Essay

SPINNING, SQUIRRELING, SHELLING, STILETTING AND OTHER STRATAGEMS OF THE SUPREMES

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"A peculiar Cant and Jargon of their own, that no other Mortal can understand, and wherein all their laws are written." JONATHAN SWIFT, GULLIVER'S TRAVELS: HOUYHNHNMS, ch. 5.

TABLE OF CONTENTS

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INTRODUCTION

As one who has a professional interest in explaining to first-year law students[1] what Supreme Court justices mean when they say what they say, I sometimes feel frustrated because the traditional categories of analysis do not explain what the justices are doing. This article is intended to fill this void by setting forth various stratagems[2] Court justices use in writing their opinions.

I. SPINNING

One of the wonders of the recent electronic era has been the opportunity to watch debates between candidates for high public office (such as president, vice president, and senate) in the privacy of one's own living room. Perhaps even more impressive has been the opportunity to learn from the candidates' associates, immediately following the debate, what the candidates really meant to say when they said what they said and why each associate is convinced, beyond a doubt, that their candidate really won the debate. Of course, the associates of each candidate do not agree on who really won the debate. Additionally, each associate uses adjectives like "strong," "vigorous," "straightforward" and "honest" to describe her own candidate, while using adjectives like "weak," "evasive," "poorly focused" and "disingenuous" to describe the other candidate. In political parlance, these associates are referred to as "spinners," "spin masters" and (for those of us partial to Germanisms) "spin meisters."

Less noticed than the work of the political spin meisters, but equally impressive, is the effort of a Court justice to summarize a precedent with which he does not agree and from which he either dissented or would have dissented if he were on the Court when the precedent was written. This activity is referred to as "spinning," or (perhaps one might prefer the less resonant) "twisting." In

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1. I teach a required two-semester constitutional law course to first-year law students, as well as an elective seminar on the First Amendment with emphasis on the Religion Clauses. The examples presented in this article are taken from material covered in these courses.

2. The term "stratagem," as used in this article, means an intended, deliberate verbal maneuver by a justice to either do more with the words he uses than their meaning ordinarily would suggest, or to do something other than what their meaning would suggest.

spinning, when summarizing a precedent, a justice will express a rule of law in a manner she finds more appealing than what was originally written. Once spun, similarly inclined justices, in their own opinions, can refer to this summarized version of the rule as the precedent rather than the original discordant version.

One illustration of spinning is the summation of prior case law in the per curiam opinion of *Brandenburg v. Ohio*.[3] In overturning a Ku Klux Klan member's conviction for speech that violated a state criminal syndicalism statute,[4] the Court summarized the then-existing law as follows:

> These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[5]

This sets forth the law which the Court is creating in *Brandenburg* itself, but it was not an accurate summary of the prior case law. The Court had previously upheld the notion that active Communist Party members could be criminally liable for advocating illegal activity which would occur as soon as circumstances would permit.[6] Thus, the *Brandenburg* Court glossed over two differences between the *Brandenburg* decision and earlier decisions. First, in *Brandenburg*, the utterance would be criminalized if it urged *imminent* lawless action. In earlier cases, however, the utterance would be criminalized if it urged *later* lawless action (as soon as circumstances would permit). Second, in *Brandenburg*, the utterance itself had to be "likely to produce" the effect of lawless action. In earlier cases, however, it did *not* have to be shown that the utterance would have any effect.

How does one explain the *Brandenburg* Court's seeming misunderstanding of the precedent? One way to do so, consistent with the likelihood that the Court members knew what they were doing, is to assume they were spinning. So viewed, the Court members reinterpreted prior law so that the law would conform with their newly developed doctrine. This would have the arguable advantage of minimizing the appearance that they were developing new law, while at the same time modifying or overturning precedent.

Another, and perhaps more typical, illustration of spinning is Justice Marshall's *Hodel v. Virginia Surface Mining & Reclamation Ass'n*[7] summary of Justice Rehnquist's opinion in *National League of Cities v. Usery*.[8] This is a more typical example of spinning than *Brandenburg* because here it is not the Court as a whole reworking earlier precedents. Rather, one justice, who has obtained the mantle of spokesperson for the Court as majority decision writer, spins an earlier decision written by another justice.

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3. 395 U.S. 444 (1969).
4. A criminal syndicalism statute makes criminal a speech utterance advocating violence without any requirement that it has any negative effect whatever. At least at the state government level, the Court in *Brandenburg* did away with such statutes.
5. *Brandenburg*, 395 U.S. at 447.
6. *See* Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298 (1957); Scales v. United States, 367 U.S. 203 (1961).
7. 452 U.S. 264 (1981).
8. 426 U.S. 833 (1976).

In *Usery*, the decision which Justice Marshall spun in *Hodel*, Justice Rehnquist held that the Tenth Amendment prohibits the federal government from using interstate commerce power to regulate the wages and hours of state employees: "'The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity *or* their ability to function effectively in a federal system.'"[9] As indicated by this passage, Justice Rehnquist had disjunctive reasons for finding that federal law cannot impose on the states. One reason given in his opinion was that the federal law imposes a "significant impact on the functioning of the governmental bodies involved."[10] He stated:

> *Quite apart* from the substantial costs imposed upon the States and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require. The Act [speaks] directly to the States *qua* States ....[11]

Rehnquist added that "[t]his congressionally imposed displacement of state decisions may substantially restructure traditional ways in which the local governments have arranged their affairs."[12]

Rehnquist's language, particularly the words "quite apart from the substantial costs," demonstrates that he perceived separate, disjunctive reasons for holding the federal law unconstitutional: (1) the financial burden placed upon the states and (2) the imposition on the states as states.

Compare Justice Marshall's summary of *Usery* in *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*[13] The notion that imposing a sufficient economic burden on states might render the federal legislation unconstitutional disappears from Marshall's rendering of Rehnquist's analysis. Also, in Marshall's hands, Rehnquist's disjunctive bases for finding that the federal law violates the Tenth Amendment became conjunctive:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. *First*, there must be a showing that the challenged statute regulates the "States as States." *Second*, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." *And third*, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." When the Surface Mining Act is examined in light of these principles, it is clear that appellees' Tenth Amendment challenge must fail because the first of the three requirements is not satisfied.[14]

Thus spun, Marshall's conjunctive version of Rehnquist's disjunctive test in *Usery* became the basis for Justice Blackmun's conjunctive description of *Usery*

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9. *Id.* at 842 (quoting Fry v. United States, 421 U.S. 542, 547 n. 7 (1975)) (emphasis added).
10. *Id.* at 846.
11. *Id.* at 847 (emphasis added).
12. *Id.* at 849.
13. 452 U.S. 264 (1981). *Hodel* involved federal legislation that gave the states a choice of either regulating strip mining themselves in conformity with federally imposed standards or accepting federal regulation of this activity.
14. *Id.* at 287–88 (emphasis added) (citations omitted).

in *Garcia v. San Antonio Metropolitan Transit Authority*,[15] a case that overturned *Usery*.[16]

The casual reader might be inclined to accept a Court justice's summary of a holding as an accurate restatement of that holding. Such reliance would come under the rubric: "If you can't trust a Court justice, whom can you trust?" But the answer to this question becomes obvious once it is realized that a justice, in summarizing precedent, might be attempting to move the law in the direction he believes it ought to go, instead of merely restating the precedent.[17] In reading a judicial summary of precedent, as in listening to a spin meister's analysis of a political debate, the reader or listener must decide how accurate the summary is.

II. SQUIRRELING

Squirreling is related to spinning but is logically distinct from it. While spinning involves rewriting precedent to suit a justice's current purpose, squirreling involves planting little nuggets of misinformation (acorns) in an opinion, concurrence, or dissent, intending to later dig them up to imply that the nuggets express what the law has always been. Whereas spinning involves the single judicial operation of mangling precedent, squirreling involves two operations: (1) planting the acorn of misinformation in one opinion, and (2) subsequently digging it up as an accurate statement of the law.

The first stage of squirreling is relatively easy because the justice does not have to state a majority opinion. The justice must merely add a few sentences to a concurrence or a dissent that, from the prospective of the legal scholar, who is not familiar with the practice of squirreling, appears outrageous.

For example, one of the great changes in constitutional law occurred during the New Deal era with respect to the activities the federal government could regulate under the Interstate Commerce Clause. At the beginning of this era, the Court applied a formalistic examination of whether a federal statute really dealt with interstate commerce, as distinct from activity either preceding interstate commerce (for example, mining or manufacturing) or occurring after interstate commerce transactions had ceased (for example, retail selling).[18]

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15. 469 U.S. 528 (1985).

16. Justice Blackmun, who had concurred in *Usery*, now having changed his mind added a fourth concurrent test to Marshall's summary in *Hodel*: "Finally, the relation of state and federal interests must not be such that 'the nature of the federal interest ... justifies state submission.'" *Id.* at 537 (quoting *Hodel*, 452 U.S. at 288 n. 29).

17. A justice might choose to engage in a more radical version of spinning, namely, by (virtually) ignoring the undesired precedent altogether. This seems to have been the tack taken by Justice Scalia in Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990) (holding that there was no violation of the Free Exercise of Religion Clause when a state declined to pay unemployment compensation to two private employees fired for ingesting peyote at an Indian religious ceremony). Instead of dealing with West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), which held that the state could not force school children to salute the flag, Scalia virtually ignored that case in favor of the earlier case that *Barnette* had overruled, Minersville School District v. Gobitis, 310 U.S. 586 (1940).

18. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that mining cannot be regulated under the Interstate Commerce Clause); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (finding that intrastate wholesalers who sell to intrastate retailers who sell to in-state consumers cannot be regulated under the Interstate Commerce Clause).

By the early 1940's, however, the Court abandoned this approach in favor of examining whether the statute dealt with something that had *any* economic effect on interstate commerce.[19] In short, the Court seemed to have developed a Marxist-like interpretation of the federal government's power under the Interstate Commerce Clause, namely, that every human activity has some economic dimension and, therefore, has some relationship to interstate commerce. Thus, there are no logical limits to what the federal government can regulate when applying the Interstate Commerce Clause.

More recently, Justice Rehnquist surveyed the precedents, and described them as follows:

> Thus it would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be *in* commerce. ... Our cases have consistently held that the regulated activity must have a *substantial* effect on interstate commerce.[20]

Any reasonably objective scholar familiar with the precedents would conclude that Justice Rehnquist does not know what he is writing about. But this conclusion would be mistaken. Justice Rehnquist's aim was not to carefully summarize precedent. Instead, he intended to plant an acorn in the ground of his concurrence to dig up when an opportunity arose to write a majority opinion dealing with Congress' power under the Interstate Commerce Clause.

So far, only squirreling's first phase has been illustrated: the planting of the acorn. Fully developed squirreling, however, is a two step process that involves both planting the acorn and digging it up. Justice Rehnquist's explanation of how federal courts should analyze alleged restraints imposed on states when federal monetary grants are allocated to states under the Spending Clause illustrates the full squirreling process.[21] In *Rosado v. Wyman,*[22] Justice Harlan engaged in what can be called a statute-by-statute analysis of the limitations imposed by the federal grant:

> Congress, as it frequently does, has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding. Our chief resources in this undertaking are the words of the statute and those common-sense assumptions that must be made in determining direction without a compass.[23]

Given that the Court had viewed examining congressional restrictions on its grants to states on a statute-by-statute basis, wherein lies the squirreling? It lies in Justice Rehnquist's treatment of the same issue. First came the acorn burying in his majority opinion in *Pennhurst State School and Hospital v. Halderman.*[24] Here, in determining whether a federal statute which granted

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19. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (holding that a farmer who planted more wheat than the federal act allowed could be penalized under the Interstate Commerce Act); Perez v. United States, 402 U.S. 146 (1971) (explaining that intrastate extortionate loan sharking could be punished under federal law based on the Interstate Commerce Clause).

20. Hodel v. Virginia Surface Mining Ass'n, 452 U.S. 264, 310 (1981) (Rehnquist, J., concurring)(emphasis in original).

21. I am indebted to my colleague, Mark Weber, for this illustration.

22. 397 U.S. 397 (1970). This case deals with the standards states could apply to federally funded public welfare assistance granted under federal statute.

23. *Id.* at 412.

24. 451 U.S. 1 (1981). While the acorn of a new interpretation of federal statutes providing grants to states was buried in *Pennhurst*, the very principle announced in that case was

states funds to aid the mentally retarded under the Spending Clause also provided the retarded with a right to enjoin alleged inhumane treatment by the state, Justice Rehnquist provided a new rule for interpreting such federal grants to states: "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[25] In other words, there no longer will be a statute-by-statute determination of what Congress intended. Contrary to Justice Harlan's opinion in *Rosado v. Wyman*,[26] any ambiguity in congressional legislation providing grants to states under the Spending Clause would be interpreted on the assumption that no federal restriction on the states had been imposed.

Two years later, Justice Rehnquist, again writing for the Court majority, was able to dig out and apply his newly planted acorn as the standard tool in interpreting any congressional grant of funds to states where there was also an alleged restriction imposed on how states could apply these grants. Buried in footnote twenty-six of his opinion in *Board of Education v. Rowley*,[27] Justice Rehnquist dug up his very own language from *Pennhurst*: "'if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously.'"[28] So now, Justice Rehnquist can use his own recently created legal concept as precedent, Squirreling, or preparing for one's future moves like a chess master, has become a respectable stratagem for the alert justice.

III. SHELLING

This is the shorthand term for the judicial shell game of "now you see it, now you don't." Suppose a justice seeks to garner an additional vote for a majority or plurality decision. One way to do this is to incorporate the language of the targeted justice in the opinion; thereby flattering that justice and encouraging him to join in the opinion. This is a perfectly respectable expression of judicial craft.

The problem arises when the targeted justice's expressed view on the subject is inconsistent with the opinion writer's view. The solution to this problem is for the opinion writer to smother the other justice's view among several expressions of the opinion writer's own inconsistent view, thereby both garnering the additional vote of the targeted justice and canceling out what the targeted justice is really saying.

An opinion illustrating this stratagem is Justice Powell's plurality decision in *Kassel v. Consolidated Freightways Corp.*[29] In this case, the Court considered whether, in the absence of a federal statute, a state's economic burden on the interstate trucking industry would violate the dormant commerce

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also applied in that case. Given that the stratagem of squirreling paradigmatically involves burying an acorn in one case to be dug up for application for the first time in a later case, *Pennhurst* is not a perfectly paradigmatic example of squirreling. But it is nonetheless an illustrative example.

25. *Id.* at 17.

26. 397 U.S. 397 (1970).

27. 458 U.S. 176 (1982). This case involved a federal statute that imposed burdens upon states as part of its grant of funds for educating handicapped children.

28. *Id.* at 204 n.26.

29. 450 U.S. 662 (1981).

clause. Based on an earlier opinion, *Raymond Motor Transportation v. Rice*,[30] it is clear that Justice Powell believed that the appropriate test was to balance the economic burden the state placed on interstate commerce against the non-economic benefit accruing to the state. However, from his concurrence in *Raymond*,[31] it is also clear that Justice Blackmun did not believe in balancing the state's non-economic interest against the economic burden it was imposing on interstate commerce. Seemingly, either a balancing occurs (in which case Justice Powell presumably would lose Justice Blackmun's vote), or a balancing does not occur (in which case Justice Powell would have discarded his own view). It is difficult to imagine how Justice Powell could reconcile these two inconsistent tests. But here is his effort to do so:

> Indeed, "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." *Raymond* ... (Blackmun, J., concurring). ... Regulations designed for [the] salutary purpose [of promoting the public health or safety] nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause. In ... *Raymond*, we declined to "accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce." This "weighing" by a court requires—and indeed the constitutionality of the state regulation depends on—"a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce."[32]

If one reads Justice Powell's language as a straightforward, careful restatement of his view of the test to be applied, one is almost certainly going to be confused. On the one hand, Powell seems to adopt Justice Blackmun's test that if the state's non-economic interest is not illusory, there will be no balancing. However, on the other hand, he seems to reject Justice Blackmun's view by restating the balancing test without any reference to whether the state's non-economic interest is illusory. Any confusion this may cause dissipates if one assumes that Powell knew what he was doing: he was writing what would seem to the uninitiated as gibberish, not because he believed it, but because it assured him Justice Blackmun's vote.[33] In other words, Powell was engaging in shelling, or "now you see it (Blackmun's version of the test), now (Powell hopes) you don't."

Justice Brennan's opinion in *Plyler v. Doe*,[34] is another example of shelling. In this case, Brennan held that the Equal Protection Clause of the

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30. 434 U.S. 429 (1978). In that case, also involving a state burden on interstate commerce, Justice Powell stated the test thusly: "[W]e cannot accept the State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce." *Id.* at 443.

31. Justice Blackmun put his understanding of the test in his concurrence in *Raymond* as follows: "Here, the Court does not engage in a balancing of policies.... Instead, after searching the factual record developed by the parties, it concludes that the safety interests have not been shown to exist as a matter of law." *Id.* at 450.

32. *Kassel*, 450 U.S. at 670–71 (emphasis added) (citation omitted).

33. Of course, this does not explain what Justice Blackmun is doing in concurring in Justice Powell's opinion. At first examination it might seem that Justice Blackmun's concurrence falls within category IX, *infra*; A fuller explanation is beyond the scope of this article.

34. 457 U.S. 202 (1982).

Fourteenth Amendment precludes a state from denying—absent "showing that it furthers some substantial state interest"—the children of illegal aliens the free public education given to other children.[35] In *Plyler*, because the Court had previously held, over Brennan's objection, that education was not a fundamental right entitled to strict scrutiny[36] and because Brennan needed to build a majority coalition, Justice Brennan had to apply the rational basis test to the equal protection issue involving education. But he did his best to obfuscate the issue of whether education was or was not a fundamental right:

> Public education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "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 addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.[37]

One who reads this language would probably conclude that Justice Brennan was attempting to make an intellectually telling distinction between a fundamental right (which education is not) and a fundamental role (that education plays). Also, the reader would try to understand the distinction between a fundamental right and a fundamental role. The result of this exercise probably would be a sense of frustration because, while a verbal distinction could be uttered, the rationale for this distinction would have little or no value. However, once the reader realizes that Justice Brennan was shelling (in this case trying to treat education as a fundamental right even though he was not able to say so), the reader can then understand the Court's seemingly nonsensical language.

