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- n1. Roth v. United States, 354 U.S. 476, 485 (1957).
- n2. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
- n3. Id.
- n4. Miller v. California, 413 U.S. 15, 23-24 (1973).
- n5. Ginsberg v. New York, 390 U.S. 629, 638 (1968). The idea is that a work that is not obscene under adult standards may nevertheless be unsuitable for minors and that the state has an interest in protecting minors from unsuitable influences. Id. at 638-41.
- n6. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., dissenting) (same opinion filed as concurrence in Ginsberg, 390 U.S. at 645).
- n7. See, e.g., Kucharek v. Hanaway, 902 F.2d 513, 521 (7th Cir. 1990) (reversing order that declared Wisconsin's obscenity statute unconstitutional), cert. denied, 498 U.S. 1041 (1991); People v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348, 374 (Colo. 1985) (upholding in part and denying in part bookstore and retail owners' overbreadth challenge to obscenity statutes).

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

While these types of infirmities are usually curable through careful drafting by legislative bodies or authoritative construction by state courts, another issue poses a more stubborn problem: Many states have exempted certain organizations, including schools, universities, [*398] public libraries, and museums, from prosecution under their obscenity statutes. n8 Operators of bookstores and their allies allege that such exemptions violate the Fourteenth Amendment's guarantee of equal protection. n9 In essence, the claims raise the following question: May a state permit one institution (e.g., a public library) to distribute obscene material, and simultaneously prohibit another institution (e.g., a bookstore) from distributing the very same work? As with any equal protection challenge, courts must evaluate both the ends the states are pursuing by drawing this type of distinction, and the means chosen to achieve those ends. n10 But before doing so, they must answer certain preliminary questions: Does the obscenity vel non of a work depend on who distributes it? Can a bookseller invoke the Fourteenth Amendment to protect activity that the First Amendment does not? To answer these questions effectively one must consider whether obscene speech is "utterly without redeeming social importance," n11 such that it receives no protection, or whether instead it is a type of expression that, while low-value to many, is not invisible to the Constitution.

-----Footnotes-----

n8. See, e.g., Wis. Stat. Ann. 944.21(8)(b) (West Supp. 1994):

No person who is an employe [sic], a member of the board of directors or a trustee of any of the following is liable to prosecution for violation of this section for acts or omissions while in his or her capacity as an employe [sic], a member of the board of directors or a trustee:

1. A public elementary or secondary school.
2. A private school, as defined in s. 115.001(3r).
3. Any school offering vocational, technical or adult education that:
 - a. Is a technical college, is a school approved by the educational approval board under s. 38.51 or is a school described in s. 38.51(9)(f), (g) or (h); and
 - b. Is exempt from taxation under section 501(c)(3) of the internal revenue code.
4. Any institution of higher education that is accredited, as described in s. 39.30(1)(d), and is exempt from taxation under section 501(c)(3) of the internal revenue code.
5. A library that receives funding from any unit of government.

n9. U.S. Const. amend. XIV, 1.

n10. See infra notes 42-44 and accompanying text.

n11. Roth v. United States, 354 U.S. 476, 484 (1957).

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

This Note examines two types of exemptions. Part I analyzes statutory schemes wherein legislatures have prohibited the distribution of all obscene material but have carved out exemptions for organizations such as libraries, schools, and museums. In these situations, the courts have subjected exemptions to a rational basis analysis. n12 [*399] Because obscenity is an unprotected category of speech, n13 an exemption to an obscenity statute does not implicate any fundamental right; therefore, the states need only be rationally furthering a legitimate interest in distinguishing among organizations to overcome an equal protection challenge. n14 Analysis reveals that three of the most commonly asserted justifications for the exemptions should fail even this relatively lenient review because they misunderstand the nature of the Miller obscenity test. Three other justifications seek to achieve legitimate state goals; however, because it is unclear how effectively the exemptions further those goals, the success of an equal protection challenge advancing one of these three justifications depends on how demanding or deferential the reviewing court is in applying the rational basis test.

- - - - -Footnotes- - - - -

n12. See, e.g., Kucharek v. Hanaway, 902 F.2d 513, 520 (7th Cir. 1990) (finding Wisconsin's exemptions for libraries, schools, and contract printers rational), cert. denied, 498 U.S. 1041 (1991); State v. Luck, 353 So. 2d 225, 232 (La. 1977) (finding Louisiana's exemptions for schools, museums, public libraries, hospitals, and governmental authorities not rationally related to legitimate state interest).

n13. See Miller v. California, 413 U.S. 15, 23 (1973) (holding that obscene material is categorically unprotected by First Amendment).

n14. See Kucharek, 902 F.2d at 520 (employing rational basis scrutiny to review Wisconsin's exemptions); Luck, 353 So. 2d at 232 (employing rational basis scrutiny to review Louisiana's exemptions).

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

Part II analyzes statutory schemes wherein legislatures have prohibited the display (rather than distribution) of materials that are harmful to minors (rather than obscene). These statutes usually proscribe the display of sexually oriented materials in windows or on display racks. n15 Because these statutes regulate the display of material that is not obscene as to adults, they implicate booksellers' First Amendment rights to display and sell certain materials, and adults' First Amendment rights to view and purchase these materials. Thus the states have granted different groups (e.g., bookstores and libraries) different rights with respect to constitutionally protected expression, and strict scrutiny is the appropriate mode of equal protection analysis. n16 Part II demonstrates that the justifications proffered for exemptions from display statutes for schools, libraries, and museums cannot pass muster.

- - - - -Footnotes- - - - -

n15. See, e.g., Ga. Code Ann. 16-12-103 to -104 (1990) (providing exemption to public and school libraries from provision generally prohibiting unlawful distribution of material to minors); 18 Pa. Cons. Stat. Ann. 5903(a)(1), (j) (Supp. 1995) (exempting charitable societies, museums, and public and school libraries from public indecency statute).

n16. See, e.g., American Booksellers Ass'n v. Webb, 643 F. Supp. 1546, 1555 (N.D. Ga. 1986) (employing strict scrutiny to review exemptions from display statutes), rev'd, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); Upper Midwest Booksellers Ass'n v. City of Minneapolis, 602 F. Supp. 1361, 1374 (D. Minn.) (same), aff'd, 780 F.2d 1389 (8th Cir. 1985); Tattered Cover, Inc. v. Tooley, 696 P.2d 780, 786 (Colo. 1985) (same).

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

Part III explores whether R.A.V. v. City of St. Paul n17 suggests a different approach to the issues raised by the two types of exemptions. In R.A.V., the Court altered the traditional approach to unprotected [*400] categories of speech by holding that even within a category of speech which a state may proscribe entirely (in R.A.V., fighting words) the state may not make selective proscriptions based on content. n18 The Justices concurring only in the judgment argued that the power to prohibit the entire category of expression, which every justice conceded states have, subsumed the power to prohibit only a subsection of it. n19 The majority, however, maintained that absent a compelling justification the state may not distinguish among words based on their content, n20 particularly, as was the case in R.A.V., when the enacted law tends to prefer one viewpoint to another. n21 For present purposes, then, the key question becomes whether the state needs a compelling justification to make selective proscriptions within a traditionally unprotected category when the discrimination is among speakers rather than subjects. Part

III indicates that the two situations are sufficiently analogous to justify employing similar approaches in both. The Part analyzes the Court's reasoning in R.A.V. and then concludes by raising the possibility that exempting certain organizations from distribution statutes and display statutes results in the preference of certain viewpoints over others, an effect the R.A.V. Court stated the First Amendment will not tolerate. n22

-Footnotes-

n17. 112 S. Ct. 2538 (1992).

n18. Id. at 2543.

n19. Id. at 2551 (White, J., concurring in the judgment).

n20. Id. at 2547.

n21. Id. at 2547-48.

n22. Id.

-End Footnotes- -I

Exemptions from Obscenity Distribution Statutes

A. Distribution Statutes and Exemptions Generally

In Miller v. California n23 the Supreme Court announced a three-part test for determining when sexually explicit material may be regulated by the states: A work may be subjected to state regulation if the work (1) taken as a whole, appeals to the prurient interest in sex; (2) portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) taken as a whole, lacks serious literary, artistic, political, or scientific value. n24 Miller set forth a new formula for determining which works are obscene n25 and reiter- [*401] ated statements from Roth v. United States, n26 which held that obscene materials deserve no protection under the First Amendment: Obscenity is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." n27 Thus, a state may restrict the distribution and exhibition of materials that are judged obscene under the three-part test. n28 Forty-seven states currently define obscenity in a manner that closely tracks the Miller definition. n29

-Footnotes-

n23. 413 U.S. 15 (1973).

n24. Id. at 24.

n25. Miller's primary alteration of the then-existing definition of obscenity was with respect to the third element of the test. The previous inquiry for the third element had been whether the work was "utterly without redeeming social value." A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v.

Massachusetts, 383 U.S. 413, 419 (1966) (emphasis omitted). The Miller majority noted that this test forced the prosecution to prove a negative, a nearly impossible task under criminal standards of proof. Miller, 413 U.S. at 22.

n26. 354 U.S. 476 (1957).

n27. Miller, 413 U.S. at 20-21 (emphasis omitted) (quoting Roth, 354 U.S. at 484-85).

n28. In Stanley v. Georgia, 394 U.S. 557 (1969), the Court held that the First Amendment protected the individual's right to possess obscene material in the privacy of the home. Id. at 565. It is important to note that in Miller the Court took care not to alter the rule from Stanley, emphasizing only that states may regulate the distribution and commercial exploitation of obscene materials. Miller, 413 U.S. at 19, 36.

n29. Ala. Code 13A-12-200.1 (1994); Ariz. Rev. Stat. Ann. 13-3501 (1989); Ark. Code Ann. 5-68-203 (Michie 1987); Cal. Penal Code 311 (West Supp. 1995); Colo. Rev. Stat. 18-7-101 (1986); Conn. Gen. Stat. 53a-193 (1992); Del. Code Ann. tit. 10, 7201 (Supp. 1994); Fla. Stat. ch. 847.001 (1993); Ga. Code Ann. 16-12-80 (1990 & Supp. 1993); Haw. Rev. Stat. 712-1210 (1985); Idaho Code 18-4101 (1987); Ill. Rev. Stat. ch. 38, paras. 11-20 (1973); Ind. Code Ann. 35-49-2-1 (Burns 1994); Iowa Code 728.1 (1993); Kan. Stat. Ann. 21-4301 (Supp. 1995); Ky. Rev. Stat. Ann. 531.010 (Michie/Bobbs-Merrill 1985); La. Rev. Stat. Ann. 14:106(A) (West 1986); Md. Ann. Code art. 27, 419 (1987); Mass. Gen. Laws Ann. ch. 272, 31 (West 1990); Mich. Comp. Laws Ann. 752.362 (West 1991 & Supp. 1995); Minn. Stat. 617.241 (1994); Miss. Code Ann. 97-29-103 (1994); Mo. Rev. Stat. 573.010 (Supp. 1993); Mont. Code Ann. 45-8-201 (1993); Neb. Rev. Stat. 28-807 (1989 & Supp. 1994); Nev. Rev. Stat. 201.235 (1994); N.H. Rev. Stat. Ann. 650:1 (1986); N.J. Stat. Ann. 2C:34-2 (West 1982); N.M. Stat. Ann. 30-38-1(B) (Michie 1989); N.Y. Penal Law 235.00 (McKinney 1989 & Supp. 1995); N.C. Gen. Stat. 14-190.1 (1993); N.D. Cent. Code 12.1-27.1-01 (1985 & Supp. 1995); Ohio Rev. Code Ann. 2907.01 (Baldwin 1992); Okla. Stat. tit. 21, 1024.1 (1991); Or. Rev. Stat. 167.087 (1993); 18 Pa. Cons. Stat. Ann. 5903(a)(1), (j) (Supp. 1995); R.I. Gen. Laws 11-31-1 (1994); S.C. Code Ann. 16-15-305 (Law. Co-op. Supp. 1993); S.D. Codified Laws Ann. 22-24-27 (Supp. 1994); Tenn. Code Ann. 39-17-901 (1991); Tex. Penal Code Ann. 43.21 (West 1994); Utah Code Ann. 76-10-1203 (1995); Va. Code Ann. 18.2-372 (Michie 1988); Wash. Rev. Code Ann. 7.48.050 (West 1992); W. Va. Code 7-1-4(b)(4) (1994); Wis. Stat. Ann. 944.21 (West Supp. 1994); Wyo. Stat. 6-4-301 (1988). Alaska, Maine, and Vermont do not define obscenity as it relates to adults because they do not regulate its distribution to adults. Counties and municipalities may also regulate obscene materials in many states. See, e.g., N.M. Stat. Ann. 3-18-17(C) (Michie 1994) (empowering municipalities to regulate obscene materials); W. Va. Code 7-1-4(a) (1994) (licensing county commissions to regulate obscene matter).

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

States are free, of course, to refrain from enacting such provisions if they choose, or to limit the reach of the provisions to fewer works than the Miller test would implicate. For instance, a state legislature could modify the third prong of the test to include an exception for works with any educational value, which could conceivably lead to the [*402] exemption of more material than the original formulation. Fourteen states have granted greater leniency by pursuing a different route; rather than narrowing the range of materials

covered by their obscenity statutes, they have narrowed the range of persons subject to the provisions. n30 These states have exempted from prosecution a variety of institutions including schools, universities, libraries, hospitals, museums, theaters, religious organizations, governmental agencies, and tax-exempt and publicly funded organizations, as well as persons acting in the capacity of employees of these institutions. n31 By enacting these exemptions the legislatures have created a zone in which materials that would otherwise be prohibited may exist.

-Footnotes-

n30. Idaho Code 18-4102 (1987); Iowa Code 728.7 (1993); La. Rev. Stat. Ann. 14:106(D) (West 1986); Mass. Gen. Laws Ann. ch. 272, 29 (West 1990); Mich. Comp. Laws Ann. 752.367 (West 1991 & Supp. 1995); Miss. Code Ann. 97-29-107 (1994); Neb. Rev. Stat. 28-815 (1989); Nev. Rev. Stat. 201.237 (1993); N.D. Cent. Code 12.1-27.1-11 (1985 & Supp. 1995); Ohio Rev. Code Ann. 2907.32 (Baldwin 1992); Or. Rev. Stat. 167.089 (1993); 18 Pa. Cons. Stat. Ann. 5903(a)(1), (j) (Supp. 1995); Wis. Stat. Ann. 944.21(8) (West Supp. 1994); Wyo. Stat. 6-4-302 (1988).

n31. See, e.g., Mass. Gen. Laws Ann. ch. 272, 29 (West 1990); Mich. Comp. Laws Ann. 752.367 (West 1991 & Supp. 1995); Ohio Rev. Code Ann. 2907.32 (Baldwin 1992).

-End Footnotes-

These exemptions have been repeatedly challenged by booksellers and trade associations as unconstitutional. n32 Their argument is not directly premised on the First Amendment; under Miller, the guarantees of freedom of speech and press do not extend to obscene materi- [*403] als and since the exemptions cover only the distribution of obscenity, a claim that the non-exempted institutions' freedom of expression was being infringed would fail. n33 Instead, the plaintiffs in these cases assert that the exemptions violate the Fourteenth Amendment's guarantee of equal protection by illegitimately allowing one set of speakers n34 to distribute obscene materials while prohibiting another set from doing the same. n35

-Footnotes-

n32. There are generally two situations in which the exemptions are challenged. First, booksellers and trade organizations have facially attacked the exemptions. See, e.g., American Booksellers Ass'n v. Webb, 643 F. Supp. 1546, 1555-56 (N.D. Ga. 1986) (invalidating exemption for public and school libraries), rev'd, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991). Second, individuals convicted by state trial courts have challenged the validity of the convictions, attacking the statute either within the state system, see, e.g., City of Duluth v. Sarette, 283 N.W.2d 533, 535-38 (Minn. 1979) (invalidating city's exemptions but upholding remaining portions of obscenity statute), or collaterally in habeas corpus petitions, see, e.g., Piepenburg v. Cutler, 649 F.2d 783, 793 (10th Cir. 1981) (holding obscenity distribution statute, under which petitioner was convicted, constitutional). While it is clear why incarcerated defendants would challenge the statutes, it is paradoxical that booksellers should attack an obscenity statute for being, in effect, too lenient; after all, under Miller, the state could prohibit dissemination of obscenity altogether. The apparent contradiction can be explained as follows: The plaintiffs hope that if faced with a choice between

a stricter statute and no statute at all, the legislature would choose the latter, which would leave the plaintiffs' businesses unregulated. See *Kucharek v. Hanaway*, 902 F.2d 513, 515 (7th Cir. 1990) (recognizing existence of this litigation strategy), cert. denied, 498 U.S. 1041 (1991). This line of reasoning supposes that an unconstitutional provision would not be severable from the rest of the statute. However, courts that have found these exemptions invalid are divided as to whether or not severance is appropriate. Compare *U.T., Inc. v. Brown*, 457 F. Supp. 163, 170 (W.D.N.C. 1978) ("It is a cardinal rule of construction that where an excepting clause or restriction is found unconstitutional the substantive provisions it qualifies cannot stand."), with *Pollitt v. Connick*, 596 F. Supp. 261, 265-66 (E.D. La. 1984) (noting that test for severability is whether legislature would have passed statute with unconstitutional elements removed).

n33. See *Kucharek*, 902 F.2d at 517, 521 (stating that First Amendment protections do not cover obscene speech).

n34. The organizations involved (e.g., a bookstore and a library) are considered speakers, as opposed to repositories for speakers (i.e., the books). This is because the dissemination of speech itself has a speech element, as well as a conduct element. See, e.g., *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389, 1391-92 (8th Cir. 1985) (recognizing speech element inherent in dissemination of books). The First Amendment thus protects the individual who distributes a book, as well as the person who creates it. See *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986) (validating forced closing of a bookstore but recognizing that selling books is activity protected by First Amendment).

n35. In cases where groups of speakers are treated differently, the Supreme Court has noted the close relationship between the First and Fourteenth Amendments. See, e.g., *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 n.3 (1987) (noting that First Amendment claims can be closely intertwined with the Equal Protection Clause); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972) (same); see also *Harry Kalven, Jr., The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 29-30 (noting potential merging of equal protection analysis in area of speech issues with considerations of censorship). In *Arkansas Writers' Project* and *Mosley*, the state grouped speakers according to the content of their speech. *Arkansas Writers' Project*, 481 U.S. at 224; *Mosley*, 408 U.S. at 92-95. With respect to exemptions from obscenity statutes, the classifications are based on the status of the speakers, though the possibility exists that such classifications have varying impacts on certain viewpoints. See *infra* notes 225-34 and accompanying text.

