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THE SCHOLARLY ATTORNEY AS LAWYERLY JUDGE: STEVENS ON STATUTES

Former law clerks, by tradition, are expected to provide commemorative anecdotes illustrating the intellectual brilliance and personal warmth of their Justices. In Justice Stevens' case, such anecdotes seem superfluous: his intellectual ability is plain from his opinions, and his unassuming, friendly manner is evident upon even the most casual personal contact. Rather than gild the lily, I would like to explore something a little less obvious: some of the relationships between his career as a practitioner and his judicial philosophy. For the sake of tradition, however, I will begin with a brief anecdote.

The scene is the oral argument in an antitrust case. I recall nothing about the facts of the case, nor about the argument itself, until Justice Stevens intervened with a question. "Maybe I just don't understand antitrust law very well," the Justice remarked, "but I'm having trouble following your argument. Could you clarify that last point?" Taking him at his word, the lawyer patiently attempted to reiterate his position in somewhat simpler language for the benefit of his unsophisticated audience. Unfortunately, the point was both crucial to the lawyer's case and completely lacking in merit, which became increasingly obvious as he continued his explanation.

That vignette is one of my clearest recollections of Justice Stevens at oral argument. It illustrates his lack of arrogance and unfailing courtesy, as well as his unerring ability to go to the heart of a legal issue. Those are not, however, the reasons why the exchange was memorable—after all, the Justice exhibited the same characteristics every day, on and off the bench. Instead, I remember the exchange so clearly because of my amusement that the lawyer apparently took Justice Stevens' disclaimer at face value.

In reality, it is hard to imagine how anyone could have a deeper or more sophisticated grounding as an antitrust lawyer. Justice Stevens had practiced extensively and superbly in the area, litigated cases in the Supreme Court, written law review articles on the subject, and had even taught the course at one of the nation's leading law schools.¹ For Stevens to disclaim knowledge of antitrust law

¹ Justice Stevens' background in antitrust is briefly described in Victor Kramer, The Case of Justice Stevens: How to Select, Nominate and Confirm a Justice of the United States Supreme Court, 7 Const. Comm. 325, 332-33 (1990).

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was something like his fellow Chicagoan, Michael Jordan, modestly confessing ignorance about the sport of basketball.

Recalling that incident at oral argument led me to think about the relationship between the two halves of Justice Stevens' career, as a lawyer and as a judge. I have often heard the Justice called the "lawyer's judge" on the Court, just as Justice Harlan was often considered the most lawyerly member of the Warren Court. Justice Stevens has tended, more than his colleagues, to approach cases in a lawyerly way, focusing on the particular facts in the record and their relationship to governing legal principles. Unlike many of his colleagues, who devote their time to debating legal abstractions, he has always considered his job to be deciding the specific cases that come before him.

The sheer extent of his legal practice is undoubtedly one explanation of Justice Stevens' judicial style. Obviously, someone with many years of litigation experience is likely to approach cases differently than someone whose experience has been largely as a law professor or government policymaker. But the connection between the Justice's practice experience and his judicial philosophy runs deeper than that. Many aspects of his jurisprudence, in my view, are connected with his deep grounding in antitrust law.

At the most superficial level, Stevens' antitrust background shows up in concerns about anticompetitiveness and in references to economic analysis. Even outside of the antitrust arena, Justice Stevens has expressed concern that government policies may be motivated by the anticompetitive desires of interest groups rather than by the public interest. For instance, in *Fullilove v. Klutznick*, in a dissenting opinion that grated on the sensibilities of some liberals, he characterized a federal affirmative action program as follows:

The ten percent set-aside ... creates monopoly privileges in a $400 million market for a class of investors defined solely by racial characteristics. The direct beneficiaries of these monopoly privileges are the relatively small number of persons within the racial classification who represent the en-

Although he had written several articles as a practitioner, one of them stands out as demanding quotation. The article was about an effort to justify price discrimination under the Robinson-Patman Act. This seemingly technical issue prompted the following summary from the future Justice:

In sum, we may conclude that a rabbit is not entitled to special privileges simply because his parents were prolific, and it cannot be demonstrated that a horse is smaller than a dog by averaging horses and rabbits.

*Cost Justification, 8 Antitrust Bulletin 413, 425 (1963).*

2. *448 U.S. 448 (1980).*
trepreneurial subclass—those who have, or can borrow, working capital.³

This characterization of a particular affirmative action plan as an anticompetitive restraint on trade would probably not have occurred to a judge lacking Stevens' antitrust background, regardless of the judge's attitude toward affirmative action.