IV. STILETTING[38]

One of the classic stratagems in argumentation, which has been adopted primarily by dissenting justices who do not need to be pleasantly bland enough to command a majority, is to wound the opposition through verbal acid so deftly and deeply that no conceivable reply could undo the damage. Perhaps the classic example of stiletting occurred in Justice Holmes' dissent in *Lochner v. New York*.[39] In *Lochner*, the Court held that the Due Process Clause of the Fourteenth Amendment provides a right of contract. This right prevented a state law from restricting the number of hours bakers could work per week.[40] In *Lochner*, Holmes noted that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[41] This warning that the Fourteenth Amendment does not enact a social Darwinist survival of the fittest theory of capitalism, while not having any discernible effect on the majority opinion, has reverberated through more recent constitutional analysis.

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35. *Id.* at 230.
36. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
37. 457 U.S. at 221 (citation omitted).
38. This category has sometimes been referred to in class as "Dissenters, like blondes, have more fun."
39. 198 U.S. 45 (1905).
40. *Id.* at 53–65.
41. *Id.* at 75 (Holmes, J., dissenting).

Here are several other examples of stiletting. In his dissent in *County of Allegheny v. A.C.L.U.*,[42] Justice Kennedy demonstrated a quick mastery of stiletting. Having only barely begun his tenure on the Court, Kennedy's dissent tartly noted that the majority decision required the Court to sit "as a national theology board."[43] This remark suggests that the idea of a group of Supreme Court justices being forced to spend their time resolving theological disputes was so self-evidently inappropriate that any sane jurist would agree with Kennedy. In addition, Kennedy also put forth the following stinging rebuke to the majority position:

> A community that wishes to construct a constitutional display must also take care to avoid floral frames or other devices that might insulate the creche from the sanitizing effect of the secular portions of the display. ... The majority also notes the presence of evergreens near the creche that are identical to two small evergreens placed near official county signs. After today's decision, municipal greenery must be used with care.[44]

By this simple stiletting exercise of reciting the Court's Establishment Clause test in terms of a floral examination, Justice Kennedy demonstrates how absurd the majority's analysis is.

Dissenting in *United Steelworkers v. Weber*,[45] Justice Rehnquist referred to the majority decision as "a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini."[46] A similar stiletting comes from Scalia's dissent in *Lee v. Weisman*[47]. There, Scalia, in response to a footnote in Justice Blackmun's concurrence noting Freud's remark that "'a religion, even if it calls itself the religion of love, must be hard and unloving to those who do not belong to it,'"[48] referred to himself as one "who ha[s] made a career of reading the disciples of Blackstone rather than of Freud."[49]

Indeed, Scalia has become something of a master stilettist. In his dissent in *Edwards v. Aguillard*,[50] Scalia provided this acerbic summary of the Court's Establishment Clause analysis:

> We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional

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42. 492 U.S. 573 (1989). In this case, the Court majority found that a privately owned creche or nativity scene placed by itself on public land violated the Establishment Clause. *Id.* at 602–03. Yet a privately owned menorah celebrating Chanukah and placed with a Christmas tree and a mayor's sign saluting liberty on different public land was constitutional because it was sufficiently secularized. *Id.* at 618–21.

43. *Id.* at 678 (Kennedy, J., concurring in part and dissenting in part).

44. *Id.* at 674–75 (citation omitted).

45. 443 U.S. 193 (1979). In *Weber*, the majority held that an affirmative action program did not violate Title VII of the 1964 Civil Rights Act. *Id.* at 208–09.

46. *Id.* at 222.

47. 112 S. Ct. 2649 (1992). The *Lee* majority held that a Rabbi's prayer at a public school graduation violated the Establishment Clause. *Id.* at 2650.

48. *Id.* at 2666 n. 10.

49. *Id.* at 2684.

50. 482 U.S. 578 (1987). The majority struck down a state statute requiring that creation science be taught in the public schools whenever evolution was taught. *Id.* at 581, 596–97.

> accommodation results in the fostering of religion, which is of course unconstitutional:[51]

By thus reciting the majority's test, Scalia makes it clear that the test should be abolished.[52]

Although it is non-paradigmatic, another good example of stiletting is Justice Stewart's response to Justice Stevens in *Young v. American Mini-Theatres, Inc.*[53] Referring to Voltaire's willingness to fight to the death for someone else's right to say something he disagreed with, Stevens asserted that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theatres of our choice."[54] Since stiletting is defined as a blood letting of such deftness that it cannot be undone, any effort to do so would be fatuous. Nonetheless, in his dissent, Justice Stewart attempted to give as good as he got: "[I]f the guarantees of the First Amendment were reserved for expression that more than a 'few of us' would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion."[55] This riposte may not be acerbic enough to be a paradigm case of stiletting, but it is nonetheless a valiant effort to diffuse the sting of Stevens' thrust.

Perhaps the classic example of stiletting is Justice Black's dissent in *Griswold v. Connecticut.*[56] Indeed, much of Black's dissent appears to be soaked in acid and blood. Black stated, for example, "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."[57] Unrelenting, Justice Black referred with polite scorn to

> My Brother Goldberg [who had] adopted the recent discovery that the Ninth Amendment ... can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice," .... [Goldberg] states, without proof satisfactory to me, that in making decisions on this basis

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51. *Id.* at 636 (citation omitted) (Scalia, J., dissenting).

52. Another recent example of Justice Scalia's stilletting skill is found in his concurrence in Court in Lamb's Chapel and John Steigerwald v. Center Morickes Union Free School District et. al, 61 U.S.L.W. 4549, 4553 (June 1993). Scalia attacked the Court's reliance on the *Lemon* test to strike down the state's prohibition of the use of a public school facility to show a religiously oriented film series. Scalia stated:

> As to the Court's invocation of the *Lemon* test: like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our establishment clause jurisprudence once again, frightening the little children and school attorneys [of the school district].

Id.

53. 427 U.S. 50 (1976). In *Young*, the Court held that a city would not violate the First Amendment if it used the content of sexually explicit films to place "them in a different classification from other motion pictures." *Id.* at 70–71. Nor does it violate the Equal Protection Clause of the Fourteenth Amendment for a city to restrict adult motion picture theaters and other commercial establishments displaying "Specified Sexual Activities," *id.* at 70, to certain locations. *Id.* at 72–73.

54. *Id.* at 70 (This is a relatively rare example of stiletting in a majority opinion).

55. *Id.* at 86 (Stewart, J., dissenting).

56. 381 U.S. 479 (1965) (finding a constitutional right of privacy even though no specific provision provides for one).

57. *Id.* at 510 (Black, J., dissenting).

> judges will not consider "their personal and private notions." One may ask how they can avoid considering them.[58]

Quoting Learned Hand, Black added that "'[f]or myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.'"[59] If a single dissent filled with rapier-like verbal stiletting could have destroyed the constitutional right of privacy at its inception, Justice Black's acerbic dissent in *Griswold* would have done so.

V. A SMILE AND A GUN ARE MORE EFFECTIVE THAN A SMILE BY ITSELF

The respected political pundit Johnny Carson once noted that a smile and a gun are more effective than a smile by itself.[60] These words come to mind when studying the classic first case in the constitutional law text with my first year students. The case, *Marbury v. Madison*,[61] is difficult enough for the nervous students to follow with its strange new vocabulary (such as, "writs of mandamus," "original jurisdiction," "appellate jurisdiction," "other public ministers," "bill of attainder" and "ex post facto" law). In addition to unfamiliar language, there is the difficult exercise of explaining to students how the great Chief Justice Marshall (The First) was able to argue that Section 13 of the Judiciary Act of 1789 gave an unconstitutional grant of authority to the Court to issue a writ of mandamus as a matter of original jurisdiction to the Secretary of State to compel him to give Marbury his commission as justice of the peace. At this point, many students (particularly those who have not studied the case in college) would quit law school on the spot if only they could get a full refund, explain their departure to their parents and friends, and figure out what else they could do with their lives (after all, if they had liked blood, they probably would have gone to medical school in the first place).

But then comes the disillusioning part of the exercise, namely, explaining that the great Chief Justice could have avoided declaring unconstitutional the Congressional grant of original jurisdiction to issue writs of mandamus in cases not affecting ambassadors, other public ministers and consuls.[62] How could Justice Marshall so badly have mangled the result of the case? Furthermore, why is this case in the casebook at all, let alone as the first case? To suggest that Justice Marshall might have purposefully mangled his analysis of the Congressional power to issue writs of mandamus in order to achieve what he

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58. *Id.* at 518–19 (citations omitted).

59 *Id.* at 526–27 (quoting LEARNED HAND, THE BILL OF RIGHTS 73 (1958)).

60. One is also reminded of Stalin's remark about the Pope during World War II, "The Pope! How many divisions has *he* got?" JOHN BARTLETT, FAMILIAR QUOTATIONS 638 (Justin Kaplan, ed. 1992).Even more directly to the point is Mao Tse Tung's assertion that "Political power grows out of the barrel of a gun" *Id.* at 686.

61. 5 U.S. 137 (1803).

