 U.S. 407, 427 (1984) (majority) ("There is, as always, some ambiguity in the legislative history."); United States v. Martin Linen Supply Co., 430 U.S. 564, 581 (1977) (concurring in the judgment) ("Interpreting legislative history is sometimes a perplexing and uncertain task.").

326. J.W. Bateson Co. v. United States, 434 U.S. 586, 605 n.16 (1978) (dissenting) ("a committee report is not edited as carefully as the bill itself"); Kosak v. United States, 465 U.S. 848, 864-65 (1984) (dissenting) (Committee Report "casually uses the prepositional phrase 'arising out of' to introduce a truncated list of the exceptions.... It is nothing more than an introduction. In such an introduction, precision of meaning is naturally and knowingly sacrificed in the interest of brevity.").

327. 480 U.S. 421, 432 n.12 (1987) (majority):

> [W]e look to the legislative history to determine only whether there is "clearly expressed legislative intention" contrary to [the enactment's] language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses.

328. *Id.* at 452-53 (Scalia, J., concurring in the judgment).

329. *Id.* Justices Stevens and Scalia also differed about legislative history in two other cases. *Compare* Green v. Bock Laundry Machine Co., 109 S. Ct. 1981, 1985-92 (1989) (majority) *and* Pittston Coal Group v. Sebben, 109 S. Ct. 414, 430-37 (1988) (dissenting) *with Green,* 109 S. Ct. at 1994 (Scalia, J., concurring in the judgment) *and Pittston,* 109 S. Ct. at 423 (Scalia, J., majority).

330. *Cardoza-Fonseca,* 480 U.S. at 452-53.

331. *See, e.g., Green,* 109 S. Ct. at 1985 ("no matter how plain the text of the Rule may be" statute is unfathomable if civil plaintiff does not have same right to impeach adversary's testimony as civil defendant does). One judge's concept of "patent absurdity" may, of course, differ from another's. In Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 586 (1982) (dissenting), for example, Justice Stevens characterized as "absurd" the payment of over $300,000 damages to an employee denied less than $500 wages, but the majority thought the result made sense as punitive damages.

construction of legislative intent to cases of "absurdity." His opinions set forth several more expansive standards for piercing the linguistic veil. "If this purely literal reading of [the statute] resulted in manifest injustice, or were plainly at war with the probable intent of Congress, I would reject it."[332] And, in somewhat less restrictive terms, he states:

> When we are dealing with a well-established and clearly defined old rule, it is usually reasonable to suppose that the legislative intent to change such a rule would be unambiguously expressed. Or if we are dealing with an old rule that is an established and important part of our national policy, we must be sure that it is not changed simply by inadvertent use of broad statutory language.[333]

These tests for piercing the veil of statutory language are versions of the "clear statement" doctrine, which posits that certain substantive results will be inferred only when the statutory language clearly impels it.[334] Justice Stevens applies this doctrine when he rejects the apparent meaning of the statutory language because it produces results that he "cannot believe" the legislature intended[335] without a clear statement to that effect,[336] especially if Congress seems unaware of what it is doing.[337] Although the "clear statement" doctrine is often criticized as being judi-

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Id. at 572 (Rehnquist, J., majority); *see also* Pittston Coal Group v. Sebben, 109 S. Ct. 414, 426, 429 (1988) (dissenting) (majority result "senseless" and "absurd"); Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 530 (1981) (dissenting) (majority decision lead to an "absurd result").

Perhaps the easiest ease for finding "absurdity" is when the language of the statute is inconsistent. In such cases, there is no need to appeal to substantive criteria outside the text to demonstrate absurdity; *see, e.g.,* Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 250 (1985) (majority) (literal interpretation leads to internal inconsistencies in the text); *cf.* Park'n Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 218 (1985) (dissenting) (Justice Stevens argued that it would violate congressional intent "to grant incontestable status to a mark that was not eligible for registration in the first place").

332. Exxon Corp. v. Hunt, 475 U.S. 355, 379 (1986) (dissenting).

333. Radzanower v. Touche Ross & Co., 426 U.S. 148, 164 (1976) (dissenting); *see also* Illinois v. Abbott & Assocs., Inc., 460 U.S. 557, 572-73 (1983) (majority) ("But the rule is so important, and so deeply rooted in our traditions, that we will not infer that Congress has exercised such a power without affirmatively expressing its intent to do so"; the tradition in this case was grand jury secrecy.).

