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The Constitutional Right to One’s Good Name: An Examination of the Scholarship of Mr. Justice Rehnquist

By Mark Tushnet*

I. Introduction

Mr. Justice Rehnquist has usually been considered an intelligent and legally gifted conservative judge. Yet his performance has not measured up to the expectations that such an evaluation usually generates. On technical matters, his opinions are impressive,1 but his work on most questions of substance has been little more than adequate.2 Sometimes the disparity appears within a single opinion. In Sosna v. Iowa,3 for example, Justice Rehnquist followed a perceptive analysis of the problems of mootness in class action litigation with a discussion of the validity, under the equal protection clause, of durational residency requirements for divorce that only occasionally reached the level of conclusory assertion and at no point could be called analytical.

Perhaps the nadir in his work so far, however, is Paul v. Davis.4 His opinion for the Court is riddled with inadequate attempts to distinguish prior cases and confusions between constitutional and statutory analysis. Indeed, his characterizations of several relevant precedents is so strained that even the gentle Justice Brennan called him a dissembler.5 In this article, I hope through a detailed examination of Paul v. Davis to provide some explanation for the gross disjunction between reputed ability and known performance that appears in many of Justice Rehnquist’s opinions for the conservative majority. I believe that the explanation lies primarily with the institu-

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2 This is not true of his major opinions on retroactivity in criminal cases. See United States v. Peltier, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433 (1974).

3 419 U.S. 393 (1975).

4 96 S.Ct. 1155 (1976).

5 Id. at 1173.
tional characteristics of an emerging conservative majority as yet unwilling to repudiate flatly relatively recent decisions. In a sense, then, Justice Rehnquist has been driven to inadequate performance because of his colleagues' reluctance to follow him where his inclinations and legal ability push him.

The facts in Paul v. Davis are easily recited. The plaintiff, Edward Davis III, a news photographer in Louisville, Kentucky was arrested in June 1971 for shoplifting, and arraigned in September. He pleaded not guilty and the case remained open when, over a year later, police officials preparing an offensive against shoplifting during the Christmas season circulated a list of "active shoplifters" including Davis' name and photograph. The list was described as including "subjects known to be active in this criminal field." Davis, after receiving an admonition from his employer, brought suit under 42 U.S.C. § 1983, seeking monetary, injunctive, and declaratory relief for an alleged deprivation of property or liberty without due process. The Supreme Court, interpreting the complaint to rest solely upon a claim of defamation—the false imputation of criminality—held that the suit was correctly dismissed by the district court for failure to state a federal claim.

II. STATUTORY AND CONSTITUTIONAL INTERPRETATION

Justice Rehnquist prefaced his opinion by noting what he considered the untoward consequences of finding that the plaintiff had stated a claim that could survive a motion to dismiss. Announcements that a person had been arrested, mistaken shootings of bystanders, injuries inflicted in ordinary automobile accidents involving government cars—all these would "almost necessarily" give rise to actions cognizable in federal courts, he said. Justice Rehnquist thought this could not have been contemplated by the framers of the fourteenth amendment.

To support his contention that the plaintiff's argument would lead to a disruption of settled conceptions of federalism, Justice Rehnquist relied on Greenwood v. Peacock and Screws

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6 Id. at 1159.
7 Id.
v. United States, both of which involved "not wholly dissimilar question[s]" relating to statutes adopted during the same period of reconstruction as § 1983. In Greenwood, the Court refrained from what it characterized as a strained interpretation of the statute allowing removal to federal court of criminal prosecutions instituted in state courts where the defendants had raised certain civil rights claims. That opinion construed the statutory language "denied or cannot enforce in the court of [the] State a right under any law providing for the equal civil rights of citizens" to allow removal only of those cases where the law providing for equal civil rights conferred an immunity from prosecution. Similarly, in Screws the Court held that the statute making it a crime to deprive individuals of rights secured by the Constitution applied only where the act was willful, that is, done with the specific intention of depriving the victim of rights known to be protected by the Constitution.