On the other hand, Stevens' orientation toward economic analysis could also work in favor of liberal positions, as illustrated in *Allen v. Wright.*⁴ The *Allen* Court held that the parents of black schoolchildren lacked standing to attack the IRS's laxness toward discriminatory private schools. The majority's rationale was that it was purely speculative whether the IRS had caused any injury to the plaintiffs.⁵ As Justice Stevens pointed out in dissent, the plaintiffs' argument was simply that less favorable tax treatment would make discriminatory schools more expensive, and would therefore discourage their growth. This argument, he observed, "is nothing more than a restatement of elementary economics: when something becomes more expensive, less of it will be purchased."⁶

Although multiplying examples of such "antitrust thinking" in Stevens' opinions would not be hard, the most interesting connections are more jurisprudential. In particular, it seems to me, his antitrust experience has shaped Justice Stevens' approach in statutory cases.⁷

In the past decade, a debate has raged about the proper methods of statutory interpretation. On the Supreme Court, Justice Scalia has emerged as the champion of textualism. Justice Stevens has argued vigorously against the new textualism, pointing out time and again that a wooden reading of statutory language serves only to muddle public policy and obstruct Congressional goals.⁸

One telling Stevens opinion is found in *Sorenson v. Secretary of the Treasury.*⁹ In *Sorenson,* the majority held that a state's claim for

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³ 448 U.S. at 532 (Stevens, J., dissenting). Later in his dissent, Justice Stevens referred to legislative history indicating that the legislation was intended as a patronage measure for certain constituencies. See id. at 541-42.
⁵ Id. at 756-759.
⁶ 468 U.S. at 788 (Stevens, J., dissenting).
⁷ I also suspect that it would be possible to trace the influence of antitrust law in other areas, such as the Justice's conception of public law litigation, or his view on the appropriate use of rules versus standards.
recoupment of child support payments took priority over a taxpayer's earned-income credit. The result was to divert money from impoverished taxpayers to state treasuries. Congress apparently never had considered this possible effect of the statute. Nevertheless, the Court concluded that this result was mandated by literal readings of one provision of an omnibus bill and of an existing section of the Internal Revenue Code.

As Justice Stevens pointed out, the Court's decision undermined the policies behind the earned income credit. Moreover, it was completely unrealistic to assume that legislators were sufficiently familiar with the omnibus bill, a "vast piece of hurriedly enacted legislation," to realize that it contained a buried provision upending the earned income credit.\(^\text{10}\) As a footnote in his dissent recounts, this particular bill was hastily slapped together from photocopies of memorandums, with handwritten insertions and deletions. In fact, the bill was so sloppily put together that it included such accidental entries as a woman's name and phone number, which had apparently been jotted down at some point on a copy of the bill and then went unnoticed.\(^\text{11}\) Yet the Court relied on the nuances of phrasing in this statute, along with an earlier tax provision probably not remembered by any member of Congress, to undermine an established program based on important legislative policies.\(^\text{12}\)

In attempting to interpret legislation realistically, what legislators have failed to say may be as meaningful as what they did say. In *Chisom v. Roemer*,\(^\text{13}\) the issue before the Court was whether state judges were covered by the Voting Rights Act. They clearly had been covered prior to an 1982 amendment strengthening the statute. The 1982 amendment, however, uses the term "representative," a word not ordinarily applied to judges, so Justice Scalia not surprisingly argued that they had been exempted. Justice Stevens, writing this time for a majority, observed that the legislative history was silent on this point. He found implausible the assertion that Congress would have silently retracted the coverage of the statute. In a footnote that has become famous among legislation scholars,

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10. 475 U.S. at 866.
11. 475 U.S. at 867 n.2.
he added that "Congress's silence in this regard can be likened to the dog that did not bark" in the classic Sherlock Holmes story.14

Justice Stevens' reluctance to base statutory interpretation on a wooden literalism is hardly surprising in someone whose central professional experiences involved the Sherman Act. Even the most dedicated textualists do not argue that the Sherman Act's ban on all "restraints on trade" should be taken literally. After all, under a literal meaning, every contract for the sale of goods would be illegal, for the simple reason that such a contract "restrains" the ability of the seller to "trade" with third parties. Rather than engaging in such wooden literalism, courts have always looked beyond the statutory language to the underlying congressional purpose of protecting competition against monopolistic practices.

In applying the Sherman Act, courts have sometimes been asked to qualify the legislative goal of free competition, either by abandoning it when other economic policies might be preferable, or by balancing it against noneconomic values. The consistent answer has been that such judicial policymaking would be inappropriate. Congress makes public policy, and subject to some statutory exceptions, Congress has chosen to make free competition the paramount economic policy.15 Similarly, more than many of his colleagues, Justice Stevens has staunchly rejected judicial efforts to qualify the policies chosen by Congress.