334. *See generally* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court,* 95 HARV. L. REV. 892 (1982).

335. *See* United States v. Locke, 471 U.S. 84, 123 (1985) (dissenting) ("I cannot believe that Congress intended the words 'prior to December 31 of each year' to be given the literal reading the Court adopts today.") (case involved loss of livelihood); *see also* Third Nat'l Bank v. IMPAC, Ltd., 432 U.S. 312, 323 (1977) (majority). In *IMPAC,* Justice Stevens stated: "We cannot believe that Congress intended to give national banks a license to inflict irreparable injury on others, free from the normal constraints of equitable relief." The statutory language prohibited an "injunction," which the Court interpreted not to apply to injunctions by debtors. The dissent, *id.* at 324 (Blackmun,J., dissenting), thought the statute "means what it says."

336. In J.W. Bateson Co., Inc. v. United States, 434 U.S. 586, 595, 605 (1978) (dissenting), Justice Stevens rejected what the majority, *id.* at 590, called the trade usage of the term "subcontractor." He claimed that the word had a broader meaning than the majority adopted, *id.* at 601-02, and further stated: "If Congress had intended to do more than allay that concern—if it had intended to

cially intrusive,[338] it is in fact the most honest way of describing what judges do when they question the plain meaning of statutes.

The tests that Justice Stevens adopts to pierce the linguistic veil and require a clear statement—whether the language produces "manifest injustice," or is "at war with the probable [legislative] intent,"[339] or deals with "a well-established and clearly defined old rule" or "an established

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cut back on the coverage of the Heard Act—I am convinced that it would have used *statutory* language to accomplish its purpose." *Id.* at 605.

"Clear statement," "cannot believe," and similar phrases also appear in opinions that do not pierce the linguistic veil. They express a substantive point of view that resolves issues left open by the language. *See, e.g.,* Exxon Corp. v. Hunt, 475 U.S. 355, 382 (1986) (dissenting) ("[W]e should not presume pre-emption unless Congress clearly identifies its intent to curtail the lawmaking power of a sovereign State . . . ."); Guardians Ass'n v. Civil Serv. Comm'n., 463 U.S. 582, 636, 638 (1983) (dissenting) ("Yet it seems to me most improbable that Congress contemplated so significant and unusual limitation on the forms of relief available to a victim of racial discrimination, but said absolutely nothing about it in the text of the statute."); Ralston v. Robinson, 454 U.S. 201, 225, 229 (1981) (dissenting) ("It is undisputed that the Youth Corrections Act contains no such clear expression of congressional intent."); Bifulco v. United States, 447 U.S. 381, 402 (1980) (dissenting) ("total absence of any statement by any legislator"); United States v. Ramsey, 431 U.S. 606, 626, 629-30 (1977) (dissenting) ("I do not believe, however, that the word 'envelope' as there used was intended to refer to ordinary letters.").

337. In Sorenson v. Secretary of the Treasury, 475 U.S. 851, 867 (1986) (dissenting), the word "refund" was not literally applied to refunds which were paid to low income families who had Earned Income Credits in excess of taxes due. Justice Stevens stated:

> With all due respect to the Court and to our hardworking neighbors in the Congress, I think "it defies belief" to assume that a substantial number of legislators were sufficiently familiar with OBRA to realize that somewhere in that vast piece of hurriedly enacted legislation there was a provision that changed the 6-year-old Earned Income Credit Program.

If the status quo of which the legislature is unaware has little substantive strength, however, then unawareness is not an argument for preserving the status quo. For example, when the prior law consists of a prior case of which Congress was unaware and which it is "inconceivable that Congress would have wanted" to preserve, then the prior law is superceded by a later statute. Director, Office of Workers' Compensation Programs v. Perini N. River Assocs., 459 U.S. 297, 341 (1983) (dissenting). In such situations, the majority's statement, *id.* at 325, that there was no evidence of legislative intent to reject the prior interpretation, is irrelevant in view of its substantive weakness. *Cf.* Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc., 108 S. Ct. 830, 837 (1988) (majority) (policy arguments support plain intent, which counters inference that the statute's limited reach is due to "inadvertence rather than deliberate choice").

338. *See, e.g.,* Note, *supra* note 334, at 904-07.

