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## Justice Potter Stewart

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## JUSTICE POTTER STEWART

HONORABLE VINCENT L. BRODERICK\*

Justice Potter Stewart† has completed twenty-two years of service on the Supreme Court of the United States. After twenty-two years of his Supreme Court work, we can see that his well reasoned, concisely limited opinions have done much to give order and direction to our legal world.

A review of the impact that Justice Stewart has had upon the law of equal protection should be prefaced by a consideration of the major events in his life prior to his appointment to the Supreme Court. Presumably these events helped shape his judicial perspective and style.

Potter Stewart was born in 1915. His father served several terms as mayor of Cincinnati before becoming a member of the Ohio Supreme Court. Thus, a tradition of public service was one of the early influences on the young Potter Stewart.<sup>1</sup>

The underpinning of his own public service was a fine education, which he began at the University School in Cincinnati and continued at Hotchkiss in Connecticut and at Yale. At Yale, Justice Stewart edited the *Yale Daily News*.<sup>2</sup> Evidently, the rigorous demands of his college newspaper work did not impede his academic activities, for he managed to garner a host of academic honors.<sup>3</sup> My research has not made it clear whether the lucid and pithy writing style that characterizes his Supreme Court opinions was brought by Justice Stewart to Yale or developed through his work on the *Yale Daily News*. The style appears in his college editorials, in which we see some of the first indications of what would later become one of his hallmarks: his independence from narrow ideological labels.

It is not possible to categorize the ideology of Potter Stewart today,

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\* Federal District Court Judge for the Southern District of New York; A.B., Princeton University, 1941; LL.B., Harvard University, 1948.

† Judge Broderick's presentation and this article were prepared prior to Justice Stewart's announcement of his plan to retire at the end of the 1980 Term.

1. J. Israel, *Potter Stewart* in IV THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 2921-22 (L. Friedman & F. Israel eds. 1969).

2. *Id.* See also Paschal, *Mr. Justice Stewart on the Court of Appeals*, 1959 DUKE L.J. 325, 326.

3. J. Israel, *supra* note 1, at 2922. See also 4 YALE L. REP. No. 3 at 10-11 (Winter 1958).

and this was probably also true in his Yale years. His family had been active in the Republican party, and the Yale student body was generally regarded as Republican by birthright. Yet, the young Potter Stewart expressed support for at least some of the New Deal policies of Franklin Delano Roosevelt.<sup>4</sup> Justice Stewart in later years was to say of the terms "liberal" and "conservative": "I have some difficulty understanding what these terms mean even in the field of political life or in the legislative or executive branches, and I find it impossible to know what they mean when they are carried over to judicial work."<sup>5</sup> What is clear is that upon completion of his undergraduate career at Yale, Potter Stewart was acutely aware that change is a fact of American life and that such change has an impact upon traditional values. As class orator, he spoke of the "New Deal and the changing Constitution" and noted that he and his classmates were "keenly sensible of the fact that many of the institutions and ideas that our fathers have known, and we have known . . . [have] already begun to crumble."<sup>6</sup>

Justice Stewart had a year of post-graduate study on a Henry fellowship at Cambridge University in England before he entered Yale Law School.<sup>7</sup> It was an interesting time for a future Supreme Court Justice to be at Yale Law School. Only a few years had passed since the Supreme Court of the early and mid-1930's had overruled, upon substantive due process grounds, various New Deal measures designed, for good or for ill, to bring the country out of the Great Depression.<sup>8</sup> Many of our nation's brightest minds—including those of the Yale Law School faculty—were drawn to the problem of what the proper role of the Supreme Court of the United States of America should be. Certain Yale Law School teachers—so-called "realists" in legal thought—rejected the myth that judges somehow discovered and impartially applied a stable body of laws.<sup>9</sup> According to these legal realists, the value judgments, personal habits, and social background of the judges influence their decisions in degrees ranging from subtle to blatant. To the legal realists, the 1932-1936 Supreme Court exemplified a judiciary that substituted the philosophies and policies of its members for those of the members of the legislative and executive branches of the government.<sup>10</sup>

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4. J. Israel, *supra* note 1, at 2922; YALE L. REP., *supra* note 3, at 10-11.

5. J. Israel, *supra* note 1, at 2921.

6. *Id.* at 2922.

7. *Id.*

8. *Id.* During this period the Court struck down "laws fixing minimum wages and maximum hours of employment, laws fixing prices, and laws regulating business activities." *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 535 (1949). Since 1937, the Court has struck down no law on substantive due process grounds. G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 591 (9th ed. 1975).

9. J. Israel, *supra* note 1, at 2922.

10. *Id.*

The realists emphasized the necessity of developing the ability to recognize and to identify the policy considerations necessarily encountered in dealing with complex legal problems. They taught that a personal policy choice was virtually inevitable in rendering a judicial opinion and that the greatest sin was trying to cover up the fact. It was better to make that personal policy choice clear, thus facilitating change in the decision itself if it became apparent that other policies should be taken into account.

None of us can know with certainty what effect the turmoil surrounding the 1932-1936 Supreme Court and the teachings of Yale Law School's realists had in shaping Potter Stewart's role model of a Supreme Court Justice. We know that Potter Stewart achieved high marks throughout his law school career,<sup>11</sup> and we might reasonably infer that he developed his mastery of the basic analytical tools of his profession under the influence of those legal realists. Judge Stewart was nominated to the Supreme Court in 1958 by President Eisenhower. One of his professors at Yale Law School was to comment that he was "one of the most intelligent, dynamic and personally attractive students who have [*sic*] attended the Yale Law School in the past thirty years."<sup>12</sup>

In one of the last conventional steps in his legal career, Potter Stewart joined a Wall Street firm upon his graduation in 1941.<sup>13</sup> He had been working at that firm less than a year when the Japanese attacked Pearl Harbor. He joined the Navy and "spent most of the war as a deck officer on oil tankers serving in the Atlantic and Mediterranean."<sup>14</sup> In his own words, his service career consisted largely of "floating around in a sea of 100 octane gas, bored to death ninety-nine per cent of the time and scared to death one per cent."<sup>15</sup>

As it did for so many of us, the war exposed Potter Stewart to a broader circle than he would ordinarily have expected to encounter on Wall Street. His service as defense counsel in several summary court-martial proceedings<sup>16</sup> may not have contributed to his ability to deal with corporate legal problems, but it is probable that the exposure later served him well in grappling with the problem of making the legal system available to everyone, both in theory and in economically practical terms as well.

