JUDGE "THE GAME BY THE RULES": AN APPRECIATION OF THE JUDICIAL PHILOSOPHY AND METHOD OF WALTER K. STAPLETON

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In this essay, we endeavor to describe the judicial philosophy of the Honorable Walter K. Stapleton, a judge whose remarkably self-effacing approach to the art of judging brings to life the exhortations of Harvard Law School professors of the late 1950s for judges to dig deep into the facts of the case and the relevant legal authority and try to emerge with decisions that can be rationally explained on the basis of principles of broad and legitimate appeal. In this process there is no room for merely personal preferences or values. Walter Stapleton's judicial work is the very embodiment of this great tradition.

Much of what we say about Judge Stapleton in this essay may sound commonplace, stuff that is said of judges all the time, for Judge Stapleton has not devoted his career to the pursuit of a radically different notion of the judicial role. What is notable about this career and not at all so familiar is the depth and sincerity of Judge Stapleton's adherence to a particular vision of judging, and the extent to which that self-disciplined adherence serves, and, indeed, is necessary to, the proper functioning of our republican form of democracy.

What is equally remarkable about Judge Stapleton is his special commitment to craftsmanship in the creation of judicial opinions. Stapleton opinions are of the highest Shaker-style quality: shorn of ornament, simple, elegant, useful, and sound. The opinions stand out because of their implacable logic, their distillation of unwieldy and complex

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problems into answerable questions, and their utter lack of stylish adornment, acid, or incivility. A Stapleton opinion does not lecture or pronounce; it persuades. Not power, but reason, animates the work.

As important, the dignity, neutrality, and compassion Stapleton brings to his work makes him a fitting oracle of the law, whose genuine devotion to the reasoned application of legal principles promotes respect for the courts of our nation. If, as Justice Holmes is reported to have once said, the duty of a judge truly is to "play the game by the rules," then few have done that job with more fidelity or care than Walter King Stapleton.[1]

I. INTRODUCTION

In the pages that follow, we highlight what we see as the most important elements of Judge Stapleton's judicial philosophy. In support of our contentions, we cite many decisions authored by him but generally eschew lengthy descriptions of particular cases, in favor of a more impressionistic and forest-level approach. In so doing, we recognize that this is a tack that Judge Stapleton — whose belief in the wisdom of the evolutionary, case-by-case formulation of the law is profound — has spent much of his life avoiding. It is, however, altogether fitting that his life's work be honored by a good-faith attempt to capture the general out of a large body of particular work.

This essay concentrates exclusively on Judge Stapleton's work as a federal appellate judge on the United States Court of Appeals for the Third Circuit. His earlier work as

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1. Holmes' admonition comes to us from Learned Hand:

> I remember once I was with [Justice Oliver Wendell Holmes]; it was a Saturday when the Court was to confer .... When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him, "Well, sir goodbye. Do justice!" He turned quite sharply and he said, "Come here. Come here." I answered, "Oh, I know, I know." He replied, "That is not my job. My job is to play the game according to the rules."

Learned Hand, Address at the National Conference on the Continuing Education of the Bar (Dec. 16, 1958), *in* Joint Comm. On Continuing Legal Educ., Am. Law Inst. & Am. Bar Ass'n, Continuing Legal Education for Professional Competence and Responsibility: The Report on the Arden House Conference, December 16th to 19th, 1958 app. D 116, 119 (1959), *reprinted in* LEARNED HAND, A PERSONAL CONFESSION, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 302, 306-07 (Irving Dilliard ed., 3d ed. 1960).

Stapleton's only addition might be the following: If the referee (the judge) does not play by the rules herself, how and why should she expect the players (legislatures, administrative agencies, citizens, and other courts) to respect those rules?

a federal district court judge, while beyond the scope of our analysis, is, we surmise, entirely consistent with and important to understanding his appellate jurisprudence.[2]

In order to forge this essay, we attempted to absorb a representative sample of Judge Stapleton's opinions as a circuit judge. To that end, we reviewed every *en banc* opinion he authored for his court, every dissent he wrote, his most cited opinions, and certain opinions he commended to our attention. We believed the dissents to be of particular insight because Judge Stapleton is by temperament and belief an institution-builder and consensus-seeker, who does not lightly reach a decision to dissent. Therefore, his dissents reflect matters he considered so important as to require him to break with his natural preference for consensus. They present situations in which he had to confront directly the possibility that outcomes may still be contestable even when all purport to play by the same rules — or even the possibility that not all judges play by the same rules.[3]

We confess to bringing to this work less dispassion than Judge Stapleton does to the decision of cases. Each of us was privileged to serve as a law clerk to him and considers him a friend and mentor. Unavoidably, our personal experiences color our views, as we had the unique opportunity that clerkships provide — the opportunity to see and understand how a particular judge plies his trade, i.e., how he actually decides cases and constructs opinions. These experiences confirm our confidence that what we write has the ring of truth, even if it is necessarily incomplete.

Our goal is to distill from his opinions the essence of Judge Stapleton's judicial philosophy and to surface its qualities at a level of generalization that the opinions themselves do not attempt. By introducing some biographical and personal background, we also hope to shed some light on some of the influential experiences and character traits that helped shape his philosophy and his dedicated adherence to it. Although Judge Stapleton strives to keep his own personality and personal preferences out of his decision making, knowing something about who he is, and where he came from, helps explain how he developed the self-assurance and discipline that enable him to rise above himself in making decisions.

The building blocks of the essay are as follows. Section II traces the basic biographical facts leading to Walter Stapleton's service on the United States Court of Appeals

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2. In separate pieces in this edition of the DELAWARE LAW REVIEW, distinguished commentators address Judge Stapleton's handling of these matters as a district court judge.

3. We also interviewed Stapleton at modest length to get some sense of whether the general themes we discerned in his jurisprudence resonated with him, and to get his input on further cases to review.

for the Third Circuit. Section III then identifies certain personal characteristics of Stapleton that bear importantly on his judicial performance.

Finally, Section IV summarizes the key elements of Judge Stapleton's judicial philosophy. By judicial philosophy, we mean to encompass diverse issues ranging from his understanding of the proper role of the judge (in particular, the intermediate federal appellate judge) in our polity, to more mundanely, but no less importantly, his view of how a judge should write opinions. The summary is punctuated with citations to decisions that exemplify the thesis and relate it to the personal experiences and characteristics of the judge that are described in Sections II and III.

II. A BRIEF BIOGRAPHY[4]

Walter Stapleton was born in Cuthbert, Georgia, in 1934 as the son of Elizabeth and Newton Stapleton. He joined his sister, Jean, in a family with deep roots in Georgia. His father, Newton Stapleton, had been an agent with the Federal Bureau of Investigation in its early gang-busting days. But by the time Judge Stapleton turned four, his family was settled in Wilmington, Delaware, and his father had assumed a managerial position at the most traditional of Delaware firms, the DuPont Company. Thus, young Walter grew to adulthood in a close family, supported by a father who held significant posts at two major

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4. Much of the biographical detail and analysis contained in this section is derived from co-author William T. Allen's address at the presentation of the portrait of Judge Stapleton on October 7, 2000. Professor Allen's address is reprinted at the beginning of volume 260 of F.3d at pages XLIV-LIII. The other facts are drawn from the authors' personal understanding of Judge Stapleton's background.

In this regard, a word of caution is appropriate. What we have written is a third-person analysis, not a first-person memoir. Our suppositions about the impact of Judge Stapleton's background and experiences, as well as our delineation of his judicial philosophy, are just that: our understandings based on our own limited and imperfect knowledge. Although we interviewed Judge Stapleton in the course of preparing this essay, we did not seek confirmation from him on each of the points we are making. While we believe we have captured the man and his judging well and fairly, others — including Judge Stapleton himself — may think otherwise.

Similarly, when we say — as we have occasion to do particularly in the latter part of this essay — that Judge Stapleton is "prone to rule" or "tends to rule" in a certain way, our conclusion is informed by the cases we have read, our discussions with Judge Stapleton, our experience as judicial law clerks for Judge Stapleton, and our collective experience as advocates, judges, and scholars. We have not systematically reviewed all of his Third Circuit decisions and, thus, we do not claim we could prove the tendencies we divine with any degree of statistical precision. Nor, it should be emphasized, do we claim to speak for Judge Stapleton with respect to the tendencies we discuss.

societal institutions, one public and one private. In this home and community, institutions of this kind were seen as useful; to be improved, to be sure, but also to be respected.

Importantly, Judge Stapleton's parents were persons of sincere religious conviction, who inculcated in their son the moral values and expected habits of a member of their Baptist faith. Contributing to the shaping of his values was his education at Wilmington Friends School, a prestigious Quaker institution of long-standing in Delaware, from which Walter Stapleton graduated in 1952. He emerged as a young man, more than unusually sensitive to his obligations to others, of his duties to his faith and community, and, perhaps most keenly, of the burden to make full use of the opportunities for service that lay ahead of him.

From Friends School, it was on to four years studying English literature at Princeton. Stapleton proceeded smartly from the deep consideration of the humanities to matriculation at the Harvard Law School. The chemistry between the young Stapleton and the jurisprudential teachings then in vogue at Harvard must, we suspect, have been almost cruel in its immediate emotional impact, although salutary in its long-term effect.

At that time, the Harvard Law School faculty included the leading exponents of a particular approach to jurisprudence — most generally known as the legal process school[5]

5. Professor Henry Hart, with whom Professor Herbert Wechsler wrote an influential text on federal courts, was a leading faculty member at Harvard during Stapleton's time as a student. *See, e.g.*, HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958). Of course, another Harvard law student of that general era went on to write classic works describing the almost heroic search for the correct result that ought to be undertaken by an ideal judge, aptly named "Hercules." *See* RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Ronald M. Dworkin, et al., *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

The legal process school accepted the critique of the "legal realists" that general legal principles do not exist as some sort of discoverable law of nature; rather, legal principles derive their origin from specific policymakers, like legislatures, administrators or judges. *See* Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, And the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1395-96 (1996). To deal with this reality, the legal process school articulated an approach to jurisprudence setting forth as a central principle "that each governmental institution possesses a distinctive area of competence such that specific tasks can be assigned to that institution without reference to the substantive policies involved." *Id.* at 1396.

But recognizing that reality, the job of the courts was still the quite rigorous one articulated by "legal formalists" — to decide cases within their constitutionally and statutorily assigned function by searching the relevant sources of authority and distilling the best reasoned rule of decision from them. Furthermore, within the realm in which judicial action is required to vindicate value judgments reflected in, for example, the Constitution or a statute, judges are sometimes required to act boldly, but with the mindset of vindicating faithfully the principles

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— resting on the proposition that every case had a uniquely correct answer, which could be discerned if only the judge exhaustively considered the facts and pored over the legitimate sources of legal authority, looking for a sound "neutral principle" to yield a basis for a decision that would be perceived by reasoned readers as a legitimate basis for the exercise of compulsory legal power.[6] To a young man not yet possessing the full measure of

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articulated in the text, not their own predilections of the good. So too must the courts protect the integrity of the political process itself, when that is under systemic attack in constitutionally improper ways, because without the effective functioning of that process, citizens are deprived of the various kinds of institutional competence their form of government promises. *Id.* at 1397-98.

Of course, at all times, the judiciary was to be mindful of its constrained role, thereby avoiding interference with the proper functioning of the government as a whole and protecting its own legitimacy from attack. *Id.* By insisting that cases be decided on the basis of reasoned arguments — sometimes called neutral principles — that were genuinely a principled ground for the resolution of not just the case before the court, but of future like cases, the legal process school believed that a disciplined judicial method would have the result of keeping courts within their proper sphere of authority, thereby enhancing their own long-term legitimacy.

As we hope to show, Stapleton's deference to other institutional decision makers, his dogged insistence on staying within the judicial "lane," and his rigorous search for logical rules of decision consistent with constitutional and statutory text and prior precedent make him a model of how the legal process school asked judges to go about their important work.

6. The classic articulation of the "neutral principles" strand of the legal process school built on a tradition that importantly included the work of Learned Hand. The culminating statement was actually made by Professor Wechsler in the 1959 Oliver Wendell Holmes lecture, given at Harvard Law School during the time Stapleton was a student. This lecture was embodied in an article concluding that a judge's decisions should be based on reasoning and analysis which transcend the immediate result — to "decide the litigated case and to decide it in accordance with the law." Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959). Interestingly, Weschler's speech was a response to Learned Hand's lecture of the prior year. Both of these great legal thinkers rested well within the American jurisprudential tradition whose ideals Judge Stapleton has attempted to put into practice.

We do not pretend to be masters of the subtle distinctions among the competing schools of jurisprudential thought in the post-war era. The reader interested in a current and well-reasoned critique of Wechsler's thinking, which argues that many, if not most, principled judicial decisions regarding important constitutional questions cannot be regarded as neutral, could usefully consult FREDERICK SCHAUER, NEUTRALITY AND JUDICIAL REVIEW, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY FACULTY RESEARCH WORKING PAPER SERIES, RWP03-008 passim (Feb. 2003) *available at* http://ssrn.com/abstract=385208. For a more venerable and complimentary consideration of Wechsler, *see* Kent Greenwalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).

self-confidence that his obvious intellectual gifts justified and believing that it was his duty to put in the effort to do things the right way, the lectures of legal process school professors like Henry Hart no doubt acted as a further goad to strenuous efforts at self-improvement.[7] In each case, the right answer existed; all Walter had to do was to go find it — a prod to sweat and toil that resonated with him.

Those lectures gave Stapleton a sense of the role and function of law in our democratically ordered system of liberty. More specifically, they exposed him to the leading thoughts on the place that courts hold in our democracy and how their proper or improper functioning affects the performance of other governmental institutions. This teaching provided a theoretical grounding for Stapleton, which in turn gave him a prism through which to view the challenging professional tasks that soon came his way.

