UNDERSTANDING THE PROCESS OF JUDICIAL POLICYMAKING THROUGH CASE ANALYSIS*

Thomas C. Marks, Jr.**

The study of law usually begins with the study of appellate opinions. Such decisions help the student learn principles of law by identifying particular legal issues and describing the state of current law in reference to each issue. A court's opinion, moreover, should contain a forthright explanation of previous judicial holdings in the area and a clear acceptance or rejection of those decisions and their rationales. Indeed, appellate courts, most notably the United States Supreme Court, acknowledge that it is their institutional duty to behave in this fashion.

Unfortunately, courts frequently do not satisfy the requirements of this undertaking, complicating the lives of both lawyers and law students. Students — and first-year students in particular — must be conscious that often more is going on in an appellate opinion than meets the eye. Learning to read between the lines is an important skill for the law student (and an invaluable one for a lawyer).

The following examination of United States Supreme Court decisions dealing with questions of constitutional law provides some examples of the process of judicial policymaking as revealed through case analysis. While some dissatisfaction with the Justices may be occasionally intended, the more important message of this examination is that judicial opinions do not always explain themselves adequately, thus placing the burden of critical analysis and understanding on the reader.

I. THE SUPREME COURT'S "INSTITUTIONAL DUTY"

 This Article is an update to the Author's Article of the same title, 12 STETSON L. REV. 762 (1983).

** Professor of Law, Stetson University College of Law. B.S., Florida State University, 1960; LL.B., Stetson University, 1963; Ph.D., University of Florida, 1971.

The Supreme Court has, short of constitutional amendment, the ultimate power to declare[1] what the United States Constitution means,[2] thus establishing constitutional law and the underlying policy reasons supporting it.[3] In this process, in which stare decisis plays a part,[4] the Court has said that its "institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be."[5] Though this concept of institutional duty does not require rigid adherence to precedent, it would require at least a confrontation of adverse earlier holdings and a square overruling of them. The 1940s provided a prime example of such judicial behavior.

In 1940, the Supreme Court decided in *Minersville School District v. Gobitis*[6] that a local board of education could make the salute[7] to the national flag mandatory "as part of a daily school exercise"[8] without violating the First Amendment rights of those children whose religious faith forbade such a salute as a violation of Scripture.[9] Apparently on authority of this decision,[10] the West Virginia State Board of Education required the salute to the national flag[11] as "a regular part of the program of activities in the public

---

1. This power cannot, however, be exercised outside the bounds of a proper case or controversy. *See* Muskrat v. United States, 219 U.S. 346, 356 (1911); *see also* Warth v. Seldin, 422 U.S. 490, 498 (1975).

2. *See* Marbury v. Madison, 5 U.S. 137, 177–79 (1803). This power has been reaffirmed repeatedly. *See* United States v. Nixon, 418 U.S. 683, 703 (1974).

3. *See* McCulloch v. Maryland, 17 U.S. 316 (1819).

4. *See* Galvan v. Press, 347 U.S. 522, 531–32 (1954).

5. Hudgens v. NLRB, 424 U.S. 507, 518 (1976).

6. 310 U.S. 586 (1940), *overruled by* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

7. At that time, the flag salute was as follows: "I pledge allegiance to my flag, and to the Republic for which it stands; one nation indivisible, with liberty and justice for all." *Id*. at 591.

8. *Id*.

9. The Scripture the Court refers to states:

> 3. Thou shalt have no other gods before me.
> 4. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth:
> 5. Thou shalt not bow down thyself to them, nor serve them . . . .

Exodus 20:3–5, *quoted in Gobitis*, 310 U.S. at 592 n.1.

10. *See Barnette*, 319 U.S. at 625.

11. The flag salute was then as follows: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all." *Id*. at 628–29.

schools"[12] and made refusal to salute the flag "an Act of insubordination" to be "dealt with accordingly."[13] This meant that a child who refused to participate in the flag salute was expelled from school and could not be readmitted until he agreed to take part in the flag salute ceremony.[14] The expelled child, while he remained out of school, was arguably delinquent,[15] and his parents or guardians were also in violation of the law.[16] A suit challenging the West Virginia flag salute requirement reached the United States Supreme Court on direct appeal from a three-judge United States district court.[17] In deciding the case, *West Virginia State Board of Education v. Barnette*,[18] the Supreme Court was squarely faced with the *Gobitis* precedent decided almost three years earlier. The Court met the *Gobitis* precedent head on, discussed it extensively, and overruled it outright.[19]

The Supreme Court is not, however, always so forthright in announcing its policy changes. In this Article, I have identified what I perceive to be four distinct tactics the Court has used in making policy shifts when it does not wish to directly confront and overrule earlier cases.[20]

A. Tactic One — Ignore Precedent When It Will Be Difficult to Distinguish on Any Principled Basis

Example — The Private School Entanglement Cases[21]

The United States Constitution, to the extent that it is a limit on power,[22] almost exclusively restricts governmental action rather

---

12. *Id.* at 626.
13. *Id.*
14. *See id.* at 629.
15. *See id.*
16. *See Barnette*, 319 U.S. at 629.
17. *See id.* at 630.
18. 319 U.S. 624 (1943).
19. *See id.*
20. This is not to suggest that this is an exclusive listing.
21. I am indebted to Professor Ronald D. Rotunda for suggesting the relationship between the cases discussed in this example in his casebook MODERN CONSTITUTIONAL LAW (Supp. 1982), which is now in its fifth edition.
22. Most of the original document is a grant of power to the federal government, while most of the amendments are limitations on the powers of the federal government, the state governments, or both.

than private action.[23] The Fourteenth Amendment, which contains the Due Process and Equal Protection Clauses, limits only the states,[24] while the Due Process Clause of the Fifth Amendment limits only the federal government.[25] When private entities engage in an activity that would violate either the Equal Protection or Due Process guarantees, the question sometimes arises whether the state or federal government has had sufficient connection with the private entity so that it is implicated in its activity.

In *Norwood v. Harrison*,[26] the Supreme Court held that the Mississippi textbook loans to students who attended racially segregated private schools sufficiently entangled the state with the private schools' racial practices as to create state action violative of the Fourteenth Amendment's Equal Protection Clause. Thus, Mississippi could not lend textbooks to students attending these schools.[27]

Nine years later, in 1982, the Court in *Rendell-Baker v. Kohn*[28] was faced with a situation in which Massachusetts had contracted with a private school to meet certain needs of special students to the extent that almost all of the school's income came from the state.[29] Certain employees of the school claimed due process violations in the manner in which they were dismissed from employment.[30] The question facing the Court was: Did the private school's relationship with the state cause its actions to be imputed to the state?[31] If the Court found state action, the school might have been obligated to provide due process procedures to the dismissed employees.[32]

The Supreme Court, without mentioning *Norwood*, found no state action. It based its reasoning on a four-factor analysis,[33] which

---

23. The Thirteenth Amendment, which outlaws slavery, limits both private and governmental action.

24. *See* United States v. Guest, 383 U.S. 745, 754–55 (1966).