Potter Stewart left the Navy with three battle stars<sup>17</sup> and, apparently,

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11. J. Israel, *supra* note 1, at 2922.

12. YALE L. REP., *supra* note 3, at 11 (quoting Professor Ashbel G. Gulliver, Dean of Yale Law School during Justice Stewart's law student days).

13. J. Israel, *supra* note 1, at 2922.

14. *Id.*

15. *Id.*

16. *Id.* at 2923.

17. *Id.* at 2922.

very little taste for resuming his New York practice. After a brief sojourn in New York City, he moved to Cincinnati and joined one of that city's leading firms.<sup>18</sup> He developed a practice that included litigation, and he defended several indigent criminal defendants, spanning the spectrum from murder<sup>19</sup> to much more minor affairs. He soon followed in his father's footsteps and entered politics. He became a member of the city council of Cincinnati and served one term as vice-mayor.<sup>20</sup>

In 1954, President Eisenhower nominated Potter Stewart, then thirty-nine years old, to fill a vacancy on the Sixth Circuit Court of Appeals.<sup>21</sup> His careers as newspaper editor, navy officer, politician, and lawyer were over, and his career in the federal judiciary began.

In his next four years on the Sixth Circuit Court, Judge Stewart dealt with some cases germane to our general theme of equal protection. He wrote an opinion on segregation in Ohio public schools,<sup>22</sup> for example, overturning a lower court decision that allowed segregation to continue until new schools were built.<sup>23</sup> In a right-to-counsel case, he stood alone in his declaration that the fourteenth amendment rights of the defendant had been violated and that the court should do something about it.<sup>24</sup>

Justice Stewart's performance on the Sixth Circuit Court of Appeals drew attention, and when Justice Harold H. Burton resigned from the Supreme Court in 1958, President Eisenhower appointed Judge Stewart to fill the vacancy.<sup>25</sup> At age forty-three Potter Stewart was the second youngest Associate Justice of the Supreme Court since antebellum days.<sup>26</sup> His youth was duly noted at the time:

The appointment of Potter Stewart to the Supreme Court has given us notice that a new generation is taking over in law as well as elsewhere. Of his predecessors, only Mr. Justice Brennan finished law school so late as 1931. With Mr. Justice Stewart, the year is advanced to 1941 and the years of maturation advanced still further. He alone of the justices had his first serious encounter with the law after the revolution of 1937 and after the Supreme Court, in response to repeated importunities, began really to function as the guardian of civil rights.

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18. *Id.* at 2923.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Clemons v. Board of Educ.*, 228 F.2d 853 (6th Cir. 1956).

23. *Id.* at 855.

24. The state court decision was *People v. Henderson*, 343 Mich. 465, 72 N.W.2d 177 (1955), *cert. denied*, 351 U.S. 967 (1956). Justice Stewart was the sole dissenter in the court of appeals opinion affirming the district court's denial of a petition for writ of habeas corpus. *Henderson v. Bannan*, 256 F.2d 363, 385 (6th Cir. 1958).

25. J. Israel, *supra* note 1, at 2923.

26. *Id.*

Furthermore, it is important to note that Stewart's world has been one in which the teachings of Pound and even Llewellyn and Frank have long since settled into the fabric of the legal order. These old victories he undoubtedly accepts, but only casually, much as one accepts the abolition of the forms of action. He thus does not have the passion of a Black or a Murphy in fashioning a new rampart. Neither does he have the feeling one senses in Harlan of puzzlement and wonder at a strange, new landscape. And, certainly, he does not smart under the disillusionment which gave overtones of tragedy to Jackson's career.

The point of all this perhaps is that Stewart will bring few new values within the compass of the law. But the point is also that he can be relied on not to depreciate those values he finds already there. . . . Happily, he inherits a more spacious legal world than did his predecessors. Perhaps his great task—and eventually his great achievement—will be to contribute toward making that legal world an orderly one.<sup>27</sup> And in this, he has certainly succeeded.

### JUSTICE STEWART'S JUDICIAL "STYLE"

One who immerses himself in Justice Stewart's judicial product learns that there is a Stewart judicial style. I use the word "style" to encompass substantive approach as well as mode of presentation, which is one way of explaining that I plan to deal with Justice Stewart's "style" at some length. I perceive this judicial style as an integral part of Justice Stewart's contribution to the development of equal protection principles.

At the outset, Justice Stewart's judicial style can best be described as entailing the application of a litany of maxims:

- (a) shorter is preferred over longer;
- (b) narrower is preferred over broader;
- (c) no issue is to be decided that does not have to be decided;
- (d) apply practical standards, not platitudes or generalities; and
- (e) respect precedent.

No one of these maxims alone is startling, and there is nothing remarkable in the application of all of them in any given opinion. It *is* truly remarkable that Justice Stewart managed to apply all of these maxims in virtually all of his opinions throughout his twenty-two years on the Supreme Court. The product of this fidelity is a body of opinions which are logical, restrained, eminently readable, and terse.

A mechanism through which Justice Stewart frequently applies these maxims is the one-paragraph concurring opinion. In these concurring opinions we encounter gems of practicality, caution, and economy of words.

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27. Paschal, *supra* note 2, at 340.

