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-Footnotes-

n426. See, e.g., Dworkin, supra note 99, at 176-275; Dworkin, supra note 51, at 105-30; see also Brewer, supra note 419, at 962 (offering a philosophically reconstructed and partially idealized account of legal reasoning by analogy).

-End Footnotes-

C. Extraordinary Adjudication

Cases framed to involve a direct consideration of ultimate principles are the most watched, and typically the most important, that the Court decides. Not all such cases are of equal importance. Some involve relatively minor issues not likely to have significant ripple effects in other doctrinal areas. n427 Other cases, by contrast, call for reassessment of principles that have come to support broad doctrinal structures and patterns of reliance; cases of this kind hold the potential for doctrinal revolution. n428

-Footnotes-

n427. See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1598 (1997) (holding that Commerce Clause doctrine generally forbidding discriminatory state taxation recognizes no exception permitting discriminatory state tax preferences for certain not-for-profit organizations).

n428. See generally Fried, supra note 20, at 15-17 (discussing the potential of Supreme Court decisions based directly on "first principles" to effect doctrinal revolution").

-End Footnotes-

The conundrums posed by reasonable disagreement are most acute in extraordinary cases. The Justices must confront competing claims of substantive principle, questions about the deference appropriately given to political branches, and the challenges of achieving agreement within the Court itself. Beyond questions of first principle lie problems of implementation. Crafting doctrine to protect constitutional principles may prove no less difficult than identifying the principles that deserve protection. Indeed, a majority of the Justices can sometimes reach agreement on a constitutional principle of potentially broad, generative significance, but fail to unite on a robustly protective test. When this happens, the result of an extraordinary case may be continuing doctrinal flux - a period of waiting to see whether the decision will prove to be a "mustard seed" or a "mule." n429

-Footnotes-

n429. Id. at 42-45 (distinguishing "mustard seeds," or decisions from which large and important doctrines ultimately grow, from "mules," or decisions that prove unable to spawn the progeny needed for ultimate doctrinal significance).

-End Footnotes-

A Case Both Extraordinary and Easy: Boerne v. Flores. -

In *City of Boerne v. Flores*, n430 the Supreme Court confronted a question about the scope of congressional power under Section 5 of the Fourteenth Amendment - whether Congress, believing that a Supreme Court decision gave too little protection to constitutional rights, could enact a statute conferring precisely those protections that Congress thought the Court had erred in not providing. n431 The origins of Boerne lay in the Court's 1990 decision in *Employment Division v. Smith*. n432 Smith presented a claim that a state law prohibiting the use of peyote violated the free exercise rights of members of the Native American Church, for whom ingestion of peyote was a sacrament. In an opinion by Justice Scalia, the Court distinguished precedents that had used an effects test to trigger strict judicial scrutiny of statutes that substantially burdened religious practices. n433 Instead, Justice Scalia substituted a nonsuspect-content rule: neutral laws of general [\*128] applicability do not trigger elevated judicial scrutiny simply because of their effects in burdening religion. n434

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n430. 117 S. Ct. 2157 (1997).

n431. In separate dissenting opinions, Justices Souter and Breyer declined to reach this issue. Each thought that the Court, before doing so, should reconsider the correctness of its ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990). See *Boerne*, 117 S. Ct. at 2185-86 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting). Justice O'Connor, who also dissented, devoted most of her attention to arguing that *Smith* was wrongly decided. Unlike Justices Souter and Breyer, Justice O'Connor said explicitly that she would agree with the majority's Section 5 analysis if she thought *Smith* were rightly decided. See *id.* at 2176 (O'Connor, J., dissenting).

n432. 494 U.S. 872 (1990).

n433. See *id.* at 883.

n434. See *id.* at 878-79.

-----End Footnotes-----

Congress, by overwhelming majorities, responded to the *Smith* decision by enacting the Religious Freedom Restoration Act ("RFRA"). n435 The statute's preamble referred directly to the Constitution's guarantee of the free exercise of religion, observed that laws neutral on their face "may burden religious exercise as surely as laws intended to interfere" with religion, adverted critically to *Smith*, and - addressing a concern expressed by the majority opinion in *Smith* n436 - found that "the compelling interest test as set forth in prior Federal court rulings is a workable" one. n437 Substantively, RFRA purported to restore by statute what Congress took to be the pre-*Smith* doctrinal structure: n438 substantial burdens on the exercise of religion could not be sustained unless shown to be the least restrictive means of advancing a compelling government interest. n439

-----Footnotes-----

n435. 42 U.S.C. 2000bb (1994).

n436. See Smith, 494 U.S. at 885-89.

n437. 42 U.S.C. 2000bb(a).

n438. Even some ardent critics of the Smith decision acknowledge that the Supreme Court, prior to Smith, had not applied the "compelling interest" test with characteristic stringency. See, e.g., Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1109-10 (1990) (noting that, although it used highly protective language, "the Supreme Court only rarely sided with the free exercise claimant, despite some very powerful claims").

n439. See 42 U.S.C. 2000bb-1.

- - - - -End Footnotes- - - - -

(a)

The Decision of Principle. -

Boerne held RFRA unconstitutional. The Court ruled that the statute, by conferring broader substantive protections of religious freedom than did the decision in Smith, exceeded Congress's power under Section 5 of the Fourteenth Amendment "to enforce" the Amendment's substantive guarantees. n440 In an opinion authored by Justice Kennedy and joined by five other Justices, n441 the Court found that the enforcement power given by Section 5 does not encompass a power to "alter[ ]" the meaning of constitutional rights. n442 Congress can provide remedies for violations of judicially defined rights, and it can enact statutes reasonably aimed at preventing violations. But "legislation which alters the meaning of [\*129] the Free Exercise Clause," as RFRA did, "cannot be said to be enforcing the Clause." n443

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n440. See City of Boerne v. Flores, 117 S. Ct. 2157, 2160 (1997). Section 5 provides that "the Congress shall have the power to enforce, by appropriate legislation," the substantive guarantees of the Fourteenth Amendment. U.S. Const. amend. XIV, 5. It is well established that the Fourteenth Amendment incorporates, or makes applicable against the states, the right to the free exercise of religion guaranteed by the First Amendment. See Boerne, 117 S. Ct. at 2163 (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

n441. Chief Justice Rehnquist and Justices Stevens, Thomas, and Ginsburg joined the entire opinion. Justice Scalia joined in all but Part III-A-1, discussing the legislative history of the Fourteenth Amendment. See Boerne, 117 S. Ct. at 2172-76.

n442. See id. at 2164.

n443. Id.

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Several factors appear to have helped the Court to agree to this principle. First, the Court found strong support in the history of the Fourteenth Amendment for the view that Congress's power to "enforce" the Constitution does not encompass a power to "alter[ ]" constitutional meaning. n444 There is widespread agreement that history must at least be reckoned with in interpreting the Constitution, n445 and some Justices are disposed to treat original understandings as conclusive. n446 Second, recognition of congressional power to confer substantive legal protections in all cases in which the Court has not enforced constitutional norms to their full conceptual limits, as supported by some champions of expansive congressional power under Section 5, n447 would have threatened a considerable diminution of the Court's central role in implementing the Constitution. As I have emphasized, reasonable disagreement is widespread in constitutional law, and rarely could it be said with confidence that Supreme Court decisions enforce constitutional norms to their full conceptual limits. Not surprisingly, the Court thought that reserving to itself the last word as to constitutional meaning would serve constitutional values best.

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n444. See *id.* at 2164-65 (citing the legislative history of Section 5).

n445. See, e.g., Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *Fordham L. Rev.* 1249, 1252 (1997) (asserting that in interpreting constitutional provisions, "we must begin ... by asking what -- on the best evidence available -- the authors of the text in question intended to say"); Larry Kramer, *Fidelity to History -- And Through It*, 65 *Fordham L. Rev.* 1627, 1627 (1997) (characterizing "most of those who engage seriously with problems of constitutional interpretation" as "'weak' originalists").

n446. See *supra* note 19.

n447. See Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 *Mont. L. Rev.* 145, 153-65 (1995); Sager, *Underenforced Norms*, *supra* note 6, at 1239-40. The launching pad for this view of congressional power lies in Justice Brennan's opinion in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which asserted that Congress has power under Section 5 to enforce rights, but that Section 5 "does not grant Congress power to exercise discretion in the other direction and to ... 'dilute'" constitutional guarantees. *Id.* at 651 & n.10. It bears emphasis that the Court could have upheld RFRA on other grounds -- for example, the ground that RFRA constituted reasonable prophylactic legislation regulating "state conduct that creates a risk of constitutional violations." Brief for the United States at 7, *Boerne* (No. 95-2074), available in 1997 WL 13201; see Laycock, *supra*, at 153, 165-67.

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Significantly, the dissenting opinions in *Boerne* did not contest the majority's interpretation of Section 5 and its specification of the line separating judicial from legislative power, but instead argued that *Smith* itself should be reconsidered. n448 Among the dissenting Justices, [\*130] Justice O'Connor said specifically that she would agree with the majority's analysis if she thought *Smith* were correctly decided. n449 Justices Souter and Breyer declined to address the Section 5 issue at all until the predicate issue of *Smith's* correctness had been reconsidered. n450

-Footnotes-

n448. See supra note 431. As in *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996), discussed above at pp. 114-17, the majority opinion did not respond explicitly to the demand of the dissenting Justices to reconsider whether relevant precedent could be sustained upon a re-examination of first principles. There are important distinctions, however. First, the Smith decision attacked by the dissenting Justices in *Boerne* was a recent one, the authority of which had not plausibly been undermined by intervening judicial decisions. Second, and in some ways more important, Justice Scalia -- the author of the Smith decision -- wrote a concurring opinion in *Boerne* (joined by Justice Stevens) specifically to respond to "the claim of Justice O'Connor's dissent ... that historical materials support a result contrary to the one reached in" *Smith*. *Boerne*, 117 S. Ct. at 2172 (Scalia, J., concurring in part).

n449. See *Boerne*, 117 S. Ct. at 2176 (O'Connor, J., dissenting).

n450. See *id.* at 2185-86 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting).

-End Footnotes-

Notwithstanding the Court's near unanimity concerning *Boerne's* central holding, the Court's reasoning is less than wholly satisfying. The most troubling issue involves fair allocations of power under the Constitution: in light of reasonable disagreement between the Court and Congress over the scope of constitutional rights, why should the Court's views always prevail? Why should Congress not have a role in cases in which democratic majorities want broader protection for constitutionally based liberties than the Court has provided? n451

-Footnotes-

n451. The conclusion that Congress should not have such a role is not a necessary implication of the concept of judicial review, nor can it be derived directly from the Court's holding in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See Tribe, supra note 219, at 349. Professor Tribe argues:

It is not difficult to reconcile congressional power to define the content of fourteenth amendment rights with *Marbury v. Madison* and judicial review. Judicial review does not require that the Constitution always be equated with the Supreme Court's view of it. It is the Court's responsibility, under *Marbury*, to strike down acts of Congress which the Court concludes to be unconstitutional -- nothing more. *Marbury* implies nothing about the criteria by which the Court should determine whether an act of Congress is unconstitutional ....

*Id.* (footnote omitted).

-End Footnotes-

Although the Court did not address this question directly, the best answer that I can imagine, and that is reasonably consistent with the Boerne majority's manifest views, would have three parts. First, notwithstanding reasonable disagreement about constitutional matters, there may be good reason to want issues of first principle to be resolved by a deliberative institution, such as the Court, that is removed from the preoccupations of electoral politics. n452 Second, the Court may actually have some capacity to respond to the problem of reasonable constitutional disagreements among concerned citizens and state and federal officials that Congress does not. On one quite plausible view, constitutional decisionmaking should, as a matter of fairness, be tempered in light of reasonable disagreement. n453 The Court, as an institution, may be acculturated to take reasonable disagreement into account [\*131] in rendering constitutional decisions. By contrast, Congress, as a more majoritarian institution, may be less restrained; the maxim of politics may too often be that to the victors belong the spoils.

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n452. For further elaboration and discussion of this claim, see section V.A below.

n453. See Jeremy Waldron, *The Circumstances of Integrity*, 3 *Legal Theory* 1, 19 (1997) (explicating a view in which officials exercising social power "must go beyond [their] particular views about justice" and accommodate divergent positions in order to "claim legitimacy in relation to the community as a whole"). For further discussion of this position, see pp. 144-45 below.

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This second argument may appear to ring hollow in the context of RFRA, a principal aim of which was to protect religious minorities. For the Court's position to be defensible, a third consideration must also come into play: among the reasons that constitutional interpretation should sometimes be tempered in light of reasonable disagreement, and should not simply reflect the substantively reasonable view preferred by the national political majority (as reflected in congressional legislation under Section 5), is that the national majority will not always be the local majority. In a case such as Boerne, principles of federalism are at stake. Although the Court generally operates with a thin theory of political democracy, n454 a majority clearly believes that the Constitution should be read to protect the authority of state and local governments to make important decisions free from national domination. n455

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n454. See *supra* pp. 103-05.

n455. See, e.g., *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997) (holding that Congress cannot compel state officials to implement a federal regulatory program); *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1119 (1996) (holding that Congress lacks power under the Indian Commerce Clause to abrogate states' Eleventh Amendment immunity from suit in federal court); *United States v. Lopez*, 514 U.S. 549, 567-78 (1995) (enforcing a limit, aimed at protecting state and local governments' regulatory prerogatives, on Congress's regulatory powers under the Commerce Clause).

- - - - -End Footnotes- - - - -

The Court's federalist stance is, of course, a contestable one, reflecting a theory of political democracy under the Constitution with which many reasonable people disagree. It is unclear what weight, if any, the Court gave to this consideration in reaching its decision in Boerne. I discuss below the significance that the Court ought to attach to reasonable disagreement among concerned citizens in ruling on constitutional issues. n456

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n456. See infra Part V.