After law school, Stapleton joined the Wilmington law firm of Morris, Nichols, Arsht & Tunnell. As might be expected, he practiced that aspect of law that involves Delaware lawyers regularly in matters of national significance: corporate law. He did so at a firm that is regarded as one of Delaware's finest, marked by a culture that demands great commitments of time and energy from its lawyers.

Significantly, Stapleton's formative years as a young lawyer came at an interesting time in Delaware corporate law. In the mid-1960s, Delaware embarked on an important initiative to comprehensively rewrite its corporation code, culminating in the adoption of the Delaware General Corporation Law in 1967.[8] As an associate and then a

7. The strict, old school Socratic approach of distinguished professors like Charles M. Haar, who taught Stapleton property, also had their intended effect. The pretense that there is a best, i.e., wisest way, to solve a legal problem may be a useful inspiration for excellence, even if the reality of human imperfection and complexity renders achievement of that objective impossible.

Professor Haar's class generated a classic Stapleton story. According to Stapleton, Professor Haar's dedication to the Socratic method was so intense that the only declarative sentences the Professor uttered in the entire semester were of this ilk: "The reading for next week is pages 154-187 of the case book." Midway through the course, Stapleton was hopelessly lost and convinced he would fail the course.

He turned to an upperclassman, who suggested that he read the most recent articles Professor Haar had written because professors' writings often reflect what they think is important. Stapleton dutifully took that advice and absorbed Haar's writings.

Then the exam (and something much more important to Stapleton) came — at the same time. On the day of the exam, Stapleton's wife was admitted to Boston Lying In Wait to give birth to their first child. Stapleton signed out the property exam and took it in the waiting room. Blessed by the birth of a healthy child, Stapleton was later happily surprised to receive much less compelling, but still welcome news: he had aced the exam!

8. *See* ERNEST L. FOLK, III, THE DELAWARE GENERAL CORPORATION LAW: A COMMENTARY AND ANALYSIS xii-xiv (1972).

young partner at Morris Nichols, Stapleton was among a select group of young lawyers who helped titans of the Delaware corporate law, such as Stapleton's mentor and senior partner S. Samuel Arsht, work with Professor Ernest Folk to craft this new law.[9]

In this role, Stapleton became steeped in the Delaware approach to corporate law. This approach was well-summarized in one sentence by Arsht, who "is said to have proposed that the law be simplified to the following principle: 'Directors of Delaware corporations can do anything they want, as long as it is not illegal, and as long as they act in good faith.'"[10] Implicit in the Delaware style of corporate law is a recognition that the benefits achievable by affording decision makers wide discretion can be lost if courts intrude on the space that corporate managers have to make good faith decisions that might be seen by others as mistaken, especially given the ability of stockholders to replace poor managers at the ballot box. Concomitantly with his exposure to the doctrines of corporate law came Stapleton's exposure to a wide array of commercial law problems and business clients, giving him a window on the real world of business and the practical implications of legal rules on the conduct of commerce.

Stapleton also benefited from what was then a common Delaware rite of passage. During the 1960s, it was still thought useful for a young corporate lawyer to know his way around a courtroom. As a result, many of the brightest young prospects at important Delaware firms did a tour of duty in the attorney general's office prosecuting criminal cases. The young Stapleton took advantage of this opportunity and spent a year immersed in criminal law and learning the ropes of dealing with juries. Out of this experience came a deep respect for the difficult role of the advocate and the importance of juries in bringing a common sense perspective to the resolution of difficult factual disputes.

By the late 1960s, Stapleton had found success in the practice of law and a secure place in his community. He was regarded as an outstanding young partner at one of Delaware's leading law firms, practicing a variety of law of tremendous importance within the state. He was active in his church and community as well. In particular, Stapleton was one of a group of progressive young Republicans, who in the mid- to late-1960s played a role in electing candidates of their liking to important posts like mayor of

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9. Indeed, Stapleton, along with Arsht, wrote several commentaries on the new law, which remain an important interpretative source to this day. S. SAMUEL ARSHT & WALTER K. STAPLETON, ANALYSIS OF THE NEW DELAWARE CORPORATION LAW (1967); S. Samuel Arsht & Walter K. Stapleton, *Delaware's New General Corporation Law, Substantive Change*, 23 BUS. LAW. 75 (1967).

10. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1015 (1997).

Wilmington, congressman, and governor.[11] The young Delaware Republicans of that day were characterized by a conservative economic bent tinged with a social conscience that recognized the need for racial equality, measures to alleviate poverty, and efforts at environmental conservation. These were Republicans in the mold of Teddy Roosevelt and Abraham Lincoln; the Delaware counterparts to names of that era such as Nelson Rockefeller, Jacob Javits, George Romney, John Chaffee, and John Lindsay. But, in their way, they were conservatives who believed in the basic institutions of American life, but who were also committed to the reform and improvement of those institutions. They were, by temperament, not rock throwers, but builders and renovators.

The tug of public service pulled on Stapleton, too, but his gifts and personality did not incline him towards pursuit of elected office, but towards service in the judicial branch. When, in 1970, Judge Caleb Layton of the United States District Court for the District of Delaware decided to take senior status, Stapleton let it be known that he would be interested in the appointment. Delaware's senior United States Senator, John Williams, thought favorably of that idea and Walter was soon appointed, at the early age of 36.

At that time, the United States District Court for the District of Delaware was comprised of three active judges, a factor that promoted a spirit of collegiality in which Stapleton flourished. But the court's small size did not bespeak of a legal backwater. Instead, because of Delaware's corporate primacy and the quality of its district court, the court faced an interesting and steady mix of sophisticated corporate, securities, and intellectual property matters, which were challenging enough to appeal to a lawyer of Stapleton's sophistication.[12] These and other matters demanded that he hone his opinion writing skills and master a complex array of legal problems.

At the same time, like all district courts, the Delaware district court had a constant diet of criminal cases and other matters requiring jury trials. Stapleton reveled in the tasks of affecting the proper judge's demeanor; correctly issuing prompt rulings on important evidentiary matters; charging juries in an understandable and common sense way

11. The candidates they helped elect included: William V. Roth, Jr., who was first elected to Congress in 1966 (and to whom Stapleton devoted volunteer labor, including research that helped Roth make the case that his opponent, the incumbent, had a poor voting record); Hal Haskell, who was elected mayor of Wilmington in 1968; and Russell Peterson, who was elected governor that same year. Out of this generation eventually emerged Michael N. Castle, who was Delaware's governor from 1985-1993 and is now one of the leading moderate Republicans serving in the U.S. House of Representatives.

12. *See supra* note 2.

that promoted their ability to make sound and fair decisions; and striking the right balance between the need for trial efficiency and the need to give lawyers leeway to try their cases and to make human mistakes. That is, he took seriously the importance of the trial judge's role, not only as a substantive guarantor of fairness and fidelity to law, but also as a symbol of justice. Being young himself, Stapleton also remembered how it felt to be an inexperienced lawyer struggling to present a case clearly and within the technical rules. He desired to be a lawyer's judge, who brought an understanding of the advocate's plight to his approach. Nature blessed his desire to be a fitting trial judge, having bestowed upon him good looks of the Clark Kent variety, with which a judicial robe fit like a bespoke suit.

For fifteen years, Stapleton served on the United States District Court, having become its chief judge in 1983.[13] In 1985, Senator William Roth commended his appointment to President Reagan to fill a second seat for Delaware on the United States Court of Appeals for the Third Circuit. The Delaware bar was warmly supportive of the promotion. Stapleton's service on the court of appeals concentrated his talents on a narrower set of tasks. Cut off from the hurly-burly of a trial court, he was given the luxury (or burden, depending on the day) of pouring most of his energy into the careful consideration of briefs, discussions of close questions with law clerks, hammering out panel and *en banc* court consensus on difficult cases, and — most importantly of all — crafting and polishing opinions. During his still-ongoing tenure, Stapleton has authored hundreds of opinions for his court, on a diverse array of important and challenging subjects.[14]

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13. Consistent with his desire for deeper understanding, in 1984 Judge Stapleton earned a master's degree in law from the University of Virginia, in its special LL.M. program for jurists.

14. Among the Stapleton opinions of diverse interest, including those discussed throughout this essay, we commend to readers the following: *DeHart v. Horn*, 227 F.3d 47 (3d Cir. 2000) (reversing district court's grant of summary judgment for defendants in action brought by prison inmate claiming failure to accommodate his religious belief violated his First Amendment and Fourteenth Amendment rights); *Armstrong Surgical Center v. Armstrong Co. Mem'l Hosp.*, 185 F.3d 154 (3d Cir. 1999) (affirming dismissal of Sherman Act claims alleging hospital had restrained and monopolized trade, concluding that alleged conduct was immune from antitrust scrutiny); *In re Minarik*, 166 F.3d 591 (3d Cir. 1999) (denying habeas corpus petition that failed to satisfy procedural standards for second petition under AEDPA, which the court retroactively applied); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997) (addressing the constitutionality of New Jersey's Megan's Law); *United Wire v. Morristown Mem'l Hosp.*, 995 F.2d 1179 (3d Cir. 1993) (addressing New Jersey's rate-setting system for hospitals and holding that the statute was not preempted by ERISA); *Landano v. U.S. Dept. of Justice*, 956 F.2d 422 (3d Cir. 1992) (discussing FBI's invocation of Freedom of Information Act exemption for records compiled for

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Filling part of the personal void left by his withdrawal from day-to-day contact with lawyers and juries came important administrative assignments, which demanded that he engage in patient exercises of diplomacy, both intra-judicial (in the case of his role as chair of the Chief Justice's United States Judicial Conference Committee on Codes of Conduct, which was charged with forging a new version of the ethical rules governing federal judges)[15] and extra-judicial (in his role representing the federal judiciary before Congress and with state courts as chair of the Judicial Conference Committee on Federal-State Relations). To the time-consuming task of presiding over the so-called "Dear Abby" judicial ethics committee,[16] Judge Stapleton brought the same care and concern in answering ethical questions posed by his federal judicial colleagues as he did to the resolution of cases. As we write, Stapleton remains a very active senior judge of the Court of Appeals, maintaining a heavy sitting case load and still accepting whatever administrative assignments (and there are many) that are sent his way.

III. THE ESSENCE OF THE MAN

Before describing the essential attributes of Stapleton's judicial philosophy and method as an appellate judge, we pause to highlight a few of his personal characteristics that inform those perceptions of him.

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law enforcement purposes on ground of privacy interests); *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991) (determining constitutionality of Pennsylvania's abortion control statute); *Sample v. Diecks*, 885 F.2d 1099 (3d Cir. 1989) (holding that when prison officials were deliberately indifferent to possibility that an inmate was detained after expiration of his sentence, violation of his Eighth Amendment rights was demonstrated); *Norfolk & S. R.R. v. Oberly*, 822 F.2d 388 (3d Cir. 1987) (addressing constitutionality of Delaware statute prohibiting coal lightering in coastal zone); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164 (3d Cir. 1986) (holding, among other things, that First Amendment right to government documents should not be lightly recognized when that would discourage the increased movement towards more liberal state Freedom of Information Act laws); *Al-Khazraji v. St. Francis Coll.*, 784 F.2d 505 (3d Cir. 1985) (addressing, among other things, whether 42 U.S.C. § 1981 precluded discrimination against Arabs within its prohibition on race discrimination); *In re Three Mile Island Alert, Inc.*, 771 F.2d 720 (3d Cir. 1985) (affirming NRC permitting restart of reactor at Three Mile Island).

15. During his career, Judge Stapleton also served as a member of the Judicial Conference of the United States.

16. Formally known as the Committee on Codes of Conduct of the Judicial Conference of the United States.

Walter Stapleton is likely one of the most deliberative persons the Good Lord ever created. It is not that he cannot absorb incoming stimuli rapidly; he can. It is only that he is constitutionally disinclined (indeed, pained if asked) to respond off-the-cuff to an inquiry of any importance. His first goal truly is understanding, and he is distrustful of impulsive answers. Few among us are less inclined to jump to a conclusion.

This attribute was on full display when we interviewed him in connection with this article. As the three of us chattily threw multiple questions at him, Stapleton was uncomfortable responding with quick answers. It was clear that he wanted to respond only after careful study and reflection. That's just how he is.

In this same vein, Stapleton's clerks have had the experience of being in the midst of discussing an opinion with him, only to have the judge appear to drift into a state of silent otherworldliness in which the only meaningful manifestation of his continued life was the slight movement of his head, in the manner of a pensive bobble-head doll. After many minutes of this, clerks have been known to take their leave, believing their continued presence was no longer useful, only to have the judge pursue them moments later excitedly exclaiming, "I'm sorry; I was just thinking!"

His powers of concentration can cause him to be forgetful of the mundane. At the Morris Nichols firm, he is still legendary for spending an entire business day in a buttoned up three-piece suit into the vest of which he had managed to insert only one arm. With affectionate mirth, his colleagues pointed out to each other the part of the vest hanging below Stapleton's suit jacket, an innovative new style their lost-in-thought friend himself managed never to notice. In like vein, only Stapleton could drive his beloved executive assistant, Mary Lynne Bush, to an event and say with a straight face, "I know I'm supposed to give you a lift back, but if I forget and leave without you, you know I won't have meant to," and be excused for it.

Stapleton's genuinely deliberative mind combines with a gentle and courteous personality. He rarely utters harsh words, being patient to a fault and reluctant to voice criticism of anyone, other than to sometimes express his disapproval by a studied silence. This reticence to find fault is a manifestation of a deeper strain in his character, which is influenced deeply by his religious and moral values. A life-long Christian with a contemplative and searching bent, Stapleton tries hard — and largely succeeds — to exemplify three of the greatest qualities valued by his faith: empathy, compassion, and humility. He genuinely tries to understand why people acted as they did by seeking to see things from their perspectives. Even when he cannot justify what they did, he is aware of the flawed nature of humanity and the capacity all of us have to err. Being conscious of his own

shortcomings, he is tolerant of others and brings that tolerance to bear in his work as a judge.