25. *See* Barron v. Baltimore, 32 U.S. 243, 247 (1833).

26. 413 U.S. 455 (1973).

27. *See id*. at 471.

28. 457 U.S. 830 (1982).

29. *See id*. at 832.

30. *See id*. at 837. A claim of violation of federal statutory law was also made, but the Court ruled that it would in essence be treated the same as the due process claim. *See id*.

31. *See id*. at 838.

32. *See id*.

33. The four factors were the school's receipt of public funds, the regulation of the school by the state, whether the school performed a public function, and whether a "symbiotic relationship" existed between the school and the state. *See id*. at 840–42.

in part was comparable to the *Norwood* analysis.[34] The Court held that the mere dependence on state funds would not make the private school actions those of the state.[35] The court stated that to so hold would make defense and other public contractors also federal or state government contractors: "Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."[36] In response to the argument that the financial arrangements between the state and the school created a "symbiotic relationship" between the two, the Court stated that similar arrangements with other private contractors did not create such a relationship.[37] Thus, the acts of the school were not the acts of the state.[38]

If the mere loan of textbooks to private school students makes the state a participant in the racial segregation practiced by that school, why does providing nearly all of a private school's finances not make the state a participant in that school's activities? From a constitutional point of view, it is difficult to argue that there is a difference. Three policy reasons come to mind, however, which would explain why *Norwood* was not even mentioned, much less followed, in *Rendell-Baker*.

First, *Norwood* does not seem to be distinguishable from *Rendell-Baker* on any principled basis, but an arguable due process violation in employment termination procedures is simply not as odious as racial segregation. However, it is the relationship between the state and the private actor, not what the private actor does, that

---

34. "Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves. . . . When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise . . . ." *Norwood*, 413 U.S. at 463–64. This is comparable to the first of the *Rendell-Baker* factors, *supra* note 33.

35. "[W]e conclude that the school's receipt of public funds does not make the discharge decisions acts of the State." *Rendell-Baker*, 457 U.S. at 840. The authority for this statement appears to rest primarily on the following statement from *Blum v. Yaretsky*: "That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business [here a nursing home]." 457 U.S. 991, 1011 (1982).

36. *Rendell-Baker*, 457 U.S. at 841.

37. *See id.* at 843.

38. *See id*. at 843. The Court again relied on *Blum v. Yaretsky*, 457 U.S. 991 (1982). See *supra* note 35 for the Court's reasoning behind why the school's acts were not acts of the state.

creates state action.[39] Second, the problem in *Norwood* was easily cured by ordering Mississippi to end the textbook loan program.[40] Such a solution did not as readily suggest itself in *Rendell-Baker*.[41]

Third, and probably most important, while the *Norwood* decision can be at best remotely linked to the public contract situation, the *Rendell-Baker* problem is virtually indistinguishable from other public contractors. The policy implications of a contrary holding in *Rendell-Baker* should be obvious.[42] Thus, the Court could not follow *Norwood*, but neither could *Norwood* be distinguished; the loan of textbooks to students who attend private schools obviously creates less entanglement between the state and the private sector than the provision of ninety percent of a school's funds. And just as obviously, the Court could not overrule *Norwood*. The solution was to ignore it.

The dissent in *Rendell-Baker*,[43] while using virtually every possible state action theory to argue that the school should have been held to due process standards,[44] studiously ignored *Norwood*. It seems likely that the dissent did not mention *Norwood* out of fear of placing that decision in jeopardy.[45]

Thus, to understand the *Rendell-Baker* holding and its relation to the Court's earlier decision in *Norwood*, the law student (and lawyer) must "read between the lines" and comprehend the process of judicial policymaking involved. In this instance, that process included ignoring an earlier precedent that was difficult, if not impos-

---

39. *See Blum*, 457 U.S. at 1003–04.

40. *See supra* text accompanying note 27.

41. In *Norwood*, the racial segregation by the private school was characterized as "not barred by the Constitution," and the remedy of barring the loan of textbooks was an easy one. 413 U.S. at 469. It seems likely that, faced with a choice of keeping the textbook loan program and desegregating or giving up the loan program and remaining segregated, the private schools would have taken the latter course. Indeed, the Supreme Court accepted the findings of the federal district court that no children would withdraw from the private schools if the textbook loan program was not continued. *See id*. at 465. In *Rendell-Baker*, the withdrawal of state funds was not a remedy at which the court could easily arrive, and it apparently did not desire to force the school to follow due process procedures.

42. *See Rendell-Baker*, 457 U.S. at 840–41.

43. *See id*. at 844–52 (Marshall, J., with whom Brennan, J., joined, dissenting).

44. *See id*.

45. If the dissent had relied on *Norwood*, that would have placed *Norwood* at odds with a newer opinion of the Court, *Rendell-Baker*, with the attendant suggestion that since *Rendell-Baker* was the law, *Norwood* no longer was. It is arguable that just such a process was used in the trilogy of shopping center cases discussed below. *See infra* text accompanying notes 46–66.

sible, to distinguish on a principled basis.

B. Tactic Two — Seize upon Factual Distinctions that Are More Apparent than Real, Thus Allowing Precedent to Be Distinguished on an Unprincipled Basis

Example One — The Shopping Center Cases

In *Hudgens v. NLRB*,[46] the Supreme Court had to decide whether the first amendment permitted the owner of a privately-owned shopping center to stop "a group of labor union members who [were] engaged in peaceful primary picketing" in the center.[47] As it faced making a decision in *Hudgens*, the Court knew that it was not writing on a clean slate. There were two earlier cases, one exactly on point, and the other nearly so.

In *Amalgamated Food Employees Union v. Logan Valley Plaza*,[48] the Court upheld peaceful picketing by members of a labor union of a nonunion retail store in the shopping center.[49] "The picketing took place on the shopping center's property in the immediate vicinity of the store."[50] The Supreme Court found the picketing to be a protected First Amendment activity because the shopping center was the "functional equivalent of the business district"[51] of a company town[52] and thus constituted state action for First Amendment purposes.[53]

In *Lloyd Corp. v. Tanner*,[54] decided four years after *Logan Valley*, picketing in a large shopping center was again involved, but this time it was unrelated to any retail activity in the shopping center.[55] Rather, it was in protest of involvement of the United States in the Vietnam conflict.[56] As in *Logan Valley*, the picketing was orderly.[57]

---

46. 424 U.S. 507 (1976).
47. *Id*. at 508.
48. 391 U.S. 308 (1968).
49. *See id.*
50. *Hudgens*, 424 U.S. at 515.
51. *Logan Valley*, 391 U.S. at 318.
52. In *Marsh v. Alabama*, 326 U.S. 501, 506 (1946), the Court held that operation of a company town constitutes state action.
53. *See Logan Valley*, 391 U.S. at 325.
54. 407 U.S. 551 (1972).
55. *See id.*
56. *See id*. at 556.
57. *See id.*