Thus, in *United States v. Watson*,<sup>28</sup> where the Court held that an arrest in a public place without a warrant was permissible, Justice Stewart was concerned that the majority opinion might be applied in situations beyond the facts of that particular case. He expressed this concern in a concurring opinion of three sentences:

The arrest in this case was made upon probable cause in a public place in broad daylight. The Court holds that this arrest did not violate the Fourth Amendment, and I agree. The Court does *not* decide, nor could it decide in this case, whether or under what circumstances an officer must obtain a warrant before he may lawfully enter a private place to effect an arrest.<sup>29</sup>

Another example of Justice Stewart's short, pithy style can be found in his one paragraph concurrence in *Giaccio v. Pennsylvania*.<sup>30</sup> At issue was the constitutional validity of an 1860 Pennsylvania statute which gave Pennsylvania jurors in a criminal case the power to assess costs against the defendant, even if the defendant had been acquitted. Justice Stewart wrote:

It seems to me that, despite the Court's disclaimer, much of the reasoning in its opinion serves to cast grave constitutional doubt upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense. Though I have serious questions about the wisdom of that practice, its constitutionality is quite a different matter. In the present case it is enough for me that Pennsylvania allows a jury to punish a defendant after finding him not guilty. That, I think, violates the most rudimentary concept of due process of law.<sup>31</sup>

Justice Stewart's penchant for brevity also allows him to turn a nice phrase from time to time. In *Lynch v. Household Finance Corp.*,<sup>32</sup> the issue before the Court was whether federal courts should hear the due process claims of debtors who felt they should be allowed some form of hearing before their property could be seized. In the opinion for the Court, Justice Stewart made it clear that rights in property were basic civil rights. I quote from the opinion, and draw attention to the short, sweet, and yet powerful couplet immediately after the first quoted sentence:

[T]he dichotomy between personal liberties and property rights is a false one. *Property does not have rights. People have rights.* The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings ac-

28. 423 U.S. 411 (1976).

29. *Id.* at 433 (citations omitted).

30. 382 U.S. 399 (1966).

31. *Id.* at 405.

32. 405 U.S. 538 (1972).

count. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. Congress recognized these rights in 1871 when it enacted the predecessor of §§ 1983 and 1343(3). We do no more than reaffirm the judgment of Congress today.<sup>33</sup>

Respect for precedent is another characteristic of Justice Stewart. Perhaps the best example of this trait appears in his dissent in *Mitchell v. W.T. Grant Co.*<sup>34</sup> In *Mitchell*, the Court upheld a state statute that permitted seizure of a debtor's property without a prior hearing. The Court had stricken a similar statute just two years earlier in *Fuentes v. Shevin*,<sup>35</sup> an opinion written by Justice Stewart himself. In his dissent in *Mitchell*, Justice Stewart despaired of the Court's indifference to precedent:

In short, this case is constitutionally indistinguishable from *Fuentes v. Shevin*, and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent. . . .

It seems to me that unless we respect the constitutional decisions of this Court, we can hardly expect that others will do so. A substantial departure from precedent can only be justified, I had thought, in the light of experience with the application of the rule to be abandoned or in the light of an altered historical environment. Yet the Court today has unmistakably overruled a considered decision of this Court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of *stare decisis* . . .

. . . The only perceivable change that has occurred since *Fuentes* is in the makeup of this Court.

A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.<sup>36</sup>

Perhaps the Court listened to this strong dissent, because the *Fuentes* holding was resurrected after *Mitchell* in the case of *North Georgia Finishing, Inc. v. Di-Chem, Inc.*<sup>37</sup> This about face prompted the following tongue-in-cheek concurrence: "It is gratifying to note that my report of the demise of *Fuentes v. Shevin*, . . . see *Mitchell v. W.T. Grant Co.*, . . . seems to have been greatly exaggerated. Cf. S. Clemens,

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33. *Id.* at 552 (citations omitted).

34. 416 U.S. 600 (1974).

35. 407 U.S. 67 (1972).

36. 416 U.S. at 634-36.

37. 419 U.S. 601 (1975).



cable from Europe to the Associated Press, quoted in . . . Mark Twain: A Biography . . . ."<sup>38</sup>

One of the important ends served by Justice Stewart's concurring opinions has been to delineate, in clear and direct language, the precise holdings of the Court. He chooses his words and phrases precisely. He says, and means, "thus far and no further." When Justice Stewart has been on the Supreme Court some seven years, a perceptive author found the possible roots of this aspect of his style in his court of appeals experience:

One of Justice Stewart's prime concerns is with the Supreme Court's responsibility to clarify—to state precisely what the law is, and thus give guidance to lawyers and to federal and state judges. The Justice's concern with guidance perhaps can be traced to his own experience as a court of appeals judge. The first opinion he wrote for the Supreme Court reflects this concern; in it he wrote that it would "promote analysis . . . of the case to emphasize at the outset what it does not involve." The vehicle which Justice Stewart most often utilizes for clarification is the concurring opinion, whether in support of a majority opinion or in opposition to a dissent. In concurring opinions, he often states what is and what is not decided, what action is required of the lower courts to conform to the Court's holding, or why the dissent may be misinterpreting the majority opinion.<sup>39</sup>

Another example of Justice Stewart's clarification of a holding of the Court appears in *Elrod v. Burns*,<sup>40</sup> which involved a dismissal of a public employee for political reasons. Justice Brennan wrote a three-man plurality opinion holding that the plaintiff's had been unconstitutionally discharged.<sup>41</sup> In a concurring opinion,<sup>42</sup> Justice Stewart identified the "single substantive question" presented by *Elrod* to be "whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs."<sup>43</sup> The Supreme Court later extended the doctrine of *Elrod* beyond nonpolicymaking, nonconfidential government employees in *Branti v. Finkel*.<sup>44</sup> Three Justices, including Justice Stewart, dissented.<sup>45</sup> Justice Stewart, who did not write in dissent, joined that portion of the dissenting opinion that indicated the majority had strayed beyond the limits set forth in his *Elrod* concurrence.<sup>46</sup>

38. *Id.* at 608.

39. Note, *Mr. Justice Potter Stewart*, 40 N.Y.U. L. REV. 526, 527-28 (1965).

40. 427 U.S. 347 (1976).

41. Joining Justice Brennan were Justices White and Marshall. *Id.*

42. *Id.* at 374.

43. *Id.* at 375.

44. 100 S. Ct. 1287 (1980).

45. *Id.* at 1296.