Integral to his ability to be empathetic and compassionate is his own humility. Although he is a gifted man, Stapleton is not arrogant. He attains a level of confidence in his judgment only when he has sweated over a problem; indeed, one of the important elements of his judicial method is his own perception that he can only produce work of the quality that he believes the public deserves through the exertion of unusual amounts of effort.

Stapleton's humility has another feature of great relevance to his work. Stapleton does not believe that he has, nor that it is his job to have, all the answers to society's legal problems at his fingertips. He is not bursting to tell you his solutions; rather, if he has a sense of pride about his work, it rests in the satisfaction of knowing that if a particular case comes before him, he can, with the commitment of energy and time, craft a decision that will be a reasoned exercise of judgment under law. Put another way, Stapleton does not have a file drawer full of answers that simply await the posing of the right questions; instead he awaits each new question as an important new puzzle he must answer after studied deliberation.

Finally, Stapleton's personality is also, to use a '90s term, compartmentalized. He has a joyous, whimsical streak, which manifests itself in a love of diverse things, like tennis, singing, horses, and bad (really bad) jokes.[17] But he is cautious about importing that side of his character into his judging. Oh, the occasional light remark might be made at oral argument, but the opinions themselves are somewhat austere. The rhetorical flourishes or humorous barbs of clerks' first drafts rarely, if ever, survive his pen. What is left are simple declarative sentences that explain the basis of his reasoning in dignified and understandable words, by reference to traditional sources of authority. Although the opinions speak in a voice, that voice is not a highly personal one. Rather, the opinions are written to convey the impression — and in Stapleton's case, the reality — that a reasoned group of dispassionate jurists believed it their duty to justify in plain terms the logic and legal precedent that support their result. By this means, it is hoped, the opinions promote acceptance, even on the part of those who have not prevailed, that the courts are impartial dispensers of justice.

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17. Although it is beyond the scope of this article, Stapleton is devoted to his beloved family, his friends and his extended family of law clerks. The loyalty and affection he shows in his personal life, we venture, informs his constructive and civil approach to judging.

IV. THE KEY ATTRIBUTES OF JUDGE STAPLETON'S JUDICIAL PHILOSOPHY

A. Overview

We turn now to the heart of our endeavor. This section attempts to do something that Judge Stapleton himself has never done: articulate in a generalized way some of the key attributes of his judicial philosophy. We begin with an important acknowledgement: much of what is described as Stapleton's view of the role of the judge is not novel to him, but is within the mainstream of a particular conception of the judicial role. That conception sees the judicial role as a constrained but important one. Deferential to sources of more legitimate policy-making authority, modest about inserting its own view of debatable questions, respectful of the need to build the common and constitutional law on foundational authority, and ever striving towards interpretations that are faithful to the expectations of citizens ordering their affairs in conformity with the written law, this school sees the judge as primarily an interpreter, rather than maker, of law. It is firmly within this tradition that Judge Stapleton resides.[18] The difficulty of our task is that judges

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18. That is, Stapleton accepts the classic articulations of the judicial role as being categorically different than that of a legislator. As Benjamin Cardozo famously noted:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life."

BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921) (quoting 2 FRANCOIS GENY, METHODES D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF 303 § 200 (1919) (trans., 9 Modern Legal Philosophy Services)).

In identifying Stapleton with the Hart-Wechsler school, we do not mean to imply that he views his as a value-free profession. Rather, we believe Stapleton embraces a reading of that tradition similar to that articulated by Professor Shapiro, whose tribute to Wechsler contained these apt thoughts:

> [T]he defense of neutral principles in judicial decisionmaking ... has been criticized ... unfairly, as a misguided effort to ask judges to park their ideals and ideology at the courthouse door and to decide cases on grounds wholly

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of this school — when they adhere to their principles — do not typically leave in their wake revolutionary pronouncements associated with their name. To do so is in no small measure at odds with their creed.

In Stapleton's case, the claim we make for him is not that his judicial philosophy imagined a new path for judges, but that he has, in an unusually committed way, stayed on the road that many conceive as the correct gateway to real justice under law. His disciplined refusal to allow personal preferences to lead him astray from the application of generally applicable legal principles, his resolute respect for the difficult tasks other governmental authorities face, and his commitment to the complicated craft of deciding cases by extracting rules of decision from traditional sources of legal authority are his legacy.

Judge Stapleton's reticence to assert his personal values is not a manifestation of a character or mind devoid of political or moral views. It must instead be understood as a deeper expression of a view about how our system of government best functions and the responsibility that judges have within that system. At the core of his view is a profound belief that our republican form of democracy is of great value, is fundamentally sensible, and is not broken, and that it deserves allegiance. Having dismantled the legal barriers that prevented full participation by all Americans, our system of democracy is, in Stapleton's conception, a basically fair one that has great resiliency and capacity for self-correction. Although our system of government can be improved, the institutions created by its elected lawmakers are to be respected, as are the decisions of those lawmakers and the people who help execute the laws on a daily basis. That is, Stapleton fully accepts the legitimacy of our

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> objective and value-free. For me, the argument for neutral principles is a more powerful one — one that recognizes the need to weigh competing values but that does not disparage the effort to transcend one's personal ideology as a worthy aspiration for a judge. The essence of the argument ... is that a principle approaches neutrality — in the Wechslerian sense — to the extent that the judge is willing and able to articulate it as the true basis of decision, and to apply it in future cases that are not fairly distinguishable. Recognizing that this effort can never be fully successful, and that principles of necessity evolve as time and circumstances change, I cannot conceive of a better canon for a judge to live by.

David L. Shapiro, *Herbert Wechsler — A Remembrance*, 100 COLUM. L. REV. 1377, 1379 (2000); *see also* Schauer, *supra* note 5, at 10 ("For Wecshler and his generation, the argument for judicial review starts with the premise that the Constitution is law, that law is what courts and lawyers are good at, and that if courts are not going to do law — as he believed they did not when they made ad hoc and unprincipled decisions unsupported by articulated reasons the Court is willing itself to follow in subsequent cases — then the argument for judicial review collapses.").

government to formulate and implement compulsory legal standards that constrain the conduct of its citizens.[19]

This acceptance comes with an important corollary that is central to Stapleton's view of our democracy. Because lawmakers have the duty to articulate the legal rules that govern private conduct, citizens are entitled to order their affairs and conduct in conformity with the law. They should, in his vision, be able to relate to each other in reliance upon these standards. To honor the realm of freedom left by law, courts should endeavor, when possible, to honor the reasonable expectations parties derive from sources of positive law, like statutes and administrative regulations, or instruments authorized by law, like contracts. For citizens to peaceably and rationally order their relations under law, judges must proceed on the basis that there is, with few exceptions, a body of settled legal principles that foreshadow the correct outcome of most controversies and that cases will be decided by reference to those principles.

As these beliefs form a foundation for Stapleton's jurisprudence, it is fitting that the culminating role of his judicial career would be that of a federal appeals court judge — an intermediate appellate court judge. Intermediate appellate court judges are the most constrained of all judges, and perhaps among the most constrained of all discretionary decision makers within our governmental system. Unlike Supreme Court justices, they are not the ultimate interpreter of a constitution or expositor of a jurisdiction's common law. Unlike trial court judges, intermediate appellate court judges have no occasion to find facts in the first instance. Unlike legislators or administrative agencies, intermediate appellate court judges do not issue policy pronouncements. Instead, intermediate appellate court judges spend most of their time deciding, often by reference to precedents handed down by the Supreme Court, whether front-line actors such as trial judges or executive branch officials have acted properly and consistently with the rules of the game adopted by more democratically responsible sources of pure policy, both at the federal and the state level.

For all these reasons, in Stapleton's world view it should be the rare case when a federal court of appeals creates a real political stir. Because courts should derive the principles driving decisions from sources like statutory text, Supreme Court teachings, administrative regulations, and settled principles of common law, federal courts of appeals should generally make decisions that, at worst, a reasonable person could have anticipated as a possible outcome.

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19. For these reasons, we believe he freely absorbed the legal process school ideas prevalent in his days at Harvard Law School.

Stapleton does not chafe at the constraints inherent in his role; he believes they are at the core of the federal appeals courts' contribution. He knows that the appellate courts' most important function is to ensure that trial courts and other front-line government agencies play their roles properly, by exercising discretion with rationality, explaining their reasoning, and complying with legal restraints. In other words, the federal appeals courts primarily exist to catch those relatively few errors that district courts and other primary government actors make.

In the arguably sexier cases in which the legal problem in controversy has important public policy implications, Stapleton does not yearn to insinuate his own sense of the public good, as he does not view that as the appellate courts' proper function. Rather, it is by being faithful implementers of the policy dictates of others that the federal courts of appeals promote the efficient and fair functioning of society. By deferring to the political branches and relying upon the best objective evidence of their good faith intentions, courts pay respect to the electorate's chosen policymakers, promote coherent and consistent nationwide interpretations of federal law, and encourage compliance with agencies charged with the day-to-day task of law enforcement. By basing their decisions on statute, administrative regulations, or higher court rulings, the courts of appeals promote fairness by giving private actors the best chance to predict, before-the-fact, how their conduct will be evaluated in an after-the-fact challenge.[20]

Because of his acceptance that this constrained approach is vital to the proper functioning of our republic, Stapleton regards standards of review as indispensable. It is through the faithful use of these standards that courts of appeals refrain from impeding the legitimate processes of democratic institutions and avoid infringing upon the free space left for private activity by citizens. These standards, in Stapleton's conception, are to be taken seriously and are to be genuinely used as a description of the judicial task at hand. To be less than faithful to their implementation is no less than to be unfaithful to the institutional role given to the court under our system of law. More practically, the standards act as a constant prod towards duty, a reminder of the limited scope available to

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20. This philosophical view was articulated recently by the distinguished scholar Frederick Schauer. *See* Schauer, NEUTRALITY AND JUDICIAL REVIEW, *supra* note 6 ("This understanding of the nature of principled adjudication as being at its core faithfulness and consistency to previously articulated reasons flows from the very fact that we expect courts to offer reasons for their decisions. Because a reason is of necessity more general than the result that it is a reason for, the reason given by a court ... encompasses cases other than the one decided. ... But having decided these other cases, if the court subsequently then says 'we didn't mean it' (which is not the same as overcoming a non-absolute presumption in favor of following the reason), then there was little point in providing a reason in the first place.").

the appellate judge to insert his own idiosyncratic view of the public good or of situational justice as the basis for deciding cases.

B. Specific Themes in Stapleton's Jurisprudence

To better illustrate these attributes of Stapleton's judicial philosophy, it is useful to examine certain themes that emerge through review of his opinions. These are:

- Stapleton's reluctance to "constitutionalize" or "federalize" debatable or minor issues. He is sensitive to the potential for judicial activism to distort the province for decision making that belongs to the political branches of the federal and state governments and to trivialize the fundamental constitutional guarantees safeguarding our liberty. He has no agenda to expand the jurisdictional reach of the federal courts.
- Stapleton's conviction that in the realm of constitutional law, especially, his role is to predict how the Supreme Court would resolve the particular issue, not prescribe for the High Court what it should do. He is vigilant about resting answers to undecided constitutional questions on a reasoned and incremental extension of the principles articulated in prior Supreme Court decisions.
- Stapleton's genuine commitment to proper deference to front-line governmental decision makers, including trial judges and juries, administrative agencies, legislatures, and the United States Supreme Court. This manifests itself in a reluctance to take issues away from juries, a fidelity to deferential standards of review, and a healthy respect for the more free-flowing procedures used by legislatures.
- His recognition that governmental actors, like school principals and police officers, need to have flexibility to implement the sometimes contradictory demands of the law and must be permitted to make good faith discretionary decisions without fear of personal liability.
- His belief that citizens should be able to order their affairs in conformity with the laws adopted by elected officials and contracts voluntarily entered into amongst private citizens. To that end, Stapleton places a high value on fidelity to the evident meaning of text, when read contextually, and believes that judges must resist the temptation to do what they think is "fair" in cases when the faithful adherence to sound neutral principles would yield a harsh result.

- Stapleton's sensitivity to economics, which may arise out of his experiences as a business lawyer. He uses economic intuitions to help him decide close cases.
- Stapleton's personal civility and compassion, which resonate in his work. They inform his conception of the proper form and tone of a judicial opinion. In his view, opinions should be dignified and clear explanations of why, given the law and the facts, the outcome the court is reaching is the correct one. Opinions should convince by their logic and evident common sense, and not through flash or vinegar-laden comments. Likewise, Stapleton is sensitive to the power judges have to hurt by their words and actions, and believes that care and compassion should be used to avoid harsh pronouncements that are unnecessary to accomplish the secular law's purposes.

We now address these categories in turn.

1. "Don't Make a Federal Case Out of It"

A common expression goes, "You don't have to make a federal case out of it." Embedded in this expression is the sensible notion of proportionality, that not every slight causes a fundamental injury. Stapleton's jurisprudence reflects a recognition that this everyday phrase is a useful admonition to federal judges charged with giving life to constitutional and statutory rights.

Stapleton also appreciates the ossifying effect that the constitutionalization of issues has on the democratic process. He respects the self-correcting mechanisms contained within our constitutional structure and recognizes that judicial overreaching can stymie the political processes' ability to produce and sustain reforms. Thus, he is cautious to avoid constitutionalizing new areas of policy that the political process is capable of addressing responsibly.

