

THREE RING CIRCUS: THE ADVENTURE CONTINUES INTO THE TWENTY-FIRST CENTURY

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Professor Marks wishes to express his profound appreciation to the faculty support services staff, Sharon Gisclair, Barbara Herndon-Lernihan, Marge Masters, Shannon Mullins, Louise Petren, and Sue Stinson, under the beneficent and inspired leadership of the Director of Faculty Support Services, Connie Evans, at Stetson University College of Law, for their great help in completing this Article. The same profound appreciation is expressed to Pamela Burdette, Dorothy Clark, and Sally Waters, reference librarians, for their help in locating sources I could not find.

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INTRODUCTION

I thought it would be both interesting and useful in this fourth installment in the continuing *Three Ring Circus* saga to explore in some depth four subjects that have never been totally clear to me. I do so in the hope that, in addition to improving my understanding, this effort will be helpful to others who also find these subjects somewhat of a puzzle. Therefore, this Article will evaluate the origins of the balancing of interests test,¹ revisit the Commerce Clause in its dormant state and the balancing of competing interests,² reexamine the intermediate scrutiny of gender-based classifications,³ and return to the idea of similarity of situation.⁴

I. ORIGINS OF THE BALANCING OF INTERESTS TEST

When a limitation upon government found in the Constitution is not absolute,⁵ it is *logical* to assume that its application is

1. *Infra* pt. I.

2. *Infra* pt. II (continuing the discussion started in Thomas C. Marks, Jr., *Three Ring Circus: The Supreme Court Balances Interests*, 18 Stetson L. Rev. 301 (1988)).

3. *Infra* pt. III (continuing the discussion started in Thomas C. Marks, Jr., *Three Ring Circus: The Supreme Court Balances Interests*, 18 Stetson L. Rev. 301 (1988)).

4. *Infra* pt. IV (continuing the discussion started in Thomas C. Marks, Jr., *Three Ring Circus: The Supreme Court Balances Interests*, 18 Stetson L. Rev. 301 (1988)).

5. A few of the many limitations on government found in the Constitution are probably absolute. However, most are not. Examples of the former include, in addition to the Self-Incrimination Clause of the Fifth Amendment discussed in Thomas C. Marks, Jr., *Three Ring Circus: The Supreme Court Balances Interests*, 18 Stetson L. Rev. 301, 303–304 n. 9 (1988), the Takings Clause of the Fifth Amendment and the anti-slavery Thirteenth Amendment. Without getting into the intellectual jungle of the difference between a possessory taking and a regulatory taking, possessory takings always require compensation unless the taken property would have been destroyed even if no taking had occurred. *Compare Aetna v. U.S.*, 444 U.S. 164, 178 (1979) (holding that “the [g]overnment’s attempt to create a public right of access” to a private pool required just compensation) *with Natl. Bd. of YMCA v. U.S.*, 395 U.S. 85, 93 (1969) (holding that occupation by the military of a building under attack by rioters

dictated by weighing the government's need to do what it wishes to do *against* the impact that action would have upon the interests protected by the limitation in question.⁶ This being so, the question arises, when did the Supreme Court first balance these competing interests? The answer to this question is, in its own way, as difficult as locating the headwaters of the Nile.⁷ At least two early opinions of Chief Justice John Marshall appear to approach, but not actually reach, a balancing of competing interests, and a third may actually sanction such a test.

Sturges v. Crowninshield,⁸ decided in 1819,⁹ nears, but apparently does not reach, the balancing of competing interests. In this context, the case involved the question of whether a state bankruptcy law violated the Contract Clause of the Constitution¹⁰ when it discharged the debt as well as the debtor after he had satisfied the requirements of the law.¹¹ The Court found that the Contract Clause was indeed violated.¹² In so deciding, it drew a "distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation."¹³ This distinction does not amount to a balance of competing interests, but merely defines what the Court saw as an impairment of the obligation of contracts.¹⁴ The two further steps needed to create a balance of competing interests in

does not warrant compensation). Other than the exceptions spelled out in the Thirteenth Amendment, slavery and involuntary servitude are not permitted in the United States.

6. In all likelihood, this statement would have pleased *Star Trek's* Commander Spock, who once commented, "[Y]ou must remember that I am entirely motivated by logic." Susan Sackett, et al., *Star Trek Speaks* 52 (Pocket Bks. 1979) (quoting *Star Trek*, "Bread and Circuses" (Paramount Pictures Mar. 15, 1968) (tv series) (emphasis omitted)).

7. "[Burton] was also the first European to lead an expedition into Central Africa to search for the sources of the Nile, a venture as daring and romantic then as going to outer space a century and a half later." Edward Rice, *Captain Sir Richard Francis Burton* 2 (Barnes & Noble, Inc. 1990).

8. 17 U.S. 122 (1819).

9. *Id.*

10. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10.

11. *Sturges*, 17 U.S. at 197. "This act liberates the person of the debtor, and discharges him from all liability for any debt previously contracted, on his surrendering his property in the manner it prescribes." *Id.*

12. *Id.* at 208. "It is the opinion of the court, that the [law] . . . so far as it attempts to discharge this defendant from the debt . . . is contrary to the Constitution of the United States." *Id.*

13. *Id.* at 200.

14. As Chief Justice John Marshall stated in his opinion, "Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." *Id.*

this context were to find that the remedy was impaired and *not* the underlying contractual obligation. In this case, it was both that were impaired.¹⁵ Therefore, it would be necessary to weigh the government interest in “modifying” the remedy against the impact of that modification on the interests of the creditor that are protected by the Contract Clause. In *Sturges*, it was unnecessary to take that last step, because more than the remedy was impaired,¹⁶ and the modification of the remedy amounted to nothing more than doing away with imprisonment for debt.¹⁷

Perhaps the best known case where modification of the remedy was balanced only against the interests protected by the Contract Clause was *Home Building & Loan Association v. Blaisdell*.¹⁸ At issue was the Minnesota Mortgage Moratorium Law and its consistency with the Contract Clause.¹⁹ The Minnesota law provided that foreclosure “sales may be postponed and periods of redemption may be extended.”²⁰ The law was “to remain in effect ‘only during the continuance of the emergency [the Great Depression] and in no event beyond May 1, 1935.’”²¹ In reaching its conclusion that the Contract Clause was not violated by the Minnesota law,²² the Court clearly balanced competing interests.

Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of

15. *Id.* at 197–198.

16. *Id.*

17. *Id.* at 200–201. This is so because

[c]onfinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner, does not impair its obligation.

Id. (footnote omitted).

18. 290 U.S. 398 (1934). Of course, this is hardly likely to be the first case where a balancing of interests occurred in constitutional law. It is mentioned to illustrate what might have happened in *Sturges* if only the remedy had been “modified.”

19. U.S. Const. art. I, § 10; *Blaisdell*, 290 U.S. at 415–416.

20. *Blaisdell*, 290 U.S. at 416.

21. *Id.* (quoting 1933 Minn. Laws 514).

22. *Id.* at 447–448.

contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the state to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity²³

But of course, by 1935 balancing of competing interests had become well established.²⁴

Another well-known early opinion of the Supreme Court interpreting the Contract Clause does not even appear to approach a balance of interests. In *Trustees of Dartmouth College v. Woodward*,²⁵ also decided in 1819,²⁶ the Court held that substantial changes made to the charter of Dartmouth College by the New Hampshire legislature impaired the contract of the trustees under the original charter.²⁷ Under the facts of this case, it is difficult to read any of the several opinions²⁸ as giving serious attention to whatever interest New Hampshire might have had in changing the charter. The opinions of Chief Justice Marshall and Justice Joseph Story suggest that if the impairment had been *deminimus*, no violation of the Constitution would have been found.²⁹ However, such concessions do not seem to amount to a balancing of interests. In his argument on behalf of the trustees under the original charter, Daniel Webster did seem to concede that extreme circumstances might warrant some degree of impairment of contractual rights.³⁰

Much has heretofore been said on the necessity of admitting such a power in the legislature as has been assumed in this case. Many cases of possible evil have been imagined, which might otherwise be without remedy. Abuses, it is contended,

23. *Id.* at 439.

24. See *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829) (showing the time it took for balancing of interests to become well established).

25. 17 U.S. 518 (1819).

26. *Id.*

27. *Id.* at 651–654.

28. The seriatim opinions are by Chief Justice Marshall, Justice Bushrod Washington, Justice Joseph Story, with Justice Gabriel Duvall dissenting. *Id.* at 624–715.

29. *Id.* at 651, 708.

30. *Id.* at 596.

might arise in the management of such institutions, which the ordinary courts of law would be unable to correct. But this is only another instance of that habit of supposing extreme cases, and then of reasoning from them, which is the constant refuge of those who are obliged to defend a cause which, upon its merits, is indefensible. It would be sufficient to say, in answer, that it is not pretended, that there was here any such case of necessity.³¹

In *Fletcher v. Peck*,³² decided in 1810,³³ the Supreme Court struck down as a violation of, among other things, the Contract Clause,³⁴ an attempt by the Georgia legislature to repeal a land grant apparently procured through corrupt practices when at least some of the land had been sold to innocent parties who were not on notice of the apparent original corrupt practices.³⁵ In so holding, Chief Justice Marshall appeared to suggest that Georgia could have repealed the land grant if the title to the land had remained in the original and, presumably, corrupt grantees.³⁶

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, *and which would have justified its abrogation so far as respected those to whom crime was imputable*. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transfer[]able; and those who purchased parts of it were not stained by that guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.³⁷

31. *Id.*

32. 10 U.S. 87 (1810).

33. *Id.*

34. *Id.* at 139.

35. *Id.* at 134–135.

36. *Id.*

37. *Id.* (emphasis added).

Thus,

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.³⁸

It can be argued that Chief Justice Marshall's reasoning closely paralleled that of Daniel Webster's nine years later.³⁹ Chief Justice Marshall's suggestion was that the supposed corruption of the original grantees in *Fletcher* would have made it necessary for the Georgia legislature to repeal the land grant if it were possible without injury to innocent parties.⁴⁰ Such reasoning does appear to amount to a balancing of interests. The government's interest in undoing the land grant, presumably procured through corruption, outweighed any interest of the practitioners in the supposed corruption.

Turning to the Commerce Clause,⁴¹ although Chief Justice Marshall does not mention a balance of interest in so many words, his opinion in *Willson v. Black Bird Creek Marsh Company*⁴² clearly reached its outcome by weighing the competing interests of the State of Delaware and the Commerce Clause in its dormant state. The State incorporated the Marsh Company and authorized it to place a dam across Black Bird Creek.⁴³ The creek was navigable.⁴⁴ The twin purposes of constructing the dam were enhancing the value of the property below the dam and, in all likelihood, improving the health of persons living in the area.⁴⁵ Both would be accomplished when the dam prevented water from entering swampy areas

38. *Id.* at 139.

39. *Supra* n. 31 and accompanying text.

40. *Fletcher*, 10 U.S. at 134.

41. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8.

42. 27 U.S. 245 (1829).

43. *Id.* at 251.

44. *Id.*

45. *Id.*

along the creek and thus, effectively drained them.⁴⁶ The dam was damaged by the *Sally*, a sloop “regularly licensed and enrolled according to the navigation laws of the United States.”⁴⁷ The Marsh Company sued Willson and others who were the owners of the sloop.⁴⁸ The owners of the sloop argued that the act of Delaware authorizing the construction of the dam violated Congress’s power to regulate commerce among the States, because, being navigable, Black Bird Creek was an avenue of commerce.⁴⁹ Had Congress used its commerce power to prevent obstructions to navigation on “those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states,”⁵⁰ it would clearly have preempted Delaware’s authorization of the dam.⁵¹ But there was no such act of Congress, so the question of the constitutionality of the Delaware law had to turn upon what Chief Justice Marshall described, probably for the first time, as “the power to regulate commerce in its dormant state.”⁵²

Consider the competing interests. First, there was the free flow of commerce along Black Bird Creek protected, argued Willson, by the Commerce Clause in its dormant state.⁵³ Second, there was the interest of the Marsh Company supported by the State in what the counsel for Willson called “private emolument.”⁵⁴ There was also the interest in public health, which Willson’s counsel depreciated.⁵⁵ Counsel for the Marsh Company emphasized the health issue, describing Black Bird Creek as “one of those sluggish reptile streams, that [does] not run but creep[s], and which, wherever it passes, spreads its venom, and destroys the health of all those who inhabit its marshes”⁵⁶ He went on to ask the following: “[C]an it be asserted, that a law authorising the erection of a dam, and the formation of banks which will draw off the pestilence, and give to those who have before suffered from disease, health and vigour, is unconstitutional?”⁵⁷ Chief Justice Marshall clearly balanced the

46. *Id.* at 246.

47. *Id.*

48. *Id.*

49. *Id.* at 251–252.

50. *Id.* at 252.

51. *Id.*

52. *Id.*

53. *Id.* at 251–252.

54. *Id.* at 248.

55. *Id.*

56. *Id.* at 249.

57. *Id.*

interest of Delaware in the health of its inhabitants against the interest of the free flow of commerce protected by the Commerce Clause in its dormant state when he stated, “We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state.”⁵⁸

Excluding the Bill of Rights for the moment, the only relevant limitations on either State or Federal governments⁵⁹ before the enactment of the post-Civil War amendments,⁶⁰ apart from the Contract Clause and the Commerce Clause discussed above,⁶¹ and the Article IV Privileges and Immunities Clause,⁶² which like them are subject to the family of balancing tests found in the *Three Ring Circus* law review articles,⁶³ were the prohibitions on Bills of Attain-

58. *Id.* at 252.

59. There were, of course, other limitations on both governments. Examples would include age and length of citizenship requirements placed upon those who wished to be a member of Congress, U.S. Const. art. I, § 3, and the prohibition on States entering treaties, alliances or confederations, and the other limits found in United States Constitution, Article I, Section 10. The foregoing are, or at least appear to be, absolute limitations. Others appear to be rudimentary weighing of competing interests that are rather rigid and do not fit within the family of balancing tests that are found in the *Three Ring Circus* articles. The “family” considers basically non-absolute limitations on government where the interests of people protected by the non-absolute limitation are weighed against the need for government to interfere with the interests protected by the non-absolute limitation. Examples I have described as rudimentary balancing tests would include the prohibition against the States waging war “*unless actually invaded, or in such imminent Danger as will not admit of delay,*” U.S. Const. art. I, § 10 (emphasis added), and the prohibition on States “without the Consent of the Congress, [to] lay any Imposts or Duties on Imports or Exports, *except what may be absolutely necessary for executing it[is] inspection Laws.*” *Id.* Another such example would probably include Article I, Section 9 of the United States Constitution, which provides that “the Privilege of the Writ of Habeas Corpus shall not be suspended, *unless when in Cases of Rebellion or Invasion the public Safety may require it.*” U.S. Const. art. I, § 9 (emphasis added).

60. U.S. Const. amends. XIII, XIV, XV.

61. For a discussion of the Contract Clause and the Commerce Clause, review *supra* notes 8–58 and accompanying text.

62. “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. art. IV, § 2.

63. Marks, *supra* n. 5, at 311–351; Thomas C. Marks, Jr., *Three Ring Circus Six Years Later*, 25 Stetson L. Rev. 81 (1995); Thomas C. Marks, Jr., *Three Ring Circus Revisited: The Drift Back to Lochner Continues*, 19 Stetson L. Rev. 571 (1990).

der and Ex Post Facto laws.⁶⁴ Neither application seems to involve any sort of balancing of competing interests.⁶⁵

Turning to the Bill of Rights, one would think that the most likely prospects for discovery of early use of a balance of competing interests would be found in the First Amendment's protection of the free exercise of religion and expression.⁶⁶ Although there was some early discussion of at least the expressive elements⁶⁷ of the First Amendment,⁶⁸ I have discovered nothing that appears to clearly be a balancing test. The first hint at a balancing test in this area that I have been able to identify appears in *Patterson v. Colorado ex rel. Attorney General*.⁶⁹ However, this hint is clearly obiter dicta.⁷⁰ The

64. Article I, Section 9 of the United States Constitution prevents Congress from enacting these two kinds of laws, while Article I, Section 10 imposes the same limitations on the States.