46. *Id.*

While it is not precisely a matter of style, but rather one of judicial philosophy, I note one more hallmark of Justice Stewart's judicial approach: his reluctance to subscribe to total prohibition of the exercise of governmental power in any given area. The development of this particular aspect of his judicial approach may stem from the political and judicial events during his formative years in the 1930's when the Supreme Court frequently limited or eliminated government action in many economic areas.<sup>47</sup> Professor J.H. Israel has commented on this aspect of the Stewart approach: "Stewart rejected any attempt to impose a total prohibition against the exercise of government power in a particular area . . . but was willing, in light of the particular case before him, to impose such limited restrictions on the use of that power as were necessary to prevent its abuse."<sup>48</sup>

#### CONTRIBUTIONS TO EQUAL PROTECTION WHILE ON THE WARREN COURT

One of Justice Stewart's significant opinions for the Warren Court was *Jones v. Alfred H. Mayer Co.*<sup>49</sup> The issue presented was simple: can a homeowner refuse to sell his or her home to an individual because that individual is black? The Court considered the case in 1968, the year in which Congress passed the Fair Housing Act.<sup>50</sup> The focus of the legal arguments was on whether the Civil Rights Act of 1866<sup>51</sup> should be given a broad or narrow interpretation. Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."<sup>52</sup>

The defendant argued that the history of section 1982 indicated that it was designed solely to block the infamous "Black Codes"<sup>53</sup> adopted by many southern states to prevent blacks from buying property. In addition, the defendant argued that in *Hurd v. Hedge*,<sup>54</sup> the Supreme

47. See text accompanying note 9 *supra*.

48. J. Israel, *supra* note 1, at 2927.

49. 392 U.S. 409 (1968).

50. 42 U.S.C. §§ 3601-63 (1976). Indeed, some of the Justices dissented in *Jones* on the grounds that the Fair Housing Act, to become effective at the end of the year, would provide the relief which the plaintiff sought, and that is more appropriate for this relief to be provided by direct congressional action rather than by the Supreme Court's interpretation of an ancient statute. 392 U.S. at 478. Justice Harlan, referring to the recent passage of the Housing Act, put it this way: "The political process now having taken hold again in this very field, I am at a loss to understand why the Court should have deemed it appropriate or, in the circumstances of this case, necessary to proceed with such precipitate and insecure strides." *Id.*

51. Civil Rights Act, ch. 31 § 1, 14 Stat. 27 (1866) (codified at 42 U.S.C. § 1982 (1976)).

52. 42 U.S.C. § 1982 (1976).

53. 392 U.S. at 426.

54. 334 U.S. 24 (1948).

Court had stated in dictum that section 1982 was directed only toward "governmental action" and not action by private citizens.<sup>55</sup>

One can almost see the addendum opinion that Justice Stewart might have written in *Hurd* had he been on the Court in 1948. It would have started with the words: "What the Court does *not* decide today, and indeed what it *cannot* decide in the case before it . . . ." What he could not write in 1948, Justice Stewart wrote, in substance, in 1968: "It is true that a dictum in *Hurd* said that § 1982 was directed only toward 'governmental action,' but neither *Hurd* nor any other case before or since has presented that precise issue for adjudication in this Court."<sup>56</sup>

We will never know how many plaintiffs' attorneys, between 1948 and 1968, decided, based on the *Hurd* dictum, that there was no basis for a constitutional challenge to private housing discrimination. We do know that in that twenty-year period no challenge to private housing discrimination reached the Supreme Court. Until *Jones*, no Supreme Court case had ever squarely presented the issue. Thus, we begin to realize the significance of Justice Stewart's insistence that the Supreme Court—for its own guidance as well as the guidance of others—carefully delineate what it is, and what it is not, deciding.

Having disposed of the argument that he was bound by precedent, Justice Stewart considered the statute and concluded that it meant exactly what it said:

On its face, therefore, § 1982 appears to prohibit *all* discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities. . . . Stressing what they consider to be the revolutionary implications of so literal a reading of § 1982, the respondents argue that Congress cannot possibly have intended such a result. Our examination of the relevant history, however, persuades us that Congress meant exactly what it said.<sup>57</sup>

And in a later section:

Thus, when Congress provided in § 1 of the Civil Rights Act [of 1866] that the right to purchase and lease property was to be enjoyed equally throughout the United States by Negro and white citizens alike, it plainly meant to secure that right against interference from any source whatever, whether governmental or private.<sup>58</sup>

Through a rigorous historical analysis, Justice Stewart demonstrated that the Black Codes constituted only one of the forms of discrimina-

55. 392 U.S. at 436.

56. *Id.* at 419-20 (citations omitted).

57. *Id.* at 421-22.

58. *Id.* at 423-24.

tion that prompted Congress to pass the 1866 Act.<sup>59</sup> He noted that the members of the 1866 Congress, being perceptive men, realized that custom and tradition could induce discrimination just as well as governmental action.<sup>60</sup> In perhaps the most striking blow to the defendant's argument, Justice Stewart pointed out that the penalty provisions of the Act prescribed specific punishment for only governmental agents acting under color of law.<sup>61</sup> He concluded that Congress intended the Act to apply to two categories of offenders, those who discriminated against blacks in property transactions, and those who engaged in such discrimination *under the color of law*. Only the smaller group, drawn for the first, was singled out for punishment.<sup>62</sup>

Having determined the purpose of section 1982, Justice Stewart turned to the issue of whether the Act was within the constitutional power of Congress. He determined that it was.<sup>63</sup> He asserted that the enabling clause of the thirteenth amendment,<sup>64</sup> which abolished slavery, "clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*'"<sup>65</sup> Hence, Congress could determine that a private individual's refusal to sell real property to another merely because the prospective buyer was black was a "badge or incident of slavery," and it was within Congress' power to pass laws to prohibit such conduct.<sup>66</sup>

I quote again from Justice Stewart:

At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.<sup>67</sup>

Prior to *Jones*, the thirteenth amendment and the Civil Rights Act of 1866 had been essentially dead areas of the law; after *Jones*, they came to life. The vitality which *Jones* restored to the Civil Rights Act of 1866 paved the way for *Runyon v. McCrary*,<sup>68</sup> in which Justice Stewart, writing for the Court, applied a companion law<sup>69</sup> to ban discrimination

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59. *Id.* at 424-37.

60. *Id.* at 423.

61. *Id.* at 426.

62. *Id.*

63. *Id.* at 439.

64. U.S. CONST. amend. XIII, § 2 states: "Congress shall have power to enforce this article by appropriate legislation."

65. 392 U.S. at 439 (emphasis by the Court).

66. *Id.* at 441-43.

67. *Id.* at 443.

68. 427 U.S. 160 (1976).

69. 42 U.S.C. § 1981 (1976) (originally enacted as Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144).

in most private contracts.