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(b)

The Doctrinal Test of Congress's Section 5 Power. -

Having agreed that Congress can provide remedies and protections for substantive constitutional rights, but cannot alter the content of those rights, the Court faced the task of applying this principle to RFRA and of creating doctrine to guide its application in future cases. Although the Boerne opinion was less than wholly clear, the Court appears to have employed a purpose test. Although Congress would be entitled, under Smith, to attempt to prevent or remedy government measures adopted for the purpose of burdening religion, RFRA could not be justified as a "preventive" or "remedial" measure, the Court concluded, because it swept too broadly. n457 As the encompassing scope of the legislation made clear, "Congress' concern was with" legislation that im- [\*132] posed "incidental burdens" on religion, not with legislation enacted or enforced due to hostility to religion. n458

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n457. See City of Boerne v. Flores, 117 S. Ct. 2157, 2170 (1997).

n458. Id. at 2169.

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The Court's agreement to a purpose test should hardly be surprising. As noted above, purpose tests frequently reflect the overlapping consensus of competing views about how constitutional principles would best be enforced. n459 Purpose tests also tend to be narrow in the protections that they provide. Accordingly, the use of a purpose test in Boerne is entirely consistent with the Court's acknowledgement that Congress retains broad preventive and "remedial" powers. n460 Significantly, the Court either affirmed, rationalized, or distinguished all of the most important Section 5 precedents, n461 including one, Katzenbach v. Morgan, n462 which upheld congressional power to forbid the use of literacy tests, n463 even though the Court had previously found that such tests did not, in principle, violate the Constitution. n464

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n459. See supra pp. 99-102.

n460. See 117 S. Ct. at 2164.

n461. See id. at 2166-68.

n462. 384 U.S. 641 (1966).

n463. See id. at 646-47.

n464. See Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50-53 (1959) (upholding constitutionality of state literacy tests). The Boerne Court distinguished Katzenbach on the ground that Congress, in barring some uses of literacy tests, permissibly acted on a predicate finding that there were widespread, otherwise unremedied violations of constitutional rights under judicially (rather than congressionally) established standards. See 117 S. Ct. at 2168. Under one rationale advanced in Katzenbach, the Boerne majority observed, the challenged provision of the Voting Rights Act was "a remedial measure to deal with "discrimination in governmental services.'" Id. (quoting Katzenbach, 384 U.S. at 653). Under another rationale, Katzenbach rested on the Court's acceptance of Congress's determination that literacy tests were in fact implemented for unconstitutional purposes. See Boerne, 117 S. Ct. at 2168.

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It is crucial, however, that the central constitutional principle underlying the Boerne decision is potentially broader than the purpose test by which the majority implemented that principle in Boerne itself. In a future case, nothing in Boerne's rationale would prevent the Court from imposing more stringent limits on the scope of congressional power; in determining whether a congressional enactment impermissibly "alters" substantive rights, the Court could augment Boerne's purpose test with an effects test or other doctrinal formulations.

Meanwhile, many important questions remain about whether congressional prohibitions against discrimination based on nonsuspect criteria, such as age, n465 should now be upheld or invalidated. As the difficulty of such questions might suggest, it may have been the narrowness of the implementing test in Boerne that made possible the Court's near unanimity on the scope of congressional power under [\*133] Section 5. In short, whether Boerne will prove to be a "mule" or a "mustard seed" remains to be seen.

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n465. See Age Discrimination in Employment Act, 29 U.S.C. @@621-634 (1994) (prohibiting preferential hiring or firing on the basis of age or pension concerns).

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2.

The "Brady Bill" Case: Implementing Constitutional Federalism. -

Although the Constitution clearly embodies principles of federalism, n466 the

Court, historically, has had peculiar difficulty in specifying those principles and in formulating workable tests to implement them. n467 In the most general terms, the current Court's Eleventh Amendment cases have shown a recurrent impulse to accord the states heightened protection against federal judicial power, n468 but it has proved difficult for the five Justices most concerned about judicial federalism n469 to agree on a doctrinal structure that effectively guards the states from suit in federal court. n470 In its recent decision in *United States v. Lopez*, n471 the Court manifested a renewed disposition to protect a domain of exclusive state regulatory authority by holding that Congress lacked power under the Commerce Clause to prohibit, without more, the sale of guns within a school zone. n472 Although the result reflected a concern with returning federalism doctrine to "first principles," n473 no clear doctrinal test emerged. n474 As a result, the implications of *Lopez* remain uncertain.

-Footnotes-

n466. For a lucid, balanced account of the constitutional status of federalism principles, see Shapiro, cited above in note 157.

n467. See generally H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633, 664-81 (1993) (discussing often failed historical efforts by the Supreme Court to formulate judicially enforceable principles of constitutional federalism); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 Harv. L. Rev. 61, 67-71 (1984) (tracing the tortured and frequently misguided history of Eleventh Amendment doctrine).

n468. See, e.g., *Idaho v. Coeur D'Alene Tribe*, 117 S. Ct. 2028, 2040-43 (1997) (finding that a suit against state officials, attempting to determine ownership of the bed of a lake and its navigable tributaries, should be treated as an unconsented-to suit against the state barred by the Eleventh Amendment, despite the rule of *Ex parte Young*, 209 U.S. 123 (1908), that suits against governmental officials engaged in continuing conduct that is unlawful under federal law are not suits against the state for Eleventh Amendment purposes); *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1118 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and holding that Congress lacks authority under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity).

n469. The five Justices who have joined the majority in all of the Court's important recent cases developing or applying federalism doctrines are Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. See *Printz v. United States*, 117 S. Ct. 2365, 2368 (1997); *Seminole Tribe*, 116 S. Ct. at 1119; *United States v. Lopez*, 514 U.S. 549, 550 (1995); *New York v. United States*, 505 U.S. 144, 147 (1992).

n470. For example, in last Term's *Coeur D'Alene* case, the five majority Justices were unable to agree on a rationale for their holding that suit was barred by the Eleventh Amendment: Justice O'Connor's concurring opinion, joined by Justices Scalia and Thomas, rested the decision on a much narrower basis than that adopted by Justice Kennedy, joined by Chief Justice Rehnquist, in the "principal" opinion. Justice O'Connor's opinion was closely tailored to the peculiar facts of the case, involving a claim of ownership of a lakebed. See 117 S. Ct. at 2043-45 (O'Connor, J., concurring in part and concurring in the

judgment). By contrast, Justice Kennedy's opinion would have revised the seemingly settled general rule that suits for injunctive and declaratory relief against state officials engaged in continuing patterns of federally unlawful conduct are not suits against the state for Eleventh Amendment purposes. See *Coeur D'Alene*, 117 S. Ct. at 2033-40.

n471. 514 U.S. 549 (1995).

n472. See *id.* at 551-52.

n473. *Id.* at 552.

n474. See, e.g., Deborah Jones Merritt, *Commerce!*, 94 Mich. L. Rev. 674, 692 (1995) (noting that the Court's decision rests on the confluence of almost a dozen factors" and claiming that, as a result, Lopez will be readily distinguishable in future cases); Donald A. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 Mich. L. Rev. 554, 554 (1995) (claiming that, even after Lopez, Commerce Clause doctrine is internally contradictory and "a mess").

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Another line of cases involving constitutional federalism addresses Congress's capacity under the Commerce Clause and the Tenth Amendment to regulate the activities of state and local governments. In 1976, in *National League of Cities v. Usery*, n475 the Court suggested that Congress could not permissibly regulate the performance by states of traditional governmental functions that were somehow integral to state sovereignty. n476 But the *National League of Cities* test proved difficult to administer. Citing this problem, the Court, by a 5-4 vote in *Garcia v. San Antonio Metropolitan Transit Authority*, n477 reversed its earlier decision. The states' constitutional protection against congressional overreaching, the Court held in *Garcia*, must come principally if not exclusively from political "safeguards inherent in the structure of the federal system." n478 More recently, however, the Court has breathed at least some life back into doctrines that limit Congress's capacity to regulate the states as states. In *New York v. United States*, n479 the Court invalidated a federal statute that required the states either to take title to nuclear waste within their borders or to make legislative provision for the waste's disposal. Congress, the Court held, could not single out the states as states and effectively "commandeer[ their] legislative processes." n480

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n475. 426 U.S. 833 (1976).

n476. See *id.* at 851.

n477. 469 U.S. 528 (1985); see *id.* at 546-47.

n478. *Id.* at 552; see also *id.* at 551 n.11 (citing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954)).

n479. 505 U.S. 144 (1992).

n480. Id. at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1991)) (first alteration in original) (internal quotation marks omitted).

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Last Term's confrontation with issues involving federal regulation of state and local governments, Printz v. United States, n481 arose from an effort by Congress to enlist local law enforcement officials in enforcing a federal regulatory program. To implement an earlier statute forbidding sales of handguns to people in certain prohibited categories, the Brady Handgun Violence Protection Act n482 commands the Attorney General to establish a national system to check the backgrounds of prospective purchasers of handguns. As an interim measure, the [\*135] Brady Act required the chief law enforcement officer of the jurisdiction in which a would-be buyer resides to make "a reasonable effort to ascertain within 5 business days" whether it would be unlawful for that person to buy a handgun. n483 In a 5-4 decision, a sharply divided Court held that the Brady Act violated principles of constitutional federalism.

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n481. 117 S. Ct. 2365 (1997).

n482. Pub. L. No. 103-159, 107 Stat. 1536 (1993).

n483. 18 U.S.C. 922(s) (2) (1994).

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(a)

Sources of First Principles, Democracy, and Disagreement. -

In invalidating portions of the Brady Act, Justice Scalia's majority opinion sought support from a variety of sources. Noting at the outset that "there is no constitutional text speaking" to the "precise question" before the Court, he first looked for guidance "in historical understanding and practice." n484 History, he concluded, revealed numerous instances of federal compulsion of the states to exercise judicial power, but few if any early instances in which Congress had compelled state executive officials to enforce a federal regulatory program. n485 Justice Scalia acknowledged, however, that historical practice was "not conclusive." n486 Turning next to considerations of constitutional structure, Justice Scalia found that the prevailing principle was one of federalism, as "reflected in numerous constitutional provisions." n487 Finally and "most conclusively," Justice Scalia looked "to the prior jurisprudence of this Court." n488 In his view, New York v. United States clearly established that "the Federal Government may not compel the States to enact or administer a federal regulatory program." n489 Coming from Justice Scalia, who is often disposed to read the Constitution as a narrow, historically defined list of commands and prohibitions, n490 the majority opinion in Printz was a remarkable tour de force.

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n484. Printz, 117 S. Ct. at 2370.

n485. See id. at 2376.

n486. Id. at 2376.

n487. Id. at 2379 n.13.

n488. Id. at 2379.

n489. Id. at 2383 (quoting New York v. United States, 505 U.S. 144, 188 (1992)) (internal quotation marks omitted).

n490. See Scalia, supra note 94, at 38-47 (defending an approach to constitutional interpretation based on the "original understanding" against the "ascendant school of constitutional interpretation [that] affirms the existence of what is called The Living Constitution, a body of law that ... grows and changes from age to age, in order to meet the needs of a changing society").

-----End Footnotes-----

Writing in dissent, Justice Stevens offered pointed counterarguments concerning history and practice, n491 constitutional structure, n492 and precedent. n493 What gave his opinion its force and passion, however, was less its individual arguments than an animating view about the prerogatives of political democracy in the face of reasonable uncertainty about constitutional meaning. The relevant sources, Justice [\*136] Stevens argued, furnished no adequate basis "for concluding that it is the Members of this Court, rather than the elected representatives of the people, who should determine whether the Constitution contains the unwritten rule that the Court announces." n494 Especially given the possibility that emergencies might reasonably require federal compulsion of modest state assistance, why not let the people decide? n495

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n491. See Printz, 117 S. Ct. at 2389-94 (Stevens, J., dissenting).

n492. See id. at 2394-97.

n493. See id. at 2397-2401.

n494. Id. at 2387.

n495. See id.

-----End Footnotes-----

From the perspective of the Printz majority, the answer is obvious. The dissenting opinion invokes a strongly nationalist conception of democracy. By contrast, the Justices in the majority read the Constitution to protect state and local majorities against national majorities, at least within the domain covered by Printz. Printz, even more than City of Boerne, reflects the commitment to revitalizing constitutional federalism that has surfaced recurrently in the Court's recent Terms.

(b)

The Test. -

In service of the principle of constitutional federalism, Printz laid down a forbidden-content rule: "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." n496 Forbidden-content rules provide the most stringent protection within their domain. But the Printz rule, like most forbidden-content tests, is strikingly narrow. As Justice Stevens noted in dissent, "nothing in the majority's holding [necessarily] calls into question" Congress's power to "require the States to implement its programs as a condition of federal spending" n497 or to regulate the states pursuant to "a program that affects States and private parties alike." n498 As long as these mechanisms remain available, Printz may possess more symbolic than practical importance.

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n496. Printz, 117 S. Ct. at 2384. Justice Stevens protested that a forbidden-content rule would deny needed federal power in cases of emergency. See id. at 2387 (Stevens, J., dissenting). For Justice Scalia, however, the benefits of a rule were paramount. See Printz, 117 S. Ct. at 2381 ("An imprecise barrier against federal intrusion upon state authority is not likely to be an effective one.").

n497. Id. at 2396-97 (Stevens, J., dissenting); see also id. at 2385 (O'Connor, J., concurring) (noting that Congress may amend the Brady Act by conditioning federal funding on compliance with federal regulations); New York v. United States, 505 U.S. 144, 167 (1992) (acknowledging that Congress may attach conditions to receipt of federal funds); South Dakota v. Dole, 483 U.S. 203, 212 (1987) (upholding a statute conditioning the award of federal highway funds on adoption of minimum drinking age).

n498. Printz, 117 S. Ct. at 2397 (Stevens, J., dissenting); see New York, 505 U.S. at 160.

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Eager to establish further doctrinal protections of constitutional federalism, Justice Thomas filed a concurring opinion in which he suggested that the Court should go far beyond the cautious holding of United States v. Lopez in restricting congressional regulatory power under the Commerce Clause. n499 He also intimated that federal regulation of the sale and possession of firearms might run afoul of a properly construed and revitalized Second Amendment. n500 But no other Justice joined Justice Thomas's Printz concurrence.