339. *See supra* note 332 and accompanying text. In routine opinion writing, Justice Stevens will try to avoid any conflict between language and legislative intent by noting agreement between these two criteria of statutory meaning. *See, e.g.,* California v. Grace Brethren Church, 457 U.S. 393, 421 (1982) (dissenting) (literal reading and purpose of Anti-Injunction Act permit injunction in this case); Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 161 (1980) (concurring in part and dissenting in part) (neither plain language nor congressional purpose leads to majority's conclusion); City of Los Angeles v. Manhart, 435 U.S. 702, 709 (1978) (majority) ("Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes."); *cf.* Delta Air Lines, Inc. v. August, 450 U.S. 346, 352 (1981) (majority) ("Our interpretation of the Rule is consistent with its purpose.").

and important part of our national policy"[340]—are very uncertain, and are even more imprecise than the testing for identifying "patent absurdity."[341] There is no clear image confronting the judge who looks behind the veil. She must weigh legislative intent in the balance, and must construct that intent from varied sources.[342] How Justice Stevens approaches such a task constitutes his theory of statutory interpretation and his distinctive blend of judicial restraint and creativity.[343]

340. *See supra* note 333 and accompanying text (quoting Radzanower v. Touche Ross & Co., 426 U.S. 148, 164 (1976) (dissenting)).

341. *See supra* note 331.

342. An example of judicial construction of legislative intent under the influence of background traditions, filtered through a judicial lens, is the inference of private remedies from federal statutes. Doctrinally, the issue is now whether legislative intent to create a remedy can be demonstrated. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 377, 378 (1982) (majority) (increased complexity and volume of federal legislation prompted further inquiry into legislative intent); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 25 (1981) (concurring in the judgment in part and dissenting in part) (arguing that the majority's approach to "fashion" remedies is contrary to the Court's history and tradition). But presumptions about legislative intent which the judges bring to the determination of this issue are shaped by background considerations having little to do with specific legislative intent.

At one time, courts were very willing to infer private remedies if the plaintiff could show that the statute was enacted for his special benefit. *Merrill Lynch,* 456 U.S. at 374 (1982) (majority). Some of our most conservative judges accepted this view of judicial power as part of common law tradition. *Middlesex,* 453 U.S. at 23-24 (concurring in the judgment in part and dissenting in part) (Justices Harlan, Clark, Frankfurter and Kirkpatrick accepted the special benefit rule); *Merrill Lynch,* 456 U.S. at 374-75. Under this earlier approach, judges assumed that the legislative context of a statute supported inferring a remedy, Califoruia v. Sierra Club, 451 U.S. 287, 299-300 (1981) (concurring) (implication of private cause of action was frequent in both common law and American courts prior to development of judicial rules); *Merrill Lynch,* 456 U.S. at 381-82, or inferred a remedy by relying on statutory language specifying the class of people benefiting from the statute, Cannon v. University of Chicago, 441 U.S. 677, 689 (1979) (majority) (looking at the statutory reference to 1893 railroad legislation).

The recent retreat from this approach, under the guise of searching for legislative intent, has been driven by a different view of the relevant background traditions. Justice Powell argues that judicial inference of private remedies without clear evidence of legislative intent violates separation of powers; *see Cannon,* 441 U.S. at 742-47 (Powell, J., dissenting). Justice Stevens, previously a strong advocate of inferring private remedies, also has accepted a more restrained approach, but for different reasons. He has been persuaded to be more cautious in inferring remedies by a familiar concern, that of avoiding excessive burdens on the federal courts. *See supra* notes 226-28 and 280-81 and accompanying text; *see also Middlesex County Sewerage Auth.,* 453 U.S. at 24-25 (concurring in the judgment in part and dissenting in part) ("a Court that is properly concerned about the burdens imposed upon the federal judiciary . . . and the sheer bulk of new federal legislation" has been more reluctant to open the courthouse door to the injured city); *Merrill Lynch,* 456 U.S. at 377 ("increased complexity of federal legislation and the increased volume of federal litigation").