Early commentators were fond of calling Justice Stewart the "swing vote" on the Warren Court,<sup>70</sup> primarily because they had difficulty fitting him into the popular perception of an "activist-passivist" split which had existed for a few years prior to his appointment.<sup>71</sup> While Justice Stewart indeed cast the critical vote in a number of five-to-four decisions by the Court,<sup>72</sup> he made important contributions in the many cases in which his draft opinions drew other members of the Court to a consensus. Such a case was *United States v. Guest*.<sup>73</sup>

*United States v. Guest* involved a conspiracy to beat, threaten, and murder blacks in Georgia in order to discourage them from using various public facilities. The conspirators were indicted, but the district court dismissed the indictment on the authority of the 1883 Supreme Court decision in the *Civil Rights Cases*.<sup>74</sup> The rationale of the dismissal was that the defendants were private individuals and that Congress did not have the power under the fourteenth amendment to punish conspiracies by *private* persons to violate the fourteenth amendment rights of others; Congress could only adopt legislation to *correct* the effect of prohibited *state laws* and *state acts*.<sup>75</sup> Justice Clark, joined by Justices Black and Fortas, took the position in *Guest* that Congress could pass, and had passed, appropriate legislation to prevent private conspiracies aimed at denying blacks their civil rights.<sup>76</sup> In a concurring opinion, Justice Brennan, joined by the Chief Justice and Justice Douglas, also took the position that Congress was empowered by the fourteenth amendment to punish actions amounting to private discrimination or deprivation of basic civil rights.<sup>77</sup> In all, six members of the Court were prepared to overrule the 1883 decision in the *Civil Rights Cases*. Justice Stewart wrote an opinion that ultimately became the opinion of the Court, in which he found a way to achieve the ends sought by the other Justices, without disturbing precedent.<sup>78</sup>

The manner in which he accomplished this was in keeping with the Stewart style. A careful reading of the challenged indictment revealed to Justice Stewart what the others had evidently ignored or overlooked—an allegation that the conspirators planned to bring about the

70. *E.g.*, Note, *supra* note 39, at 526.

71. Justices Frankfurter, Whitaker, Clark, and Harlan comprised the "passivist" group on the Court. The "activist" group consisted of Chief Justice Warren and Justices Black, Douglas, and Brennan. *Id.*

72. J. Israel, *supra* note 1, at 2925.

73. 383 U.S. 745 (1966).

74. 109 U.S. 3 (1883).

75. *Id.* at 11.

76. 383 U.S. at 761-62.

77. *Id.* at 777.

78. *Id.* at 746-60.

arrest of blacks by falsely attributing criminal activities to them.<sup>79</sup> Thus, Justice Stewart showed that the indictment in fact charged discrimination based on the requisite state action: false arrests would necessarily involve agents of the state.

His opinion in *Guest* pointed the way for plaintiffs in subsequent civil rights cases. By including an allegation that the private discrimination complained of would eventually lead to state action, albeit unwitting state action, that would aid the private conspirators in depriving blacks of their civil rights, plaintiffs could avail themselves of federal court intervention. A cause of action giving rise to a fundamentally distinct category of civil rights cases had been disclosed by Justice Stewart's opinion; yet, no precedent had been disturbed.

Throughout Justice Stewart's tenure on the Court, he has evinced an awareness of the potential dangers of unlimited expansion of federal power. The tension between his concern for restraining government and his interest in protecting the constitutional rights of all citizens has become more evident in recent years. But the dynamic interplay between the values of equality and governmental restraint appeared in his opinions during the years of the Warren Court.<sup>80</sup> One of the important "state action" cases, *Burton v. Wilmington Parking Authority*,<sup>81</sup> offers an illustrative example.

In *Burton*, a private restaurant, which rented space in a publicly owned parking building in Wilmington, Delaware, refused to serve the plaintiff because he was black. The suit against the restaurant and the state agency operating the parking building sought injunctive relief on the ground that the actions of the state agency and the private restaurant violated the plaintiff's fourteenth amendment rights to equal protection.<sup>82</sup> The Supreme Court of Delaware held that because the restaurant was a purely private entity, no relief could be afforded the plaintiff under the fourteenth amendment, which proscribed only discriminatory actions of a state.<sup>83</sup> The Delaware Court also held that it was legal for the restaurant to exclude the black man because a Delaware statute provided that no restaurant owner could be required to serve a customer "whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business."<sup>84</sup>

A majority of the Court found the requisite state action in the symbi-

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79. *Id.* at 756.

80. *E.g.*, *Shelton v. Tucker*, 364 U.S. 479 (1960).

81. 365 U.S. 715 (1961).

82. *Id.* at 716.

83. *Id.*

84. *Id.* at 717 & n.1.

otic relationship between the state, which owned the parking facility, and the restaurant, which rented space in it.

The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.<sup>85</sup>

This language sowed the seeds for a potentially massive expansion of the parameters of state action. The concept of "government insinuation" into an otherwise private business was broad enough to reach a host of private enterprises. The Court was clearly aware of this danger, and the majority attempted to forestall such a broad reading of the opinion by "[s]pecifically defining the limits" of the decision to the sort of leasehold situation at issue in the case.<sup>86</sup>

Justice Stewart concurred with the judgment, but resisted expansion of the definition of state action to cover the leasehold situation.<sup>87</sup> He foresaw a slippery slope leading to ever-widening federal intervention in this area. As in *United States v. Guest*, he searched the record for evidence of a more conventional indication of state action that would afford a basis for relief. He found what he was looking for in the Delaware statute that authorized innkeepers to exclude whomever they deemed potentially offensive to their guests. His one paragraph concurrence was clear, short, logical, and in the Stewart style:

I agree that the judgment must be reversed, but I reach that conclusion by a route much more direct than the one traveled by the Court. In upholding Eagle's right to deny service to the appellant solely because of his race, the Supreme Court of Delaware relied upon a statute of that State which permits the proprietor of a restaurant to refuse to serve "persons whose reception or entertainment by him would be offensive to the major part of his customers . . . ." There is no suggestion in the record that the appellant as an individual was such a person. The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment. I think, therefore, that the appeal was properly taken, and that the statute, as authoritatively construed by the Supreme Court of Delaware, is constitutionally invalid.<sup>88</sup>

By relying on the specific statute, rather than on an expanded definition of "state action," Justice Stewart accomplished his objective of achieving justice without sowing the seeds of a significant expansion in federal power. His opinion illustrates the predilection of Justice Stew-

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85. *Id.* at 725.