65. Application of the prohibition against bills of attainder involves nothing more than defining the term, which is legislative punishment of a person or an identifiable group of persons. See *Nixon v. Adminstr. of Gen. Servs.*, 433 U.S. 425, 473–483 (1977) (discussing, in detail, the term “punishment” as it relates to bills of attainder). The same may be said for Ex Post Facto laws. In the great case of *Calder v. Bull*, 3 U.S. 386, 390–391 (1798), Justice Samuel Chase defined the term ex post facto and held that the prohibition applied only to retroactive criminal laws.

I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. [First]. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. [Second]. Every law that aggravates a crime, or makes it greater than it was, when committed. [Third]. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. [Fourth]. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Id. at 390. Thus, in the case of both types of prohibited laws, an act of a legislative body either *is* or *is not* within the ban. There is no suggestion that either type of prohibited law is permitted in cases where the government need for it is great.

66. I employ the term “freedom of expression” to encompass the protections of speech, press, petition, and assembly found in the First Amendment and association, which apparently have grown out of those four. I have never discovered the genesis of the term in relation to the four expressive rights actually mentioned.

67. Expressive elements in contrast to the religious elements of the First Amendment, which certainly include religious expression, are considered to be religious rather than expressive.

68. See generally David M. Rabban, *Free Speech in Its Forgotten Years* (Cambridge U. Press 1997) (discussing the history of free speech). However, David M. Rabban does not appear to describe the early First Amendment cases in terms of balancing of interests. *Id.* at 129–147. The Author identified the balancing of interests in these early First Amendment cases.

69. 205 U.S. 454 (1907). Thomas Patterson published charges against the Supreme Court of Colorado to the effect that the conduct of the court complained of was “in aid of a scheme, fully explained [in the publication], to seat various Republican candidates, including the

vague suggestion of a balancing of competing interests took place when Justice Oliver Wendell Holmes opined that while “a court regards, as it may, a publication concerning a matter of law *pending before it*, as tending toward such an interference [with their administration of the law]” and punishes it, “[w]hen a case is *finished* courts are subject to the same criticism as other people.”⁷¹ In other words, the suggestion by Justice Holmes appears to be that criticism of a court regarding a matter before it would interfere with the administration of justice, and prevention or punishment of that interference would outweigh any constitutional protection of freedom of speech or of the press. On the other hand, if the criticism of a court took place after the case, then the interests protected by freedom of speech or of press would outweigh any interests a court might have in avoiding criticism.⁷²

The first really clear example of balancing competing interests in a freedom of expression case is found in the well-known case of *Schenck v. United States*.⁷³ Schenck and Baer were charged with and convicted of violating the Espionage Act of 1917⁷⁴

by causing and attempting to cause insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendant wilfully conspired to have printed and circulated to men who had been called and accepted for military

governor of the state, in place of Democrats who had been elected, and that two of the judges of the court got their seats as a part of the scheme.” *Id.* at 459.

70. *Id.* at 462. After holding that various state law grounds could not be heard by the Supreme Court, Justice Oliver Wendell Holmes stated, “We leave undecided the question whether there is to be found in the [Fourteenth] Amendment a prohibition similar to that in the [First].” *Id.* He proceeded to consider Patterson’s claim, and found, assuming arguendo, “that freedom of speech and freedom of the press were protected from abridgments on the part not only of the United States but also of the states, still we should be far from the conclusion that the plaintiff in error would have us reach.” *Id.*

71. *Id.* at 463 (emphasis added).

72. *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 436–437 (1910), offered the Supreme Court another opportunity to balance competing interests, but the Court refused to find that an injunction against the American Federation of Labor and certain individual defendants preventing the continuation of a boycott against the Stove and Range Company presented a First Amendment issue. “The defendant’s attack on this part of the injunction raises no question as to an abridgment of free speech, but involves the power of a court of equity to enjoin the defendants from continuing a boycott which, by words and signals, printed or spoken, caused or threatened irreparable damage.” *Id.* at 437.

73. 249 U.S. 47 (1919). Many people, perhaps wrongly, consider this to be the first true freedom of speech case. Rabban, *supra* n. 68, at 1.

74. *Schenck*, 249 U.S. at 49.

service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offense against the United States, to-wit, to use the mails for the transmission of matter declared to be non-mailable by title 12, § 2, of the Act of June 15, 1917, to-wit, the above mentioned document, with an averment of the same overt acts. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above.⁷⁵

As Justice Holmes pointed out,

Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.⁷⁶

The defendants' argument was that regardless of whether they intended to disrupt the armed forces of the United States in time of war, their words were protected by the First Amendment.⁷⁷

75. *Id.* at 48–49 (citations omitted).

The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the conscription act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said, "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that anyone violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on, "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up, "You must do your share to maintain, support and uphold the rights of the people of this country."

Id. at 50–51.

76. *Id.* at 51.

77. *Id.*

In beginning his discussion of the First Amendment, Justice Holmes took its application beyond the prevention of prior restraints even though, as he pointed out, "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose."⁷⁸

Justice Holmes then began working his way toward a balance of competing interests by recognizing that the expressive activities of the defendants would, in some circumstances, have been protected by the First Amendment.⁷⁹ However, it had to be recognized that circumstances alter cases.⁸⁰ After all, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."⁸¹ Then came the balance of competing interests. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."⁸² Justice Holmes elaborated,

It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.⁸³

The Supreme Court affirmed the defendant's conviction for violating the Espionage Act,⁸⁴ finding that actual success in obstructing the armed forces was not required.⁸⁵

It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in section 4 punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and

78. *Id.* at 51–52 (citing *Patterson*, 205 U.S. at 462). For a discussion of *Patterson*, review *supra* notes 69–72 and accompanying text.

79. *Schenck*, 249 U.S. at 52.

80. "[T]he character of every act depends upon the circumstances in which it is done." *Id.* (citing *Aikens v. Wis.*, 195 U.S. 194, 205–206 (1904)).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 53.

85. *Id.* at 52–53.

the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.⁸⁶

So then, this apparently first *true* First Amendment test balancing competing interests finds that First Amendment freedom of expression concerns will prevail unless the expression in question presents a “clear and present danger” that it will cause a substantive event serious enough to be prevented by punishing expression.⁸⁷ In the form of a diagram, it would appear as follows:

86. *Id.* at 52 (citing *Goldman v. U.S.*, 245 U.S. 474, 477 (1918)) (citation omitted).

87. *Id.*

“A” equals the substantive event serious enough to be prevented by punishing expression. Justice Holmes described this as “the substantive evils that Congress has a right to prevent.”⁸⁸ This idea was made more understandable by Justice Louis Brandeis in his concurring opinion in *Whitney v. California*.⁸⁹

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a state might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross uninclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State.⁹⁰

“B” equals the progression of expression from harmless to that which creates the clear and present danger. “C” represents the point at which the “proximity and degree”⁹¹ of the expression becomes a “clear and present danger”⁹² to “A,” represented by “D” on the diagram. “E” is that much of expression that is exposed to what Justice Holmes described as a sort of market place of ideas; “[T]he ultimate good desired is better reached by free trade in ideas — that the best

88. *Id.*

89. 274 U.S. 357 (1927).

90. *Id.* at 377–378 (Brandeis, J., concurring).

91. *Schenck*, 249 U.S. at 52.

92. *Id.*

test of truth is the power of the thought to get itself accepted in the competition of the market.”⁹³

This marketplace of ideas concept was expressed even more eloquently by Justice Brandeis.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self[-]reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.⁹⁴

In order to see how neatly the clear and present danger test meshes with the family of balancing tests,⁹⁵ consider Chief Justice Marshall’s opinion in *Willson*.⁹⁶ It can be argued that he, in essence, found that the health of the community was so *compelling* that it was *necessary* to impede the free flow of commerce on Black Bird Creek in order that that health might be protected. This is what has come to be known as the compelling governmental interest test.⁹⁷ The government interest is so important that non-absolute constitutional guarantees can be overridden if the means selected by the government are necessary to achieve the compelling governmental interest, that is to say that no other means of achieving the compelling purpose exist that have a less drastic impact on the

93. *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

94. *Whitney*, 274 U.S. at 377 (footnote omitted).

95. Marks, *supra* n. 5, at 311–351.

96. For a discussion of *Willson*, review *supra* notes 41–58 and accompanying text.

97. See e.g. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality) (holding that a State must have a “compelling governmental interest” to justify a classification based on race and that the means chosen must be “narrowly tailored” to achieve its purpose).

interests protected by the non-absolute constitutional guarantee.⁹⁸ In *Willson*, the *compelling* governmental interest in the health of the citizenry could only be achieved, given the rudimentary understanding of why swamps contributed to disease, by placing a dam across the creek in order to drain the swamp. This was *necessary* because, as far as the government knew, there was no other way, much less one that would have a less chaotic effect on the free flow of interstate commerce protected by the Commerce Clause in its dormant state. This is illustrated by Diagram B.

98. *Id.*

In the case of the *clear and present danger test*, the substantive evil, which the government can prevent by punishing expression, measured by the gravity of that evil⁹⁹ equates to the compelling governmental interest element of the *compelling governmental interest test*. The expression within the clear and present danger bracket¹⁰⁰ equates to the *necessary* means element of the *compelling governmental interest test*, because the expression has gone beyond the less drastic means of the marketplace of ideas.

If one was to place the two tests side by side for purposes of comparison it would resemble the following:

99. For Justice Holmes's discussion on the *clear and present danger test*, review the text accompanying *supra* notes 82–83.

100. Review the text accompanying *supra* note 91.

It would be easy to continue this discussion of the early uses of the process of balancing competing interests. However, it seems sufficient to conclude this section with two comments. First, early on, the Supreme Court found it necessary to balance interests. *Willson* may well be the earliest example. However, well before *Willson*, Daniel Webster had suggested such an approach,¹⁰¹ and Chief Justice Marshall could have used such an approach if the facts in *Fletcher* had been different.¹⁰² Second, the form of interest balancing in *Willson* is remarkably similar to that used nearly a century later by Justices Holmes and Brandeis in early freedom of expression cases.¹⁰³

*II. ANOTHER LOOK AT THE BALANCING OF COMPETING INTERESTS AND THE COMMERCE CLAUSE IN ITS DORMANT STATE*¹⁰⁴

Chief Justice Marshall, in his opinion in *Gibbons v. Ogden*,¹⁰⁵ left unanswered the question of whether the grant of the commerce power to Congress¹⁰⁶ took away *any* exercise of inherent State power that had an impact on the free flow of commerce among the States.¹⁰⁷

In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a State regulate

101. For Daniel Webster's suggested approach, review the text accompanying *supra* note 31.

102. For a discussion of *Fletcher*, review the text accompanying *supra* notes 32–40.

103. *Supra* nn. 73–100 and accompanying text and diagrams.

104. I have used Chief Justice Marshall's term "Commerce Clause in its Dormant State," because some students first coming to grips with this concept form the impression that the Constitution contains two Commerce Clauses. For the same reason I would not use the term "negative Commerce Clause." See e.g. *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept. of Nat. Resources*, 504 U.S. 353, 359 (1992) (using the terms negative and dormant).

105. 22 U.S. 1 (1824).

106. *Supra* n. 41 (providing the language of Article I, Section 8 of the United States Constitution).

107. *Gibbons*, 22 U.S. at 200.

commerce with foreign nations and among the States, while Congress is regulating it?¹⁰⁸

Justice William Johnson, although approving the outcome in *Gibbons*, would have taken the step that Chief Justice Marshall found unnecessary. He would have held that the grant of the commerce power to Congress would have totally divested the States of any power to regulate (and presumably to tax) in such a way that commerce between the states was affected.¹⁰⁹

And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.¹¹⁰

As we have already seen, Chief Justice Marshall later found that the commerce power was not exclusive unless Congress wished to make it so through legislation.¹¹¹ When this does not occur, the States can regulate in a manner that *does* affect commerce between the States, so long as the burden imposed can be justified.¹¹² The balance is struck by the judiciary.¹¹³

In order to consider the question, just how does the judiciary go about this balancing process, it is useful to begin with the opinion of the United States Court of Appeals for the Third Circuit in *Norfolk Southern Corporation v. Oberly*.¹¹⁴ Since I will rely mainly on the following paragraph rather than the rather murky applica-

108. *Id.*

109. *Id.* at 227 (Johnson, J., concurring).

110. *Id.*

111. For a discussion of *Willson*, review the text accompanying *supra* notes 41–58. In *Souther Pacific Company v. Arizona*, Chief Justice Harlan Fiske Stone commented,

Ever since *Willson v. Black Bird Creek Marsh Co.* and *Cooley v. Board of Wardens*, it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.

325 U.S. 761, 766–767 (1945) (citations omitted).

112. For a discussion of *Willson*, review the text accompanying *supra* notes 41–58. Placing the dam across Black Bird Creek did affect commerce, but the State could justify it.

113. *Willson*, 27 U.S. at 250–251.

114. 822 F.2d 388 (3d Cir. 1987).

tion of the principles it contains, the facts of the case are not relevant here.

Three standards of review are applied in performing dormant Commerce Clause analysis: 1) state actions that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity in areas of . . . particular federal importance are given heightened scrutiny; 2) legislation in areas of peculiarly strong state interest is subject to very deferential review; and 3) the remaining cases are governed by a balancing rule, under which state law is invalid only if the incidental burden on interstate commerce is clearly excessive in relation to the putative local benefits.¹¹⁵

As suggested above, this discussion of the Commerce Clause in its dormant state will be based upon the “three standards of review” approach.¹¹⁶ It will not necessarily follow the Circuit Court’s discussion of those standards.

A. State Actions That Purposefully or Arbitrarily Discriminate against Interstate Commerce or Undermine Uniformity in Areas of Particular Federal Importance Require Heightened Scrutiny.

1. Purposeful or Arbitrary Discrimination against Interstate Commerce

In *Fort Gratiot Sanitary Landfill, Incorporated v. Michigan Department of Natural Resources*,¹¹⁷ the Supreme Court held that “[a] state statute that clearly discriminates against interstate commerce is . . . unconstitutional ‘unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.’”¹¹⁸ An example of “a valid factor unrelated to economic protection-ism”¹¹⁹ arguably occurred in *Dean Milk Company v. City of Madison*.¹²⁰ Madison regulated the sale of milk as follows:

115. *Id.* at 398–399.

116. *Id.* at 398.

117. 504 U.S. 353 (1992).

118. *Id.* at 359 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988)).

119. *Id.* (quoting *Limbach*, 486 U.S. at 274).

120. 340 U.S. 349 (1951). *Dean Milk* was mentioned in *Fort Gratiot*, 504 U.S. at 361–362.

[1.] mak[ing] it unlawful to sell any milk as pasteurized unless it has been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison. [And 2.] prohibit[ing] the sale of milk, or the importation, receipt or storage of milk for sale, in Madison unless from a source of supply possessing a permit issued after inspection by Madison officials¹²¹

However, the Madison ordinance “relieve[d] municipal authorities from any duty to inspect farms located beyond twenty-five miles from the center of the city.”¹²²

The challenge to the Madison milk regulations was clearly based upon the Commerce Clause “in its dormant state.”¹²³ The Court recognized that, on the face of it, Madison’s purpose was health related and thus valid.¹²⁴

Nor can there be objection to the avowed purpose of this enactment. We assume that difficulties in sanitary regulation of milk and milk products originating in remote areas may present a situation in which “upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities.” We also assume that since Congress has not spoken to the contrary, the subject matter of the ordinance lies within the sphere of state regulation even though interstate commerce may be affected.¹²⁵

The trouble with the ordinance was the means, not the apparent health purpose. The means “erect[ed] an economic barrier protecting a major local industry against competition from [outside] the

121. *Dean Milk*, 340 U.S. at 350–351 (footnote omitted). The ordinance was quoted in *Dean Milk, Id.* at 350 n. 1 to 351 n. 2.