An instructive example of this kind of thinking is Stapleton's *en banc* opinion for the Third Circuit in *Capital Cities Media, Inc. v. Chester*.[21] In that case, a newspaper publisher and its editor asserted a First Amendment right to access documents within the possession of the Pennsylvania Department of Environmental Resources ("D.E.R.") relating to an investigation of contamination of a water supply. The D.E.R. had produced

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21. 797 F.2d 1164 (3d Cir. 1986).

most of the documents sought, but had refused, based on departmental policy, to produce certain others. The district court dismissed the complaint and the Third Circuit affirmed.[22]

In his opinion, Judge Stapleton explained that the plaintiffs were trying to make the First Amendment into something it was never intended to be: a constitutionally mandated "freedom of information act." Other than the affirmative rights to government information expressly stated in the Constitution, however, the extent to which citizens have access to government information is determined in our system by representative, political bodies. Stapleton wrote:

> [D]ecisions as to how much governmental information must be disclosed in order to make democracy work historically have been regarded as political decisions to be made by the people and their elected representatives. Conversely, the judiciary has never asserted the institutional competence to make such decisions. The reason seems apparent. Neither the free speech clause nor the structure of the government described by the Constitution yields any principled basis for deciding which government information must be made available to the citizenry and which need not.[23]

Simply put, the Constitution, by default, left the issue of access to governmental information to the political system and Judge Stapleton thought it wrong to short-circuit the proper process by imposing a judicial resolution.[24]

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22. *Id.* at 1177. Plaintiffs also asserted an equal protection violation, alleging that the D.E.R. had been discriminating among news seekers in the materials it disclosed, which the Third Circuit remanded for further proceedings.

23. *Id.* at 1171. Judge Stapleton had served on the three-member panel that first heard the *Capital Cities* appeal, the majority of whose members dissented on *en banc* hearing of the case. On at least several occasions a Stapleton panel dissent later became the basis for a Stapleton *en banc* majority opinion. *See* Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266 (3d Cir. 1998) (*en banc* court agrees unanimously with Stapleton that district court improperly granted summary judgment for defendants in securities fraud case, after Stapleton had been outvoted on panel 2-1); Kenrich Petrochemicals, Inc. v. NLRB, 907 F.2d 400 (3d Cir. 1990) (*en banc*), *vacating* 893 F.2d 1468 (3d Cir. 1990) (Stapleton, J., dissenting).

24. Stapleton's belief in the self-correcting capacity of our federal system is also exemplified by his care in respecting the boundaries between state and federal authority. *E.g.*,

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Equally notable was Stapleton's sensitivity to the incentives that court decisions create. The dissenters in *Capital Cities* argued that a First Amendment right to government documents exists in part because Pennsylvania and other states had recognized such a right by statute. Stapleton understood that this nose-counting approach penalized progressive legislation by using it as an excuse to constitutionalize issues within the state legislatures' domain, thus, perversely, discouraging legislatures from so acting.[25]

Stapleton is intensely aware that governmental actors have difficult jobs to do and that the federal courts risk making those jobs impossible if they display a receptivity to arguments based on theoretically plausible, but factually slight, invasions of rights. For example, in *C.H. ex rel. Z.H. v. Oliva,* Judge Stapleton found that a kindergarten teacher's decision to move a student's explicitly religious art work to a less prominent place in a display did not violate the student's First Amendment right of free religious expression.[26] Stapleton was mindful that the principal and teachers at the school had to balance the sometimes conflicting mandates of the First Amendment to avoid the endorsement of religion and simultaneously allow the free exercise of religion, all in the difficult context of being a crucial authority figure in the lives of impressionable five-year-olds.[27]

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Dukes v. U.S. Healthcare, 57 F.3d 350 (3d Cir. 1995) (scrupulously distinguishing between the doctrine of complete preemption, that operates to force a plaintiff in state court to litigate in the federal courts, and ordinary preemption defenses, which must be adjudicated in state court unless the federal court otherwise has removal jurisdiction); Norfolk & S. R.R. v. Oberly, 822 F.2d 388 (3d Cir. 1987) (holding that Delaware's prohibition of coal lightering in its coastal zone did not unconstitutionally inhibit interstate commerce, and leaving it for Congress to preempt such bans if it believes that wise); Nieves v. Hess, 819 F.2d 1237, 1253-62 (3d Cir. 1987) (Stapleton, J., dissenting) (dissents from majority holding that the retroactive application of an amendment to the Virgin Islands' workers compensation statute violated the contractual rights of a large employer; Stapleton notes that any contractual expectations of the employer were conditioned on the knowledge that the legislation could be changed and that the majority was therefore unduly restricting the freedom of action of the political authorities in the Virgin Islands).

25. *Capital Cities*, 797 F.2d at 1175.

26. Stapleton expressed this view for the majority of the panel hearing the *C.H.* appeal. *See* C.H. ex rel. Z.H. v. Oliva, 195 F.3d 167 (3d Cir. 1999) ("*C.H. I*"). That opinion was later vacated and, writing for the *en banc* court, Judge Stapleton affirmed the district court's denial of C.H.'s kindergarten-related First Amendment claim on the narrower grounds of a pleading deficiency. *See C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000).

27. *See C.H. I*, 195 F.3d at 176 n.3 ("We decline plaintiff's invitation to require the

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Stapleton's reluctance to find that marginal intrusions cause constitutional or statutory injury should not be confused with a distaste for vindicating the important protective purposes of the Constitution or of statutory law. In cases in which significant impairments of rights are claimed, Stapleton has not hesitated to read the law as being protective of individual rights, even when that required the recognition of an arguably novel application of the law.[28]

In *Al-Khazraji v. Saint Francis College*,[29] for example, Stapleton, writing for the court, held that a professor — who was a United States citizen of Iraqi origin — could state a claim for race discrimination under section 1981 of title 42 of the United States Code using the argument that he had been discriminated against as a member of the Arab race. Stapleton rejected the literal approach that, as an Arab, the professor was a Caucasian (i.e., in common parlance, white) and therefore could not have been discriminated against under section 1981, which guarantees that all persons have the same right to make contracts and the protection of the law as "white citizens." That is, because the professor was, by anthropological dictionary definitions, white, his employer argued that he could not have been discriminated against because of his race.

Stapleton disagreed with this argument. Finding support in the legislative history of the act, Stapleton rejected the proposition that section 1981 used the term race

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District Court to review and regulate the school's placement of its students' artwork."). (*C.H.* is also illustrative of the deference Judge Stapleton generally accords to front-line actors, including teachers, as we discuss further in the next section.) In another religion case involving the schools, *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1383-96 (3d Cir. 1990) (Stapleton, J., dissenting), Stapleton again displayed both his reluctance to expand the authority of federal courts as well as his tendency to defer to good faith decisions of public officials. In *Gregoire*, Stapleton found a high school's auditorium in the after-school period to be a "nonpublic forum" and would have upheld the school district's reasonable exclusion of a religious group. Displaying his recognition that school officials have to make difficult balancing judgments under the First Amendment, Stapleton also concluded that the school's decision to allow adult groups to use classrooms in the evening for certain religious activities did not make the school at all times a public forum. *Id.* at 1386.

28. *See, e.g.*, T.R. v. Kingwood Township Bd. of Educ., 205 F.3d 572 (3d Cir. 2000) (Stapleton, J., dissenting) (when state failed to maintain appropriate accreditation procedure for private providers of educational programs, which resulted in private school's inability to satisfy federal IDEA regulations, state could not deny child placement in that school simply because of lack of accreditation, when that school best met child's need for a free and appropriate education in the least restrictive environment).

29. 784 F.2d 505 (3d Cir. 1986).

"in a crabbed fashion or to signify only those races identified by anthropologists as distinct."[30] Instead, Stapleton found that Congress desired to provide broad protection against discrimination rooted in racial prejudice and reasoned that the imprecision in defining what races exist should not interfere with the professor's right to show that he had been discriminated against because he was part of what was perceived by many to be an "ethnically and physiognomically distinctive" group — i.e., Arabs.[31] Stapleton recognized that racial discrimination does not track anthropological learning, but sociological prejudices, which often lead people to ascribe the status of race to distinct ethnic or even religious groups.[32]

Rather than reflecting any normative judgment that there are too many individual rights or some other ideological concern, Stapleton's care in defining rights and his tendency to require that the alleged injury have some non-trivial impact reflect his deep intuition that in order for rights to be meaningful they must be given life within a system of government that actually functions sensibly and accommodates the interests of citizens with conflicting desires and beliefs.[33] Because we are a democracy, the announcement of judicial decisions has an effect on the public's perception of constitutional and statutory rights. Stapleton is, therefore, mindful that courts ought to use care in extending constitutional and statutory rights, lest their application in circumstances that are marginal

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30. *Id.* at 516.

31. *Id.* at 517-18.

32. *Id.* Stapleton's reasoning recognizes that it can be the case that the person doing the discriminating is doing so on the basis that an individual is part of what the discriminator perceives as a race (*e.g.*, Arabs) rather than because the individual is from a particular nation (*e.g.*, Iraq). Indeed, it seems likely that many people harboring deep prejudices often lump together people of diverse national origin (*e.g.*, Mexicans, Dominicans, Hondurans, etc.) into their own self-generated definition of a racial group.

33. Related to his reluctance to over-"federalize" the law, Judge Stapleton has also exhibited a protective disinclination to create uncertainty with respect to the timeliness of appeals, lest the federal appellate courts be flooded with piecemeal and protective appeals. *See, e.g.*, Martin v. Brown, 63 F.3d 1252, 1265-67 (3d Cir. 1995) (Stapleton, J., dissenting) (ruling there is no final order reviewable by appellate court when trial court awarded "reasonable travel expenses" but had not yet quantified amount of those fees); *In re* Market Square Inn, Inc., 978 F.2d 116, 121-24 (3d Cir. 1992) (Stapleton, J., dissenting) (fearing that majority's allowance of bankruptcy appeal that was interlocutory in nature will lead to flood of protective bankruptcy appeals).

reduce the legitimacy of the judiciary's vindication of those rights when they are most fundamentally important.[34]

2. "What Would the Supreme Court Do?"

Stapleton's approach to constitutional interpretation is self-effacing and restrained. In those instances when the temptation for an appellate judge to insinuate his own views of proper policy might be the most tempting — when the court faces areas of constitutional law on which the Supreme Court has not yet definitively spoken — Stapleton is at his most restrained. Many judges might view such cases as presenting a legitimate opportunity for an appellate judge to opine as to what the law ought to be. Stapleton does not see that as his task.

To the contrary, Judge Stapleton genuinely sees his task as a predictive one that involves the appellate judge trying to determine how the Supreme Court would rule if it was faced with the case and required to decide it in fidelity to the legal principles articulated in its own prior writings. This predictive exercise is not, it must be emphasized, a sort of political bet, involving Stapleton's musings about which way Justice so-and-so is leaning these days. Rather, it involves a painstaking examination of the writings of the Court and the careful application of the high court's own rules regarding the effect of precedent.

When the Supreme Court has fractured on issues, Stapleton's method impels him to parse carefully the Court's prior opinions, in patient search of areas of principled agreement that might form the basis for a stable rule in the case he faces. In Stapleton's view, this approach is the only appropriate way for appellate courts to play their role in stitching together the fabric of federal law. Because lower federal courts often deal with cases whose outcome is not clearly foreordained by previous Supreme Court holdings,

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34. *Cf. C.H. I*, 195 F.3d at 174-76 & n.3 (describing discretion inhering in school teachers, and substantial deference to which their decisions are accorded, particularly as teachers are "in a far better position than we to predict how students and their parents are likely to respond to the way she conducts her class in any given situation and what impact those responses may have on the ongoing educational process"); Barry v. Bergen County Prob. Dep't, 128 F.3d 152, 165-66 (3d Cir. 1997) (Stapleton, J., dissenting) (concluding that when a defendant was not on probation and was merely required to pay a fine and perform community service, he was not "in custody" for habeas corpus purposes and federal courts therefore lacked jurisdiction to hear his habeas petition). In this respect, Stapleton's jurisprudence appreciates the dangers perceived by thinkers like Alexander Bickel. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

their fidelity to the basic principles articulated by the high court is, again, important because it sets them all on a course towards coherence and helps them avoid the issuance of rulings that could not reasonably be foreseen by rational, law-abiding parties.

The quintessential example of Stapleton's fidelity to this approach came in *Planned Parenthood v. Casey*.[35] In *Casey*, the Third Circuit was faced with a challenge to several amendments to Pennsylvania's abortion statute adopted in 1988 and 1989. The district court had found due process violations in a number of the act's provisions: informed consent (requiring a woman seeking an abortion to be told certain information, and then to wait twenty-four hours, before being permitted to act on her choice); parental consent (requiring minors seeking abortions to obtain the permission of a parent); spousal notification (requiring a woman seeking an abortion to notify her spouse, if he could be located); and certain reporting and public disclosure requirements imposed on abortion clinics. On appeal, the Third Circuit, through Judge Stapleton, upheld the constitutionality of each of these provisions other than spousal notification.[36]

These substantive holdings, while of immense importance to many citizens and the subject of intense debate at the time they were issued, are, for our purposes, less significant than the approach Judge Stapleton took in reaching his conclusions. For it was an unusual moment in the constitutional history of abortion law when *Casey* reached the Third Circuit. The Supreme Court's landmark opinion of *Roe v. Wade*[37] — in which a seven-justice majority had upheld a fundamental right to an abortion, restrictions on which were (in simplified terms) constitutional only if they survived "strict scrutiny" review — was nearly twenty years old. *Roe* had faced political attack since the day it was handed down. In the years immediately preceding *Casey*, *Roe*'s viability had also been questioned by several Supreme Court decisions. In 1989, the Supreme Court decided *Webster v. Reproductive Health Services*,[38] upholding by a 5-4 margin (with three opinions issued by the majority alone) Missouri's viability testing provision. A year later, again by a 5-4 vote, the Court invalidated a two-parent notification statute that lacked a judicial bypass procedure.[39]

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35. 947 F.2d 682 (3d Cir. 1991).