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

B. The Appropriate Level of Scrutiny

The first and arguably most important step in deciding an equal protection claim is determining the appropriate level of scrutiny. n36 Statutory distinctions will be strictly scrutinized when they are based on a suspect classification or have an impact on the exercise of a fun- [*404] damental right. n37 In almost all other situations, the rational basis test is appropriate. n38

- - - - -Footnotes- - - - -

n36. The legal community has recognized that to decide which test to apply is to decide, for all practical purposes, the fate of the claim; equal protection claims are either "elevated to the heaven of the compelling state interest test, [or] condemned to the rational basis hell." Lawrence G. Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 78-79 (1981) (footnote omitted); see also Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 20-21 (1972) (making same observation as Professor Sager and advocating equal protection model with some "bite," wherein judicial conjecture about justifications for legislative classifications would be replaced by purposes that have substantial basis in reality). Whether or not an exemption from an obscenity statute will be held constitutional depends in part on whether the reviewing court's application of the rational basis test has any bite. See *infra* notes 97-98 and accompanying text. A discussion of how demanding rational basis review should be is beyond the scope of this Note.

n37. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973) (discussing types of classifications and rights that will trigger strict scrutiny); *Shapiro v. Thompson*, 394 U.S. 618, 658-62 (1969) (Harlan, J., dissenting) (same).

n38. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (applying rational basis scrutiny to administration of welfare program). In certain cases, a heightened but not strict level of scrutiny is appropriate. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (subjecting legislative classification based on gender to heightened scrutiny).

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

In these exemption cases, no suspect classification is involved. n39 Thus, those challenging the statute must either identify a burden on a fundamental right or proceed under a rational basis analysis. But because Miller concluded that obscenity is a category of speech outside the scope of the First Amendment, n40 the statutes do not regulate protected expression; thus, no fundamental right is implicated when the state makes classifications with respect to the distribution of obscenity. n41 The exemptions, therefore, will be subjected to a rational basis review, n42 under which the state must identify a legitimate end it wishes to achieve n43 and establish that the legislation is a rational means of achieving that end. n44 The following Section examines the legitimacy and rationality of six justifications that have been forwarded for the exemptions.

- - - - -Footnotes- - - - -

n39. Classifications based on race and national origin are suspect and thus require strict judicial scrutiny. John E. Nowak et al., *Constitutional Law* 611 (2d ed. 1983). Classifications based on alienage may be subjected to strict scrutiny in some circumstances and rational basis review in others. *Id.* at 686-87. Classifications based on illegitimacy receive an intermediate level of scrutiny. *Id.* at 701.

n40. Other categories of speech unprotected by the First Amendment include: fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); defamation, *id.*; advocacy of imminent lawless behavior, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); fraudulent misrepresentation, *Virginia State Bd. of*

Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); and child pornography, New York v. Ferber, 458 U.S. 747, 758 (1982). The rationale for allowing prohibition of child pornography differs from the rationale for allowing prohibition of obscenity because the former is predicated on states' interest in protecting the physical and psychological well-being of child "actors." Id. at 756-57.

n41. Although all of the obscenity exemption cases discussed in this Note use this categorical approach, Part III of the Note suggests the possibility that there is another way to consider the issue of what level of scrutiny to employ. The alternate method would result in the use of strict scrutiny rather than rational basis scrutiny. See infra Part III.

n42. See, e.g., Kucharek v. Hanaway, 902 F.2d 513, 520 (7th Cir. 1990) (employing rational basis test and upholding statute), cert. denied, 498 U.S. 1041 (1991); State v. Luck, 353 So. 2d 225, 232 (La. 1977) (employing rational basis test and invalidating statute).

n43. See Laurence H. Tribe, American Constitutional Law 1439-40 (2d ed. 1988) (setting out rational basis test and discussing Supreme Court's application).

n44. Id.

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[*405]

C. The States' Interests

1. Preservation of Meritorious Works

One commonly cited reason for exemptions for organizations such as schools, libraries, and museums is that they allow those organizations to disseminate obscene material for educational, scientific, or artistic purposes without fear of criminal prosecution. n45 There are two separate arguments a legislature might be advancing by making such a statement. First, the legislature may believe the setting in which a work is distributed bears on whether or not it is obscene. This argument is taken up in Part I.C.2 below. The second argument is that since the exempted organizations, by their natures, only have material with genuine merit, these organizations should be exempted from prosecution so that the materials they own are protected. In other words, because it is essential that even the threat of government action not stifle scientific, medical, educational, or other bona fide uses of explicit material, these organizations should be exempt from prosecution. n46 The state may, however, prosecute organizations that distribute materials that have no genuine merit: "The goal of ridding society of obscene materials totally lacking any serious literary, artistic, political or scientific value is a legitimate one." n47 The Tennessee Court of Criminal Appeals took this approach and upheld the state's statute. n48

- - - - -Footnotes- - - - -

n45. See, e.g., City of Duluth v. Sarette, 283 N.W.2d 533, 537 (Minn. 1979) (stating ordinance was intended to allow "legitimate uses of pornographic materials"); State v. Davis, 654 S.W.2d 688, 692 (Tenn. Crim. App. 1983) (stating that government may not "stifle scientific, medical, educational, or

other bona fide uses [of obscene materials]' " (citation omitted)).

n46. Sarette, 283 N.W.2d at 536.

n47. Davis, 654 S.W.2d at 692.

n48. Id. The court did not state explicitly that the exempted organizations only own works with legitimate merit, but such a statement is implicit in its reasoning. The court stated that the government could proscribe works without merit but should protect those with merit, and that the exemptions were a rational way to achieve those ends.

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

This line of reasoning, however, loses sight of the definition of obscenity. Under Miller, a work that has serious literary, artistic, political, or scientific value is not obscene. n49 Therefore, it is illogical to suggest, as the Tennessee court seemed to do, that the state can permit obscenity that has serious merit but proscribe obscenity that does not. If the material distributed or exhibited by the exempted organizations has legitimate value, it is not obscene, and the organizations could not be subject to prosecution in any event. Likewise, if the materials have value, it would be unconstitutional to prohibit non-ex- [*406] empted organizations such as private booksellers from distributing them. n50 Thus, if the rationale behind the exemptions is the preservation of works with legitimate merit, the exemptions serve no purpose and are irrational, or at best redundant of the Miller test. The Minnesota Supreme Court realized that such exemptions are essentially superfluous and held them invalid. n51

- - - - -Footnotes- - - - -

n49. See Miller v. California, 413 U.S. 15, 23-24 (1973). The elements of the Miller test for obscenity are listed at supra text accompanying note 24.

n50. See supra note 24 and accompanying text.

n51. Sarette, 283 N.W.2d at 537 ("The [library exemption] is ... superfluous because of the safeguards to constitutionally protected expression afforded by Miller.").

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

2. The Context of the Material

It is, however, possible that legislatures are not simply meaning to do what Miller already does. Instead, in allowing some organizations but not others to engage in certain activities, a legislature may be making the first argument identified in Part I.C.1 above, that the context in which a work is exhibited or distributed should be a consideration in deciding if a work is obscene - that what is otherwise without value may acquire some in certain settings. The Minnesota Supreme Court recognized this, stating: "The context in which [the material] is used [is an] essential consideration[] in the determination of obscenity." n52

- - - - -Footnotes- - - - -

n52. Id. The court nevertheless invalidated the exemption as a superfluous protection. See supra note 51 and accompanying text.

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

Miller does not identify the place where a work is exhibited or sold as a consideration in the determination of the obscenity vel non of the work. Under Miller, the factfinder should examine the work itself and, applying contemporary community standards, determine if the average person would find that the work appeals to the prurient interest and is patently offensive in its descriptions or depictions of sexual conduct. n53 When considering the third prong of the test - whether the work has serious literary, artistic, political, or scientific value - the factfinder is to employ a reasonable person standard, rather than an average person standard: Could a reasonable person find serious value in the work? n54 All three prongs focus within the four corners of the work itself, n55 and this approach makes sense. Whether or not a particular work (e.g., a Mapplethorpe photograph) [*407] is obscene (that is, without serious value) should not depend on whether it hangs on the wall of a museum or is sold in a collection at Barnes & Noble; a photograph that has no value cannot acquire it simply by being moved to a different building. A contrary conclusion, that a work can be legitimate when kept in a museum but obscene when sold at a bookstore, would mean that the work loses legitimate artistic, political, or scientific merit when it is moved from one location to another, or that the work does not appeal to the viewer's prurient interest when viewed in one location but does when viewed in another location. It is difficult to see how the same work would affect the same viewer differently in different locations, and the Miller line of cases does not suggest that location should be a consideration. n56 Furthermore, making a work's presence in one of these institutions the measure of whether or not it is obscene would make librarians and curators the arbiters of what constitutes protected expression, a state of affairs certainly not contemplated by the Miller line. Finally, it is unclear how the contexts of certain institutions, for instance, a public library and a bookstore, materially differ; in both, the patron selects a book from the shelf, takes it to the counter, and then leaves. Therefore, this second approach, a legislative determination that the same material is obscene in one place but not another, cannot justify exemptions to obscenity statutes.

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n53. Smith v. United States, 431 U.S. 291, 299 (1977).

n54. Pope v. Illinois, 481 U.S. 497, 500-01 (1987).

n55. Some Justices have taken a different view. In his concurrence in R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2561 (1992) (Stevens, J., concurring in the judgment), Justice Stevens suggested that the obscenity vel non of a work must be determined in light of its setting, use, and audience. In Roth, Chief Justice Warren suggested that a court must examine the conduct of the defendant, not the work itself: "It is not the book that is on trial; it is a person." Roth v. United States, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring in the result).

n56. The Court has suggested that evidence of "pandering" is relevant to the question of obscenity. *Splawn v. California*, 431 U.S. 595, 598 (1977); *Hamling v. United States*, 418 U.S. 87, 130 (1974). Whether or not a work is pandered, however, is not contingent on whether it is displayed in a museum or sold in a bookstore. Instead, it is determined by a fact-sensitive inquiry revolving around the circumstances of distribution, production, sale, advertising, and editorial intent. *Hamling*, 418 U.S. at 130. Wholesale exemptions, therefore, do not further the goal of eliminating pandering.

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3. Dissemination to an Appropriate Audience

Another, somewhat similar reason advanced by states to justify exemptions is that the exempted organizations make the materials available to a suitable audience. The Pennsylvania Superior Court, in justifying an exemption for libraries, museums, and historical societies, n57 presumed that the legislature recognized that "even in meritless publications the scholar might find value." n58 As a starting point for analysis of this argument, it is important to recognize that the exempted organizations do not as a matter of course make materials available only to "scholars" (a class whose definition is hazy at best). In theory, anyone may patronize a museum or library by viewing or borrowing from their collections. But the Pennsylvania court may [*408] have been relying on the fact that the exempted institutions are more regularly patronized by citizens from certain socioeconomic backgrounds (though it does not refer to any such evidence in the record). The public library, for instance, is more heavily used by those who have educational and economic advantages; it is "overwhelmingly an institution of the middle and upper classes." n59 An individual with a college education is almost four times as likely to use the public library as an individual without a high school diploma. n60 Public library usage is also directly proportional to income; individuals in the lowest earning ranges are less than half as likely to use the library than individuals in the highest earning ranges. n61 The legislative record does not indicate that dissemination to a wealthier and more educated audience was Pennsylvania's motive in enacting the legislation. n62 But because "it is constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," n63 courts are free to search for justifications for legislative classifications. It seems likely that the court was making a distinction based on education or intellect, given its quotation of Milton:

- - - - -Footnotes- - - - -

n57. See 18 Pa. Cons. Stat. Ann. 5903(a)(1), (j) (Supp. 1995).

n58. *Long v. 130 Market St. Gift & Novelty*, 440 A.2d 517, 527 (Pa. Super. Ct. 1982).

n59. Pete Giacoma, *The Fee or Free Decision: Legal, Economic, Political, and Ethical Perspectives for Public Libraries* 71 (1989).

n60. Jim Scheppke, *Who's Using the Public Library?*, *Libr. J.*, Oct. 15, 1994, at 35, 37.

n61. See *id.* (32% of those earning less than \$ 10,000 per year report having used the library within the last year, as compared to 70% of those earning in

excess of \$ 75,000).

n62. What the legislative history does reflect is a desire on the part of the legislature to stem the tide of commercialized obscenity, a state interest considered infra at Part I.C.5. Long, 440 A.2d at 527 ("In the legislature's view, the growth of commercial pornography has exercised a pernicious effect on the sensibilities of a majority of our populace."). Interestingly, it is not simply the aggressive display of explicit materials that the legislature wanted to combat, but unreasonably high prices: "'The worst part about the whole thing is they usually cost \$ 5 or \$ 10 and they are really not worth it.'" Id. at 528 n.23 (citation omitted).

n63. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)).

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"If it be true that a wise man, like a good refiner, can gather gold out of the drossiest volume, and that a fool will be a fool with the best book ... there is no reason that we should deprive a wise man of any advantage to his wisdom, which we seek to restrain from a fool" n64

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n64. Long, 440 A.2d at 527 n.22 (quoting John Milton, Areopagitica: A Speech for the Liberty of Unlicensed Printing, reprinted in John Milton, Areopagitica and Of Education 21 (George H. Sabine ed., 1951)). It is interesting to notice the precedent on which the court relied for the distinction it was making: "We are encouraged in this view by dicta from one of the earliest, and leading, 'communist' cases. The Supreme Court [of Pennsylvania] there made a distinction between preaching communism in its most violent forms, and teaching about communism." Id. (citation omitted).

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A legislative determination that access to information should turn on a person's educational or socioeconomic status would seem to run [*409] counter to certain highly-valued principles of democracy. "The idea of equality - set forth boldly in the Declaration of Independence as the basis for organizing society - challenged accepted ideas of the legitimacy of distinctions based on rank, status, and inherited privilege." n65 That is not to say that this type of bias has not influenced obscenity cases in the past; in the 1920s and 1930s many court decisions recognized "that on special occasions members of the upper class would need privileged access to sexually explicit information." n66 The Miller test, however, has no element regarding the educational level or wealth of the individual who reads or views a work. n67

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n65. Samuel P. Huntington, American Politics: The Promise of Disharmony 15 (1981).

n66. William E. Nelson, Criminal and Sexual Morality in New York, 1920-1980, 5 Yale J.L. & Human. 265, 277 (1993). "It seemed obvious, for instance, that 'facts' which were 'not proper subject matter' for a general audience needed

to be discussed openly in "the classroom of the law school, the medical school and clinic, the research laboratory, the doctor's office, and even the theological school.'" Id. (quoting Foy Prods. v. Graves, 253 A.D. 475, 480 (N.Y. App. Div.), aff'd, 15 N.E.2d 435 (1938)).

n67. The only distinction the Miller line of cases draws regarding the recipient of obscene material is between adults and children. See Ginsberg v. New York, 390 U.S. 629, 638 (1968) (approving use of different obscenity standards when distribution is to children). A discussion of Ginsberg appears infra at notes 99-105 and accompanying text.

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

The analysis so far suggests that state legislatures may have invalid motives for exempting certain institutions from obscenity distribution laws. The classifications they have created may be based either on the notion that: (1) the materials held by these organizations are not obscene at all; (2) they are not obscene when they are held by these organizations; or (3) they are obscene in the hands of certain consumers but not in the hands of others. The first reason is irrational and redundant of the Miller test, predicated on the assumption that the exempted organizations' materials always have serious value of some kind. The second reason is a modification of the Miller test, holding that works that are otherwise valueless may have value in some contexts. The third reason is an end-run around the Miller test, arguing that obscene works are valueless to some but valuable to others. None of these maneuvers is a legitimate one for the state to make, and therefore none defeats the equal protection challenge. The three justifications which follow, on the other hand, are predicated on legitimate state interests. The closer question is whether the exemptions truly further these three interests.

4. Resource Preservation

One conceivably rational justification for the exemptions is the protection of the resources of these institutions from dissipation in litigation. This was the state interest identified by the Supreme Judicial Court of Massachusetts in validating an exemption for any "'bona fide school, museum or ... [anyone] acting in the course of his employment as an employee of such organization.'" n68 The court held that the desire to protect educational resources from litigation expense is a legitimate state interest, and that exemption from prosecution is a rational means of achieving this end. n69 This approach was also employed by the Seventh Circuit in validating a Wisconsin exemption for libraries and schools. n70 That court noted that these organizations are often the target of private citizens, sometimes "ignorant and narrow-minded," who are concerned with immoral influences in their communities. n71 The Seventh Circuit found the exemptions to be rationally calculated to shield libraries and schools from groundless complaints, and that pursuing this type of protection is a legitimate state interest. n72

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n68. Commonwealth v. Ferro, 361 N.E.2d 1234, 1236 (Mass. 1977) (citation omitted).

n69. Id.

n70. Kucharek v. Hanaway, 902 F.2d 513, 520 (7th Cir. 1990), cert. denied, 498 U.S. 1041 (1991). A similar rationale was also employed in 4000 Asher, Inc. v. State, 716 S.W.2d 190, 193 (Ark. 1986).

n71. Kucharek, 902 F.2d at 520.

n72. Id.

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

This justification indeed seems legitimate, and should pass a deferential rational basis review. n73 But it is interesting to examine more closely the justifications proffered by the Seventh Circuit. While it is true that libraries are often the target of "mindless censorship, flavored with hysteria," n74 it is actually unlikely that these exemptions would impede such claims since the exemptions are only from criminal prosecution. These exemptions could not deter individuals from complaining about books to school faculties, library staffs, boards of education, or library boards. Nor could they deter civil suits such as Board of Education v. Pico, n75 in which private individuals resorted to litigation to determine when a school board may remove books from a school library. n76 And it can not be assumed that a legislative determi- [*411] nation to exempt these organizations would influence private citizens to forego the individual prosecution of civil suits; it is difficult to imagine that most people would be aware that the statutory exemptions exist. Thus, while protecting certain institutions' resources is a legitimate, even laudable goal, and the exemptions are a rational means to try to achieve that end, it is unlikely that these exemptions will, in reality, save these institutions much time or money.

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n73. The Supreme Court at times has encouraged use of a highly deferential test, stating that statutory classifications should be overturned "only if no grounds can be conceived to justify them." McDonald v. Board of Election, 394 U.S. 802, 809 (1969).

n74. Kucharek, 902 F.2d at 520. See generally Paul S. Boyer, Purity in Print (1968) (addressing history of suppression of certain books in America and proffering arguments against censorship).

n75. 457 U.S. 853 (1982). The Pico plaintiffs sued pursuant to 42 U.S.C. 1983 (current version at 42 U.S.C. 1983 (1988)), claiming that their First Amendment rights had been violated when their school board removed books based on its disapproval of the ideas expressed therein. The Court agreed. Pico, 457 U.S. at 871-72.

n76. There has not been much civil litigation in which private individuals sue nonschool public libraries because of the content of their collections. That is not to say, however, that disputes over such collections never result in litigation. In some instances, a patron or a library board seeks to have a book removed from the shelves, the library director refuses, the board fires the director, and the director sues to regain her position. See, e.g., Layton v. Swapp, 484 F. Supp. 958, 959-60 (D. Utah 1979) (terminated librarian suing to

regain her position on the ground that she is entitled to the same procedural protection as other county employees).

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It also should be noted that while this interest is legitimate with respect to exemptions for some organizations, it may not be with respect to others. In dicta, the Seventh Circuit criticized a decision by the Louisiana Supreme Court because that court had failed to realize that resource protection was a legitimate purpose behind an exemption to an obscenity statute. n77 But the Louisiana statute, unlike the law the Seventh Circuit considered, exempted religious organizations from prosecution. n78 Perhaps, while the opinion makes no reference to such a justification, the Louisiana court rejected the resource preservation argument because it did not find it a legitimate interest of the government to protect the resources of religious institutions. If a legislature determines that tax dollars should not be spent fighting "mindless censorship," n79 organizations such as public libraries that are state-supported might be legitimately exempted. But this argument is not as effective for religious organizations, medical clinics and hospitals, and institutions of higher learning because their funding comes from a variety of sources. n80 Moreover, while it may be that libraries are often the targets of "mindless censorship," there is no indication that this is a concern with respect to other organizations. Thus, the resource preservation argument cannot justify exemptions for as wide an array of organizations as often have been exempted absent demonstration that their resources would be jeopardized, and that the state has a legitimate interest in shielding those resources.