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n499. See Printz, 117 S. Ct. at 2385 (Thomas, J., concurring).

n500. See id. at 2386.

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Although united on Printz's relatively narrow holding, the five majority Justices apparently remain uncertain or divided about how federalism principles should be specified and implemented beyond the facts of the few particular cases that they have decided in recent Terms. Before Printz, despite a proliferation of pro-federalism cases and doctrines, uncertainties and disagreements among the most pro-federalism Justices had precluded doctrinal formulations that would give principles of federalism broad, effective protection. n501 Printz did not much alter this situation, though it does maintain the apparently building momentum for a larger doctrinal overhaul. As the Court continues to contemplate such an overhaul, a central question is what weight, if any, the Justices who believe strongly in federalism values will give to the reasonable view of others - which scholars once regarded as the uncontested centerpiece of post-New Deal constitutionalism n502 - that courts should afford the federal government broad latitude to address problems that are reasonably regarded as national.

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n501. Lopez, for example, is too vaguely written to have clear effect in restricting federal power. See supra note 474 and accompanying text. And despite the Court's manifest concern for federalism in recent Eleventh Amendment cases, see supra notes 468-470 and accompanying text, the connection between suability in federal court under the Eleventh Amendment and the protection of substantive state authority remains uncertain, due in part to the obligation of state courts to enforce federal law. See Printz, 117 S. Ct. at 2371 (recognizing obligations of state courts to enforce federal law against the states).

n502. See 1 Bruce Ackerman, We the People: Foundations 105-30 (1991).

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3.

Constitutional Fidelity and the Judicial Role: The Right to Die Cases. -

In recent years, the Supreme Court has treated substantive due process cases as almost inherently extraordinary, n503 and the Court's decisions in such cases have become occasions for visible struggles concerning the nature of constitutional fidelity. n504 For this reason among others, the Court's "right to die cases" - Washington v. Glucksberg n505 and Vacco v. Quill n506 - were perhaps the most watched, and in some ways the most revealing, of the 1996 Term.

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n503. A partial exception was last Term's decision in Kansas v. Hendricks, 117 S. Ct. 2072 (1997), in which the Court -- although divided on other issues C unanimously agreed that a law providing for the civil commitment of persons likely to engage in sexually predatory acts because of mental abnormalities did not offend substantive due process principles as established in prior cases. See id. at 2079; id. at 2088 (Breyer, J., dissenting) (agreeing that the substantive due process requirements were satisfied by the Kansas statute).

n504. See Planned Parenthood v. Casey, 505 U.S. 833 (1992); Michael H. v. Gerald D., 491 U.S. 110 (1989); Bowers v. Hardwick, 478 U.S. 186 (1986).

n505. 117 S. Ct. 2258 (1997).

n506. 117 S. Ct. 2293 (1997).

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(a)

The Holdings. -

By the seemingly remarkable vote of 9-0, the Court reversed decisions by the Second and Ninth Circuit Courts of [\*138] Appeals and upheld New York and Washington statutes forbidding physician-assisted suicide. Chief Justice Rehnquist wrote the opinions of the Court, which were joined by four other Justices in both cases. n507 The main statement of the Court's views came in Glucksberg. In that case, in which the court of appeals had found a "strong," constitutionally protected "liberty interest in determining how and when one's life shall end," n508 the Chief Justice "carefully formulated" n509 the question before the Court as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." n510 He answered in the negative. n511 In a separate opinion in the Quill case, the Chief Justice found that New York did not offend the Equal Protection Clause by permitting terminal patients to hasten their deaths by terminating or refusing medical treatment, while at the same time forbidding physician-assisted suicide. n512

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n507. Justices Scalia, Kennedy, and Thomas joined the Court's opinions without further elaboration of their views. Justice O'Connor also joined the opinions of the Court but filed a separate concurring opinion as well. See Washington v. Glucksberg and Vacco v. Quill, 117 S. Ct. 2302, 2303 (1997) (O'Connor, J., concurring).

n508. Compassion in Dying v. Washington, 79 F.3d 790, 812 (9th Cir. 1996) (en banc).

n509. Glucksberg, 117 S. Ct. at 2269.

n510. Id.

n511. See id. at 2271.

n512. See Vacco v. Quill, 117 S. Ct. 2293, 2301-02 (1997).

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Although unequivocal in upholding the challenged state laws against facial attack, the Court's decisions were narrow. Strikingly, the majority opinion in Glucksberg included, with only slight equivocation, a "right to refuse unwanted lifesaving medical treatment" at the end of a list of fundamental rights already recognized under the Due Process Clause. n513 The Court made similarly favorable reference to, without explicitly recognizing, "a constitutionally protected right to refuse lifesaving hydration and nutrition." n514 Finally, Chief Justice Rehnquist's opinion in Glucksberg grudgingly acknowledged that the door

remained open for challenges claiming that the New York and Washington statutes were unconstitutional as applied to particularized facts. n515

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n513. Glucksberg, 117 S. Ct. at 2267 ("We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional [common law] right to refuse unwanted lifesaving medical treatment.").

n514. Id. at 2269 (quoting Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 279 (1990)) (internal quotation marks omitted); see also id. at 2270 ("[A] liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." (quoting Cruzan, 497 U.S. at 287 (O'Connor, J., concurring)) (internal quotation marks omitted)).

n515. See id. at 2275 n.24.

-End Footnotes-

The Chief Justice's concession grows in significance when it is read in light of the five concurring opinions filed in Glucksberg. Although none offered a definitive pronouncement, the five concurring Justices (including Justice O'Connor, who joined the Court's opinion) all appeared open to the possibility that a state would violate due process if it were to bar "a patient who is suffering from a terminal illness and who is experiencing great pain" from "obtaining medication ... to alleviate that suffering, even to the point of causing unconsciousness and hastening death." n516

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n516. Glucksberg and Quill, 117 S. Ct. at 2303 (O'Connor, J., concurring). In an earlier formulation, Justice O'Connor appeared to hold open the somewhat broader question whether a state would violate the Due Process Clause if it were to deny "a mentally competent person who is experiencing great suffering" the right to "control[ ] the circumstances of his or her imminent death." Id. at 2303. In light of the later formulation quoted in the text, however, it is unclear whether Justice O'Connor, in particular, contemplated the possibility of a constitutional right broader than the right to take medication sufficiently powerful to alleviate pain, even when the predictable effect would be unconsciousness or death. See Yale Kamisar, On the Meaning and Impact of the U.S. Supreme Court's Recent Rulings in the Physician-Assisted Suicide Cases, Prepared Remarks for the Panel on Physician-Assisted Suicide at the American Bar Association Annual Meeting 8-12 (Aug. 2, 1997) (transcript on file with the Harvard Law Review). Justice Breyer's separate opinion concurring in the judgments, although it includes some broader language, also focuses most concretely on issues involving pain relief. See Glucksberg and Quill, 117 S. Ct. at 2310, 2311-12 (Breyer, J., concurring in the judgments).

Based on the limited available evidence, Professor Kamisar appears correct that "Justices Stevens and Souter are, if anything, probably more receptive than Justices O'Connor, Ginsburg and Breyer to arguments for a right" to physician-assisted suicide. Kamisar, supra, at 14. Without specifically advertng to the case of a terminally ill person with acute pain that could be relieved only by terminal sedation, Justice Stevens suggested that individual liberty interests would outweigh state interests in prohibiting assisted

suicide in at least some cases. See Glucksberg and Quill, 117 S. Ct. at 2305 (Stevens, J., concurring in the judgments). Justice Souter also reserved the relatively open-ended question whether the individual interest might prevail over the states' interest "in some circumstances." Glucksberg, 117 S. Ct. at 2290 (Souter, J., concurring in the judgment).

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(b)

Substantive Due Process, Democracy, and Reasonable Disagreement. -

Although six Justices wrote opinions in either Glucksberg, Quill, or both, there was little disagreement about the centrality of three considerations: the doctrinally established propriety of substantive due process adjudication; the precariousness, nonetheless, of judicial invalidation of legislation on substantive due process grounds; and the appropriateness of some deference to the claims of political democracy.

The Chief Justice, joined by those Justices generally most hostile to substantive decisionmaking under the Due Process Clause, frankly acknowledged that, beyond ensuring fair procedures, "the Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests." n517 This acknowledgement may have been necessary in part to hold the votes of Justices O'Connor and Kennedy, who in previous cases have specifically eschewed the view that the rights protected by due process can be cabined by any rigid formula. n518 But the other Justices joining in the majority opinion (Chief Justice Rehnquist, Justice Scalia, and Justice [ \*140 ] Thomas) have themselves all relied on the Due Process Clause as the source of a substantive prohibition against affirmative action by the federal government. n519 In Glucksberg, with the propriety of substantive due process adjudication accepted, the question became one of applicable restraints, largely to protect the democratic "arena of public debate and legislative action." n520 Wary of intruding on democratic prerogatives, the majority insisted that fundamental rights under the Due Process Clause must be limited to those rooted in history and tradition and must be defined narrowly, again by reference to history. n521 Although this appears on its face to be a stringent standard, the majority's indication, as noted above, that rights to refuse unwanted hydration and lifesaving medical treatment likely enjoy protection under the Due Process Clause seems to soften the otherwise rigid language.

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n517. Glucksberg, 117 S. Ct. at 2267.

n518. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 847-49 (1992).

n519. See Adarand Constructors, Inc. v. Pena, 515 U.S. 227-31 (1995); id. at 239 (Scalia, J., concurring in part and concurring in the judgment); id. at 240-41 (Thomas, J., concurring in part and concurring in the judgment).

n520. Glucksberg, 117 S. Ct. at 2268.

n521. See id.

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The concurring Justices also took careful, moderate stands. Justice Stevens, though insisting that some applications of the challenged statute would be invalid, acknowledged that "history and tradition provide ample support for refusing to recognize an open-ended constitutional right to commit suicide." n522 In the face of reasonable disagreement, he welcomed more public and political debate, n523 as did Justice O'Connor, in an opinion joined by Justices Ginsburg and Breyer. n524 Among Justice O'Connor's main themes was that the Court - even in reserving the question whether dying people in great, unrelievable pain possess a right to terminal sedation - should respect the competency and prerogatives of state political processes. n525 Justice Souter, concurring in the judgment, offered a sustained defense of the view, which he attributed to Justice Harlan, that the Court's mandate under the Due Process Clause was to identify and invalidate "arbitrary impositions and purposeless" restraints. n526 On their face, some of Justice Souter's formulations claim potentially sweeping judicial power, and the majority opinion challenged them on this basis. n527 In the course of his opinion, however, Justice Souter emphasized that the Court had "no warrant to substitute one reasonable resolution of the contending positions for another, but [rather has] authority to supplant [\*141] the balance already struck ... only when it falls outside the realm of the reasonable." n528

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n522. Glucksberg and Quill, 117 S. Ct. at 2305 (Stevens, J., concurring in the judgments).

n523. See id. at 2310.

n524. See id. at 2303 (O'Connor, J., concurring).

n525. See id.

n526. Glucksberg, 117 S. Ct. at 2282 (Souter, J., concurring in the judgment) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)) (internal quotation marks omitted).

n527. See Glucksberg, 117 S. Ct. at 2268.

n528. Id. at 2281 (Souter, J., concurring in the judgment).

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Although no Justice said so, the continuing controversy surrounding Roe v. Wade n529 almost surely played a large role in the Court's thinking. n530 In Roe, the Court handed down a broad, rule-like opinion, aimed at removing from politics a moral issue that engendered passionate, frequently reasonable disagreement. In retrospect, many believe that Roe did as much to foment discord as to resolve it, n531 and that its premature constitutional ruling frustrated the potential capacity of the political process to reach a balance of competing views. n532

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n529. 410 U.S. 113 (1973).

n530. Cf. Cass R. Sunstein, *The Right to Die*, 106 Yale L.J. 1123, 1161 (1997) (observing that ARoe looms ... clearly in the background of the discussion of a constitutional right to die").

n531. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 385-86 (1985) ("The political process was moving in the early 1970s .... Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.").

n532. See, e.g., Mary Ann Glendon, *Abortion and Divorce in Western Law* 42-43 (1987) (arguing that the Supreme Court "could have authorized the states, within broad limits, to work out legislation which would have treated the abortion question in all its complexity and with the gravity it deserves"); cf. Sunstein, *supra* note 530, at 1149-51 (noting the "plausible view" that Roe "truncated ongoing processes of democratic deliberation, and by doing so" was "futile or even counterproductive").

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Although Glucksberg reflected none of the judicial hubris often ascribed to Roe, the question might be asked whether the very moderation of the Court's stance in Glucksberg does not display the opposite vice. Should the Supreme Court, under the Due Process Clause or elsewhere, always defer to political institutions in cases of genuinely reasonable disagreement among the citizenry or between courts and the political branches about constitutional law? Is the Court's role properly limited to cases in which legislatures depart from clearly applicable historical traditions, behave wholly irrationally, or act for forbidden purposes? Perception of reasonable disagreement clearly did not stop the Court from taking a contestable position contrary to that reached by the political majority in every other extraordinary case decided during the 1996 Term. Did something about Glucksberg make deference especially appropriate, and if so, what was it?

V. Reasonable Disagreement and the Judicial Role

The phenomenon of reasonable disagreement has been at the center of debates about judicial review virtually from the outset of American constitutional democracy. n533 Judicial review, after all, is itself a means of implementing the Constitution. And implementing the Constitution, as I have emphasized, is a project that necessarily involves many people (not just courts) and often calls for accommodation and defer- [\*142] ence. Just as the Court can take reasonable disagreement into account in crafting tests to protect recognized constitutional values - a matter discussed at length in Part III - so too can the Court attach significance to various forms of reasonable disagreement in determining, in some cases, which values the Constitution is best understood to encompass at a particular time.

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n533. See supra note 13.