Greenwood and Screws demonstrate the Court's reluctance to pursue statutory language to the limits permitted by the strict sense of the words used, because of the implications of such constructions for a healthy federalism. They provide only weak support for the decision in Paul, however, since that case involved constitutional interpretation. Narrow construction of statutes may be appropriate because we should not readily assume that even Reconstruction Congresses intended to alter the federal system radically. The fourteenth amendment, however, was designed to do exactly that, and everyone knew it. Thus, the proper way to decide Paul, for a Court bent on limiting the number of situations in which federal courts might displace state courts, would have been to construe § 1983 to extend only to a subclass of all constitutionally guaranteed rights as other statutes were construed in Greenwood and Screws.12

935 U.S. 91 (1945).
96 S.Ct. at 1159.
11 In Bonner v. Coughlin, 517 F.2d 1131 (7th Cir. 1975), the court, through then-Judge Stevens, held that § 1983 relief was not available for claims predicated on negligence where the state provided adequate post-deprivation remedies in its ordinary tort system, because the post-taking remedies afforded sufficient due process. Judge Fairchild, concurring, would have interpreted § 1983 to exclude negligent deprivations of property from its scope.
12 There are indications in the Court's opinion in Paul that it was misled by
Indeed, Screws suggests a way to dispose of at least two of the hypothetical situations posed by Justice Rehnquist. First, one could easily read § 1983 as extending solely to intentional, or grossly negligent, deprivations of constitutional rights. An action would therefore not lie when someone was “negligently killed by a sheriff driving a government vehicle.” Another construction could exclude the doctrine of transferred intent derived from tort law to deny recovery to bystanders injured by intentional acts directed at others. Justice Rehnquist’s second hypothetical, the dissemination of the fact of an arrest, and Paul itself require a different analysis. Here the court could have interpreted the statute to afford a privilege for the dissemination of accurate information derived from public records. Thus, even if one were inclined to throw Paul v. Davis out of federal court, there were ways to do so that were more consistent with the cases upon which the Court relied.

Several concluding remarks are appropriate here. First, as a general matter, statutory interpretation should be a route to decision preferred over constitutional interpretation since statutory interpretation leaves open the possibility that Congress

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13 See note 7 supra and accompanying text.
14 96 S.Ct. at 1159.
15 96 S.Ct. at 1159.
16 Other privileges have been judicially incorporated into § 1983. See Imbler v. Pachtman, 96 S.Ct. 984 (1976), and cases cited therein.
17 This approach would have preserved most of the recent cases cited by Justice Brennan in dissent, 96 S.Ct. at 71-77 n.18, holding that in cases involving federal officials and not arising under § 1983, the Constitution protects against the unwarranted dissemination of arrest records.
18 Justice Rehnquist’s hypothetical of the immediate dissemination of the fact of an arrest differs from the facts of Paul, where the plaintiff was described as an “active” shoplifter on the basis of a year-old arrest. This distinction is another reason for rejecting the anticipated consequence of a finding for the plaintiff in Paul.

Ordinarily the privilege would not lead to dismissal for failure to state a federal claim but to summary judgment for the defendant. It is true that in a technical sense federal courts would have jurisdiction over a greater range of cases, but if nearly all of those cases can be dismissed at early stages, it is hard to see how traditional notions of federalism are offended; ordinarily federalism concerns would arise from federal judgments issued against state officials, or from the subjectation of state officials to extended litigation in the federal courts, not simply from the assumption of federal jurisdiction.

Actually, it might often occur, as in Paul, that the privilege would appear on the face of the complaint, so that a motion to dismiss for failure to state a claim upon which relief can be granted would be proper. See 1 Moore’s Manual § 11.06[1] (1972 ed.).
might revise § 1983 to provide the relief sought, and that relief might be available under circumstances where the concerns of federalism would not be so strong. Second, even if a privilege under § 1983 were available in *Paul*, a court might at some time have to decide whether a similar claim could be made under the general federal question jurisdiction as directly arising under the Constitution. In *Paul* itself, the Court stated that jurisdiction was claimed under 28 U.S.C. § 1343(3) so that no jurisdictional amount was alleged. Finally, in an action directly arising under the Constitution, the central question would be whether one is constitutionally protected against the dissemination of the fact of an arrest. That question was raised in *Paul*, too, and the Court disposed of it in an apparently irresponsible manner, saying only that "[n]one of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner." In light of a developing line of lower court cases which primarily involved federal officials where concerns of federalism would be irrelevant, and which gave reasoned justifications for finding protection from the dissemination of arrest records in the Supreme Court's privacy decisions, the process of principled adjudication demanded more than such a cursory disposition.