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n77. Kucharek, 902 F.2d at 520.

n78. Compare Wis. Stat. Ann. 944.21 (West Supp. 1994) with La. Rev. Stat. Ann. 14:106(D) (West 1986).

n79. Kucharek, 902 F.2d at 520.

n80. For instance, museums receive money from contributions, grants, memberships, admissions, sales, courses, and other sources. See William H. Daughtrey, Jr. & Malvern J. Gross, Jr., Museum Accounting Handbook 7 (1978).

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5. The Commercial/Noncommercial Distinction

Another state interest advanced in support of the exemptions is the goal of abolishing commercial, but not noncommercial, distribution of obscene materials. n81 The Supreme Court has consistently held that this is a legitimate distinction for states to make, recognizing the possibility that commercialized obscenity implicates the states' interests in the quality of life, tone of commerce, and possibly even public safety. n82 The Court of Appeals of Indiana relied in part on this distinction in upholding an exemption for schools, churches, museums, medical clinics, hospitals, licensed physicians and psychiatrists, governmental agencies, and publicly funded organizations. n83

The court found it legitimate to distinguish between forums where "the purpose of the display of obscenity is primarily commercial in nature and [forums] ... where the display is linked to the exchange of ideas and free expression," and rational to achieve this end by exempting certain organizations. n84

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n81. See, e.g., *Flynt v. State*, 264 S.E.2d 669, 679 (Ga. Ct. App.) (stating that government has legitimate interest in controlling the commercial exploitation of obscenity), cert. denied, 449 U.S. 888 (1980); *Ford v. State*, 394 N.E.2d 250, 256 (Ind. Ct. App. 1979) (same); *Long v. 130 Market St. Gift & Novelty*, 440 A.2d 517, 527-28 (Pa. Super. Ct. 1982) (same).

n82. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-59 (1973) (refusing to invalidate obscenity legislation simply because state could not conclusively prove undesirable effects of commercial obscenity); see also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62 (1976) (allowing city to regulate commercial exhibition of sexually explicit films).

It is not a foregone conclusion that obscenity implicates these societal concerns. There exists "a division of thought [among behavioral scientists] on the correlation between obscenity and socially deleterious behavior." *Paris Adult Theatre I*, 413 U.S. at 58 n.8 (quoting *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413, 451 (1966)). The commercial setting does not make an otherwise nonobscene work obscene; rather, the states may specifically target commercialized obscenity because of the secondary effects (such as those mentioned in the text) with which it is associated. For additional discussion of the pernicious effects of commercialized obscenity, see *Long*, 440 A.2d at 528 & n.23, in which the Pennsylvania Superior Court found that a rational reason to distinguish between stores on the one hand and libraries, museums, and historical societies on the other was that the former are influenced by organized crime and charge unreasonably high prices. Expressing support for the law, one legislator stated, "I do not buy [these materials] because some of them cost four or five bucks and it just is not worth it." *Long*, 440 A.2d at 528 n.23 (citation omitted).

n83. *Ford*, 394 N.E.2d at 256.

n84. *Id.*

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Where the legislative purpose is to extirpate only commercial obscenity, exemptions for organizations that do not sell obscene material, such as libraries and schools, seem rational. n85 They are, however, unnecessary. If a statute criminalizes only the commercial dissemination [*413] tion of obscene matter, organizations that do not engage in this activity would be immune from prosecution anyway. That is, since schools and public libraries do not sell material, but only give or lend it, they could not be prosecuted under a legislative scheme that criminalized only commercial dissemination. The Supreme Court of Louisiana, in *State v. Luck*, n86 and the United States District Court for the Eastern District of Louisiana, in *Pollitt v. Connick*, n87 recognized that the traditional activities of institutions such as the library were already protected when the legislature targeted only commercialized obscenity and thus found this justification for exemptions invalid. n88

-Footnotes-

n85. The Indiana obscenity statute prohibited "sale or distribution" of obscene matter. Ind. Code 35-30-10.1-2(1) (1976) (repealed 1977). The Ford court must have construed "distribution" in this context to criminalize only commercial dissemination of obscene matter. It would be possible to construe "distribution" to criminalize both commercial and noncommercial dissemination, but if this were the case, an exemption allowing a school or library to disseminate obscene matter would directly contravene the purpose of the statute.

n86. 353 So. 2d 225 (La. 1977).

n87. 596 F. Supp. 261 (E.D. La. 1984).

n88. Luck, 353 So. 2d at 232 (recognizing that "any material available at such institutions is offered for purposes other than commercial ones"); Pollitt, 596 F. Supp. at 266 (same).

-End Footnotes-

But the Indiana legislature had not only exempted schools and libraries; it had also exempted museums and people acting in the capacity of museum employees. Would that include, then, the museum gift shop? Would it be rational to allow the museum to sell a book, for instance, of graphic photographs by Robert Mapplethorpe but to prosecute a bookstore down the street for the same activity? The courts that reviewed the Louisiana statute thought not, holding that it was irrational to allow one organization to distribute obscene material for commercial purposes but disallow another from doing the same. n89 The state may have a legitimate interest in stemming the tide of commercialized obscenity, while not proscribing noncommercial uses, but there does not seem to be a logical reason to distinguish between two organizations that are both participating in commercial activity. n90

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n89. Luck, 353 So. 2d at 232; Pollitt, 596 F. Supp. at 264-65.

n90. The Supreme Court has held that a legislature may proceed against a perceived problem "one step at a time," Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955), and thus an underinclusive obscenity statute is not necessarily invalid. But in the situation here described, the legislature has prohibited commercialized obscenity because of the problems particularly associated with it, and then has exempted certain organizations on the assumption that they do not engage in commercial activity when in fact some of them do. This is not moving one step at a time.

-End Footnotes-

One might argue that the museum gift shop is not truly engaged in commercial distribution, as the privately owned bookstore is, because museums, as a general rule, are not driven by the profit motive. But this rule may not apply to the gift shop itself, which may have strong incentives to make a profit in order to finance operations such as collection development. n91 However, assuming for the sake of argu- [*414] ment that museum gift shop operations are not

primarily commercial, additional problems arise: How should the state treat the individual who sells or licenses her work to a museum (or to a library)? This person might be motivated by a desire for profit. Would it be rational to exempt the museum or library that displays the work and to prosecute the person who sold it to the organization?

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n91. See, e.g., Michael Shain et al., Inside New York, *Newsday*, Apr. 18, 1993, at N11 (noting that Museum Store Association sponsors annual convention to discuss ways of boosting gift shop revenues); see also Maryann Haggerty, Digging Up More Revenue for the Smithsonian, *Wash. Post*, May 17, 1993, Washington Business, at 11 (noting that Smithsonian gift shop had sales of \$ 30 million in 1992).

-End Footnotes-

Furthermore, this commercial/noncommercial justification for the exemptions is not available where the legislature has evinced a desire to eliminate noncommercial as well as commercial obscenity. For instance, the Wisconsin legislature stated that it wanted its obscenity law to be "used primarily to combat the obscenity industry." n92 Thus, although it acknowledged a distinction between commercial and noncommercial uses, by choosing the word "primarily" it clearly chose not to criminalize only commercial obscenity. Thus, the Seventh Circuit could not rely on the commercial/noncommercial distinction to justify Wisconsin's exemption. Instead, it relied solely on the state's interest in protecting educational resources. n93

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n92. Wis. Stat. Ann. 944.21(1) (West Supp. 1994) (emphasis added).

n93. *Kucharek v. Hanaway*, 902 F.2d 513, 520 (7th Cir. 1990) ("The purpose of the exemption is to shield libraries and schools from groundless complaints of disseminating obscene materials, and is rational."), cert. denied, 498 U.S. 1041 (1991).

-End Footnotes-

6. The Archival Goal

One final reason a state might exempt a library from obscenity provisions is to allow it to save the material for purely archival reasons, so that future generations might see what works this generation considered valueless, offensive, or harmful. While it is arguably a legitimate goal of the state to save material only for historical preservation and not for distribution, this purpose cannot justify wholesale exemptions for the wide variety of institutions that have generally been exempted. Most statutes exempt not only libraries, but also schools, universities, governmental agencies, religious organizations, and in some cases all publicly funded organizations. n94 If the legislature were to identify one research institution or government agency that could store the material without being prosecuted, then it would be furthering the archival goal in a rational way. This, however, is not what the states have done. Rather, they have allowed a number of institutions organized for a variety of purposes to distribute material [*415] free from state regulation. n95 This is not a

rational means of achieving the rather narrow goal described above.

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n94. See, e.g., La. Rev. Stat. Ann. 14:106(D) (West 1986); Mich. Comp. Laws Ann. 752.367 (West 1991 & Supp. 1995); Ohio Rev. Code Ann. 2907.32 (Baldwin 1992); 18 Pa. Cons. Stat. Ann. 5903(j) (Supp. 1995); Wis. Stat. Ann. 944.21(8) (West Supp. 1994).

n95. This archiving rationale was employed by one court, but not in an equal protection context. In State v. J-R Distribs., 512 P.2d 1049 (Wash. 1973), cert. denied, 418 U.S. 949 (1974), the defendant had been convicted of distributing obscene materials. On appeal, he argued that because the legislature had allowed libraries, museums, and historical societies to circulate the materials, they must actually have some value. The court disagreed, stating that the materials' "value is not somehow vaguely elevated beyond obscenity merely because it may provide police officers or students with an example of material declared illegal by [the statute]." Id. at 1061. The court thus justified preservation of the material for law enforcement purposes while rejecting an argument that a desire to preserve the material reflected a judgment that it had redeeming value.

-End Footnotes-

D. Summary of Analysis of the Distribution Exemptions

To summarize, then, the analysis in this Part has revealed the following: Because no fundamental right is implicated, the appropriate equal protection test for exemptions of this type under the traditional categorical approach is the rational basis test. n96 The exemptions may be motivated by a desire to make material available only to certain consumers based on an illegitimate classification such as their level of education. They may also be predicated on the proposition that a sexually explicit work has merit in some contexts but not in others, a proposition with some intuitive appeal but which is ultimately unconvincing for the reasons discussed above. The exemptions also may be simply an attempt by legislatures to insure that works with legitimate merit are protected. This is a legitimate intention but an unnecessary measure because of the protection inherent in the Miller test. This line of reasoning also makes the broad assumption that the materials held by exempted organizations are not obscene, which is likely to be true but which is not beyond argument.

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n96. Part III will explore the possibility that the traditional categorical approach is no longer the appropriate mode of analysis.

-End Footnotes-

The exemptions also may be an attempt to protect the resources of certain organizations. This interest is legitimate with respect to state-funded agencies such as schools and public libraries, but is less so with respect to museums, churches, and private universities. In any event, for the reasons discussed in Part I.B.4, it is unlikely that the exemptions will save the exempted organizations much time or money. The state may also want to distinguish between commercial and noncommercial dissemination of obscene material. Again, this is a legitimate distinction, but one not necessarily furthered by exemptions. If

the state statute outlaws only commercial distribution, the organizations are already protected; if the statute generally makes no distinction between commercial and noncommercial distribution, the [*416] exemptions are either a rational way to introduce the distinction into the statute or an irrational frustration of the underlying legislative purpose to eliminate all obscenity. Finally, legislators may be attempting to allow obscene material to be archived but not distributed. However, for the reasons discussed in Part I.B.6, such a conclusion is unwarranted. Thus, whether a particular statute will pass constitutional muster depends on a factual determination of how much time, effort, and money the exemption will actually save; indications in the text of the statute and in its history as to the legislators' position on the commercial/noncommercial issue; and, perhaps most importantly, how demanding a rational basis review the court employs. The legislation might pass a highly deferential application of the test n97 but would not pass a more searching application. n98

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n97. See, e.g., McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969) ("Statutory classifications will be set aside only if no grounds can be conceived to justify them." (emphasis added)).

n98. See, e.g., Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (striking down, on rational basis grounds, zoning ordinance as applied to home for mentally retarded, despite finding that "the mentally retarded are indeed different from others").

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

The analysis in this Part dealt exclusively with regulations on material that is obscene under Miller and therefore not entitled to protection under the First Amendment. Part II turns to regulation of material that is considered harmful to minors. Some of this material is obscene under Miller, but since some sexually oriented works that are unsuitable for children have literary, artistic, political, or scientific merit for adults, some of the regulated material is not. These particular works - those that are not obscene but that are not suitable for children - are the reason why the two types of regulations must be analyzed separately.

II

Regulation of Material Harmful to Minors

A. The Concept of Variable Obscenity

Part I examined exemptions from state statutes prohibiting the distribution of material that is obscene under the Miller formulation. This Part examines exemptions from statutes regulating material which is not obscene under the Miller definition but which is nevertheless considered harmful to minors. In Ginsberg v. New York, n99 the Supreme Court validated the use of a variable obscenity standard, through which states can regulate the distribution of sexually oriented material to minors, even though that material is not obscene

as to [*417] adults. n100 Accepting that states have an exigent interest in protecting children from certain material, n101 the Court held that legislatures may adapt the general standard for determining adult obscenity to reflect the "prevailing standards in the adult community as a whole with respect to what is suitable material for minors," n102 and that states may prohibit the distribution of that material to minors. n103 Of course, states may not completely ban the distribution of material that is harmful to minors; such a prohibition would seriously infringe adults' First Amendment rights, effectively "reducing the adult population ... to reading only what is fit for children." n104 But no constitutional norm is violated by prohibiting the distribution of these materials to minors. n105

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- n99. 390 U.S. 629 (1968).
- n100. Id. at 638.
- n101. Id. at 636.
- n102. Id. at 639 (quoting N.Y. Penal Law 484-h (current version at N.Y. Penal Law 235.20(6)(b) (McKinney 1989))).
- n103. Id. at 643.
- n104. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).
- n105. *Ginsberg*, 390 U.S. at 638. Thus, *Ginsberg* is analogous to *Miller*: Just as no fundamental right is implicated when the state regulates the distribution of obscenity to adults, because *Miller* held that material meeting the three-part standard is not protected speech, no fundamental right is implicated when the state regulates the distribution of sexually explicit material to minors, because *Ginsberg* held that material meeting the adapted three-part standard is not protected speech as to children. An exemption to a statute regulating the distribution of sexually explicit material to minors, therefore, would be analyzed in the fashion described in *supra* Part I. The important distinction arises when the state regulates not only the distribution of sexually explicit material to minors, but also the display of such material in general. See *infra* Part II.B.

-End Footnotes-

B. Display Exemptions Generally

In an attempt to protect their youth, many states have enacted regulations on the display of certain sexually explicit materials. n106 The statutes regulate the display of material that is considered harmful to minors without eliminating adults' right to purchase the material. For instance, the Pennsylvania legislature has made it illegal to

-Footnotes-

- n106. See, e.g., Ga. Code Ann. 16-12-103(e)(1) (1990); 18 Pa. Cons. Stat. Ann. 5903(a)(1) (Supp. 1995).

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

display or cause or permit the display of any explicit sexual materials ... in or on any window, showcase, newsstand, display rack, billboard, display board, viewing screen, motion picture screen, marquee or similar place in such manner that the display is visible from any public street, highway, sidewalk, transportation facility or other public thoroughfare, or in any business or commercial establishment where minors, as a part of the general public or otherwise, [*418] are or will probably be exposed to view all or any part of such materials. n107

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n107. 18 Pa. Cons. Stat. Ann. 5903(a)(1) (Supp. 1995).

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

While the Supreme Court has not yet dealt squarely with the issue, n108 most of the courts that have considered these display provisions have found them constitutional, n109 deciding that limitations on the manner in which sexually oriented materials are displayed - requiring either concealment behind blinder racks n110 or enclosure in sealed wrappers, n111 or prohibiting "ostentatious" presentation n112 - are valid time, place, and manner regulations. n113 Courts have reasoned that although the display provisions result in a limitation on adults' access to certain [*419] works, the burden is outweighed by the state's significant interest in protecting its youth. n114 In those cases where display regulations have been invalidated, it is generally because the display prohibitions were not narrowly tailored so as only to have a limited impact on adults' First Amendment rights. n115 This Note will proceed assuming that narrowly tailored display regulations are constitutional. n116

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n108. The Supreme Court heard argument on the validity of a display statute passed by the Virginia legislature but declined to decide the constitutional issues presented. See Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393-98 (1988). Because of the unreliable factual determinations by the district court regarding the type of material covered by the statute, the Court found it "essential that [it] ... have the benefit of the law's authoritative construction from the Virginia Supreme Court." Id. at 395. The Court certified two questions to the Virginia Supreme Court regarding the scope of the statute and the burden it imposed on booksellers, id. at 398, and ultimately remanded the case to the circuit court for reconsideration in light of the Virginia court's answers. Virginia v. American Booksellers Ass'n, 488 U.S. 905 (1988). Because the Virginia court construed the statute to cover only a narrow range of materials, American Booksellers Ass'n v. Virginia, 372 S.E.2d 618, 624 (Va. 1988) (excluding cross-section of works ranging from "classic literature to pot-boiler novels" from statute's coverage), and not to impose a heavy burden on booksellers, id. at 625 ("Because it is criminal in nature, the statute is not to be given the broad interpretation the booksellers apprehend."), the Fourth Circuit held on remand that the legislation constituted a constitutionally permissible exercise of the state's police powers. American Booksellers Ass'n v. Virginia, 882 F.2d 125, 127-28 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990).

n109. See, e.g., *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990); *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983); *American Booksellers Ass'n v. Rendell*, 481 A.2d 919 (Pa. Super. Ct. 1984).

n110. *M.S. News*, 721 F.2d at 1287.

n111. *Upper Midwest*, 780 F.2d at 1392.

n112. *Rendell*, 481 A.2d at 941.

n113. While the display provisions themselves are analyzed as time, place, and manner regulations, the exemptions from those statutes, and the exemptions from the obscenity distribution statutes, are not properly analyzed as such. A valid time, place, and manner regulation confines expression to, for example, certain geographical boundaries, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976) (zoning requirement prohibiting more than one adult theater within 1000 feet of any two other "regulated uses"), or certain decibel levels, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (city's sound-amplification guideline justified by desire to control noise levels in order to retain character of city park and to avoid undue intrusion into residential areas). On the other hand, the exemptions for schools, libraries, and museums distinguish among speakers, allowing certain institutions to distribute or display certain materials based on their status. None of the decisions evaluating the exemptions have referred to them as valid time, place, and manner regulations, though the Eleventh Circuit did refer to *Young* when determining the appropriate level of scrutiny to give an exemption. See *Webb*, 919 F.2d at 1512.

n114. See, e.g., *id.* at 1509 (noting that "placing the relatively small amount of reading material ... behind blinder racks only slightly burdens adults' access to such material"); *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 602 F. Supp. 1361, 1371-72 (D. Minn.) (holding that city's ordinance "represented an appropriate accommodation between the city's strong interest in protecting minors from exposure to sexually explicit material and adult first amendment rights"), *aff'd*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News*, 721 F.2d at 1288-89 (finding "the proscription on display of material harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them").

n115. See, e.g., *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 784 (Colo. 1985) (holding that statutes designed to restrict children's access to sexually explicit material must be narrowly drawn); *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50, 56 (N.D. Ga. 1981) (finding that Georgia's statute covered nonobscene material and consequently "infringed on the protected rights of adults").

n116. This assumption does not include, of course, the constitutionality of exemptions from the general provisions.