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Although strong judicial deference is a theoretical option in identifying constitutionally protected values, the American tradition of judicial review, in which the Supreme Court generally operates and continued to operate in the 1996 Term, typically displays at least a moderately robust judicial role. n534 But that role is by no means undifferentiated. Witness, for example, the juxtaposition of the Court's generally deferential stance in the right-to-die cases with its more assertive role in Boerne and Printz. In addition, the Court's definition of its function always remains open to challenge as a matter of first principle. At that level, one large question is whether a robustly independent judicial role in specifying constitutionally protected values is generally defensible in a world of widespread reasonable disagreement about constitutional matters. If that question is answered affirmatively, another issue involves the circumstances, if any, in which the courts should temper their approach in light of reasonable disagreement among the citizenry or between judges and legislatures about particular issues.

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n534. See, e.g., Dworkin, Freedom's Law, supra note 19, at 4 (asserting that processes of interpretation aimed at advancing a "moral reading" of the Constitution are "thoroughly embedded in constitutional practice"); Grey, supra note 331, at 710-13 (noting the lack of firm textual support for many of the Court's constitutional rulings).

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A. Courts and Constitutional Principles

Not deducible from the necessary logic of constitutionalism or even from the concept of judicial review, the Supreme Court's relatively independent interpretive role needs a pragmatic justification. n535 If judicial review as we know it deserves to be continued, it must be because moderately robust judicial review is likely, over time, to lead to better, more successful specification and implementation of constitutional values than would alternative regimes, such as one under which courts would uphold any governmental action that could reasonably be viewed as constitutional. People differ about whether relatively robust judicial review tends in fact to produce beneficial effects. n536 Alexander Bickel offered the classic modern argument in support. n537 Bickel's argument assumes that the Constitution reflects a continuing commitment of the American people to respect shared values or principles that they would want brought to bear on issues of governance. Proceeding from this assumption, he argues that "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess." n538 Bickel's point is not that legislatures and executives do not, or cannot, take constitutional principles into account in a thoughtful way. It is, rather, that questions of principle are more likely to be at the forefront of judicial deliberations and to be framed in a context that "lengthens everyone's view." n539 Thus, he maintains, it is rational for a people committed to respecting shared values, as well as to democracy, to preserve a reasonably robust, sometimes countermajoritarian role for an institution charged with respect for and deliberation about matters of constitutional principle.

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n535. See Bickel, supra note 91, at 24; Dworkin, Freedom's Law, supra note 19, at 34-35.

n536. Criticisms come from both the political right, see, e.g., Bork, supra note 19, at 17, and the political left, see, e.g., Richard D. Parker, "Here, The People Rule: A Constitutional Populist Manifesto 4 (1994); Mary Becker, Conservative Free Speech and the Uneasy Case for Judicial Review, 64 U. Colo. L. Rev. 975, 986-87 (1993).

n537. See Bickel, supra note 91, at 23-28.

n538. Id. at 25.

n539. Id. at 26; see also Michael J. Perry, The Constitution, the Courts, and the Question of Minimalism, 88 Nw. U. L. Rev. 84, 138 (1993) ("The principal reason for doubting that ordinary politics can generally do a good job of specifying constitutional indeterminacy is that for most members of the Congress, incumbency is a fundamental value.").

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It is crucial to this argument, which I generally endorse, that recognition of reasonable disagreement should not devolve into radical skepticism, in light of which further, thoughtful deliberation would be pointless. We can recognize that people reasonably disagree about moral, political, and constitutional matters without also accepting that what ought to be done is a matter of mere subjective opinion. n540 The "burdens of judgment" n541 that are imposed by the limits of current knowledge and by the frailty of our rational powers do not establish that there is no truth to be known or, in practical matters, that one course of action is as good as another. n542 Experience confirms the common sense distinction between good and bad judgment. n543 Recognizing that reasonable people differ, we can still vest responsibility for relatively nondeferential constitutional decisionmaking in a nonmajoritarian institution, with rational hope of getting better determinations of constitutional principle and more successful constitutional implementation than we would get from the not necessarily unreasonable judgments of other, more politically accountable institutions. n544

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n540. See Rawls, supra note 11, at 150-54; Robert P. George, Law, Democracy, and Moral Disagreement, 110 Harv. L. Rev. 1388, 1394-1400 (1997) (reviewing Amy Gutmann & Dennis Thompson, Democracy and Disagreement (1996)).

n541. Rawls, supra note 11, at 54-58 (characterizing the "sources, or causes, of disagreement between reasonable persons" -- including inadequate evidence and divergent weighings of relevant normative considerations -- as "the burdens of judgment").

n542. See id. at 58.

n543. For discussions of judgment, see Ronald Beiner, Political Judgment 72-82 (1983); Isaiah Berlin, Political Judgement, in The Sense Of Reality 40 (Henry Hardy ed., 1996).

n544. Among other relevant considerations, Congress in enacting a bill does not typically purport to make a determination of constitutionality, nor could it sensibly decide a statute's constitutionality as applied to particular facts. See Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 77 (4th ed. 1996). Moreover, neither Congress nor the executive branch "is so organized as to be able, without aid from the courts, to build up a body of coherent and intelligible constitutional principle, and to carry public conviction that relevant principles are being observed." Id.

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[\*144]

B. Tempering Considerations

Within our tradition of judicial review, the Court's role in interpreting and implementing the Constitution is of course not unconstrained. Conventions of legal argument and constitutional interpretation impose significant structure on judicial decisionmaking. n545 As reflected in at least some of the Justices' opinions in the right-to-die cases, two further considerations sometimes counsel judicial caution in assigning to constitutional language and interpretive precedents an expansive meaning that they would bear, but that is not required by entrenched understandings.

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n545. See Dworkin, Freedom's Law, supra note 19, at 10-11; Fallon, supra note 424, at 1192-94 (discussing implicit norms of the practice of constitutional adjudication); Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1224-25 (1995).

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First, even when interpreting the Constitution in the face of reasonable disagreement, the Court appropriately acts in a representative capacity, n546 charged with effectuating the (assumed) interest of all members of the constitutional community in having constitutional principles brought fairly to bear on matters of practical governance. The relevant question for the Justices is not what resolution would bring constitutional doctrine most nearly into line with their personal moral views, or even with their best personal understanding of values that the Constitution reflects, n547 without regard to the reasonable views of others. The question, which implicates considerations involving the fair allocation of political power, is how the Constitution ought to be interpreted and implemented in light of history and of the diverse, more or less intense, and possibly fluid array of reasonable moral views within the society. n548

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n546. See Richard H. Fallon, Jr., *Of Speakable Ethics and Constitutional Law: A Review Essay*, 56 U. Chi. L. Rev. 1523, 1538-44 (1989); Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 Yale L.J. 1, 10 (1989) (attributing this view to Alexander Bickel); Perry, *supra* note 539, at 163.

n547. Variants of this view are by no means unheard of, see, e.g., Michael J. Perry, *The Constitution, the Courts, and Human Rights* 123 (1982); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 Stan. L. Rev. 871, 883 (1989), and I cannot provide a full refutation here. Nonetheless, it strikes me as quite implausible to think that the Constitution would license judges to give so direct a role to their individual, possibly eccentric, views about justice and morality. For further discussion, see Fallon, cited above in note 546, at 1540-41.

n548. See Waldron, *supra* note 453, at 19. Waldron asserts:

Exercises of social power must claim legitimacy in relation to the community as a whole; they must claim also the allegiance and obligation of every member of the community. They will be hard put to do this if their legitimacy is based solely upon conceptions of justice that some members of society reject.

*Id.*; cf. Ronald Dworkin, Introduction to Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon & Judith Jarvis Thomson, *Assisted Suicide: The Philosophers' Brief*, N.Y. Rev. Books, Mar. 27, 1997, at 41, 42 ("When circumstances make it possible, wide public discussion is a desirable and democratic preliminary to a final Supreme Court adjudication.").

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[\*145]

When the question is framed in this way, the Court's charge is to speak authoritatively in an institutional capacity for the constitutional community and to bring the community's values, as reflected in the Constitution and in evolving traditions, to bear on constitutional adjudication. n549 In a radically pluralistic society, the effort to represent the community's morality in interpreting the Constitution requires imagination, judgment, and sometimes a constructive effort to identify an "overlapping consensus" n550 of deep, general principles, notwithstanding arguments about their appropriate application to particular issues. In moving from general principles to concrete resolutions, courts sometimes must make contestable judgments about how the community's immanent morality would best be specified, in a sense of "best" that includes an irreducibly moral dimension. n551 Nonetheless, the Justices' work in interpreting the Constitution and in crafting implementing doctrine must be rooted in values that can reasonably be viewed as shared. Without surrendering its prerogatives of judgment or compromising its obligation to uphold constitutional values in the face of political opposition, n552 the Court, in specifying the meaning of constitutional principles, must be accountable at least in part to manifestations of reasonable moral and political commitments displayed by the citizenry, both nationally and locally. n553

-Footnotes-

n549. See Harry H. Wellington, *Interpreting the Constitution* 86, 149-50 (1990).

n550. Rawls, *supra* note 11, at 43-45.

n551. See Fallon, *supra* note 546, at 1539-40. See generally Dworkin, *supra* note 99, at 52 (defining "constructive interpretation" as "a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong").

n552. Cf. Edmund Burke, *Speech to the Electors of Bristol* (Nov. 3, 1774), in *Edmund Burke on Government, Politics and Society* 156, 157 (B.W. Hill ed., 1976) ("Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.").

n553. Cf. Bickel, *supra* note 91, at 239 (arguing that "the Court should declare as law only such principles as will -- in time, but in a rather immediate foreseeable future -- gain general assent . . . . The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own").

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With respect to issues concerning the right to die, the Court was therefore correct to note that "throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide." n554 The earnestness, profundity, and widespread nature of the debate reduced and perhaps eliminated the Court's relative advantage over legislatures in formulating relevant principles and bringing these principles to bear on contested general issues. The right-to-die debate triggers fewer concerns than some other issues about the capacity of the legislature to give fair [\*146] consideration to all relevant interests and perspectives. n555 As Justice O'Connor emphasized in her concurring opinion in *Glucksberg and Quill*, "every one of us at some point may be affected by our own or a family member's terminal illness." n556 Finally, the volatility of the underlying moral issue left the Court with no firm grasp of the nature, depth, and scope of the reasonably divergent views that it ought to take into account before removing an issue so fraught with moral passion from democratic politics.

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n554. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 (1997).

n555. Cf. Tracy E. Higgins, *Democracy and Feminism*, 110 Harv. L. Rev. 1657, 1697-1703 (1997) (arguing that when the political process mirrors inequalities in the society, its outcomes lack legitimacy).

n556. *Washington v. Glucksberg and Vacco v. Quill*, 117 S. Ct. 2302, 2303 (1997) (O'Connor, J., concurring).

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A second limiting consideration involves the Court's capacity to fashion doctrine that will implement constitutional values effectively. To develop sound doctrine, the Court requires a grasp of the institutional, sociological, and psychological contexts in which possible doctrinal rules would operate. In the right-to-die cases, uncertainty predominated - uncertainty about the likely effect of rules permitting assisted suicide on the terminally ill, on their doctors and families, on organizations funding and providing medical care, and on public attitudes toward life, death, and dying. n557

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n557. See Glucksberg, 117 S. Ct. at 2290-93 (Souter, J., concurring in the judgment); Sunstein, supra note 530, at 1141-46.

-End Footnotes-

Along the dimensions of both the Court's representative capacity and its grasp of relevant facts, the right-to-die cases contrasted with past extraordinary cases in which the Court had successfully exercised a leadership role, notably including Brown v. Board of Education. n558 In Brown, the underlying value of equality was clearly articulated in the constitutional text, and widely shared understandings confirmed the "suspect" quality of race-based discrimination. n559 In addition, school segregation presented a paradigmatic case of the "prejudice against discrete and insular minorities ... which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." n560 Despite disagreement about whether school segregation should be adjudged unconstitutional, the Court's decision offered a morally compelling interpretation of an accepted norm. The Court could justifiably hope, and even anticipate, that its ruling would help to sway opinion and forge an informed consensus on the reasonableness, and ultimately the rightness, of its decision. n561 With regard to knowledge of the contexts of application, Brown again stood apart from the right-to-die cases. In contrast with the uncertainty prevailing in Glucksberg and Quill, there could be no doubt that "the social meaning of segregation [was] the putting of the Negro in a position of walled-off inferiority" and "that such treatment is hurtful to human beings." n562 In light of contrasts such as these, the Court correctly perceived that the right-to-die cases called for an unusual degree of judicial deference to state legislatures about which relevant rights, if any, the Constitution should currently be held to confer.

-Footnotes-

n558. 347 U.S. 483 (1954).

n559. Cf. Korematsu v. United States, 323 U.S. 214, 216 (1944) ("All legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").

n560. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). In contrast, right-to-die cases involve concerns by which "every one of us at some point may be affected." Glucksberg and Quill, 117 S. Ct. at 2303 (O'Connor, J., concurring).

n561. See Bickel, *supra* note 91, at 239-41.

n562. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L.J.* 421, 427 (1960). To the remaining prospect of practical difficulties of implementation, the Brown Court responded with the famous formula of "with all deliberate speed." *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955). See generally Paul Gewirtz, *Remedies and Resistance*, 92 *Yale L.J.* 585, 609-10 (1983) (describing the Court's sensitivity to the context of implementation in forging remedies for school segregation).

- - - - -End Footnotes- - - - -

C. Fidelity and Claims of Rights

My argument in favor of judicial deference in the right-to-die cases does not presuppose personal uncertainty among the Justices about whether the best "moral reading" n563 of the Constitution would identify a right to physician-assisted suicide. I have meant to suggest that even a Justice who believes that the Constitution can reasonably be read to encompass such a right, and that this interpretation would represent a substantive moral advance, would have powerful, countervailing reasons not to recognize a constitutional right to physician-assisted suicide at this time. For a Justice who believes that there is a moral right to physician-assisted suicide, and that the Constitution would ideally be read to reflect such a right, the argument for deference may seem to conflict with the imperative of constitutional fidelity. As a result of the Court's decision to uphold laws that prohibit physician-assisted suicide, some victims of severe and debilitating illnesses will carry unwanted burdens of wasting bodies, suffering inflicted on loved ones, and physical and psychological pain. In *Glucksberg and Quill*, the representatives of people so situated came before the Court, invoking constitutional rights. Whatever else might be said for the Justices staying their hands in light of empirical uncertainties and reasonable disagreement, is the Justices' deference to political institutions - at least for now - consistent with their obligation of constitutional fidelity?