62. He could have refused to take jurisdiction since this was not a case in which the Court had original jurisdiction. Or he could have asserted that the grant of the congressional power to the Court to issue writs of mandamus was remedial only (that is, to be applied only where the Court already had original jurisdiction) and did not attempt to unconstitutionally expand the category of cases where the Court was granted such jurisdiction. To that end one could also point out the disclaiming language of the congressional grant, namely, that the Court's power to issue writs of mandamus was limited to "'cases warranted by the principles and usages of law.'" *Id.* at 148.

almost certainly regarded as a more important result is like suggesting to a kid on her first visit to the department store Santa Claus that he is a pleasant fraud. In a society where the *Law* and the *Supreme Court* and the *Constitution* are exalted to the status of a civic religion, to disillusion students during the very first week of their introduction to the priesthood of this secular religion is an exercise almost too brutal to record in print.

There is some satisfaction in being able to explain to students that Chief Justice Marshall was almost certainly engaging in a Machiavellian exercise. Aware of the Court's lack of power to enforce its edicts, he began the process of establishing the precedent that the Court has the authority to declare a congressional action unconstitutional and to order the executive department to do something. However, realizing that the Court could not enforce its decrees without the cooperation of the military or police elements in the government and that these elements were controlled by an unfriendly President and Congress, Marshall almost certainly knew that he could not have gotten those branches to provide military power to support any undesired exercise of judicial authority. So; aware of the Court's political weakness, Marshall established the precedent that the Court can declare a congressional action unconstitutional without actually having to enforce its edicts on any other branch of government. Through *Marbury*, the Court enabled itself to develop the authority over time with the relevant public to be able to enforce a decision that Congress or the President was acting unconstitutionally. With this authority the Court could expect that its decrees would be enforced, even by a hostile President and Congress.

This explanation of what Justice Marshall was attempting to do in *Marbury* has an ennobling quality, to the extent that Machiavelli can seem noble. However, it is no substitute for rudely disabusing students in their first week of law school of their belief in the *Law* as the adult equivalent of Santa Claus or the Tooth Fairy.

VI. OF COURSE IT'S A GOOD IDEA, IT'S MY IDEA

A remembered college professor used to respond to flattering comments about the intelligence of his own remarks with the statement: "Of course it's a good idea, it's *my* idea." This humorous bit of self-flattery produced the intended effect of shutting up the would-be flatterer. Something similar to this attitude often emerges when a justice upholds a statute by applying the deferential rational basis test. When the Court applies the rational basis test to determine whether a government action violates the Equal Protection Clause or the Due Process Clause, the Court does not examine the actual purpose(s) that induced legislators to support the statute. Rather, the opinion writer searches his own imagination to determine whether any conceivable reason could be found to support the statute. Having come up with a reason which he thinks could be rational, he then asks himself whether it is in fact rational. In other words, he is asking himself whether his own imaginative reasoning is rational. Why would he doubt his own rationality? If someone were to question whether his imagined reason were rational, would he not be tempted to respond: "Are you asserting that I, a member of this Court, am irrational, crazy? Of course my reason is rational, it's *my* reason."

An example of such self-flattery can be found in *Railway Express Agency v. New York*,[63] in which Justice Douglas upheld a New York regulation that prevented advertising on any vehicle except vehicles used in the vehicle owner's business. A disfavored vehicle owner brought an Equal Protection Clause challenge, arguing that the distinction was irrational because the traffic problems caused by the two types of vehicles were similar. Justice Douglas responded that this "is a superficial way of analyzing the problem.... The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use."[64] Thus, applying the deferential rational basis test, Justice Douglas found the city's regulation constitutional only because he could verbalize a tautological distinction between the types of vehicles (the city distinguished between the two types of vehicles because the city could find that they were different).

Another example is Justice Rehnquist's opinion in *United States Railroad Retirement Board. v. Fritz*.[65] Here, the federal government, while continuing railroad employees' social security benefits, eliminated the pension benefits of some, but not all, former railroad employees. Justice Rehnquist found that "Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits."[66] Justice Rehnquist's "rational" justification for Congress' distinction is the circular explanation that Congress could have concluded that those employees who were to continue getting the railroad pension as well as social security benefits had a stronger equitable claim to continue getting the railroad pension than those who were no longer getting the railroad pension. However, since the plaintiffs were asserting that such a distinction was irrational, this was the very question at issue. In Rehnquist's opinion, the questioned distinction became the explanation for the distinction. Imagining that this non-explanatory reason might have induced Congress to act, Rehnquist found that his imagined reason was not "patently arbitrary" and, therefore, satisfied the deferential rational basis test.[67]

The result of such analysis is that the interlocutor is given a reason for the government's distinction that comes out of the justice's head rather than from the legislature. The imagined reason explains nothing because it simply repeats the distinction that the government has made, and which is itself at issue. Then, this result of the justice's thinking is found by the justice to be perfectly rational. Like the college professor's flatterer who learns to shut up, after a while, virtually every potential interlocutor gets the point and ceases to trouble the Court to decide that, applying the deferential rational basis test, the government's economic or social distinction between two classes of persons (or corporations) is irrational.

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63. 336 U.S. 106 (1949).
64. *Id.* at 110.
65. 449 U.S. 166 (1980).
66. *Id.* at 178.
67. *Id.*

VII. THE MEANING OF GENUINE RESPECT FOR A COORDINATE BRANCH OF GOVERNMENT

Justice Rehnquist has been at the forefront of the Court in demonstrating his respect for Congress as a coordinate branch of government. For example, in *Rostker v. Goldberg*,[68] which upheld a Congressional act that authorized registering young men, but not young women, for the draft, Justice Rehnquist, writing for the majority, found that Congress was justified in making a distinction between men and women because Congress (and the President) had decided that women would not serve in combat. Because Congress had decided that women would not be subject to the draft,[69] there was no point in registering them for the draft. Justice Rehnquist added, "The District Court was quite wrong in undertaking an independent evaluation of [the] evidence, rather than adopting an appropriately deferential examination of *Congress*' evaluation of [the] evidence."[70] Under this analysis, the Court quite properly avoided examining whether women could be drafted because Congress, in its wisdom, had decided not to draft women.

Although Justice Rehnquist, in writing for the Court, gave special deference to Congressional decisions involving the military, the judicial willingness to defer to a coordinate branch of government transcends any one category of cases. For example, in *United States Railroad Retirement Board v. Fritz*,[71] Justice Rehnquist, again writing for the majority, applied a rational basis standard of review in upholding Congress' decision to remove retirement benefits from some former railroad workers.[72] In the course of deciding *Fritz*, Justice Rehnquist said:

> Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute ....
>
> Finally, we disagree with the District Court's conclusion that Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it. If this test were applied literally to every member of any legislature that ever voted on a law, there would be very few laws which would survive it. The language of the statute is clear, and we have historically assumed that Congress intended what it enacted.[73]

So, we are told by Justice Rehnquist that the Court will defer to an act of Congress even if some, or perhaps all, members of Congress misunderstood what they were passing. This suggests that when the Court defers to the actions of Congress as a coordinate branch of government, it might well have contempt for the members who make it up.

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68. 453 U.S. 57 (1981).
69. The Court did not examine whether Congress was justified in not allowing women into combat.
70. 453 U.S. at 82–83.
71. 449 U.S. 166 (1980).
72. These former railroad workers would continue to receive social security benefits.
73. *Id.* at 179 (citations omitted).

VIII. YOU SCRATCH MY BACK, AND I'LL SCRATCH YOURS

This category is designed to explicate the stratagem of two or more justices who, while agreeing on the result, disagree on the substance of the law. If they simply write separate opinions expressing their divergent views, they also expose the fact that they disagree about the substance. So, they decide to present a united front by joining in each other's opinions. This gives the impression that there is fairly substantial support for the point they appear to be trying to make. This stratagem works for the casual reader who is impressed by the mutual support the justices give each other and the apparent strength in numbers that this suggests. It is only the more careful reader who has to struggle with the confusion generated by justices appearing to agree who do not, in fact, agree. But once it is recognized that each justice is giving support in order to gain support, this confusion is dissipated. It is the judicial equivalent of wolves traveling in packs or juveniles joining gangs. That is, it reflects the perception that there is strength and solidarity in numbers.

An example of this stratagem is the willingness of Justices Scalia and Rehnquist to join in each others' dissents in *Planned Parenthood v. Casey*.[74] In this case, a Court plurality determined that a state could regulate a woman's abortion decision before viability as long as it did not impose an undue burden on her decision. While a Court majority continued to find that a woman has a substantive due process right to an abortion before the fetus becomes viable, the dissenters disagreed. But they disagreed as to why they disagreed. On the one hand, Justice Rehnquist found that "[a] woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest."[75] In short, for Rehnquist, a woman has a constitutionally protected interest in obtaining an abortion, which could be overcome by the state's competing interest, as it was in this case. Justice Scalia put the point rather differently: "The issue is whether ... [a woman's power to abort her unborn child] is a liberty protected by the Constitution of the United States. I am sure it is not."[76] Therefore, while Rehnquist and Scalia agreed that the state here could regulate the abortion procedure, they disagreed on whether the woman had any substantive due process interest in obtaining an abortion which might, in other circumstances, trump the state regulation.

There is nothing unusual about dissenters disagreeing on the basis of their dissents. What is unusual is that each joined in each other's dissent and that Justices White and Thomas joined in both dissents. This raises the question: Why did they join each other's opinions? Assuming that they knew what they were doing, why did they do it? The only explanation that makes even minimal sense is the strength and solidarity in numbers theory: when four dissenters appear to agree, the dissent seems stronger. The only price they had to pay for this agreement was the apparently small one of the disingenuousness involved in

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74. 112 S. Ct. 2791 (1992).
75. *Id.* at 2867 (Rehnquist, C.J., concurring in part and dissenting in part) (citations omitted).
76. *Id.* at 2874 (Scalia, J, concurring in part and dissenting in part).

each joining each other's opinion. However, this mutual judicial back scratching operation must have seemed a price worth paying.