86. *Id.* at 726.

87. *Id.* at 726-27.

88. *Id.*

art's jurisprudence—to promote equality within prudently drawn restraints on government power. His opinion also illustrates his penchant for writing decisions that go no further than the facts of a particular case permit and do no less than those facts require.

### POST-WARREN COURT CONTRIBUTIONS

If I were to speculate on Justice Stewart's reaction to contrapuntal characterizations of the "Warren Court" and the "Burger Court," I suspect that he would reject them. I suspect that he would say that the Court is a continuum with occasional changes in membership and that the past—its past—is prelude. As prelude, that past, and the decisions which constitute that past, cannot be disregarded and should be built upon.

The substance with which the equal protection clause is endowed today stems largely from the judicial initiatives taken by the Warren Court. In certain areas, that substance has been enhanced in the post-Warren era. To the extent that this is so, Justice Stewart, as a senior,<sup>89</sup> although still relatively young member of the Burger Court, bore a considerable portion of the responsibility and should receive a considerable portion of the credit. I believe that there are four characteristic areas of Justice Stewart's post-Warren Court judicial activities that mandate comment.

1. *He continued to apply the civil rights statutes to situations involving invidious, purposeful discrimination.*

One contribution of the Warren Court that Justice Stewart has continued is the reanimation of the thirteenth amendment as a constitutional imperative. His efforts in this direction, dramatically begun in *Jones v. Mayer*, were renewed in *Griffin v. Breckenridge*.<sup>90</sup>

The facts in *Griffin* were truly compelling. The plaintiffs were black residents of DeKalb, Mississippi. While they were driving along a public highway, a large truck suddenly cut them off and forced them to the side of the road. Two armed white men sprang from the truck, pointed guns at the frightened blacks, threatened to kill them, and clubbed them until they were badly injured.<sup>91</sup> The plaintiffs sought damages in federal court for an alleged violation of the Civil Rights Act of 1871,<sup>92</sup> which establishes a cause of action for damages caused by a conspiracy to deprive "any person or class of persons of the equal protection of the

89. Upon his retirement, Justice Stewart had served on the Court longer than any other Justice with the exception of Justice Brennan.

90. 403 U.S. 88 (1971).

91. *Id.* at 90-91.

92. 42 U.S.C. § 1985(3) (1979 & Supp. III 1979).



laws, or of equal privileges and immunities under the laws . . . ."<sup>93</sup>

The issue in *Griffin* was whether this aged statute could, consistently with the Constitution, authorize an action by private citizens against other private citizens when there was no participation by the state in the objectionable activity and no other trace of state action. The district court dismissed the action on the authority of a twenty-year old case<sup>94</sup> that had interpreted the statute to require that any objectionable activity must have been committed under color of state law. The Court of Appeals for the Fifth Circuit reluctantly affirmed.<sup>95</sup>

Building on the base that he had established in *Jones v. Mayer*, Justice Stewart, writing for the Court, upheld the petitioners' right to maintain the action under section 1985(3) against the private parties. Drawing on the language of the statute, the interpretation of related civil rights laws, and on legislative history, he rejected the argument that state action was a necessary predicate for recovery.<sup>96</sup> *Griffin*, like *Jones v. Mayer*, represented a fresh and powerful interpretation of the thirteenth amendment and of the words "equal protection" which freed them from the operational limitations and encrustations that had developed in years of interpretation of the fourteenth amendment. As Justice Stewart wrote:

A century of Fourteenth Amendment adjudication has, in other words, made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase [equal protection] that requires the action working the deprivation to come from the State.<sup>97</sup>

In *Albemarle Paper Co. v. Moody*,<sup>98</sup> another case involving statutory interpretation, Justice Stewart once again wrote an opinion affording broader relief under the civil rights statutes. The statute in question was Title VII of the Civil Rights Act of 1964.<sup>99</sup> The subject matter of the action was, as to this locale, literally close to home. The plaintiffs, black employees at a paper mill in Roanoke Rapids, North Carolina, sought a permanent injunction to stop certain employment practices.<sup>100</sup> The paper mill, which had historically discriminated against blacks, required any person seeking to transfer from an unskilled to a higher-paid skilled position to pass tests of verbal ability and nonverbal intelligence.<sup>101</sup>

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93. *Id.*

94. *Collins v. Hardyman*, 341 U.S. 651 (1951).

95. *Griffin v. Breckenridge*, 410 F.2d 817, 825-27 (5th Cir. 1969).

96. 403 U.S. at 95-96.

97. 403 U.S. at 97.

98. 422 U.S. 405 (1975).

99. Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e-2000e-12 (1976)).

100. 422 U.S. at 409.

101. *Id.* at 410-11.

Four years earlier, in *Griggs v. Duke Power Co.*,<sup>102</sup> the Supreme Court recognized that such tests were often used as instruments of blatant discrimination. The Court in *Griggs* had unanimously set forth a requirement that such performance tests were unlawful when they had the effect of discriminating against blacks, unless the tests could be shown to relate to job performance.<sup>103</sup> Justice Stewart's opinion in *Albemarle Paper* closed a potential loophole by narrowly limiting the use of such performance tests to situations where the employers could demonstrate, according to exacting scientific standards, that the tests in fact were job related.<sup>104</sup>

2. *He wrote important opinions that continue the tortuous process of implementing the revolutionary desegregation mandate of Brown v. Board of Education.*

Justice Stewart will be remembered for his role in the Court's effort to compel actual implementation of the desegregation mandate set forth in *Brown v. Board of Education*.<sup>105</sup> Although the Court had boldly declared in 1954 that "[s]eparate educational facilities are inherently unequal,"<sup>106</sup> compliance with that decision proceeded slowly as school districts experimented with various devices aimed at evading the *Brown* mandate. They sought delays in implementing desegregation because of hostile public reactions.<sup>107</sup> They implemented plans permitting voluntary transfers<sup>108</sup> or "freedom of choice" systems<sup>109</sup> which served simply to perpetuate segregation rather than dismantle it. Finally, in *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>110</sup> the Court gave precise instructions designed to effect actual desegregation in the schools.