- - - - -Footnotes- - - - -

n563. Dworkin, *Freedom's Law*, *supra* note 19, at 2-4 (describing and advocating a Amoral reading" of the Constitution).

- - - - -End Footnotes- - - - -

The answer, again, is that the Justices' duty of fidelity to the Constitution must be defined at least partly in light of a defensible conception of their judicial role. Within that role, a Justice's job is not just to reach a personal judgment about how the Constitution, viewed in light [\*148] of correct moral principles, would best be read on the assumption that anyone claiming a right is entitled to this judgment. The Justices' role is also, at least as importantly, one of taking into account and sometimes accommodating the reasonable views of others. The Justices' role, moreover, is not exclusively one of truth-telling about the meaning of the Constitution (as each, personally, thinks that it ideally would be understood), but is also one, sometimes predominantly, of participating in a necessarily cooperative project of implementing the Constitution. This project is a practical one, extended over time. The Justices would be unfaithful to their roles if, trying to do too

much too fast with inadequate resources, they prematurely spoke the truth as they personally saw it and crafted bad doctrine that frustrated reasoned debate and democratic experiment.

D. Variables Affecting the Judicial Role

If the Court's obligation of fidelity is substantially to a project of implementing the Constitution successfully over time, and if advances in this project require both a sensitivity to diverse and fluid public moral sensibilities and practical insight into the likely effects of doctrine in varied institutional contexts, it follows that the Court's capacity to embark successfully on bold new paths of doctrinal development may vary over time. At least two variables deserve attention.

The first, made pertinent by the Court's function as a kind of representative decisionmaker, involves the moral and political climate within the society and, in particular, the relative consensus or lack of consensus on underlying values. Whatever state of affairs may have prevailed in the past, political theorists now take moral disagreement as a fact of modern life with which any political theory must reckon. n564 So, I have argued, must any theory of judicial review. Although constitutional adjudicators cannot be paralyzed by reasonable disagreement, they must take into account their capacity to function effectively as representative decisionmakers, whose judgments should exercise at least some influence, over time, on the moral consciences of those who might immediately be inclined to disagree. n565 In light of recent experience, notably with respect to Roe v. Wade, n566 the current Supreme Court has good reason to doubt its capacity to lead moral opinion effectively if it were to push too far ahead of prevailing sentiment with respect to many controverted issues.

- - - - -Footnotes- - - - -

n564. See Gutmann & Thompson, supra note 11, at 1; Rawls, supra note 11, at 36, 54-58; George, supra note 540, at 1388.

n565. See Bickel, supra note 91, at 239.

n566. 410 U.S. 113 (1973).

- - - - -End Footnotes- - - - -

A second relevant variable concerns the composition of the Court and its capacity to perform a representative function. In one way, of course, the federal judiciary, including the Supreme Court, is more diverse and arguably more representative than ever before. n567 For example, the first African-American Justice was not appointed until 1967, n568 the first woman until 1981. n569 Today, the Court includes one African-American n570 and two female Justices. n571 In another sense, however, the current Justices seem less well equipped to play a representative role than many of their predecessors. In the past, the Supreme Court often included figures of impressive political experience, whose sense of shared and evolving public morality had been shaped and tested by a broad and critical public. n572 Today, by contrast, the Court is dominated by lawyers and academics of generally narrower experience. Although I would not wish to put the point too strongly, there may be a consequent loss

in the Court's capacity to gauge the resonance of its judgments with relevant public moral understandings.

-Footnotes-

n567. See generally Richard A. Posner, *The Federal Courts: Challenge and Reform* 15-17 (1996) (discussing the increasing racial and gender diversity of the federal bench since the Carter Administration); Carl Tobias, *Increasing the Balance of the Federal Bench*, 32 *Hous. L. Rev.* 137, 140-50 (1995) (describing the dramatic increase in minority and female federal judges since 1977); Thomas Walker & Deborah Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 *J. Pol.* 596, 596 (1985) (assessing the impact of diversification of the federal judiciary).

n568. Justice Thurgood Marshall joined the Court in 1967. See Lockhart, Kamisar, Choper, Shiffrin & Fallon, *supra* note 268, at 1556.

n569. Justice Sandra Day O'Connor joined the Court in 1981. See *id.*

n570. Justice Clarence Thomas was nominated by President George Bush and confirmed by the Senate in 1991 to occupy the seat previously held by Justice Thurgood Marshall. See *id.* at 1558.

n571. The two are Justices Sandra Day O'Connor and Ruth Bader Ginsburg. See generally Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 *Ind. L.J.* 891, 901-05 (1995) (examining opinions of Justices O'Connor and Ginsburg during the 1993 Term for evidence of a distinctive female "voice").

n572. See Sanford Levinson, *Contempt of Court: The Most Important Contemporary Challenge to Judging*, 49 *Wash. & Lee L. Rev.* 339, 342 (1992); Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 *B.U. L. Rev.* 747, 756-63 (1992) (contrasting the Court that decided *Brown v. Board of Education*, and the political experiences of its members, with the current Court).

-End Footnotes-

In view of the Court's responsibility to act on a representative basis and the current obstacles to its doing so effectively, it is no personal criticism of any sitting Justice to say that the Court, as an institution, today seems doubtfully situated to exercise successful moral or practical leadership on a large scale. The Court may sometimes be able to do better, whereas at other times it would likely do worse, in moving ahead of predominant or emerging currents of public morality to implement broad programs of doctrinal revision. In the present state of affairs, the current Court would probably serve best by serving - as it did in the right-to-die cases - modestly.

Conclusion

In this Foreword, I have examined the Supreme Court's role, including its obligation of fidelity, in implementing the Constitution. [\*150] Implementation is a complex function, which requires practical judgment and collaboration. The mission of the Court in implementing the Constitution is

not the sum of the individual obligations of each of nine Justices to record his or her personal views about what the Constitution means in every case.

Much more often than is commonly recognized, a gap exists between constitutional norms and the doctrine crafted by courts to implement those norms. Shaping doctrine successfully requires an acute sense of institutional, sociological, and psychological dynamics, as well as good judgment about how to balance competing values. The Justices are statespersons as well as truth-tellers. The measure of their success often lies in the practical effect of the doctrines that they develop.

Because so much doctrine is made by the Supreme Court on the basis of practical judgments, we can learn much about the Court, and its conception of its role, by examining the kinds of doctrines that the Court has shaped. In this Foreword, I have identified eight distinctive types of tests that the Court sometimes employs to enforce constitutional norms protecting individuals against government. On the whole, the Court's selection of tests has produced doctrines that tend more to underprotect than to overprotect constitutional norms. The Court's choices are of course contestable, but fair criticism needs to take account of at least three considerations, all related to the phenomenon of reasonable disagreement in constitutional law. First, strong arguments frequently exist for according at least some deference to the reasonable judgments of politically accountable agencies concerning what the Constitution permits. Second, because the Justices often may disagree among themselves about the optimal doctrinal test, there may be a natural, even unavoidable tendency to settle on the least common denominator. Third, the Court in recent years has shown a defensible reluctance to rely too heavily on balancing tests, which invite problems of reasonable disagreement to break out again in applications to future cases. Yet the Court itself almost unavoidably carries out multifactor balancing calculations in determining which kinds of tests to use to implement constitutional values.

Once formulated by the Court, constitutional tests and doctrine have a powerful tendency to shape argument and determine outcomes, even within the Court itself. This phenomenon is not so self-explanatory as is sometimes assumed. The Court is rightly regarded as a forum for the consideration of ultimate constitutional principles. Yet one important function of doctrine, at least in the general run of cases that I have categorized as "ordinary," is to block appeals to first principles. The question then arises whether fidelity to doctrine, even when some Justices believe it less than optimal, is consistent with the obligation of fidelity to the Constitution. [\*151]

The answer, I have suggested, arises from viewing the Justices' obligation of fidelity as owed, in part at least, to the collective project of implementing the Constitution successfully. Successful implementation - which, again, is sometimes a different aim from providing a personal account of what the Constitution means - requires the Justices to collaborate in establishing and maintaining reasonably stable doctrinal rules. Once established, doctrine frequently serves as a focal point for reasonable agreement among the Justices, despite their divergent views about how the Constitution would best be interpreted or implemented.

Especially in the Supreme Court, however, the force of doctrine is importantly limited. In the loosely defined class of cases that I have dubbed "extraordinary," a majority of the Court accepts that decision requires

recourse to first principles. Cases of first principle call upon the Court not only to resolve a particular dispute but also to mark a doctrinal path for the future. In considering the Court's function in such cases, I have again emphasized issues and challenges arising from the phenomenon of reasonable disagreement in constitutional law. A recurrent question, itself rising to the level of first principle, involves the Court's obligation, if any, to take the reasonably divergent views of others into account in interpreting and implementing the Constitution.

I have argued that the Court has such a responsibility. When questions of constitutional principle are at stake, the Court's obligation is to act as a representative decisionmaker. The Justices' task is not to construe the Constitution directly in light of their own, possibly quirky, views of freedom, equality, and democracy, for example, but to take reasonable disagreement into account in determining which conclusions a court can fairly derive from shared but vague or contestable principles. Reasonable disagreement should not paralyze the Court. Notwithstanding reasonable disagreement, judgments can be right or wrong, better or worse. Moreover, our tradition of robust judicial review reflects a rationally grounded hope that the Court, having taken reasonable disagreement into account, can often resolve questions of constitutional principle better than more majoritarian institutions. Nonetheless, because the Court must speak for a diverse and sometimes reasonably divided constitutional community, not just for the Justices themselves, deference and accommodation are sometimes appropriate.

In its extraordinary cases during the last Term, the Court decided most issues of first principle relatively narrowly. But the Court placed strong reliance in some cases on a highly contestable theory of constitutional federalism that restricts national political majorities in order to preserve the prerogatives of local majorities. Rendered in the face of reasonable opposition, including that of apparent national political majorities in several cases, the Court's decisions may augur a coming doctrinal revolution. For revolution to occur, however, it would first [\*152] be necessary for the Justices to reach further agreements about how to implement their principles through broad and enforceable doctrinal tests.

For those supporting revolution, the justification sounds in terms of fidelity - fidelity to the Constitution as the founders intended it, or fidelity to the Constitution as seen in the best, locally democratic light. But these are contestable positions. In addition, the Court's obligation of fidelity encompasses the responsibility to craft doctrine prudently, so that the doctrine will prove stable and workable over time and command the allegiance of people of diverse views.

The capacity of the Court to make and remake constitutional doctrine successfully, especially in light of its representative obligations, is a variable, not a constant. Sometimes the Court should proceed with special caution. The Court's most cautious decisions of the 1996 Term, rendered in the right-to-die cases, were also perhaps its wisest.

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NOTE: DEFERENCE TO LEGISLATIVE FACT DETERMINATIONS IN FIRST AMENDMENT CASES  
AFTER TURNER BROADCASTING

SUMMARY:

... Last Term, in *Turner Broadcasting System, Inc. v. FCC*, the Court handed down the second in a pair of decisions considering the appropriate level of judicial deference due to legislative findings of fact in First Amendment free expression cases. ... In speech cases, traditional justifications for judicial deference to legislative fact-finding must be assessed with reference to a framework of norms reflected in First Amendment doctrine. ... The most fundamental norm of First Amendment jurisprudence is the primacy accorded to the judicial branch in the assessment of free expression claims; this is based on the understanding that the Bill of Rights sought to remove decisions about free expression from the political arena. ... How then can *Turner* be reconciled with the priorities of broader First Amendment doctrine? If traditional institutional competence arguments fail to justify judicial deference to legislative fact-finding, do any justifications remain for such deference? The answer is yes, but only if such deference furthers accurate judicial assessment of speech claims in accordance with the applicable heightened standards of review. ... They also suggest that *Turner's* amalgam of standards represents an early effort to craft a standard for judicial deference particular to the intermediate scrutiny context. ... Intermediate scrutiny is paradigmatically applied to cases involving "content-neutral" government restrictions aimed at the noncommunicative impact of acts, such as time, place, and manner restrictions, or regulation of conduct that "incidentally" burdens expression, such as the legislation at issue in *Turner*. ...

TEXT:

[\*2312]

Twenty-seven years ago, Professor Archibald Cox wrote that "it is hard to divine whether the Justices have developed a philosophy concerning the weight to be given legislative determinations of fact, characterizations, or degree in civil liberties cases." n1 The Supreme Court's recent First Amendment decisions remind us that everything old is new again.

- - - - -Footnotes- - - - -

n1. Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199, 213 (1971).

- - - - -End Footnotes- - - - -

Last Term, in *Turner Broadcasting System, Inc. v. FCC*, n2 the Court handed down the second in a pair of decisions considering the appropriate level of judicial deference due to legislative findings of fact in First Amendment free

expression cases. The Court articulated a standard under which the judiciary would accord deference to legislative fact determinations supported by "substantial evidence" at the time of a bill's passage. As enunciated, this standard appears to constrain significantly the prevailing scope of judicial review of legislative fact findings in free speech cases. At the same time, however, the Court assessed the legislation under review using a fact record, developed by a federal district court, that included evidence that had not been before Congress.

-Footnotes-

n2. These decisions are *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (Turner I) (1994), and *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174 (Turner II) (1997).

-End Footnotes-

The resulting confusion regarding the appropriate scope of review of legislative fact determinations has significant implications for speech protection. Speech doctrine places great weight on specific findings of fact as tools for applying speech-protective principles in new contexts. When exercising either strict or intermediate scrutiny of government action, for example, courts must make particular findings of fact about the existence and severity of asserted harms, the effect of the action on expression, and the fit between the action and the goals it was meant to achieve. These empirical determinations - based on social scientific, economic, scientific, and technological evidence about the "way the world works" n3 - are often determinative of constitutionality. Thus, the level of deference accorded to fact-finding by the political branches can have a significant impact on the implementation of the First Amendment's Speech and Press Clauses.