Literature was also distributed by the picketers, but there was no littering.[58] The Court, in coming to a decision in *Lloyd Corp.*, was immediately faced with its four-year-old decision in *Logan Valley*. The Court chose to distinguish *Logan Valley*. Even though "*Logan Valley* extended *Marsh [v. Alabama*, the company town precedent] to a shopping center situation in a different context from the company town setting, . . . it did so only in a context where the First Amendment activity was related to the shopping center's operations."[59] Thus, *Logan Valley* was distinguished on its facts and was not overruled. A shopping center was not the business district of a company town for all purposes.[60]

It is superficially arguable that the difference in facts between *Logan Valley* and *Lloyd Corp.* required that the two cases be distinguished rather than that the latter overrule the former.[61] But consider the dissenting opinion of Justice Thurgood Marshall in *Lloyd Corp.*:

> In his dissenting opinion in *Logan Valley*, Mr. Justice White said that the rationale of that case would require affirmance of a case like the instant one. Mr. Justice White, at that time, was convinced that our decision in *Logan Valley*, incorrect though he thought it to be, required that all peaceful and nondisruptive speech be permitted on private property that was the functional equivalent of a public business district.
>
> As stated above, I believe that the earlier view of Mr. Justice White is the correct one, that there is no legitimate way of following *Logan Valley* and not applying it to this case. But, one may suspect from reading the opinion of the Court that it is *Logan Valley* itself that the court finds bothersome.

---

58. *See id*.

59. *Id*. at 562. The Court went on to further limit *Logan Valley*. "There is some language in *Logan Valley*, unnecessary to the decision, suggesting that the key focus of *Marsh* was upon the `business district,' and that whenever a privately owned business district serves the public generally its sidewalks and streets become the functional equivalents of similar public facilities." *Id*. The Court found this reading of *Marsh* incorrect. *See id*. at 562, 563. It "reaches too far." *Id*. at 569.

60. *See Lloyd Corp.*, 407 U.S. at 563.

61. In Justice Brandeis's well-known concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936), he set out "a series of rules under which [the Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." The third of these rules is, "The Court will not `formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id*. at 347.

> The vote in *Logan Valley* was 6-3, and that decision is only four years old. But, I am aware that the composition of this Court has radically changed in four years. The fact remains that *Logan Valley* is binding unless and until it is overruled. There is no valid distinction between that case and this one, and, therefore, the results in both cases should be the same.[62]

Then came *Hudgens*, which was factually indistinguishable from *Logan Valley*. The attempt in *Lloyd Corp.* to factually distinguish *Logan Valley* was recognized[63] but discarded:

> [T]he fact is that the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*.
>
> It matters not that some Members of Court may continue to believe that the *Logan Valley* case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some members of the Court might wish it to be. And in performance of that duty we make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case.[64]

Accepting the argument that *Logan Valley* was not factually distinguishable from *Lloyd Corp.* and that *Lloyd Corp.* must therefore have overruled *Logan Valley*, one can consider these belated recognitions to be the equivalent of *Barnette*'s overruling of *Gobitis*.[65]

---

62. *Lloyd Corp.*, 407 U.S. at 584 (Marshall, J., dissenting) (citations omitted).

63. *See Hudgens*, 424 U.S. at 517.

64. *Id*. at 518. The Court's decision that "the rationale of *Logan Valley* did not survive . . . *Lloyd*" was the entire thrust of Justice Marshall's dissent in *Lloyd Corp.*. *See supra* text accompanying note 62.

Justice Marshall, writing for himself and Justice Brennan in the *Hudgens* dissent, also found what might be called an institutional duty. *See id*. at 538 (Marshall, J., dissenting). In the dissenters' view, the case could have been decided on statutory grounds, and the constitutional issue avoided. *See id*. at 531. Justice Brandeis's concurring opinion in *Ashwander*, 297 U.S. at 346–47, was cited. *See Hudgens*, 424 U.S. at 531; see *supra* note 61 for a discussion of Justice Brandeis's concurring opinion in *Ashwander*.

Even more interesting in terms of obligation to institutional duty, the *Hudgens* dissent found that if the constitutional issue was reached, *Logan Valley* and *Lloyd Corp.* were distinguishable after all, with the result that *Logan Valley* controlled the constitutional question in *Hudgens*, because of the Court's institutional duty to follow a now distinguishable and hence still viable *Logan Valley*. *See Hudgens*, 424 U.S. at 534–43 (Marshall, J., dissenting).

65. *See supra* text accompanying notes 6–19.

But if the Supreme Court has an "institutional duty" either to follow precedent in fact situations that command it or, if the Court feels that a precedent is no longer good constitutional law, to overrule it forthrightly, the failure to fulfill that duty in *Lloyd Corp.* made its fulfillment in *Hudgens* impossible. Thus, the *Hudgens* Court could say that since *Lloyd Corp.* sub silentio overruled *Logan Valley*, *Lloyd Corp.* would have to be followed in *Hudgens*. Conversely, the *Hudgens* dissenters could argue that since *Logan Valley* should have survived *Lloyd Corp.* because of the factual differences between the two cases recognized in *Lloyd Corp.*, *Logan Valley* was the precedent which institutional duty required be followed in *Hudgens*.

It is my suggestion that the Burger Court, faced with Warren Court decisions that were distasteful to many of its members, yet reluctant to overrule them outright, ignored its institutional duty by the tactic of distinguishing the earlier case, thus allowing the Court to reach a palatable decision without the necessity of an outright overruling of the earlier precedent. However, a by-product of this tactic is that the earlier precedent may have been substantially undermined, thereby making it easier to overrule in the future. One result has been to create uncertainty in constitutional law.[66] Law students should be alert in reading judicial opinions as to the way such uncertainty comes about.

Example Two — The Due Process Stigma Cases

Wisconsin v. Constantineau[67] involved a Wisconsin statute which provided that "designated persons may in writing forbid the sale or gift of intoxicating liquors to one who `by excessive drinking' produces described conditions or exhibits specified traits, such as exposing himself or family `to want' or becoming `dangerous to the peace' of the community."[68] The police chief of Hartford, Wisconsin

66. This is not to say that the commands of judicial self-restraint in constitutional decisionmaking, as enumerated in Justice Brandeis's concurring opinion in *Ashwander*, 297 U.S. at 346–48, should be ignored. See *supra* note 60 for a discussion of Justice Brandeis's concurring opinion. But for *Ashwander*-type distinctions to be drawn, there should be real differences related to the constitutional question at issue. As *Hudgens*'s treatment of *Lloyd Corp.* makes clear, the distinctions between the latter case and *Logan Valley* had nothing to do with the Fourteenth Amendment threshold question of state action and were, therefore, unprincipled. *See Hudgens*, 424 U.S. at 518–20.

67. 400 U.S. 433 (1971).