III. THE SCOPE OF PROPERTY UNDER THE DUE PROCESS CLAUSE

In *Paul* the plaintiff claimed that he was deprived of liberty and property when the police publicly labelled him an "active" shoplifter without giving him an opportunity to rebut that label. Thus, he had to establish that his interest in his good name was a form of liberty or property protected by the fourteenth amendment. Several recent cases in the Supreme

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18 The Court has indicated that when a jurisdictional defect arises because of the Court's own decision, it will remand to allow the complaint to be amended. Kenosha v. Bruno, 412 U.S. 507 (1973).
19 The existence of such a right need not, of course, raise a federal question, for Congress need not provide a federal forum for the vindication of constitutional rights. See generally Hart & Wechsler, The Federal Courts and the Federal System 330-60 (2d ed. 1973).
20 96 S.Ct. at 1166.
21 See cases collected in Justice Brennan's dissent at 96 S.Ct. at 1177 n. 18.
Court seemed to indicate that it was, and Justice Rehnquist strove to distinguish them. His enterprise was not a happy one, for distinguishing the cases was apparently impossible, and the opinion drew lines that cannot reasonably be defended.

A. Wisconsin v. Constantineau Distinguished

The first of the recent cases is Wisconsin v. Constantineau,\(^2\) which invalidated a state statute authorizing government officials to "post" in retail liquor establishments the names of excessive drinkers. One consequence of posting was denial of access to liquor, for bartenders could be punished for selling to persons whose names had been posted. Another consequence, more emphasized by the Court, was injury to reputation. In Paul, Justice Rehnquist read Constantineau to rest upon the fact that posting "deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the community."\(^3\)

This analysis of Constantineau is not inaccurate but, without more, does not help to distinguish it from Paul v. Davis. Either the state has a discretionary power to confer a right to one's good name by adopting defamation laws, or it has the obligation to do so.\(^4\) If it is a discretionary power, as in Constantineau, the selective withdrawal of the right is a deprivation requiring due process. If creation of the right is constitutionally mandated, its denial must be accomplished according to constitutional standards. Either alternative leads to the conclusion that the plaintiff in Paul v. Davis had stated a claim arising under the Constitution.

Something more is needed, and Justice Rehnquist provided some clues in saying that in Constantineau "it was that alteration of legal status which, 'combined with the injury resulting from the defamation,' justified the invocation of proce-
Justice Rehnquist seized this language from Board of Regents v. Roth to explain the distinction used to preserve the result in Constantineau. Roth was an untenured college professor whose probationary contract was not renewed, and the Court held that the failure to renew, standing alone, did not require procedural protections, not even a statement of reasons for the nonrenewal. It indicated, though, that a failure to renew based on reasons injurious to Roth’s reputation would give rise to a requirement of fuller procedural protection. In Paul, Justice Rehnquist interpreted Roth as requiring two elements, failure to rehire and stigmatization, both of which must conjoin to require procedural guarantees, though neither alone would do so. Similarly, in Constantineau the denial of access to liquor together with the impact on reputation required procedural due process. In Paul, however, the plaintiff alleged only damage to reputation. This, thought Justice Rehnquist, distinguished Paul from Roth and Constantineau.

It is true that the cases can be read that way without distorting terribly the language of the opinions. But legal reasoning involves more than finding linguistic hooks upon which to distinguish cases. It is important to know not only how cases may be interpreted but how they were intended. For example, Justice Brennan’s dissent in Paul fit the dual emphasis of Roth and Constantineau into a sensible conceptual framework, arguing that the failure to rehire and the denial of access to liquor were state actions and the stigmatization was a deprivation of property.

But Justice Rehnquist provided no such framework for his interpretations. He discussed them in terms of federalism, thus understandably interpreting the cases narrowly, but not sufficiently explaining Roth and Constantineau. Indeed, there appears to be no analysis that could do so. In fact, the analytic structure of Roth, aside from its particular language, shows that the plaintiff in Paul necessarily stated a federal claim, and it is at the analytic level, not the linguistic one, that legal distinctions must operate.

25 96 S.Ct. at 1164.
27 Id. at 573.
28 96 S.Ct. at 1175-76 n.15.
B. Board of Regents v. Roth Undistinguished

Roth should have been troublesome for Justice Rehnquist in another way. Aside from the strong indications that had the reasons for Roth's nonrenewal been discrediting, he would have stated a federal claim, the Roth opinion developed a novel framework for analyzing claims that property had been taken without due process. The Court's premise was that property rights are defined by state law and that only when some state-defined property right is taken do the procedural requirements of the fourteenth amendment attach. But applying that premise to the problem in Paul, it is clear that the plaintiff stated a claim. For Kentucky, as Justice Rehnquist noted, surely had created a property right in the plaintiff's good name. When that right is taken by state officials, Roth would require procedural due process.