-Footnotes-

n3. Michael J. Saks, *Judicial Attention to the Way the World Works*, 75 Iowa L. Rev. 1011, 1015 (1990).

-End Footnotes-

This Note provides a framework for judicial review of legislative fact-finding in First Amendment cases, in light of the Turner decisions. Part I explores the doctrinal confusion sown by the recent opinions. [\*2313] Part II considers the traditional arguments for judicial deference and finds them unpersuasive in the context of broader norms of First Amendment jurisprudence. Part III suggests two factors that may explain the apparent doctrinal disorder and offers a two-part framework for determining the appropriate scope of review in particular cases, consistent both with First Amendment norms and the Court's decisionmaking process in the Turner cases.

I.

Doctrinal Confusion Regarding the Scope of Review

The recent Turner decisions underscore the confusion regarding the scope of judicial review of legislative fact-finding by citing conflicting precedents and competing language within the same opinions. In these opinions, the Supreme

Court upheld the constitutionality of "must-carry" provisions, Congressional mandates requiring cable operators to carry a minimum number of broadcast stations.

In Turner I, the Court determined that the provisions constituted content-neutral restrictions on speech n4 - subject to intermediate scrutiny under United States v. O'Brien n5 - and that the interests asserted by Congress were legitimate. n6 However, citing precedent stating that "[the] Court may not simply assume" the efficacy of a speech-restrictive remedy in promoting legitimate government interests, n7 the Court required the government to establish, as an empirical matter, the existence of the asserted harm and the suitability of the remedy. n8 Specifically, the Court held that the constitutionality of the regulations would necessarily rest on a factual demonstration that "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry [regulations]." n9 Because the existing evidence was ambiguous, however, the Court remanded the case to the district court's three-judge panel for the development of a more thorough fact record regarding evidence of risk of financial threat to broadcasters in the absence of the law, the extent to which the new provisions would affect cable programmers' speech, and the availability of less restrictive measures that would achieve the government's goals. n10

-Footnotes-

n4. See Turner I, 512 U.S. at 661-62.

n5. 391 U.S. 367 (1968). O'Brien requires that a regulation must further an important or substantial government interest unrelated to the suppression of expression, and must be tailored such that the burden on speech is no greater than essential to further the interest. See id. at 376-77.

n6. See Turner I, 512 U.S. at 662-63. Those interests included preserving local broadcast television, "promoting the widespread dissemination of information from a multiplicity of sources," and promoting fair competition in the television programming market. Id.

n7. Id. at 664 (plurality opinion) (quoting City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986)) (internal quotation marks omitted).

n8. See id. at 664-65.

n9. Id.

n10. See id. at 667-68.

-End Footnotes-

[\*2314] In so doing, the Court reaffirmed existing precedent setting forth courts' authority to review facts independently. The opinion cited caselaw holding that "deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake," n11 and that the traditional deference due to a legislature's fact-finding "would not foreclose [the Court's] independent judgment" of the relevant constitutional facts. n12 Furthermore, by remanding the case to the district court for further development of the fact

record, the Court affirmed the power of the judicial branch to exercise independent judgment regarding the legislative facts underlying First Amendment adjudication. Yet other language in Turner I contemplates a significantly more circumscribed review. The decision cites precedent requiring "substantial deference to the predictive judgments of Congress," even when those judgments have an impact on speech. n13 Indeed, the Court stated, courts do not have "license ... to replace Congress' factual predictions with [their] own"; they must simply inquire whether Congress drew "reasonable inferences based on substantial evidence." n14

-Footnotes-

n11. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978), cited with approval in Turner I, 512 U.S. at 666 (plurality opinion).

n12. Sable Communications, Inc. v. FCC, 492 U.S. 115, 129 (1989), quoted in Turner I, 512 U.S. at 666 (plurality opinion).

n13. Turner I, 512 U.S. at 665 (plurality opinion) (citing CBS v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973)).

n14. Id. at 666.

-End Footnotes-

Upon revisiting the issue in Turner II after the proceedings on remand, the Court adopted more singularly deferential language. Turner II makes no mention of courts' independent judgment and proclaims instead that the judiciary's "sole obligation" is to determine whether "Congress has drawn reasonable inferences based on substantial evidence." n15 Paradoxically, however, in determining the reasonableness of Congress's action, the Court also relied on evidence developed by the district court. n16 Its consideration of data relating to developments that occurred after passage of the legislative provisions directly undermines the articulated standard of review and suggests that there is room for independent judicial consideration of legislative facts even after the Turner decisions.

-Footnotes-

n15. Turner II, 117 S. Ct. 1174, 1189 (1997) (quoting Turner I, 512 U.S. at 666 (plurality opinion)) (internal quotation marks omitted).

n16. See id. at 1190, 1193-95; see also Note, Constitutional Substantial-Evidence Review? Lessons From the Supreme Court's Turner Broadcasting Decisions, 97 Colum. L. Rev. 1162, 1167-74 (1997) (discussing contradictions in the rulings).

-End Footnotes-

Amidst the confusion, lower courts have adopted hybrid articulations of the appropriate standard; some emphasize required deference, n17 others the duty of independent judgment. n18 The Fourth Circuit has adopted an unusually deferential standard. "These are "legislative [\*2315] facts,'" it ruled, "the substance of which cannot be trumped by the fact finding apparatus of a single court." n19

-Footnotes-

n17. See, e.g., *Excalibur Group, Inc. v. Minneapolis*, 116 F.3d 1216, 1221 (8th Cir. 1997).

n18. See, e.g., *Moser v. FCC*, 46 F.3d 970, 974 (9th Cir. 1995).

n19. *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995), vacated and remanded, 116 S. Ct. 1821 (1996), readopted, 101 F.3d 325, cert. denied, 117 S. Ct. 1569 (1997).

-End Footnotes-

II.

Arguments for Deference vs. First Amendment Norms

The Turner II opinion incorporates traditional justifications for judicial deference to legislative determinations. These arguments focus on the institutional "competence" of different branches of government, encompassing both their legitimate role in the constitutional structure and their institutional capacity for fact-finding. However, the practice of adjudicating free expression claims embodies norms unique to First Amendment doctrine that shift traditional assumptions, and renders traditional arguments for deference inapposite in the speech context.

A.

Traditional Justifications for Judicial Deference

1.

Institutional Roles. -

Two related arguments regarding the comparative roles of the legislative and judicial branches are commonly invoked to justify courts' deference to legislative findings. The first focuses on the structural separation of powers established by the Constitution and the appropriate functional division of tasks between the two branches. The judicial role is limited to the resolution of cases and controversies governed by standing and injury requirements; judicial discretion is cabined by interpretations of existing law and precedent. In contrast, legislative bodies enjoy wide latitude in choosing which issues to address and which policy choices to pursue. According to this analysis, legislatures, rather than courts, should make the factual determinations underlying policymaking. Indeed, noted the Turner II Court, "the Constitution gives to Congress the role of weighing conflicting evidence in the legislative process." n20 Thus, other courts have argued, independent judicial judgment over both questions of law and the facts underlying legislative determinations "would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other." n21 This distinction between the two branches underlies the doctrine of deference in constitutional law, which "holds that a court should declare a law unconstitutional, not when it thinks that the law in question runs afoul of its own reasonable

interpretation of the Constitution, but only when the law falls outside the range where reasonable people may differ." n22

-Footnotes-

n20. Turner II, 117 S. Ct. at 1191.

n21. Anheuser-Busch, 63 F.3d at 1312.

n22. Stanley C. Brubaker, The Court as Astigmatic Schoolmarm: A Case for the Clear-Sighted Citizen, in The Supreme Court and American Constitutionalism 69, 80 (Bradford P. Wilson & Ken Masugi eds., 1998) (citing James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129-56 (1893)).

-End Footnotes-

[\*2316] The second argument appeals to the comparative legitimacy of lawmaking by the various branches and bases deference on the democratic authority of elected legislatures, in contrast to the counter-majoritarian nature of judicial decisionmaking. n23 One commentator asks: "In a republic, why should courts give deeper or more authentic expression [of the Constitution] than the people's representatives?" n24 In this vein, the Turner II Court held that "we owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power." n25

-Footnotes-

n23. See Alexander M. Bickel, The Least Dangerous Branch 16-23 (Yale Univ. Press 1986) (1962).

n24. Brubaker, supra note 22, at 76.

n25. Turner II, 117 S. Ct. at 1189.

-End Footnotes-

2.

Institutional Capacity. -

A second strain of argument favoring judicial deference to legislative fact-finding contends that the legislature's superior institutional capacity to collect evidence makes it the appropriate branch to make fact determinations. This superior capacity derives from the significant resources available to legislatures, notably their committee staffs, systems of legislative hearings, and, at the federal level, the Congressional Research Service and Budget Office. Indeed, in Turner II, the Court rested its articulated deference to congressional findings in part on its assessment of the comparative fact-finding capabilities of the legislative and judicial branches. Congress, the Court found, "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." n26 Such considerations of resources and expertise have long informed arguments about the relative capabilities of the legislative and judicial branches. n27

-Footnotes-

n26. Id. (quoting Turner I, 512 U.S. 622, 665-66 (plurality opinion)) (internal quotation marks omitted).

n27. See, e.g., United States v. Leon, 468 U.S. 897, 927 (1984) (Blackmun, J., concurring); Thomas B. Marvell, Appellate Courts and Lawyers: Information Gathering in the Adversary System 184 (1978); Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 913 (1963).

-End Footnotes-

B.

First Amendment Norms

In speech cases, traditional justifications for judicial deference to legislative fact-finding must be assessed with reference to a framework of norms reflected in First Amendment doctrine. This combination of doctrinal imperatives entrusts the continued vitality of First Amendment values to courts by affording primacy to the judicial branch in making constitutional determinations when potential speech restrictions exist, urging courts to anchor decisions on explicitly empirical de- [\*2317] terminations, and adding safeguards to ensure the accuracy of facts upon which courts base First Amendment decisions.

1.

The Judicial Primacy Norm. -

The most fundamental norm of First Amendment jurisprudence is the primacy accorded to the judicial branch in the assessment of free expression claims; this is based on the understanding that the Bill of Rights sought to remove decisions about free expression from the political arena. n28 Indeed, in recent years "virtually everyone" has reached agreement on the dominant role of courts in reviewing impediments to free speech, n29 and with the reliance on Supreme Court review as the ultimate antidote to abuse. n30 This privileged status is reflected in the heightened level of judicial scrutiny mandated in the First Amendment context. Both strict and intermediate scrutiny require courts to conduct searching review of asserted government interests, make exacting distinctions between protected and unprotected speech, and determine the existence of government interests and the effects of state action.

-Footnotes-

n28. See Cox, supra note 1, at 220.

n29. John Hart Ely, Democracy and Distrust 105 (1980). But see Robert F. Nagel, How Useful Is Judicial Review in Free Speech Cases?, 69 Cornell L. Rev. 302, 339-40 (1984).

n30. See Walter Berns, The First Amendment and the Future of American Democracy 200 (Gateway Editions 1985) (1976).

-End Footnotes-

This reliance on searching judicial review reflects an alteration in the usual balance between the coordinate branches of government. In most contexts, legal doctrine reflects significant respect for constitutional determinations made by all branches; legal and factual determinations by the political branches are presumptively constitutional. n31 Yet because expressive rights are so central to effective democratic government, protection of these "representation-reenforcing" rights is entrusted to the independent judiciary, rather than the political branches. n32 Thus, the presumptions regarding the constitutionality of legislation are shifted in First Amendment doctrine, as they are in other contexts triggering heightened scrutiny; n33 in these cases, the government faces the burden of proving the constitutionality of state action infringing speech. n34

- - - - -Footnotes- - - - -

n31. See, e.g., New York State Club Ass'n v. City of New York, 487 U.S. 1, 17 (1988) ("Legislative classifications ... are presumed to be constitutional, and the burden of showing a statute to be unconstitutional is on the challenging party.").

n32. See Ely, supra note 29, at 73-104.

n33. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500-01 (1989).

n34. See, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984).

- - - - -End Footnotes- - - - -

2.

The Accurate Decisionmaking Norm. -

In addition to placing responsibility for protecting speech rights on the judiciary, First Amendment jurisprudence embodies a particular doctrinal imperative of accurate factual determinations regarding claims that state action infringes speech, because the constitutional stakes are raised when speech is in jeopardy.

[\*2318] The requirement of accuracy is rooted in the fact-based structure of First Amendment doctrine. Although free speech jurisprudence sometimes recognizes the intrinsic value of free expression, n35 it often rests instead on the furtherance of instrumentalist or consequentialist goals, the realization of which may be assessed empirically: promoting a robust "marketplace of ideas;" n36 enabling self-governance and political participation; n37 or serving as a check on the processes of government. n38 Speech doctrine similarly requires courts to make empirical assessments of facts in order to weigh competing interests. First Amendment balancing tests - most notably the O'Brien test - require courts to assess the severity of social harms and the importance of legitimate government interests, as well as to predict potential burdens on speech. n39 Overbreadth challenges and sensitivity to "chilling effects" require courts to determine whether state action "may inhibit the constitutionally protected speech of third parties." n40 And despite the near-absolute proscription on prior restraints, some form of prior restraint may be allowed

based on contextual assessments of the degree of harm that would be suffered. n41 Even when reviewing content-based restrictions, courts must make fact determinations regarding the existence of compelling state interests n42 and the fit between these interests and the government's response. n43 The Brandenburg n44 gloss on the "clear and present danger" rule defining incitement requires determinations of "imminence" and "danger." n45 Professor Nimmer has demonstrated that even categorical rules regarding expression require meas- [\*2319] ures of "definitional" balancing. n46 Thus, in both the strict and intermediate scrutiny contexts, findings of fact are often determinative of the constitutionality of government action.