IX. STOP THE BALLET! THE DIRECTOR HAS BEEN FIRED!

Suppose a ballet company were to fire its director during a performance with all the dancers on stage frozen in the middle of their steps. Much of the dance routine has already been performed; but without the director, the dancers are unwilling to go forward and complete the dance. From the audience's perspective, the performance has become an aesthetic fiasco. But the anger that accompanies the sense of having been deprived of a positive aesthetic experience is mitigated among those in the audience who are aware that the director has been fired. While not undoing their dissatisfaction with the performance, an awareness of the reason for the fiasco enables audience members more quickly to regain emotional equilibrium and to move on to other activities.

This analogy is posited to help the constitutional law student understand why the Court, having used the Equal Protection Clause of the Fourteenth Amendment to develop and expand the concept of a fundamental right to include the right to vote[77] and the right of interstate travel,[78] declined to extend this concept to the right to be educated.[79] While an effort can be made to distinguish the categories granted fundamental right status from the categories denied this status on constitutional grounds, this approach is likely to seem unpersuasive. However, once the student learns that there was a considerable change in Court personnel from the earlier expansive understanding of a fundamental right to the later contracted view of this right,[80] her dissatisfaction with the incoherence of the various decisions dissipates. The Court personnel became more conservative because the president, here Nixon, appointing them was more conservative. This explains the incoherence of the decisions as a collective entity. Like the ballet audience whose aesthetic sensibilities were not satisfied by seeing the dancers frozen in their steps, the student's rational faculty honed through examining the relationships among cases is not satisfied by an attempt at a rational distinguishing of the cases. But also like the audience at the ballet, which is appeased at learning that the director has been fired, the student of these cases is now freed from the sense of intellectual stupor that accompanies an examination of these cases and can more easily move on to other areas of study.

X. REASSURING THE VISUALLY CHALLENGED THAT "IT'S IN THERE"

This category is suggested by the television pitchperson who informs us that his sauce (Prego) has all the necessary ingredients of spaghetti sauce. To

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77. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Kramer v. Union Free School Dist. 395 U.S. 621 (1969).

78. Shapiro v. Thompson, 394 U.S. 618 (1969).

79. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

80. During the Nixon era, Justices Burger, Blackmun, Rehnquist and Powell joined the Court while Justices Warren, Black, Fortas and Harlan left.

illustrate, let us say that the sauce contains oregano, basil, sweet pepper, onion and garlic. "It's all in there," he informs us. Let us suppose that we are the visually challenged listeners of his television pitch, that is, to use old style politically incorrect language, we are nearly blind. We go out to the store and try to read the spaghetti sauce label. We are wearing thick eyeglasses, put the bottle near the light fixture, squint our eyes and use our magnifying glass. We want to believe what we have been told by the persuasive pitchperson. Yet no matter how hard we try, we cannot be certain that we see the desired ingredients on the label.

This is roughly the same position some first-year students find themselves in as they study Justice Douglas' opinion in *Griswold v. Connecticut*.[81] Justice Douglas was determined to avoid doing what had been done some years earlier in *Lochner v. New York*,[82] namely, using the procedural Due Process Clause of the Fourteenth Amendment to create and enforce a substantive right. In *Lochner*, the Court found a baker has the right to enter into a contract with his employees for longer hours than the state would allow. In *Griswold*, the issue was whether a state law proscribing contraception could be used against a doctor who gave birth control information to a married couple and prescribed "a contraceptive device or material for the wife's use."[83] The Court, per Justice Douglas, determined that the married couple had a right of privacy which rendered the state statute unconstitutional.[84] Since Douglas and the majority were constrained by their abhorrence of the *Lochner* precedent, they could not create a right of privacy through the substantive use of the Due Process Clause. Instead, Douglas found that the right of privacy was there in the Constitution all along, created as a penumbra by emanations from specific provisions of the original Bill of Rights.[85]

In effect, like the spaghetti sauce pitchperson telling us that "It's in there," Douglas is claiming that the right of privacy is in the Constitution itself. And like the visually challenged person trying to read the spaghetti sauce label just to be sure that the pitchperson is telling the truth, the legally challenged first-year student squints to see whether there are emanations which really do create a penumbra of privacy. After a while, the student no longer has to squint, and she comes to trust her eyes and her own judgment.

XI. WHEN YOU CITE THE STATEMENT I MADE WHEN I WAS A LAWYER AS SUPPORT FOR YOUR CURRENT POSITION, YOU SHOULD BE AWARE THAT WHEN I SAID THAT I WAS LYING

The use of devastating judicial candor as a stratagem in response to a seemingly irrebuttable argument made to a justice is such a rare event in Court decision writing, it is worthy of notice in a separate category. One such argument was made to Justice Jackson by the government lawyer in

81. 381 U.S. 479 (1965).
82. 198 U.S. 45 (1905).
83. 381 U.S. at 479.
84. *Id.* at 485.
85. *Id.* at 484.

Youngstown Sheet & Tube Co. v. Sawyer.[86] The government lawyer argued that even in the absence of congressional legislation, President Truman had inherent power as Commander in Chief during the time of a national emergency (here, the Korean War) to order the Secretary of Commerce to seize and operate privately owned steel mills in order to further the war effort. In addition, the government lawyer cited as authority for his position a remark made years earlier by Justice Jackson himself while serving as President Roosevelt's Attorney General in support of that President's similar inherent power.

In a burst of excessive candor, rare for a justice or anyone else, Justice Jackson rejected the attorney's argument and citing of his own remarks by admitting that when he had been Attorney General, he was speaking as a lawyer and that what he said in that capacity should not have been taken as the truth: "While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself."[87] It is true that even Justice Jackson's burst of excessive candor had its limits. In his case, the limit was that his means of judicial expression, his language, tended to obfuscate his meaning. But once one decodes his language and puts it into ordinary English, Justice Jackson appears to be saying that when he was the Attorney General, he lied. True, it was a noble lie because it was uttered on behalf of his client, the President. But it was still a lie, and should now be disregarded. Such unusual candor would tend to disarm even the most hostile critic.

XII. YOU'VE HAD THREE PIECES OF CHICKEN, BUT WHO'S COUNTING?

According to the story, a woman comes to her friend's house for dinner and is served chicken. After finishing the pieces on her plate, her friend asks her if she wants any more chicken. The woman responds, "No, I've already had two pieces." The hostess says in turn, "You've had three pieces, but who's counting?"

The reader ponders the conundrum, "How can someone who says she is not counting give an accurate count?" The answer is obvious: she says she is not counting; but, of course, she is counting. But if this is so, why does she say that she is not counting? The answer is probably that the hostess is annoyed that her guest is becoming a pig at the expense of her hospitality, but also wants to give the impression that she is too polite to bring it up.

One is reminded of this conundrum by a similar maneuver that justices sometimes engage in. For example, Chief Justice Burger's opinion in *Hunt v. Washington State Apple Advertising Commission*[88] declared unconstitutional a North Carolina statute that ostensibly protected its consumers' health by requiring that apples shipped into the state in closed containers either bear U.S. grading or bear no grading at all (under the North Carolina scheme, the

86. 343 U.S. 579 (1952).
87. *Id.* at 647.
88. 432 U.S. 333 (1977).

Washington apples were prevented from coming into the state because they were labeled under a different, more stringent standard). The reason for the decision was the dormant commerce clause concept that North Carolina could have achieved its legitimate objective using an alternative that was less discriminatory against Washington state apples. However, Justice Burger added the following confusing language to his opinion:

> Despite the statute's facial neutrality, [Washington] suggests that its discriminatory impact on interstate commerce was not an unintended byproduct and there are some indications in the record to that effect. The most glaring is the response of the North Carolina Agriculture Commissioner to [Washington's] request for an exemption following the statute's passage in which he indicated that before he could support such an exemption, he would "want to have the sentiment from our apple producers since *they were mainly responsible for this legislation being passed....*" ... However, we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace.[89]

If, as Justice Burger indicated, the evidence of North Carolina's economic protectionism was irrelevant, why did he mention it? And if it was relevant, why did he say it was irrelevant? The answer probably is that the evidence of North Carolina's economic protectionism was relevant and Burger wanted us to know that it was relevant. But at the same time, he wanted to appear polite and ostensibly respectful of another governmental entity in our federal system by seemingly accepting at face value North Carolina's stated purpose for its policy of protecting local consumers. Thus, as in the story of the observant hostess, *supra,* this seeming anomaly is explained.

XIII. WINK AND NOD JUSTICE

Justice Holmes and the Court first began to analyze what speech is protected under the First Amendment in cases where opponents of our government's policies during the First World War spoke out and were convicted of violating the Espionage Act of 1917.[90] In several of these cases Justice Holmes indicated his contempt for these defendants and the causes they espoused. In these opinions, a defendant who said "X," which might have been protected under the Court's then understanding of the First Amendment, was inferred to have really been saying "Y," which the Court deemed unprotected under the First Amendment. In this exercise, the Court gave the impression that it believed in what might be called "wink and nod justice." Wink and nod justice refers to the Court's mind reading ability to determine what someone intended to say when he said what he said and a willingness to sustain his conviction for what the Court so astutely discerns was intended rather than what was actually said. The rationale for this exercise is the Court's sophistication. It was not born yesterday. It is aware that these defendants are disgusting radicals that want to spread revolution, anarchy or bolshevism to this country. As a result,

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89. *Id.* at 352–53 (emphasis in original) (citation omitted).