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Just as with the general obscenity distribution provisions, many states have exempted schools, museums, libraries, and other organizations from prosecution

under these display statutes. n117 Again, booksellers and trade associations have challenged the exemptions as violative of their right to equal protection. And again, the first and crucial step in evaluating the claim is determining which level of scrutiny to apply. Unlike with respect to exemptions from general obscenity provisions, the courts are not in agreement as to which test is appropriate in the display context. Some have chosen to subject these exemptions to strict scrutiny, n118 while others have utilized rational basis review. n119

- - - - -Footnotes- - - - -

n117. See, e.g., Ga. Code Ann. 16-12-104 (1990) (providing exemption to public and school libraries from provision generally prohibiting unlawful disposition of material to minors); 18 Pa. Cons. Stat. Ann. 5903(a)(1), (j) (Supp. 1995) (exempting charitable societies, museums, and public and school libraries from public indecency statute).

n118. See infra notes 124-32 and accompanying text.

n119. See infra notes 133-42 and accompanying text. In some cases, legislatures have exempted these organizations from prosecution for both the display of certain materials and the distribution to minors of these materials. Because Ginsberg v. New York, 390 U.S. 629 (1968), found that no right exists to distribute these materials to minors, see supra notes 99-105 and accompanying text, exemptions to laws proscribing distribution to minors of material harmful to them would be analyzed in the same way as exemptions to general obscenity provisions were analyzed in supra Part I. However, as the discussion infra at Part II.C will show, display proscriptions involve different issues and should be subjected to a different type of analysis.

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C. The Appropriate Level of Scrutiny

Those courts that have used a strict scrutiny standard have done so because they believe the display statutes implicate the exercise of fundamental rights relating to freedom of expression: the rights of booksellers to display and sell, and of adults to view and purchase, materials that are not obscene as to them. The Colorado Supreme Court held that "since first amendment rights [are] fundamental, the classifications in terms of the ability to exercise those rights must be judged against the strict scrutiny standard," n120 thus echoing the United States Supreme Court's repeated statement that where fundamental rights are implicated, strict scrutiny is the appropriate test. n121 In Speiser v. Randall, n122 the Supreme Court identified First Amendment rights among those rights deserving more than the traditional scrutiny, stating: "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment" n123

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n120. Tattered Cover, Inc. v. Tooley, 696 P.2d 780, 786 (Colo. 1985).

n121. See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973) (discussing types of classifications and rights that will trigger strict scrutiny); Shapiro v. Thompson, 394 U.S. 618, 658-62 (1969) (Harlan, J., dissenting) (same).

n122. 357 U.S. 513 (1958).

n123. Id. at 520; see also Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666 (1990) (holding that statutory scheme impinging on right of political expression merits strict scrutiny of different treatment of different classes of speakers).

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

Two other courts that used strict scrutiny, the district courts in Upper Midwest Booksellers Ass'n v. City of Minneapolis n124 and American Booksellers Ass'n v. Webb, n125 employed similar reasoning. In addition, both cited for support Salem Inn, Inc. v. Frank. n126 In Salem Inn, a New York municipality had outlawed nudity in cabarets, bars, lounges, dance halls, discotheques, restaurants, and coffee shops, but not in theaters, concert halls, playhouses, opera houses, ballets, or cinemas. n127 The Second Circuit held that an equal protection challenge to the legislation must be evaluated using the strict scrutiny [*421] standard, because nude performances involve a modicum of protected expression. n128 That is, since nudity alone is not obscene, n129 the proscribed performances involved "constitutionally significant" n130 expression, and selective legislative proscriptions of that expression would be strictly scrutinized. n131 Similarly, the district courts in Webb and Upper Midwest reasoned that prohibitions on the display of material harmful to minors limit constitutionally significant expression, and, thus, disparate treatment of classes with respect to this expression must be strictly scrutinized. n132

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n124. 602 F. Supp. 1361, 1374 (D. Minn.) (finding that statute implicated fundamental right), aff'd, 780 F.2d 1389 (8th Cir. 1985). The Eighth Circuit affirmed the holding in Upper Midwest, but the invalidation of the exemptions for certain organizations was not an issue on appeal. Upper Midwest, 780 F.2d at 1389.

n125. 643 F. Supp. 1546, 1555 (N.D. Ga. 1986) (finding that statute implicated fundamental right), rev'd, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991). In Webb, the Eleventh Circuit decided that the rational basis test was appropriate for reviewing the exemptions from the display provision and reversed the district court's invalidation of the exemptions. Webb, 919 F.2d at 1509-12. See infra notes 137-42 and accompanying text.

n126. 522 F.2d 1045 (2d Cir. 1975) (cited in both Webb, 643 F. Supp. at 1555, and Upper Midwest, 602 F. Supp. at 1374).

n127. Id. at 1046-47 & 1046 n.1.

n128. Id. at 1049; see also Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991) (recognizing that nude dancing involves expression protected by the First Amendment, though only "marginally so").

n129. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (noting that "all nudity cannot be deemed obscene even as to minors").

n130. *Salem Inn*, 522 F.2d at 1048.

n131. *Id.* at 1049. In its overbreadth analysis, the court alluded to possible class-based discrimination in that statute similar to that discussed supra at Part I.C.3 with respect to exemptions for libraries from obscenity statutes:

While the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some "entertainment" with his beer or shot of rye.

Id. at 1048 (quoting *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974), *aff'd in part and rev'd in part sub nom. Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975)).

n132. *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546, 1555 (N.D. Ga. 1986), *rev'd*, 919 F.2d 1493 (11th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991); *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 602 F. Supp. 1361, 1374 (D. Minn.), *aff'd*, 780 F.2d 1389 (8th Cir. 1985).

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

In contrast, three courts have chosen to subject exemptions to display regulations to only a rational basis review. n133 In two of those cases, *American Booksellers Ass'n v. Rendell* n134 and *M.S. News Co. v. Casado*, n135 the reviewing courts failed to recognize that the display provisions implicate adults' First Amendment rights because they regulate materials that are not obscene as to adults. n136 In the third case, [*422] the Eleventh Circuit's consideration of *American Booksellers v. Webb*, n137 the court relied in part on *Rendell* and *M.S. News*, which did not adequately address the issue, and in part upon its own analysis. n138 Unlike the *Rendell* and *M.S. News* courts, the Eleventh Circuit recognized the difference between regulating distribution of obscenity and regulating display of material deemed harmful to minors. n139 In fact, although the court stated that the latter presented "a closer question" n140 than the former, it still found that strict scrutiny was not warranted. n141 The court explained its choice of the rational basis test by stating that the states' interests in protecting adolescents justifies imposing a "necessary and moderate" burden on adults. n142 Undoubtedly this is true, but the balancing of interests properly occurs after choosing which test to apply, not in choosing which test to apply. In other words, a court may not determine that a government interest is so compelling that strict scrutiny does not apply. Instead, if a fundamental right is implicated, the court must apply strict scrutiny; the court may later determine that compelling governmental interests justify the government action.

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n133. See *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983); *American Booksellers Ass'n v. Rendell*, 481 A.2d 919 (Pa. Super. Ct. 1984).

n134. 481 A.2d at 919.

n135. 721 F.2d at 1281.

n136. In *Rendell*, the Pennsylvania Superior Court declined to evaluate the plaintiffs' claim that exemptions to a display provision violated equal protection, stating that it had recently decided the issue in *Long v. 130 Market Street Gift & Novelty*, 440 A.2d 517 (Pa. Super. Ct. 1982). *Rendell*, 481 A.2d at 942. *Long*, however, did not involve the display of material harmful to minors; it involved a challenge to an exemption from an obscenity distribution provision, see *id.* at 519, and thus reliance by the *Rendell* court was misplaced. Similarly, in *M.S. News* the Tenth Circuit evaluated a Wichita ordinance that exempted certain organizations from prohibitions against both the dissemination and display of material harmful to minors. *M.S. News*, 721 F.2d at 1284. The Tenth Circuit also appears not to have recognized the implication of a fundamental right in the portion of the ordinance dealing with the display of material harmful to minors; it, too, relied in part on a case, *Piepenburg v. Cutler*, 649 F.2d 783, 785 (10th Cir. 1981), that dealt with the distribution of obscene materials rather than with the display of materials deemed harmful to minors. *M.S. News*, 721 F.2d at 1291-92. This erroneous invocation of precedent, coupled with the failure of the court to mention even the possible implication of a fundamental right, leads to the inference that the Tenth Circuit, like the Pennsylvania Superior Court, failed to account for the potential restriction of adults' First Amendment rights.

n137. 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991). For a discussion of the lower court's reasoning in *Webb*, see *supra* notes 124-32 and accompanying text.

n138. The court also relied on *Ripplinger v. Collins*, 868 F.2d 1043 (9th Cir. 1989). In *Ripplinger*, the Arizona legislature had exempted cable television from its obscenity statute. *Id.* at 1049. Thus *Ripplinger* does not apply to situations like that in *Webb* where nonobscene material is regulated. The *Ripplinger* court had access to the district court opinion in *Webb* and made note of this distinction. *Id.* at 1050 n.8.

n139. *Webb*, 919 F.2d at 1511-12.

n140. *Id.* at 1512.

n141. *Id.*

n142. *Id.*

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The analytical problems in *Rendell*, *M.S. News*, and the Eleventh Circuit's opinion in *Webb* reveal that strict scrutiny is the appropriate level of review for legislation creating exemptions from display statutes. Thus, the present analysis will proceed using the approach of *Tattered Cover*, *Upper Midwest*, and

the district court opinion in Webb, where the state was required to identify a compelling (as opposed to legitimate) end it wished to achieve n143 and to prove that the legislation it had enacted was a necessary (as opposed to rational) [*423] means of achieving that end. n144 The following Section examines the validity of three justifications that have been forwarded for the exemptions. It will not be questioned that protection of minors from unsuitable influences is a compelling interest of the state. However, allowing certain organizations to display harmful materials would seem to undermine rather than further that goal. n145 Therefore, if the exemptions are justifiable, it must be for reasons other than the protection of youth. As in Part I, it is not the right to display or distribute certain material which will be analyzed, but the proffered justifications for treating different institutions differently.

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n143. See Nowak et al., supra note 39, at 591-92 (discussing careful judicial review associated with strict scrutiny analysis).

n144. Id.

n145. See, e.g., Upper Midwest Booksellers Ass'n v. City of Minneapolis, 602 F. Supp. 1361, 1374 (D. Minn.) ("There can be no rational argument ... that a minor would suffer less harm from a commercial display of sexually explicit material by a school, library, or church than from the same display by a traditional retailer."), aff'd, 780 F.2d 1389 (8th Cir. 1985).

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D. The States' Interests

1. Protection of Meritorious Works

Proponents of exemptions from display provisions have asserted essentially the same justifications as have been offered in support of exemptions from general obscenity provisions. For instance, they assert that the exemptions preserve "the accessibility of such material to minors for purely educational purposes." n146 But as is true with respect to the Miller test, n147 a valid variable obscenity statute will already protect meritorious material. For instance, the Georgia statute at issue in Webb, an adaptation of the Miller formulation, only prohibited the display of material that "is, when taken as a whole, lacking in serious literary, artistic, political, or scientific value for minors." n148 Thus, while the protection of works with value to minors is a compelling interest of the state, the exemptions are not necessary to achieve it. Those works are already protected.

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n146. American Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991).

n147. See supra notes 45-51 and accompanying text.

n148. Ga. Code Ann. 16-12-102(1)(C) (1990).

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2. Resource Preservation

It also has been suggested that the protection of the exempted organizations' resources is a valid reason for the exemptions. n149 While it is possible this justification would pass a rational basis review, it is [*424] not clear that the protection of schools' or libraries' resources from the expense of litigation (leaving aside universities' or churches' resources) is a compelling state interest. This interest does not seem as pressing as some others that the Supreme Court has judged vital enough to survive strict scrutiny, such as insuring the integrity of balloting n150 or even shielding youth from corrupting influences. n151 Nor is it clear that the exemptions are narrowly tailored to achieve this goal. For instance, rather than completely exempting these institutions from prosecution, the legislatures could subject them to liability only for display of materials that have already been ruled obscene (or harmful to children) by a court. n152 Thus, they would not be forced to spend money litigating the obscenity vel non of the sexually explicit works they own, but they would not be permitted to continue to display or distribute material that non-exempted organizations are forbidden to display or distribute. n153 But, again, this approach would only be war- [*425] ranted if resource protection were judged a compelling interest of the state.

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n149. *Webb*, 919 F.2d at 1511 n.38 (citing *Kucharek v. Hanaway*, 902 F.2d 513, 520 (7th Cir. 1990), cert. denied, 498 U.S. 1041 (1991)). For a discussion of the resource protection argument, see *supra* notes 68-80 and accompanying text.

n150. See *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (striking down Tennessee voting provision requiring minimum residence duration).

n151. See *Ginsberg v. New York*, 390 U.S. 629, 637 (1968) (upholding New York's variable obscenity regulation); see also Lawrence Tribe, *American Constitutional Law* 1452 n.4 (2d ed. 1988) (noting states' interest in accuracy of voting lists, ceilings on campaign contributions, and bans on post-viability abortions as instances in which legislation survived strict scrutiny analysis). "There are very few cases which strictly scrutinize and yet uphold instances of impaired fundamental rights." *Id.* at 1452.

n152. This discussion regarding the narrow tailoring of an exemption would have equal applicability in the distribution context if a court or a legislature thought that a tighter fit than that required by mere rationality was necessary between the goal of resource preservation and the means of an exemption for libraries, schools, and museums.

n153. In other words, the library will not be the first entity prosecuted for displaying a borderline work, but it will be held to the same standard as other organizations once it is on notice that the work is obscene. This argument recalls Justice Brennan's position in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 70 (1973) (Brennan, J., dissenting). There he argued that it is unconstitutional to prosecute an individual for distributing sexually explicit material to consenting adults because of the uncertainty inherent in determinations of what is obscene:

I am forced to conclude that the concept of "obscenity" cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms.

Id. at 103. Justice Black, in another case, also recognized that "no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of "obscenity.'" *Ginzburg v. United States*, 383 U.S. 463, 480-81 (1966) (Black, J., dissenting). Though these concerns with unpredictability were implicitly rejected by a majority of the Justices in *Miller* - the Court's opinion makes no reference to unpredictability - it still may be fair to apply the rationale to libraries and schools and not hold them accountable until they are on notice, if it is indeed a compelling interest of the state to shield their funds from dissipation in litigation.

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3. The Commercial/Noncommercial Distinction

Proponents of the exemptions also argue that, as with the distribution statutes, it is valid for the legislature to distinguish between commercial and noncommercial displays of sexually explicit materials. n154 But before analyzing this distinction as it pertains to equal protection, it is useful to examine whether the distinction is logical in the context of regulation of material that is harmful to minors. With respect to obscenity distribution statutes, distinguishing between commercial and noncommercial dissemination of obscenity is justified if the legislature is concerned primarily with issues that are particularly associated with commercialized distribution, such as aggressive sales action "offending the sensibilities of unwilling recipients," n155 or commercialized distribution's possible deleterious effect on "the tone of commerce in the great city centers." n156 However, with respect to statutes designed to protect children from material that is harmful to them, the relevance of the distinction is not as clear. While it is possible that commercialized display of sexually explicit material is more likely to reach children, n157 it is not clear that it is more harmful. The statute approved in *Ginsberg v. New York* n158 was predicated on the legislature's determination that exposure to sexually explicit material was "a basic factor in impairing the ethical and moral development of [the state's] youth." n159 This assessment does not indicate that exposure to sexually explicit material in a noncommercial setting is any less corrupting to children. The Supreme Court's decision does not distinguish between commercial and noncommercial exposure of explicit material to minors. Thus, *Ginsberg* does not support the proposition [*426] that commercial displays are more harmful to minors than noncommercial displays.

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n154. *American Booksellers v. Webb*, 919 F.2d 1493, 1512-13 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *M.S. News Co. v. Casado*, 721 F.2d 1281, 1291-92 (10th Cir. 1983); *American Booksellers Ass'n v. Webb*, 643 F. Supp.

1546, 1556 n.20 (N.D. Ga. 1986), rev'd, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); Upper Midwest Booksellers Ass'n v. City of Minneapolis, 602 F. Supp. 1361, 1374-75 (D. Minn.), aff'd, 780 F.2d 1389 (8th Cir. 1985).

n155. Miller v. California, 413 U.S. 13, 19 (1973).

n156. Paris Adult Theatre I, 413 U.S. at 58.

n157. The Court in Miller seemed concerned that commercialized exhibition carries with it a "significant danger ... of exposure to juveniles." Miller, 413 U.S. at 19; see also Stanley v. Georgia, 394 U.S. 557, 567 (1969) (acknowledging danger that obscene material might fall into hands of children).

n158. 390 U.S. 629 (1968).

n159. Id. at 641 (quoting N.Y. Penal Law 484-h (current version at N.Y. Penal Law 235.20(6)(b) (McKinney 1989))).

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But in some instances, legislative bodies have determined that commercial displays are of particular concern. n160 Because the Court indicated in Ginsberg that it would accept such legislative determinations unless they were irrational, n161 the present analysis will proceed assuming that eliminating only commercial displays of explicit material is a legitimate goal of the state. Exemptions for certain organizations, however, will not be necessary to achieve that end. If the legislature has criminalized only the commercial display of sexually explicit material, to the extent institutions such as libraries and schools do not sell material, the exemptions are redundant - just as they are in those situations where the legislature has criminalized only the commercial distribution of obscenity. n162 To the extent the exempted institutions do sell material (e.g., university bookstores or museum gift shops), "they would be engaging in the very conduct that the [statutes] seek[] to regulate." n163 That is, the legislature would be prohibiting commercial displays because of their particular pernicious effect and then allowing certain organizations to engage in that very activity. The Colorado Supreme Court invoked this reasoning in invalidating an exemption for museums, libraries, and bookstores operated by schools, colleges, and universities. It saw no reason to allow this group to deal in sexually explicit materials, including The Joy of Sex, The Joy of Gay Sex, and The Joy of Lesbian Sex, while prohibiting private bookstores from doing so. n164 And, of course, a similar rationale applies if the legislature has not proscribed only commercial display; if it has proscribed all displays on the ground that children should not be exposed to certain influences, then an exemption for any organization permits the very conduct that the statute purports to prohibit.

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n160. See, e.g., Minneapolis, Minn., Ordinances tit. 15, 385.131(1) (stating that there exists urgent need to prevent commercial exposure of minors to sexually provocative material), quoted in Upper Midwest Booksellers Ass'n v. City of Minneapolis, 602 F. Supp. 1361 app. at 1376-78 (D. Minn. 1985); Wichita, Kan., Code 36-172, 5.68.156 (prohibiting persons with control or supervision of commercial establishments from displaying certain material), quoted in M.S.