122. *Id.* at 350–351.

123. *Id.* at 351.

124. *Id.* at 353.

125. *Id.* (citations omitted).

This is not an instance in which an enactment falls because of federal legislation which, as a proper exercise of paramount national power over commerce, excludes measures which might otherwise be within the police power of the states. There is no pertinent national regulation by the Congress, and statutes enacted for the District of Columbia indicate that Congress has recognized the appropriateness of local regulation of the sale of fluid milk. It is not contended, however, that Congress has authorized the regulation before us.

Id. at 353–354 (citations omitted).

State”¹²⁶ In doing this, “Madison plainly discriminate[d] against interstate commerce.”¹²⁷

Madison of course, had attempted to “demonstrably justify [its discrimination] by a valid factor unrelated to economic protectionism.”¹²⁸ It apparently argued “that the ordinance is valid simply because it professes to be a health measure”¹²⁹

Where, as in *Dean Milk*, the means rather than the purpose discriminated against interstate commerce, “[a]t a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.”¹³⁰ This is precisely what occurred in *Dean Milk*. As has already been demonstrated, Madison’s purpose survived the “strictest scrutiny.”¹³¹ As to the existence of “nondiscriminatory alternatives,”¹³² the Supreme Court found that “[i]t appear[ed] that reasonable and adequate alternatives [we]re available.”¹³³

126. *Id.* at 354.

127. *Id.* The Court further found that “[i]t [was] immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.” *Id.* at 354 n. 4 (citing *Brimmer v. Rebman*, 138 U.S. 78, 82–83 (1891)).

128. *Fort Gratiot*, 504 U.S. at 359 (quoting *Limbach*, 486 U.S. at 274).

129. *Dean Milk*, 340 U.S. at 354. The Court would not go along, because to do so “would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.” *Id.*

130. *Hughes v. Okla.*, 441 U.S. 322, 337 (1979).

131. For the Court’s discussion of Madison’s purpose, review the text accompanying *supra* note 125.

132. *Hughes*, 441 U.S. at 337.

133. *Dean Milk*, 340 U.S. at 354. The Court went on to describe these alternatives that were not only “reasonable and adequate,” but also were “nondiscriminatory” as would be required by the Court in *Hughes*. *Id.* at 354–356.

If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors. Moreover, appellee Health Commissioner of Madison testified that as proponent of the local milk ordinance he had submitted the provisions here in controversy and an alternative proposal based on [Section] 11 of the Model Milk Ordinance recommended by the United States Public Health Service. The model provision imposes no geographical limitation on location of milk sources and processing plants but excludes from the municipality milk not produced and pasteurized conformably to standards as high as those enforced by the receiving city. In implementing such an ordinance, the importing city obtains milk ratings based on uniform standards and established by health authorities in the jurisdiction where production and processing occur. The receiving city may determine the extent of enforcement of sanitary standards in the exporting area by verifying the accuracy of safety ratings of specific plants or of the milkshed in the distant jurisdiction through the United States Public Health Service, which routinely and on request spot checks

In rare cases, even discriminatory means will be upheld if their use furthers a valid or “compelling”¹³⁴ purpose. *Maine v. Taylor*¹³⁵ is such a case. What happened there is described well in *Fort Gratiot*.¹³⁶ In *Maine*, the Court “upheld the State's prohibition against the importation of live baitfish because parasites and other characteristics of nonnative species posed a serious threat to native fish that could not be avoided by available inspection techniques.”¹³⁷ The court concluded that

[t]he evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, “apart from their origin, to treat [out-of-state baitfish] differently.”¹³⁸

It appears to be a very different matter if the State's purpose itself is to discriminate against interstate commerce or if discriminatory means are put in place to further economic interests. *Baldwin v. G.A.F. Seelig, Incorporated*¹³⁹ is a case in point. There, the State of New York established a minimum price to be paid by dealers to producers whether the latter were in New York or elsewhere.¹⁴⁰ The minimum price scheme did not trouble the Court *as it applied to New York producers*, because such application was supported by the Supreme Court's own precedents.¹⁴¹ As applied to out-of-state producers, it was a different story. The Court first suggested that

the local ratings. The Commissioner testified that Madison consumers “would be safeguarded adequately” under either proposal and that he had expressed no preference. The milk sanitarian of the Wisconsin State Board of Health testified that the State Health Department recommends the adoption of a provision based on the Model Ordinance. Both officials agreed that a local health officer would be justified in relying upon the evaluation by the Public Health Service of enforcement conditions in remote producing areas.

Id. (citations and footnote omitted).

134. Review the text accompanying *infra* note 160.

135. 477 U.S. 131 (1986).

136. 504 U.S. at 367.

137. *Id.*

138. *Me.*, 477 U.S. at 151–152 (quoting *Phila. v. N.J.*, 437 U.S. 617, 627 (1978)) (citation omitted) (second alteration in original).

139. 294 U.S. 511 (1935).

140. *Id.* at 519.

141. *Id.*

what New York was playing at was just the type of trade barrier that the Commerce Clause was designed to prevent.¹⁴²

If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, [then] the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.¹⁴³

New York countered as follows to no avail:

The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk; the supply being put in jeopardy when the farmers of the state are unable to earn a living income. Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.¹⁴⁴

Again, New York sought to justify the Milk Control Act.

142. *Id.* at 521.

143. *Id.* at 522.

144. *Id.* at 522–523 (citation omitted).

We have dwelt up to this point upon the argument of the state that economic security for farmers in the milk shed may be a means of assuring to consumers a steady supply of food of prime necessity. There is, however, another argument which seeks to establish a relation between the well-being of the producer and the quality of the product. We are told that farmers who are underpaid will be tempted to save the expense o[f] sanitary precautions. This temptation will affect the farmers outside New York as well as those within it. For that reason, the exclusion of milk paid for in Vermont below the New York minimum will tend, it is said, to impose a higher standard of quality and thereby promote health. We think the argument will not avail to justify impediments to commerce between the states. There is neither evidence nor presumption that the same minimum prices established by order of the board for producers in New York are necessary also for producers in Vermont. But apart from such defects of proof, the evils springing from uncared for cattle must be remedied by measures of repression more direct and certain than the creation of a parity of prices between New York and other states. Appropriate certificates may be exacted from farmers in Vermont and elsewhere; milk may be excluded if necessary safeguards have been omitted; but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product.¹⁴⁵

At this point, it should be observed that the “purposefully discriminate” part of the *Oberly* test¹⁴⁶ is illustrated by *Dean Milk*,¹⁴⁷ *Maine*,¹⁴⁸ and *Baldwin*.¹⁴⁹ However, the discrimination in those cases was not arbitrary as was the discrimination mentioned in *Oberly*.¹⁵⁰ In the two milk cases¹⁵¹ and the fish case,¹⁵² the “purposeful discrimination” was clearly rational and thus could not be

145. *Id.* at 523–524 (citations omitted).

146. For a review of the *Oberly* test, see the text accompanying *supra* note 115.

147. *Supra* nn. 120–133 and accompanying text.

148. *Supra* nn. 135–138 and accompanying text.

149. *Supra* nn. 139–145 and accompanying text.

150. *Supra* n. 115 and accompanying text.

151. *Dean Milk*, 340 U.S. at 349; *Baldwin*, 294 U.S. at 511.

152. *Me.*, 477 U.S. at 131.

arbitrary.¹⁵³ It is probably safe to assume that somewhere there is a case of arbitrary discrimination; however, I have been unable to discover it.

From what we have seen, strict scrutiny in the purposeful discrimination cases appears to mean some purpose other than singular economic protectionism¹⁵⁴ and requires means that are truly necessary, in that no less drastic ways of achieving the noneconomic purpose are available.¹⁵⁵ Strict scrutiny found in other areas of constitutional law means more than just a valid purpose; it means a compelling purpose.¹⁵⁶ Given the Court's discussion of the governmental purposes in *Dean Milk*,¹⁵⁷ *Maine*,¹⁵⁸ and *Baldwin*,¹⁵⁹ a case can be made that the purposes involved in those cases were in fact compelling.¹⁶⁰ If this is so, then strict scrutiny means the same thing across the spectrum of constitutional provisions that trigger the test. If not, then the strict scrutiny of the Commerce Clause in its dormant state is not as strict as the strict scrutiny of equal protection.

2. *The Undermining of Uniformity*¹⁶¹

According to *Oberly*, strict heightened scrutiny¹⁶² is also required when “state actions . . . undermine uniformity in areas of . . . particular federal importance”¹⁶³ Apparently, the first uniformity case is *Cooley v. Board of Wardens of the Port of Philadelphia*.¹⁶⁴ Its importance for our purposes is somewhat diminished because of the Court's finding of no requirement for uniformity.¹⁶⁵ Nevertheless, it is worth a brief look.

153. Review the text accompanying *supra* note 115.

154. Review the text accompanying *supra* note 125.

155. Review the text accompanying *supra* notes 132–133.

156. Review the text accompanying *supra* notes 97–98.

157. *Supra* nn. 120–133 and accompanying text.

158. *Supra* nn. 135–138 and accompanying text.

159. *Supra* nn. 139–140 and accompanying text.

160. In *Dean Milk* and *Maine* at least, where the purposes did not appear to be under a cloud as in *Baldwin*, the purposes were health and the prevention of “serious threat to native fish.” Review the text accompanying *supra* notes 125–138.

161. Review the text accompanying *supra* note 115.

162. Review the text accompanying *supra* note 115.

163. 822 F.2d at 398.

164. 53 U.S. 299 (1851).

165. *Id.* at 320. “[T]he nature of this subject is not such as to require [Congress’s] exclusive legislation.” *Id.*

In 1803 Pennsylvania enacted a law that required all vessels arriving or departing the Port of Philadelphia, with certain exceptions, to employ a harbor pilot.¹⁶⁶ After deciding that navigation was commerce¹⁶⁷ and recognizing the obvious, that the Constitution delegated to Congress the power to regulate interstate and foreign commerce,¹⁶⁸ the Court revisited¹⁶⁹ the issue of whether the grant of this power to Congress was exclusive so as to deprive the States of any power that amounted to a regulation of interstate and foreign commerce.¹⁷⁰ The Court found that it was not.¹⁷¹ The issue of the need for national uniformity then arose.¹⁷² The Court found that there was no need for national uniformity in the regulation of harbor pilots.¹⁷³ It reasoned that a 1789 federal law, providing for State regulation of harbor pilots under State laws then existing or that might be enacted in the future, could not authorize the 1803 Pennsylvania law,¹⁷⁴ but it showed that Congress did not think that national uniformity was required in the regulation of harbor pilots.¹⁷⁵ The Court did seem to suggest that if it had found that the

166. *Id.* at 311–312.

167. *Id.* at 315. “That the power to regulate commerce includes the regulation of navigation, we consider settled.” *Id.*

168. *Id.*

169. This issue, of course, was sidestepped in *Gibbons*, 22 U.S. at 200. It was decided, favorably for the States in *Willson*. Review the text accompanying *supra* notes 50–52.

170. *Cooley*, 53 U.S. at 318. “If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate.” *Id.*

171. *Id.* at 319. “[T]his court, after the most deliberate consideration, [held] that the mere grant of such a power to Congress, did not imply a prohibition on the states to exercise the same power.” *Id.*

172. *Id.* “Whatever subjects of the [commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.” *Id.*

173. *Id.*

174. *Id.* at 317–318.

175. The Court could not use the prospective part of the 1789 law directly, but it could use it indirectly.

The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789 as declares that pilots shall continue to be regulated “by such laws as the states may respectively hereafter enact for that purpose,” instead of being held to be inoperative, as an attempt to confer on the states a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of Congress,

regulation of harbor pilots was one of those areas of regulation where national uniformity was required, then the Pennsylvania law would have been found invalid without even the opportunity to survive strict scrutiny.¹⁷⁶

Although the need for national uniformity now seems to be ensured by state activity being preempted by federal law,¹⁷⁷ nevertheless, uniformity cases under the Commerce Clause in its dormant state do arise. *Southern Pacific Company v. Arizona*¹⁷⁸ appears to be one such example.

In 1912 the Arizona legislature enacted a law regulating the length of railroad trains — no more than fourteen passenger cars and no more than seventy freight cars.¹⁷⁹ Having ruled out preemption,¹⁸⁰ the Court turned to the Commerce Clause in its dormant state.¹⁸¹

Ever since *Willson v. Black Bird Creek Marsh Company* and *Cooley v. Board of Wardens*, it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters

at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the states, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants.

Id. at 319–320.

176. *Id.* at 319.

Whatever subjects of this [commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.

Id.

177. This concept of preemption was recognized by the Court in *Cooley*. “[The commerce power’s] exercise by Congress . . . may be incompatible with the exercise of the same power by the states.” *Id.* *Gibbons* was the first preemption case under the Commerce Clause. 22 U.S. at 1. After posing the question, “[C]an a State regulate commerce with foreign nations and among the states, while Congress is regulating it?,” *Id.* at 200, Chief Justice Marshall answered that question in the negative. *Id.* at 211. “In every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.” *Id.*

178. 325 U.S. 761 (1945).

179. *Id.* at 763.

180. *Southern P. Co.*, 325 U.S. at 764–766; *supra* n. 177 and accompanying text.

181. *Id.* at 766–767.

of local concern which nevertheless in some measures affect interstate commerce or even, to some extent, regulate it.¹⁸²

The Court recognized almost at once the uniformity concern when it spoke of “those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.”¹⁸³ Even in this context of the need for national uniformity, there were competing interests to resolve.

Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.¹⁸⁴

To put the Court's decision in *Southern Pacific* into the terminology of legitimate purpose and the existence or nonexistence of means that have a less drastic impact on the need for uniformity in interstate commerce requires a little imagination. The legitimate purpose presents no problem. The purpose is not to discriminate against interstate commerce, but rather to promote safety.¹⁸⁵ As far as could be determined, Arizona placed a length limitation on both passenger and freight trains¹⁸⁶ to prevent persons aboard the trains from being injured (knocked down or into something comes to mind) by the increasing shock or jar that travels down the train as the slack is taken out of the coupling mechanisms that link the cars in

182. *Id.* (citations omitted). As to the source of the limitations imposed by the Commerce Clause in its dormant state, the Court recognized that they might be “predicated upon the implications of the commerce clause itself or upon the presumed intention of Congress, where Congress has not spoken . . .” *Id.* at 768. In any event, whichever the case may be, the result is the same. *Id.* Also, as to the limitations imposed upon State activity by the Commerce Clause in its dormant state, the “Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.” *Id.* at 769 (citations omitted).

183. *Id.* at 767.

184. *Id.* at 770–771.

185. *Id.* at 770.

186. *Id.* at 763.

the train together.¹⁸⁷ Safety was the purpose, and limiting train lengths was the means.

However, there was ample proof that the length of trains was a regulatory domain that needed nationwide uniformity.¹⁸⁸

If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state. The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent.¹⁸⁹

That being the case, the Court's inquiry moved to the question of the means employed in the interest of safety *vis-à-vis* the "slack action" train length law.¹⁹⁰ Unlike the "strict scrutiny" test previously discussed,¹⁹¹ the Court did not concern itself with possible less

187. *Id.* at 776.

The principal source of danger of accident from increased length of trains is the resulting increase of "slack action" of the train. Slack action is the amount of free movement of one car before it transmits its motion to an adjoining coupled car. This free movement results from the fact that in railroad practice cars are loosely coupled, and the coupling is often combined with a s[h]ock-absorbing device, a "draft gear," which, under stress, substantially increases the free movement as the train is started or stopped. Loose coupling is necessary to enable the train to proceed freely around curves and is an aid in starting heavy trains, since the application of the locomotive power to the train operates on each car in the train successively, and the power is thus utilized to start only one car at a time.