This aspect of Roth went almost unmentioned by Justice Rehnquist, in other cases an enthusiast of the Roth approach. For example, in Arnett v. Kennedy, he argued that because property rights are defined by state law, the procedural protections provided by state law set the extent of the property right; procedural due process can therefore require no more than what state law makes available. A similar maneuver might have helped a bit in Paul. Justice Rehnquist might have said that the plaintiff's right to his good name under Kentucky law was limited by the defenses available to the police officials. The effect would be to make state law defenses applicable in § 1983 actions. Three obstacles prevent this approach. First, although the plaintiff would not gain the benefit of any substantive federal law by filing a § 1983 action, he would have a right to a federal forum, and it was this kind of transfer of jurisdiction from state to federal courts that Justice Rehnquist's citation of Greenwood v. Peacock was designed to deprecate. Second, only two members of the Court agreed with Jus-

30 96 S.Ct. at 1159. The "complaint would appear to state a classical claim for defamation actionable in the courts of virtually every state."
32 Id. Arnett actually involves federal statutory law but that can make no difference in this context. See Tushnet, supra n. 29 at 262 n. 6.
tice Rehnquist in *Arnett*.\(^{32}\) Finally, it would vitiate *Monroe v. Pape*,\(^ {34}\) the decision making the statutory liability under § 1983 coextensive with state law liability, for *Monroe* was designed for situations where the state law remedy was inadequate, or "though available in theory,\(^ {35}\) was not available in practice."\(^ {36}\) As Justice Harlan noted in concurring in *Monroe*, the structure of defenses and damage rules under state law provides one basis for concluding that the state law remedy is inadequate or unavailable.\(^ {37}\)

Echoes of *Roth* and *Arnett* occur in a brief section of Justice Rehnquist's opinion. After reciting the two factor analysis of *Roth*, the opinion concludes:

Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for the vindication of those interests by means of damages actions.\(^ {38}\)

To some extent, this is yet another restatement, albeit cryptic, of the basic argument in an opinion characterized by argument from emphatic assertion—the more frequently and forcefully one says something, the more persuasive it is supposed to be—

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\(^{32}\) Bishop v. Wood, 96 S.Ct. 2074 (1976), is a sequel to *Arnett* and *Paul v. Davis*, but it adds little to the analysis because it turns on a peculiar interpretation of state law. Bishop was a police officer who was dismissed without a pre-termination hearing. He was designated a permanent employee in the city's ordinances, which, however, provided only for a statement of reasons for the dismissal. The federal trial court interpreted the ordinance as creating only an employment at will, primarily because the ordinance did not provide for pre-termination hearings. *Id.* at 2078 n.9. This seems a strange way to construe the ordinance, but it is simply a matter of state law. No federal constitutional barrier precludes a state from saying that statutes lacking procedural protections create employment at will. Thus, it follows directly from *Roth* that no pre-termination hearing is required. The analysis is this: 1) The ordinance has no procedural guarantees; 2) as a matter of state law, such an ordinance creates an employment at will; 3) as a matter of federal law, no procedural guarantees are required. While this initially appears to be circular, it is not, because the second step is not compelled, and even the majority in *Bishop* regarded the construction of the ordinance as odd. *Id.* at 2078-79.

\(^{34}\) 365 U.S. 167 (1961).

\(^{35}\) *Id.* at 173.

\(^{36}\) *Id.* at 174.

\(^{37}\) *Id.* at 196 n. 5. See also 96 S.Ct. at 1167 (Brennan, J., dissenting).