News Co. v. Casado, 721 F.2d 1281 app. (10th Cir. 1983).

n161. Ginsberg, 390 U.S. at 641.

n162. See supra notes 81-93 and accompanying text.

n163. Upper Midwest, 602 F. Supp. at 1375.

n164. Tattered Cover, Inc. v. Tooley, 696 P.2d 780, 786 & n.5 (Colo. 1985).

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E. Summary of Analysis of the Display Exemptions

In sum, the exemptions from prohibitions against display of explicit material should not survive an equal protection claim. First, as [*427] with the exemptions from obscenity distribution statutes, these exemptions cannot be justified by the desire to protect works with legitimate merit, because a valid variable obscenity statute will already protect these materials. Second, the resource-protection justification for the exemptions will not pass a strict scrutiny review; the interest is probably not compelling, and if it is, the exemptions are not necessary to achieve this interest. Finally, a distinction between commercial and noncommercial displays cannot support the exemptions. To the extent that the exempted institutions do not sell material, they will already be immune from prosecution under a statute that only proscribes commercial displays; to the extent that they do sell material, there is no reason to allow one organization to display explicit material commercially and disallow another to do the same. n165

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n165. It is possible to conceptualize the exemptions as attempts to tailor display regulations narrowly by limiting their impact on adults' First Amendment rights while still achieving the compelling state purpose of protecting children from unsuitable influences. This explanation, however, must be premised on the belief either that children do not frequent the exempted organizations or that exposure in these contexts is not unsuitable. Yet it is undeniable that children frequent schools, libraries, and museums, and for the reasons discussed supra at Part I.C.2, the argument that a book that is unsuitable for display in a bookstore is suitable for display in an organization such as a library is unconvincing.

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III

The Rationale of R.A.V. v. City of St. Paul

The analysis in Parts I and II is founded on the proposition that obscenity, because it is one of those categories of speech that has no substantial value, receives no protection from the First Amendment. Miller v. California n166 settled that there exists no right to distribute obscene materials; therefore, legislative classifications that involve this activity implicate no fundamental right and need only pass a rational basis review to be constitutional. n167 But because the Supreme Court's more recent decision in R.A.V. v. City of St. Paul

n168 indicates a possible shift away from the traditional categorical approach, it may be that the traditionally unprotected categories of speech are not entirely invisible to the First Amendment. Thus, it may be that courts should scrutinize exemptions from distribution provisions more carefully than the traditional categorical approach demands. n169 Differences between [*428] the facts in R.A.V. and those in the exemption scenario and between the types of claims involved make it impossible to apply the holding from R.A.V. directly to cases challenging exemptions. n170 As the discussion in this Part will demonstrate, however, there are certain similarities: First, both situations involve a legislature choosing to outlaw some words within a traditionally unprotected category of speech, but not other words within that same category, and second, both situations raise the possibility that the legislature is handicapping certain viewpoints. The R.A.V. holding, therefore, while not controlling, provides guidance regarding what types of questions courts and policymakers should consider when evaluating exemptions from distribution and display statutes.

- - - - -Footnotes- - - - -

n166. 413 U.S. 13, 19 (1973).

n167. See supra notes 36-44 and accompanying text. This standard also applies to prohibitions against distributing to minors material considered harmful to them. See supra note 105.

n168. 112 S. Ct. 2538 (1992).

n169. The discussion in this Part bears more heavily on exemptions from distribution provisions than on exemptions from display provisions because, as Part II demonstrates, strict scrutiny is the correct level of review for exemptions from display provisions. Still, the analysis in this Part applies to exemptions from display provisions as well because it shows the possibility of the preference of one viewpoint over another. If there is a possibility of such a preference, there is also the possibility that the government's purpose is illicit rather than compelling, or that the legislation has undesirable ancillary effects rather than the narrow tailoring required under strict scrutiny.

n170. The only case dealing with the validity of exemptions decided after R.A.V. made no mention of the case. See State v. Thiel, 515 N.W.2d 847, 859-60 (Wis.) (rejecting claim that Wisconsin's obscenity statute violates equal protection rights), cert. denied, 115 S. Ct. 209 (1994).

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

A. R.A.V.: The Facts and the Decision

In June, 1990, several teenagers allegedly assembled and burned a crudely made cross in the yard of an African American family living in St. Paul, Minnesota. n171 The city chose to prosecute the accused under the St. Paul Bias-Motivated Crime Ordinance, n172 which criminalized expression that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." n173 The defendant challenged the validity of the ordinance, claiming that it was impermissibly content-based and therefore violated the First Amendment. n174 The Minnesota Supreme Court construed the ordinance to

prohibit only fighting words, "conduct that in itself inflicts injury or tends to incite immediate violence," n175 and therefore held the ordinance constitutional on the grounds that it reached only expression "that the first amendment does not protect." n176 The Minnesota court took the position that since the Constitution does not protect any use [*429] of fighting words, the legislature could validly forbid a subset of fighting words - those concerning race, color, creed, religion, or gender - while not forbidding other fighting words.

-Footnotes-

n171. R.A.V., 112 S. Ct. at 2541.

n172. Id.

n173. Id. (citation omitted).

n174. Id.

n175. In re Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)), rev'd sub nom. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

n176. Id. at 511.

-End Footnotes-

The Supreme Court repudiated the Minnesota Supreme Court's approach. While bound to the Minnesota court's construction that the ordinance reached only fighting words, n177 the majority held that the First Amendment forbids the prohibition of only those fighting words that insult or provoke violence on the basis of a disfavored subject. n178 Though the Court shared St. Paul's hostility towards hate speech, it stated that the city may not express its hostility by "imposing unique limitations upon speakers who (however benightedly) disagree." n179

-Footnotes-

n177. R.A.V., 112 S. Ct. at 2542.

n178. Id. at 2547.

n179. Id. at 2550.

-End Footnotes-

In addition to finding discrimination among speakers on the basis of the subject matter of their speech, the Court found that the ordinance, in practical operation, discriminated on the basis of viewpoint. n180 Although it outlawed racial epithets of all kinds, it allowed fighting words that did not themselves invoke race, color, creed, religion, or gender. n181 Thus certain fighting words, "aspersions upon a person's mother, for example," n182 could be used freely by those advocating racial equality, but not by those advocating racial inequality. n183 The result, the Court stated, was to restrict one side of the debate to a polite style of expression, while allowing the other to fight

freestyle, effectively favoring one viewpoint over another. n184

- - - - -Footnotes- - - - -

n180. Id. at 2547.

n181. Id. at 2547-48.

n182. Id. at 2548.

n183. Id. This apparent inconsistency in the ordinance was an issue of contention between Justice Scalia, who wrote for the Court, and Justice Stevens, who concurred only in the judgment. Justice Scalia's position was that the ordinance was invalid because one could hold up a sign saying "all "anti-Catholic bigots' are misbegotten," but not one that said "all "papists' are [misbegotten]" because the latter insult invokes religion. Id. Justice Stevens referred to Justice Scalia's reasoning as "asymmetrical," arguing that the logical response to a sign saying "all anti-Catholic bigots are misbegotten" is one saying "all advocates of religious tolerance are misbegotten." Id. at 2571 (Stevens, J., concurring in the judgment). He also noted that the ordinance treated insults by Catholics about Muslims and insults by Muslims about Catholics equally. Id. The issue is somewhat clouded by the Justices' choice of examples. Substituting what are (unfortunately) more realistic epithets, it emerges that the statute forbids one to say "blacks are bastards," but allows one to say "bigots are bastards," because the term bigot refers not to one's race but to one's attitude about race. Contrary to Justice Stevens's suggestion, the logical response to a racial epithet is not another racial epithet, but an epithet about racists.

n184. Id. at 2548. The fact that the ordinance was viewpoint-neutral on its face but viewpoint-discriminatory in its application is important for the analysis of the possible effects of obscenity exemptions that appears infra at text accompanying notes 225-34. Just as Justices Scalia and Stevens disagreed as to whether the ordinance was actually viewpoint-discriminatory, so have academics. Compare Elena Kagan, *The Changing Face of Viewpoint Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 Sup. Ct. Rev. 29, 69-71 (characterizing Minneapolis ordinance as viewpoint-discriminatory), with Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 762-63 & 762 n.78 (arguing that ordinance regulates on basis of "subjects for discussion, not on the basis of viewpoint").

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

{*430}

The Court went on to reject the city's claim that the ordinance's content and viewpoint discrimination was justifiable because it was narrowly tailored to serve a compelling government interest. The Court agreed that the asserted goal, the protection of basic human rights of members of groups that have historically been subjected to discrimination, was sufficiently important to justify the legislation. n185 It disagreed, however, that the ordinance was "reasonably necessary" to achieve that end, n186 holding that the availability of a content-neutral and viewpoint-neutral alternative ordinance, one that prohibited fighting words on all subjects, defeated any argument that a discriminatory ordinance was necessary to achieve the city's goal. n187 In other words, St. Paul's ordinance was invalid because the city could protect the human rights

of certain groups by prohibiting all fighting words, instead of only fighting words concerning certain subjects. n188

-Footnotes-

n185. R.A.V., 112 S. Ct. at 2549.

n186. Id. at 2549-50.

n187. Id.

n188. See id. at 2550. The Court set forth four exceptions to the general rule. First, the legislature may selectively prohibit speech when the selection is made for the very reason the entire category of speech at issue is proscribable. Id. at 2545-46. Thus the state may prohibit only that obscenity that involves the most lascivious displays of sexual activity. Id. at 2546. Second, the state may prohibit a subset of a proscribable category that is particularly associated with certain secondary effects of the speech - for example, obscenity involving minors which, in addition to being obscene, has the secondary effect of harming child actors. Id. Third, subsets of a proscribable category of speech may be swept up incidentally within a statute directed at conduct rather than speech, as where a proscription against sexual discrimination in the workplace includes a proscription against sexually derogatory fighting words. Id. Finally, the Court stated that a state may proscribe obscenity only in certain media or markets - for instance, obscene telephone communications but not obscene books. Id. at 2545 (citing Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 124-26 (1989)). The first of these exceptions may be relevant to obscenity exemptions if the exempted organizations do not distribute or display the most explicit type of material. See infra notes 223-24 and accompanying text.

-End Footnotes-

The minority rued the majority's alteration of the categorical approach, accusing it of placing heretofore unprotected categories of speech on an equal footing with political discourse. n189 While this characterization may overstate slightly the majority position (the Court did not decide that fighting words could no longer be regulated), the Court's holding does have application in a variety of circumstances. For instance, the Court noted that the same rationale would apply to discrimination within other categories of traditionally unprotected [*431] speech: "The government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government." n190 Nor may the government prohibit only those obscene works that are critical of the government. n191 Thus R.A.V. is a substantial revision of previous Supreme Court decisions' statements that certain categories of expression are outside the protection of the First Amendment. n192

-Footnotes-

n189. R.A.V., 112 S. Ct. at 2554 (White, J., concurring in the judgment).

n190. Id. at 2543.

n191. Id. Justice Stevens called the example of obscene antigovernment speech "fantastical." Id. at 2562 (Stevens, J., concurring in the judgment). While

this particular example of discrimination within the category of obscene speech may be hard to imagine, there are others that are not - for instance, proscriptions only on obscene works that depict women in a degrading fashion, or only on obscene works with a homoerotic theme. See infra notes 219-34 and accompanying text.

n192. These cases include Roth v. United States, 354 U.S. 476, 483 (1957) (obscenity), and Chaplinsky v. New Hampshire 315 U.S. 568, 571-72 (1942) (fighting words). Though it has not been faced with another fact pattern similar to R.A.V., in its other cases the Court has shown no inclination to back away from its alteration of the categorical approach. The Court has cited R.A.V. for the proposition that the government may not regulate speech based on hostility or favoritism towards the underlying message expressed. See Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2458-59 (1994) ("The First Amendment, subject only to narrow and well-understood exceptions, does not countenance government control over the content of messages expressed by private individuals." (citations omitted)). In addition, in Wisconsin v. Mitchell, 113 S. Ct. 2194, 2202 (1993), the Court approved Wisconsin's system of enhanced penalties for bias-motivated crimes. This would have seemed to be an excellent opportunity for the Justices to abandon, modify, or criticize the R.A.V. rule, but instead a unanimous Court stated that the Mitchell holding was in accord with R.A.V.: The latter involved speech protected by the First Amendment, while the former involved conduct that could claim no constitutional protection. Id. at 2200-01.

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

B. Application of the R.A.V. Rationale to Exemptions from Obscenity Statutes

A broad restatement of the R.A.V. rule might be that the government may prohibit a certain category of speech, but that it may not prohibit only particular subsets of that category - that the power to prohibit does not "necessarily subsume[] the power to prohibit selectively." n193 This phrasing of the rule seems to cast light on the issue of exemptions for certain institutions from prosecution under obscenity laws. A state legislature selectively prohibits obscene expression when it creates these exemptions, and R.A.V. made selective prohibitions invalid. But there are two significant differences between the R.A.V. situation and the exemption situation that must be addressed before applying the rule of the former to the latter.

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n193. Akhil R. Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 Harv. L. Rev. 124, 128 (1992).

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[*432]

The first difference is that R.A.V. dealt with fighting words, n194 not obscenity. This does not seem, however, to be an important distinction. As noted above, the Court stated that its approach would apply to selective proscriptions of obscenity and libel as well as fighting words. Commentators have recognized that the R.A.V. approach would be apposite in the obscenity context, n195 and an approach similar to R.A.V. was employed by the Seventh Circuit in striking down Indianapolis's antipornography ordinance. n196 That ordinance prohibited

sexually explicit material that depicts or describes the abuse, degradation, or subordination of women but allowed sexually explicit material that treated women as equals. n197 The court invalidated the ordinance on the grounds that it established an approved view of women and sexual relations and favored sexually explicit works premised on this view, while disfavoring opponents. n198 In a separate case, the Seventh Circuit noted that "the state is permitted to suppress obscenity but it is not permitted to distort the marketplace of erotic discourse by suppressing only that obscenity which conveys a disfavored message." n199

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n194. In fact, the fighting words involved were of a particularly controversial sort; Justice Blackmun feared that the Court had been improperly tempted to rule on the issue of "politically correct speech." R.A.V., 112 S. Ct. at 2561 (Blackmun, J., concurring in the judgment).

n195. See, e.g., Elena Kagan, Regulation of Hate Speech and Pornography After R.A.V., 60 U. Chi. L. Rev. 873, 896 (1990) (explaining that R.A.V. would probably bar state from prohibiting only subcategories of obscenity that contain sexual violence).

n196. See American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985) (invalidating ordinance because it discriminated on basis of viewpoint), aff'd mem., 475 U.S. 1001 (1986).

n197. See id. at 324.

n198. Id. at 325, 328. There is an important difference between R.A.V. and Hudnut: In Hudnut, the ordinance did not cover only works that are obscene under Miller; it outlawed works with the disapproved themes no matter how significant the literary, artistic, political, or scientific value, Hudnut, 771 F.2d at 325, and therefore reached both constitutionally protected and unprotected expression. While the court could have invalidated the statute on this ground alone, the greater part of the opinion is devoted to explaining why the government may not proscribe speech on the basis of the viewpoint it expresses. See id. at 327-332. The final section of the opinion discusses portions of the ordinance that could be salvaged if they were content neutral; there is no mention of the ordinance being constitutional if it were applied only to works that were obscene under Miller. See id. at 332-34. It is fair, therefore, to infer that Hudnut supports the proposition that viewpoint discrimination is illegal even within a proscribable category of speech. See Kagan, supra note 184, at 875 (stating that reasoning of R.A.V. "closely resembles" that of Hudnut).

n199. Kucharek v. Hanaway, 902 F.2d 513, 517 (7th Cir. 1990), cert. denied, 498 U.S. 1041 (1991).

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

This leads to the second difference between R.A.V. and the obscenity exemptions: the type of selectivity being employed. In R.A.V. the Court took issue with selectivity based on the content of the speech - the challenged ordinance only outlawed hate speech on the subject of race, color, creed, religion, or gender. This selectivity, while [*433] invalid in itself,

n200 led in practical application to the more nefarious viewpoint discrimination. n201 However, when a state exempts certain organizations from the coverage of its obscenity statute, it is discriminating between speakers, not between subjects. Does R.A.V. make speaker-based distinctions illicit the same way it did subject-based distinctions? As a general matter, the two situations seem sufficiently analogous to justify extending the rule to selectivity among groups of speakers. There is no more reason why a state should be allowed to favor or disfavor certain speakers than favor or disfavor certain subjects of speech. The R.A.V. Court held that a statute that can achieve the government's stated goal without prohibiting speech selectively is preferable to a statute which does prohibit speech selectively. n202 In the exemption situation, the state's interest is either the regulation of obscenity or the protection of children from unsuitable influences. A statute that prohibits all organizations from distributing or displaying certain material would be at least as effective, if not more effective, at achieving these ends.

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n200. "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547 (1992).

n201. "In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination." Id. For discussion of how this viewpoint discrimination works, see supra note 183 and accompanying text.

n202. R.A.V., 112 S. Ct. at 2549-50.

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

In R.A.V., however, the Court avoided holding that all types of selectivity should be analyzed the way content-selectivity was analyzed. Instead, it stated that prohibitions on fighting words that are directed at certain persons or groups would have to meet the requirements of the Equal Protection Clause. n203 The question not addressed by the Court is what type of equal protection review - i.e., what level of scrutiny - would be required. The traditional categorical approach, employed in Parts I and II above, would call for the use of the rational basis test since categories of speech such as obscenity and fighting words are outside the protection of the First Amendment. But in R.A.V. the Court stated that its previous statements that these categories are "not within the area of constitutionally protected speech," n204 and that "the "protection of the First Amendment does not extend'" n205 to these categories were not "literally true." n206 While the categories may be regulated, they are not "entirely invisible to the [*434] Constitution." n207 Instead, if a state proscribes only a portion of a proscribable category, it must "refute the proposition that the selectivity of the restriction is "even arguably conditioned upon the sovereign's agreement with what a speaker may intend to say.'" n208 The city in R.A.V. could not refute this proposition; in fact, in practical application, the ordinance was viewpoint-discriminatory. In the obscenity context, the relevant question would be whether the legislation "distorts the marketplace of erotic discourse." n209 If it does, the specter of viewpoint discrimination emerges.

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n203. Id. at 2548.

n204. Id. at 2543 (quoting Roth v. United States, 354 U.S. 476, 483 (1957)).

n205. Id. (quoting Bose Corp. v. Consumers Union, 466 U.S. 485, 504 (1984)).

n206. Id.

n207. Id.

n208. Id. at 2547 (quoting Metromedia, Inc. v. San Diego, 453 U.S. 490, 555 (1981) (Stevens, J., dissenting) (citation omitted)).

n209. Kucharek v. Hanaway, 902 F.2d 513, 517 (7th Cir. 1990), cert. denied, 498 U.S. 1041 (1991)

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

Assuming for the moment that exemptions can distort the marketplace of erotic discourse, n210 the important inquiry for an equal protection challenge thus becomes whether or not a rational basis review is demanding enough to compel the state to refute an assertion that it was favoring one viewpoint over another. Could a standard of review that will uphold state statutes unless "no grounds can be conceived to justify them," n211 and that makes it "constitutionally irrelevant whether this reasoning in fact underlies the legislative decisions," n212 invalidate legislation that is "arguably conditioned" n213 on the state's agreement with the message? Will a rational basis review invalidate legislation that "distorts the marketplace of erotic discourse?" n214 It is practically impossible that it would. Therefore, strict scrutiny is the appropriate test to use. n215 This is in accord with R.A.V., where the Court subjected St. Paul's ordinance to strict scrutiny even though the discrimination occurred within a traditionally unprotected category of speech. n216 Using strict scrutiny for challenges to exemptions will not put proscribed categories "on at least equal constitutional footing with political discourse" - which was what the minority [*435] in R.A.V. feared would be the result of the shift in doctrine n217 - because the legislature still has the option of entirely prohibiting the category of speech.