The slack action between cars due to loose couplings varies from seven-eighths of an inch to one and one-eighth inches and, with the added free movement due to the use of draft gears, may be as high as six or seven inches between cars. The length of the train increases the slack since the slack action of a train is the total of the free movement between its several cars. The amount of slack action has some effect on the severity of the shock of train movements, and on freight trains sometimes results in injuries to operatives, which most frequently occur to occupants of the caboose. The amount and severity of slack action, however, are not wholly dependent upon the length of train, as they may be affected by the mode and conditions of operation as to grades, speed, and load.

Id.

188. *Id.* at 775.

189. *Id.*

190. *Id.* at 775–779.

191. *Supra* nn. 97–98 and accompanying text.

drastic ways to prevent injuries caused by slack action.¹⁹² Instead, it found that the train length law was essentially counter productive when larger safety concerns were taken into account.¹⁹³

The trial court found that the Arizona law had no reasonable relation to safety, and made train operation more dangerous. Examination of the evidence and the detailed findings makes it clear that this conclusion was rested on facts found which indicate that such increased danger of accident and personal injury as may result from the greater length of trains is more than offset by the increase in the number of accidents resulting from the larger number of trains when train lengths are reduced. In considering the effect of the statute as a safety measure, therefore, the factor of controlling significance for present purposes is not whether there is basis for the conclusion of the Arizona Supreme Court that the increase in length of trains beyond the statutor[]y maximum has an adverse effect upon safety of operation. The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts.¹⁹⁴

The answer to the Court's rhetorical question was not a difficult one.

Upon an examination of the whole case the trial court found that "if short-train operation may or should result in any decrease in the number or severity of the 'slack' or 'slack-surge' type of accidents or casualties, such decrease is substantially more than offset by the increased number of accidents and casualties from other causes that follow the arbitrary limitation of freight trains to [seventy] cars and passenger trains to [fourteen] cars."

We think, as the trial court found, that the Arizona Train Limit Law, viewed as a safety measure, affords at most slight and dubious advantage, if any, over unregulated train lengths, because it results in an increase in the number of trains and

192. *Southern P. Co.*, 325 U.S. at 775-779.

193. *Id.*

194. *Id.* at 775-776.

train operations and the consequent increase in train accidents of a character generally more severe than those due to slack action.¹⁹⁵

A finding by the Court that legislation in support of safety, which has a profound effect on the need for nationwide uniformity, will actually be counterproductive to a broader safety concern is not the same as the discovery of a less drastic way to achieve the safety purpose suggested in *Dean Milk*.¹⁹⁶

However, at one point, the Court came close to the search for a less drastic means approach when it suggested that “[t]he amount and severity of slack action, however, are not wholly dependent upon the length of train, as they may be affected by the *mode* and *conditions of operation* as to grades, speed and load.”¹⁹⁷ The Court appeared to be suggesting that locomotive engineers could be taught how to start trains, even long trains, without the jolt caused by slack action.¹⁹⁸

It is interesting to note that Justice Hugo Black, in his dissent, seemed to refer to the less drastic means of well-trained locomotive engineers.¹⁹⁹

Another Arizona safety statute submitted at the same time required certain tests and service before a person could act as an engineer or train conductor, and thereby exercised a state

195. *Id.* at 779.

As the trial court found, reduction of the length of trains also tends to increase the number of accidents because of the increase in the number of trains. The application of the Arizona law compelled appellant to operate 30.08%, or 4,304, more freight trains in 1938 than would otherwise have been necessary. And the record amply supports the trial court’s conclusion that the frequency of accidents is closely related to the number of trains run. The number of accidents due to grade crossing collisions between trains and motor vehicles and pedestrians, and to collisions between trains, which are usually far more serious than those due to slack action [and] accidents due to locomotive failures, in general vary with the number of trains. Increase in the number of trains results in more starts and stops, more “meets” and “passes,” and more switching movements, all tending to increase the number of accidents not only to train operatives and other railroad employees, but to passengers and members of the public exposed to danger by train operations.

Id. at 777–778 (footnote omitted).

196. *Supra* nn. 132–133 and accompanying text.

197. *Southern P. Co.*, 325 U.S. at 776 (emphasis added).

198. The Author has ridden passenger trains when the jolt associated with slack action was very apparent. At other times, however, it was not possible to tell that the train was moving until one looked out the window.

199. *Id.* at 785 (Black, J., dissenting).

power similar to that which this Court upheld in *Nashville*, *C. & St. L. Ry. Company v. Alabama*].²⁰⁰

Based on *Nashville*, the tests may have been medical tests.²⁰¹ Nevertheless, it presents at least the germ of the idea of well-trained crews.

To summarize, if a State discriminates against interstate commerce or interferes with the need for national uniformity of regulation, such discrimination or interference must be in support of a noneconomic protectionist purpose; there must be no available less drastic means, and the means cannot be counterproductive.

B. "Very Deferential Review" of Legislation in Areas of Very Strong State Interest

The Third Circuit Court of Appeals in *Oberly*²⁰² gave *American Trucking Association v. Larson*²⁰³ as an example of "very deferential review."²⁰⁴ The issue in *American Trucking* was highway safety in the form of motor carrier vehicle inspections required by Pennsylvania.²⁰⁵ The inspections could have been accomplished in Pennsylvania or any other State.²⁰⁶ In coming to its conclusion that the Pennsylvania law should not be invalidated under the Commerce Clause in its dormant state,²⁰⁷ the Third Circuit Court of Appeals paid particular attention to the various opinions of the Justices in *Kassel v. Consolidated Freightways Corporation*.²⁰⁸

In *Kassel*, as read by the *American Trucking* court, the Supreme Court Justices were divided into three groups.²⁰⁹ Justice Lewis Powell, writing for a plurality of four Justices, balanced the competing concerns of Iowa in regulating the length of tractor-trailer trucks in the interest of highway safety against the burden that the regulation placed on the free flow of interstate commerce.²¹⁰ However, Justice Powell "acknowledged the strong presumption of

200. *Id.* (citing *Nashville*, 128 U.S. 197 (1888)).

201. 128 U.S. at 197.

202. 822 F.2d at 388.

203. 683 F.2d 787 (3d Cir. 1982).

204. *Oberly*, 822 F.2d at 399, 405.

205. 683 F.2d at 788.

206. *Id.*

207. *Id.* at 801.

208. *Id.* at 793 (citing *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981)).

209. *Id.* at 793-795.

210. *Id.* at 793.

validity given to regulations that touch upon safety, especially highway safety”²¹¹ The plurality found the free flow of interstate commerce outweighed what it found to be relatively insignificant contributions to highway safety flowing from the truck length limitation.²¹²

Justice William Brennan and Justice Thurgood Marshall concurred in the result reached by the Powell plurality, but not in the reasoning that led it to that result.²¹³

For me, analysis of Commerce Clause challenges to state regulations must take into account three principles: (1) The courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation. (2) The burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the State’s lawmakers, and not against those suggested after the fact by counsel. (3) Protectionist legislation is unconstitutional under the Commerce Clause, even if the burdens and benefits are related to safety rather than economics.²¹⁴

The reason for Justices Brennan and Marshall’s agreement that the Iowa statute must fall was that “the actual goal of the Iowa legislature was to discourage interstate truck traffic on Iowa’s highways.”²¹⁵ Thus, the Iowa law was “protectionist legislation,” which ran afoul of the Commerce Clause in its dormant state.²¹⁶

211. *Id.*

212. *Id.*

213. *Id.* Significantly, Justice William Brennan expressly rejected the balancing approach utilized by Justice Lewis Powell. *Id.*

Moreover, I would emphasize that *in the field of safety* — and perhaps in other fields where the decisions of state lawmakers are deserving of a heightened degree of deference — *the role of the courts is not to balance* asserted burdens against intended benefits as it is in other fields. . . . In the field of safety, once the court has established that the intended safety benefit is not illusory, insubstantial, or nonexistent, it must defer to the State’s lawmakers on the appropriate balance to be struck against other interests. I therefore disagree with my Brother Powell when he asserts that the degree of interference with interstate commerce may in the first instance be “weighed” against the State’s safety interests.

Id. at 794 (Powell, J., concurring) (citing *Kassel*, 450 U.S. at 681 n. 1) (emphasis added by the Circuit Court).

214. *Id.* at 793 (citing *Kassel*, 450 U.S. at 679–680).

215. *Id.* at 794.

216. *Id.*

Justice William Rehnquist wrote a dissent in which Chief Justice Warren Burger and Justice Potter Stewart joined.²¹⁷ This dissent “rejected both the [balancing] test of Justice Powell and Justice Brennan’s emphasis on the actual purposes of the lawmakers.”²¹⁸

Emphasizing that the “[t]he Commerce Clause is, after all, a grant of authority to Congress, not to the courts” and that those challenging a highway safety regulation must overcome a strong presumption of validity, he stated that the Court should not “directly compare safety benefits to commerce costs and strike down the legislation if the latter can be said in some vague sense to ‘outweigh’ the former.” In his view the Court was limited “to determin[ing] if the asserted safety justification, although rational, is merely a pretext for discrimination against interstate commerce. We will conclude that it is if the safety benefits from the regulation are demonstrably trivial while the burden on commerce is great.” Justice Rehnquist framed the question as “whether it can be said that the benefits flowing to Iowa from a rational truck-length limitation are ‘slight or problematical.’” In his view, Iowa had adduced evidence sufficient to support its safety claim by showing that longer vehicles take greater time to pass, are more likely to clog intersections, and pose greater problems at accident scenes.²¹⁹

The Court of Appeals chose to follow the highly deferential view put forward by Justice Rehnquist after declining any attempt to harmonize the competing views of the various Justices in *Kassel*.²²⁰

217. *Id.*

218. *Id.*

219. *Id.* (quoting *Kassel*, 450 U.S. at 690–691) (citations omitted) (first and second alterations in original).

220. *Id.* at 794–795.

In essence, therefore, this court must choose whether to apply the balancing approach used by Justice Powell or the highly deferential standard espoused by Justice [William] Rehnquist. Although it is attractive to attempt to reconcile them, it would be presumptuous of us to try to do so since the Justices themselves have made explicit their belief that there are significant differences between them. It appears that the Justices have acknowledged, at least implicitly, that Justice Rehnquist’s approach is even more deferential to the state’s legislative judgments on highway safety issues than the balancing approach articulated by Justice Powell, notwithstanding the “strong presumption of validity” which the latter concedes is warranted. The district court recognized the choice before it. It stated that although it believed the weighing test employed by the plurality in *Kassel* was the proper analysis, it would follow “the narrow view” advocated by Justice Rehnquist in his *Kassel* dissent “rather than become

We choose to follow the approach articulated by Justice Rehnquist in his *Kassel* dissent for several reasons. In the first place, if we attempt to align the Justices, it appears that there are five Justices who have rejected the balancing approach in the area of safety regulations, if we count not only the three Justices adhering to Justice Rehnquist's opinion but Justice Brennan and Justice Marshall as well. In the second place, we believe that the more deferential standard is appropriate because issues of highway safety have always been considered of a "peculiarly local nature." If the rational basis standard is considered adequate in equal protection cases for evaluating a wide range of state statutes and regulations, a similarly deferential standard should suffice as the standard for evaluating nondiscriminatory state commercial regulations in the field of highway safety.

Finally, we are particularly reluctant to superimpose judicial values over legislative values in the safety area. The balancing approach as applied in the plurality opinion in *Kassel* entailed making subtle distinctions on the basis of vigorously contested facts and inferences. We believe that the halls of the state legislature are a more appropriate forum for resolution of these disputes than are the walls of a judge's chambers. Because the legislative process itself involves balancing the benefits to the public interest against the restraints imposed on the affected businesses, many of whom are voters, the concern expressed by the dissent about hypothetical statutes requiring luminous trucks, a thirty-five mile per hour highway speed limit or weekly inspections are unlikely examples since they would have had to survive the legislature's scrutiny and debate. As long as the statute does not on its face or in fact discriminate against out-of-state interests or in favor of in-state interests, there is ample protection from such legislation in the democratic process itself.

embroiled in this controversy."

Id. at 794 (quoting *Am. Trucking*, 515 F. Supp. 1327, 1338 (1981)). The Circuit Court continued,

In some cases, perhaps in many cases, the choice between the two approaches which currently divide the Supreme Court may not affect the result. In this case, we are not confident that the selection of the legal standard would not be outcome determinative. Therefore, we believe it is incumbent upon us to expressly select the standard to be applied.

Id. at 794–795.

[The Circuit Court] review[ed] the record to determine whether the “strong presumption of validity” accorded Pennsylvania’s highway safety measures has been overcome by a showing that the safety benefits were “slight or problematical” or, as alternatively but equivalently phrased, merely “illusory.”²²¹

After doing so,²²² the Circuit Court found for Pennsylvania.²²³

We believe the record shows that there was ample evidence to support the legislature’s choice when reviewed under a standard giving substantial deference to the legislature.

It is even probable that were the evidence evaluated under the test which requires that the court weigh the interstate burden of a regulation against its safety benefits, Pennsylvania’s inspection requirement would survive. In *Raymond [Motor Transportation, Incorporated v. Rice]*, the Court noted that the state had failed to make “a colorable showing” that its regulations contributed to highway safety. It is difficult to conclude that Pennsylvania has not met that minimal requirement, particularly when it is balanced against a burden on interstate commerce stemming merely from an inspection requirement rather than total exclusion, as in the case of oversized vehicles. The district court made no findings under this standard, and since we have adopted an even more deferential standard, we do not decide the issue.²²⁴

The difficulty with placing a great deal of reliance on the deferential approach even when the State interest is quite weighty, as was the concern over highway safety in *American Trucking*, is the relatively slight burden the Pennsylvania inspection regime put on the free flow of interstate commerce.²²⁵ As the dissent in *American*

221. *Id.* at 795 (citations and footnote omitted).

222. *Id.* at 795–799.

223. *Id.* at 799.

224. *Id.* (citing *Raymond*, 434 U.S. 429 (1978)).

225. *Id.* at 798–799.

Pennsylvania’s inspection requirement is significantly different than the regulations invalidated in *Bibb*, *Raymond*, and *Kassel*. Unlike the state law in *Bibb*, Pennsylvania’s inspection requirement does not conflict with that of any other state. Pennsylvania does not require that the requisite inspection be performed under its own system, but instead accepts the inspection of any other state, under whatever standard that state imposes. Unlike the regulations in *Raymond*, Pennsylvania does not discriminate in favor of local industry, and unlike the regulations in *Kassel*,

Trucking more or less suggests, if the burden on the free flow of interstate commerce is considered to be too great, the deferential approach gives way to a balancing of competing interests approach.²²⁶

Justice Powell seemed to suggest the same in his plurality opinion,²²⁷ and the Court of Appeals described the Powell plurality opinion as follows:

He acknowledged the strong presumption of validity given to regulations that touch upon safety, especially highway safety, but stated, “Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause.”²²⁸

Once the balance of competing interests approach has been adopted, it becomes easy to overwhelm the State’s concerns with findings that *really* those concerns have been overstated and that the challenged regulations *really* do place quite a heavy load on the free flow of interstate commerce.²²⁹

Pennsylvania’s law does not contain exemptions which throw into question the legitimacy of its regulation system.

Id.

226. *Id.* at 802–803 (Adams, J., dissenting).

I am not persuaded, however, that absolute judicial reticence is appropriate when reviewing the actions of *state* legislatures, whose safety-related judgments, essentially attuned to local considerations, do not necessarily reflect an adequate comprehension or consideration of the burdens placed on interstate intercourse.

In my view, the better analytical approach to dormant commerce clause matters is the “sensitive” balancing advocated by the plurality in *Kassel*. Under this standard, “the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack.” Rather, a reviewing court is obligated to engage in a careful “weighing of the asserted safety purpose against the degree of interference with interstate commerce.” Ordinarily, because of their “strong presumption of validity,” state and local regulations intended to advance highway safety will withstand constitutional attack. In some-admittedly rare-cases, however, state restrictions may “further the (safety) purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause.”

Id. (citations and footnotes omitted).