For instance, Justice Stevens has criticized the increasing tendency of the Court to use judge-made canons at the expense of legislative policy. A recent example, United States v. Nordic Village, Inc.16 involved the scope of sovereign immunity. A provision of the Bankruptcy Code provided that "notwithstanding any assertion of sovereign immunity," governmental units are covered by all Code references to creditors. Despite this clear statutory language, the Supreme Court refused to find a waiver of sovereign immunity as to damage claims against the state. In dissent, Justice Stevens attacked the Court's overreliance on "clear statement" rules:

Surely the interest in requiring the Congress to draft its legislation with greater clarity or precision does not justify a refusal to make a good faith effort to ascertain the actual meaning of the message it tried to convey in a statutory provision that is already on the books. The Court's stubborn insis-

14. 111 S.Ct. at 2364 n.23.
16. 112 S.Ct. 1011 (1992)
tence on "clear statements" burden the Congress with unnecessary reenactment of provisions that were already plain enough when read literally. The cost to litigants, to the legislature, and to the public at large, of this sort of judicial lawmaking is substantial and unfortunate. Its impact on individual citizens engaged in litigation against the sovereign is tragic.\textsuperscript{17}

Several environmental cases have given Justice Stevens opportunities to criticize the Court's excessive attachment to common law traditions at the expense of contemporary public policy. In \textit{Weinberger v. Romero-Barcelo}\textsuperscript{18}, the issue was whether to enjoin an on-going violation of the Clean Water Act. Based on long-standing principles of equity jurisprudence, the Court held that the trial judge had the authority to "balance the equities" and delay compliance.\textsuperscript{19} In dissent, Justice Stevens protested that the Court had paid scant heed to congressional intent, and had thereby substituted "the chancellor's foot for the rule of law."\textsuperscript{20}

\textit{Ruckelshaus v. Sierra Club}\textsuperscript{21} was another case in which the majority was unduly attached to the ancient traditions of the common law. At issue in \textit{Ruckelshaus} was whether the Sierra Club was entitled to attorneys' fee for its participation in a particularly complex lawsuit under the Clean Air Act. The Sierra Club had not prevailed in its claims against the EPA, but it had done a great deal to clarify the issues in the suit and had helped the EPA fend off some industry claims. As a result, the lower court had awarded a fee under a provision allowing fee awards whenever "such award is appropriate." But the Supreme Court reversed, apparently finding outlandish the idea that a nonprevailing party could obtain a fee, when the longstanding common law rule barred fee awards even to prevailing parties.\textsuperscript{22}

Justice Stevens found the majority's view untenable. As he pointed out, the committee report quite explicitly rejects the Court's approach. It states that "[t]he committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the 'prevailing party.'"\textsuperscript{23} The term "prevailing parties" is found in many attorneys' fee statutes, but not in this one. Given clear statutory

\textsuperscript{17} 112 S.Ct. at 1020-21.
\textsuperscript{18} 456 U.S. 304 (1982).
\textsuperscript{19} 456 U.S. at 311-314.
\textsuperscript{20} 456 U.S. at 335.
\textsuperscript{22} 463 U.S. at 683-84.
\textsuperscript{23} 463 U.S. at 704.
text and explicit legislative history, Justice Stevens argued, the proper result was indisputable. Again, he argued that the Court was remiss in substituting its own views for those of Congress:

Regardless of our views about the wisdom of the choice Congress made, we have a plain duty to accept it. Congress consciously selected a particular course: that a party who seeks judicial review . . . may be entitled to compensation from the Government, when the court deems it "appropriate," even if the reviewing court determines that there is no ground for disturbing the agency's conclusions. I would construe this category of "appropriate" cases to be narrow; it is wrong, however, to read it out of the statute altogether. It is not the function of the courts to "sit as a committee of review, nor are we vested with the power of veto."24

Although he is deeply attached to the principle of legislative supremacy, Justice Stevens is also quite aware of the dynamic role played by courts in statutory interpretation. As he is well aware, judges are not merely legal historians, limited to reconstructing the original intent of the legislature. Again, his antitrust experience is significant. Modern antitrust law is largely a judicial creation, as the courts have converted a general congressional dictate about free competition into an extensive body of legal rules, so that the final product is as much "common law" as statutory. Not surprisingly, Justice Stevens has taken a favorable view toward evolving judicial interpretation under other statutes.