\(^{38}\) 96 S.Ct. at 1166.
If the statement is designed to add something to the argument, though, what it adds is obscure. In place of the traditionally disfavored right without a remedy, here there is apparently a remedy without a right, a damage action to make reparation for activities that "worked [no] change in the [plaintiff's] status as theretofore recognized under the State's laws." The only apparent escape from Roth would be to hold that the Roth-type analysis is appropriate for some kinds of property claims, and that some other analysis, premised not on state law but directly on the Constitution, is appropriate for other kinds of property claims. There is some authority for this course. Goss v. Lopez involved high school students who had been suspended from school because of their participation in a racial disturbance. The Court held that the due process requirements of notice and an opportunity to be heard attached for two reasons. First, Ohio statutes guaranteed the students the right to attend school, a right the Court characterized as a property right which could not be taken without due process. Second, the students had an independent interest, which the Court characterized as a liberty interest, in their reputations, and that interest too could not be taken without due process. As Justice Brennan's dissent pointed out, the majority in Paul ignored the careful distinction drawn in Goss between these two grounds and treated the liberty interest in Goss as buttressed by the statutory guarantees, thus squeezing the case into the two factor analysis. The way the Paul Court handled Goss was incredibly disingenuous. More important for present purposes, it blurred the possibility suggested by Goss that property interests are identified by looking to state law while liberty interests arise from the Constitution. In Paul, for example, there is a state-defined property right that Justice Rehnquist ignored. If Paul does not repudiate Roth, the Court's analysis in Paul depends upon a distinction between the prop-

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39 See, e.g., id. at 1165 (Paul is "quite consistent" with Goss v. Lopez).
40 Id. at 1166.
41 419 U.S. 565 (1975).
42 96 S.Ct. at 1175 n. 15 (Brennan, J., dissenting).
43 See also Montanye v. Haymes, 96 S.Ct. 2543 (1976) (state prisoner could not complain of transfer to another institution for circulating "legal petition" where state law guaranteed no right to remain at particular institution).
erty interest in Paul and that in Roth. Paul v. Davis, that is, might be seen as drawing a line within the class of property interests, so that Roth-type property interests are derived from state law while Paul-type property interests are derived directly from the Constitution.

Such an approach thus requires distinguishing among property rights for purposes of deciding what kind of constitutional analysis is to be used. One commentator has suggested that the line is located between traditional property and "new property," i.e., between interests like reputation, primarily protected until recently by the common law, and interests like tenure, primarily protected by recent statutory developments. 4 Justification of this distinction, however, is hard to come by. There is liberty and traditional property, including Paul, on one side, and new property on the other. For the former class, constitutional analysis controls; for the latter, state law controls. Perhaps, since a federal remedy is involved, federalism is a justification. It may be that federal courts have had enough experience with liberty and traditional property claims for them to be confident that any defects in procedure are unjustified. But in cases involving new property, the social sense of what procedures are desirable is much less settled, so that we should tolerate variations among the states, our Brandeisian laboratories of social experimentation.

This analysis might distinguish Paul and Roth, albeit rather weakly. Aside from that, it has little to commend it. In part, the difficulty is that the federalism rationale is counter-intuitive. It might be reasonable to defer to state law for relatively unimportant property interests but to insist on constitutional protection for important ones, and yet the distinction between traditional and new property does not correspond to a distinction based on importance. Also, there is no reason to think that Justice Rehnquist or his concurring brethren had that argument in mind in deciding Paul.

IV. CONSERVATISM AND INSTITUTIONAL CONSERVATISM

Justice Rehnquist's opinion in Paul v. Davis is seriously flawed. It is flawed on the surface because the asserted distinc-

tions between cases are utterly unpersuasive. It is flawed at deeper levels because the potential distinctions between the cases are scarcely alluded to and because such distinctions would require far too complex an analytic structure for support. In light of Justice Rehnquist's reputed ability, these flaws beg for explanation.

The explanation, I think, begins with three obvious facts. First, Paul was a hard case in that recent cases like Roth and Constantineau strongly pointed toward a conclusion that the members of the majority desired to reject. Second, the Chief Justice, when he is in the majority, decides which member of the majority will write the opinion of the court. Finally, it was essential to secure Justice Stewart's vote if a majority was to be assembled for the ultimate result in Paul, because Justice White dissented.

Thus, the Chief Justice chose Justice Rehnquist to write what must have appeared to be a most difficult opinion, something that has happened before. Justice Rehnquist's challenge was to write an opinion that would satisfy Justice Stewart. One way of cementing a wavering Justice's vote is to cite approvingly that Justice's opinions, no matter how tangential they are to the case at hand. Arguably, that is why Greenwood v. Peacock was cited at the outset of Justice Rehnquist's opinion, for the case contributed little to the argument and indeed interrupted its flow.