227. *Id.* at 793.

228. *Id.* (quoting *Kassel*, 450 U.S. at 670).

229. As described by the court of appeals,

In undertaking to make that balance, Justice Powell acknowledged that Iowa introduced more evidence on the question of safety than did Wisconsin in *Raymond*. He found, however, that the record supported the finding by the district court that [sixty-five]-foot doubles were as safe as either [sixty]-foot doubles or [fifty-five]-foot singles and that the trucking company had demonstrated that Iowa’s law substantially

One is, therefore, left to wonder if, after all, the deferential approach is more apparent than real except perhaps in a case where it would be difficult to characterize the State's safety concerns as anything but highly significant.

C. A Balancing Test, under Which State Law Is Invalid Only If the Incidental Burden on Interstate Commerce "Is Clearly Excessive in Relation to the Putative Local Benefits"²³⁰

This test apparently originated, at least in the stated form, with *Pike v. Bruce Church, Incorporated*.²³¹ It does not appear to be as simple as stated above. Its application by the Supreme Court in *Minnesota v. Clover Leaf Creamery Company*²³² is illustrative.

Minnesota banned "the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitt[ed] such sale in other nonreturnable, nonrefillable containers."²³³ This was done because

burdened interstate commerce. He noted that each of the other options available to trucking companies substantially increased the costs of trucking and might tend to increase the number of highway accidents because they entailed driving more highway mileage. He declined to defer to the state legislative judgment because the local regulation bore disproportionately on out-of-state residents and businesses in allowing several exemptions "that secure to Iowans many of the benefits of large trucks while shunting to neighboring States many of the costs associated with their use."

Id. (citing *Kassel*, 450 U.S. at 676). Consider also the following part of the dissent in *American Trucking*:

The reason for favoring the balancing over the deferential test derives from a recognition that situations may arise where enormous burdens are placed on interstate commerce by nondiscriminatory, non-illusory state safety statutes. In these instances, I believe it unwise and imprudent for a federal court to ignore significant and sizeable infringements on national commercial interests solely because some, arguably marginal, local safety objective is served. A few examples may suffice. It doubtless would increase highway safety were a state to mandate that all trucks traveling on its roads be covered with luminous paint, be driven at speeds not to exceed thirty five miles per hour, or be inspected weekly. Under the deferential standard of commerce clause review, having made such a determination, a court's inquiry must end. It is troubling, however, to accept an analysis that excludes from the decisionmaking calculus the tremendous burdens placed on interstate commerce by each of these (rather fanciful) regulations. Indeed, it is difficult to reconcile such an approach with the long-standing notion that the commerce clause exists, in part, to "prevent[] the States from erecting barriers to the free flow of interstate commerce."

Id. at 803–804 (Adams, J., dissenting) (quoting *Raymond*, 434 U.S. at 429, 440) (citation omitted) (alteration in original).

230. *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 142 (1970)).

231. 397 U.S. 137 (1970).

232. 449 U.S. 456 (1981).

233. *Id.* at 458.

the legislature found “that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste, and depletes natural resources.”²³⁴

After disposing of an equal protection challenge, the Court turned to the issue of the Commerce Clause in its dormant state.²³⁵ “[I]f a statute regulates ‘evenhandedly,’ and imposes only ‘incidental’ burdens on interstate commerce, the courts must nevertheless strike it down if the ‘burden imposed on such commerce is clearly excessive in relation to the putative local benefits.’”²³⁶

It is probably fair to say that the evenhanded regulation that places only incidental burdens on interstate commerce suggests a state purpose other than some sort of economic protectionism where the means clearly further a valid State purpose, for example, health, and simply also place some burden on the free flow of interstate commerce. The Court described the *Minnesota* situation as this sort of regulation.²³⁷

Minnesota’s statute does not effect “simple protectionism,” but “regulates evenhandedly” by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State.²³⁸

So far, so good. But, then the Court delved deeper into the *Pike* test and an ordinary, common garden balancing test turned into one that included one of the elements of strict scrutiny — the judicial search for less drastic means.²³⁹ “Moreover, ‘the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, *and on whether it could be promoted as well with a lesser impact on interstate activities.*’”²⁴⁰

In applying this balancing test to the Minnesota regulation, the Court first found that “[t]he burden imposed on interstate commerce

234. *Id.*

235. *Id.* at 461–470.

236. *Id.* at 471 (quoting *Pike*, 397 U.S. at 142).

237. *Id.* at 471–472.

238. *Id.*

239. *Supra* nn. 130–133 and accompanying text.

240. *Minn.*, 449 U.S. at 471 (quoting *Pike*, 397 U.S. at 142) (emphasis added).

by the statute is relatively minor.”²⁴¹ The Court brushed aside, so to speak, the one claim that ran counter to its assessment.²⁴²

Pulpwood producers are the only Minnesota industry likely to benefit significantly from the Act at the expense of out-of-state firms. Respondents point out that plastic resin, the raw material used for making plastic nonreturnable milk jugs, is produced entirely by non-Minnesota firms, while pulpwood, used for making paperboard, is a major Minnesota product. Nevertheless, it is clear that respondents exaggerate the degree of burden on out-of-state interests, both because plastics will continue to be used in the production of plastic pouches, plastic returnable bottles, and paperboard itself, and because out-of-state pulpwood producers will presumably absorb some of the business generated by the Act.

Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is not “clearly excessive” in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems, which we have already reviewed in the context of equal protection analysis. We find these local benefits ample to support Minnesota’s decision under the Commerce Clause.²⁴³

It also gave very short shrift to suggestions of ways to accomplish Minnesota’s goal that would produce a smaller impact on the free flow of interstate commerce, the so called less drastic means.²⁴⁴

241. *Id.* at 472.

Milk products may continue to move freely across the Minnesota border, and since most dairies package their products in more than one type of containers, the inconvenience of having to conform to different packaging requirements in Minnesota and the surrounding States should be slight. Within Minnesota, business will presumably shift from manufacturers of plastic nonreturnable containers to producers of paperboard cartons, refillable bottles, and plastic pouches, but there is no reason to suspect that the gainers will be Minnesota firms, or the losers out-of-state firms. Indeed, two of the three dairies, the sole milk retailer, and the sole milk container producer challenging the statute in this litigation are Minnesota firms.

Id. at 472–473 (citations and footnotes omitted).

242. *Id.* at 473.

243. *Id.* (citation omitted).

244. *Id.* at 473–474.

Moreover, we find that no approach with “a lesser impact on interstate activities,” [*Pike*, 397 U.S. at 142,] is available. Respondents have suggested several alternative statutory schemes, but these alternatives are either more burdensome on commerce than the Act (as, for example, banning all nonreturnables) or less likely to be effective (as, for example, providing incentives for recycling).²⁴⁵

The Minnesota regulation was upheld.²⁴⁶

*III. THE ENIGMA OF “INTERMEDIATE” SCRUTINY
IN GENDER-BASED CLASSIFICATIONS: HAS JUSTICE
RUTH BADER GINSBURG MUDDIED THE EQUAL
PROTECTION WATERS?*

Much of the story of gender classifications and intermediate scrutiny under the Equal Protection Clause was told in the original *Three Ring Circus* article.²⁴⁷ At the time, it appeared obvious that gender-based classifications would not receive strict scrutiny.²⁴⁸ Such an attempt had failed by one vote in *Frontiero v. Richardson*.²⁴⁹ Instead, the intermediate scrutiny of important government purpose and real and substantial relationship of means²⁵⁰ appeared to be the settled standard.²⁵¹ However, other forces were at work with the apparent purpose of moving an examination of gender-based classifications toward strict scrutiny.

245. *Id.* (citation omitted).

246. *Id.* at 474.

247. Marks, *supra* n. 5, at 341–344. The reader should note that even where cases used involve the federal government, they have been discussed in terms of Equal Protection. After all, even the Supreme Court seems to have created an “equal protection component” of the Fifth Amendment Due Process Clause. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

248. See Marks, *supra* n. 5, at 330 (defining strict scrutiny).

249. 411 U.S. 677 (1973) (plurality). Justice Brennan, writing for a plurality of four justices, would have added gender to the list of suspect classifications. *Id.* at 682. Justices Potter Stewart, Powell, Harry Blackmun and Chief Justice Warren Burger applied intermediate scrutiny. *Id.* at 692 (Powell, J., concurring). Justice Rehnquist would have applied what amounted to the rational basis test. *Id.* at 691 (Rehnquist, J., dissenting) (citing *Frontiero v. Laird*, 341 F. Supp. 201 (1972)).

250. See Marks, *supra* n. 5, at 341.

251. In *Clark v. Jeter*, 486 U.S. 456, 461 (1988), Justice Sandra Day O’Connor made reference to “a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex and illegitimacy.” She then described the test as follows: “To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.” *Id.*

In spite of her statement in *Clark v. Jeter*,²⁵² equating the intermediate scrutiny of classifications based upon legitimacy of birth and gender,²⁵³ Justice Sandra Day O'Connor authored the following comment in *Mississippi University for Women v. Hogan*:²⁵⁴

Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an “exceedingly persuasive justification” for the classification. The burden is met only by showing *at least* that the classification serves “important governmental objectives and that the discriminatory means employed” are “substantially related to the achievement of those objectives.” *Wengler v. Druggists Mutual Insurance Company*, 446 U.S. 142, 150 (1980).²⁵⁵

This is, of course, the epitome of ambiguity. What does “at least” mean? Are there times when something more than “least” will be required?

Of the two cases cited by Justice O'Connor, in reference to “exceedingly persuasive justification,” *Personnel Administrator of Massachusetts v. Feeney*²⁵⁶ seems to be the first time that the words “exceedingly persuasive justification” were used in the context of measuring the validity of a gender-based classification. There, Justice Stewart, after mentioning a number of cases involving gender-based classifications, concluded that “these precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.”²⁵⁷

Although “these precedents” may have “dictate[d]” to Justice Stewart an “exceedingly persuasive justification” for “any state law overtly or covertly designed to prefer males over females in public employment,”²⁵⁸ they do not employ, so to speak, that term.

252. 486 U.S. 456 (1988).

253. *Id.* at 461.

254. 458 U.S. 718 (1982).

255. *Id.* at 724 (citations omitted) (emphasis added).

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

257. *Id.* at 273.

258. *Id.*

*Craig v. Boren*²⁵⁹ used the following standard terminology: “Classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”²⁶⁰ In *Reed v. Reed*,²⁶¹ the next case cited by Justice Stewart, the standard terminology was not even used. Instead, Chief Justice Burger applied the much older test from *Royster Guano Company v. Virginia*.²⁶²

The Equal Protection Clause . . . does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”²⁶³

This opinion then continued by equating the test it had just enunciated to the lesser scrutiny of the rational basis test.²⁶⁴ “The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the State law].”²⁶⁵ In applying this strange mixture of scrutiny, the Court concluded that the classification was irrational in the sense that it was “arbitrary.”²⁶⁶ Of course, given the purpose of administrative convenience, an automatic award to the male, rather than the female, both being similarly situated, was quite rational.²⁶⁷ Later cases have read *Reed* as saying that administrative convenience was not a sufficiently important governmental purpose to be furthered by a gender-based classifica-

259. 429 U.S. 190 (1976).

260. *Id.* at 197.

261. 404 U.S. 71 (1971).

262. 253 U.S. 412 (1920).

263. *Reed*, 404 U.S. at 75–76 (quoting *Royster Guano Co.*, 253 U.S. at 415).

264. See generally Marks, *supra* n. 5, at 311–321 (discussing the rational basis test in Equal Protection jurisprudence).

265. *Reed*, 404 U.S. at 76 (citation omitted).

266. *Frontiero*, 411 U.S. at 690 (plurality). There, Justice Brennan quoted *Reed* regarding the classification in *Reed* as being “arbitrary.” *Id.* at 684.

267. *Reed*, 404 U.S. at 76–77.

tion.²⁶⁸ Consider the following statements from Justice Brennan's opinion in *Craig*:

Thus, in *Reed*, the objectives of "reducing the workload on probate courts," and "avoiding intrafamily controversy," were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of administrators of intestate decedents' estates. Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications.²⁶⁹

In any event, it is anything but clear that Chief Justice Burger's opinion in *Reed* supports the idea that an "exceedingly persuasive justification" is necessary for the constitutional validity of a gender-based classification.

The next case cited by Justice Stewart in *Feeney* was *Frontiero*.²⁷⁰ A badly divided court did not present any majority opinion.²⁷¹ The plurality opinion authored by Justice Brennan would have made gender-based classifications suspect, adding gender to race, alienage, and national origin.²⁷² However, the other five votes would not have gone that far.²⁷³

Justice Stewart concurred only in the judgment, finding that the law in question "work[ed] an invidious discrimination in violation of the Constitution."²⁷⁴

268. See e.g. *Craig*, 429 U.S. at 197–198 (citing *Reed*, 404 U.S. at 76–77) (discussing administrative convenience).

269. *Id.* (citing *Reed*, 404 U.S. at 76–77) (citations omitted).

270. This case involved "the right of a female member of the uniformed services to claim her spouse as a 'dependent' for the purposes of obtaining increased quarters allowances and medical and dental benefits . . . on an equal footing with male members." *Frontiero*, 411 U.S. at 678 (plurality) (citation and footnote omitted). The law at issue did not provide such footing. "[A] serviceman may claim his wife as a 'dependent' without regard to whether she is in fact dependent upon him for any part of her support." A servicewoman was not treated the same, because she "may not claim her husband as a 'dependent' . . . unless he is in fact dependent upon her for over one-half of his support." *Id.*

271. Justice Brennan announced the judgment of the Court and delivered an opinion for himself and Justices William Douglas, Byron White, and Thurgood Marshall. *Id.* at 692. (Burger, C.J. & Stewart, Powell & Blackmun, JJ., concurring, and Rehnquist, J., dissenting).

272. *Id.* at 682. "At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected the close judicial scrutiny. We agree . . ." *Id.* (footnotes omitted).

273. *Id.* at 691–692.

274. *Id.* at 691 (Stewart, J., concurring) (citing *Reed*, 404 U.S. at 76–77).

Justice Powell, joined by Chief Justice Burger and Justice Harry Blackmun, concurred only in the judgment, like Justice Stewart, basing the rationale on *Reed*.²⁷⁵ However, this opinion went further.

It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. [*Reed*, 404 U.S. 71], which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale.

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.²⁷⁶

275. *Id.* at 691–692 (Powell, J., concurring).

276. *Id.* (citations omitted).

The “gender-based distinction” in *Weinberger v. Wiesenfeld*²⁷⁷ was found by the Court, speaking through Justice Brennan to be “indistinguishable from that invalidated in *Frontiero*.”²⁷⁸ However, the Court based its decision on the constitutional invalidity of the law on little more than the rational basis test. “Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction [a widow with children collects benefits for herself and her child or children, while a widower collects only for his child or children] is entirely irrational.”²⁷⁹ Certainly there appears to be nothing in the opinion suggesting a higher level of scrutiny beyond the reference to *Frontiero*.²⁸⁰

*Califano v. Goldfarb*²⁸¹ is factually similar to *Weinberger*²⁸² and *Frontiero*.²⁸³ *Califano* focused on the gender-based discrimination against a woman caused by her widower having to prove some dependency on her during her lifetime in order to receive benefits upon her death from a program to which she had contributed.²⁸⁴ In similar circumstances, a widow would not have to prove any degree of dependency on her late husband during his lifetime.²⁸⁵ The Court appeared to apply the standard test. “But ‘[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.’”²⁸⁶ In doing so, it found the classification scheme invalid.²⁸⁷

277. 420 U.S. 636 (1975). The issue in this case was the constitutionality of a federal law that provides that “benefits based on the earnings of a deceased husband and father covered by the [law] are payable, with some limitations, both to the widow and to the couple’s minor children in her care.” *Id.* at 637 (citation omitted). However, “[s]uch benefits are payable on the basis of the earnings of a deceased wife and mother . . . only to the minor children and not to the widower.” *Id.* at 637–638.