68. *Id.* at 434 (quoting WIS. STAT. § 176.26 (1967)).

determined that Constantineau should be "posted."[69] This was accomplished by posting "a notice in all retail liquor outlets in Hartford that sales or gifts of liquors to [Constantineau] were forbidden for one year."[70] Constantineau filed suit, and a three-judge United States district court panel found the Wisconsin statute to be unconstitutional because of lack of procedural due process of law.[71]

The Supreme Court of the United States affirmed on the basis that the posting implicated a liberty interest protected by the Due Process Clause of the Fourteenth Amendment;[72] thus, procedural due process was required before the deprivation of the liberty interest.[73] "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[74]

Three other things are important about *Constantineau* in light of the treatment it received in *Paul v. Davis*.[75] First is the recognition by the Court that not all interests are among those within the scope of the Fifth and Fourteenth Amendments' parameters of life, liberty, and property.[76] The *Constantineau* Court cited *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*[77] as a case where the Court reviewed "the nature of the various `private interest[s]' that have fallen on one side or the other of the line."[78] Second, it is clear beyond any shadow of a doubt that the liberty interest found by the *Constantineau* Court was based solely on the stigma associated with posting. "Yet certainly where the State attaches `a badge of infamy' to the citizen, due process comes into play."[79] Third, the three dissenting justices[80] disagreed with the majority of the Court on the issues of the abstention doctrine[81] and, from what can be gleaned from the two dissenting opinions, were not in disagreement

---

69. *See id.* at 435.
70. *Id*.
71. *See id*. at 434.
72. *See id*. at 439.
73. *See Constantineau*, 400 U.S. at 436.
74. *Id*. at 437.
75. 424 U.S. 693 (1976).
76. *See id*. at 701–02.
77. 367 U.S. 886 (1961).
78. *Constantineau*, 400 U.S. at 436.
79. *Id*. at 437.
80. *See id*. at 439, 443 (Burger, C.J., Black, J., & Blackmun, J., dissenting).
81. *See id*. at 439–45.

with the majority on the merits.[82]

Paul appears to be indistinguishable from *Constantineau* on any principled or factual basis. In *Paul*, the police chiefs of Louisville and Jefferson Counties, Kentucky, caused some eight hundred copies of a flyer containing the names and pictures of "active shoplifters" to be circulated to merchants in their jurisdictions.[83] Davis was included because he had been arrested for shoplifting by a store detective, but the case "had been filed away with leave [to reinstate,]"[84] and "[s]hortly after circulation of the flyer the charge against respondent was finally dismissed by a judge of the Louisville Police Court."[85]

Davis sued in the United States district court claiming "redress for the alleged violation of rights guaranteed to him by the" United States Constitution.[86] The Supreme Court discussed Davis's remedy under state tort law[87] and the difficulty of allowing every wrong done by government to an individual to infringe on a Fourteenth Amendment due process property or liberty interest.[88] The Court then distinguished *Constantineau* because there the respondent had previously had a right under state law to "purchase or obtain liquor in common with the rest of the citizenry."[89] On the other hand, "Kentucky law does not extend to respondent [Davis] any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions."[90]

Not only is it difficult to see any real difference between what the state government had done to Constantineau and what it had done to Paul, but the linking of the liberty interest against being stigmatized by an action of government to the deprivation of a property right (the right to purchase or obtain liquor) also appears to be inconsistent with a fair reading of the Court's analysis in *Board of Regents of State Colleges v. Roth*.[91] There the Court dis-

---

82. *See id*. (Chief Justice Burger and Justice Black wrote dissents, both of which were joined by Justice Blackmun).

83. *See Paul*, 424 U.S. at 694–95.

84. *Id*. at 695–96.

85. *Id*. at 696.

86. *Id*.

87. *See id.* at 697.

88. *See id.* at 698–99.

89. *Paul*, 424 U.S. at 708.

90. *Id*. at 711–12.

91. 408 U.S. 564 (1972).

cussed both the property interest and the liberty interest in the context of a state university's declining to give a nontenured faculty member a new contract.[92] The Court clearly separated the property interest considerations from the liberty interest considerations.[93] The property interest would have arisen in that context if there had been a reasonable expectation of continued employment.[94] On the other hand, the liberty interest would have been implicated if the state, in refusing to rehire respondent, had stigmatized him.[95] One of the authorities cited for this type of liberty interest was *Constantineau*.[96]

The Court in *Paul*, however, found support for its position in the language of the *Roth* decision.[97] The *Paul* opinion also distinguished *Roth* because the discussion of stigma in *Roth* was factually linked to refusal to rehire.[98] It is suggested that this distinction is also unprincipled because the Court in *Roth* made nothing of what was merely an incidental nexus.[99]

Whether the Court was right in *Paul* regarding the existence of a liberty interest is irrelevant. The Court had an institutional duty either to follow the law, *Constantineau* and *Roth*, or change it. Rather than overrule *Constantineau* and retreat from the liberty discussion in *Roth*, the Court invented a distinction that is, at most, de minimis to reach the result it wished to in *Paul*.

Compare the factual differences in these cases with those in

---

92. *See id.* at 566–69.

93. *See id*. at 571–72.

94. *See id*. at 577–78.

95. *See id*. at 573–74.

96. *See id*. at 573.

97. *See Paul*, 424 U.S. at 709. The emphasized language merely quoted the context in which stigma might have occurred. It cannot reasonably be suggested that the language linked stigma with the deprivation of a property right, because the Court in *Roth* clearly defined property in terms of "interests that a person has already acquired." *Roth*, 408 U.S. at 576. Roth had no reasonable expectation of an employment contract for another year. *See id*. at 577–78.

> The state in *declining to rehire the respondent*, did not make any charge against him that might seriously damage his standing and associations in his community. . . .
>
> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.

Id. at 573 (emphasis added).

98. *See Roth*, 408 U.S. at 573.

99. *See supra* note 90.

Logan Valley and *Lloyd*. In the third case of the shopping center trilogy, *Hudgens*, it was found with the benefit of hindsight that *Lloyd* had in effect overruled *Logan Valley*.[100] Is there waiting in the wings some third case that will say that *Paul* really overruled *Constantineau*? If this is what the Court sees as correct constitutional law, *Paul* should have overruled *Constantineau* outright and revised *Roth* to clearly establish the nexus between the stigma type of liberty interest and a property right.

C. Tactic Three — Write Opinions in Such a Way as to Dilute Precedent Without Overruling It

Example One — Half a Loaf Is Better than None — The Importance of Education Cases

In equal protection jurisprudence,[101] suspect classifications[102] and classifications that affect fundamental rights[103] are subject to strict judicial scrutiny.[104] In 1973, in *San Antonio Independent School District v. Rodriquez*,[105] the Supreme Court failed to establish education as a fundamental right.[106] Justices Brennan,[107] Marshall, and Douglas[108] would have found it to be fundamental. In the context of a Texas school funding plan that allowed more affluent school districts to provide more money per pupil than those that were less affluent, the Court, although recognizing the importance of educa-

---

100. *See Hudgens*, 424 U.S. at 518.

101. The equivalent limit on the federal government is the Due Process Clause of the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954); *see also infra* note 136.

102. The suspect classifications are race, alienage, and national origin. *See* Frontiero v. Richardson, 411 U.S. 677, 682 (1973).