90. Schenk v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919).

the Court will pay more attention to the revolution the Court knows the defendants intended, rather than what the defendants actually said.

One example of this approach appears in *Frohwerk v. United States*,[91] where Justice Holmes noted that the defendant had "deplor[ed] 'the draft riots in Oklahoma and elsewhere,'" but that in doing so, the defendant had used "language that might be taken to convey an innuendo of a different sort...."[92] Similarly, in *Debs v. United States*,[93] Holmes pointed out that the defendant "said that he had to be prudent and might not be able to say all that he thought, thus intimating to his hearers that they might infer that he meant more...."[94] Contemporary proponents of law and order justice, that is, those opposed to allowing the Bill of Rights to interfere with criminal convictions by enabling the obviously guilty to escape their just desserts through technicalities, could still benefit by rereading these early First Amendment opinions for guidance in how to sustain convictions regardless of the quality of the government's evidence against the defendants.

XIV. IF WE APPLY MY RULES, I WIN

This stratagem is not complicated. The Justice writing the Court's opinion decides to set up the legal problem so that the conclusion follows from the premise(s). There is nothing unusual in this. The Justice simply chooses to apply a particular premise, rather than some other premise equally (or more) applicable, because the Justice knows that once the applied premise is accepted, the conclusion will appropriately follow. The maneuver is designed to disguise the fact that the Justice has chosen an arguably inappropriate premise for the purpose of providing a seemingly logically tight argument wherein the conclusion follows from the premise chosen.

One example of this approach is Justice Blackmun's decision in *Roe v. Wade*[95] to reject the two approaches for finding a right of privacy commanding the most judicial support in the case that first developed this right, *Griswold v. Connecticut*.[96] In *Griswold*, Justice Douglas, writing for the majority, found a right of privacy created by a penumbra emanating from specific provisions in the Bill of Rights. Justice Goldberg, with two others, concurred on the ground that the Ninth Amendment recognized that there were personal rights not explicitly contained in the first eight amendments.

Instead of adopting either approach, Justice Blackmun, without explanation, adopted the approach taken in *Griswold* by only Justice Harlan. In *Griswold*, Harlan relied on the Fourteenth Amendment's Due Process Clause. This was the very same approach that had been discredited by the general dissatisfaction with the earlier case, *Lochner v. New York*.[97] As Justice Blackmun said in Roe:

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91. 249 U.S. 204 (1919).
92. *Id.* at 207.
93. 249 U.S. 211 (1919).
94. *Id.* at 213.
95. 410 U.S. 113 (1973) (finding that a woman has a conditional right to an abortion).
96. 381 U.S. 479 (1965).
97. 198 U.S. 45 (1905) (finding a right of contract in the Due Process Clause of the Fourteenth Amendment).

> [The] right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[98]

Blackmun's assertion that the discredited substantive Due Process Clause approach of *Lochner* should be applied in determining whether a state can restrict a woman's right to have an abortion is made without a rationale. Indeed, it seems a rather casually adopted personal preference for one constitutionally based approach instead of another. In fact, this choice provides Justice Blackmun with support for his argument that the fetus cannot be protected by the state from the woman's desire to abort. The argument hinges on Blackmun's ability to refer to the word "person" appearing in the Due Process Clause. Since a woman is legally a person and the fetus is not,[99] the woman has a right of privacy while the fetus has no legally protected rights. Thus, it is the Due Process Clause's reference to a person that enables Justice Blackmun to give the woman the protection to get an abortion in the first two trimesters. Since Blackmun's argument turns on the word "person," which appears in the Due Process Clause but not in Justice Douglas' penumbral approach or in Justice Goldberg's Ninth Amendment approach, Blackmun's apparently casual selection of the Due Process Clause seems an ingenious sleight of hand. The reason for selecting the Due Process Clause rather than the alternative approaches suggested by Justices Douglas and Goldberg in Griswold is that this clause, unlike the alternatives, enables Blackmun to more easily assert that the woman is a legally protected person but the fetus is not. Because of his choice of constitutional provisions, Blackmun is able to apply the one premise from which his conclusion seemingly follows. Thus, the persuasiveness of Blackmun's textual argument (however modest this might seem) depends solely on his having the opportunity to choose his preferred constitutional provision as the premise from which his argument develops. That this exercise also results in the unexplained resurrection of a largely discredited concept (substantive due process) must have seemed to Justice Blackmun a worthwhile trade-off for being able to produce a plausible argument supporting the conclusion that the woman has a constitutional right to an abortion.

XV. LET ME APPLY MY RULES AND THEN CHANGE THEM WHEN THEY DON'T APPLY, SO I WIN

This stratagem is also straightforward. If the favored rule explains away much of the alleged problem but not all of it, the solution is first to use the rule to explain away what can be explained. Next, the justice shifts to another rule to explain away what still needs to be explained. A case that fits this stratagem is *Michael M. v. Superior Court.*[100] Here, the Court had to decide whether a state statute criminalizing an underaged male's conduct for engaging in consensual sex, but not his underaged female partner's conduct, violated the Fourteenth Amendment's Equal Protection Clause. Having previously decided to apply

98. 410 U.S. at 153.

99. As Justice Blackmun puts it, "All this ... persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158.

100. 450 U.S. 464 (1981).

intermediate scrutiny to cases involving sexual discrimination,[101] one would have expected the Court to apply the same standard in this case. Under this standard, the statutory rape statute would be upheld only if it was substantially related to an important government purpose. But Justice Rehnquist, the author of *Michael M.* who had previously dissented when the intermediate scrutiny standard was adopted,[102] largely jettisoned this standard in upholding the statutory rape statute.[103] He did so by engaging in two procedures usually associated with the rational basis test. Under the rational basis test, the justice first explicitly or implicitly admits that he does not know the actual reason underlying the legislative distinction. Next, the justice makes up his own reason, which he finds rational.[104] Here, Rehnquist admitted that "[p]recisely why the legislature desired th[e] result [it did] is of course somewhat less clear."[105] He then went on to suggest that one purpose of the statute was to prevent illegitimate pregnancies. He reasoned that since only women become pregnant, thereby suffering the physical and emotional consequences of pregnancy, young men and young women are not similarly situated with respect to the risks of sexual intercourse. Since a young woman is already sufficiently deterred from becoming pregnant, the statute criminalizing only the young man's conduct was justified as placing an equivalent deterrent on a young man. If one accepts Justice Rehnquist's explanation for the statutory distinction, Rhenquist's conclusion that the statute is constitutionally justified would seem to follow.

But there is one small problem. As Rehnquist himself admitted, pre-pubescent females cannot become pregnant; and, therefore, the statutory distinction between young women and young men cannot be sustained on the ground that young women become pregnant and young men do not. However, Rehnquist proved this to be an easily surmountable problem. He only needed to suggest an additional purpose to justify the legislative distinction between young males and pre-pubescent females. In order to incorporate pre-pubescent females into his analysis, Justice Rehnquist switched rationales from his previous suggestion (that young women suffer disproportionately because only they could become pregnant) to the assertion that the legislators might have believed that pre-pubescent females risk suffering physical injury, a risk not shared by young men. Then, just to be on the safe side, he suggested that the distinction between pre-pubescent women and young men needed no justification.

> Quite apart from the fact that the statute could well be justified on the grounds that very young females are particularly susceptible to physical injury from sexual intercourse, it is ludicrous to suggest that the

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101. Craig v. Boren, 429 U.S. 190 (1976).
102. *Id.* (Rehnquist, J., dissenting).
103. Some of Justice Rehnquist's language might suggest an intermediate scrutiny standard. For example, "[o]ur cases have held ... that the traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged." 450 U.S. at 468 (citations omitted). But then he undoes any effect this statement might be designed to have both by how he actually goes about analyzing the statute (as discussed in the text *infra*) and by such additional statements as, "a legislature may not 'make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women....'" *Id.* at 469.
104. *See* Ry. Express Agency v. New York, 336 U.S. 106 (1949).
105. 450 U.S. at 469.

> Constitution requires the California Legislature to limit the scope of its rape statute to older teenagers and exclude young girls.[106]

Thus, in case anyone might think of a counter-argument, Rehnquist suggests that there need not be any purpose at all to justify this aspect of the legislative distinction.

Justice Rehnquist's strategy takes the following form: (1) change the standard of judicial review of a legislative distinction to a more deferential one; (2) make up a rule justifying the government action; (3) make up a new rule when the old one ceases to apply; and (4) be prepared to discard the new rule in favor of no rule at all in order to preclude any possible challenge to the new rule.