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n210. This question is taken up infra at Part III.C.

n211. McDonald v. Board of Election, 394 U.S. 802, 809 (1969) (emphasis added).

n212. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (emphasis added) (quoting Fleming v. Nestor, 363 U.S. 603, 612 (1960) (citation omitted)).

n213. R.A.V., 112 S. Ct. at 2547 (emphasis added) (quoting Metromedia, Inc. v. San Diego, 453 U.S. 490, 555. (1981) (Stevens, J., dissenting) (citation omitted)).

n214. Kucharek, 902 F.2d at 517.

n215. With respect to obscenity distribution provisions, this is a departure from the level of scrutiny suggested in Part I. With respect to regulations on the display of material deemed harmful to minors, the suggestion in Part II was that strict scrutiny was appropriate because nonobscene expression was involved. The analysis in Part III now suggests that even if a court were to find that very little or no nonobscene material was involved, strict scrutiny would still apply.

n216. R.A.V., 112 S. Ct. at 2549.

n217. Id. at 2554 (White, J., concurring in the judgment).

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C. Possible Effects of Obscenity Exemptions on Erotic Discourse

The ordinance at issue in R.A.V. did not discriminate on the basis of viewpoint on its face; it only regulated subject matter. In practical operation, however, it handicapped proponents of one viewpoint, namely proponents of racial intolerance. n218 The obscenity exemptions do not facially discriminate on the basis of viewpoint either. So before requiring a state to refute the proposition that it is favoring certain viewpoints, we must determine whether the exemptions might practically result in such a favoritism. Might they affect discourse on sexual matters by altering the types of materials available?

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n218. See supra notes 180-84 and accompanying text.

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If the exempted organizations possess materials that could be characterized as either obscene or harmful to minors, but that do not fairly represent a variety of viewpoints on sexual issues, an unconstitutional distortion could be the result. For instance, if the organizations distribute or display sexually oriented materials that portray women as equals, but not materials that portray women as subordinates, the exemptions will have resulted in the situation the Hudnut court found unconstitutional: the establishment of an approved view of women and sexual relations. n219 Similarly, if the exempted institutions have sexually oriented materials that are thematically heteroerotic, but not ones that are thematically homoerotic, the exemptions will have established an approved view of men and women and sexual relations. n220

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n219. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325, 328 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986); see supra notes 196-98 and accompanying text.

n220. The fact that the Supreme Court has not recognized homosexuals as a suspect class, cf. Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding Georgia statute criminalizing sodomy), does not make this type of distortion legal. The issue here is not suspect classification for the purpose of, for instance, job

discrimination claims, but viewpoint discrimination under the First Amendment. Speech advocating homosexuality or homosexual rights is as entitled to protection by the First Amendment as speech advocating heterosexuality or opposing homosexual rights.

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Determining whether and to what extent the exempted organizations fail to represent different viewpoints respecting sexual relations is a complicated process given the wide variety of organizations that have been exempted, the difficulty of discovering what works they own, and the difficulty of determining a work's perspective on sexual relations without seeing it or reading it. But by looking at a particular [*436] exempted organization, for instance the public library, certain generalizations regarding the exemptions' effect on discourse are possible. First, as many of the courts that have evaluated the exemptions have noted, n221 and as seems reasonable to assume, the public library will not own the most explicit types of material. It is plausible to argue that an elimination of particularly explicit materials in itself alters the marketplace of erotic discourse because it impedes expression of a viewpoint, for instance that sexual matters are essentially carnal. n222 However, this alteration would fall within an exception to the R.A.V. rule established by the R.A.V. Court: The state may prohibit only "the most lascivious displays of sexual activity" without offending the First Amendment. n223 Thus this type of distortion would not invalidate an exemption. n224

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n221. See, e.g., American Booksellers v. Webb, 919 F.2d 1493, 1511 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991) (noting that few books owned by libraries would be judged obscene under Miller).

n222. Cf. Catherine MacKinnon, Feminism Unmodified: Discourses on Life and Law 212 (1987) (acknowledging arguments that delineation of categories of speech such as obscenity may be thought to reflect kind of viewpoint discrimination, given that speech falling within such category likely expresses single disfavored viewpoint about sexual matters).

n223. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546 (1992); see supra note 188.

n224. It should be noted that the exceptions set forth by the majority in R.A.V. to its general rule are dicta. But because the analysis in Part III discusses other dicta, it makes sense to abide by the exceptions.

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But it might be possible to demonstrate a type of distortion that would not fall within the R.A.V. rule's exception: that public libraries consistently fail to make available sexually oriented materials with a homosexual theme. Research of the holdings of the libraries of several states suggests that this could be the case. n225 Using The Joy of Sex, The Joy of Gay Sex, and The Joy of Lesbian Sex as examples of works that are sexually oriented n226 and easily identified as either [*437] hetero- or homoerotic, the author's research revealed the following: In all of Pennsylvania, a state whose exemption for libraries, museums, and historical societies was upheld, n227 only three public libraries

owned a copy of The Joy of Gay Sex, and only one owned a copy of The Joy of Lesbian Sex. By contrast, forty-three public libraries owned a copy of The Joy of Sex. n228 In all of Wisconsin, where exemptions for schools, libraries, and institutions of higher education were upheld, n229 only three public libraries owned a copy of The Joy of Gay Sex, only one owned a copy of The Joy of Lesbian Sex, and twenty-eight owned a copy of The Joy of Sex. n230 The holdings of public libraries in other states reflect similar results. n231

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n225. The author conducted on-line research of the holdings of public and university libraries using OCLC, the database used by libraries for interlibrary loan purposes. When a library wishes to borrow a book from another library, it looks up the title on OCLC to determine where it is held. Libraries that participate in the system catalog all of their titles in the database; that is, each new title purchased by a library is added to the database so that other libraries will know where to borrow the book should they want it. The author does not represent that searches of this database constitute an exhaustive scientific demonstration of what material is available and what material is not. Instead, the results are offered as preliminary evidence to support the proposition that libraries' collections do not represent the spectrum of viewpoints with respect to sexually oriented materials. The results of this research are on file with the New York University Law Review.

n226. These books would probably not be found obscene; it is very possible, however, that they would be considered harmful to minors. See, e.g., Tattered Cover, Inc. v. Tooley, 696 P.2d 780, 786 n.5 (1985) (listing these three books as examples of type of materials covered by Denver's regulations of materials harmful to minors); see also American Booksellers Ass'n v. Webb, 643 F. Supp. 1546, 1550 (N.D. Ga. 1986) (stating that textbook entitled Human Sexuality would fall within Georgia's regulation of material harmful to minors), rev'd on other grounds, 919 F.2d 1492 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991). The present research was conducted using the major editions of the three titles published by Simon & Schuster and Crown Publishers since 1972.

n227. Long v. 130 Market St. Gift & Novelty, 440 A.2d 517, 528 (Pa. Super. Ct. 1982).

n228. Twenty-one additional copies of The Joy of Sex are available in university libraries. Four additional copies of The Joy of Gay Sex and seven additional copies of The Joy of Lesbian Sex are available in university libraries.

n229. Kucharek v. Hanaway, 902 F.2d 513, 520 (7th Cir. 1990), cert. denied, 498 U.S. 1041 (1991).

n230. There are four, four, and eleven additional copies of each title, respectively, available in university libraries.

n231. In California, 25 public libraries own a copy of The Joy of Gay Sex, 10 own a copy of The Joy of Lesbian Sex, and 199 own a copy of The Joy of Sex. In New Jersey, 11 public libraries own a copy of The Joy of Gay Sex, seven own a copy of The Joy of Lesbian Sex, and 75 own a copy of The Joy of Sex.

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

These figures are not presented to suggest that it is incumbent on public libraries to purchase more of certain types of materials. A library may be responding to what it perceives as the demand for certain materials, or choosing not to devote its limited resources to books of this kind. The figures are presented to suggest public libraries do not always "make available to all citizens a current, balanced collection of books, [and] reference materials ... that reflect the cultural diversity and pluralistic nature of American society." n232 They suggest that if only public libraries are allowed to display or distribute sexually explicit material, while private bookstores are prevented from doing the same, certain viewpoints on eroticism could be handicapped. n233 Of course, a plaintiff who wished to pursue an equal protection challenge to an exemption would need to do extensive research of the holdings of the exempted organizations in her municipality or state to [*438] demonstrate a distortion of the marketplace of ideas. n234 The above figures are offered only as a preliminary indication of what she might find.

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n232. Wis. Stat. Ann. 944.21(8)(a) (West Supp. 1994).

n233. For instance, if significantly more than three private bookstores in Pennsylvania and Wisconsin would be willing to display or distribute *The Joy of Gay Sex*, such a handicap might be demonstrated.

n234. The plaintiff then would have to compare the results of this research to an estimate of what nonexempted organizations would make available to see if a distortion had occurred.

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

Part III has attempted to demonstrate: (1) that the Court has altered the traditional categorical approach under the First Amendment; (2) that this alteration results in an alteration of equal protection analysis when traditionally unprotected categories of speech are involved; and (3) that there is the possibility that exemptions from distribution and display provisions could fail this equal protection analysis because they tend to prefer certain viewpoints to others. The demonstration is intended to be a suggestion of how the issue might be addressed, rather than a declaration about how it must be addressed. That is, the discussion in Part III, if accepted, does not obviate the analysis in Parts I and II; it informs the analysis by explaining the possible undesirable effects of the exemptions.

Conclusion

Parts I and II demonstrated that under traditional analysis, distribution exemptions probably should not survive and that display exemptions cannot survive equal protection challenges. Part III offered a nontraditional way of addressing the exemptions and suggested that if they tend to handicap certain viewpoints, the exemptions should be found invalid. Resolution of exemption issues, however, requires examination not only of equal protection doctrine but of obscenity laws themselves: Do we really want to designate certain materials

as valueless, such that they receive no protection from the First Amendment?
n235 Does the tendency of legislative bodies to exempt these organizations reflect an ambivalence about entirely eliminating explicit sexual material from the marketplace of ideas? The Seventh Circuit noted that a state legislature may not find it palatable to pass obscenity statutes with no exemptions, ones that entirely eliminate [*439] certain types of material. n236 And the Eleventh Circuit, in upholding an exemption, stated: "Striking down such an exemption would hinder rather than promote robust speech." n237 Thus, rather than enacting broad prohibitions and including exemptions, legislators and their constituents might do better to confront the obscenity laws themselves and resolve their apparent ambivalence.

-Footnotes-

n235. See, e.g., Barry W. Lynn, "Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation, 21 Harv. C.R.-C.L. L. Rev. 27, 48 (1986) (noting that sexually explicit material can be used to transmit ideas); David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 82 (1974) (suggesting that obscene speech should be protected by First Amendment). But see Stephen G. Gey, The Apologetics of Suppression: The Regulation of Pornography as Act and Idea, 86 Mich. L. Rev. 1564, 1586 (1988) (noting that many believe obscene material does not transmit ideas); Catherine MacKinnon, Francis Biddle's Sister: Pornography, Civil Rights, and Speech, in Feminism Unmodified: Discourses on Life and Law 82 (1987) (arguing that certain sexually explicit materials should be regulated because of their influence on attitudes and actions).

n236. Kucharek v. Hanaway, 902 F.2d 513, 518 (noticing that exemptions from Wisconsin statute were enacted because "forces opposed to censorship had the political muscle to force a compromise"), cert. denied, 498 U.S. 1041 (1991).

n237. American Booksellers v. Webb, 919 F.2d 1493, 1512 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991). This may help explain why the Eleventh Circuit chose to use the rational basis test rather than strict scrutiny when reviewing Georgia's display regulation. See supra Part II.C. The court might have feared that employing strict scrutiny and then upholding the statute would weaken future First Amendment claims.

-End Footnotes-

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New York University Law Review

June, 1995

70 N.Y.U.L. Rev. 748

LENGTH: 13114 words

MEMBERS OF THE WARREN COURT IN JUDICIAL BIOGRAPHY: THEMES IN WARREN COURT BIOGRAPHIES

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-----Footnotes-----

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

SUMMARY:

... Several problems arise at the outset of any attempt to discuss biographies of Justices who served on the "Warren Court." ... I do not intend to suggest, however, that the theme I associate here with any individual Justice is the "master theme" for understanding that Justice, or that it is relevant to the biography of only that Justice. ... In constructing the New Deal constitutional regime, the Justices who served after 1937 found themselves torn. ... Rather, he exercised his judgment in evaluating the evidence of the Framers' intentions. ... Further, the narrative of rights triumphalism explains why the Warren Court Justices were largely uninterested in the question of restraint versus activism: They believed that protecting individual rights was the peculiar province of the judiciary. ... The opinion's evolution, however, shows Brennan working with a colleague to reach the result they both favored. ... Could Brennan's reasonableness be the basis of a constitutional jurisprudence? Again, I think it helpful to see the Warren Court Justices as defending a big Court in a big government. ... As with Brennan, there is a standard law clerk story illustrating Marshall's view. ... Marshall reconsidered his vote only after he was persuaded that the question of notice was inextricably connected to the death penalty issue. ...

TEXT:
[*748]

Introduction:
Identifying the Subjects

Several problems arise at the outset of any attempt to discuss biographies of Justices who served on the "Warren Court." Perhaps most obvious, it is not easy to identify those Justices. If the group is defined as Justices who served during Earl Warren's tenure, it includes Stanley Reed, Tom Clark, and Harold

Burton. It is unclear that examining their biographies would illuminate the historical phenomenon we call the Warren Court. If the group is defined as Justices whose understanding of the Constitution was shaped by the Warren Court, it might not include William O. Douglas or Hugo Black, and perhaps it ought to include William Rehnquist and Antonin Scalia. Again, the pattern of inclusion and exclusion seems inappropriate.

Probably the best we can do is examine the Justices who served from 1962 to 1968. The year 1962 is significant because in that year Felix Frankfurter's retirement was followed by Arthur Goldberg's appointment and the consolidation (or creation) of what we now call the Warren Court. n1 The list of Justices then is Earl Warren, Hugo Black, Arthur Goldberg, Abe Fortas, William J. Brennan, William O. Douglas, Tom Clark, Thurgood Marshall, Byron White, John Marshall Harlan, and Potter Stewart. Perhaps the only anomaly on this list is Tom Clark, because he neither adhered to the values characteristic of the Warren Court majority nor articulated a clear alternative to those values. The omissions are perhaps more bothersome. Most notably, the list does not include Felix Frankfurter, and the argument I develop below suggests that perhaps the list should include Lewis F. Powell and Warren Burger.

- - - - -Footnotes- - - - -

n1. See Mark Tushnet, *The Warren Court as History: An Interpretation*, in *The Warren Court in Historical and Political Perspective* 1, 2-12 (Mark Tushnet ed., 1993).

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A second difficulty in discussing Warren Court biographies is that there are surprisingly few good biographies of that Court's members. In my view, after White on Warren, n2 Newman on Black, n3 and Kalman [*749] on Fortas, n4 nothing contributes more than facts to our understanding of the Warren Court. The paucity of good biographies results, I believe, from the difficulty scholars have in identifying the themes that illuminate the Warren Court. Perhaps we remain too close to the events. Here I think it useful to draw on the thought, associated in the law schools with Bruce Ackerman but familiar in other forms to historians and political scientists, that the United States has experienced several "constitutional regimes." n5 Perhaps we remain within the constitutional regime of which the Warren Court was a part. n6 And perhaps historians can understand a regime only after it has ended. If so, it will be hard to be confident about the interpretive questions historians should ask. So, for example, if we continue to live under the regime of New Deal constitutionalism, we may find it difficult to understand what happened during the early or middle years of that regime; we presently find ourselves in its late years, rather than in the opening years of a different constitutional regime.

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n2. G. Edward White, *Earl Warren: A Public Life* (1982).

n3. Roger K. Newman, *Hugo Black* (1994).

n4. Laura Kalman, *Abe Fortas: A Biography* (1990).

n5. See, e.g., Bruce Ackerman, We the People: Foundations 59 (1991) (arguing that analysis of Supreme Court's role in each epoch should concentrate on prevailing "constitutional regime, the matrix of institutional relationships and fundamental values that are usually taken as the constitutional baseline in normal political life").

n6. In Ackerman's terms, there have been no formal or informal constitutional amendments to define a new constitutional regime, and thereby to provide the Supreme Court with a new set of tasks. For a discussion, see Mark Tushnet, Living in a Constitutional Moment?, 46 Case W. Res. L. Rev. (forthcoming 1996).

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

Warren Court Narratives

For purposes of this discussion, I think it useful to distinguish between biographical analyses of individual Justices and more general thematic analyses of the Warren Court as a whole. In the end, one hopes to connect the biographical points to the thematic ones. Those connections might be much looser than we think, however.

Two linked narratives dominate the present understanding of the Warren Court. The first is the narrative of judicial restraint and activism; the second is the narrative of what I call rights triumphalism. Rights triumphalism gives content to the activism on which the first narrative focuses.

A. The Narrative of Restraint and Activism

The narrative of restraint and activism is captured by the title of James Simon's The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America. n7 The fundamental interpretive [*750] theme of this work is the conflict between judicial activism in support of civil liberties, associated with Hugo Black (and Earl Warren), and judicial restraint, associated with Felix Frankfurter. n8

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n7. James F. Simon, The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America (1989).

n8. Id. at 10.

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If the Warren Court came into its own in 1962 on Frankfurter's retirement, though, making that theme central to understanding the Warren Court Justices is deeply misleading, even if the impulse is understandable. The Warren Court Justices came to legal or judicial maturity after (or, in some cases, as part of) the New Deal. For fifteen years after the New Deal's constitutional triumph in 1937, judges strove to provide an account of their roles which could combine two key elements. First, this account had to explain their acceptance of an essentially unlimited government in the economic domain, yet it also had to allow them to enforce limits on government in the domain of civil rights and

civil liberties.

By 1962, however, the question of whether such an account could be articulated had receded. The Warren Court Justices found themselves at the end of a conversation about activism and restraint. With the exception of Black and possibly Harlan, none of the Justices who served between 1962 and 1968 appears to have cared much about developing a coherent position on the question of judicial activism or restraint. Indeed, I believe, the most interesting theme for biographers of Warren Court Justices may be not why those Justices were "activists," or even why they sought to promote the values they did, but rather why they found questions about activism or restraint so uninteresting.

In exploring that theme, I will touch on related themes. The Warren Court Justices came to political maturity before, or in the early years of, the New Deal. By the time they reached the Court, the New Deal constitutional regime was a fact of life. An expansive national government, a modest welfare state, public bureaucracies staffed by professionals - these were the elements of the New Deal regime. How were judges to come to terms with those elements? By the end of their tenure, the New Deal political coalition was in the process of transformation and disintegration. How did the Warren Court Justices contribute to this transformation?