343. Another example of Jnstice Stevens' judicial creativity, once he is freed from criteria associated with judicial restraint, is his approach to *stare decisis* in statutory interpretation. Even though manifest error and lack of reliance argue for abandoning *stare decisis,* consonance of a prior decision with *contemporary* mores is a reason for adhering to the prior decision, *see* Patterson v. McLean Credit Union, 108 S. Ct. 1419, 1422 (1988) (dissenting) (Court should not re-examine holding in *Runyon*). Moreover, the *stare decisis* effect of a prior statutory interpretation should not be the statute's literal meaning, however appropriate a literal interpretation might have been in the first

b. Applications. Justice Stevens usually uncovers legislative intent behind the language to protect substantive values that, in his view, deserve the Court's special protection—specifically, that congerie of values that we earlier summarized under the heading "individual dignity."[344] The substantive concern with individual dignity is applied by Justice Stevens to statutory interpretation in two ways. First, it is a background tradition, capable of questioning the impact of all other evidence of statutory meaning. It is the "established and important part of our national policy" that cannot be inadvertently displaced. Second, this concern is a background tradition that selectively reinforces evidence of probable legislative intent "at war" with the literal language.

An example of the first use of individual dignity traditions is *Brown v. Glines,*[345] in which Justice Stevens explicitly argued that substantive values drive statutory interpretation even when both legislative intent, as indicated by the legislative history, and statutory language agree. The case concerned whether a statute protected the right of members of the Air Force to circulate petitions to legislators and executive officials dealing with grooming standards. He stated that "the plain language of the statute and its sparse legislative history slightly favor the Court's reading," but that in "a doubtful case I believe a statute enacted to remove impediments to the flow of information to Congress should be liberally construed."[346] Justice Stevens' position in this case should not be dismissed as resting on the doctrine that a constitutional interpretation should be presumed (based on first amendment concerns, in this case); that presumption is itself based on a substantive bias for background traditions favoring liberty. The maxim presuming constitutionality of an Act "is not merely based on a desire to avoid premature adjudication of constitutional issues. Like others, the maxim also reflects a judicial presumption concerning the intent of the draftsmen of the language in question."[347] Justice Stevens would presume an intent that "err[s] on the side of fundamental constitutional liberties."[348]

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place. Once an existing interpretive structure exists, it is wrong to replace "a sense of rational direction and purpose in the law with an aimless confinement to a narrow construction." *Patterson,* 109 S. Ct. at 2396; Runyon v. McCrary, 427 U.S. 160, 191 (1976) (concurring) (decision "accords with the prevailing sense of justice today").

344. *See supra* section II.B.2.

345. 444 U.S. 348, 378 (1980) (dissenting).

346. *Id.* at 378-79 (1980) (dissenting).

347. Regan v. Time, Inc., 468 U.S. 641, 697 (1984) (concurring in part and dissenting in part).

348. *Id.* at 697; *see also* Gomez v. United States, 109 S. Ct. 2237, 2240-41 (1989) (majority) (not follow literal language where assignment of felony trial duties to magistrate could be unconstitutional); *cf.* Kungys v. United States, 485 U.S. 759, 791 (1988) (concurring in the judgment) (construction of denaturalization statute influenced by the burden of the sanction, which may be more grave than a criminal conviction).

Similarly, in *Mallard v. United States District Court,* Justice Stevens interpreted a statute that permitted federal courts to "request" attorneys to represent the poor as authority "to respectfully command" such representation.[349] In affirming the ancient traditions of the bar to aid the poor, he explicitly rejected the statute's plain meaning: "This case involves much more than the parsing of the plain meaning of the word 'request' . . . ."[350]

In other cases, background traditions reinforce evidence of legislative intent that is potentially at war with the literal language. For example, in *Garcia v. United States,*[351] the threat posed to our liberties by a national police force was sufficiently worrisome to call into question the literal application of the statutory language. Justice Stevens argued that legislative intent did not support aggrandizement of national police power, despite the "literal" language: "When the literal application of a statute would produce a result 'demonstrably at odds with the intentions of its drafters,' the actual legislative intent must control our disposition."[352] Discouraging a national police force is a strong background tradition driving Justice Stevens' appeal to legislative intent and perhaps shaping his judgment as to what that intent is. Thus, he argues that a national police force should not be inferred lightly from the statutory language, if it is not "sufficiently plain"[353] because "[e]very increase in the power of the federal prosecutor moves us a step closer to a national police force with its attendant threats to individual liberty."[354]

Liberty interests also include the protection of property from arbitrary government action. The apparent meaning of a statute threatening that interest is therefore suspect. For example, *United States v. Locke*[355] involved a statute that required a filing "prior to December 31" to avoid loss of property. Though numbers and dates present the clearest case for deferring to plain statutory language, Justice Stevens refused to defer to the literal meaning because the language created a "trap for unwary property owners" by a "legislative *accident,*"[356] and "appellees [would] lose their entire livelihood for no practical reason."[357] The statute was

349. 109 S. Ct. 1814, 1826 (1989) (dissenting).