36. *Id.* at 687.

37. 410 U.S. 113 (1973).

38. 492 U.S. 490 (1989).

39. *See* Hodgson v. Minnesota, 497 U.S. 417 (1990).

These recent opinions were marked far more by their divisiveness and lack of certain mandate than they were by clarity.[40] Consequently, when *Casey* came before Judge Stapleton, the first, momentous task was to figure out what legal standards to apply.[41] This was no small matter. As Stapleton announced, "the standard of review used for abortion legislation establishes the degree to which the government may regulate abortion."[42]

In his *Casey* opinion, Judge Stapleton meticulously dissected *Roe* and each of the subsequent abortion decisions of the Supreme Court in an effort to identify the controlling legal standard to apply.[43] There were at least three possibilities: "strict scrutiny," under which limitations on the right to an abortion would be upheld only if they serve a compelling state interest and are narrowly drawn to serve that interest; "rational basis review," under which an abortion regulation is upheld as long as it is rationally related to a legitimate state interest; and the "undue burden" test, under which strict scrutiny is applied to regulations that "unduly burden" a woman's freedom to decide whether to terminate her pregnancy and rational basis review is applied otherwise.[44] Justice O'Connor, the only justice to be in the majority in both *Webster* and *Hodgson*, had articulated the undue burden test in several concurring opinions. During his lengthy discussion of alternate standards of review, Judge Stapleton's goal is not to persuade the reader, or ultimately the Supreme Court, that he has devised a wise resolution to this procedural and

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40. When *Casey* ultimately reached the Supreme Court, Chief Justice Rehnquist sympathetically explained the difficult task Judge Stapleton had faced in analyzing the Supreme Court's recent abortion decisions: "In attempting to settle on the correct standard, however, the court confronted the confused state of this Court's abortion jurisprudence.... The task of the Court of Appeals in the present cases was obviously complicated by this confusion and uncertainty." Planned Parenthood v. Casey, 505 U.S. 833, 944, 950 (1992) (Rehnquist, C.J., concurring in judgment in part and dissenting in part); *see also id.* at 845 ("The Court of Appeals found it necessary to follow an elaborate course of reasoning even to identify the first premise to use to determine whether the statute enacted by Pennsylvania meets constitutional standards.") (plurality opinion).

41. *See Casey*, 947 F.2d at 687-88 (describing "threshold question" as "whether the standard of review for abortion regulations promulgated by the Court in *Roe* ... had survived" *Webster* and *Hodgson*).

42. *Id.* at 688.

43. *Id.* at 694-97.

44. *Id.* at 688-91.

constitutional morass. Rather, he emphasizes that the Supreme Court itself has established rules for divining the law of the land even in such confused circumstances, rules he proceeds to apply diligently.

A highly truncated version of Judge Stapleton's analysis follows:

> [W]e must now decide which standard is presently the law of the land .... In making that determination, we will apply several principles of law that constrain lower courts in their decisionmaking .... Decisions of the Supreme Court regarding federal law and the Constitution are binding on the lower courts. There is no room in our system for departure from this principle, for if it were otherwise, the law of the land would quickly lose its coherence ....
>
> [W]hen a majority of the Justices announce in the course of deciding a case that they are substituting a new standard or result for that used in a prior case, the substitution is effected, and the lower courts are thereafter bound to follow the new standard or result ....
>
> Occasionally, the Supreme Court's decision in a case reveals that a standard established in an earlier case no longer commands the allegiance of a majority of the Justices, but also reveals no single substitute is endorsed by that majority of the Justices ....
>
> [A] legal standard endorsed by the Court ceases to be the law of the land when a majority of the Court in a subsequent case declines to apply it, even if that majority is composed of Justices who disagree on what the proper standard should be.... [In such circumstances,] "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds...." The binding opinion from a splintered decision is as authoritative for lower courts as a nine-Justice opinion.[45]

After analyzing the multitudinous opinions issued by the splintered 5-4 majorities in the Supreme Court's two most recent abortion opinions, Judge Stapleton concluded:

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45. *Id.* at 691-95 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).

> In these circumstances, we conclude that it would be inconsistent with the teachings of *Marks* for lower courts to apply the strict scrutiny test of *Roe* [and its successors] to all abortion regulations. We also conclude that only by applying the undue burden standard of review, that is, only by applying strict scrutiny review to regulations that impose an undue burden and rational basis review to those which do not, can we remain faithful to *Marks*. Only by following the rationale of Justice O'Connor's concurring opinions will the lower courts decide abortion regulation cases in a way consistent with the way the Court decided them in *Webster* and *Hodgson*.[46]

Judge Stapleton then found that only the spousal notification requirement imposed an "undue burden" and concluded that provision could not survive strict scrutiny.[47] None of the other challenged provisions imposed an undue burden, so each was upheld.

Time would soon tell whether Judge Stapleton had successfully predicted what the Supreme Court would do. In 1992, a closely divided Supreme Court affirmed the Third Circuit's determinations that Pennsylvania's informed consent, parental consent, and reporting and disclosure requirements were constitutional and that its spousal notification provision was unconstitutional.[48] The Court's opinion, authored jointly by Justices O'Connor, Kennedy, and Souter, expressly adopted the undue burden standard of review for abortion regulations.

Another instance of successful prediction arose out of *E.B. v. Verniero*,[49] in which Judge Stapleton's panel opinion found that New Jersey's sex offender registration and

46. *Id.* at 697. *See also* Miller v. Cigna Corp., 47 F.3d 586 (3d Cir. 1995) (*en banc*) (parsing fractured Supreme Court rulings to discern proper standard for a jury charge in an age discrimination case based on a claim that the employer's non-discriminatory justification was pretextual). In a much less confused area of jurisprudence, Judge Stapleton conducted a similar analysis and concluded that the Third Circuit's prior test for determining whether a statute is punitive (and therefore cannot constitutionally be applied to defendants convicted prior to its enactment) survived two subsequent Supreme Court decisions. *Verniero*, 119 F.3d at 1093-96.

47. *Casey*, 947 F.2d at 709-15.

48. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992). *See especially id.* at 879 (plurality opinion stating it generally agreed with Third Circuit's conclusion but would refine the undue burden analysis).

49. 119 F.3d 1077 (3d Cir. 1997).

community notification statute (popularly known as "Megan's Law") was not punitive and, therefore, could be applied retroactively to defendants who had committed their offenses before enactment of the statute. After considering the declared legislative purpose, the objective purpose, and the effects of the statute, Judge Stapleton concluded that Megan's Law was not punitive. He expressly predicted that the Supreme Court would agree:

> As we view this matter, there is unfortunately a background risk of private violence that is necessarily assumed by everyone in our society. When one commits a reprehensible crime and is publicly prosecuted, that risk is undoubtedly augmented to a limited degree. The duration of that degree of augmented risk is likely to be extended by notification pursuant to Megan's Law and this is understandably a concern for registrants. Nevertheless, we believe the Supreme Court would not regard this indirect effect of Megan's Law as sufficiently burdensome to require classification of the law as punitive.[50]

Sure enough, seven years later, in the recent decision of *Smith v. Doe*,[51] the Supreme Court held that Alaska's version of "Megan's Law" was not punitive and could be applied retroactively.[52]

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50. *Id.* at 1104-05.

51. 538 U.S. 84 (2003).

52. Another significant example of successful prediction is Judge Stapleton's thoughtful consideration of the question of the admissibility of expert testimony regarding whether Bendectin causes child birth defects. DeLuca by DeLuca v. Merrell-Dow Pharm., Inc., 911 F.2d 941 (3d Cir. 1990). His careful articulation of the gatekeeper role of the trial judge and the proper standards that must be deployed before excluding such evidence, although at odds with the stance most other circuits had then taken on the issue, presaged the Supreme Court's decision in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). *See also* United States v. Edmonds, 80 F.3d 810 (3d Cir. 1996) (Stapleton, J., concurring in part and dissenting in part) (emphasizing in dissent that jury verdict must be supported by unanimous findings on all elements of the crime, carefully following existing Supreme Court precedent and largely anticipating Supreme Court's ruling in *Ring v. Arizona*, 536 U.S. 584 (2002), which invalidated statute permitting trial judge to determine presence or absence of aggravating factors required for imposition of death penalty).

3. Staying Within His "Lane"

Judge Stapleton's approach to being a federal appellate court judge cannot be understood without understanding the fundamental importance he accords to due deference. Stapleton understands the constraints within which he operates, and accepts that, for our governmental system to operate properly, it is as important for him to defer to reasonable exercises of discretion by front-line actors as it is for him to vacate those acts in the rare instances when they cross the line.

a. Due Deference to Trial Courts

On the front lines of the judicial branch, for example, there is work to be done by trial courts and work to be done by trial judges and juries. Within their respective domains, these sources of authority are entitled to deference by courts of appeal. To be a practitioner of restraint in the Stapleton mold is to remember and reinforce this allocation of authority, and not to undermine it.[53] For example, Stapleton is prone to affirm discretionary exercises of authority by trial judges on evidentiary and procedural issues, recognizing that trial judges need to be given a strong hand to run their courtrooms and dockets.[54] At the same time, Stapleton is equally prone to reverse trial judges who take issues out of the hands of juries, often finding there to be a much broader range of rational permissible factual inferences than his judicial colleagues.[55] Just as it is inappropriate

53. A small example of Stapleton's respect for trial courts and his civility is his approach to typographical errors in district court decisions. He fixes the errors and avoids adding "sic," thus presenting the district court opinion as the busy trial judge who wrote it, but missed the typo, would have wanted it to read.

54. These norms are embedded, of course, in the abuse of discretion standard of review typically applied by any appellate court judge reviewing a trial court's procedural or evidentiary rulings. Yet there are still close cases even when an abuse of discretion standard is applied and, in such cases, Stapleton tends to defer to the trial judge. *See, e.g.*, United States v. Levy, 865 F.2d 551 (3d Cir. 1989) (*en banc*) (affirming trial judge on close judgment calls admitting evidence in a criminal trial); *see also* United States v. Velasquez, 885 F.2d 1076, 1092 (3d Cir. 1989) (Stapleton, J., dissenting) (Stapleton would have remanded to the district court for benefit of its views on whether criminal defendant's waiver of Miranda rights had been voluntary, even though appellate court review of district court finding would be plenary).

55. Many of Stapleton's dissents fall into this category. *See, e.g.*, Stanziale v. Jargowsky, 200 F.3d 101 (3d Cir. 2000) (Stapleton, J., concurring in part and dissenting in part) (finding

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for judges to intrude on the domain of elected officials, Stapleton perceives it as likewise injurious to our system of democracy for judges to constrain citizen juries from exercising the full range of discretionary authority vested in them by the Constitution. In the Stapleton framework, the distinction between these two kinds of cases is a simple one: in the first category involving the review of procedural rulings, the district judge is the government decision maker vested with legitimate authority and must be given sufficient leeway to resolve matters rationally, whereas in the second, the district judge is displacing the proper authority — the jury — and insinuating herself in its place.

Stapleton's fifteen years as a trial judge and his view of the proper functioning of government shape another characteristic of his review of district court rulings (as well as his examination of the actions of administrative agencies). Complementing his belief that the trial courts and political branches should be given deference is a view that these sources of authority should act in a reasoned way, thus promoting public confidence in their integrity and fairness. As a result, Stapleton tends to be critical of action that is unexplained

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that grant of summary judgment was in error when evidence of pretext was sufficient to permit a rational jury to conclude that the employer had engaged in unlawful discrimination); Williams v. Borough of West Chester, Pennsylvania, 891 F.2d 458 (3d Cir. 1989) (Stapleton, J., dissenting) (when arrestee had engaged in bizarre behavior, a rational jury could have inferred that members of the police would have discussed the arrestee's behavior and thus have known of the arrestee's suicidal tendencies. On that basis, jury could find that their failure to take steps to ensure he did not hurt himself resulted from their deliberate indifference to that risk. As a result, Stapleton would have found error in taking the issue away from the jury); United States v. Idowu, 157 F.3d 265 (3d Cir. 1998) (Stapleton, J., dissenting) (Stapleton would not vacate conviction when a jury could make common sense inference that defendant who drove purchaser of narcotics to scene of purchase carrying large amounts of cash and possessing other knowledge that his colleague was involved in illicit behavior had engaged in a conspiracy to purchase narcotics); Fedorczyk v. Caribbean Cruise Lines, Ltd., 82 F.3d 69 (3d Cir. 1996) (Stapleton, J., dissenting) (rational jury could draw inference that tort plaintiff slipped and fell in cruise ship bath tub because, as expert testified, the adhesive strips in the tub were inadequate to prevent slipping and thus it was error not to allow jury to decide).

So do his majority decisions in *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266 (3d Cir. 1998) (*en banc*) (reversing a grant of summary judgment after finding that a jury, contrary to the district court's conclusion, could find sufficient evidence of scienter to establish a § 10(b) fraud claim); *Azzaro v. County of Allegheny*, 110 F.3d 968 (3d Cir. 1997) (*en banc*) (reversing a district judge's decision to grant summary judgment on the grounds that there was no factual dispute whether the county employing authority had discharged the plaintiff in retaliation for filing a complaint of sexual harassment); and *Turner v. Schering-Plough Corp.*, 901 F.2d 335 (3d Cir. 1990) (error to grant summary judgment when there was sufficient evidence of pretext to create a jury question about age discrimination).

by the front-line decision maker.[56] Such action leaves citizens guessing as to why a decision was made and does not provide a basis for an appellate court to conclude that the action was a rational exercise of authority or guidance for citizens looking to plan their future conduct.