- - - - -Footnotes- - - - -

n35. See, e.g., *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

n36. E.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

n37. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

n38. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 *Am. B. Found. Res. J.* 521, 521.

n39. See *supra* note 5. O'Brien's "intermediate scrutiny" balancing test similarly governs content-neutral time, place, and manner restrictions. See, e.g., *Clark*, 468 U.S. at 288, 298.

n40. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984). Professor Richard Fallon notes:

[In *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.*,] the Court also had to make more concrete, empirical, and predictive assessments about the relative proclivity of the press to engage in self-censorship under alternative liability regimes; about the proportion of truthful and untruthful assertions that would be chilled by such regimes; about the harms that would be done by false speech and the benefits of truthful speech that would be forgone under various imaginable rules ....

Richard H. Fallon, Jr., *The Supreme Court, 1996 Term - Foreword: Implementing the Constitution*, 111 *Harv. L. Rev.* 54, 63 (1997).

n41. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976); Laurence H. Tribe, *American Constitutional Law* 1050 (2d ed. 1988).

n42. See Cox, *supra* note 1, at 214 (noting the role of "judicial investigation, characterization, and appraisal of the facts to see whether the state's justification is indeed compelling").

- n43. See, e.g., *Reno v. ACLU*, 117 S. Ct. 2329, 2349 (1997).
- n44. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
- n45. See *id.* at 447.

n46. See Tribe, *supra* note 41, at 792; Melville B. Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 Cal. L. Rev. 935, 942 (1968).

- - - - -End Footnotes- - - - -

Because empirical assessment is central to First Amendment decisionmaking, the Supreme Court has developed, in a number of doctrinal contexts, what might be thought of as a "norm of accuracy." This norm is perhaps best illustrated by the Supreme Court's imposition, in *Bose Corp. v. Consumers Union of United States, Inc.* n47 and its progeny, of a constitutional "duty" on appellate courts hearing speech cases to conduct an independent review of fact records developed by federal or state courts and administrative agencies. n48 This "independent judgment rule" is "grounded entirely upon concerns assertedly peculiar to the first amendment." n49 Indeed, "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." n50 These facts must be reviewed independently, "to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits." n51

- - - - -Footnotes- - - - -

n47. 466 U.S. 485 (1984).

n48. See *id.* at 498-511; see also *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 566-68 (1995) (independently reviewing a state court judgment); *Jacobellis v. Ohio*, 378 U.S. 184, 190 n.6 (1964) ("Even in judicial review of administrative agency determinations, questions of 'constitutional fact' have been held to require de novo review.").

n49. Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 230 (1985).

n50. *Hurley*, 515 U.S. at 567.

n51. *Bose*, 466 U.S. at 505.

- - - - -End Footnotes- - - - -

First Amendment doctrine further requires exacting and accurate adjudication by imposing stringent restrictions on the procedures that govern First Amendment litigation. n52 The Supreme Court has held that in First Amendment cases, "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law." n53 "The possibility of mistaken factfinding ... creates the danger that the legitimate utterance will be penalized." n54 The desire to maximize procedural safeguards provides the rationale for having courts, rather than administrative agencies, evaluate First Amendment claims, n55 and the preference for using criminal prosecution to adjudicate obscenity claims. n56 Indeed, [\*2320] fact

determinations have such importance in First Amendment doctrine that one commentator argues that, in the absence of accurate empirical assessment, judicial decisions will appropriately protect speech only by "happenstance." n57

-Footnotes-

n52. See Henry P. Monaghan, First Amendment "Due Process", 83 Harv. L. Rev. 518, 520-26 (1970).

n53. Speiser v. Randall, 357 U.S. 513, 520 (1958).

n54. Id. at 526.

n55. See Freedman v. Maryland, 380 U.S. 51, 58 (1965).

n56. See Monaghan, supra note 52, at 543 (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 69-70 (1963)).

An accuracy norm also underlies procedures allowing judicial consideration of the speech rights of third parties. One scholar has noted that the relaxation of traditional jus tertii standing rules to allow "overbreadth" challenges results in a requirement of "regulatory precision." Henry Paul Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 3. The same might also be said of judge-made prophylactic rules, such as those against "chilling effects," that extend protection to speech not covered by the "'real' first amendment" in order to protect covered speech most accurately. David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190, 198 (1988). Commentators have argued that the impact of First Amendment litigation on non-parties places a heightened burden on courts to look beyond the facts presented by the parties. See Kenneth L. Karst, Legislative Facts in Constitutional Litigation, 1960 Sup. Ct. Rev. 75, 105-06; Note, Social and Economic Facts - Appraisal of Suggested Techniques for Presenting Them to the Courts, 61 Harv. L. Rev. 692, 700 (1948).

The nearly absolute bar on prior restraint, see, e.g., Near v. Minnesota, 283 U.S. 697, 713, 718-20 (1931), similarly reflects the accuracy norm. The doctrine has been traced to the desire to avoid "adjudication in the abstract" so that communication can be judged according to its "actual consequences or public reception," and by an adjudicative assessment of "speech value versus social harm." Vincent Blasi, Toward a Theory of Prior Restraint: The Central Linkage, 66 Minn. L. Rev. 11, 49, 93 (1981).

n57. See Nagel, supra note 29, at 303, 323-24.

-End Footnotes-

C.

The Inapplicability of Deference Arguments in Speech Cases

In light of the underlying First Amendment norms, neither strain of the traditional argument convincingly establishes the need for judicial deference in free expression cases. Separation of powers arguments fail to reflect the shift that occurs in the traditional balance of powers when courts adjudicate claims under the First Amendment, which provides an explicit textual bar on congressional action. n58 The doctrinal imperative of accurate speech

protection privileges judicial review over constitutional determinations by the political branches. This privilege is undermined, and judicial review circumvented, if courts must accept legislative findings of fact that are determinative of constitutional rulings. n59

-Footnotes-

n58. See U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press.").

n59. See Henry Wolf Bikle, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 Harv. L. Rev. 6, 19 (1925) ("It is clear that the legislative finding as to the fact upon which the validity of the legislation depends cannot be allowed to be binding on the courts, since this would furnish a simple means of preventing judicial review of such legislation in this class of cases.").

-End Footnotes-

First Amendment doctrinal norms also prevail over arguments based on democratic legitimacy and the usual limits on the scope of judicial action. In light of the centrality of expressive rights to the democratic process, and the special sensitivity to governmental intrusion that these rights require, the advantages of a countermajoritarian judiciary that remains relatively insulated from political pressures [\*2321] militate against deference to the legislative determinations of facts underlying speech decisions. n60 Independent judgment allows for the necessary searching review, and provides for more appropriate constitutional limits on governmental infringements on speech.

-Footnotes-

n60. See Thomas I. Emerson, The System of Freedom of Expression 13 (1970). Even Judge Learned Hand, while advocating increased legislative authority, recognized that courts are less likely to repress "what ought to be free." Learned Hand, The Bill of Rights 69 (1962).

-End Footnotes-

Institutional capacity arguments fail in the First Amendment context. First, it must be noted that the relative institutional capacities are far from categorical; each branch demonstrates both strengths and weaknesses in its fact-finding ability. The judicial branch is far from "incapable" of amassing empirical evidence. n61 Courts often conduct significant fact-finding through testimony and the briefs of litigants and amici. n62 Judges have taken advantage of their unconstrained ability to take judicial notice of legislative facts, as described by the Advisory Note to Federal Rule of Evidence 201, n63 by availing themselves of electronic research n64 and special masters. Consistent with the Advisory Note, scholars have even pointed to the possibility of establishing a judicial research service, similar to those available to legislatures. n65 Gathering data in a number of ways, the Supreme Court, at least, has increasingly included citations to extra-legal sources in its decisions. n66

-Footnotes-

n61. See Marvell, *supra* note 27, at 70-98, 172-210.

n62. See *id.*

n63. See Fed. R. Evid. 201 advisory committee's note (describing a judge's latitude to notice legislative facts as "unrestricted in his investigation and conclusion... He may make an independent search for persuasive data or rest content with what he has or what the parties present." (quoting Edmund M. Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269, 270-71 (1944)) (internal quotation marks omitted)).

n64. See Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 Cornell L. Rev. 1080, 1083 (1997).

n65. See Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 Minn. L. Rev. 1, 15-16 (1986); Maurice Rosenberg, *Anything Legislatures Can Do, Courts Can Do Better?*, 62 A.B.A. J. 587, 590 (1976).

n66. See Rosemary J. Erickson & Rita J. Simon, *The Use of Social Science Data in Supreme Court Decisions* 149, 155 (1998); Schauer & Wise, *supra* note 64, at 1109.

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In contrast, although legislatures - especially Congress - can claim superior fact-finding resources, the availability of such resources is offset by political factors that hinder accurate fact-finding. The fact that legislatures derive their legitimacy from democratic authority, rather than from their objectivity - the very attribute responsible for traditional deference to legislative determinations of both law and fact - is in tension with the First Amendment doctrinal requirement that the government provide reliable data to support action that infringes speech. In general, to enact legislation legitimately, Congress need not [\*2322] prepare any factual record, n67 articulate any reasons for its decisions, n68 or even have any such reasons. n69

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n67. See *Turner I*, 512 U.S. 622, 666 (1994) (plurality opinion).

n68. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); see also *Fullilove v. Klutznick*, 448 U.S. 448, 502 (1980) (Powell, J., concurring) (noting that legislators have a duty to act in a "representative rather than impartial manner").

n69. See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 133 (1989) (Scalia, J., concurring) ("Neither due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote.").

- - - - -End Footnotes- - - - -

Furthermore, even if legislative findings of fact are made, they may be unreliable. Recent public choice scholarship has demonstrated the susceptibility of legislatures to interest group influence, which weakens the ability of

political branches to protect individual rights and to accomplish accurate fact-finding. n70 When a factual record is assembled, the legislature as a whole is unlikely to pay detailed attention to the minutia of legislative findings. n71 Thus, information from a variety of formal and informal sources n72 - including lobbyists supporting or opposing legislation n73 - can make its way into the record. Legislative hearings involve planned coordination of witnesses by a bill's supporters, n74 and additional information is included in the record after the fact. n75 The accuracy of fact-finding may be further compromised in state or local legislative bodies, which may possess significantly fewer fact-finding resources, and may have no provision for recording legislative history.

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n70. See, e.g., William H. Riker & Barry R. Weingast, Constitutional Regulation of Legislative Choice: The Political Consequence of Judicial Deference to Legislatures, 74 Va. L. Rev. 373, 374-75 (1988) ("Our detailed examination of this theory ... shows that legislatures cannot be relied upon to protect citizens' rights in any area.").

n71. See Daniel A. Farber & Philip P. Frickey, Legislative Intent and Public Choice, 74 Va. L. Rev. 423, 444-45 (1988).

n72. See Keith Krehbiel, Information and Legislative Organization 61-103 (1991).

n73. See Note, Why Learned Hand Would Never Consult Legislative History Today, 105 Harv. L. Rev. 1005, 1017 (1992).

n74. See Thomas B. Curtis & Donald L. Westerfield, Congressional Intent 12-13 (1992); Saul M. Pilchen, Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments, 59 Notre Dame L. Rev. 337, 367-68 (1984).

n75. See Note, supra note 73, at 1017.

-----End Footnotes-----

Simply stated, then, a rule of deference to the legislative record in the First Amendment context conflicts with the norm of accurate judicial decisionmaking because, as the Turner I Court recognized, legislatures are "not obligated, when enacting [their] statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." n76 Legislatures may choose to engage in accurate fact-finding, or they may not. They may choose to include a variety of viewpoints, or only a single one. They may choose to compile a complete record, or none at all. Thus, judicial deference to legislative fact-finding might well result in what one scholar has termed [\*2323] the "circular buck-pass": "Congress passes the problem over to the Court with the happy assumption that the Court somewhere is going to examine the matter closely and come to a decision; and the Court passes it back again and says that Congress has decided all the relevant factual issues, hence we can stamp it through." n77 In short, the Court has recognized that "we cannot, because of modest estimates of our competence ... withhold the judgment that history authenticates as the function of this Court when liberty is infringed." n78

-Footnotes-

n76. Turner I, 512 U.S. 622, 666 (1994) (plurality opinion).

n77. John P. Frank, Discussion of Paul A. Freund, Review of Facts in Constitutional Cases, in Supreme Court and Supreme Law 47, 53-54 (Edmond Cahn ed., 1954).

n78. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943).

-End Footnotes-

III.

Reconciling Turner-Deference with Speech Doctrine

How then can Turner be reconciled with the priorities of broader First Amendment doctrine? If traditional institutional competence arguments fail to justify judicial deference to legislative fact-finding, do any justifications remain for such deference? The answer is yes, but only if such deference furthers accurate judicial assessment of speech claims in accordance with the applicable heightened standards of review.

With this possible functional justification in mind, this Part suggests a framework for discerning the types of cases in which legislative fact-finding might promote adjudicative accuracy sufficient to warrant some deference by courts, while remaining consistent with First Amendment doctrine's emphasis on the primacy of the judiciary in making determinations in speech cases. The analysis suggests that the apparent doctrinal confusion reflected in the Turner opinions can be explained by two factors not explicitly explored by the Supreme Court: the applicable level of judicial scrutiny, which affects the norm of judicial primacy, and the quality of the legislative fact record, which affects the accuracy norm. This Part then suggests a framework for assessing legislative fact determinations in intermediate scrutiny free expression cases in light of the Court's actions in Turner II.

A.

Factor 1: The Standard of Review

Speech decisions have not elaborated the appropriate relationship between the level of judicial scrutiny and the level of deference due to legislative fact-finding. Yet the rationales underlying the application of these different levels of review indicate that, although independent judicial judgment about factual determinations is often considered a component of strict scrutiny, n79 reliable legislative fact-finding might justify some degree of deference in intermediate scrutiny cases. These rationales provide one way to reconcile Turner, an intermediate scru- [\*2324] tiny case, with Reno v. ACLU, n80 a strict scrutiny case decided several months later that did not consider deference to legislative findings. n81 They also suggest that Turner's amalgam of standards represents an early effort to craft a standard for judicial deference particular to the intermediate scrutiny context.

-Footnotes-

n79. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-503 (1989).

n80. 117 S. Ct. 2329 (1997).

n81. Reno asserted "an "over-arching commitment' to make sure that Congress has designed its statute to accomplish its purpose "without imposing an unnecessarily great restriction on speech," id. at 2347 (quoting *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2385 (1996)), and cited District Court findings to demonstrate "incorrect factual premises" relied upon by Congress, id.