350. *Id.* at 1823.

351. 469 U.S. 70 (1984) (dissenting).

352. *Id.* at 80.

353. *Garcia,* 469 U.S. at 88.

354. *Id.* at 89; *cf.* Regents of Univ. of Cal. v. Public Employment Relations Bd., 485 U.S. 589, 604 (dissenting) (rejecting the majority's reliance on "normal meaning," citing concerns for lenience in criminal statutes, for preventing a postal monopoly, and for not curtailing communication).

355. 471 U.S. 84, 117 (1985) (dissenting).

356. *Id.* at 117-18.

357. *Id.* at 125.

interpreted by Justice Stevens to mean "on or before December 31."[358] He stated that his position was "fully consistent with the intent of Congress" and did not "interfere with Congress' intent,"[359] but, once again, the appeal to intent is influenced by the substantive implications of deferring to plain meaning. His appeals to "consistency" with legislative intent and "lack of interference" with legislative intent do not make out a strong case rhetorically that the judge has engaged in a careful search for what the legislature intended. Rather this is the language of judicial reconstruction of legislative intent in light of powerful background considerations such as freedom from arbitrary government action.

Protecting the property rights of the poor from inadvertent government harm is also an important value, capable of calling into question the literal language of a statute. The question in *Sorenson v. Secretary of the Treasury*[360] was whether an Earned Income Credit, adopted by a 1976 statute and paid as a tax "refund" to poor people, was the kind of "refund" specified in a later 1981 statute. Earned Income Credits paid as refunds differ from the usual tax refund in that they are the difference between the amount of the government grant—called an Earned Income Credit—and the tax owed, rather than an actual overpayment of tax. The later 1981 statute required people who are delinquent in child support to pay income tax refunds to the state reimbursing it for payments the state had made to the child. Justice Stevens refused to interpret the word "refund" in the later statute to include an Earned Income Credit.[361] He noted that the purpose of the earlier Earned Income Credit law was to help poor families, and he was "not persuaded that Congress had any . . . intent" to divert Earned Income Credits from poor families to state governments,[362] especially in view of legislative unawareness that the term "refund" would apply to Earned Income Credit refunds.[363] Justice Stevens' statement that he was "not persuaded" of a legislative intent to harm the poor[364] suggests that he was actually reconstructing the legislature's intent in light of strong background considerations,

358. *Id.* at 123.

359. *Id.* at 124.

360. 475 U.S. 851 (1986) (dissenting).

361. *Id.* at 866-87.

362. *Id.* at 866.

363. *Id.* at 867.

364. *Id.* at 866. Another case in which Justice Stevens referred to both legislative intent and substantive concern for the poor was Heckler v. Ringer, 466 U.S. 602, 630 (1984) (concurring in the judgment in part and dissenting in part). He noted that it would "frustrate[ ] the remedial intent of Congress" and would be a "cruel irony" if the only people able to get review of a refusal to pay Medicaid benefits (a program for the poor), were those wealthy enough to pay first and sue later. *Id.* at 630. He also relied on a "careful reading of the plain language." *Id.* at 631.

which included not thoughtlessly repealing a statute intended to help poor workers.[365]

Sometimes individual dignity concerns *support* close adherence to the statutory language, rather than piercing the linguistic veil. This approach mirrors Justice Stevens' occasional preference for judicial generalizations over case-by-case decisionmaking in order to protect liberty interests.[366] He makes this point explicitly in tax cases, where the importance of evenhanded administration and taxpayer reliance[367] on fixed rules argue strongly for following the statute's plain meaning.[368]

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365. By contrast, when Congress acts consciously and rationally in a way that disadvantages the poor, the statute will not be interpreted to prevent that harm. Sehweiker v. Hogan, 457 U.S. 569, 577-80, 587, 589-91 (1982) (majority) (statutory eligibility for medical aid to the poor is properly interpreted to be based on gross income, without subtracting medical expenses to determine need).

366. *See supra* notes 233-38 and accompanying text.