XVI. THIS IS SO AMERICAN, IT *MUST* BE PROTECTED BY THE FIRST AMENDMENT

In his dissent in *Lee v. Weisman*,[107] where the Court majority held that a rabbi's prayer at a public middle school's graduation ceremony violated the Establishment Clause of the First Amendment, Justice Scalia made the point that the rabbi's prayer was American:

> [T]here is simply no support for the proposition that the officially sponsored nondenominational invocation and benediction read by Rabbi Gutterman—with no one legally coerced to recite them—violated the Constitution of the United States. To the contrary, they are so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself.[108]

The inference to be drawn from this language is that if the prayer had not been American, Justice Scalia, too, would have found it unconstitutional. Thanks to Justice Scalia's analysis, a fairly discernible test can be developed for determining whether the Establishment Clause of the First Amendment has been violated: if the government interacts with American religion, there is no violation of the Establishment Clause; but if the government interacts with non-American religion, there is a violation. Indeed, a similar rationale was applied by the Court long ago in upholding a bigamy statute as applied against a practicing Mormon: "[p]olygamy has always been odious among the northern and western nations of Europe, and until the establishment of the Mormon church, was almost exclusively a feature of the life of Asiatic and African people."[109] If this approach were resurrected and generally applied to the First Amendment, it could drastically simplify the Court's analysis in this area.[110]

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106. *Id.* at 475 (citations omitted).
107. 112 S. Ct. 2649 (1992).
108. *Id.* at 2684 (Scalia, J., dissenting).
109. Reynolds v. United States, 98 U.S. 145, 164 (1878).
110. But Justice Scalia himself has not followed this approach in dealing with Freedom of Expression. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hileah, 113 S. Ct. 2217 (1993) (where the Court unanimously struck down a city ordinance which prohibited the animal sacrifices of an African-Cuban religion); Texas v. Johnson, 491 U.S. 397 (1989) (where the Court majority including Justice Scalia held that a state conviction for burning the American flag as a means of political protest violated the First Amendment).

XVII. THIS IS TOO DISGUSTING TO BE PROTECTED BY THE FIRST AMENDMENT.

The Court majority's analysis of obscenity sometimes suggests that its members find the subject too repulsive for rational analysis. These members, as would any right-minded individual, know that something as disgusting as obscenity does not deserve First Amendment protection. Therefore, nothing is lost if their analysis is a bit on the fuzzy side. For example, in *Roth v. United States*,[111] the term "appealing to the prurient interest" is introduced by Justice Brennan as a criterion for determining what constitutes obscenity.[112] Brennan uses the following dictionary definition of prurient: "[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd."[113] With the exception of "lewd" and "lascivious longings," most of these terms are of little or no help for the reader genuinely interested in learning what prurient means. The terms "curiosity" and "propensity" are particularly uninformative. Notice also the first and presumably most informative term, "itching." Based on an understanding gleaned from contemporary advertising, seemingly if one had an itch, the way to go about relieving it would be to wash the offending area with an anti-dandruff shampoo. This is probably not what Justice Brennan had in mind, although it is difficult to tell from his analysis.

Another example of this tendency of the justices to express themselves in a way that would leave the curious but uninformed reader in the lurch is the exemplification of the term "sexual conduct." Following a draft of the Model Penal Code, both Justices Brennan[114] and Burger[115] list excretion (or excretory functions) among the examples of sexual conduct. The writer of this article admits to both a limited awareness of such subjects and a limited imagination, but after many years of contemplation he is still unable to conjure up how excretion can constitute sexual conduct.

Justice Burger's gratuitously pejorative analogies in *Miller v. California*[116] and *Paris Adult Theatre I v. Slaton*[117] also exemplify the Court's assumption that the question of whether obscenity is protected by the First Amendment is too disgusting to be analyzed rationally. In these cases, Burger compares obscenity to heroin,[118] pollution,[119] corruption,[120] debasement,[121] garbage,[122] sewage,[123] and drug addiction.[124] Anyone who views obscenity with

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111. 354 U.S. 476 (1957).
112. This concept is retained in later cases as a defining characteristic of obscenity. *See* Miller v. California, 413 U.S. 15 (1973).
113. 354 U.S. at 488 n. 20 (citations omitted).
114. Roth v. United States, 354 U.S. 476 (1957).
115. Miller v. California, 413 U.S. 15 (1973).
116. 413 U.S. 15 (1973).
117. 413 U.S. 49 (1973).
118. *Miller*, 413 U.S. at 36.
119. *Paris Adult Theatre I*, 413 U.S. at 64.
120. *Id.* at 63.
121. *Id.*
122. *Id.* at 64.
123. *Id.*
124. *Id.* at 67–68.

the passionate dislike suggested by these analogies is in a poor position to engage in a rational analysis of whether it deserves constitutional protection.

Another example to the same effect is Justice Burger's quotation of Professor Bickel's remark that "'[a] man may be entitled to read an obscene book in his room, or expose himself indecently there.... We should protect his privacy.'"[125] Presumably the man who is reading the book is doing so alone. If so, what constitutes indecent exposure? A narcissistic look at himself in the mirror in his birthday suit on his way to the bathroom? Too much prancing and preening? Somehow one suspects that this is not what Bickel and Burger meant. Although we are not told what indecent behavior the man is engaging in with the possible aid of his obscene book, one suspects that it is masturbation, and act the court thinks to be so grotesque as to be virtually unmentionable and seemingly beyond the scope of forthright analysis.

A final example of the Court's careless use of language in this area is that for something to be obscene, it must both appeal to the prurient interest and be patently offensive.[126] If something appeals to the prurient interest, it presumably is a turn on (to use contemporary parlance). But if it also must be patently offensive, then it is to be a turn off. This raises the question: How can something be both a turn on and a turn off at the same time? This, presumably, is a logical impossibility. However, what is logically impossible might be emotionally possible; we might be repelled by what we also want. One gathers that this is what the Court is driving at, but the Court offers no such explanation. The Court apparently assumes either that we can figure it out for ourselves or that the subject is so disgusting that no right-minded reader would care that the Court was logically incoherent.

Since the question at issue is whether obscenity deserves to be protected under the First Amendment, one would expect the Court to treat the subject with considerable care. The fact that the Court majority does not do so suggests that the subject is laden with too much emotional baggage for the Justices involved. But wherein lies the emotional baggage? Could it be that it is the old puritan American hang-up, the subject of sex itself, which is so difficult to discuss rationally? If so, does the Court majority's difficulty find its echo in the general society's ready acceptance of the fuzziness of the Court's rationale?

XVIII. THE PITHY, NON-EXPLANATORY EXPLANATION

The point of this stratagem is for the Court to assert something without explaining why the assertion makes any sense. The way to do this (and simultaneously economize on paper) is for the opinion writer to think up some short, snappy phrase which appears to explain the point being made, while really explaining nothing. The reader is expected to be so enamored of the judicial turn of phrase that acceptance comes without much thought even though the phrase does not explain anything.

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125. *Id.* at 59.
126. *See* Miller v. California, 413 U.S. 15 (1973).

A. A Far Cry

One such non-explanatory explanatory phrase is the use of the term "a far cry" to point out that the Court is making what it asserts to be obvious distinctions. This term could be used as a helpful introduction to a judicial argument that actually explains the difference between one thing and another. But the judicial stratagem, in fact, is rather different: it is to use the term "a far cry" as part of a substitute for an explanation, not an introduction to an explanation.

One example of this technique occurred in *Edwards v. South Carolina*,[127] where the Court overturned a breach of the peace conviction when public demonstrators were confronted by a hostile crowd and failed to obey a police command to disperse. In his opinion for the court, Justice Stewart attempted to distinguish an earlier case, *Feiner v. New York*,[128] in which the Court affirmed a demonstrator's breach of the peace conviction for continuing to speak after being confronted by a hostile crowd when the police ordered him to stop speaking. The most telling part of Justice Stewart's attempted distinction of the earlier case is his assertion that *Edwards* is "a far cry" from *Feiner*.[129] Stewart attempted to buttress this remark by noting three characteristics that he asserted distinguished *Edwards* from *Feiner*.

The first of Stewart's attempted distinctions was that the demonstrators in *Edwards* had neither engaged in nor threatened violence. But this could not have been the basis for regarding *Edwards* as distinguishable from *Feiner* because there was no indication that the demonstrator in the latter case had threatened any violence either. A second effort by Stewart to provide a substantive distinction was his remark that the crowd in *Edwards* had neither engaged in nor threatened violence against the demonstrator. But in *Feiner*, there was no violence either, and only the barest hint of threatened violence.[130] Stewart's third and final effort at distinguishing the cases was the statement that "[p]olice protection at the scene was at all times sufficient to meet any foreseeable possibility of disorder."[131] But Justice Black had earlier dissipated the effect of any such attempted distinction when he noted in his *Feiner* dissent that there was "no showing of any [police] attempt to quiet [the crowd]" nor even a pretense of trying to protect the speaker.[132] Thus, so far as one can tell, there was no indication in *Feiner* that there were inadequate police resources available to control any foreseeable disorder. After examining Stewart's attempted explanations to distinguish the facts in *Feiner* from those in *Edwards*, one is left to conclude that, without explicitly saying so, Stewart was probably laying the groundwork for overruling *Feiner* at some time in the future.

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127. 372 U.S. 229 (1963).
128. 340 U.S. 315 (1951).
129. 372 U.S. at 236.
130. Stewart stated that one member of the crowd threatened violence if the police did not act to control the speaker. This seems to have been the only threat of violence in *Feiner*, and it was expressed in conditional form. The use of the conditional form tends to weaken the seriousness of the threat. In his dissent Justice Black pointed out that "the person threatening was a man whose wife and two small children accompanied him and who, so far as the record shows, was never close enough to [the speaker] to carry out the threat." 340 U.S. at 326.
131. 372 U.S. at 232–33.
132. 340 U.S. at 326–27.