- - - - -End Footnotes- - - - -

Deference to factual determinations underlying legislation would conflict with the rationales underlying strict scrutiny in speech cases. Strict scrutiny is triggered when government "singles out" expression for "control or penalty" based on its content. n82 Such restriction receives an especially strong presumption of unconstitutionality, n83 and is almost always illegitimate. Commentators have understood the nearly absolute application of this "forbidden-content" test as a surrogate for an inquiry into whether government actors are furthering "forbidden purposes." n84 Consequently, both the content-based act and the motives of the actors are constitutionally suspect. n85 In this context, it makes no sense for courts to accord any deference to the determinations made by those actors.

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n82. *Tribe*, supra note 41, at 789, 791-92.

n83. See id. at 790-91.

n84. Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 451 (1996); see Fallon, supra note 40, at 94-97.

n85. See *Turner I*, 512 U.S. 622, 641 (1994) ("Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.").

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The same arguments for completely independent judicial judgment do not apply in the intermediate scrutiny context. Intermediate scrutiny is paradigmatically applied to cases involving "content-neutral" government restrictions aimed at the noncommunicative impact of acts, such as time, place, and manner restrictions, or regulation of conduct that "incidentally" burdens expression, n86 such as the legislation at issue in *Turner*. n87 "Content-neutral" lawmaking, then, involves legislative action that embodies legitimate purposes, but may run afoul of the Constitution because of its effects. n88 Moreover, intermediate scrutiny doctrine allows for some degree of governmental discretion; n89 legislatures may act in any number of ways, as long as a "regulation promotes a substantial government interest that would be achieved less [\*2325]

effectively absent the regulation," n90 and a "substantial portion of the burden on speech does not serve to advance [government] goals." n91

-Footnotes-

n86. See Tribe, supra note 41, at 792.

n87. See Turner II, 117 S. Ct. 1174, 1184 (1997).

n88. See Tribe, supra note 41, at 819 (discussing the Court's rejection of a "motive inquiry" in the intermediate scrutiny context).

n89. See Turner II, 117 S. Ct. at 1198.

n90. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)) (internal quotation marks omitted).

n91. Id.

-End Footnotes-

In sum, the purposes of strict scrutiny doctrine render suspect any claim that some degree of deference to legislative fact determinations would increase the accuracy of First Amendment decisions. However, deference would not be inconsistent with the demands of intermediate scrutiny if reliance on legislative findings would promote precise adjudication.

B.

Factor 2: The Quality of the Legislative Record

Speech decisions have also lacked systematic discussion of the impact of the comprehensiveness of the legislative record on the scope of review. Yet such considerations seem to explain many apparent inconsistencies in Supreme Court decisions.

Courts may receive fact records of varying quality because of the latitude accorded to legislatures in decisionmaking, the political and special-interest forces at work in the legislative process, and the ultimate fact that legislatures need not produce any evidence of fact-finding. Legislatures are able to create records that are comprehensive and procedurally sound, like the one in Turner, when they avail themselves of their considerable fact-finding capacity. Such records include significant evidence supported by documentation, studies from independent sources, testimony by representatives of various interested groups, and assessments undertaken by Congress itself. When legislators fail to consider the speech implications of their actions, and therefore do not make findings of fact regarding the fit between their enactments and perceived problems, the resulting records are less comprehensive. Other records contain limited findings, or unsubstantiated conclusions, either dressed up as "fact-finding" in the legislative history or included in an enactment's prefatory language. n92

-Footnotes-

n92. See General Media Communications, Inc. v. Cohen, 131 F.3d 273, 294 (2d Cir. 1997) (Parker, J., dissenting) (noting that "the only evidence the government offers in support of its arguments is the title of [the Military Honor and Decency] Act"); infra p. 2326.

- - - - -End Footnotes- - - - -

The variance in quality of records goes a long way toward explaining conflicting precedents regarding judicial review of legislative fact-finding. Turner II, the principal Supreme Court case articulating a deferential standard, emphasized both the process by which Congress made its findings, and the comprehensiveness of the record it produced. Noting that "the dissent criticizes our reliance on evidence provided to Congress by parties that are private appellees here," the Court emphasized that legislative hearings had included all parties, and relevant testimony "was supported by verifiable information and [\*2326] citation to independent sources." n93 The Court further noted the "years of testimony," the "volumes of documentary evidence and studies offered by both sides," and Congress's background expertise in this area of regulatory policy n94 in support of its conclusion that "we must give considerable deference, in examining the evidence, to Congress' findings and conclusions." n95

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n93. Turner II, 117 S. Ct. at 1191.

n94. Id. at 1189 (citing Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 103 (1973), which advised, in the First Amendment context, that the Court "pay careful attention to how the other branches of Government have addressed the same problem").

n95. Id.

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In contrast, the Supreme Court's rulings rejecting judicial deference have all occurred in cases involving weak legislative records. Landmark Communications, Inc. v. Virginia, n96 which initially articulated the clear "independent judgment" standard, noted that the state statute at issue was devoid of "actual facts" and contained only a "legislative declaration" of clear and present danger. n97 In Sable Communications, Inc. v. FCC, n98 which reaffirmed that standard, the Supreme Court expressed even greater misgivings about the legislative record before it. Regarding the substance of the "facts" found, the Court noted that "aside from conclusory statements during the debates by proponents of the bill, as well as similar assertions in hearings ... the congressional record presented to us contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be." n99 Concerning the process, it concluded that, "no Congressman or Senator purported to present a considered judgment with respect to how often or to what extent" the putative harm would occur. n100 Just last Term, the Court cited Sable for its "lack of legislative attention to the statute at issue." n101

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n96. 435 U.S. 829 (1978).

n97. Id. at 843.

n98. 492 U.S. 115 (1989).

n99. Id. at 129-30.

n100. Id. at 130; see also Reno v. ACLU, 117 S. Ct. 2329, 2338 n.24 (1997) (citing Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action, Hearing on S. 892 before the Senate Committee on the Judiciary, 104th Cong. 7-8 (1995) ("The Senate went in willy-nilly, passed legislation, and never once had a hearing, never once had a discussion other than an hour or so on the floor." (remarks of Sen. Leahy))).

n101. Reno v. ACLU, 117 S. Ct. at 2347 n.41 (1997). These types of shortcomings are even more likely to accompany enactments by state or local governments, which may not even have procedures for keeping legislative history or other comparable records.

-----End Footnotes-----

C.

Suggestions for Judicially Manageable Standards

When considered in light of the two factors that seem to track the Court's jurisprudence in this area, the Turner II Court's actions suggest a two-part framework for reviewing legislative fact determinations in intermediate scrutiny cases.

[\*2327]

1.

The "Turner Threshold." -

The relationship between the character of the legislative fact-finding and the scope of judicial review suggests that there is a threshold beyond which fact records are so comprehensive that they should receive some judicial deference. n102 Thus, to be consistent with the First Amendment's accuracy norm, courts hearing speech claims should first inquire as to the fact-finding capacity of the legislative body being challenged, and then ask whether that body actually made its fact determinations in light of a comprehensive legislative record.

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n102. Certainly, the initial characterization of a legislative record as "factual" rests on the thorny distinction between "fact" and "policy" questions; yet courts must often make such distinctions. See, e.g., Allentown Mack Sales & Serv., Inc. v. NLRB, 118 S. Ct. 818, 828 (1998) ("An agency should not be able to impede judicial review ... by disguising its policymaking as factfinding.").

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Turner II suggests that this threshold inquiry has three components, each related to the issue of accuracy and reliability of legislative fact-findings: a procedural component, n103 requiring the legislature to spend considerable time and resources on assembling the fact record and to afford opponents and proponents of legislation an opportunity to be heard before findings of fact are made; a substantive component, considering whether the record is substantial and whether it addresses all of the empirical First Amendment issues raised; and a qualitative component, assessing whether the facts at issue are of the type over which Congress has a demonstrated substantive expertise, perhaps as part of ongoing regulation. When records fail to meet this threshold, legislative findings should command no special weight because they would fail to meet the only legitimate justification for deference: aiding accurate judicial decisionmaking. When the Turner threshold is satisfied, the reviewing court should assess the reasonableness of the legislature's findings under the "substantial evidence" scope of review articulated in Turner II.

-Footnotes-

n103. This inquiry echoes the suggestions of some scholars that courts monitor "due process of lawmaking." See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 485-506 (2d ed. 1995); Hans Linde, *Due Process of Lawmaking*, 55 *Neb. L. Rev.* 197, 251 (1976); Laurence H. Tribe, *Structural Due Process*, 10 *Harv. C.R.-C.L. L. Rev.* 269, 269 (1975).

-End Footnotes-

A requirement that legislatures meet such a threshold makes particular sense in light of that scope of review. The Court borrowed this standard from administrative law doctrine; it is applied in that arena only in judicial review of formal adjudication or rulemaking "on the record." n104 Such procedures require notice n105 and rights to cross-examination "as may be required for a full and true disclosure of the facts," n106 and involve staff investigation and some degree of rights of [\*2328] participation by interested parties and public interest groups. n107 The ultimate determination must appear in writing and include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." n108 Under substantial evidence review, such a complete record is particularly necessary because reviewing courts are required to consider the "whole record," including all relevant evidence supporting and conflicting with the agency's findings. n109

-Footnotes-

n104. This standard is articulated in the Administrative Procedure Act, 5 U.S.C. 706(2)(E) (1994).

n105. See *id.* 554(b).

n106. *Id.* 556(d).

n107. See Peter L. Strauss, Todd Rakoff, Roy A. Schotland & Cynthia R. Farina, Gellhorn and Byse's *Administrative Law: Cases and Comments* 464-509 (9th ed. 1995) (discussing "The Role of Private Parties in Shaping Administrative Proceedings").

n108. Administrative Procedure Act, 5 U.S.C. 557(c)(A).

n109. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

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At least one lower court, the Eighth Circuit in Carver v. Nixon, n110 seems to have understood the Turner decisions as establishing some sort of a threshold for deference. Referring to the elements that Turner I "would require that we consider to justify according deference," including legislative committee studies and hearings, the court found the legislative record lacking, and held the statute at issue unconstitutional. n111

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n110. 72 F.3d 633 (8th Cir. 1995).

n111. Id. at 644-45; see also Excalibur Group, Inc. v. Minneapolis, 116 F.3d 1216, 1221 (8th Cir. 1997) (applying the Turner "substantial evidence" standard after considering the depth of the record and evidence from hearings).

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2.

Independent Judicial Reassessment. -

The Turner II Court suggested a standard by which statutes should be upheld if legislative decisions rest on "substantial evidence" of constitutionality. Yet, in light of First Amendment doctrine's emphasis on searching and accurate judicial scrutiny - and in light of the failure of institutional competence arguments in the free speech context - it seems troubling that legislation should be assessed under an entirely different scope of review merely because Congress has assembled a reliable fact record.

Despite their statement of the "substantial evidence" test, the Turner decisions also reflect an implicit rejection of this standard. Equipped with evidence from the legislative record, the Turner I Court nevertheless engaged in what might be called "independent judicial re-assessment": it remanded the case for further judicial factual development. Similarly, the Turner II Court, having established the existence of "substantial evidence" before Congress, reassessed that evidence in light of the augmented factual record, and determined that "Congress' conclusion was borne out by the evidence on remand." n112

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n112. Turner II, 117 S. Ct. 1174, 1191 (1997).

- - - - -End Footnotes- - - - -

The Turner Courts' actions thus suggest an additional component to the simple "substantial evidence" formula articulated in Turner II, a component that furthers both the judicial primacy and accuracy [\*2329] norms. n113 It might therefore be better to understand legislative records passing the "Turner threshold" as creating only a presumption that the government has proven the

factual underpinnings of its argument. Understood in this way, the existence of legislative facts does not disrupt the burdens imposed by First Amendment doctrine. The government still must demonstrate the constitutionality of its action; Congress has simply done much of the work in advance. The presumption, however, can be rebutted by facts raised by the parties, by amici, and by independent judicial research. Thus, judicial supremacy essential to the protection of free speech is preserved; the burdens on government to establish the constitutionality of its actions are maintained; changes in the underlying social facts can be considered; and the accuracy of free speech decisions is maximized.

-Footnotes-

n113. This additional judicial check ensures that the legislative fact-finding is robust in substance as well as in form, see John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 117 n.286 (1996) ("Interest groups have an incentive to make use of the judiciary's putative institutional incapacity for fact finding by obtaining factual findings from the legislature that insulate their preferred legislation from constitutional attacks in court."), and enables decisions to accurately represent changes in the underlying facts, see Transcript of Oral Argument, *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (No. 96-511), available in 1997 WL 136253, at \*49 (Mar. 19, 1997) ("Is it possible that this statute is unconstitutional today, or was unconstitutional 2 years ago when it was examined on the basis of a record done about 2 years ago, but will be constitutional next week? ... Or next year or in two years?" (questions of Justice Scalia)).

-End Footnotes-

IV.

Conclusion

As the poster children of free expression - the soapbox speaker on one hand and the political leafleteer on the other - fade into relative historical obscurity, n114 First Amendment doctrine emphasizes empirical determinations as a means for ensuring fidelity to underlying constitutional principles in the face of economic, social, and technological changes that affect the means and methods of communication. A patchwork doctrine for determining the level of deference due to legislative fact determinations threatens that fidelity, as does *Turner II*'s articulated rule of deference based on traditional arguments about institutional competence from outside the speech context.

-Footnotes-

n114. See *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 196 (1973) (Brennan, J., dissenting) ("Modern technological developments in the field of communications have made the soapbox orator and the leafleteer virtually obsolete.").

-End Footnotes-

This Note instead suggests a framework of analysis that acknowledges a legislature's ability to construct a reliable fact record without capitulating to mere assertions that it has done so. By determining the appropriate level

of deference in each case based on the level of scrutiny, the characteristics of the legislative record, and additional facts raised in court, judges can promote both the First Amendment accuracy norm and the role of courts as protectors of speech.