Thus, Stapleton's general disposition to give trial judges the benefit of a reasoned doubt is tempered by his intolerance for unexplained rulings. He is not inclined to come up with a possible answer as to why a trial judge exercised his discretion in a questionable manner for reasons that were not adequately explained.[57] Instead, he tends to require the trial court to do it over, this time the right way.[58] This does not necessarily mean the court has to change its answer; it means that the court has to explain how it came to the answer.[59] This is in keeping with Stapleton's own approach as a district judge, which emphasized the importance of making sure that litigants understood why rulings were made so that they would feel that their matters were being decided under the law, regardless of the way the court came out. It also reflects Stapleton's sincere desire to receive the full benefit of the trial judge's perspective.[60]

56. *E.g.*, Brytus v. Spang & Co., 203 F.3d 238, 247-48 (3d Cir. 2000) (Stapleton, J., dissenting) (when a district court's one-sentence explanation for denying an award of attorneys' fees in an ERISA common-fund case that goes to judgment only supported a bright-line rule against awarding fees in all such cases, when that bright-line rule was not embraced by the court or embodied in the statute, and when the district court did not explain why fees should not be awarded in the case before the court, Stapleton found that the district court's ruling was "effectively" unreviewable and a remand was required).

57. *Levy*, 865 F.2d at 599 (remanding when sentence *could* have been error and judge did not explain ruling).

58. *Id.*; *see also DeLuca*, 911 F.2d at 941 (remanding for proper inquiry into admissibility of expert testimony).

59. United States v. Queensborough, 227 F.3d 149, 170 (3d Cir. 2000) (Stapleton, J., dissenting) (stating he would remand and require district court to articulate clearly its reasons supporting its decision on appropriate sentence).

60. *E.g.*, United States v. Vastola, 25 F.3d 164, 177 (3d Cir. 1994) (Stapleton, J., dissenting) (expressing belief that trial judge's greater familiarity with record counseled for him to conduct harmless error inquiry in first instance, irrespective of the long-standing nature of the case); *see also Velasquez*, 885 F.2d at 1093 (Stapleton, J., dissenting) (even if appellate review of the voluntariness of a confession would be plenary, majority should have remanded so that the court could have the benefit of the trial judge's views and stating: "Review of a determination of voluntariness is plenary because such a determination *includes* components that an appellate court is as competent as a trial court to address. However, there are other components of such a determination with respect to which the insight of a trial judge should not be foregone.").

For related reasons, Stapleton is extremely sensitive to procedural fairness and aware of the powerful influence certain evidence can have on juries[61] and even judges.[62] He is a stickler about requiring fair notice and about proper jury charges in criminal cases, believing these to be important attributes of a genuinely fair trial process.[63]

b. Appropriate Regard for the Judgments of Executive Agencies

As adverted to, Stapleton's deference to policymakers acting within their designated spheres extends outside the judicial system to the political branches. Stapleton acknowledges that administrative agencies must breathe life into complicated statutory regimes, that these agencies have considerable expertise and that, as a result, their judgments should not be lightly displaced. In controversial cases, Stapleton has been willing to affirm difficult judgment calls by administrative agencies when the arguably "popular" thing to do would have been to reverse.[64] He has also been willing to recognize that

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61. *E.g.*, United States v. Gilsenan, 949 F.2d 90 (3d Cir. 1991) (Stapleton, J., dissenting) (if "average jurors" heard that defendant was willing to enter guilty plea they would likely be influenced in an impermissible way and therefore the case should be remanded when evidence suggested that the jury had heard this information).

62. *E.g.*, Government of Virgin Islands in Interest of A.M., 34 F.3d 153, 162 (3d Cir. 1994) (Stapleton, J., dissenting) (finding it inconceivable that the judge deciding on whether to transfer youth defendant for trial as an adult would not have been influenced by an inadmissible comment made by the youth to a social worker that he lacked remorse for his actions).

63. *E.g.*, *Queensborough*, 227 F.3d at 165-70 (Stapleton, J., dissenting) (would have remanded for new sentencing of defendant who had committed a grotesque and heinous crime because the district judge did not give proper notice of the possibility of an upward departure from the sentencing guideline range and did not adequately explain, by reference to the guidelines themselves and their goal of sentencing uniformity, his decision to give a five-level upward departure); United States v. Edmonds, 80 F.3d 810 (3d Cir. 1996) (Stapleton, J., concurring and dissenting) (court's failure to give a proper unanimity charge could not be harmless error; unless jury unanimously found all necessary elements of crime there is no proper verdict at all).

64. In *Three Mile Island Alert, Inc. v. U.S. Nuclear Regulatory Comm'n*, 771 F.2d 720 (3d Cir. 1985), Stapleton authored a decision affirming the NRC's decision to allow a restart of the undamaged reactor at the Three Mile Island nuclear power plant in Pennsylvania. Stapleton's thorough (but publicly unpopular) decision concluded that the agency had carefully complied

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administrative agencies with statutory enforcement responsibilities need to be given the room to shape creative remedies when faced with unlawful conduct of an innovative variety and that the agencies' expert views of what is necessary to ensure legal compliance should not be lightly questioned by the court.

These themes are exemplified in *Kenrich Petrochemicals v. NLRB*,[65] in which Stapleton authored the court's *en banc* decision that adopted the position he had taken in a panel dissent. *Kenrich* involved a National Labor Relations Board ("NLRB") order requiring the reinstatement of a supervisor who did not have the right to engage in concerted activity under the National Labor Relations Act. The NLRB reinstated the supervisor — not to vindicate her own rights but those of members of the bargaining unit who were her family members, based on its finding that the employer fired the supervisor to coerce her family members in the bargaining unit to refrain from participating in an ongoing battle to unionize. The NLRB, and then the Third Circuit, also rejected the employer's argument that the bargaining unit's ultimately successful organizing efforts proved that any improper effort made by the employer had failed.

In affirming the NLRB, Stapleton wrote:

> In fashioning a remedy in a particular proceeding, the Board may draw on the knowledge and expertise it has acquired during its continuous engagement in the resolution of labor disputes and need not confine itself to the record of the dispute before it ....
> When an employer fires a supervisor in order to discourage the exercise of section 7 rights by protected employees closely related to the supervisor, the Board, based upon it experience, is entitled to infer in

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with its legal authority after a satisfactory process, consistent with statutory mandate, and in a manner that validated the agency's decision not to hold a public hearing on certain evidence.

Stapleton's dissent in *Benton v. Bowen*, 820 F.2d 85 (3d Cir. 1987), also reflects his rigorous adherence to the required deferential standard of review. In that case, Stapleton would have affirmed an administrative determination that a mentally retarded claimant was unable to form an intent to reside in New York and was therefore not voluntarily living there for purposes of receiving New York state supplementary payments to her federal supplemental security income or SSI. Although the sympathies in the case fell in the direction of the complainant, Stapleton adhered to a disciplined application of the standard of review. *Id.* at 90. *See also* Clinton County Comm'rs v. EPA, 116 F.3d 1018, 1025 (3d Cir. 1997) (*en banc*) (overruling prior circuit precedent and holding that there was no federal court jurisdiction to interfere with EPA remedial activities (in this case, on-site incineration) until EPA remedial activities at the site were completed and finding the plaintiff's constitutional argument that they were owed judicial review "inconsistent with established principles of sovereign immunity").

65. 907 F.2d 400 (3d Cir. 1990) (*en banc*).

> the absence of evidence to the contrary that the intended message was an effective one. Indeed, we do not believe one needs extensive experience with behavior in response to coercive tactics in the workplace to conclude that such a discharge must communicate to rank-and-file employees that the employer is willing to go to any lengths to crush section 7 activity ....
>
> [Finally,] Kenrich's argument [that the coercive efforts failed] ignores the fact that the collective bargaining process is an ongoing one in which employees have repeated opportunities to exercise their section 7 rights; elections are followed by the negotiation of collective bargaining agreements, which in turn are followed by the day-to-day process by which disputes and grievances are resolved in the workplace. We believe it clear that the task of evaluating the likely rate of dissipation of the coercive impact of Kenrich's conduct, like the task of evaluating its original potency, is one that Congress has entrusted to the Board and its expertise.[66]

c. The Importance of Fair Treatment for Front-Line Government Employees

Stapleton is mindful of the messy and complicated nature of our society, and the cross-cutting pressures this sometimes places on government employees at the front line of delivering services.[67] These employees often have to balance arguably conflicting

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66. 907 F.2d at 1405-08. *See also* Seidman v. Office of Thrift Supervision, 37 F.3d 911, 939-45 (3d Cir. 1994) (Stapleton, J., dissenting) (dissenting from reversal of regulatory order prohibiting certain bank officials from further involvement with their institution, and arguing that the majority did not give sufficient deference to the agency's factual conclusion that the officials' misconduct implicated statutory concerns for financial soundness and integrity).

67. A good example of Stapleton's appreciation of the clash of competing interests that face government agencies is *Dehart v. Horn*, 227 F.3d 47 (3d Cir. 2000) (*en banc*). In that decision, Stapleton reversed the district court's grant of summary judgment for prison officials who had refused to provide a Buddhist inmate a vegetarian diet that the inmate contended was dictated by his religious beliefs. Judge Stapleton agreed with the district court that the prison had legitimate interests in maintaining a simplified and efficient food service and preventing resentment and jealousy on the part of other inmates. *Id.* at 52. But these legitimate interests themselves may have conflicted, as the prison provided kosher diets to Jewish inmates, and the record did not reveal a satisfactory explanation for this apparent inconsistency. *Id.* at 58.

constitutional standards, while keeping an eye on the primary public purposes for which they are employed.

Stapleton's due regard for the difficult jobs of front-line government employees manifests itself, among other ways, in a strong disinclination to hold individual government employees liable for conduct that was not clearly proscribed by statute or case precedent at the time of their actions. Stapleton stands ready to recognize the applicability of a constitutional or statutory right to a new factual scenario when that step would be a rational extension of principles endorsed by the Supreme Court or of the statute's evident purpose.[68] But he is also willing to leave a plaintiff who has suffered a new kind of constitutional or statutory injury without a remedy if the only source of recovery is against a government employee who did not have clear notice that her conduct was a violation of the law.

In other words, Stapleton perceives the doctrine of qualified immunity as a very important one, vital to the effective functioning of government. If government employees cannot make good faith, discretionary decisions without undue fear of liability, then they are unlikely to do their jobs as well as the public deserves. It may be that this view is shaped in part by Stapleton's career as a Delaware corporate lawyer, which inculcated in him the belief that the overall benefits of permitting corporate managers the freedom to make good faith mistakes without fear of personal liability — a protection inherent in the business judgment rule[69] — outweighed the costs. Like corporate managers, government employees constantly confront the need to make discretionary judgments, in an ever-changing society with complex, shifting, and often ambiguous legal rules. When they do so in good faith and their decision is not a violation of a clearly articulated rule of law, Stapleton takes seriously their entitlement to qualified immunity even in situations when their conduct might be less than sympathetic.

These qualities were perhaps best exemplified recently in Stapleton's dissent in *Sterling v. Borough of Minersville*.[70] In that case, police officers had arrested two teenage boys, ages eighteen and seventeen, for underage drinking. The boys had been found in a

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68. *See, e.g., Al-Khazraji*, 784 F.2d at 505 (holding that United States citizen of Iraqi origin may sue for "race" discrimination under 42 U.S.C. § 1981).

69. The business judgment rule and provisions allowing boards to protect directors from personal liability for conduct other than gross negligence or deliberate malfeasance, *see* DEL. CODE ANN. tit. 8, § 102(b)(7), can be seen as corporate analogues to the qualified and statutory immunities afforded to public officials.

70. 232 F.3d 190, 198-200 (3d Cir. 2002) (Stapleton, J., dissenting).

parked car in which they had apparently planned to have sex. Before releasing the boys from custody, a police officer had lectured them about the immorality of homosexuality. He also threatened to tell the grandfather of the eighteen-year-old about his homosexuality unless the boy disclosed this information himself. Soon after being released from custody, the eighteen-year-old committed suicide. The deceased boy's mother filed suit against, among others, the police officer, claiming a violation of her son's civil rights.

In his dissent, Judge Stapleton agreed with the majority that the police officer violated the boy's constitutional rights. But he did not agree that the officer could be held personally liable because the unconstitutionality of his actions was not clearly established by pre-existing case law at the time of his actions. As of that time, no court had found that information about a person's sexual orientation was protected within the right to privacy, and the only appellate court decision addressing the question had ruled against such a right.[71] Although it seems likely that Stapleton was as disturbed by the police officer's conduct as the majority, he was also unwilling to abandon his strict adherence to the crucial doctrine of qualified immunity, even in what might be viewed as sympathetic circumstances.

Similarly, in the difficult case of *Stoneking v. Bradford Area School District*,[72] the question was whether a school principal and vice-principal could be held responsible for sexual misconduct committed by a teacher towards a student. Because the only clear precedent that existed held simply that supervisors had to refrain from affirmative encouragement of such misconduct, Stapleton concluded that qualified immunity was due the defendant because he was "unable to say that a reasonable school administrator would understand that he would violate the well-established constitutional rights of students by failing to pursue a complaint of sexual abuse by a teacher with sufficient aggressiveness or even by discouraging such complaints."[73] Notably, Stapleton agreed with the majority that the constitutional standard of protection for students ought to be higher, but believed that the enhanced standard could not be fairly applied retroactively to these school

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71. *Id.* at 198.

72. 882 F.2d 720, 731-32 (3d Cir. 1989) (Stapleton, J., concurring in part and dissenting in part).