278. *Id.* at 642 (citation omitted).

279. *Id.* at 651 (citation omitted).

280. Review the text accompanying *supra* note 272. The Court, a second time, referred to the gender-based classification being “indistinguishable from the classification held invalid in *Frontiero*.” *Weinberger*, 420 U.S. at 653.

281. 430 U.S. 199 (1977) (plurality).

282. *Supra* nn. 277–280 and accompanying text.

283. *Supra* nn. 270–276 and accompanying text.

284. *Califano*, 430 U.S. at 201. The dependency required was that “he ‘was receiving at least one-half of his support’ from his deceased wife.” *Id.*

285. *Id.*

286. *Id.* at 210–211 (quoting *Craig*, 429 U.S. at 197) (alterations in original).

287. *Id.* at 217.

Justice John Paul Stevens, who held the law in question unconstitutional,²⁸⁸ focused on the gender-based discrimination practiced not against the deceased female wage earner, but rather her surviving husband.²⁸⁹ Justice Stevens found the situation where the male surviving spouse would have to prove dependency, but a female surviving spouse would not, to be violative of the Constitution.²⁹⁰

But I consider it clear that Congress never focused its attention on the question whether to divide nondependent surviving spouses into two classes on the basis of sex. The history of the statute is entirely consistent with the view that Congress simply assumed that all widows should be regarded as “dependents” in some general sense, even though they could not satisfy the statutory support test later imposed on men. It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms “widow” and “dependent surviving spouse.” That kind of automatic reflex is far different from either a legislative decision to favor females in order to compensate for past wrongs, or a legislative decision that the administrative savings exceed the cost of extending benefits to nondependent widows.

I am therefore persuaded that this discrimination against a group of males is merely the accidental by[-]product of a traditional way of thinking about females. I am also persuaded that a rule which effects an unequal distribution of economic benefits solely on the basis of sex is sufficiently questionable that “due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve [the] interest” put forward by the Government as its justification. In my judgment, something more than accident is necessary to justify the disparate treatment of persons who have as strong a claim to equal treatment as do similarly situated surviving spouses.²⁹¹

288. Justice Rehnquist joined by Chief Justice Burger and Justices Stewart and Blackmun dissented. *Id.* at 224–242 (Rehnquist, J., dissenting).

289. *Id.* at 222 (Stevens, J., concurring).

290. *Id.* at 222–224.

291. *Id.* at 222–223 (citing *Hampton v. Mow Sun Wong*, 426 U.S. 103 (1895)) (citation and footnotes omitted) (alteration in original).

In *Orr v. Orr*,²⁹² the Court struck down an Alabama law that provided alimony for the former wife of a failed marriage, but not the former husband.²⁹³ The by now familiar intermediate level of scrutiny was used. The government purpose(s) had to be important and the means selected by the government had to be “substantially related to the achievement of those objectives.”²⁹⁴ Finding that such a gender-based classification simply reinforced what it considered outmoded stereotypes of males and females, the Court concluded that it could not satisfy even this intermediate level of scrutiny.²⁹⁵

Finally, in *Caban v. Mohammed*,²⁹⁶ the Court, speaking through Justice Powell, struck down a New York law,²⁹⁷ which required the consent of the mother, but not of the father, of a child born out of wedlock before the child could be given up for adoption.²⁹⁸ The Court applied the familiar intermediate scrutiny test.²⁹⁹ New York attempted to justify this law in two separate ways. First, the State argued that the gender-based distinction furthered the purpose of recognizing that “a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does.”³⁰⁰ This was rejected by the Court as an overbroad generalization.³⁰¹ “The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother.”³⁰²

Second, the State argued “that the distinction between unwed fathers and unwed mothers is substantially related to the State’s interest in promoting the adoption of illegitimate children.”³⁰³ The idea here was that unwed fathers might block adoptions by refusing consent and that this would discourage prospective adoptive couples.³⁰⁴ The Court waxed eloquently on the value of “[t]he State’s interest in providing for the well-being of illegitimate children

292. 440 U.S. 268 (1979).

293. *Id.* at 270 n. 1.

294. *Id.* at 279 (quoting *Califano*, 430 U.S. at 316–317).

295. *Id.* at 282–283.

296. 441 U.S. 380 (1979).

297. *Id.* at 394.

298. *Id.* at 385.

299. *Id.* at 388 (quoting *Craig*, 429 U.S. at 197).

300. *Id.* (alteration in original).

301. *Id.* at 389.

302. *Id.*

303. *Id.*

304. *Id.* at 390–391.

. . . .”³⁰⁵ Nevertheless, it found that the gender-based classification “as illustrated by this case, does not bear a substantial relation to the State’s interest in providing adoptive homes for its illegitimate children.”³⁰⁶ This was so because “[t]his impediment to adoption usually is the result of a natural parental interest shared by both genders alike.”³⁰⁷

All of this led the Court to conclude that “no showing has been made that the different treatment afforded unmarried fathers and unmarried mothers . . . bears a substantial relationship to the proclaimed interest of the State in promoting the adoption of illegitimate children.”³⁰⁸ The New York law was described as “another example of ‘overbroad generalizations’ in gender-based classifications.”³⁰⁹

This then is the apparent genesis of the “exceedingly persuasive justification” requirement for gender-based classifications. Readers can decide for themselves, but from the Author’s point of view this is simply an example of incautious draftsmanship. All of the cases discussed above³¹⁰ that were relied on by Justice Stewart³¹¹ seem merely to be more or less straightforward examples of the very familiar heightened scrutiny.³¹² In *Craig*, the statistics relied on by the State to support the gender-based classification in the drinking age were simply inadequate.³¹³ In *Reed*,³¹⁴ administrative convenience was simply not important enough to support a gender-based classification.³¹⁵ In *Frontiero*, a majority of the Court refused to go along with making a gender-based classification suspect,³¹⁶ which *would* have made the “exceedingly persuasive justification” language more appropriate.³¹⁷

In *Weinberger*,³¹⁸ the only real government concern was saving money by paying benefits to widowers only upon a showing of

305. *Id.* at 391.

306. *Id.*

307. *Id.* at 391–392.

308. *Id.* at 393 (citation omitted).

309. *Id.* at 394.

310. *Supra* nn. 259–309 and accompanying text.

311. Review the text accompanying *supra* note 257.

312. See e.g. *supra* n. 251 (explaining the intermediate scrutiny test).

313. 429 U.S. at 208–209.

314. *Supra* nn. 261–269 and accompanying text.

315. 404 U.S. at 76–77.

316. 411 U.S. at 678–692.

317. *Supra* nn. 270–276 and accompanying text.

318. *Supra* nn. 277–280 and accompanying text.

dependency on the deceased spouse, a requirement that was not placed upon widows.³¹⁹ Looked at from the point of view of the wage earner, this was found to be irrational.³²⁰ Exactly the same thing may be said for the plurality in *Califano*.³²¹ Neither case remotely suggested the requirement of “exceedingly persuasive justification;” merely something more than irrationality was suggested.³²² The results of the last two cases relied on by Justice Stewart, *Orr*,³²³ and *Caban*,³²⁴ were founded on the Court’s refusal to allow gender-based classifications to be predicated on what it considered outdated gender stereotypes and overbroad generalizations.³²⁵

In short, at least from the Author’s perspective, none of the cases support the “exceedingly persuasive justification” proposition which Justice Stewart used in *Feeney*.³²⁶ And, when one considers that *Feeney* did not even involve an overt gender-based classification, but rather a veteran — non-veteran classification,³²⁷ the use of the phrase seems particularly unfortunate. After all, what the Court really decided in that case was that the veteran–non-veteran classification was not a mask for a government purpose to discriminate against women in government hiring.³²⁸

In *Hogan*,³²⁹ Justice O’Connor cited *Kirchberg v. Feenstra*,³³⁰ which involved part of Louisiana’s community property law that gave “the husband exclusive control over the disposition of community property”³³¹ This obviously amounted to a gender-based classification.³³² When such a classification exists, said the Court, “the burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an ‘exceedingly persuasive justification’ for the challenged classification.”³³³ For this proposition, the Court cited Justice Stewart’s use, appar-

319. 420 U.S. at 637–638.

320. *Id.* at 651–652.

321. *Supra* nn. 281–287 and accompanying text.

322. *Califano*, 430 U.S. at 217; *Weinberger*, 420 U.S. at 651–652.

323. *Supra* nn. 292–295 and accompanying text.

324. *Supra* nn. 296–309 and accompanying text.

325. *Caban*, 441 U.S. at 394; *Orr*, 440 U.S. at 279–280.

326. For Justice Stewart’s conclusion, review the text accompanying *supra* note 257.

327. *Feeney*, 442 U.S. at 280–281.

328. *Id.*

329. For Justice O’Connor’s comment on “exceedingly persuasive justification,” review the text accompanying *supra* notes 254–255.

330. 450 U.S. 455 (1981).

331. *Id.* at 459.

332. *Id.* at 459–460.

333. *Id.* at 461.

ently for the first time,³³⁴ of that phrase in *Feeney*.³³⁵ The Court in *Kirchberg* also favored the reader with a “see also” to *Wengler*.³³⁶ That case involved the same type of gender-based classification found in *Frontiero*,³³⁷ *Weinberger*,³³⁸ and *Califano*.³³⁹ *Wengler* was not entitled to death benefits from his deceased wife’s insurance plan unless “he either [was] mentally or physically incapacitated from wage earning or prove[d] actual dependence on his wife’s earnings.”³⁴⁰ A wife would not have to prove such dependency.³⁴¹ The classification failed, as it had in *Frontiero*, *Weinberger*, and *Califano*.³⁴² However, the *Wengler* opinion, on the page cited by the Court in *Kirchberg*,³⁴³ contained what may be a clue as to the true meaning of “exceedingly persuasive justification,” even though that phrase is not used by the Court in *Wengler*. In cases where the law provided for death or similar benefits for a wife without proof of dependency upon her husband, while in a similar situation, the husband would have to prove some sort of dependency, administrative convenience is one of the purposes.³⁴⁴ In discussing that purpose, the Court made the following comment:

It may be that there are levels of administrative convenience that will *justify* discriminations that are subject to heightened scrutiny under the Equal Protection Clause, but the requisite showing has not been made here by the mere claim that it would be inconvenient to individualize determinations about widows as well as widowers.³⁴⁵

The Court was saying that administrative convenience might be justification enough in some cases, but not in the one before it. Thus, the justification (read purpose) would have to rise to the level required by the intermediate level of scrutiny used in gender-based classification cases — important or substantial. If that is what the

334. Review the text accompanying *supra* note 256.

335. *Kirchberg*, 450 U.S. at 461.

336. *Id.* (citing *Wengler*, 446 U.S. at 151).

337. *Supra* nn. 270–276 and accompanying text.

338. *Supra* nn. 277–280 and accompanying text.

339. *Supra* nn. 283–291 and accompanying text.

340. *Wengler*, 446 U.S. at 144–145.

341. *Id.* at 145–146.

342. *Supra* nn. 270–291 and accompanying text.

343. *Wengler*, 446 U.S. at 151.

344. *Id.* at 152.

345. *Id.* (emphasis added).

court in *Kirchberg* meant when it cited *Wengler*,³⁴⁶ then “exceedingly persuasive justification” is simply another way of saying “important” or “substantial” purpose. In fact, earlier in the *Wengler* opinion, the Court had referred to this intermediate level of scrutiny in the usual way “[to] serve important governmental objectives and that the [gender classification] employed must be substantially related to the achievement of those objectives.”³⁴⁷

Be that as it may, it is problematic if the more recent incantations of “exceedingly persuasive justification” are intended as merely a new way of restating the purpose part of the old test. At this point in the analysis, it is time to shift our focus to the case that seemingly first drew serious attention to the use of the phrase “exceedingly persuasive justification,” *United States v. Virginia*,³⁴⁸ the Virginia Military Institute (VMI) case.³⁴⁹ At issue was the constitutional validity of VMIs all male student body.³⁵⁰

Justice Ginsburg, for the Court, used the phrase “exceedingly persuasive justification” early and often.³⁵¹ It first appeared in the context of a reference to *Hogan*,³⁵² which the federal district court, the first time it heard the case,³⁵³ “recognized was the closest guide.”³⁵⁴ The Court pointed out that in *Hogan* it had “underscored that a party seeking to uphold government action based on sex must

346. *Supra* n. 336; *infra* n. 349 and accompanying text.

347. 446 U.S. at 150.

348. 518 U.S. 515 (1996).

349. *Id.* at 558–559 (Rehnquist, C.J., concurring).

Two decades ago in *Craig*, we announced that “to withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.” We have adhered to that standard of scrutiny ever since. While the majority adheres to this test today, it also says that the [State] must demonstrate an “exceedingly persuasive justification” to support a gender-based classification. It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test.

While terms like “important governmental objective” and “substantially related” are hardly models of precision, they have more content and specificity than does the phrase “exceedingly persuasive justification.” That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself.

Id. (citations omitted) (first alteration in original).

350. *Id.* at 523.

351. This phrase has been used at least half seriously to describe voting behavior. *Political Quotations* 44 (Daniel B. Baker ed., Gale Research, Inc. 1990) (quoting William Porcher Miles, Speech (U.S. H. of Rep., Mar. 31, 1858)).

352. *Va.*, 518 U.S. at 523.

353. *Id.*

354. *Id.* at 523–524 (citation omitted).

establish an ‘exceedingly persuasive justification’ for the classification.”³⁵⁵ Then, the court appeared to equate the phrase to the accepted test by which gender classifications are measured. “To succeed, the defender of the challenged action must show ‘at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’”³⁵⁶ The second time the phrase appeared in Justice Ginsburg’s opinion was in her reference to Senior Circuit Judge J. Dickson Phillips’s dissent from the Court of Appeals’s approval of the Virginia plan to create a leadership program strictly for women at Mary Baldwin College.³⁵⁷ Attacking Virginia’s articulated purposes for its programs at VMI and Mary Baldwin College,³⁵⁸ Judge Phillips believed that to hold Virginia “to its appropriate stringent burden of justification, (must be ‘exceedingly persuasive’) would . . . reveal a quite different *actual* purpose.”³⁵⁹ This “actual” purpose, the judge believed, was “not to create a new type of educational opportunity for women [at Mary Baldwin College], nor to broaden [Virginia’s] educational base”³⁶⁰ Rather, the real purpose was “to allow VMI to continue to exclude women in order to preserve its historic character and mission as that is perceived and has been primarily defined . . . by VMI and directly affiliated parties.”³⁶¹

Thus, Judge Phillips put a truly interesting spin on the phrase “exceedingly persuasive justification.” Rather than suggesting that it is merely another way of saying “important” or some higher level purpose, he appeared to use it to suggest that Virginia’s announced purposes were not the real ones.³⁶²

Then, Justice Ginsburg went about the serious business of using the necessity of Virginia’s requiring an “exceedingly persuasive justification” for keeping VMI all male to insure that it could not remain so.³⁶³ She began by “not[ing], once again, the core instruction of this Court’s pathmarking decisions in *J.E.B. v. Alabama ex rel. T.B. and [Hogan]*”³⁶⁴ That core instruction stated, “Parties who

355. *Id.* at 524 (citing *Hogan*, 458 U.S. at 724).

356. *Id.* (internal quotation marks omitted by the Court).

357. *Id.* at 529.

358. *U.S. v. Va.*, 44 F.3d 1229, 1247 (4th Cir. 1995) (Phillips, J., dissenting).

359. *Id.* (citing *Hogan*, 458 U.S. at 724) (emphasis in original).

360. *Id.*

361. *Id.*

362. *Id.*

363. *Va.*, 518 U.S. at 531 (citations omitted).

364. *Id.* (citations omitted).

seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”³⁶⁵

Having made this three-word phrase the apparent linchpin of her whole argument, she set about to mold the existing body of gender-based precedent around the new standard. The logical place to begin was the history of gender-based classifications.