Justice Stewart's commitment to securing meaningful compliance with *Brown* is apparent in a pair of decisions handed down after *Swann*. In both *Wright v. Council of Emporia*<sup>111</sup> and *United States v. Scotland Neck City Board of Education*,<sup>112</sup> the Court was confronted with attempts by government units to avoid dismantling dual school systems by carving out a separate school district predominantly for white children. In *Wright*, the city of Emporia, Virginia, which for

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102. 401 U.S. 424 (1971).

103. *Id.* at 436.

104. 422 U.S. at 425.

105. 347 U.S. 483 (1954).

106. *Id.* at 495.

107. *See, e.g., Cooper v. Aaron*, 358 U.S. 1 (1958).

108. *See, e.g., Goss v. Board of Educ.*, 373 U.S. 683 (1963).

109. *See, e.g., Green v. County School Bd.*, 391 U.S. 430 (1968).

110. 402 U.S. 1 (1971).

111. 407 U.S. 451 (1972).

112. 407 U.S. 484 (1972).

years had been a part of the surrounding county's school system, suddenly decided to cut its ties to the county and run its own schools.<sup>113</sup> The Court found it significant that this decision coincided with a federal court order to desegregate the surrounding county. The net result would have been predominantly white city schools and a predominantly black county school system. In *Scotland Neck*, a similar evasive tactic was attempted by the state legislature.<sup>114</sup>

In *Wright* the Court held that creation of new school boundary lines which impeded the desegregation process was forbidden. Writing for the five-to-four majority, Justice Stewart rejected the finding of the court of appeals that boundary realignment could be permitted if the "dominant purpose" of the changes would "further the aim of providing quality education."<sup>115</sup> Reviewing the remedial decisions following *Brown*, Justice Stewart concluded: "[W]e have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect."<sup>116</sup>

Justice Stewart carefully reviewed the claims that local school control was necessary to provide the best education for the children of the city.<sup>117</sup> Since his Yale days, Justice Stewart has respected the autonomy of decision makers elected by the democratic process. This concern is present in *Wright*. The Justice notes that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society."<sup>118</sup> However, it is equally clear from the opinion that Justice Stewart is not hesitant to recommend judicial intervention where the democratic process has failed because discrete and insular minorities have not been adequately represented. Thus, in *Wright*, Justice Stewart observed: "In evaluating Emporia's claims, it must be remembered that the city represents the interests of less than one-third of the students in the system being desegregated."<sup>119</sup> According to Justice Stewart, therefore, judicial restraint may be appropriate where the elective system really works, but he seems to also say that courts should not shy from their remedial responsibilities when their assistance is sought by those who have no recourse in representative bodies.

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113. 407 U.S. at 454-55.

114. 407 U.S. at 485-87.

115. 407 U.S. at 461.

116. *Id.* at 462.

117. *Id.* at 467.

118. *Id.* at 469.

119. *Id.* at 467.

3. *He effectively invoked precedent to moderate the more restrictive approaches of some of his colleagues to individual liberty and equality.*

Justice Stewart has also helped to temper the tendency toward division within the Court. Sometimes his influence has been manifested through a concurring opinion in which he attempts to narrow or reshape the majority opinion, to bridge some of the distance between the majority and the dissenters, or to leave room for more flexible doctrinal development in the next case.

A good example of this dialectical interaction is in the development of the Court's approach to multidistrict desegregation remedies. In the five-to-four decision of *Milliken v. Bradley*,<sup>120</sup> the Court reversed a district court order that required the State of Michigan to draft desegregation plans for Detroit which encompassed the outlying suburban school districts—even though the outlying school districts were neither parties to the action nor targets of any charge of constitutional wrong-doing.<sup>121</sup>

The majority opinion, written by the Chief Justice, stressed the value of local control over the school system:

No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.<sup>122</sup>

Although the majority conceded that a multidistrict remedy might be appropriate on the proper facts,<sup>123</sup> it was not hospitable to such a remedy. It quite explicitly described the complications that would result from a multidistrict remedy in Detroit.<sup>124</sup> In describing one set of facts that might call for multidistrict relief, it emphasized the barriers to such a remedy:

Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a *significant* segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a *substantial* cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines

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120. 418 U.S. 717 (1974).

121. *Id.* at 730.

122. *Id.* at 741-42.

123. *Id.* at 744.

124. *Id.* at 743.

have been *deliberately* drawn on the basis of race.<sup>125</sup>

The majority also stated that multidistrict relief in Detroit could “be supported only by *drastic* expansion of the *constitutional right itself*, an expansion without *any support* in either constitutional principle or precedent.”<sup>126</sup> This language of the majority seemed to signal strong resistance to multidistrict remedies, but Justice Stewart’s concurring opinion struck a moderate tone in characterizing the Court’s decision. Justice Stewart shifted the terms of the debate, focusing the Court’s attention on the particular facts of the case before it, thus trying to keep doors open for future development: “In the present posture of the case . . . the Court does *not* deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction.”<sup>127</sup> His concurrence also illustrated when a multidistrict remedy “might well be appropriate,” but concluded that no remedy affecting the suburban units could be fashioned because there was no evidence of wrongdoing outside the city.<sup>128</sup>

Justice Stewart’s concurring opinion rested on a far narrower basis than that of the majority. According to Justice Stewart, the key to the case was that “[t]he formulation of an interdistrict remedy was . . . simply not responsive to the factual record before the District Court and was an abuse of that court’s equitable powers.”<sup>129</sup>

Did Justice Stewart’s concurrence have impact upon subsequent development in this area of the law? In the very next case involving multidistrict remedies, Justice Stewart delivered the *majority* opinion upholding, as a matter of law, the power of a district court to compel the federal Department of Housing and Urban Development to remedy constitutional violations in the center city by ordering a metropolitan area relief plan.<sup>130</sup> He noted that “[n]othing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred.”<sup>131</sup> He also described how the record in this case evidenced constitutional wrongdoing by the federal housing authority that justified metropolitan area-wide relief.<sup>132</sup> The opinion thus reflects the impact of Justice Stewart’s original concurrence in *Milliken*, which calmly

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125. *Id.* at 744-45 (emphasis added).

126. *Id.* at 747 (emphasis added).

127. *Id.* at 753.

128. *Id.* at 757.

129. *Id.* at 756.