367. Reliance interests are also a major reason for generally applying *stare decisis* in statutory interpretation. Runyon v. McCrary, 427 U.S. 160, 190 (1976) (concurring); *see also* Johnson v. Transportation Agency, 480 U.S. 616, 644 (1987) (concurring) ("public interest in stability and orderly development of the law.' "); Lodge 76 Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 159 (1976) (dissenting) ("Stability and predictability in the law are enhanced when the Court resists the temptation to overrule its prior decisions.").

The interest in stability provided by *stare decisis* is also important in constitutional decisions, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 780 (1986) (concurring) (*stare decisis* values cannot "be summarily put to one side" in constitutional cases), even though *stare decisis* is less weighty in constitutional cases because correction through legislation is almost impossible. Commissioner v. Fink, 483 U.S. 89, 104 n.6 (1987) (dissenting) (noting limited explanation in constitutional cases, but applying *stare decisis* for shareholder's loss recognition in tax case).

368. Hillsboro Nat'l Bank v. Commissioner, 460 U.S. 370, 416 (1983) (concurring in part and dissenting in part) ("Because tax considerations play such an important role in decisions relating to the investment of capital, the transfer of operating businesses, and the management of going concerns, there is a special interest in the orderly, certain, and consistent interpretation of the Internal Revenue Code."); United Cal. Bank v. United States, 439 U.S. 180, 207, 211 (1978) (dissenting) ("[T]he statutory language is plain and unambiguous."; "I firmly believe that the best way to achieve evenhanded administration of our tax laws is to adhere closely to the language used by Congress to define taxpayers' responsibilities."); *cf.* United States v. Foster Lumber Co., 429 U.S. 32, 49 (1976) (concurring) ("the statutory language seems rather plain"); ; Colonial Am. Life Ins. Co. v. Commissioner, 109 S. Ct. 2408, 2418 (1989) (dissenting) (hazardous to chart course through tax code on basis of first principles); HCSC-Laundry v. United States, 450 U.S. 1, 16-17 (1981) (dissenting) ("clear and unambiguous" language exempts taxpayer from tax).

Where the language in the tax law is not clear, however, Justice Stevens appears ready to adopt an interpretation that prevents tax avoidance. *See* United States v. Hughes Properties, Inc., 476 U.S. 593, 609 (1986) (dissenting) (intepretating tax regulation to forbid accrual of liability, since accrual would permit tax avoidance); Frank Lyon Co. v. United States, 435 U.S. 561, 584 (1978) (dissenting) (interprets the reality of a transaction for tax purposes to be a second mortgage, which meant that taxpayer would lose); Don E. Williams Co. v. Commissioner, 429 U.S. 569, 583 (1977) (concurring) (taxpayer loses; the word "paid" does not include giving note, but requires delivery of cash or equivalent). *But see* Commissioner v. Clark, 109 S. Ct. 1455, 1465-66 (1989) (majority) ("boot" received in acquisitive reorganization is capital gain; no tax avoidance because transaction is like a sale); United States v. American Bar Endowment, 477 U.S. 105, 120-21 (1986) (dissenting) ("trade

Similarly, the evidence of legislative intent found in legislative history, which Justice Stevens is normally willing to consider,[369] may be disregarded to protect individual dignity values. Thus, an adverse effect on liberty precludes legislating by "stealthy" legislative history.[370] And legislative history that clearly demonstrated an intent contrary to plain meaning was not relied on in a tax case, a type of case in which reliance on statutory language is especially important,[371] because "Congress has a special duty to choose its words carefully when it is drafting technical and complex laws."[372]

Not all of Justice Stevens' opinions piercing the linguistic veil involve individual dignity values. Some cases involve statutes based on the common law, where "literal interpretation would conflict with the flexible grant of judicial power characteristic of the common law context."[373] And sometimes the conclusion that the plain meaning produces an "absurd" result is flavored with a concern about "manifest injustice" that is not closely tied to the protection of individual dignity values. For example, when over $300,000 in damages were awarded to an employee who was owed less than $500 in past wages, Justice Stevens looked beyond the plain language to prevent a result he characterized as "absurd" and "palpably unjust."[374]

Finally, an occasional opinion rests on the unreasonableness of the plain meaning, but in which manifest injustice does not appear to be an issue. For example, Justice Stevens dissented in *United States v. Provi-*

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or business" does not include sale by tax-exempt organization of disability insurance to its members with the discount in premiums going to the organization).