The biographical questions I want to raise, then, are how these particular men came to understand and accept their role in the New Deal and Great Society constitutional regime. I proceed through quite brief sketches of the role of specific themes in the biographies of selected Warren Court Justices. I do not intend to suggest, however, that the theme I associate here with any individual Justice is the [*751] "master theme" for understanding that Justice, or that it is relevant to the biography of only that Justice. In the end, I believe that adequate biographies of each Warren Court Justice will touch on each of the themes I identify.

1. Hugo Black and the Displacement of Judgment

In constructing the New Deal constitutional regime, the Justices who served after 1937 found themselves torn. They knew they had to repudiate the aggressive judicial review they associated with the Old Court. The easiest course was to determine that the Constitution allowed legislatures to adopt whatever laws they chose. The Justices might have supported that course by relying on the political process as a check against completely unwarranted actions. The soundness of that process was demonstrated by the fact that it had put them on the Supreme Court.

In its strongest version, though, this course seemed anticonstitutional. Justice Robert Jackson's struggle in *Wickard v. Filburn*, n9 where he insisted on reargument of the case for further factual development, n10 is exemplary. Jackson worried that allowing Congress to regulate the economy down to the level of production for on-farm use was inconsistent with the Constitution's text. n11 Similarly, Justice Harlan Fiske Stone reserved for the Court the power to invalidate legislation when it was inconsistent with the Constitution's text or when there were reasons to believe that the political process would be unavailing to protect minorities from the legislation's damaging effects. n12 The latter concern was, of course, bolstered by the Justices' view of events overseas, to which Justice Black alluded in an opinion that even in 1962 he

described as "very high among decisions expressing [his] constitutional views."
n13 In *Chambers v. Florida*, n14 Black's first significant opinion, he observed
that "today, as in ages past, we are not without tragic proof that the exalted
power of some governments to punish manufactured crime dictatorially is the
handmaid of tyranny" but that in "our constitutional system, courts stand
against any winds that blow as havens of refuge for those who might otherwise
suffer because they [*752] are helpless, weak, outnumbered, or because they
are non-conforming victims of prejudice and public excitement." n15

- - - - -Footnotes- - - - -

n9. 317 U.S. 111, 125 (1942) (holding that Commerce Clause gives Congress
power to regulate local activity that exerts substantial economic effect on
interstate commerce).

n10. See Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* 594-95
(1956).

n11. See *id.*

n12. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

n13. Newman, *supra* note 3, at 525 n.*.

n14. 309 U.S. 227 (1940).

n15. *Id.* at 241. In *Chambers*, Black overturned the murder convictions of four
African American men accused of killing a white man because the prosecution's
reliance upon coerced confessions violated the defendants' due process rights.
Id. at 238-40.

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The rhetoric was powerful, but it was - as the Justices knew - equally
available to defenders of the Old Court's approach. n16 Black was unconcerned,
though. Perhaps the most revealing anecdote in Roger Newman's biography of Black
describes the Justice walking around the house saying: "I'm always right." n17
Black's refusal to acknowledge error, Newman shows, went deep indeed. For
example, Black never said that he had been wrong to join the Ku Klux Klan;
instead, he explained - and sought to excuse - his actions as a political
necessity for an ambitious politician in Alabama at the time. n18 And, unlike
Earl Warren, Black did not express regret about his role in the internment of
Japanese Americans during World War II; shortly before his death, Black said, "I
still think I did the right thing" in the internment cases. n19

- - - - -Footnotes- - - - -

n16. See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 452
(1934) (Sutherland, J., dissenting) (arguing that since constitutions are
created to insulate government from varying public moods, Court should invoke
Contracts Clause to overturn Minnesota statute providing extension before
foreclosure of mortgages).

n17. Newman, *supra* note 3, at 401.

n18. See id. at 585.

n19. Id. at 319.

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Black's confidence that he was always right might have led him to reproduce the Old Court's jurisprudence of the judicial role: Let Justices decide what the Constitution means. Instead, Black moved sharply in the opposite direction. Rather than justifying the exercise of judicial judgment, Black denied that judges - including himself - ought to exercise judgment at all. Black's famous reliance on the Framers' intentions displaced the decisionmaking from the judges to the Framers. n20

- - - - -Footnotes- - - - -

n20. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting) (criticizing majority for inferring "duty of this Court to keep the Constitution in tune with the times" instead of keeping in touch with Framers' intent); *Adamson v. California*, 332 U.S. 46, 89, 92-125 (1977) (Black, J., dissenting) (vigorously criticizing Court's practice of substituting own judgment' for that of Framers and supporting this claim with appendix containing historical research on legislative history of Constitution).

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Perhaps the only weakness of Newman's biography is its failure to explore the apparent anomalies here. Black was never troubled by the happy coincidence between his policy preferences and what he understood to be the Framers' judgments. For instance, when historian Leonard Levy published a well-received book arguing that the Framers had a quite limited concept of constitutionally protected free ex- [*753] pression, n21 Black was at least as concerned with the fact that Levy's conclusions would "give aid and comfort to every person in the country who desired to leave Congress and the states free to punish people under the old English seditious libel label" n22 as he was with the accuracy of Levy's historical analysis. Moreover, one can acknowledge that the Framers were extraordinarily wise and enlightened statesmen without concluding that they were right on each and every issue of contemporary concern, but Black never did.

- - - - -Footnotes- - - - -

n21. See Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* at vii (1960).

n22. Newman, *supra* note 3, at 499.

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Second, Black believed that he was always right but refused to make substantive decisions, at least directly. Rather, he exercised his judgment in evaluating the evidence of the Framers' intentions. And there too he was, in his eyes, always right. Stanford Law Professor Charles Fairman disagreed with Black's view that the Framers intended the Fourteenth Amendment to apply the Bill of Rights to the states. n23 In turn, Black considered Fairman to be an "advocate[] for [a] cause" n24 rather than "a detached historian." n25

Similarly, Black believed that Leonard Levy relied too heavily on "negative premises" in analyzing the Framers' opinions, and in a letter to Levy, Black suggested that Levy had not studied the founding era as closely as Black had.
n26

- - - - -Footnotes- - - - -

n23. See id. at 352-55.

n24. Id. at 356 n..

n25. Id. at 355.

n26. Id. at 499-500. In his letter to Levy, Black wrote: "My own hope and wish is that you continue to study the history behind the First Amendment." Id.

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

While the narrative of activism and restraint considers whether Black's assessments of history stand up on examination, I wish to emphasize that Black used history to displace substantive personal judgment. Black appears to have been entirely unaware of the tension between his confidence in his own historical judgment and the rejection of substantive judgment embedded in his conception of the judicial role. Whatever the sources of this blindness in Black's personality, it served a useful purpose in constructing the judicial defense of the New Deal constitutional regime. As Black saw things, he could not fairly be charged with the deviations he attributed to the Old Court's Justices. Unlike them, in his own eyes, Black was not displacing congressional judgments with his own, but rather with the Framers' judgments. And, conveniently, at least some of the Framers' judgments authorized aggressive judicial review in the areas Black [*754] came to care about. n27 Even more important, in refocusing judgment from substance to history, Black could not entirely domesticate judicial judgment. The choices judges made among competing interpretations of the historical record left them as untamed as they were when they made substantive judgments. His Warren Court colleagues, as I will discuss below, dealt with the question of judgment differently.

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n27. See, e.g., *Dennis v. United States*, 341 U.S. 494, 580 (1951) (Black, J., dissenting) (concluding that to Framers, benefits derived from "a government policy of unfettered communication of ideas" were worth any risk such policy might entail).

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2. Abe Fortas and the Doctrinalism of Legal Realism

Black's approach to judging was idiosyncratic among the Warren Court Justices. His colleagues believed that big government and big courts naturally went together. Because a big Court was a natural phenomenon in a big government, they were to exercise substantive judgment about what the Constitution meant simply because that was what judges did.

There was not, in my view, much subtlety about this. On some theoretical level, one cannot simultaneously defend an active interventionist Congress and presidency and an active interventionist Court. The latter can be active only to the extent that it insists on limiting the activity of the former. Yet that did not bother the Warren Court Justices. Nor did they think that a big Court was needed in the New Deal regime to offset the potential tyranny of a big, active, and interventionist legislature and executive. Indeed, they could not, for that was what the Old Court's Justices believed.

For his few years on the Court, Abe Fortas offered the most striking alternative to Black, with whom he was repeatedly at odds. Some of the tension was personal, n28 but most derived from their differing visions of the judicial role. As Kalman puts it: "Black apparently considered Fortas's approach to decision making opportunistic." n29 And indeed it was.

-Footnotes-

n28. See Kalman, supra note 4, at 321 (noting Black's "unprofessionally venomous" attacks on Fortas in internal Court documents and asserting that cause was in part Fortas's closeness to Lyndon Johnson).

n29. Id.

-End Footnotes-

In Epperson v. Arkansas, n30 for example, Fortas thought that although his law clerk's conclusion that the case was unripe might be correct, he would rather hear the case and "'see us knock this [statute] out.'" n31 Note here the language of preference, which pervades the [*755] discussions among the Justices through recent times. Immediately after oral argument in Epperson, Fortas proposed a summary reversal, relying on Meyer v. Nebraska. n32 When Black and others objected that Meyer relied too heavily on the power of judges to invalidate statutes they found arbitrary, Fortas smoothly shifted to what he described as the "narrowest ground" for his decision - the Establishment Clause of the First Amendment. n33 Whether an Establishment Clause holding is indeed narrower remains a matter of controversy; Fortas's Establishment Clause analysis required the Justices to infer from the statute and its overall background an impermissible purpose to advance religion, a task that is not obviously less intrusive than is a determination of arbitrariness. For present purposes, though, the important point is Fortas's fluidity; if one doctrinal approach did not attract enough support, another one might. Only the outcome mattered; the law did not.

-Footnotes-

n30. 393 U.S. 97 (1968).

n31. Kalman, supra note 4, at 274 (quoting Fortas). In Epperson, a public school teacher challenged the constitutionality of an Arkansas statute prohibiting the teaching of evolution in state-supported schools. Epperson, 393 U.S. at 98-100. Fortas's law clerk had argued for dismissal in part because there was no evidence that school authorities were enforcing the statute. Kalman, supra note 4, at 274.

n32. 262 U.S. 390 (1923) (overturning statute that prohibited teaching foreign languages to students before the ninth grade). The Meyer Court stated that a "determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts." Id. at 400.

n33. Kalman, supra note 4, at 274.

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Fortas's vision of the law comes through clearly in the most striking anecdote from Kalman's biography. Finding unsatisfactory a draft prepared by his law clerk John Griffiths, Fortas took over the opinion. On returning the opinion to Griffiths, Fortas said: "Decorate it." n34 The decorations, according to Griffiths, were citations to the cases that would support the conclusions Fortas had already reached. This might not be significant. For example, William O. Douglas drafted opinions that lacked supporting citations, too. But Douglas was so familiar with such a wide range of law that he often knew that support existed even though he had forgotten precisely what it was. In contrast, it seems clear from the context that Fortas did not write the draft knowing in the back of his mind that there were cases to support his conclusions. Rather, Fortas simply believed that there had to be support for his conclusions.

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n34. Id. at 271.

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Kalman suggests that Fortas's confidence flowed in substantial part from what he had taken from the Yale legal realists who were his mentors and friends. n35 The realist legacy to Fortas had three interconnected elements. The realists' debunking skepticism convinced him that invocations of "the law" were merely facades for policy prefer- [*756] ences. n36 As a judge, then, he had no need to work through what the law required before he arrived at a judgment. n37

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n35. Id. at 18 (mentioning William O. Douglas and Thurman Arnold as two examples).

n36. Id. at 271-72.

n37. When Fortas attacked certain forms of civil disobedience, though, he readily invoked a free-standing "law." See Kalman, supra note 4, at 282-86. It seems clear that Fortas's position on civil disobedience was as opportunistic as the rest of his jurisprudence. Those he attacked were themselves attacking Lyndon Johnson and the Vietnam War, and Fortas would use whatever rhetorical tools worked in the arena of public opinion. His arguments were themselves the decorations of a defense of Lyndon Johnson, taking the form of an argument about the proper scope of civil disobedience in a constitutional system.

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In addition, Fortas could treat legal citations as decorations because of the second legacy he took from legal realism, a sense that - at least on the level at which he was working - cases were available to support whatever legal propositions one put forth. Some of Fortas's teachers supported their debunking skepticism by demonstrating to their own satisfaction that conclusions said to be required by the law were not at all required. n38 Had the judges wanted to come out the other way, these realists argued, they could have found other cases, or lines within the cases they actually cited, to justify the result they preferred. n39 So even if Fortas himself did not know which cases would serve as decorations, he did know that there were such cases.

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n38. See, e.g., Grant Gilmore, *The Ages of American Law* 80-81 (1977) (describing Arthur Corbin's application of this idea to contract consideration doctrine and Yale Law School Professor Wesley Sturges's efforts to show that much case law makes "no sense").

n39. *Id.*

-End Footnotes-

The decorations were important to the public. They were, in the phrase used by Fortas's law partner Thurman Arnold, one of the symbols of government. n40 Arnold used the phrase in the service of legal realism's debunking skepticism, although he recognized as well that mere symbols were important to the functioning of government. n41 It is not surprising, however, to find a debunker-turned-Justice such as Fortas treating these symbols dismissively, as something designed to appease a less-informed public.

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n40. Thurman W. Arnold, *The Symbols of Government* 34-35, 49-51 (Harcourt, Brace & World, Inc. 1962) (1935) (describing law as reservoir of important symbols for society).

n41. *Id.* at xiv.

-End Footnotes-

Realism's third element was its interest in applying social science to the law. n42 Fortas used this element in two somewhat inconsistent ways. As one who had helped construct the New Deal's administrative bureaucracies, he was reluctant to allow courts to displace the professional judgments made by expert bureaucrats. n43 What concerned him most, though, was professionalism itself. If he was convinced that purportedly expert agencies were not actually exercising their expertise, Fortas would allow the courts to step in. n44

-Footnotes-

n42. Kalman, *supra* note 4, at 16.

n43. See, e.g., *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 177 (1967) (Fortas, J., dissenting) (disagreeing with Court's willingness to find ripe challenge to agency regulatory action).

n44. See, e.g., *FTC v. Dean Foods Co.*, 384 U.S. 597, 617 (1966) (Fortas, J., dissenting) (disagreeing with Court's decision to allow FTC to seek preliminary relief against proposed merger, noting that "nowhere is such power given to the Commission").

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Fortas's concern for professionalism affected his constitutional decisions as well and in a particularly dramatic way. For instance, law reformers of the Progressive era had relied on then-current views among social work professionals to create a system of specialized juvenile courts. Believing that the rehabilitative and educational goals of such courts would be impeded if they had to adhere to "legalistic" criteria, the Progressive reformers relieved those courts of the duty to comply with the procedural requirements imposed in ordinary criminal trials. n45 By the 1960s, though, the judgment of professionals in the field had changed. They now saw juvenile courts as failures. Fortas relied on the then-contemporary professional judgments to override the earlier ones in writing for the Court that juvenile courts had to provide at least some of the basic due process protections applied in criminal trials. n46

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n45. See generally Anthony M. Platt, *The Child-Savers: The Invention of Delinquency* (1969) (outlining juvenile agencies' and courts' movements away from strict legal constraints so as to promote rehabilitation).

n46. See *In re Gault*, 387 U.S. 1, 30 (1967) (requiring juvenile court hearing to hold up to "essentials of due process and fairness").

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Similarly, in his dissent in *Powell v. Texas*, n47 Fortas relied on a thin record of expert testimony, and a wider reading of the professional literature, to support his conclusion that alcoholics could not be punished for their condition. n48 What professionals said, Fortas wrote, "provided a context" for the Court's decision, which had to be "read against the background of medical and sociological data." n49

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n47. 392 U.S. 514, 554 (1968) (Fortas, J., dissenting).

n48. See *id.* at 570.

n49. *Id.* at 559, 569.

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In both administrative and constitutional law, Fortas's approach to professionalism was part of the defense of the New Deal constitutional regime. Progressive-era reformers attempted to displace politics with expertise; the New Deal, seen in this way, completed the Progressive reforms, or at least extended their range considerably. Legal realism embedded professional judgments in the law itself. Yet, as the conflict of judgments about the juvenile justice

system between Progressive-era reformers and Great Society social scientists shows, there remained the question of whose professional judgments should prevail. For Fortas, the New Deal regime was the welfare state, operated on terms satisfactory to both contemporary social welfare professionals and contemporary lawyers. The judge's job was to reconcile the conflicts that arose within this larger professional context.

3. John Marshall Harlan, Potter Stewart, and the Jurisprudence of Country-Club Republicanism

Political liberals with ties to the Democratic party had to work out why big courts were properly a part of big government. Political conservatives had a different problem. They needed to understand why big government itself was acceptable. The internationalist wing of the Republican party, represented in politics by Thomas Dewey and Dwight Eisenhower (and Earl Warren), had its answer. The demands placed on the United States by a dangerous world required strong domestic support. Internationalist Republicans, however, knew that they could not expect such support if they attacked the domestic programs the New Deal put in place. As Mary Dudziak has shown, the rampant discrimination in the southern United States was an international embarrassment in the 1950s, making less credible the United States's position in its ideological struggle with the Soviet Union. n50 As it turned out, large corporations - an important component of the Republicans' political support - discovered they could live with and even profit within the New Deal regime. n51

-Footnotes-

n50. See Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61, 62 (1988).

n51. Harlan's pre-judicial career was as a practicing lawyer. Thus, one could reasonably think that Harlan's representation of Pan American Airlines and the Du Pont interests gave him an appreciation of the fact that corporate interests need not conflict with the New Deal regime. However, while Tinsley Yarbrough's biography of Harlan does detail Harlan's involvement with Du Pont, see Tinsley E. Yarbrough, John Marshall Harlan: Great Dissenter of the Warren Court 63-69, 134-35, 340 (1992), it mentions Harlan's representation of Pan American only once, without describing his work. Id. at 145. To the frustration of historians, the documents that might shed some light on the details of Harlan's corporate work are unavailable, protected, at least for now, by the rules of attorney-client privilege.

-End Footnotes-

Was there a jurisprudence associated with this political vision? Because we have no decent biographies of John Marshall Harlan and Potter Stewart, I can only offer some speculations. The place to begin, I believe, is with an observation by Justice Stewart at a memorial service for Harlan that "a very interesting law review article could someday be written on "The Liberal Opinions of Mr. Justice Harlan.'" n52 The comment reflects as much on Stewart as on Harlan.

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n52. Norman Dorsen, John Marshall Harlan and the Warren Court, in *The Warren Court in Historical and Political Perspective*, supra note 1, at 109, 112.

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Historians have some understanding of the politics of internationalist Republicanism. Foreign relations played a large role in those [*759] politics. n53 At least in any direct way, foreign relations could not play anything like that role in associated conservative jurisprudence; unlike the President, the Supreme Court simply did not do enough in the area. Even more, the politics of internationalist Republicanism do not translate directly into a jurisprudence. For example, the positions Attorney General Herbert Brownell took on civil rights questions might have been consistent with the political requirements of internationalist Republicanism, but Brownell's commitments were surely more principled than political. n54 So, too, with Harlan; near the end of his career on the Court, Harlan joined Marshall in resisting Warren Burger's efforts to water down the Court's commitment to immediate desegregation. n55 It is unclear whether Marshall and Harlan disagreed about what they understood the Court's commitment to mean. It is clear, though, that presented with a choice between immediacy and gradualism, Harlan chose immediacy, at a time when the imperative of ideological combat with the Soviet Union had faded.