73. *Id.* at 732.

officials, who were entitled to base their claim to qualified immunity on the pre-existing state of the case law.[74]

d. Respect for Congress and State and Local Legislatures

Stapleton's deference to front-line actors is accompanied by a corresponding respect for the decisions of elected legislatures at the local, state, and federal level. He has resisted judicial impulses to superimpose the procedural requirements of the administrative and judicial processes on legislatures, recognizing that elected officials have more legitimate flexibility to act on the basis of intuition and an imperfectly complete record.[75]

For instance, in *Phillips v. Borough of Keyport*, Stapleton wrote for the full court in rejecting the argument that a town ordinance touching on free speech rights was unconstitutional if "the adopting entity did not have before it, at the time of adoption, evidence supporting the constitutionality of the action taken."[76] As he explained:

> There is a significant difference between the requirement that there be a factual basis for a legislative judgment presented in court when that judgment is challenged and a requirement that such a factual basis have been submitted to the legislative body prior to the enactment of the legislative measure. We have always required the former; we have never required the latter. Whatever level of scrutiny we have applied in a given case, we have always found it acceptable for individual legislators to base their judgments on their own study of the subject matter of the legislation, their communications with constituents, and their

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74. *Id.* at 731-32. *See also* Sample v. Diecks, 885 F.2d 1099, 1109-10 (3d Cir. 1989) (prison officials who kept prisoner in custody beyond the term of his sentence could be personally culpable for Eighth Amendment violation of cruel and unusual punishment only if they acted with deliberate indifference as to whether the prisoner was being held beyond his legally mandated release date; mere negligence on the part of prison officials in calculating or giving effect to a release date would not violate the Eighth Amendment).

75. He is also quick to point out that it is for the legislature, and not the federal courts, to make policy decisions. *See, e.g., Verniero*, 119 F.3d at 1080 (explaining, in reviewing constitutionality of retroactive application of sex offender registration and community notification statute — "Megan's Law" — "Nor, of course, is it our responsibility to determine whether the policy judgments reflected in Megan's Law are prudent ones.").

76. 107 F.3d 164, 178 (3d Cir. 1997) (*en banc*).

> own life experience and common sense so long as they come forward with the required showing in the courtroom once a challenge is raised. In reliance on this approach, most municipal and county councils throughout the land and some state legislatures do not hold hearings and compile legislative records before acting on proposed legislative measures. We perceive no justification in policy or doctrine for abandoning our traditional approach. Moreover, we believe that insistence on the creation of a legislative record is an unwarranted intrusion into the internal affairs of the legislative branch of government.[77]

As importantly, Stapleton deploys his capacity for empathy with full force when examining the validity of legislation, by refusing to leap easily to the conclusion that legislative distinctions have no rational or proper purpose[78] or that legislators are not acting for the reasons they say.[79]

4. Fidelity to Statutory Intent, Not Case-Specific "Fairness"

Stapleton's approach to statutory interpretation is grounded in his modesty and respect for the self-correcting nature of our political process. It also draws inspiration in Stapleton's belief that citizens are entitled to order their affairs in conformity with the written law. For these reasons, Stapleton believes that the best evidence of what the legislature means is what it writes down in text and that, when possible, the court should leave it to the political process to correct any problems that arise from giving effect to plain

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77. *Id.*

78. *E.g.*, Blanchburg Plaza Assocs. v. Fesq, 153 F.3d 113, 121 (3d Cir. 1998) (Stapleton, J., dissenting) (finding evident rationality in a plain meaning application of a congressional statute, Stapleton objects to majority's disregard of that meaning as absurd, noting: "Rather than assume an inadvertent slip on its part, I deem it prudent to take Congress at its word" when there were any "number of [rational] reasons why Congress may have regarded it advisable" to make the distinction the statutory words plainly articulated).

79. *See Verniero*, 119 F.3d at 1098 (articulating "objective purpose" prong of analysis for identifying "punitive" statutes as follows: "If a reasonable legislator motivated solely by the declared remedial goals could have believed the means chosen were justified by those goals, then an objective observer would have no basis for perceiving a punitive purpose in the adoption of those means.").

meaning.[80] This value judgment reflects not only deference to the political branches, but also an appreciation of the incentive structure that is created by positive law.

Private parties rely upon text to order their conduct and affairs. If the courts disrupt their expectations by deviating from plain meaning or undercutting the guidance given by administrative agencies, private parties will not have any reliable benchmark by which to plan their affairs. As a result, they are put at risk to be blind-sided. Nearly as bad, careful parties who had ordered their conduct in conformity with clearly articulated legal standards might find their rational incentives perverted if courts permit other, less careful parties, out of a sense of case-specific equity, to engage in behavior not permitted by those standards.

Of equal importance is the incentive structure textual fidelity creates for the democratic process itself. By being faithful to the statute as written, courts impress upon citizens the need to update the law through the legislative process, reinforcing the importance of that process and of the elections from which that process draws its legitimacy.

As a result of these factors, Stapleton balks when he perceives his colleagues deviating from plain-meaning readings of statutes in order to pursue what appears to him to be their own understanding of case-specific justice.[81] He rises to these occasions with convincing explanations of why a rational legislature could mean just what its words seem

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80. Stapleton does not, however, read text in isolation and, thus, is not a textualist in the more narrow sense identified by some with, for example, Justice Scalia. In both statutory and contractual cases, he reads text contextually and, when there is ambiguity, in light of the relevant legislative or bargaining history. *E.g., Al-Khazraji*, 784 F.2d at 515-17 (construing 42 U.S.C. § 1981 in view of legislative history). In the contractual context, *see PECO Energy Co. v. Boden*, 64 F.3d 852, 859-60 (3d Cir. 1995) (Stapleton, J., dissenting), an insurance policy recovery case, in which Stapleton dissented from the majority's holding that the combined thefts over a six-year period constituted a "single occurrence" under the policies and applied a single deductible set forth in the policy for the last year of coverage. Judge Stapleton's dissent was based on a careful interpretation of the contract within the commercial context of the parties' transaction. "The court reads the policies in a way that make the extent of each syndicate's liability depend on the insured's loss ... before and after the period covered by its policy. Because I believe this clearly was not intended by the parties, I respectfully dissent." *Id.*

81. *E.g.*, United States v. Simmonds, 235 F.3d 826, 838-39 (3d Cir. 2000) (Stapleton, J., dissenting) (arguing it was error to deviate from plain meaning of statutory definition of value and give crime victims more restitution); *Vastola*, 25 F.3d at 171 (Stapleton, J., dissenting) (dissenting from conclusion that wire tap statute was not violated and that wire tap evidence was admissible against RICO defendant, even though consequence of denying admissibility would be to reverse conviction unless harmless error was proven; Stapleton concludes that majority renders the statutory requirement a "precatory entreaty").

to say,[82] and why the incentive structure that the plain words set up are sensible and just when viewed from a broader, and less case-specific, perspective.

His decision in *Smith v. Fidelity Consumer Discount Co.*[83] illustrates this tendency. In what started as a dissent from an unpublished majority opinion of Judge Seitz,[84] and then became a unanimous panel opinion after the earlier opinion was vacated, Stapleton adhered to the plain language of the Truth In Lending Act ("TILA") and found Congress intended to pre-empt usury statutes such as Pennsylvania's. The relevant section of TILA, section 501(a), provided in pertinent part: "The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest ... which may be charged ... shall not apply to any loan ... which is — (A) secured by a first lien on residential real property .... "[85] Plainly, the phrase "any loan" included the loan extended by Fidelity to the plaintiff to purchase her used car (for which she gave a lien on her home as security). This result was inescapable, despite the troubling fact that the interest rate charged by Fidelity might range as high as 41%.[86] Perhaps because of the disturbingly high interest rate, as well as Judge Seitz's original majority opinion, Judge Stapleton did not rely solely on plain language; he proceeded to examine legislative intent and the implementing regulations adopted by the Federal Home Loan Bank Board, but found there nothing to contradict the plain meaning of the statutory language. He concluded: "We believe that considerable mischief would be created if courts abandoned the unqualified language of

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82. *See, e.g.*, United States v. Doe, 980 F.2d 876, 883 (3d Cir. 1992) (Stapleton, J., dissenting) (explaining why in linguistic and historical terms, it was evident that Congress did not equate the judicial power to "set aside" a conviction with the power of "expungement"); *see also Blanchburg Plaza Assocs.*, 153 F.3d at 121.

83. 898 F.2d 907 (3d Cir. 1990).

84. *Id.* The original, unpublished opinion, written by Judge Seitz (with Judge Stapleton concurring in part and dissenting in part), can be found at 1989 WL 106695 (3d Cir. June 27, 1989). That first Judge Seitz opinion resolved two related cases: Judge Seitz wrote for the unanimous panel in one of the cases and wrote the majority opinion, over Judge Stapleton's dissent, with respect to the second of the cases. *Id.* at *19-21. Judge Seitz's original opinion was then vacated and superceded by both a new Judge Seitz opinion (again unanimous) dealing with the first of the two related cases, *see* 898 F.2d 896 (3d Cir. 1990), and Judge Stapleton's now-unanimous opinion resolving the second of the cases in the fashion Judge Stapleton had suggested in his dissent from the original unpublished Judge Seitz opinion, *see* 898 F.2d at 907.

85. 898 F.2d at 910 (citing 12 U.S.C. § 1735f-7a).

86. *Id.* at 909.

the statute and attempted to divine, on a case-by-case basis, what loans falling within the literal words of § 501 Congress might not deem worthy of the shelter provided by that section."[87]

5. Fidelity to Contractual Text and Appreciation for Economic Realities

Judge Stapleton's principled commitment to interpretation extends to contracts as well. As he does when he reads statutes, Stapleton reads contracts with an emphasis on giving effect to the written text, even if that produces seemingly harsh results. To the interpretive task of construing contracts, Stapleton brings a sensitivity to economic rationality and the incentives that legal rules create for commercial actors — a sensitivity no doubt honed by his years as a corporate lawyer and trial judge in numerous business cases. Judge Stapleton's appreciation for economic realities underpins his emphasis on holding parties to the contractual bargains they have struck.

He is troubled by the efficiency-hampering effects of judicial rulings that bail out parties that did not protect themselves at the bargaining table, knowing that deviations from plain meaning diminish the wealth-generating potential of a reliable common law of contracts. Where some judges see harshness, Stapleton is more inclined to see a situation in which the party that portrays itself as a victim accepted a calculated risk before the fact in order to achieve gain, and is now seeking to obtain after-the-fact additional protections it failed to achieve by contract. He is prepared to acknowledge that the implementation of a fair system of incentives for the careful means tolerating what may seem to be cases of situational inequity. In other words, it is more important that there be reliable rules to guide diligent citizens than for there to be exceptions for those who do not act to protect themselves. The studied refusal to bail out such parties creates an incentive for commercial parties to take their opportunity for private ordering seriously and to use an expected level of care.

Stapleton believes that contractual words are very important to the functioning of a society under law. Courts should be careful to give such words a natural, commonsense reading so that citizens can order their affairs in reliance upon the text of their

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87. *Id.* at 912. *See also* East Wind Indus. v. United States, 196 F.3d 499, 513-14 (3d Cir. 1999) (Stapleton, J., dissenting) (dissenting in tax penalty case because taxpayers — although "grievously wronged by corrupt government officials," who had essentially destroyed taxpayers' business when taxpayers refused to continue paying bribes — clearly did not qualify for exemption from payment of employment taxes, by reference to plain language of IRS regulations).

contracts. When judges substitute their own idiosyncratic views of equity in place of plain language, he fears that the overall benefits of a society based on law will be diminished.

A good case to illustrate how Stapleton uses consideration of economic incentives as a tool for determining the meaning of contracts is *Henkels & McCoy, Inc. v. Adochio.*[88] A general contractor — a creditor of Chestnut Woods — sought to recover payments it was due under a contract with Chestnut Woods. Chestnut Woods was owned by other partnerships, including by a limited partnership known as Red Hawk, and the general contractor obtained a judgment against Red Hawk. By that time, however, Red Hawk had no cash, having paid its limited partners large capital distributions as a return on capital of another project that had been abandoned.

In simplified terms, the general contractor sought to recover by asking the court to compel the replacement of these capital distributions made to Red Hawk's limited partners on the grounds that these distributions breached the Red Hawk limited partnership agreement. The district court ruled for the general contractor and the Court of Appeals affirmed, holding that the partnership agreement precluded the challenged distributions to the limited partners as those payments left the partnership without reasonable reserves to pay creditors.

Judge Stapleton, unable to find such a preclusion of payments in the partnership agreement (a contract, after all), dissented. To Stapleton, the "critical issue posed by this appeal is one of intent — the intent of Red Hawk partners when they negotiated their partnership agreement."[89] In contrast to the majority, Stapleton parsed the Red Hawk limited partnership agreement and concluded that it evinced no voluntary desire on the part of the partners to provide creditors more protection than the statutory law required (which only precluded distributions that would leave the partnership's liabilities in excess of its assets). Stapleton persuasively explains that investors in a limited partnership are unlikely as a general matter to craft their agreement with an eye towards benefiting creditors and there was no evidence in the text of the partnership agreement that the Red Hawk investors had done such a commercially unusual thing. Although Stapleton's ruling would have left the general contractor without a remedy, general contractors are

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88. 138 F.3d 491 (3d Cir. 1998).

89. *Id.* at 504.

sophisticated parties that engage in business transactions repeatedly; as such, they can — and should be expected to — protect themselves.[90]

Stapleton's economic intuitions do not only inform his interpretations of contracts. They also factor into his decisions in all sorts of cases. Upon the diverse caseload of a federal appellate judge, Walter Stapleton brings to bear a business-like sensibility that leads him to be skeptical of factual arguments rooted in economically irrational behavior and to be cautious about reading ambiguous statutes or contracts as precluding competitive economic activity.