Given that *Edwards* is not factually distinguishable from *Feiner*, what remains in one's consciousness from Stewart's *Edwards* opinion is his pithy and memorable non-explanatory explanation that *Edwards* is "a far cry" from *Feiner*.[133] The phrase gives the misleading impression that the two cases are so self-evidently distinguishable that little or no explanation is required.

Having used this phrase so successfully in *Edwards*, Justice Stewart found good reason to use it again some years later in *Geduldig v. Aiello*,[134] to explain why a state's disability insurance program did not discriminate on the basis of gender when it excluded pregnancy and childbirth from its coverage. Stewart pointed out that the case "[wa]s a far cry from cases ... involving discrimination based upon gender as such."[135] The reason this was distinguishable from cases involving gender discrimination was because "[t]he program divide[d] potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."[136] This purported explanation satisfied Stewart and the other males making up the majority in *Geduldig*. One small intellectual puzzle remains despite Stewart's explanation. One wonders whether these men would have found this approach so persuasive if a group of female jurists were to have justified the exclusions of hernias and prostrate tumors from a disability program on the ground that the exclusions did not discriminate against men, only some men. Would they have asserted that these exclusions were a far cry from gender discrimination or would they have regarded this "explanation" as a sham?

B. In No Way Freezes the Status Quo

Justice Stewart again demonstrated his adeptness at using a pithy non-explanatory explanation. In *Jenness v. Fortson*,[137] followed by Justice White in *American Party of Texas v. White*,[138] he wrote an opinion for the Court sustaining a state requirement that, unlike the major parties, a minor political organization or party could not gain access to the ballot unless it obtained signatures on petitions representing a certain percentage of the (eligible) voters in the last election, here, either five percent or one percent. What appears to be involved is a balancing of the state's presumed interest in avoiding voter confusion by assuring that its ballots contain only serious candidates against the minor party's interest in having ballot access as a means of gaining power or at least publicity. In deciding for the state, the Court decides that the state policy does not unduly interfere with the interests of the minor party. But by using the phrase: the state scheme "in no way freezes the status quo,"[139] Justices Stewart and White engage in judicial overkill. If there are five million eligible voters in a state and a minor party has to get five percent of the voters' signatures to qualify for ballot access in the next election, the party organization would have

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133. Justice Goldberg uses the same pithy non-explanatory explanation to distinguish Cox v. Louisiana, 379 U.S. 536 (1965), from *Feiner*.
134. 417 U.S. 484 (1974).
135. *Id.* at 497 n.20 (citations omitted).
136. *Id.*
137. 403 U.S. 431 (1971).
138. 415 U.S. 767 (1974).
139. *Id.* at 787 (citations omitted).

to obtain 250,000 signatures. This is no mean trick, especially in a large state like Texas. Since it imposes a fairly substantial obstacle in the way of a small party, it tends to freeze the status quo. Although in this context the phrase "in no way freezes the status quo" does not make much sense, to the typical reader (who probably does not care much about the fate of minor parties), it has a pleasing sound that enables the reader to think well of the political system without wasting much thought on the issue itself.

XIX. M. S. C. - ADVERBIAL HELPER[140]

Hamburger Helper is a very useful product in that it enables a thrifty householder to stretch his hamburger meals and dollars by adding a cheaper substance to the mix, hoping that his family will not notice that the meat has been diluted in the process. A similar stretching of the reasoning process in some Court opinions occurs through the use of handy little adverbs, such as "merely," "surely" and "clearly."

An example of the efficacy of the use of the word "merely" occurred in Chief Justice Hughes' decision in *A. L. A. Schechter Poultry Corp. v. United States*,[141] in which the Court held that Congress did not have authority under the Interstate Commerce Clause to regulate the poultry business after the chickens had entered the intrastate market. Here is his reasoning:

> But where the effect of intrastate transactions upon interstate commerce is *merely* indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government.[142]

So, some commerce was declared to have "merely" an indirect effect on interstate commerce because otherwise all commerce could have been controlled by the federal government.

This bit of reasoning, which was so persuasive to earlier generations of justices, has more recently come into disfavor as the Court members have begun to believe that just because, as Hughes himself admitted, the logic of the Commerce Clause seemingly allowed for no limits on federal power, it made no sense for the Court to create an artificial limit which it tried to explain as intrastate commerce having "merely [an] indirect" effect on interstate commerce.[143]

A demonstration of the value of the word "surely" is provided by Justice Harlan's dissent in *Poe v. Ullman*.[144] In arguing that the right of physical privacy in the home, secured in part by the Fourth Amendment, should be

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140. Of course, as one reads this section, it most certainly will become obvious that merely, surely and clearly are not the only possible examples of an the use of adverbial helper.
141. 295 U.S. 495 (1935).
142. *Id.* at 546 (emphasis added).
143. *See* Wickard v. Filburn, 317 U.S. 111 (1942).
144. 367 U.S. 497 (1961).

extended to the right to receive contraceptive information outside the home for use in the home, Justice Harlan asserted the following:

> [It] would *surely* be an extreme instance of sacrificing substance to form were it to be held that the Constitutional principle of privacy against arbitrary official intrusion comprehends only physical invasion by the police....[I]f the physical curtilage of the home is protected, it is *surely* as a result of solicitude to protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life.[145]

This is a paradigm example of adverbial helper reasoning since, within a short passage devoted to developing a substantive (natural law-like) component to the Due Process Clause of the Fourteenth Amendment, Justice Harlan was able to provide us with not just two uses of "surely," but also one use of "certainly" and one of "merely."[146] In race track parlance, this would be the equivalent of winning the trifecta.

Justice O'Connor's dissenting opinion in *Metro Broadcasting, Inc. v. Federal Communications Commission*[147] illustrates how helpful the word "clearly" can be to an opinion. While admitting that Congress has considerable latitude under Section 5 of the Fourteenth Amendment to remedially take race into consideration (at least as far as the states are concerned),[148] she denies that Congress or the Federal Communications Commission had a remedial purpose in favoring African-American licenses for broadcast licensees. She explains her position by asserting that "The FCC and Congress are *clearly* not acting for any remedial purpose...."[149] Given that it was so clear that Congress did not act for a remedial purpose, such as undoing the negative economic impact on African-American broadcasting resulting from societal discrimination, she felt that no additional explanation was required. Thus, the adverbial helper "clearly" substitutes very nicely for the red meat of reasoning.

XX. WORDS MEAN WHATEVER I WANT THEM TO MEAN

Perhaps the ultimate stratagem is to regard words as an infinitely malleable tool to take whatever meaning the opinion writer wishes them to take at that particular moment, even if that meaning is inconsistent with their use elsewhere in the opinion. This is the ultimate stratagem because it virtually supersedes the need for all the others. An example of this rarified form of judicial craft appeared in Chief Justice Burger's determination in *Lynch v.*

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145. *Id.* at 550–51(emphasis added).

146. Despite the persuasiveness of this reasoning to Justice Harlan, the Court declined to extend it to the right of a person to ship obscene material to another for use in the latter's home. *See* United States v. Reidel, 402 U.S. 351 (1971).

147. 497 U.S. 547 (1990), *reh'g denied*, 497 U.S. 1050 (1990).

148. Presumably Justice O'Connor would accept Bolling v. Sharpe, 347 U.S. 497 (1954), a case which determined that the federal government would also be bound by the equal protection component of the Due Process Clause of the Fifth Amendment. If so, she also presumably would agree that the Necessary and Proper Clause of Article 1, Section 8 gives Congress the same power over the federal government to remedy for societal discrimination as Section 5 of the Fourteenth Amendment gives Congress over the states. *See* Fullilove v. Klutznik, 448 U.S. 448 (1980).

149. 497 U.S. at 607 (O'Connor, J., dissenting) (emphasis added).

Donnelly[150] that a city funded creche (nativity scene) at a private shopping center does not violate the Establishment Clause of the First Amendment. In order to satisfy the Court imposed Establishment Clause test,[151] Burger was faced with the task of determining that the creche had a secular purpose. He found that it did: "The display is sponsored by the City to celebrate the Holiday [of Christmas] ... and to depict the origins of that Holiday."[152] Having satisfied himself that the city sponsored creche has a secular purpose, he went on to note its religious nature:

> Even the traditional, purely secular displays extant at Christmas, with or without a creche, would inevitably recall the religious nature of the Holiday. The display engenders a friendly community spirit of good will in keeping with the season. The creche may well have special meaning to those whose faith includes the celebration of religious masses, but none who sense the origins of the Christmas celebration would fail to be aware of its religious implications.[153]

Thus, in Burger's deft hands the creche has a secular purpose because it celebrates a religious holiday. With similar reasoning applied more often, both Court opinions and constitutional law casebooks could be considerably shortened.

CONCLUSION

One hopes that this brief survey will illuminate what Court members sometimes are really doing when they write their opinions, concurrences and dissents. If so, this modest effort will prove a helpful guide in dissipating some of the confusion which readers, including law students, their professors and lawyers, bring to their analysis of Supreme Court opinions.

150. 465 U.S. 668 (1984).
151. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).
152. 465 U.S. at 669.
153. *Id.* at 685 n.12.