Today’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, “our Nation has had a long and unfortunate history of sex discrimination.” Through a century plus three decades and more of that history, women did not count among voters composing “We the People”; not until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any “basis in reason” could be conceived for the discrimination.³⁶⁶

Next, the Court recognized the importance of *Reed*³⁶⁷ and selective examples of its progeny.³⁶⁸

Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature — equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.³⁶⁹

Then, the heavy work began in what could be read as an attempt to nudge gender-based classifications closer to the strict scrutiny accorded to the suspect classifications of race, alienage, and national origin. “Without equating gender classifications, *for all purposes*, to classifications based on race or national origin, the

365. *Id.*

366. *Id.* at 531–532 (citations and footnote omitted).

367. *Id.* at 532.

368. *Id.* at 532–534.

369. *Id.* at 532.

Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men).³⁷⁰

The reader should note the thinly veiled suggestion that for some purposes a gender-based classification may be “equated” to two of the three suspect classifications. Why not alienage as well? Could it be that two exceptions to the use of strict scrutiny have eaten into that classification in ways that might suggest somewhat similar unwelcome approaches to gender-based classifications? Footnote 6 in the opinion is also of considerable interest. “The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin, but last Term observed that strict scrutiny of such classifications is not inevitably ‘fatal in fact.’³⁷¹ The reference to *Adarand Constructors, Incorporated v. Pena*,³⁷² again leaves out alienage. But of greater moment is the idea that “strict scrutiny . . . is not inevitably ‘fatal in fact.’³⁷³ What is the relevance of this to her apparent thought that sometimes gender-based classifications might be equated to classifications that do trigger strict scrutiny? Could it be that the message is even if scrutiny of gender-based classifications becomes more strict, it won’t *always* cause the classification to be found unconstitutional?³⁷⁴

Justice Ginsburg then summarized the Court’s current directions for cases of official classification based on gender.³⁷⁵ “Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is ‘exceedingly persuasive.’ The burden of justification is demanding and it rests entirely on the State.”³⁷⁶

Thus, having laid the apparent groundwork for at least some degree of more exacting scrutiny than had gone before, Justice

370. *Id.* (footnote omitted) (emphasis added).

371. *Va.*, 518 U.S. at 532 n. 6 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)) (internal quotation marks omitted by the court).

372. 515 U.S. 200 (1995).

373. *Id.*

374. Rather than being too easily taken in by this, the reader should recall the words of Justice Marshall.

If a statute invades a “fundamental” right or discriminates against a “suspect” class, it is subject to strict scrutiny. If a statute is subject to strict scrutiny, the statute always, or nearly always, is struck down. Quite obviously, the only critical decision is whether strict scrutiny should be invoked at all.

Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting) (citation omitted).

375. *Va.*, 518 U.S. at 532–533.

376. *Id.* (quoting *Hogan*, 485 U.S. at 724). The reader will note the third use of the phrase, “exceedingly persuasive justification.”

Ginsburg then recited the standard test for gender-based classifications as modified by Justice O'Connor in *Hogan*.³⁷⁷

The State must show “at least that the challenged classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.³⁷⁸

Justice Ginsburg stated the obvious as dictated by the current state of constitutional law and common sense.

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed “inherent differences” are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: “The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both.”³⁷⁹

She continued, reminiscent of Spencer Tracy in *Adam’s Rib*,³⁸⁰ “[i]nherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”³⁸¹

377. Review *supra* notes 254–255 and accompanying text.

378. *Va.*, 518 U.S. at 533 (citation omitted).

379. *Id.* (citations omitted).

380. The film ends as follows:

Amanda: All right, but, but what does that show? What have you proved?

Adam: It shows the score.

Amanda: Shows that what I said was true. There’s no difference between the sexes.

Men, women. The same.

Adam: They are, huh?

Amanda: (retreating) Well, maybe there *is* a difference. But it’s a *little* difference.

Adam: Well, you know as the French say.

Amanda: What do they say?

Adam: *Vive la difference*.

Amanda: Which means?

Adam: Which means: ‘Hurray for that little difference!’

Adam’s Rib (MGM 1949) (motion picture).

381. *Va.*, 518 U.S. at 533.

Such classifications can, to be sure, “compensate women ‘for particular economic disabilities [they have] suffered’”³⁸² They can also be used “to ‘promot[e] equal employment opportunity’”³⁸³ They can, additionally, be used “to advance full development of the talent and capacities of our Nation’s people”³⁸⁴ However, gone were the days when gender-based classifications could be used “to create or perpetuate the legal, social, and economic inferiority of women.”³⁸⁵

Surfing through Virginia’s justifications (obviously, not “exceedingly persuasive” ones), the Court arrived at the argument that women simply could not cope with the program at VMI.³⁸⁶ It is here that, as in *Wengler*,³⁸⁷ the possibility of a different meaning of the phrase “exceedingly persuasive justification” appears, although not the same one. Justice Ginsburg noted that

[t]he United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court’s turning point decision in *Reed*, we have cautioned reviewing courts to take a “hard look” at generalizations or “tendencies” of the kind pressed by Virginia, and relied upon by the District Court. State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on “fixed notions concerning the roles and abilities of males and females.”³⁸⁸

It was argued by Virginia that “VMI’s adversative method of training provides educational benefits that cannot be made available, unmodified, to women.”³⁸⁹

Alterations to accommodate women would necessarily be “radical,” so “drastic,” Virginia asserts, as to transform, indeed “destroy,” VMI’s program. Neither sex would be favored by the

382. *Id.* (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977)) (alteration in original).

383. *Id.* (quoting *Cal. Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 289 (1987)) (first alteration in original).

384. *Id.*

385. *Id.* at 534.

386. *Id.* at 540. “Virginia next argues that VMI’s adversative method of training provides educational benefits that cannot be made available, unmodified, to women.” *Id.*

387. For a discussion of the *Wengler* opinion and the meaning of “exceedingly persuasive justification,” review the text accompanying *supra* notes 343–347.

388. *Va.*, 518 U.S. at 541–542 (citations omitted).

389. *Id.* at 540.

transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would “eliminat[e] the very aspects of [the] program that distinguish [VMI] from . . . other institutions of higher education in Virginia.”³⁹⁰

This argument is illuminated by findings made by the district court.

In support of its initial judgment for Virginia, a judgment rejecting all equal protection objections presented by the United States, the District Court made “findings” on “gender-based developmental differences.” These “findings” restate the opinions of Virginia’s expert witnesses, opinions about typically male or typically female “tendencies.” For example, “[m]ales tend to need an atmosphere of adversativeness,” while “[f]emales tend to thrive in a cooperative atmosphere.” “I’m not saying that some women don’t do well under [the] adversative model,” VMI’s expert on educational institutions testified, “undoubtedly there are some [women] who do”; but educational experiences must be designed “around the rule,” this expert maintained, and not “around the exception.”³⁹¹

In its simplest terms, one possible interpretation of the phrase “exceedingly persuasive justification” is that it is the standard by which the gravity of the government’s purpose is measured when that purpose is a generally disfavored one if supported by a gender-based classification. Thus, *Wengler*, as read by the Court in *Kirchberg*,³⁹² suggests that the purpose of administrative convenience when achieved by a gender-based classification is so disfavored that “exceedingly persuasive justification” for that purpose is required.³⁹³

Similarly, as in *VMI*, a government purpose or justification predicated upon traditional views of women’s capabilities and “tendencies” to justify a gender-based classification must be

390. *Id.* (citations omitted) (alterations in original).

391. *Id.* at 541 (citations omitted) (internal quotation marks omitted by the court).

392. For the court’s interpretation of *Wengler*, review the text accompanying *supra* notes 343–347.

393. Review the text accompanying *supra* notes 343–347.

“exceedingly persuasive.”³⁹⁴ It was not.³⁹⁵ “The [State’s] justification for excluding all women from ‘citizen-soldier’ training for which some are qualified . . . cannot rank as ‘exceedingly persuasive,’ as we have explained and applied that standard.”³⁹⁶

This view is strengthened by the absence of the phrase from cases where the purpose or “justification,” for discriminating based on gender is to remediate past wrongs perceived to have been suffered by women. Two examples will suffice to illustrate the point. Both are cited by the Court in *Hogan*,³⁹⁷ which was heavily used by the Court in *VMI*.³⁹⁸ The first case is *Schlesinger v. Ballard*.³⁹⁹ It is one of the classic gender-based affirmative action cases. “Congress provided to female line naval officers a longer period of time in which to be promoted from lieutenant to lieutenant commander.”⁴⁰⁰ The reason, or “justification,” “was the recognition by Congress that not then being eligible for combat and most sea duty a female officer would normally need longer in order to be selected for promotion.”⁴⁰¹ The justification for this gender-based classification did not have to overcome the apparently high hurdle of being “exceedingly persuasive,” rather it was described merely as “complete rationality.”⁴⁰² Rather than the thinly veiled hostility toward certain government purposes supported by gender-based classifications,⁴⁰³ the government’s purpose in favoring female naval officers over male ones was clearly thought to be praiseworthy.⁴⁰⁴

[T]he operation of the statutes in question results in a flow of promotions commensurate with the Navy’s current needs and serves to motivate qualified commissioned officers to so conduct themselves that they may realistically look forward to higher levels of command.⁴⁰⁵

394. *Va.*, 518 U.S. at 541.

395. *Id.* at 545.

396. *Id.*

397. 458 U.S. at 718.

398. *Va.*, 518 U.S. at 531.

399. 419 U.S. 498 (1975).

400. Marks, *supra* n. 5, at 342.

401. *Id.*

402. *Schlesinger*, 419 U.S. at 509.

403. This hostility was evidenced by the “exceedingly persuasive justification” hurdle.

404. *Schlesinger*, 419 U.S. at 510.

405. *Id.*

The other case, *Califano v. Webster*,⁴⁰⁶ illustrates the point that the exceedingly persuasive language is missing from cases remediating past wrongs against women. There, under the Social Security system as it then existed,⁴⁰⁷

[A] female wage earner could exclude from the computation of her “average monthly wage” three more low earning years than a similarly situated male wage earner could exclude. This would result in a slightly higher “average monthly wage” and a correspondingly higher level of monthly old-age benefits for the retired female wage earner.⁴⁰⁸

As in *Schlesinger*,⁴⁰⁹ the Court was obviously favorably disposed toward the “justification.” “Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective.”⁴¹⁰

Thus, such a purpose or justification was easily identified as important using the generally accepted test of important purpose and real and substantial relation of means to purpose. However, there would be no reason to label it as “exceedingly persuasive” since that label appears to be the measure for purposes or justifications that are not viewed favorably by the Court.

Of course, the possibility remains that the use of the phrase “exceedingly persuasive justification” is the opening salvo of a new attempt to boost the scrutiny of gender-based classifications close to, if not identical with, the strict scrutiny applied to the current three suspect classifications — race, alienage, and national origin.⁴¹¹

In this regard consider Justice Ginsburg’s concurring opinion in *Harris v. ForkLift Systems, Incorporated*.⁴¹²

Indeed, even under the Court’s equal protection jurisprudence, which requires “an exceedingly persuasive justification” for a gender-based classification, it remains an open question

406. 430 U.S. 313 (1977).

407. In 1972 the system was changed to eliminate the provision at issue in *Webster*. *Id.* at 315 n. 2.

408. *Id.* at 315–316.

409. *Supra* nn. 399–405 and accompanying text.

410. *Webster*, 430 U.S. at 317.

411. *Frontiero*, 411 U.S. at 682 (plurality) (footnotes omitted).

412. 510 U.S. 17 (1993).

whether “classifications based upon gender are inherently suspect.”⁴¹³

The reference to *Hogan* in pertinent part is as follows:

Thus, we apply the test previously relied upon by the Court to measure the constitutionality of gender-based discrimination. Because we conclude that the challenged statutory classification is not substantially related to an important objective, we need not decide whether classifications based upon gender are inherently suspect.⁴¹⁴

The referenced portion of *Stanton v. Stanton*⁴¹⁵ is of similar import.⁴¹⁶

Justice Blackmun in *J.E.B.* again made reference to the supposed unanswered question.⁴¹⁷

Because we conclude that gender-based peremptory challenges are not substantially related to an important government objective, we once again need not decide whether classifications based on gender are inherently suspect. (“[I]t remains an open question whether ‘classifications based on gender are inherently suspect’”).⁴¹⁸

The VMI case arguably suggests that the Court is moving toward answering the “undecided question” by shifting the balancing tests used in gender-based classifications closer to the strict scrutiny of the compelling governmental interest test.⁴¹⁹ If this is the case, perhaps the Court should think again about the words of Justice Powell in *Frontiero*.⁴²⁰

413. *Id.* at 26 n. * (citations omitted) (internal quotation marks omitted by the court).

414. *Hogan*, 458 U.S. at 724 n. 9 (citing *Stanton v. Stanton*, 421 U.S. 7, 13 (1975)).

415. 421 U.S. 7 (1975).

416. “We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect.” *Id.* at 13.

417. For the court’s “core instruction” in *J.E.B.*, review the text accompanying *supra* notes 364–365.

418. 511 U.S. at 137 n. 6 (citation omitted) (alteration in original).

419. *Frontiero*, 411 U.S. at 682.

420. For a portion of Justice Powell’s opinion, review the text accompanying *supra* note 276. Would it “reflect appropriate respect for duly prescribed legislative processes” to make gender-based classifications a fourth suspect classification, or close to it when the requisite number of states refused to ratify the Equal Rights Amendment? *Id.* at 692 (Powell, J., concurring).

IV. SIMILARITY OF SITUATION, LIKE BEAUTY IS “IN THE EYE OF THE BEHOLDER”⁴²¹

I made the following comment in the original *Three Ring Circus* article:

Although the Supreme Court purports to utilize the same middle level scrutiny in gender based classifications as in those based on legitimacy of birth, the “real and substantial” effectiveness factor has, in the former, taken on more content. This is because it can be equated to an everpresent circumstance in gender cases, males and females either are or are not “similarly situated” regarding the state’s purpose for classification on that basis. Virtually without exception, this factor is an accurate predictor of the outcome. If there is factual similarity of situation there can be no “real and substantial” reason for treating the two sexes differently. If, on the other hand, there is a real difference which forms the basis for the classification, then there is indeed a real and substantial reason that supports the classification.⁴²²

Because of the subjectiveness and imprecision of the “real and substantial” effectiveness part of the balancing test,⁴²³ it is highly tempting to assume that “similarity of situation” is a truly meaningful predictor of the existence or nonexistence of a real and substantial relationship in every case. I came very close to such an assumption in the original article when I said, “Virtually without exception, this factor is an accurate predictor.”⁴²⁴ This is a true statement, but I now believe it assumed too much if taken to mean that in every situation all would agree that similarity of situation either did or did not exist. To put it differently, once a court, in a case involving a gender-based classification, has decided whether the two sexes are similarly situated regarding the purpose supported by the gender-

421. “Beauty is altogether in the eye of the beholder.” Gorton Carruth & Eugene Ehrlich, *The Harper Book of American Quotations* 97 (Harper & Row 1988) (quoting Lew Wallace, *The Prince of India* (1893)).

422. Marks, *supra* n. 5, at 341.

423. The test has been stated many times. In *Orr*, the Court described it this way, “Classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.” 440 U.S. at 279 (quoting *Webster*, 430 U.S. at 316–317).

424. Marks, *supra* n. 5, at 341.

based classification, then the predictor works every time. However, before this can come to pass, the court must look at the facts and decide whether similarity of situation exists or not. It is at that point that considerable subjectivity still frequently exists.

To illustrate the point, let us first consider the three cases used for illustration in the original article.⁴²⁵ *Reed* presents a situation of relatively low subjectivity. Under the statutory classification attacked in *Reed*, the father and mother of a deceased child would have been equally entitled to be the administrator of the estate of their deceased child⁴²⁶ had not the applicable statute also provided “that ‘[o]f several persons claiming and equally entitled to administer, males must be preferred to females’”⁴²⁷ Since neither the father nor the mother was “under any legal disability,”⁴²⁸ they were clearly “similarly situated.”⁴²⁹ Therefore, there was no real and substantial relationship between means and purpose, and the statute was held to violate the Equal Protection Clause.⁴³⁰ In other words, if males and females are the same regarding the purpose of the statute, then there is no good reason to treat them differently and the statute cannot satisfy the intermediate balancing test applied to gender-based classifications.