103. The fundamental rights, other than those explicitly found in the Constitution or in the Bill of Rights, are voting, *see* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626 (1969); interstate travel, *see* Shapiro v. Thompson, 394 U.S. 618, 638 (1969), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974); the privacy associated with marriage, *see* Zablocki v. Redhail, 434 U.S. 374, 386 (1978); family privacy, *see* Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977); and the intimate personal relationships associated with procreation, *see* Roe v. Wade, 410 U.S. 113, 153 (1973).

104. For legislation to meet the test of strict judicial scrutiny it must have a compelling purpose and the means selected to achieve it must be necessary. *See Shapiro*, 394 U.S. at 634–38.

105. 411 U.S. 1 (1973).

106. *See id.* at 35.

107. *See id*. at 63 (Brennan, J., dissenting).

108. *See id*. at 71 (Marshall, J., with whom Douglas, J., concurs, dissenting).

tion,[109] applied the rational basis test[110] and upheld the Texas law.[111]

Plyler v. Doe,[112] which involved a Texas law that refused a free public education to children of illegal aliens, gave Justice Brennan his chance to refurbish the constitutional status of education. The decision could not turn on the children's status as aliens,[113] because they were illegal aliens.[114] However, neither could review be foreclosed solely because the children were illegal aliens.[115]

Rather, Justice Brennan's opinion for the Court is based on the virtually absolute denial of an education to these children.[116] After recognizing that public education is not a fundamental right,[117] the Court elevated it to something more than its status in *Rodriguez*. There it was equated with many other interests that would trigger no more than the Court's minimal constitutional scrutiny, the ratio-

---

109. "[The theme of *Brown v. Board of Education*, 347 U.S. 483 (1954),] expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court . . . ." *Rodriguez*, 411 U.S. at 29–30.

110. This test requires only that the government's purpose be legitimate and the means selected to achieve it be rationally related to that purpose. *See id*. at 40. Quite apart from the Court's refusal to find that education was a fundamental right, the Court's use of the rational basis test was also bottomed on the traditional deference to a state's raising and distribution of state and local tax revenues. *See id*.

111. *See Rodriguez*, 411 U.S. at 59. The Court did, however, suggest that the outcome might not have been the same had the "State's financing system occasioned an absolute denial of educational opportunities to any of its children." *Id*. at 37. Read in context, it is difficult to say whether an "absolute denial" would have made education a fundamental right in those circumstances or would have been irrational under the mere rationality test. However, since the Court, elsewhere in its opinion, went to great pains to point out that only those rights found in the Constitution itself were fundamental (education not being one of them). *See id*. at 30–40. The effect of a particular state law on education could hardly change its status to that of being a fundamental right. This is not to say that the outcome of such a case might not be different from the result reached in *Rodriguez*, but that outcome could hardly result from a change in the constitutional nature of education itself.

112. 457 U.S. 202 (1982).

113. A classification by a state based on alienage is suspect. *See Frontiero*, 411 U.S. at 682. That is, unless the purpose of the classification is to "preserve the basic conception of a political community." *See* Sugarman v. Dougall, 413 U.S. 634, 647 (1973); *cf.* Ambach v. Norwick, 441 U.S. 68, 75 (1979) (explaining that the status of citizenship denotes association with a specific governmental agency, which in turn has significance in the governmental structure).

114. *See Plyler*, 457 U.S. at 219 n.19.

115. *See id*. at 220.

116. The children of illegal aliens could attend Texas public schools if they paid tuition. *See id*. at 206 n.2.

117. *See id*. at 221.

nal basis test.[118] While *Plyler* can be read as elevating the status of education only under the unique facts of that case,[119] the Brennan opinion is laden with the thesis that, while education is not a fundamental right, it is of such a nature as to be deserving of the midrange scrutiny reserved for governmental classifications that do not fit the mold of either the strict scrutiny of the compelling governmental interest test, or the minimal scrutiny of the rational basis test.[120]

This is not consistent with the idea that from a constitutional point of view education is no different from public welfare assistance. The Supreme Court has recognized that such assistance "involves the most basic economic needs of impoverished human beings"[121] but nevertheless has applied the rational basis test in this context because "the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy."[122]

However, according to Justice Brennan in *Plyler*, education is not

> merely some government "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child mark the distinction. . . . In sum, education has a fundamental role in maintaining the fabric of our society.[123]

---

118. *See Rodriguez*, 411 U.S. at 32–33; *see supra* note 109.

119. "[The Texas law] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status." *Plyler*, 457 U.S. at 223.

> This conclusion is fully consistent with *Rodriquez*. The Court there reserved judgment on the constitutionality of a state system that "occasioned an absolute denial of educational opportunities to any of its children," noting that "no charge fairly could be made that the system [at issue in *Rodriquez*] fails to provide each child with an opportunity to acquire . . . basic minimal skills."

Id. at 235 (Blackmun, J., concurring). "In a sense, the Court's opinion rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases." *Plyler*, 457 U.S. at 243 (Burger, C.J., with whom White, Rehnquist, & O'Connor, JJ., join, dissenting).

120. *See infra* note 125.

121. Dandridge v. Williams, 397 U.S. 471, 485 (1970).

122. *Id*. at 486.

123. *Plyler*, 457 U.S. 221. The Brennan argument, about "the importance of education in maintaining our basic institutions," is strikingly similar to his losing argument in *Rodriguez* that education is a fundamental right. *See Rodriguez*, 411 U.S. at 62

So, the Court in *Rodriguez*, over the objections of Justices Brennan, Marshall, and Douglas, reasoned that education, not being a right found explicitly or implicitly in the Constitution itself, was not fundamental and its importance did not save it, as it did not save other important issues, such as social welfare matters, from the minimal scrutiny of the rational relationship test.[124] Justice Brennan, however, in *Plyler* found that the importance of education, while not making it a fundamental right, did save it from the minimal scrutiny approach and propelled it into the midrange of judicial scrutiny.[125]

Both Justices Blackmun and Powell concurred in Justice Brennan's opinion.[126] Justice Blackmun added the idea that education received heightened protection because education was so important,[127] and because its complete denial to these children under the Texas scheme was, in his view, analogous to the denial of the right

---

(Brennan, J., dissenting).

124. *See Rodriguez*, 411 U.S. at 35–44.

125. The use of the midrange test, which lies between the minimal scrutiny of the rational basis test and the strict scrutiny of the compelling governmental interest, requires that the means selected by the government to achieve its desired purpose have a real and substantial relationship to that purpose. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76–77 (1971). In some settings, this test also requires that the governmental purpose be important. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976). The key to *Plyler* is Justice Brennan's reference to *Craig* and his description of the requirement of a substantial state interest. *See Plyler*, 457 U.S. at 217–18. The same point was recognized by the Chief Justice in dissent. "Yet by patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases." *Id*. at 244 (Burger, C.J., with whom White, Rehnquist, & O'Connor, JJ., joined, dissenting). The actual test created in *Plyler* was important purpose and rational means. *See Plyler*, 457 U.S. at 223–24.