369. *See supra* notes 322-29 and accompanying text.

370. Dalia v. United States, 441 U.S. 238, 278-79 (1979) (dissenting) ("My respect for the lawmaking process forecloses the inference that Congress authorized burglarious conduct by such stealthy legislative history"; need "legislative mandate that is both explicit and specific" before national police officers can invade "privacy interests.")

371. *See supra* notes 367-68 and accompanying text.

372. St. Martin Evangelieal Lutheran Church v. South Dakota, 451 U.S. 772, 791 (1981) (concurring in the judgment) (declining to use legislative history when referring to plain meaning of Federal Unemployment Tax Act).

373. Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 736-37 (1988) (dissenting) (discussing the common law origins of the antitrust laws); Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 529-32 (1983) (majority) (same); *Antitrust:* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 342-43 (1982) (majority) (common law background cited in Standard Oil Co. v. United States, 221 U.S. 1 (1911), on which the Court relies); *Civil rights:* Briscoe v. LaHue, 460 U.S. 325, 330-31 (1983) (majority) (statute making "every person" performing certain action liable is not interpreted literally because of background of common law immunity doctrine); *see also* McNally v. United States, 483 U.S. 350, 372-73 (1987) (dissenting) ("Statutes like the Sherman Act, the civil rights legislation, and the mail fraud statute were written in broad general language on the understanding that [they are] implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case-by-case adjudication.").

374. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 586 (1982) (dissenting).

dence Journal Co.,[375] a case addressing the issue whether a lawyer appointed by the district court to prosecute a contempt charge against the Executive Branch had authority to represent the United States in the Supreme Court. The original appointment was necessary because the contempt charge put the Judiciary at odds with the Executive, creating a conflict of interest which prevented the Department of Justice from representing both the Executive and Judiciary Branches of the government. The governing statute, however, gave exclusive authority to the Attorney General and Solicitor General in "all suits in the Supreme Court in which the United States shall be concerned."[376] Justice Stevens argued, in dissent, that a statute should not be literally interpreted if it would lead to "absurd or even *unreasonable* results" especially when the enacting legislature could not have anticipated a conflict of interest among the branches of government requiring the appointment of outside counsel.[377] He therefore interpreted the statute to permit outside counsel to prosecute the appeal in the Supreme Court. Perhaps Justice Stevens' deep commitment to the role that lawyers play in resolving disputes,[378] and the fact that a conflict of interest would otherwise paralyze the judicial process when a "coequal branch of government maintains a substantial, justiciable interest,"[379] led him to depart from the statute's literal meaning.

With these few exceptions, however, Justice Stevens' willingness to pierce the linguistic veil usually implements substantive background traditions that preserve individual dignity.

IV. CONCLUSION

We can draw a number of conclusions from Justice Stevens' Supreme Court opinions. First, what appears to be a complex combination of judicial restraint and creativity may not be so complex after all. Justice Stevens is a maverick in the sense that he does not align himself clearly with one group or another, but his judicial philosophy is still coherent. Sometimes he defers to other decisionmakers, such as states and lower courts, to implement individual dignity values; at other times, he abandons deference to serve those same values. This combination is reminiscent of the traditional common law lawyer's attachment to both judicial restraint and individual rights.

375. 485 U.S. 693, 708 (1988) (dissenting).

376. *Id.* at 1511 (citing Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93).

377. *Id.* at 1512 (emphasis added).

378. *See supra* notes 205-09, 217 and accompanying text.

379. *Id.*

Second, there is continuity between his approach to constitutional and statutory issues. Values that are entitled to constitutional protection and involve individual dignity are relevant background conditions for interpreting statutes. In the context of statutory interpretation, the protection of individual dignity values requires courts to pay close attention to the facts of the particular case, a technique normally associated with judicial restraint. But a judge who applies a common law case-by-case approach to reconstructing legislative intent is less restrained than one who defers to the plain meaning of statutory generalities.

Finally, Justice Stevens' rhetoric in his opinions comes very close to describing accurately the reasons for his decisions. He tells us what courts should and should not do, explicitly linking judicial restraint and creativity to a theory of judging that reveals its substantive bias. His "choice for candor"[380] is an especially appropriate stance for a judge for whom deliberative rationality is among the highest political values.

380. G. CALABRESI, A COMMON LAW FOR AN AGE OF STATUTES 179 (1982).