Soon after his appointment, Justice Stevens was confronted with a well established but erroneous precedent interpreting an important civil rights statute. In Runyon v. McCrary25, the plaintiffs sought to apply a section of a Reconstruction-era statute to a discriminatory private school. In Jones v. Alfred H. Mayer Co.26, the Court had held, probably incorrectly, that another section of the statute applied to private conduct, despite several clear signs that the statute was meant only to govern state action. Although he considered Jones to have been wrongly decided, Justice Stevens recognized that it was too late to turn back the clock:

The policy of the Nation as formulated by the Congress in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society. This Court has given a sympathetic and liberal construction to such legisla-

24. 463 U.S. at 712 (Stevens, J., dissenting) (citations omitted).
tion. For the Court now to overrule Jones would be a significant step backwards, with effects that would not have arisen from a correct decision in the first instance. Such a step would be so clearly contrary to my understanding of the mores of today that I think the Court is entirely correct in adhering to Jones.27

Many of the themes of Justice Stevens’ statutory interpretation opinions converged in his dissent in West Virginia University Hospitals, Inc. v. Casey, 111 S. Ct. 1138 (1991). The Court held in Casey that expert witness fees were not included in the statutory grant of “attorneys fees” to successful civil rights plaintiffs. In dissent, Justice Stevens found no reason to believe that Congress meant to compensate for an attorney’s time, but not for work done more efficiently by an expert instead of the attorney.28 The case before the Court involved “precisely the type of public interest litigation that Congress intended to encourage” with fee shifting, and the Court’s nigling reading of the statute was “at war” with that congressional purpose.

More generally, Justice Stevens observed that the Court has recently vacillated “between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation.”29 He recalled a rash of recent cases where “the Court has put on its thick grammarian’s spectacles and ignored the available evidence of congressional purpose and the teaching of prior cases.”30 As a result of these exercises in literalism, Congress often had to pass new legislation to overturn the Court’s holdings. As he reminded the Court, forcing this bur-

27. 427 U.S. at 191-192. Even where the law has been developed by the lower courts rather than the Supreme Court, maintaining the stability of the legal fabric has been a concern of Justice Stevens. In McNally v. United States, 483 U.S. 350 (1987), the majority sharply restricted the application of the mail fraud statute to political corruption, in the process overturning dozens of lower court decisions. For Justice Stevens, “the most distressing aspect of the Court’s action today is its casual—almost summary—rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question these cases present.” 483 U.S. at 376.
29. 111 S.Ct. at 1153-1154.
30. 111 S.Ct. at 1154. Regarding the teachings of prior cases, he reminded the Court of Justice’s Cardozo’s sound advice to the judge to “lay [his] own course of bricks on the secure foundation of the courses laid by others who had gone before him.” 111 S.Ct. at 1149 n.2.
den on Congress comports poorly with the Court’s obligation to act as a faithful agent of the legislature:

In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress’ actual purpose and require it “to take the time to revisit the matter” and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error.\(^{31}\)

As one commentator remarked, Justice Stevens proved to be a “good prophet”: Congress did indeed revisit the \textit{Casey} holding.\(^{32}\)

Even if he had never been an antitrust lawyer, Justice Stevens’ opinions would undoubtedly combine formidable analysis with rugged common sense. Neither analytical ability nor good judgment are unique to any one area of law. But antitrust law illustrates particularly well how a congressional policy judgment can form the foundation for dynamic judicial interpretation. Thus, it provided the perfect setting for the kind of principled, yet practical approach that Stevens has applied more broadly.

The current leading scholars in statutory interpretation identify Justice Stevens an exemplar of practical reason in statutory interpretation.\(^{33}\) Indeed, his hallmark as a Justice has been the exercise of practical reason—the exercise of good judgment in mediating between the general and the concrete. In that, he is the contemporary successor of Justices Harlan and Cardozo.

When introducing Justice Stevens at the beginning of his confirmation hearings, Attorney General Levi said:

Judge Stevens . . . is truly outstanding. His opinions . . . are gems of perfection. He is a craftsman of the highest order. He has a built-in direction system about how a judge should approach a problem fairly, squarely, succinctly. His opinions are a joy to read. . . .\(^{34}\)

Perhaps it seemed like hyperbole at the time. But today, the proof appears in over sixty bound volumes of the \textit{United States Reports}.

\(^{31}\) 111 S.Ct. at 1155.  
\(^{32}\) Philip Frickey, From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation, 77 Minn. L. Rev. 241, 266 (1992).  
\(^{33}\) See generally William Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 921 (1990) (repeatedly referring to Stevens opinions as examples).  
\(^{34}\) See Kramer, supra note 1, at 333.