Martinez v. Bynum, 461 U.S. 321, 328–29 (1983), arguably deals with the *Rodriguez-Plyler* education issue. However, since the plaintiffs facially attacked a Texas statute that prevented a minor living apart from his parents from receiving free public education if his presence in the school district was "for the primary purpose of attending the public free schools." *Id*. at 323–24 n.2. The Court treated the case as a simple question of residency requirements. *See id*. at 330 n.10. Thus, the Court avoided the larger issues of education that had troubled the Court in *Rodriquez* and *Plyler*. Justice Brennan emphasized that he concurred solely because "this case involves only a facial challenge" to the statute. *Id*. at 333. If the statute had been challenged as it specifically applied to individual minors as Justice Brennan appeared to suggest, *Plyler* considerations might have applied. *See id*. (Brennan, J., concurring). Justice Marshall's dissent is in part based on such considerations. *See id*. at 334–35 (Marshall, J., dissenting).

126. *See Plyler*, 457 U.S. at 231, 236.

127. *See id*. at 234 (Blackmun, J., concurring).

to vote and thus more important than the denial of social welfare assistance.[128] Justice Powell's concurrence was to much the same effect, except that he placed more emphasis on the singling out of these particular children.[129]

Despite the fact that Justices Blackmun and Powell seem to emphasize the importance of education under the peculiar facts of this case (as to some extent did Justice Brennan),[130] it appears that education has now been removed from those rights that receive only the Court's minimal scrutiny to those that receive heightened scrutiny (although still not the highest scrutiny of the compelling governmental interest test). The half loaf of this midrange test is better from the perspective of the justices who accomplished this feat than the no loaf of the minimal rationality test.

Example Two — Three-Quarters Loaf Is Better than Half — The Gender-Based Discrimination Cases

In the early 1970s the Supreme Court for the first time considered whether state laws that treat women differently from men violate the Fourteenth Amendment's guarantee of Equal Protection.[131] In a unanimous opinion in *Reed v. Reed*,[132] the Court set out a test that state law "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[133]

In 1973, two years after *Reed*, in *Frontiero v. Richardson*,[134] Justice Brennan, joined by three other Justices,[135] desired to change the equal protection test to be applied to government gender-based classifications.[136] Justice Brennan's plurality opinion said that a

---

128. *See id*.

129. *See id*. at 238–39 (Powell, J., concurring).

130. *See supra* text accompanying note 123.

131. *See Reed*, 404 U.S. at 74.

132. 404 U.S. 71 (1971).

133. *Id*. at 76. The *Reed* court relied on *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920), for this analysis.

134. 411 U.S. 677 (1973).

135. Justice Douglas, White, and Marshall joined Justice Brennan's opinion in *Frontiero*. *See id*. at 678.

136. *See id*. at 688. In *Frontiero*, the federal government had created the gender-based classification. Since the Fourteenth Amendment limits only the states, the Supreme Court has found an equivalent limitation on the federal government in the Due Process Clause of the Fifth Amendment. *See id*. at 689.

gender-based classification was "suspect," thus subjecting it, along with classifications based on race, alienage, and national origin, to close judicial scrutiny.[137] Four other justices[138] agreed that the federal government had violated the Constitution, but they reached that result applying the *Reed* fair and substantial relationship analysis rather than the stricter test that Justice Brennan advocated.[139] So, by one vote, the *Reed* midrange test remained the one used in gender discrimination cases.

In writing the opinion in the next major gender case, *Craig v. Boren*,[140] Justice Brennan was able to mold the Court's opinion in *Reed* to achieve much of what he and the plurality in *Frontiero* had sought but failed to achieve. After acknowledging *Reed* as controlling authority, Justice Brennan described *Reed* as supporting the proposition that not only must the gender-based classification have a fair and substantial relation to that purpose, but the purpose itself also must be important.[141] Though the opinion in *Reed* is susceptible to this reading, *Reed* and the precedent it relied on had placed far greater emphasis on the relationship of means to purpose.[142] After incantation of the fair and substantial relationship test, *Reed* shifted its focus to the relative importance of the purposes of the state law being challenged.[143] *Reed* also suggested, although never clearly, that both state purposes were not sufficiently substantial to justify a gender-based classification to achieve them.[144]

In *Craig*, Justice Brennan interpreted *Reed* as finding that the two state purposes "were deemed of insufficient importance to sus-

---

137. *See id*. at 682 (plurality opinion). For legislation to meet the test of strict judicial scrutiny, it must have a compelling purpose and the means selected to achieve it must be necessary. *See Shapiro*, 394 U.S. at 634–38.

138. Chief Justice Burger and Justices Stewart, Powell, and Blackmun concurred in the Court's judgment, but not in the Brennan opinion. Justice Rehnquist dissented. *See Frontiero*, 411 U.S. at 691.

139. Justice Stewart wrote only for himself and simply relied on *Reed*. *See Frontiero*, 411 U.S. at 691 (Stewart, J., concurring). Justice Powell, writing for himself, the Chief Justice, and Justice Blackmun, specifically rejected the plurality's characterization of gender as a suspect classification, finding it unnecessary to reach that issue because the *Reed* rationale was adequate and because the then pending Equal Rights Amendment would, if ratified, resolve the issue. *See id*. (Powell, J., Burger, C.J., & Blackmun, J., concurring).

140. 429 U.S. 190 (1976).

141. *See id.* at 197.

142. *See Reed*, 404 U.S. at 76 (1971).

143. *See id*.

144. *See id*.

tain use of an overt gender criterion."[145] Justice Brennan wrote only for himself, Justice Marshall, and Justice White. Justices Powell and Blackmun concurred in at least as much of the Brennan opinion as elevated the governmental purpose aspect of the midrange equal protection test to a position of importance.[146] Although Justice Powell found portions of Justice Brennan's opinion unnecessarily broad, he appeared to agree that the governmental purpose had to be important.[147] Justice Blackmun concurred in Justice Brennan's opinion except as to a portion unrelated to this discussion.[148]

Justice Stevens concurred in Justice Brennan's opinion, yet found it impossible to strike down the challenged state law without reaching the question of the importance of its purpose.[149] He found that the gender-based classification, while "not totally irrational," had no substantial relationship to the state's purpose without having to characterize the purpose as either important or unimportant.[150]

The Stevens concurrence is the key. Whether the purpose of the state law in *Craig* was important or not, the result should have been the same because the gender-based classification would only marginally have achieved that purpose. While this might meet the rational basis test, it could not satisfy the requirement of a fair and substantial relationship required by the midrange test. Yet both Justices Powell and Brennan went the extra step of finding that the purpose had to be important as well.[151] Put differently, it was unnecessary for the Justices to discuss the importance of the purpose issue because the law could have been struck down because the means only marginally achieved it.

While it may be true that *Reed* focused to some extent on the relative importance of the legislative purpose when weighed against the impact of the gender-based classification used to achieve it,[152]

---

145. *Craig*, 429 U.S. at 197–98 (plurality opinion).

146. *See id.* at 210–11, 214.