Stapleton is not, however, a committed ideologue of the Chicago school variety. He is not committed to the idea that homo economicus is a better name for *homo sapiens*. Rather, he believes that an examination of the economic incentives and interests of parties in litigation provides a useful forensic tool for the determination of facts[91] or the proper interpretation of an ambiguous contract[92] or statute,[93] as well as a reliable benchmark

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90. *See also generally* United States v. Am. Ins. Co., 18 F.3d 1104, 1112 (3d Cir. 1994) (Stapleton, J., dissenting) (finding that silence of surety agreement as to whether pre-judgment interest is due in event of default means that party to such agreement has no contractual duty to pay such interest).

91. *See, e.g.*, United States v. Sargent Elec. Co., 785 F.2d 1123, 1131-32 (3d Cir. 1986) (Stapleton, J., concurring) (concluding that a district court's finding of an "overarching" conspiracy to rig bids at a "universe of sites was clearly erroneous where the sketchy circumstantial evidence could not overcome" the economic preferability of site-specific bid-rigging agreements, namely that "one seeking to maximize his risk/benefit ratio will generally prefer to make ad hoc decisions that can take into account the facts of each situation bearing on benefit and risk unless there is some substantial benefit attainable from a broader commitment which is unobtainable through ad hoc decision making."); *see also* Zarin v. Comm'r of IRS, 916 F.2d 110, 117-18 (3d Cir. 1990) (Stapleton, J., dissenting) (using an examination of economic incentives to conclude that IRS Commissioner was correct in holding that taxpayer owed taxes on $2.9 million of a total of $3.4 million in credit advanced to gambler by a casino when the casino later extinguished that portion of the debt).

92. *See, e.g.*, PECO Energy Co. v. Boden, 64 F.3d 852 (3d Cir. 1995).

93. *E.g.*, *Brytus*, 203 F.3d at 247-48 (Stapleton, J., dissenting) (using economic intuition to dissent from ruling that implied that counsel in ERISA case whose efforts at trial generated a common fund would only have access to a fee based on a lodestar, whereas counsel who obtained a common fund by settlement would have access to a larger percentage of recovery fee; Stapleton finds the majority's rule creates a perverse incentive for class counsel to settle at a lower amount and secure a higher fee); Voest-Alpine Trading USA Corp. v. Vantage Steel Corp., 919 F.2d 206 (3d Cir. 1990) (Stapleton, J., dissenting) (after a careful examination of the rights of the various creditors of a corporation found to have engaged in a fraudulent conveyance,

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for measuring whether the legitimate purposes of a statute limiting economic activity are implicated.

An interesting example of this tendency is provided by a case in which Judge Stapleton's sensitivity to rational incentives led him to the view that a plaintiff complaining about sex discrimination had been improperly tossed out of court before getting to present his case to a jury. *Stanziale v. Jargosky*[94] involved a wage discrimination complaint brought by an employee of defendant, the Monmouth County Board of Health. The male plaintiff, Stanziale, was employed in the same sanitary inspector position as a younger female, but at a lower wage rate. Stanziale's employer justified the salary disparity as legitimate and non-discriminatory on the grounds that the female employee possessed certain credentials Stanziale lacked, including a bachelor's degree and computer skills. Notably, none of these credentials was considered by the employer to be necessary for the position of sanitary inspector. Nonetheless, the panel majority held that these additional qualifications were evidence of a non-discriminatory basis for the wage disparity and that Stanziale had failed to point to sufficient evidence of pretext in order to avoid summary judgment.

By contrast, Judge Stapleton would have held that there was a material dispute of fact regarding pretext and that the case should be decided by a jury. In his dissent, Stapleton declared:

> [W]hile I agree that it does not offend the ADEA or Title VII to pay a higher salary to one employee than to another based on qualifications unrelated to their job performance, I regard the fact that an employer purports to have done so as significant circumstantial evidence of pretext. *Employers rarely reward employees for qualifications that are going to make no significant contribution to the employer's mission.*[95]

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concluding that the district court's remedy put the corporation's unsecured creditors in a better position than their contractual rights would have given them if the corporation had not fraudulently transferred its assets and that this did not comport with Pennsylvania fraudulent conveyance statute, which provides remedies "designed to place a creditor in the same position as it was in prior to the fraudulent conveyance").

94. 200 F.3d 101 (3d Cir. 2000).

95. *Id.* at 108 (Stapleton, J., concurring in part and dissenting in part) (emphasis added).

The rationale to Stapleton's dissent is simple — a rational member of a jury could conclude that an employer would not pay extra wages for credentials that were not performance-related and the employer must have had some other motive for treating differently workers who otherwise did the same job. Therefore, to Stapleton, the court should have permitted a jury to decide whether the employer's proffered explanation was pretextual. *Stanziale* thus illustrates not only Stapleton's sensitivity to economic incentives but his belief that judges should not usurp the proper role of juries in determining facts.[96]

At the margins, Stapleton's economic sensibilities also incline him to read limitations on private economic activity and competition narrowly, leaving parties free to act unless a statute or contract clearly precludes their conduct.[97] Although none of his jurisprudence questions the legitimate right of legislatures to regulate commerce, Stapleton

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96. *Id.* An example of economically influenced thinking in a very different context is displayed in *Sample v. Diecks*, 885 F.2d 1099, 1108-09 (3d Cir. 1989). In holding that prison officials can be held personally liable for detaining individuals beyond their sentenced term only if they exhibit deliberate indifference, Stapleton explained that the costs of eliminating all errors in prison administration would be, if even possible, prohibitively costly.

> The administration of a system of punishment entails an unavoidable risk of error. In the case of punishment through imprisonment, those errors may result in harms to inmates. Elimination of the risk of error in many instances would be either literally impossible or unfeasible because prohibitively costly. Thus, unforeseeable accidents or inadvertent mistakes may occur during imprisonment, resulting in harm to inmates. Such accidents or mistakes are a necessary cost of any prison system; they therefore are not repugnant to the conscience of mankind, and do not violate the Eighth Amendment. *Id.* (quotation marks and citations omitted).

97. In *J.F. Feese, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1546-47 (3d Cir. 1990) (Stapleton, J., dissenting), Stapleton voted with the majority that a Robinson-Patman Act claim had been stated but dissented from the reversal of a grant of summary judgment on a Sherman Act claim. "Unlike the Robinson-Patman Act, the Sherman Act protects competition in the marketplace and not individual competitors harmed by price discrimination." *Id.* at 1546. Because the Sherman Act protects "competition, not competitors," the plaintiff had to show that the complained of discrimination had an adverse effect on the relevant market and in Stapleton's view, had not done so. *Id.*

Another dissent demonstrating Stapleton's inclination to read restrictions on competition narrowly is *J.C. Penney Co., Inc. v. Giant Eagle, Inc.*, 85 F.3d 120, 129-31 (3d Cir. 1996) (Stapleton, J., dissenting). In *J.C. Penney*, the district court granted the petitioners a permanent injunction preventing another tenant in a shopping center from operating another pharmacy. The Third Circuit affirmed, holding that the lease preserved the tenant's right to operate the only pharmacy in the shopping center. Judge Stapleton dissented based on the proposition that "restrictive covenants in prior conveyances are binding only against future lessees with actual or constructive notice before the lease is signed" and the pharmacy had received no such notice. *Id.* at 129.

is careful not to expand judicially the scope of the government's competition-affecting reach.

6. Civility and Compassion

We conclude by examining two personal characteristics of Stapleton's that deeply influence his work: his civility and compassion. As we have adverted, Stapleton is a man of deep faith and convictions. He wears them lightly, however, and is not inclined to proselytize. But his work is imbued with these traits, so central to the best traditions of his creed.

Stapleton's dissents perhaps display his civility best of all. By definition, dissents are contentious documents, which take a different view than that of a colleague. Stapleton's dissents are remarkable in that they have a stately and respectful tone and a lack of vinegar. Even when it is clear that he believes the majority's decision has decidedly negative consequences or is misguided, his opinions are devoid of rancor or personal pique. He acknowledges that reasonable minds can differ, and it suffices for him to explain (in noun and verb, rather than adjective) why he believes that the controlling legal principles and the factual context require a different ruling. When possible, Stapleton includes words of praise for the majority.[98]

Similarly, when writing for the majority, Stapleton does not rise to the bait when a tart dissent would tempt a less disciplined mind to surface an uncivil rejoinder. He is content to explain the basis for his opinion and to allow a reasonable reader to decide which view is correct.

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98. *See, e.g., Idowu*, 157 F.3d at 271 (Stapleton, J., dissenting) ("The court's majority opinion provides a fair account of the evidence. Unlike my colleagues, I conclude that this evidence supports the verdict against Mr. Idowu."); *Williams*, 891 F.2d at 474 (Stapleton, J., dissenting) ("The opinion announcing the judgment of the court describes the summary judgment record in an accurate and evenhanded manner," and, so, dissenting only on one point). Stapleton also seeks to dissent on the narrowest grounds possible. *See, e.g., Velasquez*, 885 F.2d at 1092 (Stapleton, J., dissenting) (agreeing with majority on all points except that remand is warranted to obtain benefit of trial judge's view as to voluntariness of defendant's waiver of Miranda rights). In *Kenrich Petrochemicals v. NLRB*, 893 F.2d 1468, 1487 (3d Cir. 1990), Stapleton dissented solely as to whether a remedy was available to a supervisor (among several employees who had been discharged) who had been dismissed in an effort to coerce a union organizing campaign that involved, among others, family members of the supervisor. Stapleton's position on this point was later endorsed by the Third Circuit *en banc*, *see* 907 F.2d 400 (3d Cir. 1990). In his majority, *en banc* opinion, Stapleton continued to praise the panel majority's "thorough opinion" on all other points. *Id.* at 402.

Because Stapleton sees the federal courts of appeals as having the primary role of implementing mandates of law issued by others, it is perhaps understandable that the opinions he has authored are distinctive in the extent to which they avoid flashes of personality or cantankerousness. His opinions do not shout, they do not glow, and they do not lecture. They are not sermons of personal faith.

Instead, they persuade by the dispassionate interpretation and application of the law to the facts, the patient explication of statutory words and their place within a common-sense system of statutory regulation, the identification of the common principles shared by Supreme Court justices who were unable to agree on a single opinion, or their articulation of why a debatable, but explained, judgment fell within the discretionary authority of a trial judge or government agency.

In the civility of his approach, too, Stapleton further displays his fundamental belief in our system of government, and performs his own unique service to it. In his conception, the judicial branch should be perceived by the public as non-partisan and as striving, as much as humanly possible, to be faithful interpreters of the laws created by the political branches. Judges should be fair. Judges should be neutral.

In this role, judges become imbued with a kind of moral authority that does not (conceived properly) belong to them personally, but to them in their capacity as oracles of the law. Stapleton recognizes that this authority presents opportunities for judges to make pronouncements that may have a lasting effect on the reputations of litigants, an effect that may profoundly influence not only them but also their families and friends.

Although Stapleton understands that judges must vindicate the secular law's condemnation of particular behavior, he takes no personal pleasure in that feature of the law. More than that, though, Stapleton has a real sense that courts should not pile on, by heaping adjectival insults on persons whose conduct has earned them serious punishment or consequences. One example that illustrates this feature of Stapleton is his concurring opinion in the difficult case of *United States v. Stelmokas*.[99] In that case, the court reviewed whether the INS had a sufficient basis to deport an aged Lithuanian immigrant named Jonas Stelmokas on the grounds that he had committed war crimes during World War II.

Stapleton had no difficulty agreeing with the deportation order, concluding that the INS possessed the necessary quantum of clear and convincing evidence to show that Stelmokus served as an officer in a Lithuanian group — the Schutzmannschaft — that helped the Germans occupy Lithuania and persecute its Jewish residents, by among other things, helping to confine Jews to ghetto areas, where they were subjected to cruel, and

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99. 100 F.3d 302, 322-27 (3d Cir. 1996) (Stapleton, J., concurring).

often, lethal treatment. Later, in the war, Stelmokas joined the Luftwaffe, another fact Stapleton accepted. Furthermore, Stapleton also accepted that Stelmokas had misrepresented the facts of his war history to the INS. But Stapleton balked at the INS's further grounds for deportation, which rested on its conclusion that Stelmokus had been an active participant in one of the more notorious acts of genocide during that era, the *Grosse Aktion* or Great Action, during which Jews were rounded up in the ghetto of Vilijampo. Those deemed not fit to perform compulsory labor were executed — some 9,200 or so, all told. In addressing the case, Stapleton expended a great deal of intellectual toil producing an extended concurrence, all designed to show that the evidence about Stemolkus's possible involvement in the *Grosse Aktion* was too controverted and sketchy to rise to the level of clear and convincing proof.[100]

What is telling about this concurrence is that it arguably represents a rare instance in which Stapleton strained to find a reason not to affirm a determination of an adjudicatory body's factual findings. If this seems surprising in light of what we have said, we sense that the explanation lies in his compassion; his reticence to put his stamp on a judgment that would taint Stemolkus forever on the basis of evidence that provided reason for doubt. Having done what was necessary to ensure Stemolkus's deportation, the INS did not need to go further and make a judgment about Stemolkus best left to a Higher Authority to settle (and for historians to debate). Or, as Judge Stapleton put it, an "accusation of personal participation in the atrocities of the Holocaust is a grave matter, and a judicial finding of such participation understandably carries with it extra-judicial, collateral consequences unrelated to citizenship and deportability."[101]

V. CONCLUSION

Stapleton's *Stemolkus* concurrence captures well his sensitivity to the important power he exercises and his devotion to using it wisely and gently. In the prior pages, we hope to have demonstrated how his fidelity to the judicial craft and his nation have manifested themselves in a remarkable body of work, in which Stapleton's judicial philosophy finds its voice in stately opinions, rich in principled legal reasoning and grounded in a sophisticated understanding of how our form of government works. If justice is done when judges decide cases by the "rules of the games," then Delaware, with a remarkable tradition of great judges, has produced no more faithful steward of justice than Walter Stapleton.

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100. *Id.* at 323.

101. *Id.* at 322.