There was a greater problem, however, for Justice Rehnquist chose not to repudiate the suggestions in prior cases that stigmatization gave rise to a constitutional injury. Instead, he strove mightily, and unsuccessfully, to distinguish the cases away. Here too the need to secure Justice Stewart's vote surely played a part. First, Justice Stewart had been a member of the majority in most of those cases, and, indeed, wrote the Court's opinion in Roth. More important, however, was the recent vintage of Constantineau and Roth. Justice Stewart is an institutional conservative. As such, he believes it important to avoid abrupt shifts in doctrine unless they are attributable to difficulties that arose when courts attempted to apply the doctrine; it will not do for such shifts to appear to be only the result of

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changes in the membership of the Supreme Court. Such changes make the Court look much less like an institution of law and more like an ordinary political body. Repudiating Constantineau would have been inconsistent with institutional conservatism though wholly consistent with political conservatism. Distinguishing it by ordinary legal argument, however, would suggest not that the Court had changed, but only that the cases were different.

Perhaps the nicest example of Justice Stewart's institutional conservatism is his opinion for the Court in Hudgens v. National Labor Relations Board. In 1968 the Supreme Court held, in Amalgamated Food Employees Union v. Logan Valley Plaza, that the first amendment barred state courts from enjoining peaceful picketing at a privately-owned shopping center. Four years later, in Lloyd Corp. v. Tanner, with the votes of the Chief Justice and Mr. Justice Blackmun shifting the balance, the Court distinguished Logan Valley Plaza by looking to its precise facts, and held that a shopping center could invoke state authority in aid of its ban on distributing antiwar handbills. Justice Stewart, who had joined the majority in Logan Valley Plaza, joined Justice Marshall's dissent, which noted that the change in result was fundamentally rooted in the change in the Court's membership. After another 4 years had passed, the Court decided Hudgens, and this time Justice Stewart changed sides, writing for the Court that the first amendment was totally irrelevant to the question of picketing on private property, home, or shopping center, and therefore overruling Logan Valley Plaza. Justice Stewart said that, while Lloyd purported to distinguish Logan Valley Plaza, the analysis of the later case was inconsistent with the premises of the earlier one. Thus, it was not Hudgens that overruled Logan Valley Plaza; Lloyd Corp. had done so without telling anyone. Perhaps Justice Stewart was twitting Justice Powell, who had written Lloyd, for a lack of candor that Justice Powell rather sheepishly admitted in Hudgens. But Justice Stewart's posi-

\[\text{\textsuperscript{46}} 96 S.Ct. 1029 (1976).\]
\[\text{\textsuperscript{47}} 391 U.S. 308 (1968).\]
\[\text{\textsuperscript{48}} 407 U.S. 551 (1972).\]
\[\text{\textsuperscript{49}} \text{Id.}\]
\[\text{\textsuperscript{50}} \text{Id. at 584 (Marshall, J., dissenting).}\]
\[\text{\textsuperscript{51}} 96 S.Ct. at 1039 (Powell, J., concurring).\]
tion was also that of an institutional conservative, because he could acknowledge that asserted distinctions among cases were unpersuasive and still take comfort in the fact that he had not participated in overruling a recent decision.

Finally, Justice Stewart's biting dissent in *Mitchell v. W.T. Grant Co.*,\(^5^2\) expressly rejected such a recent overruling of his opinion for the Court in *Fuentes v. Shevin*.\(^5^3\) In *Mitchell*, he declared flatly:

> No data have been brought to our attention to indicate that these decisions [which followed *Fuentes* granting to otherwise defenseless consumers the simple rudiments of due process of law, have worked any untoward change in the consumer credit market or in other commercial relationships. The only perceivable change that has occurred since *Fuentes* is in the makeup of this Court.\(^5^4\)

Because of Justice Stewart's institutional conservatism, he probably would not have joined an opinion expressly repudiating *Roth* or *Constantineau*. Justice Rehnquist was forced to distinguish those cases, and that could not be done without developing the kind of comprehensive analysis that might discourage his more timid colleagues.

The explanation for Justice Rehnquist's inadequate performance in *Paul* thus probably does not lie in any intellectual failings on his part. It lies instead in the problems of assembling a majority for a conservative result which actually required overruling prior cases. That majority could not be assembled in an honest opinion, but we can hardly blame Justice Rehnquist for that. He operates within an institution requiring such an approach.

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\(^5^2\) 416 U.S. 600, 629 (1974).
\(^5^3\) 407 U.S. 67 (1972).
\(^5^4\) 416 U.S. at 635.