147. *See id*. at 210–11 (Powell, J., concurring).

148. *See id*. at 214 (Blackmun, J., concurring).

149. *See id.* at 211–14 (Stevens, J., concurring).

150. *Id*. at 213–14 (Stevens, J., concurring). Justice Stewart concurred only with the Court's judgment in *Craig*. He found the Oklahoma law amounted to "total irrationality," and referred to *Reed*. *Id*. at 214–15 (Stewart, J., concurring).

151. *See Craig*, 429 U.S. at 197–98, 210–11, 214.

152. *See Reed*, 404 U.S. at 76. Indeed, it may have been impossible not to find the law unconstitutional without doing so, because the gender-based classification in *Reed*

this is simply not the same as a flat statement that, in gender-based classification cases, the governmental purpose must be important, not just when weighed against the impact of the gender-based classifications, but simply *important* no matter what the impact. The significance of this difference becomes apparent when the post-*Craig* test for gender-based classifications is compared to the Court's most strict scrutiny, the compelling governmental interest test. The former now requires that the governmental interest be important and the means selected to achieve it have a fair and substantial relationship to it. The latter requires that the government interest be compelling and the means selected to achieve it necessary.[153] The degree of similarity is obvious: "important" interest compared to "compelling" interest, and "fair and substantial relationship" of means compared to "necessity" of means.[154] The dissenting opinion of Justice Rehnquist, with which Chief Justice Burger was in "general agreement," recognized the heightened scrutiny but discussed instead whether such a test should be applied when men, rather than women, were discriminated against, since there was no history of past discrimination against men.[155] He then attacked the idea of a midrange test.[156]

It appears that *Craig* has, in the case of gender-based classifications, heightened the scrutiny of the midrange test by requiring that in addition to the means having a fair and substantial relationship to the purpose, that purpose itself must be important, apparently not merely in relationship to the impact of the particular gender-based classification, but also in some universal sense. In ever so subtle a manner, constitutional policy changes are made. Once made, their tenuous origin is frequently forgotten, and they are cited as authority equal to the most forthright change. Thus, in *Mississippi University for Women v. Hogan*,[157] the Court stated the test in

---

probably bore the requisite fair and substantial relationship to the purpose.

153. *See supra* note 104.

154. At one point in his *Craig* opinion, Justice Brennan used a phrase to describe the relationship of means to purpose that is even closer to the necessity of means required for the compelling governmental interest test. "In our view [the state] cannot support the conclusion that the gender-based distinction *closely serves* to achieve [the state's purpose] and therefore the distinction cannot under *Reed* withstand equal protection challenge." *Craig*, 429 U.S. at 200 (plurality opinion) (emphasis added).

155. *See id*. at 217–20 (Rehnquist, J., dissenting).

156. *See id*. at 220–22.

157. 458 U.S. 718 (1982).

gender-based discrimination cases, even when males were the sex discriminated against, as: "The [government's] burden is met only by showing at least that the classification `serves important governmental objectives and that the discriminatory means employed' are `substantially related to the achievement of those objectives.'"[158]

D. Tactic Four — Use Misplaced Language from an Earlier Opinion as a Launching Pad for a Major Change in the Law

In 1976, the Supreme Court set out in very clear terms the balancing of interest test used to measure the constitutionality of gender-based classifications. The Court said that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[159]

Three years before its decision in *Craig*, the Supreme Court had failed by one vote in the attempt to make a gender-based classification "suspect" and thus subject to the Court's most demanding scrutiny which was already being used to measure the constitutionality of the "suspect classifications" of race, national origin and in some instances alienage.[160]

In 1979, the Supreme Court decided *Personnel Administrator of Massachusetts v. Feeney*.[161] This case did not involve a gender-based classification at all, but rather a law that gave veterans preference over non-veterans for jobs with the Commonwealth.[162] Since most veterans were male in 1979, the preference had what is known as a disproportionate impact on females.[163] Under established Supreme Court precedent, such an impact is irrelevant absent additional evidence that would suggest that Massachusetts's real purpose was

---

158. *Id*. at 724. The Court, for this proposition, cited *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980), which cited *Craig*. *See Hogan*, 458 U.S. at 724.

159. United States v. Virginia, 518 U.S. 515, 558 (1996) (Rehnquist, C.J., concurring only in the judgment) [hereinafter *VMI*]. Chief Justice Rehnquist was quoting the Court's earlier opinion in *Craig*, 429 U.S. at 197. The Chief Justice further opined, "We have adhered to that standard of scrutiny ever since." *VMI*, 518 U.S. at 558. For this proposition, he cited no fewer than 13 cases in addition to *Craig*. *See id*. at 558–59.

160. As to race, see, for example, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). As to national origin, see, for example, *Korematsu v. United States*, 323 U.S. 214 (1944). As to alienage, see, for example, *Ambach v. Norwick*, 441 U.S. 68 (1979).

161. 442 U.S. 256 (1979).

162. *See id*. at 261–62.

163. *See id.* at 268–69.

not to reward veterans, but rather to insure that most persons hired by Commonwealth were male.[164] There was no such additional evidence and the veterans preference was upheld.[165]

In the course of his opinion in *Feeney*, Justice Stewart opined that "precedents dictate[d] that any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge."[166]

Two points must be made about Justice Stewart's comment. First, the established analysis for the supposed covert design "to prefer males over females" has already been discussed.[167] Simply put, it was possible that Massachusetts established the veterans' preference, not to honor veterans, but as a covert way to ensure that the Commonwealth would hire mostly males. The so-called disproportionate impact of the veterans' preference on females is the first step in proving such a hidden, unconstitutional purpose. But it is only the first step. As had already been pointed out,[168] without other evidence that this is what Massachusetts was about, the disproportionate impact standing alone is meaningless. And so it turned out.[169] What the reader must understand about this analysis is that the other evidence of a purpose to discriminate against females, had it existed, would lead the Court to reexamine the Commonwealth's real purpose and perhaps find it to be unconstitutional.[170] But in no case did the Court examine the purpose or justification of the veterans' preference law to see if it was "exceedingly persuasive." It is not the gravity of the purpose that the Court weighs in disproportionate impact cases, but rather its constitutionality. Thus, Justice Stewart's use of his apparently newly coined phrase "exceedingly persuasive justification"[171] was meaningless in *Feeney*. It is thus a relatively extreme example of an all too present judicial tendency to say

---

164. *See id.* at 275.

165. *See id.*

166. *Id.* at 273.

167. *Id*. *See supra* text accompanying notes 163–64.

168. *See supra* text accompanying notes 163–64.

169. *See Feeney*, 442 U.S. at 281.

170. "Yet, nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service." *Id.* at 279.

171. *Id.* at 273.

far more than is necessary to decide the case brought before it. This is what the law calls obiter dicta.[172]

The second point is that of the eight cases cited by Justice Stewart for his use of the phrase "exceedingly persuasive justification,"[173] not one of them used the phrase and every one appears to involve little or nothing more than the normal balancing of interests test for gender-based classifications.[174] But, the genie was, so to speak, out of the bottle.