Reed also presents an opportunity to illustrate the great subjectivity of real and substantial relationship of means to purpose, the intermediate level of scrutiny used with gender-based classification.⁴³¹ The purpose of the law was administrative convenience; “[T]he objective [was to] reduc[e] the workload on probate courts by eliminating one class of contests.”⁴³² Viewed as a matter of pure logic, preferring males over females, all other things being equal, has both a very real and a very substantial relationship to the purpose of administrative convenience. To simply say that such a relationship did not exist in order to make the test work in a way the court wanted is not only highly subjective, but also illogical. However, when “similarity of situation” becomes the determination of whether there exists a real and substantial relationship of means to purpose, the illogical and subjective fade away.

425. *Id.* at 341–344.

426. 404 U.S. at 72.

427. *Id.* at 73 (citation omitted) (alteration in original).

428. *Id.*

429. *Id.* at 77.

430. *Id.*

431. Marks, *supra* n. 5, at 341.

432. *Reed*, 404 U.S. at 76.

The reader will, of course, recognize the test has been applied to the *Reed* facts even though in its finished form, it did not exist when *Reed* was decided. The Court actually applied a confusing mix of reasoning factors⁴³³ and seems to have ended up by saying, admittedly not in a very clear way, that administrative convenience is not an important enough purpose to be served by a gender-based classification.⁴³⁴

The next case, *Schlesinger*, is the type of situation where the measure of real and substantial relationship is fairly objective and the non-similarity of situation is crystal clear. The Author will borrow the facts as stated in the original *Three Ring Circus* article.

Congress provided to female line naval officers a longer period of time in which to be promoted from lieutenant to lieutenant commander than was given to male line naval officers. The reason was the recognition by Congress that not then being eligible for combat and most sea duty a female officer would normally need longer in order to be selected for promotion.⁴³⁵

Since Congress's purpose was to improve equality in promotion opportunities for line naval lieutenants,⁴³⁶ there was a clear real and substantial relationship between the additional time given to female

433. *Id.* at 75–76.

The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the statute].

Id. (citation omitted).

434. *Id.* at 76.

Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether [the statute] advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . .

Id.

435. Marks, *supra* n. 5, at 342.

436. For a comparison to the purpose in *Reed*, review the text accompanying *supra* note 432.

lieutenants and the purpose.⁴³⁷ The non-similarity of situation between male and female lieutenants clearly predicted the existence of that real and substantial relationship.⁴³⁸

[T]he different treatment of men and women naval officers . . . reflects . . . the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service. . . . Thus, in competing for promotion, female lieutenants will not generally have compiled records of seagoing service comparable to those of male lieutenants. . . . Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with “fair and equitable career advancement programs.”⁴³⁹

Clearly, then, in *Schlesinger*, judicial subjectivity in identifying similarity of situation or its absence was not a significant concern.

The third case, *Michael M. v. Superior Court of Sonoma County*,⁴⁴⁰ presents a situation with serious subjectivity problems. As suggested in the original *Three Ring Circus* article, California sought to reduce illegitimate teenage pregnancy by making the male participant in the consensual sexual intercourse criminally liable (statutory rape).⁴⁴¹ The purpose was concededly important⁴⁴² and non-similarity of situation existed.⁴⁴³

437. *Schlesinger*, 419 U.S. at 508.

438. *Id.*

439. *Id.* (citations omitted).

440. 450 U.S. 464 (1981) (plurality).

441. Marks, *supra* n. 5, at 343.

442. *Id.* The separate opinions followed suit in one way or another. Justice Stewart concurred in the plurality opinion and, thus, its finding of important purpose. *Michael M.*, 450 U.S. at 476–481 (Stewart, J., concurring). Justice Blackmun, in concurring with the judgment, but not the opinion of the plurality, conceded that he was following the standard test by which the constitutionality of gender-based classifications are measured and thus must have found the State’s purpose in preventing illegitimate teenage pregnancies to be important. *Id.* at 483 (Blackmun, J., concurring). Justice Brennan, *arguendo* “assum[ed] that the prevention of teenage pregnancy is an important governmental objective” *Id.* at 490–491. (Brennan, White, & Marshall, JJ., dissenting). Justice John Paul Stevens conceded that “[t]he societal interests in reducing the incidence of venereal disease and teenage pregnancy are sufficient, in my judgment, to justify a prohibition of conduct that increases the risk of those harms.” *Id.* at 497 (Stevens, J., dissenting).

443. *Id.*

The means selected, criminalizing the conduct of the male, but not the female, was held to have an adequate relationship to the state's purpose because, only the female could become pregnant. Pregnancy, with all its attendant problems, was a deterrent to her conduct not shared with the male. Thus, the two sexes were not similarly situated in terms of incentive to avoid sexual intercourse that could lead to pregnancy.⁴⁴⁴

Thus, the means had a real and substantial relationship to the purpose and the law was upheld.⁴⁴⁵

Only four justices seemed to rely on the non-similarity of situation.⁴⁴⁶ Justice Blackmun, concurring only in the judgment, mainly used his opinion to criticize the plurality for not being in agreement with his views on abortion.⁴⁴⁷ He did "reluctantly"⁴⁴⁸ vote to affirm Michael M.'s conviction on the basis of the standard test by which the constitutionality of gender-based classification are measured.⁴⁴⁹ No mention was made of the similarity of situation although *Schlesinger* was cited.⁴⁵⁰

Justice Brennan wrote the principal dissent.⁴⁵¹ Although he recognized the form of mid-level scrutiny applied to gender-based classifications,⁴⁵² he gave the appearance of seriously distorting it by suggesting that the means selected by the government to achieve the purpose could not have a real and substantial relationship to that purpose unless it could be shown that "a gender-neutral statute would be a less effective means of achieving [the government's important purpose]."⁴⁵³ It is somewhat difficult to see how this suggestion is anything more than an attempt to lay the groundwork for increasing the means part of the test from "real and substantial relationship" to "necessary relationship."⁴⁵⁴ Of course, it was Justice Brennan who pushed for gender to be elevated to a suspect classification in *Frontiero*, even though in *Michael M.* he paid at least lip

444. Marks, *supra* n. 5, at 343.

445. *Michael M.*, 450 U.S. at 476 (plurality).

446. Marks, *supra* n. 5, at 343.

447. *Michael M.*, 450 U.S. at 481-484 (Blackmun, J., concurring).

448. *Id.* at 487.

449. *Id.* at 483.

450. *Id.*

451. Justice Brennan was joined by Justices White and Marshall. *Id.*

452. *Michael M.*, 450 U.S. at 489-490.

453. *Id.* at 490.

454. The existence of less drastic means quite logically suggests that the means selected by the government to achieve its purpose are not necessary.

service to intermediate scrutiny.⁴⁵⁵ However, as will be seen, there may be a more innocent explanation.⁴⁵⁶ It is the two cases he cited that gave rise to it.⁴⁵⁷

In *Wengler*, at issue was a Missouri law that made a widow automatically entitled to spousal death benefits⁴⁵⁸ while a widower was entitled to those benefits only “[if] he either is mentally or physically incapacitated from wage earning or proves actual dependence on his wife’s earnings.”⁴⁵⁹ The language in *Wengler*, upon which Justice Brennan appeared to rely, finds no empirical support for the different treatment of widows and widowers and for “what the economic consequences to the State or the beneficiaries might be if, in one way or another, men and women . . . were treated equally.”⁴⁶⁰ As tempting as it might be to suggest that this is a search for less drastic means, what it really appears to be is an admission by the *Wengler* court that it could not determine whether widows and widowers were or were not similarly situated regarding the need for benefits from workers compensation. This view is strengthened by the Courts earlier finding in *Wengler* that male and female wage earners clearly are similarly situated.⁴⁶¹

The Missouri law indisputably mandates gender-based discrimination. Although the Missouri Supreme Court was of the view that the law favored, rather than disfavored, women, it is apparent that the statute discriminates against both men and women. The provision discriminates against a woman covered by the Missouri workers’ compensation system since, in the case of her death, benefits are payable to her spouse only if he is mentally or physically incapacitated or was to some extent dependent upon her. Under these tests, Mrs. Wengler’s spouse was entitled to no benefits. If Mr. Wengler had died, however, Mrs. Wengler would have been conclusively presumed to be dependent and would have been paid the statutory amount for life or until she remarried even though she may not in fact have been dependent on Mr. Wengler. The benefits, therefore, that the working woman can expect to be paid to her spouse in the

455. *Id.* at 489–490.

456. *Infra* nn. 458–468 and accompanying text.

457. *Michael M.*, 450 U.S. at 489–490 (citing *Wengler*, 446 U.S. at 151–152 and *Orr*, 440 U.S. at 281–283).

458. 446 U.S. at 145–146.

459. *Id.* at 144–145.

460. *Id.* at 152.

461. *Id.* at 147.

case of her work-related death are less than those payable to the spouse of the deceased male wage earner.

It is this kind of discrimination against working women that our cases have identified and in the circumstances found unjustified.⁴⁶²

For the actual words, “similarly situated,” the Court quoted Justice Brennan’s plurality opinion in *Califano*.⁴⁶³

[The] provision providing survivors’ benefits to a widow regardless of dependency, but providing the same benefits to a widower only if he had been receiving at least half of his support from his deceased wife . . . disadvantaged women as compared to *similarly situated* men by providing the female wage earner with less protection for her family than it provided the family of a male wage earner even though the family needs might be identical.⁴⁶⁴

In the other case, *Orr*, the Court struck down an Alabama law that provided alimony to the former wife, upon divorce, but not to the former husband.⁴⁶⁵ As in *Wengler*, the Court recognized that intermediate scrutiny was the proper test.⁴⁶⁶ Since under the Alabama law “individualized hearings at which the parties’ relative financial circumstances are considered *already* occur,”⁴⁶⁷ the mechanism was already in place to determine whether or not similarity of situation does or does not exist. That being the case, the following language on which Justice Brennan in *Michael M.* apparently relied is not so much a search for less drastic means as it is taking advantage of an established procedure to determine the existence of similarity of situation on an individualized basis.

Where, as here, the State’s compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex. And this is doubly so where the

462. *Id.*

463. *Id.* at 148–149 (citing 430 U.S. at 199).

464. *Id.* (emphasis added).

465. 440 U.S. at 270.

466. *Id.* at 278–279.

467. *Id.* at 281 (emphasis added).

choice made by the State appears to redound—if only indirectly — to the benefit of those without need for special solicitude.⁴⁶⁸

So then, it is probably fair to say that what appeared to be a search for less drastic means in Justice Brennan's dissent in *Michael M.* may, in reality, have been nothing more than an attempt to clarify the problem of similarity of situation.

Finally, turning to Justice Stevens's dissent in *Michael M.*, it appears that his unhappiness with the result is that he believed that the non-similarity of situation found by the plurality was more apparent than real.⁴⁶⁹ The following words sum it up: "I regard a total exemption for the members of the more endangered class [females] as utterly irrational."⁴⁷⁰ If further evidence is needed, consider the view of Justice Stevens that "[a] rule that authorizes punishment of only one of two equally guilty wrongdoers violates the essence of the constitutional requirement that the sovereign must govern impartially."⁴⁷¹

Clearly then, in *Michael M.*, the existence or nonexistence of similarity of situation is very much in the eye of the beholder. A look at one other case will further illustrate the point.

Califano involved the constitutionality of a federal law that provided survivors death benefits to a widow without proof of dependency, but to a widower only upon proof of dependency.⁴⁷² The plurality found the similarity of situation, which would doom the law, by focusing upon the male and female wage earner.⁴⁷³ "[T]he gender-based differentiation created by [the law] that results in the efforts of female workers required to pay social security taxes producing less protection for their spouses than is produced by the efforts of men is forbidden by the Constitution."⁴⁷⁴ This was the case "at least when [the classification was] supported by no more substantial justification than 'archaic and overboard' generalizations"⁴⁷⁵ The plurality concluded that "providing dissimilar treat-

468. *Id.* at 283.

469. *Michael M.*, 450 U.S. at 500 (Stevens, J., dissenting).

470. *Id.*

471. *Id.* at 502.

472. 430 U.S. at 201.

473. *Id.* at 206–207.

474. *Id.*

475. *Id.* at 207 (quoting *Schlesinger*, 419 U.S. at 508).

ment for men and women who are . . . similarly situated . . . violates the [Constitution].”⁴⁷⁶

The plurality refused to base its determination of similarity of situation, *vel non*, on the beneficiaries rather than the wage earners.⁴⁷⁷ Although the Court does not say so, it is certainly possible that the ease of finding similarity of situation between male and female wage earners⁴⁷⁸ allowed the court to avoid the far more difficult question of similarity of situation among beneficiaries.

However, Justice Stevens, concurring only in the judgment, tackled the problem of the beneficiaries.⁴⁷⁹ He concluded that, given the relevant legislative history, the gender-based classification was an accident.⁴⁸⁰

The history of the statute is entirely consistent with the view that Congress simply assumed that all widows should be regarded as “dependents” in some general sense, even though they could not satisfy the statutory support test later imposed on men. It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms “widow” and “dependent surviving spouse.” That kind of automatic reflex is far different from either a legislative decision to favor females in order to compensate for past wrongs, or a legislative decision that the administrative savings exceed the cost of extending benefits to nondependent widows.⁴⁸¹

This led him to be

persuaded that this discrimination against a group of males is merely the accidental by[-]product of a traditional way of thinking about females. I am also persuaded that a rule which effects an unequal distribution of economic benefits solely on the basis of sex is sufficiently questionable that “due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve [the] interest” put forward by the Government as its justification. In my judgment, something more than accident is necessary to justify the

476. *Id.* (first and second alterations in original).

477. *Id.* at 208–209.

478. *Id.* at 206–207.

479. *Id.* at 221–222 (Stevens, J., concurring).

480. *Id.*

481. *Id.* at 222 (footnote omitted).

disparate treatment of persons who have as strong a claim to equal treatment as do similarly situated surviving spouses.⁴⁸²

Thus, in Justice Stevens's view, there were enough widows and widowers who were similarly situated whether dependent or not so that there was no real and substantial relationship between the gender-based classification and the government's purpose.⁴⁸³

One final comment about the sometimes difficult task of distinguishing similarity of situation from non-similarity. In the *VMI* case, Justice Ginsburg was faced with this problem, because Virginia argued that men and women are different in the education context because, among other things "[m]ales tend to need an atmosphere of adversativeness,' while '[f]emales tend to thrive in a cooperative atmosphere.'"⁴⁸⁴ Is this a conclusive demonstration of non-similarity of situation? Not quite, in fact, quite the contrary.

It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method. As Fourth Circuit Judge [Diane] Motz observed, however, in her dissent from the Court of Appeals' denial of rehearing en banc, it is also probable that "many men would not want to be educated in such an environment." Education, to be sure, is not a "one size fits all" business. The issue, however, is not whether "women — or men — should be forced to attend VMI"; rather, the question is whether the [State] can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.⁴⁸⁵

The answer to that question was, of course, no.⁴⁸⁶ Truly, in many cases, similarity of situation or its opposite is in the eye of the beholder.

CONCLUSION

After finishing this manuscript, I wondered if my hopes expressed in the Introduction were fulfilled. As to "improving my understanding," I believe that it has, although mystery aplenty

482. *Id.* at 223 (citation and footnote omitted) (second alteration in original).

483. *Id.* at 222–223.

484. *Va.*, 518 U.S. at 541 (citing *U.S. v. Va.*, 766 F. Supp. 1407 (1991)) (alterations in original).

485. *Id.* at 542 (citation omitted).

486. *Id.*

remains. As to whether it will be “helpful to others,” only those who read it can decide.