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n53. For a discussion of internationalist Republicanism, see generally Duane Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership* (1988).

n54. See generally John W. Anderson, *Eisenhower, Brownell, and the Congress: The Tangled Origins of the Civil Rights Bill of 1956-57* (1964) (discussing Brownell's unwavering commitment to a civil rights bill).

n55. See Mark Tushnet, *The Supreme Court and Race Discrimination, 1967-1991: The View from the Marshall Papers*, 36 *Wm. & Mary L. Rev.* 473, 481-90 (1995) (noting Harlan's and Marshall's demands for cut-off date for desegregation to force resolution of any ambiguity).

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Harlan's and Stewart's approaches to constitutional law might profitably be called a jurisprudence of country-club Republicanism. n56 *Poe v. Ullman*, n57 a constitutional challenge to Connecticut's restriction on the use of contraceptives, n58 may be the closest we can get to its relatively pure expression. Some indication of Poe's social setting is that Laura Bushby, the wife of one of the other senior partners in Harlan's Wall Street firm, served on the board of the Connecticut branch of Planned Parenthood, the sponsor of the *Poe* litigation. n59 When the Court considered how to rule in *Poe*, a majority voted to refrain from addressing the substance of the challenge because, as the majority saw it, the case was not ripe for consideration: The state had not prosecuted anyone for violating the statute in decades. Harlan disagreed and went on to address the merits in an unusually passion [*760] ate statement, telling his colleagues that the statute was "the most egregiously unconstitutional act I have seen since being on the Court." n60

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n56. Alternatively, it might be called the jurisprudence of Northeastern Republicanism, treating Stewart's attendance at private schools in New England as more significant than his home in Ohio.

n57. 367 U.S. 497 (1961).

n58. Id. at 498. The case is exhaustively discussed in David J. Garrow, Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade 131-95 (1994).

n59. Garrow, supra note 58, at 124.

n60. Id. at 184. Harlan echoed this belief in his published dissent, describing the statute as "an intolerable and unjustifiable invasion of privacy." Poe, 367 U.S. at 539 (Harlan, J., dissenting).

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Harlan wrote along similar lines when the issue came back to the Court in Griswold v. Connecticut, n61 where the Court held the Connecticut statute unconstitutional as a violation of an unenumerated right of privacy. n62 I think it important that the Justices treated the issue as one of privacy. Country-club Republicans might have been particularly alert to intrusions on privacy, which they could have associated with the private property that was the foundation of their class position. Like their commitment to racial equality, though, their commitment to privacy certainly went deeper than that. Their exemplar in politics in the 1960s was Nelson Rockefeller, who repeatedly invoked the Congregationalist-Unitarian litany "the brotherhood of man and the fatherhood of God" to explain his endorsement of the welfare state. n63 In the jurisprudence of country-club Republicanism, judicial protection of civil rights and civil liberties was justified because all men were brothers in God. n64 Of course that did not resolve difficult questions about the scope of civil rights and civil liberties, but it meant that no country-club Republican could be an unwavering proponent of judicial restraint.

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n61. 381 U.S. 479 (1965).

n62. Id. at 485.

n63. Michael Kramer & Sam Roberts, "I Never Wanted to be Vice-President of Anything!": An Investigative Biography of Nelson Rockefeller 213 (1976).

n64. It would of course be quite helpful to have some substantial information about the religious commitments and activities of Justices Harlan and Stewart.

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

B. The Narrative of Rights Triumphalism

The Warren Court will always be associated with Brown v. Board of Education.

n65 That decision lies at the heart of the narrative of rights triumphalism. Its defense - indeed, perhaps the very fact of the decision - displaced the issue of restraint and activism, as proponents of Brown's result came to agree with Justice Jackson's view that the outcome could be not be justified as "law" as Jackson and his New Deal compatriots had come to understand the term. n66 Instead, the very idea of constitutional law had to change.

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n65. 347 U.S. 483 (1954).

n66. For Jackson's views, see Mark Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961 at 189-91 (1994) (noting that Jackson "took the lesson of history to be that it was not part of the judicial function to thwart public opinion except in extreme cases").

-End Footnotes-

[*761]

In this narrative, the Warren Court took its charge to be the articulation of a more comprehensive account of fundamental rights than was available from any other national institution. Because such rights were fundamental, the Court could not allow them to vary from state to state; the Warren Court's incorporation decisions are therefore a necessary element in this narrative. n67 Further, the narrative of rights triumphalism explains why the Warren Court Justices were largely uninterested in the question of restraint versus activism: They believed that protecting individual rights was the peculiar province of the judiciary. In this way, the narrative of rights triumphalism assists a biographer in identifying the sources of the values the Warren Court Justices held.

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n67. See, e.g., Malloy v. Hogan, 378 U.S. 1 (1964) (holding that Fifth Amendment's Self-Incrimination Clause is applicable to states via Fourteenth Amendment); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that Sixth Amendment right to counsel is applicable to states via Fourteenth Amendment).

-End Footnotes-

The narrative of rights triumphalism plainly captures much of the Warren Court's decisions. But it does not capture them all. For more than a decade after Brown, the Court did little to insist that its mandate be enforced. n68 As political scientists would stress, the Court moved vigorously against continuing segregation only when it believed that it had the support of Congress and the presidency. n69 The Court's response to McCarthyism was equally tempered by a prudent sensitivity to the Court's political surroundings. n70

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n68. See Geoffrey R. Stone et al., Constitutional Law 508 (2d ed. 1991) ("Despite the lack of uniformity and absence of progress [in the lower courts], the Supreme Court remained almost entirely silent during [the] early period [after Brown]. It intervened only once, and then only in the face of outright defiance.").

n69. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 15-21 (1991).

n70. Indeed, we might explain the Warren Court's response to the "excesses" of McCarthyism by referring to the Justices' sensitivity not to fundamental human rights but to the prerogatives of professional bureaucracies. According to this view, McCarthyism was wrong because it inserted politics directly into the operation of the nation's bureaucratic governing institutions, rather than leaving discipline to the bureaucracies themselves.

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Another difficulty with the narrative of rights triumphalism lies in the relation between its understanding of individual rights and the transformation of the New Deal political coalition. The difficulty appears most dramatically in the Court's renewed confrontation with the problem of segregation in the late 1960s. For instance, *Green v. New Kent County School Board* n71 posed a conceptual problem for advocates of desegregation who understood it as a way of protecting individual rights. In this case, the school board operated separate high schools for whites and African Americans. Under pressure from the [*762] courts and the Department of Justice, the school board adopted a desegregation plan. It could have adopted a "neighborhood school" plan, under which each student would be assigned to the school nearest his or her home. Because the county was largely rural and had little residential segregation, that plan would have resulted in substantial integration. Instead, the board adopted a "freedom of choice" plan, under which each student selected which school to attend. To no one's surprise, white and African American students overwhelmingly chose the schools to which they had been previously assigned. n72

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n71. 391 U.S. 430 (1968).

n72. *Id.* at 432-34.

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The school board's plan would seem to fit comfortably within an individual rights framework: What is more fundamental than the right to choose? The Court understood, though, that choice was exercised within a social context that strongly structured the results of choice and consequently invalidated the board's plan. n73 Yet, in seeing choice within its social context, the Court necessarily began to transform its conceptualization of rights. An inchoate sense that social structure mattered began to affect the Court's decisions.

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n73. *Id.* at 440-42.

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Accommodating that sense of social context to the individualist framework with which the Justices were more comfortable proved difficult. The difficulty was exacerbated by the changes in the Court's composition after 1969; the Warren Court Justices who remained - particularly Justices Brennan and Marshall -

could no longer work out a consistent vision of the Court's role in a national system of individual rights. Instead, they were forced to salvage what they could of the Court's previous emphasis on protecting individual rights. For example, in *Keyes v. School District No. 1*, n74 Justice Brennan cobbled together a majority for an awkward doctrinal solution. In this case involving the Denver school system, the city's school board had intentionally segregated schools in one part of the city. The Court was asked to find that this constitutional violation justified a remedy that reached throughout the city. Justice Brennan's opinion held that intentional acts of segregation in one part of a district gave rise to a presumption that racially identifiable schools elsewhere in the district resulted from similarly impermissible actions. n75 This allowed the Court to avoid a direct confrontation with the linked problems of de facto and Northern segregation.

-Footnotes-

n74. 413 U.S. 189 (1973).

n75. *Id.* at 207-08.

-End Footnotes-

The Warren Court Justices' doctrinal strategy emerged most clearly in *Swann v. Charlotte-Mecklenburg Board of Education*. n76 [*763] Again those Justices had to fight for what they could get: a commitment to leaving desegregation strategies to the discretion of district judges. n77 I believe that Swann's focus on discretion reflects a deeper view of doctrine shared by some of the Warren Court Justices, a view that qualifies the narrative of rights triumphalism by subordinating substantive considerations to the exercise of sound judgment while leaving "soundness" almost undefined.

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n76. 402 U.S. 1 (1971).

n77. Bernard Schwartz, *Swann's Way: The School Busing Case and the Supreme Court 100-84* (1986) (providing detailed account of Justices' struggle to articulate desegregation strategy).

-End Footnotes-

1. William Brennan and the "Rule of Five"

William J. Brennan saw his job much as Fortas did. His law clerks report an annual event: At some point early in their clerkships, Brennan asked his clerks to name the most important rule in constitutional law. Typically they fumbled, offering *Marbury v. Madison* n78 or *Brown v. Board of Education* n79 as their answers. Brennan would reject each answer, in the end providing his own by holding up his hand with the fingers wide apart. This, he would say, is the most important rule in constitutional law. n80 Some clerks understood Brennan to mean that it takes five votes to do anything, others that with five votes you could do anything. In either version, though, Brennan's "rule of five" - or, as the narrative of activism and restraint would have it, rule by five - was about the meaning of five votes on the Court. It was not a substantive rule of constitutional law.

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n78. 5 U.S. 137 (1803).

n79. 347 U.S. 483 (1954).

n80. For one version of this statement, see James F. Simon, *The Center Holds: The Power Struggle Inside the Rehnquist Court* 54 (1995) ("Five votes can do anything around here.").

-End Footnotes-

Brennan demonstrated his understanding of the "rule of five" throughout his career. In the Court's first extended consideration of civil rights sit-ins, Brennan discovered that a majority of his colleagues were inclined to uphold the defendants' convictions for trespass at a sit-in at a Baltimore lunch counter. n81 Black circulated a proposed majority opinion in early March 1964. For Black, the state interest in upholding a private property owner's right to choose his customers prevailed over the demonstrators' attempt to protest and eliminate private discrimination; for him, enforcing neutral trespass laws did not implicate the state in the private discrimination. n82

-Footnotes-

n81. See Newman, *supra* note 3, at 544-47; Tushnet, *supra* note 1, at 11-12.

n82. See Newman, *supra* note 3, at 544; Tushnet, *supra* note 1, at 11.

-End Footnotes-

Brennan and Warren, however, were concerned as much about the impact of such a decision on pending civil rights legislation as they [*764] were about constitutional law. They opposed a quick decision, hoping that Congress would enact the statute before the Court's decision was announced. They circulated proposed dissents in early April addressing the constitutional questions. Black recirculated a revised opinion near the end of the month, hoping to get the opinion out on May 4. Brennan, though, told Black that he was revising his proposed dissent, which would delay the announcement. n83

-Footnotes-

n83. See Newman, *supra* note 3, at 545-46; Tushnet, *supra* note 1, at 11.

-End Footnotes-

Brennan's new dissent shifted ground. Now he argued the convictions were inconsistent with Maryland's new antidiscrimination law. Surprisingly to Black, this novel argument persuaded Tom Clark to change sides. That left Black with only four votes. Brennan, however, did not have a majority either because Douglas refused to join Brennan's opinion. Then Clark indicated his willingness to go along with a decision reversing the convictions on constitutional grounds. Potter Stewart abandoned Black next, either because he was persuaded by Brennan's state law argument or because he preferred that more limited disposition to a reversal on broader constitutional grounds. n84

-Footnotes-

n84. See Newman, supra note 3, at 544-54; Tushnet, supra note 1, at 11-12.

-End Footnotes-

Robert Post has properly questioned the widespread view that Brennan's contributions to the Court occurred because of his political skills, narrowly defined. n85 The suggestion that Brennan somehow twisted his colleagues' arms or offered them explicit deals is clearly incorrect. n86 Brennan was a politician in a deeper sense, though. In the sit-in cases Brennan combined strategic delay with an ingenious change in the legal theory he offered his colleagues. He then waited for enough of them to see the wisdom of his position. Like all good political leaders, Brennan structured the process of decision and gave his colleagues reasons for doing what he understood to be the right thing.

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n85. Robert C. Post, William J. Brennan and the Warren Court, in The Warren Court in Historical and Political Perspective, supra note 1, at 123, 136.

n86. In going through Justice Brennan's papers selectively for the period from his appointment through 1967 and comprehensively for the period from 1967 to 1986, I found nothing indicating an explicit "deal" for votes. Bob Woodward and Scott Armstrong have made the only specific claim that Brennan made such a deal. Bob Woodward & Scott Armstrong, The Brethren 224-25 (1979). However, this claim has been publicly denied by everyone - other than the Justices - in a position to have information. For instance, Anthony Lewis noted in the New York Review of Books that he contacted 30 Supreme Court law clerks from the 1971 term, each of whom denied knowledge of and expressed severe skepticism about The Brethren's allegations. See Anthony Lewis, Anthony Lewis Replies, N.Y. Rev. Books, June 12, 1980, at 48, 48 (letter to the editor).

-End Footnotes-

Two examples from later in Brennan's career illuminate how his approach to the law interacted with his political skills understood in [*765] this broader sense. n87 Plyler v. Doe, n88 for instance, was a challenge to a Texas statute denying a public education to the children of illegal immigrants. n89 When the Justices initially voted, a narrow majority voted to find the statute unconstitutional. The key vote was Lewis Powell's. Brennan took the opinion for himself and circulated an initial draft with three main components. The statute, Brennan first argued, was exceedingly unsound social policy in light of the fact that the children were likely to remain in the United States. n90 Second, illegal immigrants, or at least their children, should be treated as a "suspect classification" for purposes of deciding whether discrimination against them was permissible. n91 Third, the right to education was fundamental, and the courts should therefore examine carefully the justifications for classifications restricting the right of some children to receive an education. n92

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n87. For additional details on these examples, see Mark Tushnet, Justice Lewis F. Powell and the Jurisprudence of Centrism, 93 Mich. L. Rev. 1854,

1856-73 (1995).

n88. 457 U.S. 202 (1982).

n89. Id. at 205.

n90. For more details of Brennan's argument, see internal court documents cited in Tushnet, supra note 87, at 1862-67.

n91. Id.

n92. Id.

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Powell was troubled by the second and third components of Brennan's analysis. How could illegal aliens form a suspect class if their very presence in the country was a violation of the law? And how could Brennan fairly describe the right to education as fundamental after Powell's opinion for the Court in San Antonio Independent School District v. Rodriguez? n93 In response to Powell's criticisms, and to hold his vote, Brennan watered down his discussion of suspect classifications. When that proved insufficient, Brennan next watered down his discussion of education as a fundamental right. By then, Brennan's opinion consisted of a strong condemnation of Texas's policy as unwise and some gestures evoking but not quite invoking the Court's equal protection jurisprudence. That turned out to be what Powell had wanted, and the opinion came out. n94

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n93. 411 U.S. 1, 35 (1973) (holding that education is not explicitly protected constitutional right).

n94. See Tushnet, supra note 87, at 1871-72.

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As published, the Plyler opinion expresses a jurisprudence of results alone. Almost by design, it appears to have no doctrinal significance except to the extent that it embodies the view that the Court can find unconstitutional statutes that a majority of the Justices believe to be unwise social policy. Plyler is misleading when read to be an expression of Brennan's rather than Powell's jurisprudence. The [*766] opinion's evolution, however, shows Brennan working with a colleague to reach the result they both favored.

Similarly, in Massachusetts Board of Retirement v. Murgia, n95 Brennan drafted an opinion upholding a state's mandatory retirement policy while articulating a flexible standard of review in equal protection cases. n96 None of his colleagues was comfortable with the approach Brennan took. n97 Brennan tried to accommodate them, but a long and highly critical memorandum from William Rehnquist demonstrated that Brennan would be unable to bring the rest of the Court along. Accordingly, Powell took over the opinion. His attempt to mediate between Brennan's flexible approach and Rehnquist's more rigid one failed as well. Unaccustomed to this sort of failure, Powell interpreted what had happened by seeing Brennan's flexible standard as reflecting the kind of

reasonable temperament that Powell admired, and Rehnquist's rigid one as being unreasonable. n98 Thus, Brennan's failure in Murgia created, or at least helped solidify, a bond between Brennan and Powell that provided Brennan with important support in the succeeding years.

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n95. 427 U.S. 307 (1976).

n96. See Tushnet, supra note 87, at 1856.

n97. Id. Justice Marshall of course approved the flexible approach, but he was the only dissenter in the case. See Murgia, 427 U.S. at 317 (Marshall, J., dissenting).

n98. See Tushnet, supra note 87, at 1861.

-End Footnotes-

Nevertheless, Brennan's "rule of five" was not antidoctrinal in the way Fortas's jurisprudence seemed to be. As his initial resistance to Powell in Plyler showed, Brennan sought to get five votes for the doctrine that he believed most compatible with his vision of fundamental rights. Of course, the "rule of five" approach, if adopted by other Supreme Court Justices, would mean that the doctrines Brennan developed might have little constraining force on the Court itself: his colleagues might subsequently follow the "rule of five" to achieve a result incompatible with the doctrines Brennan articulated. n99 Brennan's response when asked "what he did when the law seemed to suggest one answer and justice another" - "I don't recall ever having such a case" n100 - indicates a happy congruence that might not be reproduced in other Justices' experience.

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n99. Brennan's approach might still have some effect on lower court judges. They might fear reversal by a Court still committed to Warren Court doctrines, or they might be unable to work their way around the constraining doctrines as Supreme Court Justices might.

n100. Shirley S. Abrahamson et al., Words and Sentences: Penalty Enhancement for Hate Crimes, 16 U. Ark. Little Rock L.J. 515, 532 n.51 (1994) (citing remark by Brennan in seminar at Georgetown University Law Center, Fall 1993).

-End Footnotes-

In the end, the narrative of rights triumphalism probably is strongest if it focuses on Warren Court opinions as articulations of a [*767] vision of fundamental rights in a unified nation, rather than on the Court's doctrinal accomplishments. Here Brennan's "rule of five" must qualify the narrative. Precisely to the extent that a Justice needs five votes to do anything, articulating a coherent vision becomes more difficult. Again, Green and Keyes provide useful examples. Lurking in both decisions is an inchoate sense that addressing the nation's legacy of race discrimination requires attention to group rights rather than, or in addition to, individual rights. Under the constraints of assembling a majority, and influenced by a prevailing