The Court, speaking through Justice Marshall, picked up the "exclusively persuasive justification" language in *Kirchberg v. Feenstra*.[175] Its usage there is somewhat odd in that Justice Marshall initially used the normal language for the gravity of purpose required to justify the use of a gender-based classification.[176] Then, seemingly out of the blue, he used twice only the "exceedingly persuasive justification" language from *Feeney,* which was cited,[177] then returned one last time to the standard language of "important governmental objective" or purpose.[178] Surely it is difficult to conceive that "important governmental objective" or purpose is anything but of much lesser gravity than "exceedingly persuasive justification." Yet, one can only conclude that a real possibility exists that Justice Marshall used the two measures of gravity of purpose without really considering that they might very well not mean the same thing.

Justice O'Connor apparently fell into somewhat the same trap in *Hogan*,[179] where she said that the phrase "exceedingly persuasive justification" was an appropriate burden to be placed on a govern-

---

172. "[S]tatements . . . which are not necessary in the determination of the issues presented are obiter dictum; they are not binding and do not become law." 5 AM. JUR. 2D *Appellate Review* § 603 (1995).

173. *Feeney*, 442 U.S. at 273.

174. *See* Thomas C. Marks, Jr., *Three Ring Circus: The Adventure Continues into the Twenty-first Century*, 30 STETSON L. REV. (forthcoming 2000).

175. 450 U.S. 455, 461 (1981).

176. *See id*. "The Court of Appeals properly inquired whether the statutory grant to the husband of exclusive control over the disposition of community property was substantially related to the achievement of an important governmental objective." *Id.* at 459.

177. "[T]he burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an `exceedingly persuasive justification' for the challenged classification." *Id*. (citation omitted). The Court then comments on the "appellant ha[ving] failed to offer *such a justification*." *Id*. at 461 (emphasis added).

178. "[B]ecause the State, by declining to appeal from the decision below, has apparently abandoned any claim that an important government objective was served by the statute. . . . " *Id.* (emphasis added).

179. 458 U.S. 718 (1982).

ment trying to persuade the court to uphold a gender-based classification.[180] Then, apparently trying to link it to the normal test for gender-based classifications, she said that a "justification" will only be judged "exceedingly persuasive" by establishing "at least" that the governmental purpose is important and the means are substantially related to it.[181] This is nothing if not a model for confusion. Apparently, sometimes satisfaction of the standard test for gender-based classifications is enough and sometimes it is not. Or, as I put it in an article to be published in the *Stetson Law Review*, "This is, of course, the epitome of ambiguity. What does `at least' mean? Are there times when more than `least' will be required?"[182]

This was the murky status of "exceedingly persuasive justification" when Justice Ginsburg made it the apparent linchpin of her opinion for the Court in *United States v. Virginia*.[183] Simply put, VMI argued that its unique system of building character, which involved rigorous physical training, considerable verbal abuse, and an almost total lack of privacy,[184] was simply not suited for coed education.[185] In essence, it argued that the purpose of this kind of training for future military and civilian leadership was important.[186] Furthermore, its male-only admission policy was "substantially related" to that purpose because without it (if VMI had to admit women) the education program that made the purpose so important would have to be substantially changed, thus reducing the ability to turn out the caliber of leadership on which it prided itself and for which it was well-known.[187]

Given a dispassionate application of the "normal" gender balancing test, VMI's argument might have succeeded.[188] But when

---

180. *Id.* at 724 (citing *Kirchberg*, 450 U.S. at 461, and *Feeney*, 442 U.S. at 273).

181. *Id.* Justice Ginsburg also used the phrase in *Harris v. Forklift Systems*, 510 U.S. 17 (1993). She opined: "Indeed, even under the Court's equal protection jurisprudence, which requires `an exceedingly persuasive justification' for a gender-based classification, . . . it remains an open question whether `classifications based on gender are inherently suspect.'" *Id*. at 26 n.* (Ginsburg, J., concurring) (quoting *Hogan*, 458 U.S. at 724).

182. Marks, *supra* note 174 (manuscript at 57, on file with the *Stetson Law Review*).

183. 518 U.S. 515 (1996).

184. *See id.* at 522.

185. *See id.* at 540.

186. *See id.* at 521–22.

187. *See id.* at 545.

188. The Supreme Court could have accepted the argument that continuation, unaltered, of the unique VMI method of education was an important purpose. The Court

confronted with the hurdle of "exceedingly persuasive justification" as used in the Court, VMI didn't have a chance.[189]

Only one question remains regarding the *VMI* Court's very heavy reliance on the "exceedingly persuasive justification" standard. That question is did VMI present some sort of unique problem as Justice Ginsburg herself apparently suggested.[190] Or, is *VMI* the harbinger of stricter judicial scrutiny for gender-based classification?[191] If the latter, Justice Ginsburg, for the Court, has seized upon a phrase that was clearly the most flagrant obiter dicta when first used[192] and, at best, confusingly used in the only two other instances it appeared before it's use in *VMI*.[193] Shakespeare surely would have had second thoughts about the universal application of his profound comment about "a rose by any other name would smell as sweet" had he had the opportunity to reflect upon "exceedingly persuasive justification."[194]

Chief Justice Rehnquist would no doubt agree. "It is unfortunate that the Court thereby [though its use of `exceedingly persuasive justification'] introduces an element of uncertainty respecting the appropriate test."[195]

II. CONCLUSION

In this Article, I have attempted to illustrate how the United States Supreme Court at times ignores or distorts earlier precedent when, for policy considerations, it decides to change the law on a given subject. I have suggested that the Court, by its own language,

---

did speak highly of it. *See id*. at 521–22. Had it done so, there would have arguably been a substantial relationship between not making the changes required if women were admitted. *See id*. at 540.

189. "The Commonwealth's justification for excluding all women from `citizen soldier' training for which some are qualified, . . . cannot rank as `exceedingly persuasive,' as we have explained and applied that standard." *VMI*, 518 U.S. at 545.

190. "[D]oes not the Court positively invite private colleges to rely upon our ad-hocery by assuring them this case is `unique'?" *Id*. at 600 (Scalia, J., dissenting).

191. *See id*.

192. *See supra* text accompanying notes 170–72.

193. *See Kerchberg*, 450 U.S. at 461; *Hogan*, 458 U.S. at 724.

194. "What's in a name? that which we call a rose, By any other name would smell as sweet; So Romeo would, were he not Romeo call'd." WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2, *quoted in* IVOR H. EVANS, BREWER'S DICTIONARY OF PHRASE AND FABLE, 935 (Centenary ed. 1970).

195. *VMI*, 518 U.S. at 559 (Rehnquist, C.J., concurring).

has a duty when changing the law to confront earlier adverse precedents and to clearly explain why these earlier rationales are being rejected.

Moreover, what the United States Supreme Court does on occasion in creating uncertainty is in fact done by all courts from time to time, and often with less sophistication. The law student should be alert to various methods that courts use in deciding cases and should learn quickly "to read between the lines."