130. *Hills v. Gautreaux*, 425 U.S. 284 (1976).

131. *Id.* at 298.

132. *Id.* at 298-300.

maintained the multidistrict relief could be available at the right time and in the right place.<sup>133</sup>

While Justice Stewart has used the power of separate concurrence to limit the impact of some of the Court's most recent decisions, he has also, on important occasions, joined with those members of the present Court who find themselves increasingly in the role of dissenters.

Of the recent cases, *United Steelworkers v. Weber*<sup>134</sup> stands out. *Weber* raised the question whether Title VII of the Civil Rights Act of 1964<sup>135</sup> barred voluntary race-conscious affirmative action plans "to eliminate manifest racial imbalances in traditionally segregated job categories."<sup>136</sup> The outcome of the case was in significant doubt<sup>137</sup> in the wake of *Regents of the University of California v. Bakke*.<sup>138</sup> Title VII makes it unlawful for an employer to discriminate against any individual because of his race.<sup>139</sup> The Court in *Bakke* had given little hint of how it would react to a challenge under Title VII to voluntary race-conscious amelioratory measures. In *Weber*, Justice Stewart joined in Justice Brennan's majority opinion, which denied a Title VII challenge to voluntary affirmative action programs designed to redress past discrimination in the workplace.<sup>140</sup>

4. *He evidenced an increased tension between the value of equality, on the one hand, and other values that have always been important to him, such as the restraint of government power.*

While Justice Stewart has joined with his brethren to strengthen equal protection and has used the power of the concurring opinion to moderate the impact of various opinions of the Court, his decisions continue to reflect a certain tension between his commitment to equal protection and his concern for other democratic ideals, such as the restraint of overreaching government power and the protection of individual rights. Sometimes this tension produces results which, at the threshold, are surprising.

The minority business enterprise provision of the Public Works Employment Act<sup>141</sup> was recently challenged in *Fullilove v. Klutznick*.<sup>142</sup>

133. 418 U.S. at 755.

134. 443 U.S. 193 (1979).

135. 42 U.S.C. § 2000e (1976).

136. 443 U.S. at 197.

137. See, e.g., Larson, *Race Consciousness in Employment after Bakke*, 14 HARV. CIV. RIGHTS CIV. LIB. L. REV. 215, 250-54 (1979).

138. 438 U.S. 265 (1978).

139. 42 U.S.C. § 2000e-2(a)(1) (1976).

140. 443 U.S. at 197.

141. Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116 (codified at 42 U.S.C. § 6701 (1976 & Supp. III 1979)).

This provision requires that ten percent of the federal public works grants be set aside for minority business enterprises.<sup>143</sup> Justice Stewart dissented from the majority opinion upholding the minority business enterprise provision.<sup>144</sup> He characterized the program as constituting "by definition invidious discrimination," and in itself a violation of equal protection.<sup>145</sup> "No race, . . ." he wrote, "has a monopoly on social, educational, or economic disadvantage, and any law that indulges in such a presumption clearly violates the constitutional guarantee of equal protection."<sup>146</sup>

At first view, Justice Stewart's dissent in *Fullilove* seems puzzling, given his position in *Weber*, but on second analysis, Justice Stewart's position is not as unexpected as it first might have seemed. The dissent was grounded in equal protection considerations. In *Milliken v. Bradley*<sup>147</sup> and in *Hills v. Gautreaux*,<sup>148</sup> Justice Stewart evinced concern for intruding upon the autonomy of local governments when no constitutional wrongdoing had been demonstrated. When the violation was factually demonstrated, as in *Gautreaux*, he led the Court in authorizing action. But as he showed in *Milliken*, he is unwilling to sacrifice other values where the constitutional violation has not been adequately established.

Justice Stewart has joined the majority of the Court in holding that facially neutral government action could be overturned under fourteenth amendment strict scrutiny only upon a showing that it was carried out with a discriminatory purpose. Discriminatory impact, under the line of cases that began with *Washington v. Davis*,<sup>149</sup> and developed through the recent Stewart decision in *Personnel Administrator v. Feeney*,<sup>150</sup> is not enough to trigger the strict scrutiny of the fourteenth amendment. Justice Stewart's support of the discriminatory purpose requirement comports with his consistent respect for the autonomy of local governing units. The Court has recognized that strict scrutiny is a powerful weapon which perhaps should be turned upon the actions of administrators and legislators only after a demonstration that the discretion afforded them by the democratic process has been infected with racial animus.<sup>151</sup> Justice Stewart's opinion in the *Feeney* case reflects

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142. 448 U.S. 448 (1980).

143. 42 U.S.C. § 6701 (1976 & Supp. III 1979).

144. 448 U.S. at 522.

145. *Id.* at 526.

146. *Id.* at 529-30.

147. 418 U.S. 717 (1974).

148. 425 U.S. 284 (1976).

149. 426 U.S. 229 (1976).

150. 442 U.S. 256 (1979).

151. Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment after Feeney*, 79 COLUM. L. REV. 1376, 1383 (1979).

his basic faith that courts should resist intruding into government activity when the decision-making is free from the distorting influence of racism: "When some other independent right is not at stake, and when there is no 'reason to infer antipathy,' it is presumed that 'even improvident decisions will eventually be rectified by the democratic process.'" <sup>152</sup>

## CONCLUSION

I have reviewed certain of the contributions that Justice Stewart has made to the jurisprudence of equal protection. Obviously I have not, in this short presentation, mined all the riches of his twenty-two years of service as a Supreme Court Justice. The areas I have touched upon demonstrate, I believe, Justice Stewart's penetrating resourcefulness and creativity as a judge. As we move into the 1980's, equal protection's solid jurisprudential grounding plainly bears the mark of his work.

His equal protection opinions are many, and the creativity, thoroughness, and care with which those opinions have been crafted insure their durability. But in my judgment, Justice Stewart's most enduring contribution—extending beyond equal protection to all his work and the work of his colleagues as well—has been his insistence upon respect by the Court for its own precedents. We honor, yesterday and today, one of the legacies of the Warren Court: a revitalized doctrine of "equal protection of the laws." <sup>1</sup> That it *is* a legacy, and not an historical curiosity, may be attributable, in some considerable measure, to the creativity and craftsmanship of Justice Potter Stewart.

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152. 442 U.S. 272 (citations omitted).